

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GEORGE LUKASIK,)	
)	
Claimant,)	IC 2005-524010
)	
v.)	
)	
WESTERN SPECIALTIES, INC.,)	
)	
Employer,)	ORDER
)	
STATE INSURANCE FUND,)	
)	April 22, 2011
Surety,)	
)	
Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee LaDawn Marsters 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 proven that he is entitled to PPI in the amount of 4% of the whole person, with credit to Defendants for 2% already paid.
2. Claimant has proven he is entitled to PPD benefits for his October 14, 2005 industrial injury in the amount of 34% inclusive of PPI.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this 22 day of April , 2011.

INDUSTRIAL COMMISSION

 /s/
Thomas E. Limbaugh, Chairman

_____/s/_____
Thomas P. Baskin, Commissioner

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

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __22__ day of _April_____, 2011, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

JAMES M RUNSVOLD
P O BOX 917
CALDWELL ID 83606

JON M BAUMAN
ELAM & BURKE PA
P O BOX 1539
BOISE ID 83701

jkc

_____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GEORGE LUKASIK,)	
)	
Claimant,)	IC 05-524010
)	
vs.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
WESTERN SPECIALTIES, INC.,)	AND RECOMMENDATION.
)	
Employer,)	
)	
and)	April 22, 2011
)	
STATE INSURANCE FUND,)	
)	
Surety,)	
Defendants.)	
_____)	

Pursuant to Idaho Code § 72-506, the above entitled matter was assigned to Referee LaDawn Marsters, who conducted a hearing on November 2, 2010 in Boise, Idaho. Claimant was present in person and was represented by James M. Runsvold. Employer and Surety were represented by Jon M. Bauman. Oral and documentary evidence was admitted, and one post-hearing deposition was taken. The matter was briefed and came under advisement on February 25, 2011.

ISSUES

The issues to be decided are:

1. Whether and to what extent Claimant is entitled to permanent partial impairment (PPI);
and
2. Whether and to what extent Claimant is entitled to permanent partial disability (PPD).

The parties stipulated at the hearing that medical care benefits and punitive attorney fees

were also in dispute. In his briefing, however, Claimant clarified that those issues have been either abandoned or expressly waived. Therefore, only PPI and PPD will be addressed herein.

CONTENTIONS OF THE PARTIES

On October 14, 2005, Claimant suffered an industrial lifting injury, aggravated by a similar injury on February 23, 2006, resulting in bilateral hernias and chronic pain. Claimant has undergone four corrective surgeries, the last two performed at the Cleveland Clinic in Ohio. At the time of hearing, Claimant's hernias were completely healed, but Claimant still experienced significant pain, including stabbing pain in his right testicle that radiates to his right flank, thigh, back and chest. In addition, he carries himself at all times with a distinct flexion posture, slouching down toward the left. Claimant has no history of relevant preexisting medical conditions.

As a result of his industrial injuries, Claimant contends he has suffered PPI of 4-5% of the whole person, and PPD inclusive of PPI of 40%. In support of his case, Claimant relies upon the opinion of James H. Morland, M.D., a physiatrist, who utilized the *AMA Guides, 6th Edition* in preparing his PPI opinion, and upon Nancy Collins, Ph.D., a vocational consultant, who utilized *SkillTRAN* software in preparing her PPD opinion.

Defendants counter that Claimant has suffered only 2% PPI, in addition to PPD of 15%-20%. They rely upon Nancy E. Greenwald, M.D., a physiatrist, and Leroy H. Barton, a vocational consultant. Dr. Greenwald utilized the *AMA Guides, 5th Edition*, in preparing her PPI opinion, and Mr. Barton utilized the *Boise MSA* and other local data in preparing his PPD opinion. Defendants argue that noncompensable psychological issues contribute to Claimant's condition.

Throughout the time between his first injury and the hearing, Employer has

accommodated Claimant. There is no dispute that Claimant is an excellent worker, nor that Employer believes he is the best hollow metal welder in the Treasure Valley.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
 2. Claimant's Exhibits 1 through 10 admitted at the hearing;
 3. Defendants' Exhibits 1 through 10 admitted at the hearing;
 4. The testimony of Claimant taken at the November 2, 2010 hearing;
 5. The testimony of Monte Palmer taken at the November 2, 2010 hearing;
 6. The testimony of Margaret Lukasik taken at the November 2, 2010 hearing;
 7. The testimony of Tom Dougherty taken at the November 2, 2010 hearing;
 8. The testimony of Nancy Collins, Ph.D. taken at the November 2, 2010 hearing;
- and
9. The post-hearing deposition testimony of Leroy H. Barton III, M.E., C.R.C., taken December 2, 2010.

OBJECTIONS

All pending objections are overruled.

FINDINGS OF FACT

After having considered 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.

1. Claimant moved to Idaho from Poland in 1991. He was 48 years of age and residing in Caldwell at the time of the hearing.

2. Tom Dougherty, owner of Employer, testified that Claimant possesses rare expertise as a hollow metal welder, refitting pre-manufactured hollow metal products such as door frames, doors and window frames for custom installations. Claimant is extremely proud of his ability to provide for his family and is thus a motivated employee with a strong work ethic.

3. On October 14, 2005, Claimant suffered a right-sided hernia while lifting a door onto a table. He underwent four corrective surgeries in 2005, 2007 and 2009 (two). Nevertheless, he still experiences a stabbing, pulling pain in his right groin area that radiates primarily to his chest. He is right-handed, but cannot use the right side of his body without pain. He also has pain in his right side at the waist and right testicle when turning his torso in either direction. He feels a pulling sensation from his right testicle to his chest when he bends and straightens, like something is going to “pop out” of his belly. Tr., p. 53. His pain worsens with increased movement including ambulation, lifting more than 20 pounds and raising his right arm. In addition, he has pain while sitting and laying down and difficulty sleeping. Vibration and bumps while riding in a car are also painful.

4. Claimant continues to work for Employer, running the welding shop and earning \$15.50 per hour, up \$.50 per hour from his time-of-accident wage.

5. Since his industrial accident, Claimant requires assistance at work with lifting, on average, every 20 minutes during the day. Employer has been highly supportive of Claimant, instructing others to assist him with lifting tasks and accommodating Claimant’s occasional needs to leave work early due to pain. Previously, Employer loaned Claimant money for an MRI when Surety refused to pay. Claimant repaid the loan.

6. At the hearing, Claimant was noticeably uncomfortable, slouching unnaturally to

the left and, at times, holding his side or rising to walk around. He was also deeply emotional, breaking into tears at least once while testifying about his concerns about his ability to continue providing for his family. Claimant did not require a translator, but spoke broken English. He was effective in communicating both his points and his likable personality, even though he did not always use the correct words. Claimant's appearance at Mr. Barton's deposition, attended by the Referee, was consistent with his appearance at the hearing.

7. Claimant's wife testified that she can tell her husband experiences residual pain because he cannot walk well, sits down a lot and sometimes cries. He can no longer go places with his family because he cannot keep up with their pace. He cannot participate in recreational activities he used to enjoy such as fishing and hiking. Claimant's wife explained that Claimant needs help doing almost everything, can't sleep well and has to take pain medications and lie down for 1-3 hours upon returning from work. This is a big change from his prior self, which she described as a "workaholic". Tr., p. 122. Further along these lines, Claimant described how his pigeon-racing hobby has been detrimentally affected because he needs help lifting the large bags of feed and cannot participate in their care as he could before.

8. The parties do not dispute that Claimant injured himself at work, lifting a door, on October 14, 2005, nor that he is entitled to PPI and PPD. His extensive medical records were closely reviewed; however, they are only addressed herein where directly relevant. Generally speaking, Claimant underwent four hernia repair or redo surgeries between 2005 and 2009, the last two at the Cleveland Clinic in Ohio. He also participated in various courses of physical therapy. Although Claimant presented at physical therapy as motivated and willing, it was ultimately determined that Claimant did not benefit from this type of treatment.

9. Claimant's bilateral hernia repairs are sound. However, since his first surgery, Claimant has experienced right-sided ilioinguinal neuropathic pain. His subsequent three surgeries were performed both to alleviate this pain and to repair a new, left-sided, hernia identified in 2008 with its own ensuing complications. Claimant's left-sided pain has generally resolved. His right-sided pain improved with subsequent surgeries but continues to be problematic, as further addressed herein.

Independent Medical Examinations.

10. **Dr. Greenwald.** On November 17, 2009, Dr. Greenwald performed an IME at the behest of Defendants. Formerly, Dr. Greenwald treated Claimant. Following his first surgery, she assessed PPI of 2% of the whole person.

11. At this visit, Claimant reported his left side was doing great – he had only a little pain after 6-7 hours of work. But his right side was still problematic. Claimant reported right-sided testicular pain that goes to his back, buttock area and down his anterior thigh to his medial knee, worse after lunchtime. He described it as a pumping pain that turns into a stabbing pain. He also described numbness in his right groin and leg areas. Dr. Greenwald noted continued concern about depression.

12. Dr. Greenwald provided a referral for treatment of Claimant's low testosterone condition, which can cause malaise, fatigue, muscle weakness, sexual dysfunction and other symptoms. She recommended no treatment for depression because Claimant did not believe he was depressed and did not want treatment. Dr. Greenwald did not recommend a work hardening program because Claimant was already working full-time.

13. As for his residual pain, Dr. Greenwald opined that his right flank abdominal recti

pain could be due to tearing of the lower recti muscles and recommended mobilization of that area, which could be scarred down. She referred Claimant to Jack Morris, PT, a manual therapist.

14. Overall, Dr. Greenwald reported, Claimant seemed better in 2009 than when she saw him in 2006. She also wrote that she believes Claimant will have permanent pain and, given his extensive workup so far, she recommended no further invasive procedures. She issued a 35-pound lifting restriction due to a possible tear in Claimant's lower abdominal recti muscles, which she planned to reevaluate after he completed treatment with Mr. Morris. Dr. Greenwald recommended no change in her former PPI rating of 2% of the whole person.

15. Approximately ten months later, on September 5, 2010, Dr. Greenwald responded to a letter from Defendants' attorney seeking to know whether her 35-pound lifting restriction was current. In her letter, she opined that Claimant's lifting restriction could be increased to 50 pounds if it was preventing him from returning to work at Employer's. It is unclear why Dr. Greewald believed this may be the case. She explained that a lifting restriction was appropriate due to Claimant's bilateral hernia repairs and to protect his back due to his flexion posture. She also explained that she and Claimant had previously arrived at the 35-pound limit by experimenting with what he could and could not lift.

16. **James H. Morland, M.D.** Dr. Morland, a physiatrist specializing in pain management, performed an IME at Claimant's request on January 20, 2010. Dr. Morland essentially concurred with Dr. Greenwald's opinion that Claimant has sustained a permanent partial impairment, not due to his hernia repair, but due to ilioinguinal nerve damage. He also agreed that a 35-pound lifting restriction was appropriate, without elaboration. In addition, Dr.

Morland noted that he would not recommend a spinal cord stimulator due to Claimant's potential symptom magnification, and that Claimant's prognosis for further invasive procedures in general was not good. As a result, although he did not specifically enunciate it, Dr. Morland apparently found Claimant to be at MMI.

17. Utilizing the *AMA Guides, 6th Edition*, Dr. Morland opined that Claimant has suffered PPI of 4-5% of the whole person due to his ilioinguinal nerve pain. He noted that the *6th Edition* allots up to 5% for "severe neurogenic pain in an anatomic distribution" for ilioinguinal nerve pain. *See Id.* at p. 344, Table 13-20. Dr. Morland agreed with Dr. Greenwald's 2% rating based upon the *5th Edition*, but chose instead to rely upon the *6th Edition*. He reasoned that Claimant's course supports a finding of severe neurogenic pain associated with scar tissue development. Dr. Morland also acknowledged "consistent" psychological opinions confirming that psychological factors (depression, anxiety, somatoform disorder) are affecting his pain. Defendants' Exh. 2, p. 555.

Psychological assessments.

18. **Michael H. McClay, Ph.D.** On July 26, 2006, Dr. McClay evaluated Claimant for the WorkFit program. On that day, Claimant reported 4-5/10 pain and sleep difficulties. Dr. McClay administered the Battery for Health Improvement-2 (BHI-2), which produced a valid profile and elevated scales for depression and functional complaints, even though Claimant denied feeling depressed. He also administered the SF-36 health survey, which indicated Claimant was reporting profound physical limitations and pain, as well as mood and thought problems that are counterproductive to a physical rehabilitation process.

19. Dr. McClay noted that Claimant may be displaying some elements of symptom

magnification syndrome. He opined that Claimant has elements of chronic pain syndrome including increased sensitivity to pain, somatic complaints, a secondary sleep disorder and depression, to which Claimant is oblivious. Notwithstanding Claimant's SF-36 results, Dr. McClay recommended the WorkFit program. He also recommended biofeedback sleep therapy, training in pain coping skills, vocational counseling and antidepressant medication. On August 3, 2006, Dr. McClay assessed Claimant's insomnia index and diagnosed mild to moderate sleep disturbance. He provided Claimant with a customized sleep therapy regimen.

20. **Craig Beaver, Ph.D.** On March 7 and 12, 2008, Dr. Beaver evaluated Claimant. At their first meeting, Dr. Beaver interviewed Claimant for 1½ hours. On both days, he administered psychological tests¹. Prior to rendering his opinion, Dr. Beaver reviewed Claimant's medical records back to the time of his industrial injury in October 2005. He noted Claimant had no known history of mental health pathology.

21. Dr. Beaver described Claimant's physical presentation and posture consistent with his medical records. Claimant was on time, neatly groomed, had a tendency to lean to the left, complained of pain difficulties and physical discomfort and occasionally got up and walked around due to pain. Mentally, Dr. Beaver found Claimant generally alert but internally distractible.

22. Claimant was able to follow conversation and simple instructions but had difficulties with subtleties in communication that Dr. Beaver attributed to the fact that English is

¹ Dr. Beaver administered the Validity Indicator Profile, Personality Assessment Inventory, P-3 Pain Patient Profile, Grooved Pegboard Test, Controlled Oral Word Fluency Test, Wechsler Test of Adult Reading, Rey Complex Figure Test, Color Trail Making Test, Rey Auditory Verbal Learning Test, Consonant Triagrams Test, Rey 15 Item Memory Test, Wechsler Adult Intelligence Scale-III (Prorated), Wisconsin Card Sorting Test and Victoria Symptom Validity Test.

Claimant's second language. Dr. Beaver ultimately decided not to administer the MMPI-2 because, after having Claimant read selected items and repeat back his understanding of the words, Dr. Beaver believed language to be too great a barrier to overcome to obtain a valid and meaningful test. Claimant's reading level evaluation also confirmed that the MMPI-2 was not appropriate for Claimant. In addition, Dr. Beaver took Claimant's language and reading difficulties into consideration when interpreting results from the tests he did administer.

23. Claimant scored within normal limits on three tests designed to evaluate his motivation and effort on cognitive testing, so Dr. Beaver considered his test results valid. He assessed Claimant's intellectual skills and abilities at the low end of the low-average range. Claimant's verbal fluency, reasoning and problem-solving all measured below average, while, consistent with reports of his job skills, he performed significantly above average on the Grooved Pegboard test. Claimant's ability to copy a complex visual design was excellent, while his visual spatial problem solving skills were, surprisingly, relatively poor.

24. Claimant showed no significant elevations on the P-3 Patient Profile, which measures levels of depression, anxiety and somatization in comparison to other medically documented chronic pain patients.

25. On his Personality Assessment Inventory, Claimant's responses indicated a high level of defensiveness; he presented as somebody who has a strong tendency to present himself in a positive light and to deny or minimize psychological or other related types of problems. Nevertheless, test results indicated that Claimant was experiencing a moderate amount of psychological distress and a great deal of depression and anxiety about his physical functioning level. His test results further showed Claimant has a strong need to be accepted by others and, as

a result, he is likely to shun controversy to avoid conflict.

26. With respect to his pain management, Dr. Beaver stated, "Diagnostically, while he shows some tendency to increased somatization and response to psychological stressors, it is not a particularly predominant theme. There is evidence of a modest amount of emotional distress." Defendants' Exh. 2, p. 328. Dr. Beaver found no drug dependency issues and no strong addiction potential in Claimant. He also found no secondary gain issues related to a desire not to work or potential financial gain, and no evidence of either histrionic personality disorder or malingering.

27. Dr. Beaver did suggest that Claimant may feel a need to overstate his pain to justify inabilities to do things he thinks he needs to do. He used to pride himself on his strength and is now unable to maintain that persona. In addition, he is committed to the traditional male role model and is thus greatly troubled by the idea that he may not be able to meet those breadwinner-type expectations. Dr. Beaver opined that Claimant's mild depression is likely due to a combination of these concerns, plus concerns about his perceived pain difficulties. He clarified that these perceptions are adding to Claimant's difficulties in coping with his pain, but they are not likely a factor in causing it.

28. Dr. Beaver diagnosed chronic pain behavior with symptoms that wax and wane, and evidence of symptom magnification in that Claimant's pain increases when he is feeling emotional stress. He opined that the industrial injury is the primary cause of Claimant's psychological conditions, in combination with his ethnic cultural background. He recommended Effexor for depression, pain management and to aid with sleep.

29. Dr. Beaver opined that Claimant would be at MMI, from a psychological standpoint, after 60 days of treatment with Effexor and counseling. However, as a result of Dr.

Calhoun's evaluation and treatment, Effexor was never prescribed (see below). Dr. Beaver did not believe an increased PPI rating was warranted.

Robert F. Calhoun, Ph.D.

30. Pursuant to Dr. Beaver's recommendation, Claimant was evaluated and treated for psychological concerns from June 16, 2008 through October 13, 2008. Unlike Dr. Beaver, Dr. Calhoun administered the MMPI-2 and, in addition, the Pain and Impairment Relationship Scale (PAIRS). He also noted that Claimant was born in the United States, then emigrated to Poland, then returned to the United States, in a detailed story that sounds more like the events Claimant has reported concerning his father's life than those he has reported from his own. Given the balance of evidence in the record, this error is attributed to a mistake in Dr. Calhoun's understanding or record-keeping, and not to any inaccuracy or untruthfulness on Claimant's part.

31. Dr. Calhoun found Claimant's MMPI-2 responses established a valid profile. They further indicated that Claimant is defensive. Patients with this profile lack insight into their own feelings, motivations and behaviors. Claimant's responses also suggested significant depression, a risk for somatizing stress, somatic preoccupation, lassitude and malaise. According to his PAIRS results, Claimant disagrees that he should be expected to fulfill work and family responsibilities given his ongoing pain. His profile indicates he views pain as a signal to stop activity, that he is highly fearful of his pain and feels disabled from it. He functions from a pain contingent activity level and believes all of his problems would be solved if his pain were gone.

32. Dr. Calhoun recommended eight sessions of psychological treatment to address the psychological factors related to his pain level and emotional suffering. Unlike Dr. Beaver, he did not recommend any psychotropic medications.

33. In August 2008, Claimant reported feeling victimized by some of his physicians and worsening pain. He believed he needed another surgery because he thought he had "nerves trapped in the mesh." Defendants' Exh. 2, p. 350. Dr. Calhoun opined that Claimant had a significant illness conviction that would persist until he got another medical opinion. So, Dr. Calhoun concurred that a second opinion from the Mayo Clinic would be a good idea.

34. In September 2008, Claimant brought in literature on hernia repair describing how nerves sometimes get caught in the mesh. Dr. Calhoun noted with apparent dismay that Claimant was still searching for a medical cure for his pain. He encouraged pacing through the pain, as opposed to bracing himself, and other pain control techniques.

35. By October 2008, Dr. Calhoun was unsure whether Claimant would benefit from further counseling because his continued quest for a medical solution was inhibiting his ability to cope psychologically with his pain. He believed Claimant was stuck in a pain-inducing cycle fueled by his psychological response to pain.

36. On Claimant's last visit, Dr. Calhoun recommended no further intervention other than Elavil and counseling. He believed Claimant needed to commit to counseling and stay compliant with his medications to improve his condition.

37. Dr. Calhoun wrote on December 24, 2008 that Claimant had reached MPI because:

It is highly unlikely that he will benefit from further psychological treatment as he continues to want a medical solution for his pain problems. In talking to Dr. Binigar and looking at the extensive medical treatment thus far, it is highly unlikely that Mr. Lukasik will benefit from further psychological and/or medical treatment.

Defendants' Exh. 2, p. 382. He further opined that Claimant demonstrated no psychological factors that would preclude Claimant from full-time employment. He deferred medical

restrictions to Claimant's current physicians.

Vocational consultant opinions.

38. **Maureen Niland.** In 2006, Claimant was assisted by Maureen Niland, vocational rehabilitation consultant with the Idaho Industrial Commission Rehabilitation Division (ICRD). Ms. Niland documented Claimant's job skills and oversaw preparation of a Job Site Evaluation (JSE).

39. On July 25, 2006, Ms. Niland interviewed Claimant. At the time, Claimant was still recovering from his first surgery, working half the day with a ten pound lifting restriction, and attending the WorkFit program during the other half. He was earning \$15 per hour. Ms. Niland reported that Claimant had graduated from high school in Poland and had infantry experience in the military. In addition, Ms. Niland reported that Claimant has considerable transferrable work skills as a welder/fabricator and janitor, with additional long-haul truck driving experience and metal factory training.

40. Also on July 25, 2006, Ms. Niland met with Employer to conduct a JSE, then sent the JSE report to Dr. Greenwald, for review. According to the JSE, Claimant's job requires continuous lifting of 20 pounds or less and occasional lifting of over 100 pounds. In addition, it requires continuous reaching at shoulder level or below, grasping and handling; frequent bending, stooping and twisting to sand and grind metal; frequent pushing or pulling on a grinder; occasional climbing on a six-foot ladder; and occasional reaching above shoulder level to load and unload shelves.

41. Ms. Niland closed Claimant's file on November 6, 2006 because he had worked at his time-of-injury position and wage for over 30 days.

42. **Nancy J. Collins, Ph.D.** Dr. Collins prepared a vocational assessment report at Claimant's request. She has been a counselor certified by the Commission on Rehabilitation Certification since 1994. She holds a doctorate of philosophy degree in adult education with an emphasis on vocational rehabilitation and a master of arts in counseling psychology. She has also completed a post-graduate certificate in life care planning. Her other certifications include diplomate and senior disability analyst with the American Board of Disability Analysts, forensic vocational expert with the American Rehabilitation Economics Association, and certified life care planner with the Commission on Disability Examiner Certification. She continues to supplement her education regularly as a prerequisite to maintaining her certifications. Formerly, Dr. Collins worked as a rehabilitation counselor.

43. Dr. Collins interviewed Claimant on or about April 30, 2010. In addition, she reviewed Claimant's relevant medical records and Claimant's interrogatory responses dated January 17, 2007. By the time of the hearing, she had also reviewed the vocational report of Mr. Barton. Dr. Collins relied upon several data sources in preparing her opinion, including: *SkillTRAN* software; *Idaho Department of Labor (IDOL), Occupational Employment & Wage Survey, 2009*; O*NET; *Occupational Outlook Handbook, 2009*; and Idaho Department of Labor (IDOL) job listings.

44. In her April 30, 2010 report, Dr. Collins discussed the factors she considered in assessing Claimant's PPD.

- a. First, she noted medical restrictions issued from 2006 through the present, including Dr. Greenwald's 2006 50-pound lifting restriction, Dr. Cushman's 2007 25-pound lifting restriction, Dr. Calhoun's 2008 opinion that Claimant should not be restricted from work due to his psychological condition and Dr. Morland's 2010 35-pound lifting restriction.

- b. Second, she considered Claimant's subjective complaints, noting they are well-documented and internally consistent over time, and his medical care providers' opinions that he has some depression and somatization tendencies that are affecting his pain perception and physical function.
- c. Third, she acknowledged that Claimant presents as a disabled individual in the way he ambulates and communicates, appearing depressed and teary with respect to the latter.
- d. Fourth, she considered his educational background, including his high school education with average grades, his military experience and his welding training. Dr. Collins noted Claimant holds a commercial driver's license and is not computer literate. She characterized his English as "good." Claimant's Exh. 9, p. 9.
- e. Fifth, Dr. Collins reported Claimant's vocational history, including experience working at a steel factory manufacturing gears and on a Fiat assembly line, as well as working as a janitor, fast food cook, truck driver and forklift operator. Claimant's primary experience, however, is in welding/fabrication. Specifically, Claimant has fabricated metal doors, door frames, windows, hinges and locks for almost 20 years.

45. Dr. Collins also characterized Employer as "sympathetic" because of the significant accommodations it provides, including assistance in lifting anything over 25 pounds² and time off if the pain ever gets too overwhelming. In addition, Employer has retained Claimant even though it now takes Claimant much longer to complete his assignments. Dr. Collins also noted that Claimant can no longer do on-site installations, which she reported was typically part of Claimant's work³.

46. Considering Claimant's medical and non-medical factors, as well as the various opinions regarding an appropriate lifting restriction, Dr. Collins opined Claimant has suffered PPD of 40% inclusive of his PPI.

² Mr. Dougherty testified that Claimant's estimation of a 20-25 pound door equates to an actual weight of 40-45 pounds. He explained that he knows because he has shipped them.

³ Conversely, Mr. Dougherty testified that installations have never been a large part (maybe 1%) of Claimant's job.

47. **Leroy H. Barton, III, M.E.** Mr. Barton prepared a vocational assessment report at Defendants' request. He has been a rehabilitation counselor certified by the Commission on Rehabilitation Certification since 1994. He holds a master of education degree in general counseling with specialized training of undisclosed origin in analyzing jobs, disability management, ethics in rehabilitation, job development/job placement, psycho-social aspects of delayed recovery and disability, reflex sympathetic dystrophy (aka: CRPS), vocational assessment and testimony, and wage earning capacity, among other subjects. Formerly, Mr. Barton served as a rehabilitation consultant and manager of the ICRD.

48. Mr. Barton interviewed Claimant on August 26, 2010. In addition, he reviewed Claimant's relevant medical records, the vocational report of Dr. Collins, ICRD case notes, Claimant's tax returns from 1999 through 2005, his 2006 wage records, the first report of injury and Claimant's interrogatory responses dated January 17, 2007. He relied upon several data sources in preparing his opinion, including: *Occupational Employment Quarterly II*, 2.0; *Boise City MSA*, 2009, 4th Quarter; *IDOL Occupational Employment & Wage Survey*, 2009; *U.S. Department of Labor, Dictionary of Occupational Titles*, 4th Edition; *O*NET*; *Guide for Occupational Exploration*; IDOL job listings; and various posted job openings. Mr. Barton also lists "extensive knowledge of the pertinent job market." Defendants' Exh. 7, p. 2. In addition, he interviewed Tom Dougherty, owner of Employer, on August 25, 2010.

49. In his August 27, 2010 report, Mr. Barton enumerated the factors he considered in assessing Claimant's PPD. Contributing to Claimant's employability are his intelligence, Employer's high esteem for his work ethic and ability, his history of several skilled jobs requiring extensive training, his high level of expertise at his job, his likable and sociable

personality, and his record of dependability and trustworthiness. Detracting from Claimant's employability are the medical restrictions that limit him to medium or lighter work, his age of 48 years, his poor reading skills and other issues related to English being his second language, and his presentation as an obviously disabled person.

50. Considering Claimant's medical and non-medical factors, as well as his work restrictions including a 35-pound lifting limit, Mr. Barton opined Claimant has suffered PPD of 20% in excess of his PPI. If Claimant's lifting restriction were increased to 50 pounds, his PPD assessment would decrease to 15% in excess of PPI.

DISCUSSION AND FURTHER FINDINGS

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, 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, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

51. **Claimant's credibility and pain limitations.** A claimant's credibility is generally at issue in a workers' compensation proceeding. Here, the scrutiny is heightened because Claimant is reporting significant pain in the absence of objective medical findings supporting a definite cause. In addition, there is evidence that a concurrent psychological process may be magnifying Claimant's symptoms, thereby affecting his ability to function and maintain gainful employment.

52. Neither Claimant's medical providers nor Defendants dispute that Claimant does

indeed experience some residual pain. Further, Claimant's presentation at the hearing and at the deposition of Mr. Barton, also attended by the Referee, was consistent with his claims. Claimant's physical appearance evidenced a distinct asymmetrical posture, he stood and walked around at times in what appeared to be genuine discomfort, and his testimony, both on direct and cross examination, was unrestrained, heartfelt and persuasive. The Referee's observations of Claimant are consistent with Claimant's testimony that he has suffered profoundly, not only with his chronic pain, but also with the psychological effects brought on by the limitations accompanying that pain.

53. Three psychologists have evaluated Claimant, yet none have concluded that Claimant has factitious disorder, that he is malingering, or that he has secondary gain motives related to financial gain or work avoidance. Further, Claimant has never been diagnosed with any psychological conditions which may increase his pain experience without his knowledge, such as somatization disorder, symptom magnification disorder or histrionic personality disorder. Nevertheless, Dr. McClay noted that Claimant may be displaying elements of symptom magnification disorder, Dr. Calhoun opined that Claimant was caught in a pain cycle exacerbated by his psychological reaction to his pain, and Dr. Beaver found it likely that Claimant experiences heightened pain when he is under stress.

54. These psychologists had differing levels of contact with Claimant at different times, and the conclusions drawn by each are, likewise, somewhat different.

55. Of the three, only Dr. Beaver explained how he took Claimant's ethnic background and English language difficulties into account in interpreting Claimant's test results developing his opinions. In addition, the testing he administered was the most extensive and,

importantly, Dr. Beaver was the only one to administer the P-3 Patient Profile. Since there is no dispute that Claimant experiences residual chronic pain, the results from this test, which measured Claimant's responses regarding his somatic complaints against the responses of others with chronic pain, as opposed to others in the general population, are most persuasive in terms of whether Claimant is over-reacting to his pain. Claimant's performance on this test indicates he is not significantly more depressed, anxious or prone to somatization than other pain patients.

56. Dr. Calhoun treated Claimant and spent more clinical time with him than either Dr. Beaver or Dr. McClay⁴. However, his frustration with Claimant and ultimate refusal to continue treating him because he continued to seek a medical cure for his pain seems short-sighted and unduly harsh, particularly given that subsequent medical interventions did reveal some correctable physiological causes for Claimant's pain⁵. In addition, Dr. Calhoun's unconditional reliance upon MMPI-2 results without additional explanation following Dr. Beaver's very detailed and well-reasoned description of why he elected not to administer that test seems misguided. As for Dr. McClay, his participation in Claimant's care is more remote and less involved than either Dr. Beaver's or Dr. Calhoun's. As a result, the Referee finds Dr. Beaver's opinions regarding Claimant's psychological status more persuasive than those of Dr. Calhoun or Dr. McClay.

57. The Referee finds, consistent with Dr. Beaver's evaluation, that Claimant may overstate his pain to justify his inabilities. In addition, he may experience heightened pain in

⁴ It appears that Dr. McClay saw Claimant once before preparing his opinion, Dr. Beaver saw him twice, and Dr. Calhoun had eight sessions with Claimant.

⁵ At both of his subsequent surgeries, an immune reaction to the mesh used during the first two surgeries was identified. In addition, inflammation and excessive scar tissue entrapping and displacing Claimant's vas deferens was identified by Dr. Grundfest when she operated on Claimant's right side.

times of stress. Importantly, however, Claimant's mental state does not create his pain. None of these findings establish that Claimant's representations of his abilities to function have, at any time, been significantly distorted. As a result, the psychological evidence fails to establish Claimant is not a credible witness.

58. Claimant's stated intolerance for many oral medications also adds to the complexity of his credibility analysis. As with his pain complaints, however, Claimant's problems with his medications were often accompanied by objectively verifiable symptoms, such as a rash or muscle jerking. Further, this information was available in the medical records available to each psychologist during their respective evaluations of Claimant. The Referee finds Claimant's reports of medication side effects do not amount to evidence disparaging to his credibility.

59. Defendants also cite the August 9, 2006 letter by Chad Bainbridge, P.T.A., a physical therapist assistant, stating that Claimant's performance on a functional capacity assessment was only conditionally valid because he was working to his perceived, as opposed to his actual, abilities. Apparently, Mr. Bainbridge faulted Claimant for limiting himself on testing due to his pain. The bulk of the evidence in the record indicates Claimant exerted appropriate effort throughout several courses of physical therapy. Therefore, Mr. Bainbridge's experience appears to be an isolated incident recorded by a one-time evaluator. As such this evidence is insufficient to establish that Claimant is not a credible witness.

60. In addition to the psychological and medical evidence regarding Claimant's credibility, Mr. Dougherty testified that Claimant underestimates his lifting ability. He testified that Claimant can lift more than he thinks he can because he has observed that doors or door

frames that Claimant estimates weighs 20-25 pounds actually weigh around 40 pounds. However, Mr. Dougherty failed to establish that Claimant lifts these. Claimant testified that he can't lift them because they are too heavy, that the grinder he uses is the heaviest thing he can lift, and that it weighs 18 pounds. Mr. Dougherty's testimony fails to establish that Claimant underestimates the amount of weight he can lift without pain. As a result, this testimony has no bearing upon Claimant's credibility.

61. Claimant's pain behaviors are unusual, making it more difficult to evaluate how they relate to the pain he is actually experiencing. However, the Referee finds inadequate evidence in the record to establish that Claimant suffers from any psychological condition that exacerbates his pain, or that he has, intentionally or unintentionally, otherwise significantly exaggerated his inability to function at home or at work.

62. The Referee finds Claimant is a credible witness. His testimony concerning his perceptions, experiences and subjective complaints is given full weight.

63. As with all witnesses, however, where Claimant's testimony as to the date on which a relevant event occurred conflicts with information in an otherwise reliable contemporaneously made document, the Referee will adopt the date referenced in the document as being more reliable.

Lifting restriction.

64. Claimant has a permanent lifting restriction. The evidence in the record is unclear as to whether a 35-pound restriction, approved by Dr. Morland, or a 50-pound restriction, issued by Dr. Greenwald, is more appropriate. This issue must be decided because the vocational expert opinions are contingent upon this variable.

65. On each of their final (and in Dr. Morland's case, only) examinations of Claimant, Dr. Greenwald and Dr. Morland each opined that a 35-pound restriction was appropriate. Dr. Greenwald noted that she would reevaluate her opinion after obtaining more information regarding her torn recti abdominal muscle theory from Claimant's manual therapist. Dr. Greenwald modified her recommendation to 50 pounds after she was prompted by Defendants' attorney, many months later. She had not re-examined Claimant, but essentially agreed to the modification because the weight limit was somewhat arbitrary to begin with.

66. Claimant argues that Dr. Greenwald's 50-pound restriction has less foundation than her 35-pound restriction, which she formulated after going over with Claimant what he could and could not lift. However, Dr. Greenwald indicated in her November 17, 2009 opinion that her working diagnosis of recti abdominal muscle tear was also a basis for the 35-pound restriction. Since the information from Jack Morris, manual therapist, did not confirm that diagnosis, Dr. Greenwald apparently abandoned it and, along with it, her basis for the 35-pound restriction.

67. The 50-pound restriction, issued by Dr. Greenwald in consideration of Claimant's bilateral hernia surgeries and to protect his back, is well-supported in the record. Dr. Morland did not explain the basis for his 35-pound weight restriction.

68. Claimant's medical records establish that his hernias are healed, and that the primary reason for any medical restriction is to protect his back due to his flexion posture. The record establishes that a 50-pound lifting restriction is adequate to protect him from further undue injury and is, therefore, appropriate for purposes of determining Claimant's right to

worker's compensation benefits. However, as developed infra, the Commission must also consider the impact of Claimant's subjective complaints.

Permanent partial 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 nonprogressive at the time of the evaluation. Idaho Code § 72-422. “Evaluation (rating) of permanent impairment” is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and on 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).

69. The parties agree that Claimant has reached his maximum medical improvement.

70. Claimant's complaints following his four hernia repair surgeries include right-sided chronic pain from his testicle radiating to points throughout his anterior and posterior torso, worsened by movement including ambulating, bending, being jostled such as riding over a bump in a car, lifting his right arm and lifting objects over approximately 20 pounds. In addition, he has developed an asymmetrical flexion posture in response to his pain which puts him at greater risk for back injury.

71. In 2006, Dr. Greenwald, Claimant's treating physiatrist, opined that he had suffered 2% whole person PPI due to ilioinguinal nerve damage. She relied upon the *AMA*

Guides, 5th Edition, which was current at the time. The *5th Edition* did not specifically address ilioinguinal neuropathy, so she likened Claimant's condition to sural neuropathy causing dysesthesia, for which a 2% whole person PPI rating is recommended. Dr. Morland concurred with Dr. Greenwald's approach, given the limitations of the *5th Edition* with respect to Claimant's condition.

72. After the *6th Edition* was published, Dr. Greenwald continued to confirm her 2006 PPI assessment. She did not elaborate on the authoritative basis for affirming her PPI rating in 2009, so it is presumed that she was still relying on the *5th Edition* methodology.

73. The credibility of a PPI rater in any given case will depend upon the completeness and accuracy of the facts that form the basis for that analysis, as well as the applicability of the authority on which the rater chooses to base his or her opinion. Here, there is no dispute between the parties about the appropriate basis for Claimant's permanent partial impairment. Both Dr. Greenwald and Dr. Morland assessed ratings as a result of chronic pain due to Claimant's ilioinguinal nerve damage. However, they each relied upon different editions of the *Guides*. Therefore, the first issue to resolve is whether either version of the *Guides* is more authoritative with respect to evaluating Claimant's permanent impairment.

74. In this case, only one version, the *6th Edition*, suggests a permanent partial impairment rating specifically related to ilioinguinal neuropathy. This is because, "In recent editions of the AMA *Guides*, certain peripheral nerves have been inadvertently omitted...The purpose of [Table 13-20] is to rate miscellaneous peripheral nerves that are not ratable in other places in the *Guides*." *6th Edition*, p. 344.

75. Under the *5th Edition*, Dr. Greenwald was required to make an educated guess as

to the proper rating for ilioinguinal nerve damage by applying the advice for sural nerve damage as a reference point. It is undisputed that Dr. Greenwald's approach was appropriate given the limited information available in 2006, before the 6th Edition was published. However, a new rating guide is now available that addresses the specific source of Claimant's permanent impairment, allowing a more precise PPI assessment. The 6th Edition provides information more closely tailored to Claimant's condition. As a result, the Referee finds the 6th Edition more authoritative in this case.

76. Defendants argue that Dr. Greenwald's opinion based upon the 5th Edition should be adopted because Defendants should not be required to pay additional PPI benefits just because of their bad luck that an updated rating guide was published after the initial PPI benefit was paid, but before Claimant's statute of limitation expired. They offer a number of slippery slope scenarios in support of that argument that are unpersuasive where, as here, the newer edition offers a rating scheme that provides a more complete assessment of the claimant's condition.

77. As to Claimant's specific permanent partial impairment percentage due to his ilioinguinal neuropathy, the 6th Edition allows for a rating of 0-5%, depending upon severity. Specifically, the rating categories include: no neuralgia (0%); sensory loss only in an anatomic distribution (1%); mild to moderate neurogenic pain in an anatomic distribution (2-3%); and severe neurogenic pain in an anatomic distribution (4-5%). *Id.* With respect to rating dysesthetic pain, the 6th Edition specifically instructs that severe burning pain in the ilioinguinal nerve following hernia repair may form the basis for a 4-5% PPI rating:

Sensory loss in these nerves results in little or no impairment in ADLs. However, burning dysesthetic pain may be the source of significant impairment. For example, a patient who has undergone an inguinal hernia repair may have the sequela of severe burning pain in the ilioinguinal nerve. Use Table 13-20 to rate

such painful focal neuropathies that cannot be rated from other chapters.

AMA Guides, 6th Edition, p. 344.

78. Dr. Greenwald, in 2006, characterized Claimant's ilioinguinal neuropathy as "mild" and did not add to that description in her 2009 opinion except to say that Claimant seemed better than before. Dr. Morland, however, found it suitable to rate Claimant in the "severe" category because his complaints of debilitating pain have been consistent over an extended period, through a great deal of treatment, with multiple care providers.

79. Dr. Morland described Claimant's reported functional limitations due to his pain:

He reports that he is always leaning on his left arm at work, having difficulty standing, and has an abnormal posture...it hurts to push, have a bowel movement or urination. It is OK to eat, but sleeping is difficult. He wakes 2-3 times a night because he can't stay in one position. He has to walk and sit, walk and sit. He also reports he cannot exercise...he can work for 2-3 hours, but cannot lift, and has to lay on a table.

Claimant's Exh. 8, p. 5. At the hearing, Claimant described what movements are painful:

I can't turn to the left or the right. If I do it very slow, very little and very slow. The right-hand side where the hernias were and from my right testicle the pain is always there and the more I move, the more I twist, I have to move like a robot. I can't just forget about feet. I have to move whole structure with me. If I forget about feet then get more twisted and more pain, and I can feel more in my testicle and incision area...

Tr., pp. 52-53.

When I bend and straighten up I feel like something stretches from my testicle area like somebody pulling my testicle up around here and up through my chest...

It feels like it – like something want to hop out of your belly and you can't see and something always there, something pushing on your belly, something pulling. And the more you move the worse it gets. Basically this is it. I don't know how to describe any better.

Tr., p. 53. Claimant described his right groin pain to Dr. Greenwald as "pumping" and

“stabbing”. Defendants’ Exh. 2, p. 531. He also described at the hearing that he can no longer perform many activities, such as chopping wood and starting the lawn mower, because using his right arm brings pain, and he cannot do these things with his left arm. He also cannot paint or do construction jobs or many chores around the house. He had to buy a riding lawn mower, the use of which going over bumps is also painful, because he could not operate a push mower. Claimant also described difficulties standing or sitting for long periods and going over bumps in cars:

If I get some delivery job or something like I can’t stand. My belly. I would, but my belly I can’t stand the vibrate when driving to work or small bumps you have to hold it go over the sewer cover I have to hold my belly so it won’t shake. I don’t understand why it hurts after so many surgeries and after so many years.

Tr., p. 56. He also describes difficulty finding a comfortable position in which to sleep, keeping him awake at night, due to his pain. Not surprisingly, his libido and ability to engage in sexual relations have suffered⁶.

80. Claimant does not describe his pain as the Dante-esque burning pain that is sometimes associated with severe dysesthesia. Nevertheless, he describes significant pain, brought on by a number of ordinary movements of both his upper body and his lower body, that waxes with increased activity and wanes with rest, but is always somehow present. His pain affects his ability to perform ordinary functions, including household chores, recreational activities and sexual relations. In addition, he is medically restricted from activities requiring him to lift more than 50 pounds.

81. Dr. Greenwald consistently opposed any additional surgeries after Claimant’s first

⁶ Claimant’s low testosterone condition, diagnosed in late 2009, almost certainly plays a role. However, the significance of that role is not quantified in the record.

surgery until, finally, she deferred to Drs. Anderson and Krueger, who both recommended surgical intervention to relieve Claimant's significant pain. Surgical intervention did partially alleviate Claimant's pain once his mesh sensitivity and vas deferens entrapment were identified and corrected. Further, Dr. Greenwald deferred to Dr. Crane with respect to Claimant's ureter pathology. Her approach has consistently been to recommend conservative treatment or to defer to other physicians in Claimant's case. Dr. Greenwald's treatment and opinions are consistent with an underestimation of Claimant's pain and a less than confident grasp on his condition. As such, even though she was Claimant's treating physician for a period after his industrial accident, the Referee finds insufficient evidence to establish that her opinion should be afforded more weight than Dr. Morland's, derived from his review of Claimant's relevant medical records and one examination.

82. The Referee finds Claimant has proven he has suffered permanent partial impairment in the amount of 4% of the whole person based upon the advice from the 6th Edition regarding severe ilioinguinal neuropathy. Employer is responsible for the payment of an impairment of 4% of the whole person, with credit for PPI paid to date.

Permanent partial disability.

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).

Permanent disability is defined and evaluated by statute. Idaho Code § 72-423 and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

83. Although Claimant is still working at his pre-industrial accident job, earning \$.50 more per hour, it is undisputed that, due to his workplace injury, he has suffered both a loss of access to the job market and a loss of earning capacity in the event he should leave his current job.

Relevant medical factors.

84. As a result of Claimant's industrial accident, he was assessed a 50-pound lifting restriction (see above). He has also persuasively testified that his subjective pain limits his ability to lift more than 20 pounds, to bend, to ambulate and to raise his right arm, among other things.

85. Pain is a relevant medical factor for the Commission to consider when determining disability. The evidence establishes that Claimant's ability to engage in gainful employment is limited by his pain.

86. The Referee finds Claimant's relevant medical factors limiting his ability to work include his 50-pound lifting restriction plus his functional limitations, due to pain, on his abilities

to ambulate, bend, lift more than 20 pounds, withstand jarring such as going over a bump in a car and raise his right arm.

Non-medical factors.

87. The Referee finds Claimant's ability to work is also limited by non-medical factors including his high school-level education and subsequent limited training and experience, his appearance as physically disabled, and his difficulties with English reading and comprehension, noting that his conversational skills at a superficial level are adequate. His non-medical factors are mitigated by his high-level skills and expertise in the specialized field of hollow metal welding, significant experience in janitorial work and his workplace history of dependability, a strong work ethic and sociability.

"Sympathetic employer."

88. Mr. Dougherty testified, contrary to Dr. Collins, that he is not a sympathetic employer, and that it is just "good business" to accommodate Claimant by tasking other employees with lifting objects over 25 pounds for him and allowing Claimant time off when necessary.

89. Claimant's concern that he may not be able to find a similarly accommodating employer, should he lose his current job, is understandable. Ordinarily, a claimant must establish that an employer has provided accommodations that are "out of the ordinary" to prove he is a sympathetic employer. *Christensen v. S.L. Start & Associates, Inc.*, 147 Idaho 289, 207 P.3d 1020 (2009). Here, there is inadequate evidence of comparative data from which to find that Mr. Dougherty is a sympathetic employer. Given Claimant's expertise, it is not beyond the realm of possibility that other employers may also see it as a good business practice to reduce his time

lifting so he can spend more time welding. Further, the evidence in the record is equivocal as to whether Employer's allowances of time off to Claimant to tend to his medical issues are out of the ordinary.

90. In addition, given the requirements of the Americans with Disabilities Act, the mere fact that an employer has made accommodations does not indicate the employer was "sympathetic". Here, there is inadequate evidence to establish that Employer's accommodations are out of the ordinary. They represent reasonable and perhaps legally required accommodations made for an employee whose core work was real and valued.

91. The Referee finds Claimant has failed to establish that Employer is a sympathetic employer, as that term is formally applied elsewhere in Idaho Worker's Compensation Law. However, it is also clear that Claimant could not perform all elements of his time-of-injury job, or a similar position, without accommodation.

Quantification of Claimant's PPD.

92. The Referee finds Claimant's access to suitable work, based upon his physician-assessed restrictions and abilities, is more limited now than at the time of his industrial accident in 2005. Dr. Collins and Mr. Barton each opined that Claimant has suffered both a loss of access to gainful employment and a loss of wage-earning capacity as a result of his industrial injury. However, they part ways as to the extent of each, utilizing similar methodologies but different market data sources. The extent to which each opinion should be considered in reaching a determination in this case is addressed, below.

93. Dr. Collins and Mr. Barton each considered relevant information concerning Claimant, including his medical and vocational records and his answers to Defendants'

interrogatories. Mr. Barton also interviewed Claimant and Mr. Dougherty and visited the job site. The Referee finds Dr. Collins and Mr. Barton each relied upon reasonably relevant, accurate and complete information about Claimant's relevant work and medical history to form the basis for a PPD opinion.

94. Defendants contend that Mr. Barton obtained important information about Claimant's job market from Mr. Dougherty that Dr. Collins failed to consider. The Referee disagrees.

95. Mr. Dougherty testified, essentially, that Claimant is so good at his job that, even in his current condition, other employers in the Treasure Valley with a hollow metal welder position to fill would jump at the chance to hire Claimant. However, Mr. Dougherty did not quantify or identify Claimant's potential competitors within the relevant applicant pool, specific information necessary to arrive at the specific conclusion Mr. Dougherty drew. In addition, Mr. Dougherty did not say when he last tested the market, although he did relate that he found someone to fill in for Claimant when he was out and that business continued in Claimant's absence. Mr. Dougherty's testimony about his own attitude concerning Claimant's access to the job market does not add significantly to the market information Dr. Collins considered.

96. With respect to target job market data, Dr. Collins relied upon *SkillTRAN* software, which categorizes the jobs contained in the *Dictionary of Occupational Titles* based upon 72 different job features, in conjunction with local data sources. Dr. Collins testified that it allows her to more accurately select positions appropriate to Claimant's restrictions than other data sources. Mr. Barton did not rely upon *SkillTRAN* software because it utilizes a nation-wide database of jobs, some of which do not exist in the Treasure Valley. Instead, he relied upon the

Boise MSA and other local data in an effort to determine how many relevant jobs actually exist in Claimant's local job market.

97. Defendants argue that Dr. Collins's market data derived from nation-wide information embedded in the *SkillTRAN* software is too imprecise a platform from which to develop a reasonably accurate opinion concerning local market access or earning capacity. Dr. Collins counters that she, too, relies upon local data and incorporates it, where appropriate, to modify the *SkillTRAN* results.

98. Claimant argues that Mr. Barton's local market data sources do not appropriately differentiate jobs that Claimant can perform, given his restrictions and limitations, from jobs that he cannot perform, because they are only categorized by broad lifting restrictions that do not specifically fit Claimant's lifting restrictions. Mr. Barton countered that he reviewed the relevant job titles and descriptions, including only those that fit Claimant's lifting ability.

99. The Referee finds that neither Dr. Collins's nor Mr. Barton's market data source sets are superior, and both are sufficiently reliable. Each has strengths and weaknesses and neither was proven more precise than the other.

100. Concerning calculations, both experts approached the task by first quantifying Claimant's loss of market access and his loss in earning capacity, then combining those results to arrive at a PPD assessment. The Referee finds both experts applied this commonly utilized overall process reasonably precisely.

101. Neither Dr. Collins nor Mr. Barton indicated the relative weight she or he allocated to each of Claimant's medical and non-medical factors. Each considered Claimant's educational background, training, job experience, expertise, English language skills, and

disabled-looking appearance. In addition, each considered Claimant's 50-pound lifting restriction.

102. Weaknesses in each opinion include Mr. Barton's failure to consider Claimant's pain limitations and Dr. Collins's erroneous assumption that Claimant's time-of-injury job required him to regularly do on-site installations. Her characterization of Employer as "sympathetic" appears harmless since she properly considered Employer's accommodations for Claimant even though the Referee disagreed with her use of the term insofar as it is formally applied in worker's compensation proceedings.

103. Mr. Barton's failure to specifically consider Claimant's pain limitations in developing his PPD recommendation is a significant failing, given the Referee's finding that they are a medical factor reducing Claimant's ability to engage in gainful employment. The extent of that failure is difficult to quantify; nevertheless, how or whether Claimant's subjective limitations should modify his physician-imposed restrictions is a principal dispute in this case vis à vis the issue of disability in excess of impairment.

104. As Dr. Collins described, subjective pain limitations are qualitatively different from medical restrictions. Claimant may choose whether to work outside his limitations and deal with the pain without risking further injury or disablement; whereas, an individual with permanent medical restrictions acts against medical advice designed to protect him from additional harm when he participates in a restricted activity.

105. Unlike an equivalent pain limitation, where a medical restriction is involved, an employee who must exceed his restrictions to perform his job functions runs a clear risk of further injury, subjecting the employer to a greater known risk of incurring a future compensable

worker's compensation claim. Therefore, an employer would reasonably be more reticent to hire an individual with a medical restriction than a competitor with an equivalent pain limitation but no medical restriction.

106. Here, Claimant's pain relevantly limits his ability to lift more than 20 pounds, ambulate, bend, withstand jarring such as going over a bump in a car and raise his right arm. The jobs Claimant could expect to land generally require him to perform these activities, which Claimant can do, but with moderate to severe limiting pain. As a result, he has lost access to a portion of the job market otherwise available to workers operating under a 50-pound lifting restriction.

107. Dr. Collins takes this loss into consideration and, consistently, recommends a higher PPD assessment than does Mr. Barton. Both expert opinions are credible; however, Dr. Collins's opinion is more persuasive due to her inclusion of Claimant's pain limitations as a factor in her disability analysis.

108. Based upon a 50-pound lifting restriction, Dr. Collins opined Claimant has lost access to 35% of his pre-injury job market and has lost 20-50% of his pre-injury earning capacity, resulting in PPD of 30-40%. She did not state whether this is inclusive of impairment, but her deposition testimony implies that it is. Since Claimant cannot actually lift 50 pounds, however, Dr. Collins opined 40% was appropriate. Mr. Barton opined that Claimant has lost access to 13% of his labor market and 19% of his earning capacity, resulting in PPD of 15% in excess of impairment (or, 19% inclusive of impairment).

109. Considering Claimant's medical and non-medical factors and the opinions of Dr. Collins and Mr. Barton, the Referee finds Claimant has suffered permanent partial impairment as a result of his industrial injury in the amount of 34% inclusive of PPI.

CONCLUSIONS OF LAW

1. Claimant has proven that he is entitled to PPI in the amount of 4% of the whole person, with credit to Defendants for 2% already paid.

2. Claimant has proven he is entitled to PPD benefits for his October 14, 2005 industrial injury in the amount of 34% inclusive of PPI.

RECOMMENDATION

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

DATED in Boise, Idaho, on ___14___ day of __April_____, 2011.

INDUSTRIAL COMMISSION

 /s/
LaDawn Marsters, Referee