BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TIMOTHY BERRY, Claimant, v. CARTERS MANUFACTURING, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2008-039732** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** May 24, 2013

INTRODUCTION

Pursuant to Idaho Code § 72-506, the above-entitled matter was assigned to Referee LaDawn Marsters, who conducted a hearing on August 28, 2012 in Twin Falls, Idaho. Claimant was present in person and represented by Dennis R. Petersen of Idaho Falls. Employer (Carter's or Employer) and Surety (collectively referred to as Defendants) were represented by Paul J. Augustine of Boise.

Oral and documentary evidence was admitted, and post-hearing depositions were taken. The matter was briefed, and the case came under advisement on May 8, 2013. It is now ready for decision.

ISSUES

The parties seek adjudication of whether and to what extent Claimant is entitled to disability in excess of impairment. In his briefing, Claimant withdrew the previously noticed

issue of whether the Commission should retain jurisdiction beyond the statute of limitations. Therefore, that issue will not be decided herein.

CONTENTIONS OF THE PARTIES

Claimant, a welder for most of his life, cut his right (non-dominant) forefinger at work on September 17, 2008 when the grinder he was operating slipped. He developed a neuroma and underwent corrective surgery on April 7, 2009. Following occupational therapy from that procedure, Claimant developed pain on exertion, especially when gripping. He contends his injury prevents him from pulling the trigger on a welder. He does not wish further treatment, and he does not believe he can return to any welding jobs. Based upon the Functional Capacity Evaluation (FCE) prepared by Lesley Ruby, OTR and the vocational disability expert opinion of Delyn Porter, M.A., Claimant seeks an award of either 47% or 48% permanent partial disability (PPD) inclusive of impairment, depending upon whether the Burley (time of injury) or Otis Orchards (time of hearing) labor market is elected.

Defendants counter that Claimant has suffered no PPD under the restrictions issued by either Spencer Greendyke, M.D. or Tyler Wayment, M.D. and, under the limitations suggested by Ms. Ruby's FCE, he has suffered only 2½% or 3% PPD inclusive of impairment, depending upon which local labor market is applied. They argue that Claimant's subjective pain reports are not credible, and should be afforded no weight. They also maintain that, due to Claimant's poor employment history, his time-of-injury wage is an inaccurate measure of his pre-injury wage-earning capacity. Defendants rely primarily upon the medical opinions of Drs. Wayment and Greendyke, and the vocational disability expert opinion of William Jordan, M.A.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The prehearing deposition of Claimant taken January 17, 2012;
2. The testimony of Claimant, Joseph Carter, and John Klink taken at the hearing;
3. Claimant's Exhibits (CE) lettered A through N;
4. Defendants' Exhibits (DE) numbered 1 through 14; and
5. The post-hearing depositions of Lesley Ruby, OTR, taken October 18, 2012; Spencer D. Greendyke, M.D., taken November 15, 2012; and Delyn Porter, M.A. and William C. Jordan, M.A., taken January 16, 2013.

OBJECTIONS

All pending objections are overruled.

After considering the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

VOCATIONAL BACKGROUND

1. Claimant, who is left-handed, was 43 years of age and residing in Otis Orchards, Washington at the time of the hearing.

2. Education and certifications. Claimant graduated from high school in Illinois in 1988. In 2002, he tested and became certified in welding through the OXARC School of Welding in Spokane, Washington. He recertified in 2011 (post-industrial injury). Claimant was certified as a welder by the Washington Association of Building Officials (WABO), through financial and job assistance provided by the Washington Department of Labor WorkSource/WIA program in early 2011, but this certification expired in April 2012. Claimant is also certified

through the American Welding Society (AWS). In 2011, he renewed his certification, which will expire in 2016.

3. Claimant has no computer skills or experience.

4. Prior work and wage history. Claimant's pre-injury work and wage history is succinctly set forth in page 17 of Mr. Jordan's report (DE 9-17), discussed more fully, below. That page is attached hereto as Exhibit "A" and incorporated as if fully set forth herein.

5. In his lifetime, Claimant has been employed in jobs including: small engine repairman, salvager, welder/shop worker/fabricator, mechanic helper, lube tech, potato plant laborer, RV production line worker/framer, painter, fast food manager trainee, fry cook, fast food worker/cashier, auto detailer, sheet metal worker, deburring machine operator, forklift operator, roofer, liquid waste removal truck driver, security guard, corrugated cardboard machine operator, flooring installer, meat cutter, grocery cashier, footware production line worker, and school janitor.

6. Claimant welds primarily with his left, dominant, hand. However, he sometimes uses his right hand to get to hard-to-reach places.

7. Claimant worked for the same employer from 1993 through 1995 (Miller Container Corporation). Otherwise, Claimant has not stayed with the same employer, (pre or post-injury), for more than about eight months. He left many jobs after only a few weeks. Between 1984 and 2008, Claimant was employed at approximately 75 separate jobs.

INDUSTRIAL INJURY

8. Carter's is a family business that manufactures and repairs farm equipment in Rupert, Idaho. Rupert is located near Burley, Idaho, where Claimant resided when he was employed as a welder by Carter's. On September 17, 2008, Claimant had been working for

Carter's for approximately 9 days when the grinder he was operating cut through his glove and into his right forefinger.

9. Claimant immediately reported his injury to Joseph and Jim Carter, each part owners of Carter's. According to Joseph Carter (Mr. Carter), Claimant said his tendon was cut. Upon examination and assisting Claimant in cleaning out the wound, however, Mr. Carter determined that all it needed was some pressure, some Neosporin, and a Band-Aid. Mr. Carter testified that he did not do "paper work" on the injury because it was so minor. Later that day, Mr. Carter saw some blood through Claimant's Band-Aid, but just "a little dot." Tr., p. 118.

10. The next day, Claimant could not bend his right forefinger because it was too painful, and he did not go to work. Thereafter, Claimant returned to work at Carter's for a few more weeks, but he had no flexibility in his finger. He was ultimately fired from his job because he made a mistake, cutting a very expensive cable soon after he mistakenly cut an airline. Mr. Carter thought Claimant may have intentionally cut the cable.

11. As set forth more fully below, Claimant sought treatment from Tyler Wayment, M.D., an orthopedic surgeon, in January 2009. On April 7, 2009, Dr. Wayment performed surgery on Claimant's right forefinger. Between July 10, 2009 and August 11, 2010, Dr. Wayment repeatedly released Claimant to full-duty work, without restrictions. He encouraged Claimant to use his right forefinger for everything, including welding.

POST-INDUSTRIAL INJURY EMPLOYMENT

12. Following his industrial injury, Claimant held several different jobs. He worked at: Merle's Repair ($10 per hour), doing repair work on cars and trucks, during the latter part of 2010; R&R Welding ($12 per hour), welding, from September 18, 2009 through May 21, 2010; H&B Superior Metals, via the WorkSource Washington Work Investment Act (WIA) ($16 per

hour), welding, from February 23, 2011 through April 13, 2011; and T-2 Services ($13.50 per hour), welding, for a short time in November 2011. At some point, Claimant began doing small engine repair work out of his home, earning $600 per month. Claimant's post-injury annual earnings, per his Social Security report, are set forth in Exhibit A.

13. At the time of the hearing, Claimant was not looking for welding jobs because he felt he did not have the strength in his right hand for that kind of work. He thought he might be able to continue doing small engine repair, which he learned on his own, even though his right finger injury would still be a problem.

MEDICAL TREATMENT

14. **Dr. Wayment.** Claimant first sought medical treatment for his right forefinger injury, from Dr. Wayment, on January 9, 2009. He reported that his employers had denied him medical treatment on two occasions, that his finger was stiff and he had trouble flexing it down, and that he had 9/10[1] pain when he tried to use it. On exam, Dr. Wayment noted a scar over Claimant's PIP joint, severe pain with palpation of the PIP joint, intact ligaments, and swelling in comparison to the left forefinger. Claimant lacked two centimeters to touch his fingers into his palm, and he had eighty degrees of flexion of his PIP joint with no extensor lag. Dr. Wayment ordered x-rays, which revealed no fractures or bony abnormalities. He recommended occupational therapy two times per week for six weeks, prescribed naproxen, and released Claimant to full duty. Through January 24 Claimant attended only three sessions, as described more fully, below.

15. On February 20, 2009, Claimant returned to Dr. Wayment. He reported a small increase in range of motion with occupational therapy, but no improvement in pain or other

[1] Claimant was frequently asked by medical care providers to rate his pain on a scale of one to ten.

symptoms. He reported 7/10 pain. He also reported some improvement with the naproxen. Following examination, Dr. Wayment suspected a neuroma of the dorsal branch of Claimant's radial nerve as a result of the traumatic grinder cut. He recommended surgical excision of the neuroma with placement into the bone, and again released Claimant to full duty at work.

16. On March 11, 2009, Claimant underwent an MRI of his right index finger. It demonstrated no marrow edema to suggest an acute injury, masses, or inflammatory changes. *See* CE 49.

17. On April 3, 2009, Claimant was again evaluated by Dr. Wayment. He was still experiencing 7/10 pain, and he continued to have sharp pain right over the PIP joint. In addition, Claimant reported that he recently failed a welding test because he felt like he could not hold things stable with his right index finger. Surgery was scheduled.

18. Claimant underwent surgery on his right index finger on April 7, 2009. During the procedure, Dr. Wayment located a neuroma on the tip of the dorsal branch of Claimant's radial nerve, as well as a tear in Claimant's extensor collateral ligament and scar tissue in the extensor mechanism where the grinder injury occurred. Dr. Wayment repaired these conditions without complications and took Claimant off of work until April 24, 2009.

19. On April 24, 2009, Claimant reported 6/10 pain. Dr. Wayment placed Claimant's finger into an aluminum splint and released him to work with no use of his right hand.

20. On May 26, 2009, Claimant had 6/10 pain and could not quite touch his right index finger into his palm. He reported that he could not tell any difference between his presurgical condition and his current condition. Dr. Wayment recommended therapy three times

per week for six weeks to help increase Claimant's range of motion and decrease his pain. He released Claimant back to work with a five-pound weight restriction related to his right hand.

21. On July 10, 2009, Claimant reported to Dr. Wayment that the therapy helped. Still, he reported 7/10 pain, worse when flexing his right forefinger down. He continued to take naproxen as prescribed. Following examination, Dr. Wayment explained to Claimant that he should start using his right index finger to do everything, including welding. He continued Claimant's therapy two times per week for another six weeks to help strengthen the finger and alleviate pain, and released Claimant to full duty work.

22. On July 31, 2009, Claimant reported 9/10 pain in his right index finger, similar to the pain he experienced pre-surgically. He also reported that he had been sent home from work recently due to right finger pain. He was taking naproxen and Norco for pain relief at the time. Claimant's findings on exam were unchanged. Dr. Wayment explained that the pain would improve with time and that everything was functioning normally. He returned Claimant to full-duty work.

23. On October 23, 2009, although his finger moved well, Claimant reported 8/10 pain. He was still using naproxen and he was back to welding. Claimant had normal range of motion of the PIP joint with greater than 90° of flexion and touchdown to his palm. There was mild swelling in the joint and moderate pain with palpation. Dr. Wayment administered a pain injection into Claimant's right index finger PIP joint, and returned Claimant to full duty work.

24. On December 11, 2009, Claimant continued to report pain in his right forefinger, worse when he bumped or hit it. Also, Claimant reported that his dexterity was still not great, especially when running the tig welder at work, and that his finger ached and throbbed, occasionally rising to 5/10 pain. The pain injection from October did not help much, and

Claimant's exam findings were unchanged. Dr. Wayment continued to believe that Claimant's pain would subside with time. He continued Claimant's anti-inflammatories and narcotic pain medication, as needed, and also continued him on full-duty work.

25. On May 5, 2010, Claimant reported 6/10 pain, worse at work, as he was having to lift a lot of heavy steel. He was using naproxen and occasionally hydrocodone for pain and swelling. On exam, Dr. Wayment noted no obvious swelling in Claimant's right forefinger, but it was tender to palpation over the PIP joint. He had normal range of motion with touchdown into his palm. Dr. Wayment ordered x-rays, which were normal, demonstrating no evidence of early arthritis. He continued Claimant on full duty work.

26. Claimant last saw Dr. Wayment on August 11, 2010. He reported 8/10 pain, worse with gripping. He was taking naproxen and Norco "10". On exam, Claimant's condition was unchanged. Dr. Wayment administered a pain injection, sought authorization for a second opinion from another hand surgeon, and continued Claimant on full duty.

27. On November 23, 2010, Dr. Wayment responded to a request from Surety for his opinion as to whether Claimant had reached medical stability and, if so, whether Claimant had an assignable permanent partial impairment rating in accordance with the AMA guidelines. Dr. Wayment did not opine as to when Claimant reached medical stability, but he did assign a whole person permanent impairment rating of 1%.

28. **Lesley Ruby, OTR.** Claimant first attended occupational therapy with Lesley Ruby, OTR, from January 12, 2009 through February 24, 2009, pursuant to an order from Dr. Wayment for three sessions per week for six weeks. Ms. Ruby's short-term goals were to increase Claimant's range of motion and functionality, and to decrease his pain. As mentioned, above, through January 24, 2009, Claimant only attended three sessions. He was discharged on

January 26, 2009, but then restarted on January 30, 2009, at three times per week for three weeks. On February 2, 2009, Ms. Ruby noted, "He has returned status post discharge on 01/26/09, reports 2 days after d/c the pain returned in his index finger. He is working a different job at a potatoe plant - however he feels this has nothing to do with the return of symptoms." CE-59.

29. Claimant next attended occupational therapy, again with Lesley Ruby, from June 1, 2009 through July 13, 2009, on a postsurgical order from Dr. Wayment for three sessions per week for six weeks. He attended 11 sessions through July 13, 2009. At the end of his sessions, Claimant reported that his finger hurt more than it did before surgery and that he was concerned about his deficits in range of motion, strength, and endurance because his right forefinger was his welding trigger finger. He felt that he could not make a tight enough fist. Doug Anderson, Ms. Ruby's associate, recommended further strengthening.

30. On July 14, 2009, Mr. Anderson filled out a questionnaire in support of a request to Surety for approval of additional therapy sessions. Mr. Anderson recommended further work on desensitization, range of motion, and strengthening through therapeutic activities and exercises. He indicated that Claimant had pain, muscle weakness, and range of motion restrictions that were minimal. He also noted that Claimant "[r]eports difficulty [with] occupational requirement of squeezing & maintaining pressure on his trigger (for welding)," and that Claimant had been compliant with appointments and his home exercise program. CE-82.

31. On July 15, 2009, Claimant reported that Dr. Wayment ordered six more weeks of therapy, at two times per week. Through August 12, 2009, Claimant attended six more sessions. Although Claimant continued to work on strengthening and desensitization, he continued to report pain and discomfort over the back of his PIP joint, especially at work.

32. On November 9, 2010, Ms. Ruby performed an examination in preparation to assess an impairment rating. Utilizing the *Sixth Edition* of the *AMA Guides*, Ms. Ruby assessed 1% whole person permanent impairment to Claimant's right forefinger injury.

33. On January 18, 2012, Ms. Ruby performed an FCE at Claimant's request. She used the WorkWell System in arriving at her conclusions.

34. At the time, Claimant was not working. He reported his most difficult task was lifting a 10-pound item, such as a sack of sugar, from a shoulder height shelf. He also conveyed that he wore a neoprene sleeve over the index finger most of the time because it limits motion and decreases pain. Claimant initially reported his pain as 8/10, increasing to 10/10 following waste-to-crown lifts and right-handed carry testing.

35. Ms. Ruby opined that Claimant's physiological responses and movement patterns demonstrated consistent, maximum effort on testing. She also noted, however, that Claimant did not bring his neoprene sleeve.

36. Ms. Ruby opined that Claimant "did very well with floor to waist lifts, 2 handed carry, ladder climbing and elevated work." CE-130. On the other hand, Claimant had trouble with waist–to-crown lifts, standardized fine motor testing, and reaching with his right upper extremity (RUE) while performing a resisted grasping pattern task. In addition, Claimant's loss of protective sensation along the dorsal to radial border of his PIP joint "could interfere with his ability to do a functional key pinch, such as required in the fine motor testing," and his loss of sensation indicates that he needs to be careful with sharp objects and extremes in temperatures to reduce his risk of injury. *Id.*

37. Ms. Ruby opined that Claimant demonstrated below-average performance on standardized fine motor testing with his RUE. She also observed that, following testing,

Claimant's right index finger demonstrated a loss of active range of motion and increased circumferential measurements, indicating an increase in swelling and a decreased tolerance for work activity.

38. Ms. Ruby placed Claimant's RUE abilities in the medium-duty category (able to lift 20 to 50 pounds occasionally), except with respect to waist-to-crown lifts, for which she placed Claimant in the light-duty category (40 pound lifting maximum).

39. **Clinton L. Dille, M.D./Don A. Coleman, M.D./Cassia Regional Medical Center (CRMC)** On September 30, 2009, Claimant initiated treatment with Dr. Dille, a pain specialist. Dr. Dille prescribed Norco 10, one every 4-6 hours for pain, and provided samples of pain-relieving gel and patches. On his next visit, Claimant reported that the gel patches caused his finger to itch and turn red, so Dr. Dille continued him on Norco 10 only, along with naproxen. During the prior month, Claimant rated his best pain day at 3/10, and his worst pain day at 10/10.

40. On January 19, 2010, Claimant was treated at CRMC for a crush injury to his right ring finger. His right forefinger was not affected and was not mentioned in the chart note. X-rays revealed no evidence of fracture. Claimant was returned to work with a 20-pound lifting limit and advised to take Tylenol as needed. On January 26, 2010, Anna Marie Makovec-Fuller, FNP, prescribed Norco 5 and continued Claimant's lifting restriction. On January 29, 2010, Claimant reported intractable right ring finger pain. "With use even of the Norco 10/325, he is getting minimal relief…He has not been able to work as they do not have any modifications to allow him to work without use of his right hand." DE 5-41. Claimant was given a digital block injection for pain.

41. On February 1, 2010, Claimant was evaluated by B.W. Millar, M.D. at CRMC. Chart notes indicate Claimant had never reported his right forefinger injury. "He has had no previous history of injury to the right upper extremity." DE 5-43. On exam, Dr. Millar noted no right forefinger symptoms, minimal right ring finger symptoms, and his suspicion that Claimant was exaggerating his pain:

> Inspection of the right hand shows normal overall appearance with a normal cascade [*sic*] he has a full composite grip, full extension. The ring finger is perhaps slightly swollen diffusely [*sic*] this is not terribly noticeable and does not seem to limit his range of motion. Flexor and extensor testing is intact throughout with good sublimous [*sic*] profundus strength. He has good stability to varus and valgus stress to the MCP and PIP joints. There is no point tenderness through the finger. He seems to have a rather exaggerated pain response to palpation through the entire digit.

DE 5-43. Dr. Millar diagnosed a contusion, and recommended gentle range of motion exercises and follow-up with Ms. Fuller.

42. On February 3, 2010, Claimant requested a pain medication refill from Dr. Dille's physician assistant, John Urrutia. He did not mention his right ring finger injury, for which he was receiving narcotic pain medication from Ms. Fuller/Dr. Millar. Claimant reported that the medication helped him perform full-time employment, without side effects. He rated his right forefinger pain that day at 8/10, reported that his best pain day in the last month was 5/10, and his worst day was 10/10. Mr. Urrutia refilled Claimant's pain medication and had him execute a narcotic agreement, noting that Claimant had not done so before.

43. On February 8, 2010, Claimant sought an MRI for his right ring finger from Ms. Fuller/Dr. Millar. Claimant reported he was still off work because his employer had nothing for him without a full release. On exam, Claimant's right ring finger had no deformity, and Ms. Fuller could not appreciate any swelling compared to the left ring finger. He had limited

flexion of the distal joint, and almost full flexion of the middle joint with some discomfort. Palpation over the MCP and DIP joints revealed tenderness. Ms. Fuller prescribed Norco 10, 30 pills, with no refill. Smith's Pharmacy called later that day to advise that Claimant had executed a pain contract with Dr. Dille's office, so it did not fill Ms. Fuller's prescription. A very detailed chart note at DE 5-45 describes Claimant's response to Ms. Fuller about this incident. He came into the office that same day and discussed that he "was irritated that he thought he signed a privacy act that would protect him and that he has had other mistakes occur with Smith's Pharmacy." *Id.* In her follow-up with Smith's, Ms. Fuller discovered that Claimant had just refilled a prescription for 120 Norco 10 pills on February 3. Claimant's response to Ms. Fuller's questioning in the office was vague, but Claimant called back later and reported that his girlfriend had picked up the February 3 prescription. Ms. Fuller advised that she could no longer prescribe narcotic pain medications for Claimant. His request for an MRI was denied, but Ms. Fuller did recommend additional evaluation by an orthopedic specialist.[2] Claimant never returned to Ms. Fuller/Dr. Millar.

44. On March 3, 2010, Mr. Urrutia administered an in-office drug screen, which was negative across the board. According to Claimant's report that he had not taken Norco for over 24 hours, Mr. Urrutia noted that it is possible that Claimant's test would return results that are negative for hydrocodone, and he refilled Claimant's medications. Claimant continued to receive 120 Norco 10 pills per month through January 3, 2011.

45. On May 25, 2010, Claimant told Mr. Urrutia that he lost his job, due to safety concerns, because he reported to his employer that his hand became numb while working.

[2]Claimant followed up with Mark C. Clawson, M.D., an orthopedic surgeon, on February 25, 2010 and April 27, 2010. Dr. Clawson initially prescribed Voltaren gel for pain and recommended wrapping the right ring finger to work. At the final visit, Claimant's symptoms had resolved. Dr. Clawson opined Claimant was medically stable, with normal functioning and no permanent impairment related to his right ring finger.

Mr. Urrutia recommended follow-up with Dr. Wayment and noted, "The numbness in his right hand does not sound like it is related to his work injury as my understanding of this initial injury was isolated to his right index finger. He may need to be worked up for a new iinjury [*sic*]." CE-114. In addition, Mr. Urrutia discussed with Claimant his medication usage. "I had a talk with Tim about using his medication appropriately to make sure that he does not run out. If he continues to run out of medication, I will stop treating him. I do not see any evidence of the new injury requiring a need for escalating his pain medication." *Id.*

46. Dr. Coleman, an associate professor at the University of Utah Department of Orthopaedics, evaluated Claimant's injury on June 22, 2010. "He has mostly dorsal PIP pain and is here to discuss his pain and additional need for narcotic medication. He is on Lortab 10 mg p.r.n. pain." CE-124. At the time, Claimant was still receiving 120 Norco 10's per month, pursuant to a pain medication contract, from Mr. Urrutia. Following examination, Dr. Coleman assessed dorsal index PIP pain after clinically successful surgery, and made no surgical recommendations. "There is no focal sided soft tissue swelling. Articulations appear normal. No evidence of fracture, subluxation, or dislocation." CE-126. He did not provide an opinion regarding narcotic pain medications in his report.

47. On July 20, 2010, Claimant reported to Mr. Urrutia that he would be hired back at his job as a welder as soon as it gets busier. There is no mention of any paresthesias in the chart note.

48. On November 9, 2010, Claimant reported that he was moving to Otis Orchards, Washington. Mr. Urrutia provided two months of Norco 10 refills to allow Claimant time to establish care with a Washington physician.

49. **Lisa Rendon, M.D.** Claimant obtained a second opinion evaluation by Dr. Rendon, a hand and wrist specialist, on October 13, 2010. After taking Claimant's history, reviewing his May 5, 2010 x-rays, and performing an extensive examination in which she noted no sensation on the back of the finger, Dr. Rendon performed a diagnostic injection to help determine whether he had another, as yet undiagnosed, neuroma. Claimant was able to flex his finger without pain following the injection, consistent with a diagnosis of neuroma.

50. Dr. Rendon diagnosed a second, untreated, neuroma, and recommended three options: 1) surgery, 2) activity modification, and/or 3) a neoprene splint to avoid his pain associated with extreme flexion. Claimant expressed that he did not want another surgery, so Dr. Rendon recommended that he move forward with an impairment rating.

INDEPENDENT MEDICAL EVALUATION (IME)

51. **Spencer Greendyke, M.D.** Dr. Greendyke, an orthopedic surgeon, conducted an IME at Defendants' request. In preparation to author his report, he interviewed and examined Claimant on July 17, 2012, and reviewed Claimant's medical records.

52. Claimant reported no pain at rest, but 8/10 pain after about ten minutes of use, where 10 is the worst pain he's ever had in his life.

53. On examination, Dr. Greendyke noted what was apparent at the hearing – that is, that Claimant has only a very faint, almost invisible, scar related to his right forefinger injury. He also noted that Claimant's presentation bore no indices of exaggeration or inappropriate response, and that Claimant was very cooperative. Claimant had nearly full range of motion (80^{th} to 85^{th} percentile), with no hypersensitive nerve type pain from a neuroma (as determined by Tinel's test). However, he did demonstrate lack of sensation "from the tip of the finger to the

proximal phalanx on the radial side. And [*sic*] the ulnar side, the side away from the thumb, he had decreased sensation but not as severe as the radial side." Greendyke Dep., p. 15.

54. Dr. Greendyke administered functional testing by the Blankenship format. He prefers this over the WorkWell system utilized by Ms. Ruby because he believes the Blankenship format more accurately identifies patients who are not giving good effort. The validity criteria on the Blankenship test is, according to Dr. Greendyke, reproducible, whereas, the WorkWell system relies upon the administrator's subjective reports.

55. Dr. Greendyke concluded that Claimant gave full effort on testing. He opined Claimant's right forefinger tip pinch and key pinch abilities were somewhat limited. However, they were significantly improved when compared to Ms. Ruby's results. Also, Claimant's right hand grip strength was somewhat reduced.[3]

56. Dr. Greendyke concurred in the opinions of Drs. Wayment and Rendon that Claimant suffered neuroma formation to his right index finger radial and ulnar digital nerves as a result of his industrial injury on September 17, 2008. He did not agree that Claimant has another, untreated, neuroma.

57. Because Claimant has refused further treatment, Dr. Greendyke recommended none. He specifically recommended that Claimant be prescribed no further narcotic pain to treat his right forefinger pain due to his concerns about their addictive qualities.

58. Dr. Greendyke believed, based upon the results of his testing, that Claimant's past reports of chronic pain were exaggerated. "[W]hat I mean is I think that those complaints are probably not organically based. They're, you know, more - - either a drug seeking type behavior or - - just not physically related. That's just my opinion." Greendyke Dep., p. 18.

[3]Dr. Greendyke opined that a patient's non-dominant grip strength is usually about 10% or 20% weaker than his or her dominant hand. Claimant's right grip measured 25% or 30% weaker than his left.

59. Dr. Greendyke opined that Claimant reached medical stability by July 17, 2012 and assessed 1% whole person permanent impairment based upon guidance from the *AMA Guides, Sixth Edition.*

60. Based upon Ms. Ruby's FCE findings, Dr. Greendyke restricted Claimant from lifting more than 50 pounds. In his deposition, he clarified that the 50-pound limit pertained solely to Claimant's RUE, and that Claimant was not restricted from lifting up to 100 pounds bilaterally.

61. Before his deposition was taken, Dr. Greendyke conveyed to Mr. Jordan that Claimant could perform the job descriptions contained in DE 10.[4] Regarding the use of Claimant's right forefinger to pull the trigger on a welder, Dr. Greendyke would not impose any restrictions, for two reasons. First, Claimant could use his middle finger if his forefinger became too painful. Second, it would be good for his right forefinger. "…I don't think it would be something that would be bad. I think it would be something that would be good." Greendyke Dep., p. 25.

CRIMINAL HISTORY

62. In 1999, Claimant began a two-year prison sentence for auto theft in Illinois. Upon his release, Claimant was placed on probation and he moved to Burley, Idaho. In 2004, Claimant was again incarcerated, this time for forgery. He explained at the hearing that he committed this crime because his wife had ovarian cancer and he needed to pay for chemotherapy. By 2010, Claimant had served his sentence and completed his probation.

[4]These included 10 medium-duty jobs (three different welder descriptions, small engine mechanic, laborer (salvage) assembler (mobile home), forklift operator, groundskeeper, lube tech, and janitor) and one light-duty job (fast food worker).

VOCATIONAL EXPERT OPINIONS

63. **Qualifications.** Delyn D. Porter, M.A., at Claimant's request, and Bill Jordan, M.A., at Defendants' request, each performed vocational evaluations to determine whether and to what extent Claimant has suffered any disability as a result of his right index finger injury. Mr. Porter's report is dated February 15, 2012. Mr. Jordan's is dated August 9, 2012. Both consultants are qualified to render an expert vocational disability opinion.

64. In preparing their reports, both consultants interviewed Claimant and reviewed medical and vocational information pertaining to Claimant's industrial injury. In addition, Mr. Porter reviewed Claimant's January 17, 2012 deposition transcript, and Mr. Jordan interviewed Dr. Greendyke and Claimant's post-injury employers. By the time these consultants provided post-hearing deposition testimony, each had reviewed the other's report, as well as Dr. Greendyke's post-hearing deposition testimony.

65. **Methodology and resource materials.** To quantify their respective results, each consultant utilized vocational research and computation tools, references, and databases. Mr. Porter utilized the Idaho Department of Labor-Labor Market Survey Research/Current Openings, the *Dictionary of Occupational Titles*, O*NET Research, Idaho Career Information Systems (eCIS) Research, Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles (SCODRDOT), New Guide for Occupational Exploration, The Revised Handbook for Analyzing Jobs, the *Idaho Occupational Employment & Wage Survey – 2011* (Idaho Wage Survey), and Internet job search websites. Mr. Jordan relied upon the *Dictionary of Occupational Titles,* Idaho Wage Survey, and Vertex OASYS software.

66. **Pre-injury labor market access.** Mr. Porter opined, based upon information from the 2011 Idaho Wage Survey, that Claimant met the entry-level requirements and had a

reasonable expectation of being able to perform the work in approximately 40% (Burley) or 42% (Otis Orchards) of his pre-injury labor market. Utilizing OASYS software, Mr. Jordan opined that Claimant had access to 61% of his pre-injury labor market (he does not differentiate). The precise data upon which each consultant relied in arriving at these conclusions are not set forth in the record.

67. **Non-industrial factors.** Both consultants identified the non-industrial factors they considered in evaluating Claimant's disability. Mr. Porter listed "the geographic location of his residence, the current poor economy, Claimant's limited work history, lack of current job openings, local labor market issues, limited educational background, and influx of additional job seekers that are pursuing the same positions that the Claimant is eligible to pursue." CE-201. Mr. Porter indirectly referenced Claimant's criminal history, which he opined would exclude Claimant from jobs that involve money-handling or financial transactions, and many retail sales positions, as well. In addition, Mr. Porter acknowledged at his deposition that Claimant's unreliability as an employee, his sporadic work history and his general lack of motivation to maintain employment, all of which existed prior to his industrial injury, would reduce the number of jobs for which he would be competitive.

68. Mr. Jordan listed Claimant's age, education, employment history (including his current self-employment as a small machine repairman and metal salvager) and his ability to drive by virtue of his non-commercial driver's license.

69. **Transferrable skills.** Based upon the results of the FCE performed by Ms. Ruby and Claimant's subjective assessment of his capabilities, Mr. Porter opined that Claimant is only capable of doing work categorized as light-duty or limited medium-duty. "Mr. Berry has attempted to return to work as a welder and has also experienced problems with grip strength in

regards to being able to grip, hold, and move large pieces of heavy metal. He has had experiences where he dropped the metal because he was unable to hold it in his hand." CE-202. Therefore, he determined that Claimant's welding abilities did not constitute skills transferrable to work he can perform post-injury. Mr. Porter opined Claimant has skills transferrable to occupations such as industrial truck operator, conveyor tender, small engine mechanic, tune-up mechanic and brake adjuster.

70. Utilizing Dr. Wayment's and Dr. Greendyke's restrictions, Mr. Jordan opined that Claimant either has no restrictions, or has medium-duty restrictions. In either case, he concluded that all of Claimant's pre-injury skills are transferrable. For example, Claimant can still perform the following jobs, all of which Dr. Greendyke specifically approved: welder (shop worker, combination and assembler), small engine mechanic, laborer (salvage), mobile home assembler, forklift operator, groundskeeper, lube tech, janitor, and fast food worker.

71. Applying all of Ms. Ruby's FCE findings to the analysis, Mr. Jordan acknowledged that there are some jobs from Claimant's pre-injury repertoire that his industrial injury rules out. He did not elaborate on the nature of those jobs.

72. Direct evidence of Claimant's transferrable skills can be derived from his post-injury employment at four welding shops, an auto repair shop, and a Washington State back-to-work program. Mr. Jordan interviewed Claimant's post-injury employers (Joe Carter, John Klink, Sharon from R&R Welding, Judy from the WorkSource Washington Work Investment Act (WIA), Mike Hubble and Tim Fuhrman). None of these individuals reported that Claimant's right forefinger injury limited his ability to do his work. Further, Claimant's employers reported Claimant was a consistently unreliable worker who was frequently tardy or absent from work for reasons unrelated to his industrial injury. Claimant earned as much, or more, at each new post-

injury position (two paid $10 per hour, one paid $12, and one paid $13.50) as he did in his time-of-injury position.

73. **Loss of labor market access.** Mr. Porter opined that, as a result of his industrial right index finger injury, Claimant has suffered a reduction in post-injury labor market access of either 63% (Burley market) or 58% (Otis Orchards market). Mr. Jordan opined that Claimant has suffered no loss of access under either Dr. Greendyke's or Dr. Wayment's restrictions; however, he concedes that under Ms. Ruby's restrictions, Claimant has suffered a loss of either 6% (Burley) or 5% (Otis Orchards). Both consultants relied upon information from statistical databases. In addition, Mr. Jordan canvassed job openings for which Claimant was eligible to apply and physically capable of doing.

74. Mr. Porter included very heavy-duty jobs in Claimant's repertoire of pre-injury employment. Mr. Jordan did not. Mr. Porter's report defines very heavy work as "Exerting in excess of 100 pounds of force occasionally, and/or in excess of 50 pounds of force frequently, and/or in excess of 20 pounds of force constantly to move objects. Physical demands are in excess of those for Heavy Work." CE-198. The Referee finds it unlikely that Claimant would be competitive in the future for very heavy-duty jobs because Claimant has never worked in a job in this category, in spite of significant underemployment throughout his lifetime. Due to factors unrelated to his industrial injury, such as lack of strength (or other ability) or lack of motivation to do such laborious work, Claimant is apparently either unqualified for such jobs, or he has removed himself from the very heavy labor market. Either way, this category should not be included in the pre-injury analysis of jobs available to Claimant. Therefore, Mr. Porter's calculations over-estimate Claimant's disability.

75. **Loss of wage earning capacity.** Contrasting Claimant's time-of-injury wage of $10 per hour with his potential average median wage of $8.37 per hour (Burley) or $8.20 per hour (Otis Orchard), Mr. Porter opined that Claimant has suffered loss in earning capacity of either 16% (Burley) or 18% (Otis Orchards). Mr. Jordan disregarded Claimant's 2008 earnings as anomalous and opined that Claimant could replace his usual pre-injury income easily in a minimum wage job. Mr. Jordan calculated Claimant's pre-injury annual income as the average of his earnings from the five years preceding 2008, which amounts to $1,167.

76. **Overall disability assessments.** Mr. Porter suggested in his report that Claimant's loss of earning capacity should be doubled, then averaged with his loss of labor market access, to arrive at a total of either 48% (Burley) or 47% (Otis Orchards) permanent partial disability. Mr. Porter opined that, because he is under 50, he is still in his wage-expanding years. Therefore, any disability will impact his future wage-earning ability more severely than it would someone over 50, whose earning capacity has most likely leveled out. The Referee disagrees with Mr. Porter's reasoning in this case, since Claimant has rarely earned more than a starting wage because he does not remain employed in the same job long enough to merit a significant raise. Even without any disability, it is unreasonable, given Claimant's work history, to expect that Claimant's earning capacity would significantly increase in the future.

77. When he prepared his report, Mr. Porter understood that Claimant had worked as a welder, continuously, for 23 years. He was unaware that Claimant had taken several jobs after his industrial injury, including heavy work and/or welding positions, that he left for reasons unrelated to that injury. By the time of his deposition, however, Mr. Porter was aware of Claimant's actual work history. He conceded that, had he known this, he would have calculated Claimant's disability differently, resulting in a lower assessment. He also conceded that

Claimant has no physician-imposed medical limitations that would prevent him from medium-duty work or from lifting up to 100 pounds bilaterally.

78. Mr. Jordan opines that Claimant has suffered no permanent partial disability under either Dr. Wayment's or Dr. Greendyke's restrictions. Under Ms. Ruby's restrictions, Mr. Jordan suggests that Claimant's loss of access should be averaged with his loss of wage earning capacity to arrive at either 3% (Burley) or 2.5% (Otis Orchards) permanent partial disability.

CLAIMANT'S CREDIBILITY

79. With respect to Claimant's credibility, Dr. Greendyke opined that Claimant did not demonstrate excessive pain behaviors or symptom magnification during his IME. However, Claimant's medical records demonstrate that he violated his pain medication contract with Mr. Urrutia (as noted by Ms. Fuller) and later attempted to do so again, by seeking medications from Dr. Coleman in Utah. At the hearing, Claimant admitted to being caught in this regard. Claimant's medical records also indicate that he was complaining of extreme pain in his right ring finger, such that he could not work, to one physician (Dr. Millar/Ms. Fuller) during the same few days in which he assured another physician (Dr. Dille/Mr. Urrutia) that narcotic pain medications were reducing the pain in his right forefinger sufficiently to allow him to continue working full-time. In addition, Claimant has reported pain in his right forefinger in excess of what Dr. Greendyke and Dr. Millar believed to be consistent with his objective findings on testing.

80. It must also be acknowledged that Claimant's work history is dismal, demonstrating that pervasive life forces other than his industrial injury have prevented him from maintaining sufficient employment throughout his life. This, along with the persuasive

testimony from Dr. Greendyke, Dr. Wayment, and William Jordan (and, to a lesser extent, from Joe Carter and John Klink), tending to establish that Claimant could physically maintain a welding job following his industrial injury, places Claimant's claims that he cannot, because of his non-dominant forefinger injury, into question.

81. Claimant is not a credible witness.

DISCUSSION AND FURTHER FINDINGS

82. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

PERMANENT PARTIAL DISABILITY

83. "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. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423 and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the purely advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Indus.,* 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund,* 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.,* 110 Idaho 32, 714 P.2d 1 (1986).

84. **Preexisting impairment.** Claimant has no preexisting medical restrictions or physical limitations related to his right forefinger.

85. **Permanent impairment and medical stability.** Here, there is no dispute that Claimant incurred work-related permanent impairment of 1% of the whole person, nor that his condition is medically stable; therefore, the matter is ripe for a determination of Claimant's disability.

86. **Time of disability determination.** The Idaho Supreme Court in *Brown v. The Home Depot,* WL 718795 (March 7, 2012) iterated that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing. Under Idaho Code § 72-425, a permanent disability rating is a measure of the injured worker's "present and probable future ability to engage in gainful activity." Therefore, the Court reasoned, in order to assess the injured worker's "present" ability to engage in gainful activity, it necessarily follows that the labor market, as it exists at the time of hearing, is the labor market which must be considered. Here, Claimant resided and worked in Burley, Idaho at the time of his industrial accident; however, he resided and was self-employed in Otis Orchards, Washington at the time of the hearing. The Commission is afforded latitude in making alternate determinations based upon the particular facts of a given case; however, the parties have not argued that Claimant's disability should be determined as of any point in time other than the hearing date. Further, the record divulges no reason why Claimant's ability to engage in gainful activity would be more accurately measured at any other time. Therefore, Claimant's disability will be determined as of the hearing date.

87. **Local labor market.** At the time of the hearing, Claimant resided and was self-employed in Otis Orchards, Washington; therefore, his disability will be determined with respect to his employability in that local labor market.

88. The *Brown* court acknowledged the impact of on-going changes in the local labor market on a claimant's disability finding. However, it, also cautioned against allocating too much weight to the effects of temporary labor market fluctuations:

> We do not intend to suggest that an injured worker is automatically qualified for odd-lot status solely due to a lack of employment opportunities in the applicable labor market due to temporary economic conditions at the time of hearing. Nor do we suggest that a worker may be disqualified from odd-lot status due to a labor market that is unusually favorable to prospective employees at the time of hearing. Rather, there are ebbs and flows in broad economic conditions which may affect local labor markets. Given the humane objectives underlying our worker's compensation scheme, the Commission may disregard the effects of temporary fluctuations in the applicable labor market resulting from changing economic conditions when determining whether the employee's personal circumstances demonstrate a compensable need.

Id.

89. Along these lines, in determining Claimant's disability, it must be recognized that the nation is still emerging from a profound economic recession. Although no unemployment rate statistics were offered by any expert witness, Mr. Porter baldly cited the current poor economy, lack of current job openings, local labor market issues, and influx of additional job seekers that are pursuing the same positions that Claimant is eligible to pursue as non-medical factors detrimentally weighing on Claimant's employability. No data or opinions identifying economic conditions at the time of Claimant's industrial accident were provided for comparison. Fortunately, Claimant, 43, has been hired repeatedly and has remained employed at rates similar to his pre-injury employment rates, even after his industrial

injury. The economy in Otis Orchards is not a significant factor in determining Claimant's disability.

90. **Medical restrictions and limitations.** Claimant's disability determination will be based upon his permanent right (non-dominant) forefinger restrictions and limitations which significantly reduce or eliminate his ability to perform tasks required of him to work, including but not limited to gripping, lifting, and engaging in bilateral upper extremity activities.

91. The parties disagree as to the exact nature of Claimant's impairment-related medical restrictions and limitations. Evidence of Claimant's restrictions and limitations related to his right forefinger injury is provided by Drs. Wayment and Greendyke, Ms. Ruby and Claimant. As determined, above, Claimant is not a credible witness. His testimony regarding his abilities carries no weight unless supported by other credible evidence.

92. Of the remaining opinions, the Referee finds Dr. Greendyke's most persuasive. He appropriately considered the treatment, opinions and testing rendered by Dr. Wayment and Ms. Ruby. In addition, he considered Claimant's performance on the more recent testing he administered himself, which included functional testing. Recall, Dr. Wayment performed no functional testing of his own. In addition, Dr. Greendyke's basis for believing the functional testing he performed was accurate was sound, given the reliable validity criteria incorporated into the Blankenship format, even as he acknowledged that Claimant's past complaints of severe chronic pain appeared to be exaggerated. Further, Dr. Wayment last examined Claimant on August 10, 2010, almost two full years before Dr. Greendyke's July 17, 2012 assessment. Clearly, Dr. Wayment was more familiar with Claimant's condition during his treatment period. However, Claimant's condition at the time of the hearing, as per *Brown*, is the focus of this disability inquiry. Dr. Greendyke appropriately relied on Dr. Wayment's findings while also

incorporating credible medical evidence of Claimant's condition after he was no longer under Dr. Wayment's care.

93. Pursuant to Dr. Greendyke's opinion, Claimant has industrial injury-related medical lifting limits of 50 pounds with his RUE and 100 pounds bilaterally. In addition, he is limited to lifting no more than 40 pounds from waist to crown with his RUE.

94. **Nonmedical factors.** The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 766 P.2d 763 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995). Account should be taken of the nature of the physical disablement; the disfigurement, if of a kind likely to handicap the employee in procuring or holding employment; the cumulative effect of multiple injuries; the occupation of the employee; and his or her age at the time of accident causing the injury, or manifestation of the occupational disease. Consideration should also be given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. Idaho Code §§ 72-425, 72-430(1).

95. Claimant's relevant nonmedical factors are weighed as follows:

a. *Age:* Claimant is 43. Age is not a significant factor influencing his disability determination.

b. *Education:* Claimant is a high school graduate with specialized training and certifications in welding, at least one of which was current at the time of the

hearing. He is also skilled in basic auto mechanics and small engine repair.

c. *Work experience:* Both vocational experts agree that Claimant has developed job-specific skills in welding and small engine repair, and that he has performed work in numerous other areas. Claimant is either unqualified for very heavy-duty work, or else he has voluntarily removed himself from that labor market, as discussed, above.

d. *Criminal convictions:* Claimant has felony convictions for car theft and forgery. As a result, Claimant has not been, and will not in the future be, competitive for jobs that require money-handling.

e. *Disfigurement:* Claimant has no disfigurement. His surgical scar is difficult to discern even on close inspection.

96. Given Mr. Porter's concessions at his deposition and the finding, above, that Dr. Greendyke's medical restrictions apply to Claimant's disability determination rather than Ms. Ruby's, Mr. Porter's ultimate opinions lack foundation and are not credible. On the other hand, Mr. Jordan appropriately considered Dr. Greendyke's opinion, excluded very heavy-duty jobs, included appropriate welding jobs, and considered Claimant's past earnings history. Mr. Jordan's opinion applying Dr. Greendyke's restrictions is more persuasive than Mr. Porter's opinion applying Ms. Ruby's.

97. Having considered and weighed the expert opinions along with the rest of the evidence in the record, the Referee finds Claimant has not met his burden of demonstrating disability in excess of impairment as a result of his industrial right forefinger injury.

98. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that he has sustained any permanent partial disability in excess of impairment.

2. All other issues are moot.

RECOMMENDATION

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

DATED this 16th day of May, 2013.

INDUSTRIAL COMMISSION

/s/
LaDawn Marsters, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of May, 2013, 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:

DENNIS R PETERSEN
PETERSEN PARKINSON & ARNOLD
P O BOX 1645
IDAHO FALLS ID 83403-1645

PAUL J AUGUSTINE
AUGUSTINE LAW OFFICES
PO BOX 1521
BOISE ID 83701

/s/

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TIMOTHY BERRY, Claimant, v. CARTERS MANUFACTURING, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2008-039732** **ORDER** May 24, 2013

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

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

1. Claimant has failed to prove that he has sustained any permanent partial disability in excess of impairment.

2. All other issues are moot.

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

DATED this __24th____ day of ____May_____, 2013.

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 __24th____ day of _____May_____, 2013, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

DENNIS R PETERSEN
PETERSEN PARKINSON & ARNOLD
P O BOX 1645
IDAHO FALLS ID 83403-1645

PAUL J AUGUSTINE
AUGUSTINE LAW OFFICES
PO BOX 1521
BOISE ID 83701

sjw

/s/_____