BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID PALMER, Claimant, v. ENGINEERED STRUCTURES, INC., Employer, and NEW HAMPSHIRE INSURANCE CO. , Surety, Defendants.	**IC 2017-013000** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **Filed August 9, 2019**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Mike Powers, who conducted a hearing in Boise on September 20, 2018. Claimant, David Palmer, was present in person and represented by Todd M. Joyner, of Nampa. Defendant Employer, Engineered Structures, Inc., (ESI) and Defendant Surety, New Hampshire Insurance Co., were represented by Susan Veltman, 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 March 12, 2019. Referee Powers retired from the Commission and the matter was subsequently reassigned to Referee Alan Taylor.[1]

ISSUES

The issues to be decided are:

1. Whether Claimant suffered an accident causing personal injury arising out of and in the course of employment;

[1] After issuance of Ayala v. Robert J. Meyers Farms, Inc., 2019 WL 3059806 (Idaho, filed July 12, 2019), the parties herein were contacted and did not object to the undersigned writing a recommendation in the instant case.

2. Whether Claimant is entitled to reasonable and necessary medical care pursuant to Idaho Code § 72-432; and

3. Whether Claimant is entitled to temporary disability benefits.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Defendants acknowledge that Claimant experienced an incident at work on February 22, 2017 when a wind-blown poly fiber window panel struck his head. Claimant alleges the incident caused cervical injury and seeks medical benefits for treatment thereof and temporary disability benefits. Defendants assert the February 22, 2017 incident did not cause him personal injury and his need for medical treatment of his cervical condition is due to preexisting factors.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant's Exhibits A - U and Defendants' Exhibits 1 - 15, admitted at the hearing;
3. The testimony of Claimant and Jeret Whitescarver, taken at hearing;
4. The post-hearing deposition testimony of Shane Andrew, D.O., taken by Claimant on October 26, 2018;
5. The post-hearing deposition testimony of Phillip J. Redd, D.O., taken by Claimant on November 14, 2018; and
6. The post-hearing deposition testimony of Rodde D. Cox, M.D., taken by Defendants on December 12, 2018.

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

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

FINDINGS OF FACT

1. Claimant was born in 1969. He is right-handed. He was 49 years old and lived in Nampa at the time of the hearing. ESI is a construction company.

2. **Background.** Claimant attended high school through the 11th grade, obtained his GED, and worked for approximately 30 years in various aspects of construction. In his years of construction work, Claimant sustained multiple small injuries and noted some lower back symptoms.

3. On August 13, 2009, while working for Professional Woodworks, Claimant fell approximately 10 feet from a ladder, landed upon his neck and left shoulder, and injured his neck and left shoulder. He also noted increased low back pain. On February 16, 2010, he underwent C5-6 anterior cervical discectomy and disc arthroplasty by Timothy Johans, M.D. On August 18, 2010, Claimant underwent left shoulder arthroscopy with rotator cuff repair, biceps tenodesis, and labral debridement by Roman Schwartzman, M.D. Claimant experienced waxing and waning low back symptoms but received no surgical treatment therefore.

4. On December 13, 2010, Dr. Johans examined Claimant and noted:

> I examined his neck and his wound is perfect and his range of motion is great. The films are perfect and there are no abnormalities at all. …. From my standpoint, he is fixed, stable and ready to go back to work unrestricted. The issue is that he has a bilateral ulnar nerve neuropathy with almost constant numbness in the ulnar distribution of his hands. He had a positive Tinel's at both ulnar nerves in the elbow. ….
>
> All it takes to irritate an ulnar nerve is to force a person to sleep differently such that he is causing pressure on that nerve. That is probably what has happened to him. He also had his arm in a brace and a sling set at a 90◦ angle, which would certainly pre-dispose his ulnar nerve potential compression.

Exhibit D, p. 9.

5. On December 22, 2010, Kevin Krafft, M.D., performed electrodiagnostic studies and recorded: "Minimally abnormal study. These findings suggest a mild ulnar sensory entrapment at the left Guyon's canal. …. There is no evidence of a recurrent radiculopathy, plexopathy or other entrapment or poly neuropathy." Exhibit D, p. 57.

6. On December 30, 2010, Dr. Johans addressed Claimant's neck and upper extremity symptoms and recorded:

> Next, he still has rare intermittent tingling in the ulnar nerve distribution in both hands. The State Insurance Fund wanted an electrical study done and that was done by Dr. Kraft and it was a very minimally abnormal study, suggesting a mild ulnar sensory entrapment in the left Guillain's canal and nothing to suggest a problem with decubital tunnel syndrome and no evidence of recurrent radiculopathy.
>
> I believe that electrical studies are minimally helpful. They have a high false negative rate and I would say that he does have a bilateral ulnar neuropathy. He has a very positive Tinel over both elbows and his numbness pattern exactly fits the ulnar nerves. How this is related to the fall I'm not sure, but he fell 10' and I can certainly imagine him hitting them, but especially the bracing that he had of his left arm after the shoulder surgery can cause pressure on that nerve. The left ulnar nerve is worse than the right.
>
> So, I think we still have some residual issues.

Exhibit D, p. 7.

7. On January 11, 2011, Dr. Schwartzman found Claimant's left shoulder had reached maximum medical improvement and rated his permanent impairment at 6% of the upper extremity due to his left shoulder condition. Exhibit F, p. 1. Claimant intended to follow-up with Dr. Johans for treatment of his back and neck symptoms.

8. On January 21, 2011, Michael Hajjar, M.D., examined Claimant and noted "slight evidence of ulnar neuropathy on the left side on the EMG and nerve conduction study." Exhibit D, p. 4. He found Claimant medically stable and able to return to his job with no restrictions due to his neck.

9. On March 7, 2011, Dr. Johans found Claimant had full range of motion, no strength loss in his bilateral arms, and no sensory loss in his C6 distribution and opined he was fixed and stable with "no permanent disability rating" for his cervical condition. Exhibit D, p. 2.

10. On June 6, 2011, Edwin Clark, M.D., performed an IME of Claimant and reviewed and summarized his medical treatment related to his 2009 fall. Exhibit G, pp. 77-99.

11. In August 2012, Claimant began treating regularly with Phillip Redd, D.O., for persisting neck and left shoulder pain.

12. Claimant's left ulnar neuropathy persisted. On January 23, 2013, Dr. Johans performed left ulnar nerve decompression. Claimant's right ulnar symptoms were less bothersome and he elected not to proceed with right ulnar nerve decompression surgery.

13. On July 18, 2014, Claimant presented with right shoulder pain to Dr. Redd who recorded:

> The symptoms began 3 months ago, right rotator cuff tear, slept [sic] fell on the grass due to feet being wet and when he landed he fell on his right arm, Wednesday and went to st als ER on garrity. X-rays done. He had a lifting accident about 3 months ago. He has severely decreased range of motion and pain.

Exhibit H, p. 15. Dr. Redd referred Claimant for surgical consultation, but Claimant was unable to afford right rotator cuff surgery. Thereafter Dr. Redd continued to examine Claimant regularly and treat him with prescription opioids for pain management.

14. On April 18, 2016, Claimant presented to Dr. Redd for follow-up of his chronic conditions. Dr. Redd recorded Claimant's complaints of back and neck pain. Exhibit H, p. 89. There was no mention of upper extremity radiculopathy. Dr. Redd renewed Claimant's prescriptions for pain control.

15. On May 16, 2016, Claimant presented to Dr. Redd who recorded Claimant's complaints of back and neck pain. Exhibit H, p. 92. There was no mention of upper extremity radiculopathy.

16. On June 15, 2016, Claimant presented to Dr. Redd who recorded Claimant's complaint of back and neck pain. Exhibit H, p. 95. There was no mention of upper extremity radiculopathy.

17. On July 13, 2016, Claimant presented to Dr. Redd who recorded Claimant's complaint of back pain and joint pain. Dr. Redd assessed chronic pain and recorded his impression: "Fairly stable with pain management, but getting worse and he thinks it may be a neck issue because of the radiation of pain with turning his head or bending it back, refill pain medications … followup in one month." Exhibit H, p. 101.

18. On August 5, 2016, Claimant presented to Dr. Redd who recorded: "He is having more shoulder pain in his left lately and he does remain more functional on the pain medications." Exhibit H, p. 102. Dr. Redd also recorded Claimant's complaints of back and neck pain. Exhibit H, p. 104. There was no mention of upper extremity radiculopathy.

19. On September 12, 2016, Claimant presented to Dr. Redd who recorded his complaints of back and neck pain. Exhibit H, p. 109. There was no mention of upper extremity radiculopathy.

20. On October 10, 2016, Claimant presented to Dr. Redd who recorded: "Chronic pain syndrome (onset 10/10/2016); Fair Control. Had a flare up and he could not use his R shoulder/arm for about a week and pain meds did not seem to help)." Exhibit H, p. 111. Dr. Redd also recorded complaints of back and neck pain. Exhibit H, p. 113. There was no mention of upper extremity radiculopathy.

21. On November 7, 2016, Claimant presented to Dr. Redd who recorded complaints of back pain and neck pain. Exhibit H, p. 117. He assessed chronic pain, including chronic right shoulder pain. Exhibit H, p. 118. There was no mention of upper extremity radiculopathy.

22. On December 5, 2016, Claimant presented to Dr. Redd whose notes make no mention of any neck or back pain. There was no mention of upper extremity radiculopathy.

23. Approximately December 27, 2016, Claimant was hired as a superintendent and commenced working at ESI. Although hired as a superintendent, Claimant was mostly assigned manual labor duties including shoveling snow, chipping ice, packing garbage, and cleaning the job site under the direction of ESI superintendent Steve Condon.

24. On January 5, 2017, Claimant presented to Dr. Redd who recorded complaints of back pain and neck pain. Exhibit H, p. 127. There was no mention of upper extremity radiculopathy. Claimant apparently did not see Dr. Redd in February 2017.

25. **Industrial incident.** At approximately 4:00 p.m. on February 22, 2017, Claimant was at work on a lift helping a coworker named Manny lift a 50-pound poly fiber window panel into place. Claimant testified:

> I was up on the lift and holding the right corner of the window panel. Manny was down on the ground. He was on the—the left bottom corner. The wind—a gust of wind came up and blew the panel—pushed the panel back into my—my had [sic]—my hard hat and my head and kinked my neck.
> ….
>
> Ultimately the window panel—I tried to hang onto it. Manny had lost his end of it and I was afraid somebody was going to get hurt. I held onto it as long as I could before dropping it.
>
> Q. Okay. Did it snap your head back?
>
> A. Yes.

Transcript, p. 44, ll. 13-25. Claimant noted immediate jolting pain down his left arm. He and Manny attempted again, this time successfully, to install the window panel. They then

proceeded to another side of the building where the gusting wind prevented any further window panel installations. Manny left the job site.

26. Before Claimant left work approximately an hour later, he tried to report the incident to ESI superintendent Steven Condon, but Condon refused to listen and left the work site.

27. Over the ensuring weeks Claimant continued working his assigned duties at ESI as much as he was able in spite of his persisting neck and left upper extremity symptoms.

28. On March 2, 2017, Claimant presented to Dr. Redd who recorded:

> Chronic pain syndrome (onset 10/10/2016; Uncontrolled. Pain is not really controlled as usual with pain medications and his L arm is numb in areas now. His neck, with a hx of a Prestige arthroplasty (2010, Dr. Johan) in his neck and lately when he bends his head or turns to the left he get a zinger-like sensation down his arm. …. Associated symptoms include pain scale 6/10. …. States he was not hired to do physical labor, but that is being required and with his injuries he is in more pain and losing function.
> ….
>
> 2. Assessment Cervicalgia (M54.2).
> Impression Worsening since required to do heavy physical labor daily at his new position, when he was not supposed to have physical labor and only superintendant duties.
>
> 3. Assessment Cervical radiculopathy at C5 (M54.12).
> Plan Orders Further diagnostic evaluations ordered today include MRI C-Spine w/o contrast to be performed.

Exhibit H, pp. 129, 132.

29. On March 3, 2017, Dr. Redd wrote the following:

> To Whom it May Concern,
>
> David has been a patient of mine for several years now. I have seen him through various injuries and know his history well. He has kept me updated about his employment situation and when he reported being hired on as a superintendant I was pleased because he stated he was not hired to do physical labor. However, that is being required of him daily on top of his superintendent duties, and with his injuries, he is in more pain now and losing function. He is not sleeping enough and with his other medical conditions, if he is required to keep going at this rate

you will not have him as a superintendant in a year. Please, consider not requiring the daily physical labor of David in an effort to help him maintain his employability. Please, call with any questions.

Exhibit H, p. 134.

30. On March 22, 2017, Claimant presented to Dr. Redd who recorded:

> He has come in recently with a new injury. On 3/2/17 he came in complaining of new L hand numbness, pain and weakness, L arm pain, neck pain shooting down to his hand with certain movements of his neck. This began on 2/22/17, as far as he can tell, after an incident on the job that day, immediately after which these symptoms began and are worsening. I recommended he not have to perform manual labor, which he states was never in his job description, and have written a separate letter regarding this recommendation. I still do not recommend manual labor at this time. The results of his new symptoms now make it difficult to perform daily life functions, let alone any work functions at this time.

Exhibit H, p. 135.

31. Dr. Redd assessed cervical radiculopathy and referred Claimant to neurosurgeon Shane Andrew, D.O., for evaluation and treatment "ASAP" and expressly requesting: "Please see how soon David can be seen for new onset cervical radiculopathy that is causing weakness."

Exhibit H, p. 138.

32. Also on March 22, 2017, Dr. Redd authored another letter regarding Claimant and stating:

> He has come in recently with a new injury. On 3/2/17 he came in complaining of new L hand numbness, pain and weakness, L arm pain, neck pain shooting down to his hand with certain movements of his neck. This began on 2/22/17, as far as he can tell, after an incident on the job that day, immediately after which these symptoms began and are worsening.

Exhibit H, p. 140.

33. On April 6, 2017, Claimant presented to David Clements, PA, who recorded:

> Patient … presents today in consultation for his neck and bilateral upper extremity pain and numbness. He has a fairly complex history. He was having significant right upper extremity pain and paresthesias in 2010. He underwent 2 surgeries with the most recent by Dr. Johans in 2010 where an artificial disc replacement at C5-6 was performed. He states that the right are [sic] upper extremity pain

> resolved postoperatively. He states he has never had no [sic] left upper extremity symptoms.
>
> On February 22, 2017, patient was working for ESI. He states he was installing a 8 x 8 window in the when [sic] he caught it and it hit him in the face and head. Shortly after that, he developed intermittent numbness which will last up today [sic] in the right thumb area. Also new has left upper extremity pain and numbness into a C6/C7 distribution. This radiates into his thumb index and middle finger and up into his arm. He has severe neck pain as well as upper extremity pain. ….
>
> Patient also has a chronic right rotator cuff tear for which she [sic] was diagnosed 3 years ago but never had surgery because he cannot afford to take time off work.

Exhibit I, p. 1. Claimant was assessed with neck pain, cervical disc disorder at C6-7 with radiculopathy, and cervical disc disorder at C5-6 with radiculopathy.

34. On April 20, 2017, Claimant was examined by Dr. Andrew who recorded:

> Patient is a 47-year-old male that had a previous total disc replacement at C5-6 cervical years ago and presents today with degenerative disc disease at C6-7. He did have an MRI performed of the cervical spine which has a tremendous amount of artifact secondary to the metallic nature of the total disc replacement. The MRI was unusable. A CT myelogram of the cervical spine as [sic] needed. Patient did have a total disc replacement at C5-6 for herniated disc. The patient did well after that disc replacement however on February 22 of this year he developed some diminished function in feeling in his left hand and numbness and tingling in the index finger. He also is complaining of neck pain and left upper extremity pain and radicular fashion. Turning to the left and looking up increases his pain consistent with radiculopathy. …. He was originally at work when he injured [sic] which is for a construction company called ESI. Apparently the wind blew an 8 foot by eight-foot panel hitting him in the face with an extension mechanism. He complains of this time of muscle weakness in the left upper extremity with his grip strength being diminished. He had no difficulties after total disc replacement at C5-6 and his previous symptoms prior to that surgery were in the right upper extremity. He did have a rotator cuff tear on the left which was repaired in 2010.

Exhibit I, p. 4.

35. On May 24, 2017, Claimant underwent a cervical CT scan and on May 25, 2017, Dr. Andrew restricted Claimant from all overhead work and from lifting more than 10 pounds. Exhibit I, p. 8. On June 13, 2017, Dr. Andrew determined Claimant was totally incapacitated from working. Exhibit I, p. 14.

36. On August 3, 2017, Claimant was examined by Rodde Cox, M.D., at Defendants' request. Dr. Cox was unable to relate Claimant's left arm symptoms to the February 22, 2017 work incident.

37. On September 7, 2017, Dr. Andrew recorded:

> I reviewed the patient's EMG/NCS of the upper extremities. It is positive for nerve root irritation at C5-6 and C6-7. Patient did stop physical therapy secondary to the inability to pay for it as it is very expensive for him. He still complains of left upper extremity pain and issues there. He did get some relief with physical therapy. She [sic] would need a [sic] anterior cervical discectomy and fusion at C6-7 with possible removal of his total disc replacement at C5-6 and fusion there versus an anterior fusion at C6-7 and a posterior fusion from C5-6 down to C6-7.

Exhibit I, p. 24. Dr. Andrew continued Claimant off work.

38. On September 30, 2017, Claimant was examined by Tyler Frizzell, M.D., at Claimant's counsel's request. Dr. Frizzell agreed with Dr. Andrew's conclusions. Exhibit M.

39. **Condition at the time of hearing.** At the time of hearing on September 20, 2018, Claimant continued to experience persisting neck and left upper extremity symptoms.

40. **Credibility.** Having compared Claimant's testimony with other evidence in the record, the Referee finds that Claimant is generally a credible witness.

DISCUSSION AND FURTHER FINDINGS

41. 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).

42. **Accident and medical care.** The crux of the dispute herein is whether Claimant suffered an industrial accident on February 22, 2017, resulting in his need for cervical spine

surgery. Defendants' Answer admitted the February 22, 2017 incident but denied that Claimant suffered an injury therefrom and specifically denied that the condition for which he now claims benefits was caused by the incident. Exhibit C. Claimant asserts the 2017 incident caused him cervical injury resulting in his need for cervical surgery as recommended by Dr. Andrew.

43. Idaho Code § 72-102(18)(b) defines accident as "an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury." Idaho Code § 72-432 provides in pertinent part:

> the employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer.

Of course an employer is only obligated to provide medical treatment necessitated by the industrial accident, and is not responsible for medical treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995).

44. Claimant testified that he had no left upper extremity radiculopathy prior to February 22, 2017. He testified at hearing that he never had any radiating pain down his left shoulder after his 2010 cervical and left shoulder surgeries. He testified he returned to normal, had no loss of arm strength bilaterally, and was happy with his recovery after the 2010 cervical surgery. However he acknowledged persisting neck and back symptoms for which he treated with Dr. Redd:

Q. (by Mr. Joyner) Okay. Now the fact that you got back to normal, does that mean you—you never ever had any pain in your neck?

A. No.

Q. Okay. What kind of pain would you have in your neck?

A. I guess it's like a dull ache in my neck and sometimes, you know, it goes down my back. If I—if I overwork myself and I do feel—

Q. Where would—where would the dull ache in your neck be?

A. In the center of my—center of my neck. Kind of between my and my [sic] back right above my shoulders.

….

Q. Okay. Did you ever have any radiating pain down either arm after March 7th of 2011?

A. No until February 22nd—

Q. Okay.

A. –2017.

Transcript, p. 26, l. 8 - p. 27, l. 4.

45. Claimant also confirmed some left arm pain due to his left shoulder rotator cuff injury prior to February 22, 2017. Transcript, p. 33, l. 25 - p. 34, l. 21. He further explained that his ulnar nerve injury produced symptoms extending into his left ring and little fingers but no symptoms in the other fingers of his left hand. Whereas after his February 22, 2017 accident he noted numbness and pain extending from his neck, through his armpit and down to his left thumb, index, and middle fingers. Transcript, pp. 52-53.

46. Drs. Redd, Andrew, Frizzell, and Cox have addressed the causation of Claimant's present need for cervical surgery. The opinion of each is considered below.

47. Dr. Redd. Dr. Redd, board certified in family medicine, has been Claimant's primary treating physician and has treated him regularly since August 2012. Dr. Redd testified

he was not aware of Claimant's 2009 work injury but was aware of his prior cervical surgery. Dr. Redd did not recall any previous left shoulder treatment, but only right shoulder treatment. Redd Deposition, p. 8. Claimant presented to Dr. Redd approximately monthly and never less often than once every three months commencing in 2012 and continuing through the time of hearing. Dr. Redd began noting Claimant's right shoulder pain in September 2014 and he considered it chronic no later than February 2015. He continued treating Claimant's chronic right shoulder pain with prescription medications through January 2017.

48. Dr. Redd testified that Claimant's condition in January of 2017 showed no additional complaints of neck pain; "no changes" and he was "fairly stable at this point." Redd Deposition, p. 11, ll. 24-25. Dr. Redd testified that when Claimant presented on March 2, 2017, "He said he was not hired to do physical labor but that is being required. And with his injuries, he is in more pain and losing function. So, he indicated that due to the requirements that he was—that he had at work, that his pain was worse." Redd Deposition, p. 12, l. 25-p. 13, l, 5. Dr. Redd testified that although Claimant's chronic pain syndrome was documented on October 10, 2016, nevertheless it commenced far earlier and had been documented as early as 2012. Redd Deposition, p. 15.

49. Dr. Redd also testified that Claimant's neck symptoms in March 2017 were new:

> Q. (by Mr. Joyner) Okay. And so, going into March of 2017, if I just understand your testimony correctly, your focus in regard to his pain had been his right shoulder; is that accurate?
>
> A. Correct.
>
> Q. Okay. So, when we get to your March 2nd of 2017 medical document here, it now starts talking about neck pain.
>
> A. Yes.
>
> Q. Is that new?

A. To me, that was a new complaint.

Q. Okay.

A. He told me about his arthroplasty at that point. That's why I was aware that he had had surgery.

Q. Okay. And so, on March 2nd of 2017, do you see him or do you—what's the treatment plan after March 2nd or 2017?

A. So, I ordered an MRI of his neck in order to better characterize what was going on because of his symptoms. The symptoms he was describing were consistent with what we call a cervical radiculopathy, where you have pinching of the nerves on the neck that are affecting your extremity.

Q. Okay. And if I understand correctly, he had not described that particular symptomatology to you prior to March of 2017.

A. No, sir.

Redd Deposition, p. 17, l. 15-p. 18, l. 16. Due to Claimant's new cervical radiculopathy symptoms on March 22, 2017, Dr. Redd referred him to Dr. Andrew, a neurosurgeon, for evaluation.

50. Dr. Redd discussed his July 13, 2016 notes wherein he recorded Claimant's complaints of neck pain with radiation. His subsequent treatment notes thereafter until March 2, 2017 do not discuss any continuation of such symptoms. At his deposition, Dr. Redd explained:

Q. (by Mr. Joyner) Okay. And so, other than what looks like would have been July 13, 2016, are you aware of any other issues of neck pain or neck complaints from 2012 until—

A. I'm not. And I probably—I'll just say this: if he had emphasized it a lot, I would have paid more attention. I try to, you know, deal with what's being emphasized the most. And then if—you know, because chronic pain is a very difficult thing to manage, first of all.

But I say that in an effort to just—there can be a lot of different things happening at once with someone who did a lot of physical labor like he did. And so, when something new pops up, if he just kind of says it in passing, you know, I'll probably document it. But if it's not a game changer for his treatment, then it's not going to change the treatment.

> And if it comes up again, certainly like what happened in March, he brought it up again, he told me this is what's going on, so I got more information. I got more details about the injury and—you know, to try to see if we needed to take any further steps to evaluate it.

Redd Deposition, p. 24, ll. 1-21.

51. Dr. Redd testified that prior to March 2, 2017, Claimant's "major complaints, it was his shoulder." Redd Deposition, p. 25, ll. 5-6. After that time and Claimant's February 22, 2017 incident, he "continued to, in my estimation, be in more pain because of that injury." Redd Deposition, p. 25, ll. 23-24.

52. Dr. Andrew. Claimant deposed Shane Andrew, D.O., on October 26, 2018. Dr. Andrew is a board certified orthopedic spine surgeon. He first examined Claimant on April 20, 2017. He noted positive Spurling's maneuver sign in a C6-7 distribution and requested a CT myelogram of Claimant's cervical spine which showed mild to moderate foraminal stenosis at C5-6 and C6-7. Dr. Andrew testified that the findings of C6-7 constituted new pathology. Andrew Deposition, p. 11, ll. 14-20. On June 13, 2017, Dr. Andrew took Claimant completely off of work. Exhibit I, p. 19. On September 7, 2017, Dr. Andrew noted cervical EMG demonstrated evidence of irritation to the left C5-6 and C6-7 myotomes. He prescribed physical therapy which did not provide relief. He thereafter concluded Claimant "would need–an anterior cervical discectomy and fusion at C6-7 with possible removal of his total disc replacement at C5-6 and converting that to a fusion." Andrew Deposition, p. 18, ll. 5-7.

53. Dr. Andrew opined that the window panel blown into Claimant's face and head could cause the radiculopathy he observed. In response to the concern that Claimant had preexisting arthritis, Dr. Andrew testified that he had seen many patients with preexisting arthritis who were asymptomatic until an accident rendered the condition symptomatic and thereafter symptom control was difficult. Dr. Andrews specifically testified: "Q. Would the

need for surgery be related to the work-related injury of February 22, 2017 on a more-probable-than-not basis? A. Yes." Andrew Deposition, p. 20, ll. 4-6.

54. Dr. Frizzell. Tyler Frizzell, M.D., Ph.D., is a board certified neurosurgeon. He examined Claimant on October 30, 2017, and reviewed a number of his medical records. Dr. Frizzell noted Claimant's report that on February 22, 2107, he was picking up a temporary window panel when "the wind blew it back into his face and pushed his neck back and to the left. He noted numbness, pain down the left arm into the hand. Noted symptoms into the thumb, index and middle fingers. To the left forearm and upper arm" and that Claimant continued to have these left arm symptoms. Exhibit M, p. 1. Dr. Frizzell then concluded:

> In summary, Mr. Palmer developed left radicular symptoms confirmed by EMG testing with Dr. Djernes following a work injury 02/22/17. He spoke with Dr. Redd on 03/22/27 [sic], and Dr. Redd reports that the left hand numbness, pain, and weakness, and left arm shooting pain began 02/22/17 as far as Mr. Palmer can tell. I do not have any records that pre-date 02/22/17 that state he had left arm radicular symptoms. He was working an extremely heavy job prior to 02/22/17 without problems documented in the medical records. Mr. Palmer has seen Dr. Shane Andrew and Dr. Andrew is leaning toward surgical decompression at C5-6 and C6-7 which I am in agreement with given the electrical findings documenting radiculopathy performed by Dr. Djernes.
>
> Mr. Palmer's radicular symptoms began at the time of the 02/22/17 work event.

Exhibit M, p. 5.

55. Dr. Cox. Rodde Cox, M.D., is board certified in physical medicine and rehabilitation. Dr. Cox evaluated Claimant on August 3, 2017. Dr. Cox's initial report noted: "No records prior to 2/22/17 or subsequent to 6/13/17 were available for review." Exhibit 15, p. 3. Dr. Cox further recorded:

> The patient was seen by Dr. Redd on 3/2/17 due to a chronic condition. He reported onset on 10/10/16 in his left arm that was now numb. He reported prior history of neck problems in 2010 when he was seen by Dr. Johans. …. He was requesting medication refill. He was diagnosed as chronic pain syndrome, cervicalgia and cervical radiculopathy. His cervicalgia was worsening since being required to do heavy physical labor daily at his new position when he was not

> supposed to have physical labor and only superintendant duties. …. **The examinee was asked about the mention of reported onset of left arm symptoms on 10/10/16, he states that he does not have any recollection of this. When asked if he told Dr. Redd about the work injury he states that he did.**
> ….
>
> I find it very interesting that on initial report of care when seen by Dr. Redd the only mention of onset of injury was reportedly 10/10/16. There was no mention whatsoever of any specific injury however he did note that his job was more physically demanding than he expected. …. Based on this information I am not able to say on a more probable than not basis that his left sided cervical radiculopathy if indeed present was related to any particular work activity.

Exhibit 15, pp. 5, 12 (emphasis in original).

56. On December 5, 2017, Dr. Cox was provided additional medical records pre and post accident and on April 13, 2018, he issued an addendum report stating:

> It appears that Mr. Palmer had significant preexisting issues with his neck with significant disc osteophyte complex at C5-6 as well as flattening of the ventral spinal cord at C7-T1. He did undergo surgery by Dr. Johans in the form of a C5-6 anterior cervical discectomy, foraminotomy, and arthroplasty. Despite surgery he did continue to have significant symptoms. It is reported on several occasions that he had complaints of numbness and tingling in both arms. This was reported on 12/13/10 by Dr. Johans, on 12/22/10 by Dr. Krafft, on 12/30/10 with Dr. Johans, on 6/6/11 by Dr. Clark, where bilateral symptomatology was reported. Based on this information I continue to feel that I cannot say on a more probable than not basis that the neck pain and left arm pain with possible C6-7 radiculopathy is related to the injury of record as it appears he had significant preexisting symptomatology.

Exhibit 15, p. 32.

57. In his deposition, Dr. Cox testified that Claimant's left arm symptoms were likely resulting from the C6-7 disc osteophyte complex "mechanically putting pressure on the nerve root at that level." Cox Deposition, p. 13, ll. 1-2.

58. Dr. Cox focused on Dr. Redd's March 2, 2017 record which noted October 10, 2016 as the date of onset—which Dr. Cox interpreted to pertain to Claimant's reported left arm numbness at that time. However, in contrast, at his deposition Dr. Cox acknowledged:

Q. (by Mr. Joyner) …. So since 2012 in Dr. Redd's records until January of 2017, did you find any documents that indicated he was complaining of left-sided radicular pain?

A. I don't know whether that was in Dr. Redd's records. I believe, again, it was in 2013, an imaging study on his cervical spine that was done. And I believe if you looked under "Indications," it was bilateral arm pain.

Q. Okay.

A. I don't know if that was—as I sit here, I don't know if that was in Dr. Redd's records or outside of Dr. Redd's records. It looked like during that interval of time the majority of the issues that Dr. Redd was dealing with was his chronic pain and his right shoulder symptomatology.

Q. Okay. And neck pain clearly, talked about that, correct?

A. And neck pain.

Q. And at no point in time does Dr. Redd indicate prior to January of 2017 any left-sided radicular symptoms. Is that accurate?

A. Again, I don't know who ordered the x-ray of his neck. I'd have to look at that. If Dr. Redd ordered the x-ray of his neck with the indications of bilateral arm symptoms, then that might not be accurate.

Q. Okay. Well, would it be fair to say if you had seen any left-sided radicular symptoms from Dr. Redd's records, you would have put them in your report?

A. Yes.

Q. And you didn't put any of that in your report, did you?

A. I don't believe that's in there, no.

Cox Deposition, p. 42, l. 13-p. 43, l. 20.

59. Dr. Cox concluded that Claimant's "C6-C7 radiculopathy is due to pathology that was present as far back as 2009 and it was the natural progression of that." Cox Deposition, p. 47, ll. 10-12.

60. Weighing the medical opinions. Dr. Cox testified he was plagued by the question of why Claimant did not report the February 22, 2017 accident to Dr. Redd during his March 2,

2017 appointment. Similarly, Defendants question why Claimant did not inform Dr. Redd at his March 2, 2017 visit of the February 22 accident and did not inform his coworker, Manny, or his supervisor, Steve Condon, at the time of the incident that he was injured thereby.

61. Claimant testified he attempted to report his accident to Condon approximately one hour after it occurred:

> I–after getting everything put away I was walking back to the office. I see Steve leaving the office and heading for his truck. I ran after him. I tried to get his attention. He was telling me: I got to go, Dave. I got to go. I said, Steve, I need to talk to you, can you give me just one minute, please, and he—he—I won't forget what he said. He told me he doesn't like me well enough to discuss my personal issues and he turned around and got in his truck and left.

Transcript, p. 47, ll. 5-14. After Condon's response, Claimant was hesitant to bring up the matter again and for a time hoped that his radiating left arm pain would simply resolve. Only when it persisted after several weeks did he again attempt to advise ESI of his accident. Transcript, pp. 72-73. Dr. Cox recorded a brief but similar report. Exhibit 15, p. 4.

62. Dr. Cox cites and relies upon the medical records of Dr. Johans on December 13 and 30, 2010, Dr. Krafft on December 22, 2010, and Dr. Clark on June 6, 2011 as establishing numbness and tingling in both arms indicative of cervical radiculopathy. The medical records of Dr. Johans and Dr. Krafft clearly identify the arm symptoms as bilateral ulnar neuropathy suggesting mild ulnar entrapment at the elbows. After electrodiagnostic studies, Dr. Krafft expressly stated "There is no evidence of recurrent radiculopathy." Exhibit D, p. 57.

63. Defendants also emphasize Dr. Johans' concern expressed in his February 4, 2010 addendum wherein he stated:

> I think we can get away with only doing a C5-6 anterior cervical diskectomy, wide foraminotomy and a cervical arthroplasty. I think we can leave 6-7 alone and hopefully it will not become an issue in the future. The C6-T1 small disk herniation I think we can leave alone at this point. At this point it certainly does not need surgery but if it does in the future I would probably causatively go back to this [2009 injury].

Exhibit 9, p. 1. As persuasively argued by Claimant, Dr. Johans' comments in 2010 did not contemplate or purport to address causation given an intervening event such as Claimant experienced on February 22, 2017.

64. Defendants assert that Drs. Redd, Andrew, and Frizzell largely base their opinions on Claimant's subjective complaints which Defendants assert are unreliable. Defendants emphasize that the April 22, 2010 note of Erik Heggland, M.D., declared Claimant "had misrepresented much of his medical history" and that "in the setting of someone with chronic pain behaviors, possible secondary gain and drug-seeking issues, it is an important mix that would likely lead to failure" from a surgical perspective. Defendants' Responsive Brief, p. 17, quoting Exhibit G, p. 122. Dr. Heggland was then considering Claimant for left shoulder surgery and opined Claimant had minimal objective MRI findings to substantiate his complaint of unrelenting left shoulder pain. The validity of Dr. Heggland's criticism is undermined by Dr. Schwartzman's August 18, 2010 notes recording repair of a 75% full thickness left rotator cuff tear after which Claimant recuperated and returned to work.

65. Defendants assert that Claimant had C6-7 pathology at the time of his 2009 injury which naturally progressed to become symptomatic unaffected by the February 22, 2017 incident. Dr. Cox apparently initially believed that Dr. Redd's October 10, 2016 medical record documented Claimant reported left arm numbness at that time. However neither the October 10, 2016 record or Dr. Redd's testimony supports such an interpretation. Dr. Redd's July 13, 2016 note indicates the neck exam was normal and there was no mention of radiating left upper extremity symptoms. Dr. Redd testified his notes do not indicate he treated Claimant for neck pain at the August 5, 2016 visit. Redd Deposition, p. 23, ll. 10-25.

66. Dr. Cox further opined that the records of Dr. Krafft's December 2010 electrodiagnostic testing and Dr. Johan's x-ray request in January 2013 support his opinion of the natural progression of a preexisting condition. However, he also testified:

> Q. (by Mr. Joyner) Okay. And so my question for you is, there was some symptomatology on February 2nd of 2010. My question is, what do you see in the medical records that show a consistent symptomatology after 2010?
>
> A. I think you see findings that led to Dr. Krafft doing the electrodiagnostic testing on him.
>
> Q. Okay. What year was that?
>
> A. That was in December of 2010. I think that you see the symptoms that he was having that led Dr. Johans to do the ulnar nerve decompression. I think you also see the symptoms that led to the x-ray of the cervical spine with indications listed as bilateral upper extremity symptoms.
>
> Q. And when was the review of the cervical spine that you were just mentioning?
>
> A. That was in January of 2013.
>
> Q. January of 2013. Do you know when he had his ulnar nerve surgery?
>
> A. It looked like it was January 23rd of 2013.
>
> Q. Okay. So if they did the cervical evaluation in January of 2013, and then did the ulnar nerve surgery in January of 2013, would it be assumed that they ruled out the cervical problem?
>
> A. I don't know that you can say that they ruled out the cervical problem because the imaging studies that they did didn't allow accurate visualization of the level—at the C6-C7 level.
>
> Q. Okay. Did they pursue the cervical area any more after January of 2013?
>
> A. No.
>
> Q. Okay. And so from January 13 or—excuse me January of 2013 until January of 2017, are there any medical records that talk about any need to review his cervical spine?
>
> A. No, not that I saw.

> Q. Was there any indication in any of the medical records indicating he was complaining of radiculopathy in his left arm?
>
> A. Not that I saw, no.

Cox Deposition, p. 49, l. 8-p. 50, l. 21.

67. Dr. Cox's testimony acknowledges Claimant's absence of left arm symptoms for a period of four years prior to the February 22, 2017 incident. Dr. Cox further acknowledged that he had reviewed Dr. Redd's medical records and that Dr. Redd had seen Claimant every month or every other month from 2012 on.

68. The opinions of Drs. Redd, Andrew, and Frizzell are consistent with and supported by the medical records and are more persuasive than that of Dr. Cox.

69. Claimant has proven he suffered an industrial accident on February 22, 2017, causing cervical injury. Claimant has proven his need for reasonable and necessary medical care including cervical surgery due to his February 22, 2017 industrial accident.

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

> [O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is

> likely to continue throughout his period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his light-duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986).

71. In the present case, Claimant seeks temporary total disability benefits from May 25, 2017 and continuing through the date of hearing until he reaches medical stability.

72. Dr. Andrew placed Claimant on light duty work on May 25, 2017. Exhibit I, p. 8. ESI offered Claimant light duty work although he was then out of town. Dr. Andrew found Claimant totally incapacitated for work on June13, 2017. Exhibit I, p. 14. Claimant has proven he is entitled to total temporary disability benefits commencing June 13, 2017.

CONCLUSIONS OF LAW

1. Claimant has proven he suffered an industrial accident on February 22, 2017, causing cervical injury.

2. Claimant has proven his need for reasonable and necessary medical care including cervical surgery due to his February 22, 2017 industrial accident.

3. Claimant has proven he is entitled to total temporary disability benefits commencing June 13, 2017.

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 July, 2019.

INDUSTRIAL COMMISSION

__/s/_____
Alan Reed Taylor, Referee

ATTEST:
___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __9th__ day of ___August___, 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:

TODD M JOYNER
1226 E KARCHER RD
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ge Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID PALMER, Claimant, v. ENGINEERED STRUCTURES, INC., Employer, and NEW HAMPSHIRE INSURANCE CO. , Surety, Defendants.	**IC 2017-013000** **ORDER** **Filed August 9, 2019**

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 recommendation 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 he suffered an industrial accident on February 22, 2017, causing cervical injury.

1. Claimant has proven his need for reasonable and necessary medical care including cervical surgery due to his February 22, 2017 industrial accident.

2. Claimant has proven he is entitled to total temporary disability benefits commencing June 13, 2017.

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

DATED this __9th__ day of __August__, 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 __9th__ day of __August___ 2019, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

TODD M JOYNER
1226 E KARCHER RD
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