BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LAINE BOYD, Claimant, v. BSR VENTURES, LLC dba ADVANCED HEATING AND COOLING, Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2019-001580** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED** **OCTOBER 1, 2021**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John Hummel, who conducted a hearing in Boise via Zoom teleconference on April 7, 2021. Clinton E. Miner, of Middleton, represented Claimant, Laine Boyd, who was present in person. Neil D. McFeeley, of Boise, represented Defendant Employer, BSR Ventures, LLC dba Advances Heating and Cooling, and Defendant Surety, State Insurance Fund. The parties presented oral and documentary evidence. They did not take post-hearing depositions but submitted briefs. The matter came under advisement on August 25, 2021.

ISSUES

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

1. Whether Claimant has complied with the notice limitations set forth in Idaho Code §§ 72-701 through 72-706.

2. Whether Claimant sustained an injury from an accident arising out of and in the course of employment.[1]
3. Whether the condition for which Claimant seeks benefits was caused by the industrial accident.[2]
4. Whether Claimant's condition is due in whole or in part to a preexisting and/or subsequent injury/condition.[3]
5. Whether and to what extent Claimant is entitled to the following benefits:

a. Medical care;[4] and

b. Permanent partial disability (PPD).

6. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate.[5]
7. Whether intoxication is a reasonable and substantial cause of the injury such that no income benefits shall be paid pursuant to Idaho Code § 72-208 and whether Defendants are entitled to reimbursement of any income benefits previously paid to Claimant.
8. Whether Claimant sought medical care outside the provisions of Idaho Code §72-432 and is not entitled to reimbursement for costs of such care.[6]

CONTENTIONS OF THE PARTIES

On November 20, 2018, Claimant was working for Employer, a heating and air

[1] Defendants did not brief this issue and thus it is deemed waived.
[2] Defendants did not brief this issue and thus it is deemed waived.
[3] Defendants did not brief this issue and thus it is deemed waived.
[4] Claimant did not brief this issue but rather admitted that "Claimant is not in need of any current medical treatment." Thus, the issue is deemed waived.
[5] Defendants did not brief this issue and thus it is deemed waived.
[6] Defendants did not brief this issue and thus it is deemed waived.

conditioning contractor, on a scissor lift at a substantial height placing ductwork. He alleges that a large pipe hit him in the shoulder and injured his shoulder and neck. He further alleges that he re-injured his neck three weeks later while turning his head while backing up a truck at work. He alleges that he gave appropriate notice of the injury within sixty (60) days to Employer, as well as filed a worker's compensation complaint within one (1) year of the injury, thus satisfying the notice and jurisdictional requirements of the Idaho Workers' Compensation Law. Claimant alleges that his disability in excess of impairment is between 25% and 35%. Further, he denies being intoxicated when the industrial accident occurred.

Defendants covered Claimant's medical benefits and paid out impairment ratings on his behalf for his neck and shoulder. Nevertheless, they allege that Claimant did not give proper notice of his injury as required by the Idaho Workers' Compensation Law. They further allege that Claimant was smoking marijuana when the industrial accident occurred, thus no income benefits should be paid. Finally, Defendants contend that Claimant is not entitled to any disability above his impairment because his physicians released him to return to work without any restrictions and Claimant is still working full-time at a similar wage.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Defendants' Exhibits 1 through 6, admitted at the hearing.[7]
3. The transcript of the hearing held on April 7, 2021.

[7] Claimant offered Exhibits 1 through 8 at hearing, however the Referee denied their admission to the record because Claimant did not adequately comply with JRP § 10 in notifying the Defendants prior to the hearing.

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

FINDINGS OF FACT

1. **Claimant's Background**. Claimant was born on March 11, 1980 and was 41 years of age at the time of hearing. Tr., 18:1-4.

2. Claimant grew up in Corpus Christi, Texas. He moved to California in 1997, and then moved to Idaho in 2018. *Id.* at 18:6-9.

3. Claimant attended Flour Bluff High School in Corpus Christi, Texas, and Santa Cruz High School in Santa Cruz, California. He did not obtain a high school diploma but "graduated from adult education" in Santa Cruz. *Id.* at 18:10-17.

4. **Pre-Injury Employment**. Claimant worked in construction during high school. His work tasks mainly consisted of tiling, roofing, framing and painting. *Id.* at 18:18-22.

5. After high school, Claimant was employed at a surf shop and with construction contractors. At the surf shop, he was a floor clerk. *Id.* at 19:1-5; 13-17. Claimant made $9 per hour while working for the surf shop. *Id.* at 20:3-5.

6. Claimant also worked for his aunt, post-high school. She owned a karate school in San Jose, California. Claimant was a groundskeeper and maintenance man who worked for her off and on for 10 to 15 years. He earned $12 to $13 per hour working for his aunt's karate school. *Id.* at 19:7-12.

7. He next got a job as an animal manager for Petco, Claimant was in charge of the animal department, so he was in charge of birds, snakes, lizards, frogs, and 82 fish tanks. He was also in charge of feeding mice, rats, guinea pigs, and hamsters, every animal that Petco offered for sale. He was both in charge of inventory and of employees, closing and opening the store,

and going to the bank. He worked for Petco for three years. His highest wage was $11.65 per hour. Tr., 20:9-22.

8. The construction jobs that Claimant performed during this period were mostly framing and small tile work. Claimant had one injury to his back from construction work, an injury to his L5-S1 disk for which a discectomy was performed. Claimant states that he feels "100%" in terms of the result of that surgery. *Id.* at 21:1-24. Claimant earned $15 per hour working construction. *Id.* at 22:20-23.

9. Claimant's injury to his L5-S1 disk resulted from a work injury while he was framing a house. *Id.* at 63:8-13. He did not report the injury as a workers' compensation claim but rather covered his medical care through Medi-Cal. His reason for not reporting the injury as workers' compensation is that it "would have shut the project down." *Id.* at 65:16-66:9.

10. Claimant and his family moved to Idaho in or about May or July 2017. Claimant's wife's parents offered them a home to live in, rent free, provided Claimant performed small construction chores around the house. *Id.* at 23:1-23.

11. **Subject Employment**. Employer, a heating and air conditioning sales and service provider, hired Claimant in or about November 2017. *Id.* at 23:22.

12. Claimant first performed service work for commercial and home construction projects for Employer, which included everything having to do with furnaces and air conditioning at a home or business. This was new work for Claimant. *Id.* at 24:2-25.

13. Claimant's starting wage with Employer was $15 per hour. *Id.* at 25:5-7.

14. In or about November 2018, Claimant was earning $16 per hour and his job duties had changed to working on the "commercial team." In that position he was part of a crew that would "help crane in giant huge building top outdoor units... They are giant, massive air

conditioner units that was craned onto the roof. So, I would help build the ductwork in a five-story building. Everything from return air to supply air." Tr., 26:1-15.

15. **Industrial Accident**. On November 20, 2018, Claimant was working at a construction site managed by Layton Construction. He was part of a crew working on two scissor lifts lifting a 20-foot long, 28-inch spiral duct pipe to the roof for installation. The crew took their scissor lifts 30 feet into the air to install the duct work. Claimant was on a scissor lift with two other coworkers, and his foreman, Albert Ayala, was on the other scissor lift. When they got to the top, Claimant had the pipe on his shoulder, assuming that his coworker who was in the other lift had it on his shoulder, so that they could install it. The pipe did not go into the hole as it was supposed to, and it fell on Claimant's shoulder and "kinked" his neck. Claimant explained that the pain in his neck, "lower into my neck and shoulder were excruciating, like I ripped a muscle or I pulled a nerve like we have all done in our neck." *Id.* at 27:18-28:20; 34:3-5; 36:16-37:4.

16. Claimant informed his coworkers that he was hurt, and he recalls that they replied, "Oh, you are all right and I said, no, man, this really hurts bad, you know, and at that time I was worried about our safety bonus. Everyone worries about their safety bonus at the end of the year and it was coming up and I didn't want to mess that up, so I was worried to tell anyone. You know, I wanted to keep working. I had another baby on the way." *Id.* at 34:7-15.

17. Claimant denied consuming alcohol, smoking marijuana, or taking other illicit drugs on November 20, 2018. He stated that he submitted to a drug test after the industrial accident and the results were negative. *Id.* at 30:12-17; 34:16-24.

18. After the accident, Claimant's coworkers were able to place the pipe without his help. *Id.* at 35:22-25. The twenty-foot section of pipe weighed over 100 pounds. *Id.* at 36:7-9.

Afterwards, Claimant took a 30-minute break and stayed on the ground. He helped his coworkers build their ductwork. Tr., 36:10-15.

19. Claimant states that Foreman Albert Ayala was aware of his injury, nevertheless Claimant told him that he was OK, as follows: "I'm okay, it's – I think it's just a pinched nerve, you know, because I had to keep working… I had babies at home, so I had to muscle – muscle on." *Id.* at 37:12-19.

20. Claimant finished out the day of November 20, 2018 still working. He avoided working on the scissor lifts for several days after. *Id.* at 37:20-23.

21. Claimant described his pain following the industrial accident as follows: "It was – it was – you know, it hurt really bad for a whole week and it kind of started to subside, but it was still really tough to do any kind of movement, because I was stiff… honestly, I was running around with a broken disk in my neck." *Id.* at 38:1-8. Claimant described his pain scale as 10/10 for his neck and 9/10 for his shoulder. *Id.* at 38:9-20.

22. Claimant described his reason for not initially reporting his injury as a workers' compensation claim as follows: "Because we were getting a safety bonus that month. It was a thousand-dollar bonus and I didn't want to be the first guy on that list to ruin that for the entire company of 200, 300 people." *Id.* at 39:24-40:2.

23. Claimant ultimately sought treatment at an urgent care clinic on December 23, 2018. His reason for doing so was as follows: "The 23rd I was backing up the truck on a Saturday morning for work. We were installing 11 units on the roof… The crane was there to pick these units five stories onto the roof and I had to back up the trailer with all these units on it… [I]t was really hard to do. I had my neck completely cranked in every direction to see

through the windows. It was snowing that day. I could see – my helpers weren't giving – anyways, I hurt real bad. I stopped work that moment. Told my boss I'm hurt." Tr., 40:13-41:6.

24. Claimant went home "in tears." *Id.* at 42:14-16. Before he left he told his supervisor Darrell Hulse and a coworker Luis Segarra that he was hurt. *Id.* at 42:22-43:1.

25. Claimant then sought treatment at the Saint Alphonsus Urgent Care Clinic located in Star, Idaho on December 23, 2018. *Id.* at 43:10-17.

26. **First Report of Injury (FROI).** Alana Lane, Office Supervisor of Employer, filled out a First Report of Injury (FROI) for Claimant's injury on January 14, 2019. The FROI states that Employer was notified of the injury on December 26, 2018 and that Claimant reported the injury to Alana Lane. The FROI lists Claimant's left shoulder and neck as the injured body parts. The place of injury was "two different commercial projects." How the injury occurred was stated as "Hanging duct work overhead. Original injury occurred 11/20/2018 hanging duct work from a scissor lift, overhead. Second was 3 weeks later heard a pop and couldn't move his neck and shoulder." The following note was added: "Laine went to Urgent Care and didn't realize this was a workers comp claim. I had him go to our OCC Med." Claimant was listed as still working. Ex. 1.

27. **Medical Care.**[8] Physician Assistant Chad D. Talford examined Claimant at Saint Alphonsus Medical Group Star Urgent Care on December 23, 2018. PA Talford recorded the following:

> 1. Neck Pain: Onset: 3 weeks ago. The problem has worsened. The frequency of pain is constant. Location of pain is left lateral neck. There is a radiation of pain to the left shoulder. The patient describes the pain as Sharp, Shooting, Stabbing and Throbbing. Aggravating factors include movement. Additional information:

[8] Very limited medical records have been provided for the record in this case. Basically one record per provider has been supplied.

> States he was pushing on some bars and felt a pain in neck 3 weeks ago and worsened yesterday after turning head when backing trailer.
> 38-year old male works as a framer. He notes that approximately 3 weeks ago he was pushing on a truss and felt a popping sensation in his left shoulder and had some pain associated with it. Been getting slowly better over 3 weeks and then yesterday he was backing up a trailer. He turned his head left and felt similar pain in the shoulder again after waking this morning he notes that his entire neck is stiff and tight and he has severe pain in his shoulder. He notes is worse even with his shoulder hanging. He considered doing Workmen's Comp. he notes he smoked a little bit is afraid that they'll drug test him. He left work this morning because the pain was too severe to keep working.

Ex. 2. Claimant scored his pain as a 10/10. PA Talford suspected Claimant had a muscle spasm. He administered a shot of Toradal to help with pain symptoms and prescribed a muscle relaxant, Naproxen, and Cyclobenzaprine. He referred Claimant to physical therapy, recommended follow-up with his primary care provider, and did not specify any temporary work restrictions. PA Talford noted further as follows: "Patient appears to be in pain is tearful at times, he is afraid to go Workmen's Comp. because he smoked weed twice and is afraid they'll drug test him. I discussed this with him and he still denies Workmen's Comp. claim." Ex. 2.

28. Upon referral from Employer, Claimant attended the occupational medicine clinic of Saint Alphonsus Medical Group on January 4, 2019. Jami Hoke, PA-C, examined him. She noted in pertinent part as follows:

> This is the first time I have seen Laine as a patient. I have reviewed his previous medical records. I explained the diagnosis to him. I do not suspect a nerve impingement/disc herniation at this time. (He did specifically question that.) I've directed Laine to begin physical therapy. We past work restrictions. He did also tell me that he has 2 small children at home, but I informed him that he needed to stick with the restrictions at home the best that he could. His follow-up appointment is in one week.
> Of note, the UC records mentioned in 2 separate areas that he did not want to turn this into a Workmen's Comp. claim due to the fact that he smokes marijuana and was concerned that he would be drug tested. The urgent care note also mentioned that the pain had progressively improved prior to the incident of him turning his head, the day before being seen at urgent care. He put very little effort into me testing strength and seemed to struggle with range of motion, during the exam,

but was able to raise his left arm without incident during the initial part of the discussion.
DIAGNOSIS
1. Sprain of ligaments of cervical spine, initial encounter.
2. Strain of muscle(s) and tendon(s) of the rotator cuff of left shoulder, initial encounter.
RECOMMENDED WORK STATUS
Laine's recommended work status is Restricted Duty
RECOMMENDED ACTIVITY RESTRICTIONS
Left shoulder: lifting overhead should not be performed. Carrying should be limited to 15 pounds or less. Pushing and pulling should be limited to 15 pounds or less. Reaching overhead may not be performed. Overhead work may not be performed.

Ex. 3.

29. There is a gap in medical records provided for the Industrial Commission's record in this matter, as the next record in sequence is a note from the office of neurosurgeon Richard Lockhead, M.D., of Boise, Idaho. The note, dated June 18, 2019, is authored by David Nelson, PA-C. PA Nelson observes that Claimant is three months out from his C5-6 (cervical) arthroplasty surgery. PA Nelson further notes that Claimant is moving with his family to Texas. The assessment/plan was as follows:

> Laine is a 39 year old man who is status post C5-6 cervical arthroplasty. Overall he is doing very well. His x-rays are stable, MRI is stable. He still has some numbness and a little bit of burning in the left C6 distribution. I told him that this is likely just residual nerve damage that is slowly healing. At this point he can increase activity as tolerated. He says he anticipates starting work on July 8th. I told him that *he is cleared to start working without any limitations*. I did give him a prescription for physical therapy. I do think some traction and therapy will help with that continued numbness and burning in the left arm. I also gave him a Medrol dose pack that he can take as needed. He is moving to Texas but I will be happy to see him back as needed going forward.

Ex. 4 (emphasis added).

30. Claimant alleges that Dr. Lockhead gave him a 16 pound permanent lifting restriction upon releasing him from his care. Tr., 47:5-13. This conflicts with the only record

available from Dr. Lockhead, above, that states that Claimant is "cleared to start working without any limitations.". Ex. 4.

31. There is another gap in the medical records available to the Industrial Commission, as the next note is from a Texas provider, Charles Breckenridge, M.D., dated February 10, 2020. Claimant presented for follow-up. "He has been working. He is happy with his progress. He is able to do most of his activities." Claimant presented post-rotator cuff repair. The assessment/plan was as follows:

> 1. Left shoulder superior labrum anterior and posterior labral repair utilizing multiple Smith & Nephew nonmetallic anchors.
> 2. Left shoulder arthroscopic with debridement, extensive, including labral debridement, synovectomy, and debridement of intra-articular thickness rotator cuff tear involving subscapularis tendon and supraspinatus tendon with debridement of partial-thickness biceps tendon tear with synovectomy.
> 3. Arthroscopic subacromial decompression.
> 4. Arthroscopic distal clavicular excision.

Dr. Breckenridge noted that Claimant "continues to make excellent progress. He is doing his regular work activity. He only has mild residual stiffness. His strength is improving." At this time, Claimant was considered to be at maximum medical improvement (MMI) and appropriate for an impairment rating, which is not done by Dr. Breckenridge's office. Claimant was referred to the Disability Evaluation Center for impairment rating. Ex. 5.

32. Upon referral from Dr. Breckenridge, the Disability Evaluating Center of Texas, Inc. evaluated Claimant for an impairment rating on his left shoulder on June 9, 2020, and his cervical spine on July 28, 2020. Using the 6th Edition of the *AMA Guides to Evaluation of Permanent Impairment*, Charles W. Kennedy, M.D., determined that Claimant has a 6% permanent physical impairment of the left upper extremity for his left shoulder. On July 28, 2020, Dr. Kennedy rated Claimant's cervical spine for impairment, also pursuant to the *Guides*. Dr. Kennedy first answered a question whether Claimant had any work restrictions, as

follows: "He was released back to full duty on April 01, where he is working as a former apprentice. He has been doing his regular type of job since May 2020." Dr. Kennedy assigned Claimant with a 5% permanent physical impairment of the whole person for the cervical spine. Ex. 6.

33. **Return to Texas**. At an unspecified date following his cervical surgery with Dr. Lockhead, Claimant returned with his family to reside in Texas. Tr., 47:23-48:3.

34. In Texas, Claimant received a referral to another surgeon, Dr. Breckenridge, to address his shoulder issues. *Id.* at 50:8-10.

35. Claimant went to work as an apprentice plumber with Anchor Plumbing in Texas. He alleged that with "restrictions I was only able to do small digging up to 12 inches and I was doing service work, changing toilet handles and changing fixtures." He alleged that these restrictions come from Dr. Lockhead. *Id.* at 51:10-52:3.

36. Claimant was earning $16 per hour from Anchor Plumbing at the time of his second surgery. *Id.* at 53:23-54:1. At the time of hearing he received a raise to $18.00 per hour. *Id.* at 58:2-3.

37. At the time of hearing, Claimant was working a full week of 40 hours for Anchor Plumbing. In comparison, he worked 40 to 50 hours per week for Employer. *Id.* at 54:13-22.

38. **Credibility**. Claimant made assertions during the hearing and elsewhere in the record which raised serious concerns of substantive credibility.

39. First, Claimant asserted that his pain scale, particularly a few days after his industrial accident, was a "10 out of 10." *See, e.g., Id.* at 38:13-16. The problem with this statement is that Claimant also testified that he returned to work during this time period. One

would expect a patient with a 10 out of 10 pain scale to be completely disabled by his pain and unable to work.

40. Second, he testified that both Dr. Lockhead and Dr. Breckenridge gave him 16 pound limitations above the head, whereas the medical records available from these providers indicate the opposite – that Claimant was able to conduct himself physically "as tolerated" and "without restrictions."

41. Because of these substantive concerns about Claimant's credibility, where Claimant's assertions conflict with the medical records, the medical records will be relied upon in this decision.

DISCUSSION AND FURTHER FINDINGS

42. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

43. **Notice.** Idaho Code § 72-701 provides as follows:

> **Notice of injury and claim for compensation for injury – Limitations.** – No proceeding under this law shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable but not later than sixty (60) days after the happening thereof, and unless a claim for compensation with respect thereto shall have been made within one (1) year after the date of the accident, or, in the case of death within one (1) after such death, whether or not a claim for compensation has been made by the employee. Such notice and such claim may be made by any person claiming to be entitled to compensation by or someone in his behalf. If payments of compensation have been made voluntarily or if an application requesting a hearing has been filed with the commission, the making of a claim within said period shall not be required.

44. Defendants acknowledge that notice was given within 60 days following the November 20, 2018 accident, but argue that it was not given "as soon as practicable", owing to Claimant's designs on avoiding a drug test that would likely have followed the immediate reporting of a work related injury. Giving the term its usual meaning, injured workers are required, in the first instance, to give notice as soon as the same may be accomplished, but the statute also specifies a hard stop of 60 days, after which notice will no longer be timely. Idaho case law makes it clear that it is the 60-day requirement that ultimately defines whether notice is timely. *Tonahill v. Legrand Johnson Constr. Co.*, 131 Idaho 737, 963 P,2d 1174 (1998); *Williamson v. Whitman Corp.*, 130 Idaho 602, 944 p.2d 1365 (1997).

45. Claimant, therefore, has complied with the sixty (60) day notice limitation provided by Idaho Code § 72-701. Furthermore, the record shows that Claimant has further complied with the one (1) year claims limitation of Idaho Code § 72-701 in filing a complaint on September 17, 2019. For these reasons, the notice and statutory limitations claims of Defendants must fail.

46. **Intoxication.** Idaho Code § 72-208(2) and (3) provide in pertinent part as follows:

> (2) If intoxication is a reasonable and substantial cause of an injury, no income benefits shall be paid, except where the intoxicants causing the employee's intoxication were furnished by the employer or the employer permits the employee to remain at work with knowledge by the employer or his supervising agent that the employee is intoxicated.
>
> (3) "Intoxication" as used in this section means being under the influence of alcohol or of controlled substances, as defined in section 37-2701(e), Idaho Code. Provided, however, that this definition shall not include an employee's use of a controlled substance for which a prescription has been issued authorizing such substance to be dispensed to the employee, or when such substance is dispensed directly by the physician to the employee, and where the employees used to the controlled substances is in accordance with the instructions for use of the controlled substance.

47. On the basis of the medical record from Saint Alphonsus Medical Group Star Urgent Care, dated December 23, 2018, Defendants argue that Claimant was intoxicated with

marijuana when he was injured on November 20, 2018, and thus should be excluded from payment of income benefits pursuant to Idaho Code § 72-208(2).

48. Claimant's December 23, 2018 statement to treating physicians that he smoked weed twice and was fearful of what a drug test would turn up is not sufficient to support a conclusion that Claimant was intoxicated on the day of injury on the job, much less that the intoxication, if extant, was a reasonable and substantial cause of the Claimant's injury. The medical records are just as consistent with marijuana use taking place days before the subject accident, but still of concern to Claimant who might believe that remote marijuana use would return a positive drug test, thus jeopardizing his employment. At any rate, the evidence is wholly inadequate to support a finding that Claimant was intoxicated at the time of the accident and that intoxication was a reasonable and substantial cause of the accident.

49. **Permanent Partial Disability (PPD).** "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 section 72-430, Idaho Code." Idaho Code § 72-425.

50. The test for determining whether Claimant has suffered a permanent disability is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company,* 115 Idaho 293, 294, 766 P.2d 763, 764 (1988) (claimant at time of hearing was earning a salary equal to his pre-injury employment and did not present significant evidence of disability).

51. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995) (claimant's limitations exclusively preexisted industrial injury, thus he had no disability in excess of his impairment).

52. The proper time for determining Claimant's disability under most circumstances is the time of the hearing. *Brown v. Home Depot,* 152 Idaho 605, 609, 272 P.3d 577, 581 (2012) (Commission's finding regarding disability was reached in error because it was based upon his circumstances at time of medical stability rather than hearing).

53. Claimant bears the burden of proving that he has suffered a disability. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 34, 714 P2d 1, 3 (1985) (claimant failed to establish disability where her complaints of chronic back pain were not supported by an anatomical cause of her pain or physical evidence of injury). "[A] permanent disability rating need not be greater than the impairment rating if, after consideration of the non-medical factors in Idaho Code § 72–425, the claimant's 'probable future ability to engage in gainful activity' is accurately reflected by the impairment rating." *Graybill,* 115 Idaho at 294, 766 P.2d at 764.

54. In *Poljarevic v. Independent Food Corporation*, 2010 IIC 0001 (permanent work restrictions assigned to claimant by independent medical examiner were appropriate), the Commission observed in pertinent part as follows:

> In assessing Claimant's permanent partial disability, it is first helpful to understand whether Claimant's permanent impairment has caused a loss of functional capacity, which impacts his ability to engage in physical activity. Indeed, a loss of functional capacity figures prominently in all cases involving a determination of an injured worker's disability in excess of physical impairment. *Absent some functional loss, it is hard to conceive of a factual scenario that would support an award of disability over and above impairment*; if the injured worker is physically capable of performing the same types of physical activities as he performed prior to the industrial accident, then neither wage loss nor loss of access to the labor market is implicated.

Id. at 2010 IIC 0001.7 (emphasis added). Without a finding of permanent impairment, therefore, there can be no disability. *See, e.g. Hanson v. Z., Inc., dba Paul's Market*, 2010 WL 1832647, 9 (Idaho Ind. Comm. 2008-021218) (March 10, 2010); *Davidson v. Riverland Excavating, Inc.*, 147 Idaho 339, 345 209 P.3d 636, 642 (2009); *and Rivas v. K.C. Logging*, 134 Idaho 603, 608, 7 P3d 212, 217 (2000) ("Disability only results when the claimant's ability to engage in gainful activity is reduced or absent because of permanent impairment. I.C. § 72-423. Only after the impairment reduces the claimant's earning capacity do the pertinent nonmedical factors come into play.")

55. No vocational experts have opined in this case that Claimant has a permanent partial disability. Therefore, whether Claimant has a level of disability must be based upon the medical and nonmedical factors in the record, without expert opinions.

56. While Claimant received an impairment for his cervical spine and an impairment for his shoulder, the record is devoid of any evidence, other than his own assertions, that medical authorities opined that he was subject to physical restrictions. On the contrary, Dr. Lockhead's

PA, PA Nelson, stated that Claimant was free to return to work "without any limitations." Ex. 4. Similarly, Dr. Kennedy with the Disability Evaluating Center of Texas opined on medical impairments without issuing any work restrictions to Claimant. Ex. 6. Meanwhile, Claimant's assertion of a 16-pound lifting above the head restriction lacks credibility.

57. *Poljarevic*, 2010 IIC 0001, holds that absent some functional loss, there can be no disability above impairment. In this case, Claimant has failed to sustain his burden of proof on demonstrating functional loss.

58. On the contrary, the evidence shows that Claimant at the time of hearing was working full-time in a construction trade, plumbing, at $18 per hour, at a comparable wage to his time of injury wage. Furthermore, Claimant has transferable skills, having worked in several retail trade occupations (Petco and the surf shop), so he has viable work opportunities beyond the construction trades, for which he has demonstrated skills. He is at an age (lower 40s) in which he is in the prime of his earning years. The bottom line is that Claimant remains employable in a number of occupations and has no demonstrable wage loss.

59. In conclusion, the evidence supports a finding that Claimant has not sustained any disability in excess of his impairment.

CONCLUSIONS OF LAW

1. Claimant timely complied with Idaho Code § 72-701's notice and claim requirements.

2. There is insufficient evidence to find that Claimant's cause of injury included intoxication, as set forth in Idaho Code § 72-208(2).

3. Claimant has not sustained any disability in excess of his impairment.

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 1st day of October, 2021.

INDUSTRIAL COMMISSION

John C. Hummel

John C. Hummel, Referee

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of October, 2021, 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:

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Shaunowa Carver

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LAINE BOYD, Claimant, v. BSR VENTURES, LLC dba ADVANCED HEATING AND COOLING, Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2019-001580** **ORDER** FILED OCT - 1 2021 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee John Hummel 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 timely complied with Idaho Code § 72-701's notice and claim requirements.
2. There is insufficient evidence to find that Claimant's cause of injury included intoxication, as set forth in Idaho Code § 72-208(2).
3. Claimant has not sustained any disability in excess of his impairment.
4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 1st day of October, 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 1st day of October, 2021, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

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