BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

REX S. DENOMA, Claimant, v. HOLMAN TRANSPORTATION SERVICES, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2010-018362** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed December 1, 2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on May 5, 2011. Claimant was present and was represented by Hugh Mossman, Esq. and Taylor Mossman, Esq. Defendants Holman Transportation Services and Liberty Northwest Insurance Corporation were represented by Kent Day, Esq. The matter came under advisement on July 22, 2011. By Order dated November 7, 2011, the matter was reassigned to the Commissioners for decision.

ISSUES

Per stipulation of the parties at hearing, the following matters are at issue:

1. Whether Claimant suffers from a compensable occupational disease; and

2. Whether any of the defenses set forth in Defendants' Answer to Claimant's Complaint bar compensability in this case.

All other issues were reserved for future disposition. Although the parties intimated that one of the defenses to the case might involve the timeliness of notice under I.C. § 72-448, this potential defense appears to have been abandoned by Defendants. Indeed, from the post-hearing briefing, it appears that the issues can be further refined as follows:

1. Whether Claimant's condition is causally related to the risk of injury to which he claims to have been exposed in the course of his employment by Defendant; and

2. If Claimant's condition is causally related to the demands of his employment, whether he has met his burden of demonstrating that the risk of injury to which he was exposed is "characteristic of and peculiar to" his employment, as contemplated by I.C. § 72-102(22)(a).

In this occupational disease case, as well as many others that come before the Industrial Commission, it might be worth understanding whether Claimant's condition is wholly referable to the demands of his employment, or rather, whether his condition is simply the result of an aggravation of a preexisting condition by something other than an accident. In the latter case, *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994), might be implicated as a defense to the claim. However, Defendants have not raised *Nelson, supra*, as a defense to the claim. Accordingly, the Commission does not deem it important to the resolution of the threshold matter of compensability to determine whether Claimant brought with him to his employment with Defendant Employer some condition which was later aggravated by the demands of his employment with Employer. As well, with the exception of the issues restated above, the Commission deems all other threshold compensability defenses waived.

CONTENTIONS OF THE PARTIES

Claimant has been variously employed as a long haul truck driver for the past 30 years. He commenced employment with Defendant Employer sometime in 2007. There, he was provided a newer model Peterbilt tractor that presented him with a number of ergonomic

challenges. Claimant contends that the steering wheel and gearshift lever were awkwardly placed, causing increased stress and strain on his upper extremities, and his right arm in particular. Because of the lower horsepower of this particular tractor, Claimant was also required to utilize the shift lever more frequently than he had been accustomed to in earlier employments. Claimant contends that these increased demands, along with other demands of his employment, caused or accelerated degenerative arthritis of the right glenohumeral joint, sufficient to constitute a compensable occupational disease under Idaho law. Claimant further contends that the risk of injury to which he was exposed is characteristic of and peculiar to his occupation.

Defendants argue that the medical evidence fails to establish a causal relationship between the demands of Claimant's employment and his right shoulder injury. Rather, Defendants contend that the most persuasive medical evidence establishes that a more likely explanation for Claimant's right shoulder condition lies in one or more traumatic episodes suffered by Claimant prior to his employment by Defendant Employer. Finally, Defendants contend that there is nothing in the demands of Claimant's employment which distinguishes it from any other occupation in terms of the propensity for developing arthritic changes in the shoulder.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;

2. The parties' Joint Exhibits 1 – 11, admitted at hearing;

3. The testimony of Richard Davis, M.D., taken by way of post-hearing deposition May 9, 2011; and

4. The testimony of Roman Schwartsman, M.D., taken by way of post-hearing

deposition May 20, 2011.

FINDINGS OF FACT

1. Claimant was 48 years of age at the time of hearing, and resided at Middleton, Idaho. He completed the eleventh grade, but does not have a high school equivalency degree.

2. For approximately 30 years, Claimant's occupation has been that of a long haul trucker.

3. For most of his work life, Claimant operated tractors equipped with low flat steering wheels and gearshift levers located immediately adjacent to the driver's seat.

4. In addition to long hours behind the wheel of his tractor, Claimant's job duties as a driver also included cranking down the landing gear on trailers, disconnecting trailers, pulling air lines, and climbing into and out of the tractor.

5. In November 2007, Claimant commenced his employment with Holman Transportation. At that time, he was assigned a new 2007 Peterbilt 387 tractor. This tractor had lower horsepower than tractors Claimant had previously operated. Due to its less powerful engine, Claimant found that he had to shift gears much more frequently than he had in past employments. In the course of an 11 – 18 hour day, Claimant testified that he "constantly" shifted gears.

6. In addition to its lower horsepower engine, the controls of the 2007 Peterbilt to which Claimant was assigned were configured differently than other vehicles that he had operated. Instead of being flat and low, the steering wheel of the 2007 Peterbilt was higher, and oriented in more of a vertical plane. Also, whereas Claimant was accustomed to having his gearshift lever immediately adjacent to the driver's seat, the 2007 Peterbilt was equipped with a gearshift lever that was located some distance away from the driver's seat, towards the center line of the cab. Comparing traditional vehicles to the new style of Peterbilt to which he was

assigned at Holman, Claimant testified as follows:

Q (By Mr. Mossman) Were there any changes in equipment?

A The new style Peterbilt – the trucks I have always been used to, the gear shifter sits close to the seat. The steering wheel is more downward. The new equipment you got the steering wheel up in this position.

Q Okay. Now, just stop there. For the record, you're holding both hands out in front of you a little bit above your shoulder height?

A Yes.

Q How is that different than the trucks you drove before?

A The trucks I had before the steering wheel almost sat like flat and it was down below me.

Q So, the steering wheel –

A About here.

Q Was that in a lower position in front of you?

A Yes. And more flat, where the new ones the wheel faced more like this in front of you.

Q When you say like this, we need to describe that.

A Okay. Take the spokes of the steering wheel, you're sitting almost flat, and you hold the steering wheel like this. The new steering wheel – the spokes are faced somewhat straight up and you're hanging up here.

Q The main difference you appear to be demonstrating is that the position of your hand when you're holding the steering wheel –

A Well, it –

Q Let me finish, please. – are higher than they would be in the equipment you drove before?

A Yes. Before the steering wheel sit like this. Now with the new equipment the steering wheel is up like this.

Q Okay. So, again, if I can try to describe what you're demonstrating there, the steering wheel on the trucks you drove before Holman was more of the horizontal position and the newer steering wheels with Holman were

a little bit more vertical and the main difference was that you – your position of your hand was higher in relation to your shoulder?

A Yes.

Q And you began to describe some differences in the location of the gear shift as well.

A Yeah. The gear shift on the trucks I was used to was right next and the newer style with wide cab you got to reach out like this to shift. You're almost extended all the way out.

Q Okay. When you say like this you're demonstrating with your right arm extended almost full length –

A Yes.

Hrg. Tr. 24/17 – 26/20.

In essence, as a result of the location of the steering wheel in the new vehicle, Claimant found that his hands gripped the wheel at or near shoulder level. As a result of the gearshift lever being located further away from the driver's seat, Claimant found that he had to almost fully extend his right arm to manipulate the lever. As well, because of the lower horsepower of the Peterbilt engine, Claimant was required to shift gears much more frequently than he had in older tractors. (Hrg. Tr. 26/21 – 27/10; 57/2 – 24; 62/19-64/4).

7. As noted, Claimant commenced his employment with Holman in approximately November 2007. Per Claimant's testimony, his last day of work for Holman was on July 27, 2010, a matter of days before his right shoulder surgery on August 10, 2010. Claimant testified that he worked continuously for Holman during this time, with the exception of an approximate three month period during the summer of 2009. Claimant testified that he left Holman because he needed some time away from the owner of the company, Bob Holman. For two months he drove for himself, and for one month he took a vacation to Sturgis in connection with the annual motorcycle enthusiast gathering.

8. Claimant testified that he first began to experience right shoulder symptoms sometime in 2009. He was in general agreement with the history recorded by Dr. Davis on the occasion of Claimant's visit with Dr. Davis of July 28, 2010. Dr. Davis' note of that date reflects that Claimant presented with a history of having suffered from right shoulder complaints for approximately 1½ years. Claimant testified that his right shoulder problems developed gradually, and at first, he paid them little heed. However, shortly before he first saw Dr. Davis, and while on a trip to Dallas, his right shoulder symptoms became so severe, that he was unable to use his right arm in any fashion. (Hrg. Tr. 29/3 – 30/10). According to Claimant, his arm was "totally dead" by this time and he returned to Idaho only with some difficulty.

9. Claimant appears to have first been seen for this problem on May 3, 2010, when he presented for evaluation to Middleton Chiropractic Clinic. The intake self-report reflects that Claimant presented with complaints of numbness in his hands and feet, as well as discomfort in his shoulders, bilaterally, his neck, mid and low back, and abdomen. However, the chiropractor with whom he consulted on May 3, 2010, noted that Claimant's most significant complaint was his right shoulder:

> Sore and achy all over, main problem is the right shoulder. Feels like he has a Rotary cuff tear, can hardly move it. Extremely tender to palpate.

J. Ex. 3, p. 19.

Claimant was next seen at Middleton Chiropractic Clinic on May 19, 2010, at which time the following history was recorded concerning his complaints:

> Right shoulder is killing him, left shoulder seemed better than it was last time, neck is bothering him down between this shoulders about T four five and six area.

J. Ex. 3, p. 19.

10. Claimant appears to have next been seen for medical treatment on June 2, 2010 when he presented to the office of John Downey, D.C. The patient intake history prepared by

Claimant on that date reflects that his presenting complaints included pain in his neck, shoulder, arm and back. Problem areas circled on anatomic diagrams included the head and right upper extremity, inclusive of the right shoulder. Claimant testified that Dr. Downey performed a number of chiropractic adjustments during his sessions with Dr. Downey of June 2, 2010 and June 4, 2010, at one of which Dr. Downey's ministrations resulted in the fracture of one of Claimant's ribs.

11. Interestingly, Claimant was seen on June 5, 2010 at Primary Health in Nampa for the purposes of a medical exam to determine his continuing fitness as a driver. The report generated as a result of that exam reflects that Claimant suffered from no musculoskeletal problems, and that his ability to use his extremities was unimpaired. However, on June 9, 2010, Claimant was first seen by Richard Davis, M.D., the physician who eventually performed a hemiarthroplasty on Claimant on August 10, 2010. On the occasion of his first meeting with Claimant, Dr. Davis recorded the following concerning Claimant's history of injury:

> Rex is a pleasant 48-year-old male who presents with right shoulder pain. He states that his pain has been going on for approximately one year but has worsened over the last three months. The pain is a generalized shoulder pain that radiates into his upper arm. He states that it is an 8/10 at rest and a 10/10 at its worst. It is a constant sharp pain. He is also experiencing some locking and popping. He has seen Dr. John Downey in Middleton for some chiropractic work. He states that cold and lots of movement seems to make his symptoms worse whereas really nothing seems to help his symptoms. He does state that the pain has worsened over the last few weeks since he has gotten a new truck at work. He states that the steering wheel is now much higher and the shifting gear is back behind him. He states that this has really irritated his shoulder and made his symptoms much worse.

J. Ex. 2, p. 16

12. X-Rays performed at Dr. Davis' instance revealed mild degenerative joint disease of the glenohumeral joint. Dr. Davis diagnosed right shoulder impingement/tendonitis and right shoulder degenerative joint disease, mild. He performed a subacromial injection of Claimant's

right shoulder. Dr. Davis also released Claimant from work through June 14, 2010. Claimant testified that the subacromial injection did ease his symptoms for a period of time. However, his symptoms were still significant enough by June 30, 2010 that Dr. Davis ordered MRI evaluation of the shoulder. That study was thought to show a moderate partial thickness tear of the supraspinatus tendon, severe glenohumeral joint osteoarthritis, as well as a severely degenerated and torn labrum. (See J. Ex. 2). Dr. Davis discussed a number of treatment options with Claimant, including surgery. By July 28, 2010, both Dr. Davis and Claimant had agreed that Claimant would undergo a resurfacing hemiarthroplasty to treat his right shoulder condition. This procedure was performed on August 10, 2010, and has been only partly successful in relieving Claimant's complaints.

13. In terms of preexisting right shoulder problems, Claimant initially denied having any right shoulder injuries prior to his employment by Holman. (Hrg. Tr. 21/16 – 20). However, following review of preinjury medical records, Claimant acknowledged that he has been treated in the past for at least three motor vehicle accidents which may have involved some trauma to the right shoulder.

14. The earliest medical records in evidence were prepared in connection with Claimant's treatment by John Downey, D.C., commencing July 25, 2002. Those records reflect that Claimant presented on that date with complaints of lower back and neck pain following an automobile accident. Evidently, Claimant was stopped at an intersection when he was rear-ended by another vehicle traveling at 30 – 45 miles per hour. The two treatment notes from 2002 do not reflect that Claimant had any complaints of right shoulder pain following this accident. (See J. Ex. 4).

15. Claimant was evidently involved in a similar accident on November 16, 2003. Dr. Murdoch's chart notes reflect that the accident occurred as follows:

> The patient is a 42-year-old male who was involved in a motor vehicle accident on 11/16/03. He reports that he was sitting in the driver compartment of his one ton pickup truck when he was struck from behind at a rate of speed of 65 mph. The vehicle in which Mr. Denoma was driving was not moving at the time of the injury. The patient indicates that he had immediate onset of left wrist pain as well as abdominal pain. Over the course of the past six months, he has undergone clinical and radiographic evaluation. The source of the wrist pain has not yet been completely determined. Patient also is complaining of increasing abdominal pain associated with activities of lifting and walking. He notes that the occasionally coughs up food, which was consumed approximately three to four days prior. The patient is reporting an enlarging mass in his midline just distal to his xiphoid process.

J. Ex 7, p. 53

Dr. Murdoch's notes from April 19, 2004 do not reflect that Claimant suffered any right shoulder symptomatology as a consequence of the November 16, 2003 accident.

16. Records from Caldwell Chiropractic Center reflect that Claimant was next involved in a motor vehicle accident on March 10, 2006 in Kansas City, Missouri. The mechanism of that accident is not entirely clear. Per the auto accident information form filled out by Claimant at Caldwell Chiropractic Center, three vehicles were involved in the accident, and Claimant's vehicle was impacted from the left side. Claimant reported that immediately following the accident he experienced low back and right shoulder discomfort. However, by the next day, his only complaints were of neck pain. When seen at Caldwell Chiropractic Center on March 20, 2006, Claimant's complaints were limited to his lower cervical spine and mid/low back.

17. Claimant treated at Caldwell Chiropractic Center on approximately seven occasions between March 20, 2006 and June 21, 2006. Though the hand written treatment notes are difficult to decipher, from none of the notes does it appear that Claimant presented with any complaints of shoulder pain/discomfort through June 21, 2006.

18. Commencing February 13, 2007, Claimant was treated at Caldwell Chiropractic

Center for complaints including neck and right shoulder discomfort. Again, the hand written notes are difficult to decipher, but it appears that Claimant may have been suspected of suffering from a right rotator cuff injury. For his part, Claimant testified that following the March 10, 2006 accident, the only significant problem he remembered was his neck and back. During cross-examination, it was suggested to Claimant by defense counsel that taken as whole, the chiropractic records from 2006 and 2007 demonstrated that Claimant had ongoing and continuous right shoulder symptoms from March 10, 2006 through late February of 2007. Claimant declined to adopt this proposition, stating on re-direct that all he really remembered was problems with his neck and back. (See Hrg. Tr. 54/19 – 55/4; 61/7 – 62/18).

19. In response to many of the questions put to Claimant concerning his past medical history and his past history of right shoulder symptoms, Claimant professed little to no recollection of past events. The Commission is not persuaded that Claimant's poor memory is evidence of any attempt on his part to dissemble the truth. Rather, the Commission is of the view that Claimant is simply a poor historian, and that reference to the medical records, to the extent that they can be deciphered, is a better source from which to glean Claimant's past history of treatment and symptoms.

TESTIMONY OF DR. DAVIS

20. Dr. Davis is board certified orthopedic surgeon, who saw Claimant in connection with his right shoulder difficulties, and eventually performed a hemiarthroplasty of Claimant's right shoulder in an effort to alleviate his symptoms. The goal of the surgery was to replace Claimant's arthritic glenohumeral joint.

21. As to the etiology of Claimant's degenerative joint disease, Dr. Davis acknowledged that the condition from which Claimant suffered can have a number of causes, and in order to determine a likely cause of Claimant's condition, it is necessary to correlate the

clinical findings with history taken from Claimant. For example, it is known that degenerative joint arthritis can have its genesis in a single traumatic event which disrupts the articular surface, and leads to degenerative joint disease. On the other hand, degenerative joint disease can have its genesis in cumulative traumas or micro traumas, which incrementally stress and damage the joint, eventually producing the type of changes seen in Claimant. To understand what the likely cause is in Claimant's case, one must pay attention to the history of injury.

22. Dr. Davis testified that he did not take a history from Claimant concerning any single traumatic event to which Claimant related the onset of his difficulties. Rather, Claimant described steering and shifting activities to which he was exposed in the course of his employment as the things he (Claimant) felt were associated with the onset of right shoulder discomfort.

23. Dr. Davis testified that the steering and reaching activities described by Claimant are the types of activities which are associated with a cumulative stress disorder. Based on the fact that the objective findings in Claimant's glenohumeral joint are entirely consistent with the right sided activities described by Claimant, and in the absence of another credible explanation for the development of Claimant's objective findings, Dr. Davis testified to his opinion that it is more probable than not that Claimant's degenerative joint disease is causally related to the hazards to which he was exposed as a part of his employment by Holman.

24. On cross-examination, Dr. Davis acknowledged that not all truck drivers develop glenohumeral joint arthritis. He acknowledged that the development of the degenerative disease is multifactoral, and that it is more frequently seen in older individuals. However, at age 48, one would not typically expect to see the type of changes seen in Claimant's shoulder, and the fact that Claimant has right-sided complaints, and predominantly right-sided work activities, persuades Dr. Davis that the activities described by Claimant, i.e. steering and shifting, are

causally related to the development of his problem. He stated that his opinion might change were it shown that Claimant had bilateral degenerative disease of the glenohumeral joints. The existence of bilateral shoulder disease would call into question the conclusion that Claimant's right shoulder condition was caused by the activities for which he primarily used his right upper extremity.

25. On cross-examination, Dr. Davis was also questioned about his assumption that Claimant did not have a history of specific traumatic events involving the right shoulder. Dr. Davis acknowledged that it would be important to consider such a history in evaluating the cause of Claimant's degenerative joint disease. However, he noted that for a single event or events to be considered as an explanation of Claimant's objective findings, the event would have to cause a significant trauma to the shoulder, a trauma that would leave Claimant with persistent and continuing complaints.

TESTIMONY OF DR. SCHWARTSMAN

26. Dr. Schwartsman is, as well, a board certified orthopedic surgeon. He evaluated Claimant on one occasion at the instance of Defendants pursuant to I.C. § 72-433(1). The report he generated following that exam is found at J. Ex. 8.

27. As was the case with Dr. Davis, Dr. Schwartsman did not receive a history from Claimant concerning the motor vehicle accidents in which Claimant was involved prior to the date of his hire by Holman Transportation. Dr. Schwartsman concurred with Dr. Davis' diagnosis of degenerative joint disease of the right shoulder. In his written report dated November 2, 2010, Dr. Schwartsman does not reference any history from Claimant concerning the specifics of his work activities at Holman Transportation. Concerning the etiology of Claimant's degenerative joint disease of the glenohumeral joint, Dr. Schwartsman's November 2, 2010 report offers the following commentary:

> There is no objective evidence on which I would conclude that the need for surgery was based on any specific industrial event. There was no specific documented industrial event other than the patient's statement the truck driving did this to him.

J. Ex. 8, p. 60

28. Accordingly, although Dr. Schwartsman's November 2, 2010 report purports to rule out a specific trauma as the inciting event leading to Claimant's objective findings, it does not appear to address Claimant's theory that his degenerative joint disease is the result of long term wear and tear occasioned by his exposure to certain specific risks associated with his employment. Dr. Schwartsman did have the opportunity, however, to address Claimant's theory of causation at the time of his post-hearing deposition. At the time of his deposition, Dr. Schwartsman was afforded the opportunity to consider Claimant's testimony concerning both the hand control layout of the 2007 Peterbilt, and the frequency with which Claimant used the hand controls with his right upper extremity. Dr. Schwartsman testified that nothing that he had learned about Claimant's steering and shifting activities would cause him to consider those activities as a probable cause of Claimant's degenerative joint disease. Explaining his opinion, Dr. Schwartsman testified:

> Q (By Mr. Day) So, in your professional opinion, the type of occupational stress that Mr. Denoma was working under is not causative or would not have permanently aggravated or accelerated the degenerative arthritis?
>
> A Arthritis – let me give you the longwinded answer to this question. Arthritis is deterioration of the articular cartilage that lines the joint. In this case, we're talking about the ball and socket joint of the shoulder.
>
> In order for this to occur, from a traumatic fashion, there has to be a sheer force or a consistent nonphysiologic axial load on the cartilage. In other words, the ball has to bang into the socket of the shoulder repeatedly or sheer against the socket or the shoulder repeatedly. That implies that there is a substantial weight that's being supported by that arm.
>
> In other words, if you're pushing a large weight up overhead all the time, if you're pulling against something that provides substantial

resistance all the time, then you are generating those kinds of sheer forces. There's nothing that I'm aware of about operating a steering wheel or a gearshift knob that would subject the shoulder joint to those kinds of forces that would be necessary to cause the traumatic and degenerative conditions that we're seeing here.

Q So, that –

A The simple answer is no, there's nothing about truck-driving that would cause this.

Schwartsman Depo, 29/14 – 30/22.

29. On the other hand, after learning that Claimant had suffered three motor vehicle accidents in the years preceding his employment at Holman, Dr. Schwartsman testified that it is more likely than not that these accidents are responsible for the degenerative joint disease seen in Claimant's shoulder, a disease process which would be atypical in an individual Claimant's age, absent some traumatic event.

30. Although Dr. Schwartsman agreed with Dr. Davis that the disease noted in Claimant's shoulder could be the result of wear and tear, and could also be the result of specific traumatic events, he specifically disagreed with Dr. Davis' judgment that the type of activities performed by Claimant on a daily basis could, if performed long enough, cause the objective findings seen at the time of surgery. If steering and gear shifting were causes of degenerative joint disease, Dr. Schwartsman would have assuredly have seen this in his practice, a practice in which he evidently sees truck drivers from time to time. Nor, is Dr. Schwartsman aware of any literature on the subject which supports the proposition that truck drivers are at a greater risk of injury for degenerative joint disease of the glenohumeral joint than other occupations.

DISCUSSION AND FURTHER FINDINGS

I.

CAUSATION

31. Claimant alleges that his degenerative joint disease of the right glenohumeral joint constitutes a compensable occupational disease. As one of the elements of his prima facie case, Claimant must demonstrate that a causal relationship exists between the demands of his employment, and the condition for which he seeks compensation. Medical testimony to a reasonable degree of medical probability is required to prove a casual connection between the disease and the occupational exposure which is alleged to have caused it. *Langley v. State Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995). "Probable" is defined as having more evidence for than against. *Fisher v. Bunker Hill Company*, 96 Idaho 341, 528 P.2d 903 (1974). Here, Claimant contends that his testimony, buttressed by the opinion of Dr. Davis, is sufficient to establish that his degenerative joint disease of the glenohumeral joint is causally related to the demands that he described. Equally adamant, Defendants contend that the testimony of Dr. Schwartsman establishes that the demands of Claimant's employment are not implicated in causing his disease, and that it is more likely that Claimant's condition (which even Dr. Schwartsman agrees is atypical for an individual Claimant's age) is related to one or more traumatic episodes suffered by Claimant prior to his employment by Holman.

32. Claimant has worked as a long haul trucker for over 30 years, yet only appears to have developed significant shoulder problems following a number of significant ergonomic changes he was forced to accommodate when he was assigned a 2007 Peterbilt truck contemporaneous with the commencement of his employment by Holman. Claimant has credibly and persuasively described, from a lay person's point of view, how these ergonomic changes detrimentally impacted his ability to perform his work. First, the change in the height and orientation of the steering wheel forced Claimant to steer the vehicle with his hands located at or near shoulder level. Second, the relocation of the gear shift lever from a point close to the driver's seat to a point closer to the center line of the cab, required of Claimant that he fully

extend, or almost fully extend, his right arm in order to engage the shifting mechanism. Finally, Claimant testified that because the Peterbilt truck to which he was assigned in 2007 was less powerful, he was required to shift gears with much greater frequency than he was accustomed to when driving older, more powerful, vehicles. Claimant has persuasively testified that after he began to operate this vehicle, he noted the gradual, but progressive onset of right shoulder discomfort, of a type he had not previously experienced. The Commission appreciates that a temporal relationship between the hazards of Claimant's employment and the onset of discomfort does not establish medical causation. However, the existence of such a temporal relationship is a necessary prerequisite to a finding that Claimant's employment activities are responsible for causing his condition.

33. It is noted that Defendants have attempted to establish that Claimant's right shoulder condition actually has its genesis in one or more motor vehicle accidents occurring prior to Claimant's employment with Holman. However, as revealed in the Commission's findings of fact, there is a paucity of medical evidence from which it can be argued that Claimant had any symptomatic right glenohumeral joint pathology prior to the commencement of his employment at Holman. In fact, the only medical evidence which tends to support the proposition that Claimant had right shoulder symptomatology prior to November 2007, is found in the records of Dr. Downey. It will be recalled that in February 2007, Dr. Downey treated Claimant on four occasions for neck and right shoulder discomfort, thought by Dr. Downey to possibly represent a rotator cuff injury. However, these records, upon which Defendants rely to support their argument that Claimant's right shoulder symptoms, and therefore, his injury, predate his employment by Holman, are altogether inadequate in the Commission's view to denigrate Claimant's theory of causation. First, the interesting portions of the chiropractic records are hand written and almost illegible. It is by no means clear that the references to Claimant's right

shoulder were thought by Dr. Downey to represent an injury to Claimant's glenohumeral joint. Dr. Downey was not deposed, nor were his records translated. In the final analysis, there is nothing in Dr. Downey's notes that challenges Claimant's explanation that the main reason he went to see Dr. Downey was for neck pain, and that he does not have a recollection of significant right shoulder symptomatology in February 2007. To Defendants' suggestions that the 2007 records from Dr. Downey demonstrate that Claimant had continuous right shoulder symptoms from March 10, 2006 through February 2007, the record offers even less support for this proposition. The medical records generated by Dr. Downey commencing March 20, 2006 do not reflect that Claimant treated for complaints of right shoulder discomfort at any time during March, April, May or June of 2006.

34. Dr. Davis was unaware of Claimant's history of motor vehicle accidents predating his employment by Holman. Although Dr. Davis freely acknowledged that a specific traumatic event can lead to degenerative joint disease, he was very clear in testifying that the event must be significant, i.e. of the type that causes prolonged and notable symptoms in the affected joint. Here, the medical evidence fails to establish that any of the motor vehicle accidents predating Claimant's employment with Holman constitutes such a significant traumatic event. As noted above, following the 2002 and 2003 accidents, the available records do not reflect that Claimant presented with any right shoulder complaints. It is only following the March 20, 2006 accident that the evidence suggests the possibility that Claimant suffered some type of shoulder injury as a result thereof. However, although Claimant acknowledged that immediately following the March 10, 2006 accident he had right shoulder discomfort, the medical records reflect that this discomfort had vanished by the next day, and that Claimant treated with Dr. Downey on multiple occasions through June 2006, without any apparent reference to the appearance of any shoulder complaints. In short, there is no evidence of the type that Dr. Davis thought would be significant

enough to cause him to consider a traumatic origin of Claimant's degenerative joint disease.

35. Dr. Schwartsman, too, acknowledged that degenerative joint disease can have its genesis in a specific traumatic event. Dr. Schwartsman, however, was persuaded that one or more of the motor vehicle accidents referenced above were sufficient to cause the condition for which Claimant seeks benefits. In fact, Dr. Schwartsman was unequivocal in his support of a traumatic theory of injury, and altogether disdainful of Claimant's theory of causation. However, in discussing how a traumatic event can lead to degenerative joint disease, even Dr. Schwartsman acknowledged that the event must be significant enough to disrupt the cartilage surface of the joint: There must be some damage to the articular surface before the disease can start to progress. However, although Dr. Schwartsman proposed that one or more of the motor vehicle accidents were of such significance as to ultimately lead to the development of degenerative joint disease, his opinion is undermined by the fact that none of the motor vehicle accidents are shown to have impacted the shoulder. For example, Dr. Schwartsman speculated that the 2003 motor vehicle accident which caused an injury to Claimant's left wrist, is also likely to have caused an injury to the right shoulder. Because Claimant was struck from behind, this produced a significant axial load to the right shoulder, and is therefore a likely starting point for the development of degenerative joint disease. Frankly, this testimony is altogether speculative, and is in no wise supported by the contemporaneous medical record.

36. Similarly, the Commission is unpersuaded by Dr. Schwartsman's rejection of the theory of injury purposed by Dr. Davis. Although Dr. Schwartsman acknowledges that repetitive activities can initiate degenerative joint disease of the glenohumeral joint, he did not believe that the activities described by Claimant were of the type associated with the development of degenerative joint disease of the glenohumeral joint. In this regard, it will be recalled that in order to create a risk of injury to the glenohumeral joint, it must be shown that a particular

activity produced axial loads on the ball and socket which caused the ball of the humeral head to bang against the socket, or cause the ball of the humeral head to sheer against the socket. Per Dr. Schwartsman, if you're pushing large weights overhead all the time, or if you're pulling against something that provides substantial resistance all the time, then these types of forces might be generated. In fact, these are exactly the types of activities described by Claimant. The steering wheel in the Peterbilt truck was oriented in a fashion that required of Claimant that he grip the wheel with his hands near or at the shoulder level. More importantly, because of the location of the gear shift in the new vehicle, Claimant was required to fully extend his right arm in order to manipulate the lever to change gears. Undoubtedly, this required a degree of pushing and pulling, and it is not hard to imagine that this continuous activity also implicated sheer forces of the type thought to be important by Dr. Schwartsman.

37. The Commission recognizes that Dr. Schwartsman was emphatic in his opinion that Claimant's driving activities have nothing to do with the development of his condition. However, that Dr. Schwartsman embraces so uncritically the view that Claimant's degenerative joint disease is caused by specific traumatic events predating Claimant's employment, casts significant doubt on his credibility and independence. To reiterate, nothing is known about the mechanism of the March 10, 2006 motor vehicle accident other than that Claimant's vehicle was impacted on the driver's side. We do not know how severe the impact was. We do not know how Claimant was situated in the vehicle when the impact occurred. In short, we do not know if the accident was of a type that might impart a significant axial load or sheering force to the right shoulder. For Dr. Schwartsman to suppose, on the basis of this evidence, that it is more probable than not that Claimant's degenerative joint disease of the right shoulder is related to one or more of Claimant's preemployment motor vehicle accidents strains credulity. On the other hand, the Commission finds that Dr. Davis' opinion on causation is credible, and well supported by the

evidence of record. True, Dr. Davis was unaware of Claimant's history of motor vehicle accidents predating his employment with Holman, but it is clear from Dr. Davis' testimony that he would not deem these incidents to be significant, or a likely cause of Claimant's condition. Dr. Davis concluded that the work activities described by Claimant were important to the development of his condition because Claimant's most significant complaint was of right shoulder pain, and it turns out that because of the location of the gear shift, Claimant used his right upper extremity more vigorously and more frequently than he used his left upper extremity. Dr. Davis' reasoning in this regard makes sense, and the Commission is more persuaded by his views on the question of causation than those espoused by Dr. Schwartsman.

38. Based on the foregoing, the Commission concludes that Claimant has met his burden of establishing that it is more probable than not that the condition for which Claimant seeks benefits is causally related to the demands of his employment.

II.

CHARATERISTIC OF AND PECULAR TO

39. Quite apart from his obligation to prove actual causation, Claimant also has the burden of proving that the hazards of the disease to which he was exposed are "characteristic of and peculiar to" his occupation. See I.C. § 72-102(22)(a). The treatment of this element of the prima facie case has an interesting history, and, as developed below, there is yet some difficulty in understanding exactly what standard Claimant must satisfy in order to prove this element of his case. The phrase was first construed in *Bowman v. Twin Falls Construction Company, Inc.*, 99 Idaho 312, 518 P.2d 770 (1978). There, claimant contended that his pulmonary disease was the result of rock, dust and other airborne irritants to which he was exposed in the course of his employment as a heavy equipment operator. The Commission concluded that the claimant's pulmonary disease was neither due to the nature of his occupation, nor was it characteristic of

and peculiar to his employment. In reaching this conclusion, the Commission relied, in part, on the testimony of a medical expert who opined that heavy equipment operators are not known to routinely develop emphysema. In reversing the Commission, the Court expressed its belief that the Commission may have entertained an overly restricted notion of how peculiar to a given employment the hazards must be before an occupational disease can be deemed compensable. Remanding the matter to the Commission for further action, the Court provided the following guidance as to the meaning and application of the term "characteristic of and peculiar to":

> What, then, should the Commission look for in determining whether a given occupational disease results from hazards "characteristic of and peculiar" to the worker's occupation? We find the best answer is that given by the Supreme Court of Michigan which, in construing "characteristic of and peculiar to" language, held that the requirement means
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> "The term 'peculiar to the occupation' is defined in *Glodenis v. American Brass Co.*, 118 Conn. 29, 170 A. 146, 150, and quoted in Mr. Justice Reid's opinion in *Samels v. Goodyear Tire & Rubber Co.*, 317 Mich. 149, 26 N.W.2d 742, 745, as follows: 'The phrase, "peculiar to the occupation," is not here used in the sense that the disease must be one which originates exclusively from the particular kind of employment in which the employee is engaged, but rather in the sense that the conditions of that employment must result in a hazard which distinguishes it in character from the general run of occupations.'" (Emphasis in original.)
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> *Bowman v. Twin Falls Const. Co., Inc.*, 99 Idaho 312, 581 P. 2d 770 (1978), quoting *Underwood v. National Motor Castings Division, etc.*, 329 Mich. 273, 45 N.W.2d 286-87 (1951).

40. In *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996), claimant was employed as a shop manager at a Coeur d'Alene tire store. In this job, he was required to do a substantial amount of lifting, bending and twisting in connection with this duty installing tires on vehicles. An early snowfall in Coeur d'Alene in November 1992 led to an increase in these duties, and the evidence established that claimant worked a significant amount of overtime to keep up with his work. In February 1993, claimant noted the onset and progression of low back pain. He was eventually diagnosed as having suffered a low back disc herniation. The

Commission denied claimant's claim for benefits, concluding that the evidence failed to establish that claimant suffered a compensable occupational disease. Specifically, the Commission first concluded that claimant had failed to meet his burden of establishing a causal connection between his low back condition and the demands of his employment. In addition, however, the Commission addressed the question of whether claimant's condition was the result of a hazard which was "characteristic of and peculiar to" his occupation. Citing *Bowman*, the Commission noted that this phrase has been interpreted by the Court to mean that the employment must result in a hazard which distinguishes that particular employment from the general run of occupations. The Commission applied this rule to conclude that claimant's work was "not distinguishable from many other occupations which involve strenuous or heavy labor," and concluded that claimant did not meet this additional element of his prima facie case. In affirming the Commission's reasoning in this regard, the Court stated:

> The Commission noted that Ogden's duties involved a significant amount of heavy lifting, twisting, and bending. These activities are certainly not exclusive to Ogden's occupation and are typical of activities common to the general run of occupations involving manual labor.

Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1996).

41. The difficulty with this decision is that there is a world of difference between concluding that Ogden's employment could be distinguished from the general run of occupations and the conclusion that Ogden's employment could be distinguished from the general run of occupations involving manual labor. One could certainly propose that the hazards of Ogden's employment were distinct from the hazards to which people are exposed in the general run of occupations, recognizing that the "general run of occupations," includes all occupations. However, it is much more difficult to distinguish the hazards of Ogden's job from the general run of occupations "involving manual labor." With this qualifier, it is much easier to conclude

that Ogden could not meet this element of his prima facie case because most, if not all, "manual labor jobs," likely involve a substantial amount of lifting, bending and twisting, just like Ogden's job.

42. Applied to the facts of the instant matter, it could well be argued that the injurious demands of Claimant's employment are distinguishable from the risks to which people are exposed in the general run of occupations. However, it would be harder to argue that the injurious demands of Claimant's work can be distinguished from the general run of occupations involving manual labor. Clearly, appending this qualifier to the general rule expressed in *Bowman* can make a difference in whether Claimant meets or does not meet this element of his prima facie case.

43. The meaning of "characteristic of and peculiar to" was next addressed in the case of *Mulder v. Liberty Northwest Ins. Co.*, 135 Idaho 52, 14 P.3d 372 (2000). In that case, Mulder was employed as a workers' compensation insurance adjuster. His job responsibilities required of him that he drive from Boise to Idaho Falls, Pocatello and Blackfoot on a regular basis. The evidence established that during his trips Mulder would meet with up to four clients per day, and his duties required him to handwrite from one to four pages of notes per client. When claimant was not travelling, he spent his time in the Boise office, where his duties included the use of a computer keyboard. At some point in 1994, Mulder began to notice symptoms consistent with carpal tunnel syndrome, and in 1996 he was so diagnosed by his treating physician. Claimant contended that his carpal tunnel syndrome was an occupational disease which was causally related to the demands of his employment, and which arose from a hazard which was characteristic of and peculiar to his employment. The Commission ultimately concluded that claimant's bilateral carpal tunnel syndrome constituted a compensable occupational disease. Concerning the application of the "characteristic of and peculiar to" test, the Court first reiterated

the rule expressed in *Bowman* that the phrase is used in the sense that the conditions of the employment must result in a hazard which distinguishes it in character from the general run of occupations. Employer argued that it was inappropriate to employ the *Bowman* test in carpal tunnel syndrome cases, since the risks of carpal tunnel syndrome are risks of which are common to the activities of daily living, and are also risks of which exists in the vast majority of other occupations. Employer asked the Court to take judicial notice of the fact that virtually all employees drive, write and keyboard. Thus, employer appears to have essentially argued that there was nothing about the risks to which Mulder was exposed that were distinct, as compared to the risks of the general run of occupations. In response to employer's invitation, the Court stated:

> While it is noted that a great number of occupations require an employee to drive, write or use a computer keyboard, an equally great number do not. It is the rare case that manufacturing, assembly line or construction employees are called upon as a requisite of their employment to operate an automobile, take extensive notes or utilize a computer keyboard. Moreover, the vast number of occupations which may require one or more of these activities likely do not require all of them, Therefore, we disagree with Liberty's assertion and hold that the test set out in *Bowman* is properly applied to worker's compensation claims involving carpal tunnel syndrome.
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> Applying the test from *Bowman*, the Commission found the hazards that Mulder was exposed to during his work at Liberty could be distinguished from the general run of occupations. The Commission determined that exposure to long periods of repetitive upper extremity motions, including writing, keyboarding, and gripping of a steering wheel are not characteristic of all occupations. The Commission based its factual determination, in part, on the medical testimony of Dr. Lenzi and upon the description of the job duties peculiar to Mulder's position with Liberty. The Commission determined that those duties necessitated driving, handwriting and keyboarding. Though Liberty presented conflicting testimony from its expert, Dr. Richard Knoebel (Dr. Knoebel), this Court will defer to the Commission's findings as to the credibility of conflicting medical experts. *See e.g. Pomerinke v. Excel Trucking Transport, Inc.*, 124 Idaho 301, 305, 859 P.2d 337, 341 (1993). This evidence is substantial and competent, and will not be disturbed on appeal.

44. The important point to glean from *Mulder* is that the Court unambiguously based its analysis on the comparison of the hazards of claimant's particular employment, to the general

run of occupations, and not some subset thereof. The Court's explanation of the rule is entirely consistent with the rule's original expression in *Bowman*, but is hard to reconcile with the more constrained rule that is apparently set forth in *Ogden, supra*. Choosing which rule should apply in this case is important since the *Bowman/Mulder* rule is likely to result in a finding that Claimant has met this element of his prima facie case, whereas application of the approach utilized in *Ogden* might well result in a denial of benefits; most manual labor jobs require a good deal of pushing, pulling and reaching with the upper extremities, therefore making it more difficult to distinguish Claimant's work from the general run of occupations involving manual labor.[1]

45. Because *Mulder* is the Court's most recent pronouncement on the issue, and because that case unambiguously hews to the view originally espoused by the Court in *Bowman*, we conclude that this is the standard which the Court intends the Commission to apply in evaluating the question of whether or not the injurious hazards to which Claimant was exposed are "characteristic of and peculiar to" his trade or occupation.

46. It is notable that in this, and in almost every other case in which the Commission is asked to address this issue, there is a dearth of evidence on the question of whether or not a particular risk of injury can be distinguished from the risks to which people are exposed in the general run of occupations. Physicians are often called upon to render an opinion on this issue, but, of course, the issue is hardly one that can be said to be in an orthopedic surgeon's realm of expertise. Simply, the question is not a medical question, but, instead, calls for a different type of expertise from someone (a human factors expert? an ergonomics expert? an engineer?) who

[1] Even so, Claimant might still meet this element of the prima facie case under the *Ogden* approach;

Although most manual labor jobs might require use of the upper extremities, a subset of these jobs requires repetitive use of the upper extremities. We have found that Claimant's right upper extremity activities were repetitive in nature, so it might well be argued that his job can be distinguished even from the general run of occupations including manual labor.

can speak to the distribution of the particular risk in question among all other occupations. It is quite possible that a physician may possess this expertise, but the qualifying foundation is not immediately evident in this matter. Dr. Schwartsman testified that he sees truck drivers in his practice, and not every truck driver has glenohumeral degenerative joint disease. Dr. Schwartsman also testified that he does see higher incidence of degenerative joint arthritis of the glenohumeral joint in some professions, but it is not his experience that this is the case in the trucking industry. Dr. Davis acknowledged that not all the truck drivers he sees have arthritis. He also testified that although the activities described by Claimant create a risk for cumulative trauma disorder, so would any activity where the arm is lifting/manipulating objects away from the main axis of the body. This testimony, though touching on the issue at hand, really does nothing to advance argument on the question of how the injurious hazard to which Claimant was exposed compares to the risks experienced by workers in the general run of occupations. However, common sense, as was employed in *Mulder*, provides an answer when medical expertise does not.

47. Claimant worked 11 – 18 hours per day in his job. Even before he was assigned his Peterbilt truck, his job required of him that he spend long hours every day manipulating the hand controls of his vehicle. These tasks became more onerous, and more frequent, after he was assigned a new vehicle contemporaneous with this employment by Holman Transportion in 2007. Claimant described his use of his right upper extremity as continuous. He was either grasping/manipulating the steering wheel, or shifting all day long. His testimony in this regard was not subject to serious challenge. More so than the facts before the Commission in *Mulder*, it can be concluded that while many occupations may require a worker to engage in similar, if not more onerous use of the upper extremities, an equally great number do not. Based on the foregoing, and applying what we think is the correct rule of law, we conclude that Claimant has

met his burden of establishing, on a more probable than not basis, that his condition is not only causally related to the demands of his employment, but also is the result of his exposure to a hazard which is characteristic of and peculiar to his employment.

CONCLUSIONS OF LAW AND ORDER

1. Claimant's degenerative joint disease of the right glenohumeral joint is causally related to the demands of his employment;

2. The hazards to which Claimant was exposed in the course of his employment are characteristic of and peculiar to his employment;

3. Claimant has established that he suffers a compensable occupational disease under Idaho law;

4. All other issues are reserved for further proceedings.

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

IT IS SO ORDERED.

DATED this _1st___ day of __December_____, 2011.

INDUSTRIAL COMMISSION

Participated but did not sign
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 __1st___ day of __December____, 2011, a true and correct copy of the foregoing **Findings of Fact, Conclusions of Law and Order** was served by regular United States Mail upon each of the following persons:

HUGH MOSSMAN
611 W HAYS ST
BOISE ID 83702

KENT W DAY
PO BOX 6358
BOISE ID 83707-6358

mw __/s/_____