BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GEORGE A. WOOLDRIDGE, Claimant, v. BULLOCK BUILDING COMPANY LLC, aka ZACHARY BULLOCK, Uninsured Employer, and THE FRANKLIN GROUP, INC. Statutory Employer, and, ALASKA NATIONAL INSURANCE COMPANY, Surety, Defendants.	**IC 2019-012685** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED:** **DECEMBER 15, 2023**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John C. Hummel, who conducted a hearing in Boise, Idaho, on June 11, 2021. Claimant, George A. Wooldridge, was present in person; Darin G. Monroe, of Boise, Idaho, represented him. Susan R. Veltman, of Boise, was present and represented The Franklin Group, Inc., also known as Franklin Building Supply Company, Statutory Employer, and Alaska National Insurance Company, Surety. Desiree A. Martin, of Nampa, Idaho, was present and represented[1] Bullock Building Company LLC, aka Zachary Bullock, Un-Insured Employer

[1] Quentin A. Lackey substituted as counsel of record for Bullock after the hearing.

(hereinafter, "Bullock.")[2] The parties presented oral and documentary evidence.[3] They later submitted briefs. The matter came under advisement on November 7, 2023.

ISSUES

The noticed issues were as follows:

1. Whether and to what extent Claimant is entitled to the following benefits:

    a. Temporary Partial and/or Temporary Total Disability (TPD/TTD);[4]

    b. Permanent partial impairment (PPI);

    c. Permanent partial disability (PPD);

2. Whether apportionment for a preexisting condition pursuant to Idaho Code § 72-406 is appropriate;

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

4. Whether Claimant was an employee of Bullock at the time of injury; and

5. Whether Claimant is medically stable, and if so, the date thereof; and

6. Whether Bullock is liable for Claimant's attorney fees and costs, and a 10% penalty pursuant to Idaho Code § 72-210; and

7. Whether the Franklin Group, Inc. and Alaska National Insurance Company are entitled to reimbursement from Bullock for compensation paid pursuant to Idaho Code § 72-216.

---

[2] Administrative notice is taken that "Bullock Building Company LLC" was registered with the Idaho Secretary of State on October 2, 2017 and dissolved on January 12, 2023, by Zachary Bullock as the registered agent. It is reasonable to find that the LLC was an alter ego/assumed business name of Zachary Bullock based upon the fact that he signed an independent contractor agreement with Franklin Building Supply Company in his own name, not the name of the LLC. *See* Ex. 1. Thus, "Bullock," "Bullock Building," "Bullock Building Company LLC" and "Zachary Bullock" will be considered interchangeable herein. In any event, Idaho Code § 72-319(2) holds Zachary Bullock personally liable as a member of a limited liability company for "any compensation which may accrue under this law in respect to any injury or occupational disease suffered by any employee of such corporation or limited liability company while it shall so fail to secure the payment of compensation."

[3] The parties initially indicated that they would conduct post-hearing depositions, but later waived them in a telephone conference on July 24, 2023. Thus, there is no deposition testimony in the record.

[4] Claimant withdrew the issue of temporary disability benefits at hearing. *See* Tr., 6:2-4.

CONTENTIONS OF THE PARTIES

Claimant alleges that he was an employee of Bullock, and not an independent contractor. He claims statutory attorney fees and costs, and a penalty of 10% against Bullock for failure to secure workers compensation coverage. He had an accident on August 10, 2018, in which he suffered multiple injuries, including a concussion, multiple rib fractures, and a fracture of his T1 spinal column. He alleges that his injuries are directly attributable to the industrial accident. He claims an award of permanent partial impairment (PPI) in the amount of 14%. He further claims entitlement to a 62% permanent partial disability (PPD).

Bullock claims that at the time of the accident, Claimant was an independent contractor and therefore not covered by workers' compensation. Bullock denies any liability for the claim.

The Franklin Group, Inc., as a Statutory Employer, and its Surety, Alaska National Insurance Company, accepted the claim and paid Claimant benefits and are seeking reimbursement from Bullock for all medical and indemnity benefits paid. They do not dispute causation, nor do they dispute payment of medical benefits, temporary disability benefits, or permanent partial impairment (PPI), but assert that no permanent partial disability (PPD) is owed. In any event, they assert that all benefits paid must be reimbursed by Bullock. They agree that Claimant is owed attorney fees and costs, and a statutory penalty of 10% of all benefits paid, from Bullock.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony adduced at the hearing held on June 11, 2021;
3. Joint Exhibits 1 through 20; and

4. Administrative notice taken of the registration and dissolution of Bullock Building Company, LLC, with the Idaho Secretary of State.

FINDINGS OF FACT

1. **Claimant's Background**. At the time of hearing, Claimant lived in Abilene, Texas, where he had resided for approximately two years. Claimant was 56 years of age at the time of hearing and was born on July 12, 1965.[5] Claimant attended high school until the tenth grade and quit school to go to work. He did not receive a high school diploma, nor did he attain a GED. Claimant underwent no vocational training. Tr., 24:21-25:17.

2. Claimant's only accident and injury as a child/adolescent occurred when he was pinned between two cars; the incident was not work-related. Claimant's left leg was injured and his muscles in that leg were pinched. He did not sustain any long-term consequences from the injury and was left only with a scar. *Id*. at 27:3-24.

3. **Claimant's Work History**. In 1984, Claimant went to work in the Texas oil fields on a "pulling crew" for employer Wing World. His employment there lasted approximately six years. Claimant worked as a floor hand on the oil rigs; he did not sustain any injuries in this job, nor did he sustain any injuries outside of his employment. *Id*. 25:18-27:2.

4. Claimant's next job after Wing World was for Ringo Drilling as a derrick hand working in the oil well rigging. This job lasted approximately fifteen years. Claimant did not sustain any injuries while working for Ringo Drilling, nor did he sustain any injuries outside of the workplace during this time period. *Id*. at 28:4-25.

5. Claimant next went to work for Moore Drilling, again as a derrick hand, for approximately a year and a half until the oil field in which the wells were situated went dry. He

[5] Claimant initially testified that he was 35 years of age, however a July 12, 1967 birthdate places him at 56 years of age at the time of hearing. *See* Tr., 25:3-5.

did not sustain any injuries during this time period, either in the workplace or outside of it. Tr., 29:1-23.

6. In or about 2016, after working for Moore Drilling, Claimant went to work in Montana/North Dakota for Sunlit Drilling. His job was to fix and service the company's pipelines. He did not sustain any injuries during this time period, which lasted approximately a year and a half, either in the workplace or outside of it. *Id*. at 29:24-30:19.

7. At the conclusion of his employment with Sunlit Drilling, Claimant returned to his home State of Texas. He was unemployed there. He then moved to Idaho. Upon moving to Idaho, he got a job with his nephew framing houses for construction. This employment lasted approximately a year. He did have one accident during his construction work where he shot himself in the hand with a nail gun. He received treatment for the injury and went back to work with no residuals that affected his ability to work. *Id*. at 31:1-32:21.

8. **Subject Employment**. Claimant next went to work for Bullock. Claimant began working for Bullock in or about April, 2017. Ex. 8:352. Employer paid him as a laborer to frame houses and to supervise the framing of houses. His initial rate of pay was $13 per hour. In or about March, 2018, Bullock submitted a W-9 form to Claimant and instructed him to sign it. Claimant did not understand the form but nevertheless signed it; he continued to be paid on an hourly basis, with a final rate of $15 per hour. *Id*. at 33:2-34:20.

9. **Industrial Accident and Surrounding Circumstances**. On August 10, 2018, Bullock told Claimant to show up for work at 7:30 or 8:00 a.m. in the morning. Claimant did so. Prior to this time, Bullock had always told Claimant what his work hours were and what to do. Furthermore, Bullock expected Claimant to be on the job and if he did not show up, he would be in trouble. *Id*. at 39:1-45:11.

10. On August 10, 2018, Claimant supplied his own hand tools but all other items of equipment, including an air compressor, nail guns, extension cords, ladders and a crane were supplied by, or obtained by, Bullock. On this occasion, Bullock ordered a crane to place trusses for roof construction. Prior to August 10, 2018, Claimant was not independently established in his own framing business; he did not accept jobs from other construction contractors. Tr., 35:4-38:4. Furthermore, Claimant had only worked as a construction worker for a couple of years and did not know how to read blueprints. *Id*. at 37-38.

11. At the time of the accident on August 10, 2018, Bullock characterized Claimant's status as that of an independent contractor. Ex. 5:42. Nevertheless, Bullock initially hired Claimant as an employee. In or about 2018 Bullock requested that Claimant sign a W-9 form and represented to Claimant and other workers that they were now independent contractors. Tr., 34:1-25. Claimant signed the W-9 form but nothing about his job duties or how he performed them changed. *Id*. at 34:11-17. From Claimant's perspective, he was still being paid on an hourly basis; Claimant worked standard business hours, generally Monday through Friday, and occasionally on Saturday when Bullock requested that he do so. *Id*. at 65:23-25; 66:1-8. Claimant had never owned his own business, had never formed any sort of legal entity, nor did he hire any employees. *Id*. at 66:12-20.

12. In or about October, 2019, in an investigation by IIC Compliance Department, the Industrial Commission determined that Bullock exercised control over its alleged independent contractors, including Claimant, and that they were employees, thus Bullock was required to obtain workers' compensation coverage for them. Ex. 5:64. Bullock did not obtain such coverage for his workers on or after June 20, 2018, the date that the Idaho State Insurance Fund cancelled

its policy of coverage for Bullock. The Industrial Commission assessed a penalty of $4,875 against Bullock for failure to maintain coverage. Ex. 5:55-65.

13. On August 10, 2018, Claimant received instruction from Bullock to get up on the roof of the house with two other workers. Tr., 39:12-40:6. He does not recall any of the details of the accident that occurred; he was later told that he fell from the roof. Claimant was not wearing a helmet or any other safety gear at the time of the accident. Ex. 10:373.

14. When he woke up later in the intensive care unit (ICU) of a hospital, he was informed that he had fallen 25 feet from the top of the roof. The crane had a ball attached to it with a J hook, which had slipped and sent two trusses flying off the roof, with Claimant following behind. Claimant was in a coma for nine days and in the hospital for thirteen days. He sustained injuries as follows: traumatic brain injury (TBI), broken pelvis, broken clavicle, seven ribs broken, a punctured lung, and fractures of the back in two places. Tr., 40:7-41:25.

15. **Accepted Claim**. Surety for Statutory Employer, Franklin Building Supply, accepted Claimant's claim and began paying benefits after he moved to Texas. *See* Ex. 9 (Per the log of benefits payout, Surety paid out over $130,000 in medical care on the claim and with temporary disability benefits included, paid out over $214,000. Ex. 3:23:361-369.) Statutory Employer and Surety did not dispute that an accident and injury occurred.

16. **Medical Care**. Claimant began receiving treatment immediately after the industrial accident on August 10, 2018, at Saint Alphonsus Regional Medical Center in Nampa, Idaho, and thereafter in Boise, Idaho. He traveled by ground ambulance from the Nampa facility to the Boise ER for evaluation of a severe chest injury. Claimant had first through seventh rib fractures and a 30% pneumothorax (a collapsed lung occurs when air enters into the pleural cavity between the lungs and the chest wall) which showed on a CT scan. A 32 French chest tube

was placed in Claimant at the Nampa facility. The assessment was 1. Acute left chest wall injury with rib fractures 1 through 7; 2. Acute left-sided pneumothorax; and 3. Extensive subcutaneous air extending up to the left shoulder area. Claimant was admitted to the trauma unit for further workup and treatment. Ex. 10:383-384.

17. Claimant remained in the trauma unit of Saint Alphonsus Regional Medical Center in Boise through September 10, 2018. In addition to his rib fractures and pneumothorax, Claimant was later diagnosed with a traumatic brain injury (TBI, or concussion) by Dr. Nancy Greenwald. Claimant received medical treatment at the following facilities and medical practices: Saint Alphonsus Regional Medical Center (both the Nampa, Idaho facility and the Boise, Idaho facility); Saint Luke's Regional Medical Center (both the Nampa facility and Boise facility); Idaho Physical Medicine and Rehabilitation (Dr. Nancy Greenwald); Russell S. Dickerson, M.D. (Abilene, Texas); Abilene Regional Medical Center; Hendrick Medical Center (Abilene, Texas); Abilene Diagnostic Clinic (Abilene, Texas); and Integrated Pain Associates (Abilene, Texas). Claimant received medical treatment for the following diagnoses: left-sided rib fractures 1 through 7; pneumothorax; left pulmonary contusion; T1 spinal transverse process fracture; left AC joint dislocation grade II-III; paresthesia in the T1 distribution on the left; and TBI. He received medical care totaling in excess of $130,000. *See e.g.*, Ex. 10; Ex. 11; Ex. 12; Ex. 13; Ex. 14; Ex. 15; *and* Ex. 17.

18. **Independent Medical Examination**. On August 28, 2019, Dimitri Golovko, M.D., PA, met with Claimant and performed an independent medical examination (IME) at the request of Surety. The summary of Dr. Golovko's qualifications include college at the University of California, Davis, graduation with a BS in biochemistry 1992; Saint Louis University School of Public Health, doctorate MD 1997; internship in internal medicine at Good Samaritan

Regional Medical Center from June, 1997 to July, 1998; and a residency at Occupational and Environmental Medicine, Saint Louis University, July, 1998 – July, 2000. Dr. Golovko also had other qualifications, including academic appointments, specialty boards, certifications, publications, and presentations. Ex. 16:586-588.

19. Dr. Golovko undertook a complete review of all existing and available medical records from 08/10/2018 through 02/19/2019. *Id*. at 567-569.

20. It was apparent to Dr. Golovko, upon Claimant removing his shirt, that he had a posteriorly displaced left clavicle which was healed. Claimant expressed discomfort when Dr. Golovko palpitated the left rhomboid region and he also reported some sensory changes, i.e., numbness in the left T1 thoracic dermatome. *Id*. at 566.

21. According to Dr. Golovko, total partial impairment (TPI) of Claimant's left upper extremity due to AROM (active range of motion) deficits at this time was 4% upper extremity (UE) impairment. *Id*.

22. Dr. Golovko noted in the discussion section of his report that Claimant "sustained a fall off a roof. He sustained injuries in the form of left-sided rib fractures 1-7, left pneumothorax, left pulmonary contusion. He also had a fracture of the left T1 transverse process. Lastly, he had a grade II-III left AC joint dislocation." *Id*. at 569.

23. Dr. Golovko further observed in pertinent part as follows: "Given the fact that he had a traumatic injury, I think this requires additional workup. The trauma was significant and involved multi-level left sided rib fracture, left AC joint dislocation, and left T1 transverse process fracture. One must consider a brachial plexopathy in the differential diagnosis of his symptoms." *Id*. at 569.

24. Dr. Golovko concluded that Claimant's diagnoses attributable to his 08/10/2018 injury included left-sided ribs 1-7 fractures, hemothorax, left pulmonary contusion, T1 transverse process fracture, and left AC joint dislocation grade II-III, currently with paresthesia in the T1 distribution on the left of unknown etiology. Ex. 16:570. Dr. Golovko did not include a TBI in the list of Claimant's diagnoses. *Id*.

25. According to Dr. Golovko, Claimant did not meet the clinical definition of MMI at this time because additional investigation studies were needed to determine why Claimant had sensory deficits in the left T1 distribution. At the very least, electrodiagnostic studies would be necessary. *Id*. at 571.

26. Dr. Golovko assigned no work restrictions at this time. Claimant appeared "quite functional" to Dr. Golovko. *Id*.

27. Based upon additional studies that Dr. Golovko recommended, Claimant would be considered as a candidate for neuropathic pain medication such as Gabapentin. *Id*.

28. On April 14, 2020, Dr. Golovko issued an addendum IME report to the attention of Surety's attorney. This updated report was based upon additional medical records provided to him. The medical records reviewed included those from November 5, 2018, through March 24, 2020. *Id.* at 573-576.

29. In the discussion section of the report, Dr. Golovko noted the "very limited study" in the form of electrodiagnostic studies performed by Dr. Dickerson. "On page 7 of my report, I pointed out that we are concerned about a T1 lesion and not carpal tunnel or cubital tunnel issues…. So, the EMG that was done was not useful at all in this particular situation of Mr. Wooldridge." *Id*. at 577-578.

30. Dr. Golovko stated that there were two options for appropriate follow-up for Claimant, as follows: First, have Claimant return to Dr. Dickerson and have Dr. Dickerson test the APB, the thoracic dermatomes, the thoracic paraspinal and intercostal areas. Second, refer Claimant to an EMG physician in the Dallas area. Ex. 16 at 579.

31. Dr. Golovko concluded by stating that the conclusions from his 08/27/2019 report were entirely unchanged, because electrodiagnostic studies that were performed were inadequate to rule in or rule out a left T1 nerve lesion or other upper thoracic lesion. *Id*.

32. On July 1, 2020, Dr. Golovko amended his IME report a second time to include a review of additional medical information that he received, including electrodiagnostic studies from Dr. Dickerson, dated 06/05/2020, a cervical CT myelogram, dated 5/13/2020, and a thoracic CT myelogram, dated 5/13/2020. *Id.* at 581.

33. Dr. Golovko opined that given "the nature of this trauma and the location of the trauma and given that the only cervical and thoracic vertebra affected is the left T1 vertebra and its left foramen, this supports that his [Claimant's] left T1 deficits, on an a more likely than not basis, are secondary to the injury sustained on 08/10/18." *Id*. at 583.

34. Dr. Golovko determined that Claimant had reached MMI as of June 5, 2020, the date Dr. Dickerson examined Claimant for electrodiagnostic studies. *Id*.

35. Dr. Golovko explained his impairment rating as follows: "Based on his left shoulder AROM measured on 08/27/19, this total[led] 4% UE impairment which converts to a 2% WP impairment. I believe he best satisfies thoracolumbar category II. This could be for transverse process fracture or it can be for non-verifiable radicular complaints. He does not meet the definition of Category III. Per Category II, this is 5% - 8% WP impairment. His symptoms and signs support the higher end of this range. 8% is assigned. The 8% and 2% combine to yield

10% WP impairment." Ex 16:583. Dr. Golovko based his impairment rating on the 5th Edition of the AMA Guides. Ex. 16:584.

36. Claimant was a candidate for palliative management of treatment of what appeared to be intermittent left T1 neuropathic changes and symptoms. He would be a reasonable candidate for ongoing office visits with appropriate physicians to monitor his medication regime with a medication such as Neurontin (Gabapentin). Claimant did not have any strength deficits. He had no muscle atrophy. He was not a candidate for injections or surgery in this region of his thoracic spine. *Id*.

37. Dr. Golovko did not think Claimant required any workplace restrictions as a result of the industrial injury. Rather, Claimant was simply a good candidate for palliative care. *Id.* [6]

38. **Second Independent Medical Evaluation**. James H. Bates, M.D., performed an independent medical evaluation (IME) of Claimant on February 8, 2021, at the request of Claimant's counsel. Dr Bates' credentials are known to the Commission. Ex. 20.

39. Dr. Bates took Claimant's medical history. Claimant's recollection of events was tentative and Dr. Bates deemed him a "vague historian." For example, Claimant could not recall the name of his current medical provider. *Id.* at 653.

40. Dr. Bates performed a physical examination of Claimant. He noted that Claimant appeared his age, 55 years. Claimant could stand in an upright position. His gait was mildly asymmetric. He had decreased movement of the left ankle with gait and balance difficulties with tandem walking. *Id*. at 655.

[6] Dr. Golovko left out of his IME report or impairment rating any discussion of a TBI or concussion. Claimant apparently did not tell Dr. Golovko about his TBI. Dr. Bates similarly did not rate Claimant for permanent impairment based upon his TBI. In any event, it appears that Dr. Greenwald did not rate Claimant for permanent impairment with respect to his TBI, either, in her medical records included as Ex. 14. Nevertheless, on October 11, 2018, Dr. Greenwald diagnosed Claimant with the following recurrent symptoms associated with a TBI (concussion) with a loss of consciousness: neck pain (whiplash); acute post-traumatic headaches; dizziness, disrupted sleep cycle, and blurred vision. Ex. 14:492.

41. For musculoskeletal, Dr. Bates noted that Claimant had a deformity of the left AC joint with displacement of the clavicle. No atrophy was noted. Ex. 20 at 656.

42. Dr. Bates noted no abnormalities of Claimant's motor strength. *Id*.

43. Claimant had some decreased sensation to light touch and sharp or pin prick in the left scapular region and left pectoralis region. He had a negative Spurling's test bilaterally. *Id*.

44. Dr. Bates noted some abnormalities upon inspection of Claimant's spine, a mild forward position with tenderness in the intrascapular left region and the spinous process upper thoracic region. *Id.* at 656.

45. Dr. Bates then conducted a medical records review of records from Claimant's treatment and evaluation at Saint Alphonsus and Saint Luke's, and all other providers from August 10, 2018, through October 12, 2020. *Id.* at 656 – 669.

46. Dr. Bates determined that Claimant was at MMI as of February 8, 2021, and required no further specific medical treatment as a result of his August 10, 2018, injury. *Id*. at 669.

47. As for permanent partial impairment, (PPI), Dr. Bates utilized the 6th Edition of the AMA Guides. For Claimant's T1 fracture, Dr. Bates assigned an 8% WP impairment. For Claimant's left shoulder injury, Dr. Bates assigned a 10% UE impairment which equated to a 6% WP impairment. Using the combined value chart, Dr. Bates assessed a 14% WP impairment as a combination of Claimant's thoracic spine and upper left extremity impairments. *Id.* at 670.

48. Dr. Bates determined that it was appropriate for Claimant to have permanent work restrictions which he noted in a table. *Id*. These included the following: occasional lifting of 0 to 10 pounds below shoulder; rare left lifting below shoulder of 11 to 20 pounds; occasional right lifting of 11 to 20 pounds; rare lifting below shoulder for both shoulders of 21 to 50 pounds;

never lifting of 51 to 100 pounds; rare lifting above the shoulder for the left shoulder for 0 to 10 pounds; occasional lifting of 0 to 10 pounds above the shoulder for the right shoulder; never lifting above the shoulder for the left shoulder for 11 to 20 pounds; rare lifting above the shoulder for the right shoulder for 11 to 20 pounds; never lifting of 21-50 pounds for the left shoulder; rare lifting of 21 to 50 pounds for the right shoulder above the shoulder level; never lifting of either shoulder above the shoulder level for 51 to 100 pounds; lift and carry, frequent carrying for both shoulders of 0 to 10 pounds; rare lift and carry for the left shoulder; frequent lift and carry for the right shoulder; rare lift and carry for both shoulders of weight 21 to 50 pounds; never lift and carry for both shoulders of 51 to 100 pounds; occasional push/pulling from 0 to 50 pounds; rare push pulling for weights in the range of 51 to 100 pounds; sitting total per day 6 hours; continuous sitting for 30 minutes; rare bending/stooping and twisting at the waist; rare prolonged standing; cumulative standing throughout the course of the day at 4 hours; walking total of 6 hours per day; walking without a break one hour total; rare walking over uneven surfaces; occasional stair climbing; and rare exposure to unprotected heights. Ex. 20:671-673.

49. **Claimant's Condition Post-MMI**. After being declared medically stable, Claimant attempted to perform some property maintenance work for his niece, who was a manager of an establishment known as Teekoy Properties. Tr., 51:12-25. Teekoy Properties dismissed Claimant after approximately a month because his pain flared up and Claimant had missed work for several days. Thereafter, Claimant performed no other work. *Id*. at 52:8-17.

50. **Vocational Evaluation Report**. Barbara K. Nelson, M.S., CRC, of Injury Management and Rehabilitation Counseling in Boise, delivered a vocational evaluation report regarding Claimant, on May 20, 2021, to the attention of Claimant's counsel. Ms. Nelson's

credentials are known to the Commission. *See* Ex. 8.

51. Ms. Nelson conducted a telephonic interview with Claimant, who was in Abilene, Texas, at the time. She found the interview to be quite challenging, from Claimant's Texas accent; apparent speech impediment; Claimant's hearing loss; lack of memory; and phone problems. *Id*. at 337.

52. Information considered by Ms. Nelson included relevant medical records, W-2s, Claimant's answers to discovery, and Claimant's deposition. *Id.* at 337-338.

53. Ms. Nelson employed the standard methodology used in the vocational evaluation industry to determine earning capacity for Claimant. *Id*. at 338-340.

54. Ms. Nelson considered Claimant's pre-industrial accident medical history. As a teenager, Claimant was shot in the neck with a bb gun, which accounted for the reason why Claimant could not undergo an MRI due to a ferromagnetic pellet lodged in his neck. *Id*. at 340.

55. Claimant told Ms. Nelson that he had a 1983 traumatic injury to his left leg which required a skin graft, but he was not left with any permanent restrictions or impairments. *Id*. at 341.[7]

56. Claimant also informed Ms. Nelson that he had his gallbladder removed ten years prior to the vocational evaluation. He had a full recovery. He also had carpal tunnel surgery on the right wrist and had no residual problems from that. *Id*.[8]

57. Diagnosed with high cholesterol, Claimant took prescribed medication for that condition. There were references in the records to Claimant having been diagnosed with diabetes

[7] There is a disconnect here between Claimant's testimony at hearing and Ms. Nelson's recitation of a 1983 injury to Claimant's left leg. Claimant did not testify regarding any prior injuries at hearing. His report to Ms. Nelson here will be relied upon.

[8] Again, Claimant did not testify regarding carpal tunnel preexisting at hearing. This account will be relied upon. In any event, neither Claimant's left leg injury nor his carpal tunnel is relevant to the injuries he sustained in the industrial accident. Claimant's failure to testify concerning his prior conditions at hearing may be reasonably explained by his memory problems associated with his TBI.

or pre-diabetes, but Claimant denied that. Though hard of hearing, Claimant has not been formally tested for hearing loss. Ex. 8 at 341.

58. Claimant described to Ms. Nelson as being in constant pain during their interview. The pain was localized in his mid-back on the left side, in his left shoulder, and down his left arm. Claimant took various prescriptions for pain but wanted something stronger. Claimant did not participate in physical activities due to pain. *Id.* at 350.

59. For a social history, Claimant was born in Salem, Oregon, and moved to Idaho when he was five years old. The family resided in Idaho until Claimant was in his early teens and then moved to Texas. Claimant had resided in Idaho, Texas, and briefly in North Dakota, where he worked in the oil fields. *Id*. at 351.

60. Claimant was married to his wife for 26 years and had one son from a previous marriage. Together he and his wife had nine grandchildren and one great grandchild. Claimant's wife was an assistant manager of an assisted living facility in Abilene, Texas. The family rented a home in Abilene. *Id*.

61. Claimant gave up drinking "many years ago." He stated that he occasionally used marijuana and did not admit to using the methamphetamines later found on the toxicology screen. Although he denied any criminal convictions, Claimant did have a conviction for misdemeanor battery in Canyon County in 1992. In November 2017, Claimant received a conviction for misdemeanor failure to purchase a driver's license. *Id*.

62. Claimant quit school after the 9th grade and did not obtain a high school diploma or GED. He had no formal or informal post-secondary education or training. *Id*.

63. Claimant did not read well but denied any learning problems nor was he in special education classes in school. He did not read for pleasure. While he could do basic mathematics,

his wife handled all finances. His computer skills were very basic, although he was able to access social media and make posts. Ex. 8 at 351.

64. Claimant never served in the armed forces nor did he perform volunteer work. His hobbies were fishing, hunting, and playing pool. *Id.* at 352.

65. Claimant earned $15 per hour at the time of injury; Bullock paid him $13 as a starting wage. *Id*.

66. Ms. Nelson saw no reason to recommend assigning disability to any of Claimant's pre-injury medical conditions or injuries such as carpal tunnel. He had no residuals or significant issues from any prior injuries that interfered with his ability to work. *Id*. at 353-354.

67. There was a disagreement between Claimant's medical evaluators about his permanent impairment and restrictions that Ms. Nelson noted. Dr. Golovko assigned a 10% WP permanent partial impairment to Claimant, but no restrictions. He felt that Claimant was quite functional. Dr. Bates, however, assigned a 14% WP permanent partial impairment rating related to the August 10, 2018, injury, and specified permanent restrictions related to lifting, carrying, reaching, pushing, pulling, sitting, bending, twisting, standing, walking, and climbing. *Id*. at 354.

68. Dr. Bates' restrictions were more closely aligned to Claimant's subjective complaints, according to Ms. Nelson. *Id*.

69. While Dr. Golovko's opinion would not result in any disability, Dr. Bates' restrictions would result in partial vocational disability for Claimant, according to Ms. Nelson. Claimant, however, believed that he was totally and permanently disabled. *Id*.

70. Claimant was 55 years of age at the time of evaluation, which interfered with employability. *Id*. at 355.

71. Ms. Nelson considered Claimant's ninth grade education, combined with his lack

of a high school diploma or GED, to place him in the limited education category. At most, this limited Claimant to low skilled jobs. Ex. 8 at 355.

72. The large majority of Claimant's work experience had been that of a derrick hand in the oil and gas industry. A fairly low skilled occupation, it did not lend itself to transferable skills. Ex. 8:355-356. Claimant's other experience was as a laborer in construction work with, again, limited transferable skills. *Id.* at 356.

73. Claimant's labor market was based in the Abilene, Texas area. Abilene offered diverse cultural opportunities which lent themselves well to job opportunities. *Id*. at 356.

74. Using Dr. Golovko's lack of workplace restrictions for Claimant, Ms. Nelson determined that he had no disability over and above his impairment in either Abilene or Boise. *Id*. at 357.

75. Dr. Bates' restrictions, on the other hand, limited Claimant to light to medium strength work, with significant limitations in various physical activities. These restrictions took Claimant out of performing work in the oil and gas fields or residential construction labor, the only two occupations he had performed during his career. Nevertheless, Ms. Nelson did not find it futile for Claimant to seek work. There were various light to medium strength occupations in the Abilene market which Claimant could perform, that she identified. Ex. 8 at 358-359.

76. Based upon Claimant's vocational profile, Ms. Nelson determined that he had pre-injury access to approximately 37% of the jobs in the Abilene market when using Dr. Bates' restrictions. She further found that post-injury, based upon Dr. Bates' opinion, Claimant had significantly reduced physical capacities that reduced his personal labor market access to 14%, which was equivalent to a 62% reduction in Claimant's access to personal labor market. Based

upon Dr. Golovko's lack of restrictions, however, Claimant had no reduction in his labor market access. Ex. 8 at 359.

77. Claimant earned $15 per hour at the time of his industrial injury. Based upon wages he would have been likely to earn in the labor market, however, Ms. Nelson determined that Claimant had an average wage of $11.67, a loss of 22%. *Id*. at 359-360.

78. Using Dr. Bates' restrictions, Claimant's final disability rating would be placed at the midpoint within the range of his losses in labor market access and wage-earning capacity, or between 22% and 62%. Ms. Nelson recommended that Claimant be placed at the midpoint of his vocational and economic losses, or a final disability rating of 40%, inclusive of impairment. *Id.* at 360. She did not explain her reasoning for placing Claimant at the midpoint.

79. **Claimant's Condition at the Time of Hearing**. Claimant was still experiencing pain in his left shoulder at the time of hearing. Tr., 46:4-12. He also had numbness from his mid-spine to his chest and down his left arm to his elbow. *Id.* at 47. He had pain severe enough that if he engaged in any strenuous activity, he would be "down" for a couple of days. *Id*. at 48:1-6.

80. Claimant experienced trouble performing chores around the house. Mowing the lawn and weed eating put too much tension on his back and he was forced to stop performing these activities. Tr., 49:5-12. He also had difficulty lifting from his waist to his shoulder, as well as any overhead lifting, and he had trouble with twisting, prolonged sitting, and prolonged standing. *Id*. at 53:1-23.

81. **Zachary Bullock's Testimony**. Bullock was the owner of Bullock Building Company and had organized it as a limited liability company, but it dissolved in January, 2021. Tr., 75:14-22. Bullock hired Claimant as an employee in October, 2017. *Id*. at 77:21-22. Bullock

initially hired 15 employees, including Claimant. Tr., 79:2-4. This number later increased to 20 employees. *Id*. at 79:5-10.

82. In June, 2018, Bullock lost contracts and was forced to lay off all employees, including Claimant. In late July 2018, he obtained more contracts and rehired employees as "subcontractors." *Id*. at 80:13-16. Bullock claimed that it was the employees' choice to be either a "separate entity" or a W-2 status employee. *Id*. at 80:21-22. Bullock had "both 1099 and W-2 *employees*." [Emphasis added.] *Id*. at 81:1-2. Nevertheless, Bullock stated that after layoff, he brought back all employees exclusively as subcontractors; he did not testify, however, that he had the subcontractors sign a contract. *Id*. at 81:15-19. This was "just like a management change in Bullock Building Company." *Id*. at 81:23-24. Bullock had a group discussion with five of his employees, including Claimant, in which he explained that he had W-9 forms for them to fill out. He explained that it meant that each person would be their "own company" and that they would be "independent subcontractors." According to Bullock, they were responsible for their own general insurance and workers' compensation insurance. *Id*. at 82:15-83:9.

83. When Bullock initially hired Claimant, he paid him $12.50 per hour. He claimed that when he brought employees back as subcontractors, they were paid a daily rate that depended upon the skill and dependability of the employees. The range was $100 per day to $240 per day. Claimant's daily rate was for $120 per day. *Id*. at 84:9-23. He also claimed that there were no set hours in which the employees were required to keep. *Id*. at 84:24-85:1. He further denied setting times for when employees needed to be present for company meetings and alleged that he communicated with them by phone about the start times. *Id*. at 85:9-20. If a worker did not show up for the morning, they would be paid for only half a day. *Id*. at 85:21-24. Claimant always showed up for work between 7 and 8 a.m. each working day. *Id*. at 86:3-4.

84. Bullock arranged for the crane operator to be present on the day of the industrial accident. Tr., 88:1-9. Bullock "never really decided" which positions employees would fill. *Id*. at 88:10-15. Nevertheless, Bullock ensured that the layout was "proper," and that everybody had their hand tools. *Id*. at 88:21-89:1. Bullock had sufficient tools to complete the framing of a house. *Id*. at 90:3-4. Bullock provided safety equipment for employees. *Id*. at 90:10-15. He claimed that he did not require safety equipment for employees. *Id*. at 90:16-22.

85. Bullock did not witness Claimant's fall from the roof. *Id*. at 91:18-20. He was 40 feet away from the house. *Id*. at 91:21-24. He became aware of Claimant's fall when he heard a "commotion" and he turned around and saw Claimant land on the ground. *Id*. at 92:3-8. Bullock claimed that Claimant was conscious when he approached him but that he could not communicate because he had the wind knocked out of him. *Id*. at 92:10-14. He transported Claimant to the hospital in a coworker's jeep. *Id*. at 92:14-18. Claimant was unable to stand up on his own power or walk. *Id*. at 93:16-22. They carried Claimant to the jeep. *Id*. at 93:23-25.

86. Claimant returned to work for Bullock on light duty in Spring 2019. *Id.* at 95:5-9. Claimant had a release from his doctor specifying light duty, so Bullock assigned him some light duty. *Id*. at 95:14-16. Claimant worked for six weeks. *Id*. at 95:19-21. Bullock instructed Claimant that he did not want him to do any tasks that were not within his capacity. Tr., 96:14-15. Claimant stopped working for Bullock when Bullock lost contracts again and laid employees off. *Id*. at 96:16-24. All employees at this point were "subcontractors." *Id*. at 97:3.

87. The "Framing Installation Subcontractor Agreement" Bullock provided for the record, established that the parties, Bullock and Franklin Building Supply Company, did not wish to enter into an employer/employee agreement. It purported to give the subcontractor control over the "work to be done." The subcontractor would negotiate payment for his services

"on a job-by-job basis, in an amount to be agreed upon before each job." The subcontractor would indemnify the contractor from all harm and obtain his own workers' compensation insurance. The subcontractor agreement contained in the record is signed by a "Jeff Christoffersen" on behalf Franklin Building Supply Company, and Zachary Bullock on behalf of himself; the contract does not mention Claimant. *See* Ex. 1:1-2. There is no "Framing Installation Subcontractor Agreement" in the record that is signed by Claimant, or any other worker.

88. **Credibility**. Claimant testified credibly at hearing. Zachary Bullock's testimony on the issue of whether Claimant was an independent contractor, however, was not credible. He acknowledged that he initially hired Claimant as an employee but after losing contracts and being forced to lay off employees he hired Claimant and other workers back as "subcontractors." Tr., 81:1-19. Bullock testified that he had "both 1099 and W-2 *employees*." Tr., 81:1-2. [Emphasis added.] All workers were laborers and there was no functional difference between them, despite having different designations as employees or independent contractors. Somehow, however, Bullock brought employees, including Claimant, back as independent contractors after the period of layoff. He claimed that it was just a "management change in Bullock Building Company." *Id*. at 81:23-24. It is immaterial, even if it is true, that Bullock paid workers, including Claimant, a flat rate for daily work. A $120 per day flat rate works out to $15 per hour on an 8 hour work day, within the range that Bullock was paying Claimant on an hourly basis of $13 per hour. The instrument that Bullock presented to the employees for signature was a W-9 form, a federal tax form, not an independent contractor agreement.

FURTHER FINDINGS AND ANALYSIS

89. 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, leaves 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).

90. **Employee vs. Independent Contractor**. An employee is "synonymous with 'workman' and means any person who has entered into the employment of, or who works under contract of service or apprenticeship with, an employer." Idaho Code § 72-102(11). An employer is any "person who has expressly or impliedly hired or contracted the services of another." Idaho Code § 72-102(12)(a). An independent contractor is "any person who renders service for a specified recompense for a specified result, under the right to control or actual control of his principal as to the result of his work only and not as to the means by which such result is accomplished." Idaho Code § 72-102(16).

91. Four factors are used to determine independent contractor status. According to *Stoica v. Pocol*, 136 Idaho 661, 39 P3d 601 (2001), they are as follows: 1.) the *right to control* the times, manner and method of the work being performed; 2.) the method of payment; hourly vs. an agreed estimate and withholding of taxes; 3.) the furnishing of tools and equipment; and 4.) the right to terminate the employment relationship at will, without any liability.

92. "Whether an injured worker is an independent contractor or employee is a factual determination to be made on a case-by-case basis from full consideration of the facts and circumstances." *Stoica*, 136 Idaho at 663, 39 P3d at 602. The ultimate question to be decided is

whether the employer assumes the *right to control* the times, manner and method of the work of the employee, as contrasted with merely requiring results in conforming with the agreement. *Id.*, 136 Idaho at 663, 39 P3d at 602 [emphasis added]. When there is doubt whether an individual is an employee or an independent contractor, liberal construction must be given in favor of finding that the relationship was one of employer and employee. *Burdick v. Thornton*, 109 Idaho 869, 871, 712 P.2d 570, 572 (1985).

93. The evidence shows that Bullock retained the right to control the time, manner and method of the work of Claimant; Bullock did not control merely the results. While Bullock testified differently based on a meeting he held with the employees in which he explained the transformation to independent contractors and had them sign W-9 forms, he nevertheless controlled the times, manner and method of the work performed by these employees, including the work of Claimant. This was evident in the right to tell Claimant when to show up for work and what to do on the job.

94. The method of payment was hourly before Claimant's transformation into a "subcontractor." This daily flat rate would allegedly be reduced if the worker did not show up for part of the workday, according to Bullock. There was no agreed estimate for performing work that underlay the flat rate. The expectation, however, was still clearly an 8-hour workday by the worker and a 40 hour work week, with occasional Saturdays at Bullock's discretion. Bullock's testimony on a flat daily rate is not believable; rather, it is reasonable to find that Bullock continued to pay Claimant on an hourly basis. Nevertheless, even if it were true that Bullock paid Claimant on a flat rate basis, it is immaterial. Paying Claimant $120 per day equated to $15 per hour rate for an 8-hour workday. Furthermore, there is no evidence that Claimant

competitively bid for a daily flat rate or any other contract term, which would be indicative of an independent contractor.

95. Neither Claimant nor any other worker signed an independent contractor agreement with Bullock. Saying that a worker is independently established in their own trade or occupation, and actually being independently established, are two different things. Claimant was a laborer who supplied all of his services to Bullock, not an independent contractor. Claimant had the right to terminate the employment relationship with Bullock at any time at will without liability, which is indicative of an employer/employee relationship.

96. Bullock supplied major items of equipment such as ladders, nail guns, an air compressor and the crane, whereas Claimant only provided his own hand tools. This situation, again, is indicative of an employee/employer relationship, not an independent contractor.

97. The evidence demonstrates that the switchover from being an employee to a subcontractor was merely a matter of form and not substance. The instrument signed by Claimant that purportedly transformed him into an independent contractor was a W-9 Form, a federal tax form, not a subcontractor agreement.

98. Thus, Bullock, as the Employer, retained the right to control the work, not merely the results of the work. Bullock hired and rehired Claimant as an employee, and despite allegedly transforming him into an independent contractor, retained the right to control which is indicative of an employer/employee relationship, not an independent contractor.

99. Claimant was an employee of Bullock.

100. **Compensation Due, Attorney Fees & Penalties**. Idaho Code § 72-210 provides that if an employer fails to secure payment of compensation as required by the Idaho Workers Compensation Law, an injured worker may claim compensation under the law and shall be

awarded, in addition to compensation, an amount equal to 10% of the compensation awarded, together with costs, if any, and reasonable attorney fees. "Compensation" for purposes of the 10% penalty is statutorily defined collectively as "… any or all of the income benefits and the medical and related benefits and medical services." Idaho Code § 72-102(7).

101. Claimant has proven that he was an employee and not an independent contractor of Bullock. Bullock failed to secure payment of workers' compensation benefits for Claimant. Therefore, Claimant is entitled to claim from Bullock compensation under the law and 10% of the compensation awarded, together with costs and attorney fees pursuant to Idaho Code § 72-210. The payment of these costs and attorney fees is due from Bullock, not the Statutory Employer and its Surety. *See Vickers v. Pyramid Framing Contractors, Inc.*, 852 P.2d 484, 485, 123 Idaho 732, 733 (Idaho 1993), *Eldridge v. Meissen Trucking*, 012122 IDWC, IC 2018-002756 ¶ 81 (Idaho Industrial Commission Decisions, 2022).

102. **Causation.** Claimant bears the burden of proving that the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). There must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his contention. *Dean v. Dravo Corporation*, 95 Idaho 958, 560-61, 511 P.2d 1334, 1336-37 (1973). No special formula is necessary when medical opinion, evidence plainly and unequivocally conveys a doctor's conviction, that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979).

103. There is no legitimate dispute that Claimant's injuries were the direct result of the industrial accident. Statutory Employer and its Surety acknowledge that Claimant suffered an

accident and injury in covered employment on August 10, 2018. A truss knocked Claimant off of the roof of the house, and Claimant's injuries, including head trauma/TBI, broken ribs, T1 fracture, right upper extremity injury, and other injuries, resulted from the accident. No one has suggested any other cause of Claimant's injuries, which were immediately apparent to his medical providers upon Claimant being examined. The Statutory Employer, Franklin Building Supply, and its Surety accepted Claimant's claim and paid benefits, which were considerable (over $130,000 in medical services alone).

104. Claimant has shown that his injuries were incurred due to the industrial accident and injury. Claimant has proven causation.

105. **Medical Stability**. Medical stability, or MMI, is a determination that a claimant has reached a point in treatment where no further substantive treatment is warranted and only palliative care would be in order. It is reached after maximum medical rehabilitation has been achieved, and the Claimant's status is considered stable or nonprogressive. *See* Idaho Code § 72-422 (permanent impairment).

106. Both Dr. Golovko and Dr. Bates agreed that Claimant was at MMI upon their examinations of him. There is no legitimate dispute whether Claimant reached medical stability. Dr. Bates determined that Claimant was at MMI on February 8, 2021. Dr. Golovko placed MMI at an earlier date, but as discussed below Dr. Bates' opinion took Claimant's ongoing conditions into account, used the more recent edition of the AMA guides, and is more persuasive. His opinion is adopted.

107. **Impairment**. "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). In cases where two physicians have issued conflicting impairment ratings for the same body part(s), the Commission has the discretion to average the impairment ratings or choose the impairment rating that more closely aligns with the evidence. *Waters*, 156 Idaho at 262, 322 P.3d at 995.

108. Dr. Golovko rated Claimant’s WP impairment at 10%. Dr. Bates, however, found that Claimant had a 14% WP. Dr. Golovko’s opined that Claimant did not have any work restrictions, however Dr. Trifilo subsequently opined that Claimant had work restrictions and Dr. Golovko did not have access to Dr. Trifilo’s records.

109. The Commission has the discretion to average the two impairment ratings or choose the one that more closely aligns with the evidence. *Waters*, 156 Idaho at 262, 322 P.3d at 995. The 14% WP impairment, as found by Dr. Bates, is more reasonable based upon the facts of Claimant’s significant work restrictions that Dr. Bates determined, which Dr. Golovko did not. Dr. Bates found that Claimant suffered severe permanent work restrictions that were consistent with his limitations. Dr. Bates also took into account Claimant’s chronic pain caused by the industrial accident.

110. Dr. Bate’s impairment rating more closely aligns with the evidence and should be utilized in this case. Claimant is correct in arguing that Dr. Bates’ impairment rating is more

persuasive than Dr. Golovko's. Dr. Bates used the 6th Edition of the AMA Guides to the Evaluation of Permanent Impairment, while Dr. Golovko used the 5th Edition. *See* Claimant's Brief at 2-3.

111. No doctor, not Dr. Golovko, Dr. Bates, Dr. Trifilo, nor Dr. Greenwald, rated Claimant for permanent impairment based upon his TBI.

112. Claimant has sustained a 14% WP partial impairment.

113. **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.

114. 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).

115. 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); *and 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).

116. The opinions of medical and vocational experts are not controlling on the Commission. The evidence of vocational experts, like the opinions of medical experts, should be entitled to the weight that they deserve, and are not definitive *per se*. *See e.g., Urry v. Walker and Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989) ("[T]he Industrial Commission, rather than the claimant's treating physician, is the fact finder and ultimate evaluator of impairment. The physician, as an expert witness, *may provide information helpful to the Commission*… Medical testimony should not be held to be conclusive irrespective of other evidence." [citations omitted] [emphasis added] *Urry*, 115 Idaho at 755-756.

117. The first requirement for determining whether Claimant has sustained disability in excess of impairment is to establish that Claimant has a permanent partial impairment. *See Urry*, 115 Idaho 750, 769 P2d 1122. Claimant has sustained a permanent partial impairment of 14% WP. Thus, the *Urry* bar has been met.

118. There is only one vocational assessment in the record, that of Ms. Nelson. *See supra* at 14-18. Ms. Nelson's assessment establishes that Claimant sustained a disability in excess of impairment if Dr. Bates' restrictions are used. The Referee determines that the opinion of Ms. Nelson is entitled to substantial weight in this decision.

119. As Claimant argues, Dr. Bates' opinion is consistent with Claimant's testimony regarding his pain, which limited his abilities. It is also consistent with the fact that Claimant received approval for Social Security Disability. *See* Claimant's Brief at 3.

120. It is reasonable to adopt Dr. Bates' work restrictions and impairment, as noted above. Claimant sustained serious injuries in the industrial accident that drastically affected his

ability to perform manual labor. Dr. Bates' opinion is consistent with Claimant's limitations due to his pain.

121. Defendants, Statutory Employer, and its Surety, however, argue that Dr. Bates determined that Claimant had permanent work restrictions based solely upon Claimant's subjective complaints alone. *See* Defendants' Brief at 12. Nevertheless, Dr. Bates also conducted a personal medical examination of Claimant and observed his presentation. Even if it were true that Dr. Bates considered Claimant's subjective complaints alone, there is other evidence in the record which supports his opinion, such as Claimant's testimony regarding his abilities. Therefore, Ms. Nelson's citation to Dr. Bates' restrictions is reasonable and justified, however her adoption of a 40% WP permanent partial disability is not in order, for the reasons explained below.

122. Ms. Nelson averaged the disability percentages and determined that Claimant was at the mid-range of his losses in labor market access and wage-earning capacity, or between 22% and 62%, thus placing him at 40%, inclusive of impairment. However, her decision to average the two measures of disability was not well explained, and the Referee finds that it is more reasonable to determine Claimant's disability at the top of the range, or 62%.

123. Claimant's restrictions deny him the ability to compete for work in the only two professions that he has ever had, that of a derrick hand in the oil fields and that of a laborer in house framing construction. Ms. Nelson identified delivery driver, restaurant host, dog walker, grocery shopper or grocery delivery person, vehicle driver, entry-level temperature taker, host, and production helper as occupations that would still be available to him. *See* Ex. 8:358-359. Nevertheless, at age 56, Claimant would have a difficult time finding re-employment in any occupation outside of those identified in his work history. Ms. Nelson herself acknowledged that

it would be "hard to have to change occupations at age 56, especially if one does not read well, does not operate computers, and does not have a high school diploma or GED." Ex. 8 at 358. Furthermore, Claimant suffered from the sequalae of his TBI, including slurred speech, memory problems, sleep disturbance, and impaired cognition, which further impedes employment.

124. The reduction of Claimant's ability to engage in gainful activity is better reflected by his loss of access to the labor market, than by application of a convention of averaging two different measures of disability. *See* Claimant's Brief at 3. The Referee agrees with Ms. Nelson that it would not be futile for Claimant to seek work, nevertheless, he is greatly disadvantaged for doing so for the reasons stated above. Claimant's request for a 62% WP permanent partial disability, inclusive of impairment, therefore, is not excessive. Under the facts of this case, 62% represents a more appropriate assessment of Claimant's disability.

125. Claimant has sustained a permanent partial disability of 62% WP, inclusive of impairment.

126. **Apportionment**. Having established that Claimant suffered permanent partial disability in the amount of 62% WP from all sources, inclusive of impairment, it must next be determined whether that disability should be apportioned between the subject accident and any pre-existing impairment or impairments per Idaho Code § 72-406(1) and *Page v. McCain Foods,* 141 Idaho 342, 109 P3d 1084 (2005). Defendants bear the burden of proving that some portion of Claimant's disability should be apportioned to a pre-existing physical impairment. *Baldner v. Bennets*, 103 Idaho 458, 649 P.2d 1214 (1982).

127. Defendants have not argued that Claimant's permanent partial disability should be apportioned based upon pre-existing impairment(s); there was no pre-existing impairment found

by a physician either contemporaneously or afterwards in an IME. Therefore, Claimant's permanent partial disability of 62% WP should not be apportioned to a pre-existing impairment.

128. Claimant's permanent partial disability of 62% WP is not apportioned to any pre-existing impairment(s).

129. **Reimbursement**. "The employer who shall become liable and pay such compensation may recover the same from the contractor or subcontractor for whom the employee was working at the time of the accident causing the injury or manifestation of the occupational disease." Idaho Code § 72-216(3)(a).

130. Bullock as Employer is entirely liable for repayment of all workers' compensation benefits awardable to Claimant. It is undisputed that Bullock was uninsured at the time of Claimant's August 10, 2018, industrial accident.

131. Bullock, therefore, shall reimburse any payments, either those made in the past or those made in the future, by The Franklin Group, Inc., as the Statutory Employer, and its Surety, Alaska National Insurance Company.

CONCLUSIONS OF LAW

1. Claimant was an employee of Bullock.

2. Bullock as Employer failed to secure payment of workers' compensation for Claimant's employment. As such, Bullock is liable to Claimant for compensation paid, the amount of 10% of all workers' compensation benefits paid, plus reasonable attorney fees and costs, if any. *See* Idaho Code § 72-210.

3. The industrial accident of August 10, 2018, caused Claimant's injuries.

4. Claimant reached medical stability (maximum medical improvement, or MMI) on or about February 8, 2021.

5. Claimant has sustained a 14% WP impairment.

6. Claimant has sustained a 62% WP permanent partial disability, inclusive of impairment.

7. Claimant's 62% WP permanent partial disability, inclusive of impairment, is not subject to apportionment. *See* Idaho Code § 72-406(1).

8. Bullock, as the Employer, is liable to The Franklin Group, Inc., as Statutory Employer, and its Surety, Alaska National Insurance Company, for repayment of all workers' compensation benefits paid to or for the benefit of Claimant, including medical benefits, temporary disability benefits, PPI, and PPD. *See* Idaho Code § 72-216(3)(a).

9. Unless the parties agree on what constitutes 10% compensation, reasonable attorney's fees, and costs, Claimant's attorney shall prepare a motion or memorandum with an affidavit of attorney fees and costs, based upon Bullock's nonpayment of workers' compensation insurance coverage, to be reviewed by the Commission. *See Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984), IDAPA § 17.01.01.802. Claimant shall also provide a calculation of what sum constitutes 10% of the total amount of Claimant's compensation. The amount should be numerically definitive to the extent possible, but may reference uncertain amounts, such as future medical benefits, in general terms as needed.

10. Unless Claimant and Bullock file a stipulation resolving the issues or providing an alternate briefing schedule, Claimant shall file the above-mentioned documents within thirty-five days of the date this award is served. Bullock shall have twenty-eight days to file a response from the date Claimant's filing is served. Claimant shall have fourteen days to file a reply from the date Bullock's filing is served.

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 9th day of November, 2023.

INDUSTRIAL COMMISSION

John C. Hummel

John C. Hummel, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of December, 2023, a true and correct copy of the foregoing ***FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION*** was served ***via*** **Regular United States Mail** and **Email Transmission** upon each of the following:

DARIN G. MONROE
P.O. BOX 50313
BOISE, ID 83705
dmonroe@monroelawoffice.com

SUSAN R. VELTMAN
1703 W. HILL ROAD
BOISE, ID 83702
veltman@bvwcomplaw.com

QUENTIN A. LACKEY
1212 11TH STREET SOUTH
NAMPA, ID 83651
icourt@lackeylawgroup.com

mh

Margo Harmata

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GEORGE A. WOOLDRIDGE, Claimant, v. BULLOCK BUILDING COMPANY LLC, aka ZACHARY BULLOCK, Uninsured Employer, and THE FRANKLIN GROUP, INC. Statutory Employer, and, ALASKA NATIONAL INSURANCE COMPANY, Surety, Defendants.	**IC 2019-012685** **ORDER** FILED DEC 15 2023 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 was an employee of Bullock.

2. Bullock as Employer failed to secure payment of workers' compensation for Claimant's employment. As such, Bullock is liable to Claimant for compensation paid, the amount

of 10% of all workers' compensation benefits paid, plus reasonable attorney fees and costs, if any. *See* Idaho Code § 72-210.

3. The industrial accident of August 10, 2018, caused Claimant's injuries.

4. Claimant reached medical stability (maximum medical improvement, or MMI) on or about February 8, 2021.

5. Claimant has sustained a 14% WP impairment.

6. Claimant has sustained a 62% WP permanent partial disability, inclusive of impairment.

7. Claimant's 62% WP permanent partial disability, inclusive of impairment, is not subject to apportionment. *See* Idaho Code § 72-406(1).

8. Bullock, as the Employer, is liable to The Franklin Group, Inc., as Statutory Employer, and its Surety, Alaska National Insurance Company, for repayment of all workers' compensation benefits paid to or for the benefit of Claimant, including medical benefits, temporary disability benefits, PPI, and PPD. *See* Idaho Code § 72-216(3)(a).

9. Unless the parties agree on what constitutes 10% compensation, reasonable attorney's fees, and costs, Claimant's attorney shall prepare a motion or memorandum with an affidavit of attorney fees and costs, based upon Bullock's nonpayment of workers' compensation insurance coverage, to be reviewed by the Commission. *See Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984), IDAPA § 17.01.01.802. Claimant shall also provide a calculation of what sum constitutes 10% of the total amount of Claimant's compensation. The amount should be numerically definitive to the extent possible, but may reference uncertain amounts, such as future medical benefits, in general terms as needed.

10. Unless Claimant and Bullock file a stipulation resolving the issues or providing an alternate briefing schedule, Claimant shall file the above-mentioned documents within thirty-five days of the date this award is served. Bullock shall have twenty-eight days to file a response from the date Claimant's filing is served. Claimant shall have fourteen days to file a reply from the date Bullock's filing is served.

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

DATED this 15th day of December, 2023.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Aaron White, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of December, 2023, a true and correct copy of the foregoing ***ORDER*** was served ***via*** **Regular United States Mail** and **Email Transmission** upon each of the following:

DARIN G. MONROE
P.O. BOX 50313
BOISE, ID 83705
dmonroe@monroelawoffice.com

SUSAN R. VELTMAN
1703 W. HILL ROAD
BOISE, ID 83702
veltman@bvwcomplaw.com

QUENTIN A. LACKEY
1212 11TH STREET SOUTH
NAMPA, ID 83651
icourt@lackeylawgroup.com

mh

Margo Harmata