

2. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition.
3. Whether and to what extent Claimant is entitled to the following benefits:
 - a. Medical care;
 - b. Temporary partial and/or temporary total disability benefits (TTD/TPD) due after September 2005;
 - c. Permanent partial impairment (PPI); and
 - d. Disability in excess of impairment, but not to include total permanent disability.
4. Whether apportionment for a pre-existing or subsequent condition pursuant to Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

Claimant was injured on May 8, 2001, while lifting a roll of carpet weighing approximately 300 lbs. Subsequently, Claimant underwent 5 surgeries to his right shoulder and neck and maintains that the surgeries and any resulting impairments are compensable. According to Claimant, he was assessed a 26% whole person permanent partial impairment for his cervical fusion and a 16.66% PPI for the upper extremity limitation on Claimant's right arm. Claimant acknowledges that Defendants paid the benefits associated with the 16.66% PPI rating for the upper extremity and seek only the benefits associated with the 26% rating. Further, Claimant alleges that he has suffered disability in excess of impairment in a range of 80-90%.

Defendants accepted Claimant's arm surgeries and paid the appropriate benefits. While it is undisputed that the industrial accident caused the biceps tendon injury, Defendants allege that Claimant's further injuries were not caused by the industrial accident. Instead, Defendants assert that the disputed injuries are due to surgical error, chiropractic care and/or degenerative diseases.

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Defendants also contend that Claimant did not prove disability in excess of impairment because Claimant's post injury wage is higher or at least comparable to his pre-injury wage.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's hearing testimony;
2. Claimant's exhibits 1-11;
3. Defendants' exhibits A-Y;
4. The post-hearing depositions of Roger Dunteman including materials attached to his deposition, Claimant, Mark Schwager, Tom Moreland, and Arnold Silver.

All objections are overruled. Defendants' exhibit X is admitted. The issue of Idaho Code § 72-435, Injurious practices, was first introduced by Defendants during post-hearing briefing. Since it was untimely, this issue will not be determined by the Commission. After considering the above evidence and the briefs of the parties, the Commission hereby issues its decision in this matter.

FINDINGS OF FACT

1. At the time of hearing, Claimant was 53 years old and right hand dominant. He lived in Rathdrum, Idaho with his 18 year old daughter, for whom he had sole custody for the past one and a half years.
2. Claimant has a high school diploma and studied at ITT Tech for 3 months to be a bank teller. He has never held that position.

Work History

3. In 1972, Claimant enlisted in the Navy and worked as an Aviation Store Keeper until 1997 when he was honorably discharged. Following his military service, Claimant worked primarily in manual labor and management.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER-3

4. Claimant began working for Eagle Hardware and Garden (Eagle) in 1997 in the paint department. In 1999, Lowe's Companies, Inc. (Lowe's) purchased Eagle. Soon after, Claimant transferred to the flooring department as a flooring sales specialist and earned \$12.00/hour. Claimant's duties included stocking tile, laminate flooring, and carpet. In 2002, Claimant was promoted to department manager of flooring. However in 2003, Claimant's position was dissolved and he made a lateral move back to flooring sales specialist. He received the same managerial pay. At the time of injury, Claimant earned approximately \$14.82/hour.

Pre-Existing Injuries

5. Claimant previously injured his back and knee. He testified that his back rarely bothers him at work. Claimant's knee injury required surgery and is aggravated by walking.

Accident

6. On May 8, 2001, Claimant was injured while lifting a 300 lb. carpet roll onto a cart. After Claimant placed one end of the carpet roll on the cart, he proceeded to lift the other end of the carpet and slide it onto the cart when the cart's brake unlocked and it rolled backward. Claimant's shoulders were struck by the carpet roll and bore the majority of the weight. Claimant felt both shoulders "pop." Hearing Tr. 17:18-20. Claimant maintains that his pain has remained in the same locations since the time of injury.

7. Within an hour and a half after the injury, Claimant sought treatment at North Idaho Immediate Care Center (NIICC) for left shoulder and back pain. While the NIICC notes only indicate pain in the left shoulder and back, Claimant testified that at the time of injury his pain radiated from the base of his neck, through his back, across his shoulders and down. Hearing Tr. 21:23-22:1. Claimant was treated conservatively. Over the next few months Claimant returned several times to NIICC with continued pain. The first report of right shoulder pain appeared on June 4, 2001. In a June 18 note, Dr. K. Hjeltness, M.D., specifically stated "An

orthopaedic consultation is a possibility but it is felt that the right shoulder pain is not related to the initial injury and he has reached near maximal improvement.” Ex. 1, p. 13. NIICC notes indicate an orthopedic referral occurred on November 27, 2001. The NIICC medical notes are void of any neck complaints.

Roger Charles Dunteman, M.D.

8. On January 2, 2002, Roger Dunteman, M.D., examined Claimant based on Dr. Hjeltness’ referral. He received his medical degree from Northwestern University Medical School and is a board certified orthopedic surgeon who is duly licensed to practice in Idaho. Dr. Dunteman previously treated Claimant for his left knee injury. Dr. Dunteman’s notes from this exam state that Claimant’s left shoulder was essentially asymptomatic, however Claimant’s right shoulder pain showed a progression of symptoms. Because the symptoms continued for seven months, Dr. Dunteman ordered an MRI for January 11, 2002.

9. Upon reading Claimant’s MRI, Dr. Dunteman’s impression of Claimant’s right shoulder injury was a partial rotator cuff tear and impingement. Further, Dr. Dunteman discussed with Claimant a possible consult with a neurosurgeon, feeling Claimant’s pain may be related to cervical radiculopathy.

Neurological Consult-William F. Ganz, M.D.

10. On January 25, 2002, Dr. Ganz saw Claimant per Dr. Dunteman’s request. According to his medical notes, Claimant’s primary complaint was of right shoulder pain but he did express symptoms of worsening cervical pain. After a physical examination and reviewing the MRI, Dr. Ganz concluded that Claimant’s right shoulder pain was likely muscular in nature with a possibility that it may be caused by some nerve root irritation. Ultimately he found no neurological pain and Claimant’s neurological exam was normal. He noted Claimant’s condition did not warrant surgical intervention.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER-5

Surgical Intervention

11. Claimant returned to Dr. Dunteman with continued pain. On February 28, 2002, Claimant underwent his first surgery. Dr. Dunteman found severe tearing of the biceps tendon and a partial rotator cuff tear on the right shoulder. He performed a subacromial decompression, a biceps tendonotomy and repaired the superior labrum. Post operation treatment included no heavy lifting with his right shoulder and physical therapy 2-3 times/week. Claimant received a two week work release.

12. The surgery provided temporary relief to Claimant. Several post-op visits show Claimant had mild to no pain between his shoulders and there was no numbness or tingling. He reported occasional sharp, pinprick needle sensations in his right shoulder. Claimant returned to work part time, progressing to full time, with the same duties as prior to surgery.

13. On April 29, 2002, Claimant presented to Dr. Dunteman with severe swelling and right shoulder pain with limited mobility. Claimant maintained there was no trauma to his right shoulder to cause such pain. Dr. Dunteman stopped physical therapy and restricted Claimant to six hour work days.

14. Claimant's pain continued. On June 26, 2002, Dr. Dunteman noted significant symptoms in the neck and shoulder and requested an MRI for the cervical area. Surety denied the request, reasoning the industrial accident did not injure the cervical area and the industrial accident occurred a year prior.

15. Claimant's pain continued with conservative treatment. On October 2, 2002, a request was made and granted by Surety for right shoulder surgery. On October 17, 2002, Claimant underwent arthroscopic surgery. Dr. Dunteman repaired a mini partial rotator cuff tear, performed an excision of the distal clavicle and inserted a pain pump.

16. Claimant initially responded well to the 2nd surgery. Two or three months following surgery Claimant returned to work. He was placed on four hours per day and left hand work only restrictions, but stated his work duties remained unchanged. Claimant's condition deteriorated on January 3, 2003. Claimant presented with increasing shoulder pain and pain into the neck. Dr. Dunteman stopped physical therapy and continued the work restrictions.

17. In early March 2003, Claimant visited Dr. Dunteman's physician assistant, Mark Fickert, regarding neck pain. An MRI of the cervical spine was performed. At a March 10, 2003 visit, Dr. Dunteman reviewed the MRI and diagnosed a right-sided foraminal disc and referred Claimant back to Dr. Ganz.

18. On March 19, 2003, Dr. Ganz reviewed Claimant's March MRI and performed a physical exam. He found Claimant's spine normal except for cervical spondylosis and a possibility of neural foraminal narrowing, both at C5-6 and C6-7. Ex. 2, pg. 10. Because Claimant exhibited some signs of radiculopathy, Dr. Ganz ordered an EMG. The EMG was normal. Again, Dr. Ganz did not recommend surgery.

19. Claimant returned to Dr. Dunteman for treatment. On April 23, 2003, Claimant underwent an MR arthrogram on his right shoulder. The arthrogram showed a large rotator cuff tear. Again, surgical intervention was necessary to re-repair the rotator cuff and was performed on May 2, 2003. Following surgery, Claimant again returned to work at Lowe's. Again, the surgery proved unsuccessful.

20. In September 2003, Claimant visited Dr. Dunteman with right and left shoulder pain. Upon examination, Dr. Dunteman ordered another MR arthrogram. Dr. Dunteman consulted with Russell VanderWilde, M.D. Dr. VanderWilde felt Claimant's MRI was positive for C-6 radicular pain and suggested a spinal surgery evaluation. The two doctors determined that Claimant's condition warranted surgery on the recurrent right rotator cuff tear.

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21. On February 12, 2004, Claimant underwent his 4th and last surgery to correct the rotator cuff tear in his right shoulder. Claimant returned to work after the surgery in May.

22. On June 6, 2004, Claimant visited Dr. Dunteman with pain in both shoulders. Both men agreed that further intervention would not work on the left shoulder and that he would live with the problem. Regarding the right shoulder, Claimant was permanently restricted to no overhead activity and no lifting more than 20 pounds. Dr. Dunteman Depo. Ex. 5, pg. 22.

23. On June 30, 2004, Dr. Dunteman released Claimant back to work with permanent restrictions of no repetitive activity at or above shoulder level and no lifting greater than 5 pounds. Dr. Dunteman Depo., pg. 18, lines 18-19. Dr. Dunteman provided Claimant an overall upper extremity impairment rating of 16.66%. Defendants paid benefits associated with this rating.

Chiropractor

24. Claimant saw a chiropractor, Dr. Priebe, in 2004 for his neck and associated headaches. Claimant underwent an undetermined amount of manipulations. Defendants' independent medical examination (IME) doctor eluded that Claimant's cervical spine pain was caused by the chiropractic manipulations. Claimant testified that he did not believe his chiropractor visits were a cause of his neck pain.

Neck Surgery

25. On October 29, 2004, Claimant presented to Dr. Dunteman primarily for neck pain and residual right shoulder pain. Feeling that the shoulder pain was associated with his neck, Dr. Dunteman referred Claimant to a neurosurgeon for a third time. Dr. Dunteman opined that Claimant's neck impairment was related to the May 8, 2001 accident.

26. On August 24, 2005, Claimant visited Jeffrey D. McDonald, M.D., regarding his neck pain and continued upper extremity pain. After several visits, Dr. McDonald ordered an

MRI and diagnosed a large posterior central and paracentral right disc extrusion at C5-6 with right sided foraminal narrowing and another concentric disc bulge at the right C6-7 with severe narrowing of the right neural foramen. Surgery was recommended.

27. Beginning in September, 2005, Claimant took a 6 month leave of absence for his surgery. Swanson Deposition pg. 51-52, lines 20-1. When his leave expired, Claimant did not return to work testifying that “they didn’t feel that I could do the job that I was trained to do.” Hearing Tr. Pg. 5, lns. 16-17. Later during his testimony, Claimant stated he did not return to work because he felt he could no longer perform his duties. Hearing Tr. pg. 42, lns. 10-14.

28. On October 10, 2005, Dr. McDonald performed a cervical fusion at C5-6 and C6-7 with insertion spacers. Numerous post-op visits occurred and Claimant’s neck and shoulder pain continued following surgery. In April 2006, after no relief, Dr. McDonald recommended a CT scan of the cervical spine. On May 5, 2006, Dr. McDonald told Claimant that the results of the scan showed a fusion and no neural compression at any level. Ex. 5, pg. 17.

29. Through Claimant’s insurance with Lowe’s, surety paid 80% of the cervical fusion surgery, leaving Claimant responsible for the remaining 20%. Claimant’s portion is outstanding.

30. Claimant maintains that he has lost 80% ability to push and pull. He testified that he has pain all the time, but it increases in hot or cold weather. Claimant further testified that he used to enjoy fishing and playing pool, however, his injuries greatly restrict these activities.

Independent Medical Evaluations

31. Both parties submitted IMEs. After extensive review of Claimant’s medical record and performing a physical exam on July 31, 2006, Claimant’s IME doctor, J.M. McNulty, M.D., opined that Claimant’s shoulder and cervical injuries resulted from the May 8, 2001 industrial accident. Because Claimant’s symptoms have continued since the date of the accident

and because there is a lack of any previous spinal injuries, Dr. McNulty believes Claimant's injuries progressed from the accident to a point requiring surgical intervention. Dr. McNulty assessed Claimant an impairment rating of 26% whole person, based on successful surgical arthrodesis. Dr. McNulty also gave a light to medium duty work restriction with a 20 lbs. lifting restriction and a 10 lbs. occasional lifting restriction.

32. Richard A. Silver, M.D., performed an IME on Claimant per Defendants' request. Dr. Silver's practice is comprised primarily of IMEs and second opinion consults for the defense. Dr. Silver does not believe the industrial accident caused the right shoulder rotator cuff or neck injuries. Instead, Dr. Silver opines that, according to the operative findings, Claimant's surgeries are the result of surgical error, chiropractic care and/or degeneration. Relying heavily on Dr. Dunteman's surgical notes, Dr. Silver testified that a tear was not present in the right shoulder at the initial February 28, 2002 surgery. Further, Dr. Silver interpreted the notes to find that the resulting surgeries to the right shoulder were each new and separate tears located in different areas. He determined that the resulting right shoulder surgeries were due to degeneration based on the types of corrective surgical procedures used and the noting of tendon fraying.

33. Regarding Claimant's cervical surgery, Dr. Silver reflects back to the initial medical reports stating Claimant did not report a neck injury at the time of the accident. Dr. Silver points to Dr. Ganz's 2002 and 2003 reports stating Claimant's neurological exams were normal with a good range of motion.

34. Dr. Silver testified that there may have been two other intervening causes to Claimant's neck injury besides degeneration, Claimant's chiropractic care and chronic smoking. According to Dr. Silver, smoking inhibits healing and makes patients more prone to a nonunion of cervical fusion surgeries. Dr. Silver testified this was likely the case for Claimant.

Current Employment

35. Claimant left his position at Lowe's on September 29, 2005. On April 19, 2007, Ackers Allbest in Spokane hired Claimant to work with disabled adults in a protection program for Washington State. He obtained this employment through a friend. Claimant's duties include 1-on-1 supervisory care for two disabled adults. While Claimant occasionally cooks, he is not required to do any laborious activities. He earns approximately \$31,000/year.

Vocational Testimony

36. Both parties submitted vocational rehabilitation expert testimony. Defendants' expert, Mark Schwager, has a master's degree in rehabilitation counseling and has worked in the field since 1985. Mr. Schwager met with Claimant in May 2007 with the understanding that Claimant was at maximum healing for his shoulder conditions. Mr. Schwager admitted that the doctors' restrictions varied but understood them to be as follows: Dr. Dunteman's 5 lbs. restriction for the right upper extremity, Dr. McNulty's assessment of Claimant's work abilities were in the light to medium range and to refrain from lifting more than 20 lbs., and Dr. Silver assessed a medium work ability range and lifting no greater than 50 lbs. both arms and 15 lbs. individual arm. Mr. Schwager testified that restrictions concerning walking or standing were void in the medical records.

37. According to his testimony, Mr. Schwager stated Claimant had various transferable skills and compiled a list of potential jobs within Claimant's limitations. These jobs fall within the medium to sedentary range available in Northern Idaho, spanning from Nez Perce County to Boundary County. Mr. Schwager testified that Claimant can minimize wage loss because there are numerous positions available with mean wage averages comparable to Claimant's pre-injury wage. Further, Mr. Schwager found Claimant's current position was within his work restrictions and he made at or above his Lowe's salary.

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38. Claimant's expert, Tom L. Moreland, has a master's degree in rehabilitation counseling in special education, owns a private vocational rehabilitation company and has worked in Coeur d'Alene since 1980. He failed to write a report, but did testify via deposition. Mr. Moreland reviewed Claimant's medical history and saw Claimant in May 2007. He generally agrees with Mark Schwager's analysis of Claimant's work history, job titles, and transferable job skills. Mr. Moreland also understood that Claimant likely earned more at his current employment than he did at Lowe's. However, Mr. Moreland testified that some of Mr. Schwager's earnings averages for potential replacement jobs are high for the area. According to Mr. Moreland's testimony, Claimant has suffered a 90% loss of access to the labor market because of a sedentary work restriction. Claimant was placed in this category because of his medical lifting restrictions and Claimant's subjective pain complaints with repetitive work with hands and arms. Mr. Moreland testified that the only job on Mr. Schwager's list that fell fully into the sedentary work category was telephone sales. He further testified that Claimant would be unable to return to any of his prior positions because they fell into a medium work category. Mr. Moreland admitted that he did not look at any particular job available in Claimant's area taking into account Claimant's restrictions. Instead, Mr. Moreland testified that he relied on the Dictionary of Occupation Titles to make his assessment.

DISCUSSION

1. It is well settled in Idaho that the workers' compensation law is to be liberally construed in favor of the claimant in order to effect the object of the law and to promote justice. 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, 910 P.2d 759 (1966). Although the worker's compensation law is to be liberally

construed in favor of a claimant, conflicting evidence need not be. Aldrich v. Lamb-Weston, Inc., 122 Idaho 316, 834 P.2d 878 (1992).

Causation

2. A claimant must prove she 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, 918 P.2d 1192 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 901 P.2d 511 (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, 890 P.2d 732 (1995). "Probable" is defined as "having more evidence for than against." Soto v. Simplot, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994).

3. A conflicting medical record exists regarding Claimant's various injuries and the industrial accident. The record contains doctors who dispute causation, two who support it, and many who are silent. For clarity, the two injuries will be discussed individually.

4. **Shoulder injuries:** Four doctors gave causation statements. Two doctors opined it unlikely that Claimant's right shoulder symptoms were related to the industrial accident. Dr. Hjeltness, the doctor who initially examined Claimant, found that Claimant had not presented, initially, to NIICC for right shoulder pain and that pain was likely not caused by the industrial accident. The record does not show Dr. Hjeltness' reasoning for this opinion. Claimant did raise the right shoulder symptoms only a month following the accident. Also, Claimant testified that the pain originated in the same areas since the accident and that there was not an intervening traumatic event to cause the right shoulder pain.

5. Dr. Silver, Defendant's IME, also opined that Claimant's injuries were unrelated to the industrial accident giving numerous alternative reasons for Claimant's continued surgeries.

While Dr. Silver critically analyzed Dr. Dunteman's medical notes to hypothesize additional theories regarding causation, they amount to little more than speculation. The Commission finds it difficult to take one doctor's hypothetical of why the surgical doctor performed various surgeries over the opinion of the surgical doctor himself. Further Claimant testified several times that he has had the same pain since the time of the injury. Neither of these two doctors gave any viable reason for Claimant's continued symptoms. Based on the above reasons as well as reasons explained below, the Commission does not find their opinions persuasive.

6. Drs. Dunteman and McNulty both opined that on a more probable than not basis, the industrial accident caused the injuries. It weighs heavily that the primary treating physician, Dr. Dunteman, who performed surgeries on Claimant, opined that the industrial accident caused the shoulders and cervical injuries. He was in the best position to discern the nature of Claimant's injuries and make a causal determination. Further, after a thorough review of Claimant's medical history, Claimant's IME, Dr. McNulty, also determined, on a more probable than not basis, that Claimant's industrial accident caused the cervical and shoulder injury. His reasoning was sound and well reasoned. The Commission finds their opinions most persuasive.

7. Claimant has provided the requisite medical testimony in support of causation. Without evidence of any other cause for the right shoulder pain and ample medical evidence supporting his injuries, the Commission finds that Claimant's right shoulder injuries were caused by the industrial accident.

8. **Cervical Injury:** The Commission acknowledges the conflicting opinions of the doctors. It is not inconceivable that the described accident could cause injury to Claimant's neck. While Claimant did not initially indicate acute pain in his neck, he did testify that at the time of injury his pain started at the base of his neck and spread over his shoulders. Dr. Ganz, even though finding normal test results, did note spurring and narrowing at C 5-6 and C 6-7.

This finding later progressed to the point requiring Claimant's cervical fusion. The record does not indicate an intervening or subsequent injury to Claimant's neck during the time between the accident and the time of surgery. Both Dr. Dunteman and Dr. McNulty opined that Claimant's neck pain, on a more probable than not basis, was caused by the industrial accident. Both doctors determined that even with the lapse in time from the accident to the reported neck pain, the injury likely progressed to the point of needing cervical intervention. The Commission finds their opinions most persuasive.

9. Therefore, without evidence pointing to any other cause for the cervical injury and the requisite medical evidence supporting his injuries, the Commission finds that Claimant's cervical injury was caused by the industrial accident.

Pre-existing Injury/Subsequent Condition

10. The Commission received insufficient evidence that Claimant had a contributing pre-existing injury/subsequent condition to his upper extremities or neck. Claimant seldom visited the doctor prior to the accident. The record is void of any medical reports indicating Claimant had a pre-existing neck degeneration problem. Claimant testified that he had never injured his shoulders or his neck prior to the industrial accident and they never bothered him. The previous knee injury has no bearing on Claimant's cervical or shoulder injuries. Claimant testified that his previous back injury rarely bothers him. Therefore, the Commission finds that Claimant's shoulders and cervical injuries were not due either in whole or in part to a pre-existing injury or subsequent condition.

Medical Care

11. Under Idaho Code § 73-432(1), an employer must provide an injured employee reasonable medical care as may be required by the employee's physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to

decide whether the treatment is required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989).

12. Claimant has shown by a preponderance of the evidence that his cervical and shoulder injuries are related to the industrial accident. It is undisputed that Claimant sought medical treatment immediately after the accident and has consistently continued to seek treatment. All of Claimant's treating physician's have adequately explained their reasoning for the continued treatments and surgeries. Each surgery resulted from specific needs of Claimant and the procedures used were reasonable. Based on the above reasons, the Commission finds Defendants liable for the costs associated with any reasonable treatment related thereto. Defendants are entitled to credit for any medical costs already paid.

TTD/TPD

13. Idaho Code § 72-408 provides that income benefits for total and partial disability are paid to disabled employees "during the period of recovery." The burden is on a claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C. P. Clare and Company, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980). Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, an injured worker is entitled to temporary disability benefits unless and until such evidence is presented that the worker has been released for light duty work *and* that (1) the former employer has made a reasonable and legitimate offer of employment to the worker who is capable of performing such a job under the terms of a light work release and which employment is likely to continue throughout the period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is

consistent with the terms of a light duty work release. Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986).

14. Claimant seeks TTD/TPD benefits due from September 2005 to May 6, 2006, the date he left work for his neck fusion to the date of medical stability. Dr. McNulty gave Claimant an impairment rating based on a successful arthrodesis. This condition was fulfilled on Dr. McDonald's May 6, 2005 medical note finding a fusion. Therefore, Claimant was in a period of recovery from the date of the accident through the date of medical stability for the cervical injury, or May 6, 2006.

15. Claimant testified that he took 6 months off in September for his cervical fusion. His cervical surgery occurred in October 2005. It is unclear from the record whether Defendants did not allow him to return to work or whether Claimant chose to discontinue working. However, Claimant has shown that he was in a period of recovery. He had a light duty release from his doctor. There is no evidence in the record indicating that Defendants offered a legitimate and reasonable offer to Claimant that would fit within his restrictions or that Claimant was able to achieve other employment within his restrictions. Therefore, Claimant is entitled TTD/TPD benefits from September 1, 2005 through May 6, 2006. Any benefits already paid by Defendants shall be credited.

PPI

16. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422.

"Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation,

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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).

17. **Shoulder Injuries:** It is undisputed that Claimant received a 16.66% impairment rating for his upper extremities from Dr. Dunteman on June 30, 2004 and that Defendants have paid benefits in regards thereto. This rating equates to a 10% whole person impairment. Therefore, Defendants are entitled to a credit for benefits paid in association with this rating.

18. **Cervical injuries:** Dr. McNulty determined Claimant's 26% whole person impairment rating using the AMA Guides to Evaluation of Permanent Impairment, 5th Edition. It is the only medical appraisal of the neck fusion in the record. This rating was based on successful arthrodesis. Dr. McDonald stated in his medical reports that a CT scan showed a fusion and no neurological compression at any level. Therefore, the Commission finds the condition placed on the rating is satisfied. Defendants took an all or nothing approach, maintaining Claimant's cervical injury was not related to the industrial accident and did not provide an alternative impairment rating. Therefore, Claimant is found to have a 26% whole person PPI rating for his cervical injuries.

19. Using the combined values chart, the combined rating for the shoulder rating of 10% and the cervical rating of 26% is 33%. Claimant is entitled to appropriate benefits related thereto.

Disability in Excess of Impairment

20. "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.

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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.

21. 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). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995). Wage earning capacity may be considered. Baldner v. Bennet's, 103 Idaho 458, 649 P.2d 1214 (1982). However, wage earning capacity may not be the sole factor considered in determining permanent disability. Loya v. J.R. Simplot Co., 120 Idaho 62, 813 P.2d 873 (1991). Evidence of disability must be more than speculation. McClurg v. Yanke Machine Shop, Inc., 123 Idaho 174, 845 P.2d 1207 (1993).

22. Once again, conflicting evidence exists regarding this issue. Claimant seeks disability in excess of impairment of 80-90%. Due to Claimant's injuries, he was given three different sets of restrictions by three different doctors. According to Dr. Dunteman, Claimant has a 5 lb. restriction for his right upper extremity with no repetitive activity at or above shoulder level. Dr. McNulty put Claimant in a light to medium work ability range and restricted Claimant from lifting more than 20 lbs. Lastly, Dr. Silver placed Claimant in a medium work ability range and limited lifting to no great than 50 lbs. both arms and 15 lbs. for each individual arm.

23. Two separate vocational rehabilitation experts testified as to Claimant's access at gainful employment. According to Mr. Schwager, who placed Claimant in a medium work ability range, Claimant had numerous jobs available to him. However Mr. Schwager's job list

included 9 counties in Idaho, from Nez Peace County north, and therefore falls outside of a reasonable geographical area. Further, Mr. Schwager did not take into consideration Dr. Dunteman's repetitive restriction. Mr. Moreland, Claimant's expert, placed Claimant in the sedentary work ability range due to his restrictions. While Mr. Moreland agreed with some of Mr. Schwager's assessment of Claimant's abilities, Mr. Moreland found that the only suitable job identified by Mr. Schwager was telephone marketer. Mr. Moreland stated that those jobs were declining in number in Claimant's area and they paid significantly less than Claimant's current position. He ultimately found Claimant had ability to find gainful employment was reduced by 80-90%.

24. The Commission recognizes the conflicting evidence regarding PPD. While there is some evidence in support of not finding disability in excess, there is more evidence to support PPD. The Commission determined above that Dr. Dunteman, as Claimant's treating physician, was the most reliable source of information regarding Claimant's injury. Therefore, his restrictions carry the most weight.

25. It is undisputed that Claimant has lost significant use of both arms. His weight restriction coupled with the inability to do repetitive activity above the shoulder and his former knee injury greatly restricts access to employment. The evidence persuades the Commission that Claimant is restricted to a light work category for his future employment. He has lost the ability to perform a significant segment of the labor market.

26. Wage earning is not the sole factor to be considered in determining PPD. Claimant earnings now are comparable to his pre-injury wage. However, both vocational rehabilitation experts found that Claimant's current employment was extremely rare. Claimant's ability to have such a job was due to his perseverance, luck, and the help of a friend.

27. Therefore, the Commission finds that Claimant's disability in excess of impairment is 65%, inclusive of the combined whole person impairment of the cervical and upper extremities. He is entitled to benefits associated with this rating.

Apportionment

28. Due to the above analysis concerning the lack of any pre-existing condition, the issue as to apportionment is moot.

CONCLUSIONS OF LAW

1. Claimant's right arm and cervical injuries were caused by the May 5, 2001 industrial accident.

2. Claimant's condition is not due in whole or in part to a pre-existing and/or subsequent injury/condition.

3. Claimant is entitled to reasonable medical care for the right arm and cervical injuries. Defendants are entitled to any credit for medical care already paid.

4. Claimant is entitled to TTD/TPD benefits from September 1, 2005 through May 6, 2006. Defendants are credited for any TTD/TPD benefits already paid.

5. Claimant has a 33% whole person PPI rating and is entitled to such an award. Defendants are entitled to credit for any PPI already paid.

6. Claimant has incurred whole person disability inclusive of impairment of 65%.

7. The issue of apportionment is moot.

ORDER

1. Claimant's right arm and cervical injuries were caused by the May 5, 2001 industrial accident.

2. Claimant's condition is not due in whole or in part to a pre-existing and/or subsequent injury/condition.

3. Claimant is entitled to reasonable medical care for the right arm and cervical injuries.

Defendants are entitled to any credit for medical care already paid.

4. Claimant is entitled to TTD/TPD benefits from September 1, 2005 through May 6, 2006. Defendants are credited for any TTD/TPD benefits already paid.

5. Claimant has a 33% whole person PPI rating and is entitled to such an award.

Defendants are entitled to credit for any PPI already paid.

6. Claimant has incurred whole person disability inclusive of impairment of 65%.

7. The issue of apportionment is moot.

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

DATED this __20th_ day of _____May_____, 2008.

INDUSTRIAL COMMISSION

/s/ _____
James F. Kile, Chairman

/s/ _____
R.D. Maynard, Commissioner

Participated but did not sign
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

AMENDED CERTIFICATE OF SERVICE

I hereby certify that on the 21th day of __May__, 2008 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** was served by regular United States Mail upon:

LOUIS GARBRECHT
1400 SHERMAN AVE
COEUR D'ALENE ID 83814

THOMAS V MUNSON
PO BOX 8266
BOISE ID 83707-8266

Rjo/cjh

_____/s_____