BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RICHARD HOLT, Claimant, v. VAN BEEK NUTRITION, Employer, and FEDERAL INSURANCE COMPANY, Surety, Defendants.	**IC 2017-004601** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **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 April 10, 2018. Claimant, Richard Holt, was present in person and represented by Todd M. Joyner, of Nampa. Defendant Employer, Van Beek Nutrition (Van Beek), and Defendant Surety, Federal Insurance Company, were represented by Eric S. Bailey, 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 September 13, 2018.

ISSUES

The issues to be decided were narrowed at hearing and in the parties' briefing and are:

1. Whether Claimant is entitled to additional medical care; and
2. The extent of Claimant's permanent disability.

CONTENTIONS OF THE PARTIES

All parties acknowledge that Claimant suffered an industrial accident on

January 11, 2017, when he slipped while moving a box at work, injuring his low back. Defendants accepted the claim and provided medical and temporary disability benefits. Claimant underwent diagnostic and conservative care, including extensive physical therapy. His low back condition was deemed non-surgical and was rated at 1% permanent impairment of the whole person. He was ultimately released to modified work and returned to work at Van Beek briefly but then ceased working, claiming increasing back symptoms. He asserts he has been largely unable to find work elsewhere. Claimant maintains he suffers permanent disability of 67.5%, inclusive of his 1% permanent impairment. Defendants argue Claimant overstates his continuing low back symptoms, is not motivated to return to work, and has not performed a meaningful work search. They assert he has at most a 5% permanent disability inclusive of his 1% permanent impairment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file.
2. Claimant's Exhibits A through M and Defendants' Exhibits 1 through 14, admitted at the hearing.
3. The testimony of Claimant and Tricia Basson taken at the hearing.
4. The post-hearing deposition testimony of Tracy Ervin, P.T., taken by Claimant on April 26, 2018.
5. The post-hearing deposition testimony of Delyn Porter taken by Claimant on June 12, 2018.
6. The post-hearing deposition testimony of Keith Holley, M.D., taken by Defendants on June 28, 2018.

All outstanding objections are overruled and motions to strike are denied. Claimant's Motion to Strike Exhibits from Defendants' Responsive Brief is denied as the Commission has repeatedly taken notice of the AMA, Guides to the Evaluation of Permanent Impairment previously and does so in the present case.

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 1979 and is left-handed. He was 38 years old and had resided in Twin Falls for two years at the time of the hearing. Van Beek Nutrition is a large manufacturing facility that produces nutritional products for livestock.

2. **Background.** Claimant was born in Fort Worth, Texas. He dropped out of school after the ninth grade. In approximately 1998, he moved to Oklahoma. From April through November 1999, Claimant served in the Job Corps while he received brick masonry training. He did not graduate. In 2005, at the age of 26, he earned his GED. In approximately 2006, he returned to Texas where he worked as an assembler, warehouseman, plumber's helper, landscaper, forklift operator, and tow truck driver.

3. Claimant has three felonies including discharging a stolen firearm in city limits in 2004 and theft in 2009. His criminal record has made obtaining employment more difficult.

4. In October 2015, Claimant moved to Lewiston where he worked for two months at a fishing lodge caring for the grounds, trimming trees, cutting firewood for the cabins, and performing general maintenance. He then moved to Twin Falls.

5. On January 15, 2016, a temporary employment agency placed Claimant at Van Beek, who eventually hired him directly. Claimant's duties included filling supplement bags,

sewing them closed, palletizing, shrink-wrapping loads, and stocking the warehouse. He commonly stacked forty 50-pound bags per pallet and used pallet jacks and forklifts to move pallets.

6. Claimant had no back injuries or back problems prior to January 2017. Claimant acknowledged that his job with Van Beek was "really [his] first full-time permanent position." Transcript, p. 58, ll. 18-20.

7. **Industrial accident and treatment.** On January 11, 2017, Claimant was working at Van Beek when he slipped on a pallet and nearly fell while carrying a 50-pound box. He felt a pop in his back and noted immediate low back pain. He reported the accident and was sent to St. Lukes where he was examined and released from work. He was earning approximately $12.18 per hour at the time of his accident. Claimant was off work for several weeks after which Van Beek created a light-duty job for him.

8. By February 7, 2017, Claimant's back had not improved and Douglas Stagg, M.D., ordered a lumbar MRI that revealed "Minimal degenerative change at L4-5 and L5-S1. At the L4-5 level there is a 3 mm circumferential posterior disc bulge with a small associated annular tear." Claimant's Exhibit D, p. 14. Dr. Stagg referred Claimant to physical therapy and then to David Jensen, D.O.

9. On February 21, 2017, Dr. Jensen examined Claimant, reviewed his lumbar MRI, and diagnosed low back strain and degenerative lumbar changes. He concluded Claimant's back condition was not surgical and recommended further physical therapy.

10. On February 27, 2017, Industrial Commission rehabilitation consultant Kristen Bench began working with Claimant. Bench orchestrated a light-duty job for Claimant at Van Beek.

11. By mid-March 2017, Claimant commenced light-duty work at Van Beek consisting of sweeping warehouses, helping in the office, taking out light trash, and making tags for mineral bags. Dr. Jensen performed one lumbar steroid injection which Claimant reported provided no benefit and then prescribed additional physical therapy. Claimant attended the physical therapy sessions but asserted they were of no help.

12. In April 2017, Claimant requested a permanent impairment rating and Dr. Jensen rated the permanent impairment of his low back at 1% of the whole person.

13. On April 25 and 26, 2017, Claimant underwent a functional capacity evaluation (FCE) by Tracy Ervin, P.T., to evaluate his lifting abilities. Claimant demonstrated he could stand for two hours, sit for three hours, and walk 10 blocks.

14. On May 2, 2017, Dr. Jensen and Claimant reviewed the results of the FCE. Having considered the FCE, Dr. Jensen restricted Claimant to lifting 10 pounds from floor to knees, 20 pounds from knees to waist, and 10 pounds overhead. Claimant's Exhibit E, p. 5.

15. In May 2017, Claimant's supervisor attempted to return Claimant to work filling bags with mineral and guiding the bags on a conveyor belt. However, after attempting this work Claimant reported it aggravated his back pain and he could not tolerate it repetitively. On May 3, 2017, Claimant signed a statement declaring:

> I am unable to perform the duties that have been laid out by my manager Zane Yokum in accordance with the Doctor's prescribed limitations which in detail is to place a bag on the bagger weighing .333 pounds, it then drops the weight in the bag and bag drops on to the conveyor. Richard then grabs a tag and guides the bag through the sewing machine.

Defendants' Exhibit 9, p. 203. Van Beek was unable to provide a less demanding permanent position. Claimant ceased working for Van Beek.

16. Claimant completed 12 more physical therapy sessions after his April 25-26, 2017 FCE with Ms. Ervin, but asserted his back condition did not improve.

17. Kristen Bench assisted Claimant in his job search from May 17 until August 14, 2017. Claimant searched for work for 16 weeks to qualify for unemployment benefits. However, after Claimant's sporadic follow through with job leads and missed vocation appointments, Bench closed Claimant's rehabilitation file on August 14, 2017. Thereafter Claimant sought positions in fast food restaurants, dishwashing, and packaging musical instruments. He obtained a few temporary and/or short term positions.

18. In September 2017, Delyn Porter interviewed Claimant at his counsel's request and produced a report regarding Claimant's employability. Porter concluded Claimant suffered permanent disability of 67.5% inclusive of his 1% permanent impairment.

19. In October 2017, Claimant presented to Dr. Jensen seeking stronger pain medications. Claimant was taking Methocarbamol with Tylenol for which Dr. Jensen prescribed refills; however, he refused to prescribe narcotic medications.

20. Also in October 2017, Claimant started taking on-line college classes at Independence University, an on-line college based in Salt Lake City. He commenced studying graphic arts but subsequently changed his major to business. He continued taking on-line classes through the date of hearing.

21. On February 23, 2018, Keith Holley, M.D., examined Claimant at Defendants' request and diagnosed lumbar myofascial strain due to the industrial accident and chronic low back pain with subjective complaints unsupported by objective evidence. Dr. Holley agreed with Dr. Jensen's rating of Claimant's permanent impairment at 1% of the whole person. He considered Claimant's February 2017 lumbar MRI:

> significant for the absence of what I would consider an acute pathology, essentially an acute tear or herniated disc. …. It did show some minor disc bulging and minor degenerative changes at the lower lumbar segments. I would consider these normal age-related changes on an MRI for a lumbar spine of someone Mr. Holt's age.

Holley Deposition, p. 7, ll. 16-22. Dr. Holley explained his ultimate conclusion that the MRI findings reflected age-related degenerative changes rather than acute injury:

> Q. (by Ms. O-Barr) You testified that you cannot age-date MRI findings—well, testified generally you cannot. Is it possible to use an MRI to differentiate between an acute and a degenerative condition?
>
> A. Yes, in some cases.
>
> Q. And in this case what led you to conclude that the mild degenerative changes on the lumbar spine were preexisting?
>
> A. The medical research shows that by the fourth decade of life that these types of changes on an MRI lumbar spine are present in over 50 percent of the population. That it was not associated with MRI findings of edema or other acute things that would suggest an acute tear or an acute injury; and, certainly, it wasn't the type of disc herniation, separate from a disc bulge, that more commonly is due to a traumatic event.
>
> So all of those factors led me to conclude that these are normal, age-related degenerative changes in Mr. Holt's lumbar spine.

Holley Deposition, p. 35, ll. 5-21.

22. Dr. Holley opined Claimant "had a lumbar strain related to the industrial injury of January 11, 2017" and by the time of the examination, it had resolved. Holley Deposition, p. 8, ll. 14-15. He diagnosed chronic low-back pain without objective findings and did not believe the accident permanently aggravated any pre-existing condition.

23. Claimant has unsuccessfully applied for Social Security Disability twice. Claimant's common law wife, Tricia Basson, has filed for Social Security Disability.

24. **Condition at the time of hearing.** At the time of hearing, Claimant continued to complain of significant low back pain and testified he took prescription medications three times daily. He had not been to a doctor for his work injury in more than six months.

25. By the time of hearing Claimant had attended on-line classes for approximately seven months. He believes he cannot perform physical labor jobs any more so he is focusing on formal education. He utilized government grants and loans to cover tuition and other school expenses. Claimant anticipates taking online classes for a total of 36 months to complete his bachelor's degree in business. He plans to keep looking for light-duty work as he continues his on-line classes. He utilizes temporary employment agencies to find odd jobs or part-time work within his restrictions. He identified only two jobs in four months through Extreme Staffing in Twin Falls; however, Claimant reported he could not do the jobs because of the lifting required. His most recent odd job was on a weekend holding signs for Ashley Furniture in Twin Falls.

26. **Credibility.** Having observed Claimant at hearing and compared his testimony with other evidence in the record, the Referee finds that Claimant is not an entirely credible witness. The record indicates that Kristen Bench, who assisted Claimant vocationally, and most of the medical providers who have dealt with Claimant have expressed concern about his apparent lack of motivation to return to work and/or his unusually high subjective pain complaints.

27. Bench assisted Claimant in his job search for four months. Several of her notes suggest a lack of interest by Claimant to seek work:

> 05/17/17 …. I asked if he found work or would like ICRD assistance in locating some job leads. The claimant stated he is working with DOL and making two job contacts a week. I asked if he wants ICRD services to assist. He said he wants to speak with his attorney first and will call me back. I asked who his attorney was and he said he already told me. I said I don't have a letter from the attorney and to let his attorney know that if he wants the ICRD notes, he must

> send us a letter of representation. The claimant said he will talk to his attorney and let me know if he wants ICRD services.
>
> 05/18/17 The claimant called and said he had spoken to his attorney (Joyner out of Nampa) and the attorney told him to work with me.

Defendants' Exhibit 11, p. 223.

28. On May 22, 2017, Bench met with Claimant and provided a list of eight actual jobs within the work restrictions imposed by Dr. Jensen. Claimant testified at hearing that he applied for these jobs. However, his job search records indicate he did so over the span of several weeks, rather than promptly as directed by Bench.

29. Claimant did not call or show for his scheduled appointment with Bench on June 5, 2017. The following day Bench recorded:

> I spoke with the claimant and the claimant said he forgot about the appointment on 06/05/17. I asked if he had applied for any of the jobs or if he was working. He said he has so many things going on right now, but he is not working and did apply for some of them. He said he didn't want to work in Jerome and some of the jobs were in Jerome and he couldn't apply for part time work because UI doesn't accept that. I explained we look for work within the local area, 50 miles radius of Twin Falls, and I will continue to look for work within that range for him. I explained I am not working with UI and I gave him the part time jobs to apply for as a start to possibly get employment to work into a full time job. I explained I didn't want him only applying to two jobs a week. I gave him that list to apply all in a week to get his name out. I explained if he only applies for two jobs a week because UI only requires that, he will not get a job quickly. The claimant said he is going to see Dr. Jensen tomorrow at 2:00 PM to discuss a work hardening program that they want him to attend. He said he wants to know if he has to attend it or if he can say no.

Defendants' Exhibit 11, pp. 224-225 (emphasis supplied). Claimant attended the work hardening program but by July 5, 2017, "the end result wasn't much of a change from the time he started." Defendants' Exhibit 11, p. 225. Dr. Jensen considered Claimant's work restrictions unchanged.

30. On July 12, 2017, Bench contacted Claimant and "asked him about making an appointment to begin job searches and he wasn't real responsive to it, he said he wants to see what the doctor says first. He said he doesn't know about work because he is still in a lot of pain." Defendants' Exhibit 11, p. 225.

31. On July 19, 2017, Bench recorded:

> I spoke with the claimant and asked how his doctor's appointment went. He said Dr. Jensen said there was no change on restrictions and to look for work within those already given. I suggested a vocational appointment be scheduled to begin looking for work. The claimant said he's not sure if he can work due to the pain in his back. I explained if we don't begin looking for vocational avenues, I am going to have to close the rehab file, since he is not being treated, has permanent restrictions, and was given a PPI. The claimant said his attorney said to keep the file open. I explained in order for it to stay open, he must work with me on vocational. The claimant said ok, he'll work with me. A vocational appointment was scheduled for 07/25/17 at 9 am. The claimant then stated he may have a difficult time getting around for work as his truck is still not fixed. I stated I will still look for vocational avenues for the appointment. The claimant informed me he is currently applying for SSDI. I said that's fine, we can still look for work.

Defendants' Exhibit 11, p. 226.

32. On July 25, 2017, Bench met with Claimant and reviewed his job search. Bench recorded: "he's not getting hired because the jobs he's applying for have heavy lifting requirements. We discussed the need to apply for jobs that fall within his work restrictions of 10 lbs, that way he is able to be hired." Defendants' Exhibit 11, p. 226. Bench gave Claimant six new job leads including front desk, cart/greeter, guest services, and customer service representative positions at Motel 6, Comfort Inn, Wal-Mart, Target, and C3. On August 1, 2017, when Bench next met with Claimant, he reported he had applied for only two of the six job leads she provided the week before. Six more job leads were identified, including service writer, kennel worker, rental counter clerk, front desk clerk, and hospitality attendant.

33. On August 10, 2017, Claimant called to reschedule his appointment that day with Bench. On August 14, 2017, Claimant failed to call or attend his rescheduled appointment. Bench attempted unsuccessfully to reach Claimant and left a voice message regarding impending closure of his rehabilitation file. The record does not indicate that Claimant responded to Bench's message. Bench closed Claimant's file.

34. Tracy Ervin, P.T., administered a functional capacity evaluation to Claimant on April 25-26, 2017, and noted his report of pain at 8 or 9 on a scale of 1 to 10. During her post-hearing deposition she testified:

> A. I would expect, on my scale of zero to ten, zero being no pain and ten being emergency room pain, and that's how I described that to my clients and my patients when I'm asking them to rate the pain. …. If anyone is sitting at an eight or a nine or a ten, ten being you should be in the emergency room, I would expect objective signs of grimacing, limping, antalgic gait, guarded movement patterns, difficulty moving on and off my tables, chairs. There should be objective movement patterns that I can visually see and document as fact.
>
> Q. (by Mr. Joyner) …. So I'm gathering you didn't see any of those signs as far as—Richard indicated his pain and the movement patterns you saw?
>
> A. There were a few documented times where I noted there was some mild guarding, or slow patterns of movement, but they were few, and did not seem to match the level of pain he was reporting.

Ervin Deposition, p. 23, l. 20 through p. 24, l. 12. Ervin further testified:

> What I noticed with walking was that it was a slow pace that seemed to be self-selected, meaning there didn't appear to be any particular physical limitation for the slow pace. For example, I wasn't seeing a limp, I wasn't seeing stiffness in the joints. But he was reporting low back pain with the walking, which might account for the slow pace.

Ervin Deposition, p. 30, ll. 12-19.

35. Ervin noted Claimant had delayed onset muscle soreness on day two of the FCE due to his upper body deconditioning. Ervin Deposition, p. 31. After the FCE, she attempted to address Claimant's deconditioning with a four week period of "manual" physical therapy

consisting of work-conditioning activities specific to his time-of-injury position and designed to significantly improve his ability to return to work. Ervin testified that this manual therapy usually produces excellent results. However, she reported: "Over the four weeks that I saw him, there was really no significant or notable change in reports of symptoms, changes in his performance or notable changes in his Outcomes reports." Ervin Deposition, p. 40, ll. 8-11. Ervin recorded of Claimant's performance during his concluding FCE reevaluation on June 29, 2017: "He continues to rate his pain levels very high. However, his movement patterns and demeanor do not reflect these high ratings. …. His motivation levels seem low in regards to improvement." Exhibit H, p. 27. She reaffirmed this concern during her deposition. Ervin Deposition, p. 59.

36. Andrew Mix, P.T., provided physical therapy to Claimant prior to the FCE. After approximately 10 physical therapy treatment sessions in which Claimant showed little progress, Mix recorded on March 27, 2017, that Claimant "did not respond to my suggestion to go back to being a tow truck operator, which he says he could easily do." Claimant's Exhibit G, p. 11. On April 5, 2017, Mix noted Claimant: "continues to have significant symptoms …. He has shown only mild improvement in function …. Richy promises to keep up his exercises but does not seem to be motivated to return to full duty at work and will not likely benefit from further skilled PT."[1] Claimant's Exhibit G, p. 14.

37. Dr. Jensen examined Claimant in early April 2017, and recorded:

> He has finished up with physical therapy. He had about 12 visits with Lifestyles Physical Therapy. He does not feel like he has had any improvement with his

[1] Noting Mr. Mix's ultimate conclusion, Tracy Ervin testified: "At the conclusion of our therapy together, that's where I landed as well, as far as my opinion." Ervin Deposition, p. 65, ll. 14-15. Ervin was sufficiently concerned to discuss with Dr. Jensen telephonically Claimant's "lack of progress with the therapy. We talked about his high rate of pain levels in absence of expected demeanor in movement patterns associated with high levels of pain. We talked about his lack of progress with the work-conditioning activities …." Ervin Deposition, p. 68, ll. 20-25.

> symptoms. We also did an injection, which he also states did not change any of his symptoms. He states that he is not using much in the way of any medicines, some over-the-counter medications.
> ….
>
> I discussed with the patient further treatment options such as a trial of chiropractic. He states he is not interested in that. He states he is not interested in any more treatment. He states what he would like is to get an impairment rating. I explained to him, having an impairment rating done would indicate that he is at Maximum Medical Improvement and once again made sure he did not wish to try any other treatment of evaluations. He once again stated he is not interested. ….
>
> As far as an impairment, using AMA Guide to Impairment, Sixth Edition, Table 17-4 under nonspecific chronic or chronic recurrent low back pain, chronic strain, class 1 gives between zero and three with the default being two. His functional history modifier is a one. Physical exam modifier is zero. Clinical modifier is a one. Leading to an overall net adjustment of -1; therefore, his impairment would be a 1% whole person impairment.

Claimant's Exhibit E, pp. 2-3. On August 25, 2017, Dr. Jensen opined Claimant was at maximum medical improvement and no further treatment was recommended. He discussed with Claimant being active, continuing with stretching activities, and discharged Claimant from his care. Claimant's Exhibit E, p. 3.

38. On October 5, 2017, Claimant returned to Dr. Jensen who recorded:

> This is a gentleman who comes in stating the medications do not help and he wants stronger medications.
> ….
>
> I discussed with him I would stop all medications. I absolutely would not give him anything such as a narcotic. He can just use Tylenol and ibuprofen. …. I do not recommend any further medications.

Claimant's Exhibit E, p. 1.

39. Dr. Holley examined Claimant on one occasion in February 2018. He testified that "the primary reason [Claimant] met the criteria for any impairment was because of his ongoing subjective complaints of low-back pain." Holley Deposition, p. 31, ll. 16-18. Regarding Claimant's subjective complaints, Dr. Holley opined:

> So I believe the level of pain reported by Mr. Holt is completely out of proportion to objective findings in this case, and there is really not an objective finding either by imaging or physical exam that would warrant an impairment rating under the AMA 6th Edition Guides.
>
> However, the AMA Sixth Edition Guides do allow for a small impairment, generally 1 or 2 percent, in someone who has had a straining-type injury to the lower back with persistent symptomatic complaints, although they're unsubstantiated by objective findings.

Holley Deposition, p. 14, l. 21 through p. 15, l. 6. Dr. Holley recorded: "It is felt that his recovery and subjective improvement has been retarded by his pre-existing physical deconditioning and obesity, as well as psychosocial factors. He clearly exhibits a high degree of disability conviction and lack of motivation to return to gainful employment." Defendants' Exhibit 8, p. 174.

40. At hearing Claimant testified that none of his treatment improved his back pain and that he was in excruciating pain:

> Q. (by Mr. Bailey) I've looked through all of your medical records, including the treatment with Dr. Stagg, Dr. Jensen, a couple of physical therapy outfits that you went to, and my interpretation of the records is that none of the medical care that was given to you helped your condition at all?
>
> A. Nope.
>
> Q. You started out with your back complaints and pain of anywhere from 8 to 10 on a scale of 1 to 10, and that's how it ended up at the very end, also; is that accurate?
>
> A. It's been that pain scale since the accident.
>
> Q. That was going to be my next question. Is that the way it is today?
>
> A. Yes.
>
> Q. Is that the way it is right now as you're sitting here?
>
> A. Yes.
>
> Q. So as you're sitting here, you're experiencing pain that most people would

consider excruciating pain of 8 to 10 on a scale of 1 to 10?

A. Yes.

Transcript, p. 66, l. 16 through p. 67, l. 12. No indication of Claimant's reportedly excruciating pain at hearing was apparent to the Referee.

41. When asked what physical issues Claimant listed on one of his two Social Security Disability applications that he believed rendered him totally disabled he replied: "Two torn lower discs, the L4-L5, and right hip tissue damage from the slip-and-fall." Claimant's Deposition (Defendants' Exhibit 14), p. 12, ll. 23-24 (emphasis supplied).

42. The record establishes that Claimant was not motivated to find employment or return to work after his release by Dr. Jensen. The record also establishes that Claimant overstates the extent of his injuries and his reports of severe or excruciating back pain are not consistent with his demeanor and presentation. To the extent Claimant's self-reported pain declarations are inconsistent with other evidence in the record, his statements will be considered suspect. To the degree Claimant's restrictions are based solely upon his declarations of pain, they will be considered suspect.

DISCUSSION AND FURTHER FINDINGS

43. 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).

44. **Medical care.** The first issue is Claimant's entitlement to additional medical care for his January 11, 2017 industrial accident. Idaho Code § 72–432(1) requires an employer to provide an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Of course an "employer cannot be held liable for medical expenses unrelated to any on-the-job accident or occupational disease." Henderson v. McCain Foods, Inc., 142 Idaho 559, 563, 130 P.3d 1097, 1102 (2006). Thus claims for medical treatment must be supported by medical evidence establishing causation. A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995).

45. In the present case, Claimant alleges he is entitled to additional medical treatment consisting of a three month gym membership. Defendants resist his request.

46. After finding Claimant medically stable and providing an impairment rating at Claimant's express request in April 2017, Dr. Jensen declined Claimant's request for stronger pain medications in October 2017, and recorded:

> I feel like the most important thing for him is to further strengthen his back. He could benefit from a 3-month gym membership that should be payed [sic] for for him. If he would do that and do that every day, he would likely feel better, his back will get stronger, his pain will reduce. I do not recommend any further medications.

Claimant's Exhibit E, p. 1. Although noting Claimant could benefit from gym membership if he applied himself every day, it does not appear Dr. Jensen prescribed or requested Surety's

authorization of a gym membership.

47. As previously set forth, physical therapists Andrew Mix and Tracy Ervin documented Claimant's lack of improvement in spite of physical therapy over the course of several months. Ervin documented that by July 14, 2017, Claimant was "doing physical therapy home ex.; trying to walk about 1 mile/day; otherwise, enjoys playing video games at home" and "is no longer working out at the gym." Ervin Deposition, Exhibit 1. Similar references to Claimant's minimal level of physical activity and interest in video gaming appear in nearly every record during the period Ervin treated Claimant.

48. Both Dr. Jensen and Dr. Holley found Claimant reached maximum medical improvement and needed no further medical treatment for his industrial accident. Dr. Holley and Dr. Jensen opined Claimant is medically stable and rated his permanent impairment at 1% of the whole person. While Dr. Jensen's October 2017 note acknowledges Claimant could benefit from a gym membership, according to Claimant's testimony quoted previously no treatment to date, including multiple medications, a steroid injection, or months of therapy—including intensive manual physical therapy customized to his job duties from multiple skilled physical therapists—improved his back condition. Dr. Holley noted Claimant's obesity and opined he would benefit from regular exercise, but did not recommend further medical treatment and testified persuasively that a gym membership was not necessary under his industrial injury claim.

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

50. **Permanent disability**. The next issue is the extent of Claimant's permanent disability due to his industrial accident. "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.

51. 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 generally 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.

52. Work restrictions. In the present case, two physicians opined regarding work restrictions. Dr. Jensen largely relied upon Tracy Ervin's April 2017 FCE and restricted Claimant to lifting 10 pounds from floor to knees, 20 pounds from knees to waist, and 10 pounds overhead. Claimant's Exhibit E, p. 5. However, in evaluating Claimant's FCE performance, Ervin herself recorded that while Claimant gave consistent effort: "With lifting testing he is limited primarily due to symptoms, with few objective signs that maximum capacity has been reached." Exhibit H, p. 27.

53. Dr. Holley reviewed the FCE and concluded it was apparent that Claimant's significant limitations were based on his self-reported pain. Holley Deposition, p. 12. Dr. Holley testified regarding functional capacity evaluations: "I don't feel they are a perfect measurement tool" and did not rely on them solely in formulating his opinion.

54. Dr. Holley reviewed Dr. Jensen's last reported examination on October 5, 2017 and testified "There is [sic] no objective findings on exam that substantiate [Claimant's] high levels of reported pain." Holley Deposition, p. 16, ll. 8-9. Dr. Holley explained alternative causes for Claimant's reported subjective symptoms:

> Well, he's noted to be overweight and musculoskeletally deconditioned, and to be a smoker. And tobacco use, as well as poor core conditioning and an obese status are all known risk factors that increase the incidence of reported low-back pain in the population. I feel these factors, as well as psychosocial issues, are more responsible and at play here as the reason for his ongoing complaints.

Holley Deposition, p. 34, l. 21 through p. 35, l. 4. Dr. Holley agreed with Dr. Jensen that further prescription medication was not indicated and opined Claimant had no permanent physical restrictions.

55. The Referee finds the restrictions determined by Dr. Jensen are influenced by Claimant's deconditioning and overstated pain complaints and constitute conservative estimates of Claimant's actual functional ability.

56. Opportunities for gainful activity. Claimant asserts his low back condition makes it difficult for him to work. Two vocational experts have addressed his employability and Claimant himself has produced evidence of his search for employment.

57. *DeLyn Porter*. DeLyn Porter, MA, CRC, a vocational expert retained by Claimant, interviewed Claimant on September 14, 2017, and prepared a report evaluating his disability. Mr. Porter has been a vocational rehabilitation counselor and consultant for approximately 27 years. He considered Claimant limited to sedentary work according to the FCE. Porter noted that Claimant is five feet eleven inches tall and weighed 227 pounds.

58. Porter agreed that Claimant's work history was sporadic prior to his employment with Van Beek:

> Q. (by Mr. Bailey) And based upon your understanding of his history, going back in time, due to the felony issues that he had … in Texas or Oklahoma or a combination of the two—that, in fact, his employment history subsequent to those dates and up until obtaining employment with Van Beek were tempered by the felonies and, likewise, his work history is part-time, temporary work with a lot of under-the-table cash payment because of those felonies? Is that your understanding?
>
> A. Yes.

Porter Deposition, p. 37, ll. 6-17.

59. Porter calculated Claimant's loss of labor market access at 80.8% and his wage loss at 13.7%. Straight averaging of these two factors would produce a disability of 47.25%. However, Porter concluded that Claimant suffered permanent partial disability of 67.5% inclusive of his 1% permanent partial impairment. He arrived at this figure by weighting

Claimant's loss of labor market access by a multiplier of 1.5 and then averaging it with his wage loss. Porter selected this multiplier per his masters program training and acknowledged that a different multiplier may be appropriate given Claimant's prior felonies:

> Q. (by Mr. Bailey) Okay. And I realize you have not done the calculations, but if you backed out these types of occupations pre-injury that Mr. Holt would have been precluded from by way of his history with the law or the fact that he had never actually performed those types of jobs, I assume that that would make the multiplier decrease because the numbers would be closer; would that be an accurate statement?
>
> A. Yes.

Porter Deposition, p. 42, ll. 4-13.

60. *Kristen Bench*. Industrial Commission rehabilitation consultant Kristen Bench assisted Claimant with his job search. Bench identified and provided Claimant job leads consistent with the lifting restrictions imposed by Dr. Jensen. After assisting Claimant with his job search from March through August 2017, Bench ultimately closed Claimant's rehabilitation file after he repeatedly failed to pursue job leads she provided and missed scheduled appointments. At file closure, Bench identified multiple job leads and potential earnings within Dr. Jensen's restrictions and summarized Claimant's labor market and employment opportunities:

> In conclusion, my recommendation is as follows: my vocation[al] research indicates the claimant would not be able to return to his pre-injury position. At the time of the injury, the claimant was working in a heavy strength category averaging 40 hours a week. The claimant's current restrictions allow him to work in a sedentary to light strength category with no limit on hours worked. Despite the permanent restrictions the claimant has been given, employment is available in the claimant's local labor market area that would restore the claimant to his pre-injury wage. Many jobs are available in his labor market and are regularly listed with the Idaho Department of Labor and various job seeking websites that meet the claimant's restrictions, which he should pursue to ensure full time employment within his restrictions.

Defendants' Exhibit 11, p. 231. It does not appear that Claimant ever informed Bench of his prior criminal record.

61. *Claimant's job search.* Claimant testified at hearing he believes there are jobs he can do and he has been looking for work. His job search form, contained in Claimant's Exhibit L, shows a total of 42 job contacts between May 27 and September 9, 2017—a period of approximately 16 weeks—for an average of 2.6 contacts per week. Interestingly, 18 of his contacts were on Sundays, 19 contacts were on Saturdays, three were on Labor Day (September 4, 2017), and the remaining two were on a Wednesday or a Thursday. Claimant's job search log indicates follow-up after initial contact with only nine of the 42 businesses contacted. Claimant testified that after his job at Van Beek he collected unemployment ending September 12, 2017. Claimant's Deposition (Defendants' Exhibit 14), p. 9, l. 23. His job search record coincides with his receipt of unemployment benefits. Claimant's work search appears cursory and largely motivated by his desire to qualify for unemployment benefits. Claimant testified at hearing that he was willing to try tow truck driving. His job search record does not indicate that he applied for such a position. Physical therapist Andrew Mix encouraged Claimant to pursue tow truck driving after he reported he could easily return to tow truck driving.

62. *Weighing the vocational evidence.* Claimant asserts permanent disability of 67.5% inclusive of his 1% permanent impairment. Defendants urge a finding of 5% permanent disability inclusive of Claimant's 1% permanent impairment.

63. Porter did not indicate he was aware Claimant had been taking on-line college business classes since October 2017. Even when providing an addendum to his report on March 23, 2018, Porter made no mention of Claimant's pursuit of a business degree and the probable future impact of this training on his permanent disability. As noted, permanent

disability is generally measured at the time of the hearing, in this case April 10, 2018. Claimant testified by the time of hearing he had been taking on-line college classes for seven months. Porter's employability analysis and conclusions entirely omit this significant factor that enhances Claimant's future employability. Mr. Porter summarized Claimant's education: "I understand he dropped out of school after the 9th grade and then went on to get his GED while he was enrolled in Job Corps, if I remember correctly." Porter Deposition, p. 15, ll. 8-11. Porter was not aware of any post-GED training. Porter testified he was not provided with a copy of Claimant's deposition or the hearing transcript. Porter Deposition, p. 43, ll. 6-13. Claimant testified in his February 8, 2018 deposition that he had then been in on-line courses for four months for computer graphic arts.

64. Dr. Holley and Tracy Ervin observed it was unusual that Claimant reported so much ongoing pain when he was not working or otherwise involved in a physically taxing activity. Ervin discussed this concern with Dr. Jensen.

65. Claimant readily acknowledged that his job at Van Beek was his first full-time permanent position, that all of his previous work had been short term and/or sporadic work for friends or temporary employment agencies. Claimant's Deposition (Defendants' Exhibit 14), p. 30, ll. 1-9; Transcript p. 58, ll. 18-20. Claimant's only tax forms contained in the record show adjusted gross income for 2013 of $9776.50 and for 2014 of $13,813.00—less than the annualized earnings of any full-time minimum wage job. Claimant was earning $12.18 per hour at the time of his industrial accident and has lost labor market access due to his industrial back injury. However, any minimum wage job would restore 60% of his time of injury earnings. Work as a tow truck operator at $10.00 to $15.00 per hour—which Claimant testified he could

perform but had actually declined an offer to pursue—would restore 82% to 123% of his time-of-injury earnings.

66. Additionally, evaluating permanent disability includes an evaluation of an injured worker's likely future wage earning capacity. Completion of his on-line business degree, as Claimant testified he intends to do, would likely increase both his light-duty labor market access and his wage earning capacity and potentially restore his time-of-injury wage and more. Even without completion of his business degree, Kristen Bench, who worked more closely and for a longer period with Claimant than any other vocational expert, concluded that many jobs are regularly available in his labor market that meet the permanent restrictions imposed by Dr. Jensen and employment is available that would restore Claimant's pre-injury wages.

67. Claimant's history of three felonies will preclude his access to a portion of the light-duty job market. The record indicates his computer skills are presently limited. However, his continued pursuit of a business degree on-line will likely increase his computer skills while also providing access to additional areas of the light-duty labor market.

68. Based upon Claimant's permanent impairment of 1% of the whole person, very conservative permanent physical restrictions determined by Dr. Jensen based in part upon Claimant's self-reported pain complaints, and considering all of his medical and non-medical factors including but not limited to transferable skills, criminal record, inability to return to previous positions, and age of 37 at the time of the industrial accident and 38 at the time of the hearing, Claimant's ability to compete in the open labor market and engage in regular gainful activity after the industrial accident has been reduced. The Referee concludes that Claimant has proven permanent disability of 15%, inclusive of his 1% whole person permanent impairment.

CONCLUSIONS OF LAW

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

2. Claimant has proven he suffers permanent disability of 15% inclusive of his 1% whole person permanent impairment due to his industrial accident.

RECOMMENDATION

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

DATED this __26th__ day of November, 2018.

INDUSTRIAL COMMISSION

_/s/_____
Alan Reed Taylor, Referee

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 RECOMMENDATION** was served by regular United States Mail upon each of the following:

TODD M JOYNER
1226 E KARCHER ROAD
NAMPA ID 83687-3075

ERIC S BAILEY
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PO BOX 1007
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_/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RICHARD HOLT, Claimant, v. VAN BEEK NUTRITION, Employer, and FEDERAL INSURANCE COMPANY, Surety, Defendants.	**IC 2017-004601** **ORDER** **FILED** **NOVEMBER 30, 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 not proven that he is entitled to additional medical benefits due to his industrial accident.
2. Claimant has proven he suffers permanent disability of 15% inclusive of his 1% whole person permanent impairment due to his industrial accident.
3. Pursuant to Idaho Code § 72-718, 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 **ORDER** was served by regular United States mail upon each of the following:

TODD M JOYNER
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sc _/s/_____