BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHRIS M. REED, Claimant, v. ENVIROCON, INC., Employer, and ARGONAUT INSURANCE COMPANY, Surety, Defendants.	)	**IC 2005-010334** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** May 4, 2009

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Susan Veltman, who conducted a hearing in Pocatello, Idaho, on April 25, 2008. Craig R. Jorgensen of Pocatello represented Claimant. David P. Gardner of Pocatello represented Defendants. The parties submitted oral and documentary evidence. Two post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on April 3, 2009 and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident, including whether Claimant's condition is due, in whole or in part, to a pre-existing cause and/or a subsequent, intervening cause; and

2. Whether and to what extent Claimant is entitled to permanent partial or permanent total disability (PPD/PTD) in excess of permanent impairment, including whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine.

PROCEDURAL HISTORY

On April 21, 2008, Claimant filed a Motion for Continuance of the April 25, 2008 hearing in order to obtain a neurological evaluation that he had previously been unable to obtain because of financial reasons. Defendants objected to a continuance on multiple grounds, including the fact that travel arrangements had been made for an out-of-town witness and Employer representative. A teleconference was held on April 22, 2008 to allow the parties to present argument and discussion regarding Claimant's Motion for Continuance and Defendants' Response to Claimant's Motion for Continuance. Claimant's Motion for Continuance was denied, but it was agreed that the record would be held open for a period of 60 days to allow Claimant to obtain and offer the opinion of a neurologist. It took longer than Claimant anticipated to schedule a neurological evaluation and he filed a motion requesting additional time to undergo the evaluation and obtain post-hearing deposition testimony. Defendants did not oppose Claimant's request and additional time was granted. Time limits for Defendants' post-hearing deposition and the parties' post-hearing briefs were similarly extended.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant sustained an industrial injury to his right shoulder on July 18, 2005 for which he underwent surgical intervention on April 6, 2006. Claimant contends that the injury extends to include his left shoulder, neck and ongoing bilateral upper extremity symptoms. Claimant maintains that his symptomology interferes with activities of daily living

and precludes employment. Claimant seeks a determination that he is totally disabled by virtue of the odd-lot doctrine.

Defendants maintain that Claimant's industrial injury is limited to his right shoulder condition for which Claimant has reached maximum medical improvement (MMI). Defendants contend that Claimant has not met his burden to establish entitlement to additional benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Defendants' Exhibits 1 through 17 admitted at hearing;

2. Testimony of Claimant and Employer loss control/safety officer Mel Lockridge taken at hearing;

3. Post-hearing deposition of neurosurgeon Lynn M. Gaufin, M.D., with two exhibits attached and of physiatrist David C. Simon, M.D., with one exhibit attached; and

4. The Industrial Commission's legal file.

Defendants requested in their post-hearing brief that the opinions of Dr. Gaufin be stricken from the record because Dr. Gaufin is a neurosurgeon as opposed to a neurologist and because Dr. Gaufin's report (attached to his deposition as "Exhibit 1") lacks foundation. Defendants did not object to Dr. Gaufin's testimony or report prior to or during his post-hearing deposition. Defendants' request is denied. Defendants' concerns regarding the opinions of Dr. Gaufin will be taken into consideration with regard to the weight and credibility afforded them.

Claimant's objection on page 35 of Dr. Gaufin's deposition is sustained. All other objections made during the depositions of Drs. Gaufin and Simon are overruled. 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

Background, Injury and Treatment

1. At the time of hearing, Claimant was 34 years old and resided in Pocatello. He completed the ninth grade and obtained a GED. He earned approximately 20 college credit hours. His past work experience includes flipping hamburgers, general labor, delivery driver work, warehouse work and computer manufacturing.

2. Employer is an environmental remediation company that performs clean-up of hazardous materials at various job sites throughout the United States. Employer was a sub-contractor at the INL site hired to dig up contaminants from a landfill and move them to a site where a new landfill was being established. The project lasted approximately seven months.

3. Claimant was hired by Employer on May 12, 2005 as a laborer earning $20.68 per hour. His primary job duty was to tarp and untarp dump trucks but other duties included flagging, trash pick-up, decontamination of equipment and monitoring the arrival/dispatch of the trucks. The tarps were affixed to the dump trucks but were manually folded and secured as opposed to being on a roller or other automated device.

4. Based on testimony at hearing and contemporaneous e-mails generated by Employer, the correct date of injury is July 18, 2005, in spite of the existence of multiple documents reflecting an August 2005 date of injury.

5. During the afternoon of July 18, 2005, Claimant was tarping a truck with a co-worker when the tarp was lifted by a strong gust of wind. The co-worker let go of his side of the tarp, but Claimant held onto the tarp and the force of the wind was sufficient to jerk his right arm back behind his body and lift him off of his feet.

6. Claimant reported the injury to his foreman and to Employer's facility manager, Dave Irvin, during the afternoon of July 19, 2005. Claimant described a sore/strained shoulder but declined medical treatment at that time. Claimant was assigned lighter duty tasks over the next few days after which he reported that his shoulder was not bothering him.

7. On September, 19, 2005, Claimant's foreman noticed that Claimant was favoring one arm over the other and recommended that Claimant seek treatment. Mr. Irvin arranged for Claimant to be evaluated at the Immediate Care Center on the same day. Claimant was evaluated by nurse practitioner, Kristin Belanger. Claimant reported that his right arm had been "pulled back and out" when the wind hit the tarp and that his symptoms initially improved but then became worse. There is no mention of symptoms beyond the right shoulder. Claimant was placed on light duty with a limitation of five pounds lifting with his right arm pending an orthopedic evaluation.

8. Claimant received conservative treatment from Kenneth Newhouse, M.D.,[1] from September 27, 2005 through mid-February 2006. Claimant reported numbness and tingling in his fourth and fifth fingers of his right hand and mentioned that he was not sure if the symptoms were coming from his shoulder or neck. Dr. Newhouse described the injury as a "traction abduction hyperextension injury" to the right shoulder.

9. Employer's contract at the job site was cancelled effective November 1, 2005. Claimant was terminated pursuant to a reduction in force on October 24, 2005. Claimant was in good standing with Employer at the time he was laid-off. Between the date of injury and Claimant's lay-off, Employer informally accommodated light-duty restrictions on an as-needed basis and Claimant did not lose time from work.

[1] Claimant was evaluated by a physician assistant under the direction of Vermon Esplin, M.D., on the initial visit but was thereafter followed by Dr. Newhouse at the same facility.

10. Claimant continued to report radicular symptoms of his right upper extremity. Dr. Newhouse considered that Claimant may have a brachial plexopathy, cervical radiculopathy or reflex sympathetic dystrophy (RSD) type symptoms and recommended diagnostic studies. X-rays of the right shoulder and cervical spine were described as essentially normal. A right shoulder MRI performed on October 14, 2005 revealed a labral tear. A right upper extremity EMG/NCV study performed on January 16, 2006 by Scott S. Petty, M.D., was normal. A cervical MRI of January 17, 2006 was described by Dr. Newhouse as revealing a small disc protrusion on the left at the C6-7 level, but nothing on the right.

11. By February 2006, Claimant was still symptomatic and Dr. Newhouse was in "somewhat of a quandary" as to the source of Claimant's symptoms. He recommended an evaluation by a neck expert and wanted to eliminate Claimant's neurological symptoms prior to arthroscopic shoulder surgery.

12. On March 8, 2006, Claimant initiated treatment with John Andrady, M.D., for his right shoulder at the referral of Dr. Newhouse. Based on Claimant's right shoulder MRI findings, Dr. Andrady diagnosed a SLAP lesion with impingement and recommended arthroscopic labral repair. He noted Claimant's nerve symptoms and felt that it was possible but unlikely that Claimant had RSD/chronic regional pain syndrome (CRPS).

13. On March 16, 2006, Claimant was evaluated by neurosurgeon Clark Allen, M.D., to address his cervical condition. Dr. Allen noted a small acute protrusion/herniation at C6-7 that he attributed to the industrial injury. However, he determined that the cervical findings were sub-clinical and not likely the source of Claimant's complaints. He recommended against cervical surgery or further cervical work-up. Dr. Allen attributed Claimant's complaints to his right shoulder injury.

14. On March 20, 2006, Dr. Andrady recommended that Claimant proceed with right shoulder arthroscopy to repair the SLAP lesion. He identified a right shoulder lipoma that was not part of the industrial injury and provided evaluation and removal of the lipoma through Claimant's private insurance. Dr. Andrady performed surgery on April 6, 2006. Claimant's initial post-operative evaluation was satisfactory and Claimant was referred to physical therapy.

15. By mid-May 2006, Claimant had significant soreness and reported shooting pain down both arms which prompted a re-evaluation by Dr. Allen. Dr. Allen ordered a new cervical MRI and considered the possibility that Claimant's disc rupture at C6-7 had been exacerbated. Claimant's repeat cervical MRI of July 5, 2006 demonstrated resolution of the acute nature of the disc rupture at C6-7 but Claimant's disc derangement persisted. Dr. Allen recommended follow-up in three months. He assigned work restrictions of sedentary work with no overhead lifting or looking up and recommended that Claimant's lifting be limited to 20 pounds on an occasional basis.

16. In June 2006, Dr. Andrady released Claimant to return to work with no lifting greater than 10 to 15 pounds and no overhead work. He felt that Claimant was doing well with regard to the shoulder injury, but not his nerve injury.

17. On July 12, 2006, Dr. Andrady released Claimant to return to work without restrictions as to his right shoulder condition but noted that he "will have significant restrictions for the remainder of his problems." He certified MMI and assigned a 4% whole person impairment rating for Claimant's right shoulder.

18. Claimant returned to Dr. Allen on October 5, 2006 for follow-up on his cervical condition. Dr. Allen noted that Claimant's reported complaints were inconsistent with the resolution of his disc rupture as demonstrated by MRI. Dr. Allen strongly recommended against

cervical surgery. He felt that Claimant may benefit from a pain treatment program and that it would be reasonable for Claimant to be evaluated by a neurologist to rule out a brachial plexopathy.

Post-MMI Medical Evaluations

Richard T. Knoebel, M.D.

19. Claimant was evaluated on September 7, 2006 by orthopedic surgeon Richard T. Knoebel, M.D., at the request of Defendants. Dr. Knoebel reviewed Claimant's medical records and diagnostic studies. His examination of Claimant included an impairment rating evaluation.

20. Dr. Knoebel agreed that Claimant had temporary disability from October 25, 2005 through July 12, 2006; that Claimant reached MMI on July 12, 2006; and that Claimant's whole person impairment of the right shoulder is 4%. Dr. Knoebel assigned permanent restrictions to the right upper extremity of no forceful, repetitive work at or above shoulder level. He noted that Claimant's subjective complaints far outweighed objective findings and that Claimant demonstrated symptom magnification.

Kevin Hill, M.D.

21. Claimant was evaluated on September 20, 2006 by Kevin Hill, M.D., who performed a disability evaluation at the request of the Social Security Administration. Dr. Hill reviewed medical records, obtained a history from Claimant and performed a physical examination. He attributed the Claimant's SLAP lesion and rotator cuff tear to the industrial injury but did not give an opinion as to causation of Claimant's chronic pain syndrome and complaints of radiculopathy.

22. Dr. Hill assigned a 25 pound lifting and carrying restriction; recommended that Claimant avoid overhead work and repetitive activities with the upper extremities; and that

Claimant be able to alternate sitting/standing/walking. He determined that Claimant's hearing, speaking and ability to travel were unaffected.

Richard A. Wathne, M.D.

23. Claimant was evaluated on September 26, 2006 by orthopedist Richard A. Wathne, M.D., at the referral of Claimant's attorney. Dr. Wathne reviewed medical records and diagnostic studies. He interviewed Claimant and performed a physical examination. Dr. Wathne agreed that Claimant reached MMI with regard to his right shoulder condition but suspected that Claimant's chronic right shoulder and upper extremity pain was secondary to a brachial plexopathy. He indicated that there was no set treatment for brachial plexopathy other than tincture of time, modification of activities and medication. He would not advocate surgical intervention but recommended that Claimant be evaluated by a neurologist, not a neurosurgeon, and that Claimant undergo a repeat nerve conduction study by someone skilled in evaluating a brachial plexopathy.

24. Dr. Wathne agreed that Claimant should limit lifting to 20 pounds at shoulder height and that Claimant should avoid repetitive overhead work with his right upper extremity.

David C. Simon, M.D.

25. Claimant was evaluated on December 12, 2007 by physical medicine and rehabilitation physician David C. Simon, M.D., at the request of Defendants. Dr. Simon reviewed medical records, had Claimant complete pain status inventories, obtained a history from Claimant and performed an examination. Claimant reported to Dr. Simon that he had extreme pain in both shoulders immediately after the injury. Claimant's physical evaluation did not reveal dystrophic changes or abnormalities consistent with RSD/CRPS.

26. Dr. Simon agreed that Claimant's initial right shoulder complaints were causally related to the industrial injury and that Claimant has reached MMI with 4% impairment as reported by Dr. Andrady.

27. Claimant's subjective symptoms were not consistent with the objective diagnostic studies and Dr. Simon suspected that Claimant's persistent subjective complaints involved secondary gain relating to disability benefits. Dr. Simon did not find Claimant's complaints at the time of evaluation to be credible and found no objective basis to support permanent work restrictions or the need for additional medical treatment.

28. Dr. Simon reviewed the report of Dr. Gaufin prior to giving deposition testimony. Dr. Simon agrees with Dr. Gaufin that it is possible for EMG studies to produce false negative results. However, false negative results are generally consistent with a mild condition that will resolve with time.

29. Dr. Simon disagrees with Dr. Gaufin (see below) as to whether Claimant's industrial injury resulted in a brachial plexus problem and/or thoracic outlet syndrome. Dr. Simon does not believe that Claimant suffered from a brachial plexus problem at the time he evaluated Claimant or that Claimant injured his brachial plexus at the time of injury. He does not believe that Claimant has thoracic outlet syndrome.

30. Dr. Simon explained that brachioplexopathy can be caused by either trauma or as a response to a viral infection. Surgical intervention for brachioplexopathy or brachial plexus in adults is rare.

Lynn M. Gaufin, M.D.

31. Claimant arranged to be evaluated on August 4, 2008, by neurosurgeon Lynn M. Gaufin, M.D. Dr. Gaufin performed a neurosurgical consultation and perceived his role as that

of a clinician rather than an independent medical evaluator. As such, Dr. Gaufin relied on the history provided by Claimant and his review of Claimant's cervical MRI scans from 2006 that Claimant brought with him to the examination. He did not review additional diagnostic studies, medical records or other documentation regarding Claimant's injury or past treatment.

32. Dr. Gaufin documented the history provided by Claimant and noted in his report that Claimant gave "a very good history." However, Dr. Gaufin readily admits that he did not verify the information provided by Claimant and took the information at face-value. Dr. Gaufin agrees that his opinions are tied to the accuracy of information provided by Claimant.

33. The evidence does not establish that Claimant provided inaccurate or incomplete information to Dr. Gaufin in an attempt to mislead him. However, there are multiple inconsistencies and omissions between the bases for Dr. Gaufin's opinions and contemporaneous reports from multiple physicians who treated Claimant during a period of three years before Claimant presented to Dr. Gaufin. Some inconsistencies are minor and likely irrelevant such as Claimant reporting to Dr. Gaufin that he does not smoke or use alcoholic beverages which is contrary to the histories noted by multiple other physicians. Other inconsistencies and omissions are more relevant to issues of causation and extent of injury such as the timing of the onset of Claimant's left shoulder symptoms and the fact that Claimant underwent an EMG/NCV study in January 2006 with normal results. Dr. Gaufin was not aware that Claimant had previously undergone a neurosurgical work-up by Dr. Allen.

34. Dr. Gaufin concluded that Claimant sustained a traumatic injury to both shoulders and that a left rotator cuff tear needed to be ruled out. He determined that Claimant has bilateral brachial plexopathy secondary to thoracic outlet syndrome. He recommended that Claimant undergo surgical decompression of the thoracic outlet on both shoulders, operating on one

shoulder at a time. He feels that Claimant would then need to consider operative intervention for his cervical spine. Dr. Gaufin emphasizes that he is not advocating for surgical intervention and that the decision should be made by Claimant.

Vocational Evidence

35. Claimant's case was referred to the Industrial Commission Rehabilitation Division (ICRD) in November 2005. Claimant initially cooperated with ICRD consultant, Sarah Brown. In February 2006, Claimant developed a resume with the assistance of Ms. Brown. He chose a vocational goal of obtaining a telemarketing job but indicated that he would be looking for any work that was sedentary in nature. Claimant was provided with 15 job leads on February 28, 2006. He expressed interest in some of the job leads but did not pursue them.

36. From February through August 2006, ICRD involvement primarily consisted of contact between ICRD and the nurse case manager because Claimant was pursuing pre-operative and post-operative evaluations and rehabilitation. During this period of time, Randy Parkin took over from Ms. Brown as Claimant's ICRD consultant.

37. By September 2006, Claimant felt that he was unable to return to work and pursued Social Security Disability benefits. Claimant contacted ICRD on October 26, 2006 and advised Mr. Parkin that he was not planning to participate in rehabilitation activities. ICRD closed its file in December 2006 based on Claimant's request. Claimant was advised that he could contact ICRD in the future if he became interested in job development activities.

38. Claimant has not sought work since his lay-off by Employer in October 2005. At the time of hearing he was unable to articulate what medical restrictions have been assigned to him but indicated that he remains physically unable to vacuum or lift a gallon of milk. Claimant is able to drive but does not think he could work as a pizza delivery driver because he does not

believe that he could physically tolerate carrying pizzas or containers of soda for an extended period of time. He testified that one reason he refrained from seeking work is that it would be unfair to solicit or accept employment and/or training from an employer in light of his current limitations. Claimant has considered an eight week training course offered by the teamster's union, but prefers to wait until his disability determination issues are resolved before worrying about a career. He agrees that telemarketing was discussed with ICRD as a career option but does not plan to pursue customer service positions because he feels that he does not have the personality or demeanor for that type of work.

39. ICRD prepared a labor market survey and report upon closure of their file in December 2006. It was noted that efforts to meet with Claimant for job development were met with clear resistance or excuses and that Claimant failed to submit a single job application. Mr. Parkin identified multiple jobs that would be appropriate for Claimant in spite of right shoulder restrictions. Claimant's highest annual past earnings were $17,715.00, earned in 2004. Mr. Parkin concluded that it is highly likely that Claimant has the ability to meet or exceed his customary wages based on his 2000 through 2004 earnings. Claimant will have a difficult time finding work that pays as much as his time-of-injury employment since wages paid at INL for contract work exceed usual wages in Claimant's labor market. Mr. Parkin explained that INL contract jobs are generally temporary, seasonal and/or without fringe benefits. Overall, Mr. Parkin concluded that Claimant did not suffer wage loss as a result of his industrial injury.

40. The labor market survey does not indicate the extent to which Claimant's labor market would be reduced because of right shoulder restrictions.

DISCUSSION AND FURTHER FINDINGS

Causation

41. A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability, only their plain and unequivocal testimony conveying a conviction that events are causally related. *See, Jensen v. City of Pocatello*, 135 Idaho 406, 412-413, 18 P. 3d 211, 217-218 (2001).

Cervical Spine

42. Although Claimant did not specifically report neck pain during the first few months following his injury, the possibility of Claimant's right upper extremity problems emanating from his neck was considered during Dr. Newhouse's initial treatment in September 2005. Dr. Newhouse referred Claimant to Dr. Allen for treatment and/or to rule-out cervical injury. The opinions of Dr. Allen are supported by objective medical evidence and are credible. Claimant's industrial injury was sufficient to aggravate Claimant's cervical disc disease and resulted in an acute disc herniation at C6-7, on the left side. However, Claimant's cervical condition does not account for Claimant's ongoing radicular symptoms or other neurological complaints. The aggravation to Claimant's cervical spine resolved by the time of Dr. Allen's evaluation in October 2006.

43. Dr. Gaufin noted that Claimant has disc herniations at C5-6 and C6-7 for which surgery is an option, but did not address causation other than to indicate that "…it is not unheard

of to have both thoracic outlet and herniated disc [sic] occurring simultaneously, particularly with the type of injury that [Claimant] described." Dr. Gaufin's opinion falls short of a plain and unequivocal opinion establishing a causal relationship between Claimant's cervical spine condition and the industrial injury. The opinions of Dr. Allen are adopted over the opinions of Dr. Gaufin regarding the cervical spine.

44. Claimant has failed to meet his burden of proof to establish that his ongoing cervical symptoms are causally related to his industrial injury.

Left Shoulder

45. Claimant did not experience symptoms to his left shoulder or left upper extremity until May 2006, approximately ten months after his industrial injury. Claimant's testimony and history provided by Claimant to Drs. Simon and Gaufin of immediate onset of left shoulder pain are refuted by contemporaneous medical records and employer documentation. Claimant's testimony that he was told by Dr. Newhouse and/or his claims adjuster that his left shoulder treatment would be placed on hold until resolution of his right shoulder problems is not credible and not supported by the other evidence. There is an absence of documentation of left upper extremity complaints in the records of multiple medical service providers until Claimant's post-operative care in May 2006. There is no assertion or evidence that Claimant's left shoulder complaints are attributable to surgical complications.

46. Dr. Gaufin concluded that Claimant's injury included the left shoulder and that a left rotator cuff tear still needed to be ruled out. Dr. Gaufin's opinion in this regard is given no weight since it is based on Claimant's representations that he had immediate onset of left shoulder pain following the injury and that his left shoulder had been symptomatic for three years.

47. Claimant has not met his burden of proof to establish that his industrial injury extends to his left shoulder.

Neurological Injury

48. Claimant has consistently reported right-sided radicular complaints. As discussed above, the complaints included Claimant's left upper extremity as of May 2006. There are differences in opinion among the medical experts as to the source, nature and extent of Claimant's neurological symptoms. Multiple physicians have suggested that Claimant may have a brachial plexus injury and felt that a referral to a neurologist would be appropriate. The only physicians who have given a clear and unequivocal opinion as to whether Claimant has a brachial plexus injury are Drs. Simon and Gaufin. Dr. Simon believes that the Claimant's injury does not extend to brachial plexopathy and Dr. Gaufin believes that Claimant has bilateral brachial plexopathy that is secondary to thoracic outlet syndrome and causally related to the industrial injury.

49. Claimant's EMG/NCV study of January 16, 2006 was performed and interpreted by neurologist, Scott S. Petty, M.D. Claimant has not otherwise been evaluated by a neurologist.[2] The EMG/NCV results were "well within the range of normal limits." Both Drs. Simon and Gaufin agree that electrodiagnostics results can produce false negative results. Dr. Simon explained that false negative results generally occur in cases where the injury is minor and that he would not expect false negative results in a patient with the severity of symptoms that Claimant describes. Dr. Gaufin was unaware that Claimant had undergone an EMG/NCV study until he was cross-examined during his post-hearing deposition, but was comfortable relying on

[2] Claimant is not seeking a determination that he is entitled to an evaluation by a neurologist and/or that he is entitled to additional medical treatment for his ongoing neurological symptoms. Rather, he seeks a determination regarding the extent of his injury for the purpose of calculating his permanent disability.

"classic history and physical findings" because of the risk of both false positives and negatives in EMG/NCV results.

50. It is possible that Claimant sustained a brachial plexus injury. However, the opinions of Dr. Simon are more credible than those of Dr. Gaufin on this issue. Dr. Simon's opinions are consistent with the diagnostic studies and other medical records. Diagnoses of RSD/CRPS were mentioned as possibilities but not adopted by any physician. As described above, Dr. Allen ruled out neurological injury emanating from the cervical spine.

51. Claimant has failed to meet his burden of proof to establish that his neurological complaints are causally related to his industrial injury.

Permanent Total Disability

52. A claimant may establish that he or she is totally and permanently disabled by using either of the two methodologies available to establish total permanent disability:

> First, a claimant may prove a total and permanent disability if his or her medical impairment together with the nonmedical factors total 100%. If the Commission finds that a claimant has met his or her burden of proving 100% disability via the claimant's medical impairment and pertinent nonmedical factors, there is no need for the Commission to continue. The total and permanent disability has been established at that stage. *See Hegel v. Kuhlman Bros., Inc*., 115 Idaho 855, 857, 771 P.2d 519, 521 (1989) (Bakes, J., specially concurring) ("Once 100% disability is found by the Commission on the merits of a claimant's case, claimant has proved his entitlement to 100% disability benefits, and there is no need to employ the burden-shifting odd lot doctrine").

Boley v. State, Indus. Special Indem. Fund, 130 Idaho, at 281, 939 P.2d at 857 (emphasis added). When a claimant cannot make the showing required for 100% disability, then a second methodology is available:

> The odd-lot category is for those workers who are so injured that they can perform no services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.

Jarvis v. Rexburg Nursing Center, 136 Idaho 579, 584 38 P.3d 617, 622 (2001), citing *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 565 P.2d 1360 (1977). The worker need not be physically unable to perform any work:

> They are simply 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.

Id., 136 Idaho at 584, 38 P.3d at 622. There are three methods of proving odd-lot status: (1) attempts at other types of employment were unsuccessful; (2) the worker, vocational counselors, employment agencies or other job service agencies have unsuccessfully searched for work for the worker; or (3) that any efforts of the employee to find suitable employment would be futile. *Fowble v. Snoline Express, Inc*., 146 Idaho 70, 190 P.3d 889 (2008).

53. Medical impairment relating to Claimant's industrial injury is properly calculated at 4% of the whole person. The record is void of medical evidence supporting a determination that Claimant is totally and permanently disabled. Drs. Andrady and Simon opined that Claimant has no permanent physical restrictions as a result of his right shoulder injury. Dr. Allen recommended a sedentary to light position with no overhead work and limited lifting of 20 pounds on an occasional basis. However, Dr. Allen's restrictions were given in July 2006 and not addressed in his subsequent report of October 2006; it is unclear whether these restrictions were intended to be permanent. Dr. Knoebel recommends that Claimant avoid repetitive or forceful overhead work with his right arm. Dr. Hill assigned a 25 pound lifting restriction and included postural limitations. However, Dr. Hill's restrictions are based on the totality of Claimant's complaints and were not designated as being related to the industrial injury. Dr. Wathne restricts Claimant from repetitive right upper extremity activities and recommends that

Claimant limit lifting to 20 pounds to shoulder height. Dr. Gaufin did not address permanent work restrictions.

54. Claimant made no efforts to seek employment. The labor market survey from ICRD is unrefuted and concludes that there are multiple appropriate jobs available to Claimant. Claimant may perceive that his job seeking efforts would be futile, but the overwhelming evidence is contrary to Claimant's self-perception and establishes that Claimant is employable.

55. Claimant is ill-served by his decision to defer all efforts to retrain or seek employment until final decisions have been issued regarding his workers' compensation disability and social security disability applications. It is understandable that Claimant would feel that customer service positions are beyond his comfort level and/or that he is unable to bolster enthusiasm regarding a career in telemarketing. However, Claimant's self-limiting behavior does not establish that he is totally disabled.

56. Claimant has failed to meet his burden to prove that he is permanently and totally disabled by either the 100% method or by virtue of the odd-lot doctrine.

Permanent Partial Disability

57. The burden of proof is on Claimant to prove the existence of any disability in excess of impairment. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986). "Evaluation (rating) of permanent disability" is an appraisal of the Claimant'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 non-medical factors provided for in Idaho Code § 72-430. Idaho Code § 72-425.

58. The parties have taken all or nothing positions with regard to permanent disability and neither party articulated alternative positions addressing what amount of disability less than total would be appropriate.

59. Based on the opinions set forth in the ICRD labor market survey, Claimant's injury did not result in wage loss. Claimant is relatively young and has transferable skills. Claimant's failure to explore vocational and/or retraining options resulted in a lack of evidence that would allow an appraisal of Claimant's probable future abilities.

60. Based on the totality of the medical evidence, it is more likely than not that Claimant has at least some permanent limitations as a result of his right shoulder injury. Claimant is likely precluded from jobs that require repetitive overhead work with his right upper extremity.

61. In spite of the lack of argument by Claimant regarding PPD, the credible medical evidence establishes that Claimant's labor market will be somewhat reduced by his right shoulder limitations. The evidence establishes that Claimant has 3% PPD in excess of 4% impairment.

CONCLUSIONS OF LAW

1. Claimant has failed to meet his burden of proof to establish that his industrial injury of July 18, 2005 extends beyond a right shoulder injury and a temporary aggravation of his cervical spine condition. Claimant's left shoulder condition, neck and ongoing neurological symptoms involving his upper extremities are not causally related to his industrial injury.

2. Claimant is not permanently and totally disabled.

3. Claimant has 3% permanent partial disability in excess of his 4% permanent partial impairment.

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 __27_ day of _April_____ 2009.

INDUSTRIAL COMMISSION

_/s/_____
Susan Veltman, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _4_ day of _May__ a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

CRAIG R JORGENSEN
P O BOX 4904
POCATELLO ID 83205-4904

DAVID P GARDNER
P O BOX 817
POCATELLO ID 83204-0817

_/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHRIS M. REED, Claimant, v. ENVIROCON, INC., Employer, ARGONAUT INSURANCE COMPANY, Surety, Defendants.	)	**IC 2005-010334** **ORDER** May 4, 2009

Pursuant to Idaho Code § 72-717, Referee Susan Veltman submitted the record in the above-entitled matter, together with her proposed 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 failed to meet his burden of proof to establish that his industrial injury of July 18, 2005 extends beyond a right shoulder injury and a temporary aggravation of his cervical spine condition. Claimant's left shoulder condition, neck and ongoing neurological symptoms involving his upper extremities are not causally related to his industrial injury.

2. Claimant is not permanently and totally disabled.

3. Claimant has 3% permanent partial disability in excess of his 4% permanent partial impairment.

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

DATED this __4__ day of ___May_____, 2009.

INDUSTRIAL COMMISSION

_/s/_____
R. D. Maynard, Chairman

_/s/_____
Thomas E. Limbaugh, Commissioner

_/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __4_ day of __May_____, 2009, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

CRAIG R JORGENSEN
P O BOX 4904
POCATELLO ID 83205-4904

DAVID P GARDNER
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jkc _/s/_____