BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID A. HARMON, Claimant, v. IDAHO CUSTOM WOOD PRODUCTS, Employer, and IDAHO STATE INSURANCE FUND, Surety, and EMPLOYERS COMPENSATION INSURANCE COMPANY, Surety Defendants.	)	**IC 2005-502651** **IC 2009-008598** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED AUG 15 2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Boise on October 7, 2010. Todd M. Joyner represented Claimant. Max M. Sheils, Jr., represented State Insurance Fund ("Fund") regarding the 2005 claim. Alan R. Gardner represented Employers' Compensation Insurance Company ("ECIC") regarding the 2009 claim. The parties presented oral and documentary evidence, and took post-hearing depositions. On February 4, 2001, they gave oral argument in lieu of briefs. The case came under advisement on February 28, 2011. It is now ready for decision.

ISSUES

The issues to be resolved according to the amended notice of hearing and by stipulation of the parties are:

1. Whether and to what extent Claimant is entitled to:

    a) Permanent Partial Impairment (PPI), and
    b) Permanent Partial Disability; and

2. Whether apportionment for a preexisting condition under Idaho Code § 72-406 is appropriate.

Issues relating to total and permanent disability were withdrawn by the parties.

CONTENTIONS OF THE PARTIES

Claimant contends he suffered a mild injury in 2005 and recovered without PPI or residua. He suffered an injury in 2009 for which he is entitled to all benefits, including a 6% whole-person PPI and disability of 49%, inclusive.

Fund contends Claimant received all benefits due him for his 2005 injury. No PPI or disability should be apportioned to that accident.

ECIC contends Claimant's current condition was caused in part by the 2005 injury and/or degenerative conditions for which apportionment under Idaho Code § 72-406 is appropriate. He incurred an impairment from the 2009 accident which should be rated at 3% of the upper extremity. No restrictions have been imposed. Therefore, no disability over PPI should be assigned.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant, his wife, Employer's representative Ken Shocky, and vocational expert Mary Barros-Bailey, Ph.D.;

2. Claimant's Exhibits 1 – 17;

3. Fund Exhibit 1;

4. ECIC Exhibits 1 – 12; and

5. Post-hearing depositions of Mark S. Williams, D.O., George A. Nicola, M.D., Roman Schwartsman, M.D., and vocational expert Doug Crum.

Having examined the evidence, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

FINDINGS OF FACT

1. Claimant worked for Employer as a woodworker and cabinetmaker.

2. On January 25, 2005, he strained his shoulder carrying a sheet of plywood in a compensable accident. He sought medical treatment, including three physical therapy visits. Fund paid $469.45 in medical benefits in 2005. He did not lose any work time. No restrictions were imposed. No doctor provided a permanent impairment rating then.

3. On January 28, 2005, William H. Vetter, M.D., examined Claimant. This was the first of three visits. Dr. Vetter noted some impingement and swelling and ordered physical therapy.

4. On March 24, 2009, he strained his shoulder in a compensable accident.

5. On March 26, 2009, Dr. Vetter examined Claimant. By history, he recorded that Claimant had reported he retained 25% discomfort from the 2005 accident, but that Claimant was able to work and sleep before the 2009 accident. On June 3, 2009, he opined Claimant suffered a chronic shoulder condition "which I have discussed on many occasions." Dr. Vetter's records do not show any visits between the two 2005 visits and the several visits following the 2009 accident. His records do include a February 2007 visit to an ER doctor, Dr. Chatlin, for a hand injury which does not include any mention of a shoulder problem.

6. On March 31, 2009, Dr. Nicola began treating Claimant. He opined that Claimant suffered no acute injury, that Claimant's shoulder condition was the result of degeneration. He recommended arthroscopic surgery, including AC resection, biceps tendon tenodesis and rotator cuff repair. His last examination of Claimant occurred on May 5, 2009.

In deposition Dr. Nicola expressed some confusion about a September 9, 2010 note. This note appears to have been generated in response to an ECIC request and does not indicate Dr. Nicola actually examined Claimant in 2010.

7. On June 4, 2009, Dr. Schwartsman evaluated Claimant at ECIC's request. He opined Claimant suffered a biceps and rotator cuff injury as a result of the 2009 accident, but that arthritis and all other findings and symptoms in Claimant's shoulder related to the 2005 accident. He offered to treat Claimant and later did.

8. On July 8, 2009, Dr. Schwartsman performed an arthroscopy and SLAP repair with debridement of loose bodies and of a partial thickness rotator cuff repair.

9. On December 3, 2009, Dr. Schwartsman noted Claimant was at MMI. He assigned PPI at 3% of the upper extremity related to the 2009 accident without apportionment. He did not evaluate or assign PPI for preexisting arthritis. He later retracted his repeated expressions of his opinion that the preexisting arthritis resulted from the 2005 accident.

10. Dr. Schwartsman's PPI rating of 3% of the upper extremity rated only the acute injury, the biceps-labral injury, not any preexisting degenerative condition.

11. Mark S. Williams, D.O., evaluated Claimant at Claimant's request. He found a significantly more restricted range of motion than Dr. Schwartsman had. This was a significant basis for his PPI rating of 6% whole person. He recommended Claimant "avoid all overhead lifting, grabbing, reaching, etc." He also recommended against rock climbing and other activities which would exert strain on Claimant's shoulder.

12. In deposition, Dr. Schwartsman retracted the opinion given in his December 3, 2009 office note. Without an X-ray from 2005, he cannot opine that the loose bodies and

arthritis in Claimant's shoulder relates to the 2005 injury. Given Claimant's reported active lifestyle, many activities could bring the cumulative trauma that might cause the condition observed in 2009.

13. In deposition, Dr. Nicola opined Claimant's condition was entirely degenerative, including the condition for which Dr. Schwartsman performed surgery. He opined the degenerative condition took years to develop, and began "possibly" earlier than the 2005 injury.

14. In deposition, Mark S. Williams, D.O., opined that, accepting Claimant's history as described, the 2009 accident and injury accelerated or exacerbated a previously asymptomatic degenerative condition. On that basis, all of Claimant's condition is attributable to the 2009 accident. However, Dr. Williams did not have access to the March 26, 2009 note of Dr. Vetter in which it is recorded that Claimant's discomfort after the 2005 accident resolved 75% with 25% discomfort remaining. Much of Claimant's shoulder condition preexisted the 2009 accident, but Dr. Williams could not opine about the extent to which the 2005 accident, Claimant's lifestyle activities, or other unreported events might be related to that preexisting condition.

15. On November 15, 2004, Claimant lacerated his left long finger including the tendon. He was released from work for a week, was treated and returned to work without restriction or PPI. No party asserts that this prior accident bears on the issues involved.

DISCUSSION AND FURTHER FINDINGS OF FACT

16. It is well settled in Idaho that the Workers' Compensation Law is to be liberally construed in favor of the claimant in order to effect the object of the law and to promote justice. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1966). Although the worker's compensation law is to be liberally

construed in favor of a claimant, conflicting evidence need not be. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 316, 834 P.2d 878 (1992).

Permanent Impairment

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

18. Both Drs. Schwartsman and Williams assigned PPI. Both used *Guides* to do so. Having performed the surgery, Dr. Schwartsman is in a better position to evaluate the condition of Claimant's shoulder. Dr. Schwartsman's assessment appears more consistent with a proper application of clinical findings to the evaluation methodology set forth in *Guides*. As a result of the 2009 accident, Claimant suffered PPI rated at 3% of the upper extremity.

Permanent Disability

19. Permanent disability is defined and evaluated by statute. Idaho Code § 72-423 and 72-425 *et. seq*. Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See*, *Eacret v, Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

20. Although Dr. Schwartsman rated Claimant for PPI, he imposed no restrictions. While this would be consistent with his approach – evaluating only the condition which he deemed related to the 2009 accident – it fails to address whether Claimant's shoulder actually restricts him from certain work activities. Dr. Williams' restrictions more accurately reflect

Claimant's condition.

21. Doug Crum evaluated Claimant's disability as a 22% loss of access and 0% wage loss which he averaged to an 11% disability, based upon certain assumptions, including Dr. Williams' restrictions.

22. Mary Barros-Bailey evaluated Claimant's disability as a 50% loss of access and a 48% wage loss which she averaged to a 49% disability, based upon assumptions, some of which differ from Mr. Crum's.

23. Dr. Barros-Bailey's assessment of disability is more consistent with Claimant's actual shoulder condition and the restrictions which Dr. Williams imposed. Claimant is significantly disabled from the trade he knows best, woodworking and cabinetry.

Section 406 Apportionment

24. "In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease." *Idaho Code* § 72-406. *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008). Claimant bears the burden of persuasion on the issue of whether he has suffered disability referable to the subject accident. However, once Claimant makes a prima facie showing in this regard, the burden of going forward with the evidence that some portion of Claimant's disability is, in fact, referable to a preexisting condition shifts to Defendants. *See, Barton v. Seventh Heaven Recreation, Inc.,* 2010 IIC 0379 (2010). Here, Claimant has clearly made a prima facie showing that he has suffered disability referable to the 2009 accident. Therefore, the burden of going forward with the evidence that some part of Claimant's disability is referable to the 2005 accident, shifts to Defendants.

25. As a prerequisite to considering whether Claimant's disability was increased or prolonged by the 2005 accident, ECIC must show that the 2005 accident resulted in a "preexisting physical impairment." Only then, is it appropriate to consider whether the 2005 accident increased or prolonged Claimant's disability. Here, evidence adduced by ECIC fails on both counts.

26. Here, Claimant's shoulder condition was rated as suffering no impairment in 2005. No permanent restrictions were imposed in 2005. No medical opinion of record, in hindsight, quantifies the preexisting impairment, if any. Indeed, Claimant worked from the date of recovery from the 2005 accident to the date of the 2009 accident without seeking medical treatment for his shoulder. Between those dates, he did seek medical treatment for other conditions unrelated to his shoulder and medical examiners did not record shoulder abnormalities or symptoms. He continued to work and to participate in rock climbing, extreme bicycling, and other strenuous activities without complaint. He testified he was symptom free between those dates. He reasonably explained how the 75% immediate improvement in 2005 may have been misunderstood or misconstrued in the medical note of March 3, 2009. Regardless of his speculation or explanation about that note, a recorded history in a medical note is hearsay that, although admissible in workers' compensation proceedings, carries less weight than a credible first-hand witness. Mr. Harmon's demeanor and substance of testimony was credible.

27. The consensus medical opinion that Claimant has a preexisting degenerative condition in his shoulder, by itself, does not substitute for a quantified impairment rating nor outweigh the preponderance of evidence which shows that condition did not constitute an impairment nor hinder his activities of daily living. *See*, *Idaho Code* § 72-424.

28. While ECIC reasonably relied upon Dr. Schwartsman's written opinion about the effect of the 2005 accident through the date of hearing, he retracted that opinion in his posthearing deposition testimony.

29. Claimant was asymptomatic before the 2009 accident. No PPI had been assigned to his shoulder before the 2009 accident. The 2009 accident exacerbated, aggravated or accelerated a previously asymptomatic preexisting condition. The Claimant demonstrated by a preponderance of the evidence that his permanent disability should not be apportioned.

Other Issues

30. Claimant alluded to potential issues of future medical care and retraining. He mentioned a possible future shoulder surgery. He described his efforts at additional education. These were not properly noticed for hearing. Regardless, the Referee analyzed the record and has determined that Claimant failed to show by a preponderance of the evidence that benefits for future medical care and/or retraining are due him.

CONCLUSIONS OF LAW

1. Claimant suffered PPI rated at 3% of the upper extremity as a result of the 2009 accident; he suffered no PPI as a result of the 2005 accident;

2. Claimant is permanently disabled, rated at 50% of the whole person, inclusive of PPI, as a result of the 2009 accident;

3. The record shows apportionment under Idaho Code § 72-406 is not appropriate; and

4. Claimant failed to establish his entitlement to future medical care and/or retraining benefits.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED this 3RD day of AUGUST, 2011.

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:

/S/_____
Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID A. HARMON, Claimant, v. IDAHO CUSTOM WOOD PRODUCTS, Employer, and IDAHO STATE INSURANCE FUND, Surety, and EMPLOYERS COMPENSATION INSURANCE COMPANY, Surety Defendants.	)	**IC 2005-502651** **IC 2009-008598** **ORDER** FILED AUG 15 2011

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

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

1. Claimant suffered PPI rated at 3% of the upper extremity as a result of the 2009 accident; he suffered no PPI as a result of the 2005 accident;

2. Claimant is permanently disabled, rated at 50% of the whole person, inclusive of PPI, as a result of the 2009 accident;

3. The record shows apportionment under Idaho Code § 72-406 is not appropriate; and

4. Claimant failed to establish his entitlement to future medical care and/or retraining benefits.

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

DATED this 15TH day of AUGUST, 2011.

INDUSTRIAL COMMISSION

/S/_____
Thomas E. Limbaugh, Chairman

Unavailable for signature
_____
Thomas P. Baskin, Commissioner

/S/_____
R. D. Maynard, Commissioner

ATTEST:

/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15TH day of AUGUST, 2011, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

TODD M. JOYNER 1226 E KARCHER ROAD NAMPA, ID 83687	MAX M. SHEILS JR. P.O. BOX 388 BOISE, ID 83701	ALAN R. GARDNER P.O. BOX 2528 BOISE, ID 83701-2528

db

/S/_____