BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HENRY STEVEN SMITH, Claimant, v. HENRY STEVEN SMITH, dba QUALITY APPLIANCE SERVICE, Employer, and HARTFORD UNDERWRITERS INSURANCE COMPANY, Surety, Defendants.	**IC 2012-024062** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed February 18, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Coeur D'Alene, Idaho, on August 20, 2015. Claimant was represented by Stephen Nemec, of Coeur D'Alene. Emma Wilson, of Boise, represented Henry Steven Smith, dba Quality Appliance Service ("Employer") and Hartford Underwriters Insurance Company ("Surety"), Defendants. Oral and documentary evidence was admitted. Post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on January 4, 2016.

ISSUES

By agreement of the parties, the issues to be decided are:

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;

2. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition;

3. Determination of Claimant's Average Weekly Wage; and

4. Whether and to what extent Claimant is entitled to the following benefits:

    a. Medical care;
    b. Temporary disability benefits, partial or total (TPD/TTD);
    c. Permanent Partial Impairment (PPI);
    d. Permanent Partial Disability in excess of impairment, including total permanent disability pursuant to the odd-lot doctrine; and
    e. Attorney fees.

CONTENTIONS OF THE PARTIES

On January 6, 2008, while in the course and scope of his employment as a self-employed appliance repair technician, Claimant slipped and fell on ice. From that accident, Claimant asserts he injured his right hip, which was diagnosed as greater trochanter bursitis, and bothers Claimant to this day. He also suffered an acute contusion to the median nerve in his right hand, which developed into carpal tunnel syndrome (CTS). Surgery was belatedly performed for this condition, but nevertheless left Claimant with permanent restrictions and pain in his right hand.

Claimant argues he is entitled to reimbursement of all medical costs associated with his industrial accident which he incurred after Surety "closed" its file and refused to provide Claimant further medical treatment. He is also entitled to temporary disability benefits from the date of the accident until June 1, 2015, and total permanent disability benefits thereafter. He is permanently disabled. His AWW is $979.56. He is entitled to attorney fees.

Defendants argue Claimant has been paid all benefits to which he is entitled. His current condition did not result from the industrial accident. He had arthritis symptoms in his hands and low back, and treated for hip pain prior to his accident. Other complaints developed years after his accident. Claimant's AWW should be based on his net earnings, and Surety has actually overpaid TTD benefits as a result. Claimant is not permanently disabled. Claimant has failed to prove he is entitled to attorney fees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's testimony, taken at hearing;

2. The hearing testimony of Claimant's wife Lucy Smith, and witness Sandra Brewer;

3. Joint Exhibits (JE) 1 through 48, admitted at hearing[1];

4. The post-hearing deposition transcript of Dan Brownell, taken on August 31, 2015;

5. The post-hearing deposition transcript of Nancy Collins, Ph.D., taken on September 16, 2015; and

6. The post-hearing deposition transcript of Robert Friedman, M.D., taken on September 25, 2015.

All objections preserved during the depositions are overruled.

Having considered the evidence and briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

[1] At hearing Defendants raised a conditional objection to Exhibit 48, but withdrew the objection during the course of the hearing. They retained an objection to certain medical bills; the response to that objection is found hereinafter.

FINDINGS OF FACT

1. At the time of hearing, Claimant was a sixty-six year-old unemployed married man living in Worley, Idaho.

2. Since 1988, Claimant has owned and operated a sole proprietorship, last known as Quality Appliance Services. His job duties included all aspects of the appliance repair business, including doing the taxes, managing advertising, and doing appliance repair work in the Coeur d'Alene/Spokane Washington geographical area.

3. For approximately twenty-one years prior to 1998, Claimant worked primarily for Sears, starting in shipping, and progressing through warehouse work to warehouse manager, to the shipping, receiving and delivery department, and finally to the auto service center manager. He had supervisory duties for several years in his various managerial positions. He also had a four-year stint in the Coast Guard and worked for one year at Food Services of America before starting his own business.

4. On January 6, 2008, Claimant slipped and fell on ice after repairing a hot water heater for a client. He was carrying a wallet in his right rear pants pocket, and fell directly onto it. He felt immediate "lightning bolt" pain from his right hip shooting up through his chest and into his left shoulder. He was carrying a soft-sided tool bag in each hand when he fell.

5. Although Claimant was in pain after the fall, he continued to work. He first went to a physician on February 28, 2008, at which time he saw Michael Metcalf, M.D., his family doctor in Spokane for his regular physical, as well as fall-related complaints.

6. Dr. Metcalf's records note the following history and complaints:

> Fell about 6 weeks ago on the ice, hard. [Claimant] is having problems walking up stairs, with pain in the hip. He has L&I

> coverage. Has also some pains in neck and both shoulders since. *** *** *** R 3-4 fingers numb for awhile, just at tips. This has not bothered. *** Sleep issues are much better. Stresses are gone, going to work part time. Marriage is good. *** ***.

(Each *** represents a complaint not directly relevant to this discussion.) JE 6-1.

7. Dr. Metcalf conducted a thorough physical examination. Of note were the findings that Claimant had right wrist arthritic changes but negative for Carpal Tunnel Syndrome findings. Also, Claimant had pain in his right hip exhibited during range of motion examination. Dr. Metcalf appears to have causally connected Claimant's right hip complaints to the industrial accident. His notes state "L&I claim re the hip." ("L&I" is a term commonly used throughout this case for Washington's worker's compensation system, administered by the Washington State Department of Labor & Industries.) Dr. Metcalf ordered a low back and right hip MRI.

8. Claimant filed a First Notice of Injury on February 28, 2008, and Surety opened a file. On March 4, 2008, Claimant called Surety regarding his claim. Surety's notes related, in relevant part, the following history as being provided by Claimant;

> Went down on buttocks. Hurt upper back and shoulders. Was limping and was sore, but not too bad. Then 2-3 weeks ago it got worse. Pain into rt rear into hip pain. MRI done last Friday. L3-L4. Went to Dr. Metcalf. Assoc. Family Physicians, in Spokane, WA. Was in for physical and Dr. told him to file claim. He ordered MRI. MRI showed DDD. …Works in Spokane and lives near CDA, ID. Does some work in Idaho. Does 98% of work in Spokane.

JE 34-17.

9. Claimant's MRI showed minimal bilateral hip degenerative changes, moderate degenerative disc disease at right L4-5 junction, and no focal soft tissue abnormality.

10. Claimant was next seen by Dan Osborne, D.C., on March 20, 2008, complaining of right hip and low back pain. Dr. Osborne's notes reflect a history from Claimant of a fall on January 6, 2008 directly onto his right ischial tuberosity (also known as "sitting bones") region. The fall caused immediate pain, which persisted for "several weeks." His main complaint was increased right hip pain and difficulty when climbing stairs. Claimant was working at the time, although he claimed to have passed up jobs which required walking up "too many" stairs. Claimant also acknowledged past regular chiropractic treatment for his back and neck.

11. Dr. Osborne treated Claimant for right sacroiliac joint dysfunction, right hip enthesopathy, and cervicothoracic joint dysfunction with regional muscle pain. Upon his return to Dr. Osborne on March 27, 2008, Claimant reported decreased pain throughout his treated area. He was able to climb stairs without discomfort. Dr. Osborne treated Claimant and suggested a follow up if symptoms persisted. No further records are included from Dr. Osborne.

12. Due to coverage issues, Surety did not direct Claimant's medical care until at least May 2008. Thereafter, Surety sent Claimant to Michael Ludwig, M.D., a physical medicine and rehab doctor. Claimant first saw Dr. Ludwig on July 3, 2008.

13. Dr. Ludwig noted Claimant had fallen directly onto his buttocks in a work-related accident. He continued to have pain and difficulty climbing stairs in spite of chiropractic treatment, which afforded Claimant relief. Dr. Ludwig's notes state that

Claimant denied any other associated trauma besides his right buttocks/hip. Claimant did note some mild left shoulder pain since the accident.[2]

14. Dr. Ludwig felt Claimant was primarily manifesting symptoms of either sacroiliac joint pathology or lumbar radicular pain. The doctor ordered a lumbar spine MRI. He allowed Claimant to continue working as tolerated, but limited him to occasional (up to 33% of the work day) squatting/stooping and stair climbing.

15. Claimant returned to Dr. Ludwig on July 10, 2008, to discuss the MRI findings. Dr. Ludwig noted the MRI films showed significant degenerative changes to Claimant's lumbar spine, most notably at L4-L5 and L5-S1. Dr. Ludwig felt Claimant's L4-L5 foraminal stenosis was responsible for Claimant's pain complaints. He further noted there were no acute structural changes shown on the film, but the fall may have exacerbated the underlying condition.

16. Dr. Ludwig recommended a short trial of chiropractic treatment and if that did not help, he would consider an epidural steroid injection. Claimant's work restrictions were changed to include occasional bending/twisting, and lifting no more than 25 pounds.

17. Claimant began treating with George Miskovic, D.C., with dramatic results. By the time Claimant returned to see Dr. Ludwig on July 21, 2008, he had received four treatment sessions with Dr. Miskovic, and was nearly pain free. He could climb stairs, and do most of his pre-injury activities. Claimant wished to return to full-duty work. Dr. Ludwig felt four to six more sessions with Dr. Miskovic was appropriate, as Claimant transitioned back to heavier lifting. Dr. Ludwig removed all work restrictions, and released Claimant to an "as-needed" follow up schedule.

[2] It is unclear if those two statements are inconsistent, or if Claimant did not consider the shoulder pain as an actual injury resulting from the fall, as opposed to simply soreness in the area without associated injury.

18. Claimant first saw Dr. Miskovic on July 11, 2008, as referenced above. While he mentioned numbness in his thumb and third and fourth digits of his right hand, he listed only "pain when walking up incline or steps" when asked to detail his changes in condition. Claimant also complained of low back cramping pain, leg pain which originated in his right flank, to his right anterior hip, down his right anterior-lateral thigh to his knee. The pain "skipped" his knee, and continued to the top of his foot, which burned like it was "sunburned." Climbing stairs or inclines, or transitioning from sitting to standing stimulated Claimant's leg pain.

19. Dr. Miskovic believed Claimant's low back and right leg pains were likely from various factors. He felt Claimant's low back pain was from a sprain/strain and joint dysfunction. Claimant's hip pain was caused by myofascitis of the psoas and iliacus muscles. Dr. Miskovic thought Claimant's leg pain was referred from the right sacroiliac joint, and his right dermatomal pain at L-5 was from L5-S1 foraminal stenosis. He recommended conservative care.

20. Claimant treated a total of eight times with Dr. Miskovic. The treatments were beneficial for Claimant's low back and right hip/leg pains. Dr. Miskovic monitored but did not treat Claimant's hand complaints.

21. On September 3, 2008, Dr. Miskovic wrote a letter to Drs. Metcalf and Ludwig regarding Claimant's right hand and foot issues. In it, he noted Claimant's right hand numbness and his right foot burning sensations were getting worse. Dr. Miskovic felt these conditions suggest the need for further medical evaluation.

22. On September 10, 2008, Dr. Ludwig, in response to a written inquiry from Surety, opined that Claimant was medically stable as of August 1, 2008, and suffered no permanent impairment from his industrial injury.[3]

23. On September 15, 2008, Claimant presented to Dr. Ludwig for persistent right hand numbness, right leg numbness, and episodic buttocks pain. Dr. Ludwig noted Claimant suffered from long-standing significant degenerative spinal changes and foraminal stenosis. He recommended a nerve conduction study (NCS) and an EMG of Claimant's right arm and leg.

24. Claimant's October 3, 2008 EMG testing was interpreted by Dr. Ludwig as showing evidence of demyelinating right median neuropathy at his wrist without axonal loss. No chronic fibrillation potentials were seen. Dr. Ludwig felt Claimant's findings could be due to demyelination from an unresolved acute nerve contusion. Dr. Ludwig recommended Claimant consult with a hand surgeon for possible decompression surgery.[4]

25. For reasons unclear in the record[5] Claimant did not seek further treatment with Dr. Ludwig. Instead, he began treating with Rockwood Clinic in Spokane. From there, he was referred to neurosurgeon Jeffrey Hirschauer for an outpatient neurosurgical consultation on December 4, 2008. Dr. Hirschauer felt that in spite of his severe disc degenerative changes, Claimant's hip and leg pain stemmed from his right hip

[3] The form letter does not specify what constituted Claimant's injury, but given Dr. Ludwig's treatment of Claimant to that point in time, it is likely Dr. Ludwig was referencing only Claimant's hip pain.

[4] The actual notation reads "Recommend hand surgery c/s for possible decompression." The "c/s" abbreviation is not standard medical shorthand, so the Referee, after notifying counsel, contacted Dr. Ludwig's office and faxed the note in question for further elaboration. Dr. Ludwig's office replied, clarifying that "c/s" meant "consult." It is worth noting in Claimant's briefing, when quoting from this passage omitted the "c/s", thus making it seem as if Dr. Ludwig was recommending surgery, which was not accurate. In the future, counsel is advised when quoting a passage, to make sure the quote as typed is accurate, as an omission such as this one can materially alter the meaning of the quote and can be misleading.

[5] Claimant argues Surety specifically told Dr. Ludwig that further treatment was not authorized post-EMG, but the record citations provided do not prove that allegation.

and not his low back, and he should see an orthopedic surgeon for his complaints. Insofar as his hand was concerned, Dr. Hirschauer opined that Claimant had a median nerve injury.

26. Claimant followed up with orthopedic surgeon, William Faloon, M.D., who diagnosed spinal stenosis, which accounted for Claimant's right leg pain, and greater trochanteric bursitis, causing hip pain.

27. Dr. Faloon injected Claimant's greater trochanter with steroids and lidocaine, prescribed pain relievers and physical therapy, and suggested Claimant be seen by spinal physician Dr. Jamie Lewis for further conservative care.

28. On December 15, 2008, Claimant began physical therapy. He reported to his therapist that since the injection two weeks previous, Claimant had been completely pain free, and felt he was 99% recovered. His only ongoing complaint at that time was some left shoulder pain. The therapist was unable to elicit any symptoms; Claimant had full range of motion in his hips and back and all other tests were negative, although he had a general muscle tightness which the therapist attributed to Claimant's stenosis. Claimant was shown home exercises, and asked to return weekly for the next two weeks for monitoring. By January 6, 2009, Claimant was released from PT, as he was still 100% functional, and pain free.

29. Claimant continued to treat at Rockwood, and later at Freedom Health Group (FHG) in Spokane from 2009 until at least 2014. His complaints during that time included a number of issues, including his low back, right hip, and right hand. He received injections into his right hip approximately twice a year during this time. He also had at least two injections into his right hand for a condition known as Dupytren's contracture. FHG's notes sometimes indicated Claimant's hip condition (as well as low back, hands,

shoulders, and knees) was osteoarthritis and sometimes his hip was listed as trochanter bursitis. The labels FHG chose to use are not determinative in this case.

30. In the spring of 2012, Claimant sought to re-open his claim file with Surety. Initially, Surety's records did not show that he had endorsed coverage for himself as a sole proprietor, and denied the claim. Eventually, Surety conceded that Claimant had properly endorsed as an insured on January 1, 2008 and accepted the claim.

31. On June 21, 2012, Claimant returned to Dr. Metcalf. Claimant's complaints included his right hip and both shoulders. Claimant described his injuries from the 2008 industrial accident as jarring his neck, right hip, low back, and injuring his right forearm. He also mentioned issues with his right foot. Claimant stated he could work no more than one day per week, and even that was quite painful. Claimant also claimed it had been recommended that he have a nerve release in the median side of his right hand due to the industrial fall.

32. Dr. Metcalf scheduled an MRI of Claimant's low back and right hip. He also arranged a neurology referral to assess Claimant's median nerve neuropathy.

33. On July 11, 2012, Claimant saw Kurt Anderson, M.D., at Orthopaedic Specialty Clinic in Spokane for right hand issues. Interestingly, Claimant's description of his work-related fall "onto his right hand and then right side" as noted in JE 13-1 is a departure from his previous descriptions of falling directly onto his backside. Right hand X-rays showed obvious arthritic changes, with no fractures or dislocations noted.

34. Dr. Anderson diagnosed hand arthritis, severe carpal tunnel syndrome, spontaneous rupture of EPL tendon of right thumb, and right long finger A1 pulley

trigger finger. Dr. Anderson injected the trigger finger with cortisone. He recommended surgery for the CTS and EPL tendon rupture, with the possibility of surgery on the trigger finger if it did not respond to the injection.

35. On August 30, 2012, Claimant saw neurologist John Wurst, M.D., in Spokane. Dr. Wurst found no neurologic deficits in Claimant's right leg. He suggested Claimant see physiatrist Steve Goodman, M.D. Based upon an IME report obtained in September 2012 and discussed below, Surety denied authorization for medical care with Dr. Goodman.

36. In mid-September 2012, Claimant enrolled in physical therapy at St. Luke's Rehab Outpatient Therapy Valley for his "spine", although the therapy included not only his low back, but also right hip and lower extremity.

37. Claimant's stated goal included "not to have pain," but he specifically had no goal of returning to work. He reported that he had previously been given home stretching exercises to do but quit them because the cortisone shots took his pain away. (By that time Claimant had received eight cortisone shots into his right hip.) Additionally, Claimant preferred organized physical therapy to home stretching because he had paid for worker's compensation insurance for "a whole bunch of years" so he felt he should get covered medical care until he had at least covered what he had put in.

38. Claimant did not progress in reaching his goal of pain reduction, exhibited poor posture in spite of repeated cues, and wanted to move forward with neurological treatment and/or chiropractic care. His physical therapy was discontinued after eight sessions.

39. Surety sent Claimant to Robert Friedman, M.D., on September 21, 2012 for an independent medical examination (IME). Dr. Friedman did not have Claimant's medical records available at the time of examination, but did subsequently review them. At the time of the IME, Claimant was complaining of left shoulder, low back, right hip, and right hand issues.

40. After examination, Dr. Friedman determined Claimant was suffering myofascial disease in his glutei from the accident. Based on his examination and Claimant's history, Dr. Friedman felt Claimant's left shoulder and low back complaints were the result of osteoarthritis unrelated to the accident. At that time, Dr. Friedman found Claimant's CTS to be of unclear etiology but unrelated to his fall.[6] Claimant's trigger finger, which was resolved previously through injection, was also unrelated to the accident.

41. Dr. Friedman felt Claimant was at MMI regarding his myofascial disease, required no further medical care, but Claimant should stretch and ice the area daily.

42. Dr. Friedman opined that prior to any surgery for Claimant's CTS, a repeat electrodiagnostic study should be performed to determine whether conservative treatment would be a more appropriate treatment.

43. Dr. Friedman felt Claimant could return to work with permanent restrictions of lifting no more than 50 pounds occasionally, 25 pounds repetitively. These restrictions were due to Claimant's osteoarthritis, and not related to the industrial accident.

44. After receiving Dr. Friedman's IME report, Surety terminated Claimant's benefits as of October 4, 2012.

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[6] Subsequently, Dr. Friedman was provided medical records. His opinion after reviewing them was that Claimant's CTS was the result of osteoarthritis in his right hand and wrist. *See* finding 49, below.

45. Claimant next treated with chiropractor Gina Wolf, D.C., in October 2012. Once again, chiropractic adjustment was wildly successful. Claimant went from pain of 7/10, to 0/10 in his hip and low back with just four treatments. Dr. Wolf noted Claimant had been suffering from a rotational restriction in his pelvis, corrected with gentle techniques.

46. On December 10, 2012, Claimant's counsel asked Dr. Ludwig to opine on causation of Claimant's right hand ailments. In response, Dr. Ludwig first noted that Claimant did not complain of right hand issues on either his initial visit or any of the next three follow-up appointments. The first mention of numbness (but no pain) in the right hand was during Claimant's visit of September 15, 2008. In reviewing Dr. Miskovic's records, Dr. Ludwig likewise noted Claimant complained of right hand numbness, but no pain, instability, or triggering. By mid-July 2012, Claimant's complaints included triggering and pain in the right thumb.

47. Dr. Ludwig felt that based on medical records and the nerve conduction studies, Claimant's right thumb numbness was related to his industrial accident. He felt further treatment, including decompression of the medial nerve, would be related both temporally and causally to the injury of record. He also believed that before any surgical intervention was considered, a repeat right wrist NCS would be necessary, since a contusion or transient swelling of the median nerve often resolves with time. Finally, Dr. Ludwig felt the EPL rupture and trigger finger were not related to Claimant's workplace accident.

48. In early December 2013, Dr. Friedman was provided additional medical records, including Claimant's previous EMG from 2008. He was asked to

further opine in light of the additional records. On January 6, 2014, he authored his response. The additional records did not cause Dr. Friedman to change his opinions but he did elaborate on his rationale for them, discussed below. Dr. Friedman did give additional permanent restrictions for Claimant's right hand of no repetitive, forceful gripping or prolonged exposure to vibratory activities such as impact hammers or power tools.

49. Dr. Friedman rated Claimant at 7% whole person PPI for his degenerative disc disease, apportioned 100% to pre-existing condition, and 5% upper extremity PPI for the right CTS, apportioned 100% to non-injury findings, namely osteoarthritis in his hand as documented radiologically.

50. In March 2014, Claimant participated in a functional capacity evaluation (FCE) which showed significant upper extremity limitations. The evaluator noted that, while not tested, Claimant's lower extremities also exhibited significant issues.

51. Claimant saw Paul Horn, M.D., of Northwest Orthopaedic Specialists in Spokane, on May 29, 2014 for his right hand issues. Claimant's history included a notation that in 2008 Claimant fell onto his right wrist and ended up seeing Dr. Anderson for it.

52. Dr. Horn's impressions after reviewing X-rays of Claimant's wrist were advanced wrist arthritis, concerning for inflammatory arthropathy, carpal tunnel syndrome, potentially severe stage, and right middle finger stenosing flexor tenosynovitis.

53. Dr. Horn suggested proceeding with a right carpal tunnel release, and a flexor sheath release. He also wanted to evaluate Claimant for rheumatoid arthritis,

but Claimant left the office before the doctor could provide him the appropriate lab slips. Claimant did not return to Dr. Horn.

54. In June 2014, Claimant began treating with Conner Quinn, M.D., of Action Orthopedics in Coeur d'Alene, for right hip and hand pain.

55. Hip injections continued to provide temporary relief of up to several months. Hip X-rays showed mild femoral acetabular degenerative changes, moderate pubic symphysis and sacroiliac degenerative changes, and severe partially impinged degenerative disc changes at L4-5 and L5-S1. Claimant was considering evaluation by a neurosurgeon for low back issues.

56. Ultimately, Dr. Quinn performed a carpal tunnel release and trigger finger release surgery. The surgery was successful in reducing Claimant's pain and numbness and increasing his function, although he experienced persistent paresthesias in his median nerve distribution post surgery.

57. Claimant complained of arthritic wrist pain. Dr. Quinn noted it might require fusion surgery. He referred Claimant to Joseph Bowen, M.D., an orthopedic surgeon, for right wrist evaluation.

58. Claimant told Dr. Bowen his right wrist was injured in the work accident of January 2008 and bothered him since then. Claimant's complaints noted by Dr. Bowen included chronic wrist pain, crepitus and grinding, relieved by wearing an over-the-counter brace, and carpal tunnel syndrome, improved with surgery, in addition to weakness in his right thumb, and a trigger thumb.

59. Dr. Bowen read Claimant's right wrist X-rays as showing an old fracture with malunion of the distal radius and subsequent stabilization of the carpus. This old malunion of the fracture led to degenerative arthritis in the doctor's opinion.[7]

60. Dr. Bowen suggested conservative treatment, but no surgery at that time. Dr. Bowen wanted to see Claimant's X-rays from the time of injury, but those did not exist.

61. Claimant again underwent an FCE in April 2015. Claimant exhibited increased ability to discriminate objects in his hand, but experienced pain primarily in left shoulder and right wrist when performing resistive and repetitive movements. ROM on left shoulder was decreased by 19% on rotation, and maximally painful on push/pull activities. Claimant's coordination was improved, and his tremors were gone. Assembly speed, while still moderately to severely limited, was better than the first FCE. As noted by the evaluator, Claimant's hand function was improved, which increased his ability in self care. Additionally, Claimant's lower extremities still showed significant issues. The evaluator felt that Claimant would be limited to sedentary work with lift and carry tasks limited to less than twenty pounds floor to waist, front carry and waist to shoulder, and ten pounds shoulder to crown and forward reach. Repetitive hand movements, with his wrist support worn, up to five pounds with limited repetitions would be permissible.

62. Claimant sought an evaluation from John McNulty, M.D., on June 1, 2015. Dr. McNulty chronicled a detailed history and examined Claimant. At the time of examination, Claimant's chief complaint was right wrist pain, weakness, and crepitus. Claimant's secondary complaint was right hip pain, which limited his walking,

[7] In briefing, Claimant tried to link this finding to his industrial fall but there is no supporting medical evidence, and the notion is dismissed as purely speculative.

and was moderately painful on a daily basis. Finally, Claimant complained of right hand numbness and sensory loss in his thumb, index, and middle fingers.

63. After examination, Dr. McNulty diagnosed chronic right hip greater trochanter bursitis, residual sensory loss and muscle atrophy status post right carpal tunnel release, chronic right wrist osteoarthritis with evidence of scapholunate dissociation, and history of EPL tendon rupture.

64. Dr. McNulty stated that Claimant had reached MMI by the time of his examination. Further, the doctor agreed with Dr. Ludwig's opinion that Claimant's CTS was the result of his industrial accident but that his EPL rupture and trigger finger were not. Dr. McNulty also opined that Claimant's arthritic right wrist condition was not related to his work accident.

65. In calculating impairment ratings, Dr. McNulty acknowledged that the MRI and X-rays did not support the diagnosis of greater trochanter bursitis. Instead, the diagnosis comes solely from physical examination. In light of that fact, Dr. McNulty rated Claimant's chronic greater trochanter bursitis at 6% lower extremity permanent impairment.

66. Dr. McNulty calculated Claimant's impairment for carpal tunnel syndrome at 8% upper extremity.

67. Dr. McNulty agreed with the latest FCE which placed Claimant in a sedentary job duty category, based on his most significant impairment of his degenerative

right wrist dysfunction. Just considering Claimant's CTS and bursitis, Dr. McNulty opined that Claimant would have restrictions placing him in a light-duty job category.[8]

68. On July 16, 2015, Claimant saw Jeffrey McDonald, M.D., at North Idaho Neurosurgery & Spine, for evaluation and treatment of his low back and right hip pain. Dr. McDonald reviewed Claimant's low back MRI scan from 2014 which showed severe degenerative disc disease at literally every level of the lumbar spine. Dr. McDonald found it remarkable that Claimant could be asymptomatic in light of his lumbar disc changes. He felt that Claimant may have a degree of greater trochanter of his right hip, but noted he also had markedly positive SI provocation testing for right-sided sacroiliitis and chronic L5 radiculopathy. As such, Dr. McDonald felt Claimant's low back and hip issues were likely multifactorial in origin. Dr. McDonald recommended renewed physical therapy, although he noted Claimant did not feel prior PT was particularly helpful. The doctor also recommended a single right SI joint steroid injection, for diagnostic as well as therapeutic purposes. The result of this injection is not in the record, nor is Dr. McDonald's final assessment post injection.

DISCUSSION AND FURTHER FINDINGS

69. Claimant has the burden of proving, by a preponderance of the evidence, all facts essential to recovery to his claims. *Evans v. Hara's, Inc.*, 123 Idaho 473, 849 P.2d 934, (1993). Claimant must prove not only that he suffered an injury, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996).

[8] Dr. McNulty also opined on whether Claimant could pursue his time-of-injury occupation, but without further foundation there is no showing he has the requisite knowledge to make such an opinion, which is outside the field of his medical expertise, and therefore, his opinion on that issue is disregarded.

Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995).

Causation

70. The first issue is whether and/or which of Claimant's physical conditions attributed to the work-related fall were in fact caused by such accident. Related to that issue is whether and/or which of Claimant's physical conditions attributed to the industrial accident were due in whole or in part to pre-existing or subsequent injuries or disease processes. These two issues will be discussed concurrently.

71. At various times, Claimant has attributed a host of medical issues and complaints, including bilateral shoulders, neck, low back, right leg, right foot, and right forearm issues, in addition to his right hip and carpal tunnel syndrome, to his accident. However, in briefing and in the medical records, only Claimant's right hip and right CTS are developed as resulting from the work accident. As such, only those two complaints are analyzed for causation. To the extent Claimant's other ailments are alleged to be related to his work accident, there is no medical testimony to a reasonable medical probability linking them to the accident, and Claimant has therefore failed to prove causation on those complaints.

Claimant's Right Hip

72. Claimant has consistently complained of right hip pain since his fall in January 2008. He has been diagnosed by several doctors as having greater trochanter bursitis in his right hip. Not all physicians have agreed with this diagnosis. Drs. Miskovic and Friedman felt the issue was myofascial in nature. Several doctors have opined the hip pain was related to Claimant's severe low back disc disease. One physician felt Claimant's hip complaints were due to several factors.

73. While a definitive diagnosis for Claimant's right hip issues is elusive, certain facts are established by the weight of the evidence. Claimant's hip condition changed for the worse from the time of his industrial accident. Immediately upon falling, Claimant felt right hip pain, which is documented from the time of his first physician visit through the time of hearing. His tenderness is specific to well-delineated point on his right hip. It particularly bothers him when climbing stairs or riding in a vehicle for long distances. He does not have corresponding issues in his left hip.

74. While Dr. Friedman was critical of the bursitis diagnosis, he nevertheless attributed Claimant's hip pain to the industrial accident. While he claimed ice and stretching should assist in resolving Claimant's hip complaints, he offered no alternative, non-industrially related reason for Claimant's continued pain and limitations.

75. Claimant has established that his ongoing right hip condition is causally related to his industrial accident of January 6, 2008, and not the result, in whole or in part, of a pre-existing condition or of a subsequent injury or condition.

Claimant's Carpal Tunnel Syndrome

76. Claimant did not initially complain of immediate CTS symptoms from the industrial accident. He did not initially describe falling on his right hand or wrist. His accentuation of his right hand/wrist's involvement when he slipped and fell evolved over time. Claimant's more recent testimony, including at hearing, emphasized an immediate and painful injury to his right hand which is at odds with the earlier medical records. Greater weight is assigned to his contemporaneously-made statements to his initial treaters and Surety than to his more-recently revised history of the accident and resultant injuries.

77. When Claimant first presented to Dr. Metcalf, almost eight weeks after his accident, it was for a physical examination. As part of that exam, Claimant listed a host of medical issues he was experiencing. Claimant described the fall as injuring his right hip, together with some pain in his shoulders and neck since the fall. He did not attribute any other complaints to the accident. Claimant next described a left ear issue. Then he discussed a spot on his skin. Next he commented he had "dry blood" smells in his nose. Thereafter, Claimant told the doctor he had experienced three or four of his fingers on his right hand feeling numb for awhile, just at the tips. That condition had not been bothersome. He then commented on his concern about parasites and several other issues. The point is he did not mention his right fingers in conjunction with his slip-and-fall, but rather as one more of a number of conditions he wanted his physician to check out.

78. Dr. Metcalf did check Claimant's right finger complaints and specifically found that Claimant did not have CTS findings, although he did have arthritic changes in his right wrist. Dr. Metcalf felt Claimant's right hip was industrially-related and filled out a "physician's initial report" for Washington Labor and Industry, ordering a right hip MRI after diagnosing a right hip sprain. He filled out no such paperwork for Claimant's right wrist and/or hand issues.

79. Surety's file notes indicate that during his initial contact on March 4, 2008, Claimant described the accident and his injuries. He complained of pain into his right rear and hip. There was no mention of right hand/wrist either at the time of the fall or as hurting later on.

80. When Claimant first presented to Dr. Ludwig on July 3, 2008, he again did not mention right wrist or CTS-type issues. In fact, he denied trauma other than to his right hip and some mild left shoulder pain from the fall.

81. Claimant first began to complain in earnest of right hand numbness while treating with Dr. Miskovic in July 2008.

82. After an abnormal EMG/NCS in October 2008, Dr. Ludwig questioned whether Claimant's right hand median nerve neuropathy could be due to an acute nerve contusion. This was the first potential linking of Claimant's right hand numbness with an acute event. Unfortunately, Claimant did not follow up with a hand surgeon, nor does it appear Dr. Ludwig made such a referral, despite his recommendation that Claimant see one.

83. Surety's adjuster notes indicate Surety sought information from Dr. Ludwig to see if the EMG/NCS was related to accident. Soon thereafter, Claimant retained an attorney (not his current counsel). Surety sent all medical records and list of benefits paid to Claimant's attorney. There are no notes indicating whether Dr. Ludwig ever responded to Surety's inquiry regarding EMG/NCS as related to industrial accident.

84. As detailed above, Claimant continued to treat his various ailments including his CTS and right hip pain from late 2008 until 2012 without going through Surety. In late March 2012, Claimant re-opened his claim seeking additional benefits for his right hand CTS and hip complaints.

85. Soon after the claim was re-opened, Surety sent Claimant to Dr. Friedman for an IME. After the examination, Dr. Friedman prepared a report on September 21, 2012, in which he concluded Claimant's industrial injury was limited to myofascial gluteal pain, Claimant was at MMI, and suffered no impairment or permanent disability.

86. Once Dr. Friedman's IME report was prepared, Surety terminated benefits. Thereafter, in response to written inquiry from Claimant's counsel, Dr. Ludwig causally connected Claimant's right hand CTS and right thumb to the subject accident. Subsequently, Dr. McNulty did likewise.

87. While Drs. Friedman, Ludwig, and McNulty have all opined on whether Claimant's right CTS is causally related to his industrial accident, only Dr. Friedman has expounded on his opinion, most notably in a deposition taken on September 25, 2015.

88. Dr. Ludwig's opinion is curious. He first noted that Claimant made no comment or complaint of right hand injury or symptoms at his initial visit on July 11, 2008. Next, he pointed out that even during follow up visits on July 10 and 23, Claimant said nothing of right hand pain or numbness. He also stated, "[i]t was not until the note of 9/15/08 that mention of numbness of the right hand is noted. No pain is mentioned of the right hand. Upon review of Dr. Miskovic's note of 9/3/08, the complaint of right hand numbness is again mentioned, but no complaints of pain, instability, or triggering are mentioned." In spite of these observations, which would appear to cut against causation, Dr. Ludwig opined that if medial nerve decompression surgery is offered, he would support the treatment as being related both temporally and causally to the injury of record. He also believed a new NCS would be advisable prior to surgery, since "[o]ften, a contusion or transient swelling of the median nerve will resolve with time." JE 8- 21, 22.

89. Originally, Dr. Ludwig wanted to investigate the possibility that Claimant's finger numbness was due to an acute contusion, perhaps from his industrial fall. Five years later, Claimant still had the same complaints, which could suggest against an acute contusion. Nevertheless, with no elaboration or explanation, Dr. Ludwig causally related Claimant's CTS

to a fall five years previous. It would be helpful if Dr. Ludwig had been given the chance to explain how Claimant's lack of complaints for seven months fits into his opinion. One could question why, if Claimant had traumatically injured his median nerve in 2008, it was still causing symptoms in 2014. Dr. Ludwig did not respond to Dr. Friedman's opinion that one would expect a traumatic injury to have a sudden onset and then resolve over time, which is not Claimant's history. Dr. Ludwig likewise did not attempt to rebut Dr. Friedman's testimony that Claimant's CTS was explained by his documented right wrist osteoarthritis. Without the chance to defend his position, expand on his opinions, and clarify issues such as those listed above, the weight of Dr. Ludwig's opinion is diminished.

90. In his report dated June 1, 2015, Dr. McNulty's assessment on causation regarding Claimant's CTS was limited to the following passage;

> Dr. Ludwig did a chart review and his conclusion was that the carpal tunnel syndrome was the result of his work-related injury on 1/6/2008. I agree with Dr. Ludwig's assessment. In addition, Dr. Ludwig felt the diagnosis of EPL rupture and triggering of the right middle finger were not related to the 1/6/2008 injury. I also agree with that assessment. In addition, medical record does not support that [Claimant's] arthritic condition in his right wrist is related to the 1/6/2008 injury.

JE 23-9.

91. With no further elaboration, and no deposition testimony or written report explaining his position, Dr. McNulty's opinion on the issue of causation carries even less weight than Dr. Ludwig's, who at least treated Claimant on several occasions. There was no explanation as to what was Dr. McNulty's basis for agreeing with Dr. Ludwig. It was not clear if he relied on anything other than Claimant's history, which evolved over time to emphasize, if not create, injury to his wrist and hand during the industrial accident. It would be helpful to know how Claimant's acknowledged severe arthritic condition in his right wrist

fit into the doctor's opinion, if at all. Dr. McNulty's opinion is little more than a "check-the-box" agreement with another physician's assessment and has little persuasive value.

92. Finally, Dr. Quinn did fill out a check-the-box response form which agreed with Dr. McNulty. He agreed with every conclusion and recommendation contained in Dr. McNulty's IME report without any elaboration, caveat, or independent observations. Dr. Quinn's opinion suffers from the same defect as Dr. McNulty's, and is so broad it is given little weight.

93. In addition to preparing two reports, Dr. Friedman was deposed. His reports and deposition still leave unanswered questions, and some of the doctor's assumptions are suspect. In spite of those shortcomings, at least he was able to flesh out his opinion on causation and provide a plausible explanation for Claimant's CTS apart from his industrial accident, which may or may not have involved his right hand. Certainly, Claimant's early medical records do not support the notion that he injured his right hand/wrist in the accident.

94. While Dr. Friedman originally stated Claimant's CTS was of uncertain etiology, he subsequently refined his opinion after reviewing medical records. In his January 6, 2014 report, Dr. Friedman indicated Claimant's CTS was consistent with his osteoarthritis, which was more likely than not a pre-existing condition. By the time of his deposition, Dr. Friedman testified that in addition to a trigger finger which is related to osteoarthritis, not trauma, Claimant's increasing complaints over time are contrary to what one would expect to see with an acute nerve injury. While it could take up to three weeks for the nerve injury to "fully mature" or worsen, thereafter there should be slow but steady improvement.

95. Claimant mentioned a non-bothersome (at that time) tingling in his fingers to Dr. Metcalf during a routine physical examination in February 2008. Claimant did not relate this to the industrial accident from the month before. While Dr. Metcalf felt the tingling was not related to CTS, Claimant's condition worsened by late summer of that year. At his deposition, Dr. Friedman interpreted the EMG and nerve conduction testing in 2008 as showing Claimant had a slowing of his median nerve but no permanent nerve damage. Dr. Friedman further noted the muscle atrophy found by Dr. Quinn at the time of surgery is consistent with a slowly progressing condition like arthritis or a degenerative process, but not with a trauma.

96. Drs. Ludwig, McNulty, and Quinn all agreed Claimant's CTS was causally related to his industrial accident, but without any rationale of substance. It is difficult to even fashion a supporting argument from these opinions, which appear to be based primarily or perhaps exclusively on Claimant's history. Furthermore, they do not explain why Claimant did not complain of pain, show swelling, or have any other indicia of trauma in his right hand when examined by Dr. Metcalf or any other doctor. Furthermore, they do not provide insight on why it is not important to consider Claimant's initial history which did not mention hand injury, or limitations with his hand from the fall for months after the accident.

97. On the record as a whole, Dr. Friedman's opinion carries more weight because it is consistent with Claimant's early history and course of treatment. Dr. Friedman provides an explanation for Claimant's CTS (osteoarthritis) which is known to exist, and is severe. His opinion does not ignore Claimant's initial history, but is supported by it.[9]

[9] Claimant argued that Dr. Friedman's opinions should be discounted due to the fact he makes a significant income from performing IMEs. It is no secret that many if not most physicians make a lot of money. There is no evidence that 1) Dr. Friedman compromised his beliefs in this case when rendering these opinions, 2) would have opined differently if he was a treating physician, or paid less, or 3) is inherently dishonest due to the fact he makes a lot of money. Wealthy doctors are capable of rendering sound opinions.

98. Claimant has not proven his CTS is causally related, in whole or in part, to his industrial accident of January 6, 2008.

Claimant's Average Weekly Wage

99. The parties dispute the calculation of Claimant's Average Weekly Wage (AWW). Both parties used Claimant's prior year tax returns to calculate AWW. In 2007, Claimant's tax return shows he had gross receipts of $60,600, from which he subtracted his cost of goods sold and return allowances, leaving him a gross profit of $50,937. The parties divided that gross profit number by 52 (weeks), which led to an AWW of $979.56. Surety paid Claimant benefits based upon this AWW figure. Surety now claims it overpaid benefits because it should have used the much smaller net profit number from Claimant's tax returns.

100. Idaho Code § 72-419(4) provides the mechanism for calculating Claimant's AWW. Under the statute, the parties are to look to Claimant's *best* (greatest income) 13 consecutive weeks of the preceding 52 weeks, and use that income figure divided by 13 to arrive at AWW. Since Claimant's accident occurred right after the first of the year 2008, it would be appropriate to examine Claimant's 2007 records and determine in which consecutive 13 weeks he had the most income, and divide that number by 13. This would result in an AWW of *at least* the figure utilized by the parties previously.

101. If Claimant is unable to reproduce his weekly, or at least monthly, income,[10] then Idaho Code § 72-419(5) provides the AWW should be calculated using the customary wage in the particular industry for the same or similar service. There was testimony that such wage would be less than $20 per hour. Interestingly, this wage does not necessarily take into account the other responsibilities a business owner has in addition to his repair work. The owner must

[10] Since the calculation calls for consecutive weeks, averaging the worker's best three consecutive months will most often yield substantially the same figure.

also perform executive functions, like scheduling appointments, managing advertising, and doing at least some of the bookwork. These tasks should increase the owner's anticipated hourly wage above that of an employee, who has no such responsibilities. The under $20 hourly wage is therefore probably not an accurate figure to use under the statute.

102. In 2007, Claimant made approximately $24.50 per hour. It would be contrary to the humane spirit of the act to apply such a narrow, technical construction of the statute to these facts. *See generally, Ogden v. Thompson,* 128 Idaho 87, 910 P.2d 759 (1996). (The humane purposes of the worker's compensation statutes leave no room for narrow, technical construction.) It is more likely than not inaccurate as well, for the reason discussed above.

103. In the present case, Claimant is entitled to *at least* $979.56, his actual AWW over the whole of 2007. Using Idaho Code § 72-491(4), he would be entitled to more, if he can substantiate his income at least monthly. After all, Claimant's 2007 income includes not only his best 13 week period, but also his worst, and two others in the middle. To reduce his AWW to a figure well below his actual income would go against the intent of Idaho Code § 72-491(4).

104. Defendants' argument that the "net profit" line (line 31 of Claimant's Schedule C) should be used to calculate AWW is wrong. For tax purposes, deductions *from* income are used to calculate a *taxable* income. This is different than Claimant's actual income. The parties used the correct figure, which came from line 7 of Schedule C, labeled Gross Income, to calculate AWW. This figure includes all gross receipts, less the cost of goods sold, and represents Claimant's true wages. An example should make this clear. Suppose Claimant undertook a water heater repair. He changed a heating element. The cost of the element to him was $30. He charged $50 for the element and $100 to install it. The customer received a bill

for $150 which she paid (ignoring tax on the element). Claimant's "wage" for that service call is calculated as $150 (total bill) minus $30 (expense for element) which equals earnings of $120, and would be part of Claimant's Schedule C, line 7 total. If Claimant bought a new business truck he could claim depreciation, and that would be a deduction *from* his gross income. Depending on his income, he could, due to this purchase, actually show a business loss by the time he calculated his net profit or loss on line 31 of Schedule C. But, he still had income, and used that income (in whole or in part) to buy his new business truck. In short, business expenses are paid with income. AWW looks at income, not how that income is used.[11] As such, using a "net profit or loss" figure from tax forms is incorrect.

105. Claimant's AWW is either $979.56 or the figure generated using the calculations provided for in Idaho Code § 72-419(4).

Claimant's Additional Benefits

106. Lastly, Claimant seeks additional benefits for medical care, temporary disability, permanent impairment, disability in excess of impairment (including total disability), and attorney fees.

Medical Care - Past

107. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other related attendance or treatment as may be reasonably required by the employee's physician or needed immediately after an injury, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Of course an employer is only obligated to

[11] If Claimant was a salaried employee and bought new work gloves with some of his salary, the fact he bought a work item would not decrease his salary. His AWW would be calculated from his salary, not salary less cost of gloves.

provide medical treatment necessitated by the industrial accident, and is not responsible for medical treatment not related to the industrial accident. *Williamson v. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d 1365 (1997).

108. Claimant has established that his right hip pain was causally related to his industrial accident of January 6, 2008. With regard to his hip, Dr. Ludwig pronounced Claimant at MMI with no permanent impairment as of August 1, 2008. Thereafter, Dr. Ludwig released Claimant to full duty work with no restrictions on September 15, 2008.

109. Surety adjuster notes of September 11, 2008, indicate that after Dr. Ludwig declared Claimant at MMI, Surety was going to close the claim. Claimant then spoke with the adjuster on September 25, 2008, after Surety received Dr. Ludwig's recommendation regarding Claimant's hand testing. Claimant at that time apparently did not discuss his hip. Again on October 6, 2008, Claimant called Surety to discuss a prescription for Lyrica prescribed by Dr. Ludwig. The adjuster informed Claimant she was waiting for the doctor's notes to see if this prescription was related to the industrial accident. Claimant became upset and indicated he should get an attorney. Claimant stated "I'm done" and hung up. Two weeks later, Surety sent all medical records and a list of benefits paid to Claimant's recently-hired attorney. Surety's next note of import was from March 27, 2012, when Claimant called about re-opening his claim.

110. Surety paid all benefits due and owing Claimant up through the time he was declared medically stable, as well as Dr. Ludwig's charges for the September 15, 2008 examination. Nothing in the record indicates Surety failed to pay for reasonable medical care related to Claimant's right hip, thus obligating Claimant to seek such care on his own. There was no change of status filed with the IIC after May 2008.

111. Claimant asserts that Surety specifically told Dr. Ludwig's office that further treatment was not authorized after the EMG testing. However, none of the citations listed in briefing by Claimant establish that proposition. At most, Claimant testified at hearing that Surety told him that his claim was denied after the EMG study. However, when put in context of the testimony, it is unclear if Claimant was testifying about a specific point in time in the fall of 2008 or generally over the life of the claim, since his testimony was that he was denied five times. Not all of those denials were made immediately after the EMG testing.

112. If Surety had refused to provide Claimant a physician at the time he sought additional treatment for his hip, then Surety would be liable to cover the cost of such treatment, if reasonable. *Reese v. V-1 Oil Co.* 141 Idaho 630, 115 P.3d 721 (2005). Otherwise, if Claimant went outside the chain of referral to obtain treatment, then Surety is not responsible for payment of such treatment.

113. When considering all the evidence, and the record as a whole, it is more likely than not that Claimant sought treatment outside the chain of referral for his right hip from 2008 into 2012. Dr. Ludwig's notes do not indicate that Claimant tried to schedule an appointment for his hip after mid-September 2008. There is no record that Claimant or his then-attorney ever contacted Surety regarding additional hip treatment. Nothing in the record establishes that Surety would not have allowed Claimant to return to Dr. Ludwig if and when his hip pain flared, even after MMI. After all, even though Dr. Ludwig declared Claimant at MMI and released him with no restrictions or indications that Claimant should return as needed, Dr. Ludwig did see Claimant again after declaring him at MMI. Surety paid for the doctor's charges for that September 15, 2008 examination.

114. Claimant has not shown he was required to go outside the chain of referral for hip treatment due to any of Surety's actions. Claimant has failed to prove his entitlement to medical care reimbursement benefits from August 1, 2008 through March 27, 2012.

115. In March 2012, when Claimant re-opened his claim, apparently Surety paid for his medical care until it received an IME report from Dr. Friedman. As such, it appears Claimant is making no claim for medical expenses related to charges in that time frame. After obtaining the IME report, Surety refused to pay for any further medical treatment.

116. Regardless of whether Claimant's hip condition is greater trochanter bursitis or myofascial pain, (which are the two diagnoses carrying the most weight based upon the totality of the record), the fact remains this condition originated with Claimant's January 6, 2008 work accident.

117. Claimant, having proven causation regarding his right hip, is entitled to reimbursement at the full invoiced rate for reasonable medical charges from the time Surety denied further treatment in 2012 until the present for treatment of Claimant's right hip. *See, Neel v. Western Const. Inc.,* 147 Idaho 146, 206 P.3d 852 (2009).

118. An issue was brought up concerning the palliative nature of Claimant's treatment, including chiropractic care and steroid injections. Untreated, Claimant's hip condition caused him pain and limitations, especially in negotiating stairs and during long-distance travel. Claimant's complaints were reduced or eliminated with chiropractic care and/or steroid injections. While these treatments did not prove curative, they provided more than fleeting relief, and allowed Claimant to carry on his normal activities including work, with little or no hip pain for months at a time. Claimant's palliative care to date has been reasonable, and is recoverable.

119. Several of Claimant's treaters during this time frame saw or treated Claimant for various complaints, including non-compensable issues. To be compensable, the care must include more than simply noting Claimant's hip condition in passing. It is up to the parties to sort out charges attributed to right hip diagnosis, treatment, and palliative care. [12]

Medical Care - Future

120. As noted above, the chiropractic treatment and steroid injections Claimant has received to date have been very beneficial in increasing Claimant's functional abilities for weeks or months at a time. It is reasonable to continue these modalities into the future if they continue to provide extended relief, and are found necessary by Claimant's treating physician(s). This is not meant to preclude other treatments which may be suggested in the future as conditions dictate. The parties may reconsider the reasonableness of such treatments should they at some point fail to provide pain relief and increased mobility to a similar degree as Claimant has experienced in the past.

Temporary Disability Benefits

121. Idaho Code § 72-102(11) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on Claimant

[12] Defendants objected to the inclusion of various medical bills in the joint exhibits on the grounds they included charges for non-related medical issues. Such exhibits, irrelevant to the matters at issue, were not considered. Without a specific reference to each objectionable document by exhibit number and page, it is not possible to sustain the objection and remove the offending pages. The citations listed by Defendants in their briefing do not correspond to the described billing. The Referee noted several times when it appeared the citations provided by one party or the other did not correspond to the fact asserted. Perhaps the documents were renumbered at some point prior to submission?

to establish through expert medical testimony the extent and duration of the disability in order to recover income benefits for such disability. *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 605 P.2d 939 (1980). Once Claimant reaches medical stability, he is no longer in a period of recovery, and temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001).

122. Claimant argues his declining revenue from his sole proprietorship is proof his industrial accident left him unable to perform his work duties. While Claimant's declining income will be discussed further below, first Claimant must consider the duration and extent of his alleged disability from a medical viewpoint.

123. Dr. Metcalf was the first physician to examine Claimant post-accident. On the Washington L&I Initial Physician's Report form, Dr. Metcalf noted Claimant could return to his regular work. In fact, Claimant was and had been working since his January 2008 accident.

124. On July 3, 2008, Dr. Ludwig modified Claimant's work duties to frequent walking, and occasional squatting/stooping and climbing. Further restrictions of occasional pushing/pulling, and lifting of twenty five pounds and bending/twisting were added on July 10, 2008. Dr. Ludwig released Claimant for full duty with no restrictions on July 21, 2008, and declared Claimant at MMI as of August 1, 2008. Dr. Ludwig had yet to see Claimant for his right hand issue, so the release was associated with Claimant's right hip and its improvement with chiropractic care.

125. From the record, it is not possible to tell if or what work Claimant lost during the eighteen days where he was under a modified work restriction. Claimant did not testify to any specific jobs he lost during this time frame. In fact, when reviewing Claimant's income from 2003 through 2013, the tax year 2008 showed the smallest income decline in five years.

(Claimant's income declined each year since he moved from Spokane to Worley in 2004). *See* Appendix A, attached hereto, which sets out Claimant's gross income from 1998 through 2013.

126. Surety began paying Claimant TTD benefits in 2012, when Claimant's claim was accepted. Surety continued paying such benefits until October 4, 2012, when Dr. Friedman determined Claimant had reached MMI and could return to work with no restrictions.

127. While it is true Claimant's income continued to decline in 2008 and until the time Claimant gave up his business in 2013, that fact does not obviate the need for Claimant to prove with medical testimony - typically in the form of a doctor's work release or restriction - his right to temporary disability benefits. His subjective testimony that he had an increasingly difficult time doing his job tasks is not sufficient.

128. Claimant has failed to prove he is entitled to additional temporary disability benefits related to his right hip industrial injury.

Permanent Partial Impairment

129. Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and a claimant's position is considered medically stable. *Henderson v. McCain Foods*, 142 Idaho 559, 567, 130 P.3d 1097, 1105 (2006). Idaho Code § 72-424 provides that the evaluation 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, elevation, traveling, and other activities. The Commission can accept or reject the opinion of a physician regarding impairment. *Clark v. City of Lewisto*n, 133 Idaho 723, 992 P.2d 172 (1999). "When deciding the weight to be given an expert opinion, the Commission can certainly consider whether the expert's reasoning and

methodology has been sufficiently disclosed and whether or not the opinion takes into consideration all relevant facts." *Eacret v. Clearwater Forest Industries*, 136 Idaho 733, 40 P.3d 91 (2002). The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989).

130. Dr. Friedman opined that Claimant suffered no permanent impairment from his industrial accident. Dr. McNulty rated Claimant at 6% lower extremity for greater trochanter bursitis.

131. Claimant continued to the time of hearing with chronic right hip pain, relieved by chiropractic care and/or steroid injections. His chronic condition causes him difficulties in his daily life, such as stair climbing, riding in automobiles, and recreational activity. Certainly, his injury created a permanent impairment. Dr. McNulty's 6% lower extremity impairment converts to a 2% whole person impairment.

132. Looking at the record as a whole, Claimant has proven he is entitled to 2% whole person PPI benefits for his right hip condition.

Permanent Disability

133. 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 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 the accident causing the injury, 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. The test for determining whether Claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced [his] capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). Claimant bears the burden of establishing his claim for permanent disability benefits.

134. 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, he 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). Odd-lot presumption arises upon showing that a claimant has attempted other types of employment without success, by showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available, or by showing that any efforts to find suitable work would be futile. *Dehlbom v. ISIF*, 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997).

135. After determining Claimant's disability from all causes combined, the Commission, in appropriate cases, determines what portion of that disability is attributable to the industrial accident. *See Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008).

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

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

Idaho Code § 72-406(1).

136. Daniel Brownell, a vocational rehabilitation expert from north Idaho hired by Claimant, prepared an employability report after reviewing medical records, legal, and vocational information, and meeting with Claimant.

137. Mr. Brownell placed Claimant in a sedentary work category. Based upon various references, including the Idaho Occupational Employment and Wage Reports, SkillTran, ONET, and VDARE, Mr. Brownell opined that Claimant would not qualify for 95 percent of the occupations listed in his designated labor market, and incurred a PPD, inclusive of PPI, in the range of 85 to 90 percent with a 70 percent loss of earnings, based on injuries and conditions he attributed to the industrial accident. When other non-industrial limitations and factors are considered, Claimant is totally disabled under the odd-lot doctrine. Mr. Brownell felt it would be futile for Claimant to look for work.

138. Mr. Brownell was deposed post-hearing. He acknowledged he had not submitted any job applications for Claimant, although he testified he had talked with someone at Lowe's

and various appliance distributors and sales positions about physical requirements of jobs at those places. He felt the requirements (which he did not set out) would exceed Claimant's abilities. Mr. Brownell also did not consider the Spokane market (where Claimant had done most of his work for his entire career) because that market was too far away given Claimant's driving limitations. He did concede, however, that no physician placed restrictions on Claimant's driving.

139. Mr. Brownell refused to even consider Dr. Friedman's opinions. Instead, he testified that he disagreed with Dr. Friedman's interpretation of the case. When pressed, Mr. Brownell simply answered "no comment" and would not even consider a medical point of view which was contrary to his own. Mr. Brownell has no medical degree, and no qualifications on which to dispute medical findings. Mr. Brownell's credibility and objectivity were diminished by this testimony.

140. Mr. Brownell completed what he called a job site evaluation with Claimant. Therein, Mr. Brownell opined that Claimant's appliance repair work required all of the following activities continuously (67 to 100 percent of the work day); climbing, bending, stooping, kneeling, crouching, twisting, crawling, reaching below shoulder height, reaching above shoulder height, grasping, pushing and pulling, and "other." Clearly, it is physically impossible to perform all of those activities continuously. After all, when Claimant is climbing, he is not crawling; when he is kneeling he is not crouching. Further, Mr. Brownell listed Claimant's work as involving standing and walking 90 percent of the time. One can not stand 90 percent of the time while kneeling for at least 67 percent of that same work day. This clear exaggeration further calls Mr. Brownell's objectivity into question.

141. In his report and at deposition, Mr. Brownell opined that Claimant lacked management skills and has not supervised other employees. The record certainly does not support this opinion.

142. When reviewing the record as a whole concerning Mr. Brownell's reporting and opinions, he clearly overstated Claimant's limitations. His bias was evident when he refused to even consider expert opinions which were at odds with his view of the case. Many of his opinions and observations are valid, some are not. Each will be considered in light of the whole record and given appropriate weight.

143. Defendants hired Nancy Collins, Ph.D., to conduct a disability evaluation. She also prepared a report. After a thorough analysis, she opined Claimant suffered a loss of access of up to 70 percent, assuming a light lifting restriction, lack of retail job suitability, and poor computer skills.

144. Dr. Collins calculated Claimant's income considerably less than actual, due to her using taxable "net income." As noted previously, this is not the correct way to calculate wages. As such, she figured Claimant suffered a 50 percent wage reduction.

145. In August 2015, Dr. Collins found several jobs in the Coeur d'Alene market by using labor market research. These included jobs at Sears and Lowe's. Also, there were three security guard jobs, including one which advertised a "great opportunity for a retired older worker." There were also porter jobs at three car dealerships available. Dr. Collins opined it would not be futile for Claimant to look for employment.

146. Utilizing Dr. McNulty's restrictions, Dr. Collins found Claimant suffered disability inclusive of impairment of up to 60 percent. If Dr. Friedman's opinions were accurate, Claimant suffered no disability above impairment.

147. Dr. Collins noted that Claimant had not looked for work, and does not feel he can. This is consistent with his statements at physical therapy where he indicated he did not have a goal of returning to work. His goals did include being able to fly fish right handed and tie flies.

148. Claimant has failed to show by a preponderance of evidence that he is totally and permanently disabled as an odd-lot worker or otherwise. Claimant's job search has been non-existent. He has no desire to return to work, as noted above. Defendants, through Dr. Collins, established it would not be futile for Claimant to look for work. While he has numerous restrictions, most of which are not industrially related, there is no evidence Claimant could not find a job if motivated to do so. Dr. Collins persuasively testified at deposition that businesses such as Lowe's routinely hire individuals with limitations. She noted seeing workers in a wheelchair, on oxygen, and with an amputated arm working for Lowe's, albeit not in Coeur d'Alene. She pointed out many of the jobs, including the one she found at Sears, were part time. Claimant was working part time when he had his industrial accident.

149. The significant conditions and restrictions impacting Claimant's employability include;

- His age at hearing – 66;
- Low back degenerative disc disease with radiculopathy and lifting restrictions;
- Bilateral knees surgeries and need for knee replacement at some point;
- Right wrist arthritis, with medical restrictions and brace;
- Right carpal tunnel syndrome residual nerve loss post-surgery;
- Left shoulder arthritis;
- Hearing loss;
- Memory problems;

- Right hip bursitis;
- Education;
- Lack of computer skills; and
- Subjective complaints and attitude.

150. Considering the record as a whole and the advisory opinions of experts, Claimant has suffered loss of access to the job market of 80 percent. Further, he has suffered a loss of earning potential of 60 percent, from $25 per hour pre-accident, to $10 per hour at the time of hearing.

151. When all factors, both medical and non-medical, are examined, and considering the advisory opinions of experts, Claimant suffered disability from all causes combined of 70 percent, exclusive of impairment.

152. In cases where disability is less than total, once Claimant's permanent disability from all causes is determined, a second determination must be made to establish the extent to which the injured worker's permanent disability is due to the accident in question. Idaho Code § 72-406 requires a finding that Claimant suffered from a "pre-existing physical impairment."

153. Here, the record reflects that Claimant did suffer from several pre-existing conditions which constitute pre-existing physical impairments. Claimant's low back severe degenerative disc disease, right wrist arthritis, knee surgeries and resultant arthritis, and left shoulder arthritis all pre-dated his accident. While these various conditions were not rated for impairment prior to his industrial accident, the record establishes these conditions would likely have been entitled to an impairment rating. Idaho Code § 72-406 does not require that the extent of Claimant's pre-existing physical impairment be quantified in order to be

considered for the purposes of the statute. *Duncan v. Varsity Contractors*, 2014 IIC 0041, (June 2, 2014).

154. Dr. McNulty limited Claimant to sedentary work for the cumulation of his conditions, but only light work restrictions related to his right hip and wrist. Only Claimant's right hip condition is attributable to the industrial accident. His other restrictions are far more significant when considering Claimant's disability from all causes; his hip is a relatively minor consideration. Even with a light duty work restriction as would likely be given for Claimant's hip alone, the majority of jobs for which Claimant is qualified fall within that category. Dr. Collins testified that 60 percent of available jobs in the Claimant's job market (which does not include Spokane) are in the light category.

155. The Referee finds, based upon the record as a whole, Claimant's 70 percent disability from all causes is properly apportioned as 12 percent, exclusive of PPI, attributed to Claimant's right hip condition, and 58 percent to his non-industrial pre-existing conditions.

Attorney Fees

156. Claimant asserts entitlement to attorney fees pursuant to 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 a claimant 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).

157. Claimant argues a right to attorney fees because Surety denied Claimant's medical treatment in the form of a carpal tunnel release surgery in 2008, in spite of having Dr. Ludwig's records requesting a referral to a hand surgeon. Moreover, Surety allegedly failed to follow up with Dr. Ludwig regarding the causal connection between the industrial accident and Claimant's right hand issues. The delay in surgery left Claimant with permanent impairment and disability.

158. Contrary to Claimant's argument, Surety records show it attempted to follow up with Dr. Ludwig regarding the causal link between Claimant's right hand condition and the accident. The records show no response from Dr. Ludwig. In fact, he did not opine on causation until 2012. By the time he rendered such an opinion, Surety had already obtained a physician's opinion that the right hand was not related to the industrial accident, a finding supported by this decision.

159. Given the ruling herein, the Referee declines to recommend an award of attorney fees to Claimant.

CONCLUSIONS OF LAW

1. Claimant has failed to prove his right hand carpal tunnel syndrome was caused in whole or in part by the industrial accident of January 6, 2008. All subsequent issues are moot as regards Claimant's right wrist/hand.

2. Claimant has proven his symptomatic right hip condition was wholly caused by the industrial accident of January 6, 2008.

3. Adequate records were not provided to establish Claimant's average weekly wage (AWW) computation, but it is not less than $979.56.

4. Claimant has failed to prove a right to reimbursement for medical care for his right hip from August 1, 2008 through March 27, 2012.

5. Claimant has proven a right to reimbursement at the full invoiced rate for reasonable and necessary medical charges from the time Surety denied further treatment in October 2012 until the present for treatment of Claimant's right hip.

6. Claimant has proven a right to continuing reasonable and necessary medical benefits, palliative or otherwise, for treatment of Claimant's right hip from the present moving forward.

7. Claimant has failed to prove he is entitled to additional temporary disability benefits (TPD/TTD) related to his covered right hip industrial injury.

8. Claimant has proven he is entitled to 2 percent whole person permanent partial impairment (PPI) benefits for his covered right hip industrial injury.

9. Claimant has failed to prove he is entitled to permanent total disability (PTD) pursuant to the odd-lot doctrine or otherwise.

10. Apportionment under Idaho Code § 72-406 is appropriate. After applying Idaho Code § 72-406 apportionment to the facts, Claimant has proven he is entitled to permanent partial disability (PPD) of 12 percent, exclusive of PPI.

11. Claimant has failed to prove he is entitled to an award of attorney fees under Idaho Code § 72-804.

RECOMMENDATION

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

DATED this 2nd day of February, 2016.

INDUSTRIAL COMMISSION

_/s/_____
Brian Harper, Referee

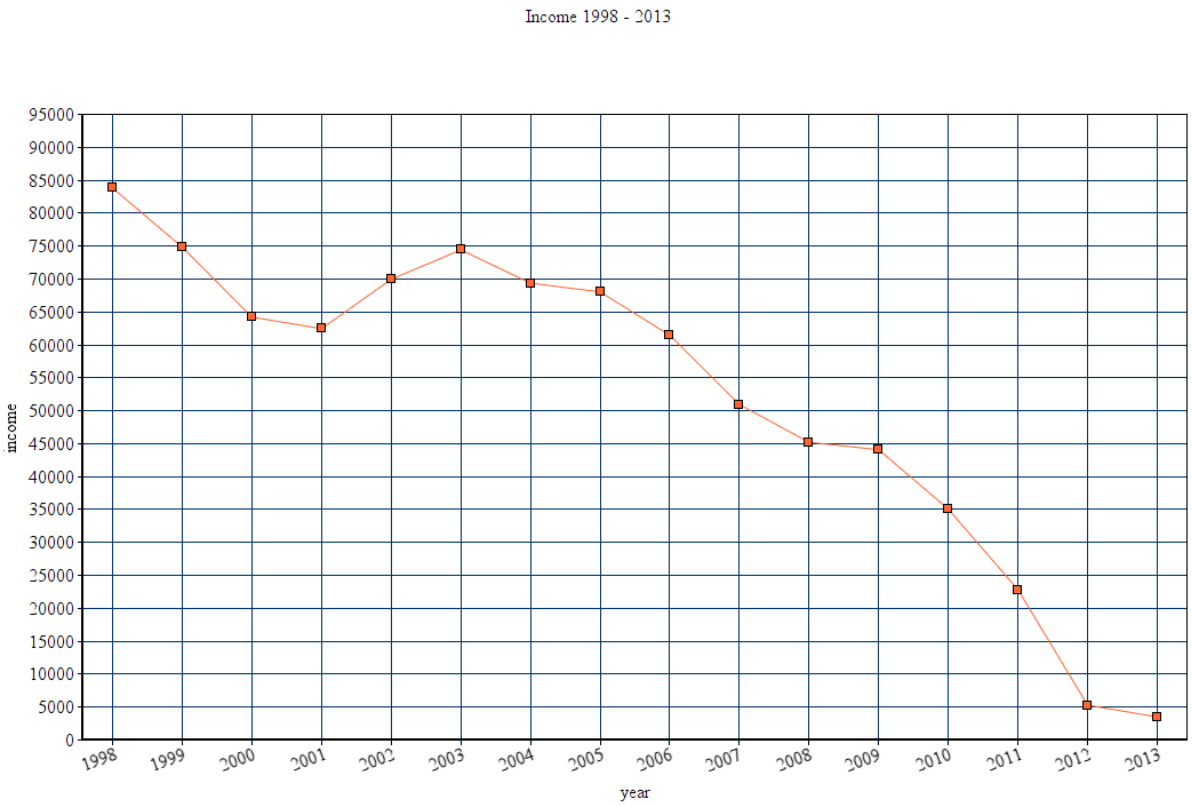
CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of February, 2016, 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:

STEPHEN NEMEC
1626 LINCOLN WAY
COEUR D ALENE ID 83814

EMMA WILSON
1703 W HILL RD
BOISE ID 83702

__/s/_____



Year	Income $	% increase $ previous year	% decrease $ previous year
1998	83,813	--	--
1999	74,836		11
2000	64,217		14
2001	62,470		3
2002	69,950	12	
2003	74,426	6	
2004	69,366		7
2005	68,050		2
2006	61,455		10
2007	50,937		17
2008	45,208		11
2009	44,085		2
2010	35,058		20
2011	22,825		35
2012	5,294		77
2013	3,508		34

Appendix A

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HENRY STEVEN SMITH, Claimant, v. HENRY STEVEN SMITH, dba QUALITY APPLIANCE SERVICE Employer, and HARTFORD UNDERWRITERS INSURANCE COMPANY, Surety, Defendants.	**IC 2012-024062** **ORDER** Filed February 18, 2016

Pursuant to Idaho Code § 72-717, Referee Brian Harper 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 has failed to prove his right hand carpal tunnel syndrome was caused in whole or in part by the industrial accident of January 6, 2008. All subsequent issues are moot as regards Claimant's right wrist/hand.

2. Claimant has proven his symptomatic right hip condition was wholly caused by the industrial accident of January 6, 2008.

3. Adequate records were not provided to establish Claimant's average weekly wage (AWW) computation, but it is not less than $979.56.

4. Claimant has failed to prove a right to reimbursement for medical care for his right hip from August 1, 2008 through March 27, 2012.

5. Claimant has proven a right to reimbursement at the full invoiced rate for reasonable and necessary medical charges from the time Surety denied further treatment in October 2012 until the present for treatment of Claimant's right hip.

6. Claimant has proven a right to continuing reasonable and necessary medical benefits, palliative or otherwise, for treatment of Claimant's right hip from the present moving forward.

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8. Claimant has proven he is entitled to 2 percent whole person permanent partial impairment (PPI) benefits for his covered right hip industrial injury.

9. Claimant has failed to prove he is entitled to permanent total disability (PTD) pursuant to the odd-lot doctrine or otherwise.

10. Apportionment under Idaho Code § 72-406 is appropriate. After applying Idaho Code § 72-406 apportionment to the facts, Claimant has proven he is entitled to permanent partial disability (PPD) of 12 percent, exclusive of PPI.

11. Claimant has failed to prove he is entitled to an award of attorney fees under Idaho Code § 72-804.

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

DATED this 18th day of February, 2016.

INDUSTRIAL COMMISSION

Participated but did not sign

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 18th day of February, 2016, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

STEPHEN NEMEC	EMMA WILSON
1626 LINCOLN WAY	1703 W HILL RD
COEUR D ALENE ID 83814	BOISE ID 83702

_/s/_____