BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RODNEY WATSON, Claimant, v. WORKSTEER LLC, Employer, and TECHNOLOGY INSURANCE COMPANY, INC., Surety, Defendants.	**IC 2021-002402** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Douglas A. Donohue who conducted a hearing in Twin Falls on November 9, 2022. Claimant appeared *pro se*. Chad Walker represented Employer and Surety. The parties presented oral and documentary evidence. A post-hearing deposition was taken. Although Claimant informally indicated he would file a brief, in lieu of a brief he submitted additional documents without comment. Defendants filed a brief. Claimant did not reply. The case came under advisement on June 6, 2023. This matter is now ready for decision.

ISSUES

The issues to be decided according to the Notice of Hearing are:

1. Whether Claimant has complied with the notice and limitations requirements set forth in Idaho Code § 72-701 through Idaho Code § 72-706, and whether these limitations are tolled pursuant to Idaho Code § 72-604;

2. Whether Claimant suffered an injury caused by an accident arising out of and in the course of employment;

3. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;

4. Whether and to what extent Claimant is entitled to:

   a) Permanent partial impairment, and
   b) Permanent disability in excess of impairment; and

5. Whether apportionment is appropriate under Idaho Code § 72-406.

CONTENTIONS OF THE PARTIES

Claimant contends he suffered a compensable injury when he fell out of the back of a truck leaving a loading dock. Although initially he thought he was unhurt, a couple days later he began experiencing trunk pain. He was unable to wear a shirt for three months because of the pain. He still experiences symptoms about his ribs. Post-accident communication with Employer was strained to nonexistent. He missed work, tried other work, was unable to work. He suffers functional disabilities in daily chores.

Defendants contend Claimant's alleged injuries were not caused by the alleged accident. Medical records do not show a treating physician has opined that a causal connection exists. Claimant did not identify an issue about temporary disability benefits; no physician removed him temporarily from work nor imposed temporary restrictions. No physician has rated PPI above zero. Claimant's reported symptoms began at least six months before the alleged accident and continued up to and after the accident. If the accident occurred in November 2020 as Claimant and supervisor have asserted, Claimant sought medical care on several occasions after the alleged accident before he first mentions the accident to a physician. Even then, earliest descriptions of the alleged accident are only partially consistent with Claimant's description given at hearing. The IME opined Claimant may have, at most, suffered a mild thoracolumbar strain which required no medical attention, and which did not contribute to ongoing complaints. Claimant receives Medicaid and SSD benefits. These impact the amount of money he wants to earn.

EVIDENCE CONSIDERED

The record in the instant case includes the following:

1. Oral testimony at hearing of Claimant;

2. Claimant's Exhibit 1 (admitted post-hearing without objection);

3. Defendants' Exhibits 1 through 7; and

4. Post-hearing deposition of physiatrist John Anthony Vallin, M.D.

The Referee submits the following findings of fact and conclusions of law for the approval of the Commission and recommends it approve and adopt the same.

FINDINGS OF FACT

Introduction and Accident

1. Claimant worked for Employer, Worksteer Staffing, as a temporary worker assigned to Rite Stuff Foods.

2. On or about late December 2020 Claimant fell out of the back of a truck and/or off the loading dock as the truck pulled out. He landed on his feet. Claimant has offered alternate dates for this event including around Thanksgiving 2020 and January 11, 2021. A December 1, 2020 date for the accident is found on the First Report of Injury, which was signed by Claimant on January 18, 2021. Mostly handwritten, the few instances of typing—including this date—suggest it was chosen and added by Surety after it received the FROI. Rite Stuff Foods' representative, Stacy Zimmer, on August 4, 2022 authored a document which admits Zimmer saw Claimant fall from between a truck and the dock in November 2020. The accident occurred. Its date is reasonably located within the span identified here.

3. Claimant first sought treatment claiming a work accident on January 11, 2021 from

St. Luke's Family Medicine. He described the subject accident as having occurred since his prior visit of December 22, 2020. This description is much less dramatic than as described at hearing but is not deemed entirely inconsistent. Luke Sudgen, DO examined Claimant about his prior complaints, was more concerned with possible depression, and noted, "He did not have any acute findings on exam today that make me concerned that he requires more urgent work-up." Dr. Sudgen declined to do more without authorization from Surety.

4. On January 18, 2021, Claimant was evaluated for possible physical therapy. He attended three visits in late January.

5. Also on January 18, 2021, Todd Hastings, D.O. at St. Luke's Occupational Health in Twin Falls noted that Claimant asserted the accident "might have" occurred about November 24, 2020. Clamant asserted right hip, rib and left thoracic back and rib pain. X-rays showed no acute findings. It was after this visit that Claimant was helped by treaters to file the FROI. Dr. Hastings opined Clamant most likely suffered a "potential exacerbation of her" [sic] preexisting condition. He tempered this opinion by noting, "Based upon the currently available information" and "if the circumstances with regards to the injury can be verified by the employer or the Worker's Compensation adjuster." Dr. Hastings went on to say, "He does have significant pre-existing conditions and significant imaging that has been undergone that that [sic] has not showed any acute findings but more chronic degeneration of the spine and that possibly could be accounting for quite a bit of his pain." Hip X-rays were negative for acute findings but positive for moderately severe degenerative changes of the right hip and mild degenerative changes of the SI joints and pubic symphysis. Rib X-rays were normal.

6. A January 20, 2021, Jerome emergency note describes weepiness. (Claimant also

exhibited heightened emotional reactions throughout the hearing.) Testing on examination revealed no issue with the weakness Claimant described as his primary complaint on this visit.

7. On April 2, 2021, Jon Vallin, M.D. reported his forensic evaluation of Claimant. The IME, at Surety's request, occurred in Boise on March 23, 2021. Dr. Vallin reviewed records and examined Claimant. He interpreted Claimant's pain diagram to indicate an abnormal and incongruent depiction compared to the mechanism of the alleged accident and objective medical records. Dr. Vallin diagnosed multiple pre-existing conditions unrelated to an industrial accident as well as a "thoracolumbar sprain/strain-type injury secondary to industrial fall, 01/18/21; at MMI." Dr. Vallin opined against a likelihood of industrial relationship to preexisting conditions through exacerbation or aggravation. He rated Claimant's PPI for the industrially related strain at zero.

8. On April 14, 2021, Dr. Vallin issued an addendum to his report in which he opined that Claimant did not require any time off work as a result of the industrial accident. (This possibility arose as a result of vague comments in Dr. Hastings' medical records, Dr. Hastings did not clearly state whether suggested light duty or time off was related to an industrial condition versus a non-industrial pre-existing condition.)

9. In post hearing deposition, Dr. Vallin well explained his opinions that Claimant's industrially related condition had reached MMI, and that Claimant suffered no permanent partial impairment. Dr. Vallin attributed Claimant's chronic pain complaints to neuropathic artefacts of his uncontrolled diabetes. Several other conditions were evaluated, including the abdominal pain, T7-8 disc protrusion, diffuse idiopathic skeletal hyperostosis (DISH), osteoarthritis, rib pain, and depression. None were related to the subject accident.

10. The medical records mention references to chiropractic visits, but chiropractic records are not present. Contrary to these mentions to Dr. Vallin, Claimant alternately denied seeing a chiropractor since moving from North Dakota in 2015 and claimed he received chiropractic care since the subject accident.

11. On July 1, 2022, Justin Dazley, M.D., a St. Luke's orthopedist, examined Claimant for his low back pain and referred Claimant for psychiatric assessment.

Prior Medical Care: 2020

12. On June 12 Claimant reported to Yolanda Sedano, PA-C, at St. Luke's Family Medicine Clinic in Jerome, that he had been experiencing abdominal pain for a month. His primary complaint was a cough causing him to worry about Covid.

13. Once Covid testing showed negative Claimant returned to PA Sedano on June 15 for evaluation of his chronic abdominal pain. A CT scan showed diverticulosis without diverticulitis. He returned again on June 23 with SSD paperwork. He returned on July 8 where examination showed "obvious swelling" in his abdomen. On July 14 he acknowledged his longstanding diabetes but reported he no longer took medication for it. He emphasized his abdominal pain was of greater concern than his diabetes. An August 14 CT of Claimant's abdomen and pelvis was unrevealing of a cause for Claimant's continuing abdominal pain. An August 27 visit added a complaint of tender ribs. A September 4 visit showed Claimant, based on Google research, had self-diagnosed a "slipped rib" as a cause for his abdominal pain which now reportedly radiated into his back. After two more follow-up visits Claimant reported on October 6 that the abdominal pain began 18 years ago. Dr. Sudgen speculated about social stressors or gastric acid as contributory to his abdominal complaints. During the course of these visits, Claimant said

the location of the abdominal pain expanded to additional areas in and around his abdomen.

14. On October 24 Claimant visited St. Luke's emergency in Jerome for a rash along with his abdominal pain. Rex Wortham, M.D. determined this was not a rash, rather, cherry angiomas.

15. On October 28 Claimant returned to Dr. Sudgen at Family Medicine. Dr. Sudgen speculated about neuropathic pain as a basis for the abdominal pain. A November 19 thoracic X-ray showed osteophytes. A December 1 MRI showed no acute problem but did note a small left central disc protrusion at T7-8. At a December 9 visit Claimant told Dr. Sudgen that taking gabapentin subtly changed the quality of his abdominal pain. On December 22 he visited for a rash on his upper chest. Through this date, no medical record mentions the subject accident.

DISCUSSION AND FURTHER FINDINGS OF FACT

16. 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).

17. 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). A claimant must prove all essential facts by a preponderance of the evidence. *Evans v. Hara's, Inc.*, 123 Idaho 472, 89 P.2d 934 (1993).

18. Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447–48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 626–27, 603 P.2d 575, 581–82 (1979); *Wood v. Hoglund*,

131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

19. Claimant was labile in affect at hearing. He often paused to regain composure. He appeared unable to focus and his answers more than occasionally drifted into subjects not responsive to questions.

20. Claimant's statements to medical providers have been inconsistent over time as to details about the accident, its date, his recollection of onset and location of earlier symptoms, what other physicians have told him, etc. He is credible, but contemporaneously made medical records, where inconsistent with his memory at hearing, are given more weight.

Notice and Limitations

21. Idaho Code § 72-701 through Idaho Code § 72-706 are the pertinent statutes governing the deadlines for giving notice and for filing a claim. Idaho Code § 72-604 tolls these statutes where Employer has not filed a First Report of Injury.

22. In briefing, Defendants suggest that absent a specific date of accident, Claimant cannot show timeliness of notice or of filing a claim. Contemporaneously made medical records show that on January 18, 2021, Claimant first mentioned to a physician that the subject accident had occurred. He reported it happened since his prior visit to that medical office, which visit occurred on December 22, 2020.

23. Stacy Zimmer's belated, unsworn statement made in April 2022, without live testimony to lend foundational support, and Claimant's testimony at hearing that the subject accident occurred about November 2020 or "around Thanksgiving" receive less weight than the recorded, contemporaneously made report Claimant gave the physician on January 18, 2021. Having determined that the accident most likely occurred between December 22, 2020 and January

18, 2021, the notice prepared by Claimant with the assistance of his treaters and filed on January 18, 2021, is timely, since it was served on Employer within sixty days following the subject accident. I.C. § 72-701.

24. Moreover, contemporaneously made medical records show Claimant complained that Employer failed or refused to communicate with him when he attempted to provide notice of the subject accident. No testimony in the record refutes this alleged fact. Employer should not be allowed to duck liability by thwarting receipt of notice.

25. Finally, Mr. Zimmer's statement admits he observed the subject accident when it happened. Mr. Zimmer was a supervisor to Claimant. Actual notice is satisfied. The mere technicality that he was employed by Claimant's job site employer and not by the temporary staffing agency that was Claimant's direct Employer would exalt form over substance to thwart the legislative goal of providing sure and certain relief to Idaho's injured workers. One should not expect or require a temporary staffing agency to post a supervisory representative, merely as a potential witness, at every job site in which one of its temporary workers is stationed.

26. Even if notice was not timely given, Employer did not file an employer's report of accident within ten days as required by I.C. § 72-602(1). Therefore, had Claimant failed to timely comply with the provisions of I.C. § 72-701, the limitation provisions of that section would be tolled by operation of I.C. § 72-604, since the evidence also demonstrates that Employer's failure to file the required report was "willful."

27. Here, Defendants failed to show a *prima facie* case for their affirmative defense of lack of timeliness.

Causation

28. 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). Aggravation, exacerbation, or acceleration of a preexisting condition caused by a compensable accident is compensable in Idaho Worker's Compensation Law. *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994).

29. Dr. Vallin's opinion that Claimant suffered a strain of his thoracolumbar region in the subject accident is persuasive. Further, his opinion is persuasive that this strain healed without the need for medical care and that no other condition or complaint of Claimant's is related to the subject accident.

30. Incidentally, Dr. Sudgen expressly did not treat an industrially related injury. He expressly declined to do so without authorization from Surety. Dr. Hastings thoroughly expressed his reservations about whether his care was linked to a possible industrial accident.

31. Dr. Vallin's opinions are consistent with the majority of physicians who treated Claimant for various conditions before and after the subject accident.

PPI

32. Permanent impairment is defined and evaluated by statute. Idaho Code §§ 72-422 and 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

33. Impairment is an inclusive factor of permanent disability. Idaho Code § 72-422. An impairment award is a part of a disability award and not separate. *Oliveros v. Rule Steel Tanks, Inc.*, 165 Idaho 53, 438 P.3d 291 (2019).

34. Only Dr. Vallin rated Claimant's PPI. He opined a rating of zero. Claimant suffered no permanent partial impairment as a result of the subject accident.

PPD and Apportionment

35. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423 and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See*, *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

36. "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 as provided by Idaho Code § 72-430.

37. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 766 P.2d 763 (1988). Without permanent partial impairment, there is no permanent partial disability. *See Urry v. Walker Fox Masonry*, 115 Idaho 750, 753, 769 P. 2d 1122, 1125 (1989). In sum, the focus of a determination of permanent disability is on a claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995). A claimant's local labor market access in the area around his home is the general geographical scope for assessing permanent disability. *Combs v. Kelly Logging*, 115 Idaho 695, 769 P.2d 572 (1989).

38. Dr. Vallin rated PPI from the subject accident at zero. No other physician rated PPI. The medical factors of PPI are a first step in considering PPD. This journey cannot begin without a first step. Without PPD, apportionment under Idaho Code § 72-406 is moot.

CONCLUSIONS

1. Claimant suffered a compensable accident between Thanksgiving 2020 and January 18, 2021;

2. Defendants failed to establish a *prima facie* defense for their claim of untimeliness of notice or of filing a claim. Regardless, facts of record show these statutes were tolled by application of Idaho Code § 72-604;

3. Claimant failed to establish a *prima facie* case that he is entitled to permanent partial disability based upon medical factors also known as permanent partial impairment;

4. Without permanent partial disability, apportionment under Idaho Code § 72-406 is moot.

RECOMMENDATION

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

DATED this 28th day of July 2023.

INDUSTRIAL COMMISSION

Douglas A. Donohue, Referee

ATTEST:

Debra Cupp

Assistant Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August 2023, a true and correct copy of the **FINDINGS OF FACTS, CONCLUSIONS OF LAW AND RECOMMENDATIONS** was served by regular United States Mail and Electronic Mail upon the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RODNEY WATSON, Claimant, v. WORKSTEER LLC, Employer, And TECHNOLOGY INSURANCE COMPANY, INC., Surety, Defendants.	**IC 2021-002402** **ORDER** FILED AUG 25 2023 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Doug Donohue 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 suffered a compensable accident between Thanksgiving 2020 and January 18, 2021;

2. Defendants failed to establish a *prima facie* defense for their claim of untimeliness of notice or of filing a claim. Regardless, facts of record show these statutes were tolled by application of Idaho Code § 72-604;

3. Claimant failed to establish a *prima facie* case that he is entitled to permanent partial disability based upon medical factors also known as permanent partial impairment;

4. Without permanent partial disability, apportionment under Idaho Code § 72-406 is moot.

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

DATED this 25th ay of _August_____, 2023.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Aaron White, Commissioner

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 2023, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail and Electronic Mail upon each of the following:

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