

- b. Temporary partial and/or temporary total disability benefits (TPD/TTD);
- c. Permanent partial impairment (PPI);
- d. Retraining; and,
- e. Disability in excess of impairment.

CONTENTIONS OF THE PARTIES

Claimant argues that he injured his left shoulder on July 26, 2002 while operating a front-end loader for Employer. Claimant was subsequently diagnosed with a labral tear, which was surgically repaired in December 2002. Claimant continued to have trouble with his shoulder and underwent a second surgical procedure on the left shoulder in December 2003. Claimant contends that neither surgery improved the condition of his left shoulder. Ultimately, his left-sided limitations led to overuse of his right arm and shoulder necessitating right shoulder surgery in April 2004. As a result of his July 26, 2002 accident, Claimant cannot return to his time of injury occupation; he has permanent impairment of both shoulders, and if not retrained, disability in excess of his impairment; he will require on-going medical care on an as-needed basis; and, finally, he is owed time-loss benefits from October 24, 2003 through August 17, 2004.

Defendants do not dispute that Claimant was involved in a work-related accident on July 26, 2002 at which time he suffered a labral tear of his left shoulder. Defendants paid for all three of Claimant's shoulder surgeries, although they now contend that the need for the right shoulder surgery was not a result of the July 26, 2002 accident, but was as a result of Claimant's pre-existing degenerative joint condition.¹ Defendants aver that Claimant is medically stable from the only injury attributable to his industrial accident—the left labral tear; that Defendants paid the PPI for the left shoulder as assigned by the rating physicians; that because Claimant's right

¹ Defendants do not seek reimbursement for benefits already provided Claimant with respect to his right shoulder surgery and recovery.

shoulder restrictions were not the direct result or natural sequelae of his industrial accident that Defendants are not liable for any right shoulder impairment; that Claimant has failed to prove he is entitled to any disability in excess of impairment for either shoulder; and that Claimant has failed to prove any entitlement to retraining.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Dan Brownell, and Kevin Stevens offered at hearing;
2. Claimant's exhibits A through P admitted at hearing;
3. Defendants' exhibits A through R admitted at hearing; and
4. The post-hearing deposition of J. Craig Stevens, M.D.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. At the time of hearing, Claimant was 36 years of age. He resided in Spirit Lake, Idaho, with his wife and five of his children, aged 12, 11, 5, 4, and 1. Claimant attended high school in Battle Mountain, Nevada, through the ninth grade. Claimant started, but did not complete the tenth grade. After leaving school, Claimant entered a youth work program in Battle Mountain where he learned to operate heavy equipment of all types.

2. From the time he left high school until his industrial injury in 2002, Claimant worked as a heavy equipment operator for a number of employers in various industries and locales, operating loaders, backhoes, dump trucks, track hoes, scrapers, water wagons, forklifts, rollers, compactors, and cranes among other types of equipment.

3. In April 2002, Claimant went to work for Employer as an equipment operator at

Employer's recycling plant—the facility where asphalt and concrete removed during road projects is crushed for reuse.

4. On July 26, Claimant was working at the recycling plant when he received a call from Kevin Stevens, his boss. Stevens directed Claimant to a construction site in Spokane where Employer needed someone to operate a loader. While operating the loader, Claimant injured his left shoulder. Initially, Claimant believed he had merely pulled a muscle in his left shoulder, and he continued working. Later that day, a co-worker advised Employer about Claimant's accident and possible injury, at which time Employer took Claimant to the emergency room at Kootenai Medical Center (KMC).

MEDICAL CARE

5. It is noted in Claimant's treatment history that he had suffered an accident involving the same shoulder about six weeks previously when he was trying to dislodge a piece of debris from the crusher. By Claimant's description of the remote accident and subsequent appearance of the shoulder, the doctor suspected an acromioclavicular (AC) separation caused by the earlier crusher accident. However, x-rays of Claimant's shoulder were negative, and he was diagnosed with a shoulder strain, though the doctor believed that a rotator cuff tear was also possible. Claimant was placed in a sling, advised to elevate and ice the left arm, given pain medication, and advised to take over-the-counter anti-inflammatories. He was released to return to work with restrictions.

6. Claimant returned to the emergency room for a recheck on July 30 and saw a different doctor. The chart note indicates that Claimant was upset that he hadn't yet had an MRI, although the chart notes for July 26 specifically stated that the need for an MRI would be evaluated *after* Claimant's July 30 recheck. The emergency room doctor diagnosed a left AC

separation and prescribed a sling for three days, anti-inflammatories, and no left-handed work for twelve days with a follow-up in two weeks.

7. Claimant returned to the emergency room for his two-week recheck on August 12. On this visit, he was treated by yet a third emergency room doctor. The doctor described Claimant as “an alert irritable gentleman who is rather frustrated with his situation.” Defendants’ Ex. H., p. 93. On exam, the doctor found generalized tenderness throughout Claimant’s left shoulder with pain on abduction and rotational movement. He suspected a rotator cuff tear, ordered an MRI, and referred Claimant to Roger Dunteman, M.D., an orthopedist.

8. Claimant had an MRI on August 18, which showed a longitudinal tear of the posterior labrum extending into the inferior labrum. The rotator cuff was intact. The MRI showed hypertrophic changes in the AC joint and edema across the joint evidencing on-going degenerative processes.

9. Claimant first saw Dr. Dunteman on September 18, 2002. In addition to shoulder pain, Claimant described cervical pain as well as numbness and tingling in his left arm and hand. Claimant demonstrated full range of motion with his left shoulder, with some tenderness in the impingement area, lateral bursa, biceps tendon and anterior capsule. There was no popping, snapping, or crepitation in the shoulder with active or passive range of motion. Dr. Dunteman diagnosed left shoulder pain, possible labral tear and possible cervical radiculopathy. He ordered a cervical MRI and x-rays, both of which were normal.

10. Claimant returned to Dr. Dunteman on October 21. His condition was essentially unchanged. Dr. Dunteman recommended conservative treatment, including anti-inflammatories and physical therapy. Claimant participated in physical therapy without making significant

improvement. When he returned to Dr. Dunteman on November 22, the doctor administered a cortisone injection. Ultimately Dr. Dunteman recommended, and the Surety authorized, left shoulder surgery, which was scheduled for December 26, 2002.

11. The surgery confirmed the diagnosis of inferior labral tear and chronic inflammation of the left acromioclavicular joint. In addition to repairing the labral tear, Dr. Dunteman performed an arthroscopic subacromial decompression with release of coracoacromial ligament, subtotal bursectomy, acromioplasty, and distal clavicle resection (DCR or Mumford procedure).

12. Claimant's recovery was variable, but he was released to full duty on February 28, 2003. Dr. Dunteman rated Claimant with a 12% permanent impairment of the left upper extremity based on the distal clavicle resection and Claimant's limited internal rotation of the left shoulder. A month later Claimant was complaining of worsening pain across the top of his left shoulder. Dr. Dunteman prescribed a work-hardening program.

13. Claimant returned to Dr. Dunteman on April 23, 2003. Dr. Dunteman noted, "At this point all of his symptoms seem to be localized to the acromioclavicular joint." Defendants' Ex. I, p. 133. Dr. Dunteman could find no pathology that would explain Claimant's pain and suggested a cortisone injection. On the same date, Dr. Dunteman sent a letter to Surety advising that a 1994 motor vehicle accident had not involved Claimant's left shoulder and was not contributory in any way to Claimant's left shoulder problems. He also noted that imaging showed a good resection and observed that he could not account for Claimant's continuing complaints. He advised Surety that they might want to consider obtaining an IME or second opinion.

14. On July 7, 2003, Claimant appeared at the emergency room at KMC complaining of bilateral shoulder pain. He advised the treating physician that he had been stacking hay the previous day, and was concerned that he had somehow damaged the instrumentation in his left shoulder. Claimant also complained about chronic pain in his right shoulder, which he attributed to overuse, and denied any specific trauma to the right shoulder. X-rays indicated that the labral screw in his left shoulder was still in good position. He was advised to follow up with Dr. Dunteman.

15. On July 15, 2003, at the request of Surety, Claimant saw Michael T. Phillips, M.D., an orthopedic surgeon. Dr. Phillips reviewed Claimant's medical records and performed an exam. He concluded that Claimant's work injury—the labral tear—was superimposed on an AC joint that had chronic degenerative joint disease. The labral tear was healed, and Claimant was stable as to the work-injury. Dr. Phillips opined that Claimant's on-going pain complaints were of unknown etiology unrelated to the industrial injury and recommended a rheumatology consultation, noting that such a consult was because of the AC joint disease, not the industrial accident. Dr. Phillips rated Claimant with a 10% permanent impairment of the left upper extremity based on the DCR alone. Dr. Phillips did not believe Claimant's range of motion indicators to be valid, so awarded no impairment for loss of range of motion. He did not apportion any of the 10% PPI to Claimant's pre-existing degenerative AC joint condition. Claimant reported his right shoulder pain to Dr. Phillips, but denied any trauma, and Dr. Phillips' report made no mention of the hay stacking that led to an emergency room visit just a week prior to the IME. Dr. Dunteman had an opportunity to review Dr. Phillips' report and agreed with his findings.

16. On August 11, Claimant saw Patrick S. Lynch, M.D., for another opinion regarding his left shoulder. Dr. Lynch was concerned that Claimant's on-going pain could be indicative of some residual impingement or an incomplete healing of the labral tear. He could not find Claimant fixed and stable without post-surgical imaging to rule out those concerns. Dr. Lynch recommended an MRI arthrogram and follow up with Dr. Dunteman. There is no mention in Dr. Lynch's report regarding right shoulder pain. While Dr. Dunteman was concerned about the likelihood of false positive results given the previous surgery, he did not object to the MRI arthrogram.

17. Claimant had the MRI arthrogram, and, as Dr. Dunteman predicted it might, it was suspicious for a recurrent labral tear. Dr. Dunteman advised an arthroscopic evaluation of the labrum, subacromial space, and rotator cuff with an open distal clavicle revision to remove scar tissue. The surgery was approved and scheduled for December 18, 2003.

18. Claimant returned to Dr. Dunteman in early November, before the scheduled left shoulder procedure, complaining of pain on the top of his right shoulder. This is the first reference in Dr. Dunteman's notes to right shoulder pain. Claimant attributed the right shoulder pain to overuse. Nothing in the records indicates that Claimant told Dr. Dunteman about the hay stacking incident and subsequent trip to the emergency room three months earlier. Dr. Dunteman recommended conservative treatment of the right shoulder.

19. Repeat arthroscopy of the left shoulder revealed significant scarring in and around the AC joint with recurrent impingement, but no indication of a recurrent labral tear. Dr. Dunteman performed a second decompression with acromioplasty and an open debridement of the AC joint. Dr. Dunteman also administered cortisone injections to the right AC joint and right subacromial space while Claimant was sedated. Claimant again had a somewhat variable

recovery, complicated by an infection at the incision site caused by sutures that failed to dissolve.

20. By early March 2004, Claimant advised Dr. Dunteman that his left shoulder had been much better until he slipped and fell against a snow machine. His primary complaint was his right shoulder, which he rated as ten out of ten on the pain scale. Claimant advised that neither Percocet or OxyContin provided relief. Dr. Dunteman diagnosed AC joint inflammation and possible impingement in the right shoulder and recommended excision of the distal clavicle. Based on Claimant's subjective report, Dr. Dunteman attributed the right shoulder problems to overuse during recovery from the two left shoulder surgeries.

21. Dr. Dunteman performed an arthroscopic DCR on Claimant's right shoulder on April 9, 2004. The arthroscopy showed chronic inflammation of the AC joint with cystic formation. Three and a half months post right shoulder surgery, Claimant described himself as "minimally improved." Defendants' Ex. I, p. 165. He was still complaining of pain and weakness in both upper extremities, but worse on the right. Dr. Dunteman suggested bilateral upper extremity nerve conduction studies. The studies were done August 2, 2004. But for an indication of right-sided carpal tunnel syndrome, the tests were normal.

22. On August 17, 2004, Claimant had another IME, this one by Dr. Stevens. Dr. Stevens described the atmosphere in the exam room as "emotionally charged, as [Claimant] essentially accused me of being paid by the insurer to render the opinion that they wanted." Defendants' Ex. Q, p. 203. Claimant's explanation of his left shoulder injury and course of treatment was largely consistent with the medical records. Of note, Claimant explained his right shoulder symptoms as evolving in connection with splitting wood to heat his home. No mention was made of the hay stacking incident. Dr. Stevens' was unable to obtain valid results on range

of motion and strength testing, as Claimant's responses on exam were inconsistent. Additionally, and of some concern to Dr. Stevens, Claimant's averred sensory deficits in the upper extremities were physiologically questionable and grossly inconsistent with his condition as observed surgically and on radiographic imaging. Dr. Stevens noted that most of Claimant's treatment following his initial left shoulder surgery had been directed to his subjective complaints, and that there was little objective medical evidence of pathology that would explain Claimant's symptoms.

23. Dr. Stevens' conclusions were comprehensive and thorough. As to Claimant's left shoulder, he opined that only the labral tear could be attributed to the industrial accident. That injury had healed, was stable, and did not result in permanent restrictions or impairment. Claimant's long-standing AC degenerative condition pre-existed his work injury, and the symptoms he exhibited at the time of the IME exam represented an extension of his AC disease, not his labral tear. Finally, although he had an impingement of the left shoulder, he underwent a successful Mumford procedure, which should have resolved the impingement. Without valid range of motion tests, Claimant's true range of motion deficit, if any, could not be determined. With regard to the right shoulder, Dr. Stevens could not attribute Claimant's problems to overuse occasioned by his left shoulder injury:

I feel that the claimants [sic] statements that his right shoulder became bothersome as he favored his left is problematic, as the radiographs reveal arthritic degeneration which would have taken years to evolve. I also do not feel his right shoulder symptoms represent an exacerbation of a preexisting condition, but are a continuation entirely of a preexisting condition which may have become apparent within the time frame of his recovery. The fact that he was not working at all during this time but only performing home activities further removes work relatedness.

Id., at p. 208.

24. Dr. Stevens determined Claimant's impairment rating by using *Guides to the*

Evaluation of Permanent Impairment, Fifth Ed., (*AMA Guides*). He agreed with Dr. Phillips' rating of 10% of the left upper extremity taken from table 16-27 of the *AMA Guides*, and converting it to a whole person impairment of 6%. This impairment was based solely on the DCR and not on any loss of range of motion. Dr. Stevens could not impose any impairment rating for the right shoulder, as he could not find it related to the industrial accident. Dr. Stevens imposed permanent restrictions—no lifting greater than 30 lbs. to shoulder level and 5 lbs. above shoulder level on either side. These restrictions were permanent, but resulted solely from Claimant's degenerative AC disease, and not his industrial injury, which was limited to the labral tear.

25. Claimant returned to Dr. Dunteman on October 4, 2004. Claimant was frustrated because he wanted to return to work but was limited by his restrictions on overhead work. Claimant and Dr. Dunteman discussed Dr. Stevens' IME. Claimant felt that Dr. Stevens had been rough with him during the IME, and "caused him a fair amount of distress." Defendants' Ex. I, p. 167. Dr. Dunteman stated that Dr. Stevens' evaluation of Claimant's left shoulder was reasonable, as were his permanent restrictions. Dr. Dunteman continued to believe that Claimant's right shoulder problems were due *in part* to overuse during the treatment of his left shoulder and should be given "an impairment rating of 10% with 50% due to pre-existing conditions of the cystic change, etc." *Id.* Dr. Dunteman also opined that Claimant might need physical therapy and prescription anti-inflammatories on an as-needed basis for either or both shoulders in the future.

VOCATIONAL EVIDENCE

26. Employer terminated Claimant shortly after his July 26, 2002 accident. At the time of his termination, he was earning \$16.00 per hour. Claimant was released for light duty

work on January 6, 2003 following his first left shoulder surgery. Restrictions included right handed desk work only. Despite the earlier termination, Employer offered Claimant a “light duty” position at the rate of \$13.50 per hour starting January 13, 2003. Duties included cleaning the shop, inventorying shop yard, errands and miscellaneous assignments.² Claimant returned to work, but was taken off work again by Dr. Dunteman from January 17 through February 2. Dr. Dunteman released Claimant to light duty work again on February 3, with no lifting over 10 lbs. with his left arm, no repetitive work at or above shoulder level with the left arm, and *sedentary work only*. Claimant quit Employer on February 12, in part because the work he was asked to do was not within his restrictions.

27. Claimant was released to full duty on February 28, 2003. Sometime thereafter, he went to work for Norm’s Plumbing running a backhoe and a dozer. Claimant worked for Norm’s Plumbing for approximately three months until he was offered a job on a bridge project in Spokane, where he remained employed until October 2003.

28. Dr. Dunteman took Claimant off work on October 24, 2003 pending his second left shoulder surgery. Before he was released to return to work following the second left shoulder procedure, Dr. Dunteman performed surgery on the right shoulder. Dr. Dunteman released Claimant to work with restrictions on May 19, 2004. Restrictions were sedentary work only, no right handed work, and left hand limited to typing. Claimant did not return to work until March 2005, at which time he went to work for White Water Construction operating a dozer. Claimant had no problem doing the work while in Coeur d’Alene, but when he was sent to a job site in Montana, rough terrain caused his left arm to swell and become painful and Claimant was forced to quit and return to Coeur d’Alene. In all, Claimant worked for White

² Although not at issue in this proceeding, the Referee notes that the alternative duty offered by Employer was *not* in compliance with the restrictions imposed by Dr. Dunteman.

Water Construction for approximately five and a half weeks, earning \$15.00 per hour. At the time of hearing, Claimant was working for a friend making connections between phone company lines and homes. He was earning \$10.00 per hour.

29. Claimant obtained his G.E.D. in January 2005, an Idaho high school equivalency in February 2005, and a commercial driver's license in March 2005. With the assistance of Dan Brownell, Industrial Commission Rehabilitation Division (ICRD) Consultant, and financial assistance from the Idaho Department of Vocational Rehabilitation (IDVR), Claimant enrolled in a wastewater treatment certification program through California State University, Sacramento. At the time of hearing, Claimant was successfully working his way through the self-directed certification course with excellent test scores. Because Claimant needed to work to support his family, he was only able to work on his certification course on weekends. Upon receipt of certification, Claimant could expect to become employed in an entry-level position that paid between \$12.00 and \$14.00 per hour plus benefits.³ With additional certification and some experience, Claimant could expect to earn \$16.00 per hour plus benefits.

DISCUSSION AND FURTHER FINDINGS

CREDIBILITY

30. Claimant. Much of the briefing in this matter was directed to issues of credibility—of the Claimant and of Dr. Stevens. Review of the record and observation of Claimant at hearing leads the Referee to conclude that Claimant is essentially an honest and hard-working man. He demonstrated a volatile nature that quickly flares when he is frustrated. Certainly the consequences of his work-related injury have provided ample opportunity for frustration. Unfortunately, Claimant's reaction to his frustrations has made him a refractory

³ Benefits are valued at approximately 30% of wages.

patient on occasion, and this recalcitrance and tendency to hyperbole has not worked in his favor. In particular, it is clear that Claimant was not always cooperative during his IMEs, particularly with Dr. Stevens.

Most of Claimant's testimony was generally credible and consistent with the medical records and documented objective findings. Claimant's testimony concerning the timing and onset of his right shoulder pain is a notable exception to his general credibility. Claimant may sincerely believe that his right shoulder problems arose because of his left shoulder limitations. But Claimant's failure to tell Dr. Dunteman about the emergency room visit that resulted from bucking hay, and the other inconsistent explanations he provided regarding the cause and timing of his right shoulder problems, makes Claimant's testimony inherently unreliable on this particular point.

31. Dr. Stevens. Claimant makes much of Dr. Stevens' reliance on IME work in his practice, and defense IME work in particular, as a way of challenging his credibility. While a practice heavily reliant on performing IMEs for sureties certainly gives rise to questions of bias, it would be improper to dismiss the opinion of an otherwise qualified physician without further analysis for that reason alone. The record substantiates that Dr. Stevens is well qualified, holding board certifications in physical medicine and rehabilitation, electrodiagnostic medicine, and as an independent medical examiner. Dr. Stevens' opinions in this case are based on objective findings, and his explanations and rationale for reaching the conclusions he did are thorough, well-reasoned, and persuasive. The Referee finds Dr. Stevens a credible witness in this proceeding.

MEDICAL CARE

32. The burden of proof in an industrial accident case is on the claimant.

The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proved by expert medical testimony.

Hart v. Kaman Bearing & Supply, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot*, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994). Once a claimant has met his burden of proving a causal relationship between the injury for which benefits are sought and an industrial accident, then Idaho Code § 72-432 requires that the employer provide reasonable medical treatment, including medications and procedures.

In this case, Defendants have accepted and paid for all of Claimant's treatment to the time of hearing, including three surgical procedures. While Defendants now question whether Claimant's right shoulder surgery was in fact compensable, they do not seek to recover from Claimant any of the medical costs Defendants have incurred.

33. The only remaining issue regarding medical care is whether Claimant is entitled to physical therapy or prescription medication that Dr. Dunteman opined *might* be necessary on an as-needed basis in the future. Claimant argues that he is entitled to any future medical care that his treating physician, Dr. Dunteman, deems reasonable and necessary. Claimant relies upon the compensable consequences doctrine as discussed in § 13.00 of *Larson's Workers' Compensation Law*, Vol. 1, 1998. In summary, the compensable consequences doctrine provides that when the primary injury arises out of and in the course of employment, then all of the natural consequences that flow from the initial injury are also compensable. For example, if

Claimant had suffered nerve damage as a result of the surgery to repair his labral tear, then Surety would be responsible for all medical treatment made necessary by the nerve damage, which was a natural consequence of the initial injury. The Idaho Industrial Commission has adopted the compensable consequences doctrine. See, *Castaneda v. Idaho Home Health, Inc.*, 99 IWCD 86, at p. 12185 (July 1999); *Martinez v. Minidoka Memorial Hospital*, 99 IWCD 27, at p. 11793 (February 1999); and *Perkes v. Idaho Humane Society*, 96 IWCD 109, at p. 9664 (November 1996).

34. Left Shoulder. The applicability of the compensable consequences doctrine in this case is not so clear-cut as the example provided above. The only injury that Claimant sustained as a *direct* result of the industrial accident was the labral tear in his left shoulder. Did Claimant's labral tear *necessitate* the DCR, AC decompression, and acromioplasty or were those procedures done to address preexisting pathology that was neither exacerbated nor aggravated by the industrial injury?

Fortuitously, this very question was addressed in the *The Guides Newsletter*, September/October 2005, published by the American Medical Association. In an article entitled "Acromioclavicular Joint Arthritis," authors Charles N. Brooks, M.D., and Christopher R. Brigham, M.D., discuss the relationship between procedures commonly done for AC joint disease and how they relate medically to workers' compensation injuries. In an example that is analogous to the case at bar, the authors pose the following scenario: Employer hires a painter with pre-existing AC joint disease. While painting a house, the painter develops recurrent impingement that causes a preexisting partial rotator cuff tear to progress to a full-thickness tear, disabling the painter. Conservative treatment fails and the painter undergoes arthroscopic surgery to repair the rotator cuff tear, including acromioplasty, and DCR. The authors pose their

question with regard to impairment, but it is just as applicable to the question of medical care: Is the 10% upper extremity impairment resulting from the DCR compensable under the workers' compensation claim?

The authors opine that the rotator cuff repair and any impairment, such as shoulder loss of motion or weakness directly consequent thereto, are compensable as part of the workers' compensation claim. But, they go on to observe, the DCR was performed to address a preexisting condition that was not caused or worsened by painter's work activities—there is no *medical* causal relationship between the painter's work activities and the DCR. Similarly, in the case at bar, repair of Claimant's labral tear and any impairment that resulted from that repair is compensable. But, Claimant's DCR and acromioplasty addressed his preexisting AC joint disease that was neither caused nor worsened by his industrial accident.

The authors conclude that as a practical matter, it may not be possible to parse medical causation in shoulder surgery with precision. The theme that seems to underlie their analysis is that it is consistent with good medical practice to address the unrelated pre-existing shoulder pathology whenever an injury requires surgical repair:

Assuming all the shoulder procedures were performed concurrently, and the surgery was covered under the workers' compensation claim, it may be that any impairment from the operation, even if one portion was done for a nonoccupational condition, becomes occupationally related.

The Guides Newsletter, September/October 2005, p. 3. Again, the authors couch their discussion in terms of impairment because impairment is the focus of the publication, but if impairment flows from a procedure that addressed a nonoccupational condition, there is no reason that medical care should be treated differently.

Although not explicitly stated as part of their impairment ratings, Drs. Dunteman, Phillips, and Stevens all rate Claimant's impairment based upon the DCR, not the repair of the

occupational labral tear. Acceptance of the approach suggested by Drs. Brooks and Brigham in their article is implicit in the 10% PPI rating for Claimant's left shoulder that is not disputed in this proceeding.

This approach is also consistent with Idaho case law which provides that the workers' compensation law is to be liberally construed in favor of the employee. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

The procedures relating to the pre-existing AC joint disease in Claimant's left shoulder were performed at the same time as the repair of the occupationally-caused labral tear, and the surgery was covered under the workers' compensation claim. Claimant was given an impairment rating based on the DCR, which was paid by Surety. It follows, then, that Claimant is entitled to future medical care for his left shoulder that his treating physician, Dr. Dunteman, deems reasonably necessary as a result of the labral tear or the DCR.

35. Right Shoulder. Claimant has failed to carry his burden of proving that his right shoulder surgery was necessitated by his left shoulder injury. Dr. Dunteman's opinion regarding causation of the right shoulder problem is not persuasive.

As Claimant himself has stated, overuse of the right shoulder is only one of several possible causes of his right shoulder pain. In July 2003, four months before he first reported right shoulder pain to Dr. Dunteman, Claimant was seen in the emergency room for bilateral shoulder pain that he attributed to stacking hay the previous day. At his deposition, Claimant stated that he didn't start having right shoulder pain until he slipped on the ice and banged his

right shoulder against a snow machine.⁴ He told Dr. Stevens that his right shoulder started hurting when he was chopping wood to heat his home. It does not appear that Dr. Dunteman was aware of any of the alternative explanations Claimant gave for his right shoulder pain. While it is understandable that Dr. Dunteman, in his capacity as Claimant's treating physician, accepted Claimant's statement regarding causation, the record as a whole does not support Dr. Dunteman's opinion on this particular issue. Claimant is not entitled to any on-going care for his right shoulder under this workers' compensation claim.

TTDs

36. Idaho Code §72-408 provides that an injured worker receive income benefits, calculated as a percentage of his average weekly wage or the average weekly state wage, during his period of recovery. Once a Claimant has been declared at maximum medical improvement, the right to income benefits ceases. In his briefing, Claimant claims entitlement to income benefits for the period from October 24, 2003 (when he was taken off work pending his second left shoulder surgery) until he was released to work following his right shoulder surgery (August 17, 2004). Claimant is clearly entitled to income benefits during this time. As evidenced by Appendix 1 of Defendants' Response Brief, Surety did, in fact, pay Claimant income benefits during this period totaling \$18,768.60. Claimant has failed to establish that he is entitled to any additional TTD benefits.

PPI

37. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is

⁴ Dr. Dunteman's records intimate that Claimant injured his left arm in this accident, but his testimony at deposition and at hearing specifically reference that the injury was to his right shoulder because he was protecting his left shoulder, which was still in a sling following his surgery.

considered stable or non-progressive at the time of the evaluation. Idaho Code § 72-422. “Evaluation (rating) of permanent impairment” is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker’s personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

38. Claimant is not seeking any additional impairment on his left shoulder, and Defendants have paid the 6% whole person PPI rating for the left shoulder. Claimant is entitled to a rating on his right shoulder only if the functional impairment of the shoulder is related to the industrial accident that forms the basis of this claim. As discussed at some length above, Claimant has failed to causally relate his right shoulder complaints to his July 26, 2002 industrial accident. Claimant is not entitled to an impairment award for his right shoulder.

DISABILITY/RETRAINING

39. Claimant asserts that he is entitled to either retraining benefits, or disability in excess of his impairment. Idaho Code § 72-423 provides:

“Permanent disability” or “under a permanent disability” results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected.

Evaluation or rating of a permanent disability consists of an assessment of the injured employee’s present and probable future ability to engage in gainful employment as that ability is affected by an employee’s permanent impairment and by other pertinent non-medical factors. Idaho Code § 72-425. Among the pertinent non-medical factors are the claimant’s age, his

occupation, education, personal and economic circumstances, or other factors that diminish the claimant's ability to compete in an open labor market within a reasonable geographical area. *See*, Idaho Code § 72-430.

Retraining can present an alternative to an award of permanent disability if a retraining program can reasonably be expected to restore the pre-injury earning capacity of an injured worker by equipping them with new skills that are in demand in the open labor market.

40. Prior to his injury, Claimant was earning \$16.00 per hour working as a heavy equipment operator. He regularly worked forty to fifty hours a week. As a result of his industrial injury and subsequent left shoulder surgeries which left him with an impairment and permanent restrictions, Claimant has clearly lost access to some portion of his former labor market. While there may be some types of heavy equipment that Claimant could operate on some jobs and stay within his restrictions (equipment operated by levers where the wrists and arms remain in a resting position, and where operation is on relatively smooth and level terrain), Claimant clearly has lost utility in the eyes of potential employers. Before his injury, Claimant could operate most types of heavy equipment on virtually any type of job. Because Claimant has only worked as a heavy equipment operator, his transferable skills are limited. Apart from the certification course that he is pursuing, his education is also a limiting factor. It is well understood that there is a labor/education trade off in the workplace. The less physical labor a job requires, the more education or technical skill it is likely to entail.

41. The record in this matter does not include any expert testimony from vocational experts regarding the percentage of labor market loss that Claimant might have incurred as a result of his occupational injury. The ultimate decision regarding a disability rating remains with the Commission, and while the Commission is certainly capable of determining a rating in this

case on the existing record, it is not necessary to do so because it is clear from the record that Claimant can re-establish or even improve his pre-injury wage through a modest retraining program.

42. Since he began working with ICRD consultant Brownell, Claimant has demonstrated that he has the desire and the capacity to pursue a new career in wastewater treatment. With nominal financial support from IDVR, Claimant has enrolled in a self-directed study program that will lead, upon successful completion, to an entry-level certification in wastewater treatment. With additional study and experience, Claimant could obtain additional certifications that would qualify him for more responsible and higher paid positions in the field. The faster that Claimant can obtain his initial certification, the sooner he can be restored to his pre-injury wage.

Defendants argue that Claimant could return to operating some heavy equipment and restore his time of injury wage, so Defendants should not be liable for retraining costs. In the event that the Commission determines that retraining is appropriate, Defendants contend that one month of income benefits, together with the cost of the course, is more than adequate, as Claimant could complete the course in one month if he chose to do so. Claimant seeks training benefits of one year's duration, beginning on September 22, 2004 when he began working with ICRD consultant Brownell. Additionally, Claimant asks the Commission to retain jurisdiction over the issue of retraining so that Claimant can obtain his secondary certification and fully rehabilitate his earning capacity.

Retention of jurisdiction was first raised in Claimant's opening brief, and will not be considered because it was not timely raised. Neither party's position with regard to retraining benefits is reasonable under the facts of this case. One month is clearly inadequate for even a

dedicated student to obtain his initial certification and make a reasonable employment search. Even if Claimant is receiving income benefits during his retraining, those benefits will not replace his pre-injury income, and he will likely need to continue to work at least part-time to support his family while he obtains his certification and finds employment. Conversely, if Claimant is receiving some income benefits, he should be able to work fewer hours to support his family and increase the amount of time he can spend studying for his certification.

43. The Referee finds that retraining benefits to consist of six months of income benefits beginning from the date of this order, together with all costs of the certification program, including enrollment fees, supplies, and books, should provide Claimant with a reasonable time to complete his initial certification, and perhaps some or all of his secondary certification, as well as make a reasonable job search.

CONCLUSIONS OF LAW

1. Claimant is entitled to medical care for his left shoulder, on an as-needed basis, to the extent that the need for additional care can be causally related to his distal clavicle resection or to his labral tear repair;

2. In lieu of an award of disability in excess of impairment, Claimant is entitled to retraining benefits, including TTDs, tuition, books, and supplies for a period of 180 days, commencing from the date of the Commission's final order in this proceeding;

3. Claimant has received all income benefits to which he was entitled for his period of recovery;

4. Claimant is entitled to a permanent partial impairment rating of 6% of the whole person for his left distal clavicle resection, which amount has already been paid by Defendants. Claimant is not entitled to any permanent partial impairment for his right shoulder;

5. The Commission declines to consider retaining jurisdiction during the period of retraining benefits for the reason that the issue was not raised in a timely manner.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 9 day of November, 2005.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 23 day of November, 2005 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

THOMAS B AMBERSON
PO BOX 1319
COEUR D'ALENE ID 83816-1319

MONTE WHITTIER
HARMON WHITTIER & DAY
PO BOX 6358
BOISE ID 83707-6358

djb

/s/ _____

retraining benefits, including TTDs, tuition, books, and supplies for a period of 180 days, commencing from the date of the Commission's final order in this proceeding;

3. Claimant has received all income benefits to which he was entitled during his period of recovery;

4. Claimant is entitled to a permanent partial impairment rating of 6% of the whole person for his left distal clavicle resection, which amount has already been paid by Defendants. Claimant is not entitled to any permanent partial impairment for his right shoulder;

5. The Commission declines to consider retaining jurisdiction during the period of retraining benefits for the reason that the issue was not raised in a timely manner.

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

DATED this 23 day of November, 2005.

INDUSTRIAL COMMISSION

Participated but did not sign
Thomas E. Limbaugh, Chairman

/s/ _____
James F. Kile, Commissioner

/s/ _____
R.D. Maynard, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of _____, 2005, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

THOMAS B AMBERSON
PO BOX 1319
COEUR D'ALENE ID 83816-1319

MONTE WHITTIER
HARMON WHITTIER & DAY
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