BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BART CLOVIS, Claimant, v. SCHUON MANUFACTURING COMPANY, Employer, and LIBERTY NORTHWEST, Surety, Defendants.	**IC 2008-005893** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed February 2, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Coeur d'Alene on June 14, 2011. Claimant was present and represented by Thomas B. Amberson of Coeur d'Alene. E. Scott Harmon represented Employer/Surety. Oral and documentary evidence was presented. No post-hearing depositions were taken and the parties submitted post-hearing briefs. This matter came under advisement on September 28, 2011.

ISSUE

By agreement of the parties, the sole issue to be decided is whether and to what extent Claimant has incurred permanent partial disability (PPD) in excess of his permanent partial impairment (PPI).

CONTENTIONS OF THE PARTIES

Claimant suffered an industrial right shoulder injury resulting in three surgeries, permanent partial impairment and permanent restrictions. He was initially restricted from overhead work with his right arm. However, when shown surveillance videos of Claimant performing certain activities, the physicians assigning Claimant restrictions changed their minds regarding Claimant's physical capabilities, and lifted the no overhead work restriction. In any event, Claimant argues that he has searched for jobs to no avail and is entitled to 60% whole person PPD inclusive of his 18% upper extremity PPI.

Defendants contend that they owe Claimant no more PPD benefits than the 16.3% he has already been paid. Defendants' vocational expert opined that before the surveillance videos, Claimant had incurred whole person PPD of 49.3%, but after the videos, Claimant is entitled to 16.3%. Claimant under-performed on an FCE, and there is no objective medical evidence supporting a decrease in Claimant's ability to engage in gainful activity. As demonstrated in the surveillance videos, Claimant is capable of returning to work as an industrial spray painter but for his diabetes. Because Claimant is consciously overplaying his symptoms, he should be awarded no more PPD benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the hearing;
2. Claimant's Exhibits 1-9; 14-21; and 28-40 admitted at the hearing; and
3. Defendants' Exhibits A-R admitted at the hearing.

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

FINDINGS OF FACT

1. Claimant was 56 years of age and a nine-year resident of Coeur d'Alene at the time of the hearing. He stands six feet tall and weighs 275 pounds, 50 pounds more than his "working weight." Claimant is not technically ambidextrous, but he can perform work with his left hand. Claimant graduated from high school in 1973 and attended two semesters at Boise State University studying psychology and sociology. He quit due to injuries sustained in a motorcycle accident.

2. Claimant, at one time, was certified to operate both boom and overhead cranes up to 100 tons. Claimant began painting at his stepfather's furniture refinishing store when he was nine years of age. Claimant began his career as an industrial spray painter in 1992. During his typical 10-hour work day for Employer, a manufacturer of saw mill equipment, Claimant would spend considerable time climbing ladders ranging from five to 50 feet in height.

3. Claimant began working for Employer as a painter in 2005. He generally worked from 12 to 14 hours a day, six and sometimes seven days a week. Claimant was earning $12.50 an hour with benefits when he was let go due to his restrictions.

4. On February 8, 2008, a steel beam impacted Claimant's right shoulder, rotating and abducting it. He immediately sought medical attention.

5. Claimant was first seen at Kootenai Medical Center where he was placed in a sling, given pain medication, and issued work restrictions (no use of his right arm). He followed-up with occupational health on February 14. A right shoulder MRI was ordered and Claimant

was continued on one-handed work. The MRI revealed right rotator cuff impingement with supraspinatus tendinosis, but no gross tear. Claimant was prescribed physical therapy. His work restrictions were revised to include no overhead work with his right arm and no lifting, pushing, or pulling over five pounds with his right arm. When conservative treatment failed, Claimant was referred to an orthopedic surgeon.

6. On May 15, 2008, orthopedic surgeon Spencer Greendyke, M.D., performed a large chronic rotator cuff tear repair and an acromioplasty with coracoacromial ligament excision on Claimant's right shoulder, along with a right distal clavicle excision. Unfortunately, Claimant developed an infection post-surgery, resulting in a right shoulder infection irrigation and debridement on June 17, 2008.

7. Claimant continued to have problems with his right shoulder. He noticed a decrease in his right shoulder range of motion after he returned to work, and his burning sensation, which had resolved, returned. By October 2008, Dr. Greendyke began to suspect adhesive capsulitis as the cause of Claimant's continued right shoulder pain.

8. On October 23, 2008, Claimant was seen at Defendants' request by Matthew Provencher, M.D. Dr. Provencher diagnosed a right shoulder post-traumatic impingement syndrome and right shoulder adhesive capsulitis, not fixed and not stable. He recommended that Claimant keep treating with Dr. Greendyke and complete a series of injections followed by physical therapy. Dr. Provencher found Claimant to be straightforward without any secondary gain behaviors. Dr. Provencher released Claimant to sedentary work until his recommended treatment was completed in three to four months.

9. Dr. Greendyke reviewed Dr. Provencher's IME and recommended a second opinion before proceeding with any additional treatment. Jonathon King, M.D., an orthopedic

surgeon, provided his opinion on December 9, 2008. Dr. King diagnosed a probable adhesive capsulitis in Claimant's right shoulder. However, he also ordered an EMG to rule out a brachial plexus injury. Dr. King recommended a subacromial cortisone injection and continued physical therapy. Claimant returned to Dr. King on February 5, 2009, complaining of continued right shoulder pain. The cortisone injection provided only short-term relief. Dr. King suspected a possible recurrent rotator cuff tear. On March 11, 2009, Dr. King performed an arthroscopic surgery with right shoulder manipulation under anesthesia, a revision of the distal clavicle excision, and debridement of a SLAP lesion. Claimant was limited to one-armed work and returned to physical therapy.

10. On June 16, 2009, Dr. King found Claimant to be at MMI[1] and assigned the following permanent restrictions: no lifting over ten pounds with his right arm; no prolonged overhead activity.

11. Dr. Provencher conducted another IME on July 30, 2009. He agreed that Claimant was at MMI and needed no further medical treatment. Dr. Provencher agreed with Dr. King's permanent restriction of no lifting over ten pounds with his right arm. He assigned an 18% right upper extremity PPI rating without apportionment. Dr. Provencher ordered a Functional Capacities Evaluation (FCE) to gain a better objective understanding of Claimant's physical capabilities. Dr. King agreed with Dr. Provencher's analysis and conclusions.

12. The above-mentioned upper extremity FCE was accomplished on August 6, 2009 by Jon Pratt, DPT. Regarding limitations, Mr. Pratt noted that:

> He has limited ability/willingness to raise his right arm to crown level and is unable to perform weighted work at this level and above. He is unable to maintain a crouched position for longer than 30 seconds secondary to LE

[1] After opining that Claimant was at MMI, Dr. King recommended another IME for the assignment of a PPI rating.

> weakness and pain reports. It is expected that Mr. Clovis will have some limitations in repetitive reaching and overhead type work. However, secondary to self limited effort, pain focused behavior and inconsistency during testing, the FCE Grid data likely represents a minimum level of ability rather than a maximum.

Defendants' Exhibit M, p. 3. Although the FCE did not represent the maximum of Claimant's abilities, Mr. Pratt placed Claimant in the light work category on a full-time basis.

13. On August 24, 2009, Dr. Provencher authored an addendum to his July 30, 2009 IME, after he reviewed the FCE wherein he placed Claimant in the light-work category with the following permanent restrictions: no lifting with the right upper extremity greater than ten pounds; no overhead activities; only occasional repetitive hand activities; and only occasional reaching. He approved the position of spray painter so long as the just-mentioned restrictions were followed.

14. On September 11-12 and 25, 2009, two surveillance videos (Defendants' Exhibit P) captured some of Claimant's activities. The two-plus hours of videos show Claimant helping set up a four-to-six person tent, carrying objects in his right hand and with his right arm that appear to exceed Dr. Provencher's five-pound lifting and reaching restrictions, placing ATV ramps on the bed of a pickup, backing the ATV up the ramp with his right arm extended forward on the handlebars, and otherwise moving about without demonstrating any problems with his right upper extremity.

15. Upon review of the surveillance videos, Dr. Provencher opined:

> The surveillance goes along with my initial inclination and impression that he did not have a very valid functional capacities evaluation (FCE) where he demonstrated maximum effort of only 33 percent on some of the sub-tests for material handling.
>
> I had given him a 10 pound lifting restriction based on the FCE.
>
> I would now approve his job as a spray painter with modifications with a much higher lifting capacity of up to 25 to 30 pounds on a frequent basis. Per the job analysis, he is required to lift 11 to 20 pounds, 21 to 35 pounds, and 36 to 50

> pounds on an occasional basis; he can do this [sic] occasional basis. He can perform overhead work.

Defendants' Exhibit O, p. 33.

16. Dr. King also reviewed the videos and Dr. Provencher's assessment. He agrees with Dr. Provencher's limitations and that Claimant can return to work as a spray painter.

DISCUSSION AND FURTHER FINDINGS

"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 impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease. Consideration should 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, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

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 non-medical 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 partial disability is determined as of the date of maximum medical improvement. See *Stoddard v. Hagadone Corporation,* 147 Idaho 186, 207 P.3d 162 (2009).

Vocational evidence

Dan Brownell

17. Claimant retained vocational consultant Dan Brownell to prepare an employability report. Mr. Brownell's credentials are well known to the Commission and will not be repeated here. Mr. Brownell reviewed relevant medical and vocational records and resources, viewed the surveillance videos, interviewed Claimant on August 11, 2010, and prepared a report. At the time of the interview, Claimant was still under Dr. Provencher's ten-pound lifting restriction. Claimant's diabetes had flared, causing his feet to go numb and creating the need to use a cane when ambulating. Mr. Brownell separated his analysis into two parts: pre-surveillance videos and post-surveillance videos.

18. Pre-surveillance videos: Claimant was restricted to lifting no more than ten pounds with the right arm above his waist and no overhead repetitive motion activities. It was recommended that he not return to work as a spray painter. Mr. Brownell noted that ICRD could not find Claimant a job other than a short one week stint as a telemarketer. He estimated Claimant's loss of access to his labor market at between 60 and 65% and opined that Claimant

would need retraining, an understanding/sympathetic employer, and major assistance with new job placement. Mr. Brownell did not address Claimant's loss of earning capacity, if any.

19. Post-surveillance videos: Mr. Brownell took it upon himself to do some investigation regarding the weights of objects lifted in the videos as well as spending time with Claimant "recapturing his movements" observed in the videos. Mr. Brownell ". . . measured the right arm force and ROM for each activity. I detailed this information the same as I have for thousands of other Job Site Evaluations. I found the weights and body mechanics actually utilized and accomplished by claimant did not exceed the previously outlined overhead ROM and weight recommendations. By all means, the activities were not repetitive and would not match a work environment." Claimant's Exhibit 5, pp. 6-7. (Emphasis in original). Based on his "investigation," Mr. Brownell chose to accept the pre-surveillance videos scenario. He recommended an updated FCE.

Mary Barros-Bailey, PhD.

20. Defendants retained Dr. Barros-Bailey to address vocational issues. Dr. Barros-Bailey's credentials are well-known to the Commission and will not be repeated here. Dr. Barros-Bailey reviewed medical and vocational records and met with Claimant on either January 15 or February 15, 2010.[2] Dr. Barros-Bailey only concerned herself with Claimant's right shoulder condition, not his diabetes or other non-industrial problems that may affect his employability. Dr. Barros-Bailey was aware that Dr. Provencher changed Claimant's restrictions from light to medium after he reviewed the surveillance videos. Dr. Barros-Bailey was also

[2] Dr. Barros-Bailey's report (Defendants Exhibit N) is dated February 2, 2010, so perhaps she met with Claimant on January 15, 2010, rather than on February 15, as she indicated in her report.

aware of Mr. Brownell's report, but noted that no employability opinions were offered in that report; rather, Mr. Brownell performed more of a task analysis regarding the surveillance videos.

21. After having explained that her role is not to pick one set of restrictions over another, Dr. Barros-Bailey opined that under the light-work category Claimant has suffered PPD of 49.3% and under the medium category 16.3% both inclusive of PPI. Defendants have paid the 16.3% rating.

22. The Referee finds that Claimant is entitled to no more PPD than has been paid by Defendants. Drs. Povencher's and King's opinions regarding Claimant's functional limitations after reviewing the post-surveillance videos are unrebutted. Even assuming that Mr. Brownell's "investigation" regarding the surveillance videos was properly conducted and produced accurate results, it is nonetheless meaningless as there is no evidence that Mr. Brownell discussed his "findings" with either Dr. Provencher or Dr. King, or any other physician qualified to assign physical restrictions, to obtain their opinions. The only medical evidence before the Commission is that Claimant may return to work as a spray painter. Dr. Barros-Bailey took this into account, as well as other factors, and concluded that even though Claimant could return to work as a spray painter,[3] he nonetheless suffered some disability above impairment. Her opinions are also unrebutted. While certainly no smoking gun, the surveillance videos do supply additional relevant evidence sufficient to comprise a foundation for Drs. Provencher and King to change their opinions regarding restrictions, especially when Claimant's FCE showed only minimal

[3] Claimant did, in fact, return to work as a spray painter at the Chilco Mill for two weeks until the job ended. He testified that he could not continue with the job in any event because he was unable to use both arms. However, Dr. Barros-Bailey's report indicates that Claimant's job performance was unsatisfactory. Claimant may be restricted from spray painting due to his non-industrial diabetes with associated neuropathies in his hands and feet, but not due to his right upper extremity.

effort in a number of areas. The medical records show that Claimant had a tendency to overplay his physical symptoms. Mr. Brownell's opinion that Claimant suffered a 60% to 65% loss of his labor market is without foundation and is not persuasive. Dr. Barros-Bailey's opinions take into account both pre- and post-surveillance video restrictions and are well-articulated.

CONCLUSIONS OF LAW

1. Claimant is entitled to permanent partial disability (PPD) benefits equaling 16.3% of the whole person inclusive of his permanent partial impairment (PPI).

2. Defendants are entitled to a credit for any amounts paid in PPI and/or PPD.

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 __24th__ day of January, 2012.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __2nd__ day of __February___, 2012, 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:

THOMAS B AMBERSON
PO BOX 1319
COEUR D'ALENE ID 83616-1319

E SCOTT HARMON
PO BOX 6358
BOISE ID 83707

ge

Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BART CLOVIS, Claimant, v. SCHUON MANUFACTURING COMPANY, Employer, and LIBERTY NORTHWEST, Surety, Defendants.	)	**IC 2008-005893** **ORDER** Filed February 2, 2012

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers 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 recommendation 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 is entitled to permanent partial disability (PPD) benefits equaling 16.3% of the whole person inclusive of his permanent partial impairment (PPI).

2. Defendants are entitled to a credit for any amounts paid in PPI and/or PPD.

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

DATED this __2nd___ day of __February___, 2012.

INDUSTRIAL COMMISSION

__/s/_____
Thomas E. Limbaugh, Chairman

___/s/_____
Thomas P. Baskin, Commissioner

Participated but did not sign
R. D. Maynard, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __2nd___ day of __February___ 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

THOMAS B AMBERSON
PO BOX 1319
COEUR D'ALENE ID 83616-1319

E SCOTT HARMON
PO BOX 6358
BOISE ID 83707

ge ___/s/_____