

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

THOMAS G. ENLOW,)
)
 Claimant,)
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 v.)
)
 YELLOWSTONE TRUCKING 2000, INC.,)
)
 Employer,)
)
 and)
)
 INSURANCE COMPANY OF THE WEST,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2002-005720

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

filed July 31, 2008

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Coeur d'Alene on November 14, 2007. Claimant, Thomas Enlow, was present in person and represented by Thomas Amberson of Coeur d'Alene. Defendant Employer, Yellowstone Trucking 2000, Inc. (Yellowstone), and Defendant Surety, Insurance Company of the West, were represented by Thomas Munson of Boise. State of Idaho, Industrial Special Indemnity Fund, settled with Claimant prior to hearing and is no longer a party to these proceedings. At hearing the parties presented oral and documentary evidence. This matter was then continued for the taking of post-hearing depositions, the submission

of briefs, and came under advisement on March 26, 2008. The case is now ready for decision.

ISSUES

The issues to be resolved were narrowed at hearing and are:

1. Claimant's entitlement to additional medical benefits;
2. Claimant's entitlement to additional temporary disability benefits;
3. Extent of Claimant's permanent partial impairment;
4. Extent of Claimant's permanent disability, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine;
5. Apportionment pursuant to Idaho Code § 72-406;
6. Whether ISIF may be liable pursuant to Idaho Code § 72-332;
7. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984);
8. Whether Claimant's bilateral shoulder injuries constitute pre-existing impairment;
9. Claimant's entitlement to attorney fees; and
10. Whether any benefits Claimant would otherwise be entitled to should be denied pursuant to Idaho Code § 72-403.

ARGUMENTS OF THE PARTIES

Claimant sustained an industrial injury to his left shoulder and now argues he is entitled to additional medical benefits for over-the-counter anti-inflammatory medications. He also claims additional temporary disability benefits from approximately March 10 until July 12, 2004. Claimant asserts he suffers permanent impairment of 9% of the whole person and permanent disability of at least 40% in excess of impairment due to his left shoulder injury. Lastly, Claimant argues that he is

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2

totally and permanently disabled pursuant to the odd-lot doctrine.

Defendants acknowledge Claimant's industrial injury to his left shoulder but maintain that his need for additional medication is due to his low back injury sustained subsequent to his left shoulder injury. Defendants deny Claimant is entitled to any further temporary disability benefits and assert that Claimant suffers only 8% permanent impairment due to his left shoulder injury; which Defendants have already paid. Defendants argue that Claimant is not totally and permanently disabled as a result of his industrial injury to his left shoulder, but rather due to subsequent medical problems including his low back injury.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the November 14, 2007, hearing;
2. Claimant's Exhibits A through E admitted at the hearing;
3. Defendants' Exhibits A through Y admitted at the hearing;
4. The post-hearing deposition of Barbara Nelson taken by Defendants on January 18, 2008; and
5. The post-hearing deposition of Michael Phillips, M.D., taken by Defendants on January 29, 2008.

After having fully considered all of the above evidence, and the arguments of the parties, the Referee submits the following Findings of Fact and Conclusions of Law for review by the Commission.

FINDINGS OF FACT

1. Claimant was born in 1935 and was 72 years old at the time of the hearing. He is right hand dominant, six feet one inch tall, and weighs approximately 210 pounds. Claimant completed the eighth grade in California. He has completed no other formal education and has never obtained a GED.

2. Claimant commenced working at a rock quarry at the age of 15. He drove a truck and lit fuses. Claimant then worked in a variety of laborer positions and in approximately 1952, at age 17, commenced driving truck. He served in the National Guard from 1953 through 1957 where he trained as a tank crewman. Claimant has been employed as a truck driver for nearly all of his adult life. He has a CDL and was also certified to haul hazardous materials. Through the years, Claimant has driven a wide variety of trucks including quarry trucks, dump trucks, log trucks, flatbed trucks, boom trucks, and fuel trucks for many different employers.

3. In 1995 Claimant commenced working for Yellowstone. Claimant drove a flatbed truck long haul. He was paid by the mile and regularly worked more than 70 hours per week. Claimant's duties included securing the load with chains, tarps or straps, and chaining up in inclement weather. Triple-railer tire chains weighed approximately 75 pounds and tarps weighed over 100 pounds. Claimant also performed routine vehicle maintenance including checking fluid levels and adjusting brakes. He regularly picked up smaller loads while in route to add to his main load and thus earned an additional \$60 to \$300 for each "pick-up load."

4. In approximately 1995, Claimant sustained an injury to his right shoulder while at work. He filed no workers' compensation claim and sought no medical treatment at that time, believing his shoulder pain would resolve itself. His right shoulder symptoms never entirely resolved but he continued working.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 4

5. On March 26, 2002, Claimant was pulling down on a winch bar to secure a load when he felt a sharp pain in his left shoulder and his left arm went numb. Claimant radioed another driver who helped him finish securing the load. Claimant also radioed Yellowstone and reported his injury. Claimant was 66 years old at the time of the accident. The day after the accident, Claimant sought medical attention for his left shoulder from a physician's assistant and received medications. Claimant rested his shoulder for a few days and then continued to work in spite of persisting left shoulder pain. On July 6, 2002, an MRI revealed a full thickness left rotator cuff tear. Claimant continued to work even though his left shoulder continued to be symptomatic.

6. Yellowstone assigned Claimant a Conestoga flatbed truck so he did not have to lift tarps or tarp loads. Yellowstone also assigned Claimant loads that did not require shoulder work to load or secure. Claimant learned to use his chest and body weight to push on a longer winch bar to fasten binders and thereby secure loads. With these modifications, Claimant was able to continue working as a truck driver, although his income decreased 25% to 33% because he could no longer add "pick-up loads" to his main load as he had prior to his shoulder injury.

7. On September 3, 2002, Claimant injured his low back at work while trying to close the tarp rollers on his truck. Claimant noted low back and radiating left lower extremity pain. His back was too painful to drive thereafter and he could not tolerate prolonged sitting. Claimant was forced to quit truck driving as of September 4, 2002. He has not worked since. At the time of Claimant's back injury, Yellowstone was insured by a different surety which later settled Claimant's workers' compensation claim against it.

8. On October 2, 2003, Russell VanderWilde, M.D., surgically repaired Claimant's left rotator cuff tear. Even after extensive post-surgery physical therapy, Claimant noted but little

improvement in his left shoulder symptoms.

9. Claimant eventually wearied of his longstanding right shoulder pain. On February 12, 2004, Dr. VanderWilde performed surgery for a rotator cuff tear on Claimant's right shoulder. Following surgery, his right shoulder improved more than his left, because Claimant's right rotator cuff tear was less severe.

10. In March and April 2004, Claimant had surgery on both eyes and underwent a total of three eye surgeries in eight days. A lens was surgically implanted in Claimant's left eye to address cataracts. One cataract surgery was complicated by partial retinal detachment. Claimant suffers early macular degeneration in one eye.

11. At the time of hearing, Claimant continued to have left shoulder pain, numbness, and burning. Claimant testified he had no significant pain relief after his left shoulder surgery. Claimant has difficulty sleeping due to left shoulder pain. He continues to experience low back symptoms and is trying to avoid lumbar surgery.

12. Claimant has given up his former hobbies of golfing and fly-fishing because of his left shoulder pain. Claimant cannot type. He is able to go online and check his email, but otherwise has no computer skills.

13. Having observed Claimant at hearing, and carefully examined the record herein, the Referee finds Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

14. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leave no room for narrow, technical construction.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 6

Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1996).

15. **Additional medical benefits.** The first issue is Claimant's entitlement to additional medical benefits. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer.

16. After his left shoulder surgery, Claimant ultimately determined that prescription medications were no more helpful than over-the-counter medications and chose to rely upon over-the-counter rather than more expensive prescription medications. Claimant asserts entitlement to payment for over-the-counter pain and anti-inflammatory medications from the time of his left shoulder surgery in 2003, into the future. Defendants note that Claimant suffers low back pain and that Claimant has not shown his need for over-the-counter medications is due to his left shoulder as opposed to his low back and other physical conditions.

17. On May 12, 2004, Michael Phillips, M.D., examined Claimant at Defendants' request and reported that Claimant's left shoulder symptoms could be managed with over-the-counter analgesics. On July 12, 2004, John McNulty, M.D., evaluated Claimant's left shoulder condition and expressly approved Claimant's continued use of anti-inflammatory medications or Tylenol. Dr. McNulty's report adequately relates Claimant's continued need for anti-inflammatories or Tylenol to his left shoulder condition.

18. Claimant has proven his entitlement to additional medical benefits, specifically over-the-counter anti-inflammatory medications for his left shoulder injury.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 7

19. **Additional temporary disability benefits.** The next issue is Claimant's entitlement to additional temporary disability benefits. Idaho Code § 72-102 (10) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present medical 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, 605 P.2d 939 (1980).

Furthermore:

[O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his 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 his light duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986) (emphasis in original).

20. Claimant acknowledges that Defendants paid temporary disability benefits from the time of Claimant's left shoulder surgery on October 2, 2003, until March 10, 2004. Claimant alleges he was not medically stable at that time and continued in physical therapy for his left shoulder thereafter. Claimant asserts entitlement to additional temporary disability benefits from March 11, 2004, until Dr. McNulty declared Claimant medically stable from his left shoulder injury on July 12,

2004. Defendants argue that Claimant's September 2002 low back injury precluded him from working during this time thus he could not have driven a truck regardless of his left shoulder condition.

21. The record establishes that Claimant ultimately received temporary total disability benefits due to his low back injury from September 5, 2002, through September 24, 2003. There is no clear indication that Claimant received any temporary disability benefits for the period of March 11, 2004, until July 12, 2004. Thus this is not a circumstance of a potential double recovery of temporary disability benefits.

22. While Defendants' assertion that Claimant's low back condition precluded him from working as a truck driver regardless of the condition of his left shoulder appears true, it is equally true that the condition of Claimant's left shoulder following surgery precluded him from working regardless of the condition of his low back. Since Claimant has not received temporary disability benefits for this period from any source, there is no persuasive reason to ignore Idaho Code § 72-408 and the mandate of Malueg.

23. On March 3, 2004, Dr. VanderWilde ordered further physical therapy for Claimant's left shoulder once or twice per week for an additional six weeks. The records of North Idaho Physical Therapy document that Claimant received physical therapy and slowly progressed during this time. The record does not establish that physical therapy for Claimant's left shoulder continued beyond approximately mid-April 2004. On May 12, 2004, Dr. Phillips examined Claimant, opined his left shoulder condition was stable, and issued a permanent impairment rating. On July 12, 2004, Dr. McNulty examined Claimant and also found his left shoulder had reached maximal medical improvement. In his report, Dr. McNulty expressly recited Dr. Phillips' May 12 report with its

permanent impairment rating. Dr. McNulty took no issue with Dr. Phillips' conclusion that Claimant's left shoulder was medically stable by May 12, 2004.

24. Claimant has proven that he was in a period of recovery from his left shoulder injury from March 11, 2004, until May 12, 2004, and is entitled to total temporary disability benefits for this period.

25. **Impairment.** "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 employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, 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).

26. On May 12, 2004, Dr. Phillips rated Claimant's left shoulder impairment at 13% of the upper extremity, which equates to 8% of the whole person, due to his 2002 left shoulder injury. Defendants acknowledge this impairment and have apparently paid benefits accordingly. On July 12, 2004, Dr. McNulty evaluated Claimant and rated his left shoulder impairment at 15% of the upper extremity which equates to 9% of the whole person.

27. Claimant asserts Dr. McNulty's rating of 9% whole person is more credible than Dr. Phillip's rating of 8% of the whole person. While the ratings by the physicians are nearly identical and are accompanied by similar restrictions, the record contains comments from Kirk Hjeltness,

M.D., who treated Claimant's low back injury, questioning the thoroughness of Dr. Phillip's evaluation. The Referee finds Dr. McNulty's rating more thorough and therefore persuasive, and concludes that Claimant suffers a permanent impairment of 9% of the whole person due to his March 2002 left shoulder injury.

28. The record suggests that Claimant may suffer from other physical impairments which pre-existed his March 2002 industrial accident. Claimant sustained nerve damage in his right ear as a young man which resulted in some permanent hearing loss and difficulties. However, Claimant testified his hearing was not an impediment to his work as a truck driver prior to 2002 and the record contains no evidence of an impairment rating for this condition. In approximately 1961 Claimant underwent left carpal tunnel release surgery. It is unclear whether this condition constituted a permanent impairment to Claimant and the record contains no impairment rating for this condition. As noted above, in approximately 1995 Claimant suffered a right shoulder injury while at work. He experienced intermittent right shoulder symptoms over the years but continued to work. Claimant ultimately had right shoulder surgery in 2004. The record contains no impairment rating for his right shoulder condition prior to his March 2002 left shoulder injury or any time thereafter. In approximately 1999 Claimant had two cataract surgeries. The record does not reveal whether Claimant suffered any impairment due to his vision problems.

29. In September 2002, Claimant sustained a low back injury resulting in L3-4 and L4-5 disk bulging which produced persisting lumbar, left buttock, and left lower extremity pain. His permanent impairment due to his low back injury was rated at 8% of the whole person. However, Claimant's September 2002 back injury was clearly subsequent to his March 2002 left shoulder injury.

30. The Referee concludes that Claimant has proven he suffers permanent impairment of 9% of the whole person due to his March 2002 left shoulder injury. He has not proven he suffered any specific permanent impairment prior to his March 2002 accident.

31. **Permanent Disability.** "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. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected 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 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).

32. Relevant labor market. A threshold inquiry is the appropriate labor market in which Claimant's disability must be evaluated. In Davaz v. Priest River Glass Company, Inc., 125 Idaho 333, 870 P.2d 1292 (1994), the Idaho Supreme Court interpreted the phrase "reasonable geographic

area” contained in Idaho Code § 72-430(1) as the area surrounding the claimant’s home at the time of the hearing. However, the Court noted there may be instances where a market other than the claimant’s residence at the time of the hearing is relevant. In Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 565 P.2d 1360 (1977), the Court held that the Commission may consider the labor market within a reasonable distance of the claimant’s home both at the time of the injury and the time of the hearing to determine a claimant’s post-injury employability because: “a claimant should not be permitted to achieve permanent disability by changing his place of residence.” Lyons, 98 Idaho at 407 n. 3, 565 P.2d at 1364 n. 3.

33. Claimant apparently lived in Post Falls, in the Coeur d’Alene area, at the time of his 2002 left shoulder injury. At the time of hearing he lived outside of Entiat, Washington approximately 35 miles from the Wenatchee city limits. Pursuant to Davaz and Lyons, Claimant’s permanent disability is most appropriately evaluated in the more favorable of the two labor markets—Post Falls and the Coeur d’Alene area, rather than Entiat and Wenatchee.

34. Physical restrictions. As a result of Claimant’s March 2002 left shoulder injury, Dr. VanderWilde restricted Claimant to lifting no more than 10 pounds overhead with his left shoulder. Dr. McNulty restricted Claimant from lifting above shoulder level and from lifting more than 10 pounds with his left arm. Dr. Phillips recommended similar restrictions due to Claimant’s left shoulder injury. Claimant’s shoulder discomfort increases after lifting. He is unable to tolerate sleeping on his left side for more than an hour at a time due to left shoulder pain.

35. The record contains no physical restrictions arising from Claimant’s hearing, carpal tunnel, right shoulder, vision or any other pre-existing condition. Nor does Claimant assert that any of these pre-existing physical conditions hindered him from obtaining employment prior to his

March 2002 left shoulder injury.

36. As a result of Claimant's September 2002 back injury, he must avoid stooping and bending, and has been restricted to light duty work. Claimant told Dr. McNulty that his back was a more significant limitation than his left shoulder. Dr. McNulty specifically opined Claimant's back condition precludes him from returning to truck driving. Dr. Phillips opined that Claimant's back injury is more disabling than his left shoulder injury because Claimant continued to drive a truck for six months after his left shoulder injury but promptly ceased driving when he injured his back.

37. Employment opportunities. From October 2002 through July 2004, Claimant met periodically with Industrial Commission consultant Dirk Darrow in the Coeur d'Alene area to discuss Claimant's recovery and work search efforts. Claimant testified that the Commission consultant advised him it would be difficult to find work and difficult for Claimant to retrain because of his age and lack of education. Claimant testified that the consultant had no job leads for him. Darrow's notes reflect his observations that Claimant faced challenges in reemployment due to his age, limited education, and non-industrial health conditions. However Darrow noted Claimant's very personable presentation and reported that re-employment in the local labor market was available to Claimant. He noted there were jobs available which Claimant could have pursued including general and retail sales with beginning wages from \$7.00 per hour to commission-based compensation of \$25,000 annually. Darrow recorded that Claimant began drawing Social Security retirement benefits by May 2004 and thereafter did not seek work.

38. Claimant unsuccessfully searched for work in the Wenatchee area. He considered a janitorial position at BiMart, but concluded it involved unloading trucks and stocking merchandise which required lifting beyond his restrictions. Claimant applied for a forklift driver position but was

advised it involved restacking pallets which required lifting beyond his restrictions. Both positions required a GED or high school education. Claimant applied for a greeter position at WalMart but discovered it also required a GED or high school education. Claimant applied for a position at the Entiat foundry but discovered it required lifting beyond his restrictions. He investigated transportation positions, including school bus driving, but did not apply when advised that a GED or high school education was required. Claimant also investigated a cashier position but could not operate a cash register.

39. Defendants' vocational expert, Barbara Nelson, noted that following Claimant's March 2002 accident he continued to work 15 hour days for several months until injuring his back. Nelson expressly opined that were it not for Claimant's back injury, he could have continued to work for Yellowstone regardless of his left shoulder condition. Nelson also opined that given deregulation of the trucking industry, there is a high demand for drivers and that although Claimant's driving opportunities may have been somewhat limited due to his left shoulder restrictions, he could have competed for many truck driving positions. She acknowledged that his left shoulder precluded him from some driving positions. Nelson also considered other work opportunities given the restrictions arising from Claimant's March 2002 left shoulder injury, but prior to his September 2002 low back injury and subsequent vision, hearing, and right shoulder problems. She reported Claimant had a very pleasing personality and presentation and there were a number of positions in the Post Falls/Coeur d'Alene labor market for which Claimant could have competed including motor coach operator, usher, lobby attendant, ticket taker, courier, school bus driver, parking lot attendant, motel host, kick press operator, dishwasher, kennel assistant, and hospital housekeeper. These positions would have paid from \$5.92 to \$20.78 per hour. Although

not the pertinent labor market pursuant to Davaz and Lyons, Nelson also reported that a number of positions were available to Claimant in the Wenatchee, Washington labor market paying from \$7.93 to \$19.40 per hour. These included motor coach operator, security guard, host, candy packer, room attendant, porter/housekeeping attendant, and courtesy clerk.

40. At the time of Claimant's March 2002 left shoulder injury he was paid by the mile and often worked 15 hour days for more than 40 hours per week. His weekly earnings for the three years prior to his March 2002 accident averaged approximately \$754. Commission consultant Dirk Darrow reported Claimant's average weekly wages at approximately \$800. Assuming 40 hours per week, this equates to \$20 per hour. Assuming 15 hour days, six days per week—which Claimant testified he often worked—this equates to approximately \$9 per hour.

41. Claimant was 66 years old at the time of the accident. Based on Claimant's total impairment rating of 9% of the whole person and his permanent restrictions from overhead lifting or lifting more than 10 pounds with his left arm, and considering his non-medical factors, including his age at the time of the accident, lack of formal education, lack of experience and transferable skills in sedentary and light occupations, near computer illiteracy, and his inability to return to some of his previous occupations in truck driving, Claimant's ability to engage in gainful activity has been reduced. Significantly, Claimant's earnings decreased 25% to 33% after his left shoulder injury and before his back injury because he could no longer add "pick-up" loads to his main load. The Referee concludes Claimant has established a permanent disability of 30%, inclusive of his 9% whole person impairment due to his March 2002 left shoulder injury.

42. **Odd-lot.** Claimant herein asserts that he is totally and permanently disabled pursuant

to the odd-lot doctrine. A claimant who is not 100% permanently disabled may prove total permanent disability by establishing he or she is an odd-lot worker. An odd-lot worker is one “so injured that he [or she] can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.” Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable “in any well-known branch of the labor market - absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part.” Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status rests upon the claimant. Dumaw v. J. L. Norton Logging, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). A claimant may satisfy his or her burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways:

1. By showing that he or she has attempted other types of employment without success;
2. By showing that he or she or vocational counselors or employment agencies on his or her behalf have searched for other work and other work is not available; or
3. By showing that any efforts to find suitable work would be futile.

Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

43. In the present case, Claimant has not worked since he left Yellowstone due to his back injury in September 2002, thus he has not shown that he attempted other types of employment without success.

44. As noted previously, Claimant unsuccessfully searched for work around Wenatchee. He investigated approximately 10 positions, although he acknowledged that he did not make

application for some of these positions. It is significant that he was precluded from competing for a substantial percentage of these positions because of the restrictions arising from his back injury—not his prior left shoulder injury. Moreover, the relevant labor market pursuant to Davaz and Lyons, is the Post Falls and Coeur d'Alene area, rather than Entiat and Wenatchee. Claimant's work search is not sufficient to satisfy the second prong of Lethrud.

45. As noted above, although Claimant testified that the Commission's vocational consultant told him there were no suitable job openings, Darrow's actual notes refute this assertion and indicate that there were job opportunities available. Nelson's report lists a number of job opportunities available to Claimant. The Referee finds that Claimant has not demonstrated that he or vocational counselors acting in his behalf have searched for other work and that other work is not available.

46. Finally, no vocational expert has opined, and there is no persuasive evidence, that a job search in the pertinent labor market would be futile.

47. Claimant has not established a prima facie case that he is an odd-lot worker under the Lethrud test. Claimant has not proven he is totally and permanently disabled under the odd-lot doctrine.

48. **Idaho Code § 72-406 apportionment.** The next issue is apportionment of permanent disability pursuant to Idaho Code § 72-406. Claimant worked for Yellowstone as a truck driver for many years in spite of his right shoulder discomfort. He testified that his hearing and vision problems prior to 2002 did not hinder his work performance. Claimant's present employability is adversely affected by significant health problems, including L3-4 and L4-5 disk bulges and macular degeneration. However these challenges arose after, and are not related to, his

March 2002 left shoulder injury. Claimant's 30% disability arises from his left shoulder injury and no apportionment of disability is appropriate in this case.

49. **ISIF liability.** Claimant has failed to prove he is totally and permanently disabled, thus pursuant to Idaho Code § 72-332, ISIF bears no potential liability.

50. **Carey apportionment.** Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984), is moot.

51. **Shoulder injuries as pre-existing impairments.** The next issue is whether Claimant's bilateral shoulder injuries constitute pre-existing impairments. Claimant's left shoulder injury is the principal focus of the instant proceeding. Claimant's right shoulder condition pre-existed his left shoulder injury, however as noted above the record contains no impairment rating for his right shoulder. Inasmuch as apportionment of liability is not warranted pursuant to Idaho Code § 72-406 or Idaho Code § 72-332, this issue is moot.

52. **Attorney fees.** At hearing Claimant asserted as an issue his entitlement to attorney fees pursuant to Idaho Code § 72-804. Claimant presented no argument in support of his claim for attorney fees. His briefing makes no mention of this issue thus the Referee concludes it is abandoned.

53. **Idaho Code § 72-403.** At hearing Defendants asserted the issue of whether any benefits Claimant would otherwise be entitled to should be denied pursuant to Idaho Code § 72-403. Defendants presented no argument in support of their claim for application of Idaho Code § 72-403. Defendants' briefing makes no mention of this issue, thus the Referee concludes it is abandoned.

CONCLUSIONS OF LAW

1. Claimant has proven his entitlement to additional medical benefits including over-the-counter anti-inflammatory medications due to his left shoulder injury.
2. Claimant has proven his entitlement to additional temporary total disability benefits from March 11, 2004, until May 12, 2004.
3. Claimant has proven he suffers permanent partial impairment of 9% of the whole person due to his 2002 left shoulder injury. Defendants are entitled to credit for amounts already paid for permanent partial impairment.
4. Claimant has proven he suffers permanent disability of 30%, inclusive of permanent partial impairment, due to his 2002 left shoulder injury.
5. Claimant has failed to prove he is totally and permanently disabled pursuant to the odd-lot doctrine.
6. No apportionment pursuant to Idaho Code § 72-406 is appropriate.
7. Claimant has failed to prove ISIF bears any potential liability to Claimant.
8. Apportionment under the formula set forth in Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is moot.
9. Whether Claimant's bilateral shoulder injuries constitute pre-existing impairments is moot.
10. The issue of Claimant's entitlement to attorney fees is deemed abandoned.
11. Whether any benefits Claimant would otherwise be entitled to should be denied pursuant to Idaho Code § 72-403 is deemed abandoned.

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

THOMAS G. ENLOW,)
)
 Claimant,) **IC 2002-005720**
)
 v.)
) **ORDER**
 YELLOWSTONE TRUCKING 2000, INC.,)
)
 Employer,)
)
 and) **filed July 31, 2008**
)
 INSURANCE COMPANY OF THE WEST,)
)
 Surety,)
)
 Defendants.)
 _____)

Pursuant to Idaho Code § 72-717, Referee Alan Reed Taylor submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee’s proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has proven his entitlement to additional medical benefits including over-the-counter anti-inflammatory medications due to his left shoulder injury.
2. Claimant has proven his entitlement to additional temporary total disability benefits from March 11, 2004, until May 12, 2004.

3. Claimant has proven he suffers permanent partial impairment of 9% of the whole person due to his 2002 left shoulder injury. Defendants are entitled to credit for amounts already paid for permanent partial impairment.

4. Claimant has proven he suffers permanent disability of 30%, inclusive of permanent partial impairment, due to his 2002 left shoulder injury.

5. Claimant has failed to prove he is totally and permanently disabled pursuant to the odd-lot doctrine.

6. No apportionment pursuant to Idaho Code § 72-406 is appropriate.

7. Claimant has failed to prove ISIF bears any potential liability to Claimant.

8. Apportionment under the formula set forth in Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is moot.

9. Whether Claimant's bilateral shoulder injuries constitute pre-existing impairments is moot.

10. The issue of Claimant's entitlement to attorney fees is deemed abandoned.

11. Whether any benefits Claimant would otherwise be entitled to should be denied pursuant to Idaho Code § 72-403 is deemed abandoned.

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

DATED this __31st day of _____July_____, 2008.

INDUSTRIAL COMMISSION

_____/s/_____
James F. Kile, Chairman

_____/s/_____
R.D. Maynard, Commissioner

_____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __31st day of ____July_____, 2008 a true and correct copy of **Findings, Conclusions, and Order** was served by regular United States Mail upon each of the following:

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ka

_____/s/_____

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