BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SABINO BEASCOECHEA, Claimant, v. CENTRAL PAVING COMPANY, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2013-021349** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed November 17, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue who conducted a hearing in Boise on April 15, 2016. Taylor Mossman-Fletcher represented Claimant. Matthew Vook represented Defendants Employer and Surety. The parties presented oral and documentary evidence and later submitted briefs. The case came under advisement on July 18, 2016. This matter is now ready for decision.

ISSUES

The issues to be decided according to the Notice of Hearing are:

1. Whether and to what extent Claimant is entitled to benefits for:
    a) Temporary disability,
    b) Permanent partial impairment (PPI),
    c) Permanent disability in excess of PPI, including total and permanent disability, and
    d) medical care; and
2. Whether Claimant is permanently and totally disabled under the odd-lot doctrine.

At hearing Claimant withdrew the issue of attorney fees.

CONTENTIONS OF THE PARTIES

Claimant contends he is totally and permanently disabled—100% or as an odd-lot worker. He suffered an undisputed 6% PPI from the accident, but should receive more because rating physicians failed to include a consideration for subjective pain. Claimant's labor market and nonmedical factors at the time of hearing support an odd-lot determination. Claimant's decision to retire came only after MMI when he assessed his inability to return to the job which he would have continued but for the accident. He needs future medical care in the form of medications and therapy.

Employer and Surety contend Claimant is not in the labor market because, at age 68, he has retired. His permanent disability is much less than total by every reasonable analysis. He does not meet the criteria for an odd-lot worker. Claimant's vocational expert rated his disability at 60%. Claimant failed to show a benefit for future medical care should be awarded.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant, Employer's vice-president Patrick McEntee, and Claimant's step-son Robert Nagel;
2. Claimant's exhibits 1 through 21; and
3. Defendants' exhibits A through S.

The Referee submits the following findings of fact and conclusions of law for the approval of the Commission and recommends it approve and adopt the same.

FINDINGS OF FACT

1. Claimant was born in the Basque country in Spain. His native language is Basque. He understands some Spanish and limited English but speaks less of either.

Although intelligent, he is marginally literate in these languages. A Basque interpreter, Ms. Izaskun Kortazar, was required at hearing. A Spanish interpreter assisted at Claimant's prehearing deposition.

2. Claimant has worked at manual labor for essentially all of his life. For Employer he operated heavy equipment, primarily a roller used to pave asphalt roadways.

3. On August 12, 2013 Claimant was injured in a compensable accident at work. Despite surgery he still has right shoulder issues and he feels he cannot return to roller operation.

Post-Accident Medical Care: 2013

4. On August 12 Claimant sought emergency care immediately after the industrial accident. His right shoulder was dislocated. The dislocation was reduced and a sling was provided. X-rays showed the acute condition, its reduction, and chronic degeneration. They showed no fracture. Claimant was told not to return to work for two days, and not to use his right arm or hand significantly for seven days.

5. On August 23 an MRI showed two full-thickness tears in the rotator cuff.

6. Follow-up visits and therapy provided little help in the following weeks.

7. On September 12 Darby Webb, M.D., recommended surgery.

8. On October 1 shoulder surgery, both arthroscopic and open, was stopped because of excessive bleeding.

9. On October 29 arthroscopic surgery was completed including debridement, biceps tenotomy, subacromial decompression, and rotator cuff repair.

10. On October 30 Claimant reported intolerable pain.

11. In mid-November Claimant began what would become 25 weeks of significant physical therapy. He was cooperative and reported diligence performing his home exercise

program as well.

Medical Care: 2014

12. On January 16 Claimant sought treatment at Primary Health with Dr. Belzer for chronic conditions unrelated to his shoulder. Claimant's shoulder was not mentioned in the note except to indicate Claimant has been unable to exercise since surgery. This was relevant to Claimant's blood glucose level.

13. On January 27 Claimant reported continuing shoulder and neck pain radiating into his arm. Dr. Webb's examination revealed paresthesias in the ulnar and radial nerve distributions, and mild reductions in strength and range of motion. He deemed Claimant's improvement "fair . . . but still quite stiff." He recommended Claimant continue physical therapy and use the JAS brace. He noted Claimant was back at light duty.

14. At a March 10 follow-up visit to Dr. Webb, Claimant reported he had not been working because he was caring for his long-time companion, Robin, who had been diagnosed with liver cancer. After an examination which showed normal strength and nearly normal range of motion, Dr. Webb recommended he return to light-duty work, if available, and continue physical therapy. Dr. Webb anticipated MMI in two weeks.

15. On May 15 Dr. Webb recommended a work-hardening program. He deemed Claimant was not yet at MMI. He noted Claimant had developed adhesive capsulitis. Dr. Webb also noted Robin had passed away.

16. On May 27 Michael McClay, Ph.D., evaluated Claimant for entry into the WorkFit program. He approved Claimant's entry. Dr. McClay provided biofeedback training to aid pain control and sleep during the WorkFit program.

17. On May 27, Claimant's physical therapy changed. Nancy Greenwald, M.D.,

began providing the therapy and evaluated Claimant in the WorkFit setting. For the next four weeks Claimant cooperated and met goals established by therapists.

18. On June 3 Dr. Greenwald reviewed records and examined Claimant for the WorkFit program. She found decreased range of right shoulder motion, with weakness and atrophy in specific musculature. She recommended an EMG. She diagnosed chronic rotator cuff with paresthesia as well as Dupuytren's contractures in both hands. After the EMG results showed objective abnormal findings she added a diagnosis of brachial plexus injury.

19. The WorkFit occupational therapist used the Key protocol for functional testing. She reported Claimant's performance as "Valid" and "full effort." The report does not indicate whether an interpreter was present or whether Claimant spoke Spanish or English, but the report indicates Claimant was able to communicate well about specific function and tolerance to the testing.

20. After a June 26 follow-up visit and after consultation with Dr. Greenwald, Dr. Webb opined Claimant was at MMI. He rated PPI at 10% of the upper extremity which converted to 6% whole person. Drs. Webb and Greenwald restricted Claimant as follows:

> no overhead work, no pushing or pulling, occasional lifting of 25 pounds, but frequent lifting 10 pounds, and continuous lifting of 5 pounds. He will also do no shoveling. He may drive occasionally at work on the pa[v]er 1-2 hours per day on[] other small vehicles no more than 2-3 hours per day. He should not lift more than 25 pounds.

Dr. Webb did not see Claimant again until February 2015.

21. On July 16 Dr. Belzer reported Claimant said his right shoulder pain was not getting better. Dr. Belzer noted Claimant's blood glucose was "slightly improved. Will be a little tougher for him now that he will be retiring."

Medical Care: 2015

22. On January 19 Claimant visited Shelley Ringo, M.D. at Primary Health. She noted continued right shoulder pain despite physical therapy. She suspected degenerative joint disease was contributing to the ongoing right shoulder pathology. Her exam findings were mildly positive. She opined the condition was related causally to Claimant's work accident and referred him to a surgeon for consultation.

23. On January 19 a right shoulder x-ray showed mild-to-moderate degeneration with post-surgical changes.

24. On February 12 Dr. Webb noted "he did retire." Claimant complained of neck, rather than shoulder, pain. Examination showed shoulder strength and range of motion to be diminished at about where it was in late January 2014. Dr. Webb opined this related to the subscapularis tendon which was now chronic and not repairable. Radicular symptoms were not present. Dr. Webb recommended continuing physical therapy.

25. On February 13 Claimant again began physical therapy. It lasted about six weeks.

26. On March 23 Dr. Webb noted, "Sabino is retired." He noted chronic pain and weakness and opined Claimant was still at MMI.

Prior Medical Records

27. About one month before this industrial accident Claimant sought medical care for a wrist condition that affected his grip strength, Dupuytren's contracture, right greater than left. This chronic condition caused Claimant to worry about needing surgery but did not affect his shoulder.

28. Claimant has high blood pressure and is prediabetic.

Vocational Factors

29. Born in 1947 Claimant was 68 at the time of hearing.

30. Employer's records show a time-of-injury wage of $18.00 per hour, consistent with an average weekly wage of $720.

31. On September 17, 2013 Claimant was referred to ICRD. Greg Herzog provided service. Both Employer and Claimant desired to return Claimant to his old job if possible.

32. On December 16, 2013 Dr. Webb opined Claimant could return to work, sedentary duty only, without identifying specific restrictions. After several contacts back and forth, on March 18, 2014 Dr. Webb assigned specific temporary restrictions of 10 pounds lifting, limited repetitive lifting and bending, and no work above the shoulder.

33. A May 15, 2014 time-of-injury job site evaluation (JSE) was signed by Dr. Webb as "not approved" pending completion of the work-hardening program. Employer confirmed suitable work would be available as soon as Claimant completed the work-hardening program.

34. A June 18, 2014 ICRD note represents the first recorded instance of Claimant expressing hesitance about returning to work. He was worried he might be a danger to coworkers. He also mentioned that he had retained an attorney.

35. On June 25, 2014 Employer reported that Claimant had expressed a wish to retire.

36. On June 27, 2014 Employer reported that a job was immediately available to Claimant within the restrictions imposed by Dr. Webb on the date of MMI. An offer letter was dated June 30, 2014. Claimant refused the job and refused to sign an acknowledgement that the offer had been made. Claimant was given until July 8 to accept the job. Claimant did not contact Employer to accept the job by that date. ICRD closed its file, noting that Claimant had "elected to retire."

37. On January 30 2015 Mary Barros-Bailey, Ph.D., evaluated Claimant. She conducted an interview in Spanish. She noted Claimant's history of manual, mostly unskilled

and semi-skilled jobs as well as his transferrable skills. Her recitation of relevant nonmedical factors is consistent with Claimant's testimony and other evidence of record. Dr. Barros-Bailey opined that if Claimant did not return to work for employer, considering medical restrictions and nonmedical factors, his permanent disability would likely be rated at 60% inclusive of PPI. She also noted:

> Should Sabino return to his employer at injury in the future within the approved job offer at the same wages and not seek employment in the competitive labor market through his remaining worklife, than [sic] his loss of access to the labor market would be moot and there would be no lost wage earning capacity.

Dr. Barros-Bailey further noted that Claimant "is considered retired."

38. In deposition Claimant was aware of the maximum wage he could earn and still receive full Social Security retirement benefits. When asked if he was looking for work he answered, "I'm done."

39. Claimant worked some part-time hours for Employer in December 2013 and January through April 2014.

DISCUSSION AND FURTHER FINDINGS OF FACT

40. 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).

41. 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). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447−48, 74 P.2d 171, 175 (1937).

See also Dinneen v. Finch, 100 Idaho 620, 626−27, 603 P.2d 575, 581−82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

42. Claimant makes a good first impression. At hearing the formality of interpretation impeded useful assessment of his language ability in Spanish and in English. He appears genuine. His work record establishes his lifelong willingness to work. Nothing in his demeanor suggested a lack of candor. He does not appear prone to exaggeration.

PPI

43. Permanent impairment is defined and evaluated by statute. Idaho Code § 72-422 and 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

44. Both physicians of record who expressed an opinion agreed a six percent whole-person PPI is most appropriate. Claimant's suggestion that an allegation of subjective pain should warrant an increase is not well taken. Claimant reported continuing pain and pain with certain activity to these physicians and to therapists and others in the WorkFit program who communicated with these physicians. The evidence of record supports a PPI rating of six percent.

Permanent Disability

45. **"**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.

46. 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 a claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

47. 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. ISIF*, 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).

48. If a claimant is able to perform only services so limited in quality, quantity, or dependability that no reasonably stable market for those services exists, she is to be considered totally and permanently disabled. *Id.* Such is the definition of an odd-lot worker. *Reifsteck v. Lantern Motel & Cafe*, 101 Idaho 699, 700, 619 P.2d 1152, 1153 (1980). Taken from, *Fowble v. Snowline Express*, 146 Idaho 70, 190 P.3d 889 (2008). Odd-lot presumption arises upon showing that a claimant has attempted other types of employment without success, by showing that she or vocational counselors or employment agencies on her behalf have searched for other work and other work is not available, or by showing that any efforts to find

suitable work would be futile. *Boley*, *supra.*; *Dehlbom v. ISIF*, 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997).

49. The mere fact of a return to work for the same employer does not establish an absence of permanent disability in excess of PPI where physicians have imposed restrictions which may decrease a claimant's labor market access or wage-earning capacity. All medical and nonmedical factors are to be considered. *Graybill*, supra. Also see, e.g., *Loya v. J.R. Simplot Company*, 120 Idaho 62, 813 P2d 873 (1991) (Loss of concurrent employment and wage is a relevant factor in determining permanent disability).

50. The only vocational opinion appears thorough and well reasoned to the extent that it identifies disability less than total. Claimant is not 100% disabled.

51. Dr. Barros-Bailey opined that Claimant was 60% permanently disabled if he did not return to work for Employer, but would experience no loss of labor market access or wage-earning capacity—therefore, no permanent disability—if he did. This reasoning is contrary to *Graybill* and *Loya*.

52. Employer provided persuasive evidence that Claimant was a valued worker. Claimant's return to work would be accommodated as required by physicians' restrictions. Employer offered suitable work.

53. Nevertheless, Claimant's restrictions do not allow him to return to his prior job. He has suffered a loss of some labor market access as a result of these restrictions. Dr. Barros-Bailey's opinion that loss of labor market access was "moot" if he returned to Employer is not well taken. Moreover, although Employer actually maintained Claimant's time-of-injury wage while he performed part-time, light-duty work, the record is speculative at best about whether Claimant would have continued to receive that wage if such work

had become more than temporary during recovery. Therefore, Dr. Barros-Bailey's opinion about mootness of a wage-loss factor if he returned to Employer is similarly without persuasive foundation.

54. Dr. Barros-Bailey's opinion of 60% permanent disability is persuasive but incomplete as it did not factor in the bona fide opportunity for return to Employer. The weight assigned to such an offer is a matter within the expertise of the Commission. After all, there are offers and then there are offers.

55. Here the record shows the offer was real rather than a token in aid of litigation. Employer testified about the availability of jobs within the company that fit Claimant's restrictions. Employer valued Claimant's knowledge and work ethic demonstrated during his years of service to the date of the accident. However, Employer's business is to an extent seasonal. Light-duty positions available to Claimant appear from the record to be somewhat more likely to be subject to a shorter season.

56. Taking these factors into account, together with all medical and nonmedical factors of record, Claimant's permanent disability is likely less than, but somewhat near to the 60% figure articulated by Dr. Barros-Bailey. The record supports a finding that Claimant's permanent disability is 45%, inclusive of PPI.

Odd lot

57. Claimant returned to part-time, light-duty work about four months after the accident. He left that job after five months of such work, mostly out of fear that he would be unsafe to others if required to drive the paver. Claimant's subjective fear constitutes an independent, intervening basis for his decision to end his employment. It was speculative and contrary to physicians' restrictions which expressly allowed some driving of a paver.

Claimant did not fail at an attempt to work because of the accident. He was offered a job within his restrictions and was able to work it for as long as he chose to continue.

58. Neither Claimant nor others on his behalf conducted a job search sufficient to qualify for odd-lot status.

59. Claimant failed to provide persuasive evidence to show it likely that a job search would be futile.

60. Employer's willingness to provide continued employment did not represent an offer by a sympathetic employer. Rather, it represented a recognition of valued traits and skills Claimant had provided and could provide as an employee.

61. Claimant failed to show he qualifies as an odd-lot worker. This is not a close case. Moreover, even if he had so shown, the presumption, if applied, would be overcome by the bona fide offer of employment which Claimant rejected.

Medical Care

62. Claimant argues for a benefit for future medical care. He failed to show a preponderance of evidence to support such a claim. Dr. Webb's last visit essentially stated he was still at MMI. Except for a single visit to Dr. Ringo, Claimant has not sought ongoing medical treatment.

63. The parties dispute the compensability of the bill from Dr. Ringo amounting to $103.95. Although Claimant was at MMI and did not receive prior approval, this single visit, second opinion sufficiently related to the accident and injury and is deemed compensably related to the accident and injury.

CONCLUSIONS

1. Claimant is entitled to PPI rated at 6% of the whole person;

2. Claimant is entitled to permanent disability rated at 45% of the whole person, inclusive of PPI;

3. Claimant is entitled to an additional $103.95 as a compensable medical benefit;

4. Claimant failed to show it likely he is entitled to future medical benefits;

5. Claimant failed to show it likely he is totally and permanently disabled, either 100% or as an odd-lot worker.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 17th day of October, 2016.

INDUSTRIAL COMMISSION

___/s/_____
Douglas A. Donohue, Referee

ATTEST:
___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November, 2016, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** were served by regular United States Mail upon each of the following:

TAYLOR L. MOSSMAN-FLETCHER
611 WEST HAYS STREET
BOISE, ID 83702

MATTHEW VOOK
P.O. BOX 6358
BOISE, ID 83707

___/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SABINO BEASCOECHEA, Claimant, v. CENTRAL PAVING COMPANY, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2013-021349** **ORDER** Filed November 17, 2016

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

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

1. Claimant is entitled to PPI rated at 6% of the whole person;

2. Claimant is entitled to permanent disability rated at 45% of the whole person, inclusive of PPI;

3. Claimant is entitled to an additional $103.95 as a compensable medical benefit;

4. Claimant failed to show it likely he is entitled to future medical benefits;

5. Claimant failed to show it likely he is totally and permanently disabled, either 100% or as an odd-lot worker.

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

DATED this 17th day of November, 2016.

INDUSTRIAL COMMISSION

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

PARTICIPATED BUT DID NOT SIGN.

_____
Thomas E. Limbaugh, Commissioner

___/s/_____
Thomas P. Baskin, Commissioner

ATTEST:
___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November, 2016, a true and correct copy of the **ORDER** was served by regular United States Mail upon each of the following:

TAYLOR L. MOSSMAN-FLETCHER
611 WEST HAYS STREET
BOISE, ID 83702

MATTHEW VOOK
P.O. BOX 6358
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___/s/_____