BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

WILLIAM DALE FORD, Claimant, v. CONCRETE PLACING CO., INC., Employer, and LIBERTY NORTHWEST INSURANCE COMPANY, Surety, Defendants.	**IC 2005-518336** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed November 6, 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers. Referee Powers conducted two hearings previously, leading to two prior decisions and orders of the Commission, as summarized, below. On June 6, 2014, the parties submitted a Stipulation to Admit Additional Record in which they agreed to resubmit the case with new medical evidence. Upon review of the stipulation and the case file, the Referee placed the matter under advisement on June 10, 2014. The case is now ready for decision.

PRIOR EVIDENTIARY HEARINGS AND ORDERS

First hearing and order. On January 19, 2010, Referee Powers conducted the initial evidentiary hearing in this case. The corresponding Order, issued by the Commission on June 10, 2010, held:

1. Claimant's 2005 shoulder injury was due to the industrial accident and not to his preexisting underlying degenerative condition.

2. Claimant is entitled to past and future medical benefits for his shoulder condition.

3. Claimant is entitled to temporary total disability benefits from February 25, 2009 through April 21, 2009.

4. Defendants are liable for permanent partial impairment in the amount of 12% of the whole person.

5. Claimant failed to prove that jurisdiction of this case should be retained by the Industrial Commission.

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

Second hearing and order. On June 12, 2013 and July 2, 2013, Referee Powers conducted the second evidentiary hearing. The corresponding Order, issued by the Commission on December 13, 2013, held that Claimant failed to prove that he was medically stable at the time of the hearing. Therefore, the extent of Claimant's disability could not be assessed.

ISSUES TO BE DECIDED PURSUANT TO THE PARTIES' STIPULATION

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

1. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine or otherwise; and

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

CONTENTIONS OF THE PARTIES

Claimant contends that he is totally and permanently disabled under the 100% method due to his August 1, 2005 industrial injury to his left shoulder and his nonmedical factors, which include his education, experience, personality, criminal record, remedial

computer skills and appearance. If not, then he is totally and permanently disabled pursuant to the odd-lot doctrine. Claimant relies upon the opinions of Scott Humphrey, M.D. and Kevin Krafft, M.D., treating physicians, and Nancy Collins, Ph.D., vocational consultant.

Defendants contend that Claimant is not totally and permanently disabled as a result of his industrial injury. Among other things, they argue that, as per the Commission's decision in *Benner v. The Home Depot, Inc.,* 2013 IIC 0002, Claimant's psychological conditions cannot be considered nonmedical factors because they were not incurred as a result of his industrial injury. Defendants rely upon the opinions of Mary Barros-Bailey, Ph.D., vocational consultant.

OBJECTIONS

All pending objections preserved in the deposition transcripts are overruled.

EVIDENCE CONSIDERED

The record in this matter consists of the following, admitted pursuant to the parties' June 6, 2014 stipulation:

1. The testimony taken at hearing of Claimant, Nancy Collins, Ph.D., and Mary Barros-Bailey, Ph.D.;

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

3. Defendants' Exhibits (DE) A, B, C, E, F, O, and S admitted at the second hearing; and

4. Claimant's Exhibit GG admitted following receipt of the parties' stipulation.

The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

FINDINGS OF FACT

BACKGROUND, INCLUDING SOME PREVIOUSLY PUBLISHED FINDINGS

1. Claimant was 44 years of age at the time of the hearing and residing in California. As a child, Claimant lived in foster homes. He was raised in California and Idaho.

2. Claimant has undergone four surgeries on his left shoulder, including arthroscopic repair by Dr. Hessing (January 2006), total shoulder replacement by Dr. Hassinger (February 2009); reverse total shoulder arthroplasty by Dr. Humphrey (April 2012), and, when the reverse total procedure failed, an emergent hemiarthroplasty by Dr. Humphrey (August 2012). Following the last procedure, Dr. Humphrey advised Claimant not to attempt physical therapy due to the increased risk of further damaging what little bone remains in his left shoulder.

3. On December 5, 2012, Dr. Humphrey opined there was no further treatment he could offer Claimant and imposed a five-pound lifting restriction. Similarly, on December 6, 2012, Kevin Krafft, M.D., a physiatrist, opined Claimant had reached maximum medical improvement (MMI) and assessed a five-pound lifting restriction. Dr. Krafft assessed 24% whole person permanent partial impairment (PPI). No other physician has rated Claimant's PPI.

4. On April 22, 2013, Robert Calhoun, Ph.D., a psychologist, evaluated Claimant. Following his evaluation and testing of Claimant he offered the following clinical synthesis:

> Dale Ford is a 44-year-old maritally separated man who presents with unresolved left-sided shoulder, neck, clavicular, and arm pain. The patient is reportedly status post reverse total joint replacement surgery. He has had an extremely poor outcome from that surgery as he has shown no functional improvement whatsoever.

> At this time, there are multiple psychological and behavioral factors impacting the patient's pain problem and ongoing level of debilitation. Most notable is this patient's heightened state of emotional distress characterized by anger, hostility, depression, and current state of learned helplessness. Such a distressed psychological state keeps him pretty much immobilized from moving forward in any direction in his life. Mr. Ford also has antisocial personality disorder. Structured personality testing combined with his criminal record and current presentation, strongly support antisocial personality disorder in Mr. Ford. Thus, he is at high risk for manipulating his physicians, family, and anybody who will talk to him to obtain opioids. The patient does have a long-term history of preexisting substance abuse. Currently, he is just reverting back to who he was prior to his injury.
>
> Behaviorally, the patient is physically tense. He is unable to achieve a state of relaxation that would be sufficient enough to help him with his pain. He does function on pain contingent activity level. He is pretty much determined that his left upper extremity is useless.
>
> Cognitively, the patient is highly somatically focused. His disability conviction is high. Due to his hostility, cynicism, and illness conviction, he would not likely trust any physician that attempted to help him understand that he could function better with his left upper extremity if he could get beyond the fear and illness conviction.

5. Dr. Calhoun offered no opinions on whether Claimant's psychological problems are causally related to the work accident. Nor did Dr. Calhoun specifically address whether Claimant qualified for psychological diagnoses using the criteria contained in the current Diagnostic and Statistics Manual of Mental Disorders published by the American Psychiatric Association. In a letter to Claimant's counsel dated June 5, 2013, Dr. Calhoun stated that when he saw Claimant, Claimant was in an unstable psychiatric state characterized by depression, hostility and anger. He noted that Claimant also had anti-social personality disorder, chronic pain syndrome, polysubstance abuse and opiate dependency. Dr. Calhoun advised Claimant's counsel that Claimant's psychiatric state made him a very poor candidate for working in any environment that would require him to have contact and interaction with members of the public.

6. On April 23, 2013, Dr. Krafft assessed a left-sided lifting limit of one pound to abdominal height, and (apparently) recommended stabilization of the left shoulder for anything above that. (See CE-V588). He also assessed a right-sided lifting limit of 50 pounds. It is unclear from the record whether Dr. Krafft assessed the right-sided restriction due to Claimant's left shoulder condition, a right shoulder condition, or something else.

7. On May 31, 2013, Dr. Humphrey again examined Claimant's left shoulder. Claimant reported it had become increasingly painful, with deep burning pain and poor function, and that he was planning to move to Washington. At the hearing, Claimant testified that he is torn because he does not want to return to opiate usage, but he cannot stand the pain. He also described his sleep problems related to his shoulder pain. "I sleep in the car in my garage, because I can't sleep on a bed or anywhere else. And I can't sleep very good in my car either. I get like an hour or two to sleep every night." TR-40.

8. Among other things, Dr. Humphrey noted from new x-rays that Claimant's hemiarthroplasty component appeared to be in good position, but there was also evidence of continued erosion of the glenoid bone. Dr. Humphrey discussed treatment options with Claimant, including a revision surgery, and ultimately recommended that Claimant seek another opinion. "I would recommend that he seek another opinion from a shoulder specialist, perhaps at the University of Washington. I mentioned to Dale that Dr. Winston Warme and Dr. Rick Matsen are excellent surgeons who might be able to help him." CE-562b. Dr. Humphrey elaborated:

> Unfortunately, the results of my surgery on the left side have not been good, and I strongly feel that perhaps it would be best to have him evaluated by another physician at this point. I plan no further surgical intervention for Dale. I told Dale I was sorry that his results had not been better, and that I certainly understood that his shoulder was painful and that the result had not been what he had hoped for. *Id.*

9. Claimant testified at the hearing that he would like to follow up on Dr. Humphrey's recommendation.

> Q. Okay. Did - - have you been back to Dr. Humphries [*sic*] since he released you in December 2012?
>
> A. I went back a couple months ago to - -
>
> Q. Okay.
>
> A. - - because my shoulder has been really acting weird.
>
> Q. Did he offer you any extra help?
>
> A. He was pretty bleak about it. There ain't nothing much they can do at this point.
>
> Q. Okay. He wrote a report, Mr. Ford, and said that he would suggest that you see a couple doctors up in the Seattle area. Is that - -
>
> A. Yeah.
>
> Q. - - is that something you'd think about?
>
> A. Yeah. Probably.

TR-24-25.

STIPULATED FACTS AND EVIDENCE

10. On March 14, 2014, Claimant obtained a second opinion from Keith G. Holley, M.D., an orthopedic surgeon. Dr. Holley recorded Claimant's left shoulder history, including four surgeries and persistent pain leading to opioid addiction. He also noted that Claimant had no desire for further surgery, and that his symptoms "have been stable, with no reported recent worsening or improvement." CE-GG894. On exam, Dr. Holley noted Claimant had mild atrophy of the periscapular musculature, severely restricted range of motion both passively and actively, and overall diminished strength due to pain. Claimant's distal neurovascular examination was intact. X-ray imaging revealed a

longstem uncemented hemiarthroplasty with significant glenoid erosion, well-maintained subacromial space, and no fracture or acute pathology.

11. Dr. Holley recommended no further treatment. He felt that Claimant would not improve, either with surgery or non-surgical interventions such as physical therapy. He opined that Claimant could return to work in a light-duty or sedentary job, with no left arm lifting greater than five pounds, and no left arm overhead work. Dr. Holley opined that Claimant remains capable of repetitive grasping and handling activities with the left arm below shoulder level.

12. The parties agree that Claimant has reached maximum medical stability.

EVIDENCE OF PREEXISTING CONDITIONS

13. **Preexisting impairments.** Claimant has a history of right shoulder problems, including a dislocation in 1995 and a fracture in 2000, which was treated conservatively. In 2002, Dr. Goodwin noted diffuse atrophy of the entire shoulder girdle and arm, with possible residual brachial plexopathy and/or carpal tunnel syndrome in the right hand. In April 2013, Dr. Krafft assessed a 50-pound lifting limit; however, the reason for this limit is not apparent from the record. Claimant reported that he has a 3% PPI assessment for his right upper extremity condition. However, neither the medical records in evidence, nor the Lump Sum Settlement agreement addressing Claimant's right shoulder injury, substantiate this. Claimant was apparently using his right upper extremity normally, doing heavy-duty work, prior to his industrial injury.

14. Claimant sustained other injuries prior to his industrial injury; however, there is insufficient evidence from which to determine that he suffered any PPI as a result of any of them.

15. **Preexisting substance abuse.** Claimant has a history of methamphetamine dependence, alcohol abuse, and marijuana abuse. He has a criminal history including convictions for drug and alcohol related offenses. Claimant also became dependent on opiates for pain relief following his industrial injury; however, he was no longer using opiates at the time of the hearing.

Preexisting psychological conditions.

16. In February of 2002 Claimant was admitted to Intermountain Hospital on a 24-hour police hold from Canyon County. During his stay at Intermountain Hospital, Claimant underwent psychological evaluation by Dr. Kruzich and others. Claimant's Axis I diagnosis was as follows: Major depression; alcohol abuse; mixed substance abuse primarily methamphetamine and marijuana. Claimant also carried an Axis II diagnosis of mixed personality disorder.

17. **The record contains multiple exemplars** demonstrating that Claimant presents as an angry individual. For example, in 2002, Claimant's psychiatric evaluation notes that Claimant was at that time no longer dangerous, but still angry and hostile. At the hearing, Dr. Collins testified that Claimant was very loud and very angry as they sat in the waiting room before Dr. Humphrey could see them in May 2013. Then, during their meeting with Dr. Humphrey, she felt she needed to intervene to prevent Claimant from punching him:

> Q. Was he profane?
>
> A. He - - yes, he swore a lot. He was just very angry. He requested an x-ray of his right shoulder just to prove that it was fractured and so that he got mad at the nurse, because she didn't - - wouldn't do it and he got mad at the doctor because he wouldn't do it and he was - - at one point I mean he was kind of afraid he was going to hit the doctor.

Q. Physically?

A. Physically.

Q. Did you have to get in between them?

A. No. I just tried to talk him down and the doctor stayed away from him. So, yeah, he was very angry.

TR, 46-47.

Dr. Collins and Dr. Barros-Bailey both noted Claimant's angry demeanor in their reports. Dr. Collins opined, "His personality does appear to limit the kind of work he can consider." CE-BB637.

VOCATIONAL EVIDENCE ADMITTED AT SECOND HEARING

18. **Education and work history.** Claimant completed the eighth grade. He did not do well in school, but he obtained his GED in 1994. In 1998, he obtained a commercial driver's license (CDL), and has had all endorsements. At the time of the hearing, Claimant's license was suspended as the result of a DUI conviction in 2011. Claimant has no other education or formal training. He can use Facebook, but he has no computer training.

19. In addition to truck driving, Claimant has worked in unskilled medium and heavy-duty jobs. He has experience in construction clean-up, painting, dishwashing, cooking, building maintenance, and some factory production work.

20. At the time of his industrial injury in 2005, Claimant was working as a truck driver for CPC. He drove dump trucks, ten-wheelers, pickups, and flatbeds hauling heavy equipment, earning approximately $50,000 per year. Thereafter, he drove a flatbed truck for another employer. At some point, until October 2011, Claimant and his wife worked as

team drivers. He earned approximately $48,000 per year (as a team, they earned in excess of $80,000 per year). He also worked as a potato hauler.

21. **Nancy Collins, Ph.D.** Dr. Collins prepared a vocational disability analysis on December 20, 2012. Previously, she interviewed Claimant and reviewed his medical and vocational records. By the time of the hearing, she had reviewed some additional records and Dr. Barros-Bailey's report. Dr. Collins is qualified to render a vocational opinion.

22. Dr. Collins noted Claimant is functionally limited by his left upper extremity impairment, as well as his angry persona. As to Claimant's physical impairment, Dr. Collins acknowledged Dr. Humphrey's (and Dr. Krafft's) left-sided five-pound lifting restriction, with no repetitive use of the shoulder. However, Dr. Humphrey told her and Claimant in December 2012 that Claimant should use his left arm as little as possible to prevent further injury:

> Q. And, then, you also heard him tell you and Mr. Ford just don't use that shoulder at all?
>
> A. Right.
>
> Q. Did he have any specific comments about - - Dale says he's supposed to just let his left arm hang all the time, is that the idea?
>
> A. Well, I asked him about physical therapy, because I was looking at future medical care questions. He said absolutely not. We just don't want him to move it. So, he just said, you know, try and get along, you know, as well as you can without using your - - your left arm. He said you can use it as an assist, as long as it's not out away from your body. But other than that really try not to use it.
>
> Q. So, he - - if he picks anything up he's got to initiate that with his right and only assist with the left, is that the idea?

A. Right. And not lift anything heavy with the left.

TR, 47-48.

23. As to Claimant's right shoulder, Dr. Collins was unaware of the medical nature of his injury or any associated permanent impairment.

24. Regarding Claimant's employment history, Dr. Collins noted he had been employed since he was 12 years of age, due to running away from an abusive foster home situation. Most of Claimant's employers through 1996 were family members who, Dr. Collins opined, may have been more forgiving of his irritability than others would be. She also noted that Claimant's short tenure at various subsequent trucking companies demonstrated he had difficulty keeping a job, possibly related to his prickly personality.

25. Claimant's prior employment was primarily in medium and heavy-duty jobs that require good upper extremity function; however, his industrial impairment now limits him to sedentary work, for which he has no experience or training. Further, she opined, based upon her interpretation of the licensing rules, that Claimant's upper extremity impairment renders him unable to satisfy the requirements to renew his CDL. "While there do appear to be some driving jobs that do not require lifting, the physical requirements required to maintain a CDL would make driving jobs that require this license impossible." CE-BB640. In addition, although Claimant may be able to do some light duty jobs one-armed, these jobs typically require frequent to constant use of the upper extremities.

26. Considering Claimant's five-pound lifting restriction, Dr. Collins opined Claimant had lost access to 98% of the labor market. She opined that he cannot return to truck driving, that he has no skills transferrable to a desk job, and that he has no experience or aptitude for customer service jobs. Specifically, he would not be a good candidate to be

a dispatcher at a trucking company (as suggested by an ICRD counselor) due to the high-stress, person-to-person nature of the job. Further, Claimant cannot keyboard with both hands, which he would likely be required to do as a dispatcher. Also, Dr. Collins does not believe Claimant would be successful at operating his own tow truck company, as he had mentioned, because he would have to hire someone to do the actual work and he would probably have a very difficult time succeeding as an employer.

27. Dr. Collins opined that the only job Claimant could reasonably compete for, given his physical, education, and experiential qualities, is a security guard position. However, his personality/social skills development would relegate him to security guard jobs that do not require public contact. Also, his criminal history may be an obstacle to obtaining this type of work. If Claimant could land such a job, his earnings would be half of what they were at the time of his industrial injury. Given Claimant's limited education, she does not believe he is a good candidate for any kind of formal training program, although he may be able to be trained on the job to do security work, as discussed above.

28. Based upon her analysis, Dr. Collins opined that Claimant is totally and permanently disabled, in any labor market (see also, TR-64):

> In my opinion Mr. Ford's labor market access is so poor that a competitive labor market does not exist. A competitive labor market is one where the transferable jobs are of sufficient quantity to assure reasonable access. If he had more education or a more pleasant demeanor he might be able to train for an office job. In my opinion, there are no sedentary jobs in sufficient quantity for Mr. Ford to be employable and he should be considered totally disabled.

CE-BB642. Dr. Collins opined that Claimant only has a very remote possibility of being hired for any job. "I do think that it would probably be futile for him to look." TR-55.

29. **Mary Barros-Bailey, Ph.D.** Dr. Barros-Bailey prepared a vocational disability analysis on May 13, 2013. Previously, she interviewed Claimant and reviewed his medical, criminal, and vocational records. She had also reviewed Dr. Collins' report. Dr. Barros-Bailey is qualified to render a vocational opinion.

30. During the interview, Claimant was alternately angry and animated. He was experiencing withdrawals from opiates at the time. Dr. Barros-Bailey testified that Claimant's demeanor at the hearing (via telephone) was different. As to Claimant's appearance, she noted he was missing a front tooth.

31. Claimant reported his vocational history, and Dr. Barros-Bailey understood that he had only completed the eighth grade. She recognized this discrepancy (and a few others) at the hearing, but did not change her opinions as a result.

32. Dr. Barros-Bailey considered Claimant's criminal record in her wage loss analysis, but apparently not in her labor market access analysis. She noted that Claimant had previously lost a job when his employer learned of his criminal record. Claimant has several driving-related infractions since 1990, plus the following misdemeanor convictions: failure to provide proof of insurance (1990, 2001), possession of drug paraphernalia (1998), motor carrier safety violation (1998), obstructing officers (2002), failure to appear (2002), disturbing the peace (2002, 2011), possession of controlled substance (2002), driving without privileges (2003), and driving under the influence (2011).

33. Dr. Barros-Bailey incorporated Claimant's left-sided five-pound lifting restriction into her analysis. She also noted Dr. Krafft's 50-pound lifting restriction on the right, as well as Claimant's recollection that he was assessed 3% whole person permanent impairment and the absence of medical evidence on this point. In addition, she considered

Claimant's reports of a number of limitations due to pain in his left upper extremity including:

- Standing: 20 minutes
- Walking: Avoids because the bouncing causes shoulder pain
- Sitting: He ends up leaning on his arm, causing pain
- Lifting/carrying: Anything over one pound causes pain on the left
- Pushing/pulling, overhead reaching: Cannot perform on the left
- Twisting/turning: Cannot torque or twist left upper extremity or twist the top off a beer bottle
- Climbing: Cannot support himself on a ladder or stepstool
- Forward reaching, controls, driving: Cannot perform on left; drives one-handed and only operates an automatic transmission; drove from California for interview hitting speeds up to 125 m.p.h.
- Kneeling/crawling: Is fearful due to uncertainty about arising
- Feeling: Constant numbness in left shoulder, down the back of left arm, and into pinky and ring fingers
- Sleeping: Sleeps in recliner or car to avoid lying on left shoulder
- Judgment/memory: Claimant believes he does not possess good judgment or memory

34. Prior to the hearing, Dr. Barros-Bailey classified Claimant as a one-handed worker within the light-duty work category. She opined he may also be able to do some medium-duty work. She disregarded Claimant's personality issues in determining what jobs he could do because they are not industrially related. However, she acknowledged that "it is unlikely that he is feasible for return-to-work services until some of his mental health needs stabilize." CE-CC653. Dr. Barros-Bailey ultimately opined that Claimant

sustained 51% disability inclusive of impairment, if medium-duty work is assumed, or 69% if light-duty work is assumed.

35. Claimant reported his father-in-law used to own a tow truck, so he might be able to run that kind of business if he hired someone to do the driving. Dr. Barros-Bailey apparently did not believe this was a viable vocational possibility. Based upon research involving a sample of 400 employers regarding a variety of jobs, Dr. Barros-Bailey opined in her report that over 50% of employers would employ a one-handed worker with Claimant's residual transferable skills and vocational profile as a:

- Greeter
- Cashier
- Gas bar island attendant
- Ticket taker
- Kiosk vendor
- Booth cashier at a parking garage

36. At the hearing, however, Dr. Barros-Bailey was informed of Dr. Calhoun's opinion that Claimant's mental state would not allow him to do any of these jobs. She did not offer any alternatives, but agreed with Dr. Collins that Claimant could still probably perform a subset of security guard jobs that do not require public contact or use of firearms.

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).

PERMANENT DISABILITY

37. **"**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.

38. 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).

39. **Maximum medical improvement (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.

40. The parties' stipulation, supported by Dr. Holley's opinion that Claimant's condition is medically stable, is sufficient to establish that Claimant's industrial left shoulder condition became medically stable as of March 14, 2014.

41. **Date of Disability Determination.** In *Brown v. The Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012), the Supreme Court held that the date for evaluating Claimant's "present and probable future ability to engage in gainful activity", is ordinarily the date of hearing. However, the Court recognized that depending on the peculiar facts of a case, the Commission should be given some leeway in the application of this rule. *See also, Davaz v. Priest River Glass Co., Inc.*, 125 Idaho 333, 870 P.2d 1292 (1994). Here, a hearing on the issue of Claimant's disability in excess of fiscal impairment was held on June 12, 2013 and July 2, 2013. As noted above, the Commission did not reach the issue of disability following this hearing because of its conclusion that Claimant was not yet medically stable. Subsequent to the December 13, 2013 decision, Claimant underwent additional medical evaluation, and as discussed above, the Commission has determined that Claimant reached medical stability as of the date of his evaluation by Dr. Holley. Following this evaluation, no additional hearing was held; the parties submitted the case to the Commission via a stipulation which included additional medical evidence the Commission had not previously considered, including, *inter alia*, Dr. Holley's report. Obviously, it would be inappropriate to measure Claimant's disability as of the prior hearing dates since we have found that he did not reach medical stability until March 14, 2014. We believe that the most appropriate date upon which to evaluate Claimant's

disability is June 6, 2014, the date of the parties' stipulation to resubmit the case with new medical evidence.

TOTAL PERMANENT DISABILITY

42. **100% method.** There is no dispute that Claimant incurred work-related permanent impairment, nor that his condition is medically stable; therefore, the matter is ripe for a determination of whether Claimant is totally and permanently disabled. If Claimant's disability due to medical and non-medical factors totals 100%, then he is totally and permanently disabled under Idaho Code § 72-430. Such medical and nonmedical factors include, in relevant part, "the nature of the physical disablement, …the cumulative effect of multiple injuries, the occupation of the employee, and his age at the time of accident causing the injury, … consideration being given to the diminished ability of the afflicted employee to compete in an open labor market within a reasonable geographical area considering and the personal and economic circumstances of the employee, and other factors as the commission may deem relevant…" *Id.*

43. Claimant's relevant medical conditions include his industrial left shoulder condition and its related five-pound lifting limitation, as well as his 50-pound lifting limitation on his right upper extremity. Claimant's relevant nonmedical factors include his eighth grade education, his work experience in primarily medium-duty and heavy-duty jobs that do not require contact with the general public, his disheveled appearance including a missing front tooth, his criminal history, and non-industrial psychological conditions.

44. Ultimately, Dr. Collins and Dr. Barros-Bailey each concluded that Claimant could only work within a subset of security guard jobs that did not require him to deal with the public. Dr. Barros-Bailey's opinion that this subset must be further narrowed to those jobs that do not require the use of a firearm is also persuasive, as is Dr. Collins' opinion that Claimant's criminal

history would further preclude him from this type of employment. Dr. Collins opined that the remaining subset amounts to so few actual jobs that they are not regularly and continuously available, such that Claimant is totally and permanently disabled. Dr. Barros-Bailey did not rebut this conclusion.

45. As noted above, the record contains insufficient proof from which to determine that Claimant's psychological condition is, in some respect, referable to the subject accident, much less whether the accident is the predominant cause, as compared to all other causes combined, of his present psychological condition. However, whether Claimant's psychological condition is related to his accident, or is instead pre-existing in nature, is immaterial to the determination of whether or not Claimant is totally and permanently disabled as of the date of the disability determination. In making that determination, the Commission must consider Claimant's disability from all causes, including consideration of the impact of his psychological condition, whether related to the work accident, or pre-dating the work accident. As well, the Commission must consider the impact of Claimant's psychological condition regardless of whether it constitutes a ratable impairment under Idaho Code § 72-451, or is instead, merely a part of Claimant's relevant non-medical factors. *See Mapusaga v. Red Lion Riverside Inn*, 113 Idaho 842, 748 P.2d 1372 (1987).

46. Regardless of how characterized, Claimant's psychological condition is a factor which detrimentally impacts Claimant's ability to engage in gainful activity. Based on the opinions offered up by Dr. Calhoun, Dr. Collins and Dr. Barros-Bailey, it is clear that Claimant cannot perform the vast majority of jobs for which he retains the physical capacity to perform simply because he is not well suited to employment which requires him to interact with members of the public. Consistent with the opinions of Drs. Collins and Barros-Bailey, the Commission

concludes that Claimant has established that he is totally and permanently disabled under the 100% method as a result of his industrial left shoulder injury and restrictions, his right shoulder restrictions, his psychological condition (however characterized) and other non-medical factors.

47. **Odd-lot doctrine.** A claimant who is not 100% permanently disabled may still prove total permanent disability by establishing he is an odd-lot worker. An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State, Industrial Special Indemnity Fund,* 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department,* 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status rests upon the claimant. *Dumaw v. J. L. Norton Logging,* 118 Idaho 150, 153, 795 P.2d 312, 315 (1990).

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

a. By showing that he has attempted other types of employment without success;

b. By showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or

c. By showing that any efforts to find suitable work would be futile.

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

49. The record contains insufficient evidence to establish that Claimant is an odd-lot worker under the first or second *Lethrud* prongs. However, Dr. Collins' persuasive testimony, that it would be futile for Claimant to attempt to find work, is sufficient to establish Claimant's status as an odd-lot worker under the third prong. Further, Defendants have not rebutted Claimant's case with sufficient evidence of an actual job within a reasonable distance from Claimant's home that he is reasonably capable of obtaining, as per *Lyons v. Industrial Special Idemn. Fund,* 98 Idaho 403, 565 P.2d 1360 (1977).

50. Having found Claimant to be totally and permanently disabled under both the 100% and odd-lot methods, any discussion concerning whether employer is or is not responsible for Claimant's psychological condition under Idaho Code § 72-451 is moot. Although Defendants have raised Idaho Code § 72-406 apportionment as an issue in this matter, apportionment under that section is only relevant to cases of less than total and permanent disability. Since the Commission has found Claimant to be totally and permanently disabled, the issue of Idaho Code § 72-406 apportionment in this case need not be reached.

51. Apportionment under Idaho Code § 72-406 is moot.

52. Having found Claimant to be totally and permanently disabled as of June 6, 2014, we must next consider how long prior to the date of the parties' stipulation the status of Claimant's total and permanent disability existed. In the absence of any change in Claimant's status between the date of the stipulation and the March 14, 2014 date of medical stability, we conclude that Claimant's total and permanent disability is retroactive to March 14, 2014. Per the recent decision in *Corgatelli v. Steel West, Inc.*, 2014 Opinion No. 91, issued August 25, 2014, rehearing denied October 29, 2014, Defendants are <u>not</u> entitled to credit PPI payments against their obligation to pay total and permanent disability benefits effective March 14, 2014.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven that he is totally and permanently disabled, as of March 14, 2014, under the 100% method and as an odd-lot worker.

2. Apportionment under Idaho Code § 72-406 is moot.

3. Defendants are ordered to pay total and permanent disability benefits at the applicable rate commencing on March 14, 2014. No credit is given for PPI benefits previously paid.

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

DATED this _6th__ day of __November_____, 2014.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Chairman

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

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _6th__ day of November, 2014, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

RICHARD S OWEN
PO BOX 278
NAMPA ID 83653

KENT W DAY
PO BOX 6358
BOISE ID 83707-6358

_/s/_____