BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ARTURO RAMIREZ, Claimant, v. LIBERTY IDAHO GOLD LLC, Employer, and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Surety, Defendants.	**IC 2015-021395** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED** **APRIL 2, 2024** **IDAHO INDUSTRIAL COMMISSION**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Douglas A. Donohue who conducted a hearing in Pocatello on March 10, 2023. Joel Beck represented Claimant. Eric Bailey represented Employer and Surety. Tony Valdez represented ISIF, but the parties agreed at the start of the hearing that ISIF could be dismissed without prejudice for lack of evidence to demonstrate any liability to ISIF. The Commission issued a formal order to that effect on June 8, 2023.

The parties at hearing presented oral and documentary evidence. Claimant took post-hearing depositions, and the parties submitted briefs. The Referee notes that Claimant inappropriately single-spaced much of pages 6 and 7, and a bit of pages 10 and 11, and used smaller font and single-spacing on footnotes to cram its overlong brief into the 30-page limit. The Referee deems this admonition to be a sufficient sanction to prevent such future abuse of the rule. This case came under advisement on September 1, 2023. This matter is now ready for decision.

ISSUES

The issues to be decided according to the Notice of Hearing and as modified by agreement

by the parties at 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,
   c) Permanent disability in excess of impairment including total permanent disability,
   d) Medical care; and
   e) Attorney fees;

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

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

With the dismissal of ISIF, the issues relating to ISIF liability were withdrawn. In briefing, the parties agreed that permanent partial impairment was undisputedly at 6% of the upper extremity (4% whole person) and that section 406 apportionment should be withdrawn.

CONTENTIONS OF THE PARTIES

Claimant contends he injured both wrists at work about June 1, 2015, when a 50-pound box of potatoes came down on his left wrist. In 2017 Claimant underwent bilateral carpal tunnel releases at his wrists and trigger finger releases on certain fingers of his left hand. He believed he was worse after surgery. Physicians began speculating about alternate diagnoses, including cubital tunnel syndrome, Reflex Sympathetic Dystrophy ("RSD" aka "CRPS"), rheumatoid arthritis. Although the claim was initially accepted, Defendants stopped benefits in August 2017, then reinstated medical benefits in August 2020, but discontinued them again in May 2021. In August 2020—Claimant's brief incorrectly identifies 2021 as well—Defendants resumed TTD benefits prospectively but discontinued them again in May 2021. In 2021, despite prior acceptance of certain medical treatment, Defendants failed to pay for some of it. In August 2022 medical benefits

were denied. Claimant should be entitled to medical benefits at the *Neel* rate for those not yet paid in the amount of $3,055.20 as well as reasonable and necessary future medical benefits. The arthritis was exacerbated by the accident. Moreover, even if the Commission accepts Defendants' arguments that Claimant's arthritis is nonindustrial, that reasoning does not apply to the CRPS diagnosis. Claimant still needs a ganglion block.

Claimant contends that Claimant should have been paid TTD benefits to the date of MMI which was May 3, 2021. These are unpaid from August 22, 2017, to August 13, 2020, and partially unpaid from August 13, 2020, to May 3, 2021. The amount unpaid is $55,646.67.

Claimant contends that in 2019 Nancy Collins, Ph.D. opined Claimant was totally and permanently disabled. He has attempted other work unsuccessfully. He did work one harvest for Employer operating the potato piler with physical accommodations and a manual-labor assistant. Being seasonal, that job is not consistently available regardless of the presence or absence of accommodations. Claimant is 100% disabled or, alternately, qualifies as an odd-lot worker under each of the three prongs of analysis. Defendants' vocational expert agrees Claimant is totally and permanently disabled as an odd-lot worker.

Claimant contends that Defendants should be liable for attorney fees for their unreasonable denials of medical bills and TTDs beginning as early as August 2017, for unreasonable delay in paying the undisputed PPI. Defendants' excuses—that Dr. Stucki (who was referred by Dr. Fields) was not authorized and that Claimant failed to show for an (improperly scheduled) IME—are not reasonable in themselves. A reasonable attorney fee as of the date of hearing is $27,212.92 for denied benefits plus 30% of $14,734.87 for unreasonable delay of medical and PPI benefits paid at the 11th hour before hearing.

Defendants contend that any arthritis diagnosis is unrelated to the accident. Such complaints did not arise until four years after the accident, and objective testing suggested a positive rheumatoid factor only after more than five years post-accident. Moreover, both the rheumatoid complaints and the objective testing involve essentially Claimant's entire body, not just his wrists and hands. The evidence shows arthritis is not a preexisting condition aggravated by the industrial accident. Similarly, CRPS is not supported by the evidence as being caused by the accident. Dr. Stucki did recommend an additional surgery in 2018 which Claimant chose not to undergo. When next considered in 2021 Dr. Stucki recommended against any surgical option.

Defendants contend that temporary disability benefits were stopped August 15, 2018 because Dr. Stucki imposed no restrictions. Moreover, benefits were payable only for such temporary disability caused by the accident and not for the impact of Claimant's conditions unrelated to the accident, like arthritis. Even if deemed related by the Commission, Defendants were not unreasonable in questioning whether temporary disability arose from a nonindustrial cause.

Defendants contend that belated restrictions imposed in August 2020 were based upon a dramatic change in conditions from August 2018. Also, such restrictions arose in the face of a normal EMG taken in 2020. Dr. Stucki did not opine this change to be related to the accident.

Defendants contend that the vast majority of Claimant's permanent disability described at the time of hearing is related to nonindustrial causes and unrelated to the accident. The piler job shows Claimant can work for at least a month at a time at more than full-time hours. Moreover, it shows Employer values Claimant's services and would employ him more if Claimant wanted to work more. Odd-lot status is not supported by the record. Claimant did not seriously try to work

for Employer more than the piler job. He did not seriously try to find other employment. His testimony about these points has been inconsistent. Similarly, Dr. Collins did not actually try to find employment for him—she merely surveyed the local labor market for forensic purposes. Lastly here, without restrictions related to the industrial accident, minimal disability is no basis to speculate that genuine attempts to work and find work would be futile as Dr. Collins suggested.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant and his supervisor Jeffrey Mark Thompson (all references in the record to "Mark" or "Marcus" refer to Mr. Thompson);

2. Joint Exhibits 1 through 39; and

3. Post-hearing depositions of orthopedic hand surgeons Vermon Esplin, M.D. and Jeffrey Stucki, D.O. and of vocational expert Nancy Collins, Ph.D.

Objections raised in depositions are OVERRULED.

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

FINDINGS OF FACT

Introduction and Accident

1. Claimant testified at hearing that a 50-pound box of potatoes which he was lifting fell on his hands and wrists.

2. The medical records offer better support for bilateral carpal tunnel syndrome and left trigger fingers as occupational diseases arising from repetitive motion rather than having been caused by a specific accident. Regardless, the parties do not dispute that the conditions are compensably work related.

3. February 16, 2015, is the date of the first medical record involving a complaint of wrist pain bilaterally. Claimant described repetitive motion at work with his fingers frequently getting caught on the table. He stated it began about two months prior. Carpal tunnel syndrome was the diagnosis.

4. On February 26, 2015, Claimant again sought treatment. He said he "bumped them" when packing boxes. X-rays showed minimal degeneration. Gary Martin, M.D. examined Claimant, took X-rays, and added tenosynovitis and DeQuervain's syndrome to the carpal tunnel diagnosis. Claimant returned to work. Wrist pain persisted and increased over time.

5. June 1, 2015, is the date Surety entered as the date of the accident. Once Surety established that Claimant gave timely notice to Employer, Surety reversed its initial denial of compensation more than one year later on or before February 21, 2017.

Medical Care: 2016

6. On February 22, one year after the initial visits, Claimant underwent nerve conduction velocity studies (NCV) and an EMG. These tests showed mild carpal tunnel syndrome, but not ulnar neuropathies. Some visits for treatment in March did not lessen his complaints of wrist pain.

7. On March 3, Shane Haas, PA-C examined Claimant. Claimant reported bilateral numbness in his first four fingers and wrist pain, worse on the right. PA Haas observed mild to moderate swelling. He diagnosed acute tenosynovitis, probably caused by overuse at work.

8. On March 8, after review of the EMG PA Haas added bilateral carpal tunnel syndrome to his diagnoses.

9. On September 5, right hand pain from carpal tunnel syndrome was noted at the time

of an ER visit for an unrelated abdominal pain. Subsequent visits for unrelated problems were also noted but did not treat his wrist complaints.

10. On November 11, he visited the ER for his bilateral wrist pain. Dr. Timmons referred Claimant to Gail Fields, D.O.

Medical Care: 2017

11. On February 15, Dr. Fields examined Claimant. He admitted Claimant for left carpal tunnel release surgery.

12. On February 20, Dr. Fields performed surgery. On March 2, Dr. Fields noted Claimant still had complaints. Dr. Fields told Claimant this was "normal" given the severity of his condition and that it would take time for the nerve to regenerate.

13. On March 9, Claimant was referred to the Commission's rehabilitation division. Seli Mena began assisting Claimant as he recovered from his left carpal tunnel release. When he provided an initial history, Claimant told Ms. Mena that he developed pain over time and did not describe any industrial accident. Ms. Mena continued to monitor and provide Claimant ICRD services until June 1, 2018. Her services ceased when Claimant sought surgery.

14. On March 21 Claimant visited Dr. Fields in anticipation of a right carpal tunnel release. He noted pain in the left long finger which Dr. Fields diagnosed as tendinitis.

15. In early April a bout of appendicitis and an appendectomy eclipsed his upper extremity complaints.

16. On April 13, Dr. Fields diagnosed trigger finger of Claimant's left long and ring fingers. He noted that Claimant was okay with surgery because he was off work as a result of the appendectomy anyway.

17. On April 17, Dr. Fields performed a surgical release of trigger fingers.

18. Effective May 1, Surety reinstituted TTD benefits for surgical recovery. One week after sending the TTD reinstatement notice, Surety stopped TTD benefits, began PPI benefits, and cited Dr. Fields' MMI date of May 3, 2017.

19. On May 24, Dr. Fields approved a jobsite evaluation for Claimant's time-of-injury job without restrictions effective May 30. Shortly thereafter Dr. Fields clarified that the return to work only extended to the upcoming date of right carpal tunnel release surgery. Claimant questioned this approval because the right carpal tunnel release surgery was already scheduled.

20. On May 30, Dr. Fields noted Claimant's complaints of continuing pain. He agreed Claimant should remain off work until after recovery from the right carpal tunnel release surgery. He so informed Employer.

21. On June 12, Dr. Fields performed the right carpal tunnel release surgery.

22. On June 27, at a follow-up visit Claimant still expressed bilateral complaints. Dr. Fields noted some stiffness and limited active range of motion. He referred Claimant for a second opinion without specifying any particular physician.

23. On a jobsite evaluation dated July 10, Jeffrey Stucki, D.O. refused to approve Claimant's time-of-injury job.

24. On July 12, Dr. Stucki first examined Claimant to provide a second opinion about Dr. Fields' concerns about Claimant's persistent symptoms following the carpal tunnel release surgeries. Dr. Stucki indicated that he interpreted Claimant's history as describing a work-related occupational disease. Dr. Stucki suspected a diagnosis of left cubital tunnel syndrome and, being unaware of the February 22, 2016, testing, recommended an NCV/EMG. He recommended

conservative treatment including physical therapy until more definitive objective data had been obtained. The second NCV/EMG had not been performed by the time of Dr. Stucki's follow-up in late August. Dr. Stucki reiterated his recommendation that it be done.

25. On July 17, Claimant returned to Dr. Fields to report severe left arm pain when gripping. Dr. Fields was unable to arrive at a definitive diagnosis. He ordered tests.

26. On August 9, Claimant's attorney sent a letter which notified Surety that he represented Claimant.

27. Employer scheduled an IME and notified Claimant on August 11 of the date—September 11, 2017—and time of the upcoming examination. On August 17, Surety sent Claimant's attorney correspondence informing him that an IME was in the works.

28. On August 30, X-rays of Claimant's left elbow and shoulder were taken as Dr. Fields tried to determine a diagnosis for Claimant's complaints.

29. On September 12, the second NCV/EMG was performed. These tests were entirely normal.

30. On September 27, Dr. Stucki again examined Claimant. Despite the negative NCV/EMG Dr. Stucki endorsed an "ulnar nerve entrapment of some sort" as an explanation for Claimant's ongoing reports of pain and numbness. He discussed surgery with Claimant but emphasized to him that he could not guarantee relief of symptoms. Dr. Stucki prepared for surgery and issued temporary work restrictions including lifting no more than "0-5" pounds. Surety denied authorization for surgery citing as reasons that Claimant had changed physicians without permission and had failed to attend the scheduled IME.

31. On November 8, Claimant visited Brian Johnson FNP-C. He reported that Dr.

Stucki was planning another surgery without acknowledging that Surety had denied authorization. Nurse Johnson examined Claimant and noted decreased flexion and grip strength. He prescribed medication.

Medical Care: 2018

32. On January 29, Dr. Stucki examined Claimant with Claimant's attorney present. Dr. Stucki explained that an additional potential benefit of the proposed surgery followed by "aggressive therapy" was "to try and prevent any potential of an RSD or chronic regional pain syndrome from developing." If Claimant declined surgery Dr. Stucki would deem him at MMI.

33. On March 14, Claimant visited Gary Ullery, D.O. who was treating Claimant.

34. On July 10, Claimant underwent an FCE. He self-limited so much that the therapist Tia Burns deemed the evaluation invalid. She opined that despite cooperative behavior Claimant reported inability because of pain and that he stopped many tests before objective indicators showed maximal effort. She opined that his self-limiting behavior suggested he would not return to work.

35. On August 7, occupational therapist Janice Jean examined Claimant for forensic purposes at Claimant's request. She reviewed records and examined Claimant's upper extremities. Using the *Guides*, 6th edition, she rated Claimant's impairment at 6% upper extremity or 4% whole person.

36. On August 15, Dr. Stucki also rated PPI at 6% upper extremity, 4% whole person. He opined Claimant had no specific restrictions but acknowledged that pain and weakness in the left wrist and hand may have some effect.

37. On October 30, Claimant underwent a second FCE, this time with physical therapist

Steve Klitgaard. He found Claimant cooperative and the tests valid. Claimant self-limited due to pain. His ability to use his hands was reduced in all aspects of testing. His wrists and hands showed increased swelling by the end of the day's testing.

38. On December 19, Dr. Stucki noted Claimant's limitations of lifting over 10 pounds, but expressly checked two boxes to confirm these were not restrictions.

Medical Care: 2019-Hearing

39. At a June 1, 2020, visit to Dr. Ullery Claimant provided a history in which he claimed a benefit from the surgeries but also that his pain and inability to move his hands and fingers had returned and worsened.

40. On August 13, 2020, Dr. Stucki's PA noted complaints now included Claimant's right digits as well. Examination revealed only subjective responses and a longstanding positive Tinel's sign. The PA noted his pain pattern was "quite diffuse." The PA recommended another NCV/EMG. The PA issued a return to work note which temporarily restricted bilateral repetitive grasping, pinching, and twisting. The new NCV/EMG was entirely normal.

41. On September 29, 2020, Dr. Stucki noted he had not personally seen Claimant for about two years. Dr. Stucki recalled that two years ago he had permanently restricted Claimant from work over 10 pounds. (This recollection is contrary to the 2018 note which indicated Claimant's self-limitation was 10 pounds, but expressly imposed no restriction.) Dr. Stucki stated Claimant's self-limitation was consistent with Dr. Stucki's current restriction recommendation. He formalized this permanent restriction.

42. On October 26, 2020, Dr. Stucki noted that the prior injection improved wrist pain by 50% but did not affect the numbness and tingling. Dr. Stucki noted that Claimant's guarding

and hypersensitivity seems to be less when distracted. Examination showed a positive Tinel's on the right but not on the left.

43. On January 4, 2021, Claimant visited Dr. Stucki. After examination he tentatively reported on differential diagnoses. He noted that rheumatoid arthritis was "not necessarily" work related. He recommended against surgery.

44. On February 11, 2021, Claimant visited Ranmali Walallyadda, PA-C. As part of a three-visit evaluation, he examined Claimant and ordered testing. Ultimately, he identified a positive rheumatoid factor and diagnosed rheumatoid arthritis in multiple joints throughout Claimant's body. Surety approved and paid for these diagnostic visits.

45. On April 19, 2021, Dr. Stucki responded to Nurse Case Manager Wheatley's questions. He opined Claimant was at MMI and could return to activity "as tolerated" without restrictions. Her questions state that rheumatoid arthritis is not work related. Dr. Stucki circled the phrase "based solely upon his industrial condition" or its equivalent twice.

46. Nurse Case Manager Wheatley withdrew her services effective May 12, 2021. Her notes do not well identify or separate her opinions from her reports of other physicians' opinions. She did not provide actual treatment. She acted well as a communications liaison. These notes are useful for establishing dates on the timeline, but do not add significant weight to any substantive issues herein.

47. On August 9, 2021, Surety notified Claimant that PPI benefits had been paid in full.

48. On August 26, 2021, Vermon Esplin, M.D. examined Claimant for forensic purposes. Claimant reported that the 50-pound box of potatoes landed on his left hand and that Claimant strained his right hand trying to catch it as it slipped from his grasp. Claimant reported

severe inability to perform activities of daily living. Upon examination Dr. Esplin found nonanatomical sensory deficits, no atrophy, no hyperhidrosis, no true allodynia. He endorsed the restrictions suggested by the valid FCE – rarely lifting 10 pounds, occasionally lifting 5 pounds, and no repetitive use of wrists, hands and fingers. He did find weakness in grip and pinch strength and mild swelling at the wrists. He opined the accident caused bilateral carpal tunnel syndrome and left trigger fingers. He opined the poly-arthritis was exacerbated by the work injury but added that the traumatic injury did not cause the arthritis. He considered RSD (CRPS) but found Claimant did not have the constellation of signs and symptoms required for such diagnosis. Nevertheless, he would not entirely rule out the possibility that the condition was present. He recommended a stellate ganglion block to diagnose the presence or absence of RSD. Absent Claimant's cooperation with suggested procedures Dr. Esplin opined Claimant would be deemed to be medically stable. If procedures were undertaken and if they relieved Claimant's complaints, the MMI would be deferred until recovery was complete. Dr. Esplin also suggested a thyroid function work-up which would not be work related. He agreed that if Claimant were at MMI Dr. Stucki's PPI rating was accurate. Only confirmation of RSD could change the rating.

49. On October 12, 2021, Dr. Stucki confirmed to Claimant's attorney that he agreed with Dr. Esplin's opinions that a non-work-related inflammatory process was present.

50. On November 1, 2021, Dr. Stucki performed injections as Dr. Esplin suggested.

51. On December 17, 2021, Dr. Stucki noted that the recent pisotriquetral steroid injections "did not help." Dr. Stucki emphasized that the recommended cubital tunnel releases for numbness were not work related.

52. On June 2, 2022, Dr. Esplin issued a follow-up letter confirming his then-current

opinions had not changed since the IME of 2021. He pointed to partial relief following an injection, excessive pain, weakness, and swelling as bases for a diagnosis of CRPS. He disclosed that Claimant's clinical picture did not meet all criteria for CRPS. He recommended a ganglion block as a diagnostic tool to determine whether the "main cause" was CRPS or not. Reviewing X-rays, he did not see "significant" degenerative arthritis which might explain Claimant's current pain and symptoms. He reported that despite a positive rheumatoid factor, ESR and CRP labs were inconsistent with polyarthritis as the sole condition. He opined that the positive rheumatoid factor shows an underlying arthritis which "most likely was aggravated by the work injury but I do not feel this is the whole picture."

53. On June 20, 2022, Dr. Stucki reported that he agreed with Dr. Esplin's diagnosis of CRPS. He opined that Claimant's "pain seems to be out of proportion for a structural component and a CRPS would make sense." He approved Dr. Esplin's recommendation for a ganglion block.

54. On August 15, 2022, Sergio Hickey, M.D. examined Claimant in preparation for a stellate ganglion block. He diagnosed CRPS and stated Claimant met the "Budapest criteria" for this condition.

55. In post-hearing deposition Dr. Esplin disagreed with Dr. Hickey that the Budapest criteria was established in any physician's examination, including Dr. Hickey's. Dr. Esplin opined Claimant may have CRPS even if he does not meet all criteria.

56. In post-hearing deposition Dr. Stucki explained his use of "limitations" and "restrictions" as terms in his notes. While not entirely consistent with Idaho Workers Compensation Law usage, his operational use of these terms is reflected in these findings and conclusions in a way that harmonizes such use.

57. In post-hearing depositions both Drs. Stucki and Esplin testified about potential future medical care. Neither was willing to call it "probable" that any future medical care would significantly change Claimant's symptoms or dysfunction. Both cited the extreme amount of time having passed since symptoms arose as a contraindication to an expectation of cure or relief.

Vocational Factors

58. Born in Mexico on December 9, 1966, Claimant attended school there until age 11. He began working in agriculture after he arrived in the United States in 1999. He first moved irrigation lines for one season, then packaged potatoes. He began working for Employer in 2012. He worked at various positions within Employer's potato processing buildings and storage facilities.

59. Dr. Collins, in her vocational report, found Claimant unable to read English and severely limited in his ability to understand and speak English. She also found his computer skills severely limited.

60. He testified at hearing that he does not have a driver's license. He reported to ICRD in March 2017 that he did have a driver's license.

61. He testified that he applied for a job with Employer and in landscaping since his surgeries. He actually worked for Employer as a piler and in his son's landscaping business. He described his landscaping work as merely being a driver for one or more of his son's employees.

62. Claimant testified that ibuprofen did not help, but also that without it he would be unable to use his hands at all.

63. Claimant testified that he can use only his left thumb and index finger to grip.

64. Employer has jobs available—piler, singulator, quick lock printer, crushing

cardboard, sorting, and grading—which are within Claimant's restrictions of rarely lifting up to 10 pounds, normally lifting 5 pounds, and limiting the use of fingers and hands. Mr. Thompson was unsure if the FCE added additional restrictions. The sorting and grading might be too repetitive given Claimant's testimony at hearing. Mr. Thompson accepts at face value Claimant's representations about his ability to function. Although no warehouse jobs are suitable, Claimant has shown Mr. Thompson that he remains a valuable piler operator. The job as piler operator is only available during the harvest, four to six weeks more or less.

65. The potato piler job is performed for 12 to 14 hours per day, Monday through Saturday. Some demands of the job are physically challenging in that they require lifting pipe, moving conveyor belts, and picking up potatoes that have gotten loose. Assistants would perform those aspects of the job while Claimant would do the mentally challenging duty, which involves holding a remote control box that hangs around the operator's neck while he or she presses buttons to move the machine up and down, right and left, or telescope in and out from a stream of potatoes pouring into the storage area. Before the surgeries at issue, Claimant was able to perform the entire piler operator job by himself. Claimant's piler operator skills are a great value to Employer. Not many people can do it. It requires eye-hand coordination.

Vocational Experts' Opinions

66. On February 13, 2019, Nancy Collins, Ph.D. submitted her report. She expressly considered Claimant's status as an undocumented worker. She assessed his labor market access based upon jobs where undocumented workers are "often hired." She opined that based upon Dr. Esplin's restrictions Claimant lost 100% labor market access. She noted that the seasonal piler operator job which Claimant performed was not regularly available. She opined Claimant's loss

of labor market access was 100%. On February 20, 2023, Dr. Collins affirmed her opinion of 2019.

67. Sara Statz submitted to Defendants a draft report. She evaluated Claimant on August 21, 2020. She also reviewed Dr. Collins' report. She opined that based upon Dr. Esplin's restrictions Claimant lost 100% labor market access. Ms. Statz did not appear to consider the labor market for undocumented workers. At the time of her evaluation, Dr. Stucki had not yet stated that he concurred with Dr. Esplin's opinions and restrictions. Therefore, her analysis about Dr. Stucki imposing no restrictions is not germane.

DISCUSSION AND FURTHER FINDINGS OF FACT

68. 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).

69. 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).

70. 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).

71. Claimant's demeanor appeared demonstrative. His primary language is Spanish.

The extent to which he needed a translator at hearing was unclear, but the translator certainly helped him be confident that he was being understood. Medical records often note the use of a translator—often his son—as well. The Referee observed that Claimant exhibited a very mild deformity of two fingers on his left hand. Claimant made a good first impression for sincerity. His testimony required some allowance for hyperbole. Perhaps Claimant exaggerated his testimony to assist his comfort that he was being heard, understood, and appreciated. Because Claimant's testimony was relatively brief, the Referee did not have sufficient opportunity to assess demeanor as a factor. Substantively, the record shows multiple representations by Claimant which are not reconcilable with each other. He inconsistently reported about how or whether an accident involving a box of potatoes occurred. He gave differing dates or claimed no recollection of the date of such accident at various retellings. There is evidence of hyperbole in his reports of pain and his claimed inability to function because of pain. Nevertheless, Claimant presents as a hard-working individual who returned to work after his carpal tunnel syndrome was diagnosed and continued to work as it worsened over time. On multiple occasions he underwent steroid injections to provide temporary relief sufficient to return to work. After he was restricted from use of his hands at a less than sedentary level he still worked the piler during harvest for a few weeks in succeeding years.

72. Employer's general manager, Jeffrey Mark Thompson, testified credibly, but also too briefly to assess demeanor as a factor.

Causation

73. 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).

74. Here, the parties have accepted compensability on an accident and injury theory. It is inappropriate for the Referee to raise issues *sua sponte* about whether an occupational disease theory better fits these facts.

75. Physicians have opined that the bilateral carpal tunnel syndrome and trigger fingers were work related. There is a split of physicians' opinions whether underlying arthritis was aggravated at the time and is therefore also work related. For physicians who accept the diagnosis, late arising RSD/CRPS was also work related. One or another doctor has expressed some reservations from time to time, but the preponderance of medical evidence strongly favors a finding that Claimant's wrist and hand conditions are causally work related. Most of the conditions are directly caused by the industrial event; the arthritic condition was aggravated in a compensably work related way. The disagreements about what diagnosis or diagnoses most properly designates these conditions do not negate a finding that these conditions were caused by the work accident.

The Referee finds persuasive Dr. Stucki's opinion, well expressed in his deposition, that it is Claimant's dysfunction and pain which matters more than what a physician calls it; Claimant had no pain or dysfunction before.

Temporary Disability

76. Idaho Code § 72-408 provides income benefits "during the period of recovery." The burden is on a 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).

77. Here, the record supports Dr. Stucki's MMI date of January 29, 2018. The additional medical care thereafter in which physicians attempted to definitively diagnose the symptoms or to ameliorate those symptoms is compensable, but it does not suggest Claimant remained in a period of recovery. His condition neither improved nor worsened significantly.

78. Reconciling unpaid TTDs alleged in exhibit 39 with an MMI date of January 29, 2018, Claimant is entitled to 23 weeks of additional benefits amounting to $7,242.01 ($314.82 (90% AWW) X 23 weeks).

Medical Care

79. Defendants do not dispute Claimant's claim for $3,055.20 in unpaid medical benefits. Other unpaid medical bills are not related to the accident.

80. The weight of physician opinion is against additional surgery. Claimant has not

shown that future medical care is reasonable or necessary beyond the palliative care, over-the-counter analgesics, which he actually has been taking.

Permanent Partial Impairment

81. 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.

82. The record supports and the parties agree that Claimant's work related PPI is 4% whole person for bilateral carpal tunnel syndrome, trigger fingers and his arthritic hand condition.

Permanent Disability

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

84. **"**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.

85. 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). A claimant's local labor market access in the area around his home is the general geographical scope for assessing permanent disability. *Combs v. Kelly Logging*, 115 Idaho 695, 769 P.2d 572 (1989). Undocumented status is not a bar to permanent disability. Rather, it is a pertinent nonmedical factor to be considered. *Marquez v. Pierce Painting, Inc.*, 164 Idaho 59, 423 P.3d 1011, (2018).

86. Physically impaired at 4%, physicians have also imposed significant restrictions upon Claimant. In addition to the light weight of 10 pounds which Claimant is deemed to be allowed to lift, he is not allowed to lift or otherwise use his hands repetitively in a work day. For his entire life Claimant has been a manual laborer. Recall that "manual" comes from the Latin word for "hand." He is now essentially unable to use his hands to work.

87. Premised on accurate medical restrictions, functional capacity evaluation, and work history, Dr. Collins' February 13, 2019, vocational report and May 15, 2023, deposition are persuasive. She appropriately addressed the labor market available to Claimant considering all medical and non-medical factors. The more significant of these are Claimant's restrictions, his undocumented status, his work history and lack of transferrable skills, his very limited English, and his age. Dr. Collins appropriately considered the local labor market for which undocumented

workers are hired and established that Claimant has lost total access to all regularly available, suitable jobs.

88. Dr. Collins summarized Claimant's disability succinctly and persuasively at hearing in March 2023. She explained the significance of the limitations on Claimant's use of his hands. He's an unskilled worker who is severely limited in his use of technology. He's also 57 years old with chronic pain.

89. Dr. Collins report and testimony provide an especially persuasive and detailed description of Claimant's undocumented, unskilled labor market in the Pocatello, Idaho Falls, Black Foot area. The rate of handling, grasping and turning involved in all 14 of those types of jobs are clearly outside Claimant's repetitive handling restrictions, just as Dr. Collins opined. Only two months after the time of the hearing, when disability is generally assessed under the rule of *Brown v. Home Depot*, 152 Idaho 605, 609, 272 P.3d 577, 581 (2012), Dr. Collins also persuasively noted that Claimant's age and additional time out of the labor market are additional factors employers would consider.

90. At this point in the analysis, evidence strongly indicates Claimant is totally disabled under the 100% method of analysis. As will be discussed below, the arguments proffered by the Defense regarding suitable work does not ultimately disrupt this conclusion. Furthermore, Dr. Collins' use of the phrases "super human effort" and "sympathetic employer" suggest that she anticipated the Commission might apply odd-lot disability analysis. Since we do not, that portion of her opinion is extraneous.

91. A total permanent disability finding under the 100% method does not necessarily render an odd-lot analysis inappropriate, however. See, *Brownlee v. Glanbia Foods, Inc.*, p. 13,

paragraph 80, IC 2007-017523 (Idaho Industrial Commission, July, 2015). Because Claimant's genuine value to employer was sufficiently addressed in the parties' arguments, some clarification about the Commission's interpretation of that relationship is warranted. As a legal term of art, "sympathetic employer" has been defined as an employer that is willing to make accommodations that are out of the ordinary in order to obtain an employee's beneficial services. *Christensen v. S.L. & Associates, Inc.*, 147 Idaho 289, 207 P.3d 1020, 1024 (2009). Employer's general manager who supervised claimant, Mark Thompson, offered testimony showing his respect for Claimant's valuable ability to operate the piler operator. Thompson commended Claimant's eye-hand coordination. However, nothing in Mr. Thompson's testimony suggested he was a sympathetic employer.

92. Turning back to the topic of the work which the Defense contends Claimant is capable of performing, Defendants have been unable to show it likely that a regularly available, suitable job exists. Employer credibly established that it values Claimant's honesty and work ethic as well as his skill as a piler operator. Claimant has worked the harvest as a piler operator since his accident. This job is available only for a few weeks during the harvest. By itself, it does not constitute regularly available work. Mr. Thompson credibly showed his willingness to have Claimant work for Employer as a piler operator and elsewhere throughout the year, if possible, to keep him available during the harvest for piler operator work. However, Mr. Thompson could only speculate about some jobs which might be suitable. Defendants have not shown the existence of a regularly available, suitable job for Claimant, with or without regard to Claimant's undocumented status.

93. Furthermore, for purposes of Idaho Code § 72-406, Defendants did not show that

any prior condition had been rated for PPI or caused the imposition of restrictions.

94. Claimant is totally and permanently disabled under the 100% method without apportionment.

Attorney Fees

95. Attorney fees are awardable for unreasonable denial or delay of benefits due and owing to a claimant. Idaho Code § 72-804. Recently, additional duties of notice and approval by the Commission are prerequisites to a Surety denying benefits for noncooperation. *Arreola v. Scentsy, Inc.*, 531 P.3d 1148 (2023).

96. *Arreola* is inapposite for purposes of addressing the possible unreasonableness of actions which occurred long before the *Areola* decision changed the interpretation of the Idaho Workers' Compensation Law. It is axiomatic that *expost facto* law is not applied retrospectively without a significant express basis to do so. *Arreola* expressly declared it was to be applied prospectively only. It was not unreasonable for Surety to adjust this claim in conformance with the law as it existed before *Arreola*.

97. Much of the early compensability disputes arose from confusion and inconsistency about the accident. Claimant reported the details of the accident differently at different times to various players in the workers compensation system. He alternately said there had been no accident, just a gradual worsening of symptoms, that the potato box had fallen on both wrists, that it had fallen on only his left wrist and he "strained" his right wrists trying to catch it as it slipped.

98. Claimant's statements about an accident, his varying descriptions of symptoms within his upper extremities and physicians' uncertainty about proper diagnosis and treatment gave rise to a claim which was understandably difficult to adjust. Even the Surety's actions around the

time of the appearance of Claimant's attorney and the missed IME—August and September 2017—show Surety was acting reasonably upon the information available at the time, which information was updating and changing on successive days. A hindsight, broad-brush caricature of Surety's actions does not establish that Surety acted unreasonably in any specific action it took here. Moreover, Surety appropriately accepted the claim in the face of inconsistent recitations by Claimant about the occurrence of the accident and about his symptoms.

99. Surety paid TTD and PPI upon the opinions of physicians as they existed at the time. Even the unpaid medical benefits, $3,055.20 appear to have been a mere oversight and not a willfully unreasonable action.

100. This was a very close case. Claimant's irreconcilably inconsistent statements to physicians and others offered an avenue upon which it might have been found that Claimant's testimony was not substantively credible and that many subjective assertions to physicians could not be given much weight after the left carpal tunnel and trigger finger surgeries. The mere fact that ultimately the Referee was persuaded by the preponderance of evidence that Claimant was a compensably disabled worker—because he worked through pain while the conditions were still developing and because he worked as a piler operator during the harvest in succeeding years—is *non sequitur* to the issue of attorney fees.

101. Claimant failed to show that any action taken by Surety was unreasonable. Surety is not liable for attorney fees under Idaho Code § 72-804.

CONCLUSIONS

1. Claimant suffered compensable injuries to his wrists, hands, and fingers. These injuries arose both directly and as a compensable aggravation of an underlying condition;

2. Claimant is entitled to medical care benefits which were unpaid at the time of

hearing amounting to $3,055.20;

3. Claimant is entitled to temporary disability benefits which were unpaid at the time of hearing amounting to $7,242.01;

4. Claimant is entitled to PPI rated at 4% of the whole person;

5. Claimant is 100% totally and permanently disabled, without apportionment; and

6. Claimant failed to show he is entitled to attorney fees.

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 1st day of February, 2024.

INDUSTRIAL COMMISSION

Douglas A. Donohue, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April 2024, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

JOEL BECK
1950 E CLARK ST, STE 200
POCATELLO, ID 83201
joel@idaholaw.us
trudi@idaholaw.us

ERIC BAILEY
PO BOX 1007
BOISE, ID 83701-1007
wcesb76@hotmail.com
bperkins@bowen-bailey.com

RACHAEL O'BAR
PO BOX 1007
BOISE, ID 83701-1007
robar@bowen-bailey.com
slaughlin@bowen-bailey.com

dc Debra Cupp

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ARTURO RAMIREZ, Claimant, v. LIBERTY IDAHO GOLD LLC, Employer, and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Surety, Defendants.	**IC 2015-021395** **ORDER** **FILED** **APRIL 2, 2024** **IDAHO INDUSTRIAL COMMISSION**

Pursuant to Idaho Code § 72-717, Referee Douglas 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 compensable injuries to his wrists, hands, and fingers. These injuries arose both directly and as a compensable aggravation of an underlying condition;
2. Claimant is entitled to medical care benefits which were unpaid at the time of hearing amounting to $3,055.20;
3. Claimant is entitled to temporary disability benefits which were unpaid at the time of hearing amounting to $7,242.01;
4. Claimant is entitled to PPI rated at 4% of the whole person;

5. Claimant is 100% totally and permanently disabled, without apportionment; and
6. Claimant failed to show he is entitled to attorney fees.
7. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this _2nd_____ day of ___April_____, 2024.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Claire Sharp, Commissioner

Aaron White, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __2nd____ day of __April_____, 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:

JOEL BECK
1950 E CLARK ST, STE 200
POCATELLO, ID 83201
joel@idaholaw.us
trudi@idaholaw.us

ERIC BAILEY
PO BOX 1007
BOISE, ID 83701-1007
wcesb76@hotmail.com
bperkins@bowen-bailey.com

RACHAEL O'BAR
PO BOX 1007
BOISE, ID 83701-1007
robar@bowen-bailey.com
slaughlin@bowen-bailey.com

dc

Debra Cupp