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

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| ROBIN STANGER,<br><br>Claimant,<br><br>v.<br><br>IDAHO STATE UNIVERSITY, Employer, and STATE INSURANCE FUND, Surety,<br><br>and<br><br>STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,<br><br>Defendants. | **IC 2013-015556**<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**<br><br>**FILED**<br>**NOVEMBER 5, 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 Pocatello on October 17, 2017. Claimant, Robin Stanger, was present in person and represented by James C. Arnold, of Idaho Falls and Kent A. Higgins, of Pocatello. Defendant Employer, Idaho State University (ISU), and Defendant Surety, State Insurance Fund, were represented by Steven R. Fuller, of Preston. Defendant, State of Idaho, Industrial Special Indemnity Fund (ISIF), was represented by Anthony M. Valdez, of Twin Falls. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on August 28, 2018.

## ISSUES

The issues to be decided were narrowed in briefing and are:[1]

[1] In post-hearing briefing, Claimant asserted the issue of retention of jurisdiction. Retention of jurisdiction was not mentioned in Claimant's Request for Calendaring or any parties' response thereto. Consequently, it was not listed as an issue in the Commission's Notice of Hearing. Pursuant to Idaho Code § 72-713, it cannot be addressed in the present decision.

1. The extent of Claimant's permanent impairment and the portion thereof attributable to her industrial accident.

2. Whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise.

3. Whether the Industrial Special Indemnity Fund is liable under Idaho Code § 72-332.

4. Apportionment under the Carey Formula.

Employer/Surety have briefed the issue of whether Claimant's claim for permanent disability is precluded by Idaho Code § 72-435 because Claimant engaged in the allegedly unreasonable practice of declining surgery, specifically, bilateral reverse total shoulder arthroplasty. This issue was not mentioned in Claimant's Request for Calendaring filed October 3, 2016 after joinder of ISIF, Claimant's Amended Request for Calendaring filed October 7, 2016, or her Second Amended Request for Calendaring filed October 27, 2016. This issue was not listed in ISIF's Response to Claimant's Request for Calendaring filed October 20, 2016. The document entitled "Response to Amended Request for Calendaring," dated October 21, 2016, and attached to Employer/Surety's Objection to Claimant's Reply Brief filed August 31, 2018, is not contained in the Commission's legal file and was apparently not received by the Commission.[2] Consequently, whether Claimant is precluded from claiming permanent disability for failure to follow prescribed medical treatment was not listed as an issue in the Commission's November 2, 2016 Notice of Hearing, May 9, 2017 Order Vacating and Resetting Hearing,

[2] Whether Claimant is precluded from claiming permanent disability for failure to follow prescribed medical treatment was listed as an issue in the Commission's September 23, 2015 Notice of Hearing, pursuant to the statement of that issue in Employer/Surety's Response to Request for Calendaring filed September 14, 2015. However said hearing was subsequently vacated and reset and was ultimately vacated by order of the Commission on June 7, 2016, pursuant to stipulation of Claimant and Employer/Surety due to the imminent joinder of ISIF.

June 15, 2017 Amended Order Vacating and Resetting Hearing, or August 7, 2017 Second Amended Order Vacating and Resetting Hearing. Pursuant to Idaho Code § 72-713, it cannot be addressed herein.[3]

## CONTENTIONS OF THE PARTIES

Claimant asserts she is 100% totally and permanently disabled or is an odd-lot worker. Employer/Surety assert that Claimant has failed to prove she is totally and permanently disabled due to her 2013 industrial injury and also assert that if Claimant is found to be totally and permanently disabled, it is due to the combined effects of her industrial accident and pre-existing permanent impairment for which ISIF bears responsibility. ISIF maintains that Claimant's pre-existing condition was not a hindrance or obstacle to her employment and that her 2013 accident does not combine with her preexisting condition to render her totally and permanently disabled asserting that prior to her accident Claimant worked without restrictions and was fully able to function.

## EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The parties' joint exhibits A through R;

[3] Although not noticed per Idaho Code § 72-713 as an issue to be presently addressed, the assertion that Claimant unreasonably failed to submit to bilateral reverse total shoulder arthroplasty finds little support in the record. Reverse total shoulder arthroplasty requires major surgery. Dr. Wathne described the surgical alteration of the shoulder—the ball of the proximal humerus and the socket of the glenoid—in lay terms: "what we do is we reverse the configuration and we put the ball where the socket is and socket where the ball is." Wathne Deposition, p. 17, ll. 7-9. At the time such was suggested to Claimant, she was advised the surgery would likely improve her pain but not her range of motion. Additionally, as further set forth hereafter, at the time reverse total shoulder arthroplasty was originally offered, a preoperative examination revealed Claimant's blood platelet count was too low to permit such major surgery. Further diagnostic testing confirmed idiopathic thrombocytopenia ostensibly unrelated to her industrial accident. To resolve her thrombocytopenia, a splenectomy was advised as a prerequisite for shoulder surgery. However, Claimant had no means to pay for a splenectomy and Surety declined to do so. Given the present record, Claimant's failure to undergo bilateral reverse total shoulder arthroplasty does not appear to constitute an unreasonable practice.

3. The post-hearing deposition testimony of Richard Wathne, M.D., taken by Claimant on December 19, 2017;

4. The post-hearing deposition testimony of Kathy Gammon, CRC, MSPT, taken by Claimant on January 30, 2018; and

5. The post-hearing deposition testimony of Sara Statz, CRC, taken by Employer/Surety on March 2, 2018.

All outstanding objections are overruled and motions to strike are denied except as noted below. Employer/Surety's objection to Claimant's Reply Brief is overruled pursuant to Idaho Code § 72-713 for the reasons set forth above. Employer/Surety's Motion to Strike Claimant's Response to Objection to Claimant's Reply Brief, filed September 12, 2018, in which ISIF subsequently joined on September 21, 2018, is hereby granted only as to pages 3 through the paragraph entitled "CONCLUSION" at page 17 of Claimant's response.

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. **Background**. Claimant was born in 1952 in Pocatello. She was 65 years old and resided in Pocatello at the time of the hearing. She is right-handed.

2. Claimant graduated from Pocatello High School in 1970. In high school she participated in gymnastics and Taekwondo. She eventually tested for and advanced to black belt proficiency. She completed a year of college but obtained no college degrees. Claimant has been actively involved in caring for, training, and riding horses most of her life. Between approximately 1970 and 2001, Claimant worked as a fast food server, stable attendant, hotel housekeeper, cake decorator, construction flagger, convenience store cashier, baker, animal

control officer, security guard, bartender, dry cleaning attendant, and assisted living center administrator.

3. In approximately 2001, Claimant commenced working for Idaho State University as an office specialist and later as an archives record manager. She inventoried archived records, retrieved, organized, and re-shelved boxes of records and made a computer data base of the materials. She re-boxed materials into appropriate containers for long term storage. Claimant regularly transported boxes in her own vehicle for several miles and moved boxes alone and with assistance from others. Boxes often weighed from 40 to 50 pounds or more. She used ladders frequently to access higher shelves.

4. **Prior conditions.** On June 22, 2011, Claimant sought medical treatment for pain in her left shoulder, left knee, and right hip. Michael Doyle, PA-C, recorded her left shoulder symptoms included pain "which keeps her awake" and limited range of motion with abduction to "80-85 degrees, but she groans and moans while doing so." Exhibit C, p. 9. Left shoulder x-rays showed significant calcification and she was diagnosed with likely calcific left rotator cuff tendonitis and given prednisone and Naprosyn. Thereafter she continued to seek medical treatment periodically for shoulder, knee, and hip symptoms.

5. On August 1, 2011, Claimant presented to Jami Price, PA-C, reporting pain in her shoulders. Exhibit C, p. 4.

6. In approximately October 2011, Claimant began treating with Ananda Walaliyadda, M.D., who diagnosed Claimant with rheumatoid arthritis, systemic lupus erythematosus, and chronic pain.

7. On October 3, 2011, David Brizee, D.O., recorded Claimant's complaints of bilateral knee pain, right hip pain, and left shoulder pain. He noted calcification of her left

shoulder tendons and considered referring her to a pain management specialist. Claimant was then taking a number of medications, including: Buprenorphine patch for shoulder pain; Ibuprofen 800 milligrams for knee, hip and shoulder pain; Meloxicam for arthritis, pain, swelling, and stiffness in her knee, hip, and shoulder; Baclofen for spasms and leg cramps; Simvastatin; and Hydroxychloroquine for arthritis and lupus. Exhibit A, p. 4. She was referred to Kevin Hill, M.D., for pain management.

8. On October 20, 2011, Dr. Hill examined Claimant and recorded her report of a six-month history of severe joint pain. He further recorded: "Crepitus noted in the right shoulder. Right shoulder shows forward flexion to approximately 90 degrees, shoulder abduction to 85 degrees, shoulder internal and external rotation decreased by 25% bilaterally." Exhibit B, p. 2. He prescribed methadone, Celebrex, and Wellbutrin.

9. On August 23, 2012, Dr. Hill examined Claimant noted her pain was 7/10, and recorded: "Her pain is aching in bilateral shoulders, left greater than right." Exhibit B, p. 56. He assessed joint arthralgias, rheumatoid arthritis, lupus, and chronic pain syndrome. Dr. Hill renewed her medication prescriptions including Butrans opiate extended release patch, Mobic, Hydroxychloroquine, and Omeprazole.

10. On December 20, 2012, Dr. Walaliyadda offered to perform a left shoulder tenotomy for pain management; however Claimant declined. Exhibit B, p. 63.

11. At hearing Claimant readily admitted she had "aches and pains" in both shoulders prior to 2013, but asserted it was nothing serious and that prior to June 2013, she was saddling and riding her horse, roping cows, and throwing hay over the fence to feed her horses.

12. **Industrial accident and treatment.** On June 13, 2013, Claimant was at work rearranging boxes on shelves to make room for more boxes. She was on a ladder with a missing wheel when the ladder tilted and she fell while holding a box and struck her right shoulder against adjacent shelving. Claimant noted immediate right shoulder pain and burning, and told a co-worker she had fallen. She finished her shift. Upon returning to work the next day, Claimant reported her fall to a supervisor and was encouraged to seek medical attention.

13. On June 14, 2013, Claimant presented to Jacob Forke, M.D., who suspected right shoulder strain but could not rule out rotator cuff injury. He prescribed medications and later physical therapy. Claimant returned to work and also participated in physical therapy. However, by June 19, 2013, her worsening shoulder pain prompted a half-day work schedule. By July 25, 2013, Claimant requested a leave from work to seek further medical treatment for her shoulder. A July 10, 2013 right shoulder MRI revealed rupture of the infraspinatus tendon, nearly full thickness tearing of the supraspinatus tendon, and complex labrum tearing. She was referred to Richard Wathne, M.D., for treatment.

14. On August 1, 2013, Claimant presented to Dr. Wathne who confirmed right rotator cuff tear. She reported to Dr. Wathne that she had injured both her right and left shoulders in the industrial accident. He performed injections which provided only temporary benefit. Dr. Wathne recommended that Claimant undergo surgery on her right shoulder and ultimately recommended reverse total shoulder arthroplasty for both shoulders. He indicated such surgery would improve her pain but likely not increase her range of motion. Dr. Wathne later affirmed that a successful reverse total shoulder arthroplasty would allow Claimant to lift to her waist and allow her to lift up to 20 pounds to her shoulder, but "no more than a couple

of pounds above shoulder level, and certainly not on a repetitive basis." Wathne Deposition, p. 41, ll. 14-16. Dr. Wathne cautioned Claimant to not lift anything given the condition of her shoulders, thus she never returned to her work at ISU.

15. On November 8, 2013, Claimant was examined by Stanley Waters, M.D., Ph.D., at Surety's request. He assessed right rotator cuff tear and recommended arthroscopic right acromioplasty with distal clavicle resection and attempted right rotator cuff repair. Dr. Wathne did not oppose the recommendation, but opined that this more conservative surgery had at most only a 50% probability of resulting in significant functional improvement. He continued to recommend reverse total shoulder arthroplasty.

16. On February 13, 2014, Dr. Waters concluded Claimant's industrial accident had "clearly exacerbated or worsened her shoulder pain and weakness with overhead activities; and probably contributed to expanding the left shoulder rotator cuff tear." Exhibit F, p. 8.

17. On March 13, 2014, Claimant applied for Social Security disability benefits.

18. On March 21, 2014, ISU terminated Claimant's employment because she had not returned to work.

19. Claimant was scheduled for reverse total right shoulder arthroplasty on June 16, 2014; however, pre-operative consultation revealed unacceptably low blood platelet levels resulting in cancellation of her shoulder surgery.

20. On August 2, 2014, Claimant was found eligible for Social Security Disability Benefits effective as of June 13, 2013.

21. On September 8, 2014, Claimant was examined by Michael Francisco, M.D. He diagnosed idiopathic thrombocytopenia and recommended splenectomy to treat her thrombocytopenia. Claimant was not financially able to pursue such treatment.

22. In response to Surety's inquiry, on November 4, 2014, Dr. Wathne affirmed Claimant had reached "maximum medical improvement until such time she is able to proceed with the recommended reverse total shoulder" surgery. Exhibit E, p. 34. He indicated rating Claimant's permanent impairment should be deferred until after shoulder surgery.

23. On December 23, 2014, Claimant was examined by David Simon, M.D., at Surety's request. He rated Claimant's right shoulder impairment at 11% of the whole person and apportioned 45% to pre-existing causes. Dr. Simon rated Claimant's right shoulder impairment due to her industrial accident at 6% of the whole person.

24. On September 29 and 30, 2015, Sharik Peck, PT, CRC, administered a functional capacity evaluation to Claimant and concluded she was extremely limited in all aspects of physical function. He opined she could lift and carry no more than five pounds, reach and handle only occasionally, and lacked the ability to perform productive work at any level according to the Dictionary of Occupational Titles.

25. On March 30, 2016, Dr. Wathne concurred with Mr. Peck's FCE findings, conclusions, and resulting restrictions, noting they were consistent with his observations from previous orthopedic examinations. Dr. Wathne affirmed that Claimant's bilateral shoulder dysfunction and restrictions were directly related to her industrial accident.

26. On August 24, 2017, Dr. Wathne examined Claimant and rated her permanent impairment at 23% of the whole person with 55% (equating to 13% of the whole person) attributable to her industrial accident and the balance of 10% to preexisting conditions.

Dr. Wathne opined Claimant was restricted from returning to employment due to a combination of her preexisting conditions and her 2013 industrial injury.

27. Claimant applied for employment with the City of Chubbuck, Maverick, Common Cents, Fred Meyer and several other businesses. She received no job offers.

28. **Condition at the time of hearing.** At the time of hearing, Claimant testified her shoulders were painful. Claimant understood that Dr. Wathne continued to recommend she undergo bilateral reverse total shoulder arthroplasties. She was not on pain medication and had not been on prescription pain medications for her shoulders for more than a year. She acknowledged the possibility of reverse total shoulder arthroplasty still exists, but she does not desire such surgery presently. She reported receiving PERSI retirement and Social Security Disability benefits.

29. **Credibility.** Having observed Claimant at hearing and compared her testimony with other evidence in the record, the Referee finds that Claimant is not an entirely reliable witness. Dr. Wathne, Kathy Gammon, and Sara Statz all observed that Claimant was not an accurate historian. The Referee does not find that Claimant is or has been deliberately false in any account. However, her memory is demonstrably imperfect and not reliable. Furthermore, Claimant is stoic to the point of consistently understating her bilateral shoulder condition, her need for medical treatment thereof, and the limitations therefrom. As is more fully set forth hereafter, Dr. Wathne testified that Claimant avoided acknowledging the full extent of her physical limitations. Wathne Deposition, pp. 50-51. To the extent Claimant's declarations are inconsistent with other evidence in the record; her statements will not be relied upon.

## DISCUSSION AND FURTHER FINDINGS

30. 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).

31. **Permanent impairment.** The first issue is the extent of Claimant's permanent impairment and the portion thereof attributable to her 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).

32. In the present case, Dr. Simon examined Claimant on December 23, 2014, and rated her right shoulder impairment at 11% of the whole person with 6% due to her industrial accident and the balance preexisting. Dr. Wathne examined Claimant on August 24, 2017, and rated the permanent impairment of her shoulders at 23% of the whole person with 55%

attributable to her industrial accident. This equates to 13% of the whole person. He opined that Claimant had a preexisting chronic right rotator cuff tear.

33. On September 12, 2017, Dr. Simon examined Claimant again at Surety's request and concurred in Dr. Wathne's rating as to Claimant's right shoulder only. He apportioned 45% of Claimant's right shoulder impairment to pre-existing causes, concluding "She likely had pre-existing arthritis and a chronic rotator cuff tear that was aggravated by the 6/13/13 industrial injury." Exhibit G, p. 9. Dr. Simon rated Claimant's right shoulder impairment due to her industrial accident at 7% of the whole person.

34. Claimant indicated both shoulders were impacted in her June 13, 2013 fall:

> A The box I had ahold [sic] of hit this shoulder (indicating). And this shoulder and arm (indicating) hit the other row of shelving.
>
> Q. (by Mr. Fuller) You are demonstrating to a shoulder. Which shoulder are you demonstrating?
>
> A. I had the box on my left shoulder. And my right shoulder hit the row of shelving across.
>
> Q. Which shoulder was injured then?
>
> A. Both.
>
> Q. Both shoulders?
>
> A. Yes.

Exhibit O, p. 10 (Claimant's Deposition, p. 34, l. 21 through p. 35, l. 4).

35. Dr. Simon considered Claimant's left shoulder condition unrelated to her industrial accident and offered no opinion as to any left shoulder impairment. Dr. Simon's conclusion that Claimant's left shoulder symptoms are preexisting and entirely unrelated to her industrial accident does not explain the rapid increase in her symptoms and rapid loss of

left shoulder function following her accident. In contrast, regarding the relation of the 2013 industrial accident to Claimant's left shoulder pathology, Dr. Wathne testified:

> Q. (by Mr. Fuller) Could Ms. Stanger's left shoulder problems simply be due to the progressive nature of her disease and not necessarily to the industrial injury?
>
> A. Certainly can contribute to it. But I must admit that she claimed that she was lifting all these boxes and that in the few month period of time between June and December when she came in there, she basically developed a pseudoparalytic shoulder on the left. It's almost too much of a coincidence not to have some link to her injury or overusing it as a result of it.

Wathne Deposition, p. 51, l. 25 through p. 52, l. 11.

36. Dr. Wathne is Claimant's treating physician and observed her on multiple occasions over time. His opinion that both of Claimant's shoulders were injured in the 2013 accident or as a result thereof is supported by the record and persuasive. Dr. Wathne's impairment rating and apportionment are also supported by the record and persuasive.

37. Claimant has proven she suffers permanent impairment of her shoulders of 23% of the whole person, of which 55% is attributable to her industrial accident, and 45% is attributable to preexisting conditions. Claimant has proven she suffers permanent impairment of 23% of the whole person with 13% attributable to her 2013 industrial accident and 10% attributable to her preexisting condition.

38. **Permanent disability**. The next issue is the extent of Claimant's permanent disability, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise. "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 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).

39. To evaluate Claimant's permanent disability several items merit examination including the physical restrictions resulting from her permanent impairment and her potential employment opportunities—particularly as identified by vocational rehabilitation experts.

40. Work restrictions. Claimant's activities are restricted due to her shoulder condition. After an FCE on September 29 and 30, 2015, Sharik Peck concluded Claimant could lift and carry no more than five pounds, reach and handle only occasionally, and lacked the ability to perform productive work at any level according to the Dictionary of Occupational Titles. Dr. Wathne concurred with Mr. Peck's conclusions and restrictions. The Referee finds that Claimant is restricted to lifting and carrying no more than five pounds,

reaching and handling only occasionally, and lacks the ability to perform productive work at any level according to the Dictionary of Occupational Titles.

41. Opportunities for gainful activity. Kathy Gammon, MS, CRC, CIWCS, LVRC, MSPT, a vocational rehabilitation expert retained by Claimant is also a licensed physical therapist who actively practiced physical therapy for many years. Her training brings a clearer and more thorough understanding and appreciation for Claimant's medical history. She interviewed Claimant on April 14, 2016, reviewed her medical and employment records, and prepared a report on May 6, 2016, assessing her employability. Ms. Gammon concluded that Claimant was precluded from the competitive labor market because of her reduced lifting, carrying, reaching and handling abilities resulting from her June 13, 2013 industrial accident. Ms. Gammon summarized: "She has suffered a 100% loss of access to employment and is totally and permanently disabled from future employment due to her industrial injury." Exhibit K, p. 26.

42. On October 4, 2017, Ms. Gammon issued an addendum to her employability report in response to new medical information from Dr. Wathne's August 24, 2017 examination of Claimant, permanent impairment rating, and conclusion that she was prevented from returning to gainful employment due to a combination of her preexisting conditions and the conditions related to her June 13, 2013 industrial injury. Ms. Gammon then opined:

> According to this newly received medical information, Mrs. Stanger currently continues to experience a 100% loss of access to the local labor market due to a combination of her pre-existing shoulder conditions and her industrial injury of June 13, 2013.
>
> On a more probable than not basis, she remains totally and permanently disabled from gainful employment within the local labor market due to a combination of

> her preexisting left shoulder limitations, which were exacerbated by the industrial injury, and her right shoulder limitations resulting from her industrial injury.

Exhibit K, p. 28.

43. Sara Statz, MS, CRC, CIWCS, a vocational rehabilitation expert retained by Employer/Surety, interviewed Claimant on April 20, 2016, reviewed her medical and employment records, and prepared a report on May 13, 2016, assessing her employability. Ms. Statz noted that Dr. Wathne found Claimant reached maximum medical improvement by November 4, 2014. Ms. Statz noted that Claimant had not been released to any kind of work "and as such would be deemed totally disabled at this time." Exhibit L, p. 17. In her post-hearing deposition, Ms. Statz concluded that Claimant was totally and permanently disabled based upon the limitations recorded by Mr. Peck and endorsed by Dr. Wathne.

44. The conclusions reached by Ms. Gammon and Ms. Statz are similar, thorough, well-reasoned, and persuasive. Based on Claimant's bilateral shoulder impairment rating of 23% of the whole person, her extensive permanent physical limitations including her restrictions of lifting and carrying no more than five pounds, and reaching and handling only occasionally, and considering her non-medical factors including her age of 60 at the time of the accident and 65 at the time of hearing, absence of transferable skills, and inability to return to any of her previous positions, Claimant's ability to engage in regular gainful activity in the open labor market in her geographic area has been eliminated. The Referee concludes that Claimant has suffered a permanent disability of 100%, inclusive of her 23% whole person permanent impairment. Claimant has proven that she is totally and permanently disabled.

45. **ISIF liability**. The next issue is whether ISIF bears any liability in the present case. Idaho Code § 72-332 provides that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of

and in the course of his employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his income benefits out of the ISIF account. In Dumaw v. J. L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court summarized the four inquiries that must be satisfied to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was a pre-existing impairment; (2) whether that impairment was manifest; (3) whether the impairment was a subjective hindrance to employment; and (4) whether the impairment in any way combined with the subsequent injury to cause total disability. Dumaw, 118 Idaho at 155, 795 P.2d at 317.

46. Pre-existing, manifest impairment. The preexisting physical impairment at issue herein is Claimant's bilateral shoulder condition prior to her 2013 industrial accident.

47. Claimant's preexisting shoulder condition compelled her to seek medical treatment on multiple occasions before her 2013 accident. In 2011, Michael Doyle, PA-C, noted Claimant's left shoulder symptoms of pain and limited range of motion. Left shoulder x-rays showed calcific left rotator cuff tendonitis. Also in 2011, Dr. Walaliyadda diagnosed Claimant with rheumatoid arthritis producing pain in both of her shoulders. Dr. Brizee noted calcification of her left shoulder tendons and referred her to Dr. Hill for pain management. Dr. Hill found crepitus in Claimant's right shoulder and limited range of motion bilaterally. In spite of multiple medications for prolonged periods, Dr. Hill noted in 2012 that Claimant continued to have bilateral shoulder symptoms. Her symptoms were sufficient to prompt her to seek further medical care. Dr. Wathne testified that from the right shoulder MRI it was

apparent that Claimant had a substantial right rotator cuff tear before her 2013 accident. Dr. Simon opined similarly. Dr. Wathne also opined that Claimant likely had a left rotator cuff tear prior to her 2013 accident. Claimant's bilateral shoulder impairment was rated at 10% of the whole person by Dr. Wathne. Exhibit E, p. 46.

48. Claimant's bilateral shoulder condition constitutes a pre-existing condition for purposes of Idaho Code § 72-332. It pre-existed and was manifest prior to the 2013 industrial accident. The first and second prongs of the Dumaw test have been met as to this condition.

49. Hindrance or obstacle. The third prong of the Dumaw test considers "whether or not the pre-existing condition constituted a hindrance or obstacle to employment for the particular claimant." Archer v. Bonners Ferry Datsun, 117 Idaho 166, 172, 786 P.2d 557, 563 (1990).

50. Claimant asserted that her shoulder condition did not prevent her from performing her work and testified that it did not hinder her work for any employer before the 2013 industrial accident. However, she admitted experiencing shoulder pain at work: "I lifted a lot of weight. And I thought most of the pain was from too much lifting." Exhibit O, p. 11 (Claimant's Deposition, p. 38, l. 25 through p. 39, l. 1). Claimant testified that she had "aches and pains" prior to her industrial accident "but they weren't stopping me from doing anything." Transcript, p. 70, l. 7. Claimant testified that with the help of an assistant she threw 500 boxes of records in a dumpster the week before her 2013 accident. However, Claimant had repeatedly sought medical treatment for her "aches and pains," including her bilateral shoulder pains, and functioned with the aid of periodic medical treatment and multiple prescription medications.

51. Dr. Wathne testified:

> You know, obviously she claims she didn't have, you know, left shoulder problems before, although subsequent I learned that, you know, she had had a prior injection and was treated on the left side. So she obviously had been having some dysfunction but at the time of her injury was functioning at a normal level.

Wathne Deposition, p. 21, ll. 18-24. Dr. Wathne noted that Claimant had had considerable prior treatment including a Butrans opiate shoulder patch and multiple medications for shoulder pain control before her industrial accident. She treated extensively with Dr. Hill, a pain management specialist.

52. ISIF emphasizes Claimant's testimony that she was able to saddle and ride horses, and load and lift boxes at the library in her job at ISU before her 2013 accident as evidence that her preexisting shoulder condition was not a hindrance. However, regarding the accuracy of Claimant's assertions that she had no shoulder problems before her 2013 accident, Dr. Wathne testified:

> Q. (by Mr. Fuller) Didn't she deny to you that she had any shoulder problems prior to the industrial injury?
>
> A. Yes, she did.
>
> Q. Both shoulders?
>
> A. She just said right—occasionally right she had some pain.
>
> Q. But she never mentioned anything prior to the injury or said that she had any problems with her shoulder, left shoulder prior to the injury?
>
> A. That's correct. She did say that.
>
> Q. But she did have, didn't she, according to the records?
>
> A. According to the records she did.

Wathne Deposition, p. 52, ll. 12-24. Considering Claimant's denial of prior shoulder limitations, Dr. Wathne agreed Claimant was not an accurate historian:

> Q. (by Mr. Arnold) Based on what you have learned overall about the condition of her—particularly her left shoulder prior to the June 13th, 2013, accident, would you agree that Ms. Stanger is not a correct historian?
>
> A. She is probably not the most accurate historian I've encountered. She seems to be in somewhat of a denial as to her condition. You know, as I mentioned before, even when I saw her this past August, she was like: Yeah, I'm doing fine. I'm functioning fine. I'm like: Well, let me see you lift your arm up. Is that fine? And she's like: No. I go: Are you in pain? Yes. They hurt me all the time.
>
> Q. So it—
>
> A. She's a tough cookie. Yes, I would concur that she's not a great historian.

Wathne Deposition, p. 50, l. 14 through p. 51, l. 5.

53. Claimant's testimony denying shoulder problems and limitations prior to her 2013 accident is unpersuasive. The medical records establish that prior to her 2013 accident, Claimant suffered significant pain and physical limitations that reduced her function and compelled her to seek medical attention repeatedly for her bilateral shoulder condition. Dr. Hill's records establish that Claimant's pre-existing condition was sufficient to restrict her horseback riding—a priority in her non-work activities—that prompted her to seek medical attention. Only with the aid of periodic medical attention from a pain management specialist and multiple prescription medications to control her bilateral shoulder pain was Claimant able to function in her work and non-work activities. Ms. Gammon noted the types and quantities of medications Claimant was taking prior to her industrial accident and testified: "she was taking a significant amount of pain medication and anti-inflammatory medication, and that seems probably to be the case that had she not been on that medication, she likely could not have done the work." Gammon Deposition, p. 33, ll. 12-16.

54. Furthermore, as clearly explained by Ms. Gammon, even with the aid of multiple prescription medications Claimant's pre-existing bilateral shoulder condition caused

her to adopt less than optimal compensatory procedures for performing her assigned work at ISU which ultimately contributed to her June 13, 2013 accident. Having extensively reviewed Claimant's records, Ms. Gammon testified that Claimant's pre-existing left shoulder condition was a hindrance to her work performance. Ms. Gammon noted that Dr. Hill's August 23, 2012 records document significant left shoulder range of motion deficits. She testified that Claimant's left shoulder abduction was then below shoulder level and that:

> Normal for that range of motion is … clear over your head. So she was significantly limited in that she couldn't bring that left hand up to shoulder level because of her dysfunction in her left shoulder.
>
> Flexion was zero to one twenty. So that was a little bit above shoulder level; but normal, again, is clear over your head.
>
> So, again, she was significantly limited in the function of her hand out in front of her, not only to the side, but out in front of her, that she couldn't get it up over her head.

Gammon Deposition, p. 21, l. 13 through p. 22, l. 1.

55. Ms. Gammon observed that Dr. Hill encouraged home exercises which modestly improved Claimant's left shoulder range of motion; however, she still could not lift her arm above her head and reported left shoulder pain from four to seven out of ten. By March 2013, her left shoulder pain had improved to where she was riding her horses again.

56. Ms. Gammon summarized: "in answering your questions how was her activity affected prior to her injury, according to the medical records, I could see many instances where it affected not only her daily activities but also would impinge upon her vocational activities." Gammon Deposition, p. 25, ll. 18-22. Ms. Gammon then carefully analyzed Claimant's description of the June 13, 2013 industrial accident and testified that the very manner in which Claimant was performing her work when she was injured illustrated how her preexisting shoulder condition hindered her ability to work. She noted Claimant's testimony

that she was repositioning two heavy boxes on the top shelf and was at least four steps up on the ladder when she fell. Claimant testified at hearing regarding her accident as follows:

> Q. (by Mr. Valdez) …. You have a box of books on one of your shoulders, and you're climbing up to place it on one of the shelves—
>
> A. No. That's not what happened. The boxes were already on the shelf.
>
> Q. Okay.
>
> A. And I was just going to shift it from one part of the shelf to the other part, because I was trying to make some room.
>
> Q. And you were doing that by—you have one box on one of your shoulders; right?
>
> A. Yeah. It was too heavy to lift, so I was going to kind of swing it over.

Transcript, p. 87, ll. 4-16 (emphasis supplied). Claimant estimated the box she was positioning when she fell weighed 50 pounds. Exhibit M, p. 7.

57. After citing the above portion of Claimant's hearing testimony, Ms. Gammon explained:

> So let's picture this. So we have her up four steps on the ladder where she's—her shoulder is level to the top shelf. She reaches over and puts the left box on her shoulder with probably her right hand. She puts it on her left shoulder, and she's going to move the other box and then put the box back from her left shoulder back on the shelf.
>
> But as she shifts her weight to move the box, the ladder tips and she falls. Okay. If you and I were going to move a box, would we go up four steps where we're shoulder level to the shelf? No. I'd probably go up two steps, put my hands up, grab the box, move it over, pick it up with my arms over my head, pick it up, move it over, and put it where it needs to be on the shelf. I wouldn't go up four steps, transfer the box to my shoulder, push the other box over and then push it back up.
>
> So what she's doing is she's accommodating her inability to lift her hands over her head with any kind of weight.

Gammon Deposition, p. 30, l. 15 though p. 31, l. 10 (emphasis supplied).

58. Ms. Gammon testified that given Dr. Hill's August 23, 2012 records: "There's no way she could have lifted over her head with that active range of motion." Gammon Deposition, p. 43, ll. 3-5.

59. Common experience teaches that the higher one ascends a ladder, the less stable one becomes. Thus, Claimant's pre-existing shoulder condition actually constrained her to move the box on June 13, 2013, in a hazardous manner—swinging it—resulting in the shifting of her weight on the ladder, and the ladder tipping due to the missing wheel.

60. Responding specifically to counsel's assertions that Claimant's pre-existing shoulder condition was inconsequential because she could apparently lift above shoulder level to saddle and ride her horse, Ms. Gammon testified:

> I grew up on a ranch. I saddled many horses in my life, and you don't necessarily always lift. You can swing, and with swinging, you use momentum. And when you use momentum, it requires less muscle force and less range of motion because momentum is carrying the object up.
>
> So I believe she could swing the saddle up. And she talks about how she was going to swing the box.

Gammon Deposition, p. 44, ll. 18.

61. Sara Statz largely agreed with Ms. Gammon's assessment:

> Q. (by Mr. Fuller) Do you believe that any of those conditions could have acted as a hindrance to her employment, those preexisting conditions?
>
> A. It depends on which document you look at. Because in Ms. Stanger's interview with me, like I said, she appeared to be the picture of health. And I believe that she presented herself as being quite healthy prior to the industrial injury. But then when you look at medical notes and you look at everything in totality, it appears that she was struggling.
>
> And I think Kathy Gammon did a really great job, she was talking about how she had modified these activities because she wanted to. And it was just a slow progression that caused these things to build up to the point where she couldn't overcome them any longer; that is was insurmountable.

Statz Deposition, p. 25, l. 17 through p. 26, l. 7.

62. The Referee finds that Claimant's pre-existing shoulder impairment constituted a hindrance to her employment prior to her 2013 industrial accident. The third prong of the Dumaw test is met as to this impairment.

63. Combination. Finally, to establish ISIF liability, the pre-existing impairment must combine with the subsequent industrial injury to cause total permanent disability. "[T]he 'but for' standard … is the controlling test for the 'combining effects' requirement. …. The 'but for' test requires a showing by the party invoking liability that the claimant would not have been totally and permanently disabled but for the preexisting impairment." Corgatelli v. Steel West, Inc., 157 Idaho 287, 293, 335 P.3d 1150, 1156 (2014), rehearing denied (Oct. 29, 2014). This test "encompasses both the combination scenario where each element contributes to the total disability, and the case where the subsequent injury accelerates and aggravates the pre-existing impairment." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

64. The record in the instant case contains persuasive evidence that Claimant's pre-existing shoulder condition combined with the 2013 industrial injury to render her totally and permanently disabled.

65. Dr. Wathne opined that "the restrictions that prevent her from returning back to gainful employment are due to a combination of the pre-existing conditions and the conditions related to her industrial injury of June 13, 2013 on a more probable than not basis." Exhibit E, p. 46. Ms. Gammon persuasively testified that Claimant is "totally and permanently disabled from gainful employment within the local labor market due to a combination of her

pre-existing left shoulder limitations, which were exacerbated by the industrial injury, and her right shoulder limitations resulting from her industrial injury." Exhibit K, p. 28.

66. Dr. Wathne described how Claimant's pre-existing condition combined with the injuries from her 2013 industrial accident to produce her loss of shoulder function. He testified that Claimant likely had pre-existing chronic rotator cuff tearing happening over a period of years resulting in muscle atrophy; however, Claimant "was able to use other muscles to compensate for that." Wathne Deposition, p. 10, ll. 3-4. He considered her 2013 accident and observed: "there's just kind of a tipping point where you have an injury …. And she was kind of teeter-tottering and it just took an injury to throw her over the hump essentially where she wasn't going to have that function now." Wathne Deposition, p. 11, ll. 3-10.

67. The record, particularly Dr. Wathne's testimony, establishes that but for Claimant's pre-existing condition she would not have been totally and permanently disabled by the industrial accident. Claimant's 2013 industrial accident combined with her pre-existing left shoulder condition to render her totally and permanently disabled. The final prong of the Dumaw test has been satisfied as to Claimant's pre-existing shoulder impairment.

68. Pursuant to Idaho Code § 72-332, ISIF is liable for Claimant's pre-existing shoulder impairment and the proportion of disability attributable thereto.

69. **Carey apportionment.** The final issue is apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54, (1984).

70. In Carey, the Idaho Supreme Court adopted a formula apportioning liability between ISIF and the employer/surety at the time of the final industrial accident. The formula prorates the non-medical portion of disability between the employer/surety and the ISIF in proportion to their respective percentages of responsibility for the physical impairment.

Conditions arising after the injury, but prior to a disability determination, which are not work-related, are not the obligation of ISIF. Horton v. Garrett Freightlines, Inc., 115 Idaho 912, 915, 772 P.2d 119, 122 (1989).

71. Before applying the Carey formula, the portion of Claimant's impairment pre-existing her 2013 industrial accident at ISU, and the portion caused by her 2013 industrial accident must be quantified. Claimant's qualifying pre-existing impairment is 10% of the whole person for her shoulder condition. Claimant's shoulder impairment due to her 2013 accident is 13% of the whole person. Thus, Claimant's impairments for Carey apportionment total 23%. Claimant's impairment from her 2013 industrial accident constitutes 56.5% (13/23), and her qualifying pre-existing impairment constitutes 43.5% (10/23) of her total impairment.

72. By application of the Carey formula, Employer/Surety are responsible for the medical portion of 13% impairment caused by Claimant's 2013 accident and for 56.5% of the nonmedical portion of Claimant's permanent disability. ISIF is responsible for the pre-existing medical portion of 10% impairment and for 43.5% of the nonmedical portion of Claimant's permanent disability. Thus, Employer/Surety are liable for 282.5 weeks of statutory benefits commencing on November 4, 2014, the date Dr. Wathne found Claimant had reached maximum medical improvement from her 2013 industrial injury.

73. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: for the 282.5 week period subsequent to November 4, 2014, Employer/Surety are responsible to pay to Claimant total and permanent disability benefits at the applicable statutory rate. During this same period ISIF is responsible to pay to Claimant the difference between the applicable permanent partial disability rate and the applicable total and permanent disability rate. Thereafter, ISIF is wholly

responsible for the payment of total and permanent disability benefits at the applicable statutory rate.

## CONCLUSIONS OF LAW

1. Claimant has proven she suffers permanent impairment of 23% of the whole person with 13% attributable to her 2013 industrial accident and 10% attributable to her pre-existing condition.

2. Claimant has proven she is totally and permanently disabled.

3. ISIF is liable pursuant to Idaho Code § 72-332 for Claimant's pre-existing shoulder impairment and the proportion of disability attributable thereto.

4. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: for the 282.5 week period subsequent to November 4, 2014, Employer/Surety are responsible to pay to Claimant total and permanent disability benefits at the applicable statutory rate. During this same period ISIF is responsible to pay to Claimant the difference between the applicable permanent partial disability rate and the applicable total and permanent disability rate. Thereafter, ISIF is wholly responsible for the payment of total and permanent disability benefits at the applicable statutory rate.

## 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 __29th_ day of October, 2018.

INDUSTRIAL COMMISSION

_/s/_____
Alan Reed Taylor, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the __5th_ day of _November____, 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:

JAMES C ARNOLD
PO BOX 1645
IDAHO FALLS ID 83403

STEVEN R FULLER
PO BOX 191
PRESTON ID 83263

KENT A HIGGINS
109 N. Arthur, 5th Floor
Pocatello, ID 83204

ANTHONY M VALDEZ
2217 ADDISON AVENUE EAST
TWIN FALLS ID 83301

_/s/_____

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

| | |
|---|---|
| ROBIN STANGER,<br><br>Claimant,<br>v.<br><br>IDAHO STATE UNIVERSITY, Employer, and STATE INSURANCE FUND, Surety,<br><br>and<br><br>STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,<br><br>Defendants. | **IC 2013-015556**<br><br>**ORDER**<br><br>**FILED**<br>**NOVEMBER 5, 2018** |

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 proven she suffers permanent impairment of 23% of the whole person with 13% attributable to her 2013 industrial accident and 10% attributable to her pre-existing condition.
2. Claimant has proven she is totally and permanently disabled.
3. ISIF is liable pursuant to Idaho Code § 72-332 for Claimant's pre-existing shoulder impairment and the proportion of disability attributable thereto.

4. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: for the 282.5 week period subsequent to November 4, 2014, Employer/Surety are responsible to pay to Claimant total and permanent disability benefits at the applicable statutory rate. During this same period ISIF is responsible to pay to Claimant the difference between the applicable permanent partial disability rate and the applicable total and permanent disability rate. Thereafter, ISIF is wholly responsible for the payment of total and permanent disability benefits at the applicable statutory rate.
5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this __5TH_ day of _November____, 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 _5th_ day of _November_____, 2018, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

JAMES C ARNOLD
PO BOX 1645
IDAHO FALLS ID 83403

STEVEN R FULLER
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TWIN FALLS ID 83301

sc

_/s/_____

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

| | |
|---|---|
| KAYE WARNER,<br><br>Claimant,<br>v.<br><br>PLEXUS,<br><br>Employer,<br>and<br><br>TRAVELERS INDEMNITY,<br><br>Surety,<br>Defendants. | **IC 2016-003316**<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**<br><br>**Filed November 30, 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 Boise on January 17, 2018. Claimant, Kaye Warner, was present in person and represented by J. Brent Gunnell, of Nampa. Defendant Employer, Plexus, and Defendant Surety, Travelers Indemnity, were represented by W. Scott Wigle, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on June 20, 2018. The undersigned Commissioners agree with the outcome proposed by the Referee, but believe different analysis should be applied to the opinions of the vocational experts and therefore issue their own findings of fact, conclusions of law, and order.

## ISSUE

The issues to be decided by the Commission were narrowed at hearing and by the parties' briefing. The sole issue is the extent of Claimant's permanent disability due to her industrial

accident, including whether Claimant is totally permanently disabled pursuant to the odd-lot doctrine.

## CONTENTIONS OF THE PARTIES

The parties agree that Claimant suffered an industrial accident on January 29, 2016, when she tripped and fell while at work, injuring her left shoulder, wrist, and thumb. Defendants accepted the claim and provided medical and temporary disability benefits. Claimant underwent left shoulder, and left wrist and thumb surgeries. She was ultimately released to modified work and returned to work at Plexus for several months but ceased work due to increasing symptoms. She has been unable to find work elsewhere. Claimant asserts she is totally and permanently disabled pursuant to the odd-lot doctrine. Defendants maintain Claimant successfully returned to modified work at Plexus, is not totally permanently disabled, and her permanent disability is minimal.

## EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant's Exhibits A through T and Defendants' Exhibits 1 though 28, admitted at the hearing.
3. The testimony of Nancy Collins, Ph.D., taken at hearing.
4. The testimony of Adam Castillo taken at hearing.
5. The testimony of Whitney Crockett taken at hearing.
6. The testimony of Claimant, Kaye Warner, taken at hearing.
7. The testimony of David Adams taken at hearing.
8. The testimony of Cliff Anderson taken at hearing.

9. The testimony of Floyd Atkinson taken at hearing.

10. The post-hearing deposition testimony of Mark Williams, D.O., taken by Claimant on February 2, 2018.

11. The post-hearing deposition testimony of David Lamey, M.D., taken by Claimant on February 27, 2018.

12. The post-hearing deposition testimony of Rodde Cox, M.D., taken by Defendants on March 22, 2018.

13. The post-hearing deposition testimony of William Jordan, M.A., C.R.C., C.D.M.S., taken by Defendants on April 10, 2018.

All outstanding objections are overruled.

## FINDINGS OF FACT

1. Claimant was born in 1962 and is left-handed. She was nearly 56 years old and resided in Nampa at the time of the hearing. Plexus is a large manufacturing facility that contracts to produce high complexity low volume electronic systems and circuit boards for larger projects. Plexus employs from 400 to 700 workers according to the needs of its clients.

2. **Background.** Claimant was born in Oregon and later attended Payette High School. She moved to Montpelier and in 1980 graduated from Bear Lake High School. After high school she worked at several fast food restaurants and a truck stop. Claimant also worked for several years making motorcycle and snowmobile helmets. From 1980-82, she worked as a nurse's aide in a hospital. From 1984-85, she worked at a nursing home. From 1994 until 2009, Claimant worked as a cashier at Albertsons in Elko, Payette, Nampa, and Boise. She eventually earned $12.17 per hour at Albertsons.

3. In approximately 2010, Claimant attended the Milan Institute in Nampa and completed training as a medical assistant. However, she found the training very challenging and did not pursue certification fearing she would be unable to pass state certification testing.

4. In 2014, Claimant started working for Adecco, a temporary employment agency, and was assigned to work at Plexus. After working for Adecco approximately 18 months she was hired directly by Plexus as a production associate. Her work at Plexus required two-handed holding and lifting. She lifted 10 to 15-pound trays into racks above her head multiple times daily. She also lifted baskets and buckets of parts. As a production associate her duties included building panels with frameworks of metal bars weighing from 20 to 40 pounds. She often wired as many as 500 components into panels. This required her to reach with both arms, push in wires, and manipulate a screwdriver with her dominant left hand. The production pace was fast and constant. She enjoyed her position and her 12-hour shift schedule with alternating three days on, four days off; and four days on, three days off. By January 2016, Claimant was earning $11.17 per hour and also receiving medical, dental, and optical insurance, and 401k benefits.

5. **Industrial accident and treatment.** On January 29, 2016, Claimant was working at Plexus when she tripped over a chain and fell onto her extended left hand and then onto her side. She noted immediate left hand pain. Her production lead and direct supervisor Cliff Anderson immediately encouraged her to obtain medical care. At St. Alphonsus Urgent Care Claimant was diagnosed with a left wrist sprain. In follow-up at St. Alphonsus Occupational Health she was also noted to have left shoulder symptoms. She underwent physical therapy. Left hand and wrist x-rays revealed bone-on-bone arthritis. A left shoulder MRI showed supraspinatus tendon strain and suspected labral tear.

6. On May 10, 2016, Clark Robison, M.D., performed arthroscopic left shoulder subacromial decompression and distal clavicle excision. He found no labral or rotator cuff tendon tears. Claimant recuperated from surgery and Dr. Robison released her to light-duty work.

7. Upon Claimant's release to light-duty work, Plexus provided her modified work in a water spider position. The water spider position required ordering, obtaining, and distributing parts to production associates for use in fabrication. Parts ranged from small nuts and washers to 40-pound steel bars. Claimant's duties included ordering parts via computer, removing parts and materials from pallets, and transferring parts to points of use for the builders. Mr. Anderson was promoted to production supervisor. He testified that 20 to 25% of the water spider job was moving steel bars. Floyd Atkinson became a production lead and Claimant's direct supervisor.

8. Claimant's left hand symptoms continued and on September 21, 2016, David Lamey, M.D., performed a left thumb scapho-trapezium-trapezoid (STT) and carpometacarpal (CMC) arthroplasty. He opined Claimant's industrial accident permanently aggravated pre-existing arthritis at the base of her left thumb. On January 17, 2017, Dr. Lamey recorded Claimant's left hand grip strength at 25 pounds as compared to 65 pounds for her right hand. He noted that her left thumb condition made it difficult to prepare food, dress, or write. However, Dr. Lamey released Claimant to work with no activity restrictions. She returned to work at the water spider position.

9. On February 24, 2017, Mark Williams, D.O., examined Claimant at her request. He found her medically stable and rated the permanent impairment of her left shoulder, wrist, and hand at 10% of the whole person due to her industrial accident. On April 11, 2017, Rodde

Cox, M.D., examined Claimant at Defendants' request. He rated the permanent impairment of her left shoulder and left hand at 12% and 16% respectively of the left upper extremity for a combined rating of 26% of the upper extremity. He apportioned 5% to Claimant's pre-existing left hand arthritis, with the remaining 21% upper extremity—equating to 13% of the whole person—attributable to her industrial accident. Dr. Cox's impairment rating is acknowledged by all parties and Defendants have or are paying this impairment rating in full.

10. Claimant enjoyed working at Plexus. After returning to work following her left hand surgery, she tried to complete the duties of her water spider position. However, she discovered that if she used her dominant left hand frequently, her left wrist became swollen and painful by the end of the shift. Thus she favored her left wrist and avoided using her left thumb. She delivered pallets of materials as best she could with her non-dominant right hand and a pallet jack. She used her right hand to pick up most parts; however she was unable to lift 40-pound steel bars with only her right hand. Claimant was encouraged by Plexus supervisors to obtain assistance from co-workers with heavier lifting but she perceived that assistance was not always readily available. She noted significant left hand pain by the end of each work shift. Her left hand swelling and pain did not fully resolve during her days off work. Claimant believed her assigned duties at Plexus exceeded her medical restrictions and that Plexus knew she was effectively being pressured to work beyond her restrictions.

11. In the summer of 2017, Claimant began training two new associates. They refused to lift 40-pound steel bars leaving Claimant to find help to do the task. Claimant's left hand and shoulder pain increased. She missed a few days of work due to the increasing pain and was written up for missing work without a doctor's excuse. Claimant talked about her increasing

symptoms with a trainer at Plexus who indicated she could help with heavier lifting; however, this trainer was not always present to provide help during Claimant's shift.

12. Claimant testified that on one occasion Mr. Atkinson, her immediate supervisor, directed Claimant to move some tables—a task Claimant believed exceeded her restrictions against lifting heavier items. Claimant did as directed and was subsequently criticized by her trainer for moving the tables. Claimant testified that she was not written up nor was she reprimanded by any supervisor at Plexus for refusing to do a task she believed was beyond her abilities, but was generally told to "Do what you can." Claimant Deposition, p. 85, 25. Claimant's left hand and shoulder pain continued to worsen to the point she decided that she could no longer perform her assigned duties as a water spider.

13. On July 24, 2017, Claimant left her employment at Plexus without prior notice. She did not talk to anyone at Plexus about her decision before leaving but walked out mid-shift. She has not worked since that time.

14. Mr. Atkinson, as Claimant's direct supervisor, was advised of her work restrictions but did not recall Claimant having complaints regarding her assigned duties. However, he acknowledged that Claimant sometimes told him she was in pain and hurting but did not recall Claimant ever indicating she had such physical problems performing her duties that she could not continue working. He did not recall asking Claimant to move tables—a task that he acknowledged would have exceeded her restrictions.

15. Plexus supervisors Anderson, Atkinson, and Plexus environmental health and safety generalist David Adams testified at hearing that had they been informed that Claimant's left hand and shoulder pain were worsening they would have assigned her less strenuous work

duties. They believed she had successfully returned to work in the water spider position with adequate assistance from coworkers to perform the heavier lifting.

16. On October 16, 2017, Dr. Lamey observed that Claimant showed poor left thumb extension and concluded she needed to wear a rigid left thumb splint which would need to be replaced periodically throughout her life. He observed this would limit some of her activities. Lamey Deposition, p. 14. Thereafter Claimant wore the rigid left thumb splint most of the time to avoid pain in her left thumb.

17. **Condition at the time of hearing.** At the time of hearing, Claimant tended her seven and four year old grandsons several hours each day, five days per week for which her daughter paid her approximately $100.00 per week. However, Claimant declined to tend her two month old grandchild fearing that, given her left hand pain and weakness, she might drop the infant. Claimant continued to have left shoulder and hand symptoms for which she took over-the-counter medications.

18. **Credibility.** Having observed Claimant, Nancy Collins, Ph.D., Adam Castillo, Whitney Crockett, David Adams, Cliff Anderson, and Floyd Atkinson at hearing and compared their testimony with other evidence in the record, the Referee found that all are credible witnesses. The undersigned Commissioners see no reason to disturb the Referee's findings and observations on credibility.

## DISCUSSION AND FURTHER FINDINGS

19. 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).

20. **Permanent disability**. The sole issue is the extent of Claimant's permanent disability due to her industrial accident, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine. "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.

21. 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 extent and causes of permanent disability "are factual questions committed to the particular expertise of the Commission." Thom v. Callahan, 97 Idaho 151, 155, 157, 540 P.2d 1330, 1334,

1336 (1975). The proper date for disability analysis is the date of the hearing, not the date the injured worker reaches maximum medical improvement. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012). Work restrictions assigned by medical experts and suitable employment opportunities identified by vocational experts may be particularly relevant in determining permanent disability.

22. Work restrictions. In the present case, the parties cite work restrictions as determined by Drs. Williams, Cox, and Lamey.

23. On February 24, 2017, Dr. Williams opined that Claimant was restricted to light-duty work with her left hand. He restricted her from overhead work, reaching more than 21 inches from her body, ladder climbing, and repetitive fingering or handling. He limited her to occasionally lifting 10 pounds and frequently lifting two pounds with her left hand. At hearing, Claimant demonstrated that 21 inches from her body is approximately to the knuckle of the middle finger of her right hand and, for practical purposes, is approximately as far as she can reach. Dr. Williams explained the 21-inch reaching restriction was to reduce Claimant's risk of further injury to her left shoulder. He testified that he did not intend to entirely preclude Claimant from working and believed "based on the surgeries that she had and the most common outcome with both, that there would be something that she could find that would allow her to return to some work." Williams Deposition, p. 42, ll. 5-8. Dr. Williams later affirmed Claimant's need to wear a splint on her left thumb to protect the joint and acknowledged that "it does limit her ability to move the thumb across the palm. In touching, grasping, or grabbing, the movement of the thumb is significantly limited." Williams Deposition, p. 21, ll. 7-10.

24. On April 11, 2017, Dr. Cox restricted Claimant from repetitive high force gripping with her left hand and all work above shoulder level. Dr. Cox later explained the gripping restriction:

> [W]ith the wrist injury I wouldn't want her doing anything that required her to grip heavily, like running power tools or having to use a wrench or a screwdriver or something that required an excessive amount of—or an abundance of gripping type activity. I didn't feel she was particularly limited in fine-motor activity, but high-force gripping.

Cox Deposition, p. 15, ll. 5-10.

25. On February 14, 2018, Dr. Lamey agreed with the restrictions determined by Dr. Cox. Dr. Lamey specifically agreed that Claimant should avoid repetitive high-force gripping involving her left hand; however, when asked if he would restrict her from all repetitive work because of her left hand he testified: "No. …. I don't think so. I think that if it does not require any forceful gripping that she could use the hand." Lamey Deposition, p. 20, ll. 1-5. Dr. Lamey indicated that scar tissue forming as a consequence of Claimant's hand surgery may reduce tendon motion resulting in difficulty gripping.

26. While Claimant's overhead work restrictions are acknowledged by all of the physicians, her most significant limitation is in the use of her dominant left hand. The pivotal question is the extent to which Claimant may use her dominant left hand. Dr. Cox restricted her left hand use only to the extent of avoiding repetitive forceful gripping. Dr. Lamey concurred. However, Dr. Williams restricted Claimant's left hand use to only occasional handling, fingering, and lifting 10 pounds. He defined occasional as up to 33% of the time. Dr. Williams acknowledged that part of this restriction was based on his physical examination of Claimant and "[p]art of it is subjective." Williams Deposition, p. 35, l. 25. There is some evidence calling into question Claimant's subjective left hand complaints.

27. Grip strength testing administered by Dr. Lamey showed 65 pounds with Claimant's right hand and only 25 with her left. In response to Claimant's report of persistent symptoms, Dr. Lamey addressed her assertions of left hand and thumb atrophy, overuse, pain, and swelling:

> Q. (by Mr. Gunnell) Would there be concerns about muscle atrophy as a result of having to wear a splint most of the time?
>
> A. I suppose, if you wore the splint all the time, yes; but I don't think there is a need to do that. You know, I think her grip should still be reasonably good. When you have arthroplasty or any kind of a joint replacement like that, you know, normally, motion is full. In her case, it's not. Normally, pain relief is pretty good. ….
>
> Q. Would you expect her pain to increase with overuse of that thumb?
>
> A. No, I don't think so, unless something else, like another joint, is becoming arthritic or something.

Lamey Deposition, p. 12, l. 16 through p. 13, l. 11. Claimant's left hand complaints may be the product of additional arthritis in her left hand, as mentioned by Dr. Lamey in his testimony. While her arthritis may have progressed in other joints in her left wrist, no party has specifically so asserted or produced evidence that such a development would relate to her industrial accident.

28. Dr. Cox testified that in his manual muscle examination of Claimant she demonstrated giveaway weakness—as differentiated from true muscle weakness—in her entire left arm: "All I can say is she didn't give me a full effort on her strength testing." Cox Deposition, p. 28, ll. 6-7. He testified that although Dr. Lamey's grip strength testing showed 65 pounds with Claimant's right hand and only 25 with her left, such grip strength testing in only one position "doesn't tell you anything about the patient's effort." Cox Deposition, p. 25, ll. 19-20.

29. Claimant's daughter testified that Claimant's left shoulder symptoms have improved since she ceased working at Plexus; however, her left thumb symptoms have worsened. Transcript, p. 80. Claimant credibly testified that her left hand and shoulder pain worsened post-surgery when she worked as a water spider at Plexus and has not significantly improved since she quit working.

30. Claimant's deposition and hearing testimony of her left thumb symptoms and use of a thumb splint are consistent and are corroborated by the consistent testimony of her children at hearing. The record as a whole establishes that Claimant's subjective complaints of debilitating left thumb pain are credible.

31. The undersigned Commissioners conclude that the restrictions imposed by Dr. Williams are most persuasive. Due to Claimant's left shoulder, wrist, and hand condition resulting from her industrial accident, she is restricted from overhead work, reaching more than 21 inches from her body, ladder climbing, and repetitive left hand fingering or handling. She is also limited to occasionally lifting 10 pounds and frequently lifting two pounds with her left hand and will need to wear a left thumb brace regularly.

32. Opportunities for gainful activity. Claimant asserts her left shoulder, wrist, and thumb conditions make it difficult for her to work. Two vocational experts have addressed her employability and Claimant herself has sought employment.

33. *Nancy Collins*. Nancy Collins, Ph.D., a vocational expert retained by Claimant, interviewed Claimant on September 24, 2016, and prepared a report evaluating her disability. Dr. Collins has been a vocational rehabilitation counselor and consultant for 30 years and has testified for both defendants and claimants for approximately 25 years. She noted that Dr. Lamey initially released Claimant without activity restrictions whereas Dr. Williams

restricted Claimant to occasionally lifting 10 pounds with her left arm and occasional reaching 21inches from her body. Dr. Collins noted that Dr. Cox's restrictions, with which Dr. Lamey later agreed, included avoiding repetitive high force left hand gripping and above shoulder level work with her left hand. Dr. Collins observed that a high force gripping restriction effectively precluded Claimant from heavy lifting.

34. Dr. Collins opined that Claimant has no significant keyboarding or office related computer skills and very dated and limited medical knowledge. Dr. Collins noted that for 30 years Claimant worked in fast paced repetitive hand gripping employment requiring frequent to constant use of her hands and arms, such as a production associate at Plexus, cashier at Albertsons, or fabricator in helmet manufacturing. Dr. Collins opined that applying Dr. Cox's work restrictions, Claimant sustained at least a 40% loss of labor market access. Applying Dr. Williams' work restrictions, Dr. Collins opined Claimant's "restriction for occasional use of her dominant arm and hand for reaching and handling is very significant. … Ms. Warner's loss of labor market access exceeds 90%." Claimant's Exhibit N, p. 8.

35. Dr. Collins noted Claimant is left-handed and must use a splint that functionally eliminates movement in her left thumb, resulting in very little opposition in her left thumb. Dr. Collins indicated wearing a wrist splint would be an issue when applying for hand intensive positions. She accepted Claimant's report that repetitive left hand activities cause pain and swelling so she performs most activities with her non-dominant right hand. Dr. Collins noted that Claimant has transferable skills particularly within small retail environments. However, her non-dominant right hand dexterity is slow and not viable for production pace work. Dr. Collins testified:

> I included sedentary and light jobs as those jobs she could still perform, but her most significant restriction is for occasional handling, reaching and fingering and

> it's her dominant arm. So, … that's the most significant restriction you can really have, because we all know we use our hands constantly to perform anything basically. So, 92 percent of all job titles in the DOT require frequent to constant reaching and handling. So, you're significantly limited if those are your restrictions. If you can only use that dominant arm one percent to 33 percent of the time, there are very few jobs left.

Transcript, p. 25, l. 19 through p. 26, l. 6 (emphasis supplied). She reported that Claimant would likely not be placeable in any job. Dr. Collins offered no opinion as to Claimant's wage loss in either her report or during her testimony at hearing due to difficulty identifying a suitable position.

36. Dr. Collins evaluated the 30 positions recommended by Bill Jordan in his report and based upon the Dictionary of Occupational Titles job description of each job, opined that nearly all would be unsuitable for Claimant:

> In reviewing the ones that he did include, in my opinion she's not competitive for most of them and in order to perform these jobs you would only have to rely on Dr. Cox's restriction, not Dr. Williams' restrictions, because all of these jobs would require frequent to constant reaching and handling and some of them would be heavier than her lifting restriction. All the medically related jobs that are here, which there are a lot—a medic—well, transfer driver probably doesn't need any medical knowledge, but med tech, medical receptionist, phlebotomist, med tech aide, phlebotomy processor, plasma processor, donor center TAG, pharmacy TAG, medical assistant—she really has no—her medical experience is over 30 years ago, other than two months as a home companion. So, you know, those are not relevant. She's not going to be competitive for these medical jobs. So, that eliminates a lot of the jobs here. And, the, he even has a production work in here. Call center jobs she doesn't have the computer skills for. So, while they may be within the restrictions from Dr. Cox, she would not be considered for these jobs—for most of these jobs and she would have to use her left arm and hand on a frequent and constant basis.

Transcript, p. 29, l. 17 through p. 30, l. 14. Dr. Collins opined that while Mr. Jordan believed Claimant could work as a bus monitor, such positions are uncommon and typically involve special needs students often having mobility limitations consequently requiring gripping, pushing, pulling, and even lifting by the monitor to assist such students. She concluded:

> [T]aking into account her functional limitations, her subjective complaints and Dr. Williams' specific restrictions for her and based on those restrictions it's my opinion that she's really an odd lot worker, that there are not jobs available in significant numbers or regularly available that she would be competitive for. She might be able to get a job, but she'd have a really difficult time keeping the job, because she's just not going to be fast enough using her nondominant hand to complete the activities.

Transcript, p. 33, ll. 10-19.

37. *William Jordan*. Defendants retained vocational expert William Jordan, M.A., CRC, CDMS, to evaluate Claimant's employability. Mr. Jordan has been a vocational specialist for almost 40 years and affirmed that he performs the majority of his work for the defense. He interviewed Claimant on December 4, 2017, and issued an employability report on January 4, 2018. Mr. Jordan noted Claimant had extensive experience as a cashier and also completed a medical assistant course through the Milan Institute in approximately 2012 but did not attempt state certification testing thereafter. He observed that even without state certification, some employment opportunities would be open in this medical area. Jordan Deposition, p. 28.

38. Mr. Jordan observed that none of the physicians have indicated Claimant cannot work and none have restricted her to less than full-time hours. He provided examples of positions regularly available in her labor market that he opined fit within the restrictions of either Dr. Cox or Dr. Williams or both, including: non-emergency transport driver, med tech, registrar, optician, female caregiver, medical receptionist, mobile phlebotomist, med tech aide, teller, plasma processor, pharmacy tech, medical assistant, front desk agent, customer service associate, medical office receptionist, food service associate, call center sales rep, production worker, and quality control tech. Defendants' Exhibit 26, p. 482. Mr. Jordan reviewed job descriptions with Dr. Cox who approved the following: nurse's aide, clothing sorter, companion, cashier, security

watch guard, self-service cashier, Medical Assistant, coffee counter attendant, barista—coffee maker, sales clerk bakery, school bus monitor, counter attendant cafeteria, breakfast attendant, and delivery driver auto parts. Dr. Cox also approved Claimant's production associate and water spider positions at Plexus. Jordan Deposition, p. 32.

39. Mr. Jordan opined that accepting the restrictions imposed by Dr. Cox; Claimant would sustain a loss of labor market access of 20% and a 3% wage loss producing a 12% permanent disability, inclusive of her permanent impairment. Thus, Mr. Jordan concluded that if Dr. Cox's restrictions are adopted, Claimant has no permanent disability in excess of her 13% whole person permanent partial impairment.

40. Mr. Jordan testified that accepting Dr. Williams' more extensive restrictions, there were still jobs available. Mr. Jordan opined that given the restrictions imposed by Dr. Williams, Claimant would sustain a loss of labor market access of 56% and a 3% wage loss producing a 28% permanent disability, inclusive of her permanent impairment. Defendants' Exhibit 26, p. 484.

41. *Claimant's job search.* Claimant testified at hearing she believes there are jobs she can do and she has been looking for work. Mr. Jordan testified that in her interview Claimant reported she thought she could work as a customer service clerk at Albertsons cashing checks, handling money orders, and distributing tobacco products, a cashier at Michael's, a cashier at Kmart, or a cashier at Burlington. Jordan Deposition, p. 11-12.

42. Between November 10 and December 8, 2017, Claimant submitted a total of 18 job applications—12 online—to potential employers, all without success. She applied at Where You Have a Habit, Chevron, Domino's, Jackson's, Family Dollar, Great Clips, Wal-Mart, Albertson's, Country Store, Denny's, Napa Auto Parts, Cloverdale Nursery, Target, Meridian

Village, Chicago Connection, Albertson's Warehouse, Clean Authority, and Martinizing Cleaning.

43. Additionally, in approximately December 2017, Claimant's daughter, Whitney Crocket, an employee of Idaho Employment Training Services, sent Claimant's resume through several on-line services to approximately 50 companies including Packaging Corporation of America, American Tire Distributors, Bretz RV, Oldcastle, Buffalo Wild Wings, Gem State Staffing, IES Custom Staffing, Franz Family Bakery, Burlington Stores, Follett, Sodexo Frontline, Pro Moto Billet, NPC International, FedEx, Tomlinson & Associates, Liveops, Key Bank, One Main, Mosaic Field, Shopko, Sprint, Camping World, AAA Oregon/Idaho, Stage, T-Mobile, Stanley Steemer, Albertsons, Michaels, American Express Global, State Farm Agency, Terminex, Aspire Human Services, Mister Car Wash, LaborMAX Staffing, Denny's, Mor Furniture, Fred Meyer, Heartland RV, Northwestern Marketing Concepts, Redneck Trailer Supplies, Kmart, Volt, and PepsiCo. Claimant received no interviews or employment offers.

44. Between January 13 and 15, 2018, Claimant canvassed Nampa and submitted approximately 25 resumes or job applications to the following: coffee shop attendant at Flying M, associate at Now World of Nutrition, Farm Store, Lucky's Dog Grooming, circulation assistant at Caldwell Library, dispatcher, playroom attendant at Shire Pharmaceuticals, sales associate at JC Penny, jewelry sales associate, front desk associate at Massage Envy, part-time teller at Westmark Credit Union, dispatch assistant, scheduling agent at O2 Photography, cashier at Craft Warehouse, cashier at Idaho Center Chevron, cashier at Flying J, hostess at Enrique's Mexican Restaurant, food server at Yogurt Court, cashier at Maverick, retail associate at Ross Stores, crew member at Sodelicious, front desk receptionist at Fast Lane, associate at Kart

Racing, part-time cashier at St. Lukes Meridian, and associate at two different call centers. Claimant received no interviews or employment offers.

45. Claimant called and inquired about the jobs that Mr. Jordan identified in his January 2018 report. She determined that nearly every position either required experience she did not possess or lifting in excess of 40 pounds. The billing position at Premier required higher computer skills, the phlebotomy position was filled and also required state certification that Claimant lacked, and the medical technician position at Brookdale Assisted Living required state certification that Claimant lacked.

46. *Weighing the vocational evidence.* Claimant's significant work search factors into the evaluation of the expert vocational testimony but is not altogether convincing. With some exceptions, her work search was a matter of distributing resumes, the majority of the resumes being sent electronically by her daughter, with little if any follow-up contact of potential employers by Claimant. Careful targeting of employers with available positions that would be suitable given Claimant's work restrictions as imposed by Dr. Williams is not apparent. Mr. Jordan believed that while Claimant's daughter had electronically sent Claimant's resume to a number of potential employers, and Claimant had actually talked with some potential employers, she had applied in-person for only a few open positions. Jordan Deposition, p. 55. Mr. Jordan therefore characterized Claimant's job search as cursory rather than extensive, and testified that to be effective she needed to work with "someone that would help her to determine the right kinds of jobs to apply for, coach her about talking with employers in-person, taking the resume by directly, scheduling appointments, that sort of thing." Jordan Deposition, p. 56, ll. 20-23.

47. Considering Dr. Williams' left hand occasional handling restriction, Mr. Jordan opined Claimant's loss of labor market access was 56%; Dr. Collins opined it exceeded 90%.

While Mr. Jordan acknowledged that Dr. Williams restricted Claimant to occasional handling/fingering with her dominant left hand, he offered little explanation of the probable impact of this restriction on Claimant's employability. His opinion does not appear to realistically apply Dr. Williams' restriction against frequent or constant handling or fingering with Claimant's dominant left hand and Claimant's slower paced handling and lesser manual dexterity when forced to rely upon her non-dominant right hand for anything more than occasional use. Mr. Jordan's recitation of potential jobs for Claimant does not clearly differentiate between jobs suitable per Dr. Cox's work restrictions and those Mr. Jordan deems suitable per Dr. Williams' work restrictions. Mr. Jordan admitted that Claimant's wearing a splint on her dominant hand would be a competitive disadvantage in seeking employment and that her age of 56 may also be a disadvantage. Mr. Jordan's opinion of Claimant's loss of labor market access is less persuasive than that of Dr. Collins.

48. Dr. Collins testified that 92% of the job titles in the Dictionary of Occupational Titles require frequent to constant handling. She thus opined Claimant sustained a 92% loss of labor market access. Dr. Collins also based her opinion upon the assumption that Claimant was restricted to lifting 20 pounds. Transcript p. 49, ll. 4-13. This is a misstatement; in fact, no physician limited Claimant's overall lifting to 20 pounds. Dr. Williams opined that Claimant was restricted to no lifting greater than 15 pounds and no carrying greater than 10 pounds with the left arm on an occasional basis. He also opined Claimant could likely lift 40 pounds on occasion with both arms. Williams Deposition, p. 37, ll. 17-18. Claimant has no positional restrictions and no driving limitations. She testified that she had no difficulty driving with her right hand. Dr. Williams restricted Claimant from frequent or constant handling with the left hand, thus implicitly affirming her capacity to use her left hand to engage in occasional handling,

defined as up to 33% of the time. Left hand use up to 33% of the time plus unlimited right hand use, taken in conjunction with Dr. Williams' indication that Claimant can occasionally lift up to 15 pounds with her left hand and 40 pounds using both hands, suggest additional potential employment opportunities not addressed by Dr. Collins.

49. Significantly, the record establishes viable employment options for Claimant. Claimant performed the work of a water spider at Plexus for several months after her left hand surgery. The unloading of pallets of 20 to 40 pound metal bars increased her left hand pain until it became intolerable. However, Plexus personnel including Adams and supervisors Anderson and Atkinson affirmed help was available for lifting. Claimant herself acknowledged at hearing that she did not always seek help with lifting while working at Plexus in her water spider position even though she had been directed to do so:

> Q. (by Mr. Gunnell) Did you ever talk to your immediate supervisors about problems you were having at work?
>
> A. I talked to the trainer about it.
>
> Q. About the—who was the trainer?
>
> A. Annie Hall.
>
> Q. And did she provide any help to you?
>
> Q. Yes. She just—she said if you need help let me know, you know, but she was busy doing her own thing when I would need help, so, you know, I'm not the kind of person to ask for help every minute, you know. Either I can do it or I can't, you know.
>
> Q. And did you sometimes ask for help when—
>
> A. Yes.
>
> Q. –there was [sic] people around you that could have helped you?
>
> A. Yes, I did.

Transcript, p. 116, l. 25 through p. 117, l. 15 (emphasis supplied).

50. Dr. Collins acknowledged at hearing that there are two jobs of the 30 listed by Mr. Jordan that Claimant can perform within the restrictions imposed by Dr. Williams. She testified:

> [I]f you look at these job descriptions, every single one of them, with the exception of one, required frequent reaching and handling and it's listed right on the page on the job description under physical demands. The only one that doesn't is the—again, school bus monitor and that indicates it's not present. Now, there was one other customer service rep where it was occasional and she, according to the doc, could do occasional reaching and handling and that was a customer service rep. So, maybe those two jobs if they were regularly available and she had the skill set to perform them.

Transcript, p. 34, ll. 7-22. Focusing further on the customer service position, Dr. Collins explained:

> [W]hat we think of as customer service jobs in Boise are the call center jobs and that's not what this is. This is a sedentary job where you're talking to people who are returning merchandize, like maybe at a grocery store or a department store. So, it has to do with the billing and merchandize. It's more of a clerical kind of job and she really doesn't have any clerical skills, but she has worked with the public, she has—had worked in the grocery business, so she does have some of those skills and it if was not fast paced she could maybe do that job, if she could primarily use her right hand and use her left hand occasionally.

Transcript, p. 35, ll. 11-23.

51. Thus, while not numerous, there appear to be viable employment options in addition to the water spider and less strenuous positions at Plexus that are suitable for Claimant given Dr. Williams' restrictions. Claimant does not assert that Plexus is a sympathetic employer that is somehow willing to accept inadequate job performance.

52. Claimant's actual wage loss is unclear. Dr. Collins provided no opinion on Claimant's wage loss, and Mr. Jordan acknowledged that while he estimated a wage loss of only 3% (from $11.15 to $10.91 per hour), Claimant received health, dental, and vision benefits and a

401(k) program at Plexus generally equating to an additional "$3 or $4 an hour." Jordan Deposition, p. 66, ll. 10-11. Mr. Jordan assumed that all of Claimant's potential future employers would provide a similar benefits package. The record contains little support for this assumption. A larger loss of earnings is more probable due to the fact that all of the benefits Claimant enjoyed at Plexus, including medical, dental, and vision insurance and 401k benefits, may not be available from prospective future employers. Thus Claimant's loss of earnings per Mr. Jordan's analysis may range from 3% to as much as 28%. Claimant's actual wage loss, whatever that may be, when considered with Dr. Collins's testimony that 92% of jobs in the Dictionary of Occupational Titles require frequent to constant handling and fingering and that Claimant had lost access to more than 90% of the labor market, produces a potential range of permanent disability of 47.5% ([3% + 92%] ÷ 2) to as much as 60% ([28% + 92%] ÷ 2).

53. The Commission has previously observed the limitations arising from simply averaging the estimated loss of labor market access and the expected wage loss, declaring:

> the averaging method has its limitations as the two measures averaged are not entirely independent. Complete loss of labor market access produces complete expected wage loss. As the loss of labor market access becomes more substantial, the expected wage loss is less significant in predicting actual disability.
>
> The Commission discussed this very phenomena in Deon v. H&J, Inc., 2013 WL 3133646 (Idaho Ind. Com. May 3, 2013):
>
> > Rating an injured worker's permanent disability by averaging her estimated loss of labor market access and expected wage loss, as Drs. Collins and Barros-Bailey have done in the instant case, can provide a useful point of reference. However, the averaging method itself is not without conceptual and actual limitations. As the loss of labor market access becomes substantial, and the expected wage loss negligible, the results of the averaging method become less reliable in predicting actual disability. For illustration, as judged by the averaging method, a hypothetical minimum wage earner injured sufficiently to lose access to 99% of the labor market may theoretically suffer no expected wage loss if she can still perform any minimum wage job. Calculation of such a worker's disability according to the averaging method would produce a

> permanent disability rating of only 49.5% ([99% + 0%] ÷ 2) even though her actual probability of obtaining employment in the remaining 1% of an intensely competitive labor market may be as remote as winning the lottery. The averaging method fails to fully account for the reality that the two factors are not fully independent.

Gonzales v. Champion Produce, Inc., 2014 WL 4659388, at 8 (Idaho Ind. Com. Aug. 22, 2014). We believe these considerations are present in the instant matter, and warrant giving more weight to Claimant's labor market access loss.

54. The weight to be given evidence is a question for the Industrial Commission. Murray v. Hecla Mining Co., 98 Idaho 688, 571 P.2d 334 (1977). The extent of an injured worker's disability for work is a factual matter committed to the particular expertise of the Industrial Commission. Gordon v. West, 103 Idaho 100, 645 P.2d 334 (1982)(citing Thom v. Callahan, 97 Idaho 151, 540 P.2d 1330 (1975)). The Commission concludes that the facts of this case warrant giving more weight to Dr. Collins' opinion that Claimant has suffered a 92% labor market access loss. Even though we believe, as set forth in ¶45-51 above, that some employment opportunities do exist for Claimant, we nevertheless conclude that the labor market access loss proposed by Dr. Collins is closer to the mark than the figure proposed by Mr. Jordan. In addition to the reasons set forth *infra*, we believe that Claimant's work search, though imperfect, lends more support to Dr. Collins' opinion than to Mr. Jordan's.

55. Based upon Claimant's permanent impairment of 13% of the whole person, permanent physical restrictions as determined by Drs. Cox, Lamey and especially Dr. Williams including her restriction to using her dominant left hand only occasionally for handling and fingering, and considering all of Claimant's medical and non-medical factors including but not limited to transferable skills, extremely dated and limited medical training, inability to return to her previous positions, and age of 54 at the time of the industrial accident and 56 at the time of

the hearing, Claimant's ability to compete in the open labor market and engage in regular gainful activity after her industrial accident has been significantly reduced, but not altogether eliminated. Claimant has proven permanent disability of 70%, inclusive of her 13% whole person permanent impairment.

56. **Odd-lot.** Claimant also alleges she is totally and permanently disabled pursuant to the odd-lot doctrine. 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 a prima facie case of 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).

57. In the instant case, other than Claimant's leaving her water spider position at Plexus, she makes no assertion of a failed attempt at other types of employment. Claimant walked out of her water spider job. She failed to take advantage of the help with lifting that was offered her by her trainer and others at Plexus. Such does not constitute a failed work attempt sufficient to satisfy the first prong of the Lethrud test, but rather a failure by Claimant to fully avail herself of the assistance offered.

58. Claimant has presented evidence of an unsuccessful work search. She alone, and with the assistance of her daughter, contacted more than 90 prospective employers without success. This constitutes a significant work search. However, the second prong of the Lethrud test requires a showing that suitable work is not available, most often established by evidence of an unsuccessful job search. However, when a substantial part of the job search is not shown to be more than the distribution of electronic resumes without apparent reasonable follow-up, the large number of electronic submissions is insufficient to prove that suitable work is not available. Moreover, while Dr. Collins initially opined that a work search would be futile, she later testified that two positions identified by Mr. Jordan may be viable employment options. Finally, Plexus established that it had directed Claimant to ask for assistance with lifting in her water spider position and that lighter duty positions were available to Claimant had she notified Plexus of her difficulty performing the water spider position. Claimant has not proven that other work is not available or that a work search would be futile. She has not established a prima facie case under the Lethrud test.

59. Claimant has not proven that she is totally and permanently disabled pursuant to the odd-lot doctrine.

## CONCLUSION OF LAW AND ORDER

1. Claimant has proven she suffers permanent disability of 70%, inclusive of her 13% permanent impairment, due to her industrial accident. She has not proven that she is an odd-lot worker, totally and permanently disabled.
2. Pursuant to Idaho Code § 72-818, this decision is final and conclusive as to all matters adjudicated.

Dated this __30th__ day of ____November____, 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 ___30th___ day of __November_, 2018, 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:

J BRENT GUNNELL
1226 E KARCHER RD
NAMPA ID 83687

W SCOTT WIGLE
PO BOX 1007
BOISE ID 83701-1007

_____/s/_____

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

| | |
|---|---|
| GAYLEN DOWNS,<br>Claimant,<br>v.<br>OLD CASTLE PRECAST, INC.,<br>Employer,<br>and<br>LIBERTY INSURANCE CORPORATION,<br>Surety,<br>Defendants. | **IC 2016-002297**<br>**2016-007327**<br><br>**FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER**<br><br>**Filed 12/14/18** |

## INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-referenced consolidated[1] matter to Referee Michael E. Powers, who conducted a hearing in Boise on May 2, 2018. Claimant was present with his attorney Bruce Skaug of Nampa. David Farney, of Meridian, represented Defendant Employer Oldcastle Precast, Inc., and its surety, Liberty Insurance Corporation. Judith Atkinson, also of Meridian, undertook the representation of Defendants and submitted Defendants' post-hearing brief. The parties submitted oral and documentary evidence and took two post-hearing depositions. This matter came under advisement on September 17, 2018 and is now ready for decision. 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.

[1] By Order dated May 13, 2016, the Commission consolidated IC # 2016-002297 (date of injury 7/29/15) involving Claimant's left shoulder with IC # 2016-007327 (date of injury 2/19/16) involving Claimant's right knee. Claimant indicated in his opening statement that Claimant's right knee injury has resolved and is no longer a part of this claim. See HT., p. 12.

## ISSUE

The sole issue to be decided is whether Claimant had suffered permanent partial disability above his permanent partial impairment.[2]

## CONTENTION OF THE PARTIES

Claimant contends that he has incurred disability above his impairment of at least 69% according to his vocational expert. Defendants contend that Claimant has not incurred disability above impairment of 49.5% according to their vocational expert.

## EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and his wife, Debbie, taken at the hearing.

2. Joint Exhibits (JE) A-S admitted at the hearing.

3. The post-hearing depositions of Mary Barros-Bailey, Ph.D., taken by Claimant on May 22, 2018 and that of Nancy Collins, Ph.D., taken by Defendants on July 6, 2018.

## FINDINGS OF FACT

1. Claimant was 53 years of age and has resided in Nampa his whole life. He completed the 11th grade at Nampa High School and has not obtained a GED. "The only things I got good grades in was auto mechanic [sic] and math. The rest of my grades were lousy." HT., p. 16.

2. During and post-high school, Claimant worked as a laborer, welder,[3] millwright worker, fabricator, pre-cast concrete worker, and welder/fabricator at Motive Power.[4] Claimant began his employment with Employer in 2007 or 2008 as a maintenance tech but was doing mechanical work

[2] Additional issues were identified at hearing, such as the payment of certain medical bills and whether Claimant is an odd-lot worker. Since neither party argued for or against these issues in their briefing, they are deemed waived.

[3] Claimant has been certified in certain aspects of welding, but does not believe any such certifications are current.

[4] Claimant had to obtain a certification in welding for this job, which he held for seven years.

and welding at the time of his 2015 industrial accident. Claimant described the vast majority of his pre-injury work as heavy/very heavy.

3. On July 29, 2015, Claimant injured his left shoulder when a ladder slipped out from underneath him and he reached out with his left arm to catch himself from falling further. Claimant continued working as he was already on light duty due to a previous right shoulder injury.

4. Claimant was fired by Employer in March 2016 for reasons unrelated to his left shoulder injury.

5. Claimant underwent left shoulder surgery on August 9, 2016. Surety paid for the surgery as well as providing time loss benefits and physical therapy. Claimant's left shoulder failed to improve so in January 2017, Claimant underwent a "re-do" left shoulder surgery followed by more physical therapy. At hearing, Claimant testified that his left shoulder did not improve after this surgery and "[i]f anything it felt worse." HT., p. 38.

6. Claimant's treating physician, Miers Johnson, M.D., and Surety's independent medical examiner, Rodde Cox, M.D., assigned Claimant a 10-pound lifting restriction with no repetitive overhead lifting and Claimant agrees that such restrictions are appropriate. With the current condition of Claimant's left arm/shoulder, he does not believe he could perform any of his previous jobs. He can still weld, but cannot perform the many activities associated with welding.

7. Claimant conducted a job search[5] with the help of ICRD consultant Diana Contreras. Ms. Contreras assisted Claimant in creating a resume. She also found some specific jobs Claimant could apply for; he followed up on some of them. Claimant also registered with the Job Service and has applied for some jobs online. Claimant testified that he would tell prospective employers up-front about his restrictions because he did not want to waste their time. His job search has been

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He was also required to perform strenuous overhead work while at Motive Power.

[5] See JE Q for a list of potential employers Claimant contacted since August 2017.

unproductive; of the places he has contacted he has only had "maybe five" interviews. HT., p. 43. Claimant testified that he wants to work: "I want to get the hell out of my house. I'm going crazy." HT., p. 45.

8. Claimant has prior injuries; some were industrial, some were not. He has had three operations on his right knee, the first of which was nonindustrial and the last of which was 21 years ago. Claimant testified that he, at least as of the time of the hearing, has no difficulties with either knee. Prior to his injury of July 29, 2015, Claimant did not have any physical problems in performing his heavy/very heavy work.

9. Claimant has expressed interest in setting up a business for home health care to be able to continue to care for his 82-year-old mother-in-law who suffers from dementia and recently moved in with Claimant and his wife. Whether it be Claimant or someone else, she needs constant supervision which he could provide within his restrictions. Claimant deferred to his wife regarding the status of that endeavor paperwork-wise.

10. Claimant admitted under cross-examination that he tells prospective employers that he is injured and quite limited in the work he can perform. He has not applied for Social Security Disability because "I want to go back to work." HT., p. 68.

11. Regarding Claimant becoming a home care attendant for his mother-in-law, Claimant's wife, Debbie, testified that she is still working with the Idaho Department of Health and Welfare as well as the VA to complete the process. Debbie did not know the dollar amount Claimant would receive for his caretaking duties should the same be approved.

**Vocational evidence**

ICRD

12. Employer[6] referred Claimant to ICRD on September 16, 2016 and consultant Diana Contreras was assigned to his case (JE D). She noted that 14 days post-left shoulder surgery Claimant was given restrictions of no overhead work, no power gripping, no pulling/pushing motions of the left arm, no use of vibrating tools, and no lifting over 20 pounds with the left arm.

13. Ms. Contreras completed a Job Site Evaluation (JSE) with Employer's assistance (even though Claimant no longer worked for Employer) and sent the same to Claimant's treating left shoulder surgeon, who indicated Claimant could return to modified duties effective October 20, 2016. His restrictions included rarely reaching above shoulder level and frequently lifting and pulling and pushing five pounds.

14. Unfortunately, Claimant developed adhesive capsulitis in his left shoulder requiring an additional left shoulder surgery that was accomplished on January 27, 2017. Post-surgery, he was still restricted to lifting less than five pounds with his left biceps.

15. In August 2017, Rodde Cox, M.D., reviewed the JSE and assigned permanent work restrictions of lifting no more than ten pounds, push/pull 20 pounds, and rarely lifting above shoulder level.

16. After Dr. Cox's assigned restrictions, Claimant was ready to pursue job development; he was interested in maintenance work. Ms. Contreras helped him with a resume tailored to that interest; however, Claimant was having difficulty securing maintenance-type work due to his restrictions and lack of education. Ms. Contreras referred Claimant to Idaho Department of Labor to

[6] In a Previous Injury Report, the referral source was listed as Employer (JE D., p. 147). In Ms. Contreras' September 16, 2016 Case Notes, she indicated that Claimant was self-referred.

help with his job search by attending workshops focusing on interviewing techniques and the "hidden labor market." She also supplied Claimant with job leads and helped him apply for jobs online.

17. On April 2, 2018, Ms. Contreras reported that Claimant was interested in setting up a home care business to take care of his mother-in-law.

18. Claimant's work restrictions place him in the sedentary work category; however, Claimant "…does not want to pursue sedentary work because it will require working in an office setting or additional training or education." JE D., p. 171.

19. On September 11, 2017, Ms. Contreras summed up her involvement vocationally with Claimant as follows:

> In conclusion, my recommendations are for the claimant to continue working closely with ICRD for job development. As shown in the case notes initially there were several months of unsuccessful attempts to work with the claimant for job development. The claimant recently attended his first job development appointment and the claimant is pursuing employment as a maintenance worker. The claimant feels he can work around his restrictions with employer's support. We discussed that his restrictions only allow sedentary work but he may be able to find light duty work that can be within his restrictions. We have discussed options of seeking work where he is either a lead person or a trainer. I also suggested other options for employment such as a driver like a van driver/Uber driver. In my opinion, in order to replace his wage he will need to find an occupation that may require on-the-job training or a short term training program. The claimant has to consider if he pursues retraining he has to begin with pursuing his GED. Then he may be able to attend a short term course that will give him the skills needed to find work that he can physically perform. I have listed some occupations[7] that he may be able to find with his existing skills and physical abilities.

JE D., p. 175.

Mary Barros-Bailey, Ph.D.

20. Claimant retained Dr. Mary Barros-Bailey to assess Claimant's employability. Dr. Barros-Bailey's credentials are well known to the Commission and she is qualified to give expert vocational opinions in this matter.

21. Dr. Barros-Bailey met with and tested[8] Claimant for over three hours on October 5, 2017 and prepared a Disability Evaluation on November 15, 2017. She reviewed Claimant's education, work and social history, and medical and vocational records. She noted Claimant's subjective limitations[9] as well as the permanent restrictions assigned by Dr. Johnson on May 4, 2017 of working up to four hours a day, avoiding over-the-shoulder lifting, heavy vibrating tools, and pushing/pulling type movements with the left hand (Claimant is right hand dominant), and lifting up to five pounds using the biceps. Dr. Barros-Bailey also noted the permanent restrictions assigned by Dr. Cox on August 4, 2017 of lifting up to 10 pounds, pushing/pulling up to 20 pounds, and rarely lifting above the shoulder.

22. Dr. Barros-Bailey testified in her deposition that Defendant's expert, Dr. Nancy Collins, had an updated report from Dr. Johnson that increased somewhat the range of light-duty work available to Claimant; however, it did not change the classification of light-duty work.

23. Dr. Barros-Bailey testified that Claimant obtained employment pre-injury because he knew somebody at the workplace or had prior exposure to the prospective employer. Claimant was eligible for both ICRD and IDVR assistance. She characterized Claimant's post-injury job search as

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[7] These occupations include parts clerk, machine shop production lead, and machine tender, although she concluded that such jobs are in low demand without at least a high school education.

[8] Dr. Barros-Bailey administered reading (98% of the population reads better than Claimant), aptitude (mechanical reasoning) that with Claimant's work history she thought would be higher, and spatial relations (average). Dr. Barros-Bailey was unable to give other tests because of Claimant's trouble reading which is below kindergarten level.

[9] Dr. Barros-Bailey only considers objective restrictions and merely notes what subjective limitations Claimant alleges he has.

"reasonable," although his lack of reading and computer skills has hindered him in obtaining employment. Claimant cannot perform managerial duties due to, again, his lack of reading, education, knowledge, and computer skills.

24. Dr. Barros-Bailey opined that, based solely on Dr. Cox's restrictions Claimant has lost access to 83% of his pre-injury labor market (Ada and Canyon counties). Claimant's loss of access percentage would be closer to 100% when considering Dr. Johnson's restrictions. Attempting to explain the difference between her 83% labor market access loss and the 65% (or 68%) figure favored by Dr. Collins, Dr. Barros-Bailey testified that she believed Dr. Collins erroneously assumed that Claimant is capable of performing work in the medium category of jobs. Dr. Barros-Bailey Dep., p 29. In fact, like Dr. Barrios-Bailey, Dr. Collins concluded that Claimant's restrictions foreclose the ability to perform medium work. As explained *infra*, the real explanation for the difference in labor market access loss opinions rendered by the experts lies in the starting point for their respective assessments.

25. Dr. Barros-Bailey identified some limited driving jobs Claimant may be able to perform such as delivering pharmaceuticals, pizza, etc., or basic messenger services at about $10.50 per hour, which would represent a 40% loss of wage earning capacity (versus 31-33% as found by Dr. Collins).[10]

26. Dr. Barros-Bailey concluded that Claimant has incurred PPD from his work-related injury between 69% on the low end and odd-lot on the high end. "The odd-lot was based more on the restrictions that I had at the time from Dr. Johnson that, according to Dr. Collins' report, have been updated. His restrictions seem to be closer to Dr. Cox. I would say that, within that range, it's probably closer to the 69 percent as opposed to the odd-lot." Dr. Barros-Bailey Dep., p. 36.

[10] According to Dr. Barros-Bailey, Claimant would not be able to perform some of the higher paying jobs identified by Dr. Collins so Dr. Collins' loss of wage earning capacity is too low.

27. On cross-examination, Dr. Barros-Bailey testified that she needed to "spend more time" on Claimant's interest in caring for his mother-in-law as she "briefly" remembers Claimant mentioning it, but she "skimmed through that aspect of it." *Id.*, p. 39. She would "have to spend more time on it" to answer questions regarding whether Claimant could perform the duties associated with attendant care. *Id*.

28. Dr. Barros-Bailey recommended a "job developer" or "job coach" to assist Claimant in his job search because before his last injury, he had always been able to find work through "word of mouth," and that approach would not work when looking for a different occupation. IDVR could provide such a service.

29. Dr. Barros-Bailey testified as follows regarding Claimant's practice of informing prospective employers about his physical restrictions/limitations:

> I think that, generally, if somebody has restrictions, unless they – if somebody knows what the activities of the job are and they believe they can do those, with or without limitation, there is no reason to bring it up. I know that certain individuals feel that this is dishonest, but that is the law.
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> So sometimes that is part of the training that goes into job placement. I think that is, frankly, one of the areas that he is not sophisticated about; and he needs to have greater attendance [sic], in search of his job search skills.

Dr. Barros-Bailey Dep., p. 45.

30. Dr. Barros-Bailey testified that if the Commission finds that Claimant had a pre-existing right knee restriction of no lifting over 50 pounds, it would not change her disability assessment, but her apportionment of disability would be less for his last injury. In other words, she would look at Claimant's total present disability, then determine how much would be apportionable to Claimant's pre-existing right knee restriction. However, Dr. Barros-Bailey saw no evidence that Claimant was having trouble with, or was accommodated for, his right knee in the very heavy work he was performing for Employer pre-last injury.

Nancy J. Collins, Ph.D.

31. Defendants retained Dr. Collins to assess Claimant's employability "… considering the effect of this injury on the capacity to obtain and sustain competitive work and future earning capacity." JE M., p. 484. Her credentials are well known to the Commission and need not be repeated here. She is qualified to give expert vocational opinions.

32. In preparation of her vocational report dated March 30, 2018, Dr. Collins interviewed Claimant[11] and reviewed medical and vocational records, including Dr. Barros-Bailey's deposition testimony and report, ICRD records, and the hearing transcript. Dr. Collins noted that Claimant's physician-imposed restrictions for his left shoulder were "fairly consistent." She understood that restrictions are imposed to prevent further injury. Dr. Johnson imposed a 10-pound left shoulder lifting restriction and no over-the-left-shoulder lifting. Dr. Cox agreed with the 10-pound restriction and no over-the-shoulder repetitive lifting. The medical records support Claimant's subjective limitations.

33. Dr. Collins reported that Claimant had a number of pre-existing conditions that may affect his overall disability:

> He'd had a number of industrial injuries and nonindustrial injuries. One that was recent was he had injured his right shoulder, was recovering from that when he injured his left shoulder. So that was a concern.
>
> But he also had a right hand injury that he talked about. Actually, and is in the record, that left him with about 50 percent of the strength in his right dominant hand. So that was something. And the employer, where that particular injury happened, had moved him from a physical job into a position as a safety manager because of that restriction that was provided at the time.

[11] Dr. Collins found Claimant to be a "very nice" man with good communication skills and who presented well. She found nothing in his personality or physical presentation that would present an obstacle in securing re-employment.

> And then he also had a right knee injury, and he was given a 50-pound lifting restriction. And so I assumed, when I did my analysis, that that's where I was starting from, is that he had realistically had restrictions for lifting to 50 pounds and not above; so I eliminated the heavy and very heavy in my analysis.

Dr. Collins' Dep., p. 12.

34. According to Dr. Collins, Claimant is not a functional reader and she agreed with Dr. Barros-Bailey's testing regarding his reading skill level. Dr. Collins testified that Claimant is a bright man who has worked in skilled jobs; however, he learned through demonstration rather than by reading or writing.

35. Dr. Collins had this comment regarding Claimant's vocational history and transferrable skills:

> Well, primarily to see what his transferrable skills might be as it relates to his restrictions. It also shows that he was the type of man who worked kind of long periods of time. He had good longevity in jobs. He promoted overtime in jobs. He had some supervisory kinds of responsibilities, was able to learn not only all the welding skills, but a lot of maintenance skills on the job. So, you know, he had a really good work history. A lot of work he had done was heavy; medium, heavy, or very heavy.

*Id.*, pp. 19-20.

36. Although "very limited" by his left arm restrictions, Dr. Collins opined that Claimant continues to have the ability to perform light bench welding tasks as well as forklift driving and some maintenance work.

37. Dr. Collins considered Claimant's right knee to be a pre-existing condition regarding heavy work:

> . . . [I]f we are going to consider that his current restrictions are to prevent further harm, then I need to consider what his past restrictions are as well.
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> So he was not supposed to be doing heavy and very heavy work. He was limited to 50 pounds back in 1998. So I eliminated heavy and very heavy work in my analysis because that was a restriction that was in place for him and what I assumed was permanent.

*Id.*., p. 24.

38. Dr. Collins opined that Claimant could perform sedentary and light electrical, industrial equipment repair, metal fabrication, welder, and industrial truck operator. She did not include medium work.

39. Dr. Collins testified that Claimant has lost 65% of his pre-injury labor market consisting of Boise, Nampa, Caldwell, Kuna, and Meridian. She attributed this loss of access solely to Claimant's left shoulder injury.

40. Regarding Claimant's employability, Dr. Collins testified:

> Yes, he does have some employability limitations. First one is his literacy levels. You know, if you had a gentleman who had actually graduated from high school and had average reading levels, you could consider jobs like safety manager. He had done that in the past, but realistically, he can't do that job with his reading level.
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> Another example might be working as a service writer. They need to be able to read and write. He has great customer service skills, he presents really well, it would be a good job for him, but he really probably can't functionally do it because of his reading level.
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> So that makes a difference for him as far as what he can still do now. But he still has a lot of mechanical skills and the welding skills that he could use in a lighter environment where there wasn't a lot of overhead work.

*Id.*, pp. 32-33.

41. As with employability, Dr. Collins testified that Claimant is also limited in placeability, but there are light duty jobs that exist in significant numbers for him; therefore, his placeability is limited, but not severely.

42. Dr. Collins identified actual jobs within Claimant's labor market and fit within his functional capabilities:

> Well, one, in particular, in one area, I think, and I'm not sure he applied for any of these, is the forklift operation. When we were talking

> about driving, he did - - does have some kind of arm fatigue when he drives a lot.
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> But he was talking about as a forklift operator, they always have suicide knobs on them; so it's a lot easier to maneuver, and a lot of it is done with the right hand. So if he had a forklift operating job, he really wouldn't be lifting with his left arm, wouldn't be reaching above shoulder level, and he has those skills and abilities.
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> Another one would be bench welding. And one particular job that I saw was for Meridian Fence; so it's doing the decorative gates, it's welding in the shop to put these gates and fences - - kind of to manufacture them. So there wouldn't be overhead work and not a lot of heavy lifting.

Dr. Collins' Dep., pp. 34-35.

43. Claimant was earning $21.00 per hour at his time-of-injury job. He was also receiving certain Employer-provided benefits generally valued at about 20% above his hourly salary. Dr. Collins opined that forklift operator, machine operator, and some welding jobs pay between $13.00 and $16.00 an hour, which makes Claimant's loss of earning capacity at 31%.

44. Dr. Collins was critical of Claimant for informing prospective employers up front about his restrictions and testified that he only needs to do so if he would require accommodations.

45. Dr. Collins concluded that, in her professional opinion, Claimant has suffered permanent disability of 49.5% inclusive off his impairment as the result of his left shoulder injury. *See,* Dr. Collins' Dep., p. 39.

46. On cross-examination, Dr. Collins admitted that Claimant would not be amenable to retraining "in the formal sense" due to his lack of reading, writing, and spelling skills. Even so, she found him to be "…very pleasant, very agreeable, good communication skills." Dr. Collins' Dep., p. 47.

47. Regarding Dr. Collins' 65% loss of labor market access, she testified that she limited Claimant's pre-injury labor market to exclude heavy and very heavy work even though his time of injury job was "heavy" in nature. Dr. Collins did this because Claimant's permanent restrictions pre-

existing his left shoulder injury took him out of the heavy work category and just because he performed heavy work for eight years pre-left shoulder injury does not mean he should have done so.

## DISCUSSION AND FURTHER FINDINGS

Permanent partial disability

48. "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 impairment and by pertinent non-medical 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 the 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, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

49. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of

permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

50. A two-step analysis is appropriate when apportionment is at issue and requires "(1) evaluating the claimant's permanent disability in light of all his physical requirements, resulting from the industrial accident and any pre-existing conditions existing at the time of the evaluation; and (2) apportioning the amount of permanent disability attributable to the industrial accident." *See, Horton v Garrett Freightlines, Inc.*, 115 Idaho 912, 915, 772 P.2d 119, 122 (1989) and *Page v. McCain Foods, Inc.*, 145 Idaho 302, 309, 179 P.3d 265, 272 (2008).

51. A claimant's disability is to be determined, in most cases, as of the date of the hearing. *See, Brown v. Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012).

52. Turning first to the evaluation of Claimant's disability from all accident-produced and pre-existing impairments, only Dr. Barros-Bailey appears to have made this assessment. Claimant's time-of-injury job was "very heavy" in nature. Per the restrictions imposed by Dr. Cox, Claimant is now only capable of performing work in the light and sedentary categories, and not even all of those jobs, per Dr. Barros-Bailey. In conducting her analysis, Dr. Barros-Bailey did <u>not</u> assume that Claimant had any pre-existing restrictions, even though she was aware that Claimant had subjective complaints relating to his prior knee condition. Dr. Barros-Bailey testified that if one were to assume the existence of a 50 pound lifting restriction for Claimant's pre-existing right knee condition, some part of the 69% disability she assessed for Claimant would be assigned to such pre-existing condition. Barros-Bailey Dep., pp. 13, 48-49. From this, we conclude that Dr. Barros-Bailey's opinion that Claimant currently suffers disability in the range of 69% of the whole person represents her opinion on Claimant's disability from all causes, including the less onerous restriction against lifting more than 50 pounds.

53. From Dr. Collins' testimony, it is clear that in assessing Claimant's disability, her starting point was different than the starting point employed by Dr. Barros-Bailey. Dr. Collins was aware of physician-imposed restrictions stemming from Claimant's pre-existing right knee injury. These restrictions limited Claimant from heavy and very heavy work, notwithstanding that he evidently performed such work in the years immediately prior to the subject accident. Per Dr. Collins, physician-imposed restrictions do not represent functional capacity. Rather, restrictions represent a guideline imposed by a physician to avoid further injury. That Claimant was able to work at his time-of-injury job is in no wise inconsistent with a physician-imposed restriction cautioning him against certain aspects of that job. Indeed, as noted by Dr. Barros-Bailey, Claimant acknowledged right knee symptoms in performing certain activities.

54. Based on her conclusion that Claimant was precluded from heavy and very heavy work activity on a pre-injury basis, Dr. Collins excluded these portions of Claimant's labor market in conducting her evaluation of the impact of the work accident on Claimant. In essence, she evaluated Claimant's disability from the work accident alone, as opposed to Claimant's disability resulting from the work accident and his pre-existing impairments. Referring to Page 10 of her report, Claimant's labor market consisted of approximately 7,848 jobs. 1,932 of these jobs fell into the heavy and very heavy category, while 3,809 of these jobs fell into the medium category. Excluding heavy and very heavy jobs left Claimant with a labor market consisting of 5,916 jobs (7,848 - 1,932). Per Dr. Collins' report, the medium-duty jobs Claimant is no longer able to perform as a result of the subject accident constitute approximately 65% of his 5,916 job labor market.[12]

55. Although Dr. Collins did not offer testimony on this point, from her report it is possible to deduce Claimant's labor market loss from both the work accident and his pre-existing impairments.

[12] Inexplicably, while Dr. Collins report reflects that she initially proposed labor market access loss of 65%, she later stated that Claimant has suffered labor market access loss of 68%. See JE M., pp.

Claimant's labor market of 7,848 jobs is comprised of 5,741 jobs which fall into the medium, heavy, and very heavy categories. (3,809 + 1,932). These jobs constitute approximately 73% of Claimant's total labor market, a figure within striking distance of Dr. Barros-Bailey's conclusion that Claimant has suffered 83% loss of labor market access from all causes. The difference between these assessments may be explained by Dr. Barros-Bailey's belief that Claimant is foreclosed from accessing all medium, and some light duty work. Dr. Collins believed Claimant is capable of all light duty work. Further, she believed that because Claimant's upper extremity restrictions are unilateral only, there were probably some medium-duty jobs that fall into his residual labor market. Dr. Collins' Dep., p. 25.

56. Dr. Barros-Bailey and Dr. Collins also differ in their evaluation of Claimant's wage loss. Both Dr. Barros-Bailey and Dr. Collins acknowledged that in addition to his time-of-injury wage of $21 per hour, Claimant received other benefits from his Employer which could be reduced to a monetary value of something in the range of 20% of his hourly wage, or an additional $4 per hour. Both experts acknowledged that it is unknown whether, or to what extent, jobs in Claimant's residual labor market will afford Claimant a similar benefit structure. This uncertainty makes it more practical to evaluate wage loss by comparing hourly wages alone.

57. Dr. Collins assumed that Claimant can earn anywhere from $13 to $16 per hour in his residual labor market, and identified specific welding and forklift operation jobs which support this assessment. Compared to his time-of-injury wage of $21 per hour, she believed Claimant has suffered wage loss of 31%. (14.5 ÷ 21). Dr. Collins' Dep., pp. 35-36. Dr. Collins did not base her wage loss analysis on entry level wages for forklift operation and bench welding since Claimant has skills that are directly transferable to these positions. Dr. Collins' Dep., pp. 36-37. Inexplicably, she later concluded that Claimant's wage loss is more in the range of 33%. Dr. Collins' Dep., p. 39. Assuming

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31% wage loss and 73% labor market access loss from all causes, would yield, according to the convention employed by Dr. Collins, disability in the range of 52%. (31 + 73 = 104 ÷ 2).

58. Dr. Barros-Bailey concluded that Claimant has suffered wage loss of approximately 40%. To reach this figure, she assumed that although Claimant's time of injury wage was $21 per hour, his annual income in the years immediately preceding the subject accident suggested an earring capacity of $17-$18/hour when prorated to a 2080 hour year. JE N, p. 506. In his residual labor market, Dr. Barros-Bailey believed Claimant can expect to earn a starting salary in the range of $10.50 per hour. She believed that Dr. Collins overstated Claimant's wage earning capacity in his residual labor market, and felt that it was more accurate to base a wage loss assessment on what Claimant might be expected to earn as an employee starting in a new position. Dr. Barros-Bailey concluded that in view of Dr. Cox's restrictions, Claimant has disability in the range of 69% (83 + 40 ÷ 2).

59. In evaluating these opinions, we are mindful that Dr. Collins did not give explicit testimony concerning Claimant's disability from the combined effects of his accident-produced and pre-existing impairments. However, as explained above, we believe her opinion in this regard can be inferred from her report, particularly the table at JE M at 493. Only Dr. Barros-Bailey has rendered an opinion explicitly based on Claimant's disability from all causes. In evaluating these opinions, we believe that Dr. Barros-Bailey has failed to fully consider the fact that Claimant's upper extremity limitations are unilateral only, and that he has no established restrictions for his right upper extremity. From this, we conclude that Dr. Collins was correct in concluding that the possibility exists that Claimant can yet perform some work classified as medium-duty. Further, we conclude that it is not entirely appropriate to evaluate Claimant's wage loss based only on what he will earn in his residual labor market as a new employee; Claimant will not always be a new employee, and it is therefore inappropriate to evaluate his present "and probable future" ability to engage in gainful activity by reference to his starting wage alone. Further, we do not fully accept Dr. Barros-Bailey's criticism of

the specific jobs identified by Dr. Collins for which it was felt Claimant had directly transferable skills. For these reasons, we believe that Dr. Barros-Bailey has slightly overstated the extent of Claimant's disability from the combined effects of the subject accident and Claimant's pre-existing impairments. We conclude that Claimant has present disability of 65% from accident-produced and pre-existing causes.

60. Having determined that Claimant suffers disability of 65%, inclusive of his 7% impairment rating, we must next consider the second step of the *Horton* analysis, i.e. identifying what portion of Claimant's disability from all causes is referable to the industrial accident. Both Dr. Collins and Dr. Barros-Bailey acknowledge that some part of Claimant's current disability must be assigned to a pre-existing condition upon demonstration that Claimant actually has physician-imposed restrictions referable to his pre-existing right knee conditions. Though such restrictions exist, Dr. Barros-Bailey was evidently unaware of them, and therefore, did not make an effort to apportion Claimant's disability. Dr. Collins was aware of pre-existing restrictions which would prohibit Claimant from engaging in heavy and very heavy labor. She addressed these pre-existing restrictions by simply choosing to state Claimant's disability in terms of what it would be after first excluding heavy and very heavy components of his labor market. Based on the assumption that Claimant's time-of-injury labor market included only sedentary, light and medium work categories, she concluded that Claimant suffered accident-caused labor market access loss of 65% and wage loss of 31%, yielding disability of 48%. (65 + 31 ÷ 2). Though we have criticized Dr. Barros-Bailey for slightly overstating Claimant's wage loss, we believe that Dr. Collins can be criticized for slightly understating Claimant's wage loss. Even she may have intuited this when she increased Claimant's wage loss from 31% to 33%.

61. We can infer nothing from Dr. Barros-Bailey's testimony that would allow us to hazard a guess as to what her opinion might be on Claimant's accident-produced disability. We know only that she was in agreement with the proposition that if Claimant had demonstrable pre-injury

restrictions, it would be appropriate to assign some part of his current disability to a pre-existing cause. However, she was not asked to quantify an opinion on apportionment.

62. Having considered the testimony of both vocational experts, the testimony of Claimant and other relevant non-medical factors, we conclude that Claimant has accident-produced disability of 55%, inclusive of his 7% PPI rating. We depart from Dr. Collins' opinion because of the significance we attach to Claimant's functional illiteracy, a non-medical factor that will have a much greater impact on Claimant as he competes for the sedentary, light, and medium jobs that remain in his residual labor market.

## CONCLUSIONS OF LAW AND ORDER

1. Claimant is entitled to permanent partial disability of 55% inclusive of his 7% whole person permanent partial impairment.

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

DATED this __14th__ day of __December__, 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 ___14th___ day of ___December___, 2018, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

J BRENT GUNNELL
1226 E KARCHER RD
NAMPA ID 83687

JUDITH ATKINSON
PO BOX 6358
BOISE ID 83707-6358

_____/s/_____

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

| | |
|---|---|
| JEROLD MOSS,<br><br>Claimant,<br><br>v.<br><br>CDA SERVICE STATION EQUIPMENT, INC.,<br><br>Employer,<br><br>and<br><br>IDAHO STATE INSURANCE FUND,<br><br>Surety,<br><br>Defendants. | **IC 2013-000548**<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**<br><br>**Issued 2/25/19** |

## INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted hearings in Coeur d'Alene, Idaho, on June 27, 2016 and May 1, 2018.[1] Claimant was represented by Charles Bean, of Coeur d'Alene. James Magnuson, of Coeur d'Alene, represented CDA Service Station Equipment, Inc., ("Employer") and Idaho State Insurance Fund ("Surety"), Defendants. Oral and documentary evidence was admitted. Post-hearing depositions were taken and the parties thereafter submitted briefs. The matter came under advisement on October 30, 2018.

[1] At the time of the first hearing Claimant was seeking, but had not received, a spinal cord stimulator implant. A key issue for resolution was whether the proposed implant should be paid for by Defendants. Not long after the hearing, Claimant obtained funding for the proposed implant surgery from a third party entity. He moved to suspend proceedings until after the surgery. The motion was granted. Well after this surgery a second hearing was conducted, with Claimant providing testimony as to his then-current physical status post-implant surgery.

## ISSUES

The issues noticed by the parties to be decided are:

1. Whether and which of the conditions for which Claimant seeks benefits were caused by the industrial accident;

2. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury or condition;

3. Whether and to what extent Claimant is entitled to the following benefits:
   a. Medical Care;
   b. Temporary Disability Benefits
   c. Permanent Disability in excess of Impairment (PPD), including Total Permanent Impairment under the Odd Lot Doctrine;

4. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate; and

5. Whether Claimant is entitled to attorney fees.[2]

## CONTENTIONS OF THE PARTIES

Claimant argues he was injured as the result of a covered fall at work on January 3, 2013. Claimant had neck and lumbar spine surgeries due to injuries he received in his work accident. Even after these surgeries, Claimant had ongoing pain complaints in his back, as well as his upper and lower extremities. Claimant's unrelenting pain and loss of function proved debilitating. A subsequent spinal cord stimulator improved Claimant's condition to some degree, but he is still incapable of sustained employment, and is thus totally and permanently disabled. Surety refused to pay for the stimulator implant. Claimant is entitled to the unpaid medical treatment costs,

[2] The only issues briefed and argued by Claimant were Claimant's right to medical treatment in the form of a spinal cord stimulator, a right to TTD benefits for an indeterminate time period, permanent disability in excess of impairment, and attorney fees. Defendants only briefed and argued against the spinal cord stimulator and permanent disability. As such, issues 1, 2, and 4 are waived, although the issue of disability does tangentially include pre-existing conditions but not as a separate issue for discussion.

including the spinal cord stimulator, temporary disability benefits until he reaches MMI, and total permanent disability benefits. Surety should pay attorney fees.

Defendants contend that Claimant had medical conditions which pre-existed his work injuries, and from which he never fully recovered. The restrictions in place for these conditions were the same as those given by Defendants' expert after Claimant's work accident. As such, Claimant's disability in excess of impairment is at most negligible. Claimant was not a good candidate for a spinal cord stimulator, and the implantation of such device was not reasonable or necessary. It failed to provide meaningful relief. Claimant is not entitled to temporary disability benefits.

## EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Claimant's wife, and Jessica Jameson, M.D., taken at the hearing of June 27, 2016, and Claimant's testimony taken at the hearing of May 1, 2018;

2. Claimant's Exhibits (CE) A through N, admitted at hearing;

3. Defendants' Exhibits (DE) 1 through 36, admitted at hearing;

4. The post-hearing deposition transcripts of Daniel McKinney, Sr., taken on July 6, 2016, and May 10, 2018;

5. The post-hearing deposition transcript of Bret Dirks, M.D., taken on May 8, 2018;

6. The post-hearing deposition transcript of Craig Beaver, Ph.D., taken on June 7, 2018;

7. The post-hearing deposition transcript of Robert Friedman, M.D., taken on

June 27, 2018; and

8. The post-hearing deposition transcript of Douglas Crum, taken on June 28, 2018.

All objections and Motions to Strike preserved during the depositions are overruled.

## FINDINGS OF FACT

1. Claimant was a married 61 year old man living in Dalton Gardens, Idaho at the time of the last hearing. He obtained his GED after dropping out of high school as a sophomore. Thereafter he joined the Navy and was enlisted for just over two years. His post-military jobs included warehouse worker, purchasing agent, and wholesale/retail electrical component salesman. His time-of-injury job included purchasing parts and maintaining Employer's warehouse. Claimant also stocked parts, ran a fork lift, made job-site deliveries, bid contracts, and performed telephone sales tasks.

2. While working for Employer on January 4, 2013 Claimant tripped and fell down a three-foot stairway, striking his head. He injured his neck and low back during this accident. Claimant had a history of neck and back pain with past surgeries but during the two years preceding this accident he had not sought medical treatment for his back or neck.

3. Claimant was seen in the Kootenai Medical Center ER, where diagnostic studies were done of his neck and low back. The cervical CT scan showed Claimant's prior C4-C6 anterior fusion, along with spondylosis and bilateral bony foraminal narrowing. No acute traumatic injury was detected. Low back x-rays were positive for moderately severe L5-S1 disc space narrowing, with mild narrowing at L4-5, and mid-lumbar spondylosis.

4. A follow up lumbar MRI showed evidence at L5-S1 of Claimant's prior left

hemilaminectomy and a small broad-based left posterolateral disc herniation impinging the traversing left S1 nerve root. At L4-5 there was advanced disc degeneration with mild to moderate central canal stenosis and mild compression of the traversing L5 nerve root bilaterally. Claimant also had degenerative facet arthropathy throughout his lumbar spine.

5. Upon referral from his family doctor, Richard Bell, M.D., and John Swanson, M.D., who had been managing Claimant's persistent pain since the accident, Claimant began treating with Bret Dirks, M.D., a Coeur d'Alene neurosurgeon, on January 24, 2013.[3]

6. When he first presented to Dr. Dirks Claimant complained of neck and bilateral shoulder pain, right arm and wrist pain, and tingling fingers bilaterally, together with low back pain and shooting electrical pain down his left leg and numbness in his calf.

7. Dr. Dirks diagnosed left sided lower extremity radiculopathy consistent with Claimant's recurrent left L5-S1 disc herniation and L4-5 disc bulge with impingement on the descending and exiting nerve roots. With regard to Claimant's neck, Dr. Dirks found bilateral dysesthesias which he correlated to pseudoarthrosis at C4-5 and C5-6. Dr. Dirks noted that while the work accident "aggravated his symptomatology, [Claimant] is not fused and that will have to be addressed" surgically. DE 3, p. 254. Dr. Dirks prescribed physical therapy and injections for Claimant's low back.

8. Claimant underwent corrective neck surgery on March 11, 2013. His immediate recovery thereafter was as anticipated. Claimant's low back conservative treatments did not resolve his complaints. Dr. Dirks recommended a fusion surgery at L4-5 and L5-S1.

[3] Dr. Dirks was known to Claimant, as he was the surgeon who performed Claimant's prior cervical fusion surgery in 2010.

9. Claimant's lumbar surgery took place on May 15, 2013. Claimant's initial post-surgical recovery progressed well, although Claimant continued to complain of pain in his back with leg numbness, both far less than before surgery.

10. In August 2013 Claimant underwent transforaminal injections due to continuing left-sided back and hip pain.

11. On October 31, 2013, Claimant returned to Dr. Dirks complaining of increased pain in his back and down his legs. Claimant indicated he was having difficulty walking, and was barely able to do his exercises. His gait was slow and hunched over. Dr. Dirks ordered a repeat MRI and a nerve conduction study.

12. The EMG showed no evidence of active lumbosacral radiculopathy bilaterally, but the conducting physician did note that Claimant exhibited a "significantly low pain threshold" during the exam. DE 3, p. 314.

13. In his December 5, 2013 office notes, Dr. Dirks stated that Claimant's most recent MRI was "fairly unremarkable", as was the EMG study. Dr. Dirks prescribed two additional sets of injections at L4-5 and L5-S1, along with an EMG study for Claimant's upper extremities. Thereafter, Dr. Dirks anticipated declaring Claimant fixed and stable if the EMG came back normal. Dr. Dirks suggested Claimant continue pain management with his primary care physician. Dr. Dirks felt Claimant was not capable of returning to work at that time. He also noted Claimant had filed for Social Security Disability.

14. Claimant's upper extremities EMG of January 8, 2014, showed moderate chronic bilateral C5 radiculopathy, left greater than right.

15. Claimant then began a series of various injections and pain medication

treatments for his poorly controlled neck, shoulder, back and left leg pain. He received cervical and lumbar epidural injections, and was prescribed narcotic pain medication. Claimant complained that he had difficulty walking for any considerable distance (he could walk the 75 yards to his mailbox and back), trouble sleeping, numbness in his extremities, and was limited in what he could do on a daily basis. He took oxycodone or oxycontin every four hours, which made him "foggy." He was also treated for depression.

16. In August 2014, Jessica Jameson, M.D., one of the pain management physicians at Pain Management of North Idaho, PLLC, who had been treating Claimant's chronic pain complaints, suggested Claimant try a spinal cord stimulator. She felt Claimant could reduce his opiod consumption with the device, and sought Surety approval.

17. Surety set up a panel examination for Claimant to be seen by Robert Friedman, M.D., a rehabilitation physician, and Craig Beaver, a psychologist. The examination took place in September 2014. Both examiners felt Claimant was not a good candidate for a spinal cord stimulator from a medical and psychological standpoint, respectively.

18. Specifically, Dr. Friedman found after examining Claimant and reviewing medical records that Claimant's repeat cervical fusion with ongoing cervical radiculopathies, and Claimant's lumbar fusion surgery were causally related to his industrial accident. He also noted Claimant had a tremor and other symptoms indicative of possible degenerative nervous system disease (such as Parkinson's) unrelated to the accident, but worth exploring. Dr. Friedman opined that Claimant should wean from his opiates and anticholinergic medications. Claimant should use home icing and stretching for his lumbar spine.

19. Dr. Friedman thought Claimant should have permanent restrictions of 50 pounds occasional, 25 pounds frequent lifting, with no repetitive lifting above shoulder height greater than 20 pounds. However, he felt these restrictions should have been in place from the date of his earlier surgeries, such that there were no additional restrictions related to the work accident in question. Dr. Friedman also felt Claimant was at MMI, and assigned him a 16% whole person permanent impairment rating after apportionment, attributable to Claimant's industrial injuries.

20. From a psychological standpoint, Dr. Beaver diagnosed a somatic symptom disorder with predominant pain. He believed Claimant suffered from persistent, chronic pain, with secondary anxiousness and mood changes. Psychological factors impacted the severity of Claimant's pain complaints. Claimant also struggled with depression, for which he had received treatment and medication. Dr. Beaver noted Claimant met the criteria for an adjustment disorder with depressed mood diagnosis.

21. According to Dr. Beaver, Claimant's somatic symptom disorder reflected a longstanding coping style for Claimant, and was not associated with his work injuries. Instead, it was a pre-existing condition which interacted with Claimant's injuries.

22. On the other hand, Claimant's adjustment disorder with depressed mood was, according to Dr. Beaver, predominately caused above all other causes by Claimant's work injury. Claimant's depression was improved with medication and counseling at the time of Dr. Beaver's visit with Claimant, to the point where the doctor felt it was not causing Claimant significant difficulties. Dr. Beaver opined that any past or further counseling and/or medication for depression would be causally related to Claimant's work accident.

23. Dr. Beaver did not believe Claimant sustained any permanent impairment

from a neuropsychological standpoint as a result of the accident in question.

24. Based on the panel examination findings, Defendants denied Dr. Jameson's authorization request for a spinal cord stimulator.

25. On November 4, 2014, Defendants stopped Claimant's TTD benefits.

26. On March 18, 2016, Claimant returned to Dr. Dirks with complaints of neck, bilateral arm, low back, and bilateral leg pain in his thighs and calves. Additionally, Claimant exhibited upper extremity tremors and weakness. Dr. Dirks noted Claimant's gait was slow and deliberate, and it appeared Claimant had trouble walking. Dr. Dirks suggested diagnostic studies, as Claimant had, in Dr. Dirks' opinion, "gone downhill quite markedly" since his last visit in 2014. CE B, p. 2. Dr. Dirks opined that Claimant was totally disabled at that time, and might prove to be a candidate for a dorsal column stimulator, depending on the results of the planned studies. The doctor also felt Claimant was a candidate for long term narcotic pain management under physician supervision.

27. Claimant returned to Dr. Jameson on March 21, 2016 for a pain management consultation. At that time Dr. Jameson reaffirmed her belief that Claimant was "a perfect candidate for spinal cord stimulator." She noted the stimulator should allow Claimant to be "much more functional" and ideally reduce his opiate consumption by 50% or greater. CE C, pp. 2, 3.

28. Dr. Dirks conditionally signed off on a letter from Claimant's attorney dated March 22, 2016, agreeing with Dr. Jameson that a spinal cord stimulator was "a medical necessity" but noted that he had recommended an MRI. This endorsement pending the MRI results was consistent with the Doctor's office notes discussed above. Subsequently, in May 2016, Dr. Dirks again endorsed the idea a spinal cord stimulator

was medically necessary, if the stimulator trial run proved effective.

29. Claimant's diagnostic studies ordered by Dr. Dirks (lumbar x- rays, cervical and lumbar MRIs, and lower extremities EMG/nerve conduction tests) showed no significant changes from previous studies. No cervical or lumbar nerve root compression was noted, although there was a small disc bulge one level above the L4-5 fusion level. EMG/nerve conduction studies again showed chronic L5 and S1 radiculopathy from pre-surgical nerve damage. Dr. Dirks again stated his opinion that Claimant would be disabled from doing any kind of work at that time, and would support Claimant should he apply for disability.

30. Claimant received authorization from Pacific Source/Medicare for a spinal cord stimulator, and a trial course of treatment took place in November 2016. On December 22, 2016, Claimant had a permanent stimulator implanted. Dr. Jameson managed Claimant's stimulator adjustments in conjunction with the device's technicians. However, Claimant received his prescription narcotics from his family physician Dr. Bell through this time frame.

31. The only medical reference to Claimant's trial stimulator experience is a statement in Dr. Jameson's operative report for the permanent implantation. Therein she states that the trial implant was a success, with Claimant's pain in his hands and legs reduced by 60%, and his functionality significantly improved.

32. Claimant testified at his 2018 hearing that once his permanent stimulator was implanted, the results were mixed. First he had pain from the implantation surgery, then the machine needed adjustments regularly in an effort to maximize its benefits. Often he would have little pain relief. Other times he experienced temporary

pain reduction.

33. Approximately eight months post implantation, Claimant was taking narcotics (Percocet) at his pre-stimulator rate of four pills per day, was depressed and anxious, and saw no long term benefits. Then, on November 21, 2017, a further adjustment was made to the devicse by upping the amps and changing the unit from intermittent to constant firing. Claimant described the effect as miraculous.

34. Claimant testified that immediately after the adjustment he was able to reduce his opiod intake by half, to two pills per day. Claimant still experienced pain on a daily basis, but with less severity.

35. At the time of hearing Claimant noted that in the hour or two before he takes his next pain pill his pain will increase dramatically. He testified that his memory has improved since he reduced his pain medications, the distance he can walk has increased, and he can shop with his wife for a half hour or so (leaning on a cart) before his back pain becomes severe.

36. Claimant's sleep has reportedly improved as per his hearing testimony. He still only sleeps about six hours, but he claims his sleep is deeper. He is up by 3 a.m. due to increasing pain, and spends much of his day on the couch, but overall he asserted he was more functional on most days, and able to do light chores for half an hour at a stretch.

**DISCUSSION AND FURTHER FINDINGS**

37. Claimant has the burden of proving, by a preponderance of the evidence, all facts essential to recovery to his claims. *Duncan v. Navajo Trucking,* 134 Idaho 202, 203, 998 P.2d 1115, 1116 (2000).

***SPINAL CORD STIMULATOR***

38. The parties' main thrust of argument centers on the question of whether Claimant is entitled to be reimbursed the costs of his spinal cord stimulator from Defendants. In so doing, they necessarily invoke the provisions of Idaho Code § 72-432(1), which mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment as may be reasonably required by the employee's physician or needed immediately after an injury, and for a reasonable time thereafter. If the employer fails to provide the care, the injured employee may obtain that care at the expense of the employer.

39. The Idaho Supreme Court has determined that it was for the physician, not the Commission, to decide whether the treatment at issue was required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989) (overruled to the extent *Sprague* may have suggested its articulated factors were exclusive by *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015)).

40. An employer is only obligated to provide necessary and reasonable medical treatment necessitated by the industrial accident, and is not responsible for treatment not related to the industrial accident. *Williamson v. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d 1365 (1997).

41. Under the Supreme Court's *Neel* Doctrine, reimbursement of medical charges is made at the full invoiced amounts of a claimant's medical bills when (1) the employer denies a claim and (2) that claim is subsequently deemed compensable by the Commission. *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009).

***Claimant's Position***

42. Dr. Jameson testified it was a "medical necessity" that Claimant receive a spinal cord stimulator. TR, p. 38. Her belief was in part based on the fact Claimant had previously tried to control his pain with injections, physical therapy, pain medications, and counseling from a pain psychologist, all to no lasting avail. Further, both in her experience and according to published studies, an SCS could reduce Claimant's opiod use by half, and make Claimant more functional.

43. Dr. Jameson sent Claimant for counseling and psychological testing to Patty Bullick, MSW, LCSW. Ms. Bullick has a Master's degree in social work and is licensed in Clinical Social Work. She counselled Claimant over nine sessions for pain management. Thereafter Dr. Jameson asked her to test Claimant for suitability for a spinal cord stimulator. Ms. Bullick administered a Pain Patient Profile Assessment (P-3), a standardized test designed to measure depression, anxiety, and somatization. Claimant had average depression and somatization scores.

44. This psychological testing coupled with her observations of Claimant in a physician-patient setting and Claimant's pain pattern and etiology convinced Dr. Jameson that Claimant was the "perfect" candidate for success using a spinal stimulator. Without the device, Dr. Jameson felt Claimant's pain symptoms would continue to worsen, with a resulting diminution in his ability to care for himself and perform activities of daily living.

45. Dr. Jameson felt Claimant was not at maximum medical improvement at the time of her testimony in June, 2016.

46. Claimant's trial implantation of a dorsal spinal cord stimulator resulted in significant pain reduction and increased Claimant's ability to function. Given these results,

Claimant obtained authorization from Medicare for a permanent SCS implant, which took place on December 22, 2016.

47. Claimant testified the permanent SCS worked for a couple of months; thereafter numerous adjustments were needed to finally find that "sweet spot" where Claimant reportedly received optimum benefit from the device. The final adjustment was made on November 21, 2017. After this adjustment Claimant testified he reduced his opiod intake by half (from four pills daily to two), which in turn increased his clarity of thought. He testified that while he still copes with daily pain, his ability to do minor tasks like shopping, mowing the lawn, and socializing have increased. Subjectively, Claimant expressed feelings of gratitude, hope, joy, and better outlook from November 2017 up through the time of the May 1, 2018 hearing.

48. In April 2018, Dr. Jameson authored a letter wherein she reiterated Claimant's reported improvements since the stimulator implant. She also reported an improvement in Claimant's mood. Dr. Jameson opined that continued use of the SCS was imperative to assist in Claimant's pain control.

49. Claimant argues that when all the above evidence is considered the use of the SCS was reasonable and medically necessary, and he is entitled to reimbursement for the costs of the stimulator and all medical expenses related thereto.

***Defendants' Position***

50. Defendants contend Claimant was not a good candidate for a spinal cord stimulator, both by prediction and after-the-fact evidence review. Medical experts for Defendants testified that the SCS was not reasonable treatment for Claimant's work injuries.

*Predictive Analysis*

51. Before Claimant received his SCS, Dr. Beaver evaluated Claimant by interview and administration of various standardized psychological tests including the Personality Assessment Inventory, SIMS, Personality Assessment Inventory test, and the MMPI. Review of the testing led the doctor to the belief that Claimant would more likely than not fail to achieve long term benefits from the stimulator. The MMPI results showed a highly pronounced "conversion V profile" which in early studies was indicative of individuals "who tended to have less favorable outcomes" with spinal cord stimulators. Beaver Depo. pp. 16-17. Individuals with a highly pronounced conversion V profile, according to Dr. Beaver, are much more likely to have their emotions and situational stress significantly impact their perception of how bad their pain is on any given day; a condition Dr. Beaver labeled as somatization. (He noted his use of somatization was different than a conversion disorder – where the patient has no medical condition but has convinced himself he does.) Other testing confirmed the validity of Claimant's MMPI findings.

52. Dr. Beaver testified that while Claimant may have significant pain, there were other things besides the pain sensation itself which would influence his perception of his pain level and its effects. These types of individuals tend not to have a positive long-term outcome with spinal cord stimulators.

53. Dr. Beaver's formal diagnosis for Claimant was Somatic Symptom Disorder (SSD), Predominantly Pain – Moderate, and Adjustment Disorder with Depression. Dr. Beaver described the diagnosis of SSD as a person with real pain symptoms who is more highly focused and more highly sensitive to such pain than others. Such individuals will have more distress than other persons with similar problems. The Adjustment Disorder with Depression diagnosis

is related to Claimant's depression stemming from his condition and corresponding lifestyle changes.

54. Dr. Friedman also opined on Claimant's suitability for an SCS prior to its implantation. Dr. Friedman specifically felt that Claimant's depression, somatoform and somatic dysfunction were significant contraindications to SCS implantation.

55. Dr. Friedman was critical of the fact Claimant had not exhausted all possible other pain treatment modalities, such as acupuncture, TENS units, and "aggressive" physical therapy prior to seeking a spinal cord stimulator. He was also critical of the fact that Claimant did not, in his opinion, exhibit a true radiculopathy or radiculitis in his cervical and lumbar spine. Dr. Friedman testified that patients with radiculopathy are better candidates for an SCS. He also noted that Claimant exhibited a "number of nonphysiologic findings" such as positive Waddell's signs during examination. Friedman Depo. p. 34. He concluded it was not in Claimant's best interest to have an SCS implanted.

*Post-Implant Analysis*

56. Both Drs. Beaver and Friedman were asked to prepare supplemental reports on whether Claimant's SCS treatment was successful after its implantation. Dr. Beaver prepared a supplemental report dated January 20, 2018, and was deposed on his opinions contained therein. Unfortunately, it appears Dr. Friedman's opinions were sought prior to November 2017 when Claimant asserts the SCS finally began providing consistent and significant pain improvement which allowed for decreased narcotic use and greater functionality. However, Dr. Friedman was deposed on this subject post hearing.

57. Dr. Beaver's supplemental report was made on review of documents and not on any personal contact with Claimant. Dr. Beaver felt after reviewing additional medical records

that his original opinions were accurate; Claimant was not substantially benefited by the SCS. He based this opinion on the fact that, to Dr. Beaver's reading of the record, Claimant was "still on a fair amount of opiate medications, still had significant sleep difficulties, [and] functionally was viewed as limited in what he could do because of his pain." Beaver Depo. p. 24. Dr. Beaver also noted Claimant had not been able to return to work, which would be an ideal outcome. The doctor did acknowledge however, that SCS treatment can still be considered successful when it allows users to reduce pain medications, increase activity, but still not be able to return to work.

58. Dr. Beaver felt the evidence in the instant case was conflicting. On one hand, Claimant's May 1, 2018 hearing testimony spoke of increased functionality, better sleep patterns, and a 50% pain medication reduction. On the other hand, Dr. Beaver pointed to Dr. Dirks' April 12, 2018 office notes which indicated Claimant's condition was actually worsening. At that visit Claimant was having severe difficulty ambulating, with increasing pain and trouble with activity. Dr. Beaver felt Claimant's reported improvements in symptoms were encouraging, but he had reservations concerning Claimant's long-term prognosis. In Dr. Beaver's experience often patients tend to report favorable response to a change in SCS settings, but those positive effects will fade with time. It was his belief Claimant would follow this pattern.

59. Dr. Friedman argued Claimant's SCS was unsuccessful because it did not increase his function until May 2017, and yet by August Claimant was reporting only a 20% pain reduction. Dr. Friedman questioned whether the 20% pain reduction was due to the spinal stimulator or other "nonprescribed drugs" Claimant was using at that time. Friedman Depo. p. 43. (Claimant had tested positive for THC on a previous drug test and admitted to using cannibis to help him sleep on at least one occasion.) Dr. Friedman felt

Claimant should have noticed improvement in less than a week after the SCS was implanted, which he claims did not happen. Dr. Friedman opined that if the stimulator use had been successful Claimant should have been able to completely wean off his opiates.

60. After reading Claimant's May 1, 2018 hearing testimony the doctor believed Claimant equivocated, reporting no increase in function and "a little" decrease in his opiate use. Friedman Depo. p. 45. Dr. Friedman also was skeptical that the improvement noted by Claimant at that hearing came from the SCS; instead Claimant may "just be better." *Id.* at 46.

***Spinal Cord Stimulator Analysis***

61. Whether the Claimant has shown an entitlement to medical benefits in the form of a spinal cord stimulator depends on whether such treatment is necessary and reasonable. The determination of reasonableness of Claimant's request for this medical treatment is a question of fact. This question is resolved by employing a totality of the evidence approach. *Chavez, supra* at 158 Idaho 797-798.

62. Evidence weighing against Claimant's testimony on the efficacy of the SCS includes the notation from Dr. Dirks dated April 12, 2018. Dr. Dirks noted Claimant complained of significant neck and low back pain, to the point that Claimant reportedly fell down in the elevator that very day due to his legs giving out on him due to pain. Dr. Dirks also noted Claimant had trouble "doing anything", with pain down both of his arms and both of his legs. Claimant's gait was "extremely poor" with small shuffling steps "because of pain in his lower back." Claimant was unable to walk heel to toe or tandem gait at the time of examination. Dr. Dirks concluded Claimant, as he presented that day was "clearly [un]able to work"…. Dr. Dirks had no further treatment suggestions for Claimant. CE B, p. 15. Such testimony does not easily square with the upbeat testimony Claimant gave less than one month later at hearing.

63. Defendants are also skeptical of Claimant's purported 50% reduction in narcotic pain medication. They point out that Dr. Bell, who prescribed Claimant's pain medication, never reduced the prescription to the rate of 60 pills per 30 days.

64. While Dr. Dirks' April 12, 2018 observations, confirmed in his deposition, cut against the purported success of the SCS, there is nothing in the record to suggest that Dr. Dirks saw Claimant other than one time between November 2017, when Claimant testified the SCS finally began providing him the sought-after relief he was hoping for, and the May 1, 2018 hearing. Claimant never testified that the SCS allowed him to be pain free, narcotics free, or free of his physical limitations. He still slept only about six hours per night, had trouble walking distances, and could participate in daily activities only for brief periods of time without the need to lie down. However, Claimant testified his sleep was deeper and more rejuvenating, his walking was improved to a degree, and even simple activities such as shopping with his wife or limited yard work, which had been very difficult prior to November 2017, were now possible, albeit with significant limitations. And some days were better than others.

65. This Referee observed significant differences in Claimant's attitude and demeanor at the two hearings (2016 and 2018). Although at both hearings Claimant walked slowly, shuffling along with some bend in his back, in 2016 Claimant's effect was flat, his voice was subdued and monotone, his face was expressionless. In 2018 his effect was lively, his face was animated, and his voice was clear and strong. Admittedly one can manipulate these external effects, dialing up or down emotions to coincide with one's testimony, but feigned or real, there was a marked difference in Claimant's demeanor and attitude between the two hearings. The Referee found the Claimant to be believable at both hearings, and has no reason to doubt his credibility.

66. Records from Dr. Bell are consistent to a degree with Claimant's testimony. On December 27, 2017, Claimant called the doctor's office asking that his Percocet prescription be reduced to 90/30 days, or to three a day from four per day. One month later, on January 29, 2018, Claimant again called the office asking for a further Percocet reduction to 75/30 days, or 2.5 pills per day. About 30 days later Claimant again asked for a further opiod reduction to 65/30 days, or just over 2 pills per day. While Claimant testified that within a few days of the November 21, 2017 SCS adjustment he was taking just two pain pills per day, his requests for a graduated reduction of the narcotics, while not precisely consistent with his testimony, does show he initiated a reduction in narcotic medication such that he was essentially down to two pills per day by March 2018.

67. On his April 3, 2018 office visit with Dr. Bell, Claimant noted pain not exceeding 5 on a 10 scale. Dr. Bell noted Claimant appeared well and in no distress. While less than two weeks later Dr. Dirks had a contrary opinion of Claimant's condition, that one observation does not outweigh the consistent records of Dr. Bell showing Claimant's narcotic use declining by nearly 50% in the months preceding the May 1, 2018 hearing.

68. Dr. Jameson's records are likewise consistent with Claimant's 2018 hearing testimony. While many of Dr. Jameson's notations are simply a memorialization of Claimant's reported history and not independent observations, nevertheless Claimant was reporting improvement with the final SCS adjustment in November 2017 in line with Claimant's subsequent testimony. Dr. Jameson felt the Claimant's history supported her goal of increased function and decreased narcotic use by half. Using those criteria Dr. Jameson opined that the SCS implantation was successful.

69. When the totality of the circumstances is considered, the weight of the evidence supports the finding that, at least to some incremental degree, Claimant's spinal cord stimulator was efficacious. However, that finding does not necessary translate to a conclusion that the treatment was reasonable in light of all the circumstances.

*Reasonableness of Treatment*

70. Analysis of reasonableness begins with our Supreme Court's instructions in *Rish v. The Home Depot*, 161 Idaho 702, 390 P.3d 428 (2017). In *Rish*, the Court cautioned that it is error to find palliative care is compensable only if it improves a claimant's medical condition. Instead, the Commission needs to also consider the "important role of pain management." 176 Idaho at 432, 390 P.3d at 706. Also, where the care is palliative, such care may be reasonable even if in hindsight it proves to be ineffectual, if at the time the treatment was prescribed such prescription was reasonable. The Court warned against "armchair doctoring" by simply using hindsight to determine reasonableness.

71. Of course, the analysis should not ignore the reality of the treatment's efficacy, or lack thereof, since reasonableness is to be determined by a *totality* of the circumstances, and *totality* means *all* of the evidence must be considered. To stop the analysis at the time the treatment was prescribed, and ignore the reality of the treatment's effect, would violate the rule in *Chavez, supra.* Instead, all of the evidence must be considered, including whether the treatment seemed reasonable at the time it was prescribed, whether it proved efficacious or ineffective, and a host of other factors as discussed below.

72. As is often the case in disputes going to hearing, strong arguments can be made supporting and refuting the reasonableness of Claimant's SCS treatment. Various factors must be analyzed when making such determination.[4]

73. A list of factors weighing in favor of the treatment includes;

- Claimant's prior industrially-related lumbar and cervical treatments aimed at reducing the consistent pain in his upper and lower extremities, back, shoulders, and neck, including physical therapy, lumbar and cervical injections, counseling, and various narcotic and non-narcotic pain medications, all provided at best short-lived relief. The narcotics also affected Claimant's mental clarity, concentration, and focus.

- Claimant's credible testimony at the first hearing described sharp shooting pains from his neck down through his fingers, with associated numbness, low back and bilateral hip and buttocks pain, and shooting pains into his lower extremities and feet. The pain was temporarily moderated with narcotics, but Claimant still had trouble sitting or laying for more than about a half hour without changing positions. Claimant's pain led to depression. While those shooting pains still occurred after the SCS implantation, their frequency has declined.

- Dr. Jameson testified that a spinal cord stimulator was a medical necessity, and could lessen Claimant's need for narcotic pain medications, as well as make him considerably more functional. She had Claimant undergo psychological testing, and felt the results of the test showed Claimant was a perfect candidate for the treatment. She also testified that without an SCS Claimant would continue to worsen with more intense pain symptoms.

- Claimant's SCS implantation was ultimately successful in reducing his opiate consumption, although it took about a year to find the right settings to provide Claimant the desired relief. Since the last adjustment, Claimant was able to reduce his narcotic use by approximately 50%. Claimant's mental clarity reportedly improved since he began taking fewer opiates. His reported activity level increased somewhat as well. He testified he was able to socialize with people to a greater extent and that over all, his quality of life has improved.

- Dr. Jameson opined that the SCS was an imperative component in her plan for continuing control of Claimant's pain. Further it has allowed Claimant to stop medicating with THC to go to sleep, and should allow him to continue with his reduced opiate use into the future.

[4] In the fact lists which follows, "facts" argued by the parties which are not accurate, or are irrelevant to a determination of reasonableness, or are used out of context in briefing by a party are not included in the discussion.

- Dr. Beaver acknowledged Claimant's results were encouraging, even though there was no long-term data to review to see if Claimant's results would be long lasting.

- Dr. Friedman acknowledged that if Claimant truly reduced his opiate use by half, and increased his daily functionality, one could consider those improvements a successful application of an SCS.

74. A list of factors weighing against the treatment includes;

- Dr. Beaver opined Claimant was not a good candidate for a spinal cord stimulator after testing and interviewing him. Dr. Beaver felt Claimant's psychological profile made it unlikely Claimant would benefit long term from the device. Even if Claimant experienced short-term benefits after adjustments were made, those benefits could tend to fade with time, as evidenced by Dr. Beaver's own experience with SCS patients, and literature. Dr. Beaver opined on a more-likely-than-not basis that it was his opinion that Claimant's limited benefits, if any, would not last more than two years.

- Claimant did not exhaust all other possible treatment modalities before proceeding with a spinal cord stimulator.

- Dr. Friedman testified Claimant would improve by weaning off opiates and implementing a home icing and stretching program. Claimant would most likely "get worse before he gets better" but if he persevered with this program Dr. Friedman felt Claimant should see positive results without the need for drugs and/or an SCS. Furthermore, Dr. Friedman opined that since Claimant had no radiculopathy he would not benefit from an SCS. Claimant's cervical symptoms would not warrant SCS treatment.

- Dr. Friedman asserted that Claimant's gait was due to medical conditions not associated with his industrial accident.

- There is little objective evidence that the SCS has been efficacious. Most of the "evidence" of its benefit centers on Claimant's subjective testimony. Close scrutiny of the records suggests Claimant could go to the store and do limited yard work before the stimulator, could walk as far, and was active at the same level before and after the stimulator, even allowing for the stimulator adjustment period. Claimant may "feel" more hopeful (or testify that he does) with the stimulator, but as far as measurable benefits are concerned the SCS has made only a slight difference. As Dr. Beaver noted, there was not "a substantial functional change in Claimant after the stimulator." Beaver Depo. p. 24. Dr. Dirks felt Claimant's condition was worse than ever less than one month before Claimant's May 1, 2018 hearing.

- Claimant was not working or looking for work after the SCS implantation, despite his testimony at the first hearing that if he could reduce his opiate intake by half he should be able to work part time.

- While not argued by the parties, there is a cost-benefit factor to consider. Here, Claimant seeks over $106,000.00 (at the *Neel* rate) for a treatment which provided him with at best minimal physical benefit for what may be a limited period of time. The SCS did not allow Claimant to re-enter the job market or even seek employment to date, did not allow him to wean off narcotics, or undertake new activities to any significant extent.

***Benefit Determination***

75. Defendants note, and Claimant does not dispute, the fact that the spinal cord stimulator in this case constitutes palliative care. While it does seem clear that such is the case, palliative care may be reasonable treatment, and pain management is an important consideration. *Rish, supra.*

76. At the time the SCS was prescribed, the weight of the evidence argued against its use. Dr. Beaver testified convincingly that the battery of tests he administered would place Claimant in the group of individuals likely to not receive benefits from the device. The P-3 testing conducted at the request of Dr. Jameson was far more limited in scope, and was administered not by a licensed psychologist, but by Ms. Bullick, a licensed Clinical Social Worker. There were no validating cross-check tests, unlike the battery of assessments administered by Dr. Beaver which were designed to validate findings of the other tests.

77. The undersigned must weigh all the evidence, including that which came to pass after Claimant was prescribed the SCS, notwithstanding Justice Bistline's admonition against "armchair doctoring" (quoted in *Hipwell v. Challenger Pallet & Supply*, 124 Idaho 294, 300, 859 P. 2D 330, 336 (1993) and quoted again with approval in *Rish, supra*).

78. Because pain management is an important consideration, and treatment designed to reduce pain even without improving Claimant's physical condition may be

compensable depending upon the weight of all evidence for and against compensability, it is important to consider all the circumstances when determining compensability in this matter.

79. Although Claimant was not a "good" candidate for an SCS according to predictive analysis, he nevertheless obtained some incremental benefit from the device. He was able to reduce his narcotic use by approximately one half, at least after November 2017 through the time of hearing on May 1, 2018. Had Claimant not obtained such benefit from the SCS, it would have been difficult to find the SCS treatment compensable, since at the time it was prescribed such prescription ran contrary to the weight of the predictive analysis. This fact places the instant matter more in line with *Sprague* than *Hipwell.*

80. Simply because Claimant received what by objective standards could be called a minimal benefit from the SCS does not mandate compensability. Such a finding would violate *Rish* in that the determination would rest solely on the retrospective analysis of the efficacy of the treatment. Instead, all of the other factors listed above must also be considered.

81. When all of the evidence is carefully considered the primary benefit provided by the SCS is not so much physical, or even substantial pain reduction, but rather falls into the category of "quality of life." Claimant expressed optimism, hope, and happiness with the stimulator. His demeanor change between the two hearings was very apparent to this Referee. Claimant's outlook was positive in spite of his pain and limitations. He was more willing to put up with his pain instead of letting it drag him into depression.

82. *Rish* does not specifically address the compensability of a treatment which does not significantly reduce a claimant's pain, improve the claimant's physical condition, or return the claimant to the work force, but simply improves the claimant's outlook toward such

chronic pain at least for a period of time, which according to Dr. Beaver may last less than two years, and comes at a cost of over $100,000.

83. Put another way, is palliative care reasonable which is of limited physical benefit, predominantly in the area of an incremental reduction of Claimant's perceived disability for an unspecified time period, and which costs are quite substantial when compared to both the benefit itself and alternative palliative treatments, such as continued narcotic pain pills at the rate of up to four per day, or other alternative modalities.

84. In *Millard v. ABCO Construction, Inc.*, IC 2007-008413 (Aug. 21, 2015) (*appealed and aff'd on other grounds at 161 Idaho 194 (2016)*), the Commission considered, among other things, a cost/benefit ratio analysis when determining if a specific palliative treatment was reasonable. The Commission noted that while cost alone cannot dictate reasonableness it is a factor to consider. The cost must be juxtaposed against the benefit provided. In *Millard* it was determined that requiring Surety to pay for a very expensive treatment with questionable benefit could in certain circumstances be considered a form of economic waste, which by definition is not reasonable. On the other hand, an expensive treatment which was either curative, effective in pain management, or increased a claimant's function may well be reasonable.

85. Also considered was whether there was some objective measure of effectiveness with the treatment. The Commission pointed out that purely subjective responses to treatment are less reliable, and more subject to a wide variety of outside factors, thus making it difficult to determine if the treatment was actually responsible for the response. However, purely subjective responses are not to be ignored.

86. The Commission in *Millard* looked at the availability of alternative treatments and the effectiveness of such alternatives. In that vein, experimental or medically controversial treatments not generally accepted in the medical community might be more difficult to justify as being reasonable.

87. Applying these factors to the present case, the cost of an SCS is clearly far more expensive than any other alternative treatment suggested, including the continuation of narcotic pain relievers at an increased frequency. However, it is unknown if any of the alternative treatments (other than pain medication) suggested by Defendants would be of any benefit. While Defendants were critical of the fact an SCS was implanted prior to trying the alternative treatments, it does not appear Defendants offered Claimant these treatments. Defendants' own experts indicated alternative treatments such as acupuncture, hypnosis, or a TENS unit would be reasonable and necessary prior to trying an SCS, but Defendants failed to provide such treatments to Claimant in spite of that information. As such they cannot now use Claimant's failure to try such alternatives as a defense.

88. While the SCS was quite expensive, its benefits were not objectively substantial. Other than the fact Claimant requested fewer Percocets from December 2017 through at least April of the following year, there is no objective evidence the SCS produced any other benefits. Dr. Beaver's testimony that very few individuals obtain relief for more than about two years is concerning. Dr. Friedman noted that Washington's worker's compensation program excluded spinal cord stimulators as a compensable palliative treatment. Medical literature on the effectiveness of spinal cord stimulators is all over the board. Some studies show a very high success rate, while other studies show a high failure rate. It would be fair to say the treatment is controversial.

89. From a subjective standpoint, Claimant testified his SCS treatment has been very successful, although it did take some time to find the correct settings. The SCS took the edge off of Claimant's constant pain, allowing him to cope much better in his day-to-day life. Reducing his opioids purportedly improved Claimant's mental clarity to a degree.

90. From a strictly objective point of view the spinal cord stimulator treatment as applied to the facts herein seems to be at worst a case of economic waste, and at best a controversial form of treatment with minimal gain and an uncertain lifespan of whatever slight benefits it is providing. However, from the Claimant's subjective point of view it has been something he "wouldn't trade for anything." As he put it, "I would do it over again, easy… I can probably start to deal with things a little better… enjoying some daily activities." Comparing himself pre and post SCS implant, he said "[t]here for awhile… it was very bleak, and I just felt like I was in the wrong tunnel. And this helped me out a lot." Tr. (V. II) p. 148. He concluded by testifying "I'm so grateful now." Tr. (VII) p. 149.

91. While it was not unreasonable for Defendants to deny the spinal cord stimulator treatment when first proposed due to the greater weight of evidence available at the time, when considering all of the evidence available as of the May 1, 2018 hearing, such treatment proved to be reasonable. Claimant's subjective benefits, including his opiate reduction, and our Supreme Court's admonition that palliative care may be reasonable even when it is of limited effectiveness, lead to the conclusion that in this case the factors in favor of the SCS palliative treatment outweigh those factors against its use. This is true even considering the substantial cost of the treatment. It is undeniable Claimant required less narcotic pain medicine with the SCS, which is an objective measure of the device's efficacy.

Furthermore, Claimant experienced significant quality of life improvement with the SCS. In this particular case those two factors outweigh cost considerations.

92. Claimant has proven his right to medical care benefits for his spinal cord stimulator.

***TEMPORARY DISABILITY BENEFITS***

93. Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to Claimant "during the period of recovery." The period of recovery ends when Claimant has reached maximum medical improvement (MMI). *Hernandez v. Phillips,* 141 Idaho 779, 118 P.3d 111 (2005). The burden is on 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).

94. Claimant argues that Dr. Friedman's September 19, 2014 pronouncement of medical stability was premature. Claimant's argument is based on statements made by Dr. Dirks and Dr. Jameson. Dr. Dirks opined Claimant was at MMI prior to December 12, 2017, when the doctor checked a box in a letter provided by Claimant's attorney asking about this issue. Dr. Dirks did not elaborate on a date of MMI, but rather checked "yes" when asked if Claimant was at MMI as part of the letter referenced above. In his deposition of May 8, 2018, Dr. Dirks confirmed Claimant was at MMI but was not asked to opine when Claimant became medically stable. (Maximum medical improvement, MMI, and medical stability are all synonymous terms.)

95. Dr. Jameson was asked at the June 27, 2016 hearing in this matter if Claimant had by that date reached maximum medical improvement. She said "no." At that time

Claimant had not yet received his spinal cord stimulator. Dr. Jameson went on to discuss at the hearing a number of permanent restrictions she testified applied to Claimant as of that date.

96. Dr. Friedman declared Claimant at MMI after his examination of Claimant on September 19, 2014. At that time, he also imposed permanent restrictions and rated Claimant for permanent impairment.

97. Dr. Friedman's opinion on MMI is persuasive. Claimant was not being treated for industrially-related medical conditions other than pain management by September 19, 2014. Dr. Jameson's goals for a spinal cord stimulator were not curative, but rather focused on reducing Claimant's opiod intake and restoring some of his daily activity function. Claimant was not in a period of recovery by the time of the June 2016 hearing. Although he was symptomatic, the only proposed treatment was the SCS with the goal of pain reduction and increased function of daily living. There was no proposed treatment for any injuries sustained by Claimant in his industrial accident in question. Dr. Jameson would have no reason to impose *permanent* restrictions if she anticipated Claimant's further medical improvement. A claimant may have pain and symptoms from an industrial injury even after MMI, so long as no further material improvement is expected with time or treatment. *Shubert v. Macy's West, Inc*, 158 Idaho 92, 102; 343 P.3d 1099, 1109 (2015), *overruled on other grounds by Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015).

98. Defendants paid TTD benefits through the period of Claimant's recovery.

**Permanent Disability**

99. **"**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. That section 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 a claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

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

101. Defendants argue Claimant's disability should be measured as of the time of the first hearing. The Idaho Supreme Court in *Brown v. The Home Depot*, 152 Idaho 605, 272 P. 3d 577 (2012), held that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing. Under Idaho Code § 72-425, a permanent disability rating is a measure of the injured worker's "present and probable future ability to engage in

gainful activity." Therefore, the Court reasoned, in order to assess the injured worker's "present" ability to engage in gainful activity, it necessarily follows that the labor market, as it exists at the time of hearing, is the labor market which must be considered. Claimant's permanent disability did not change from the time of his first hearing to his second, as he was medically stable throughout this time frame. If anything, Claimant's condition improved slightly. Regardless of which date is used to determine permanent disability, the outcome would be the same. The entirety of the record will be examined.

102. In this case, Claimant's vocational expert opined that Claimant is 100% disabled, and it would be futile for him to seek work. Defendants' vocational expert argued that Claimant has no disability beyond his impairment.

103. Claimant's vocational expert, Mr. Dan McKinney, has not recently testified before the Commission.[5] Mr. McKinney resides in Colbert, Washington, and is a vocational rehabilitation counselor. He holds a Masters' degree in counseling, and has been employed in the field of rehabilitation for many years. He holds several certifications. He is qualified to testify in this case.

104. Mr. McKinney authored a vocational assessment report dated March 7, 2018. Therein he concluded Claimant could not work in any known job. In rendering his opinion of total disability, Mr. McKinney reviewed the medical record, paying special attention to the notes and testimony of Drs. Dirks and Jameson. Without much discussion Mr. McKinney found that Claimant on a more probable than not basis was permanently and totally disabled as a direct result of Claimant's industrial accident.

[5] Records show an individual of the same name, presumably the same Dan McKinney as testifying herein, testified in a case which went to hearing in 1991.

105. Mr. McKinney was deposed twice; first after the hearing in 2016 and again after the 2018 hearing. His conclusions of total permanent disability were presented in both depositions. At his May 10, 2018 deposition Mr. McKinney was walked through the records he reviewed in reaching his disability conclusion. Those included medical records and testimony from the first and second hearings.

106. Mr. McKinney felt it was significant that Claimant spends more than half of his day lying on a couch or on the floor. He reasoned if Claimant was lying on the floor he could not be working during that time. Claimant would have difficulty maintaining employment with that limitation.

107. Dr. Dirks' restrictions of May 12, 2016 for Claimant were also considered impediments to employment. The doctor limited Claimant to never climbing ladders, scaffolds, ramps, and no crouching, crawling, or stooping. Additionally, Claimant was restricted to occasional balancing and kneeling. Dr. Dirks also limited Claimant to frequent lifting of less than ten pounds. Mr. McKinney felt these restrictions would limit Claimant to sedentary work.

108. Claimant's walking and standing were also restricted to less than two hours per workday, and sitting less than six hours per day. Importantly, Dr. Dirks indicated Claimant would need to sit in a recliner up to a third of the work day. Finally Dr. Dirks noted Claimant would need to miss at least one day per week at unpredictable times due to his industrial injuries, and would have trouble focusing or staying on task at least ten minutes per hour at unpredictable intervals.

109. Mr. McKinney opined that these various restrictions and impediments would render Claimant unemployable in a competitive work market. He also noted Dr. Jameson rendered a report which correlated with Dr. Dirks' opinions.[6]

110. With the restrictions and impediments listed above, Mr. McKinney felt it would be a waste of time for Claimant to seek employment, and Claimant was totally and permanently disabled.

111. On cross examination Mr. McKinney acknowledged that if Dr. Friedman's restrictions were used Claimant would have no permanent disability related to the industrial accident.

112. Defendants hired vocational expert Doug Crum, who reviewed medical records and interviewed Claimant. Mr. Crum prepared a report dated May 3, 2016 and was subsequently deposed.

113. In his report and at deposition Mr. Crum relied on Dr. Friedman's September 2014 report wherein the doctor gave Claimant a 15% WP impairment for his cervical spine with 6% pre-existing, and a 15% WP impairment for Claimant's lumbar spine with 7% pre-existing. Dr. Friedman found only myofascial pain still plaguing Claimant at the time of his examination, with no cervical or lumbar radiculopathy. Dr. Friedman placed on Claimant permanent restrictions of lifting 50 pounds occasionally and 25 pounds repetitively with no repetitive over-the-shoulder lifting of greater than 20 pounds. However, Dr. Friedman felt these restrictions were not new, or related to Claimant's industrial accident, but instead

[6] It should be noted the "reports" from Drs. Dirks and Jameson were in fact "check the boxes" forms prepared by Claimant's counsel, where the doctors could agree or disagree with various assertions such as "would Claimant be expected to miss at least one day of work per week… due to his injuries" (paraphrased), and then signed and dated by the physician. The fact the doctors' opinions correlated so well is because they were asked to answer the same questions.

were related to Claimant's previous cervical and lumbar surgeries stemming from pre-existing conditions.

114. Because the above restrictions were in place (or should have been in place) since before Claimant's industrial accident, and the accident resulted in no greater restrictions, Mr. Crum felt Claimant had no loss of market, no loss of income potential, and therefore no permanent disability from the subject accident.

115. Defendants argue that while Claimant presents himself as a disabled person with a multitude of pain complaints, his somatic symptom disorder, a longstanding coping mechanism, may account for some of his presentation. In any event they argue the weight of the medical evidence supports a finding that Claimant's current condition is not the result of the two industrially-related surgeries necessitated by the work accident.

116. In reality, the so-called "weight of the medical evidence" relied on by Defendants is the report and deposition testimony of a single physician, Dr. Friedman, who was hired by Defendants, saw Claimant on a single occasion as part of a panel examination, and rendered an opinion that in spite of two surgeries Claimant has no additional permanent disability related to the industrial accident, because he had previous surgeries at the same locations. He rendered this opinion in spite of the fact Claimant was able to work full time before this accident with little or no complaints for the two years before the accident. While his employer wanted Claimant to limit his lifting since his previous surgeries, and at times had to call Claimant out for improper lifting, the fact remains Claimant's troubles began when he fell at work. That event was the catalyst for what has transpired since.

117. While Mr. McKinney's report left a lot to be desired in terms of analytical thinking and detail, it nevertheless correlated more closely with Claimant's credible presentation at both hearings than did Dr. Friedman's findings.

118. When all the circumstances and evidence is considered, including Claimant's consistent testimony, the observations of Dr. Dirks, Claimant's treating physician, and the testimony of Dr. Jameson, also a treater, the weight of the evidence supports a finding that Claimant is totally and permanently disabled under the 100% method of analysis.

119. Claimant has proven his entitlement to benefits for total and permanent disability, as of his September 19, 2014 date of medical stability.[7]

120. Apportionment under Idaho Code § 72-406 is inapplicable to the present case, as it only applies to cases of disability less-than-total.

**Attorney Fees**

121. The final issue is Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804. Claimant has proven his entitlement to medical and permanent total disability benefits related to his industrial accident. However, attorney fees are not granted as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804 which provides:

> If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law,

[7]Claimant has claimed entitlement to ongoing TTD benefits on the theory that he was not medically stable as of September 19, 2014. This Referee has found otherwise. However, because Claimant is totally and permanently disabled, he is entitled to lifetime benefits at the TTD rate per Idaho Code § 72-408 following his September 19, 2014 date of stability. Per *Dickinson v. Adams County*, 2017 IIC 0007 (March 2017), Defendants are allowed to apply any indemnity payments made subsequent to September 19, 2014 to their obligation to pay Idaho Code § 72-408 benefits from September 19, 2014 forward.

> or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding attorney fees is a factual determination which rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

122. Claimant argues Defendants were unreasonable for refusing to pay for the SCS, and for cutting off Claimant's TTD benefits when they did. These arguments are not valid.

123. Defendants acted reasonably in denying Claimant's request for an SCS. They relied on Dr. Beaver's opinions that based upon several tests Claimant was in the high risk of failure group. Furthermore, Dr. Friedman informed Defendants that spinal cord stimulators did not work well for individuals like Claimant based upon the doctor's findings at the time of his examination, and based on Claimant's own history of symptoms. Also, Defendants were correct to cease TTD payments upon the finding of MMI by Dr. Friedman, which was a sound conclusion. Finally, since Claimant did not prevail on the issue of TTD benefits, attorney fees cannot be awarded for failure to pay such benefits. *Accord, Salinas v. Bridgeview Estates*, 162 Idaho 91, 394 P.3d 793 (2017).

## CONCLUSIONS OF LAW

1. Claimant has proven his entitlement to additional medical benefits in the form of reimbursement for his dorsal spinal cord stimulator at the *Neel* rate.

2. Claimant has proven he is totally and permanently disabled under the 100% method.

3. Apportionment under Idaho Code § 72-406 is inapplicable.

4. Claimant has failed to prove he is entitled to attorney fees for Defendants' failure to authorize the spinal cord stimulator and for terminating Claimant's TTD benefits when he was determined to be at maximum medical improvement.

## 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 13th day of February, 2019.

INDUSTRIAL COMMISSION

/s/
Brian Harper, Referee

## CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of February, 2019, 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:

CHARLES BEAN
2005 IRONWOOD PKWY, STE 201
COEUR D ALENE ID 83814

JAMES MAGNUSON
PO BOX 2288
COEUR D ALENE 83814

/s/

jsk

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

| | |
|---|---|
| JEROLD MOSS,<br>Claimant,<br>v.<br>CDA SERVICE STATION EQUIPMENT, INC.,<br>Employer,<br>and<br>IDAHO STATE INSURANCE FUND,<br>Surety,<br>Defendants. | **IC 2013-000548**<br><br>**ORDER**<br><br>**Issued 2/25/19** |

Pursuant to Idaho Code § 72-717, Referee Brian Harper submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the 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 proven his entitlement to additional medical benefits in the form of reimbursement for his dorsal spinal cord stimulator payable per *Neel*. Pursuant to *Williams v. Blue Cross of Idaho*, 151 Idaho 515, 260 P.3d 1186 (2011), such an award by the Commission is subject to the claim of the subrogated health carrier.

2. Claimant has proven he is totally and permanently disabled under the 100% method.

3. Apportionment under Idaho Code § 72-406 is inapplicable.

4. Claimant has failed to prove he is entitled to attorney fees for Defendants' failure to authorize the spinal cord stimulator and for terminating Claimant's TTD benefits when he was determined to be at maximum medical improvement.

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

DATED this 25th 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 25th day of February, 2019, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

CHARLES BEAN
2005 IRONWOOD PKWY, STE 201
COEUR D ALENE ID 83814

JAMES MAGNUSON
PO BOX 2288
COEUR D ALENE 83814

/s/

jsk

**IN THE SUPREME COURT OF THE STATE OF IDAHO**
**Docket No. 45581**

| | | |
|---|---|---|
| **ARTURO AGUILAR,** | ) | |
| | ) | |
| **Claimant-Appellant,** | ) | |
| | ) | **Boise, September 2018 Term** |
| **v.** | ) | |
| | ) | **Filed: March 14, 2019** |
| **STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,** | ) | **Karel A. Lehrman, Clerk** |
| | ) | |
| **Defendant-Respondent.** | ) | |
| | ) | |

Appeal from the Industrial Commission of the State of Idaho. Chairman Thomas E. Limbaugh presiding.

The order of the Industrial Commission is vacated and remanded.

Goicoechea Law Offices, Chtd., Boise, for appellant. Daniel J. Luker argued.

Ludwig Shoufler Miller Johnson, LLP, Boise, for respondent. Daniel A. Miller argued.

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STEGNER, Justice.

Arturo Aguilar (Aguilar) appeals from the Findings of Fact and Conclusions of Law and Order of the Idaho Industrial Commission in which it concluded the Idaho Industrial Special Indemnity Fund (ISIF) was not liable to him for worker's compensation benefits. The Industrial Commission (the Commission) found that Aguilar was totally and permanently disabled and that he had pre-existing impairments that constituted subjective hindrances to his employment. However, the Commission rejected Aguilar's claim that the ISIF was liable for benefits. We vacate and remand.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Aguilar was born in Mexico. Aguilar speaks limited English and testified through a translator at his hearing. He can read Spanish but not English. Aguilar, in the words of the Commission, is "a Mexican National and has resided illegally in the United States since approximately 1986." He completed the fifth grade in Mexico and does not appear to have had any additional schooling. Aguilar is married. The couple has two daughters, the eldest of whom has cerebral palsy and is seriously disabled.[1]

Aguilar primarily worked as a manual laborer, including agricultural work, ranch work, and, for the last fifteen to sixteen years prior to the injury giving rise to this claim, concrete and cement work. During this latter line of employment, Aguilar sustained multiple back injuries. In 1999, Aguilar injured his back in a vehicular accident when the company vehicle in which he was riding was rear-ended. He subsequently filed a worker's compensation claim for the injuries he sustained. In 2002, Aguilar strained his back removing a stuck jackhammer. On December 11, 2006, Aguilar suffered another low back injury while screeding concrete.[2] Following this latter injury, Aguilar was diagnosed with degenerative disc disease and a disc herniation at the L4-5 level of his spine. He was treated with epidural steroid injections and anti-inflammatory medications without significant relief. Because he was unable to get his pain to abate, he underwent back surgery, which was performed by Miers Johnson, III, M.D. The surgery resulted in the fusion of the L4-5 level of Aguilar's spine. (This surgery will be referred to as the L4-5 fusion or first surgery.)

After this first surgery, on July 10, 2008, a Functional Capacity Evaluation (FCE) was performed, and Aguilar was given a light physical demand classification, which restricted him to occasionally lifting seventeen pounds. Although Dr. Johnson had previously imposed various work restrictions, on July 7, 2009, (almost a year following the FCE) he imposed a twenty-pound lifting limitation on Aguilar. This restriction was related to Aguilar's diagnosis of "degeneration

[1] The relevance of his daughter's disability is that prior to Aguilar's injury of October 3, 2011, he was capable of lifting and carrying his daughter who weighs between 105 and 110 pounds. Since the injury of October 3, 2011, he claims he has been unable to lift or carry his daughter.

[2] Screeding concrete is the process of flattening and smoothing wet concrete.

of lumbar intervertebral disk." Notwithstanding his medical restrictions, Aguilar testified at the hearing that he could lift and move his disabled daughter, once he recovered from the first surgery.

On August 21, 2008, Aguilar filed a second worker's compensation claim seeking benefits as a result of his injury in 2006 and the resulting surgery. Aguilar alleged he was totally and permanently disabled. On July 22, 2009, Aguilar entered into a Lump Sum Agreement with his two previous employers and the Idaho State Insurance Fund[3] to settle his worker's compensation claims for both the 1999 and 2006 accidents. The lump sum payment compensated Aguilar for "permanent partial lifetime disability." On August 5, 2009, the Industrial Commission approved the Lump Sum Agreement. The Agreement approved by the Commission awarded Aguilar benefits for less than total, permanent disability.

Aguilar claimed that his back felt fine as early as September 25, 2009, notwithstanding his earlier injuries and worker's compensation claims. On April 11, 2010, Aguilar began working part time for Gail Ansley at CA Bull Elk Ranch. Aguilar later took up full-time concrete work for Lowry Excavation and Concrete, Inc. (Lowry Excavation), on June 3, 2010.

On December 9, 2010, Aguilar hurt his lower back working at CA Bull Elk Ranch when he tripped and fell backwards while attempting to move a 55-gallon barrel. As a result, Aguilar was diagnosed as having sustained a "[l]umbar strain with sacral contusion." After conservative treatment, Brian Johns, M.D., discharged Aguilar on January 20, 2011, at "maximum medical improvement." Dr. Johns did not anticipate any permanent impairment, and *removed* a thirty-pound lifting restriction. Aguilar testified that he could still lift and move his disabled daughter after this injury. As a result of this injury in 2010, Aguilar filed a worker's compensation claim.

Aguilar hurt his lower back once again on October 3, 2011, while working for Lowry Excavation when he tried to lift a lodged jackhammer. (The injury of October 3, 2011, will be referred to as the second or subsequent injury.) Aguilar testified that the jackhammer weighed between eighty and ninety pounds. At the time of the injury, Aguilar experienced pain down both legs and into his feet.

[3] The State Insurance Fund insured both employers.

Following physical therapy and other conservative treatment that did not resolve Aguilar's pain, he underwent an MRI. In analyzing that study, Cameron Evans, M.D., stated that "[t]here is multilevel degenerative disk disease throughout the lumbar spine, worst at the L3-L4 level, above the fused segment." On January 25, 2012, Aguilar underwent an epidural steroid injection at L3-4 without significant relief. Consequently, on February 13, 2012, Samuel Jorgenson, M.D., "recommended surgical intervention in terms of an L3-L4 laminectomy, discectomy, and fusion." He also wrote "[t]he fusion is required since it is adjacent to an existing fusion and as a consequence of the expected increase stress at the L3-L4 level."

After the recommendation for surgery, the Idaho State Insurance Fund, Lowry Excavation's surety, sought a second opinion from David B. Verst, M.D. Following that independent medical exam, Dr. Verst recommended surgery but suggested that the 2011 jackhammer incident was not the reason Aguilar needed a second surgery.

Dr. Jorgenson disagreed with Dr. Verst's opinion that the second injury was not the cause of Aguilar's need for a second surgery. In spite of their initial disagreement, both doctors ultimately agreed that an underlying condition had been aggravated by the second injury and that compensable surgery was appropriate. Dr. Verst wrote "that the injury that occurred on 10/03/11 aggravated an underlying advanced degenerative condition." Dr. Jorgenson stated that Aguilar's "symptoms are best categorized [as] an aggravation of an existing pathology at the L3-L4 level."

On May 4, 2012, Aguilar filed his original worker's compensation complaint against Lowry Excavation and the State Insurance Fund. Shortly thereafter, on May 15, 2012, Dr. Jorgenson performed surgery on Aguilar. Dr. Jorgenson removed the implant at L4-5 and replaced it with a posterior lumbar interbody fusion and PEEK interbody cage, as well as pedicle screw instrumentations at L3, L4, and L5. (This surgery will be referred to as the second or subsequent surgery.) Following the second surgery, Aguilar continued to experience back and leg pain. Due to Aguilar's ongoing pain, multiple diagnostic images were taken and a CT myelogram of the lumbar spine was performed on November 19, 2012. That study found "mild to moderate degenerative changes" at the L2-3 level, adjacent to the extended fusion. The final impression noted in that study was "postoperative and degenerative change of the lumbar spine"

and L2-3 degenerative change. Aguilar also completed post-operative physical therapy and had epidural steroid injections with minimal to no improvement in his symptoms.

Aguilar was next involved in a car accident in December of 2012, and again saw Dr. Jorgenson due to increased back pain. Dr. Jorgenson, R. Tyler Frizzell, M.D., and Nancy Greenwald, M.D., all agreed that the car accident was not a substantial factor in Aguilar's symptoms and that his ongoing symptoms were a result of the second injury. In contrast, Kenneth Little, M.D., found that Aguilar's "aggravated back pain and new left leg radicular symptoms radiating into his calf" were due to the car accident. However, he also concluded Aguilar's "residual back pain and his left anterior thigh parathesis (without motor deficits) [we]re directly related to the October 3, 2011, industrial injury . . . ."

On July 12, 2013, Dr. Jorgenson wrote, "Mr. Aguilar is currently not working as a consequence of his ongoing symptoms. At this time, he is limited to light duty capacity only with alteration [sic] between standing and sitting with no significant bending, lifting, or twisting." In 2013, almost a year after the second surgery, Aguilar began attempting new lines of work. He tried three different jobs (landscaping, janitorial, and truck driving) but could not last more than a few hours at any of them. Aguilar testified that following the second injury he could no longer lift or move his daughter.

On January 17, 2014, Aguilar filed another worker's compensation claim, adding the ISIF as a defendant to his claims against Lowry Excavation and the State Insurance Fund. On July 22, 2015, the Commission held a hearing regarding Aguilar's claims against Lowry, the State Insurance Fund, and the ISIF. Aguilar was the only witness who testified.

On October 19, 2015, Aguilar, Lowry Excavation, Gail Ansley (Aguilar's employer at CA Bull Elk Ranch), and the State Insurance Fund[4] filed a Lump Sum Agreement to settle Aguilar's claims for his 2010 and 2011 industrial accidents. The ISIF was not a party to that agreement. On that same day, the Commission approved the Lump Sum Agreement and dismissed Aguilar's claims against all parties except the ISIF. Aguilar's claim against the ISIF continued with the taking of two post-hearing depositions of rehabilitation specialists, Delyn

[4] The State Insurance Fund was the surety for both Gail Ansley and Lowry Excavation.

Porter, M.A., and John Janzen, Ed.D. Following the depositions, the parties submitted post-hearing briefs. On October 13, 2017, the Commission issued its Findings of Fact, Conclusions of Law and Order (Commission's Order). In it, the Commission rejected Aguilar's claim against the ISIF.

In denying Aguilar's claim, the Commission drew a number of conclusions related to Aguilar's pre-existing impairments. First, the Commission found that Aguilar was totally and permanently disabled as of the hearing, as an "odd-lot" worker. The Commission also found that Aguilar had a number of pre-existing impairments that were manifest as of the injury of October 3, 2011. Those pre-existing impairments and their corresponding impairment ratings were as follows: lower back issues, 19%; hypertension, 17%; right eye deficit, 15%; depression, 5%; and diabetes, 10%. The Commission further found that Aguilar's hypertension, right eye deficit, and lower back issues were all subjective hindrances to his employability prior to the injury of October 3, 2011. Aguilar's depression and diabetes were not considered to be subjective hindrances to his employment.[5] Additionally, the Commission determined that the hypertension and right eye deficit were "vocationally irrelevant in view of [the] conclusion that [Aguilar's] low back limitations restrict him from all the jobs for which he is otherwise suited." Ultimately, the Commission found that Aguilar was rendered "totally and permanently disabled by virtue of his low back condition alone . . . ."

Finally, the Commission found that Aguilar's pre- and post-injury limitations had not changed, effectively deciding Aguilar was totally and permanently disabled prior to his second injury. The Commission also concluded Aguilar had failed to prove his pre-existing impairments combined with his subsequent injury to cause his total and permanent disability; therefore, the ISIF was not liable for any compensation and all other issues were moot.[6] Aguilar filed a timely appeal of the Commission's Order.

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[5] At the conclusion of its Order, the Commission stated that Aguilar's "impairment for diabetes, hypertension and right eye vision loss **did** constitute subjective hindrance[s] to [Aguilar's] employment as of the date of the October 3, 2011 industrial accident." (Emphasis added.) This conclusion appears to be contradicted because the Commission's previous findings state that Aguilar's diabetes was not a subjective hindrance to his employment.

[6] The Commission originally identified the following issues as being presented, but ultimately determined they were rendered moot as a result of its final decision: (1) how disability should be apportioned if ISIF is found liable; (2)

## II. QUESTIONS ON APPEAL

1. Did the Commission apply the correct legal standard when it concluded Aguilar's limitations and restrictions did not materially change following his second injury?
2. Did the Commission apply the correct legal standard to analyze the "but for" causation test as set out in Idaho Code section 72-332?
3. Is either party entitled to attorney's fees on appeal?

## III. STANDARD OF REVIEW

"When reviewing a decision by the Industrial Commission, this Court exercises free review over the Commission's conclusions of law, but will not disturb the Commission's factual findings if they are supported by substantial and competent evidence." *Green v. Green*, 160 Idaho 275, 280, 371 P.3d 329, 334 (2016) (citing *Knowlton v. Wood River Med. Ctr.*, 151 Idaho 135, 140, 254 P.3d 36, 41 (2011)).

> Substantial and competent evidence is relevant evidence that a reasonable mind may accept to support a conclusion. Substantial and competent evidence is more than a scintilla of evidence, but less than a preponderance. [This Court] will not disturb the Commission's conclusions on the weight and credibility of the evidence unless those conclusions are clearly erroneous.

*Hope v. Indus. Special Indem. Fund*, 157 Idaho 567, 570–71, 338 P.3d 546, 549–50 (2014) (citations omitted).

This Court freely reviews the Commission's interpretation of the workers' compensation statutes. *Id.* at 571, 338 P.3d at 550 (citing *Brown v. Home Depot*, 152 Idaho 605, 607, 272 P.3d 577, 579 (2012)). "The provisions of workers' compensation laws are to be liberally construed in favor of the [employee], as the humane purposes they seek to serve leave no room for narrow, technical construction." *Fowble v. Snoline Exp., Inc.*, 146 Idaho 70, 74, 190 P.3d 889, 893 (2008) (citing *Kinney v. Tupperware Co.*, 117 Idaho 765, 769, 792 P.2d 330, 334 (1990)).

"This Court reverses the Commission's decisions when the findings of fact do not as a matter of law support the order." *Id.* (citing I.C. § 72-732(4)). "All facts and inferences are

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whether Aguilar is barred from recovering permanent disability benefits due to his alienage; (3) whether Aguilar has a remedy outside of Title 72, Idaho Code if he does not recover; and (4) whether Aguilar engaged in injurious practices that may reduce benefits under Idaho Code section 72-435.

viewed in the light most favorable to the party who prevailed before the Commission." *Corgatelli v. Steel W., Inc.*, 157 Idaho 287, 290, 335 P.3d 1150, 1153 (2014) (citing *Zapata v. J. R. Simplot Co.*, 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999)).

If the Commission acts "beyond the bounds of its statutory authority the Commission has acted arbitrarily and capriciously and has manifestly abused its discretion." *Curr v. Curr*, 124 Idaho 686, 691, 864 P.2d 132, 137 (1993).

## IV. ANALYSIS

The ultimate issue in this appeal is whether the Commission erred in deciding the ISIF is not liable to Aguilar under Idaho Code section 72-332(1). That code section reads as follows:

> If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, . . . and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account [fund] [sic].

In order for the ISIF to be liable to an injured worker, the claimant must prove that he is totally and permanently disabled and that he suffered from a previous impairment that was "manifest." *See Hope*, 157 Idaho at 571, 338 P.3d at 550. A claimant can establish total, permanent disability by showing "his or her medical impairment together with the nonmedical factors total 100%" disability, or by showing that he or she "fits within the definition of an odd-lot worker." *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997). "An odd-lot worker is one who, as a result of the injury, is impaired to an extent that his or her ability to perform services is so limited in quality, quantity, or dependability that no reasonable market for his or her services exists." *Lethrud v. State, Indus. Special Indem. Fund*, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995) (quoting *Ragan v. Kenaston Corp.*, 126 Idaho 152, 155, 879 P.2d 1085, 1088 (1994)). In its decision, the Commission found that Aguilar was totally and permanently disabled as a result of his falling within the "odd-lot" category. In

addition, the Commission concluded Aguilar was totally and permanently disabled as an odd-lot worker before his second injury.

**A. The Commission found Aguilar's limitations and restrictions had not materially changed following the second injury. Having drawn that conclusion, the Commission failed to apply the correct legal test in analyzing the ISIF's liability.**

Aguilar claims the Commission implicitly found him totally and permanently disabled as a result of his first injury in 2006 and prior to his second injury in 2011. Aguilar contends the Commission's reliance on this finding to reject ISIF liability was also erroneous.

As noted, the Commission explicitly found Aguilar totally and permanently disabled "under the odd lot doctrine as of the date of the hearing." However, the Commission also concluded that: (1) "prior to October 3, 2011[,] [Aguilar] was already restricted to light duty [work] because of his pre-existing low back condition[,] . . . notwithstanding the fact that by June of 2010 [Aguilar] had returned to physically demanding concrete work[;]" (2) Aguilar's "low back limitations/restrictions did not materially change following the 2011 accident[;]" and (3) Aguilar "is totally and permanently disabled by virtue of his low back condition alone, . . . as those conditions existed as of October 3, 2011."

The Commission also found:

> With respect to the pre-existing low back condition[,] Dr. Janzen testified that Claimant is not any worse off than he was before the subject incident. In other words, a comparison of the restrictions/limitations applicable to Claimant on a pre-injury basis with those applicable to Claimant as of the date of hearing reveals no significant difference. Claimant's low back condition was just as limiting to Claimant on the date of hearing as it was prior to the October 3, 2011, accident.

The Commission thus determined Aguilar to be restricted to light duty work both *before* and *after* his second injury. The Commission found Aguilar to be totally and permanently disabled as a result of his light duty work restriction because his "limited English language skills[,]" minimal education, and lack of "training or transferable job skills" precluded him from "sedentary and light duty employment." A fair reading of the Commission's decision confirms that the Commission implicitly found Aguilar to be totally and permanently disabled *before* his second injury, as his work restrictions, lack of English skills, limited education, and lack of transferable work skills all pre-dated the second injury.

The Commission may find an employee totally disabled before a second injury. The effect of doing so may absolve the ISIF of liability. *See Fowble*, 146 Idaho at 75, 190 P.3d at 894. However, before the ISIF can avoid liability in this way, the Commission must apply the proper legal test. The Commission failed to apply that test here. The applicable test is set out in *Bybee v. State, Indus. Special Indem. Fund*, 129 Idaho 76, 82, 921 P.2d 1200, 1206 (1996). To the extent the Commission implicitly found Aguilar to be totally and permanently disabled *prior* to his second injury (and it appears that it did), and then failed to apply the appropriate test, it erred as a matter of law.

The test to be applied under the Commission's ruling is as follows:

> In all cases in which a claimant seeks to establish ISIF liability, I.C. § 72-332(1) places the initial burden on that party to establish that the pre-existing impairment and the subsequent injuries in some way combined to result in total permanent disability . . . [T]his requirement is not met if the total permanent disability pre-dates the [subsequent] industrial injury. Therefore, the claimant in this type of case must presumptively establish that she is not an odd-lot worker, *ie*.[sic] that regular and continuous employment is available to her. A claimant will be able to do this simply by showing that she was working regularly at a job at the time of injury.
>
> Once the claimant makes her initial showing, the ISIF must establish that she was in fact an odd-lot worker even though employed at that time. To do so, it must show that the claimant's actual employment was due to "a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on [her] part."

*Bybee*, 129 Idaho at 82, 921 P.2d at 1206 (citations omitted).

Here, the record shows that Aguilar met his initial burden because it was undisputed that he was working regularly at two rigorous jobs before his second injury. Once that showing was made, the burden then shifted to the ISIF to show Aguilar was an odd-lot worker before his second injury. The Commission makes no mention of and apparently did not recognize the burden had shifted to the ISIF as *Bybee* requires. As a result, any finding by the Commission that Aguilar was rendered totally and permanently disabled prior to the second injury was in error. The decision of the Commission must therefore be vacated and remanded. In the event that the ISIF cannot carry its burden under *Bybee*, Aguilar would still need to prove ISIF's liability by showing the elements of section 72-332. *See Fowble*, 146 Idaho at 75, 77, 190 P.3d at 894, 896.

**B. The Commission also erred by failing to apply the disjunctive test for causation as set out in Idaho Code section 72-332.**

According to the Commission's decision, once total and permanent disability has been established, the employee must prove the following four elements to impose liability on the ISIF: (1) the claimant suffered from a pre-existing impairment; (2) the pre-existing impairment was manifest; (3) the pre-existing impairment was a subjective hindrance to employment; and (4) the pre-existing impairment "combined with the impairment referable to the [second] industrial accident to render [an employee] totally and permanently disabled." The Commission cited *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 155, 795 P.2d 312, 317 (1990) for the articulation of this test. The Commission found that the fourth element had not been established, and concluded that the "Claimant has failed to prove that but for his pre-existing impairments he would not be totally and permanently disabled." Aguilar contends this conclusion of the Commission did not apply the appropriate legal test, because the fourth element set out in *Dumaw* is incomplete and therefore incorrect. Aguilar is correct that the Commission's reliance on that case was legally flawed. As a result of the Commission's use of an incomplete test, it erred as a matter of law.

While the Commission correctly identified the "but for" test as being applicable, the operative statute, Idaho Code section 72-332, establishes *two* alternative ways in which causation may be established. *Sines v. Appel*, 103 Idaho 9, 14, 644 P.2d 331, 336 (1982). The statute states in relevant part:

> (1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury . . . arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury . . . ***or*** by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease . . . .

I.C. § 72-332 (1) (emphasis added).

The Commission's decision only dealt with one method of proving the ISIF's liability. Because there is medical testimony in this record to support Aguilar's claim under the second

(and ignored) method of proof, the Commission erred as a matter of law. One method of proving the ISIF's liability involves the combined effects test (the one used by the Commission); the other focuses on the aggravation and acceleration of a pre-existing impairment as a result of the second industrial accident.

> [Idaho Code section 72-332(1)] is phrased in the disjunctive, and not in the conjunctive. If either condition exists, i.e., total permanent disability occasioned by the combined effects of both the preexisting impairment and the subsequent injury, or *if the facts disclose aggravation and acceleration of the preexisting impairment* by the industrial accident, then the liability of the I.S.I.F. arises.

*Sines*, 103 Idaho at 14, 644 P.2d at 336 (italics added).

The "but for" test "encompasses both the combination scenario where each element contributes to the total disability, and the case where the subsequent injury accelerates the pre-existing impairment." *Bybee,* 129 Idaho at 81, 921 P.2d at 1205. Although Idaho Code section 72-332 specifically includes the means of proving liability of the ISIF when the subsequent injury "aggravates and accelerates the pre-existing impairment," recent cases applying the test (including *Dumaw*, which was relied on by the Commission) have inexplicably omitted this alternative method of proof. *See, e.g.*, *Green,* 160 Idaho at 285, 371 P.3d at 339; *Hope*, 157 Idaho at 571–74, 338 P.3d at 550–553; *Corgatelli*, 157 Idaho at 296–98, 335 P.3d at 1159–61.

Accordingly, we take this opportunity to recognize and correct the incomplete articulation of the fourth element of this test set out in *Dumaw*, *Green*, *Hope*, and *Corgatelli*. To the extent that those cases do not include a basis for ISIF liability due to the aggravation and acceleration of the pre-existing impairment, those articulations of the four part test are incomplete.

In order to be a correct statement of the law, the fourth element of the test must expressly include both the "combined effects" test as well as the "aggravates and accelerates" test. Thus, the elements a claimant must prove to establish the ISIF's liability are correctly stated as follows: (1) the claimant suffered from a pre-existing impairment; (2) the pre-existing impairment was manifest; (3) the pre-existing impairment was a subjective hindrance to employment; and (4) the combined effects of the pre-existing impairment and the subsequent injury or occupational disease resulted in total and permanent disability; ***or*** the subsequent injury or occupational

disease aggravated and accelerated the pre-existing impairment to cause total and permanent disability. I.C. § 72-332. The pre-existing physical impairment may arise "from any cause or origin." *Id.*

Aguilar argues that the Commission failed to apply both prongs of the disjunctive test set out in Idaho Code section 72-332(1) for determination of ISIF liability. In this regard, Aguilar is correct. The Commission's failure to apply the appropriate test is a sufficient basis to vacate the Commission's decision, to remand the case to the Commission, and to require it to apply the correct legal test. *See Sines*, 103 Idaho at 14, 644 P.2d at 336.

**C. Neither party is entitled to an award of attorney's fees.**

The ISIF contends it is entitled to attorney's fees as a sanction against Aguilar based on Idaho Appellate Rule 11.2. Under Rule 11.2, attorney's fees may be awarded as a sanction if a party files a frivolous appeal or files an appeal for an improper purpose. *Andrews v. State, Indus. Special Indem. Fund*, 162 Idaho 156, 160, 395 P.3d 375, 379 (2017) (quoting *Akers v. Mortensen*, 160 Idaho 286, 289, 371 P.3d 340, 343 (2016)). Because Aguilar has succeeded on appeal, his appeal was obviously not frivolous and the ISIF is not entitled to attorney's fees under Rule 11.2.

Aguilar argued for the first time in his reply brief a claim to attorney's fees on appeal. Notably, Aguilar did not identify attorney's fees as an issue in his initial brief. Rule 41(a) of the Idaho Appellate Rules requires that a claim for entitlement to attorney's fees be included in a party's initial brief. The reason for the Rule is to put the opposing party on notice that a response is necessitated. If a claim is not included in the initial brief, the opposing party will not have an opportunity to respond to it. However, this Court may "permit a later claim for attorney fees under such conditions as it deems appropriate." I.R.A. 41(a). We are unpersuaded that any conditions exist that warrant deviation from the general provisions of this Rule. Because Aguilar's request for attorney's fees did not comply with the applicable rule, and no extenuating conditions exist, his request is denied.

## V. CONCLUSION

Because the Commission implicitly found Aguilar totally and permanently disabled *prior* to the second injury, and it was uncontested that Aguilar was working regularly at two different

jobs at the time of the second injury, the Commission failed to appropriately shift the burden of proof to the ISIF. In addition, the Commission erred by failing to analyze both prongs of the disjunctive test as required by Idaho Code section 72-332(1). As a result of these two errors, the order set out in the Commission's decision is vacated. The case is remanded for further proceedings consistent with this opinion. No attorney's fees are awarded on appeal. Costs are awarded to Aguilar.

Chief Justice BURDICK, Justices HORTON, BRODY, and BEVAN CONCUR.

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

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| KIMBERLEY BOSWELL,<br><br>Claimant,<br><br>v.<br><br>EDGEWOOD VISTA,<br><br>Employer,<br><br>and<br><br>TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,<br><br>Surety,<br><br>Defendants. | **IC 2015-033326**<br><br>**FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION**<br><br>**Issued 3/15/19** |

## INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted the hearing in this matter in two sessions; the first in Pocatello, Idaho, on July 18, 2018, where Claimant testified, and the second on July 20, 2018 in Boise, where Defendants' witness Joyce Marlar testified. Dennis Petersen of Idaho Falls represented Claimant. W. Scott Wigle of Boise represented Defendants. The parties produced oral and documentary evidence at the hearing and submitted post-hearing briefs. Two post-hearing depositions were taken. The matter came under advisement on January 8, 2019.

## ISSUES

The sole issue for adjudication in this decision is Claimant's entitlement to medical care in the form of a proposed lumbar spinal surgery and related treatments. While Claimant lists

the issue of temporary disability benefits, she withdrew her request for past TTD benefits in her brief. Claimant attempts to argue her entitlement to temporary disability benefits during her anticipated period of recovery in the event she proves her entitlement to the proposed surgery. However, Defendants do not currently dispute her right to such temporary disability payments should Claimant obtain surgery benefits; thus there is no currently-justiciable issue for resolution. Issues which are merely hypothetical or advisory are not ripe for adjudication. *Accord, ABC Agra, LLC, v. Critical Access Group, Inc.*, 156 Idaho 781, 331 P.3d 523 (2014).

## CONTENTIONS OF THE PARTIES

On December 4, 2015, Claimant suffered injury to her low back and right shoulder from an industrial accident. While Claimant's right shoulder injury recovered with time and treatment, Claimant eventually came under the care of Dr. Benjamin Blair for her continuing low back complaints. In August 2016 Dr. Blair recommended lumbar surgery, and he attributed the need for such surgery entirely to Claimant's industrial accident. Defendants denied the surgery. Claimant is entitled to continuing medical care as proposed by Dr. Blair, including a followup MRI and the surgery.

Defendants argue that Claimant has not proven her current need for lumbar surgery, and if and when she does undergo such surgery it will be due to conditions unrelated to her work accident.

## EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Joyce Marlar taken at hearing;
2. Claimant's exhibits (CE) A through Q admitted at hearing;
3. Defendants' exhibits (DE) 1 through 10 admitted at hearing; and

4. The post-hearing deposition transcripts of Benjamin Blair, M.D., and Paul Collins, M.D., taken on September 5 and September 27, 2017, respectively.

## FINDINGS OF FACT

1. On December 4, 2015, while in the course and scope of her duties with Employer, Claimant was assisting a resident returning from the restroom when the resident started to fall. Claimant managed to keep the resident from falling but in the process Claimant experienced right shoulder and low back pain which shot down her left leg from her hip to her foot. Claimant was able to work the remainder of her shift and subsequent shifts over the next several days. During this time frame Claimant testified her condition worsened, with bilateral leg pain and difficulty walking.

2. Claimant sought medical treatment five days after the work accident at Power County Hospital, where x-rays were taken. No acute process or abnormalities were identified. Claimant was prescribed anti-inflammatory, muscle relaxant, and pain medications. Physical therapy was ordered. Claimant was allowed to return to work with a "no lifting" temporary restriction.

3. Claimant was taken off work on December 18, 2015 pending physical therapy. Records indicate Claimant obtained some relief from therapy, but still reported ongoing right shoulder and left lower extremity radiculopathy.

4. On January 7, 2016, Claimant was directed to Pocatello Orthopedics (n.k.a. OrthoIdaho), where she came under the care of Benjamin Blair, M.D., a Pocatello orthopedic surgeon, and Justin Pool, P.A.-C. Mr. Pool ordered lumbar x-rays which showed straightening of the normal lumbar lordosis with grade 1 anterior spondylolisthesis of L4 on L5. Degenerative changes and anterior osteophytes were identified at all lumbar levels, with some

loss of disc space height at L4-5 and L5-S-1. Mr. Pool encouraged Claimant to continue with physical therapy, and consider an MRI if symptoms persisted; he also prescribed a Medrol dose pack. Mr. Pool restricted Claimant to no repetitive bending or twisting, no overhead lifting, and no lifting over five pounds. These restrictions were conveyed to Employer.

5. Employer made Claimant a light duty job offer which Claimant felt violated her restrictions, so she declined it. Claimant was then terminated on January 15, 2016.

6. With time and therapy treatments Claimant's shoulder/upper extremity complaints resolved. However, her low back/left lower extremity complaints persisted. On February 1, 2016, Mr. Pool ordered a lumbar spine MRI and prescribed Meloxicam.

7. The MRI showed disc bulges at L2-3, L4-5, and L5-S1 with a small annular tear at L5-S1. Additionally, there was multilevel facet arthropathy, most advanced (moderate in severity) at L4-5 and L5-S1. No significant central spinal stenosis or focal lateralizing disc protrusion was noted. CE E, p. 13.

8. After reviewing the films, Mr. Pool noted Claimant was still complaining of left leg and buttock pain and pain over her left greater trochanter region associated with bursitis. On February 9, 2016, Mr. Pool recommended an injection into Claimant's left hip for her bursitis, and sought authority for epidural injections at L4-L5 for Claimant's low back. Mr. Pool felt Claimant could return to work with no restrictions.

9. Anthony Joseph, M.D., of Pocatello Orthopedics obtained authority for three epidural steroid injections. He also took Claimant off work as of March 10, 2016 – the date he administered Claimant's first injection.

10. When Claimant next saw Mr. Pool three weeks post injection, she denied any significant relief from the lumbar injection. Mr. Pool felt it would be appropriate for Claimant

to discuss surgery with Dr. Blair or consider a pain management regimen if the next injection was unsuccessful. He also limited Claimant to sedentary work with option of sitting or standing at her discretion and lifting no more than three to five pounds.

11. Claimant had her second ESI on May 3, 2016. At that time Dr. Joseph noted Claimant was complaining of sharp stabbing pain down her left leg when she walked, although her left foot numbness was better since the first injection.

12. The second injection provided some relief, but Claimant still had left leg complaints with occasional right leg symptoms. It was decided Claimant should see Dr. Blair.

13. Dr. Blair examined Claimant on May 23, 2016, at which time Claimant continued to complain of pain in her lower extremities, left side far worse than right. Her symptoms were relieved by leaning forward in a sitting position and aggravated by walking. His examination was unremarkable in that Claimant had a full range of motion, walked with normal gait, had symmetrical muscle and lower leg sensation, and negative leg raise testing. X-rays again showed Claimant's grade 1 spondylolisthesis at L4-5; an MRI showed multilevel degenerative disc disease and what Dr. Blair called borderline stenosis at L4-5. Hip x-rays were normal. Dr. Blair ruled out hip involvement, and suggested a myelogram and CT scan to "delineate the extent of neurologic impingement." CE G, p. 75.

14. Surety then sent Claimant to Lynn Stromberg, M.D., an Idaho Falls neurosurgeon in mid-June. Dr. Stromberg perceived his involvement as providing a second surgical opinion. He examined Claimant and reviewed her lumbar spine x-rays. He noted Claimant's generalized degenerative changes seemed somewhat advanced for a woman of her age. Dr. Stromberg's impression after examination was that Claimant had "degenerative facet disease resulting in a minor spondylolisthesis of L4-5." He also noted "an incidental annular fissure" at L5-S1.

The doctor felt these findings were longstanding degenerative changes with no evidence of acute fracture or herniation or traumatic instability. CE I, pp. 96, 97. Dr. Stromberg opined that at "some point" Claimant would likely require decompression and fusion surgery. He disagreed with the need for a CT myelogram as requested by Dr. Blair, as "it appears the diagnosis is pretty straightforward." *Id* at 97. Dr. Stromberg specifically chose not to opine on causation.

15. Surety authorized Dr. Blair's myelogram and CT, which was performed on August 24, 2016. The myelogram demonstrated the grade 1 anterior spondylolisthesis at L4-5 and "small anterior extradural defects at L3-4, L4-5 and L5-S1 without frank central spinal canal stenosis identified at any level of lumbar spine." CE E, p. 17. The report noted "some neural foraminal narrowing at L5-S1, right greater than left. Correlation with pain in the right L5 nerve root distribution is recommended." *Id.* at 15. The final conclusion was that the CT scan did not show any "significant change when compared to the previous MRI of [Claimant's] lumbar spine." *Id.*

16. Upon review of the myelogram and CT reports, Dr. Blair suggested fusion and instrumentation surgery at L4-5 for the spondylolisthesis, and laminectomy at L5-S1 for the foraminal stenosis. He sought authority from Surety to proceed surgically.[1]

17. Surety sent Claimant for an IME with Paul Collins, M.D., an orthopedist and former surgeon, who currently is a consultant for the Idaho State Insurance Fund, an independent

[1] Claimant returned to Dr. Blair in mid September with complaints diagnosed as dysesthesias (Dr. Blair described her symptoms as numbness in both arms and legs) not associated with her back. While Defendants use Dr. Blair's office notes of that visit (unsure of exact etiology of the [Claimant's] symptoms) as "evidence" that Dr. Blair was unsure what was causing Claimant's back problems, it is clear by looking at the record, and confirmed by Dr. Blair in his deposition, that his notes were discussing Claimant's new dysesthesias symptoms, not her back. Because this visit is not related to Claimant's complaints at issue it is not discussed in the body of this decision. Also, four days after this visit to Dr. Blair in September 2016, Claimant began treatment, including hospitalization, for a serious vascular condition in her lower extremities. Her hospital treatment ran into early October. There is no medical evidence this condition was due to her industrial accident.

medical examiner on matters not involving the Fund, and an airman medical examiner.

18. Dr. Collins saw Claimant on October 18, 2016. Dr. Collins reviewed records, took Claimant's history, and performed an examination. Dr. Collins prepared a report wherein he concluded Claimant suffered a back strain in her industrial accident. He felt there was no "evident operable factor which might improve [Claimant's] back function" and therefore disagreed with Dr. Blair that Claimant was a suitable candidate for lumbar spine surgery.[2] Dr. Collins also cited Claimant's then-current poor overall health and vascular complications, and her smoking habit as contraindications for surgery at that specific time.

19. Claimant's attorney sent Claimant back to Dr. Blair in late November 2017 for an examination and report. Dr. Blair conducted a physical exam which was unremarkable. He was asked for a diagnosis and opinion on causation, to which he responded that Claimant suffered a "permanent aggravation of her pre-existing, asymptomatic spondylolisthesis and secondary foraminal stenosis at L4-5" which he attributed entirely to the accident in question. CE I, p. 89. His rationale was based on the notion that Claimant, by her history, was "relatively asymptomatic" prior to her industrial accident such that had Claimant not experienced the work accident she would have "remained asymptomatic for the foreseeable future." *Id.*

20. Dr. Blair again advocated for surgery, arguing that Claimant was not at MMI without surgical intervention. Dr. Blair noted Claimant had not smoked for more than one year

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[2] Dr. Collins' report was complicated by the fact that Claimant was having vascular issues during the timeframe relevant to this report; thus the doctor discussed her vascular health when answering questions regarding aspects of Claimant's condition. Also, Dr. Collins noted in his report an almost certain mistype in the earlier CT scan, where it mentioned Claimant's spondylolisthesis at L2-L3 instead of L4-5. All other films and all other opinions reference the spondylolisthesis at L4-5, including the MRI reports reviewed by Dr. Collins. It appears obvious the CT scan report was in error. Dr. Collins did not specifically rely on the error when he stated there were no evident operable factors so it is not clear what he relied on when making that statement. However, Dr. Collins was deposed post hearing, and did not mention the erroneous CT report statement. He agreed at the time of his deposition that surgery "may be needed" as will be discussed hereinafter.

prior to this examination so any concerns over her smoking as negatively affecting her surgery were moot (assuming she does not restart prior to surgery). Dr. Blair was deposed post hearing.

## DISCUSSION AND FURTHER FINDINGS

### *SURGERY AND RELATED CARE*

21. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment as may be reasonably required by the employee's physician or needed immediately after an injury, and for a reasonable time thereafter. If the employer fails to provide the care, the injured employee may obtain that care at the expense of the employer. An employer is only obligated to provide necessary and reasonable medical treatment necessitated by the industrial accident, and is not responsible for treatment unrelated to the industrial accident. *Williamson v. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d 1365 (1997).

22. Claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident with evidence of medical opinion—by way of physician's testimony or written medical record—supporting the claim for compensation to a reasonable degree of medical probability. *Callantine v Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973).

23. In order for Claimant to have a compensable claim, she must establish there was an accident-caused injury "which result[ed] in violence to the physical structure of the body". I.C. § 72-102(18)(c). Claimant seeks compensation for a claimed permanent aggravation of her pre-existing degenerative low back condition. A pre-existing

disease or infirmity does not disqualify a workers' compensation claim. As noted in *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 104, 666 P.2d 629, 631 (1983), "our compensation law does not limit awards to workmen who, prior to injury, were in sound condition and perfect health. Rather, an employer takes an employee as he finds him."

24. Claimant relies upon Dr. Blair to provide the needed medical opinion establishing the causal connection between the December 4, 2015, accident and Claimant's current condition.[3] While his written reports are long on conclusions and short on analysis, he had the opportunity to expound on his opinions at his deposition.

*Dr. Blair's Deposition Testimony*

25. In his deposition Dr. Blair testified that the CT scan and myelogram showed Claimant had "dynamic stenosis," or a pinched nerve at L4-5 when she bent forward and backward, as well as foraminal stenosis at L5-S1. He later explained that these findings are not always evident on MRI which is done with a patient in a supine position and not flexing or extending. As such, just because the MRI did not show a herniated disc pressing on a nerve, Dr. Blair still felt Claimant's "spine was narrowed to the point that it almost was pinched, and the spondylolisthesis was putting it over the edge, the motion would close it further when she'd move." Blair Depo., p. 30. He felt this pinching with movement was the cause of Claimant's continuing leg pain. Dr. Blair testified an L4-5 fusion surgery was warranted, with a laminectomy at L5-S1.

[3] Claimant attempts to put Dr. Stromberg in her camp, but her reasoning is faulty. Dr. Stromberg did not say Claimant needed the proposed surgery at that time; rather he indicated that "at some point" Claimant may need a decompression surgery. Also, he did not discuss causation and thus is no help to Claimant in establishing the causal link she needs to obtain the medical benefits she seeks.

26. Dr. Blair acknowledged Claimant had pre-existing degenerative changes in her lower back, including the spondylolisthesis, "but the accident caused a permanent aggravation." *Id*, p. 17. He testified that if not for the industrial accident Claimant would not have needed surgery at the time he saw her, based on his understanding that "maybe ten percent of patients, if that, with [Claimant's] diagnoses end up having to have surgery." *Id.* at 18. Dr. Blair opined that the industrial accident alone caused the need for Claimant's proposed surgery.

27. Dr. Blair felt that if Claimant did not have leg pain she would still need the fusion surgery (but not the laminectomy) to stabilize her spondylolisthesis, which was the source of Claimant's back pain. Her leg pain was caused by nerves being pinched by the spondylolisthesis and the arthritis present in Claimant's low back.

28. During cross examination Dr. Blair noted the fact that Claimant complained of left leg pain initially, with bilateral pain beginning several months post accident. He explained the progression of symptoms would be due to the development of swelling and inflammation around the nerve.

29. Dr. Blair admitted his proposed surgery would address conditions – spondylolisthesis at L4-5 and stenosis at L5-S1 – which likely existed prior to Claimant's industrial accident. When asked to state what anatomical injury was caused by the accident in question, Dr. Blair stated "I can't." Blair Depo. p. 23. He did however opine that;

> I think there might be a microanatomic injury that we wouldn't be able to see on an MRI as the cause. It could be a biomechanical injury that we're not going to see on the MRI, so I think the actual physiologic – pathophysiological cause, I can't tell you. But I think there is something more than symptoms alone as the cause.

*Id.* When asked why he thought there might have been a microanatomic injury, Dr. Blair responded that it was due to the temporal connection between the accident and the onset of

Claimant's symptoms. He felt it was significant that Claimant had no pre-existing medical records of low back complaints, and had consistently denied prior back issues of note.

30. Pressed to explain how Claimant's spondylolisthesis was aggravated by the work accident, Dr. Blair testified that while he could not say directly, he thought the incident would cause an abnormal force onto the spine due to an eccentric loading. Again, Dr. Blair could not articulate the pathophysiology.

31. In spite of the admitted fact that the scans evidenced no visible changes resulting from the work accident, Dr. Blair was clear in his opinion that Claimant suffered a pathological change, not just a change in her symptoms, as a result of the industrial accident. He further opined that the forces imparted on Claimant's spine in the accident were "severe enough to cause permanent aggravation" of Claimant's pre-existing lumbar spine condition. Blair Depo. p. 35. Dr. Blair admitted he relied on Claimant's continuing pain complaints to establish his belief that the forces were severe enough to cause permanent aggravation (and Claimant's continuing pain complaints).

*Dr. Collins' Deposition Testimony*

32. In addition to Dr. Collins' written report discussed above, he was deposed on September 27, 2018. Dr. Collins did acknowledge that Claimant's spondylolisthesis could cause pain and could possibly be improved with surgery. He reiterated his belief that any low back surgery contemplated for Claimant would not be causally connected to the industrial accident, but rather to her pre-existing progressive degenerative arthritis, which in turn is related to her age, weight, long-standing smoking habit, and multiple other factors.

33. Dr. Collins testified that Claimant told him she had experienced issues with back pain prior to the accident, which he felt would be consistent with the level of her degenerative

changes. Also, with time her low back complaints would get worse as the degeneration continued, so it did not surprise him that her pain complaints were worsening with time.

34. In cross examination Dr. Collins acknowledged Claimant was complaining of leg pain at her first medical visit post accident, but argued it would be hard to "sift through" the reason for such pain, given her "whole history" including her "significant vascular impairment in her lower extremities to the point she was losing her toes." Collins Depo. p. 28.

35. Dr. Collins testified at several points that Claimant's condition and need for surgery, if any, is simply due to a progression of her underlying degenerative changes, which were periodically symptomatic prior to her industrial accident and will continue to worsen with time. He saw no evidence of radiculopathy at the time of his examination, although he noted Claimant had intermittent radiculopathy, which he felt was completely consistent with her progressive degenerative condition. In short, Claimant's condition and any need for surgery had nothing to do with her work accident.

*Medical Testimony Analysis*

36. While a temporal relationship is always required to support a finding of causation between an accident and the injury, the existence of a temporal relationship alone, in the absence of substantive medical evidence establishing causation, is insufficient to satisfy Claimant's burden of proof. *Swain v. Data Dispatch, Inc.* IIC 2005-528388 (February 24, 2012). The Industrial Commission, as the fact finder, is free to determine the weight to be given to the testimony of a medical expert. *Rivas v. K.C. Loggin*g, 134 Idaho 603, 608, 7 P.3d 212, 217 (2000). "When deciding the weight to be given an expert opinion, the Commission can certainly consider whether the expert's reasoning and methodology has been sufficiently disclosed and whether or not the opinion takes into consideration all relevant facts." *Eacret v. Clearwater*

*Forest Industries*, 136 Idaho 733, 737, 40 P.3d 91, 95 (2002). Claimant's burden of proof requires "a reasonable degree of medical probability" that her injury was caused by an industrial accident. *Anderson v. Harper's, Inc.*, 143 Idaho 193, 196, 141 P.3d 1062, 1065 (2006). "The Commission may not decide causation without opinion evidence from a medical expert." *Id.*

37. In this case the two medical experts are pushing two starkly different opinions on causation. Both opinions are less than satisfying. Because Dr. Collins' opinion is easier to dissect, it will be addressed first.

38. Dr. Collins, like every other medical expert in this case, noted Claimant's degenerative low back condition, including her spondylolisthesis, pre-dated the industrial accident. Due to its degenerative nature, Claimant's low back condition will deteriorate with time. Dr. Collins relied on statements allegedly made by Claimant at the time of his examination that she had experienced back pain prior to the accident. He used that information to describe Claimant's condition as one which was symptomatic prior to the industrial accident, destined to get worse with time due to the nature of her condition, possibly leading to the need for surgery at some point. Claimant's industrial accident had no lasting effect on her lower spine degeneration; it neither permanently aggravated it, nor did it in any way influence her rate of degeneration.

39. Nowhere else in the record is there any evidence of Claimant having "numerous" (or any) prior low back "sprain/strain issues." CE L, p. 110. In fact, at hearing Claimant specifically denied ever having "any symptoms or issues" with her low back prior to this accident. Tr. pp. 25, 26. She also denied ever seeing any type of medical practitioner for her low back before the work accident, consistent with the medical documents produced in this case. Neither attorney specifically asked Claimant if she told Dr. Collins she had prior back issues.

40. Even if Dr. Collins' report is entirely accurate, Claimant reported her prior low back sprain/strain issues were "different" than the symptoms of her industrial injury. *Id.* The industrial injury pain was "much worse" and involved leg pain, unlike any prior occurrences. Dr. Collins acknowledged the records show Claimant was complaining of lower extremity pain from her first medical treatment onward. He had no satisfactory explanation as to why Claimant would be complaining of shooting leg pain soon after the accident, but not before.

41. The sudden emergence of shooting leg pain immediately after the accident, which continued unabated through the time of hearing, does not fit well with Dr. Collins' theory that Claimant's current condition is simply a continuation of her pre-existing degenerative condition and the work accident was essentially a nonfactor in her current condition. Other than an injury of some type occasioned by the accident, there has been no alternative theory advanced for Claimant's sudden complaints of shooting leg pain, whether or not it represents a true radiculopathy.

42. Dr. Blair also admits Claimant's observable low back degenerative condition pre-dates her work accident, and is progressive. He further admits he cannot point to any acute abnormalities in any diagnostic studies. He cannot state what anatomical injury was caused by the accident. He does have a theory that there "might be a microanatomic injury" which is not visible on MRI, and is the catalyst for Claimant's ongoing symptoms.

43. Dr. Blair opined that in his opinion the spine around the nerve roots at L4-5 and L5-S1 was narrowed to a point that it was almost pinching the nerve, and the disc slippage with movement resulted in the nerve compression. *See* Blair Depo. p. 30. While that opinion alone does not explain causation, Dr. Blair further opined that he believed the dynamics of the accident put into play sudden abnormal eccentric loading forces severe enough to permanently injure

Claimant's already-compromised spine. The aftermath of these forces was not apparent in any diagnostic films, but Dr. Blair believed the injury exists. He admittedly relied heavily on his understanding that Claimant was asymptomatic prior to the accident in question. He points to Claimant's ongoing pain as "proof" that such forces in fact caused permanent, but unidentifiable injury to Claimant.

*CAUSATION DETERMINATION*

44. Claimant argues Dr. Blair's opinion should be given the greater weight because it is "rooted in established workers' compensation principles that an asymptomatic condition that becomes symptomatic is compensable." Claimant's Brief, p. 13. Claimant cites to no authority for such statement, contrary to JRP 11C. (Whenever a party asserts a point of law, such assertion must be supported by citation to appropriate legal authority….). Claimant's arguments in favor of causation center on the fact Claimant was "essentially asymptomatic prior the accident and subsequently required treatment." *Id.* Standing alone, the fact a claimant was essentially asymptomatic prior to the accident, but symptomatic thereafter has never been enough to award benefits. Rather, causation is proven with the weight of medical evidence linking the accident to the condition, as noted in citations above.

45. Claimant discounts Dr. Collins' testimony; she argues his opinion improperly relied on the fact that Claimant had prior low back issues and her current condition was simply a continuation of progressing symptoms unrelated to her industrial accident. Claimant notes Dr. Collins could point to no medical records documenting Claimant's pre-existing low back complaints, and had no explanation for her leg pain post accident.

46. Defendants argue Dr. Blair's testimony does not provide a causal link between the accident and Claimant's current condition.[4] They frame the issue as whether Claimant's low back strain brought about the need for a surgery which only addresses Claimant's pre-existing degenerative condition. Defendants assert that the proposed surgery is designed to address only pre-existing conditions. No new pathology or anatomical change resulted from the accident; all that changed was Claimant's symptoms, despite Dr. Blair's "theory" that maybe "microanatomic" injuries are to blame for Claimant's ongoing pain. Dr. Blair admits his opinion that Claimant's pre-existing conditions were permanently aggravated by the accident is based on the fact Claimant has ongoing pain complaints and no history of such complaints prior to the accident. In short, Dr. Blair's opinion is nothing more than speculation, based on the theory that she must have been permanently injured because she reports pain now and did not report pain prior to the accident. Speculation is not a medical opinion, even if it comes from a physician.

47. Defendants point to *Fife v. The Home Depot*, 2010 IIC 0332 (June 8, 2010) to support their position. *Fife* also dealt with an "aggravation of pre-existing condition" opinion. The Commission ruled against the claimant. On appeal at *Fife v. The Home Depot*, 151 Idaho 509, 260 P.3d 1180 (2011), the Court noted that "injury must result in violence to the physical structure of the body" so the Commission was "free to reject" the claimant's physician's testimony "because the physician could not identify any anatomical findings that were likely related to the subject accident." *Id* at 151 Idaho 514.

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[4] Defendants also question whether Claimant has even proven a need for surgery at this time, regardless of causation. In light of Dr. Collins' deposition testimony, this argument has little merit and will not be discussed further.

48. The problem with comparing *Fife* to the current case is that in *Fife* the claimant rushed to surgery less than three weeks after the accident. A physician for the defendants had convincingly opined that the claimant suffered only a strain in the work accident. He also opined that conservative care would have resolved the claimant's complaints had the claimant not rushed to surgery. As such, the claimant's surgery was, and had to be, to correct a problem other than the muscle strain caused by the accident. The surgery was not compensable, given that the defendants' physician's opinion was afforded more weight than that of the surgeon who claimed the accident permanently aggravated the claimant's pre-existing symptomatic low back condition. On appeal, the Court simply pointed out that there was a basis to give more weight to the defendants' physician (a discretionary determination) than the claimant's doctor because the claimant's physician could not identify any anatomical findings related to the accident.

49. *Fife* does not stand for the proposition that a physician *must* be able to identify a specific anatomical change from the accident in order to have that physician's opinion considered; it merely affirms the Commission's right and duty to assign weight to competing physician opinions.

50. It is true Dr. Blair could not specifically identify any anatomical findings related to the subject accident. However, unlike the physician in *Fife*, Dr. Blair did not admit that the only change to Claimant post accident was her symptoms; he steadfastly maintained there was an anatomical change which occurred due to the forces exerted on Claimant's spine when she suddenly had to catch a patient to prevent that patient from falling. Dr. Blair rejected the idea that because the injury could not be seen in diagnostic films it did not exist. Granted, he relied heavily on Claimant's pain complaints and history in making his determination,

but he did opine on the loading forces which Claimant would have experienced during her work accident. He noted that if the injury was transient it would not have persisted for three years and counting, and should have responded to conservative treatment.

51. Admittedly, Dr. Blair's opinion is not strong. It would be much nicer to see an acute finding, but such does not always happen. However, Dr. Blair does give a medical explanation on a medically more probable than not basis as to why Claimant suffered more than a temporary muscle strain. Because Dr. Blair cannot point to the exact spot where Claimant suffered violence to the structure of her body does not mean it did not occur.

52. In *McCrea v. Idaho Youth Ranch, Inc.,* IC 2012-026908 (December 3, 2013), the Commission was faced with a situation where there was no objective medical evidence supporting the occurrence of an industrial injury, and no medical testimony describing the nature of the injury which the claimant was thought to have suffered. Inferences had to be drawn from circumstantial evidence including the fact that the claimant was asymptomatic for several months prior to the work accident (he had a prior back injury from which he had just recently recovered), worked a physically demanding job without difficulty for a month prior to the accident, and was not a surgical candidate just prior to the industrial accident. The claimant experienced immediate low back and lower extremity symptoms following the accident. Finally, the claimant did not respond to conservative care, and did not return to baseline after the accident. The Commission found the facts listed above were sufficient to support the conclusion that the work accident did permanently aggravate the claimant's condition by causing damage of some unknown type to the physical structure of the claimant's body sufficient to explain his symptoms.

53. As in *McCrea*, the Claimant herein worked a physically demanding job without difficulty before this accident, was not a surgical candidate just prior to the accident, (see Dr. Blair Depo. pp. 40, 41), and was symptom free for some time prior to the accident (even if Dr. Collins' report is considered). She experienced immediate pain in her low back and lower extremity(ies), which did not respond to conservative treatment, and did not return to baseline with time.

54. Dr. Collins' opinion cannot account for the sudden and unrelenting leg pain Claimant experienced from the date of the accident onward, which weighs against natural progression of an ongoing degenerative condition as the sole cause of Claimant's current complaints, and thus is also not a strong opinion. Opinions that do not account for all relevant facts must be discounted to a degree.

55. When the totality of the evidence is considered, Dr. Blair's opinion is afforded more weight. This finding is consistent with the findings in the recent and similar case of *Kobrock v. The Franklin Group*, IC 2015-009878 (January 25, 2019). As determined therein and equally applicable to the present case, the Referee is more persuaded by the testimony and opinions of Dr. Blair. The evidence supports the assertion that Claimant did suffer a permanent injury to her lumbar spine as a consequence of the industrial accident in question, even though the medical evidence leaves this Referee unable to identify the precise location and nature of the injury. The undersigned is satisfied, as was Dr. Blair, that a permanent aggravation of Claimant's pre-existing condition occurred.

56. Claimant is entitled to additional medical care up to and including surgery as may be required for care of her work-related injuries.

57. All other issues are reserved.

## CONCLUSION OF LAW

Claimant has proven she is entitled to additional reasonable medical care up to and including surgery as may be required for the care of her industrial injuries of December 4, 2015.

## RECOMMENDATION

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

DATED this 7th day of March, 2019.

INDUSTRIAL COMMISSION

/s/
Brian Harper, Referee

## CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of March, 2019, 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:

DENNIS PETERSEN
PO BOX 1645
IDAHO FALLS ID 83403

W SCOTT WIGLE
PO BOX 1007
BOISE ID 83707

/s/

jsk

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

| | |
|---|---|
| KIMBERLEY BOSWELL,<br><br>Claimant,<br><br>v.<br><br>EDGEWOOD VISTA,<br><br>Employer,<br><br>and<br><br>TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,<br><br>Surety,<br><br>Defendants. | **IC 2015-033326**<br><br>**ORDER**<br><br>**Issued 3/15/19** |

Pursuant to Idaho Code § 72-717, Referee Brian Harper submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusion 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 conclusion of law as its own.

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

1. Claimant has proven she is entitled to additional reasonable medical care up to and including surgery as may be required for the care of her industrial injuries of December 4, 2015.

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

DATED this 15th day of March, 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 15th day of March, 2019, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

DENNIS PETERSEN
PO BOX 1645
IDAHO FALLS ID 83403

W SCOTT WIGLE
PO BOX 1007
BOISE ID 83707

/s/

jsk

# Workers' Compensation Decision Summaries

## McGivney v. Aerocet, Inc. and Quest Aircraft

**Idaho Supreme Court**
**Decision filed: June 13, 2019**

## Facts:

Claimant suffered a left knee injury on May 6, 2011, while working for Aerocet. The job required him to go up and down steep wooden stairs several times a day, and on one particular trip he felt "something go" in his left knee. He went to Dr. McInnis about two months later, who diagnosed progressive arthritis in the knee, as well as a meniscal tear. Claimant was given the option of a meniscectomy or some sort of a partial knee replacement. Claimant went with the meniscectomy, which was done in September of 2011 and which resulted in a 2% lower extremity rating. Claimant was returned to work with his time-of-injury employer with restrictions that he not use stairs and that if a particular activity bothered his knee, he should discontinue it.

Claimant, shortly thereafter, went to work for Quest in October of 2011. On March 4, 2014, while descending stairs at work, he overstepped a step and landed hard on his left leg, after which his knee began hurting. He went to Dr. Jeffrey Lyman, an orthopedic surgeon who performed a unicompartmental arthroplasty, or in other words, a partial knee replacement. The surety denied this surgery. Following the surgery, Claimant's attempts to return to work were unsuccessful. He filed a Complaint against Quest, the employer at the time of the second accident in the fall of 2014, and a few months later filed a Complaint against Aerocet, his employer at the time of the first accident. He moved to consolidate the two. The first employer objected, the objection was denied, and the cases were consolidated.

In September of 2015, Claimant moved to compel Quest to pay past due temporary disability benefits and medical benefits. Later in September of 2015, the Commission granted Claimant's motion. The cases went to hearing in November of 2015. The Industrial Commission rejected the proposed opinion by the referee and issued a decision in December of 2017. The Commission concluded that Claimant's disability had to be determined as of the date of hearing based upon the Idaho Supreme Court's decision in the case of *Brown v. Home Depot,* 152 Idaho 605, 272 P.3d 577 (2012). The Commission concluded that Claimant had suffered a 50% permanent partial disability inclusive of 21% permanent partial impairment, which was apportioned equally to the two accidents. The Commission concluded that apportionment was appropriate as to the medical expenses incurred from when Claimant underwent the partial knee replacement on June 25, 2014, forward. The Industrial Commission concluded that apportionment of the total temporary disability benefits owed to Claimant should also be apportioned as between the 2 employers and their sureties from June 25, 2014 forward. The Commission concluded that Quest, the second employer and its surety, were entitled to reimbursement from the first employer and its surety to any overpaid time loss benefits that had been incurred by virtue of the Commission's earlier ruling on motion. The first employer and the surety appealed.

## Issues:

1. Whether Claimant's disability in the sense of impairment from the first accident, the 2011 accident, should have been determined as it was prior to his 2014 accident when employed by Quest.

2. Whether the cases should have been consolidated insofar as the effect of the methodology used in determining permanent partial disability, Aerocet, the first employer, contending that theirs should have been determined separately from the permanent partial disability analysis of the first claim.

## Holding:

In a decision authored by Justice Stegner and joined in by other members, The Court rejected Appellants' argument to the effect that consolidation of the cases constituted an abuse of the referee's discretion. There was a great deal of discussion of prior decisions that involved multiple injuries where the Commission had considered the claimant's ultimate permanent disability effectively from the perspective of the injuries involved. The Court here concluded the referee did not abuse his discretion, because the same body part, the left knee, was involved in both accidents; the same type of activity, descending stairs, was involved in both accidents; and they couldn't really argue with the referee's conclusion that consolidation would result in judicial economy.

The Court then turned its attention to whether or not an analysis of what disability in excess of impairment had been suffered by the claimant in the 2011 action should have been done separately. Basically, the employer and surety for the first accident were arguing that a separate analysis should have been done as to Claimant's disability status as of the time he reached maximum medical improvement from the first accident. The Court pointed out that Claimant had not raised this issue until after the second accident occurred, and they didn't see any problem considering disability from both injury claims at the same time.

Defendant Employer and Surety for the first accident insisted that PPD as to their accident should have been determined when Claimant reached maximum medical improvement. The Court rejected this, pointing out that determination of permanent disability is a measure of "present and probable future ability to engage in gainful activity." I.C. §72-425. The Court felt that the term "present" meant when the evidence was received, and that would be at the time of hearing. The Court concluded that the *Brown* case was dispositive on this point and that the time of hearing was, indeed, the time at which determination of PPD should be made, as the Commission had done.

Finally, the Court was asked to review the apportionment that was done, at least as to PPD. The Court determined that the apportionment methodology used by the Commission was appropriate.

## Significance:

There is really nothing significant about the case other than medical and temporary disability benefits were the subject of apportionment, which was affirmed by the Court, as well as permanent partial disability. Apportionment in this fashion had been approved by the Court as long ago as 1994 in the case of *Blang v. Basic American Foods*, 125 Idaho 275, 869 P.2d 1370 (Idaho 1994). However, it is rarely done, and this is just a reminder that there are situations where apportionment of benefits other than PPD are appropriate.

## Austin v. Biotech Nutrients

**165 Idaho 248, 443 P.3d 262 (Idaho 2019)**

## Facts:

Claimant was injured on November 20, 2008. He received medical treatment up through June 20, 2014. He received TTDs from June 9, 2012 through July 18, 2014. He was declared MMI and rated on June 20, 2014. On July 18, 2014, he received a Notice of Change of Status pursuant to I.C. §72-806 advising that his temporary disability benefits would cease and that payment of his impairment would begin. This notice included the statement that the impairment rating did not settle the claim and that MMI status meant medical treatment was not likely to improve Claimant's condition. The IME report containing the impairment rating was provided along with the notice.

PPD benefits pursuant to the impairment rating actually began a few days prior to when the notice said they would and continued until June 22, 2015, when final payment was made in the amount of $2,379.30. No Notice of Change of Status was issued.

Claimant subsequently filed a Complaint seeking medical benefits, TTD benefits, and reserving the right to bring claims for additional PPD benefits. Defendants' Answer claimed that the Complaint was barred by the Statute of Limitations under I.C. §72-706.

## Issue:

1. Whether the statute of limitation was tolled under I.C. §72-604 by virtue of Defendants' failure to file a Notice of Claim Status when they submitted Claimant's final PPD payment pursuant to the impairment rating.

## Holding:

The Idaho Supreme Court noted that the referee who heard the issue concluded that the tolling provisions of I.C. §72-604 did not apply, because with the payment of the final PPD check for impairment, the level of benefits did not change, referring to the language of I.C. §72-806. The Commission, however, did not follow the referee's recommendation and concluded that I.C. §72-806 does require Defendants to submit a Notice of Change of Status with the last check for PPI

payments and that its failure to do so tolled the one year statute of limitations under I.C. §72-604. The Court, affirming the Industrial Commission, reasoned as follows.

The Court noted that I.C. §72-706(3) gives a claimant one year from the date of the last payment of income benefits to file a Complaint. The Court noted that Claimant had not done so in this instance. However, the Court pointed out that I.C. §72-604, the tolling statute, applied not only to notice of injury, but also to notice of change of status requirements. In other words, a failure to comply with §72-806 can trigger the tolling provisions of §72-604. As to the defendants' argument that because Claimant's level of compensation did not change when he received his final PPI payment, the Court rejected the same, noting that the statute requires notice of any change of status or condition, including the cessation of medical or monetary compensation benefits. The Court felt the level of benefits was affected, because he had been receiving the payments and because by sending out a big final check, they had shortened the period of time in which he could have expected the benefits, and hence shortened the time within which the statute of limitations ran.

The second argument was whether any such failure was willful, as required by I.C. §72-604. The Court said that willful doesn't require an intent to commit wrongdoing, but simply "willingness to commit the act." They noted the defendant didn't have a problem earlier providing a Notice of Change of Status when the statute required them to provide such, and, therefore, their act was willful under the statute. Finally, the appellants argued that they substantially complied with the requirements of I.C. §72-806. Basically, they were arguing that the check that contained the final payment contained most of the information provided in form that they would execute to comply with §72-806. Here again, the Court was primarily preoccupied with the fact that Claimant was paid off early, denying him essentially seven additional weeks within which to file his Complaint.

**Significance**: The lesson to be learned by this case is to make sure you file the Notice of Change of Status with the cessation of any kind of benefit, and don't advance benefits early and create the risk that ultimately created the tolling problem in this case. One wonders the extent to which this decision merely reflects dislike of technical defenses such as statutes of limitations since the reasoning is a bit strained.

## Oliveros v. Rule Steel Tanks, Inc.

**165 Idaho 53, 438 P.3d 291 (Idaho 2019)**

## Facts:

On his second day of work between his junior and senior years of high school, Claimant was injured on July 30, 2008, when portions of 4 fingers on his dominant hand were amputated. Claimant underwent a difficult recovery involving 4 or 5 surgeries before he was declared stable by his treating physician and rated at 32% whole man permanent partial impairment. He was released to return to work with restrictions that included 5 lbs. grip and carry, 25 lbs. push, 50 lbs. pull, and 20 lbs. lifting with the effected extremity. Claimant had previously worked in the fast food industry, and he was released to return to that kind of work, as well as the time of injury

job. Claimant returned to high school, but elected to obtain his GED. He subsequently took college courses up at Lewis & Clark State College in Lewiston, and then an online class in communications at the College of Western Idaho. At the time of injury and prior to the time of injury, Claimant had earned $7.00 to $7.50 per hour in his employment endeavors. Post-injury he went back to work at a fast food place and worked at a call center for $9.00 to $10.00 with benefits. In 2012 and 2013 he took a pharmacy tech course and subsequently worked as a pharmacy technician in training at wages between $13.00 and $14.00 an hour. Claimant subsequently worked in sales earning $14.42 an hour plus commissions, he worked as a bank teller making $11.75 an hour, and ultimately went to work for Albertson's in the corporate office as a third party coordinator at $15.87 an hour. Basically, he was the go-between to obtain insurance company authorization for medications sold in pharmacies.

Claimant claimed retraining benefits after the fact and permanent partial disability in excess of his 32% whole man impairment rating. While the injury was back in 2008, the hearing as to these issues was held on February 22, 2017. Claimant relied primarily on his vocational expert, who originally issued a report back in 2009 that Claimant had a permanent partial disability of 75%. In 2016, the same vocational expert revised his report, stating that due to Claimant's retraining or retraining, he now had permanent partial disability of 45%. The Industrial Commission rejected Claimant's claim, reasoning that Claimant did not lose any skills as a result of the accident that he needed to replace with retraining, because he was a teenager and had not acquired any work skills. The Commission concluded that Claimant did not have any permanent disability in excess of the 32% impairment rating. The Commission expressed their conclusion, stating that when they did their permanent partial disability analysis, it came out to 25% PPD.

The matter went up on appeal to the Idaho Supreme Court.

## Issues:

1. Whether Claimant was entitled to retraining;

2. Whether Claimant was entitled to permanent partial disability basically separate and apart from monies he had been paid out pursuant to the impairment rating.

## Holding:

Claimant's argument before the Idaho Supreme Court was to the effect that by virtue of the *Corgatelli v. Steel West* decision, permanent partial impairment is a separate benefit from permanent partial disability such that he should receive the impairment, and then receive additional monies to reflect his permanent partial disability separate and apart from those monies he had received for the impairment. Basically, he argued for an extension of *Corgatelli* to cases less than total permanent disability. The Court rejected Claimant's arguments, noting that permanent partial impairment is not a separate benefit from permanent partial disability, and in fact was not in and of itself a benefit at all. They pointed that per the statutory scheme involving I.C. §§ 72-427 – 72-429, permanent physical impairment was simply a component of permanent partial disability and that there was no separate benefit outlined in the statutes for impairment. The Court characterized the Commission's finding that Claimant had a 25% PPD rating as

erroneous, because you can't have a PPD award that is less than impairment. In this case, Defendants had paid out 32% whole man impairment, and, therefore, the only real question was whether Claimant had disability in excess of impairment. In this case, the Court felt that there was not, because Claimant really did not suffer any loss of wage earning capacity, nor did he have a loss of his established job market in excess of his impairment rating.

The Court disposed of Claimant's retraining claims in a similar fashion. The Court noted that Claimant's post-accident education and employment improved his access to the labor market, and then went on to note that I.C. §72-450 gave the Commission discretion as to whether to award retraining benefits. They noted the Commission had not done so. They noted that Claimant did not have an established vocation or set of skills at the time of his accident that he lost. They noted, as did the Commission, that Claimant always intended to go on to school, which he did. They ultimately reasoned that a claimant must have an established earning capacity that has been damaged by virtue of an accident before one can talk about restoration of that earning capacity through the retraining statute.

## Significance:

The *Corgatelli* decision was never well received by the workers' compensation community. The Industrial Commission previously concluded that a decision by the Idaho Supreme Court subsequent to *Corgatelli* basically overruled *Corgatelli.* Defense counsel in *Oliveros* tried to primarily argue that *Corgatelli* did not apply, because it was a total permanent disability case involving interpretation of I.C. §72-408 and that *Oliveros* was a permanent partial disability case that dealt with different statutes. The Court also shared this concern. Nonetheless, the Court entertained argument on *Corgatelli* and whether it was still good law. As part of its decision, the Court wrote:

> We hold that the commission did not err in following *Mayer* and identifying that there is not a separate avenue for recovery of both impairment and disability, because impairment is included in a determination of disability. *Corgatelli* and *Davis,* supra, are overruled insofar as they are inconsistent with this opinion.

The *Mayer* decision and the *Oliveros* decision certainly raise a legitimate issue as to whether there is anything left of the *Corgatelli* decision.

## Moser v. Rosauer's

**Idaho Supreme Court (May 2019)**

## Facts:

Claimant dislocated her shoulder on October 9, 2016, while working. The claim was accepted. Claimant underwent surgery on her shoulder in November of 2016, but continued to experience stability issue such that her treating physician wanted her to be seen by a Seattle physician for a second opinion. The surety decided to have an IME done and obtained an opinion that the

original shoulder dislocation that was the subject of the accident was a result of a preexisting condition, that all of Claimant's 11% upper extremity impairment was due to the preexisting condition, and that she did not require any further medical care.

Claimant filed a Complaint seeking all the usual benefits, and Defendants, in January of 2018, filed a Notice of Medical Exam to be performed by Dr. Joseph Lynch in February of 2018. Claimant's counsel advised that his client would not be attending the exam, Defendants filed a Motion for Sanctions, Claimant filed a Motion for Protective Order, and the Commission denied the Motion for Sanctions and the Motion for Protective Order, ordering Claimant to appear for examination under I.C. §72-433. Defendants persisted in their attempt to get an IME done such that Claimant filed a Petition for a Declaratory Ruling on the issue.

The issue posed was whether or not the employer could compel a claimant to attend an IME exam under I.C. §72-433 without first establishing that Claimant was within her "period of disability." Claimant contended that the period of disability was a period of time where Claimant was actually receiving benefits.

The Industrial Commission ruled on the Petition for Declaratory Ruling rejecting Claimant's arguments, and the matter went up to the Idaho Supreme Court.

## Issue:

1. Whether the employer and surety could require an IME exam under I.C. §72-433 without establishing that Claimant was in a period of disability.

## Holding:

The Court noted that the IME statute, §72-433, allows the medical exams done after (1) an injury or occupational disease; and (2) during a period of disability. The Court then noted that I.C. §72-102(11) defines disability as a decrease in wage earning capacity due to injury or occupational disease. The Court noted that Claimant had made a claim for, amongst other things, a decrease in her wage earning capacity, and advised that it didn't matter whether she was receiving income benefits or not. The Court reaffirmed that if you're going to make claim for benefits, you're going to have to submit to these kinds of examinations and that your failure to do so may result in the suspension of consideration of your claim during the period of obstruction, as per I.C. §72-434.

## Boutwell v. Spierse Manufacturing Co., Inc.

**I.C. 2017-011374**
**Decision Filed: 05/03/2019**

## Facts:

Claimant was a woman in her early fifties and had worked any number of jobs over the years, including work as a waitress, bartender, cashier, and teacher's assistant. In particular, she'd had a number of cashier-type positions. She went to work at the employer's place of business in January of 2017 working on what was basically called a cutting line. These folks make PVC plumbing parts. She used hydraulic scissors to cut rigid PVC plastic, and she had to use snips or pliers to trim the plastic. She started working on January 2, 2017, and by the fourth day of her first week complained of experiencing pain in both of her hands, knuckles, wrists, and elbows. She explained to two different lead people that week that her hands were hurting. She was advised by these individuals that it was normal for someone to have hand pain when starting on the cutting line and that she would get used to it. Claimant did not go to a doctor. Her testimony was that she did not do so because she had been told that the hand pain was normal and that she would get used to it. Towards the end of her stay at Spiers, which was a total of 33 days, she had to ask a supervisor if she could transfer to another position at Spiers, because the cutting line made her hands hurt. She stopped going to work, because she had difficulty using her hands and they hurt too badly. She continued to not go to a doctor, because she didn't have health insurance.

Claimant did obtain work about a month later as a bakery clerk, and she continued to work for a year. In April of 2017, she went to the Industrial Commission offices and filled out a First Report of Injury, listing a date of injury of January 17, 2017 on the document. The claim made its way to the surety, and she was contacted by an adjuster. Claimant had not gone to a doctor. The surety denied the claim citing I.C. §72-439(2) to the effect that the employer is not liable for a nonacute occupational disease unless the employee was exposed to the hazard of such disease for 60 days. They then went on to state that Claimant's hand problems did not result from a work-related occupational disease.

In early May of 2017, Claimant went to a nurse or a nurse practitioner and provided a history of the development of bilateral hand pain and swelling as a result of working on the cutting line. The nurse's chart note, in turn, stated that Claimant's hand problems were probably from cutting at work. Claimant was referred for EMG testing, which was also done in May, and which revealed abnormal nerve conductions of the median nerve in both wrists. Claimant was then sent to Dr. Wayment, who saw her in June of 2017. His history was trouble with her hands since January. Dr. Wayment diagnosed bilateral carpal tunnel syndrome, severe bilateral cubital tunnel syndrome, and trigger finger issues, which he injected. In July of 2017, he recommended surgery to treat these various conditions, at least in the right hand, which surgeries the defendants denied.

## Issue:

1. Whether Claimant met all the various requirements to establish a compensable occupational disease.

## Holding:

The Industrial Commission went through and discussed the various elements that are required to establish the compensability of an occupational disease. Amongst other things, they reviewed the requirements of I.C. §72-439, which contains the 60-day exposure rule for so-called nonacute occupational diseases. The Industrial Commission reviewed the testimony of Dr. Wayment that was offered as to this issue. Dr. Wayment, as to causation, stated that he thought her hand problems were due to her work at Spiers. He also stated that Claimant's hand problems had a "sudden onset, sharp rise, and short course," which he felt made the onset acute. Armed with the information, the Industrial Commission found Claimant's condition compensable. They discussed how Claimant satisfied the peculiarity requirements and all the other requirements.

## Significance:

Acute versus nonacute cases are rare. Frankly, most defendants kind of view the matter as being somewhat of a red herring defense to the extent that anytime a treating physician wants the matter compensable, he just calls the onset acute in a very conclusory fashion. This case is somewhat different to the extent that the physician received a definition in the context of a question. Acute onset per this decision is when there is a sudden onset, sharp rise, and a short course.

## Ayala v. Robert J. Myers Farms, Inc.

**Idaho Supreme Court Decision Filed 07/12/2019**

## Facts:

Claimant had an accident in 2009 and a second one in 2013 while employed by the same employer. He filed Complaints, which Complaints were consolidated, and a hearing was held on October 26, 2016. Claimant and the principal from the employer testified. Post-hearing depositions were done by the experts, and final briefing was done by the parties. It was under advisement as of November 3, 2017. The Industrial Commission subsequently sent a letter to counsel explaining that the referee who heard the case had a backlog of cases, that the Commission was concerned about potential resulting delay, and that the Commission was willing to decide the case based upon the records submitted. The letter suggested that if the parties did not want the Commission to decide the case without benefit of the referee's recommendations, the matter would be handled by the referee. Claimant's counsel responded to the Commission's letter apparently advising he wanted the referee's recommendations based upon what he felt was an observational credibility issue. The Industrial Commission subsequently issued its opinion without recommendation from the referee on April 9, 2018. In the decision, the Industrial Commission did address what the Idaho Supreme Court subsequently characterized as Claimant's counsel's objection to the issuance of a decision without the benefit of a referee's recommendations. The Commission stated that the outcome of the case did not depend upon an assessment of the claimant's credibility by means of observation at hearing.

Claimant's counsel filed numerous post-decision motions for reconsideration, to reopen, and for modification of award. There apparently was yet another accident that occurred in 2017, which accident Claimant's counsel wanted consolidated with the earlier cases that were the subject of the Commission's decision. Claimant's counsel also iterated concerns about having the benefit of observational credibility that would have been achieved with a referee's recommendation. All motions were declined, and an appeal was filed.

## Issue:

1. Whether Claimant's due process rights were violated by virtue of the Industrial Commission's decision without the benefit of referee recommendations.

## Holding:

The Court pointed out that where the hearing was conducted by a referee, I.C. §72-717 requires that the referee's findings and determination be submitted to the Commission for its review. The Court acknowledged that the referee's findings of fact merely constitute a recommendation to the Commission and that the Commission has ultimate responsibility for deciding the case. The Court also acknowledged that the Industrial Commission was free to reject recommendations of a referee. The Court, primarily based upon its concerns that a referee acts as the eyes and ears of the Commission, because of I.C. §72-717, concluded that the Commission must have the referee's recommendations in hand before making a decision. The Court concluded that in this instance the failure to have the referee's recommendations amounted to a violation of due process, which requires that a claimant be given an opportunity to be heard in a meaningful time and in a meaningful manner. The Court had concerns that the Commission ignored the objections of Claimant and Claimant's counsel even though their initial letter suggesting that the Industrial Commission would be willing to issue a decision said that they would entertain such objection, the Court was concerned that Claimant did not have the ability to have his observational credibility commented upon by the referee's recommendations, the Court felt that failings as to the level of a due process concern.

## Significance:

Hopefully we won't see more of these or an expansion of these kinds of issues creeping into the system. The potential for abuse is too obvious.