BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHARLES BUSSELL, Claimant, vs. HECLA MINING COMPANY, Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2006-505377** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED 09/12/2011

Pursuant to Idaho Code § 72-506, the above-entitled matter was assigned to Referee LaDawn Marsters, who conducted a second hearing on April 7, 2011, in Coeur d'Alene, Idaho. Claimant was present in person and was represented by Michael J. Verbillis. Defendants, Employer and Surety, were represented by Gardner W. Skinner, Jr. Oral and documentary evidence was admitted, and one post-hearing deposition was taken. The matter was briefed and came under advisement on July 22, 2011.

ISSUES

The parties stipulated at the hearing to the following issues to be decided:

1. Whether Claimant is totally and permanently disabled as an odd lot worker; and, if not,
2. Whether and to what extent Claimant is entitled to permanent partial disability (PPD).

CONTENTIONS OF THE PARTIES

Claimant suffered permanent partial impairment (PPI) of 55% of the whole person

following an industrial crush fracture to his left hand on March 4, 2006 that resulted in amputation of his left hand above the wrist. Following surgical and skin graft procedures, Claimant's stump healed and he learned to use prostheses. He returned to work for Employer and eventually succeeded in obtaining a permanent, full-time position as a hoistman, a job he can perform. Claimant still performs his time-of-injury job driving a mine truck, when Employer needs him to fill in. There is no dispute that Claimant makes more money in his current position than he did in any of his pre-injury jobs, or that he has, nevertheless, suffered a significant loss of access to his local job market as a result of his industrial injury. The appropriate measure of that loss is all that is in dispute.

Claimant contends that he has lost 100% access to his competitive local job market and, therefore, he is totally and permanently disabled under the Odd Lot Doctrine. In the alternative, he argues that he has suffered 75-80% PPD. Claimant relies upon the opinion of Dan Brownell, vocational consultant.

Defendants counter that Claimant has suffered 65% PPD. They rely upon the vocational opinion of Douglas Crum, CDMS.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The pre-hearing deposition testimony of Claimant taken on July 14, 2008;
2. The testimony of Claimant, Daniel W. Brownell and Michael Achord taken at the hearing;
3. Claimant's Exhibits 1 through 21 admitted at the hearing;
4. Defendants' Exhibits 1 through 21 admitted at the hearing; and
5. The post-hearing deposition testimony of Douglas N. Crum, CDMS, taken on

April 27, 2011.

OBJECTIONS

All pending objections are overruled.

After having considered 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

PRE-INDUSTRIAL ACCIDENT VOCATIONAL, EARNINGS AND HEALTH HISTORY

1. Claimant was 43 years of age at the time of the hearing and residing in Page, Idaho. He has primary physical custody of his two teen-aged sons. In order to take care of them properly, he took a job at Employer's operating mining vehicles in January 2006. Previously, he had worked for various companies doing heavy construction, such as road work, which required him to move around from job to job. Claimant is an accomplished heavy equipment operator, having done this type of work all his life. He learned his skills on the job and did not obtain any further formal education after he earned his high school diploma.

2. Claimant is a reliable employee with a good work ethic. In addition to operating heavy equipment (for example, Caterpillars, from small D2s through 250,000-pound D10s; excavators; compactors; loaders; scrapers; backhoes and graders), he has also worked as a foreman/supervisor on heavy construction jobs. He was a member of the Operating Engineers Union.

3. Claimant's earnings records in evidence for periods before 2006 include tax returns without W-2s for 2001-2005, a Social Security Administration (SSA) earnings report for 1985-2005 and Exhibit 21, which Claimant compiled to illustrate what he believes were his earnings for 2001-2005. Given that Claimant's tax returns for 2001 and 2002 were joint returns

and that Claimant's W2s are not in evidence, and that the foundation laid for Exhibit 21 is inadequate to overcome the SSA report, the Referee finds the SSA report provides the most reliable report of Claimant's income over the years. It indicates Claimant earned $60,883 in 2001, $33,161 in 2002, $50,782 in 2003, $50,013 in 2004 and $33,094 in 2005.

4. When he was doing heavy construction work, Claimant was sometimes employed year-round. More often, however, he would have a few months off each year. As a result, when Claimant worked, he was out of town and putting in up to 16-hour work days for a total of 1,800-2,200 hours per year. He essentially crammed a full year's work into seven to nine months during those years he was not employed year-round.

5. Claimant is in generally good health, although he smokes approximately two packs of cigarettes a day, drinks 6-10 beers per day and previously suffered a myocardial infarction requiring stent placement.

INDUSTRIAL ACCIDENT

6. On March 4, 2006, Claimant was driving a mine truck over a wet, rough road inside the Lucky Friday Mine when his hard hat flew off and he reached out to grab it. As he twisted, the truck veered, catching his left wrist between the tunnel wall and the truck. Claimant underwent emergency surgery that day, and additional procedures were performed during the next week. Unfortunately, Claimant suffered such extreme damage to the soft tissues of his left hand that it could not be revascularized. On March 11, 2006, Claimant's left hand was amputated at the distal forearm, above the wrist.

7. Over time, skin graft procedures were successful and Claimant’s wound healed. He obtained, first, a mechanical prosthesis and, second, a myoelectric prosthesis. Together, they allow him to perform a range of work activities in addition to his activities of daily living.

Claimant still experiences periodic phantom and neuropathic pain which he controls, but cannot completely eliminate, with medications.

8. Patrick J. Mullen, M.D., Claimant's hand surgeon, opined that Claimant had reached maximum medical improvement by August 3, 2006. He assessed no real medical restrictions and opined that Claimant had sustained a permanent partial impairment (PPI) rating of 92% of the left upper extremity, or 55% of the whole person, in consideration of his left hand amputation. Dr. Mullen indicated that he relied upon the *AMA Guides,* but he did not cite the edition he consulted. Anecdotally, Dr. Mullen's assessment would be superseded in this case by Idaho Code § 72-428, which provides that PPI benefits in the amount of 270 weeks shall be paid to claimants suffering industrial amputation of the forearm below the elbow joint distal to the insertion of the biceps tendon. However, PPI is not at issue; the parties agree that Claimant is entitled to 55% of the whole person.

POST-ACCIDENT VOCATIONAL, EARNINGS AND HEALTH HISTORY

9. **Claimant's return to work.** Claimant returned to his time-of-injury job (driving truck) at Employer's in August 2006. He drove truck for three or four months, then began running a mucker, loading trucks. Claimant can operate the older-model muckers; however, the newer models require more dexterity in his left hand than his prostheses allow, so he is unable to run them. Claimant can operate all of the mine trucks at Employer's.

10. Claimant was also involved with applying magnesium chloride to the mine roads for dust control, which required him to lift up to 100 50-pound bags in a day. Although it was painful, Claimant was able to do this job once a week for about a year. Claimant explained that lifting the bags straight up would bring on a sharp, knife-like pain from pressure on his radial nerve, which sits on top of the bone at the end of his stump.

11. In May 2009, Claimant successfully bid for a hoistman position. As a result, he was hired for that position on a permanent basis. As a hoistman, Claimant operates the cage that transports people and materials up and down the mineshaft. It requires little physical effort, but constant vigilance for safe operation. At the time of the hearing, Claimant was seventh out of eight hoistmen at Employer's in terms of seniority. Claimant continues to pull extra shifts most weeks in which he drives truck, usually qualifying him for overtime pay.

12. Claimant regularly works four 10-hour shifts per week, then adds overtime hours when he can. He sees his sons every evening.

13. **Robert H. Friedman, M.D.** On February 8, 2008, Dr. Friedman, a physiatrist, performed an independent medical evaluation (IME) at Surety's request. He interviewed and examined Claimant, and administered tests[1]. He also viewed a videotape of Claimant's job duties, although this evaluation took place before Claimant became a full-time hoistman. He noted observing images of Claimant operating a crane and a vehicle.

14. Dr. Friedman opined, among other things, that Claimant is capable of doing these jobs without restrictions or limitations in terms of his amputation and prosthetic management. He did note that normal prosthetic slippage may make it difficult for Claimant to lift heavy objects on his left side; however, while this may require some accommodation on Claimant's part, it does not call for a medical restriction. Dr. Friedman also suggested that a spinner knob on his vehicles may decrease his risk of forearm injury. According to Claimant, this accommodation was subsequently made.

15. **Hand Function Assessment.** On December 4 and 24, 2009, Claimant's hand function was assessed by Virginia Taft, OTR, an occupational therapist. At the time, Claimant

[1] Dr. Friedman administered Beck's questionnaire and the Oswestry Functional Test.

was having significant carpal tunnel syndrome (CTS) symptoms in his right hand (see below), which have now resolved. As a result, her findings concerning Claimant's right hand and overall functionality are no longer relevant. Her findings with respect to his left arm were consistent with Claimant's testimony and the medical evidence in the record.

16. **Right Carpal Tunnel Syndrome (CTS).** Compensatory use of Claimant's right hand following the loss of his left resulted in tingling, numbness and other right hand symptoms that were eventually diagnosed as CTS. In August 2010, Claimant underwent a right carpal tunnel release by Peter C. Jones, M.D. By the time of the hearing, Claimant's CTS symptoms had resolved, but he was still working on regaining full strength in his right arm.

17. **Post-accident earnings.** Claimant confirmed at the hearing that he earned $67,418.55 in 2007, $65,631 in 2008, $63,656 in 2009 and $73,095 in 2010. He explained, however, that his base pay rate is only $16.69 per hour, scheduled to increase to $17.19 on May 1, 2011. The rest of Claimant's income from Employer is derived from profit-sharing and the silver premium he receives when silver prices are high. Claimant testified that his profit sharing and silver premium payments are highly volatile and unreliable. However, the evidence shows that even when Claimant believed Employer was close to closing in 2008 or 2009 due to low silver prices, he earned more overall pay than he did before his industrial injury.

18. **Michael Achord, Claimant's supervisor.** Mr. Achord testified that Claimant's seniority as a hoistman in terms of time on the job is seventh out of eight. He explained, however, that skill level, as well as time in service, is a consideration if lay-offs must be made. He also discussed his past experience since the 1980's with employment stability at the mine, citing a 14-month shutdown in 1986. None of Mr. Achord's testimony establishes facts concerning any likelihood of a future shutdown. He testified that Claimant is a very valuable

employee, and that he has his job as a result of putting in a successful bid.

DISCUSSION AND FURTHER FINDINGS

The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods,* 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). 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).

LEGAL AUTHORITY

"Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and on specialized activities of bodily members. Idaho Code § 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 Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a

determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

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).

VOCATIONAL EXPERT OPINIONS

19. Douglas N. Crum, CDMS, and Daniel W. Brownell both presented opinions as to the extent of Claimant's permanent disability related to his industrial left hand amputation. Mr. Crum has a bachelor's degree in an unrelated field, coursework in vocational rehabilitation subjects, seven years' experience as a vocational rehabilitation consultant for the Industrial Commission Rehabilitation Division (ICRD) and a credential as a Certified Disability Management Specialist. Mr. Brownell has experience in a variety of vocational rehabilitation settings, including 29 years as a consultant for ICRD, as well as coursework in vocational rehabilitation subjects. In addition, Mr. Crum worked for a private vocational rehabilitation consulting firm for five years and has worked as a solo practitioner for 12 years. Mr. Brownell retired from ICRD two years ago and has worked as a private vocational rehabilitation consultant for two years. Mr. Crum and Mr. Brownell each possess vocational rehabilitation knowledge and experience beyond that of a layperson. Both are qualified to provide expert opinion testimony in this case.

20. **Mr. Crum.** In preparation to render his opinion, Mr. Crum interviewed Claimant twice, visited his job site twice, and reviewed the report of Mr. Brownell, as well as Claimant's medical records, income records, pre-hearing deposition and ICRD case notes. Prior to his deposition, he also reviewed the hearing transcript.

21. Mr. Crum determined that Claimant is a single father of two children who took a job at Employer's so he could be home with them more. Just prior to his industrial accident, Claimant was in good health and under no medical restrictions, although he had a history of heart attack with stenting. Mr. Crum also noted Claimant is ambidextrous.

22. Mr. Crum considered Dr. Mullen's vague post-recovery restrictions indicating that whatever Claimant was capable of doing with his left arm, he could do; and, in time, Claimant's actual abilities in that regard would become known. Along these lines, Mr. Crum opined that lifting 50-pound bags regularly was probably beyond Claimant's functional capabilities. Mr. Crum also considered Dr. Jones's release without restrictions following Claimant's right carpal tunnel repair surgery, in which he generally advised Claimant to avoid doing anything stupid. Concerning Ms. Taft's FCE, Mr. Crum, like the Referee, found it to be an inaccurate reflection of Claimant's abilities at the time of hearing.

23. By Mr. Crum's observation, Employer could implement additional modifications that would make the job more amenable to Claimant's prosthesis; however, such modifications would make operations more difficult for the rest of the employees, so it elected not to do so. Even without additional modifications, Mr. Crum opined that Claimant had little difficulty performing his job as a hoistman. He also noted Claimant's seniority is sufficient and his health strong enough to keep him employed for the foreseeable future, but acknowledged that

he could lose his position if he were fired for cause, laid off due to economic circumstances or if he became unable to perform his job safely.

24. Claimant's primarily relevant non-medical factors, according to Mr. Crum, include his high school education, age, skills, experience, residential location as it pertains to employment rates and his appearance. He believes Claimant's missing left hand may dissuade some Employers; however, Claimant's knowledge and experience may ameliorate this negative effect in some situations.

25. Mr. Crum also discussed the relative ease with which Claimant could retrain for certain positions. However, Employer has not offered retraining, nor is retraining under Idaho Code § 72-450 a noticed issue in these proceedings.

26. If Claimant were laid off from Employer's, Mr. Crum opined that he could find another job as a security guard, janitor or construction site cleaner, landscaper, cashier, courier, light delivery driver, parts counterman, mechanic helper or light cabinet assembler and, in addition, he could do some shipping and receiving jobs. Mr. Crum does not believe that Claimant could return to operating heavy equipment.

27. With Claimant's medical and non-medical factors in mind, Mr. Crum analyzed his disability in terms of both loss of earning capacity and loss of access to his local labor market. Noting Claimant's increased income since his industrial accident and other factors, such as the average income for heavy equipment operators and the poor job market for such workers recently, Mr. Crum concluded that Claimant has suffered no loss of earning capacity, at least so long as he maintains his current employment. Mr. Crum did acknowledge that, should Claimant lose his current job, he would probably suffer some wage loss based on the nature of the jobs in his residual labor market for which he can now compete. (Crum Dep., p. 33). With respect to loss

of access, Mr. Crum relied upon labor market statistics for North Idaho compiled by the Idaho Department of Labor to conclude that, before his industrial injury, Claimant was qualified and able to perform 11.8% of the jobs in his labor market. However, just 3.9% of those jobs remain available to him now that he has lost his left hand. As a result, he has suffered 67% loss of access to his local labor market.

28. Analyzing Claimant's loss of earning capacity (0%) and his loss of access (67%), Mr. Crum concluded that Claimant's loss of access to the labor market is the more significant factor, and opined that Claimant's disability is in the range of 65%.

29. **Mr. Brownell.** In preparing his report, Mr. Brownell interviewed Claimant and reviewed the same records Mr. Crum reviewed. Unlike Mr. Crum, Mr. Brownell did not visit Claimant's worksite; however, he did meet with a representative from Claimant's operator's union. Mr. Brownell's report was prepared February 11, 2010, when Claimant was still experiencing significant right carpal tunnel symptoms, materially reducing the functionality of his only hand. He opined therein that Claimant was 75-80% disabled. At the hearing, Mr. Brownell continued to opine that Claimant was 75-80% disabled, even though his right hand symptoms had resolved. He based his opinion on Claimant' loss of access to the local labor market, but he was unable to quantify his measures. Mr. Brownell persuasively related that he knew the local labor market well and that he believed Claimant would have a very difficult time finding another job if he were to lose his current position, but he did not offer any market statistics to support his numerical conclusion. In addition, Mr. Brownell did not analyze Claimant's loss of earning capacity. Seeming confused, he adopted Mr. Crum's 65% PPD assessment in relation to Claimant's loss of earning capacity alone, explaining that the additional

10-15% is warranted in light of Claimant's loss of access. Recall, however, that Mr. Crum determined Claimant suffered 0% PPD in terms of loss of earning capacity.

30. The Referee finds Mr. Crum's opinion more persuasive than Mr. Brownell's. Although Mr. Brownell established that he is intimately familiar with the general labor market in North Idaho, he failed to convey his opinion in objective, quantifiable terms that are necessary to establish a fair measure of Claimant's disability.

31. However, the Referee also finds Mr. Crum's opinion somewhat lacking, in that it fails to provide wage data for the 3.9% of jobs currently available to Claimant. Perusing the list of jobs Mr. Crum believes Claimant can perform (for example: janitor, courier, light delivery person), the Referee finds it likely that Claimant would suffer some loss in earning capacity (over his pre-injury earning capacity as a heavy equipment operator) if he were to lose his job at Employer's. Therefore, the Referee is unpersuaded that 0% is an accurate measure of Claimant's loss in earning capacity. Further, Claimant's loss in earning capacity is likely significant enough to warrant a small bump upward from Mr. Crum's 67% assessment for loss of access, as opposed to the small bump downward that he opined to be appropriate.

32. Claimant also argues that his gross income in excess of his hourly wage from Employer should be discounted. A great deal of speculation about the stability of the labor markets for mining and heavy equipment operator workers was raised; however, Claimant failed to adduce any admissible expert opinion evidence to establish that his profit sharing or silver premium payments from Employer should not be fully included in his wage calculations.

33. Finally, Claimant contends that he is an odd lot worker because he would have no access to his local labor market if he were to lose his job at Employer's and further because Employer is a "sympathetic employer." The evidence in the record overwhelmingly establishes

that Claimant retains access to a small part of his local labor market and, as well, that Employer is not keeping him on primarily due to altruistic motivations. Claimant obtained his hoistman position, an important job requiring a vigilant, safety-conscious individual to perform it, through a competitive bidding process. In addition, he adds value by filling in for truck drivers.

34. The Referee finds Claimant is not totally and permanently disabled under the Odd Lot Doctrine or otherwise, but that he has suffered PPD in the amount of 70%.

CONCLUSIONS OF LAW

1. Claimant has failed to prove he is totally and permanently disabled under the Odd Lot Doctrine or otherwise.

2. Claimant has proven that he is entitled to PPD inclusive of PPI in the amount of 70% as a result of his industrial left hand amputation.

RECOMMENDATION

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

DATED in Boise, Idaho, on the 1st day of September, 2011.

INDUSTRIAL COMMISSION

_____/s/_____
LaDawn Marsters, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of September, 2011, 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:

MICHAEL J VERBILLIS
PO BOX 519
COEUR D'ALENE ID 83816-0519

GARDNER W SKINNER
PO BOX 359
BOISE ID 83701

srn _____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHARLES BUSSELL, Claimant, vs. HECLA MINING COMPANY, Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2006-505377** **ORDER** FILED 09/12/2011

Pursuant to Idaho Code § 72-717, Referee 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 he is totally and permanently disabled under the Odd Lot Doctrine or otherwise.

2. Claimant has proven that he is entitled to PPD inclusive of PPI in the amount of 70% as a result of his industrial left hand amputation.

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

DATED this 12th day of September, 2011.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

_____/s/_____
Thomas P. Baskin, Commissioner

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

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of September, 2011, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

MICHAEL J VERBILLIS
PO BOX 519
COEUR D'ALENE ID 83816-0519

GARDNER W SKINNER
PO BOX 359
BOISE ID 83701

srn _____/s/_____