BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ALFONSO CARRANZA, Claimant, v. PREMIER TECHNOLOGY, INC., Employer, and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Surety, Defendants.	**IC 2020-022647** **IC 2020-017690** **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 Idaho Falls on December 12, 2022. James Arnold represented Claimant. Scott Wigle represented Employer and Surety. Claimant required assistance of a Spanish interpreter. At hearing Claimant withdrew his earlier eye claim which had been consolidated with the later low back claim. Issues identified relate only to the back claim. The parties presented oral and documentary evidence. Post-hearing depositions were considered but not taken. The parties submitted briefs. The case came under advisement on August 10, 2023. This matter is now ready for decision.

ISSUES

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

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

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

   a) Temporary disability,
   b) Permanent partial impairment, and
   c) Permanent disability in excess of impairment, including 100% total permanent disability;

3. Whether Claimant is entitled to permanent total disability under the odd-lot doctrine; and

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

The noticed issue of medical care was withdrawn. Any reference of the remaining issues to an eye claim—which, previously, had been consolidated with Claimant's low back claim—was likewise withdrawn.

In post-hearing briefing Claimant raised the issue of attorney fees under Idaho Code § 72-804. This issue was identified in Claimant's Complaint, but it was not identified in Claimant's Request for Hearing nor designated an issue at hearing. Nevertheless, Defendants did not object to consideration of the issue in post-hearing briefing. They addressed it. The issue of attorney fees is deemed to be under consideration here.

CONTENTIONS OF THE PARTIES

Claimant contends that Claimant was injured at work on July 23, 2020. He tripped, fell, and hurt his low back. He reported the injury and sought medical treatment that day. He was taken off work and prescribed physical therapy and medication. This conservative care preceded epidural injections at L4-5 and discussions about surgery. Claimant was allowed to return to work March 19, 2021, but again taken off work on April 16, 2021. In July Surety denied a physician's request for another MRI and surgery. On August 4, 2021, Claimant was allowed to return to light duty with lifting and motion restrictions. Claimant was terminated on October 25, 2021, because Employer had no work within his restrictions. On November 4, 2021, Claimant's treating physician assigned permanent partial impairment ("PPI"). Vocational expert Delyn Porter opined Claimant is totally and permanently disabled from the accident coupled with his lack of English language skills.

Claimant contends that Claimant is entitled to total temporary disability for certain additional periods unpaid previously by Surety. These periods include October 25, 2021, through March 8, 2022 when he was declared to be at maximum medical improvement ("MMI"). Claimant is entitled to 12% whole person PPI and total and permanent disability either *per se* or by application of the odd-lot doctrine. Attorney fees under Idaho Code § 72-804 are appropriate for unpaid temporary disability and PPI.

Employer and Surety contend an earlier claim for an eye injury should be dismissed with prejudice. This claim, which had been consolidated with the low back claim, was withdrawn by Claimant at hearing. Credibility problems arise within the low back claim. Gary Walker, M.D. performed a forensic examination and reported non-anatomical, exaggerated symptoms and evidence of some degeneration consistent with Claimant's age of 66. He diagnosed a lumbar strain with continuing complaints and rated Claimant at 1% PPI attributable to the industrial accident. He opined that there was no basis for additional treatment or for work restrictions. Without work restrictions there is no basis for permanent disability in excess of PPI. Acknowledging that surgery was discussed by treating physicians, it was Claimant who declined surgery. Claimant was still actually working full time for Employer when the Complaint and Answer were filed. He made a video to support a disability claim but denied that was the purpose for it. Claimant denies prior back issues despite medical records to the contrary. His story about the accident has changed—worsened—over time. His complaints were inconsistent with the first MRI in November 2020. Claimant was spotty without medical excuse in performing light-duty tasks within the restrictions dictated by his treating physician. Claimant began reporting right arm symptoms which were not anatomically related to a low back claim. His deposition testimony about relief following injections was inconsistent with medical records from the time around the injections. Claimant

was terminated for non-attendance after leaving work early on occasions as well as failing to return to work after physical therapy visits. Claimant represented that he was able and available for work when claiming unemployment benefits. Claimant has not seriously looked for work. Indeed, he appears to have been going through the motions with the intent not to obtain work but merely to satisfy the requirements of obtaining unemployment benefits. Temporary disability benefits were no longer payable after October 7, 2021, when Claimant was declared to be at MMI. Surety's denial of certain benefits was based on Dr. Walker's report. The denial was reasonable. No basis for attorney fees arises here.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant; and

2. Joint exhibits ("JE") 1 through 12 and 14 through 16 (the record was held open for submission of a proposed exhibit 17, but neither party proffered it).

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. On July 23, 2020, Claimant tripped. Reporting sources did not indicate whether Claimant actually fell. Claimant reported inconsistently to medical providers over time about whether he actually fell. In deposition and at hearing he consistently testified that he fell onto his right side.

2. Claimant reported the injury and was sent for medical care that day. Nurse practitioner Bryce Campbell examined Claimant, noted tenderness from thoracic spine through

Claimant's buttocks, ordered X-rays which showed degeneration including spondylolisthesis and possible pars defects. He diagnosed a lumbar strain, and recommended activity to "avoid debilitation". He further released Claimant to light duty, no lifting over 10-20 pounds and allowed position changes as desired. Steven Larsen, M.D. concurred.

3. On the date of the accident Employer prepared a disciplinary report for a safety violation. It noted Claimant had reported eight accidents in the past. The write-up was delivered to Claimant who returned it and signed it on August 3, 2020.

4. On July 24, 2020, Employer notified Surety of the accident. Employer expressed skepticism about the claim.

5. At hearing Claimant described his pain as radiating down his right leg and up and into his right hand.

Medical Care: Accident through 2020

6. At a one-week follow-up visit Claimant reported some improvement but with continued pain. He had not filled the medication for muscle relaxer and had taken no medication. Upon examination, tenderness was now found only around L1-2 in the paralumbar muscles.

7. An undated work release from Alan Crandall, PA-C provided a 20-pound lifting restriction. Where the date of the release should have been, PA Crandall put the date of the injury. It does note a follow-up visit scheduled for Monday August 10. Judicial notice is taken that August 10 fell on a Monday in 2020.

8. On Monday August 10 PA Crandall's medical note states that Claimant had been taking his muscle relaxer as well as Tylenol. Claimant then reported pain radiating down his left buttock into his thigh. Unexpectedly, examination showed right paralumbar muscles and buttocks were tight, but not on the left. Temporary restrictions were extended for another 10 days and again

at the next visit. Claimant worked light duty.

9. Physical therapy began on September 1. After initially being released from work for physical therapy, on September 8 Claimant was again allowed light-duty work, no lifting over 10 pounds. He first cleaned machines and later drove a sweeper cart. On December 30 Claimant made a video of his light-duty work, Exhibit 15. Although he testified that he made it to show his doctor what work he did, he never showed it to his doctor.

10. The physical therapist noted that Claimant was wearing a back brace despite doctors' orders against it. The physical therapist emphasized to Claimant that he should wear it only on occasions when he needed to do something that would aggravate his symptoms. The physical therapist approved light-duty work lifting up to 10 pounds and limiting postural and motion activities. Claimant reported he was unable to tolerate the light-duty work provided. However, the physical therapist's notes show Claimant did return to light-duty work.

11. In mid-October Marc Cardinal, M.D. examined Claimant and administered an MRI. His report of Claimant's history and complaints varies somewhat from other physicians' earlier reports. Claimant also claimed physical therapy had ordered a hiatus, but records did not confirm that claim. Actually, the physical therapist noted Claimant's failure to attend sessions in November and December. It appears that Claimant missed appointments, in part, for a family obligation in Mexico.

12. The MRI showed degenerative findings from T10 to the sacrum. Degeneration at L4-5 and L5-S1 was greater on the left than on the right and thus anatomically inconsistent with Claimant's complaints.

13. The 10-pound lifting restriction was continued. Despite this, on October 22, Dr. Crandall signed as approved a job-site evaluation (JSE) which included occasional lifting up

to 50 pounds. Dr. Crandall referred Claimant to Dr. Hansen.

14. On November 23, Claimant first visited neurosurgeon Stephen Hansen, M.D. By history Claimant reported constant pain in his right buttock and leg extending into his foot since the accident. Dr. Hansen discussed surgery and recommended L4-5 epidural steroid injections.

15. On December 7, after examination was essentially entirely normal, Dr. Hansen reviewed the MRI. He noted degeneration at L4-5 and L5-S1 with stenosis. He ordered more physical therapy.

Medical Care: 2021

16. On February 1, Claimant complained to Dr. Hansen about intermittent right arm paresthesias into his hand and fingers. Dr. Hansen added cervical stenosis and radiculopathy to the diagnoses. Diagnostic imaging of Claimant's neck was refused by Claimant. X-rays showed mild spondylosis with spondylolisthesis with flexion in Claimant's lumbar spine. An epidural steroid injection was performed. The result suggested to Dr. Hansen that a decompression, but not a fusion, was being considered. Claimant again declined to consider surgery. Dr. Hansen also expressed concern about Claimant's neck but noted that surgery "may need to be done with his private insurance." Dr. Hansen released Claimant from work for the rest of March.

17. On March 18, Dr. Hansen allowed Claimant to return to work without restrictions.

18. On April 16, Claimant returned to Dr. Hansen and complained of significantly escalating right low back and lower extremity pain. Dr. Hansen noted that inconsistent stories about Claimant's ability to work in March had arisen between Claimant and Employer. Dr. Hansen again took Claimant off work through the end of May.

19. On May 25, Dr. Hansen performed another set of injections. He extended Claimant's off-work status through mid-June.

20. On June 18, Claimant told Dr. Hansen that the injections helped for about one week but that pain and numbness returned throughout his right side, upper and lower extremities.

21. On August 14, Dr. Hansen responded to Surety's inquiry. He reported that if Claimant refused surgery, a work hardening program—perhaps with another injection—would be appropriate. Dr. Hansen allowed Claimant sedentary work, no lifting above 8 pounds, and no repetitive performance of certain motions.

22. Throughout his treatment Claimant's examination varied. One example is that the straight-leg-raising test would change from positive to negative and back again on different dates. Where tests on examination are measured by a patient's subjective response, variance is seen.

Medical Opinions

23. On October 7, 2021, physiatrist Gary Walker, M.D. reviewed records and performed a forensic examination at Surety's request. Claimant reported a somewhat more dramatic, but generally consistent, description of his industrial accident. Claimant's description of the accident emphasized details that would tend to connect arm symptoms to the accident. Claimant gave an inconsistent report of the effectiveness of Dr. Hansen's injections by stating they only helped for about three hours. In records review, Dr. Walker noted a 2013 cervical spine MRI report which reportedly showed degeneration with disc protrusion and mild compression. He noted the lumbar MRI from 2020 showed greater degeneration on the left and not the right. Thoracic X-rays showed degeneration at multiple levels. On examination Claimant reported pain in the thoracic and upper lumbar areas but no low back complaints. Nevertheless, Claimant exhibited significant limitations in lumbar range of motion. Sensation was non-anatomic throughout the right side of Claimant's body and extremities. Muscle testing showed "give way weakness" and grip strength was "nonphysiologic." Dr. Walker found many nonanatomical

symptoms in Claimant's complaints. He diagnosed a lumbar strain arose from the accident with no acute pathology. He opined the cervical spine condition and complaints in Claimant's right arm were not work related and were nonphysiologic. Claimant's complaints did not correlate with the findings of the lumbar MRI of November 2020. He opined that neither surgery nor additional physical therapy was indicated. Claimant reported taking over-the-counter Tylenol two or three times per week, and Dr. Walker recommended continuing it along with home exercise. He opined that Claimant could return to work with no restrictions. He rated PPI at 1% whole person essentially upon persistent pain complaints after a strain where degeneration is present.

24. On March 8, 2022, Dr. Hansen responded to Claimant's attorney's request for an impairment evaluation. He opined that the work accident contributed to Claimant's lumbar radiculopathy, exacerbation of spinal stenosis, and exacerbation of lumbar spondylosis. He opined Claimant was at MMI and rated impairment at 12% whole person PPI. Dr. Hansen made permanent his earlier temporary restrictions of sedentary work, no lifting over 10 pounds, and no repetitive performance of certain body motions. Dr. Hansen added restrictions of no sitting for more than one hour or standing more than 30 minutes without position changes. He opined these restrictions arose entirely from Claimant's industrial accident.

Prior Medical Care and Conditions

25. In January 2018, Claimant underwent an annual physical examination. Dr. Flint Packer, D.O. noted full range of motion without pain when describing Claimant's back.

26. In March 2019 Dr. Packer recorded complaints of neck pain radiating into Claimant's upper back.

Vocational Factors

27. Born in Mexico on March 19, 1957, Claimant attended elementary school for four

years. He began working at age 10 in the fields. Four years later he worked excavating land with hand tools in preparation for pouring concrete. Another four years and he began working as a plumber's helper. Five years later he worked as a driver.

28. Claimant became a permanent resident of the United States in 1985. He obtained citizenship in 2021.

29. In 1985 Claimant began working in Idaho moving irrigation lines. He did that for nine years. He worked one season as a gardener and one more producing strawberries.

30. He next worked in potato packing plants as a machine operator. He worked a line which filled cans of dry-pack instant potatoes. He operated a computer and supervised about 20 people. He was terminated in 2006 after his wife got injured there and sued for her injuries.

31. Claimant began working for Employer in 2006. First, he worked as a manual laborer. After about 18 months he began training to become a welder. About six years later Employer moved him to forklift driving.

32. In April 2001, Claimant claimed a work-related low back injury.

33. In February 1996, Claimant claimed a work-related upper back injury.

34. On September 2, 2020, Employer prepared a disciplinary action report for nonattendance after a physical therapy visit. Since the accident, Employer had contemporaneously documented disagreements about Claimant's perceived ability to work, the light-duty work available, and whether the work was within physicians' temporary restrictions. Employer had documented occasions upon which Claimant did not return to work after physical therapy sessions and when he left work early because he was unwilling or felt unable to perform the light-duty tasks assigned to him.

35. On September 25, 2020, ICRD began working with Claimant. Claimant was

working light duty for Employer at the time. Claimant's cooperation was equivocal. The ICRD file was closed in January 2022 essentially for noncooperation on Claimant's part.

36. On August 9, 2021, Claimant prepared a Complaint arising from the accident.

37. On October 25, 2021, Employer terminated Claimant.

38. On April 19, 2022, Delyn Porter evaluated Claimant at Claimant's request. His assessment included consideration of Claimant's then-open eye claim as well as Claimant's right sided upper back and arm complaints. Mr. Porter apparently gave no weight to Dr. Walker's opinions. Mr. Porter opined Claimant was totally and permanently disabled, either 100% or as an odd-lot worker under the "futile" prong of the test.

DISCUSSION AND FURTHER FINDINGS OF FACT

39. 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).

40. 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).

41. 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).

42. Claimant's demeanor initially appeared stoic and reserved. He appeared physically uncomfortable and at 20-30 minute intervals would rise from sitting to stand for a few minutes. He became emotional when talking about retirement. Claimant's demeanor appeared generally credible.

43. However, as discussed below, his substantive credibility is only fair to poor. Claimant presents a claim highly dependent upon the accuracy of his representations of subjective, unverifiable symptoms and abilities. Claimant's reporting to doctors and his testimony is often inconsistent with his contemporaneous medical records about onset and severity of symptoms. Where contemporaneously made records are inconsistent with Claimant's testimony, the records receive more weight.

Accident and Causation

44. 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).

45. The parties do not dispute that the accident occurred. Claimant tripped. Several instances in the record do not directly confirm or deny that Claimant also fell. One might assume that if Claimant fell, it would have been reported instead of merely stating that he tripped. But in the absence of a direct statement that he did not fall when he tripped, the preponderance of evidence indicates he also fell. Some inconsistencies within Claimant's deposition and hearing testimony may be attributable to confusion and the language barrier.

46. The preponderance of medical evidence shows the accident caused a lumbar muscle strain which aggravated mild degeneration.

Temporary Disability

47. Idaho Code § 72-408 provides income benefits "during the period of recovery." The burden is on the claimant to present medical evidence of the extent and duration of the disability. *Sykes v. C.P. Clare and Company,* 100 Idaho 761, 605 P.2d 939 (1980). Once a claimant attains medical stability, he is no longer in the period of recovery. *Jarvis v. Rexburg Nursing Center,* 136 Idaho 579, 38 P.3d 617 (2001). Further, a claimant's refusal of an offer of light-duty work suitable to Claimant's restrictions ends his entitlement to temporary disability. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986).

48. Claimant's period of recovery ended with Dr. Walker's pronouncement of MMI on October 7, 2021. The record does not support a finding of material improvement in Claimant's condition after that date. Claimant's condition remained essentially the same for the next six months when Dr. Hansen declared Claimant to be at MMI.

49. In his briefing, Claimant asserts that he is entitled to temporary disability benefits from October 25, 2021, the day he was terminated, through March 8, 2022, the date Dr. Hansen declared Claimant had reached MMI. Clt's Opening Brief, p. 19; Clt's Reply Brief, p. 8. However,

as discussed above, the evidence this Referee finds persuasive establishes that Claimant reached MMI on October 7, 2021, a few weeks before Claimant was terminated on October 25, 2021. Therefore, Claimant was not in a period of recovery during the time period for which Claimant requests temporary disability benefits, and he is not entitled to such. *See* Idaho Code § 72-408.

50. Claimant has failed to prove that he is entitled to the temporary disability benefits for the requested time period.

Permanent Impairment

51. 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). Impairment is an inclusive factor of permanent disability. Idaho Code § 72-422.

52. Here Dr. Walker more fully and completely explained how he arrived at his PPI rating. His opinion of 1% PPI is accepted.

Permanent Disability and §72-406 Apportionment

53. "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.

54. 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). 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).

55. 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 the claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986). When making an apportionment, the Commission should: (1) evaluate the claimant's permanent disability in light of all of his physical impairments, resulting from the industrial accident and any pre-existing conditions, existing at the time of evaluation; and (2) apportion the amount of the permanent disability attributable to the industrial accident. *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008). An employer takes an employee as he finds him. *Wynn v J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983).

56. Here, the disparity of physicians' opinions about restrictions is almost maximally broad. This disparity represents essentially the difference between objective physical findings and Claimant's reporting of symptoms and subjective responses to examinations.

57. Initially Claimant reported symptoms in his thoracic spine to his buttocks. One week later examinations showed only mild tenderness at L1-2. His back symptoms seemed to improve timely until he began seeing Dr. Hansen. Claimant's reports of pain increased. He reported pain in more body parts, down his right leg, than before. In February 2021 he told

Dr. Hansen about arm symptoms and upper back pain. Over time, Dr. Hansen noted this was not part of a low back problem nor likely related to the accident.

58. According to the physicians who have read the MRI, the degeneration objectively seen in diagnostic imaging is paradoxically greater on the side for which Claimant does not claim symptoms. The right sided degeneration does not objectively show a mechanism which could be a likely pain generator.

59. Dr. Hansen's opinions and restrictions are based upon an unquestioning acceptance of Claimant's subjective symptoms, but Dr. Hansen did not see Claimant in the early days after the accident. The accident was in July. Dr. Hansen first saw Claimant in September. The symptoms Claimant presented to Dr. Hansen were more dramatic than those recorded by the initial treating physicians. Claimant represented that pain and paresthesias had extended into his leg and foot since the accident. That representation is not supported by the medical evidence.

60. Claimant's reports of arm symptoms are similarly claimed to have arisen at the time of the accident, but they are not so linked by contemporaneous medical records. Indeed, older medical records show diagnostic imaging on Claimant's neck and thoracic spine occurred years earlier. The record is insufficient to find that these prior conditions were problematic, but, combined with the absence of arm complaints arising timely after the accident, these old records undercut Claimant's unsupported claim that they arose at the time of the accident. Even Dr. Hansen indicated that these arm complaints were unrelated to the accident.

61. Moreover, Claimant again reported another dramatic increase in low back and leg pain about April 16, 2021. This appears to coincide with Claimant's dissatisfaction with the light-duty assignments or to Employer's response to Claimant's dissatisfaction.

62. Dr. Walker's report provides substantial, specific evidence of exaggeration on

Claimant's part.

63. Unfortunately, Mr. Porter's disability analysis does not take into consideration Dr. Walker's findings and opinions that Claimant should have no work restrictions.

64. Dr. Walker's report carries significant weight. It points out Claimant's lack of anatomical knowledge as Claimant attempted to link symptoms in a nonanatomic distribution to the low back injury. It points out inconsistencies in Claimant's symptoms versus his objective condition. However, one still cannot be too sure to what extent some of this exaggeration may have been, in part, Claimant's attempt to communicate by facial expression, gesture, and pantomime his perceptions and beliefs about his condition where the language barrier interfered.

65. Although Dr. Walker's opinion is found to be more credible, Dr. Hansen's opinion is not entirely discredited. This Referee accepts Dr. Hansen's opinion that the work accident exacerbated pre-existing conditions of spinal stenosis and lumbar spondylosis. The preponderance of the evidence of record shows it likely that Claimant suffered a minor injury to his low back musculature—a strain—in the accident. It is likely that this injury aggravated the underlying degeneration in some painful way. It is similarly likely that some pain persisted beyond the weeks of treatment which occurred before Dr. Hansen began treating Claimant.

66. The preponderance of evidence supports Dr. Walker's opinion that there need be no lifting restrictions. However, the record also supports Dr. Hansen's opinion that Claimant should be careful and limit his bending and twisting his torso to some extent. Thus, Claimant's work restriction going forward is no repetitive bending or twisting as recommended by Dr. Hansen. The additional work restrictions recommended by Dr. Hansen are not accepted.

67. The salient nonmedical factors are Claimant's age and education. Education includes his limited English. All other potential nonmedical factors indicated by the record are

considered as well.

68. This case involves two widely divergent medical opinions on the matter of Claimant's permanent restrictions. Applying Dr. Walker's restrictions, Claimant has not proven any disability above impairment. If Dr. Hansen's restrictions are accepted, Claimant is 100% totally permanently disabled. As outlined above, while this Referee is more persuaded by the opinions of Dr. Walker, the opinions of Dr. Hansen should not be entirely ignored. We accept Dr. Walker's no lifting restrictions, and yet we also accept Dr. Hansen's opinion that Claimant should avoid repetitive bending or twisting. Based on the foregoing, this Referee concludes that Claimant's disability falls between the two extremes suggested by reliance on the opinions of one physician vs. the other, but closer to the outcome suggested by Dr. Walker's opinion.

69. In his report, Mr. Porter opined that Dr. Hansen's work limitations post-industrial accident were both "exertional" and "positional." JE 11:260. Mr. Porter determined that Dr. Hansen's work restrictions rendered Claimant totally and permanently disabled as follows:

> The exertional restrictions place him in a SEDENTARY to LIMITED LIGHT physical demand work category, but the positional restrictions limiting him from sitting no more than one hour consecutively with the freedom to perform ad lib position changes and no standing for more than 30 minutes without a break would make employment in sedentary or light work that is compatible with his vocational profile nearly impossible.

JE 11:260 (emphasis in original). As explained above, only Dr. Hansen's restrictions to avoid repetitive bending or twisting are accepted. Therefore, Claimant is restricted from certain jobs post-accident, but not to the extent that Mr. Porter suggests. This Referee also finds pertinent non-medical factors to be a significant factor in assessing Claimant's permanent disability. Mr. Porter concluded that Claimant's access to jobs prior to the industrial accident was limited because Claimant was "a monolingual Spanish speaking worker who has only completed four years of

formal schooling in Mexico. He has limited ability to read or write Spanish. He understands more than he can speak English and is unable to read or write in English." JE 11:259. This Referee agrees that these pertinent non-medical factors limit Claimant's access to certain jobs and contribute to his permanent disability.

70. Considering all medical and nonmedical factors, Claimant is entitled to disability rated at 20% of the whole person, inclusive of impairment. Claimant failed to meet his burden of establishing permanent disability greater than this amount. Defendants failed to show a basis for apportionment.

Odd-lot analysis

71. If a claimant is able to perform only services so limited in quality, quantity, or dependability that no reasonably stable market for those services exists, he is to be considered totally and permanently disabled. *Id.* Such is the definition of an odd-lot worker. *Reifsteck v. Lantern Motel & Cafe*, 101 Idaho 699, 700, 619 P.2d 1152, 1153 (1980); *also see*, *Fowble v. Snowline Express*, 146 Idaho 70, 190 P.3d 889 (2008). Odd-lot presumption arises upon showing that a claimant has attempted other types of employment without success, by showing that hhe or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available, or by showing that any efforts to find suitable work would be futile. *Boley*, *supra.*; *Dehlbom v. ISIF*, 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997).

72. Upon establishing the presumption, the burden shifts to a defendant to show suitable work is regularly and continuously available. *Rodriguez v Consolidated Farms, LLC.*, 161 Idaho 735, 390 P.3d 856 (2017).

73. Mr. Porter's opinion that Claimant met the "futile" prong of the test for odd-lot disability is inadequate. It is based upon the same failure to consider Dr. Walker's opinions and

absence of restrictions. It is not well analyzed or explained how Mr. Porter came to this conclusion.

Attorney Fees

74. Attorney fees are awardable for unreasonable denial or delay of benefits due and owing to a claimant. Idaho Code § 72-804. The Supreme Court has held that it is "not unreasonable per se for a surety to rely on its own physicians when faced with legitimate but conflicting medical opinions, and to deny benefits based on these opinions." *Wutherich v. Terteling Co., Inc.*, 135 Idaho 593, 595, 21 P.3d 915, 917 (2001).

75. Claimant argued for, but did not show, that any denial or delay was unreasonable. Claimant asserts that Defendants' actions were unreasonable because the Defendants "completely ignored the complaints of [Claimant] and the opinion of Dr. Hansen and relied solely on the outdated opinion of Dr. Walker." Clt's Reply Brief, p. 8. This was a claim upon which Claimant's representations to Employer and to his physicians was difficult to assess and verify. This Referee, having found Dr. Walker's opinion to be persuasive as explained above, cannot conclude that Defendants unreasonably denied or delayed benefits by relying on Dr. Walker's opinion. Claimant has failed to prove that he is entitled to attorney fees under Idaho Code § 72-804.

CONCLUSIONS

1. Claimant suffered a compensable low back strain which likely aggravated a degenerative condition;

2. Claimant reached MMI on October 7, 2021. Claimant has failed to prove that he is entitled to total temporary disability benefits from October 25, 2021 through March 8, 2022 as requested.

3. Claimant is entitled to PPI rated at 1% whole person;

4. Claimant is entitled to PPD rated at 20% whole person without apportionment;

5. Claimant failed to prove it likely he suffered total permanent disability under the odd-lot doctrine;

6. Claimant failed to show he is entitled to attorney fees under Idaho Code § 72-804.

7. The eye claim, withdrawn at the start of hearing is dismissed with prejudice.

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 _____8th_____ day of December 2023.

INDUSTRIAL COMMISSION

Douglas A. Donohue, Referee

ATTEST:

Assistant Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of January, 2024, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION** was served by regular United States Mail and Electronic Mail upon each of the following:

JAMES ARNOLD
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dc

Debra Cupp

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ALFONSO CARRANZA, Claimant, v. PREMIER TECHNOLOGY, INC., Employer, and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Surety, Defendants.	**IC 2020-022647** **IC 2020-017690** **ORDER**

Pursuant to Idaho Code § 72-717, Referee Douglas A. 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 low back strain which likely aggravated a degenerative condition;

2. Claimant reached MMI on October 7, 2021. Claimant has failed to prove that he is entitled to total temporary disability benefits from October 25, 2021 through March 8, 2022 as requested.

3. Claimant is entitled to PPI rated at 1% whole person;

4. Claimant is entitled to PPD rated at 20% whole person without apportionment;

5. Claimant failed to prove it likely he suffered total permanent disability under the

odd-lot doctrine;

6. Claimant failed to show he is entitled to attorney fees under Idaho Code § 72-804.

7. The eye claim, withdrawn at the start of hearing is dismissed with prejudice.

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

DATED this 5th day of January, 2024.

INDUSTRIAL COMMISSION

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

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 5th day of January, 2024, 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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