BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARRETT BERGER, Claimant, v. ALL SEASONS TREE SERVICE, LLC, Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2015-019466** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **FILED 11/3/17**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Coeur d'Alene on April 12, 2017. Claimant, Garrett Berger, was present in person and represented by Stephen J. Nemec, of Coeur d'Alene. Defendant Employer, All Seasons Tree Service, LLC (All Seasons), and Defendant Surety, State Insurance Fund, were represented by H. James Magnuson, of Coeur d'Alene. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on August 15, 2017. 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 in order to give different treatment to Claimant's disability in excess of impairment.

ISSUES

The issues to be decided are:

1. The extent of Claimant's permanent partial impairment and causation thereof;

2. The extent of Claimant's permanent disability; and

3. Claimant's entitlement to attorney fees.

CONTENTIONS OF THE PARTIES

Claimant asserted a right shoulder injury at work on July 16, 2015, for which he eventually underwent right shoulder surgery. He alleges he has sustained 4% permanent impairment of the upper right extremity due to the right shoulder injury, is now restricted to lifting no more than five pounds overhead, and suffers a permanent disability of 68-70%. Claimant also alleges Surety unreasonably delayed benefits owing on the claim; hence he is entitled to attorney fees. Defendants have accepted responsibility for Claimant's right shoulder surgery and temporary disability benefits, but maintain he suffers no permanent impairment, has no work restrictions, and no permanent disability due to his right shoulder injury. They contend Surety's handling of the claim was reasonable and deny liability for attorney fees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. Claimant's Exhibits A through E and Defendants' Exhibits 1 through 13, admitted at the hearing.

3. Claimant's testimony taken at hearing.

4. Post-hearing deposition testimony of Paul Sears taken by Defendants on April 21, 2017.

5. Post-hearing deposition testimony of Dan Brownell taken by Claimant on April 26, 2017.

6. Post-hearing deposition testimony of Adam Olscamp, M.D, taken by Defendants on May 23, 2017.

7. Post-hearing deposition testimony of Douglas N. Crum, C.D.M.S., taken by Defendants on June 9, 2017.

All outstanding objections are overruled and motions to strike are denied.

FINDINGS OF FACT

1. Claimant was born in 1993. He is right-handed. He was 23 years old and lived with his father in the Coeur d'Alene area at the time of the hearing. All Seasons is an employer that specializes in tree trimming and hazardous tree removal in Coeur d'Alene and surrounding areas.

2. **Background.** Claimant attended high school at Priest River, Timber Lake, and Lake City. He completed the 10th grade, but dropped out of high school in the 11th grade because he was essentially homeless. He has not earned a GED. He has no further formal training. After leaving high school Claimant worked at Polar Ice stacking bags of ice on pallets, at Silver Wood Theme Park, Dairy Queen, Pita Pit, Center Partners Tele-sales, Jeremy Drywall, a temporary employment agency, several lumber mills, and his own company—Berger Building and Remodel. Claimant's work in lumber mills, construction, and drywall required frequent heavy lifting and overhead reaching. He earned $10.00 to $12.00 per hour at the lumber mills. In approximately 2012, Claimant worked for a season at Big Timber Tree Service where he became a climber earning approximately $12.00 per hour.

3. In March 2015, Claimant began working at All Seasons as a tree climber. All Seasons offered larger and more technical jobs and better pay. Claimant reported to his boss's house each work day around 6:00 a.m., prepared equipment, and drove a company vehicle to the

job site. At the job site Claimant would climb the tree, remove branches, "top off" the upper 20 feet of the tree and lower it to the ground using ropes. Thereafter he sectioned off the tree, rigging and lowering logs weighing from 100 to 900 pounds to the ground with ropes. He often worked overhead with a 15 to 20-pound climbing saw, and also used a larger 75-pound chain saw. He usually finished for the day by 5:00 or 6:00 p.m. Claimant earned $16.00 per hour. Overtime was not uncommon.

4. **Industrial accident and treatment.** On July 16, 2015, Claimant and a coworker were removing and thinning 20 to 30 trees, each approximately 40 to 50 feet tall. Claimant had no shoulder symptoms prior to that day. Claimant estimated he made 60 to 80 cuts above shoulder level in the process. He noted right shoulder pain when he was "topping" one of the trees. The topping cut was made at chest to shoulder height with the right hand holding the smaller climbing chainsaw. As Claimant continued working, his right shoulder pain increased. After a couple hours of working, his right shoulder was too painful to continue. Claimant notified his supervisor and sought medical treatment at Urgent Care Center where a right shoulder MRI was recommended and consultation with an orthopedist. Claimant began treating with Adam Olscamp, M.D., who prescribed physical therapy; however this aggravated Claimant's shoulder pain.

5. Defendants initially delayed accepting the claim and Claimant was unable to perform his usual overhead tree work. He then worked for a time supervising residential remodels at 2M Services, a company operated by a long-time family friend, earning $15.00 per hour.

6. In December 2015, Defendants finally authorized medical treatment and payment of medical benefits and on December 29, 2015, Claimant underwent a right shoulder MRI that

revealed a Type 2 SLAP tear. On January 27, 2016, Dr. Olscamp performed arthroscopic right shoulder labral repair. Claimant last saw Dr. Olscamp in April 2016. Ryan Smith, PA-C, released Claimant "to normal activity without restriction other than heavy lifting overhead which he does for a living." Defendants' Exhibit 7, p. 125.

7. On May 21, 2016, Claimant was driving and was "T-boned" on the driver's side by a drunk driver, flipping Claimant's truck over. He noted severe hip pain and was examined at Kootenai Medical Center and subsequently began treating with Dr. Olscamp for his hip injuries. In November 2016, Dr. Olscamp performed left hip surgery and in January 2017, right hip surgery.

8. On March 21, 2017, John McNulty, M.D., examined Claimant and reported loss of range of motion in Claimant's right shoulder and loss of strength. He rated Claimant's impairment at 4% of the upper right extremity.

9. **Condition at the time of hearing.** At the time of hearing, Claimant continued to notice loss of range of motion and was limited in reaching above his head. Claimant feels right shoulder pain when lifting more than 20 to 30 pounds. At the time of hearing, Claimant was released from care as to his left hip, but was still recovering from his right hip surgery.

10. **Credibility.** Having observed Claimant at hearing, and compared his testimony with other evidence in the record, the Referee found Claimant to be a credible witness. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

DISCUSSION AND FURTHER FINDINGS

11. 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).

12. **Impairment.** The first issue is the extent and causation of Claimant's permanent impairment. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment, Waters v. All Phase Construction, 156 Idaho 259, 262, 322 P.3d 992, 995 (2014), and "in conducting a permanent impairment evaluation, is not limited to record or opinion evidence of a physician requested to give a permanent impairment rating." Soto v. J.R. Simplot, 126 Idaho 536, 539-540, 887 P.2d 1043, 1046-1047 (1994).

13. A two-step analysis is appropriate in impairment and disability evaluations and requires "(1) evaluating the claimant's permanent disability in light of all of his physical impairments, resulting from the industrial accident and any pre-existing conditions, existing at the time of the evaluation; and (2) apportioning the amount of the permanent disability attributable to the industrial accident." Horton v. Garrett Freightlines, Inc., 115 Idaho 912, 915, 772 P.2d 119, 122 (1989). In the present case, there is no assertion or evidence of any pre-

existing condition or impairment resulting from any cause other than the industrial accident. Two physicians have opined regarding the permanent impairment resulting from Claimant's industrial right shoulder injury.

14. Dr. McNulty. Dr. McNulty examined Claimant on March 21, 2017, and rated his right shoulder impairment at 4% of the upper right extremity, equating to 2% of the whole person, pursuant to the regional shoulder impairment grid of the AMA Guides to the Evaluation of Permanent Impairment (Guides), Sixth Edition, p. 404.

15. Dr. Olscamp. Dr. Olscamp is a board certified orthopedic surgeon. He commenced treating Claimant in July 2015 and performed Claimant's arthroscopic SLAP repair in January 2016. Dr. Olscamp completed a check-the-box letter provided by Surety indicating that Claimant had no impairment due to his industrial injury. However, at his post-hearing deposition, when asked his opinion of Dr. McNulty's assessment of permanent partial impairment, Dr. Olscamp testified:

> He describes a default impairment rating of three percent of his upper extremity based on having a labral tear, period. And that's outside of what I do. I don't—when I fill out the impairment form—I guess, backing up a step, in generality, Labor and Industries is aware that I don't do formal impairment ratings, so they send me the paperwork saying, "In your opinion, has this patient reached maximum medical improvement?" And my answer is, "Yes." Does he have a formal impairment rating? My answer is, in this case, no, but I don't do formal impairment ratings, so if they want one, they'll send him for an independent evaluation. So in my opinion, as noted in my notes and as noted by the physical therapists, his range of motion and strength were back to very close to normal, so that's what I wrote down as my feeling about his impairment rating. He had reached maximum medical improvement and had no impairment rating. I'm, to be frank, not aware of there being a three-percent default impairment rating because you had a labral tear in your shoulder after it's surgically fixed and you have normal function. I'm not aware that there's an impairment rating for that.

Olscamp Deposition, p. 13, l. 21through p. 14, l. 18 (emphasis supplied).

16. When Dr. Olscamp was specifically cross-examined about his understanding of impairment ratings under the AMA Guides, he acknowledged he was generally aware of the diagnosis-based method used by the Guides to calculate permanent impairment:

> A. Some of them, but again, I don't do impairment ratings myself, so the answer to that question is I guess in theory I'm aware of some conditions being—having an impairment rating. For example, if you have a meniscus tear, it's rated as X number of percentage. But I'm not personally aware of there being any rating for a labral tear in the shoulder with normal outcome after surgery.
>
> Q. Okay. But if page 404 of the sixth edition of the Guides states there is a default impairment of three percent of the upper extremity, would you default [sic] to Dr. McNulty with respect to that calculation?
>
> A. If that's the case, I would defer to him having done the impairment rating.

Olscamp Deposition, p. 15, ll. 1-14 (emphasis supplied).

17. Dr. Olscamp's testimony forthrightly acknowledges that he does not do impairment ratings and is not familiar with labral tear impairment rating under the Guides. Dr. McNulty's 2% whole person impairment rating is well explained and persuasive.

18. Claimant has proven he suffers permanent impairment of 2% of the whole person attributable to his industrial right shoulder injury.

19. **Permanent disability**. The next issue is the extent of Claimant's permanent disability. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in

determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant.

20. 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). The extent and causes of permanent disability "are factual questions committed to the particular expertise of the Commission." Thom v. Callahan, 97 Idaho 151, 155, 157, 540 P.2d 1330, 1334, 1336 (1975). A disability evaluation requires "the Commission evaluate [claimant's] disability according to the factors in I.C. § 72–430(1), and make findings as to her permanent disability in light of all of her physical impairments, including pre-existing conditions, and that it then apportion the amount of the permanent disability attributable to [claimant's] accident." Page v. McCain Foods, Inc., 145 Idaho 302, 309, 179 P.3d 265, 272 (2008). The labor market to be used for assessing disability is Claimant's labor market as of the date of hearing. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012). Work restrictions assigned by medical experts and suitable employment opportunities identified by vocational experts may be particularly relevant in determining permanent disability.

21. Work restrictions. In the present case, the parties rely upon the opinions of Drs. McNulty and Olscamp regarding Claimant's functional limitations.

22. *Dr. McNulty.* Dr. McNulty examined Claimant on March 21, 2017, evaluated his right shoulder function, and reported:

> Mr. Berger has residual loss of range of motion of his right shoulder as well as weakness. He is unable to return to his previous occupation as a tree climber. He cannot meet lifting requirements nor is he able to work overhead. He is most suited to work in a medium job duty category. He should have a 5-pound maximum overhead lifting restriction. These work restrictions are attributable to his right shoulder injury.

Claimant's Exhibit D, p. 5.

23. *Dr. Olscamp.* Dr. Olscamp initially disagreed with Dr. McNulty's 5-pound overhead lifting restriction, and testified that it was normal to release an individual back to full-duty work, including using a hammer or nail gun overhead, within five and a half months after labral repair surgery. However, he agreed that where Claimant's full-duty work as a tree climber included working overhead with a 75-pound chainsaw, "there might be increased risk for reinjury" of his right shoulder relative to his left shoulder. Olscamp Deposition, p. 20, ll. 7-8.

24. Dr. Olscamp readily acknowledged that according to the final physical therapy record dated April 8, 2016, Claimant had not yet met his long term goal to "hold a chainsaw in front of him without weakness or pain, but he shouldn't have even tried that at six weeks." Olscamp Deposition, p. 23, ll. 18-20. Dr. Olscamp opined that if Claimant credibly testified at hearing that he has loss of motion in reaching above his head, cannot carry heavy items, and feels right shoulder pain when lifting 20 to 30 pounds, inasmuch as Dr. Olscamp had not examined Claimant since approximately April 13, 2016, he would need to examine Claimant's right shoulder to determine whether medium duty work restrictions should be imposed. Dr. Olscamp testified: "if he has pain any time he lifts more than 20 pounds above his head, would he have some lifting restriction at work. And I think the answer is yes." Olscamp Deposition, p. 25, ll. 18-22.

25. As previously noted, the Referee found that Claimant is a credible witness. His testimony of right shoulder pain when lifting more than 20 or 30 pounds is credible. Dr. McNulty's opinion is adequately explained, supported by his more recent physical examination of Claimant, consistent with Claimant's credible testimony, and persuasive. Claimant is limited to medium duty work and his right shoulder function is limited to lifting a maximum of five pounds overhead.

26. Opportunities for gainful activity. Claimant's opportunities for gainful employment have been evaluated by two vocational experts, Daniel Brownell, and Douglas Crum. Their opinions are examined below.

27. *Daniel Brownell*. Daniel Brownell interviewed Claimant in March 2017, reviewed his medical and employment records, and evaluated his permanent disability. He noted that Claimant dropped out of high school in the 11th grade and has no GED. Mr. Brownell opined Claimant had no marketable computer skills. He observed that Claimant's prior work history included food and beverage work which was generally light or medium duty with earnings of $7.50 to $8.00 per hour, telesales which was light duty with earnings of $7.50 to $8.00 per hour, construction labor and sawmill work which was medium to heavy duty with earnings of $10.00 to $12.00 per hour, and tree removal which was heavy duty with earnings of $16.00 per hour.

28. Mr. Brownell was aware of the opinions of both Dr. Olscamp and Dr. McNulty concerning Claimant's limitations/restrictions. However, in preparing his report, he relied only on Dr. McNulty's opinion, explaining that Dr. McNulty's was the most recent evaluation of Claimant's limitations/restrictions. (McNulty Deposition p. 21-22 ll. 20-3). Mr. Brownell accepted Mr. Crum's recitation of Claimant's past employment and wage history, and testified

that based on Dr. McNulty's limitations/restrictions, Claimant has suffered loss of access to the labor in the range of 68-70%. Mr. Brownell did not calculate Claimant's pre-injury access to the labor market. His 68-70% calculation of Claimant's labor market access loss is evidently based on his belief that Claimant cannot return to any type of construction or sawmill work, and only about 50% of the food service jobs which Claimant was previous capable of performing. (Brownell Deposition p. 11 ll. 6-16). Mr. Brownell testified that while Dr. McNulty's limitations/restrictions generally allow Claimant to access medium duty work, there are some medium duty jobs which Claimant will not be able to perform due to Dr. McNulty's limitation against overhead lifting of more than five pounds with the affected extremity.

29. Mr. Brownell opined that as a consequence of the subject accident Claimant suffered wage lost in the range of 50%. However, this opinion was premised on Mr. Brownell's conclusion that if Claimant went back to work in the food and beverage industry, he could expect to earn $7.25 to $8.00 per hour. (Brownell Deposition p. 9 ll. 16-22). Therefore, Mr. Brownell's opinion on Claimant's wage loss referable to the subject accident is based on his perception of what Claimant could expect to earn if he sought employment in a very narrow segment of the labor market.

30. Mr. Brownell ultimately concluded that Claimant has suffered disability inclusive of impairment in the range of 68-70% of the whole person. He did not average Claimant's loss of labor market access with his wage loss to arrive at his opinion on disability. Rather, he relied only on his conclusion concerning Claimant's loss of access to the labor market in support of his ultimate opinion on the extent and degree of Claimant's disability. Explaining his reasoning in this regard he testified:

> Q. [By Mr. Nemec]: And can you explain why you utilized the loss of access in arriving at your final opinion on PPD as opposed to loss of earning?

> A. Well you can use - - and I note the Commission can use one or the other in different situations. His loss of access to the labor market is more than what his wage loss factor is.

Brownell Deposition p. 25 ll. 19-25

31. *Douglas Crum.* Douglas Crum, C.D.M.S, a vocational expert retained by Defendants, interviewed Claimant in March 2017, and prepared a report evaluating his disability. Mr. Crum noted that Claimant reported he was an average to good student in high school, was never in special education, is able to read well and perform basic mathematics. Claimant changed schools frequently because his parents' marital issues resulted in him being "bounced around a lot," and left high school in the 11th grade because he "was basically homeless." Defendants' Exhibit 12, p. 355. Furthermore, Mr. Crum indicated that Claimant owns a computer and reported he had good computer skills with knowledge of basic word processing and some spreadsheet training. He is a ten-finger typist but did not know his typing speed. Mr. Crum reported that Claimant had prior work experience in cooking, customer service, simple data entry, operating forklifts and a grader machine, hanging drywall, and residential remodeling.

32. When preparing his report of March 27, 2017, Mr. Crum only had access to Dr. Olscamp's opinions concerning Claimant's limitations/restrictions. Based on Dr. Olscamp's opinion that Claimant has no limitations/restriction following recovery from shoulder surgery, Mr. Crum opined that Claimant has suffered no disability as a consequence of the subject accident. Mr. Crum's March 27, 2017 report reflects that Mr. Crum was unaware of any pre-injury limitations/restrictions that affected Claimant's employability. Based on Claimant's education and transferable skills, Mr. Crum opined that prior to the subject accident, Claimant had access to approximately 13.9% of the jobs in his labor market. He identified all of the jobs he reviewed in arriving at this conclusion in his post-hearing deposition. (*See* Crum Deposition

p. 25-30). Mr. Crum testified to the entry level wage for the jobs that he identified, as well as the average wage. He acknowledged that on a post-injury basis, and assuming the limitations/restrictions envisioned by Dr. McNulty, Claimant can no longer perform all of the jobs in his pre-injury labor market. For example, Claimant can no longer perform his time of injury job, or certain construction jobs, such as roofing, which require lifting in excess of 50 pounds. However, unlike Mr. Brownell, Mr. Crum did not believe that Claimant was entirely foreclosed from working in the lumber or construction industries. (Crum Deposition p. 20-21 ll. 12-8). Based on the limitations/restrictions imposed by Dr. McNulty, Mr. Crum proposed that Claimant currently has access to approximately 11% of the labor market, which represents a 20% reduction of Claimant's access to the labor market as compared to his pre-injury labor market access. (Crum Deposition p. 14 ll. 4-9).

33. Mr. Crum also expressed an opinion on the extent and degree to which Claimant will suffer a prospective wage loss as a consequence of the subject accident. He proposed that since Claimant has a demonstrated ability, on a post accident basis, to earn $15.00 per hour, it is appropriate to measure wage loss by comparing this hourly wage against his $16.00 per hour time of injury wage. Therefore, Claimant has suffered wage loss of only 6.25% as a consequence of the subject accident. On cross examination, Mr. Crum was asked to speculate on what Claimant's wage loss might be were he unable to return to his position with 2M. Based on the starting and average wages of the jobs he reviewed, his belief that Claimant can return to certain medium duty jobs in the construction and lumber industry, the fact that the minimum wage in the state of Washington, an area within Claimant's labor market, is $11.00 per hour, Mr. Crum proposed that it is not unreasonable to believe that Claimant can obtain employment paying at least $11.00 per hour. Based on this assumption, Claimant has suffered wage loss of 31% as a

result of the subject accident. Therefore, of the opinions expressed by Mr. Crum, those most favorable to Claimant recognize labor market access loss in the range of 20% and wage loss in the range of 31%.

34. Weighing the vocational opinions. Mr. Brownell's opinion that Claimant has suffered loss of labor market access in the range of 68-70% is not persuasive. He did not explain this figure, other than to state that Claimant is incapable of returning to construction jobs, jobs in the lumber industry, and about half of the job in the food and beverage industry. He did not evaluate Claimant's pre-injury and post-injury access to the Northern Idaho labor market. Moreover, we conclude that Mr. Brownell's summary assessment that Claimant is incapable of performing jobs in any parts of the construction or lumber industries fails to recognize that there are certainly some jobs in those industries which fall within Claimant's limitations/restrictions. Mr. Crum's testimony was more credible in this regard. It is also troubling that in a arriving at his ultimate conclusion on Claimant's disability referable to the subject accident, Mr. Brownell simply chose to rely on the higher of the two measures he calculated in his evaluation process. Without any explanation, other than that Claimant's loss of labor market access was the higher figure, he rejected inclusion of Claimant's wage loss in his evaluation. Mr. Brownell's wage loss calculation can, in turn, be criticized because Mr. Brownell arrived at it simply on the basis of his belief that Claimant would be paid at minimum wage in any job he could obtain in the food and beverage industry. Mr. Brownell's evaluation of Claimant's probable wage loss fails to recognize other industries in which Claimant can compete with medium duty restrictions. It also fails to recognize Mr. Crum's unrebutted testimony that even those jobs in Claimant's residual labor market which start employees at minimum wage, pay a higher average wage after some period of service. It would be inaccurate to measure a 23-year-old individual's prospective wage loss by

his starting wage alone. Such an individual has many years in the labor market to look forward to, and a starting wage does not represent his anticipated average wage in any industry in which he obtains employment. By statute, disability is a measure of Claimant's present and "probable future" ability to engage in gainful activity. Idaho Code § 72-425.

35. Mr. Crum's opinion on disability is much better reasoned. He calculated Claimant's pre-injury and post-injury access to the labor market at large in arriving at his conclusion that Claimant has suffered loss of labor market access in the range of 20 percent. His analysis appropriately recognizes that while there are some jobs in the construction and lumber industry which Claimant is no longer capable of performing, there are still many that he can compete for. Mr. Crum's estimation that Claimant is probably capable of earning $11.00 per hour, on average, finds better support in the record than the estimates arrived at by Mr. Brownell. Even though there is no evidence, other than Claimant's testimony, that Claimant's employment at 2M Services was the result of a sympathetic employer, it nevertheless seems appropriate to discount that job as somewhat of an outlier. While Mr. Crum made his best guess that Claimant should be able to find employment paying $11.00 per hour, we believe that a $10 per hour wage better depicts Claimant's prospective hourly wage. While minimum wage is now $11.00 per hour in Washington, Claimant's past work history does not reflect that he has ever worked in that state. A comparison of Claimant's time of injury wage of $16 per hour with what we believe we believe represents his prospective wage, yields wage loss of 37.5%.

36. While the wage loss analyses performed by both Mr. Crum and Mr. Brownell were couched in terms of an evaluation of Claimant's pre-injury, and likely post-injury hourly wage, there is another way, not discussed by these experts, to consider the issue of wage loss. Claimant's earnings record establishes that in the five year period immediately preceding the

subject accident, his highest annual earnings were in 2012 at $16,141, and 2015 at $19,253. The record suggests, but does not definitively prove, that the tree removal business is a seasonal endeavor. (Brownell Deposition p. 19-20). Any full time minimum wage job in Idaho would produce annual earnings of $15,080. A full time (2,080 hour per year) job paying $10.00 per hour would produce annual income of $20,800. If, indeed, tree removal is seasonal work, it would be relatively easy for Claimant to exceed his highest annual income reported to date with a full time job paying $10.00 per hour.

37. Claimant does not have a high school degree, or its equivalent. However, he possesses some skills that belie his lack of a high school diploma. He has some computer skills and he is among the ten fingered when it comes to key board operation. He successfully employed these skills while working for Center Partners as a customer service representative. Claimant has work experience in a relatively wide sample of the labor market, given his relative youth. He retains the ability to perform some type of work in most of these industries. Nevertheless, Claimant's medium duty restrictions, and in particular, the restrictions against overhead lifting of more than five pounds with his injured arm are significant, and will deny him access to certain jobs at which he was successful in the past, such as tree removal and drywalling. Based on the foregoing, and after having considered Claimant's relevant medical and non-medical factors, the Commission concludes that he has suffered disability of 28.75% of the whole person, inclusive of his 2% PPI rating, which represents the average of what we have found to be the most accurate reflection of his wage loss and loss of access to the labor market.

38. **Attorney fees.** The final issue is Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804. Attorney fees are not granted as a matter of right under the Idaho

Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804 which provides:

> If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding attorney fees is a factual determination which rests with the Commission. Troutner v. Traffic Control Company, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

39. In the present case, Claimant asserts entitlement to attorney fees for Defendants' unreasonable delay of benefits. Claimant's accident occurred July 16, 2015. Defendants issued the first benefits check in January 2016—nearly 180 days after the accident. Claimant asserts that Defendants had notice his right shoulder injury was work-related by September 30, 2015, but still sent another letter to Dr. Olscamp asking whether the aging process might explain Claimant's shoulder injury when Claimant was 22 years old at the time and had no prior history of right shoulder complaints. Defendants assert that delay was in part due to Claimant's failure to provide Surety permission to obtain his prior medical records to investigate the medical causation of his right shoulder condition. Defendants also assert the delay was due in part to Dr. Olscamp's delay in providing Surety a medical opinion regarding causation.

40. Idaho Code § 72-402, provides in part:

> (1) An injured employee shall not be allowed income benefits for the first five (5) days of disability for work; provided, if the injury results in disability for

> work exceeding two (2) weeks, income benefits shall be allowed from the date of disability and be paid no later than four (4) weeks from date of disability. Provided, further, that the waiting period shall not apply if the injured employee is hospitalized as an in-patient.

(Emphasis supplied.)

41. Claimant was injured on July 16, 2015, and gave notice that very day to his supervisor David Turner, co-owner of All Seasons. Surety paid no medical benefits on the claim until December 11, 2015, and no temporary disability benefits until January 27, 2016. The chronology below aids in evaluating whether the delay was unreasonable:

a. July 16, 2015, Claimant developed right shoulder pain while doing tree removals at work and notified his Employer that his right shoulder was hurting such that he could not continue working and needed medical attention.

b. July 16, 2015, Claimant sought medical treatment at Northwest Urgent Care. His right arm was placed in a sling, he was restricted to light duty work with no use of his right arm, and was referred to Dr. Olscamp for orthopedic consultation.

c. July 21, 2015, Employer prepared a First Report of Injury listing an injury date of July 16, 2015 at 9:00 a.m., that Claimant began work that day at 7:30 a.m., and describing the work accident: "upon arrival of [sic] job employee stated that shoulder hurt and would be unable to do work required that day." [1]

d. July 24, 2015, Ryan Smith, PA-C, assistant to Dr. Olscamp, examined Claimant and recorded: "Chief complaint pain in the right shoulder. …. The patient is unsure when the symptoms began. The injury occurred at work. …. The injury occurred on 07-16-2015. The injury was reported to his employer on 07-16-2015. Accident/injury description: Pt shoulder gradually started hurting. He climbs trees for a living so has significant risk with overhead activities using his chainsaw etc. He denies a specific injury. …. At this point he has significant risk given his job requirements so time off would be suggested and encouraged. Work release note provided today." Defendants' Exhibit 7, pp. 103-104.

e. July 27, 2015, Surety acknowledged receiving the First Report of Injury. Surety believed the report suggested Claimant may have been injured prior to reporting for work.

[1] Claimant took no part in completing the report, had no shoulder pain prior to starting work on July 16, 2015, and denied ever making such a statement.

f. August 4, 2015, Surety left telephone messages for Claimant and Employer requesting statements.

g. August 7, 2015, Claimant returned Surety's call, but was too busy then to give a statement which may have taken 30 minutes or longer.

h. August 8, 2015, Claimant signed the first medical release supplied by Surety and thereafter returned it; however, he did not list the names of medical providers he had seen in the previous ten years.

i. August 13, 2015, Ryan Smith, PA-C, examined Claimant, noted continuing right shoulder pain, and recorded: "He has not fully gained strength and ROM to this point so we will continue with PT for another 4-6 weeks. Work release note provided today and we will have him return here in about 5 weeks to check on progress with hopes of releasing him back to work full time." Defendants' Exhibit 7, p. 107.[2]

j. August 14, 2015, Surety received a call from North Star Physical Therapy affirming Claimant had received eight physical therapy sessions for his shoulder. Surety confirmed claim was pending with no guarantee that any visits will be authorized for payment.

k. August 17, 2015, Surety sent a second medical release form to Claimant asking him to list all medical providers he had seen in the previous ten years so Surety could obtain his pre-injury medical information.[3]

l. August 19, 2015, Surety took Claimant's statement telephonically wherein Claimant was asked "What were you doing when you noticed your current symptoms? And replied "Just working, no specific incident or accident." Defendants' Exhibit 9, p. 331.

m. August 19, 2015, Surety also took a telephonic statement from Employer wherein the Employer was asked: "Did a specific event occur? And responded: "No, nothing specific. No injury." Defendants' Exhibit 9, p. 334.

n. September 2, 2015, David Turner, co-owner of All Seasons the insured policy holder, called Surety's examiner who recorded: "TC from PH regarding claim. He is frustrated by the length of time it has been to make a claim decision. I explained that with this kind of claim (OD) it does take longer. Advised that we

[2] Four weeks had passed since Claimant had reported his July 16, 2015 right shoulder injury at work to his Employer.

[3] Surety believed the information available suggested an occupational disease rather than an accident and sought information about pre-existing shoulder conditions. Surety's examiner testified: "With an occupational disease we have to obtain all the past medical history to determine whether or not there was a preexisting condition. My understanding of the statute is if there was a preexisting condition, it can be denied unless there was a specific accident." Sears Deposition, p. 8, ll. 18-23.

are waiting for clmt's past medical records to confirm if any prior injury or condition. He states that it is just had [sic] to sit back while the clmt can't work, has no income, and is losing everything he owns because he has not worked. PH states that he has worked the clmt LD hours since the injury but they just don't have that much LD work." Defendants' Exhibit 9, p. 264 (emphasis supplied).

o. September 2, 2015, Surety called Claimant and left message that second medical release had not yet been returned and was needed to gather past medical records and make a decision on the claim. Claimant subsequently returned the second medical release and provided names of the medical providers but did not sign the second release. Surety used his signed first release to request information from the pre-injury medical providers listed on his second release.

p. September 4 and 8, 2015, Surety received calls from the physical therapist's office wanting to know if the claim was going to be accepted or denied and when a decision would be made. Surety advised it was still working on the claim.

q. On or before September 21, 2015, Claimant retained attorney Stephen Nemec to represent him in his workers' compensation claim.

r. September 23, 2015, Claimant's counsel notified Surety he had been retained and stating: "please advise on whether Mr. Berger's claim will be accepted as well over two months have passed since the date of the accident." Defendants' Exhibit 9, p. 302.

s. September 25, 2015, Surety's examiner returned Claimant's attorney's call and left message confirming that Surety was then gathering past medical history.

t. September 25, 2015, Surety's examiner faxed a letter to Dr. Olscamp, acknowledging Claimant's treatment at Dr. Olscamp's office on July 24, 2015 for an injury occurring at work on July 16, 2015, and requesting his medical opinion on the cause of Claimant's condition.

u. September 29, 2015, Surety's examiner called several past and current medical providers requesting Claimant's medical records.

v. September 30, 2015, Dr. Olscamp faxed his response to Surety's September 25, 2015 letter listing a diagnosis of "RIGHT SHOULDER STRAIN & IMPINGEMENT." And specifically opining: "DOES SEEM LIKELY ASSSOCIATED WITH WORK OVERUSE PER HISTORY." Defendants' Exhibit 7, p. 111.

w. October 8, 2015, Surety's examiner recorded: "TC from Nancy at CAT [Claimant's attorney] office. Clmt is in dire need of medical treatment and she wanted to know what the status of the claim is. Advised that claim is pending but sent to my supervisor for review. She stated that they will probably need to file a

complaint then since no decision is made." Defendants' Exhibit 9, p. 259 (emphasis supplied).

x. October 16, 2015, Surety sent a follow-up letter to Dr. Olscamp asking whether "Mr. Berger's complaints were caused by his work activities, as opposed to other factors, including but not limited to the aging process? [and] whether the condition originated from his employment as opposed to merely being aggravated by his employment." Defendants' Exhibit 9, p. 114. [4]

y. October 16, 2015, Surety's examiner called All Seasons explaining Surety needed time sheets to confirm exposure to occupational disease. All Seasons provided Surety the requested information that very same day.

z. October 21, 2015, Surety's examiner recorded: "TC from CAT, Steve Nemec. He wanted status of claim. Advised that we are waiting for response on causal from MD but nothing new in file. He stated … he will probably go ahead and file a complaint." Defendants' Exhibit 9, p. 257.

aa. October 21, 2015, Claimant filed his Complaint initiating the instant action.

bb. December 1, 2015, Ryan Smith, PA-C, assistant to Dr. Olscamp faxed to Surety a response to Surety's October 16, 2015 letter asking whether "Mr. Berger's complaints were caused by his work activities, as opposed to other factors, including but not limited to the aging process? …. On a more probable than not basis—yes. See chart notes." And as to the question "whether the condition originated from his employment as opposed to merely being aggravated by his employment" responded "Unknown. Pt did not state specific injury while at work however work conditions could elicit this type of injury/pain." Defendants' Exhibit 7, p. 116.

cc. December 11, 2015, Defendants finally authorized medical treatment and made their first payment of medical benefits. Defendants' Exhibit 3, p. 26.

dd. December 29, 2015, Claimant underwent a right shoulder MRI that revealed a Type 2 SLAP tear.

ee. January 27, 2016, Defendants issued the <u>first</u> temporary disability benefits check covering the period of September 9-October 4, 2015. Defendants' Exhibit 3, p. 25.

ff. January 27, 2016, Dr. Olscamp performed arthroscopic right shoulder labral repair.

[4] Claimant asserts it was unreasonable and effectively a delay for Surety to seemingly attempt to influence Dr. Olscamp's opinion by inquiring about causation related to "the aging process" when Claimant was then only 22 years old.

gg. June 10, 2016, Defendants issued a temporary disability benefits check in the amount of $2,900.71 covering the period of July 17-September 2, 2015. Defendants' Exhibit 3, p. 25.

42. The above establishes that although Claimant initially contributed to the delay in processing his claim, he was not responsible for any delay after September 25, 2015. Defendants blame the delay thereafter on Dr. Olscamp; however, he provided chart notes and a direct response to Surety's September 25th letter affirming causation no later than September 30, 2015. If Surety believed Dr. Olscamp's September 30, 2015 faxed response was unclear, it should not have waited more than two weeks—until October 16, 2015—to request clarification. Surety knew by September 2nd from All Seasons' co-owner that Claimant could not perform his usual work and All Seasons did not have much light duty work to offer.

43. As noted, Idaho Code § 72-402 directs payment of income benefits no later than four weeks from the date of disability. By September 30, 2015, more than 10 weeks had passed since Claimant gave notice of his right shoulder injury to Employer. The fact that Dr. Olscamp's office apparently did not respond to Surety's October 16, 2015 letter until December 1, 2015, does not excuse Surety from at least partial responsibility for the additional delay. Even assuming Surety's October 16th request for clarification was itself reasonable, the record does not show timely and diligent follow-up by Surety with Dr. Olscamp's office between October 16 and December 1, 2015—a period of more than six weeks—to obtain any information Surety believed was lacking. Moreover, entirely ignoring the total delay of 122 days (76+46) between July 16 and September 30, 2015 (76 days), and between October 16 and December 1, 2015 (46 days), Surety offers no persuasive reason for its delay totaling more than 10 weeks from September 30 to October 16, 2015 (16 days), and from December 1, 2015 to January 27, 2016 (58 days), before paying Claimant any income benefits.

44. Defendants' delay in authorizing medical treatment was unreasonable. Defendants' delay in payment of temporary disability benefits was unreasonable. Claimant has proven Defendants' liability for attorney fees.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven he suffers permanent partial impairment of 2% of the whole person due to his 2015 industrial accident.

2. Claimant has proven permanent disability of 28.75%, inclusive of his 2% whole person permanent impairment.

3. Claimant has proven Defendants' liability for attorney fees. Unless the parties can agree on an amount for reasonable attorney's fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees and costs in the matter. See Hogaboom v. Economy Mattress, 107 Idaho 13, 684 P.2d 900 (1984). Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendant may file a memorandum in response to Claimant's memorandum. If Defendant objects to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after Defendant's response, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees and costs.

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

DATED this _3rd_ day of _November_, 2017.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

_____/s/_____
Thomas P. Baskin, Commissioner

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

ATTEST:

____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _3rd _ day of _November__, 2017, 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:

STEPHEN J NEMEC
1626 LINCOLN WAY
COEUR D'ALENE ID 83814

H JAMES MAGNUSON
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_____/s/_____