

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHAEL J. PRIEST,

Claimant,

v.

VALLEY REGIONAL TRANSIT,

Employer,

and

STATE INSURANCE FUND,

Surety,

Defendants.

IC 2008-016630

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

Filed April 16, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue, who conducted a hearing in Twin Falls, Idaho on March 30, 2011. Claimant, Michael J. Priest, was present in person and represented by Kevin E. Donohoe, of Bellevue, Idaho. Defendant Employer, Valley Regional Transit, and Defendant Surety, State Insurance Fund, were represented by M. Jay Meyers, of Pocatello, Idaho. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on September 1, 2011. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law, and order.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 1

ISSUES

The issues to be decided by the Commission as the result of the hearing are:

1. Whether the condition for which Claimant seeks benefits was caused by an industrial accident;
2. Whether apportionment for a pre-existing condition pursuant to Idaho Code 72-406 is appropriate;
3. Whether and to what extent Claimant is entitled to benefits for permanent disability in excess of impairment; and
4. Whether Claimant is totally and permanently disabled, under the odd-lot doctrine or otherwise.

At the hearing, Defendants conceded the issue of causation, originally noted in the Notice of Hearing (*see* Tr., p. 5). However, significant additional evidence on this issue was admitted through post-hearing depositions, and the parties each argued it in post-hearing briefing. Therefore, pure causation or, more specifically, the work-relatedness of Claimant's low back condition, is addressed herein.

Also, Claimant's entitlement to retraining benefits was a noticed issue. However, the parties did not argue this issue in their briefing, so it is deemed waived.

CONTENTIONS OF THE PARTIES

Claimant contends that, on May 2, 2008, he sustained industrial injuries to his left shoulder, right knee and low back when he fell running up the steps to a bus. He further claims that, as a result of his injuries, he is totally and permanently disabled. Claimant relies upon the medical opinions of Drs. Verst, Hajjar and Knoebel to prove that his low back injury was caused

by the industrial accident. He relies upon the vocational opinion of Mr. Crum to establish his total and permanent disability under the odd-lot doctrine.

Defendants agree that Claimant sustained 5% permanent partial impairment (“PPI”) of the whole person as a result of his left shoulder injury. However, they counter that Claimant did not sustain any back injury as a result of the industrial accident and that he is not totally and permanently disabled. They rely upon the medical opinions of Dr. Knoebel and Dr. Hajjar to establish that Claimant’s back injury is unrelated to his employment, and the vocational opinion of Mr. Jordan to establish that, even if Claimant establishes causation, he is entitled to no more than 17-19% permanent partial disability (“PPD”) inclusive of PPI.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The pre-hearing deposition testimony of Michael J. Priest, taken August 10, 2010;
2. Joint Exhibits A through V, admitted at the hearing;
3. The testimony of Claimant and his wife, Christine Priest, taken at the hearing;
4. The post-hearing deposition testimony of Richard Knoebel, M.D., taken April 14, 2011;
5. The post-hearing deposition testimony of Douglas N. Crum, vocational consultant, taken April 19, 2011;
6. The post-hearing deposition testimony of William Jordan, vocational consultant, taken April 20, 2011; and
7. The post-hearing deposition testimony of Michael V. Hajjar, M.D., taken April 20, 2011.

OBJECTIONS

All pending objections are overruled.

FINDINGS OF FACT

1. At the time of the hearing, Claimant was 60 years of age. He was 57 at the time of his industrial accident on May 2, 2008, in which he injured his right knee, left (non-dominant) shoulder and low back when he fell running up the steps to a bus.

CLAIMANT'S VOCATIONAL HISTORY

2. Claimant graduated from high school in Declo, Idaho. During the following years, he took agricultural business classes and emergency medical technician ("EMT") training at College of Southern Idaho. Subsequently, Claimant obtained his certification and worked as an EMT. Claimant later attended Boise State University, where he took political science classes and participated in the Peace Officer Standards and Training ("POST") Academy. Claimant obtained his POST certification and went on to serve as a police officer for 20 years or so, five of which he served as the Emmett Chief of Police.

3. Claimant has held an unrestricted Class A commercial driver's license ("CDL") since at least 1991. Between 1991 and 2003, he owned and managed his own agricultural trucking business which hauled sugar beets from Washington to Nyssa, Oregon. From 1999 to 2002, he also worked for another trucking company as operations manager, where he oversaw a fleet of 96 tractor trailers and 90-100 drivers, contracted freight accounts in the northwest, and maintained a schedule to keep trucks running on a 24-hour basis. Claimant also did some dispatching. From 2003 to March 2004, Claimant worked for another company as a school bus driver.

4. In 2004, Claimant finished the requirements for his business management degree by completing both live and online courses at the University of Phoenix. Due to a financial controversy with that school he did not, however, receive his degree.

5. **Valley Regional Transit.** Claimant was hired by Employer in March 2004. Following his industrial injury, from May 2008 through September 2008, Claimant worked in a modified-duty position. Following that period, Claimant was on leave until his employment was terminated on February 4, 2009.

6. Claimant initially served as operations manager. As operations manager, he established transit routes, ensured compliance with union labor requirements, evaluated employee job performance and supervised and dispatched 30 drivers. Then, Claimant advanced to the maintenance director position. As maintenance director, he oversaw day-to-day operations of the mechanic shop, maintained bus coverage over all city routes, supervised employees (including hiring, firing and disciplinary actions, as well as arranging training and ensuring proper employee qualifications), maintained supplies and budgets, monitored building maintenance, and performed record-keeping on matters pertaining to vehicles, employees and financial activities.

7. Documents in Claimant's personnel file indicate that, in approximately August 2008, he was written up for poor performance and a paranoid attitude, among other things. His file before this period reflects no significant adverse issues with Claimant's job performance.

8. Claimant is a hunt-and-peck typist who is proficient in using a computer. He has a home computer and is comfortable using the Internet and software, including a bus tracking system at work which required him to enter and remove data.

9. Claimant has not been gainfully employed since February 4, 2009. In June 2009, he moved to Burley, Idaho, where he owned a second home. He lost his time-of-injury home in Meridian through foreclosure.

CLAIMANT'S PRIOR MEDICAL HISTORY

10. Claimant has a history of low back pain which he attributed to degenerative disc disease on his 2003 fitness determination for renewal of his CDL (JE F-10), and back and hip pain, for which he sought treatment in 2004 (JE F-12). In addition, four fingers on Claimant's left hand are partially amputated. He also has a history of insomnia, restless leg syndrome, hypertension, morbid obesity, sleep apnea treated with CPAP, hypercholesterolemia, colon polyps, diverticulitis, diabetes controlled by medication, and tobacco and alcohol dependence.

INDUSTRIAL ACCIDENT

11. On May 2, 2008, Claimant fell running up the stairs to a bus, immediately noting pain in his left shoulder and right knee. His pain persisted, so he sought medical attention three days later. His treatment course follows.

12. **Michael P. Gibson, M.D.** On May 5, 2008, Dr. Gibson, an occupational medicine physician, evaluated Claimant for right knee and left shoulder injuries. Following evaluation and testing, Dr. Gibson diagnosed a left shoulder strain (probably the biceps tendon) and a right knee medial collateral ligament ("MCL") strain with possible cartilage involvement. He recommended icing and exercises for the shoulder injury and icing plus a stabilizer for the knee. He prescribed naprosyn twice a day, and restricted Claimant from running, jumping and working overhead.

13. Claimant's symptoms worsened so, on May 12, 2008, Dr. Gibson prescribed physical therapy for his shoulder and ordered an MRI for his knee. He maintained Claimant's prior restrictions, adding no kneeling or squatting.

14. Claimant's right knee MRI revealed extensive bone bruising and some edema. This injury healed without further complication.

15. Claimant's left shoulder condition continued to worsen, so Dr. Gibson referred Claimant to an orthopedic surgeon.

LEFT SHOULDER

16. **William C. Lindner, M.D.** On August 12, 2008, Dr. Lindner, an orthopedic surgeon, evaluated Claimant's left shoulder. He assessed severe impingement-type pain unresponsive to conservative management, continued Claimant's restriction on overhead work and ordered an MRI arthrogram to rule out acute rotator cuff tear and labral pathology. That study revealed a partial thickness tear of Claimant's distal supraspinatus tendon with some delamination. It did not, however, demonstrate significant preexisting pathology. Dr. Lindner ultimately opined Claimant's left shoulder injury was most likely due to his industrial accident and recommended surgical repair.

17. On September 18, 2008, Dr. Lindner performed an arthroscopic subacromial decompression, rotator cuff repair, and pain pump placement. Claimant subsequently underwent a course of physical therapy. On March 17, 2009, Dr. Lindner opined Claimant's shoulder injury had reached medical stability and referred Claimant to his practice partner, Mark Williams, M.D., for an impairment rating. At that time, Claimant still experienced left shoulder soreness with overexertion, which Dr. Lindner apparently found normal. He recommended that Claimant remain limber and continue strengthening his shoulder.

18. **Mark S. Williams, M.D.** On April 8, 2009, Dr. Williams, an orthopedic surgeon, evaluated Claimant's left shoulder permanent partial impairment ("PPI"). Relying upon the *Guides to the Evaluation of Permanent Impairment, Sixth Edition* ("Sixth Edition"), Dr. Williams assessed 5% PPI of the whole person due to his industrial left upper extremity range of motion impairments.

19. Dr. Williams opined Claimant should do no continuous overhead activity, and no "lifting away from the body from neutral to 90 degrees and limited at 15 pounds." JE A-31. He also limited Claimant to overhead lifting of five pounds or less and overhead movements as he could tolerate. Dr. Williams further opined that Claimant has no shoulder-related restrictions on floor-to-waist movement.

LOW BACK

20. **Dr. Lindner.** On September 12, 2008, Claimant discussed low back pain radiating into his right buttocks and down his leg with Dr. Lindner, who was treating his shoulder. Although Dr. Lindner's note is somewhat ambiguous as to when Claimant's low back symptoms began, the earliest date on which Claimant could have possibly reported them to Dr. Lindner was during his first visit on August 12, 2008.

21. On October 17, 2008, Claimant underwent a lumbar spine MRI which revealed moderate spondylitic change throughout, including "a moderate degree of right-sided foraminal narrowing without mass effect on the exiting right L5 nerve root" and "significant right lateral recess stenosis resulting from large right-sided facet osteophytes resulting in mild mass effect on the proximal portion of the traversing right S1 nerve root." JE A-21. Dr. Lindner opined these findings evidenced "considerable changes consistent with stenosis of the L5 nerve root on the right side" and referred Claimant to a neurosurgeon. JE A-23.

22. **Michael V. Hajjar, M.D.** On November 12, 2008, Dr. Hajjar, a neurosurgeon, evaluated Claimant's low back condition. He reviewed Claimant's lumbar spine MRI, opining, "This film demonstrates evidence of spinal stenosis as well as degenerative changes in the lumbar spine as well as some disk bulging which is worse at the L4-5 level." JE B-4. He wrote to Dr. Lindner on November 26, 2008, "Mr. Priest is a very pleasant gentleman with a history of back problems as well as lower extremity problems with numbness and tingling." JE B-4. Dr. Hajjar recommended physical therapy for core strengthening and additional studies, including x-rays and possibly a bone scan.

23. On December 4, 2008, Claimant underwent lumbar spine x-rays which revealed degenerative changes including anterior lipping and spurring of the vertebral bodies, but no compression fractures or subluxation. A bone scan performed on that day demonstrated evidence of radiotracer accumulation "likely secondary to degenerative disease." JE B-8.

24. On December 19, 2008, Dr. Hajjar wrote to Dr. Lindner that Claimant's condition did not improve with physical therapy and advised that, after discussing the benefits and risks of surgical intervention, Claimant had elected surgery. Claimant was having "fairly severe right leg and hip pain with numbness and tingling which is far worse then [*sic*] his back pain." JE B-9. Claimant was returned to light duty work pending Surety's approval for the proposed surgery, a right-sided L5-S1 decompression. Dr. Hajjar indicated that a more involved surgery was not indicated by Claimant's symptomatology.

25. On March 3, 2009, Dr. Hajjar performed a right L5-S1 hemilaminectomy, medial facetectomy and foraminotomy.

26. The next day, Dr. Hajjar executed a form letter provided by Surety indicating he agreed with the findings reported in Dr. Verst's February 18, 2009 independent medical

evaluation (“IME”) report. Dr. Verst, among other things, found Claimant’s lumbar spine condition was related to his industrial accident. However, records in evidence prepared by Dr. Hajjar contain no contemporaneous reports by Claimant, or any other references at all, to any specific cause for Claimant’s low back condition.¹ Further, at his deposition, Dr. Hajjar opined that, if the evidence shows Claimant’s initial low back symptom onset occurred several months after his industrial accident, then his spine condition is likely *not* industrially-related.

27. On March 11, 2009, Claimant was treated at the emergency department of St. Luke’s Regional Medical Center for post-surgical complaints of increased drainage from his wound site, increased back pain and leg pain, and numbness and tingling bilaterally, but worse on the right. He reported that, before surgery, he only had leg numbness at the tops of his thighs; however, after surgery, this sensation enveloped his whole leg. On examination, Claimant’s drainage was found to be minimal. An MRI revealed the source of Claimant’s symptoms: post-operative fluid collection “slightly indent[ing] the thecal sac and anteriorly displac[ing] the right S1 nerve root with enhancement surrounding [*sic-the*] thecal sac and right S1 nerve root.” JE B-27. The offending fluid was determined unlikely to carry infection or to be cerebrospinal fluid. Emergent conditions were ruled out, partially on no evidence of spinal headache, and Claimant was provided a prescription for Norco and a referral to the neurosurgery clinic for a follow-up.

28. On March 12, 2009, Claimant followed-up with Dr. Hajjar. Dr. Hajjar noted Claimant had experienced continuous drainage from his wound, and that Claimant *had* been having spinal headaches. On examination, Dr. Hajjar found Claimant to be pleasant and comfortable, without pathologic exam findings other than, perhaps, “some drainage from the incision.” JE B-33. Claimant elected to proceed with surgery for wound exploration and reclosure (ultimately, a redo right L5-S1 arthroscopic decompression), which Dr. Hajjar

¹ None of Dr. Hajjar’s contemporaneous chart notes are in evidence.

performed that day. During that procedure, Dr. Hajjar identified “a fragment of either facet or bony endplate that had migrated into the lateral recess, just cephalad to the L5-S1 disk in the lateral recess.” JE B-35. He removed this fragment, “thereby decompressing the spinal canal, the lateral recess and the S1 nerve root, as well as the axilla of the L5 nerve root.” *Id.* Three days later, Claimant had recovered well and Dr. Hajjar discharged him home.

29. Claimant’s post-surgical recovery care and therapy is unclear from the record. On March 14, 2009, Dr. Hajjar ordered Claimant a wheeled walker. In summer 2009, he sought Surety’s backing to extend this order for 12 months. At some point, Claimant decided on his own to use a single-point cane. Dr. Knoebel disputes that these aids were necessary (see below).

30. On June 3, 2009, Claimant underwent another lumbar spine MRI. This study clearly demonstrated continued problems at L5-S1, as well as mild congenital stenosis at multiple levels:

At L5-S1, there is a bulging disk and central disk protrusion compressing the ventral aspect of the thecal sac. There are degenerative changes of the facet joints. There is fluid at the right facet joint. There is mild left foraminal narrowing. There is a right hemilaminectomy defect at this level with epidural fibrosis surrounding the thecal sac and the right S1 nerve root. There is moderate right foraminal narrowing due to a bulging disk extending into the neural foramen as well as epidural fibrosis.

IMPRESSION: 1. Right laminectomy defect at L5/S1 with epidural fibrosis surrounding the right aspect of the thecal sac, the right S1 nerve root, and extending into the right neural foramen contributing to neural foraminal narrowing along with a bulging disk.

2. Mild congenital stenosis at L3/L4 through L5/S1.

3. Multifactorial central stenosis at L4/L5.

JE B-41.

31. On July 14, 2009, Claimant underwent an electromyography (“EMG”) to assist in identifying reasons for his right S1 radiculopathy. Needle testing indicated no evidence of active denervation, but “[m]ild chronic neuropathic changes were seen on the right at S1.” JE B-45.

32. On August 9, 2009, Dr. Hajjar wrote Dr. Lindner to convey that Claimant’s symptoms had changed and that he was also developing new left-sided symptoms including numbness, tingling and pain with walking and standing. Dr. Hajjar noted Claimant’s only objective findings from the EMG showed chronic denervation at the right L5 nerve root. Dr. Hajjar opined Claimant was “a potential candidate for additional intervention” which Dr. Hajjar felt “reluctant to pursue this at this time.” JE B-49. He recommended that Claimant seek a second opinion.

33. Following examination and review of new x-rays and a new bone scan, all performed on August 19, 2009, Paul Montalbano, M.D., a neurosurgeon, opined that Claimant is “an excellent candidate for surgical intervention.” JE D-5. He recommended an L5 to S1 decompression, fusion, and instrumentation.

34. Thereafter, on October 1, 2009, Dr. Knoebel performed an IME at Surety’s request (see below). He opined that the recommended surgery may improve Claimant’s symptoms and, arguably, that Claimant’s PPI should be apportioned equally between his industrial injury and his preexisting condition.² On October 21, 2009, Dr. Hajjar returned a check-the-box letter to Surety, indicating he concurred in Dr. Knoebel’s opinion.

35. On November 17, 2009, Dr. Hajjar performed the L4-S1 spinal fusion surgery endorsed by Drs. Montalbano and Knoebel. An x-ray taken two days later demonstrated no

² As discussed more fully below, Dr. Knoebel’s report apportioned PPI even though it also indicated a reluctance to find Claimant’s back condition was work-related.

evidence of acute complication, and Claimant was discharged home on November 22 after an uneventful five-day recovery period.

36. On December 10, 2009, Claimant was recovering nicely. Soon after, he began a course of physical therapy. A January 8, 2010 x-ray revealed no complications related to the fusion site and no instability. It did, however, show degenerative disc disease in Claimant's lower thoracic spine. X-rays on March 8, 2010 and May 26, 2010 also confirmed the fusion site was stable.

37. Dr. Hajjar regularly responded to Surety's requests for updates with respect to whether Claimant was yet medically stable. As Claimant continued to improve, Dr. Hajjar continued to respond that he had not yet reached medical stability. On May 5, 2010, however, he notified Surety that Claimant would probably be stable and ratable in one to two months. On May 10, 2010, he signed a check-the-box letter provided by Surety, indicating Claimant's condition had become fixed and stable.

38. On June 14, 2010, Dr. Hajjar wrote to Surety, opining that Claimant was "ratable." JE B-83. He elaborated that Claimant still had some residual weakness in his L5 distribution on the right that worsened with activity. He also noted some baseline muscular pain.

39. On October 26, 2010, Dr. Hajjar completed another check-the-box letter provided by Surety, this time indicating Claimant's condition had become fixed and stable as of June 6, 2010 (he filled in the date) and that Claimant had sustained PPI of 8% of the whole person as a result of his low back condition. He followed this up with a letter on November 11, 2010, in which he explained that he had derived his medical stability date of June 6 from his notes, that he had rated Claimant's condition under "Class 1 impairment for motion segment lesions with resolved radiculopathy at clinically appropriate levels" of the *AMA Guides*. JE B-85. Dr. Hajjar

did not identify which edition of the *AMA Guides* he referenced. Contradicting his earlier concurrence in Dr. Knoebel's apportionment opinion, Dr. Hajjar added that "none of these factors are related to any prior or any preexisting conditions." *Id.*

40. On December 9, 2010, Dr. Hajjar met with William C. Jordan, CDMS, who Defendants retained as their vocational expert to evaluate Claimant's PPD. Mr. Jordan's memorandum documenting that meeting bears Dr. Hajjar's signature on December 10, 2010, indicating he concurred with the information printed therein.

41. Among other things, the memorandum states that Dr. Hajjar believes that 50% of Claimant's PPI of 8% of the whole person related to his low back condition could be apportioned to his preexisting degenerative condition. Further, he opined that permanent restrictions of no lifting greater than 40 to 50 pounds and no frequent bending, stooping, twisting or exposure to low frequency vibration were appropriate.

42. Dr. Hajjar also reviewed a description of Claimant's job as director of maintenance at Employer's and opined that Claimant could return to work at that or a similar type of job. After reviewing other job descriptions provided by Mr. Jordan, Dr. Hajjar further opined that, without accommodations, Claimant could perform the following light-duty and sedentary jobs: auto parts delivery driver (light), market research interviewer (light), escort vehicle driver (sedentary), security/watchguard (light), greeter (sedentary), motor vehicle dispatcher (sedentary), production supervisor (light), service writer (light), truck terminal manager (sedentary), and service manager (light). With an anti-vibration seat cushion, Dr. Hajjar opined that Claimant could additionally work as a water truck driver (light), local semi-truck driver (light), long haul semi-truck driver (light), and school bus driver (light).

43. On January 31, 2011, Dr. Hajjar wrote to Surety that he had met with Claimant and reviewed his functional capacity evaluation (“FCE”), discussed more fully below. Dr. Hajjar confirmed that the FCE appeared valid and that it noted Claimant’s capabilities. He also requested approval for a CT scan to verify a well-healed fusion. Approval was granted, and Claimant underwent the scan on February 9, 2011. Dr. Hajjar wrote a follow-up letter to Surety after reviewing the results, confirming a “solid fusion at the L5 and at the L5-S1 levels.” JE B-89. He also noted unspecific findings at L3-4, but added: “There are no additional findings which will require additional intervention or surgery.” *Id.*

44. During his post-hearing deposition, Dr. Hajjar learned that Claimant had low back symptoms before his industrial injury. At that time, he opined that Claimant’s low back condition is likely not work-related at all, because his symptom onset occurred several months after the industrial accident.

45. It appears from the record as if Dr. Hajjar seeks to accommodate the asker of the question, whoever it may be. This trait is especially evident in Dr. Hajjar’s unqualified check-the-box concurrence with Dr. Knoebel’s IME opinion, which derides his (Dr. Hajjar’s) order for a wheeled walker for Claimant as neither reasonable nor appropriate. Dr. Hajjar’s opinions with respect to the etiology of Claimant’s low back condition are all over the board. Therefore, Dr. Hajjar’s opinions regarding causation are given little weight in this proceeding.

INDEPENDENT MEDICAL EVALUATIONS

46. **David B. Verst, M.D.** On February 18, 2009, Dr. Verst, an orthopedic surgeon, conducted an IME at Surety’s request. Prior to rendering his opinion, Dr. Verst took an intake history from Claimant and conducted an examination regarding his low back complaints. He also reviewed a lumbar spine MRI film or report, the date of which is not indicated in his report,

which he opined demonstrated degenerative disc disease and severe foraminal stenosis which was greater on the right. Apparently, he did not review any of Claimant's other prior records.

47. Claimant reported right lower extremity pain since his May 2, 2008 industrial accident and no preexisting back symptoms. Similarly, Claimant's intake sheet revealed no history contributory to his spinal complaints. He described a deep, aching, persistent, moderate, and frequent pain that appeared to be worsening. Long periods of sitting, standing and walking increased Claimant's symptoms. Dr. Verst relied upon the accuracy of Claimant's statements in developing his opinion.

48. Dr. Verst administered a functional self-rating test, on which Claimant scored 38, indicating severe impairment.

49. Dr. Verst evaluated Claimant's neurological, sensory, reflex, coordination, gait, vascular and lymphatic functions. He also palpated Claimant's spine and administered credibility tests and other function tests, including the Hoffman's, inverted radialis, spasticity, Spurling, Babinski and straight leg lift. Dr. Verst concluded that Claimant was credible and that his spinal range of motion was limited in all planes.

50. Dr. Verst diagnosed degenerative disc disease and foraminal stenosis. As a result, he concluded Claimant was not medically stable and recommended surgical decompression of Claimant's L5 nerve root. In addition, Dr. Verst opined, "absent any other findings in chart" that would contradict his understanding that Claimant had not previously suffered from leg or back pain, that "on a more probable than not basis the injury ignited underlying degenerative elements to become painful." JE G-3.

51. As indicated above, there is persuasive evidence that Claimant suffered chronic back pain, at least as early as 2003. The prerequisite condition Dr. Verst specified for his causation opinion has not been met. Little weight is afforded Dr. Verst's causation opinion.

52. **Richard Knoebel, M.D.** On October 1, 2009, Dr. Knoebel, an orthopedic surgeon, performed an IME at Surety's request. Dr. Knoebel assessed Claimant's low back condition after reviewing an intake history and relevant medical records, and conducting an examination. He relied upon the *Sixth Edition* in conducting his examination and preparing his opinion.

53. Claimant filled out a pain diagram, which Dr. Knoebel opined to be "exaggerated and nonphysiologic." JE H-5. The diagram indicated right-sided mid-back pain, bilateral low back pain, bilateral leg pain posteriorly in the knee area on the left and over the entire posterior right leg, numbness over the bilateral anterior thighs and groin, and pins and needles sensations over the dorsal left foot. Claimant rated his pain 8/10. He walked with a cane in his right hand and reported that he used it both at home and when going out. Claimant had Soma and naproxen available for pain, but he did not take medication often. Dr. Knoebel also noted Claimant reported no back problems prior to his 2008 industrial injury.

54. During examination, Dr. Knoebel opined that Claimant evidenced some exaggerated pain behaviors. However, he also noted that Claimant exerted maximum effort in strength testing. Dr. Knoebel concluded that Claimant's presentation was "partially credible," with evidence of right S1 radiculopathy. He diagnosed morbid obesity and deconditioning, in addition to "[s]ystemic osteoarthritis affecting multiple joints including the lumbar spine." JE H-8.

55. Dr. Knoebel agreed with Dr. Montalbano's assessment that a decompression and fusion surgery at L4-S1 might improve Claimant's symptoms. As to causation, Dr. Knoebel ambivalently stated, "At most, the patient had an industrial aggravation of the pre-existing degenerative changes." JE H-10. However, he went on to apportion Claimant's need for surgery between his industrial accident and his preexisting condition *as if* he had determined Claimant's industrial accident had aggravated his preexisting condition. He opined that Claimant's L5-S1 condition was at least partially due to preexisting degeneration, and his L4-5 condition was fully due to preexisting degeneration. Therefore, he apportioned Claimant's need for treatment on a "50-50" basis:

Reasonable apportionment of the proposed fusion surgery for pre-existing degenerative changes including both the L4/5 and L5/S1 levels, as well as the industrial condition on the right at L5/S1, would be 50% industrial and 50% non-industrial secondary to pre-existing degenerative changes including the pre-existing DJD at the L5/S1 level, as well as the level above the prior industrial injury site.

JE H-10.

56. Dr. Knoebel also opined in his report that Claimant could return to semi-sedentary work pending surgery.

57. At his post-hearing deposition, Dr. Knoebel opined that Claimant's low back condition is likely *not related to his industrial accident at all* because his symptom onset occurred several months after the event. "If you hit your thumb with [*sic*] hammer, you don't [*sic*] four months later [*sic*] say, I've got thumb pain. You have immediate pain. If you have an injury, you usually have immediate pain, certainly within 48 hours. If it was significant you'd want to get it looked at." Knoebel Dep., 16/22 – 17/3. Dr. Knoebel opined that Claimant's pain should have appeared within two days; however, Claimant did not seek treatment (for any of his injuries) for three days and did not report back pain for several months. He further opined that

Claimant's pain medications could decrease back discomfort, but would not eliminate significant pain.

58. Dr. Knoebel's opinions are adequately supported and, thus, credible. They are given full weight.

VOCATIONAL REHABILITATION

59. **Industrial Commission Rehabilitation Division.** From June 9, 2009 through March 24, 2011, Ken Halcomb and Irene Sanchez, vocational rehabilitation consultants at ICRD, assisted Claimant in securing new employment. Claimant's file was closed because, "The claimant has not returned to work even though significant services have been provided." JE R-19.

60. These services included assisting Claimant in completing a resume and providing him with potential job leads, as well as preparing a job site evaluation ("JSE"). Consistent with Mr. Jordan's memorandum regarding his discussion with Dr. Hajjar in December 2010, ICRD notes indicate that, after reviewing the JSE, Dr. Hajjar again opined in January 2011 that Claimant could return to his time-of-injury job. Nevertheless, on January 24, 2011, Claimant advised ICRD that he did not believe he could return to work due to his medical condition. He reiterated this response on March 7, 2011, when ICRD discussed with him the possibility of working as a security guard or dispatcher.

61. Upon closing Claimant's file, ICRD prepared a labor market summary assessing Claimant's transferrable skills. Taking into consideration Claimant's work experience, skills, education, and disabilities, ICRD concluded that Claimant could do light to sedentary work as a counter helper (with stool), dispatcher, security gate guard (with stool), hotel desk clerk (with

stool) and bank office/credit clerk. Aggregate local hourly wages for these jobs ranged from \$7.25 to \$12.50.

62. In addition, ICRD recorded Claimant's work history and earnings, including his W2 earnings from 2005 through 2009.³

63. **Mr. Crum.** Mr. Crum is a certified vocational rehabilitation consultant. He was retained to provide an opinion in this case by Claimant. He prepared a disability evaluation on September 9, 2010. Prior to rendering his opinion, Mr. Crum reviewed Claimant's medical, vocational and work records, and interviewed Claimant. Following his initial evaluation report, but before his deposition, Mr. Crum reviewed Mr. Jordan's report and two addenda (discussed below), some additional discovery responses and the hearing transcript.

64. Vocationally, Mr. Crum opined that Claimant's work experience generally falls into the areas of law enforcement, truck transportation, management, brokering and supervising a bus operation. He acknowledged Claimant's CDL, his class credit equivalent of a bachelor's degree in business administration, and his other certifications and training.

65. Through 2008, Mr. Crum opined that Claimant's only functional limitations were due to his partial left finger amputations. However, this condition did not limit Claimant's ability to work. He also noted no medical restrictions had ever been assessed in relation to Claimant's back.

66. Following his industrial accident, Mr. Crum noted Claimant's permanent restrictions on the use of his left shoulder (issued by Dr. Williams) and low back (issued by Dr. Knoebel and identified by Ms. Becerra). He relied mainly on Dr. Knoebel's low back opinion in

³ Mr. Halcomb's records reflect that Claimant's W-2s showed earnings of \$35,754 in 2005, \$39,663.29 in 2006, \$52,841.95 in 2007, \$53,116.54 in 2008, and \$0 in 2009.

concluding that Claimant is relegated to sedentary and light-duty work, noting generally that the left shoulder impairment also presents some issues:

Okay. In general, those restrictions would place him into the light to sedentary category, just like Dr. Knoebel had said, with some additional issues related to his ability to use his left arm primarily for over shoulder-level work and some limitations in terms of walking, standing, those kinds of things.

Crum Dep., 16/9-14. Mr. Crum also apparently relied upon Dr. Hajjar's diagnosis of foot drop, which Dr. Knoebel rejected upon examining Claimant.

67. In addition to what Mr. Crum determined to be Claimant's industrial injury-related medical restrictions, he also considered medical factors including Claimant's difficulty sleeping,⁴ his use of narcotic pain medications and his reliance on a cane to walk.

68. Mr. Crum also considered nonmedical factors including Claimant's age, education, skills, work experience, and disabled-looking appearance (walks with a cane), as well as both the Burley and Meridian/Boise local labor markets.

69. Procedurally, Mr. Crum first identified Claimant's pre-injury access to gainful employment to be 11.1% of the south central Idaho labor market area, which includes the counties of Blaine, Camas, Cassia, Gooding, Jerome, Lincoln, Minidoka and Twin Falls. (He explained that the statistical information from the Idaho Department of Labor, on which he relied, is not broken down per county.) Mr. Crum similarly opined Claimant's pre-injury access to gainful employment in the Boise labor market area was 13.4%.

70. Following his industrial injury, however, it is Mr. Crum's opinion that Claimant "does not have access to any well or regularly occurring full-time job in either of those labor markets." Crum Dep., 20/21-23. Consistent with that opinion, Mr. Crum disputed the list of

⁴Claimant has a history of sleep problems, partly due to sleep apnea and restless leg syndrome, documented in his medical records prior to the industrial injury. Mr. Crum seemingly contrarily opined that Claimant's sleep apnea and restless leg syndrome had no effect on his employability, yet his sleep problems did.

jobs that Mr. Jordan opined Claimant could perform. Mr. Crum rejected any driving jobs on the basis of Claimant's foot drop (allegedly due to his low back condition). Other than that, he did not really explain his opinion, except to say that Claimant's physical appearance, walking with a cane, would raise red flags for any potential employer and he would not likely be competitive for any job.

71. Mr. Crum acknowledged Dr. Hajjar's post-operative impairment evaluation, memorialized by Mr. Jordan, assessed less limiting restrictions than Dr. Knoebel's pre-operative assessment. Nevertheless, he did not prepare an addendum to his report. At his deposition, however, he opined that Claimant *would* be employable if Dr. Hajjar's low back restrictions were substituted for Dr. Knoebel's *before* backtracking to state that, considering his nonmedical factors, Claimant is *not* employable, even with Dr. Hajjar's restrictions:

Q. (BY MR. DONOHUE): Applying those limitations, would that change your opinion as to Mr. Priest's ability to find full-time employment in the Magic Valley?

A. Well, as far as they go, if you only considered those restrictions, I would guess he would be employable.

Q. Okay. But if you apply the restrictions given by Dr. Knoebel or the restrictions to semisedentary work, is that the restrictions you used in determining that he was unemployable?

A. It was. But just so I can - - just to be clear, even with Dr. Hajjar's comments or restrictions on December 9, 2010, you're still dealing with a person with a specific education, a specific skill set, living in a specific area, and he still has use of a cane, he still gets poor sleep, he's still using narcotic medications. You know, he's kind of a broken guy.

And if you put all that back in to the mix, I don't know that he would be employable, even with those restrictions, because those are realities of his situation. But taken alone by themselves, you know, if there was no other significant employment issues, he would be employable.

Q. I'm sorry. I wasn't clear on that last - - you lost me on that last part.

A. If you were taking a guy that had no other problems that was in good health, otherwise good health, had no other issues, presented just fine, you know, all those kinds of things to potential employers, you know, ordinarily I would say that he would be employable under that particular set of restrictions on page 3 of Bill Jordan's 12/15/10 report, the paragraph relating to Dr. Hajjar.

Crum Dep., 39/13-40/21.

72. As qualified *infra*, the Commission finds that Mr. Crum's opinions are generally credible.

73. **William C. Jordan.** Mr. Jordan is a certified vocational rehabilitation consultant. He was retained to provide an opinion in this case by Defendants. He prepared a disability evaluation on December 15, 2010. Prior to rendering his opinion, Mr. Jordan reviewed Claimant's medical, vocational and work records, and interviewed Claimant. He determined that when Claimant was discharged from Employer's, he was earning a salary of \$4,726 per month.

74. He concluded that Claimant has suffered 17-19% PPD, inclusive of impairment, based upon Dr. Hajjar's PPI assessment of 4% of the whole person and Claimant's medical restrictions due to his low back condition, as well as Dr. Williams' 5% PPI assessment and Claimant's medical restrictions due to his left shoulder injury.

75. In reaching his conclusion, Mr. Jordan also appropriately considered Claimant's other medical conditions, including his partially amputated fingers on his left hand, Type II diabetes, restless leg syndrome, sleep apnea, right shoulder soreness and right biceps tendinitis. He found none of these conditions impacted Claimant's ability to obtain or perform gainful employment.

76. In addition, Mr. Jordan appropriately considered Claimant's nonmedical factors, including his age (57), education, ability to operate a motor vehicle, current employment status

(unemployed) and employment history. Of these, Mr. Jordan opined only Claimant's age represents a disability factor in his case.

77. Mr. Jordan listed a number of job descriptions culled from the *Dictionary of Occupational Titles* and the *Idaho Occupational Employment & Wage Survey – 2010*, and considered them alongside data compiled for the Metropolitan Statistical Area of Boise ("MSA"). He opined that these jobs are available in the Meridian/Boise and/or Burley local job markets and that Claimant could perform them. These jobs fell mostly within the sedentary or light-duty categories, but two bus driver jobs identified fell within the medium-duty category. They paid an average wage of \$10.22 per hour to \$38.11 per hour in the aggregate, with nine of those positions paying below \$19 per hour and only three paying over \$27 per hour.

78. Mr. Jordan also listed recent job openings in both the Meridian/Boise area and the Burley area that he opined Claimant could perform. Mr. Jordan's report does not provide salary information for all of these job openings but, of those for which salary information is provided, none approaches the \$4,726 monthly salary Claimant was earning at the time of his industrial injury. The highest-paying job opening identified paid \$20.68 per hour, at the highest end, compared to Claimant's \$27.32 at Employer's.

79. On March 15, 2011, Mr. Jordan prepared a follow-up addendum to his report, which listed additional job openings that had opened up since his original search. He also suggested that Claimant keep a detailed work search log, apparently in response to a concern that Claimant was not trying very hard to obtain employment.

80. On March 16, 2011, Mr. Jordan again supplemented his report, after reading Claimant's discovery responses concerning his job search. With respect to the state police dispatcher position, which pays \$13.68-\$20.68, Claimant did not apply because he thought he

would need to pass a POST physical, as well as be able to perform hours of sitting. However, after calling about the position, Mr. Jordan ascertained that there are no physical requirements for the job, that the dispatchers use headsets, and that Claimant would have a great deal of freedom to move around on the job. Similarly, Mr. Jordan goes on to respond to Claimant's assertions that he does not believe he can do several other recommended jobs with contradictory information from the potential employers or with reasonable challenges to the foundation for Claimant's positions. For example, Claimant responded that he did not apply for an electrical motor and switch assembler job because it required electrical certification and ability to lift 60 to 120 pounds. Mr. Jordan did not know where Claimant got this information. When Mr. Jordan called on the ad, which listed a number of positions in a new company opening in Boise, he was told Claimant would not need to lift 60 to 120 pounds or do electrical work. Sales positions and other jobs within Claimant's restrictions were available.

81. As qualified *infra*, the Commission finds that Mr. Jordan's opinions are generally credible. His documentation, along with the ICRD records in evidence, persuasively establish that Claimant is reluctant to return to work. He would rather retire.

FUNCTIONAL CAPACITY EVALUATION

82. On January 18 and 19, 2011, Claimant underwent a functional capacity evaluation ("FCE") by Tracy Becerra, who is apparently a physical therapist. Ms. Becerra administered testing through the WorkWell System and determined that Claimant participated with maximum effort on both days. His pain was worse at the end of the first day than it was at the beginning, and worse yet at the beginning of the second day. Ms. Becerra found this consistent with Claimant's exertion. She also noted evidence of mild foot drop and Claimant's use of a cane, which she opined was necessary for safe execution of walking exercises.

83. Claimant reported no typical problems with his left shoulder, but only an occasional burning sensation at his glenohumeral joint. His right shoulder (not implicated in the industrial injury) is more problematic. He has pain, catching and popping at times, and he suspects he may have a rotator cuff tear.

84. Claimant reported low back pain, including sharp pain at times with walking or movement, and stabbing, burning pain into his posterior left leg from buttocks to knee and calf area with sitting. He also indicated numbness in his posterior and anterior left lower extremity, as well as bilateral hip pain. Claimant denied specific knee symptoms.

85. In addition, Claimant reported trouble sleeping (only three to four hours each night), lying on his back, bending, twisting, floor to stand transfers, driving or riding in cars, jarring motions of vehicles, prolonged sitting (greater than 30 minutes), prolonged walking (further than 50 yards or two hours, depending on whether resting helps), prolonged standing (from five to 30 minutes), and getting in and out of the bathtub. He said he cannot ride a motorcycle or a four-wheeler, or go hunting or boating; however, he can do light cleaning and organizational activities around the house and garage (including vacuuming), take daily walks, lift 20 to 30 pounds occasionally, and perform activities of daily living.

86. Claimant tested strongest with gripping, hand coordination, prolonged standing (although Ms. Becerra opined Claimant would likely not tolerate standing for greater than an hour at a time) and modified floor-to-waist lifting (so long as the starting point is no lower than 23 inches from the floor due to difficulty with deep squats).

87. Claimant's testing was limited due to low back pain, decreased range of motion in his trunk and lower extremities, decreased strength in his upper and lower extremities, and cane use. Limited activities include: right hand and front carrying (due to cane use), prolonged

walking (more than 15-30 minutes at a time), prolonged sitting (more than 30-40 minutes at a time), forward bending, kneeling, crouching, deep squatting and overhead lifting. Ms. Becerra also opined that Claimant should not be required to walk over uneven ground or be subjected to vibration or jarring while sitting.

88. Ms. Becerra opined that Claimant's abilities fall into the sedentary to light work categories. "Any positions being considered for return to work would need to fall within this physical demand category, and adhere to the stated restrictions listed on the FCE grid." JE O-3. She also opined that there is "no job match" for Claimant; however, the "Job Match Grid," to which she refers the reader for more details, is not appended to her report. JE O-3; JE O.

CLAIMANT'S CREDIBILITY

89. A claimant's credibility is always a factor considered in workers' compensation proceedings. Here, the scrutiny is heightened because, on September 2, 2008, Claimant reported that he had no spinal injury or low back pain in connection with renewal of his CDL. However, ten days later, Dr. Lindner first recorded that Claimant had low back pain radiating into his buttocks and right leg, which Claimant represents began at the time of his industrial injury. At the hearing, Claimant explained the discrepancy. He testified that he had been untruthful in his CDL renewal application because he did not want to lose his license, but truthful with Dr. Lindner. Based upon this evidence, it must be concluded that Claimant has been untruthful in order to obtain a perceived tangible benefit in the past.

90. The matter of Claimant's credibility is further complicated because he represented to post-industrial accident physicians that he had no prior low back symptoms. Yet, he indicated on his 2003 CDL renewal that he had chronic back pain from degenerative disc disease, and in 2004, he reported to a physician that he had back and hip pain. Further, his imaging studies

confirm that he has degenerative arthritis in his lumbar and thoracic spine, of prolonged duration. This evidence does not prove that Claimant was untruthful about his past symptoms, but it does establish that Claimant is a poor historian when it comes to his medical history.

91. Finally, Dr. Knoebel persuasively conveyed in his IME report that, while Claimant put forth full effort on strength testing, at other times he exaggerated his symptoms. This evidence establishes that Claimant was likely trying a little too hard to convey his symptomatology to Dr. Knoebel, but it does not establish Claimant had any intent to mislead.

92. The Referee concluded that Claimant is a strong self-advocate and a poor historian. Where otherwise credible evidence contradicts his testimony, that evidence will be afforded more weight. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

DISCUSSION AND FURTHER FINDINGS

93. The provisions of the Idaho 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).

CAUSATION

94. The Idaho Workers' Compensation Act places an emphasis on the element of causation in determining whether a worker is entitled to compensation. In order to obtain workers' compensation benefits, a claimant's disability must result from an injury, which was caused by an accident arising out of and in the course of employment. *Green v. Columbia*

Foods, Inc., 104 Idaho 204, 657 P.2d 1072 (1983); *Tipton v. Jannson*, 91 Idaho 904, 435 P.2d 244 (1967).

95. The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973), *overruled on other grounds by Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000). *See also Callantine, Id.*

96. The Idaho Supreme Court has held that no special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993).

97. Three physicians have opined on the issue of whether Claimant's low back condition is a result of his industrial accident. Due to incurable internal inconsistencies, lack of foundation, or the failure of the record to establish validating prerequisite facts, the opinions of Drs. Verst and Hajjar were determined, above, to be unpersuasive on this point. Therefore, they are insufficient to assist Claimant in carrying his burden of proof. Likewise, Dr. Knoebel's causation statement in his report, that "at most" Claimant's back pain represents an aggravation of his preexisting degenerative condition, is insufficient to establish that he believes the accident was likely industrially-related, for the reasons set forth, below.

98. Dr. Knoebel’s report is confusing with respect to his causation opinion because it does not state that he believes Claimant’s back pain is related to his industrial accident – “at most” does not, on its own, satisfy even the relaxed requirement of *Paulson* to establish the requisite medical opinion – yet other language in the same report apportioning causation, which implies he may believe a causal relationship exists. From the face of the report, it would be reasonable to conclude *either* that Dr. Knoebel actually does believe that Claimant’s back injury is likely work-related and his “at most” statement was just inelegantly worded *or* that he actually does not believe the injury is work-related, but he is providing additional information on apportionment for Surety’s use in either scenario. In the absence of Dr. Knoebel’s deposition testimony, the Commission would find the former. However, given Dr. Knoebel’s unequivocal testimony that he does not believe Claimant’s late-appearing symptoms indicate a connection with the industrial accident, the Commission finds the latter. Additional support for this conclusion is also found in Dr. Knoebel’s report, where he states “[r]easonable apportionment...*would be...50% industrial and 50% non-industrial...*”. JE H-10 (emphasis added).

99. Dr. Knoebel’s opinion fails to support Claimant’s position that his back injury is related to his industrial accident.

100. Claimant has failed to adduce sufficient evidence to prove that his low back injury was caused by his industrial accident.

PERMANENT PARTIAL DISABILITY

101. **Permanent partial disability.** “Permanent disability” or “under a permanent disability” results when the actual or presumed ability to engage in gainful activity is reduced or

absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423.

102. “Evaluation (rating) of permanent disability” is an appraisal of the injured employee’s present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. In determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement; the disfigurement (except in certain cases), if of a kind likely to handicap the employee in procuring or holding employment; the cumulative effect of multiple injuries; the occupation of the employee; and his or her age at the time of accident causing the injury, or manifestation of the occupational disease. Consideration should also be given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. Idaho Code §§ 72-425, 72-430(1).

103. 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, 766 P.2d 763 (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, 896 P.2d 329 (1995).

104. 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 nonmedical 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).

105. In evaluating Claimant's disability, consideration must also be given to identifying the labor market in which Claimant's disability should be assessed. Here, we must determine whether Claimant's disability should be measured against the Treasure Valley labor market, where he resided at the time of injury, or the Magic Valley labor market, where he resided at the time of hearing. Also, we must consider whether Claimant's disability should be evaluated as of the date of medical stability, the date of hearing, or some other date, recognizing that Claimant's ability to access his applicable labor market may change depending on the state of the economy at a particular time.

106. On this latter point, the Idaho Supreme Court has recently reiterated that as a general rule, Claimant's disability assessment should be performed as of the date of hearing. *See Brown v. The Home Depot*, WL 718795 (March 7, 2012). Under Idaho Code § 72-425, a permanent disability rating is a measure of the injured worker's "present and probable future ability to engage in gainful activity." In order to assess the injured worker's "present" ability to engage in gainful activity it necessarily follows that the labor market, as it exists at the time of hearing, is the labor market which must be considered. However, the Court was quick to point out that simply because a hearing happens to be held in the depths of a temporary economic downturn does not confer upon an injured worker the advantage of inflating what might otherwise be a modest disability award:

We do not intend to suggest that an injured worker is automatically qualified for odd-lot status solely due to a lack of employment opportunities in the applicable

labor market due to temporary economic conditions at the time of hearing. Nor do we suggest that a worker may be disqualified from odd-lot status due to a labor market that is unusually favorable to prospective employees at the time of hearing. Rather, there are ebbs and flows in broad economic conditions which may affect local labor markets. Given the humane objectives underlying our worker's compensation scheme, the Commission may disregard the effects of temporary fluctuations in the applicable labor market resulting from changing economic conditions when determining whether the employee's personal circumstances demonstrate a compensable need.

Brown, at 7.

107. Accordingly, it is within the discretion of the Commission to weigh the impact of temporary good or bad times in assessing an injured worker's disability. In making our determination of Claimant's disability, we recognize that Idaho is slowly emerging from a profound economic recession, and that there is no reason to believe that economic conditions will dramatically shift in favor of those seeking employment within Claimant's reasonable future work life.

108. Next, consideration must be given to identifying the locale of Claimant's relevant labor market. Again, Idaho case law expresses a general preference for considering the location of Claimant's labor market at the time of hearing in performing the disability analysis. *Davaz v. Priest River Glass Co. Inc.*, 125 Idaho 333, 870 P.2d 1292 (1994). However, as with identifying the appropriate point on the time line at which to perform the disability analysis, the Court recognized that the Commission is given broad discretion to consider whether the particular facts and circumstances of a case warrant departure from the general rule preferring the location of Claimant's labor market at the time of hearing. In order to prevent an injured worker from artificially inflating his disability by moving from a good labor market to a bad labor market, the Commission may measure the injured worker's disability based on the more favorable labor market from which he moved. (*See Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 565 P.2d 1360 (1977)). Here, Claimant left a more favorable and more diverse labor market in

the Treasure Valley for a less diverse and less favorable labor market in the Magic Valley, where he resided as of the date of hearing. However, the evidence fails to reveal that this move was accomplished for any improper purpose, much less to influence the outcome of the Commission's evaluation of Claimant's disability. Following his industrial injury, Claimant lost his job, and like many others in the current crisis, suffered foreclosure of his primary residence in the Treasure Valley. Claimant was fortunate to have the ability to move to family acreage in the Magic Valley following foreclosure of his Treasure Valley home. It is difficult to argue that this move was anything but involuntary and forced upon Claimant by factors outside of his control. Based on these facts, we find it appropriate to consider the Magic Valley labor market in evaluating Claimant's disability.

109. Having determined that Claimant's disability must be measured against the MagicValley labor market as it existed as of the date of hearing, we must consider how to proceed in assessing Claimant's disability where Idaho Code § 72-406 apportionment is raised as a defense to Claimant's claim for disability benefits. In such cases, Idaho law establishes a two-part analysis. *See Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008). First, Claimant's disability from all causes combined must be assessed. Next, the Commission must consider what portion of Claimant's permanent disability is attributable to the subject accident versus preexisting impairments/conditions.

110. Claimant suffers from a number of physical conditions which potentially impact his ability to engage in gainful activity. First, of course, are the left shoulder and low back injuries which are the subject of the instant claim. Claimant has been given significant permanent limitations/restrictions for these injuries. As well, Claimant suffers from partial finger amputations on his non-dominant hand, diabetes, sleep apnea and hypertension. However,

neither Mr. Crum nor Mr. Jordan felt that these problems significantly impacted his ability to engage in gainful activity. Indeed, both Mr. Jordan and Mr. Crum concluded that prior to the subject accident, Claimant's various physical problems, whatever they might be, did not significantly limit or impact his ability to engage in gainful activity. Both Mr. Jordan and Mr. Crum concluded that to the extent Claimant suffers current disability, that disability is wholly the result of his left shoulder and low back conditions.

111. Foundational to any assessment of Claimant's disability, is a clear understanding of Claimant's relevant limitations/restrictions as of the date of hearing. On or about April 8, 2009, Dr. Williams gave Claimant a 5% whole person rating for his left shoulder, and imposed the following permanent limitations/restrictions:

Work Restrictions: Based on Mr. Priest's restricted ROM and his injury, I would recommend against any future continuous overhead use type of activities and work. I would limit him to 5 pounds overhead lifting and occasional overhead movements as tolerated. Working 18"-21" away from the body with the shoulder and elbow in a neutral position would be most conducive for his type of injury. Avoiding any lifting way from the body from neutral to 90° and limited at 15 pounds. Floor-to-waist movement, no limitations for the shoulder itself.

JE A-31.

112. The record does not reveal that these limitations/restrictions have ever been revisited in subsequent evaluations. However, the functional capacities evaluation performed by Ms. Becerra in January 2011 fails to suggest that Claimant has significant functional limitations relating to the left shoulder. A fair reading of Ms. Becerra's report reflects that although Claimant has profound functional limitations, these limitations relate almost entirely to the low back. For example, over two days of testing, Ms. Becerra reported that Claimant was significantly limited by pain and discomfort in the lumbar spine and lower extremities. However, two days of testing failed to elicit any significant complaints of pain/discomfort in the

left shoulder. (See JE O-2). Ms. Becerra's summary/recommendations reflect that the most significant of Claimant's limitations relate to his low back. Indeed, the Claimant's upper extremities warranted only passing reference in Ms. Becerra's recommendations:

Summary/Recommendations

These projections are for 8 hour a day 5 days a week at the levels indicated on the FCE grid.

1. The client's main limitations are his reported low back pain, decreased LE/trunk ROM, decreased shoulder and lower extremity strength, and reliance on a cane for safety with mobility/ambulation activities. He is most limited with prolonged walk, forward bend, kneel and overhead lifting. He is unable to safely assume a deep squat/crouch position safely. He is unable to safely participate in a front carry or a right hand carry due to his need for use of the cane with ambulation activities for safety.
2. The client will need to have floor lifts modified in such a way as to have the lift occur at a height no lower than 23" from the floor, due to his inability to safely assume a deeper squat position.
3. The client should be allowed to switch positions as needed from sit/stand/walk for symptom control.
4. The client falls into a work category of sedentary to light, given his overall performance on the FCE. Any positions being considered for return to work would need to fall within this physical demand category, and adhere to the stated restrictions listed on the FCE grid.
5. The client would likely not tolerate any positions that required sustained sit greater than approximately 30-40 min. at a time, prolonged walk greater than 15-30 min. at a time, and prolonged stand greater than 1 hour at a time. The client should not be placed into positions that would require ambulation on uneven ground or into positions that would involve vibration forces or jarring when in a sitting position.
6. The client's activity level tends to significantly increase his low back pain; however, his activity level did not affect his right knee or left shoulder pain.

JE O-3.

113. It is equally clear that both Mr. Crum and Mr. Jordan, though aware of Dr. Williams' recommendations concerning permanent limitations/restrictions for Claimant's left shoulder, felt that Claimant's low back problems were much more significant in contributing to Claimant's ultimate disability. In fact, neither Mr. Crum nor Mr. Jordan expressed an opinion as

to how, or whether, the limitations/restrictions imposed by Dr. Williams contributed to the disability caused by Claimant's low back problems.

114. Concerning the low back, both Dr. Knoebel and Dr. Hajjar have proposed certain permanent limitations/restrictions relevant to this injury. Dr. Knoebel's limitations/restrictions were proposed before Claimant had reached a point of medical stability, indeed, before Claimant had even undergone his three low back surgeries. Accordingly, his prognostications concerning what Claimant's permanent limitations/restrictions would be are not particularly instructive. Similarly, although Dr. Hajjar rendered an opinion on Claimant's permanent limitations/restrictions in December 2010 in response to an inquiry from Mr. Jordan, Dr. Hajjar testified that these restrictions were somewhat generic in nature. He noted that the limitations he imposed in December 2010 were "a very standard list of restrictions" for someone who had Claimant's pathology and type of treatment. (Hajjar Dep., 13/15-24). He conceded that the more individualized assessment performed by Ms. Becerra likely provides a more accurate assessment of Claimant's limitations/restrictions. (Hajjar Dep., 14/14-15/5; 18/1-8).

115. Although not referenced in his notes, Dr. Hajjar also testified that Claimant does suffer from a foot drop, and that he (Dr. Hajjar) had prescribed an AFO brace for Claimant to manage this condition. He could not speculate as to whether Claimant's foot drop might diminish in time, although he did note that it typically does not worsen without some exacerbating event.

116. As noted above, Ms. Becerra made certain specific recommendations concerning Claimant's limitations/restrictions upon completion of her testing of Claimant. Per Dr. Hajjar's testimony, the Commission finds that these limitations/restrictions are the best reflection of Claimant's permanent limitations/restrictions as of the date of hearing.

117. Neither Mr. Jordan nor Mr. Crum had the opportunity to consider the results of the functional capacities evaluation when authoring their various reports. However, during his testimony, Mr. Jordan acknowledged that taking into account the recommendations by Ms. Becerra would cause him to increase his disability assessment of Claimant by 10%. For his part, Mr. Crum incorporated many of Claimant's subjective complaints, later validated by Ms. Becerra, in reaching his conclusion that Claimant has no current reasonable labor market in the Magic Valley.

118. Having reviewed the reports and testimony of Mr. Crum and Mr. Jordan, the Commission finds certain shortcomings in the analysis of each consultant.

119. Mr. Jordan proposed that Claimant has suffered a disability of 19-21%, or 17-19%, depending on whether one assigns a 6% or 4% whole person rating to Claimant's low back condition. However, the method by which Mr. Jordan reached this conclusion is altogether opaque, and made none clearer by his testimony. Mr. Jordan acknowledged that Claimant suffered loss of access to his labor market as a consequence of his restrictions, but did not quantify that loss of access. Neither did he quantify the extent and degree to which he felt Claimant had suffered a wage loss as a result of the subject accident. He recognized that Claimant was a high wage earner at the time of injury, \$4,726 per month, but failed to include in this figure the value of Claimant's benefits package valued at anywhere from an additional \$1,300 to \$1,600 per month. Finally, as noted above, Mr. Jordan relied upon Dr. Hajjar's limitations/restrictions in reaching his conclusions about Claimant's disability in excess of impairment. These limitations/restrictions were acknowledged by Dr. Hajjar to be a less accurate measure of Claimant's functional abilities than the evaluation performed by Ms. Becerra in January 2011.

120. On the other hand, Mr. Jordan gave appropriate consideration to Claimant's wide ranging employment history, education and transferable job skills. He convincingly explained that in the course of his diverse careers in law enforcement, small business ownership, the trucking industry, etc., Claimant has developed a skill set that is transferable. In conjunction with his education, this skill set can be used to allow Claimant to access employments in which he has no past experience, but for which he is nonetheless well suited because of his transferable skills. To the criticism that Claimant's lack of a formal degree will impede him in finding a job, Mr. Jordan convincingly explained that "people hire people," and that Claimant is smart enough and well spoken enough to overcome this problem in any one-on-one interaction with a potential employer.

121. For his part, Mr. Crum did make an effort to evaluate Claimant's preinjury access to the Treasure Valley and Magic Valley labor markets. He proposed that Claimant had access to 11.1% of the Treasure Valley labor market on a preinjury basis, and 13.4% access to the Boise labor market on a preinjury basis. Mr. Crum made assumptions concerning Claimant's permanent limitations/restrictions that are much more in line with Ms. Becerra's recommendations than the assumptions made by Mr. Jordan. Based on these assumptions, Mr. Crum concluded that Claimant has no reasonable access to either the Treasure Valley or Magic Valley labor market at the current time. Presumably, for this reason he felt it unnecessary to consider the extent and degree to which Claimant suffered wage loss as a consequence of the subject accident.

122. Although Mr. Crum's better grasp of Claimant's limitations/restrictions necessarily increased his assessment of Claimant's disability, we conclude that he did not give sufficient weight to Claimant's educational background, diverse work history, and truly

remarkable bundle of transferable job skills. Mr. Crum pointed out all the reasons that Claimant could not perform the various jobs discussed by Mr. Jordan, but failed to adequately consider Claimant's greatest strengths, the transferable skill set developed over a long and varied work life. The Commission finds it improbable that Claimant, if truly motivated to do so, could not identify and obtain suitable sedentary employment commensurate with his skill set. Notwithstanding that Mr. Jordan overestimated Claimant's functional abilities, we nevertheless believe that many of the jobs he identified are still suitable for Claimant, even though Claimant evidently has no designs upon pursuing future employment.

123. Even so, it is clear that Mr. Jordan has significantly underestimated Claimant's disability. Claimant's access to the labor market is markedly diminished, and even though we have concluded that Claimant is capable of performing a variety of suitable employments, it is clear that he has nevertheless suffered a significant wage loss as a consequence of his limitations/restrictions.

124. Based on our analysis of the relative merits and shortcomings of the opinions of Mr. Crum and Mr. Jordan, we conclude that as of the date of hearing, Claimant has met his burden of demonstrating disability of 70% of the whole person, inclusive of impairment.

125. **Claimant is not an odd-lot worker.** A claimant who is not 100% permanently disabled may still prove total permanent disability by establishing he is an odd-lot worker. An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary

good luck, or a superhuman effort on their part.” *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status rests upon the claimant. *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990).

A claimant may satisfy his burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways:

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

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

126. In the present case, Claimant testified to many, many failed work attempts. He kept a work search log after Mr. Jordan told him he should, identifying businesses he had contacted. However, Claimant also refused to apply for jobs that appeared to be a very good fit for him, for reasons that Mr. Jordan credibly disputes. For example, Claimant did not apply for a state dispatcher job because he thought he would need to satisfy POST physical requirements; however, Mr. Jordan easily ascertained that this is not the case with a phone call. Further, the ICRD consultant closed Claimant's file and stopped assisting him after finding a number of jobs meeting Claimant's medical restrictions and vocational abilities that Claimant would not pursue, because he, nevertheless, said he did not believe he was physically capable of performing them.

127. The totality of the evidence indicates that Claimant's attempts at finding work were half-hearted at best. His job search log, though long, fails to rebut the evidence from Mr. Jordan and ICRD, that Claimant is really not interested in returning to work. If he had applied

for all of the jobs recommended by Mr. Jordan, it is likely that he would have been hired for one of them.

128. The Commission finds Claimant has failed to establish any of the three *Lethrud* requirements necessary to prove odd-lot status.

APPORTIONMENT

129. Having determined Claimant's disability from all causes combined, the Commission must next ascertain what portion of that disability is attributable to the industrial accident. *See Page v. McCain Foods, Inc., supra.* Having met his burden of demonstrating the extent and degree of his disability from all causes combined, the burden of going forward with evidence that some portion of Claimant's disability is referable to a preexisting condition shifts to Defendants. *See Barton v. Seventh Heaven Recreation, 2010 IIC 0379 (2010).* Idaho Code § 72-406 allows for apportionment of disability between a work caused condition and preexisting impairment. That section specifies in pertinent part:

In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

Idaho Code § 72-406(1).

130. The statute embodies one of the underlying tenants of the Idaho Workers' Compensation system: although an employer takes the employee as it gets him, the employer should only be held responsible for disability caused by the industrial accident.

131. This principle is clearly implicated by the facts of this case. Here, the Commission has found that Claimant has suffered a profound disability from all causes combined, those causes consisting of Claimant's low back condition and his left shoulder

condition. However, we have also found that Claimant's low back condition is not causally related to the subject accident. Moreover, as discussed above, it seems that all of the experts who have considered the matter have implicitly concluded that of Claimant's various conditions, it is the low back condition that causes the lion's share of Claimant's disability.

132. It is to be noted that the provisions of Idaho Code § 72-406 anticipate that apportionment is appropriate where there is a "preexisting physical impairment." The first question that is presented by the facts of the instant matter is whether, or how, Claimant's low back condition can be said to qualify as a "preexisting physical impairment," that is, an impairment which predated the subject accident. The record demonstrates that Claimant has a preinjury medical history significant for complaints of chronic low back pain. The Commission has further concluded that Claimant first presented with complaints of low back pain following the May 2, 2008 accident sometime in September 2008. Radiological studies performed in the fall of 2008 demonstrated long standing degenerative changes in Claimant's lumbar spine, without evidence of any acute injury. While it must be conceded that Claimant was never given an impairment rating for his low back condition prior to the May 2, 2008 accident, it is clear that the condition that resulted in his need for surgery and the subsequent award of an impairment rating predated the subject accident. We believe the record, considered as a whole, supports the inference of a preexisting physical impairment. In this regard, the facts of the current case bear remarkable similarity to the facts at issue in *Horton v. Garret Freight Lines, Inc.*, 115 Idaho 912, 772 P.2d 119 (1989). In *Horton*, claimant suffered a right hip injury in 1974. It was also shown that prior to the 1974 accident, claimant suffered a number of other latent orthopedic conditions which did not flare up and become problematic until the mid-1980's. Even so, the Court considered it appropriate to treat these latent orthopedic conditions as preexisting impairments

for purposes of apportionment after concluding that the conditions, though latent, did indeed predate the subject accident. The same reasoning could be applied to the instant matter, even if it were impossible to show that Claimant had a symptomatic preexisting lumbar spine condition. For these reasons, we think it appropriate to conclude that Claimant's low back condition does qualify as a preexisting physical impairment for the purposes of the application of Idaho Code § 72-406.

133. The real difficulty with this case is that neither the parties, nor their experts, anticipated the need to identify that portion of Claimant's disability solely attributable to the work-related left shoulder condition, even though the potential need to address this matter was foreseeable from the outset.⁵ Neither Mr. Crum nor Mr. Jordan made any effort to specifically address the manner in which disability might be apportioned should the Commission find that Claimant's low back condition is not causally related to the subject accident. However, the reports of Mr. Crum and Mr. Jordan are not altogether unenlightening on the question of how Claimant's disability should be apportioned between his preexisting low back condition and his work related left shoulder injury. As noted above, it is unstated, but implicit, in the opinions of Mr. Jordan and Mr. Crum that it is the low back condition which creates the most significant impediment to Claimant's employability. In fact, neither in the reports of Crum and Jordan, nor in their testimony, is there any assertion that the additional limitations imposed by Claimant's left shoulder injury create disability over and above that which is caused by Claimant's low back condition.

⁵ The noticed issues include the issues of whether Defendants are responsible for Claimant's injuries and whether Idaho Code § 72-406 apportionment is appropriate. Defendants should have anticipated how their need to adduce proof on apportionment would be affected by a Commission determination that Claimant's low back condition is not related to the subject accident.

134. Moreover, the extent and degree to which Claimant actually suffers from limitations/restrictions referable to his left shoulder may be called into question by Ms. Becerra's last word on Claimant's function. Even so, we recognize that limitations/restrictions are ordinarily imposed not to define an injured worker's functional ability, as much as to protect the injured worker from further injury. With this in mind, we perceive no disconnect between Dr. Williams' unchallenged recommendations for activity restrictions referable to Claimant's use of his left upper extremity, and Ms. Becerra's failure to note that Claimant had any significant loss of left shoulder function.

135. Claimant has significant limitations/restrictions from his low back condition that will relegate him to sedentary employment at best. We think it likely that he will be prohibited from performing some of these sedentary jobs because of the prophylactic limitations imposed by Dr. Williams. In other words, jobs that Claimant would be capable of performing even with his low back condition would be foreclosed to him because they require use of the upper extremity in a manner which is in derogation of the recommendations made by Dr. Williams. The extent and degree of the contribution of the left shoulder condition to Claimant's total disability is difficult to quantify based on the record at hand. However, our synthesis of the reports and testimony of Mr. Crum and Mr. Jordan is that Claimant's 70% disability from all causes should be apportioned 45% to Claimant's documented preexisting condition and 25% to the subject accident of May 2, 2008.

136. All other issues are moot.

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CONCLUSIONS OF LAW AND ORDER

Based on the foregoing analysis,

1. Claimant has failed to prove that his low back condition was caused by an accident occurring during the course and in the scope of his employment;

2. Claimant has permanent partial disability from all causes of 70% of the whole person, inclusive of impairment;

3. Claimant failed to prove that he is totally and permanently disabled under the odd-lot doctrine;

4. Pursuant to Idaho Code § 72-406, Claimant's disability is apportioned to 45% to his preexisting physical impairment and 25% to the work injury of May 2, 2008. Defendants are responsible for the payment of a 25% disability, inclusive of impairment previously paid on the left shoulder;

5. All other issues are moot; and,

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

IT IS SO ORDERED.

DATED this 16th day of April, 2012.

INDUSTRIAL COMMISSION

/s/ Thomas E. Limbaugh, Chairman

/s/ Thomas P. Baskin, Commissioner

Participated but did not sign
R.D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of April, 2012, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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/s/