BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JEREMIAH S. CHAVES, Claimant, v. RIGHT NOW, INC., Employer, and TRUCK INSURANCE EXCHANGE, Surety, Defendants.	**IC 2013-020545** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed June 2, 2015

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee LaDawn Marsters, who conducted a hearing in Boise on January 5, 2015. Claimant was present and represented by David M. Farney of Nampa. Jon M. Bauman of Boise represented Employer (Right Now) and Surety (collectively, Defendants). The parties presented oral and documentary evidence. One post-hearing deposition was taken. The parties then submitted post-hearing briefs, after which Claimant submitted a reply brief. This matter came under advisement on April 29, 2015.

ISSUES

By agreement of the parties at the hearing, the previously noticed issues to be decided as a result of the hearing were narrowed to the following three issues:

1. Whether Claimant's condition is due in whole or in part to a preexisting and/or subsequent injury or condition;

2. Whether and to what extent Claimant is entitled to benefits for permanent partial disability in excess of permanent impairment; and

3. Whether apportionment for a preexisting condition pursuant to Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

Claimant contends that, given his medical and non-medical factors, he has suffered permanent partial disability (PPD) of 32%[1] of the whole person due to permanent restrictions and limitations he incurred solely as a result of a July 2013 industrial low back injury, plus a subsequent hernia he sustained due to side effects of medication prescribed to treat his low back. Claimant relies upon the vocational expert opinion of Douglas Crum, CDMS.

Defendants counter that Claimant has suffered significantly less PPD than he seeks. They rely upon the vocational opinions of Teresa Ballard, M.A., vocational consultant with the Industrial Commission Rehabilitation Division (ICRD). They also argue that Mr. Crum's opinion is substantially founded upon incomplete and inaccurate information, so it should be afforded little evidentiary weight. Finally, Defendants seek apportionment of Claimant's disability to his bilateral forearm impairment due to a congenital condition.

[1] Claimant seeks 35% PPD inclusive of PPI. There is no dispute that Claimant incurred 3% PPI as a result of his industrial injuries. So, Claimant seeks 32% PPD.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Douglas Crum taken at the hearing;

2. Claimant's Exhibits (CE) A through I admitted at the hearing;

3. Defendants' Exhibits (DE) 1 through 15 admitted at the hearing; and

4. The post-hearing deposition testimony of Teresa Ballard taken January 21, 2015.

After having considered all the above evidence and legal arguments of the parties, the Referee submits the following findings of fact and conclusions of law for adoption by the Commission.

OBJECTIONS

All pending objections at the deposition of Ms. Ballard are overruled.

The Referee recommends the following findings of fact and conclusions of law for consideration by the Commission.

FINDINGS OF FACT

BACKGROUND

1. Personal. Claimant was one day shy of his 34th birthday at the time of the hearing and residing in Caldwell. He is the father of six children, including one set of twins, ranging from nine months of age to 12 years, and he is engaged to be married. The twins live with him fulltime, and he has physical custody of the other children during some weekends and vacations.

2. Education. Claimant attended high school in Caldwell until the eleventh grade. In 1998, Claimant obtained his GED after quickly and successfully completing the high school equivalency program at Boise State University. Claimant speaks English and Spanish fluently, but is a proficient reader of only English. For example, Claimant said he could read a Spanish

street sign, but he would not be able to read a Spanish newspaper article and understand it. Claimant likes mathematics and can perform basic addition, subtraction, multiplication, and division, and he is computer literate. He is a hunt-and-peck typist, but he can create a document using word processing software. He can also surf the web, communicate via email, and perform Internet research.

PREEXISTING MEDICAL CONDITIONS

3. Bilateral radioulnar synostosis. Claimant has bilateral radioulnar synostosis, a congenital defect that prevents him from turning his forearms underhand/downward (supinating). Childhood surgeries failed to correct the condition because, as Claimant explained, "The radioulnar synostosis, it's a bone that grows between the two bones that allow you to supinate and it is ever growing, and so even after removal, it wants to heal itself and the way it does that is it grows back." TR-31, 32.

4. Claimant's inability to supinate his wrists affects the way he approaches all aspects of his life – work, sports, social, school – but he generally finds alternative methods for accomplishing tasks that ordinarily require supination.

5. Claimant has been unable to perform some tasks at work, and has lost some jobs he was assigned through a temporary employment service, due to his in inability to supinate his wrists:

> There was just temporary work that I had done where they required you to lift things underhand a certain way or had to be close to the body so your arms have to be underhand, where on occasions if I could shift around something, I could grab it maybe from the outside or pull it into my body with one hand over the other hand over on the other side, this meant it was up against something on a track or something where I had to consistently be able to supinate just to keep it consistent as far as that went.

TR-73, 74.

6. At Right Now, as with his other permanent positions, Claimant was able to accommodate for his inability to supinate. "…I would have to contort my body, have to lay down in order to kind of sit myself or rest my body so that I can then stick my fingers or hands in certain places that [a person] would in normal circumstances have to supinate to be able to do that." *Id.*

7. Claimant has never been assessed any PPI or medical restrictions related to his bilateral radioulnar synostosis.

8. Left foot fractures. In 2001, Claimant suffered multiple fractures in his left foot when a piece of heavy equipment rolled onto him at work. Claimant's treatment included physical therapy and wearing a boot. Following his recovery, Claimant was not assessed any permanent partial impairment (PPI) or permanent medical restrictions.

9. Burn injury on hand. In 2005, Claimant burned his hand at work. The wound was treated with ointments and completely healed with no resultant PPI or permanent medical restrictions.

10. Right ankle sprain. In 2007, Claimant suffered a right ankle sprain when he rolled it against a pallet. He had no PPI or permanent medical restrictions as a result.

11. Right knee injuries. In 2008, Claimant felt a clicking in his right knee after slipping off of an edge. He had it examined for "well-being purposes," but the injury fully resolved without any resultant PPI or permanent medical restrictions. He had another right knee injury in 2010 that completely resolved without PPI or restrictions.

12. Right shoulder, mid back, and right leg injuries. In 2011, Claimant suffered injuries to his right shoulder, mid back, and right leg when a vehicle struck him while he was riding his bicycle to work. Claimant was treated with physical therapy, chiropractic adjustments,

and medication. He fully recovered without any residual problems, PPI, or permanent medical restrictions.

13. Upper back strain. In 2012, while he was working for Right Now, Claimant suffered an upper back strain that healed on its own. No PPI and no permanent medical restrictions were assigned as a result of this injury.

EMPLOYMENT HISTORY

14. Employment experience. Claimant worked as an agricultural laborer before he reached high school. Then, he left high school to continue working. He soon looked into other types of work, seeking to improve his skills and abilities. Claimant went from agricultural labor jobs, to jobs in food processing, assembly, and manufacturing plants. Claimant's employment choices were not random. He has always been on the lookout for new opportunities to, as he phrased it repeatedly during the hearing, build himself up. Specifically, Claimant:

- Built the external housing that mounted into RVs, along with the framework and installation.
- Built framework for external and internal walls for manufactured homes on a production line, working himself into a supervisory position in which he trained and monitored new hires on equipment use and safety practices.
- Built RV furniture, assembling pieces "from top to bottom," including cushioning and sealing them with fabric. TR-24. Each unit weighed 50-150 pounds.
- Obtained certification to operate equipment, including forklifts. Drove forklifts on the job.
- Operated assembly plant machines.
- Prepared granite for countertops and moldings on a production line by cutting, routing edges, and setting.
- Performed building framing work as an independent contractor.

- Built and repaired custom heating, cooling, ventilation, and humidification systems for potato storage buildings.

- Worked as a lead carpet cleaning technician in commercial and residential buildings, supervising one or two other employees on his crew. In connection with this job, Claimant was a member of an inspirational team, representing the company as a member of networking organization through which he gave and received business referrals.

15. Most of the jobs Claimant has held in his lifetime required him to regularly lift objects exceeding 50 pounds, and many of them required him to frequently twist at the torso.

16. Earnings history. Claimant's annual earnings by tax year, before his time-of-injury job, as compiled by Douglas Crum, CDMS:

- 2000: $4,519
- 2001: $442
- 2002: $11,815
- 2003: $961
- 2004: $7,056
- 2005: $2,603
- 2006: $15,707
- 2007: $8,208
- 2008: $21,388
- 2009: $31,605
- 2010: $23,193
- 2011: $14,303
- 2012: $32,459
- 2013 (through July 8 injury): $21,602

17. Based upon the above figures, Claimant's average annual earnings for the five full tax years preceding his industrial injury (2008 through 2012) was $24,590. His median wage was $23,193.

EMPLOYMENT AT RIGHT NOW

18. Claimant began working at Right Now, as a heating/cooling system tune-up tech, in 2012. Following a successful training and probationary period, Claimant was promoted to a regular technician position. He was sent out on service calls where he assessed heating and

cooling systems at the owner's request, diagnosed the problem and recommended repairs, obtained consent to perform repairs and/or order parts, and referred customers who may be in the market for a full system replacements to a "comfort adviser". "[A] comfort advisor … was able to get them into equipment, higher efficiency equipment, or if it was damaged equipment that was no longer repairable, then they would then be able to get them custom fitted to a system that I got a bonus off or commission off of." TR-29.

19. Claimant described his working conditions:

> You work from site to site. The conditions can be anywhere from walking into just normal open areas, into crawl spaces, attic spaces. It can be exceedingly hot or it can be exceeding[ly] cold. The temperature determines the demand of the technician and can move into equipment as far as that goes, removing equipment and assembling, disassembling, and servicing furnaces and air conditioners.

TR-27. Claimant confirmed that the job required a lot of bending, twisting, and stooping.

20. Claimant consistently worked 40 hours per week at Right Now, and sometimes more. His earnings following his probationary period included base pay of $13 per hour plus overtime, bonuses, and commissions. Claimant received overtime pay mainly during the hottest and coldest parts of the year. "…[Y]ou could definitely be out there 12 to 14 hours a day." TR-28. In addition, Claimant could earn three different types of commissions, including: commissions on sales by the comfort advisors to whom Claimant referred clients; "service commissions" when he was able to repair a system with parts he had on-hand, and "service replacement commissions," which were related to his ability to diagnose system problems and recommend appropriate parts and service. *Id.*

21. Earnings for the 52 weeks preceding Claimant's industrial injury. During the 52 weeks preceding his industrial injury (from July 8, 2012 through July 8, 2013), Claimant earned base pay at the rate of $13 per hour for a total of $22,450 plus $3,685.89 in overtime, $13,651.49

in service replacement commissions, $888.14 in service commissions, $95.07 in comfort advisor commissions, and $24 for drive time. His total gross earnings for the period amounted to $40,794.59. Without the overtime, he earned $37,108.70.

INDUSTRIAL INJURY

22. On July 8, 2013, Claimant was on his knees and squatting to reach under some equipment in a tight space when he cut his hand on a piece of sheet metal. When he felt blood begin to drip down his palm and wrist, he stood up quickly and felt a pop in his lower back. When he took his first step, he felt sharp pain down to his heel.

23. Claimant reported the injury to his supervisor, who sent him to obtain medical treatment at Primary Health, where he was evaluated and prescribed with pain medication. The pain medication caused constipation and, about a week-and-a-half later, an umbilical hernia.

24. Claimant underwent hernia repair surgery by Ronald Cornwell, M.D., a general surgeon, on August 21, 2013. As Claimant recovered from this procedure, his low back and leg pain continued, so he began treatment with Christian Gussner, M.D., a physiatrist.

25. Claimant underwent a low back MRI on October 1, 2013. Based upon this imaging and his clinical findings, Dr. Gussner diagnosed lumbosacral radiculitis. Over the next few months, Dr. Gussner prescribed injections and physical therapy. He did not recommend surgery because of the potential for worsening Claimant's condition.

26. <u>MMI, PPI, restrictions.</u> On December 9, 2013, Robert Friedman, M.D., a physiatrist, conducted an independent medical evaluation at Defendants' request. He diagnosed an annular fissure tear at L5-S1 with left lower extremity symptomatology, left quadratus lumborum spasm, and moderate sleep disturbance. He opined Claimant would reach maximum medical improvement (MMI) in four weeks and assessed 1% whole person PPI as a result of

Claimant's hernia repair. He anticipated 2% whole person PPI would be appropriate as a result of Claimant's low back injury. Dr. Friedman did not apportion PPI for either of these industrial injuries to any preexisting conditions.

27. On January 6, 2014, Dr. Gussner opined Claimant had reached MMI. His final diagnosis was annular fissure at L5-S1 without extrusion of nucleus pulposus causing slight mass effect on the lateral recesses, and slight neural foramina narrowing at L4-5 on the left without neurologic impingement. Dr. Gussner did not address Claimant's hernia repair but, like Dr. Friedman, he assessed 2% whole person PPI to the low back injury, without apportionment.

28. Both Dr. Gussner and Dr. Friedman assessed medium-duty permanent medical restrictions due to Claimant's industrial injuries. Dr. Gussner recommended frequent position changes; occasional bending, twisting, and stooping (no more than one-third of a shift); occasional lifting of up to 50 pounds (less than one-third of a shift); and frequent lifting of up to 25 pounds (less than two-thirds of a shift). Dr. Friedman's medium-duty restrictions were slightly different. He would allow repetitive lifting of up to 25 pounds and would completely restrict Claimant from activities requiring torso twisting or torqueing.

29. Neither Dr. Gussner nor Dr. Friedman addressed Claimant's preexisting conditions or opined as to any preexisting PPI or PPD.

30. Surety paid Claimant a PPI benefit equal to 3% of the whole person.

31. Claimant was unable to return to work at Right Now following his industrial injury because there was no position available that would accommodate his restrictions. He was released from his position on January 17, 2014.

JOB SEARCH/RETRAINING ATTEMPT

32. When Claimant learned he was unable to return to work at Right Now, he began looking for other employment. Claimant obtained assistance with his job search primarily from Teresa Ballard, ICRD vocational consultant, as well as from consultants employed by Job Service/Idaho Department of Labor (IDOL) and the Idaho Department of Vocational Rehabilitation.

33. Claimant was selective in his job search. He did not apply for positions that were advertised as requiring more physical ability than he had, and he did not apply for positions that did not offer reasonable pay. "Too low of compensation and I thought there would be no way I can make it." TR-47.

34. Claimant still maintained his forklift license at the time of the hearing, so he likely had a valid forklift license during his job search in early 2014. However, his torso movement restriction due to his industrial injury prevents him from doing much (Gussner) or any (Friedman) forklift driving. Similarly, Claimant still maintained an EPA certification that allowed him to work on air conditioning equipment. However, as with his position at Right Now, most heating/air service jobs require physical abilities beyond Claimant's restrictions. Also, Claimant previously held a certification to apply insecticides on food products, which has lapsed.

35. When he did not immediately secure employment, Claimant obtained additional education to improve his employment opportunities. With tuition assistance from Job Service and his PPI payment, Claimant took three summer courses (algebra, computer literacy, and English) at College of Western Idaho (CWI). Along with two additional courses, these were prerequisites for entrance into the electronic technology and machine technology programs. In

all three classes, Claimant earned an "A." Nevertheless, by the end of the summer, he was running out of funds to support himself and his children, so he ceased taking classes and accelerated his efforts to find employment.

CURRENT EMPLOYMENT

36. About a month-and-a-half after completing his summer courses, Claimant was hired as an electronic assembler at Johnson Thermal Supply (Johnson). He had worked at Johnson for about four months at the time of the hearing. At a rate of $14 per hour plus overtime (up to 10 hours per week), with no commission or bonus opportunities, Claimant prefabricates material onto which electronic components are fitted, then installs them into chillers. He also wires the components into a control box.

37. Claimant's job duties at Johnson do not exceed his medical restrictions. "They're very accommodating. I can always physically move. I don't have to be in one place at all times and can, you know, walk and can sit into positions where I am working with equipment." TR-51. Claimant is happy with his job at Johnson. He expects growth opportunities over time if he stays with the company, but he did not elaborate on what they may be.

38. At $14 per hour, based upon 2,080 work hours available annually, Claimant could earn $29,120 per year in base pay at Johnson. If he works 189 hours of overtime annually, as he did during the year preceding his industrial accident, and which he testified is available to him, he would earn another $3,969, for a total of approximately $33,000.[2] Either way, Claimant's earnings at Johnson exceed his average earnings for his five tax years prior to 2013, the year of his industrial injury.

[2] Claimant testified he could work up to ten hours of overtime per week. His time-and-a-half overtime wage would be $21, for $210 per week. Over 52 weeks, his overtime pay could reach $10,920.

VOCATIONAL EXPERT EVIDENCE

39. Teresa Ballard's testimony. Teresa Ballard has been employed as a vocational consultant by ICRD for about eight years. Previously, she was employed for 17 years by IDOL in a variety of positions, and for the 17 years prior to that, she owned and operated her own insurance agency. Ms. Ballard holds a bachelor's degree in Spanish and a master's degree in guidance and counseling. She assisted Claimant in his return-to-work efforts between September 16, 2013 and approximately May 13, 2014. In doing so, she reviewed his medical and vocational records. Ms. Ballard is qualified to render vocational opinions in this case.

40. After Claimant was deemed medically stable by Dr. Gussner on January 6, 2014, Ms. Ballard determined that Claimant's restrictions due to his industrial injuries precluded him from returning to his time-of-injury job, so she assisted Claimant in his attempt to find other employment. They met at 17 weekly job search meetings. Ms. Ballard's goal was to provide Claimant with job leads consistent with his vocational, educational, and functional abilities that would replace his time-of-injury income. Some job leads she recommended included route driver, field service technician, machine repair technician, pest prevention technician, branch manager position at Terminix (pest control), and warehouse clerk. She admitted that some leads may not have, ultimately, been appropriate for Claimant. For example, she testified that her recommendation for a forklift driver job was potentially inappropriate due to the twisting at the torso required to drive a forklift.

41. Ms. Ballard described Claimant's positive vocational qualities, including his positive, upbeat, energetic demeanor. Also, she opined that he is "a very verbal young man." Ballard Dep., p. 15. In addition, Ms. Ballard considered Claimant's proven ability to be a team leader, teach and train new hires, and generate motivation among his

crew. "And so I felt that not only could he do technical, hands-on kinds of things - - which he told me he preferred - - but I also thought that he could lead, guide, direct, and supervise other people. As well as do sales. I thought he had a gift for sales." Ballard Dep., p. 15, 16. Ms. Ballard was also aware of Claimant's job history and his basic computer ability, as well as his experience earning commissions at Right Now. She did not, however, know exactly how much money Claimant made in commission sales or the exact nature of the sales he made. She believed his commissions were from "items sold or repairs done that were in addition to the basic servicing or service calls that he had performed." Ballard Dep., p. 17.

42. Ms. Ballard found Claimant to be a very motivated job seeker. She opined he was reasonable in being picky about the jobs he would consider, even though she implied in her report of May 8, 2014 that Claimant may not have been exerting full effort in his job search through that date.

43. Ms. Ballard closed Claimant's file in her office on May 8, 2014 because Claimant had enrolled in classes at CWI toward a two-year degree. She did not assist him in his educational pursuit or test his aptitude for retraining. She believed that he could probably replace his time-of-injury earnings and job status without additional training.

44. After Claimant ceased attending school at CWI because he ran out of funding, he contacted Ms. Ballard for job leads on an informal basis, and she later became aware that he took a job at Johnson that paid $14 per hour. Ms. Ballard does not believe Claimant is underemployed, but she generally opined that he probably has the potential to earn more money. She was aware of Claimant's radioulnar synostosis, but she did not consider this condition in her employment recommendations for him.

45. Ms. Ballard was aware that Claimant could speak Spanish with his friends and family, but she did not assess his abilities in this regard. Although Ms. Ballard is a fluent speaker of Spanish, Claimant conversed with her in English. Ms. Ballard opined that bilingualism assists job seekers in providing them access to more jobs, but it does not necessarily enhance earning ability.

46. Douglas Crum, CDMS. Mr. Crum has been a vocational rehabilitation consultant since 1987, when he began working for ICRD. He has been employed in private practice since 1994. Mr. Crum holds a bachelor's degree in business studies, and he has completed coursework in theological studies and a college counseling program. Mr. Crum interviewed Claimant on November 17, 2014 and reviewed his medical and vocational records. He also observed Claimant's hearing testimony before he, himself, testified. Mr. Crum is qualified to render a vocational opinion in this case.

47. Mr. Crum was aware of Claimant's radioulnar synostosis condition and prior injuries, and he understood that no PPI ratings or medical restrictions had been assessed as a result of any of them. He did not factor any preexisting disabilities into his vocational analysis. Although he was aware of Claimant's inability to supinate, Mr. Crum did not factor this into his vocational analysis because he concluded from Claimant's assertions that "while it was basically a hassle for him in terms of some activities, he was generally able to overcome the limitations by doing adapted behaviors, changing the way he did things - - … - - so I did not feel it was a significant functional issue in terms of his pre-injury physical capacities." TR-103.

48. Mr. Crum opined that Claimant's work history consists primarily of heavy production labor work, with some very heavy and medium-duty positions, as well.[3] He thought

[3] Mr. Crum defined heavy work as requiring lifting of up to 100 pounds occasionally, up to 50 pounds frequently,

Claimant's carpet cleaning job was probably the lightest-duty work he had done for several years. Mr. Crum noted that Claimant did not stay at any job for very long, reducing the likelihood that he became an expert in any particular area. At the hearing, he also considered Claimant's supervisory experience, but opined that it was limited in terms of range and time. He was unaware of Claimant's role as a motivational team member, sales person, or company networker before the hearing. He did not change his opinion as a result of any of this new information due to the limited nature of Claimant's related experience, but he did opine that the ability to sell and earn commissions are transferrable skills for positions in Claimant's labor market.

49. Loss of labor market access. Mr. Crum opined that Claimant had access to 15.4 percent of his local labor market prior to his industrial injury. In doing so, he considered the Boise metropolitan statistical area (based upon information from the Idaho Occupational Employment and Wage Survey); Claimant's age, education and skill level; and Claimant's pre-injury demonstrated physical capacities. Mr. Crum found Claimant's age significant because, as a young man with primarily labor-intensive job experience, the effects of his medical restrictions would foreseeably have an impact on his employability for the next 30 years.

50. Post-injury, applying Dr. Gussner's medical restrictions, Mr. Crum concluded that Claimant had access to 9.3 percent of his local labor market, for a loss of access of 39 percent. It was significant to Mr. Crum's determination that Dr. Gussner restricted Claimant's bending, twisting, and stooping to a less-than-occasional basis. "The restrictions for bending, twisting, and stooping are important because production work typically requires a significant amount of

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and up to 25 pounds continuously, and assumes the worker spends the majority of the day on his or her feet. Medium-duty requires lifting up to 50 pounds occasionally, 25 pounds frequently, and 10 pounds continuously, and also assumes the worker spends the majority of the day on his or her feet. "Occasional" equals one-third of the day, "frequent" equals two-thirds of the day, and "continuous" equals everything in excess of frequent.

bending, twisting, and stooping just kind of globally." TR-104. The medium-duty lifting restrictions and requirement that Claimant be able to change positions frequently also significantly impacted Mr. Crum's opinion.

51. Wage loss analysis. Mr. Crum reviewed Claimant's tax year earnings history prior to preparing his report. However, he had not seen Claimant's payroll summary from Right Now that itemized his earnings – including his commissions – before he testified at the hearing.

52. At the hearing, after seeing Claimant's wage itemization from Right Now, Mr. Crum assessed Claimant's pre-injury wages at $36,101 based upon the straight-time wages and commissions he earned during the 52 weeks immediately preceding his industrial injury. Previously, he was unaware that Claimant had earned any commissions. This is similar to the $36,346 in straight-time wages he postulated in his report. He opined Claimant's actual hourly wage prior to his industrial injury was a little less than $17.47.

53. Mr. Crum used Claimant's wage at Johnson – $14 her hour – in assessing his post-injury earning ability. Based upon these figures, Mr. Crum opined Claimant had suffered a 20 percent loss in earning capacity.

54. In consideration of the factors discussed, above, Mr. Crum opined that Claimant has suffered PPD of 35 percent, inclusive of PPI. Mr. Crum did not average Claimant's loss of earnings (20 percent) with his loss of access (39 percent) in arriving at his PPD recommendation. Instead, he placed more weight on Claimant's loss of access, due to his young age.

DISCUSSION AND FURTHER FINDINGS

The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction.

Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). However, the Commission is not required to construe facts 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

55. 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).

56. 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 958, 560-61, 511 P.2d 1334, 1336-37 (1973). See also *Callantine*, *Id*.

57. 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).

58. It is undisputed that Claimant suffered industrial injuries including an annular fissure tear at L5-S1 with lower extremity symptoms and an umbilical hernia as a result of his industrial accident on July 8, 2013. No preexisting conditions or subsequent events worsened these conditions by the time of the hearing.

PERMANENT DISABILITY

59. "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.

60. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company,* 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

61. **Time of disability determination.** The Idaho Supreme Court in *Brown v. The Home Depot,* WL 718795 (March 7, 2012) held that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing. 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." Therefore, the Court reasoned, 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. The record divulges no reason why Claimant's ability to engage in gainful activity would be more accurately measured at any time other than the date of the hearing. Therefore, Claimant's disability will be determined as of the hearing date.

62. **Local labor market.** At the time of the industrial accident in question and at the time of the hearing, Claimant resided in Caldwell, Idaho. Mr. Crum opined that Claimant's local labor market is the Boise metropolitan statistical area (Ada and Canyon Counties) local labor market.

63. **MMI.** As a prerequisite to determining Claimant's PPI or PPD, the evidence must demonstrate that he is medically stable. To wit, "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. The statute does not contemplate that a claimant must be returned to his original condition to be considered medically stable, but only that the condition is not likely to progress significantly within the foreseeable future. Another important consideration is that workers' compensation benefits are allocated based upon injuries stemming from specific workplace accidents and occupational diseases.

64. In this case, there is no dispute that Claimant is medically stable from his industrial injury, even though he has not been restored to his pre-injury condition. Both opining physicians agree on this point. The Referee finds Claimant's industrial low back and post-hernia repair conditions are medically stable.

65. **PPI.** Permanent impairment "is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved. . . ." I.C. § 72-422. A permanent impairment valuation "is a medical appraisal of the nature and extent of the injury . . . as it affects an injured employee's personal efficiency in the activities of daily living. . . ." I.C. § 72-424.

66. Industrial PPI. There is no dispute that Claimant has suffered 3% whole person PPI related to his industrial injuries, without apportionment, nor that this assessment is supported by sufficient medical evidence in the record. Therefore, the Referee finds Claimant has satisfied his burden of establishing permanent impairment as a result of his industrial injuries.

67. Nonindustrial PPI. There is no dispute that Claimant's bilateral inability to supinate his forearms constitutes an anatomic or functional abnormality or loss, even though no physician has opined on the subject. Due to the obvious and undisputed nature of this condition, the Referee finds that Claimant likely has some PPI attributable to his bilateral radioulnar synostosis.

68. Mr. Crum did not filter his job recommendations for this impairment because no physician had rated it and Claimant told him he could accommodate for his loss of supination ability. Indeed, Claimant has never lost a permanent job due to his upper extremity impairments. However, Claimant has lost a couple of temporary jobs because they required him to supinate, and he carefully screens job announcements to be sure he can perform the required physical functions before he applies.

69. The Referee is persuaded that Claimant's inability to supinate likely reduces his labor market access, independent of his industrial injuries. However, the record contains

insufficient evidence from which to determine on a more-likely-than-not basis that this reduction is significant enough to measurably alter either Claimant's pre- or post-injury disability analysis.

70. **Restrictions.** Drs. Gussner and Friedman assessed medium-duty permanent medical restrictions, but there were some differences. Dr. Friedman recommended no torso twisting or torqueing at all, while Dr. Gussner would allow twisting for up to one-third of a shift (occasionally). Dr. Friedman would apparently allow unlimited lifting up to 25 pounds, while Dr. Gussner would restrict such lifting to two-thirds of a shift or less (frequently).

71. **Non-medical factors.** 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 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. I.C. §§ 72-425, 72-430(1).

72. Claimant's non-medical factors that are either neutral or helpful in terms of his ability to engage in gainful employment include his age of 33; his local labor market of the Boise statistical area, which offers a variety of vocational opportunities; his high school diploma; his proven ability to be a fast learner on the job and in his college classes; his ability to engage in limited communications in Spanish; his familiarity with basic computer use; his experience in on-the-job supervisory and training experience; his professional and affable demeanor; his motivation to succeed; and his ability to communicate the status of a job he is working on with a

customer. Non-medical factors that will hinder Claimant's earning ability include his lack of competitive keyboarding ability, his lack of experience in any work categories lighter than medium, his lack of direct or retail sales experience, and his lack of a college degree.

73. Wage loss. Mr. Crum's calculations of Claimant's wage loss rely on Claimant's 52 weeks immediately prior to his industrial injury to establish his preinjury earning capacity. This period yielded significantly higher income than Claimant had ever previously earned in any single tax year (about $41,000). However, as Defendants point out, Claimant did not stay in any job for very long, so his ability to maintain these earnings is unproven. Under such circumstances, it is appropriate to consider Claimant's annual earnings during recent years to determine what he should reasonably be expected to earn to replace his time-of-injury wages. As addressed, above, his average annual earnings for the prior five years amount to a little less than $25,000.

74. Claimant's current annual projected annual pay of about $29,000, without overtime, exceeds his 5-year annual average earnings. With the same amount of overtime Claimant worked at Right Now during the year prior to his industrial injury, he would earn around $33,000, which would replace his highest single-year wages during that prior period, in which it is likely he also worked overtime. Also, Claimant expects to increase his opportunities at Johnson, which the Referee took to include his opportunity to earn more money. This appears to be a reasonable expectation. Finally, Claimant's current wage at Johnson should not be considered the full extent of his earning ability for the purpose of determining his wage loss. Claimant is not underemployed at Johnson, but it is likely that there are some jobs available to Claimant that would pay more.

75. Claimant's highest earning potential was achieved at Right Now in a job that he can no longer do due to his industrial injuries. In consideration of this and the other relevant factors addressed, above, the Referee finds Claimant has suffered a loss in actual or presumed wage earning capacity of 5%.

76. Loss of access to labor market. Mr. Crum opined that Claimant has lost access to 39% of his labor market. Defendants argue that Mr. Crum undervalued Claimant's supervisory experience, as well as his experience as a motivational team member, sales person, and company networker. If this is true, they posit, Claimant's loss of access would be less than Mr. Crum suggests. The Referee agrees. So, to the extent that Mr. Crum undervalued Claimant's transferrable skills, above, that were unaffected by his industrial accident, Mr. Crum's loss of access opinion should be reduced.

77. As Mr. Crum noted, Claimant's supervisory skills are limited to on-the-job team leader-type positions, rather than less labor-intensive supervisory positions. When Claimant acted as a supervisor, he was also required, to some extent, to work beyond his current restrictions along with his supervisees. Also, Claimant was never hired as a supervisor. He always worked his way into the position. So, Claimant's supervisory skills are valuable, but without a specific area of expertise – partly owing to Claimant's short tenure at any given position – it is doubtful that they open up a significant number of new job opportunities for him. Similarly, Claimant's motivational and networking accomplishments likely make him more competitive than the average applicant for some jobs for which he is otherwise qualified, but there is insufficient vocational evidence in the record from which it could be found that these abilities increase the actual number of jobs available to Claimant, either pre-injury or post-injury. Defendants also cited Claimant's ability to earn commissions as a transferrable skill, and

Mr. Crum agreed. However, given the nature of the commissions Claimant earned, there seems to be no specific skill required in addition to his knowledge of the service he was providing and his ability to communicate and, to some extent, sell, so it is difficult to see how this experience increases Claimant's access to jobs.

78. With respect to his ability to sell, Ms. Ballard sees Claimant as a gifted salesperson. However, Claimant's lack of any experience with direct sales or retail sales must also be considered.

79. The record establishes that Claimant has lost access to a significant segment of his pre-injury labor market, but probably not as significant as Mr. Crum opined, owing primarily to retail and direct sales positions that Claimant likely was, and is still, competitive for, which Mr. Crum did not consider. Also, the Referee is unpersuaded that, as Mr. Crum suggests, Claimant's positive wage earning outlook should be all but ignored in determining his overall PPD because he is a relatively young worker. It is true that consideration must be given to the fact that Claimant's industrial injury limitations will affect him for the rest of his worklife, which could amount to more than 30 years into the future. However, Claimant's age cuts at least two ways. Given his motivation and ability to learn quickly, along with his limited Spanish-speaking skills and supervisory experience, he has sufficient time to learn a new position and rise in seniority, such that it is likely he will continue to gather valuable skills and experience over time, and continue to replace his reasonable time-of-injury wages, even if he eventually leaves Johnson.

80. The Referee finds that Claimant has suffered loss of labor market access of 35%.

81. Considering all of Claimant's medical and non-medical factors, and the testimony of Teresa Ballard and Douglas Crum, the Referee finds Claimant has proven that he has suffered PPD of 20%, in excess of PPI.

APPORTIONMENT

82. When a claimant suffers PPD, the employer is only liable for the disability attributable to the industrial injury. Idaho Code § 72-406 (1). The degree to which the industrial injury is increased or prolonged because of a preexisting physical impairment is not the employer's responsibility. *Id.* In some cases, a two-step analysis must be applied to determine whether any of Claimant's PPD should be apportioned. *Page v. McCain Foods, Inc.,* 145 Idaho 302, 179 P.3d 265 (2008). First, Claimant's disability must be evaluated in light of all his physical impairments resulting from the industrial accident, and any preexisting conditions. Next, the amount of permanent disability attributable to the industrial accident must be apportioned.

83. It was determined, above, that Claimant has suffered PPD of 20% from all medical and non-medical factors. Defendants assert that some of this disability should be apportioned to Claimant's PPI from his radioulnar synostosis. However, as determined, above, the evidence in the record fails to establish that Claimant's disability is significantly affected by this preexisting condition. Moreover, the evidence of record fails to establish that Claimant's preexisting physical impairment (affecting his bilateral upper extremities) increased or prolonged the degree or duration of his disability resulting from his industrial injury (affecting his low back). Therefore, Claimant's PPD should not be apportioned.

CONCLUSIONS OF LAW

1. Claimant has proven that his annular fissure tear at L5-S1 and related lower extremity symptoms and his subsequent umbilical hernia are the sole result of his industrial accident on July 8, 2013.

2. Claimant has proven that he has suffered disability of 20% in excess of permanent partial impairment as a result of his July 8, 2013 industrial injuries, without apportionment.

RECOMMENDATION

Based on 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 13th day of May, 2015.

INDUSTRIAL COMMISSION

_____
LaDawn Marsters, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June, 2015, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

DAVID M FARNEY
OWEN & FARNEY
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JON M BAUMAN
ELAM & BURKE
PO BOX 1539
BOISE ID 83701-1539

sjw /s/

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JEREMIAH S. CHAVES, Claimant, v. RIGHT NOW, INC., Employer, and TRUCK INSURANCE EXCHANGE, Surety, Defendants.	**IC 2013-020545** **ORDER** Filed June 2, 2015

Pursuant to Idaho Code § 72-717, Referee LaDawn Marsters submitted the record in the above-entitled matter, together with her 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 has proven that his annular fissure tear at L5-S1 and related lower extremity symptoms and his subsequent umbilical hernia are the sole result of his industrial accident on July 8, 2013.

2. Claimant has proven that he has suffered disability of 20% in excess of permanent partial impairment as a result of his July 8, 2013 industrial injuries, without apportionment.

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

DATED this __2nd____ day of _____June_____, 2015.

INDUSTRIAL COMMISSION

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

_/s/_____
Thomas E. Limbaugh, Commissioner

_/s/_____
Thomas P. Baskin Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __2nd____ day of _____June_____, 2015, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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PO BOX 278
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sjw

_/s/_____