BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MIGUEL A. TAMAYO, Claimant, v. UFP CALDWELL, LLC, Employer, and THE PHOENIX INSURANCE COMPANY, Surety, Defendants.	**IC 2016-017790** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED MAY 16, 2024 IDAHO INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Boise, Idaho, on August 2, 2023. Matt Steen, of Storer and Associates,[1] represented Claimant at the hearing. Susan Veltman, of Breen Veltman Wilson, PLLC, represented Defendants. The parties produced oral and documentary evidence at hearing and submitted post-hearing briefs. Two post-hearing depositions were taken. The matter came under advisement on March 25, 2024.

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[1] Mr. Steen represented Claimant at hearing, but based upon the signatures on the briefing, it appears Mr. Bryan Storer prepared the post-hearing briefs, perhaps because Mr. Steen no longer works for Storer and Associates.

ISSUES

The issues for resolution are:

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

2. Whether and to what extent Claimant is entitled to the following benefits;

    a. Disability based on medical factors, commonly referred to as permanent partial impairment (PPI), and

    b. Permanent partial disability attributable to all factors (PPD).

CONTENTIONS OF THE PARTIES

Claimant contends he injured his low back on June 28, 2016, while engaged in regular work activities for Employer. Substantial medical treatment ensued, ultimately involving two back surgeries. As a result of the industrial accident, even after surgical and conservative treatment modalities, Claimant is left with permanent disability, both based upon medical factors (PPI) and attributable to all factors (PPD).[2]

Defendants acknowledge Claimant suffered a lower back injury in the course of and arising out of his work duties with Employer. However, they contend all appropriate benefits have been paid to Claimant and he has failed to carry his burden of proving entitlement to additional PPI and PPD benefits. Claimant is not a credible witness (as borne out by surveillance video) and his symptoms are inconsistent with his level of function and the findings of Defendants' IME physicians.

[2] In his opening brief, Claimant's counsel misstated the issues for resolution but corrected his mistake in his reply brief. In his opening brief he also at times single spaced portions of his argument, particularly after a block quote. Also, at times in briefing, he employed a reduced font size. It appears his single spacing was done unintentionally and not in an attempt to circumvent the requirements of JRP 11, so no remedial action is warranted. He is admonished to pay closer attention to line spacing and font size in the future. Finally, in both his briefs he used the expression that the issues were "limited to" when in fact this was not a bifurcated hearing and no issues in addition to those set out above were reserved by either party for future consideration by the Commission.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's hearing testimony;

2. Hearing testimony of witnesses Carmen Tamayo, Jevon Olvera, and Matthew Mann;

3. The post-hearing deposition testimony of expert witnesses Richard Radnovich, DO, taken on November 22, 2023, and David Bauer, M.D., taken on October 31, 2023; and

4. Joint exhibits (JE) 1 through 22, (including 9 surveillance DVDs contained in JE 18), admitted at hearing.

Claimant's motion to strike Dr. Bauer's comments, made on page 26 of the doctor's deposition, is GRANTED.

FINDINGS OF FACT

1. Claimant injured his back while working for the Bureau of Land Management in 1989. He received injection treatment in California after being told by physicians in Idaho there was "nothing wrong" with his back. The injury may have entailed an injury "like a herniated disc." JE 20, pp. 628. No records of this injury exist in the record, as Claimant burned all of them several years ago. However, he testified he had no further problems with his back after the injection until the date of the industrial accident in question.

2. Claimant began working for Employer in April 2016. His job duties as described by him and those listed in a time-of-injury job site evaluation form differ, but it is undisputed Claimant injured his low back while stacking cut pieces of lumber on June 28, 2016.

3. Claimant was first seen at Primary Health Medical Group two days after the accident when his back pain failed to resolve on its own. His initial diagnosis was lumbar back strain. He was prescribed pain medication, light duty work restrictions, and physical therapy.

4. When his symptoms failed to timely resolve, (and actually increased to involve his right lower extremity), an MRI was scheduled for October 1, 2016.

5. MRI findings included discogenic and hypertrophic degenerative changes from L3 through S1, with a broad right sided disc protrusion, possibly impinging upon the traversing right S1 nerve root. The protrusion also deformed the right ventral aspect of the thecal sac contributing to mild to moderate central canal stenosis. Claimant also had, at L3-4 and 4-5, redundance of the ligamentum flavum, facet arthropathy and bulging of the disc annulus with foraminal narrowing. As a result of these findings Claimant was referred to a spinal specialist, Michael Glover, M.D.

6. After injections and physical therapy did not improve his condition, Claimant underwent L5-S1 microdiscectomy surgery on March 8, 2017.

7. Claimant initially felt some improvement in symptoms after the surgery, but symptoms soon returned. Dr. Glover thought the symptoms could be related to Claimant's spinal stenosis. An EMG performed on August 4, 2017, found evidence consistent with acute right S1 radiculopathy. Additional treatment and diagnostic studies, and a second opinion examination supported the diagnosis.

8. Due to his lumbar stenosis which caused ongoing radicular symptoms not remedied by conservative treatment, on December 28, 2017, Claimant underwent a second surgery, an L4 laminectomy and partial laminectomy decompression surgery at L3.

9. The laminectomy surgery, and post-surgery steroid injections and physical therapy failed to improve Claimant's low back and right lower extremity symptoms. He was restricted to light duty work activities by his pain management physician, Michael Spackman, M.D. Claimant was prescribed percocet and gabapentin.

10. On September 28, 2018, Defendants had Claimant examined by Lynn Stromberg, M.D., in an independent medical examination setting. Dr. Stromberg reviewed medical records and conducted an examination. During the examination Dr. Stromberg found what he considered to be "flagrant magnification of symptoms." Claimant's described sensory distribution was "reasonable at S1, which correlates with the nerve conduction studies" but Claimant's other findings were not. Dr. Stromberg felt an additional MRI scan of Claimant's lumbar spine was in order due to the possibility of a recurrent fragment at L5-S1. JE 3, p. 21.

11. Ultimately, Dr. Stromberg opined that Claimant did have degenerative disc bulges at L3 through S1, residual S1 radiculopathy, and generalized facet degenerative changes, but no recurrent disc fragment or herniation. Dr. Stromberg felt Claimant had reached MMI, and while he had residual sensory compromise on the lateral aspect of his right foot, his motor function was normal on examination, with no atrophy present.

12. Dr. Stromberg rated Claimant at 12% whole person permanent impairment but apportioned 50% of the rating to Claimant's advanced degenerative lumbar disease, thus leaving Claimant with a net 6% WP PPI rating. He also opined that Claimant could return to work with no restrictions, as he presented no risk to himself or others in his time-of-injury job and had the capacity to do such work. Because tolerance cannot be scientifically measured, Dr. Stromberg did not consider Claimant's tolerance to symptoms associated with his return to work.

13. Dr. Stromberg opined that any future medical treatment for Claimant's advanced degenerative lumbar disease would be attributable to such ongoing condition and not the work accident in question. Dr. Stromberg also felt Claimant should be weaned off all pain medications, especially percocet. He found no evidence of radiculitis (nerve pain) in spite of

Claimant's attempts to magnify his symptoms. There was evidence of radiculopathy or nerve dysfunction (numbness and weakness) but such finding did not imply pain to Dr. Stromberg.[3]

14. On July 1, 2019, at the request of Claimant's attorney, James Bates, M.D., examined Claimant and prepared an IME report. He reviewed medical records and took a history from Claimant in addition to the physical examination. At the time of the IME, Claimant reported right sided low back pain, most tender in the area of the iliac crest. He also complained of pain and decreased sensation at the lateral aspect of his right thigh with sensitivity in his lower leg and right foot. Claimant indicated he had trouble standing or sitting for more than fifteen minutes and could walk about one block. He rarely used opioid medication for pain.

15. On examination, Claimant walked with a normal gait, but had difficulty walking on his toes or supporting his weight on his right foot. He had mild to moderate restriction in flexion and extension, lateral tilt, and rotation of his lumbosacral spine. Motor strength was essentially 5/5 bilaterally with hip and knee flexion/extension, abduction/adduction and dorsiflexion. Ankle inversion/eversion and plantar flexion was right 4/5, 5/5 on left lower extremity muscle groups. Toe risers were significantly limited on right *vis a vis* left. Muscle stretch reflexes were diminished right *vis a vis* left. Right sided leg raises sitting and supine were positive, left negative.

16. In response to specific questions, Dr. Bates attributed Claimant's current symptoms to his industrial accident in question, and felt Claimant was not medically stable. Dr. Bates argued that Claimant's S1 radiculopathy had not been adequately addressed. Claimant's temporary restrictions included frequent position changes, maximum 30 minutes, with occasional lifting, stooping and bending without twisting and lifting no more than 25 pounds. Dr. Bates felt Claimant

[3] Dr. Stromberg acknowledged that, "even among medical professionals the sloppy use of the terms" radiculopathy vs. radiculitis can cause confusion, as sometimes nerve pain is described as radiculopathy. JE 3, p. 23.

could benefit from specific physical therapy to address his soft tissue restrictions. Claimant needed another MRI with contrast and a CT myelogram to evaluate his radiculopathy.

17. Defendants had Claimant seen by orthopedic surgeon David Bauer, M.D., in an IME setting on January 6, 2023. Dr. Bauer reviewed medical records and surveillance videos, photographs, and reports. He prepared an outline of treatment and events. He examined Claimant.

18. Dr. Bauer observed Claimant in no apparent acute distress, but Claimant claimed his pain during examination was 9/10. His movement was fluid and his demeanor was appropriate. He appeared healthy to Dr. Bauer. During the exam Claimant walked with a slight limp which was not present when he left the office. Extension was somewhat limited, with pain complaints. Side bending evoked complaints of increased pain complaints. No atrophy was present in Claimant's lower extremities. Sitting straight leg raises were normal. Dr. Bauer felt Claimant did not exert maximum effort in right lower extremity maneuvers. Claimant had decreased sensation from his right thigh to his calf and in the dorsal aspect of his right foot.

19. In response to specific questions, Dr. Bauer opined Claimant was not totally disabled, and could perform "at least" medium physical demand jobs, lifting up to 50 pounds occasionally and 20 pounds regularly. He further opined Claimant had no apparent physiologic conditions which would cause functional limitations from causes other than his industrial accident. Dr. Bauer expressed agreement with Dr. Stromberg's IME conclusions and opinions. JE 13, p. 399.

20. Looking specifically at the abnormal EMG findings, Dr. Bauer stated the findings of acute S1 radiculopathy was "not consistent with the need for permanent restrictions." He argued that EMG studies "can sometimes stay positive for years after the acute condition has resolved." *Id* at 400. He felt Dr. Rogers, who conducted the studies, may have failed to properly delineate between acute and chronic findings, but even if the testing demonstrated active findings

of radiculopathy, Claimant's presentation at the examination did not document "significant or severe weakness" consistent with the S1 radiculopathy diagnosis. He insinuated the findings could be false positives. Dr. Bauer stated "the presence of an electrodiagnostic finding in the absence of any other objective findings does not mandate restrictions." *Id.*[4]

21. According to Defendants' discovery responses, in October 2020, Surety authorized Claimant to return to the Spine Institute of Idaho's pain management clinic, where he had treated previously with Dr. Spackman. However, Claimant did not return until February 20, 2023. At that time, Dr. Spackman noted it had been five years since Claimant last sought his treatment and Claimant's symptoms were "about the same." Dr. Spackman noted Claimant's reported pain level seemed "out of proportion to how he presents." JE 7, p. 230.

22. Dr. Spackman ordered updated lumbar x-rays and MRI, which apparently found no surgical conditions, as Dr. Spackman suggested Claimant continue conservative treatment with an independent exercise program to include low impact and aerobic exercise and generalized increased activity. By the time of this visit in early 2023, Claimant had been off narcotic pain medications "for years." Claimant did not return to Dr. Spackman for further treatment after this visit.

23. On July 18, 2023, Claimant was seen by Richard Radnovich, D.O., for an IME at the request of his attorney. Claimant indicated at that time that he was experiencing constant pain, typically in the range of 7/10, with pain spikes during activity and twisting motions. His right leg throbbed, and he experienced lateral right leg numbness. Claimant complained of

[4] The undersigned would be remiss if he did not comment on Dr. Bauer's behavior and testimony at his deposition. His failure to directly answer direct questions, telling counsel to "move on" because the doctor did not feel like he had to answer questions pertaining to the issue of causation, diminishes his standing. While the undersigned, despite contrary temptations, did not "throw the baby out with the bathwater" and completely disregard Dr. Bauer's deposition testimony, he is admonished to educate himself on proper deposition conduct and demeanor, as expected under Idaho standards.

stabbing back pain. Claimant's right foot issues included decreased sensation on the lateral aspect of his toes, with periodic spasm. Claimant claimed to exercise almost daily but was limited in his activities. He occasionally took oxycodone for pain, and gabapentin as needed for his nerve issues.

24. Dr. Radnovich observed that Claimant did not appear to be in distress at the time of examination, nor did he appear ill. Claimant appeared uncomfortable and shifted positions frequently, however. Claimant's lower extremity range of motion was within functional limits. No atrophy was noted, but Claimant did exhibit decreased patellar reflexes and a "subtle weakness" of his plantar flexion right versus left. JE 14, p. 414. Straight leg testing was negative on left but positive on right. Claimant's diminished sensation is in "roughly the S1 distribution." Claimant walked with a slight limp favoring his right leg.

25. After a record review and examination, Dr. Radnovich diagnosed chronic lumbar pain with S1 radiculopathy, lumbar stenosis, lumbosacral spondylosis, bilateral neural foraminal stenosis L5 – S1, and "post laminectomy syndrome." He attributed all of the above diagnoses and Claimant's treatment to date to his June 28, 2016 work accident. He noted Claimant had reached maximum medical improvement. JE 14, p. 415.

26. Dr. Radnovich assigned Claimant a 15% whole person impairment rating. Being unable to find a prior impairment rating for Claimant's lumbar spine or ongoing treatment for prior spine injury, coupled with Claimant's denial of "previous significant lumbar injury or any treatment for his spine," Dr. Radnovich did not apportion his PPI rating. Additionally, even if he was asked to ascribe an impairment for Claimant's degenerative changes, Dr. Radnovich noted such impairment would still be zero, since asymptomatic lumbar degenerative changes are assigned a 0% impairment in the *AMA Guides to the Evaluation of Permanent Impairment, 6th Ed.*

27. Dr. Radnovich felt Claimant would benefit from consultation with a pain specialist for pain medications tailored to his condition. He also felt Claimant might benefit from additional injections, but formal physical therapy would not likely improve his condition.

28. Dr. Radnovich gave permanent restrictions of no repetitive bending, squatting, stooping, crawling, or climbing. Also, no frequent lifting of more than 25 pounds, carrying more than 20 pounds, and no repetitive exposure to low frequency vibrations.

DISCUSSION AND FURTHER FINDINGS

29. The first listed issue is whether the condition for which Claimant seeks benefits was caused by the industrial accident. While Claimant raised specific arguments on causation, Defendants did not.[5] However, as a broad concept, causation for Claimant's condition is interwoven into Defendants' argument that Claimant is not entitled to additional disability benefits because he has no permanent disability attributable to his industrial injuries above his impairment rating. If he has any disability, it is due to his longstanding and progressive degenerative disc disease, not the workplace accident.

30. As made clear in cases such as *Serrano v. Four Seasons Framing*, 157 Idaho 309, 317, 336 P.3d 242, 250 (2014), and *Gomez v. Dura Mark, Inc.*, 152 Idaho 597, 601, 272 P.3d 569, 573 (2012), "[c]ausation is an issue whenever entitlement to benefits is at question." However, causation was not argued as a stand-alone basis for denying Claimant further benefits and no further discussion on this topic is warranted outside of the discussion on Claimant's entitlement to permanent partial disability.

31. The substantive issues for determination herein are the extent of Claimant's disability based on medical factors, commonly known as permanent partial impairment (PPI),

[5] Defendants do not dispute that Claimant suffered a work injury on June 28, 2016. They paid for considerable medical treatment, including two surgeries and a host of other treatment charges.

and whether and to what extent, if any, Claimant is entitled to permanent partial disability (PPD).

PPI

32. Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and a claimant's position is considered medically stable. *Henderson v. McCain Foods,* 142 Idaho 559, 567, 130 P.3d 1097, 1105 (2006). Idaho Code § 72-424 provides that the evaluation 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, elevation, traveling, and other activities. The Commission can accept or reject the opinion of a physician regarding impairment. *Clark v. City of Lewisto*n, 133 Idaho 723, 992 P.2d 172 (1999). "When deciding the weight to be given an expert opinion, the Commission can certainly consider whether the expert's reasoning and methodology has been sufficiently disclosed and whether or not the opinion takes into consideration all relevant facts." *Eacret v. Clearwater Forest Industries,* 136 Idaho 733, 40 P.3d 91 (2002). The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry,* 115 Idaho 750, 769 P.2d 1122 (1989).

33. In late September 2018, Dr. Stromberg opined Claimant was at MMI and had a class 2 impairment (single level disc herniation with residual radiculopathy) with a default impairment of 12% whole person. He then apportioned the rating 50/50 between the industrial accident and Claimant's "advanced degenerative disease at multiple levels of his lumbar spine." He did so in spite of his opinion that the "work event" in question (the accident) was "improbable as a cause of [Claimant's] lumbar disc herniation." He then stated the accident was "more of a 'last straw' event." JE 3-22. "Last straw events" can, and by definition, do, cause injury. The mere fact Claimant may have been predisposed to injury from his anatomical

condition does not, by itself, mandate apportionment when the injury occurs. The employer takes an employee as it finds him. *Spivy v. Novartis Seed, Inc.*, 137 Idaho 29, 34, 43 P3d. 788, 793 (2002).

34. Dr. Radnovich declared Claimant at MMI as of July 18, 2023. He assigned Claimant a PPI rating of 15% for multiple level disc herniation and radiculopathy, (class 3). Finding no treatment records for Claimant, coupled with the fact that Claimant was, to Dr. Radnovich's understanding, "fully functioning" with "no track record of repetitive or even … history of back issues," which put Claimant "in the category of degenerative disease with zero symptoms," Dr. Radnovich did not apportion Claimant's PPI rating. He further testified that Dr. Stromberg's 50% apportionment was not explained by him, did not utilize a formula which others could reproduce, and instead was just a random number he pulled "out of his head." Radnovich Depo. pp. 12-14.

35. Apportionment simply because after the accident the diagnostic imaging disclosed preexisting but asymptomatic conditions in Claimant is not supportable. Defendants cite no statute or case, or even the *AMA Guides,* to validate their argument. Further, it is undisputed Claimant had surgeries at multiple levels of his lumbar spine. The evidence supports a finding that Claimant's S1 radiculopathy, when coupled with his two level disc herniations, leads to a class 3 designation, as per the *Guides.*

36. When comparing the analysis of Dr. Radnovich and Dr. Stromberg, Dr. Radnovich's methodology is better reasoned, more fully explained, and more accurate. While Claimant had a remote back injury, there is no indication it did not fully resolve. It did not continue to plague Claimant up to the time of his industrial accident in question. Also, while Claimant did have degenerative disc disease, it likewise was not manifest and did not hamper Claimant prior to his industrial accident. Dr. Stromberg did not provide a reasonable explanation

of why or how he arrived at his 50% apportionment figure.

37. On the issue of permanent partial impairment, Dr. Radnovich's opinion is afforded the greater weight.

38. When the record as a whole is considered, Claimant has proven entitlement to a 15% whole person permanent partial impairment rating, with no apportionment.

PPD

39. 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 impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides in relevant part that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the occupation of the employee, and his age at the time of the work accident. Permanent disability analysis considers the diminished ability of the employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. 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, 294, 766 P.2d 763, 764 (1988). Claimant has the burden of establishing his claim for permanent disability benefits. When making an apportionment, the Commission should: (1) evaluate the claimant's permanent

disability in light of all his physical impairments, resulting from the industrial accident and any pre-existing conditions, existing at the time of evaluation; and (2) apportioning the amount of the permanent disability attributable to the industrial accident. *Page v. McCain Foods, Inc.*, 145 Idaho 302, 309, 179 P.3d 265, 272 (2008); *Horton v. Garrett Freightlines, Inc.*, 115 Idaho 912, 772 P.2d 119 (1989).

Delyn Porter

40. Claimant hired vocational rehabilitation expert Delyn Porter to assist in calculating Claimant's permanent partial disability. He interviewed Claimant (in Spanish), reviewed medical records, and created a residual functional capacity profile after considering his work history with prior job demands. He conducted a labor market and wage earning analysis. He then prepared a written report detailing his methodology and opinions.

41. When reviewing medical records, Mr. Porter considered Claimant's treatment history records (treating physicians and physical therapy) and the IME reports of Dr. Stromberg (defense), Dr. Bates, and Dr. Radnovich (both hired by Claimant). He did not consider the defense IME from Dr. Bauer. It was not referenced in his report, which leads to the conclusion that either the report had not yet been provided by Defendants, or if it had, it was not supplied to Mr. Porter for consideration in formulating his opinions.

42. Mr. Porter considered Claimant's lack of education (6th grade in Mexico), his lack of ability to write or fluently converse in English, his lack of computer skills, his long history of manual labor jobs (over 50 years in the United States), and the fact he is a naturalized US citizen. He looked at Claimant's past work history (but omitted his work with the Forest Service where he injured his back), past medical history, (Claimant apparently did not disclose his prior back injury from 1989), and the jobs for which Claimant would have been suitable prior to his injury in question. He determined Claimant

had no prior physical demand restrictions which would have limited his ability to work in those jobs for which he was otherwise qualified, from light duty up through very heavy duty.

43. In analyzing Claimant's post-accident work ability, Mr. Porter conceded that if Dr. Stromberg's opinions of no work restrictions was applied, Claimant could have no permanent partial disability since he had no restrictions on his ability to work in any job for which he was otherwise qualified.

44. Conversely, if Dr. Radnovich's restrictions were applied, (no repetitive bending, squatting, stooping, crawling, or climbing, along with no frequent lifting over 25 pounds and no carrying more than 20 pounds or repetitive exposure to low frequency vibrations), Mr. Porter opined that Claimant had lost 78% of his labor market as the result of his work injury in question.

45. Claimant's wages at the time of his accident ($10 per hour) compared to the prevailing wages for the jobs remaining in Claimant's post-accident job market resulted in a 0% wage capacity decrease.

46. Mr. Porter chose not to average wage decrease and labor market decrease. He felt it would be more equitable to weight the average in favor of Claimant's job market loss. His "heavier" (unspecified) weighting resulted in his opinion that Claimant sustained a 64.7% permanent partial disability, instead of the evenly-weighted 39% PPD rating. Both ratings were inclusive of PPI.

47. Defendants argue the opinions of Drs. Stromberg and Bauer carry the greater weight when compared to Dr. Radnovich's opinions, thus leaving Claimant with no permanent disability. Analysis of this argument is warranted.

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Dr. Stromberg

48. Defendants note Dr. Stromberg found no lower extremity atrophy. While he acknowledged Claimant had positive EMG findings, indicating nerve damage in his right leg, Dr. Stromberg felt Claimant could perform maneuvers which would not be possible if Claimant had **severe** nerve dysfunction. (Emphasis added.)[6] Dr. Stromberg also found evidence of "flagrant" symptom magnification. After repeat diagnostic nerve studies were performed, Dr. Stromberg opined that while Claimant "has some residual sensory compromise on the lateral aspect of [his right] foot which correlates with the findings of the EMG/NCS studies," he had normal motor function and could return to work without restrictions (and thus no permanent disability). JE 3, pp 21, 22.

49. Dr. Stromberg felt no work restrictions were warranted for Claimant. He opined that Claimant was structurally sound with no neurologic deficits (although he did have "residual sensory compromise" i.e., numbness and nerve damage in his right foot) which would impede his function at work. Dr. Stromberg reasoned Claimant would not pose a risk to himself or others by working. Regarding tolerance, Dr. Stromberg noted the concept is not scientifically measurable or verifiable, so it is up to Claimant to decide if he was willing to tolerate the symptoms brought on by work. Put another way, Claimant would have to decide if it hurts too much to allow him to work full time at his regular employment.

[6] Dr. Stomberg is a frequent participant in worker's compensation disputes and is familiar with the importance of his wording. It is unlikely his use of the term "severe" nerve dysfunction was an unintended overstatement. A reasonable reading could infer Claimant might have less-than-severe, *i.e.* mild to moderate, nerve dysfunction, although Dr. Stromberg never stated as much.

Dr. Bauer

50. Defendants also point out that Dr. Stromberg's opinions were supported by Dr. Bauer, who likewise felt no restrictions were warranted, and also used the three-prong disability analysis employed by Dr. Stromberg. Dr. Bauer was, as noted by Defendants, the only physician who actually observed the surveillance videos of Claimant. (The videos will be discussed hereinafter.) Dr. Bauer felt the videos of Claimant "proved" he had the capacity to work a full time job in the heavy labor category. Dr. Bauer defined "tolerance" as "a person's *desire* to work." (Emphasis added.) Bauer depo. p. 15.

51. Dr. Bauer testified the two laminectomy surgeries only changed the structure of Claimant's spine "very little" and did not affect Claimant's discs or spinal joints. As such, the functional capacity of Claimant's spine was not "significantly" altered. Consequently, the risk to Claimant or others was "nil" if he returned to his time-of-injury job. *Id.* Because Claimant's neurological examination was considered by Dr. Bauer to be "essentially" normal, Claimant, in Dr. Bauer's opinion, had the capacity to return to his old job.

Symptom Magnification as Impacting Medical Testimony

52. Defendants argue that Claimant magnified his symptoms, as noted by Drs. Stromberg, Bauer, and Spackman, who noted at one visit that Claimant's pain level was "out of proportion" to his presentation. JE 7, p. 230. Dr. Bauer noted Claimant did not vocalize pain, nor did he grimace, when standing from a seated position. Furthermore, Claimant "reacted" to Dr. Bauer's joke. These observations by Dr. Bauer led him to

the conclusion that Claimant was not in severe pain at the time of examination, even though he self-reported pain level at 9 out of 10.[7] Bauer depo. p. 18.

53. Defendants are critical of Dr. Radnovich's reliance on Claimant's subjective pain reports (7 out of 10), and the fact that he did not question Claimant's "slightly antalgic gait" JE 14, p. 414. When Claimant exhibited 5/5 lower extremity strength, Defendants argue it should have caused Dr. Radnovich to question Claimant's claim of disability. Instead, they point out Dr. Radnovich applied "cookie cutter" restrictions he typically gives all back surgery patients, which oddly did not include walking and standing restrictions in spite of Claimant's claim of increased pain with prolonged walking and standing.

54. Defendants point out Dr. Radnovich is not a spine surgeon, unlike Drs. Stromberg and Bauer. They argue that by applying "standard" restrictions on Claimant without considering the medical evidence or the surveillance videos, Dr. Radnovich's opinions should carry no weight.

55. Since much of Defendants' arguments against Claimant's credibility focus on the video surveillance (in addition to his presentation at the IME examinations of Dr. Stromberg and Dr. Bauer), a review of the video is appropriate.

Surveillance Videos

56. After viewing nearly eight hours of videos spanning several months, it appears the most damaging evidence involves Claimant replacing two second story windows at his home over the course of several hours on consecutive days. Also, there is video of him

[7] One has to wonder if Claimant had vocalized pain, or grimaced, upon standing, whether Dr. Bauer would have used such demonstrations to support his conclusion that Claimant attempted to magnify his pain during the examination. Subjective interpretation such as this could certainly put a claimant in a "catch 22" situation.

mowing and trimming lawns with either a push mower or a riding mower. Finally, there is video of Claimant going to Home Depot and purchasing boards.

57. To start with, the videos do not, contrary to Dr. Bauer's opinion, establish that Claimant could work a full-time heavy labor category job. Nothing he lifted weighed close to fifty pounds. The heaviest thing he lifted – the replacement window – he did with assistance from his grandson. In fact, it does not appear he actually violated the parameters of Dr. Radnovich's work restrictions in any of his filmed activities.

58. On the other hand, the videos do establish that Claimant does not walk with a limp, although he does not ambulate with the spry fluidity of a young man. (He walks with a shuffle of a sixty-something-year-old man, which he is.) The videos also show Claimant is capable of physical activity over several hours and consecutive days. He showed no limitation with extension, contrary to Dr. Radnovich's exam findings. There were no overt indications the viewer was watching a man in severe pain or with limitations beyond those of age. While replacing the second window, Claimant did at one point grimace a bit and take a break from working, choosing to sit for about five minutes or less.

59. The overall impression the undersigned took away from watching the videos is that Claimant is a hard-working older gentleman who has pride in his home, does what it takes to maintain it, and has the help of his family when needed. He certainly does not work at a commercially viable pace, either because he cannot, or because he chose not to (although many people work at a pace comfortable for them, but not intentionally slower than necessary). The videos do not totally discredit Claimant, but also do not support his claim to be in severe pain most, if not all, of the time. They diminish, but do not eliminate, Claimant's arguments in favor of permanent disability.

Witness Testimony

60. Claimant's ex-wife, with whom he still lives, and his grandson, both testified. Both of them were credible witnesses and portrayed Claimant as a man changed by this accident. Claimant and his wife spoke convincingly about how he used to be involved in soccer, actively exercised with weights at the YMCA, was full of energy, and how that changed after his back injury. Their testimony, and that of his grandson, who explained how he helped Claimant with yard care and the window replacement project, carried weight.

Analysis

61. Drs. Stromberg and Bauer both correctly did not consider tolerance as a factor to consider when determining a person's restrictions for medical reasons. Restrictions are imposed to prevent risk to the worker and to a much lesser extent, others around the worker. Commonly, physicians impose restrictions to minimize future risk of such damage. Capacity is not a restriction. It is the limit of endurance, beyond which the person cannot choose to go. Physicians do not impose capacity limits. Individuals do. When Drs. Stromberg and Bauer chose not to impose work restrictions on Claimant, they did so because they believed Claimant was not at risk of further injury from his two surgeries or his radiculopathy. They felt there was no risk of further harm in him doing whatever he was capable of doing. They did not need to put the brakes on his activities. They also determined that neurologically Claimant had the capacity to return to his time-of-injury job.

62. Dr. Radnovich felt it was warranted to impose restrictions on Claimant to prevent the risk of further damage to himself after his two back surgeries. Dr. Radnovich makes it his practice to typically impose limits similar to those he imposed on Claimant for "somebody with past…lumbar surgery, someone with significant degenerative changes." Radnovich depo. p. 16.

63. Claimant's permanent disability is a function of his capacity to work, which is influenced by his pain and tolerance thereto. As noted by one of Claimant's physicians, Michael Glover, M.D., "[C]laimant would have no surgical restrictions at this point (March 28, 2018), and would be allowed to return to work without restrictions if he were feeling better. Unfortunately, he is currently limited by his persistent pain, and that is what is keeping him from work." JE 22, p. 701.

64. Pain must be accounted for when determining permanent disability. It "may be considered as a medical factor or a non-medical factor, or both, but it must be considered." *Sharp v. Thomas Bros. Plumbing*, 510 P.3d 1136, 170 Idaho 343 (2022), citing to *Funes v. Aardema Dairy*, 150 Idaho 7, 11, 244 P.3d 151, 155 (2010).

65. While the record supports a finding that Claimant's complaints of pain do not well correlate with his medical findings, or his candid behavior as evidenced by the videos, nevertheless the record does support some level of disability based on his residual radiculopathy and convincing witness testimony. Also, medical testimony and records, such as admissions that Claimant could work in "at least" medium capacity jobs, suggests some level of disability, as it rules out heavy and very heavy job categories. When all of the record is taken as a whole, Claimant has suffered some level of permanent disability, contrary to the stated opinions of Drs. Stromberg and Bauer.

66. Mr. Porter's analysis overstates Claimant's disability, even before considering whether it would be proper to weight the average with a skew toward job market loss. He did not consider medium level jobs, in part due to focusing exclusively on Dr. Radnovich's suggested work restrictions. The problem is that Dr. Radnovich did not have the benefit of reviewing the surveillance videos, which paint a more accurate picture of Claimant's abilities and disabilities. Dr. Radnovich's restrictions are excessive in light of the videos and Dr. Bauer's testimony on

the differences between restrictions for surgeries such as fusions, and those applicable to laminectomies. While it is unreasonable to impose no restrictions on Claimant given the nature of his surgeries and his ongoing radiculopathy, medium level restrictions would be warranted.

67. Dr. Bauer testified Claimant could do "at least" medium physical demand jobs, and that opinion is found to be the most in line with the remainder of the record. His opinion that the videos proved Claimant could do heavy physical demand is not in line with the videos and is rejected.

68. When medium level jobs (both skilled and unskilled) are accounted for, Claimant's existing job market is just over half of what it was prior to his accident. Also, a significant number of those semiskilled jobs are in construction, which Claimant testified is not a market where his skills are particularly well matched. Using the OES figures as a rough guideline, there were about 12,700 jobs which Claimant could, in theory, perform prior to his accident. Eliminating the heavy-duty category jobs, Claimant's potential job market has been reduced by roughly 45 to 50% due to permanent restrictions and his pain tolerance.

69. However, given Claimant's past work history, which included mostly light and medium level jobs, and his age, reducing the number of heavy category jobs available to him pre-injury, is realistic. Claimant also testified that construction jobs did not emphasize his skill set. In his more recent past, Claimant has gravitated to light and medium level jobs, which reduces his loss of labor market, as he is still able to perform many medium level job tasks. His observed issue is with the pace of his work, and his tolerance to pain, as convincingly described by his ex-wife. These factors, when considered with Claimant's lack of proficiency with the written and spoken English language, and somewhat offset by the video glimpses into his work ability, and the OES statistics, require a downward adjustment of Claimant's disability rating.

70. The record, when taken as a whole, supports a finding that Claimant has lost 40% of his labor market, with no wage-earning capacity loss. Averaging the figures is appropriate under these circumstances. As discussed *supra*, Defendants failed to show a basis for apportionment.

71. When the totality of the record is considered, Claimant has proven an entitlement to permanent partial disability benefits in the amount of 20%, inclusive of his 15% impairment.

CONCLUSIONS OF LAW

1. When the totality of the evidence is considered, Claimant has proven by a preponderance of the evidence the condition for which he seeks benefits was caused by the industrial accident of June 28, 2016.

2. When the totality of the evidence is considered, Claimant has proven by a preponderance of the evidence that he is entitled to benefits for disability based on medical factors, otherwise known as permanent partial impairment in the amount of 15% whole person.

3. When the totality of the evidence is considered, Claimant has proven by a preponderance of the evidence that he is entitled to benefits for permanent partial disability in the amount of 20% whole person, inclusive of his 15% whole person PPI benefits.

RECOMMENDATION

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

DATED this 1st day of May, 2024.

INDUSTRIAL COMMISSION

Brian Harper

Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May, 2024, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by email transmission and regular United States Mail upon each of the following:

BRYAN STORER
4850 N. Rosepoint Way, Ste. 104
Boise, ID 83713
lawdocstorer@gmail.com
storerlit@gmail.com

SUSAN VELTMAN
1703 W. Hill Road
Boise, ID 83702
veltman@bvwcomplaw.com

Jennifer Komperud

jsk

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MIGUEL A. TAMAYO, Claimant, v. UFP CALDWELL, LLC, Employer, and THE PHOENIX INSURANCE COMPANY, Surety, Defendants.	**IC 2016-017790** **ORDER** FILED MAY 16, 2024 IDAHO INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Brian Harper 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 recommendation of the Referee. The Commission concurs with this recommendation.

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, IT IS HEREBY ORDERED that:

1. When the totality of the evidence is considered, Claimant has proven by a preponderance of the evidence the condition for which he seeks benefits was caused by the industrial accident of June 28, 2016.

2. When the totality of the evidence is considered, Claimant has proven by a preponderance of the evidence that he is entitled to benefits for disability based on medical factors, otherwise known as permanent partial impairment in the amount of 15% whole person.

3. When the totality of the evidence is considered, Claimant has proven by a preponderance of the evidence that he is entitled to benefits for permanent partial disability in the amount of 20% whole person, inclusive of his 15% whole person PPI benefits.

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

DATED this the 15th day of May, 2024.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Claire Sharp, Commissioner

Aaron White, Commissioner

ATTEST:

Paul Jeffries
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May, 2024, a true and correct copy of the foregoing **ORDER** was served by email transmission and regular United States Mail upon each of the following:

BRYAN STORER
4850 N. Rosepoint Way, Ste. 104
Boise, ID 83713
lawdocstorer@gmail.com
storerlit@gmail.com

SUSAN VELTMAN
1703 W. Hill Road
Boise, ID 83702
veltman@bvwcomplaw.com

Jennifer Komperud

jsk