BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY BURKE, Claimant, v. SUNSHINE WINDOW CLEANING, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2009-029148** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED MAR 13 2013**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue who conducted a hearing in Boise on August 29, 2012. Claimant was represented by Robert Nauman. Defendants Employer and Surety were represented by Gardner Skinner. Defendant Industrial Special Indemnity Fund (ISIF) was represented by Thomas High. The parties presented oral and documentary evidence and later submitted briefs. The case came under advisement on November 26, 2012. Employer and Surety reached a settlement agreement with Claimant in January 2013. This matter now ready for decision regarding all issues remaining between Claimant and ISIF.

ISSUES

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

1. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;
2. Whether apportionment of permanent disability for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate;
3. Whether and to what extent Claimant is entitled to medical care and future medical care;
4. Whether and to what extent Claimant is entitled to permanent disability in excess of impairment, including total permanent disability;
5. Whether Claimant is permanently and totally disabled under the odd-lot doctrine;
6. Whether ISIF is liable under Idaho Code § 72-332; and
7. Defendants' respective liability upon apportionment under *Carey*.

With the settlement agreement and dismissal of Employer and Surety, the issues are reduced to those affecting whether and to what extent ISIF may be liable for benefits to Claimant.

CONTENTIONS OF THE PARTIES

Claimant contends that he injured his right shoulder while lifting a ladder onto a work van on November 9, 2009. He underwent shoulder surgery on February 9, 2010. The surgery was not entirely successful in fixing his shoulder. It caused additional complaints including a trigger thumb and facial nerve injury. He is totally and permanently disabled as a result of this industrial accident and its surgical sequelae, combined with his preexisting physical impairments.

ISIF contends Claimant is not totally and permanently disabled and does not qualify as an odd-lot worker. Claimant is a fraud. He repeatedly misrepresented his conditions to physicians. His actions shown on surveillance videos are so inconsistent with his representations to physicians that no physician's opinions can support a finding that he is totally and permanently disabled. Claimant testified falsely in depositions and at hearing.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant and Nancy Collins, PhD;
2. Claimant's exhibits A-CC, admitted at hearing;
3. Employer and Surety's exhibits 1-43, admitted at hearing;
4. ISIF's exhibit 1, admitted at hearing; and
5. Post-hearing depositions of orthopedist Jeffrey Hessing, M.D., neurologist Richard Wilson, M.D., and vocational expert Douglas Crum.

All objections made in Dr. Wilson's deposition are overruled, except for the objection at page 27 which is sustained.

All objections made in Lance Anderson's deposition, Exhibit E, are overruled.

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

FINDINGS OF FACT

The Accident

1. On November 9, 2009, Claimant was lifting a ladder when he felt right shoulder pain. While working for Employer's window cleaning business he "ran the company." He hired and fired, bid and scheduled the jobs, supervised three to six employees, and handled marketing. He also cleaned windows.

Post-Accident Medical Care

2. On November 13, 2009, Claimant sought medical care through Michael Foutz, M.D., Claimant's regular doctor. Claimant reported the ladder-lifting incident. He reported right shoulder pain and a new muscle spasm in his neck "which was not there previously". Dr. Foutz diagnosed "a posterior rotator cuff tear vs. strain." On November 17, an MRI confirmed a partial thickness tear with tendinosis. He discussed potential surgery with Michael Curtin, M.D.

3. On December 8, 2009, Dr. Curtin examined Claimant. Dr. Curtin reviewed the MRI and reported it showed a small full thickness tear. Dr. Curtin recommended Claimant discontinue use of an arm sling because it was contributing to shoulder pain, stiffness and immobility. He prescribed home exercises and suggested physical therapy. Claimant expressed a preference for surgery over steroid injections. A follow-up examination on January 19, 2010 showed Claimant had better motion, albeit painful, in his right shoulder than in his left. Other objective findings rendered Claimant's condition to be surgical.

4. On December 16, 2009, the physical therapist reported Claimant's excessive use of a sling was impairing progressive recovery of use of his right shoulder. Therapy continued to June 3, 2010.

5. On December 31, 2009, Claimant reported to Dr. Foutz that his left thumb had been "locking up" since the accident. On examination, no issues regarding Claimant's facial nerves were noted; all were normal.

6. On January 11, 2010, Claimant underwent an exercise stress radionuclide scan to evaluate potential cardiac problems relative to the planned surgery. This test showed normal heart function.

7. On February 1, 2010, Dr. Curtin performed an arthroscopic rotator cuff repair, biceps tenotomy and subacromial decompression. An interscalene block was administered for anesthetic effect. During surgery, Dr. Curtin observed a full thickness tear of the supraspinatus, a type-II SLAP lesion, and a bony spur at the AC joint.

8. On February 5, 2010, Claimant reported to Dr. Foutz, residual pain in his shoulder and a sore and stiff thumb. He also complained of right eye irritation and watering.

9. On a February 9, 2010 follow-up visit to Dr. Curtin, Claimant reported more pain

than Dr. Curtin expected. Claimant also reported difficulty in physical therapy. Claimant's shoulder was stiff. Claimant's thumb was triggering, which Dr. Curtin felt was due to postsurgical swelling. Dr. Curtin emphasized that Claimant should move his shoulder for best recovery. In follow-up visits Dr. Curtin and his PA noted continuing shoulder stiffness despite physical therapy.

10. On March 11, 2010, Claimant reported facial numbness to Dr. Curtin's PA. Claimant reported it had been present since the surgery. A neurosensory examination of Claimant's face was within normal limits.

11. On March 25, 2010, Dr. Curtin found Claimant displayed adhesive capsulitis probably secondary to scarring following surgery. A new complaint, visual changes, Claimant reported as having been present beginning 7-10 days after surgery. The complaint of facial numbness continued. Dr. Curtin discontinued physical therapy and recommended frequent—four times each day—home exercises of a more moderate nature. On April 15, 2010, Dr. Curtin noted he planned to perform an injection in a few weeks, after Claimant's surgical site had healed more. Following the injection Claimant would return to physical therapy. Dr. Curtin recommended this plan as the best option in attempting to increase Claimant's shoulder motion.

12. Dr. Curtin had proposed to perform the injection on May 6, 2010. On that date, Claimant reported his condition had dramatically and suddenly improved and that his pain had decreased and his range of motion increased. The face and thumb complaints continued. However, on the June 3 follow-up visit, Claimant reported his shoulder pain and mobility had worsened. Dr. Curtin's PA recommended surgery to remove the adhesions.

13. On May 10, 2010, Claimant visited neurologist James Herrold, M.D., for evaluation of his complaint of facial numbness and right eye monocular diplopia. On

examination, motor strength of the nerves to Claimant's right face was normal; sensory strength was subjectively reduced. Dr. Herrold opined Claimant's symptoms "do not fit any specific pattern" but could be a complication of the interscalene anesthetic block performed at surgery. Dr. Herrold also considered differential diagnoses of Horner syndrome, stroke, brachial plexus abnormality or injury, and migraine, but noted that Claimant's complaints and examination were not entirely consistent with any of these potential diagnoses. He ordered a brain MRI.

14. Referral to an ophthalmologist, Kathryn Fethke, M.D., resulted in normal findings—20/30 vision on right, 20/25 on left—without objective explanation for Claimant's complaint of double vision in his right eye. She noted an astigmatism which was correctable with glasses. Claimant declined to wear glasses. Dr. Fethke opined, "It is likely that this was more of an incidental finding and not caused from his surgery." She found no link between his eye complaint and his complaint of headaches.

15. On May 18, 2010, a brain MRI failed to identify any objective bases for Claimant's complaints of facial numbness.

16. On May 28, 2010, Dr. Herrold reported to Dr. Curtin that to the extent Claimant allowed testing, his right arm strength appeared "intact." He described Claimant's complaints as "idiopathic" without good explanation of cause. Dr. Herrold considered the possibility of reflex sympathetic dystrophy (RSD).

17. On June 7, 2010, Steven Care, M.D., examined Claimant. Because Claimant reported a history of reaction to prednisone injection, Dr. Care recommended a trigger release surgery for Claimant's thumb.

18. A June 17, 2010 test by Dr. Herrold showed no abnormality of blood flow to Claimant's head.

19. On July 30, 2010, Dr. Foutz records Claimant's complaint of numbness on the right side of his face with reduced vision.

20. Through 2011 and 2012 Dr. Foutz's office notes telephone messages and conversations in which Claimant repeatedly requests additional pain medication beyond the maximum Dr. Foutz had prescribed. In June 2011 to July 2012, Dr. Foutz diagnosis of Claimant's condition is "unspecified neuralgia, neuritis, and radiculitis, unspecified myalgia and myositis."

Surveillance Videos

21. Video evidence of surveillance occurring on April 12 through 15, 2011 was admitted at hearing as exhibit 41. It contains a brief segment taken April 12 which was obtained through a mirror. The extent of the mirror-image video is readily identifiable by the reverse image "J & M" on a tall, wheeled and lidded garbage receptacle in the scene. Of course, for this brief reverse image recording, what appears to be Claimant's left side is actually his right.

22. In the April 2011 surveillance, Claimant is seen shoveling leaves and debris with a small long-handled scoop like a snow shovel. He repeatedly lifts shovels full of leaves and dumps them into the garbage receptacle. He shows no indication of pain or disability as he uses both arms to shovel leaves. At the 11:34 a.m. mark, he appears to look directly at the surveillance camera and disappears into a garage. He returns with and briefly uses a leaf rake. Between the raking actions, he intermittently holds his right arm close to his body, forearm and hand supinated. Between the 11:36 and 11:47 marks, Claimant repeatedly glances directly at the surveillance camera. During this same period, he exhibits occasional, intermittent displays of supination of his right hand and forearm. At 11:39, Claimant shows a more pronounced limp, followed almost immediately by a less pronounced limp. No limp is observed

during the remainder of the April 12 surveillance.

23. No inference is drawn about whether Claimant actually became aware of the surveillance being conducted at that time. No finding of fact will be made regarding whether Claimant's displays of disability on April 12 were genuine or were a response to possible awareness of the surveillance camera.

24. In and around the 11:55 through 12:05 marks, Claimant and a gentleman with whom he is conversing make gesticulations and glances in the general direction of the surveillance camera. Observation of their other actions provides context surrounding these particular gestures and glances. These particular actions do not appear to be a response to or recognition of the presence of a camera.

25. Investigator Lance Anderson performed the April 2011 surveillance. He testified to qualify the foundation of his report and video. He reported the mirror image segment pertaining to the April 2011 surveillance.

26. Surveillance video taken April 14, 2011, shows Claimant working on a motor vehicle. Its tailgate is down. Claimant leans in and works with a tool—possibly a ratchet, wrench, screwdriver, or similar hand tool—applied to the inner panel on the driver's side. This activity lasted less than one-half hour. Another gentleman assisted briefly.

27. Video evidence of surveillance occurring on January 27 and 30, 2012 was admitted at hearing as exhibit 40. It also contains a brief segment on January 27 which was obtained through a mirror. This segment is readily identifiable near its endpoint when Claimant opens a door in which the "EXIT" sign appears in reverse image. Similarly with the reverse image of April 12, 2011, apparent left is actually right. The investigator's report fails to note that this segment depicts a mirror image view.

28. In the January 2012 surveillance, Claimant is seen opening and closing car doors and a building door, unloading grocery items from a cart into a vehicle, walking with a cane, walking without a cane, and, in one scene, riding in a wheelchair. The wheelchair is pushed by another gentleman across a parking lot toward a vehicle, into which Claimant becomes a passenger. Elsewhere, surveillance video shows Claimant driving unassisted.

29. The Referee concurs with Dr. Wilson's observation that Claimant does not appear to be favoring his right hand or arm when performing any activities depicted on the surveillance videos. However, for brief periods during the raking and shoveling activities, Claimant sometimes holds his right arm close to his body, hand supinated, when he is not actually using a rake or shovel.

Other History and Prior Medical Care

30. Claimant filed and settled a 1991 California workers' compensation claim related to a back injury.

31. Claimant injured his left knee in California on March 31, 1993. On June 10, 1993, treating orthopedist Stanley Robboy, M.D., performed arthroscopic surgery which ruled out a meniscal tear but did show chondromalacia of the lateral tibial plateau.

32. In November 1993, Dr. Robboy, examined Claimant and evaluated his California workers' compensation injury to his left knee. Dr. Robboy diagnosed chondromalacia, left lateral tibial plateau, after Claimant recovered and stabilized following an accident at work. The accident occurred March 31, 1993. Dr. Robboy opined that based upon subjective pain complaints and objective findings, Claimant had permanent partial disability as a result. Dr. Robboy did not quantify it in a way translatable to the Idaho system. Dr. Robboy recommended Claimant not engage in occupations requiring prolonged walking or standing.

The surety in that matter paid just under $4,500.00 in permanent partial disability before finally settling the claim.

33. In February 1994, orthopedist Philip Sobol, M.D., examined Claimant and evaluated his California workers' compensation injury to his left knee. Dr. Sobol's major diagnosis was post-surgical chondroplasty of the lateral tibial plateau. He considered the possibility of RSD based upon additional subjective complaints not recorded in the report of Dr. Robboy. Claimant declined the offer of nerve blocks which would be both diagnostic and therapeutic. Nevertheless, Dr. Sobol opined Claimant's condition to be "permanent and stationary." He recommended Claimant be precluded from activities requiring prolonged weight bearing and repetitive kneeling, squatting or climbing. Dr. Sobol noted Claimant had been terminated from his job in November 1993.

34. Orthopedic surgeon Alex Etemad, M.D., was the primary treating physician for Claimant's left shoulder. On February 7, 2007, he performed arthroscopic debridement of Claimant's left shoulder to relieve impingement syndrome. In February 2008, Dr. Etemad rated Claimant's left shoulder impairment at 16%.

35. Claimant settled a Minnesota worker's compensation claim relating to a July 13, 2006 accident involving his left shoulder and cervical and thoracic spine. A July 2007 IME by Carlos Guanche, M.D. in Minnesota found Claimant was not yet stable following left shoulder surgery and noted that Claimant was seeking a C-spine fusion. Claimant was notified that his final benefit payment for the Minnesota accident was issued on November 6, 2009. Three days later, he claimed he suffered the accident which is the subject of the instant claim.

36. According to Claimant's report to Social Security in 2008, John Shammas, M.D., prescribed eyeglasses sometime between 2006 and January 2008.

37. Michael Foutz, M.D., treated Claimant for various conditions in 2008 through October 2009. Claimant repeatedly reported left shoulder pain and headaches. Throughout these visits, Dr. Foutz's records identify Claimant as a "Disabled GM of Window company."

38. Treatment of Claimant's other multiple and varied preexisting complaints and conditions are well documented in the record. These were carefully reviewed and considered by the Referee. However, except as referred to in findings related to IME and other physicians' records pertaining to this accident, records of such treatment need not be set forth in separate detail.

Expert Medical Opinions

39. On June 24, 2010, James Bates, M.D. examined Claimant for an impairment rating at Dr. Curtin's request. Dr. Bates noted Claimant showed increased swelling on the right of his neck with shoulder range-of-motion testing. He noted many subjective findings. He noted no objective abnormalities in Claimant's cranial nerves. Dr. Bates opined Claimant was at MMI and rated a 14% PPI for his shoulder and 3% for his thumb. Dr. Bates relied upon the *AMA Guides*, sixth edition, range of motion values not DRE to rate Claimant's shoulder.

40. On August 19, 2010, Claimant performed a functional capacity assessment (FCA) administered by physical therapist Peggy Wilson. Ms. Wilson recorded that except for stair climbing, Claimant did not work hard enough to increase his heart rate significantly above the resting rate; his frequent and varied complaints accompanied less than full effort; inconsistency of effort invalidated grip and pinch testing; participation in "weighted activities" was deemed valid; overall, testing was deemed invalid. Claimant consistently did not use his right thumb. Claimant inconsistently used his right upper extremity throughout testing. Ms. Wilson concluded, "The results indicate that the client has manipulated the results of this assessment.

Therefore, these levels, reported on overview, do not represent the true safe capability level." Later, upon review of the surveillance videos, Ms. Wilson reported they showed a similar inconsistency of function as demonstrated at the FCA.

41. On September 13, 2010, Dr. Bates examined Claimant and reviewed the FCA. Dr. Bates recommended restrictions of no work or reaching at or above the shoulder, rare to occasional lifting and carrying of 5 pounds with the right upper extremity, rare use of his right thumb in fine manipulation such as keyboarding, light occasional pushing and pulling. He further noted, Claimant "has greater capabilities of use of his hands than that of just a helper hand."

42. On January 30, 2012, Nancy Greenwald, M.D., examined Claimant at Employer's request. After a careful, detailed examination, Dr. Greenwald opined use of the AMA Guides, sixth edition, range of motion criteria for Claimant's right shoulder was inappropriate given Claimant's responses and invalid FCA. Under DRE criteria, Claimant exhibits an 11% upper extremity rating which translates to a 7% whole person PPI rating related to the accident and surgery.

43. Dr. Greenwald further opined Claimant's facial sensation is unrelated to the accident or to surgery; vision change is not related to surgery; medical history shows right thumb complaints pre-date the accident, so her rating of 3% of the upper extremity for the trigger thumb is not related to the accident or surgery; Claimant's complaint of memory changes is not objectively supported by MRI or other diagnostic treatment and is not related to the accident or surgery; Claimant's C-spine condition is rated at 25% of the whole person but pre-dated the accident and surgery; further, Claimant's C-spine condition is the major cause of Claimant's right arm complaints and precludes a CRPS (RSD) diagnosis; Claimant's prior left shoulder

injury is rated at 5% of the upper extremity; thoracic scoliosis with back pain is rated at a 3% whole person PPI; Lumbar back pain is rated at 3% whole person PPI; No PPI is appropriate for Claimant's varicose veins; Claimant's old left knee injury is rated at 7% of the lower extremity; asthma and lung issues are rated at 6% whole person; coronary artery disease is rated at 6% whole person; headaches are rated at 2% whole person; umbilical hernia is rated at 3% whole person; right hip arthritis is rated at 20% of the lower extremity; depression is mild and no impairment rating is appropriate; obesity does not result in a PPI rating. Claimant later clarified that she intended to rate Claimant at 51% PPI whole person for all preexisting conditions, using the *AMA Guides* combining table.

44. Dr. Greenwald recommended restrictions related to his right shoulder consist of avoidance of above-shoulder activities with his right arm, and avoidance of pushing or pulling more than 25 pounds. She further outlined recommended restrictions for Claimant's other complaints. Among them she included, no lifting over 10 pounds, no driving, avoid awkward neck and back motions, no left arm work above shoulder level, avoid high impact activities involving the left knee, avoid dust or other asthma provoking environments, and avoid long distance walking and stairs for his hip.

45. After review of the surveillance videos, Dr. Greenwald opined Claimant's depicted activities were inconsistent with his representations upon examination.

46. On June 13, 2012, Dr. Bates reviewed the surveillance videos. He opined the activities shown were consistent with Claimant's motion when rated for PPI. He opined the activities shown confirmed Claimant's PPI and restrictions.

47. On June 20, 2012, Richard W. Wilson, M.D., examined Claimant with Jeffrey Hessing, M.D., as part of a panel evaluation at ISIF's request.

48. Dr. Wilson reviewed the surveillance video and opined that Claimant's demonstrated strength and mobility was "totally inconsistent" with Claimant's words and actions during the panel evaluation and examination. Dr. Wilson commented at length as he reviewed the surveillance video in deposition about particular instances of use. Among these, he commented that Claimant uses his cane in either hand. This latter observation is incorrect. Dr. Wilson did not recognize the mirror reversal of a brief portion of the January 27, 2012 surveillance video. Claimant was actually shown to be consistently using his cane in his left hand in every scene of surveillance where a cane was employed.

49. Dr. Wilson opined Claimant's display during his evaluation and examination constituted a "portrayal of invalidism"; that is, Claimant attempted to show himself—at a conscious level—to be disabled.

50. Dr. Wilson opined Claimant suffered PPI of 5% of the right upper extremity, which translates to 3% of the whole person, as a result of his right shoulder condition. He opined Claimant should be rated at 0% PPI for his left shoulder, neck, and varicose veins. He opined Claimant's lack of cooperation and poor effort made it impossible for him to provide a PPI rating for Claimant's assertions of facial sensory abnormality and right hip complaints, resulting in no PPI. He opined Claimant's assertion of double vision was unverifiable and without any neurological explanation; further, Claimant's refusal to wear glasses did not entitle him to a PPI rating. He opined that none of Claimant's various other complaints provided a basis for any additional award of PPI.

51. Dr. Wilson disagreed with the ratings opined by Drs. Etemad and Greenwald.

52. Dr. Hessing provided a supplemental written report and posthearing deposition in addition to the IME panel report. Among other inconsistencies Claimant exhibited,

Dr. Hessing opined that the absence of upper extremity muscle atrophy was inconsistent with Claimant's reports of inability to use his upper extremities.

Vocational Factors

53. Born February 23, 1960, Claimant was 52 years old at the time of hearing.

54. Claimant earned $13.00 per hour at the time of the accident.

55. Claimant completed his junior year of high school. He did not graduate and has not completed a GED.

56. Claimant served in the U.S. Army from 1978-1980. Claimant refused to disclose the status of his discharge to ICRD, claiming that information was "classified." In October 2006, he reported to a Minnesota vocational consultant that he received an "Honorable" discharge. At hearing, he testified about his discharge as follows: "There was a conflict with—something happened and there was a conflict that wasn't resolved directly and I decided that I wasn't comfortable with it."

57. Claimant did not explain why Social Security Administration shows he had no earnings from 1986 through 1990 and again from 1998 through 2003 and again throughout 2007.

58. Claimant's time-of-injury job included supervisory duties. Co-workers occasionally assisted him in performing details of the job. Sometime after the accident, Claimant was terminated. Employer reported the termination was unrelated to the accident or Claimant's physical condition as a result of the accident.

59. Claimant has worked for the Red Cross and elsewhere as a licensed phlebotomist. He testified that some duties in that job included lifting in excess and moving in ways contrary to his physician's restrictions.

60. Claimant has also worked as a local delivery driver and has been self-employed as

a window installer. He has operated machinery including forklifts, D8 Cats, dump trucks, bulldozers and cranes. He has worked in customer service, as a gas station attendant, and as a bartender and bouncer. He worked building bread slicing machines and as a binder for a magazine company. He has worked as a division head for an office products company and as a business owner installing windows. He supervised 30 people when he worked for a landscape company.

61. Beginning in December 2009 and ending August 2011, although not continuously throughout that period, ICRD attempted to assist Claimant in returning to the work force in a job other than window cleaning. Ultimately, ICRD consultant Mr. Holloway concluded, "Claimant does not believe he can work at this time therefore it is unlikely that claimant can benefit from the ICRD services."

62. In 1993, Claimant settled a California workers' compensation claim pertaining to his left knee for $25,000. He returned to "full-time regular work for his pre-injury employer."

63. In late 2009, Claimant settled a Minnesota workers' compensation claim pertaining to his left shoulder, neck and low back following an alleged July 13, 2006 accident.

64. When Claimant applied for Social Security Disability in May 2008, he alleged his disability began July 13, 2006. He described his conditions:

> Extreme pain when back and neck go out, breathing problems, Left Shoulder Injury/Torn Rotator, Heart Problems, Depression, Severe Headaches, Extreme pain with weight or turning fingers l/hand numb. Bad varicose veins in both legs.

He described how these limited his ability to work:

> Cannot sit in anything but a recliner anymore pressure from chairs hurt back. Cannot twist or turn at all anymore or my back will go out. The headaches are devastating cannot read or look at anything when they happen need a dark room. My l/shoulder is not able to lift anything cannot bend or turn or twist it without chronic pain my fingers on that hand do not hardly work anymore. My neck is not

> turnable either side to side or up and down always hurts. Pain is all consuming day in day out. After awhile i just succumbed to the pain i just cant do anything anymore. The easiest things are now the hardest things. After awhile u just give up and try to live with the pain. I find myself battling depression daily but it gets harder every day. Once you so much for so long it seems like a nightmare that just goes on and on. I am always tired i can never sleep more than a couple of hours at a time. The pain is getting to be to much even for me.

[Errors as in original]. Claimant reported he had not worked since July 13, 2006. The application is replete with Claimant's assertions that he is essentially an invalid. He reported that he needed a cane. He reported headaches were caused by injections to his neck.

65. On August 18, 2008, Social Security physician Leslie Arnold, M.D., reviewed limited medical records and examined Claimant. Dr. Arnold concluded Claimant could lift 20 pounds occasionally and 10 pounds frequently, stand or walk for 6 hours of an 8-hour workday, sit for 6 hours of an 8-hour workday. Dr. Arnold limited Claimant to light duty with only occasional overhead reaching with his left upper extremity because of his left shoulder and C-spine conditions and complaints. Dr. Arnold further recommended avoidance of moderate exposure to fumes, dusts, etc., because of Claimant's asthma and/or breathing problem. Dr. Arnold opined that even considering Claimant's subjective complaints, he "has severe physical impairments that restrict his ability to work. However, they do not preclude all work activity."

66. Disability examiner Susan Gabel concluded, "Cl. Has worked in the past as a Phlebotomist. This work, as normally performed nationally, is light duty work that falls within cl's current RFC [Residual Functional Capacity]. He is capable of returning to work such as this." (brackets ours.) The Social Security Administration denied Claimant's initial application.

67. Claimant's second application for Social Security Disability was filed in June 2010. He alleged his disability began November 9, 2009. This application was approved.

Vocational experts

68. Vocational expert Doug Crum evaluated Claimant and his records at the request of Employer. He opined that Claimant was totally and permanently disabled before he began working for Employer. Mr. Crum gave particular weight to the old contemporaneously made recommendations of various physicians treating various injuries and conditions which preexisted the work accident. He gave significant weight to Claimant's subjective claims of disability made in Claimant's first application for Social Security Disability. He gave less weight to the fact that Claimant successfully worked in excess of those recommended restrictions – without formal accommodations – for substantial periods of time. He gave little weight to evidence that Claimant consciously exaggerated his claimed loss of functional daily ability to physicians, disability evaluators, and others.

69. Nancy Collins, Ph.D., evaluated Claimant's disability at Claimant's request. She considered post-accident work restrictions recommended by Dr. Curtin—limited reaching above and below shoulder level, lifting nothing greater than ten pounds—a well as those recommended by Dr. Bates—no work or reaching at or above shoulder level, limit lifting and carrying to five pounds occasionally with the right upper extremity, rare use of the right thumb, occasional keyboarding, occasional pushing and pulling at a light level. She combined these with pre-accident restrictions to arrive at her opinions. Because Dr. Collins felt that Dr. Bates had taken into account Peggy Wilson's—the FCA therapist's—conclusion that the FCA was invalid due to poor effort by Claimant, she took Dr. Bates' restrictions at face value. Despite Dr. Collins' acknowledgement that Claimant "might be able to do things somewhat more functionally than were exhibited in the FCA," she did not give "much credence" to Ms. Wilson's opinion that the FCA was invalid. Dr. Collins stated, "There is nothing in the records that

identifies secondary gain issues, functional overlay or malingering." Dr. Collins testified that she viewed the surveillance videos and that this evidence did not change her opinions. Additional evidence of issues of secondary gain, functional overlay and malingering are described elsewhere in these findings.

70. Dr. Collins opined that, under Dr. Bates' restrictions, Claimant is totally disabled as a result of the combination of right upper extremity restrictions from the accident and his pre-accident conditions and restrictions. She opined his loss of labor market access as a result of the accident "probably exceeds 90%." She opined the few jobs he could have performed but for his accident probably would have resulted in a wage loss from $13.00 per hour to between $8.00 and $11.00 per hour. At hearing, Dr. Collins opined that, under Dr. Greenwald's restrictions, Claimant is probably employable. Further, Dr. Collins acknowledged that the panel IME opined that Claimant was not significantly disabled, but she did not consider those opinions in evaluating Claimant's disability because she found them "inconsistent with the record . . . and odd."

71. Dr. Collins disagreed with Mr. Crum's assessment that Claimant was totally and permanently disabled before the accident.

72. Dr. Collins stated, "Subjectively, he is limited to less than sedentary work as he cannot sit for longer than 20 minutes at a time. At hearing, Claimant sat while testifying for more than 50 minutes before a brief recess was called. Upon return, Claimant sat for another 45 minutes, at which point he asked if he could stand while continuing to testify. Dr. Collins was present at hearing and observed Claimant while she waited to testify.

DISCUSSION AND FURTHER FINDINGS OF FACT

73. 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).

74. Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447−48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 626−27, 603 P.2d 575, 581−82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

75. Here, Claimant testified in deposition on November 5, 2010, before ISIF became a defendant. He testified again in deposition on January 19, 2012, after ISIF became a defendant. He testified a third time before the Referee at hearing on August 29, 2012.

76. Claimant is a poor historian. He is unable to recall when and where he has worked in a manner that produces a coherent employment history. He is vague and inconsistent when describing his physical conditions. Claimant's physical demeanor at hearing was grossly inconsistent with his actions shown on the surveillance videos. At hearing Claimant showed and testified to an inability to perform the shoulder motions demonstrated on the videos. In 2010, Claimant testified he was unable to raise his right arm to the side or forward or backward or twist it; he claimed he was unable to lift anything.

77. In 2010, Claimant testified that since leaving the U.S. Army in June 1979, he worked continuously with no more than one or two consecutive months of unemployment. He testified that he always paid his taxes and Social Security withholdings.

78. Claimant's testimony of no more than one or two consecutive months of unemployment is impeached by his testimony that he did not work after his July 2006 accident in Minnesota, did not work after he moved to California, and did not work until he moved from California to Idaho and began working for Employer. Claimant had not moved from Minnesota when he saw the eye doctor, Dr. Shammas in January 2008. The record is ambiguous about how long he lived in California thereafter, but he was in Idaho and began working for Employer in September 2008.

79. He was unable to specifically account for two separate periods of approximately five years each in which Social Security Administration records show that Claimant reported no earnings or withholding.

80. The two five-year periods without income recognizable by Social Security remain unexplained. At hearing, Claimant vaguely suggested that these periods may represent employment on an independent contractor basis for window companies which should have provided him a 1099 tax form. He testified could not recall the names of any such companies for which he might have worked during these periods.

81. In 2010 Claimant testified he had never been self-employed.

82. Medical records do not support his 2010 testimony that he suffered two heart attacks.

83. In 2010, Claimant testified, "I called to see if I qualified for Social Security over the phone. They said no and that was the extent of it." The record demonstrates that Claimant filed a formal written application for benefits and complied with requests for follow-up information including several pages of documents.

84. The surveillance videos do not assist in determining whether or too what

extent Claimant may be capable of work. They show only brief discrete instances of activity. However, they do assist in determining whether Claimant has exaggerated his disability to physicians and to this Commission.

85. The sum of the record shows Claimant has untruthfully exaggerated his disability by representation and action to his physicians and to this Commission.

Causation

86. The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be evidence of medical opinion—by way of physician's testimony or written medical record—supporting the claim for compensation to a reasonable degree of medical probability. No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993). A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973).

87. Claimant suffered a rotator cuff tear as a result of the November 2009 accident.

88. Whether Claimant suffered a trigger thumb, right facial sensory deficit, and right eye vision changes, as a result of the accident are questions upon which medical providers are divided. The preponderance of the medical opinions, particularly as opined by Claimant's treating physicians support a finding that Claimant's trigger thumb problem is related to the accident and right shoulder surgery. Although Dr. Greenwald noted preexisting complaints

pertaining to Claimant's right thumb, treating physicians Herrold and Foutz records support a finding that Claimant's right thumb condition was accelerated or exacerbated by the swelling following the surgery.

89. The preponderance of the medical opinions support a finding that Claimant's face and eye conditions are not related to the accident or to the surgery. Treating physicians Herrold and Foutz considered the possibility that these conditions were possibly related to the administration of the anesthetic block during surgery, but did not opine the connection was likely. IME physicians Bates, Greenwald, Wilson and Hessing agree these conditions are not likely related to the accident, surgery or anesthetic.

PPI and Permanent Disability

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

91. Claimant's right shoulder is rated by various physicians within a reasonable range of difference among experts. Considering the inconsistencies and ambiguities in the record pertaining to Claimant's ability to move his shoulder joint, Dr. Greenwald's rating of 7% whole person based upon *AMA Guides* DRE criteria is entitled to more weight than Dr. Bates' rating which is based upon range of motion. Drs. Wilson and Hessing appear to give much weight to the surveillance videos, but were unaware that the video actually showed Claimant consistently using his cane in his left hand when they thought he was using either his right or left alternately.

92. Although Dr. Greenwald's opinion does not persuade us that the trigger thumb

condition is entirely preexisting, her careful examination and rating of 3% upper extremity PPI does persuade.

93. Converting the thumb rating to whole person and combining these ratings, Claimant established he suffered PPI of 8% of the whole person as a result of the accident.

94. Similarly Dr. Greenwald's careful and thorough analysis in separating and rating the various preexisting conditions is persuasive. Shifting the thumb condition out of the preexisting group, Claimant showed he suffered a preexisting physical impairment of 50% of the whole person on the date of the accident.

95. **"**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.

96. 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).

97. 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 non-medical 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).

98. Here, disability evaluation is complicated by Claimant's exaggerations of disability to Social Security, to his physicians, to vocational consultants and experts, and to this Commission.

99. Mr. Crum's opinion that Claimant was totally and permanently disabled before the date of the accident relies too heavily on the accuracy of Claimant's representations of invalidism and not sufficiently on the fact that he was working a real job for over a year before the accident.

100. Dr. Collins' opinion that Claimant was rendered totally and permanently disabled also relied too heavily on Claimant's representations of invalidism and on restrictions imposed by physicians who relied too heavily on Claimant's representations of invalidism. She rejected significant consideration of Dr. Wilson's and Dr. Hessing's opinions about appropriate restrictions for Claimant. At hearing, she acknowledged that if Dr. Wilson's and Dr. Hessing's restrictions were used, Claimant was not totally and permanently disabled.

101. Restrictions imposed by physicians who treated Claimant as he recovered from prior accidents, where discernible, are important factors despite Claimant's refusal to work within these restrictions for sometimes many years afterward. Dr. Greenwald's thoughtful analysis of what his restrictions should, in hindsight, have been carries slightly less weight. However, Claimant's exaggerations to treating physicians and IME physicians alike were

largely accepted at face value. As a result, these restrictions are too limiting. Drs. Hessing and Wilson opined about restrictions with eyes opened to Claimant's exaggerations. Their restrictions are likely the most appropriate given Claimant's actual ability given his conditions.

102. Nevertheless, with the addition of a restriction against overhead work with his dominant right arm, and some loss of use of his dominant right thumb, Claimant established, more likely than not, that he suffered disability in excess of impairment related to the accident.

103. Considering all medical and nonmedical factors relevant to disability analysis, Claimant established he is permanently partially disabled, rated at 75% inclusive of all PPI. Claimant failed to show it likely that he is 100% totally and permanently disabled.

104. Because Employer and Surety settled before this decision, apportionment of disability between preexisting and accident-related PPI is not relevant to potential liability of ISIF.

105. **Odd lot.** If a claimant is able to perform only services so limited in quality, quantity, or dependability that no reasonably stable market for those services exists, he is to be considered totally and permanently disabled. *Id.* Such is the definition of an odd-lot worker. *Reifsteck v. Lantern Motel & Cafe*, 101 Idaho 699, 700, 619 P.2d 1152, 1153 (1980). Taken from, *Fowble v. Snowline Express*, 146 Idaho 70, 190 P.3d 889 (2008). Odd-lot presumption arises upon showing that a claimant has attempted other types of employment without success, by showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available, or by showing that any efforts to find suitable work would be futile. *Boley*, *supra.*; *Dehlbom v. ISIF*, 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997).

106. Claimant has not attempted any employment, successfully or unsuccessfully, since the November 2009 accident. He has not applied for any job since the November 2009 accident. He has resisted attempts by ICRD to seek jobs to apply for. Claimant failed to demonstrate that any efforts to find suitable work would be futile.

107. Claimant does not meet any of the *prima facie* qualifications for an odd-lot worker. Therefore, there is no presumption shift which would require Defendant to show the existence of a suitable job generally available in his local labor market. Nevertheless, the preponderance of the evidence shows Claimant could work as a phlebotomist in a setting that does not require him to perform other than the job's core functions. The *Dictionary of Occupational Titles* does not show physical requirements of a phlebotomist which are beyond Claimant's restrictions. Claimant is trained and has work experience as a phlebotomist. His Minnesota Red Cross job as phlebotomist apparently included additional work, such as excessive or too frequent lifting, etc., which would be beyond his present restrictions.

CONCLUSIONS

1. Claimant injured his right shoulder as a result of the accident;

2. Claimant's right thumb condition was exacerbated as a compensable consequence of the accident;

3. Claimant suffered PPI rated at 8% of the whole person as a result of the accident;

4. Claimant is permanently partially disabled in excess of PPI, from all causes and conditions, rated at 75% of the whole person;

5. Claimant is not 100% disabled and does not qualify as an odd-lot worker; and

6. Additional issues of ISIF liability and apportionment are rendered 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 22ND day of February, 2013.

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:

/S/_____
Assistant Commission Secretary dkb

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY BURKE, Claimant, v. SUNSHINE WINDOW CLEANING, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Surety, Defendants.	**IC 2009-029148** **ORDER** **FILED MAR 13 2013**

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

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

1. Claimant injured his right shoulder as a result of the accident.

2. Claimant's right thumb condition was exacerbated as a compensable consequence of the accident.

3. Claimant suffered PPI rated at 8% of the whole person as a result of the accident.

4. Claimant is permanently partially disabled in excess of PPI, from all causes and conditions, rated at 75% of the whole person, inclusive of all PPI.

5. Claimant is not 100% disabled and does not qualify as an odd-lot worker.

6. Additional issues of ISIF liability and apportionment are rendered moot.

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

DATED this 13TH day of MARCH, 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 13TH day of MARCH, 2013, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

ROBERT A. NAUMAN 3501 W. ELDER ST., STE. 108 BOISE, ID 83705	GARDNER W. SKINNER, JR. P.O. BOX 359 BOISE, ID 83701	THOMAS B. HIGH P.O. BOX 366 TWIN FALLS, ID 83303-0366

dkb

/S/_____