BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TODD FISHER, Claimant, v. BOISE PETERBILT, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORP., Surety, Defendants.	**IC 2008-019786** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed August 17, 2012**

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Douglas Donohue. Referee Donohue conducted the August 26, 2011 hearing in Twin Falls, Idaho. Dennis R. Petersen represented Claimant. Kent W. Day represented Employer/Surety. The parties presented oral and documentary evidence at the hearing, and subsequently submitted post-hearing depositions and briefs. Claimant did not file a reply brief. The case came under advisement on March 5, 2012. It is now ready for decision.

ISSUES

After due notice and by agreement of the parties at hearing the issues are:

1. Whether Claimant has shown entitlement to Total Temporary Disability (TTD) benefits or Total Partial Disability (TPD) benefits from April 2, 2009 until June 27, 2010; and,

2. Whether Claimant has shown he has Permanent Partial Disability (PPD) in excess of his 5% impairment.

CONTENTIONS OF THE PARTIES

Claimant argues he is entitled to temporary total disability (TTD) benefits from April 2, 2009 until June 27, 2010, because he remained in a period of recovery. Dr. Schwartsman's April 1, 2009 release of Claimant back to work was premature, because Claimant required an additional surgery to treat his industrial injury. Claimant contends that Employer abruptly discharged him in July 2009, and the discharge does not excuse Employer's TTD obligation.

Claimant requests disability of at least 60% PPD inclusive of impairment, based on Mr. Delyn Porter's report. Claimant's argues his restrictions significantly impact his present and future ability to engage in gainful activity and cause considerable wage loss, due to Claimant's limited education, minimal marketable skills, and his bilateral hearing loss and speech disabilities.

Defendants argue that Claimant is not entitled to additional temporary total disability (TTD) benefits, because he was not in a period of recovery from April 2, 2009 through June 27, 2010. Dr. Schwartsman released Claimant back to work in 2009, and Claimant's restrictions allowed him to return to work. Defendants paid Claimant all benefits related to the subsequent medical treatment. The subsequent medical treatment, including Dr. Coleman's surgery, does not retroactively entitle Claimant to TTD benefits. In the alternative, Claimant's poor performance post-release, which ultimately resulted in his discharge, is the equivalent of Claimant refusing a bona fide offer of employment and forfeiting his entitlement to TTD

benefits. See Smith v. Champion Building Products. Div., 1994 IIC 1511, 94 IWCD 9896. Defendants have paid all other TTD benefits due to Claimant.

Defendants contend that Claimant's minimal impairment has not caused much labor market loss of access or wage loss. Claimant remains capable of performing many medium-duty positions; his transferrable skills and varied job background will facilitate re-employment at or above his time-of-injury wage, once Claimant is motivated to take his employment pursuits seriously. Claimant's disability analysis is more reliant on Claimant's subjective opinion of his capabilities than on his actual physical condition. However, vocational expert, Mr. Bill Jordan, analyzed Claimant's labor market access and wage loss based on the objective medical record. The objective medical record shows Claimant has not suffered disability over 5% PPD. Claimant's hearing loss has never been a disabling issue, and may be remedied with hearing aids. In the alternative, Claimant has not proven entitlement to disability more than 15% disability, inclusive of impairment, under Baldner v. Bennett's, Inc., 103 Idaho 458, 649 P.2d 1214 (1982).

EVIDENCE CONSIDERED

The Record in this case consists of the following:

1. Oral Testimony by at hearing from Claimant and Irene Sanchez;
2. Claimant's Exhibits 1 through 17 admitted at hearing;
3. Defendants' Exhibits A through E admitted at hearing;
4. Post-hearing Depositions from Don Aubrey Coleman, Thomas Nilsen, William C. Jordan, and Delyn Porter; and
5. The Commission's legal file.

FINDINGS OF FACTS

1. Claimant was born in 1969. He was 42 years old at the time of hearing, and resided in Heyburn, Idaho. Claimant earned good grades and a high school diploma from the non-accredited Calvary Christian School in Burley, Idaho. Were Claimant to seek a college degree, he would be required to obtain a GED. Claimant has completed some college courses offered through a previous employer.

2. Claimant's employment history reflects a myriad of heavy-duty and medium-duty jobs of short duration. Except for a period of employment at McCain Foods from 2002-2006, Claimant has averaged more than one job per year, every year since high school. Claimant worked during high school helping people with disabilities and delivering newspapers. After leaving high school, Claimant managed a car wash and worked for the Burley Irrigation District. Claimant worked for Crown Pacific Lumber Mill on the green chain. Between 1990 and 1992, Claimant worked for Manpower and Express Services. In 1991, Claimant started working for the Pioneer Cut Stock lumber mill on laminating, finger joints, and the green chain. In 1992, Claimant was a cutter deck one/two operator where he was in charge of machinery and assembly line work. Also in 1992, Claimant worked for a lumber mill. In 1994, Claimant started at JD Daily and Sons, a construction outfit, and worked on copper and fiber optics. Claimant worked his way up to be an operator, and then a foreman. Claimant continued work for JD Daily in 1995, then started at the Sprinkler Shop with backhoe operating, digging main line pipes for the sprinklers, and running the excavators. In 1996, Claimant worked for Amalgamated Sugar on a seasonal basis on lime kiln, a process where water is poured on heated rocks to produce gas and energy. Claimant also worked as a sales/stock person at Venture South Distribution delivering Pepsi products. In 1997, Claimant resumed work for Amalgamated Sugar. Claimant also

worked for TCI Communications as a service technician. AT&T purchased TCI, and Claimant continued his responsibilities under AT&T in 1999. In 2000, Claimant worked for Bind Cable Communication and Comcast Cable.

3. From 2002-2006, Claimant worked for McCain Foods in the environmental department as a mechanic where he fixed pumps and electrical motors. Claimant's move to McCain Foods was motivated by a desire to work and live near his ailing father. Claimant started at $10 per hour and worked up to $15 per hour. Between 2003 and 2006, Claimant averaged earnings of $2,500 a month with McCain Foods.

4. In 2007, Claimant started with Gooding Motors as a sales representative of car and truck parts. Although Claimant used to maintain an active lifestyle, Claimant found his new job too demanding to maintain his exercise routine. Claimant's position required outside sales, review of part orders, and deliveries. Claimant testified that the Gooding position also involved lifting heavy items, such as transmissions and clutches, with the assistance of co-workers. In 2008, Claimant worked as a sales representative for Trebar, a semi-truck company. Claimant also delivered sold items. Claimant grossed about $10,000 during the four months he worked at Trebar, including commission pay.

5. Claimant began employment with Employer on February 26, 2008. Claimant was responsible for opening new accounts and performed deliveries incidental to sales. Employer paid Claimant a salary of $1,500.00 semi-monthly beginning March 15, 2008 through July 31, 2008. On June 2, 2008, Claimant's industrial accident occurred. Claimant delivered an 800 pound, 13-speed transmission in Mountain Home, Idaho, and strained his right-sided biceps while lifting the item. Claimant continued to Jerome, Idaho, to complete another delivery. Claimant again felt a sharp pain in his right biceps area while lifting a 600-pound cylinder. After

Claimant completed the delivery, he sought treatment at the emergency room. The emergency room physician examined Claimant's arm, and recommended prompt follow-up for surgery.

6. Claimant returned to work while relying almost exclusively on his left arm. Joseph Petersen, M.D., commenced treatment of Claimant on June 5, 2008. Dr. Petersen is licensed in Idaho, Utah, and Virginia. After finishing an orthopedic residency in 1987, Dr. Petersen started his practice in Burley, Idaho. Dr. Petersen has some personal connections with Claimant's family, not thought to affect his objectivity.

7. Dr. Petersen diagnosed Claimant with a right biceps tendon rupture and avulsion fracture, necessitating prompt surgical intervention to avoid ossification and additional scarring. Defendants accepted and paid for Claimant's operation. Post-operation, Claimant wore casts and splints that caused some swelling and sores. Claimant was generally compliant with his physician's post-operation instructions, but could not resume the full extent of his job's physical responsibilities.

8. Employer discharged Claimant on July 28, 2008, for reportedly failing to perform his required job duties, and generating customer complaints. Claimant believed he performed the job as expected, and denied poor job performance or notice that his job was in jeopardy. Employer's July 30, 2008 termination form is a simple checkbox listing "unsatisfactory performance" as the reason for dismissal, with the comment that Claimant was "unable to establish customer relation." D. Exh. B., p. 22. Claimant's supervisor indicated that Claimant left on good terms and wanted to maintain workers' compensation coverage. In a statement dated August 15, 2008, Claimant's manager, Willie Biorn, attributed Claimant's discharge to poor sales performance and failure to improve.

9. Claimant continued physical therapy and treatment with Dr. Petersen. Dr. Petersen recommended an MRI to investigate Claimant's complaints of paresthesia and range of motion issues. Claimant's August 11, 2008 MRI showed a high-grade partial tear of the distal bicipital tendon, consistent with the mechanism of the industrial accident. Dr. Petersen took Claimant off work, and Surety referred Claimant to Roman Schwartsman, M.D.

10. Dr. Schwartsman is an orthopedic surgeon practicing in Boise, Idaho. Dr. Schwartsman found Claimant's right elbow had heterotopic bone formation, and restricted Claimant to left-handed work only. After reviewing a CT scan, Dr. Schwartsman recommended surgical removal of the surgical screws and bone formation. Dr. Schwartsman performed the recommended surgery on November 21, 2008. Post surgery, Claimant squabbled with Dr. Schwartsman about the veracity of his complaints, his diagnosis, and his need for additional treatment. Exh. 5. After failing to find medical reasons for Claimant's subjective complaints and symptoms, Dr. Schwartsman declared Claimant medically stable and released Claimant to his time-of-injury position on April 2, 2009 with a 1% whole person impairment rating. Exh. 5.

> I have reviewed his time of injury job description. My recommendation would be that the patient returned (sic) to this time of injury job description. The patient contests the time of injury job description stating that this [is] not what he does. I would again leave that to the Idaho Industrial Commission to sort it (sic) out. Based on the objective evidence that I have, I do not see any reason why the patient could not return to his time of injury job 10 months out from his distal biceps tendon repair and over four months out from removal of heterotopic bone, which was an uncomplicated procedure and that succeeded in establishing significant degrees of both pronation and supination for the patient.
>
> Exh. 5, p. 13.

Based on Ms. Irene Sanchez's Job Site Evaluation, Claimant's time-of-injury job responsibilities including driving the company vehicle to set up accounts, representing the business while performing sales of parts, providing prompt courteous and accurate customer

service, maintaining familiarity with all vendor products and merchandising programs, contacting major accounts daily, taking orders, loads, and delivering parts to customers. The job's physical demands include working 10-12 hour days with 95% of the work day consisting of driving and visiting with customers, standing, walking, and occasional lifting of 50 to 75 pounds. Employer indicated that forklift, hoists, dollies, and coworkers are available to assist with heavy lifting when needed.

Exh. 14., p. 34-35.

11. After Dr. Schwartsman's release, Claimant treated with Dr. Petersen on April 17, 2009. Dr. Petersen disagreed with the medical stability finding and release back to work, but declined to issue restrictions different than Dr. Schwartsman, because the latter performed the surgery. In the alternative, Dr. Petersen thought Claimant's condition warranted a higher PPI rating. Dr. Petersen treated Claimant with prescribed pain medication and Claimant minimized use of his arm. Claimant's symptoms did not improve, although he continued with physical therapy. Tr. 54/20-24; 55/8-9.

12. On September 4, 2009, Rodde Cox, M.D. performed an independent medical examination. Exh. 7. Dr. Cox found Claimant was not at maximum medical improvement, gave work restrictions of no lifting greater than 20 pounds, and suggested EMG testing to rule out additional treatment. Dr. Cox also reiterated concerns similar to Dr. Schwartsman about symptom magnification, poor effort during recovery, and lack of objective findings to substantiate Claimant's complaints.

Diagnostic/Consultation

> Further diagnostic and consultation recommendations are very difficult in this case as Mr. Fisher does demonstrate very poor effort with testing and he does demonstrate a great deal of symptom magnification. This is complicated by the

> fact that he was terminated by his employer which could certainly effect his motivation to improve.
>
> Nonetheless he does have some objective findings in the form of heterotopic bone still present in the distal biceps tendon and evidence of some thickening of the ulnar nerve on MRI scanning. I do feel that he would benefit from electrodiagnostic testing of the ulnar nerve to show if there is indeed any slowing of the nerve across the elbow. If this is negative, no further workup would be needed for that.

Exh. 7, pp. 12-13.

The EMG test results were unremarkable with no evidence of nerve injury. Defendants produced a surveillance video, shown at hearing but not entered into evidence, showing Claimant welding and moving his right arm. The EMG results and surveillance video persuaded Dr. Cox to modify his IME findings that Claimant was at maximum medical improvement as of the September 4, 2009 appointment with lifting restrictions of 50 pounds.

13. Dr. Petersen last treated Claimant's industrial injuries on November 30, 2009. Claimant had complaints about his median nerve, and supination and pronation limitations. Dr. Petersen cites Claimant's need for additional physical therapy to counter Dr. Schwartsman's finding of medical stability, although he acknowledges that it is possible to be medically stable and receive additional medical care. Dr. Petersen suggested that Claimant seek treatment at the University of Utah, if Claimant was unhappy with the progress of his treatment.

14. Claimant treated in Utah with Don A. Coleman, M.D., on February 4, 2010. Dr. Coleman is board certified in orthopedics with a specialty in hand surgery. Claimant complained of limitation in movement with his right arm due to pain in the biceps insertion region, and indicated his interest in surgical intervention to relieve pain. Claimant demonstrated nearly full flexion and extension of the right elbow. Dr. Coleman found negative Phalen's and right Tinels', negative elbow flexation test, negative Tinel at the elbow, and assessed probable scarring around

the previous surgery site limiting supination. Dr. Coleman ordered a CT scan to investigate heterotopic bone and probable scarring around the previous surgery site. The CT scan showed possible ulnar neuritis and a calcified tendon, warranting surgical intervention once Claimant lost weight and lowered his blood pressure.

15. On June 28, 2010, Dr. Coleman performed the third and final surgery relating to Claimant's industrial accident, a median nerve decompression, to clean up scar tissue and free the nerve from scar tissue. Thereafter, Claimant returned to physical therapy to prevent tendon scarring and treat intermittent tingling in fingers. Dr. Coleman favorably reviewed Dr. Schwartsman's methodology of the second surgery, i.e., not removing the calcification or ossification in his arm, because Dr. Coleman thought the risks outweighed the potential benefits, and expected Claimant's symptoms to resolve. Dr. Coleman released Claimant from his care as MMI on November 9, 2010, and issued a 5% PPI rating. Dr. Coleman referred Claimant to a functional capacity exam with Thomas Nilsen.

Thomas Nilsen

16. Thomas Nilsen, MS, PT, conducted a functional capacity evaluation ("FCE") on November 15, 2010. Mr. Nilsen received his Master of Science degree with emphasis in physical therapy in 1990, and works as a physical therapist and rehabilitation manager at Cassia Regional Medical Center. Mr. Nilsen met with Claimant twice for exams, each around 40 to 60 minutes. Claimant's pain complaints forced Mr. Nilsen to abandon many physical therapy exams and caused exam inconsistencies. First, Mr. Nilsen found Claimant limited to sedentary jobs. Then, Mr. Nilsen found Claimant capable of light duty work with lifting up to 25 pounds, and truck driving, including the TranSystems job. Mr. Nilsen attributed Claimant's inconsistencies to pain from his injuries.

> As he showed in his previous results it is important to mention the great disparity between the static lift test and the material handling activities section on the FCE data sheet. The criterion for stopping the test is pain, poor postures or an inability to do the lift. He can clearly lift a lot more weight than the data sheet gives him credit for but does not qualify because it caused an increase in pain. He also showed some inconsistencies in his static lift trials and I believe that is because of the pain. He experienced pain with each of these lifts and was able to work through some of the pain at differing levels which caused some inconsistency. I do believe that a valid effort was given.
>
> Exh. 13, pp. 5-6.

Above all, Mr. Nilsen found Claimant's reported pain was his largest vocational hurdle.

Dr. Cox's Second IME

17. On November 2, 2010, Dr. Cox performed a second IME to evaluate Claimant's functionality. Exh. 7, p. 24. Claimant presented as excitable without significant pain behavior, with some inconsistencies upon examination. For example, Claimant's Jamar Dynamometer exam showed a significant decrease in strength, without the corresponding atrophy in the right upper extremity. Claimant's range of motion had improved since Dr. Coleman's surgery, but Claimant's pain issues complicated his actual work capacity evaluation. While Claimant did have inconsistencies upon examination, Dr. Cox did not think Claimant was exaggerating or prolonging his pain for financial gain.

> Work capacity determination in this situation is very difficult for several reasons. 1. The functional capacity evaluation seemed to have limited tests looking at validity. Secondly, functional capacity evaluation test was stopped based on self reported complaints of pain. Additionally there is previous video evidence that Mr. Fisher is capable of functioning at a higher level than he describes. As a result, I feel that the sedentary level of duty likely underestimates his true physical capacity and I would place him based on the objective exam findings at at least a medium level of physical capacity.
>
> Exh. 7., p. 30.

Overall, Dr. Cox found Claimant's low functional behavior more indicative of self-limiting behaviors than objective findings. Dr. Cox issued a 2% whole person impairment, inclusive of

the previously awarded 1%, and permanent restrictions of no repetitive pushing or pulling more than 50 pounds on an occasional basis.

Dr. Coleman

18. Dr. Coleman signaled his agreement with Dr. Cox's 50 pound lifting restriction on January 6, 2011, only to state via a fill-in-the-box letter on April 26, 2011 that FCE report/light duty restrictions from Mr. Nilsen were appropriate. Dr. Coleman explained in his deposition that he did not receive any specific numbers with the FCE, but agreed with a light duty classification. After considering the FCE and Dr. Cox's IME, Dr. Coleman recommended restrictions of 35 to 50 pounds.

Post-Accident Employment

19. Between April 2009 through October 2009, Claimant applied for work at Verizon as a salesperson, Perkins Auto Parts as a parts runner/sales counter, various bartending positions, the sugar factory, McCain's, and construction outfits, despite his concerns about his physical capacity. Claimant offered, if questioned, that he was restricted to light-duty work with no lifting over 10 pounds. Hr. Trans., p. 111. Claimant's job search was unsuccessful, and he survived on his unemployment benefits.

20. After Claimant's release from his third surgery, Claimant drove trucks for TranSystems from November 15, 2010 through March 28, 2011, earning about $400 a week. TranSystems laid him off on March 28, 2011, but is expected to rehire him in the fall at a wage of $12.50 per hour. Claimant did not seek other work between March 2011 and June 2011, because he thought he had secured a job transporting lime rock from Oregon. Unfortunately, Claimant's plans for the lime rock transportation job fell through, and he resumed his job search.

21. Clamant has sought light-duty positions in Las Vegas, Nevada, including Netflix and RedBox. Claimant applied for heavy-duty construction work with backhoe and excavating

responsibilities. He also applied for sales positions at Sprint, Autozone and Dutchman, a trailer/camper store, Home Depot, Lowe's, and jobs with Gem State Staffing and Personnel Express, without success.

Vocational Assessments

Irene Sanchez

22. Irene Sanchez, Idaho Industrial Commission Field Consultant, met with Claimant on August 7, 2008. Ms. Sanchez worked with the Idaho Department of Labor for 12 years prior to joining the Industrial Commission. Ms. Sanchez conducted a job site evaluation for Dr. Schwartsman to review. Dr. Schwartsman approved the job site evaluation, and Ms. Sanchez made numerous job recommendations within those restrictions, but Claimant neglected to apply for jobs or maintain contact. As such, Ms. Sanchez closed Claimant's file.

23. On September 28, 2010, Claimant resumed services with Ms. Sanchez with a renewed focus on improving his employment prospects and increased motivation. Claimant had obtained a seasonal job with TranSystems but preferred more permanent prospects. Ms. Sanchez recommended a variety of jobs within a 50-pound lifting restriction, such as truck driving, service writer for car dealership, parts order clerk, or lube tech.

24. Ms. Sanchez also testified about Claimant's employability and wage loss in the Burley-Rupert labor market. Her concerns about Claimant's employability are very similar to Mr. Porter's, discussed below. Ms. Sanchez found many jobs consistent with Mr. Jordan's report, but doubted that Claimant could secure several of the positions identified by Mr. Jordan, such as sales, truck driver, bartender, and school bus driver, due to the competitive labor market, reservations about his skill set, physical capacity, and his hearing disability. Ms. Sanchez

estimated Claimant might expect wages of $12-$15 per hour in a trucking position or $10-13 per hour in a service position, such as a gas station attendant.

Delyn Porter

25. On May 20, 2011, Mr. Delyn Porter, at Claimant's request, completed a vocational assessment. Mr. Porter is a private vocational rehabilitation consultant who worked for the Industrial Commission as a vocational rehabilitation counselor from 1991-2006, and as a rehabilitation consultant/regional manager from 2006-2010. Mr. Porter obtained his Master's degree in rehabilitation counseling from Western Washington University in 2006, and accreditation in certified rehabilitation counseling from the Commission on Rehabilitation Counselor Certification (CRCC) in 2007. Mr. Porter is also a certified Idaho workers' compensation specialist through the Industrial Commission.

26. Mr. Porter conducted a two and a half hour, in-person interview with Claimant. He reviewed the medical records, Mr. Nilsen's FCE, Dr. Cox's report, Dr. Coleman's records, Claimant's work history, and wages, and the *Dictionary of Occupational Titles* to form his vocational opinions. Mr. Porter opined disability ratings from 38% to 60%, inclusive of impairment rating, dependent on the restrictions and expert testimony the Commission adopts.

27. Mr. Porter is unquestionably more persuaded by Mr. Nilsen's FCE restrictions of 25 pounds. Under these restrictions, Claimant can access light/light-medium-duty work. Mr. Porter used the *Idaho Occupational Employer and Wage Survey* with emphasis on the South Central Idaho Statistical area as the basis for his analysis, with consideration of Claimant's pre-injury educational level, work history, vocational skills, age, and non-industrial disabilities. Mr. Porter calculated Claimant's pre-injury labor market access to be 64% of the total jobs in his labor market area. Using Mr. Nilsen's restrictions, Claimant's post-injury labor market is 30% of the

total jobs in his labor market. Mr. Porter calculated total loss of labor market access by subtracting his post-injury job access of 30% from 100% to find a 70% loss of access.

28. Mr. Porter's approach inflates Claimant's loss of access by subtracting his post-injury labor market access from 100%. As Claimant has never had access to 100% of the labor market, it is disproportionate to consider the change of 64% access to 30% access as a 70% loss of labor market access. With a reduction from 64% to 30%, Claimant can still access almost 50% of his pre-injury labor market.

29. Mr. Porter used Claimant's time-of-injury wage of $17.31 per hour to represent Claimant's pre-injury wage, even though Claimant had only been employed in the sales representative position for a few months. Mr. Porter identified "SOC codes" and occupational titles within a light duty work category, such as counter and rental clerk, retail sales workers, industrial truck driver, etc., and their respective median wages. He then averaged the median wages from all categories to find a post-injury median wage earning capacity of $8.89 per hour, for a 49% loss of wage earning capacity. Mr. Porter applied the same mechanism to find Claimant's average median wage consistent with Dr. Cox's restrictions was $10.11 per hour, for a 42% loss of wage earning capacity.

30. Mr. Porter had serious reservations that Claimant could competently perform truck driving positions and/or sales positions, particularly due to Claimant's bilateral hearing impairment and speech impediment. Mr. Porter opined that Claimant has disability of 60%, inclusive of impairment, with the FCE results. Mr. Porter opines that the restrictions from Drs. Coleman and Cox place Claimant in the medium-duty work category. With Dr. Cox's restrictions, Claimant's post-injury job access is 53%, resulting in a 47% disability. Claimant's disability with Dr. Coleman's restrictions is within the range of 45%-60%, preferably 52%.

Bill Jordan

31. Mr. Bill Jordan, Defendants' vocational expert, has been in the vocational rehabilitation field for over 33 years, with experience in job evaluations, labor market surveys, forensic analysis, disability evaluations, and brain injury rehabilitation. Mr. Jordan has his Master's degree in Public Administration, and national certifications as a Rehabilitation Counselor, and Disability Management Specialist. Mr. Jordan interviewed Claimant on July 21, 2011. Mr. Jordan also reviewed medical and social history, treatment, restrictions, the hearing transcript of the case, and the depositions of Mr. Delyn Porter and Dr. Coleman. Like Mr. Porter, Mr. Jordan evaluated Claimant's pre-injury labor market access using the *Idaho Occupational Employer and Wage Survey* with emphasis on the South Central Idaho statistical area, *The Dictionary of Occupational Titles'* physical/exertion requirements, and GED reasoning and math levels. Mr. Jordan also performed a residual transferrable skills analysis with consideration of restrictions from Drs. Schwartsman, Cox, and Coleman, to identify vocations consistent with Claimant's restrictions. All three physicians approved Claimant's pursuit of occupations that Mr. Jordan identified, including parts order clerk/stock clerk, sales representative, telephone service, service writer, retail sales clerk, lube tech, heavy equipment operator (medium), sales of new cars, security guard, assembler of small products, semi-truck driver, general production worker, truck rental clerk, bartender, sales representative, heavy equipment, bus driver, school, parts clerk, and sales representation of television cable service. Mr. Jordan then found recent job openings from Claimant's community appropriate for his knowledge, skills, and physical capacity. Given Claimant's minimal impairment and restrictions, Mr. Jordan opined that Claimant's loss of access to the labor market is insignificant.

32. Mr. Jordan used Claimant's social security records to prepare Claimant's wage earning history over five years. With a five-year pre-injury average income of $27,529, Claimant's pre-injury wage is $13.24 per hour. Mr. Jordan found Claimant's time-of-injury earnings from Employer were inconsistent; Claimant never made over $2,800 per month at Peterbilt. Mr. Jordan calculated Claimant's Peterbilt wages to be $14.42 per hour by averaging a half a year's work (1,040 hours) with Claimant's earnings of $15,000 over the five to six-month period. Mr. Jordan found that Claimant did not suffer a degree of permanent wage loss, because Claimant could easily restore his pre-injury wage.

33. Based on Claimant's minimal loss of labor market access and wages, Mr. Jordan finds Claimant is entitled to 2% PPD in excess of impairment under Dr. Cox, and 5% PPD under Dr. Coleman. If the Commission adopts the FCE findings as Claimant's restrictions, Mr. Jordan would increase the percentage of disability to Claimant.

DISCUSSION AND FURTHER FINDINGS

TTDS

34. Pursuant to Idaho Code § 72-408, a claimant is entitled to income benefits for total and partial temporary disability during a period of recovery. Once a claimant reaches a point of medical stability, he or she is no longer in a period of recovery and the claimant's entitlement to temporary total or temporary partial disability benefits comes to an end. Jarvis v. Rexburg Nursing Center, 136 Idaho 579, 38 P.3d 617 (2001).

35. In Malueg, the Idaho Supreme Court approved a test formulated by the Commission to determine when, and under what circumstances, TTD benefits can be curtailed by an employer. Malueg v. Pierson Enterprises, 111 Idaho 789, 727 P.2d 1217 (1986). Affirming the Commission's approach, the Court stated:

We agree with the following test set forth by the Commission:

> In the opinion of the commission, once a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work and that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery or that (2) there is employment available in the general labor market which Claimant has reasonable opportunity of securing and which employment is consistent with the terms of this light duty work release.
>
> Id.

36. Here, the parties dispute Claimant's entitlement to TTD benefits from April 2, 2009 through June 27, 2010. Dr. Schwartsman found Claimant medically stable on April 2, 2009 and Defendants suspended TTD payments. Claimant challenges the soundness of the TTD suspension, given his pain complaints and subsequent surgical intervention. Defendants counter that no physician took Claimant off work or issued restrictions from April 2009 through June 2010. In the alternative, Defendants find that Claimant's termination for cause severs any obligation they would have to pay TTDs during the disputed period.

37. Claimant must show he remained in a period of recovery despite Dr. Schwartsman's release in 2009. Defendants' argument frames the issue as if Dr. Schwartsman's findings on releasing Claimant back to his time-of-injury job without restrictions were unchallenged. This is not the case. Dr. Schwartsman and Claimant did not part on good terms, especially when Dr. Schwartsman doubted the legitimacy of Claimant's presentation. When Dr. Schwartsman did not think the objective medical evidence justified Claimant's pain complaints and released him, Claimant reacted poorly, declined future meetings in Boise with Dr. Schwartman, and quickly returned to Dr. Petersen for treatment. That same month, Dr. Petersen opined that Claimant was not medically stable, partly because Claimant needed additional

physical treatment for his symptoms. Dr. Petersen reiterated his concerns about Claimant's stability in November 2009. Even Defendants' IME physician, Dr. Cox, initially disagreed with Dr. Schwartsman's view of Claimant's stability and physical condition. Dr. Cox issued restrictions of no lifting over 20 pounds, and did not reconcile his opinions with Dr. Schwartsman until after Defendants produced a surveillance video showing Claimant welding and moving his arm. While the surveillance video is helpful in explaining Dr. Cox's changed opinion, the video is not the equivalent of a thorough medical evaluation. Finally and most importantly, Claimant required additional surgical intervention for his industrial accident to treat heterotrophic bone and scarring from the first surgery that did not occur until June 28, 2010. Claimant was a difficult patient to treat and evaluate, but his subsequent need for surgery validates his earlier complaints. After considering the record, Claimant has presented compelling medical evidence that he remained in a period of recovery from April 2, 2009 through June 27, 2010.

38. Defendants argue in the alternative that Claimant's termination for cause ends his entitlement to TTD benefits, because such a discharge functions as a refusal of an employer's legitimate offer of light-duty work. In Smith v. Champion Building Products, employer offered the claimant suitable light-duty work, and the claimant returned to work. 1994 IIC 1511.11. Thereafter, the claimant missed work without notifying employer during hunting season. Claimant was aware of the company policy to call in if he could not report to work, and failed to provide a suitable explanation for his absence. As a result, the claimant lost his entitlement to TTD benefits.

39. In this case, Employer discharged Claimant for generating customer complaints, and failing to meet sales quotas. Claimant denied any knowledge of the customer complaints or

that his job was in jeopardy. Claimant testified that he tried very hard to meet Employer's expectations. Claimant's failure to meet Employer's expectations due to poor performance can reasonably be attributed to either his short tenure with Employer or perhaps an inability to meet sales quotas. The Commission declines to curtail Claimant's entitlement to TTD benefits under these circumstances. There is no showing by Employer that Claimant was actually capable of satisfying Employer's expectations. This case is unlike Smith, supra, where it was demonstrated that Claimant's failure to abide by Employer's policy was tantamount to declining suitable employment. Here, Defendants have not shown that Claimant's discharge was equivalent to refusing a suitable offer of light-duty work.

PPD

40. The definition of "disability" under worker's compensation law is "a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided in section 72-430, Idaho Code." Idaho Code § 72-102(10). 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. A rating of permanent disability is "an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors." Idaho Code § 72-425. Among the pertinent factors are the following:

- The nature of the physical disablement;
- The cumulative effect of multiple injuries;
- The employee's occupation;
- The employee's age at the time of the accident;

- The employee's diminished ability to compete in the labor market within a reasonable geographic area;
- All the personal and economic circumstances of the employee;
- Other factors deemed relevant by the Commission. Idaho Code § 72-430.

The decrease in wage-earning capacity must be "due to injury or occupational disease." Idaho Code § 72-102(10). Likewise, disability only results when the claimant's ability to engage in gainful activity is reduced or absent "because of permanent impairment." Idaho Code § 72-423. Only after the impairment reduces the claimant's earning capacity do the pertinent nonmedical factors come into play. See Idaho Code § 72-102(10).

41. Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the purely advisory opinions of vocational experts. See Eacret v. Clearwater Forest Indus., 136 Idaho 733, 40 P.3d 91 (2002); Boley v. State, Industrial Special Indem. Fund, 130 Idaho 278, 939 P.2d 854 (1997). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 896 P.2d 329 (1995). The burden of establishing permanent disability is upon a claimant. Seese v. Idaho of Idaho, Inc., 110 Idaho 32, 714 P.2d 1 (1986).

42. The extent of Claimant's disability is informed by his restrictions. Multiple physicians have endeavored to distinguish between Claimant's self-limiting behavior and his actual functional capacity. After considering the expert testimony, the Commission finds the opinions of Drs. Cox and Coleman more persuasive than the results of Mr. Nilsen's FCEs. Claimant's FCE results were heavily influenced by subjective pain complaints. Mr. Nilsen acknowledged that the FCE tests were based on what Claimant said he could lift without

increased pain, not on Claimant's lifting capabilities to prevent further injury or re-injury. Dr. Coleman, as the last surgeon to operate on Claimant, has the advantaged viewpoint to evaluate Claimant's condition. Dr. Coleman's final opinion that Claimant's lifting restrictions are 35-50 pounds is not lessened by his previous hesitancy to align himself with a particular expert report. Dr. Cox has provided a thorough report on Claimant's physical restrictions with focus on objective testing that complements Dr. Coleman's conclusions. After reviewing the competing reports, the Commission finds that Claimant has restrictions of 35-50 pounds lifting related to his industrial accident.

Labor Market Access

43. Mr. Porter and Mr. Jordan are both well-qualified vocational experts who have provided opinions in many previous workers' compensation cases. Ms. Sanchez did not complete a vocational report, but testified at hearing regarding Claimant's wage loss and access to the labor market. To calculate loss of labor market access, both Mr. Porter and Mr. Jordan thoroughly reviewed the medical history, surveyed Claimant's pre- and post-injury labor market within a 50-mile radius, and considered Claimant's pre-injury educational level, work history, vocational skills, age, and non-industrial disabilities. Both Mr. Jordan and Mr. Porter agree that Claimant has lost some access to his labor market due to his industrial accident. However, they disagree on the extent of that loss.

44. Based on Mr. Jordan's findings, Claimant's post-injury access is very similar to his pre-injury labor market access. Claimant remains capable of accessing many medium-duty jobs. Dr. Coleman's additional lifting restrictions only slightly affect Claimant's loss of access to the labor market. To show Claimant's access to the labor market, Mr. Jordan identified several jobs for Claimant within a 50-pound lifting restriction, including truck driver and sales

representative. Despite concerns about these jobs, Mr. Jordan is persuasive that Claimant could perform jobs in these categories. Claimant has maintained a commercial drivers' license since 1993, with experience driving for parts and deliveries. With Claimant's certification in doubles, triples, and tankers, he could readily seek trucking positions or even add a hazmat certification to make him more competitive. Mr. Jordan explained that school bus driving is available to Claimant, as many school buses are equipped with an air system/push button to open doors without causing driver strain. Further, Claimant's hearing disability has not been a vocational obstacle, and could be remedied through obtaining hearing aids through the State of Idaho Division of Vocational Rehabilitation. Claimant's transferrable skills will allow him access to different employment opportunities.

45. Mr. Porter's conclusions about Claimant's loss of labor market access are easy to understand, and perhaps to critique, because of the formulaic methodology he used to reach his conclusions. As discussed above, Mr. Porter subtracted Claimant's post-injury labor market access from 100%. Mr. Porter posited that Claimant's minimal impairment has eliminated around half of Claimant's labor market access. The Commission has considered Mr. Porter's and Ms. Sanchez's reservations about Claimant's abilities to perform many jobs, but is not persuaded by them. While Claimant has a reduced ability to engage in some heavy lifting activities, the impact of his accident-produced impairment on his labor market access is not substantial and is not accurately shown by the FCE results. Where Mr. Porter's calculations greatly inflate Claimant's loss of labor market access, Mr. Jordan's are slightly understated because he focused on the higher end of Claimant's lifting abilities of 50 pounds. Still, Mr. Jordan is closer to capturing Claimant's actual loss of labor market access. Claimant is understandably concerned about jobs requiring heavy lifting or specialized training, but Claimant

has not shown medical and vocational evidence to persuasively substantiate all of his concerns. Claimant does not have restrictions on working full-time or year-round work, and his lifting capabilities exceed the FCE results. Claimant remains capable of performing and excelling in many other positions that were available to him pre-accident.

Wage Loss

46. Claimant's decrease in wage-earning capacity must be "due to injury or occupational disease." Basing Claimant's wage loss on only one pre-injury and post-injury job is a less reliable view of the long-term effects of his restrictions on his wage earning capacity. Consideration of Claimant's annual income over the five year period preceding the subject accident gives a truer picture of Claimant's pre-injury wages than does the snapshot afforded by Claimant's time-of-injury wage alone, particularly in this case where Claimant has frequently changed jobs. Mr. Jordan averaged Claimant's five-year earnings to arrive at a pre-injury wage of $13.24 per hour. Mr. Jordan finds that Claimant could realistically replace or exceed those earnings, and directs the Commission to Claimant's post-accident job at TransSystems. While Claimant is currently unemployed, Claimant does expect re-employment with TranSystems at $12.50 per hour in the fall with potential for higher wages. It may currently be a tough job market, but Claimant has not persuasively shown a substantial decrease in his wage-earning capacity. Claimant's long-term decrease in wage-earning capacity due to the industrial accident is very slight. Claimant remains a young, capable worker with varied experience in his local area, and transferrable skills. His non-industrial disabilities have never been a vocational factor or limited his opportunities. Claimant has been able to secure employment, and is expected to restore or exceed his pre-injury average wages. Claimant has not shown significant wage earning capacity due to his industrial accident.

47. Mr. Jordan did not assign specific percentages for Claimant's loss of labor market access and Claimant's loss of wage earning capacity. However, as Mr. Jordan found Claimant's loss of wage earning capacity so slight, it is reasonably assumed that most of Mr. Jordan's finding of 5% PPD comes from Claimant's loss of labor market access. For reasons discussed above, Mr. Jordan's loss of labor market access slightly understates Claimant's loss of access. Claimant has shown he has sustained PPD of 20%, inclusive of PPI, as a result of his industrial accident based on medical and vocational opinions.

CONCLUSIONS OF LAW

1. Claimant has shown he was in a period of recovery from April 2, 2009 until June 27, 2010.

2. Claimant's discharge was not the equivalent of Claimant refusing an offer of suitable employment.

3. Claimant has not shown substantial loss of labor market access or loss of wage-earning capacity connected with his industrial accident. Claimant is entitled to PPD of 20%, inclusive of impairment, as a result of his industrial injury.

//

//

ORDER

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

1. Claimant is entitled to TTDs from April 2, 2009 until June 27, 2010. Defendants are entitled to a credit for benefits previously paid;

2. Claimant is entitled to PPD of 20%, inclusive of PPI, as a result of his industrial injury.

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

DATED this _17th___ day of _August_____, 2012.

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 _17th__ day of __August_____, 2012 a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** was served by regular United States Mail upon:

DENNIS PETERSEN
PO BOX 1645
IDAHO FALLS ID 83403

KENT DAY
PO BOX 6358
BOISE ID 83707

cs-m _/s/_____