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

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| JOEL MARES,<br><br>Claimant,<br><br>v.<br><br>LONE PINE DAIRY,<br><br>Employer,<br><br>and<br><br>STATE INSURANCE FUND,<br><br>Surety,<br>Defendants. | **IC 2015-020467**<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**<br><br>FILED<br>AUG 12 2021<br>INDUSTRIAL COMMISSION |

## INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John Hummel, who conducted a hearing via Zoom on September 16, 2020. Claimant, Joel Mares, was present; Bryan S. Storer, of Boise, represented Claimant. Neil D. McFeeley, of Boise, represented Defendant Employer, Lone Pine Dairy, and Defendant Surety, State Insurance Fund. The parties presented oral and documentary evidence at the hearing, took post-hearing depositions, and submitted briefs. The matter came under advisement on March 11, 2021.

## ISSUES

The issues to be decided by the Commission as a result of the hearing are:

1. Whether, and to what extent, Claimant is entitled to the following benefits:
    a. Medical care;
    b. Temporary Partial and/or Temporary Total Disability (TPD/TTD);

c. Permanent Impairment based on medical factors;

d. Disability based on all factors; and

e. Attorney fees.

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

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

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

## CONTENTIONS OF THE PARTIES

Claimant alleges that on July 3, 2015, he suffered a left shoulder injury while working for Employer. As a result of the industrial accident, for which he received medical care, including surgery, Claimant contends that he is entitled to additional medical care, PPD, and attorney fees.

Defendants assert that Claimant's left shoulder injury received appropriate medical treatment, including surgery from Dr. Daines. Because Dr. Daines released Claimant to return to work without restrictions, Defendants allege that Claimant is not entitled to any disability above the impairment rating specified by Dr. Daines. Even if Dr. Radnovich's restrictions were accepted, Defendants assert that it would result only in a small disability over impairment. Furthermore, Defendants allege that Claimant's restrictions from his 2010 neck injury should apportion any award of disability in this case. Defendants deny Claimant's entitlement to attorney fees.

## OBJECTIONS

All unresolved objections from the hearing and post-hearing depositions are overruled.

## EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The transcript of hearing;
2. Joint Exhibits 1 through 20, admitted at the hearing;
3. The post hearing deposition testimony of Nancy Collins, PhD, taken by Defendants;
4. The post hearing deposition testimony of Richard Radnovich, DO, PC, taken by Claimant; and
5. The post hearing deposition testimony of Douglas Crum, taken by Claimant.

The Commission has reviewed the proposed Findings of Fact, Conclusions of Law and Recommendation authored by Referee Hummel, and concludes that different treatment is warranted on the issues of disability and apportionment. Accordingly, the Commission declines to adopt the proposed decision and issues these findings of fact, conclusions of law, and order.

## FINDINGS OF FACT

1. **Claimant's Background**. Claimant was born in Mexico on December 2, 1968. He attended school until the third grade. He is a permanent resident of the United States. He emigrated to this country when he was sixteen years old. Tr., 16:15-25; 17:12-14. He was 51 years old at the time of hearing. *Id.* at 18:19-20.

2. Claimant testified at the hearing through a Spanish interpreter. He stated that he reads "very little in Spanish." Nevertheless, on one occasion during the hearing, Claimant answered his counsel's question before the interpreter interpreted it for him. *Id.* at 44:12-19. Claimant acknowledged under cross examination that he has learned to speak and understand

English to at least some degree, including well enough to accomplish his job duties. *Id.* at 46:5-21. Claimant communicated with both doctors and employers in English. *Id.* at 46:8-13.

3. Claimant has worked in the agricultural field in dairies since 1991. Tr., 17:24-18:1. Prior to that, he worked for golf courses. He was also employed in a job that required him to work with fiberglass. All his work has been in labor. *Id.* at 17:17-18.

4. Claimant is right-hand dominant. *Id.* at 53:9-10.

5. **Prior Medical Conditions**. Prior to sustaining the industrial accident at issue in this case, Claimant had a left shoulder injury while working for the Big Willow Heifers on November 15, 2009. This occurred while Claimant was throwing a saddle on a horse. After chiropractic care with Timothy Trees, D.C., the condition resolved. Ex. 14:8; Ex. 16:4.

6. Again, while working for Big Willow Heifers, Claimant sustained a cervical injury with left upper extremity radiculopathy. This occurred on April 9, 2010, when Claimant was reaching up for an object while slipping in silage and felt a pop in his arm or shoulder or neck; he subsequently began having pain down his left arm and some pain in his neck. Ex. 15:1.

7. On May 11, 2010, Ronald E. Jutzy, M.D., a neurosurgeon based in Boise, diagnosed Claimant with an extruded left C5-7 disk with C5 and C7 radicular findings with no myelopathy. Dr. Jutzy prescribed an anterior cervical diskectomy with allograft interbody fusion at the C5-7 level to decompress Claimant's cervical spinal cord and his C5 and C7 nerve roots. *Id.* at 2. Claimant also received treatment from Dr. Trees for his neck. *Id.* at 8.

8. Claimant, however, never underwent the recommended surgery because his condition improved and he chose not to have the surgery, although he continued to experience radicular symptoms down his left arm. *Id.* at 15:3. Dr. Jutzy released Claimant to return to work on June 15, 2010. *Id.* at 15:5. On December 7, 2010, Dr. Jutzy determined that Claimant had

reached maximum medical improvement and assigned him a 12% impairment of the whole person. Dr. Jutzy further gave Claimant the following permanent restrictions: 25 pounds maximum lifting and pushing/pulling no more than 50 pounds. Ex. 15:10.

9. At the request of Surety, Claimant underwent an independent medical examination with Christian Gussner, M.D., on February 7, 2011. Ex. 16:1. Dr. Gussner reviewed Claimant's past medical records, including MRIs and the records of Dr. Trees and Dr. Jutzy. *Id.* at 1-4. He took Claimant's history and performed a physical examination. Claimant continued to report some burning discomfort as well as aching in the left upper extremity. Claimant further reported that the numbness in his left arm and fingers had resolved. Claimant continued to have some weakness in the left arm. *Id.* at 5-7. Dr. Gussner concluded that Claimant had a left C6-7 disk protrusion resulting in left C7 radiculopathy, which on a more probable than not basis was related to the work injury of April 9, 2010. *Id.* at 7. Dr. Gussner agreed that Claimant was at MMI and should have permanent work restrictions, which he set at maximum lifting not to exceed 35 pounds, repetitive lifting not to exceed 20 pounds, and push/pull limited to 50 pounds. Dr. Gussner agreed with Dr. Jutzy's 12% whole person impairment for Claimant. *Id.* at 8.

10. Claimant did not see any other doctors for neck or shoulder problems from the time of his IME with Dr. Gussner in 2011 until after his industrial accident in 2015.

11. **Industrial Accident**. On July 3, 2015, Claimant was working on Employer's premises. He was attempting to take the lid off a riser, which is pipeline used to collect irrigation water. The lid was broken, and Claimant was putting pressure on it with a wrench; while performing this operation, Claimant slipped and fell on his left shoulder. Tr., 23:2-24:3.

12. Claimant kept working the rest of the day, with pain. *Id.* at 24:23-25:1. Thereafter, he treated his shoulder conservatively at home by icing it. Nevertheless, the pain continued so he decided to see a doctor. *Id.* at 25:7-12.

13. **Medical Care Following Industrial Accident**. On July 7, 2015, Michael P. Gibson, M.D., of Saint Alphonsus Occupational Medicine, examined Claimant for the first time. Claimant's chief complaint was "left shoulder blade pain." Dr. Gibson noted in pertinent part as follows: "On 7/4/15[1] he [Claimant] was putting a lot of pressure on a wrench and was leaning forward when he fell striking the left scapular area on the ground. Now it is tender to the touch and bothers him while sleeping. If he moves a [sic] left arm he gets increasing pain. His range of motion is full. He has no radicular symptoms. The neck motion is good." Ex. 2:1. Dr. Gibson placed Claimant on restricted duty, with a restriction of 2 pounds lifting with the left arm alone; 20 pounds both arms and no overhead work with the left arm. *Id* at 2.

14. Dr. Gibson continued to treat Claimant and arranged for his left shoulder to be X-rayed on July 24, 2015. The X-ray findings were as follows: "Normal alignment. No visible fracture or significant degenerative change. Type II acromion process." All other findings were negative. *Id.* at 6.

15. Dr. Gibson next arranged for an MRI of Claimant's left shoulder. The radiologist's conclusions were as follows: "Mild infraspinatus insertional tendonitis. Otherwise intact rotator cuff. Cleft in the base of the superior labrum appears most compatible with a prominent sublabral sulcus, otherwise intact labrum. Intact proximal biceps tendon. No marrow contusion or fracture." *Id.* at 13.

[1] The correct date of injury was July 3, 2015.

16. On September 14, 2015, after reviewing the MRI, Dr. Gibson diagnosed Claimant with a contusion of the left scapula. He noted that the MRI did not reveal any surgical issues. Dr. Gibson decided to refer Claimant for an orthopedic evaluation. Ex. 2:14-15.

17. Claimant received a referral to Michael T. Daines, M.D., an orthopedic surgeon with West Idaho Orthopedics & Sports Medicine in Meridian, Idaho. Dr. Daines first evaluated Claimant in an office visit on September 17, 2015. Ex. 4:1. Dr. Daines continued to treat Claimant until November 14, 2016, when he released Claimant. *Id.* at 32-33. Dr. Daines treated Claimant with medications, shoulder injections, physical therapy, and surgery. Ex. 4.

18. On February 25, 2016, Dr. Daines met with Claimant in an office consultation. He noted in pertinent part as follows: Claimant "is a pleasant gentleman coming in for follow-up of shoulder pain. Pan is continually worse over time. He rates it a 6 out of 10 today. Sharp in nature. He has failed conservative management including injections, anti-inflammatories, home exercise and relative rest. An MRI scan shows damage to the rotator cuff as well as evidence for impingement." Dr. Daines discussed Claimant's options, which included surgery. Claimant opted to undergo surgical treatment. Ex. 4:11-12.

19. Dr. Daines took Claimant to surgery at the West Valley Medical Center in Caldwell, Idaho on March 10, 2016. Dr. Daines noted that Claimant "came into my office complaining of left shoulder pain. I initially indicated for conservative management, gave him injections and then sent him to therapy. He followed for about 6 months for this conservative program but did not improve." Claimant's preoperative diagnosis was as follows: "1. Left shoulder pain with impingement. 2. Partial thickness cuff tear. 3. Acromioclavicular arthropathy." Diagnostic arthroscopy showed the following findings: "1. Superior labrum tear. 2. Subscap intact. 3. Articular cartilage intact. 4. Axillary pouch clear. 5. Subscapularis tendon

intact." The surgical procedures performed were as follows: "1. Subacromial decompression. 2. Distal clavicle resection. 3. Limited intraarticular debridement." There were no complications. Ex. 7:22-24.

20. On April 5, 2016, Claimant came to Dr. Daines for a postoperative visit. He was still struggling with pain and rated it at 8/10. Claimant was still using a sling and had not yet arranged for physical therapy. Dr. Daines's Physician Assistant (P.A.) discussed with him the importance of moving the shoulder and not wearing a sling anymore. The P.A. also renewed a prescription for physical therapy. He released Claimant to light duty. Ex. 4:15-16.

21. At a May 19, 2016 office visit, Dr. Daines' P.A. observed that Claimant's "subjective complaints seem a bit exaggerated." *Id.* at 20.

22. On July 7, 2016, Dr. Daines observed that Claimant's range of motion was still limited, and certain movements caused an increase in his pain. Claimant's pain was at 3/10. He was working light duty, managing his pain with NSAIDs, and participating in physical therapy. Dr. Daines noted that Claimant was doing somewhat better than at his last visit but was still feeling pain. He administered a steroid injection in Claimant's left shoulder. *Id.* at 23-24.

23. Claimant continued to report struggling with pain in an office visit on August 4, 2016. *Id.* at 25-26. Dr. Daines prescribed a TENS unit to help stimulate Claimant's left shoulder. *Id.* at 26.

24. On September 1, 2016, Dr. Daines noted that Claimant "has remained painful since the surgery." Dr. Daines referred Claimant back to physical therapy. *Id.* at 28.

25. On October 6, 2016, Claimant continued to report pain in his left shoulder. An MRI on September 30, 2016, revealed signs of a SLAP tear in the left shoulder. Dr. Daines discussed various treatment options with Claimant, including work hardening physical therapy

and activity modification, as well as surgical intervention. Claimant asked for more time to decide about treatment. Ex. 4:30. Dr. Daines released Claimant to light duty with no reaching above shoulder level and no lifting above 20 pounds. *Id.* at 31.

26. At the next office visit on November 14, 2016, Dr. Daines released Claimant from his care. Dr. Daines noted in pertinent part as follows: "I discussed at length with Joel treatment options regarding his ongoing left shoulder discomfort. I feel that Joel has reached maximum medical improvement. I do not see any further benefit from physical therapy or indications for further surgical intervention. I encouraged him to maintain physical activity as tolerated. I would be happy to see him for any new or worsening symptoms." Ex. 4:33. There is no indication in the medical record of what changed between October 6 and November 14, 2016, that changed Dr. Daines' opinion about treatment. *Id.*

27. Claimant discussed the office visits of October 6 and November 14, 2016 at the hearing as follows:

> Q. [by Mr. Storer] Joel, did Dr. Daines recommend a second surgery to your shoulder?
>
> A. He recommended a second surgery and, then, at the end he changed it and, then, he says that he didn't recommend it. At first he said he did and, then, he said that, no, that everything was fine. He changed it.
>
> Q. And did he give any explanation as to why he changed his mind?
>
> A. Yes. He said it's because he didn't have a guarantee that it was going to be better. It could be worse or I could be completely disabled from that arm. So, he thought that it could be worse – that the surgery would be worse for me.

Tr., 34:3-15.

28. Notes generated by the Industrial Commission Rehabilitation Division (ICRD) on November 15, 2016, reflect that Claimant reported the following history of his visit with Dr. Daines of the previous day:

> I phoned the claimant. He states he saw Dr. Daines, yesterday. He relates that since there was not a guarantee that additional surgery would provide additional recovery, the claimant states he chose not to have another procedure. According to the claimant, he has been released from medical care and he was told by Dr. Daines he would have a 20 lbs. lifting limit, the rest of his life.

Ex. 13:28.

29. For an impairment rating of Claimant, Dr. Daines consulted the sixth edition of the *AMA Guides to Evaluation of Permanent Impairment.* He concluded that Claimant had a 5% impairment of the upper extremity, which yielded 3% impairment of the whole person. *Id.*

30. Dr. Daines released Claimant to return to work without restrictions on November 21, 2016. *Id.* at 34.

31. **Return to Work**. Claimant disagreed with being fully released to return to work. He characterized it as "not fair" because Dr. Daines "knew that my arm wasn't good." Tr., 30:20-21. Nevertheless, Claimant returned to work and remained employed with Employer until early 2020, when Employer laid him off due to a dispute about hours worked. *Id.* at 54:3-55:2; 61:19-22. Steve Bouschma, the owner/operator of Employer, recalls that Claimant continued to perform satisfactory work following his release and did not exhibit any physical limitations in 2017 through 2019. Claimant performed the same job with the same tasks and responsibilities as before the shoulder injury. He also received the same pay. Tr., 81:1-24.

32. Claimant's son, Juan Mares, worked with him at Employer. *Id.* at 68:10-24. He shared tasks with Claimant. *Id.* He disputes that Claimant had no difficulties working after his

injury and claimed that he was required to help his father with heavy tasks and welding. Tr., 70:6-71:7.

33. At the time of hearing Claimant was working full-time for a dairy known as Hidden Valley. He described his job title as "farmer" and his general responsibility was to maintain irrigation pipes. He also performed some welding. Another worker helped him lift heavy items and with welding. He still had left shoulder pain. Hidden Valley was aware of his shoulder issue. *Id.* at 43:6-44:13. Claimant received $14.00 per hour for his work at Hidden Valley. *Id.* at 55:12-14.

34. Prior to working for Hidden Valley, Claimant worked for two other employers, a ranch and a dairy. *Id.* at 63:11-16. There is no wage information in the record for these jobs.

35. **Independent Medical Examination**. At the request of Claimant's attorney, Richard Radnovich, D.O., performed an IME of Claimant on February 23, 2017. As a preliminary observation based upon his interview of Claimant, Dr. Radnovich noted in pertinent part as follows:

> [H]e was eventually referred to Dr. Daines who identified a left shoulder partial tendon tear and did a decompression and tendon repair. The patient reports that the surgery was not helpful and in fact he feels worse than he did before the surgery. After surgery he had additional injections, physical therapy and medications, none of which helped.
>
> He continues to report pain in the anterior shoulder. The pain is worse with activities, worse with lifting, worse with overhead work; somewhat better with rest, but he has pain even at rest. He has had to modify how he works because of the pain in the shoulder…

Ex. 8:1.

36. For "past medical history," Claimant reported to Dr. Radnovich as follows: "Patient denies medical problems." *Id.* Thus, Claimant did not inform Dr. Radnovich of his past cervical issue or previous injury to his left shoulder.

37. Dr. Radnovich reviewed the following past medical records: hospital notes from West Valley Medical Center (where Claimant had his surgery); office notes from St. Alphonsus Occupational medicine clinic (Dr. Gibson); physical therapy notes from Tri-City Physical Therapy; physical therapy notes from STARS Physical Therapy; and office notes from West Idaho Orthopedics (Dr. Daines). He did not review the records of Dr. Jutzy or the IME of Dr. Gussner. *Id.* at 2.

38. Dr. Radnovich's primary impression of Claimant's condition was as follows: "Status post left shoulder decompression and tendon repair with residual pain." *Id.*

39. For causation, Dr. Radnovich opined that the industrial accident of July 3, 2015, was the cause of Claimant's left shoulder problems. *Id.* at 3. For an impairment rating, using the sixth edition of the *AMA Guides to the Evaluation of Permanent Impairment*, Dr. Radnovich rated Claimant's left shoulder as a 3% upper extremity impairment which translates to a 2% whole person impairment. Ex. 8:3.

40. For permanent restrictions, Dr. Radnovich specified the following: no frequent (greater than 30% of the workday) lift and carry greater than 30 pounds. Max one-time floor to waist lift of 50 pounds; max one-time lift waist to chest 30 pounds. Max lift chest to overhead 10 pounds. No frequent pushing or pulling. *Id.*

41. In a section entitled "Treatment," Dr. Radnovich noted that Claimant "has consistent reports of chronic pain. It is the standard of care to treat chronic pain. Treatment might include oral medications, topical medications, and injections. It is unlikely that additional physical therapy would be helpful. Consultation with a shoulder specialist might be warranted." Ex. 8:3.

42. On December 4, 2018, Dr. Radnovich wrote a memorandum to Claimant's counsel in which he states that he had reviewed the records from Dr. Daines and "I do not disagree with his methodology" on the impairment rating. Therefore, Dr. Radnovich subscribed to the higher whole person impairment rating of 3%. He noted that the sixth edition of the *Guides* mandates then when more than one appropriate method of rating an impairment can be used, "the method resulting in the higher rating must be used." *Id.* at 6.

43. ***Radnovich Deposition***. Claimant's attorney took Dr. Radnovich's deposition on October 28, 2020. The Commission is acquainted with Dr. Radnovich's credentials.

44. Dr. Radnovich's examination of Claimant found that he had a restricted range of motion of the left shoulder. He also found that he had some atrophy of the left shoulder deltoid muscle. Otherwise, Claimant was in "pretty good shape." Radnovich Dep., 7:25-8:4.

45. Dr. Radnovich did not find that Claimant had any problems or issues with his neck or cervical spine. *Id.* at 8:5-14.

46. Dr. Radnovich stated that he was aware of Claimant's prior neck injury that occurred in 2010. His understanding was that Claimant did not need surgery because of his neck injury. He deemed "appropriate" the restrictions given by Dr. Jutzy and Dr. Gussner for Claimant's cervical condition. *Id.* at 12:1-14:7.

47. Regarding the decision by Dr. Daines to release Claimant back to work with no restrictions, Dr. Radnovich stated in pertinent part as follows: "I don't understand it and there is not a lot of explanation in Dr. Daines' office notes to explain that. So, I would have probably continued restrictions and, indeed, I did give permanent work restrictions. I don't understand the reasoning." *Id.* at 2:5-9.

48. When asked whether Dr. Daines was in a better position as Claimant's treating physician to opine on his condition, Dr. Radnovich stated in pertinent part as follows: "Not necessarily… I mean if you ask me is he in a better position to describe what's in the shoulder – absolutely, because he was in there [as a surgeon]." Radnovich Dep., 28:2-10.

49. Dr. Radnovich admitted that in his report under past medical history Claimant denied that he had any past medical issues. *Id.* at 28:13-20. Thus, at the time of his exam and report, Dr. Radnovich was unaware that Claimant had any neck issues. Furthermore, Dr. Radnovich did not read Dr. Jutzy's and Dr. Gussner's reports until Claimant's attorney asked him to read them prior to the deposition. *Id.* at 28:21-29:4. Similarly, Dr. Radnovich was unaware that Claimant had ever had problems with the left shoulder prior to the industrial accident. *Id.* at 29:5-9.

50. Dr. Radnovich was unaware that Claimant continued to perform the same job for the same employer for several years after his 2016 surgery. *Id.* at 30:4-10.

51. **Vocational Evaluation by Douglas N. Crum.** Claimant's attorney arranged for Claimant to be evaluated vocationally by Douglas N. Crum, C.D.M.S. Mr. Crum issued a vocational analysis report on April 12, 2019. Ex. 10:1. He revised and reissued his report on April 19, 2020. Ex. 10:12.

52. Mr. Crum reviewed medical records from Dr. Gibson, Dr. Daines, Dr. Jutzy, Neil Sweeten, PAC, Craig Newman, DPT, and Dr. Radnovich. He also reviewed additional medical imaging records, physical therapy records, wage information, and case notes and the job site evaluation of the ICRD. Claimant's interview took place on January 8, 2019. *Id.* at 1 and 12.

53. Claimant reported the following current subjective complaints about his injury to Mr. Crum:

- He cannot pick up anything heavy using his left upper extremity;
- He has pain on a daily basis;
- He mostly drives using his right hand/arm;
- He has issues with dropping things regularly from his left hand;
- At work, he gets help from his sons to move and feed cows, he uses his upper right extremity to drive a tractor, he can ride a horse but must do it "easy," and he opens and closes gates using his right upper extremity; and
- His current employer knows about his limitations.

Ex. 10:5.

54. For Claimant's educational/social history, Mr. Crum noted that Claimant had some limited English language proficiency. However, during Mr. Crum's interview Claimant's daughter had to interpret several questions and answers for him. *Id.*

55. Mr. Crum observed that Claimant had limited math skills; he could add and subtract but did not have the ability to do multiplication and division. *Id.*

56. Claimant had no computer skills and has never used a computer. *Id.*

57. For a pre and post labor market access analysis, Mr. Crum first noted that at the time of the industrial accident, Claimant was employed on a full-time basis as a dairy laborer. He had performed that type of work since 1990. He did not require any accommodation to perform this work. Ex. 10:7.

58. Based upon the ICRD job site evaluation, Claimant's time of injury job would be categorized as medium to heavy, with occasional lifting to 50 pounds, and frequent lifting up to 35 pounds. *Id.*

59. Mr. Crum concluded that on a pre-injury basis, Dr. Jutzy and Dr. Gussner restricted Claimant to essentially medium work with occasional lifting, pulling and pushing up to 50 pounds. *Id.* at 8.

60. Based upon a pre-injury physical capacity which limited Claimant to medium demand occupations, Mr. Crum found that Claimant had access to 7.7% of the jobs in his labor

market. Ex. 10:8. Nevertheless, for his analysis, Mr. Crum assumed that Claimant was able to perform medium to heavy labor occupations for which he was otherwise qualified. Based on that, Mr. Crum determined that Claimant had access to approximately 9.1% of the jobs in his labor market, pre-injury. *Id.*

61. For his post-injury analysis, Mr. Crum, using the restrictions specified by Dr. Radnovich, if he assumed that Claimant had preexisting restrictions to medium work, Mr. Crum found that Claimant had access to approximately 2.9% of the jobs in his labor market. This represented a 62% reduction in labor market access as compared to the pre-injury access of 7.7% jobs in the labor market. *Id.* at 9.

62. If, however, Mr. Crum assumed that Claimant was not limited to medium work, per Dr. Jutzy and Dr. Gussner, following the industrial accident, he would still have access to approximately 2.9% of the jobs in his labor market. This represented a 68% reduction in labor market access compared to Claimant's pre-injury status. *Id.* at 9.

63. For a wage-earning capacity analysis, Mr. Crum noted that Claimant had 2017 W-2 earnings of $34,894, indicating an effective earning capacity of $16.77 per hour. *Id.* at 9.

64. Mr. Crum determined that the average wage for unskilled occupations in Claimant's job market was $10.13 per hour. In Mr. Crum's opinion, $10.13 per hour was a reasonable estimate of Claimant's post-injury wage earning capacity. A $10.13 per hour wage represents a 40% reduction in wage earning capacity compared to Claimant's preinjury wage of $16.77 per hour. *Id.* at 9.

65. If Dr. Daines' restrictions were used,[2] Claimant had a 74% loss of job market access if he had preexisting restrictions, and 78% loss of job market access if Claimant did not

[2] Mr. Crum must have been referring to the temporary restrictions that Dr. Daines gave Claimant because

have preexisting restrictions, with a 40% loss of wage-earning capacity, Mr. Crum determined that Claimant would have 58% disability, inclusive of impairment. If Dr. Radnovich's restrictions were used, considering that Claimant had preexisting restrictions, his loss of job market access would be 62%. If it were assumed that Claimant did not have preexisting restrictions, using Dr. Radnovich's restrictions, Claimant would have a 68% loss of job market, with a 40% loss of wage-earning capacity, Mr. Crum determined that Claimant would have a 52.5% disability, inclusive of impairment. Ex. 10:10-11.[3]

66. ***Crum Deposition***. Claimant took the deposition of Mr. Crum on November 5, 2020. Crum Dep., 4:1. The Commission is familiar with Mr. Crum's credentials.

67. Mr. Crum described his labor market analysis as follows:

> [U]sing labor market statistics from the Idaho Industrial Commission Rehabilitation Division, I calculated that if one considers his [Claimant's] background and includes the restrictions recommended by Dr. Gussner and Jutzy, which were, essentially, for medium work, occasional lifting, pushing, pulling up to about 50 pounds, he would have a labor market access of 7.7 percent. If you do not include those restrictions – and the reason you might do that is because he was able to perform his time-of-injury job that required physical capacities in excess of the restrictions given [by] Jutzy and Gussner, his labor market access was about 9.1 percent.

*Id.* at 14:15-15:3.

68. Mr. Crum opined that Dr. Radnovich's restrictions were "significantly more restrictive" than those provided by Dr. Jutzy and Dr. Gussner. *Id.* at 16:1-15.

69. Mr. Crum calculated a 52.5 percent permanent partial disability based upon an average of 62 percent loss of job market access and a loss of wage-earning capacity of 40%. Crum Dep., 16:23-17:13.

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when Dr. Daines released Claimant from his care it was with no permanent restrictions. *See*, Ex. 4:34.

[3] Mr. Crum's math appears to be wrong. His PPD is actually averaging loss of labor market under both scenarios, thus: 74 + 78/2= 76+40/2= 58; 62+68/2= 65+40/2= 52.5. He just averaged the loss of labor market under both scenarios.

70. Mr. Crum admitted that if the lack of restrictions specified by Dr. Daines were used, Claimant would have no disability in excess of impairment. *Id.* at 18:24-19:3.

71. Mr. Crum described the essential difference between his two reports as follows:

> Q. And you prepared two reports, did you not?
>
> A. I did. The first one – I don't have it in front of me – was prior to the April 16, 2020 report and the main difference is that by the time April 16, 2020 rolled around Mr. Storer had indicated to me that Dr. Daines had indicated the claimant did not have any industrial restrictions. So, that being the case there wouldn't be any calculation for disability.

*Id.* at 17:24-18:6.

72. Mr. Crum admitted that the nonmedical factors applicable to Claimant – lack of education, language issues, no computer skills, etc. – were the same pre-injury and post-injury. *Id.* at 25:14-26:6.

73. Mr. Crum was aware that Claimant worked for Employer for several years following the industrial accident and had a wage increase of approximately $3 per hour during that time. *Id.* at 27:18-28:8.

74. **Vocational Evaluation by Nancy J. Collins, Ph.D.** Defendants hired Nancy J. Collins, Ph.D. to perform a vocational evaluation of Claimant. She delivered a report dated January 14, 2020. Ex. 19:1.

75. Dr. Collins based her methodology upon the following criteria:

- Review of medical reports
- An interview of Claimant
- Assessment of medical restrictions
- Functional capacities
- Age and educational level
- Current level of aptitudinal functioning and prior specific vocational preparation
- Employment history
- Transferable skills analysis

- Labor market accessibility and wage rate data

Ex. 19:1. Records reviewed and relied upon for this vocational analysis are medical records and vocational records. *Id.*

76. Dr. Collins stated that Claimant's "subjective complaints have been consistent over time and with his diagnosis." *Id.* at 5.

77. Dr. Collins identified the following job titles that are illustrative of the kinds of work Claimant had performed over the years: farmworker, dairy (agriculture); farmworker, livestock (agriculture); laborer, meat products; and industrial truck operator (any industry). *Id.* at 8.

78. Regarding Claimant's skill level of work, Dr. Collins found as follows: "Mr. Mares is an unskilled to semi-skilled worker. While he was a lead worker on a dairy farm, his education and lack of reading and writing skills will limit him in supervisory positions. He does have a limitation for skill acquisition if it requires reading or writing. He has demonstrated the ability to gain skills on the job through demonstration and on-the-job training." *Id.* at 9.

79. As far as levels of physical exertion, Dr. Collins observed as follows: "Most of Mr. Mares' past work has been at the medium to heavy physical exertion level. Since 2010 [circa the cervical injury], he has been restricted to light/medium work and he continues to have similar restrictions for lifting. His treating physician, Dr. Daines, released him to full work relative to his shoulder injury. Dr. Radnovich felt he should have light medium level lifting but provided additional restriction for no overhead reaching with the left arm." *Id.* at 10.

80. For a labor market access analysis, Dr. Collins opined in pertinent part as follows:

> Mr. Mares was limited to light/medium level work prior to his 2015 industrial accident. Assuming he had access to light work and 50% of the medium level jobs were available to him, his loss of access was 50%.

> According to Dr. Radnovich, he now has access to the same light medium level jobs, but he can no longer perform work that requires overhead work with his left arm. Assuming he had access to 8,900 light/medium level jobs before his 2015 accident, and he can still work at this physical exertion level, but he loses access to approximately 50% of the jobs remaining to him because of his overhead reaching restriction, he would still have access to 4,450 jobs. This restriction leaves him with a 53% loss of access to the labor market.
>
> Dr. Daines feels Mr. Mares has no restrictions related to his LUE injury. Assuming this opinion, Mr. Mares has no loss of access to the labor market.

Ex. 19:11.

81. For earning capacity, Dr. Collins observed that Claimant earned $16.77 per hour as his final wage with Employer, that Employer terminated him for cause and not due to the physical demands of the job, therefore his earning capacity continues to be $16.77 per hour. According to the pertinent wage survey, Claimant could make this wage or higher as a farm equipment operator or a hyster operator. Thus, Claimant has no loss of wage capacity. *Id.* at 19:12.

82. Concerning the impact of pre-injury and accident caused restrictions, Dr. Collins stated:

> The following chart illustrates occupations where unskilled, limited language workers are often found. This analysis illustrates his pre-2015 loss of access as well as his current loss of labor market access.

| Job Title | #employed | sed | light | med | heavy | overhead reaching both arms | wage |
|---|---|---|---|---|---|---|---|
| Construction labor | 2261 | 0 | 646 | 646 | 969 | 75% | $16.18 |
| Hyster driver | 1159 | 0 | 232 | 811 | 116 | 46% | $17.23 |
| Farm labor | 1555 | 0 | 0 | 1113 | 318 | 56% | $10.67 |
| Ranch worker | 739 | 0 | 160 | 578 | 160 | 56% | $15.41 |
| Agricultural equip op | 456 | 0 | 124 | 207 | 124 | 56% | $17.77 |
| Production helper | 235 | 5 | 75 | 95 | 61 | 66% | $14.98 |
| Packer/packager | 809 | 27 | 398 | 247 | 137 | 31% | $11.10 |
| Grader sorter | 157 | 0 | 88 | 52 | 18 | 40% | $13.08 |
| Janitor | 4992 | 0 | 333 | 3993 | 666 | 22% | $11.67 |
| Cleaner of vehicles | 963 | 0 | 186 | 575 | 202 | 57% | $10.97 |
| Food Prep worker | 1736 | 0 | 1012 | 723 | 0 | 59% | $11.13 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Dishwasher | 796 | 0 | 265 | 531 | 0 | 52% | $9.40 |
| Landscaping worker | 2015 | 0 | 168 | 1008 | 840 | 68% | $13.57 |
| Totals | 17873 | 32 | 3687 | 10579 | 3611 | 53% | |

> Mr. Mares was limited to light/medium level work prior to his 2015 industrial accident. Assuming he had access to light work and 50% of the medium level jobs were available to him, his loss of access was 50%.
>
> According to Dr. Radnovich, he now has access to the same light medium level jobs, but he can no longer perform work that requires overhead work with his left arm. Assuming he had access to 8900 light/medium level jobs before his 2015 accident, and he can still work at this physical exertion level, but he loses access to approximately 50% of the jobs remaining to him because of his overhead reaching restriction, he would still have access to 4450 jobs. This restriction leaves him with a 53% loss of access to the labor market.

Ex. 19:11.

83. ***Collins Deposition***. Defendants took the deposition of Dr. Collins on December 9, 2020. Collins Dep., 4:1. The credentials of Dr. Collins are known to the Commission.

84. The following question in the deposition addressed the importance of Claimant continuing to work for Employer for four years after his industrial accident, as follows:

> Q. Why is it important that – or is it important that he [Claimant] continued to work for the same employer for some four years after the industrial accident after he was released by Dr. Daines?
>
> A. It was important. It really went to the fact that – that his job was a light medium job. He was able to perform physical tasks before 2015 and after 2015. His restrictions were very similar for the cervical injury and the left shoulder. The only difference that increased his disability was that he was precluded from overhead work with this left nondominant arm after the 2015 accident.
>
> Q. By Dr. Radnovich?
>
> A. By Dr. Radnovich, yes.

*Id.* at 11:17-12:5.

85. Dr. Collins learned from Employer that Claimant was able to perform the work required both before and after the 2015 industrial accident. If lifting was 50 pounds or more, it was to be performed by two people. If lifting were 100 pounds or more, it would be done by a tractor. "So, he really didn't need any accommodations, either pre- or post-injury and most of the time he operated equipment and supervised other workers." Collins Dep., 12:20-13:6.

86. Dr. Collins stated that it was important that in previous jobs Claimant had operated loaders, tractors, forklifts, and hysters, because these were transferable skills for Claimant. *Id.* at 14:14-25.

87. Dr. Collins observed that prior to the industrial accident, Claimant had a light medium physical exertion level, based upon the restrictions assigned to him from his 2010 accident. Dr. Radnovich's restrictions also fell into a light medium physical exertion level, however the primary difference was Dr. Radnovich's restriction for no overhead work/no reaching with the left upper extremity. *Id.* at 15:5-13.

88. Regarding the factors that went into her disability analysis, Dr. Collins stated in pertinent part as follows:

> Q. All right. So what – what goes into a – sort of disability analysis. Are there various factors?
>
> A. Well, there are two we have primarily looked at over the last 20 years and one is labor market access and using the most relevant, most recent data I found that he [Claimant] had a 53 percent loss of access because of his overhead reaching restriction and I assumed that he had very similar restrictions from the 2010 and 2015 accidents. They were both right in the middle of light and medium work at 30 to 35 pounds. So, he already had a disability prior to 2015. So, I felt like that was a really fair estimate of what his loss of access is and, then, the other vocational factor that we look at is loss of earning capacity.

*Id.* at 18:15-19:4.

> The second factor is earning capacity and earning capacity is that what – that wage that you could realistically earn in a regular traditional labor market. It's not

> an average of wages, you know, that just isn't what earning capacity is. It's, you know, the most probable highest wage you can earn. It has to do with capacity. So I considered the fact that he [Claimant] was earning 16.77 after his accident. I think that was about when he was fired, not what he was earning – he was earning 13.75 when he was hurt, but he had gotten raises and he was earning 16.77. And then I looked at the median wages for jobs that I felt were directly and generally transferable for him and he could earn – there are some light medium jobs in the construction labor that paid 16.18. This – this wage data comes from the Idaho Occupational Employment and Wage Survey for his labor market. So, it's the most recent, relevant employer data. And then for hyster driver or forklift driver, the median wage is 17.23, so above what he was earning. Agricultural equipment operator. He operated equipment on farms and ranches and had enough experience I felt to have a median wage and that was 16.77. So – in my opinion – it's faulty to look at an average of wages…

Collins Dep., 20:2-25.

89. Dr. Collins summarized her reasons for why Claimant did not have a wage capacity loss as follows: "And in addition to his having access to those other jobs that paid well, he also lost his job for reasons other than his injury. So, had he not been fired for overreporting his hours he would still have had access to $16.77. So, for both of those reasons I felt like he did not have a loss of earning capacity." *Id.* at 21:14-19.

90. The "ultimate" conclusion that Dr. Collins reached was as follows: "So, I averaged no loss of earning capacity and his 53 percent loss of access [to the job market], which left him [Claimant] with a 26.5 percent disability rating inclusive of impairment." *Id.* at 22:16-19. This was based upon Dr. Radnovich's restrictions; if Dr. Daines' conclusions were used, Claimant's disability would be zero. *Id.* at 22:20-23:3. Following Dr. Daines' conclusions would result in zero disability because, "There is nothing to assess disability if you don't have restrictions." *Id.* at 23:5-6.

91. One of the concerns that Dr. Collins had about the analysis of Mr. Crum was that "his opinion appears to be that his lifting restrictions or physical exertion level was – worse following the 2015 accident per Dr. Radnovich, but looking at the restriction – the actual

restrictions, they are very, very similar. They are both 30 to 35 pounds lifting occasionally, which is in the light medium range. So I'm not sure how he got there." *Id.* at 23:17-23.

92. Dr. Collins was also critical of Mr. Crum's wage capacity analysis, because he averaged mean numbers and included low paying jobs like dishwasher that Dr. Collins didn't feel were fair to include. Furthermore, Mr. Crum did not include the jobs of forklift operator, agricultural equipment operator, or construction labor. "He had one machine operator – or operator job that paid 18.28, so – and then, he averaged these numbers and, in my opinion, that's not earning capacity." Collins Dep., 24:15-25:1.

93. Finally, Dr. Collins questioned the transparency of Mr. Crum's analysis, as follows:

> I have never seen an in-depth report how he [Mr. Crum] arrives at his opinions, he just gives you a pre-injury labor market access number, and, then, a post-injury labor market access number. But again, I have no idea what jobs he's considering or what restrictions he's using, whether he actually has objective data that is addressing the reaching restriction. Whether he's looking at reaching with both arms or one arm. So, I can't just tell. He's not transparent in his report.

*Id.* at 25:17-25.

94. **Claimant's Credibility**. The Referee found that Claimant generally testified credibly, however he proved to be a poor historian. For example, when asked whether he had any prior injuries or conditions before the industrial accident, he answered "no" and had to be reminded of his cervical injury from 2010. *See*, Tr., 47:17-48:19. Thus, where Claimant's recollections vary from the written record, medical records will be relied upon. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

## DISCUSSION AND FURTHER FINDINGS

95. 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).

96. **Causation**. A claimant must prove that he was injured as the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). 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). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001).

97. Claimant carried the burden of proving causation. *Serrano v. Four Seasons Framing*, 157 Idaho 309, 317, 336 P.3d 242, 250 (2014) (*quoting Duncan v. Navajo Trucking*, 134 Idaho 202, 203, 998 P.2d 1115, 1116 (2000)). "The proof required is 'a reasonable degree of medical probability' that the claimant's 'injury was caused by an industrial accident.'" *Id.* (*quoting Anderson v. Harper's Inc.*, 143 Idaho 193, 196, 141 P.3d 1062, 1065 (2006)). Put another way, the "claimant has the burden of proving a probable, not merely a possible, causal

connection between the employment and the injury or disease." *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 332, 179 P.3d 288, 295 (2008) (*quoting Beardsley v. Idaho Forest Indus.*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995)). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Estate of Aikele v. City of Blackfoot*, 160 Idaho, 903, 911, 382 P.3d, 352, 360 (2016) (*quoting Jensen v. City of Pocatello*, 135 Idaho 406, 412, 18 P.3d 211, 217 (2000)). "The Commission may not decide causation without opinion evidence from a medical expert." *Serrano*, 157 Idaho at 317, 336 P.3d at 250 (quoting Anderson, 143 Idaho at 196, 141 P.3d at 1065).

98. Although it was an issue scheduled for hearing, the parties did not contest causation. In any event, there is sufficient medical testimony in the record from Dr. Radnovich relating the industrial accident of July 3, 2015, to Claimant's left shoulder condition. *See* Ex. 8:3. Causation has been established.

99. **Medical Treatment**. An employer shall provide reasonable medical care for a reasonable time after an injury. Idaho Code § 72-432(1). A "reasonable time" includes the period of recovery before medical stability but may include a longer period. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001). Reasonable medical treatment benefits may continue for life; there is no statute of limitation on the duration of medical benefits under Idaho Workers' Compensation Law.

100. A claimant bears the burden of showing that medical treatment required by a physician is reasonable. Idaho Code § 72-432(1). A claimant must support his or her workers' compensation claim with medical testimony that has a reasonable degree of medical probability. *Hope v. ISIF*, 157 Idaho 567, 572, 338 P.3d 546, 552 (2014), *citing Sykes v. CP Clare & Co.*, 100 Idaho 761, 764, 605 P.2d 939, 942 (1980). The reasonableness of treatment is dependent

upon the totality of the facts and circumstances of the individual being treated. *Harris v. Independent School District No. 1*, 154 Idaho 917, 303 P.3d 605 (2013). Totality of the facts and circumstances is a factual determination, but not a retrospective analysis with the benefit of hindsight. *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015).

101. It is for the physician, not the Commission, to decide whether the treatment is required; the only review the Commission is entitled to make is whether the treatment was reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). Where there is both a positive and a negative diagnosis between two qualified doctors, the fact finder may examine the methodologies of both physicians to determine which physician is more credible. *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 759, 302 P.3d 718, 727 (2013). It is the role of the Commission to determine the weight and credibility of testimony and resolve conflicting interpretations of testimony. *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 565, 130 P.3d 1097, 1103 (2006).

102. Further, the "treatment" to which an injured worker is entitled must be broadly construed to include all steps necessary to effect a cure for an injury. Therefore, palliative treatment for pain is compensable even though it does nothing to restore or increase function. *Rish v. Home Depot, Inc.*, 161 Idaho 702, 390 P.3d 428 (2017).

103. Relying on Dr. Radnovich's testimony and report, Claimant asserts that he is entitled to such care as may be needed to control his pain or further assess his shoulder condition. In keeping with the authorities discussed above, we agree that Claimant is entitled to future medical care causally related to the subject accident and required by his treating physicians.

104. However, in his briefs, Claimant has interjected a new issue not before the Commission. The issue before the Commission is Claimant's entitlement to medical care.

Instead, Claimant asks the Commission to order Defendants to pay for a referral to a new physician, of Claimant's choosing, to provide further evaluation of Claimant's shoulder. Claimant is actually petitioning the Commission for a change of physician, as anticipated by Idaho Code § 72-432(4). Idaho Code § 72-432 (4)(a) specifies that a prerequisite to pursuit of a change of physician is written notice to employer/surety, intended to allow employer to fulfill whatever obligations it may have relating to the provision of medical care. There is no indication in the record that such prior notice was given. Moreover, while JRP 20 allows a request for change of physician to be pursued at hearing along with other issues (see JRP 20(I)), the inclusion of such issue must also comply with Idaho Code § 72-713, which requires, *inter alia*, a minimum of ten days' notice of issues to be heard. For these reasons we decline to entertain the request for a referral to a new physician. However, even were the request properly before the Commission, the record does not support a showing of good cause to grant the request. Although Dr. Daines' declared Claimant to be at MMI on November 14, 2016, his notes of that appointment indicate that he "would be happy to see [Claimant] for any new or worsening symptoms. [Claimant] will follow-up with me on an as needed basis." Ex. 4:33. From the testimony and records in evidence, it is not clear to the Commission that Dr. Daines has washed his hands of Claimant. The record reflects that Dr. Daines entertained further treatment for Claimant, including surgery, but decided against such interventions either after further reflection, or at the request of Claimant. See paragraphs 27, 28, *supra*. Claimant may return to Dr. Daines for further evaluation if Claimant desires.

105. **Temporary Disability Benefits**. Claimant did not argue the issue of temporary disability benefits in his briefing, thus this aspect of his claim for benefits is deemed waived.

106. **Permanent Partial Impairment (PPI)**. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Waters v. All Phase Construction*, 156 Idaho 259, 262, 322 P.3d 992, 995 (2014).

107. Claimant did not dispute in his briefing the accuracy of the 3% whole person impairment assigned by both Dr. Daines and Dr. Radnovich. Claimant's Brief at 17. Defendants argue that Claimant is entitled to only the 2% whole person impairment first proposed by Dr. Radnovich. Defendants' Brief at 16. Nevertheless, Defendants ignored the fact that Dr. Radnovich changed his conclusion to agree with the 3% impairment rating of Dr. Daines. Claimant is thus entitled to a 3% whole person impairment based upon the preponderance of the evidence in the record.

108. **Disability**. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is

affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425.

109. The test for determining whether Claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced Claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on Claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

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

111. Where the degree of disability resulting from an industrial injury is increased because of a pre-existing impairment, the employer is liable only for the disability caused by the industrial injury. Idaho Code § 72-406(1). As set forth in *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2007), the statute contemplates a two-step process in determining what percentage of a Claimant's disability is to be apportioned to the industrial injury. First, Claimant's disability from all causes, i.e. pre-existing and accident produced impairments, must be determined as of the day of hearing. Second, the Commission must determine what part of Claimant's disability from all causes is attributable to the subject accident. There is a presumption that the Commission, by its experience, is capable of judging how such

apportionment should be made. However, the Commission must explain its apportionment determination in such detail as to allow review on appeal. *Reiher v. American Fine Foods*, 126 Idaho 58, 878 P.2d 757 (1994).

112. In evaluating disability and its apportionment, it is first important to come to some conclusion concerning the nature of Claimant's pre-existing and accident produced restrictions. The parties are in general agreement that as a consequence of the 2010 cervical spine injury, Claimant was given permanent restrictions by Drs. Jutzy and Gussner, as discussed above. At his deposition, Dr. Radnovich agreed that the permanent restrictions imposed by Drs. Jutzy and Gussner were "generally appropriate." Radnovich Dep., 13:9 – 14:7. The Commission concludes that the restrictions authored by Drs. Jutzy and Gussner are consistent, well founded and accurate in describing the activities that should be avoided to protect Claimant's neck from further injury.

113. There is a dispute between the parties as to the restrictions referable to the subject shoulder injury. Dr. Daines released Claimant without restrictions on November 21, 2016, but Dr. Daines' assessment is challenged by other medical records generated around the same time. On September 30, 2016, Claimant underwent MRI evaluation of his left shoulder. That study was read as showing a tear of the superior labrum, extending into the posterior superior labrum (SLAP tear). Ex. 11. Claimant was seen by Dr. Daines on October 6, 2016, with complaints of persistent shoulder pain, unimproved by physical therapy. Dr. Daines noted the MRI findings of a SLAP tear and discussed surgical treatment of the same versus further conservative care. The visit ended with Claimant expressing his desire to think things over before deciding on further treatment. On the same date Dr. Daines gave Claimant temporary restrictions to avoid reaching above shoulder level and lifting over 20 pounds. Ex. 4:31. On November 14, 2016, Claimant returned to Dr. Daines, stating that his discomfort was unchanged, and expressing his desire to

discuss treatment options. However, on the occasion of this visit, Dr. Daines stated: "I feel that Joel has reached maximum medical improvement. I do not see any further benefit from physical therapy or indications for further surgical intervention." Ex. 4:33. He rated Claimant and, as noted above, released him to return to work without restrictions on November 21, 2016. Nothing in Dr. Daines' records explains this turnaround, although Claimant has explained that Dr. Daines may have reached this conclusion because he came to believe that surgery presented too great a risk of doing further damage to Claimant's shoulder. The ICRD records tend to reflect that Claimant participated in this decision. At any rate, Dr. Daines released Claimant from care and, inexplicably, without restrictions.

114. In his report of February 23, 2017, Dr. Radnovich imposed restrictions similar to those imposed for Claimant's cervical spine injury, with the addition of a restriction against overhead work. Presumably, this restriction relates to the left upper extremity only; Dr. Radnovich did not state that Claimant suffers from a right shoulder condition warranting restrictions. At the same time, Dr. Radnovich also gave a restriction against lifting more than ten pounds chest to overhead, seemingly admitting that limited overhead work was permissible. Ex. 8:3. Regardless, the Commission concludes that with respect to Claimant's left shoulder, Dr. Radnovich has persuasively established that Claimant should avoid all, or almost all, overhead work. As Dr. Collins has noted, of the restrictions authored by Dr. Radnovich, this is the only restriction that is not already encompassed by the pre-exiting restrictions established by Drs. Jutzy and Gussner.

115. Having made these determinations concerning Claimant's accident produced and pre-existing restrictions, we turn to the first step of the two-step process of evaluating Claimant's disability, the assessment of his disability from all causes, i.e., the disability resulting from the

combined effects of the subject accident and the 2010 cervical spine injury. Unfortunately, neither the report of Dr. Collins nor the report of Mr. Crum specifically addresses Claimant's disability from all causes, although careful review of both reports does allow some conclusions to be drawn on this required finding.

116. Dr. Collins assumed that Claimant had pre-existing restrictions as proposed by Drs. Jutzy and Gussner. She presented a scenario in which she assumed that Dr. Radnovich's restrictions would be found persuasive. Dr. Collins concluded that Dr. Radnovich imposed restrictions similar to those previously imposed by Jutzy and Gussner, with the addition of restrictions against overhead work. This is, however, a significant addition. Based on Claimant's relevant non-medical factors such as his education, transferable job skills and relevant work history, Collins proposed that absent physical restrictions, Claimant had access to approximately 17,873 jobs in his labor market. Ex. 19:11. The restrictions imposed by Drs. Jutzy and Gussner limit Claimant to light/medium work. Collins reasoned that with these restrictions in place, Claimant lost access to all (3611) heavy jobs, and 50% (5289) of medium duty jobs. This left Claimant with access to 8973 jobs following the 2010 cervical spine injury (17,873-3611-5289=8973).[4] Ex. 19:11. This represents a loss of labor market access of 49.8% referable to the 2010 injury. Collins then proposed that of the remaining 8973 jobs for which Claimant could compete following his cervical spine injury, the subject accident, specifically the overhead work restrictions imposed by Dr. Radnovich, reduced Claimant's labor market access by another 50%. As a result of the subject accident, Claimant now has reasonable access to only 4486[5] jobs in his labor market. Although Dr. Collins did not couch her conclusion in these terms, it should be clear from what she did say that, as a result of the combined effects of the pre-existing condition

[4] In her report, Collins rounded this number down to 8900. Ex. 19:11.

and the work accident, Claimant has current access to only 25.1% (4486/17,873) of his original labor market, an approximate 75% loss of access.

117. Dr. Collins did not perform a specific assessment of the extent to which Claimant suffered a loss of wage-earning capacity as a result of the 2010 injury. She did perform an assessment of Claimant's loss of wage-earning capacity resulting from the 2016 injury. In so doing, she considered the fact that Claimant continued to work for Employer for approximately four years following the 2016 industrial accident, and that he received wage increases that eventually left him with earnings of $16.77 per hour. Dr. Collins concluded that Claimant could earn similar wages in other employment consistent with his current restrictions. Ex. 19:12. She did not consider every low paying job that Claimant could continue to compete for following his injuries; she considered, as she assumed Claimant would, those higher paying jobs which were consistent with Claimant's restrictions. Collins Dep., 19-22. She explained that if an injured worker can compete for employment for both a $200/hour job and a $10/hour job it erroneously deflates the workers wage earning capacity to average the two hourly wages to measure wage earning capacity, because the $10/hour job is not something the worker would reasonably seek out in view of his alternative employment opportunity. She pointed out several job opportunities for Claimant that demonstrate he has suffered no wage loss. For example, Dr. Collins proposed that Claimant can currently compete for work as an agricultural equipment operator and as a Hyster driver, both jobs which pay in excess of $17/hour. These jobs were also available to Claimant prior to the 2010 injury, and they were among the highest paying jobs for which Claimant could compete prior to the 2010 injury. Ex 19:11. Thus, per Dr. Collins, Claimant has no wage capacity loss referable to the subject accident, as compared to his wage-earning capacity

[5] In her report, Collins rounded this number down to 4450. Ex. 19:11.

immediately prior to the accident. Her reasoning applies with equal validity to consideration of wage loss resulting from the 2010 injury. In that scenario, too, Claimant still had access to the highest paying jobs making up his pre-injury labor market of 17,873 jobs. Therefore, the Commission concludes that Claimant lost no wage-earning capacity as a result of the 2010 accident, just as he suffered no loss of wage-earning capacity as a result of the 2016 accident.

118. Like Dr. Collins, Mr. Crum also considered a number of scenarios in evaluating Claimant's disability. Based on our conclusions concerning Claimant's restrictions we need not consider all of his opinions. Without consideration of physical restrictions, Crum proposed that Claimant had access to 9.1% of the labor market at large, that is, of the total jobs in his geographic locale, he had the skills, education and aptitude to compete for employment in 9.1% of the total labor market. Ex. 10:8. Crum next proposed that if the additive restrictions of Jutzy, Gussner and Radnovich are taken into account, Claimant has access to only 2.9% of the total labor market, a loss of 6.2% of labor market access referable to the combined physical restrictions. Ex. 10:9. This equates to a 68% loss of labor market access (6.2/9.1).

119. In terms of loss of wage-earning capacity, Mr. Crum assumed that Claimant's preinjury wage-earning capacity was $16.77/hour, notwithstanding that he was earning only $13.75/hour as of the day of injury. Explaining this choice, he testified that he has "done it both ways in the past" but here it seemed appropriate to consider Claimant's current wage as his time of injury wage. Comparing this wage to the wage that Claimant could compete for in other jobs comprising his residual labor market led Mr. Crum to conclude that Claimant has suffered a wage loss of 40% referable to the subject accident. Mr. Crum did not calculate loss of wage-earning capacity from all causes, and it is not possible to derive that value from his report.

120. Therefore, while neither Mr. Crum nor Dr. Collins rendered specific opinions on Claimant's disability from all causes combined, it is possible to arrive at some idea of what their opinions would have to be on this question based on what they did report and testify to. Labor market access loss from all causes combined can be derived from each report. The opinions on this deficit are not too far apart, with Dr. Collins's data supporting a 75% figure and Mr. Crum's, a 68% figure. Mr. Crum did not offer an opinion on loss of wage-earning capacity from all causes. From Dr. Collins' report and analysis, the Commission concludes that Claimant did not suffer any loss of wage-earning capacity as a result of the 2010 accident. Since Dr. Collins also concluded that Claimant did not suffer any loss of wage-earning capacity as a result of the 2016 accident, the Commission concludes that Claimant has not demonstrated any loss of wage-earning capacity from all causes combined. Employing the averaging convention used by both Dr. Collins and Mr. Crum leads the Commission to conclude that Claimant has disability from all causes combined of 37.5% ((75+0)/2=37.5).

121. The next step is to ascertain what part of Claimant's disability from all causes is fairly attributable to the subject accident. Although Dr. Collins has stated that approximately 50% of claimant's labor market access loss is attributable to the subject injury, from her testimony and report it is clear that in saying this she is referring to an approximate 50% loss of Claimant's residual labor market. i.e., the labor market as it existed after having initially determined that the restrictions from Jutzy and Gussner reduced Claimant's previously unhampered labor market access by 50%. Of Claimant's 75% loss of labor market access referable to all causes, only 25% is referable to the subject accident. The subject accident caused Claimant's labor market access to go from 8973 jobs to 4486 jobs, but Claimant had previously

gone from access to 17,873 jobs down to 8973 jobs. The accident is responsible for a 25% loss as compared to the total loss of access.

122. With no wage loss referable to the 2016 accident, and using the same averaging convention both she and Mr. Crum have adopted, Claimant's disability referable to the subject accident is 12.5% ((25+0)/2=12.5).

123. Mr. Crum posited that if the restrictions of Drs. Jutzy and Gussner are considered in a vacuum, Claimant has access to 7.7% of the total labor market, as compared to the 9.1% of the total labor market accessible to him without physical restrictions. Therefore, as a consequence of the 2010 accident, Claimant lost access to approximately 15% of his preinjury labor market (9.1-7.7=1.4/9.1=15%). From this it follows that of Claimants 68% loss of labor market access from all causes, he has a 53% loss of labor market access referable to the subject accident according to Mr. Crum's calculations (68-15=53).

124. Mr. Crum believes that Claimant has suffered loss of wage-earning capacity referable to the subject accident of 40%, so the disability referable to the subject accident would be 46.5% (53+40=93/2=46.5).

125. Trying to tease out what Mr. Crum and Dr. Collins would have done had they followed the direction of *Page, supra*, is a somewhat frustrating exercise. However, in the discharge of our obligation to assess disability and apply Idaho Code § 72-406, we must decide whether Claimant has proven his claim by a preponderance of the evidence and we must support our decision by reliance on substantial and competent evidence. Here, our analysis yields two outcomes that are quite different. Our review of Dr. Collins's testimony and report persuades us that using her data, Claimant has disability of 12.5% referable to the subject accident, while Mr. Crum's data yields disability of 46.5% referable to the subject accident. For the following

reasons, we believe that the assessment we have derived from Dr. Collins's opinion is closer to the mark.

126. First, apart from all the numbers, consider the nature of the restrictions viewed in light of Claimant's non-medical factors. Claimant is uneducated and possesses poor English language skills. Unskilled to semi-skilled labor comprised the bulk of his work history and his pre-injury labor market. The restrictions imposed by the 2010 accident left him with the ability to perform sedentary, light and some medium duty jobs. This represents a significant diminution of his original labor market, in which heavy and medium work figure prominently. Ex. 19:11. The 2015 accident imposed almost the same restrictions that existed on a pre-injury basis, with the exception of the additional restriction against overhead work. As Dr. Collins explained, the restriction is unilateral, yet in performing her analysis she assumed that the restriction was bilateral, mainly because she had no way to account for a unilateral upper extremity restriction. Her analysis may have overestimated the impact of the restriction against overhead work. Even so, the impact of this additional restriction is small according to her analysis. For this largely unskilled laborer, most of the impact lies in taking away his ability to perform heavy and approximately one half of medium work. Mr. Crum significantly underestimated the impact of the 2010 accident on Claimant's employability.

127. Second, it is difficult to understand how Mr. Crum arrived at his opinions on labor market access loss under the various scenarios he considered. He did not show or explain his work, so it is difficult, for example, to agree or disagree with his assessment that the subject accident caused Claimant to lose access to all but 2.9% of the total labor market, or that the 2010 accident left him with access to 7.7% of the total labor market. Nor did Mr. Crum explain whether his analysis was conducted by using the new data set relied on by Dr. Collins, which

allows consideration of the impact of reaching on a worker's ability to perform a particular job. Collins Dep., 15-16. On the other hand, Dr. Collins's opinion is well explained, and includes a description of the number and type of jobs constituting Claimant's pre-2010 labor market, along with an explanation of how the restrictions from 2010 and the 2015 chipped away at the number of jobs for which Claimant could reasonably compete in the absence of physical restrictions.

128. Third, we agree with Dr. Collins that Mr. Crum's analysis of wage loss significantly overstates Claimant's accident produced wage loss by including in his calculations low paying jobs which Claimant would never seek out in light of the higher paying jobs for which he can still compete. It must be recalled that Claimant continued to work at his time of injury job for a number of years following the subject accident, and only left because of a reason unconnected with his physical ability to perform his work. He is still capable of earning $16.77/hour in that job and is currently employed at a job paying approximately $14.00/hour. Mr. Crum did not explain why it is appropriate to say that Claimant's time of injury wage should be the wage he was earning when he left Lone Pine, when in other cases he has considered the time of injury wage to be the wage actually earned at the time of injury. Possibly, his choice in this case is related to the need to attempt to make an apples-to-apples comparison between the time of injury wage and wages paid in other jobs; it would be inappropriate to compare the lower wage paid to Claimant in 2015 to current wages paid in other jobs. However, it is not shown that the wages in those other jobs kept pace with the increases Claimant enjoyed between 2015 and the date of hearing.

129. On balance, we find Dr. Collins's analysis to be more persuasive. She did evaluate the impact of both the 2010 and 2015 accidents on Claimant's access to the labor market, only failing to recognize that the 50% labor market access loss she ascribes to the subject

accident really refers to a 50% loss of the residual labor market remaining to Claimant after the impact of the 2010 accident. From this we conclude that Claimant has proven disability from all causes combined, with 12.5% apportionable to the subject accident.

130. **Attorney Fees**. Claimant has requested attorney's fees pursuant to Idaho Code § 72-804, which reads as follows:

> If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

131. Claimant argues that it was unreasonable for Defendants to rely upon the opinion of Dr. Daines, who released Claimant from his care with no restrictions on November 21, 2016. *See* Claimant's Brief at 24-25. Nevertheless, while Dr. Daines' care decision may have been strange, Defendants properly relied upon it in discontinuing treatment and paying Claimant the 3% impairment that Dr. Daines assigned to him. Furthermore, Dr. Daines explicitly stated in his notes that he was open to further treatment of Claimant if his conditioned worsened or changed. There is no evidence in the record that Claimant ever sought further treatment. Under these circumstances, attorney fees are not appropriate.

## CONCLUSIONS OF LAW AND ORDER

1. The industrial accident of July 3, 2015 is causally connected to Claimant's left shoulder condition.

2. The medical care Claimant has already received is compensable. Claimant is

entitled to such further care as may be required by his physicians pursuant to Idaho Code § 72-432. The Commission will not entertain Claimant's claim for change of physician in this proceeding.

3. Claimant is not entitled to further temporary disability benefits.

4. Claimant has suffered disability of 37.5% from all causes combined.

5. Defendants have met their burden of proving that Claimant's disability from all causes should be apportioned under Idaho Code § 72-406. Claimant has suffered 12.5% disability referable to the subject accident, with credit for PPI paid to date.

6. Claimant is not entitled to an award of attorney fees.

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

DATED this 11th day of August, 2021.

INDUSTRIAL COMMISSION


Aaron White, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 13th day of August, 2021, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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