BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSEPH D. SELZER, Claimant, v. ROSS POINT BAPTIST CAMP, Employer and STATE INSURANCE FUND, Surety, Defendants.	**IC 2007-015506** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed February 27, 2013**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Commission assigned this matter to Referee Michael Powers. On February 29, 2012, this case was reassigned to the Commissioners. Commissioners Limbaugh, Baskin, and Maynard conducted a hearing in Coeur d'Alene, Idaho on April 19, 2012. Claimant, Joseph D. Selzer, was present in person and represented by Thomas Amberson of Coeur d'Alene. Defendants, Ross Point Baptist Camp (Ross Point), and State Insurance Fund were represented by Bradley Stoddard of Coeur d'Alene. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefing was filed. The matter came under advisement on August 13, 2012.

ISSUES

The issues to be decided are:

1. The extent to which, if any, Employer/Surety are entitled to a reimbursement for the overpayment of permanent partial impairment (PPI) benefits;

2. Whether Claimant is entitled to permanent partial disability (PPD) in excess of permanent impairment, and the extent thereof; and

3. Apportionment pursuant to Idaho Code § 72-406.

CONTENTIONS OF THE PARTIES

All parties agree that Claimant suffered an electrical burn to his right middle finger on May 5, 2007, while employed by Ross Point as a kitchen manager and chef.

Claimant contends that Defendants should not be reimbursed for any PPI benefits paid simply because Defendants have shopped around for a lower rating. Claimant further argues that according to a Baldner analysis, he is entitled to no less than 36% disability in excess of impairment without apportionment to a pre-existing disability. Baldner v. Bennett's, Inc., 103 Idaho 458, 649 P.2d 1214 (1982).

Defendants point out that Dr. Stevens was the only physician to review the medical records involving both his back injury and his hand injury. Thus, Dr. Stevens' IME is most persuasive and the prior impairment award paid in recognition of Dr. Shanks' IME should be reimbursed. Finally, Defendants contend that with no restrictions and no impairment, Claimant has not suffered any permanent disability referable to the 2007 industrial accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. Claimant's Exhibits 1-11, and Defendants' Exhibits 1-28, admitted at the hearing;

3. The testimony of Claimant, Debbie Selzer, and John Bachelder taken at the April 19, 2012 hearing;

4. The post-hearing deposition of Dan Brownell taken by Claimant on May 3, 2012;

5. The post-hearing deposition of Douglas Crum taken by Defendants on May 8, 2012; and

6. The post-hearing deposition of J. Craig Stevens, M.D., taken by Defendants on May 11, 2012.

Defendants' motion to strike at page 14 of the Deposition of Dan Brownell is granted. All other objections posed during the depositions are overruled.

FINDINGS OF FACT

1. Claimant was 49 years old at the time of the hearing and living in the Spokane Valley. Claimant is married to Debbie Selzer and they have two sons.

2. Claimant was a good student in high school and continued on to Bellevue Community College for one school year. Claimant later received a degree from South Seattle Community College in culinary arts and kitchen management. Additionally, Claimant has been certified in CPR and first aid by the American Red Cross.

3. After high school Claimant managed a Baskin Robins for a couple years and then managed a restaurant called Patchworks Deli. In these positions Claimant handled the day to day operations, hiring, inventory, ordering, and observing health department regulations.

4. Claimant next worked for Community Home Health Care for seven years providing support, education, and guidance to developmentally disabled adults in their own home. Claimant was later employed at Egghead Software supervising from 4 to 20 people. The position at Egghead Software required proficient keyboard and ten-key skills.

5. Claimant left Egghead Software to pursue his lifelong desire to be a chef. Claimant obtained his culinary arts degree and secured employment as a sous chef. As a sous

chef Claimant made appetizers, salads, and desserts. He also prepped food which required a large volume of chopping and cutting.

6. Additionally, Claimant worked as a manger for a Blimpie restaurant and as an office manager for the YMCA in Seattle.

7. In 2004, Claimant and his family moved to Prescott, Arizona where Claimant worked in food service management for Whispering Pines Camp. Claimant's duties there included food production, kitchen management, inventory, and ordering. On July 11, 2006, Claimant suffered a work related back injury at Whispering Pines while lifting a case of frozen peas out of a chest freezer. The Arizona accident is discussed in further detail below. In December 2006, Claimant left Whispering Pines to come to Ross Point in Post Falls, Idaho.

8. In January 2007, Claimant began working for Employer at the camp as a kitchen manager and chef. Claimant's beginning salary was $28,000 plus housing, utilities, health care for his family, retirement benefits, and paid time off. Claimant's wife was employed by the camp as an assistant cook. Claimant was in charge of food production, inventory, ordering, following health department guidelines, and supervising other kitchen staff.

9. **Idaho Industrial Accident.** Claimant suffered an industrial accident while working for Employer on May 5, 2007, when he activated the garage disposal by pressing the button with his right middle finger. The switch shorted out and Claimant sustained an electrical shock and burn, from 110 current, to his right middle finger. Claimant is right hand dominant.

10. Debbie Selzer immediately called 911 and Claimant was transported to Kootenai Medical Center. An examination showed a 1 square centimeter blister on Claimant's right middle finger which was cleaned and dressed. Claimant was given some pain medication,

Silvadene cream for application to the burn, and a splint. Claimant was instructed to not use his right hand until he had a wound check in 3 days or less if a referral was accomplished sooner.

11. Medical records show that Claimant was restricted to no use of his right hand on the day of the accident. After Claimant's initial treatment at the emergency room, he was under the care of Michael Ludwig, M.D. Two days after the accident his restrictions were modified to include no grasping with the right hand, no lifting, pushing, or pulling more than 2 pounds. On May 14, 2007, Claimant's restrictions were changes to occasional grasping and no lifting or pushing more than 15 pounds. Claimant then started occupational therapy. On May 31, 2007, the restrictions were increased to occasional grasping with the right hand and no lifting over 5-10 pounds with the right hand. A nerve conduction study performed on June 11, 2007, found right distal median neuropathy with temporal dispersion without evidence of axonal loss. Claimant was treated by Dr. Ludwig, who continued the restrictions of occasional grasping with the right hand and no lifting over 10 pounds with the right hand on July 12, 2007. On August 9, 2007, Claimant's restrictions were occasional grasping with his right hand, occasional pushing and pulling of up to 15 pounds with the right hand, and occasional lifting limited to 10 pounds with the right hand. On September 17, 2007, Dr. Ludwig declared Claimant was at maximum medical improvement and was ready for an impairment rating. Dr. Ludwig noted that Claimant could return to regular work, but he also made a notation that Claimant was restricted to occasional grasping with the right hand.

12. Claimant testified that after the accident he was off work for a couple of days. Employer then moved an extra employee onto the kitchen staff to assist Claimant with tasks he was unable to perform. The assistant worked with Claimant from May until August 2007, through the busy summer camp season. Thereafter Claimant was able to perform his job duties,

although he was still having trouble gripping and holding. Claimant never asked Employer for an additional assistant but Claimant's wife would step in and help when needed. Claimant's wife was also employed by Ross Point in a kitchen staff position.

13. Claimant was laid off from his position with Employer in October of 2010 for reasons unrelated to his industrial injury. At the time of his layoff Claimant reported that he was functioning well at work, though he was not able to use his right hand fully.

14. After leaving Ross Point Claimant applied for positions as a teaching assistance and paraprofessional in the Post Falls School District. Claimant was not hired for those positions but he has worked intermittently as an on-call substitute teacher in the Post Falls School District at a rate of $70 per day without benefits. In the month prior to the hearing, Claimant was able to substitute teach four or five times. Claimant has not applied for any cooking or chef positions since leaving Ross Point.

15. At the time of hearing, Claimant and his family lived in a church parsonage in exchange for Claimant's ministerial services, some counseling, and maintenance of the lawn performed by Claimant's son.

16. Claimant still has trouble with his shirt buttons and tying his shoes. Claimant testified that he constantly drops things and that he has tried to train his left hand to manage more of the lifting and tasks of daily living. Claimant's keyboarding skills have also diminished due to his right hand injury. Claimant and his sons do not play catch anymore, nor do they wrestle as before.

17. Claimant rates his right hand pain at a three on a scale of one to ten. On days when he decides to use his right hand more, such as cooking for guests, Claimant's hand pain will increase the next day to a four or six. Claimant is not taking any prescription medication for

his hand but he will take two Aleve tablets anywhere from one to four times a week for right hand pain.

18. **Prior Industrial Accident in Arizona.** On July 11, 2006, Claimant injured his back lifting a case of frozen peas from a chest freezer. At the time of the accident Claimant was working at Whispering Pines in Arizona. Claimant's pain started in his back, predominately on the right, and extended into his right shoulder and neck. Claimant was a weight lifter prior to the Arizona accident. Subsequent to the accident Claimant could not do much weight lifting and lost about 40 pounds. Claimant received conservative treatment in Arizona and his treatment continued when he moved to Idaho.

19. Claimant's back injury was still symptomatic when he began work for Ross Point. Claimant continued physical therapy in Idaho from January through May 2007. On April 25, 2007, Claimant presented to North Idaho Medical Care Center with complaints of neck pain from his July 2006 back strain injury. Claimant was treated by Dr. Hjeltness and on Claimant's returned on May 8, 2007, he was given a pushing, pulling, and lifting restriction of 20 pounds. He was also referred for chiropractic care where he reported pain when lifting and difficulty sleeping, among other back related issues. Claimant continued with chiropractic care until August 29, 2007.

20. On August 16, 2007, Claimant's restrictions remained unchanged and he was referred for an independent medical examination. Jennifer J. James, M.D., performed an IME on January 18, 2008 at the request of the surety liable for the 2006 Arizona back injury. Claimant complained of cervical pain and pain in the right scapula that radiates into underneath the shoulder blade. Dr. James noted that a review of systems was unremarkable with the exception of difficulty sleeping due to the pain on his medial inferior scapular border. Dr. James found

Claimant's back injury had not yet reached a fixed and stable status and she recommended further diagnostic evaluation. Dr. James restricted Claimant from lifting more than 20 pounds in a position where the weight is directly in front of his body and further noted that more restrictions can be determined by Claimant's treating physician. There is no mention of Claimant's finger and hand injury in Dr. James's report.

21. Claimant participated in physical therapy and chiropractic care from February 2008 through March 2008. Larry K. Lamb, M.D., examined Claimant on March 11, 2008. Dr. Lamb found less severe winging of the right scapula and recommended an MRI which was completed on March 22, 2008. The MRI found no abnormality involving the right brachial plexus structures and mild multilevel degenerative changes of the cervical spine causing minimal right lateral recess stenosis at C5-6 with no spinal canal or neural foraminal stenosis in the cervical spine. Dr. Lamb read the MRI as essentially flat normal. Imaging done of Claimant's right shoulder on April 1, 2008, found no evidence of fracture or dislocation, no significant degenerative changes, AC joint intact, no focal soft tissue abnormality, and the visualized lung parenchyma was clear. Dr. Lamb recommended strain/counter strain physical therapy and a C4-5 facet injection, neither improved Claimant's condition. On August 28, 2008, Dr. Lamb reported that he had no treatment options left for Claimant. Dr. Lamb stated that it was difficult to accept Claimant's pain conviction with minimally identified pathology.

22. On September 30, 2008, Judith A. Heusner, M.D. performed an independent medical examination of Claimant regarding his Arizona back injury. Dr. Heusner's report does not mention an additional Idaho finger or hand injury. Dr. Heusner diagnosed a localized muscle tear complicated by muscle spasm and guarding. She opined that Claimant was not stable but

that he would be stable after another 4 to 6 weeks of chiropractic care in combination with massage therapy.

23. On April 3, 2009, Peter T. Zografos, D.C., reviewed Claimant's medical records and found Claimant has reached maximum medical improvement. Dr. Zografos had previously treated Claimant in October and November of 2008.

24. On April 16, 2009, Dr. Heusner evaluated Claimant again, found him not yet stable, and recommended more conservative care. Dr. Heusner did find improvement in Claimant's range of motion in his neck and right shoulder.

25. On May 8, 2009, Michael Errico, M.D., an orthopedic surgeon, performed an IME regarding Claimant's Arizona injury. Dr. Errico reviewed some of Claimant's medical records and opined that Claimant was stable from his 2006 Arizona back, neck and shoulder injury. Dr. Errico rated Claimant's permanent partial impairment at 10% due to the 2006 Arizona injuries. Dr. Errico also imposed permanent restrictions of no heavy lifting beyond 20 pounds, allowing periods of rest after an hour or two of standing on his feet, and a restriction on working with his head and neck in an overextended, upward position. No carrying, pushing, pulling, or lifting over 20 pounds and restricted bending.

26. On June 23, 2010, Spencer D. Greendyke, M.D., performed an independent medical examination concerning Claimant's back and neck injuries from the 2006 Arizona accident. Dr. Greendyke examined Claimant and reviewed medical records. He opined that Claimant was stable with a 5% permanent partial impairment rating, and permanently restricted to no lifting more than 20 pounds and no work above the shoulder.

27. At the time of hearing Claimant continued to have intermittent right back pain due to the Arizona Accident.

28. Having observed Claimant at hearing and compared his testimony with other evidence in the record, the Commission finds that Claimant is generally credible. Where Claimant's recollection conflict with contemporaneously prepared medical records, preference will be given to the medical record.

29. Claimant did not disclose any information about this Idaho finger injury with his back providers. Claimant did not disclose any information about this Arizona back injury with his finger and hand providers.

30. **Prior Medical Issues.** Claimant reported to medical providers that he was diagnosed with obsessive compulsive disorder and depression many years before either accident discussed above. Claimant also stated that he has had difficulty with sleep as long as he can remember, but that it became worse after his back injury. Medications have helped minimize the symptoms.

31. **Dr. Shanks' 2007 IME.** Dr. William Shanks, an orthopedist, conducted an independent medical examination of Claimant on October 23, 2007 regarding his Idaho finger and hand injury. Testing showed mild grip and pinch strength weakness on the right and decreased sensation in the median nerve distribution and slightly in the radial nerve distribution of the right hand. Dr. Shanks diagnosed an electrical burn injury of the right hand with residual sensory impairment and strength loss.

32. Dr. Shanks reported that Claimant denied problems in the right upper extremity prior to the finger injury. "There is no evidence, either by history given by the patient or by the records provided that this man had any pre-existing condition in the right upper extremity." Cl. Ex. 1, p. 3. Claimant did not inform Dr. Shanks of his Arizona accident or resultant back, neck, and shoulder injury and treatment.

33. Dr. Shanks agreed with Dr. Ludwig's opinion that Claimant's right hand was likely to continue to improve over the next year. Thus, Dr. Shanks did not find Claimant had reached a point of being fixed and stable yet no further treatment was recommended. Dr. Shanks went on to state that if an impairment rating were based on the current objective findings it would be 10% for sensory loss and 10% for strength loss, for an overall rating of 19% of the right upper extremity as a result of the finger and hand injury. No physical restrictions were given.

34. **Dr. Shanks' 2008 IME**. Dr. Shanks conducted a second IME on June 3, 2008. In reviewing Claimant's current status, Dr. Shanks noted that Claimant still had weakness in the hand, dropped things easily, and could not lift objects overhead with the right arm. Dr. Shanks found Claimant's sensory loss to be consistent with his prior exam but found that Claimant's upper extremity condition has actually worsened since his 2007 exam. Again, Dr. Shanks did not know of Claimant's Arizona back, neck and shoulder injury. Dr. Shanks opined that Claimant suffered an overall impairment rating of 28% of the right upper extremity, with 20% for strength loss and 10% for sensory loss. Again, no physical restrictions were given. Defendants paid the 28% upper extremity impairment rating to Claimant.

35. **Dr. Stevens' 2011 IME.** J. Craig Stevens, M.D., evaluated Claimant on November 16, 2011. Dr. Stevens was the only doctor given medical records from Claimant's finger and hand injury as well as his back, neck, and shoulder injury. Dr. Stevens diagnosed Claimant with a prior history of right parascapular strain and right-sided carpal tunnel syndrome unrelated to the 2007 Idaho industrial accident. Dr. Stevens reported that he was unable to objectively identify any persisting permanent anatomic change or permanent condition or current diagnosis that would be causally related to the industrial injury of May 5, 2007. Therefore,

Claimant is at maximum medial improvement from the 2007 Idaho injury and he requires no further treatment. Dr. Stevens gave no restrictions because there was no demonstrated persisting condition.

36. Dr. Stevens was also asked about the Arizona injury and he opined that Claimant at most sustained a shoulder strain or parascapular muscle strain which resolved long ago. Dr. Stevens gave no restrictions for the Arizona injury and no impairment rating due to the fact that he found no objective basis.

37. **Dan Brownell**. Claimant hired Dan Brownell as a vocation expert in this case. Mr. Brownell worked with the Idaho Industrial Commission Rehabilitation Division for 29 years and has been a self-employed vocational expert for about two and a half years. He specializes in the area of north Idaho and the adjacent area of Washington.

38. On November 30, 2010, Mr. Brownell submitted his summary report of Claimant's employability. Mr. Brownell interviewed Claimant in October of 2010 and reviewed medical records from Dr. Ludwig as well as both IME reports from Dr. Shanks. Claimant provided Mr. Brownell with additional information about Claimant's problems sleeping at night, difficulty dressing, limited ability to perform household chores, challenges driving, and instability problems.

39. Mr. Brownell's report indicates that Claimant felt his balance was impaired. At hearing Claimant attributed his balance trouble to his back injury from his Arizona accident. Yet, Mr. Brownell was not given any of the medical records pre-dating Claimant's finger injury. There was no distinction made between physical restrictions due to the back injury in Arizona and the finger injury in Idaho. Claimant reported all his subjective physical information to Mr. Brownell and all the information was used in Mr. Brownell's assessment of Claimant's

disability. Mr. Brownell opined Claimant suffered 70% permanent partial disability inclusive of impairment.

40. After the hearing, one day prior to his post-hearing deposition, Mr. Brownell was given a copy of Dr. Stevens' IME report, Spender Greendyke's IME report, and Doug Crum's employability report. Mr. Brownell testified that those reports contained totally new information (about Claimant's Arizona back, neck, and shoulder injury) which would impact his opinion and the information would change the whole perspective of the case. Mr. Brownell was unable to render a revised opinion as to Claimant's employability and disability.

41. **Douglas Crum.** Defendants hired Mr. Crum to perform a disability assessment in this case. Mr. Crum is a vocational rehabilitation consultant in Boise, Idaho. He is a certified disability management specialist and has handled around 500 cases since becoming self-employed as a vocational rehabilitation consultant.

42. Mr. Crum met with Claimant on March 9, 2012 and reviewed records including information from Dr. Errico, Dr. Greendyke, Dr. Stevens, Dr. Hjeltness, Dr. Shanks, Dan Brownell's report, a Social Security earnings statement, and records from the Arizona Industrial Commission associated with Claimant's 2006 spine injury.

43. Mr. Crum noted that Claimant's earnings increased in 2008 and 2009, the years following his finger and hand injury. In contrast to Mr. Brownell's report, Mr. Crum was informed of Claimant's spine injury which resulted in a 5% impairment rating and a restriction for light duty work and limited work above shoulder level. Mr. Crum acknowledged the impairment rating given by Dr. Shanks for the finger injury but, because there were no permanent restrictions assigned to the finger and hand injury, there were no limiting factors which impacted his ability to engage in gainful activity. Mr. Crum opined that because there

were no permanent restrictions assigned to the May 5, 2007 right upper extremity injury and because Claimant earned more in the two years following the accident, there is no basis to conclude that Claimant sustained any permanent partial disability in excess of impairment.

44. If the restrictions by Dr. Ludwig of decreased grip strength are utilized, Mr. Crum opined that Claimant would have suffered disability of 35% due to the combined effects of the 2006 Arizona injury and the 2007 Idaho injury, with 5% of the total disability attributable to the Idaho finger and hand injury.

DISCUSSION AND FURTHER FINDINGS

45. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

46. **Permanent partial impairment**. Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss is considered stable at the time of evaluation. Idaho Code § 72-422. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

47. Claimant was evaluated by two doctors regarding an impairment rating for his 2007 Idaho injury, Drs. Shanks and Stevens. At Claimant's first evaluation with Dr. Shanks, on October 23, 2007, Claimant was found not yet stable. Thus, any reference to prospective

impairment ratings is not particularly probative on the issue of Claimant's impairment. Dr. Shanks' second IME with Claimant occurred on June 3, 2008. Dr. Shanks reported Claimant's current status as follows:

> Mr. Selzer tells me that he does not feel the condition of his hand has improved at all since I last examined him in October 2007. He still has weakness in the hand and drops things easily. He cannot lift objects overhead with the right arm. He has persistent numbness in the hand and especially notes this when he awakens in the morning. He tries to protect the right hand and uses the left arm more for activities such as lifting pans and kettles at work. He feels the symptoms in the hand are worse at the end of a busy work day.
> Claimant's Ex. 2.

48. Dr. Shanks examined Claimant's right shoulder, elbow, wrist, and hand. The conclusions he drew were clearly informed by findings related to both the Arizona and Idaho accidents, even though the Arizona accident was entirely unknown to him. Dr. Shanks concluded Claimant "currently rates at 20% of the extremity for strength loss. In addition, he continues to show decreased sensation in the right upper extremity equal to 10% of the extremity. In combining the 20% strength loss with the 10% sensory loss, he would have a combined total of 28% impairment of the right upper extremity as a result of the injury in question." Claimant's Ex. 2. From those conclusions it is impossible to parse out what impairment might be related to Claimant's 2007 Idaho industrial injury. The treatment for the Arizona injuries focused on the right upper extremity and continued through the same time period as the Idaho injury and treatment for the same. The medical records from Claimant's back, neck and shoulder treatment consistently give a 20 pound lifting restriction. Without a comprehensive understanding of Claimant's separate injuries and an explanation of how the resultant impairments can be divided, Dr. Shanks' analysis is not helpful. The Commission finds Dr. Shanks' opinions on Claimant's impairment due to the Idaho accident to be unpersuasive.

49. Dr. Stevens is the only doctor to evaluate Claimant with the benefit of medical records from the Arizona injury and the Idaho injury. Because of the close proximity of the injured areas, the overlap in treatment timelines, and the related physical restrictions, the Commission finds the fact that Dr. Stevens knew about both injuries to be a critical factor in the persuasiveness of his opinion.

50. Dr. Stevens was closely questioned about Claimant's right hand grip strength and the results of the grip strength testing. Dr. Stevens performed grip strength testing on Claimant's hand which indicated a variability he found troubling. The results of the three tests were 10, 20, and 15 kilograms. The left hand grip strength testing results were 30, 28, and 26 kilograms. Dr. Stevens recognizes a variability of 10% to be acceptable and Claimant's right hand grip strength was well beyond that range. Dr. Stevens found that the large variance could be explained by pain, but if that was the case one would expect a larger number on the first test and a lower number thereafter because the patient is avoiding the pain response, which was not the case here. The second explanation, an obscure neurologic disorder, was also not applicable in Claimant's case. The final explanation posited by Dr. Stevens was that an individual may be attempting to purport a degree of strength that they do not actually have, which is difficult to do on repetitive testing which alternates between left and right hand testing. The grip strength testing performed by Claimant was performed in this type of alternating pattern to determine if such variability in results was extant. As noted, right hand testing did show significant variability in grip strength. Thus, there is a concern about the validity of Claimant's right hand grip strength test results.

51. Dr. Stevens opined that Claimant's carpal tunnel syndrome might have reduced his right hand grip strength but it would not have contributed to the variability that he demonstrated.

52. Dr. Stevens did diagnose Claimant with right-sided carpal tunnel syndrome but found it was unrelated to the 2007 Idaho industrial accident. Dr. Stevens reported that he was unable to objectively identify any permanent condition that would be causally related to the industrial injury of May 5, 2007. Therefore, he opined that Claimant is at maximum medial improvement from the 2007 Idaho injury and he requires no further treatment.

53. Dr. Stevens' opinion is well reasoned and it was developed with a complete knowledge of Claimant's physical history. The evidence supports a finding that Claimant suffers no permanent partial impairment.

54. Claimant has not proven he suffers any permanent impairment due to his 2007 Idaho industrial accident involving his finger and hand.

55. **Permanent disability**. "Permanent disability" results when the claimant's 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 reasonable expected. Idaho Code § 72-423. Absent permanent impairment, there can be no permanent disability. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 753, 769 P.2d 1122, 1125 (1989). Having failed to prove any permanent impairment, Claimant herein has not proven he suffers any permanent disability due to his 2007 industrial accident.

56. **Apportionment**. Apportionment of permanent disability pursuant to Idaho Code § 72-406 is moot.

57. **Idaho Code § 72-316.** The final issue is whether Defendants are entitled to a

reimbursement for the overpayment of PPI benefits pursuant to Idaho Code §72-316. In 2008 Dr. Shanks gave Claimant a 28% upper extremity impairment rating. Defendants promptly began payments and as of May 27, 2009 payment in full had been made in the amount of $26,980.80. As stated above, the Commission finds that Claimant is entitled to no impairment.

58. Defendants argue that Idaho Code §72-316 supports a conclusion that they are entitled to be reimbursed for the payments made. That section provides:

> 72-316. Voluntary payments of income benefits. – Any payments made by the employer or his insurer to a workman injured or afflicted with an occupational disease, during the period of disability, or to his dependents, which under the provisions of this law, were not due and payable when made, may, subject to the approval of the commission, be deducted from the amount yet owing and to be paid as income benefits; provided, that in case of disability such deduction shall be made by shortening the period during which income benefits must be paid, and not by reducing the amount of the weekly payments.

Therefore, when voluntary payments of income benefits have been made when they were not due, the Commission may order a deduction from future income benefits. The statute is unambiguous and is clearly tailored to address one specific scenario, *i.e.* how credit for overpayment is to be applied against other benefits yet due. The instant facts make application of the statute problematic. First, in the present case, no additional benefits are owed. As discussed above, Claimant has not proven his entitlement to PPI benefits or PPD benefits. Therefore, there are no future benefits from which Defendants may deduct any overpayments. Second, it is arguable that the PPI award paid by Defendants was "due and payable when made". Defendants appropriately paid the PPI award, having no medical predicate upon which to set up a dispute over Claimant's entitlement to the same. Indeed, had they refused to do so, they might be subject to liability for the payment of attorney fees under Idaho Code § 72-804.

59. The first distinction between the situation contemplated by the statute and the instant facts is relatively easy to resolve. Clearly, the purpose underlying the statute is that an

employer ought to have some ability to recoup benefits which were paid but were not owed. The statute addresses how to accomplish this goal where future benefits are payable to the injured worker. The statute specifies that in such case, an employer is not allowed to recoup the overpayment by decreasing the amount of an injured workers' periodic benefits payment. Rather, the overpayment is to be recouped by cutting short the period during which the future benefits would otherwise be paid. Because, in this case, there are no future benefits against which the credit may be applied, the only way to advance the goal of the statute is to order Claimant to reimburse Defendants in the amount of the PPI award. Notably, there is nothing in the language of Idaho Code § 72-316 which prohibits the Commission from entering such an award. Again, Idaho Code § 72-316 only deals with how the overpayment is to be recouped where additional benefits are payable to the injured worker.

60. Next, Idaho Code § 72-316 specifies that the credit for overpayment exists where the benefits in question "were not due and payable when made." Here, it is at least arguable that the PPI award was due and payable when made. However, the extent and degree of Claimant's impairment from the work accident did not change with the passage of time. As the facts of this case illustrate, he was neither more, nor less, entitled to a PPI award for his finger injury at the time of his evaluation by Dr. Shanks, than he was at the time of his evaluation by Dr. Stevens. Without a medical predicate to challenge Dr. Shanks' conclusion, Defendants had no choice but to pay the PPI award. However, that award has ultimately been demonstrated to have been not due and payable either at the time it was made, or at any other time. That our determination concerning Claimant's entitlement to the PPI award is retrospective does nothing to diminish the fact that the PPI award paid by Employer following Dr. Shanks' evaluation was not due and payable when made.

61. The purpose underlying Idaho Code § 72-316 is advanced by our ruling today; it is desirable to encourage employers to err on the side of making voluntary payments to injured workers in situations of questionable liability. During a period of recovery, an injured worker can ill-afford interruptions in his or her benefits stream. Such interruptions are less likely to occur where an employer knows that if it makes a benefits payment to an injured worker which ultimately turns out not to have been owed, a mechanism exists for the employer to seek reimbursement for the overpayment. Idaho Code § 72-316 encourages voluntary payments of compensation, as does our ruling today.

62. It is important to note, however, that Idaho Code § 72-316 allows flexibility in ordering deductions from future benefits. "Any payments made … may, subject to the approval of the commission, be deducted from the amount yet owing." Idaho Code § 72-316, (emphasis supplied). The Commission makes overpayment determinations on a case by case basis, with a view towards the attainment of justice in each individual case. "[T]he Commission has historically been imbued with certain powers that specifically enable it to simplify proceedings and enhance the likelihood of equitable and just results." Hagler v. Micron Technology, Inc., 118 Idaho 596, 599, 798 P.2d 55, 58 (1990). The Commission's equitable jurisdiction was recognized by the Supreme Court in Brooks v. Standard Fire Insurance Company, 117 Idaho 1066, 793 P.2d 1238 (1990). In Brooks, the Court affirmed the Commission's adjudication of the equitable right of contribution and reimbursement between sureties in a workers' compensation dispute where Idaho Code §72-313 did not provide an adequate remedy. Brooks supports the existence of equitable remedies where, as in the instant case, Idaho law does not provide an adequate remedy at law.

63. We recognize the seemingly harsh result of holding Claimant responsible for the overpayment; Claimant might well argue that he ought not to bear responsibility for repayment where payment was occasioned only as a result of a unilateral decision to pay made by Defendants. However, that payment was made in good faith, and in an effort by Employer to satisfy what it then thought was its obligation under the Idaho Workers' Compensation Laws. Since Claimant does not now have, and has never had, an entitlement to a PPI award for the subject accident, the better solution is to order repayment of that award to Employer, all to encourage payment on questionable claims under these laws. Further, to allow Claimant to retain the benefit of the PPI award under the facts of this case would amount to an unjust enrichment, and this too should be guarded against in our administration of the Workers' Compensation Laws. Therefore, Defendants are entitled to reimbursement from Claimant in the amount of $26,980.8.0, representing the PPI award which Claimant was paid, but to which we have determined he is not entitled.

CONCLUSIONS OF LAW

1. Claimant has not proven he suffers any permanent impairment due to his 2007 Idaho industrial accident involving his finger and hand.

2. Claimant has not proven he suffers any permanent disability due to his 2007 industrial accident.

3. Claimant shall reimburse Defendants the sum of $26,980.80, representing the overpayment of PPI benefits.

4. Apportionment pursuant to Idaho Code § 72-406 is moot.

ORDER

1. Claimant has not proven he suffers any permanent impairment due to his 2007 Idaho industrial accident involving his finger and hand.

2. Claimant has not proven he suffers any permanent disability due to his 2007 industrial accident.

3. Claimant shall reimburse Defendants the sum of $26,980.80, representing the overpayment of PPI benefits.

4. Apportionment pursuant to Idaho Code § 72-406 is moot.

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

IT IS SO ORDERED.

DATED this __27th_____ day of __February_____, 2013.

INDUSTRIAL COMMISSION

/s/_____
Thomas P. Baskin, Chairman

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

/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __27th_____ day of _February _____, 2013, 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:

THOMAS B AMBERSON
PO BOX 3724
COEUR D'ALENE ID 83816-1349

BRADLEY J STODDARD
PO BOX 896
COEUR D'ALENE ID 83816-0896

/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSEPH D. SELZER, Claimant, v. ROSS POINT BAPTIST CAMP, Employer and STATE INSURANCE FUND, Surety, Defendants.	**IC 2007-015506** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed February 27, 2013**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Commission assigned this matter to Referee Michael Powers. On February 29, 2012, this case was reassigned to the Commissioners. Commissioners Limbaugh, Baskin, and Maynard conducted a hearing in Coeur d'Alene, Idaho on April 19, 2012. Claimant, Joseph D. Selzer, was present in person and represented by Thomas Amberson of Coeur d'Alene. Defendants, Ross Point Baptist Camp (Ross Point), and State Insurance Fund were represented by Bradley Stoddard of Coeur d'Alene. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefing was filed. The matter came under advisement on August 13, 2012.

ISSUES

The issues to be decided are:

1. The extent to which, if any, Employer/Surety are entitled to a reimbursement for the overpayment of permanent partial impairment (PPI) benefits;

2. Whether Claimant is entitled to permanent partial disability (PPD) in excess of permanent impairment, and the extent thereof; and

3. Apportionment pursuant to Idaho Code § 72-406.

CONTENTIONS OF THE PARTIES

All parties agree that Claimant suffered an electrical burn to his right middle finger on May 5, 2007, while employed by Ross Point as a kitchen manager and chef.

Claimant contends that Defendants should not be reimbursed for any PPI benefits paid simply because Defendants have shopped around for a lower rating. Claimant further argues that according to a Baldner analysis, he is entitled to no less than 36% disability in excess of impairment without apportionment to a pre-existing disability. Baldner v. Bennett's, Inc., 103 Idaho 458, 649 P.2d 1214 (1982).

Defendants point out that Dr. Stevens was the only physician to review the medical records involving both his back injury and his hand injury. Thus, Dr. Stevens' IME is most persuasive and the prior impairment award paid in recognition of Dr. Shanks' IME should be reimbursed. Finally, Defendants contend that with no restrictions and no impairment, Claimant has not suffered any permanent disability referable to the 2007 industrial accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. Claimant's Exhibits 1-11, and Defendants' Exhibits 1-28, admitted at the hearing;

3. The testimony of Claimant, Debbie Selzer, and John Bachelder taken at the April 19, 2012 hearing;

4. The post-hearing deposition of Dan Brownell taken by Claimant on May 3, 2012;

5. The post-hearing deposition of Douglas Crum taken by Defendants on May 8, 2012; and

6. The post-hearing deposition of J. Craig Stevens, M.D., taken by Defendants on May 11, 2012.

Defendants' motion to strike at page 14 of the Deposition of Dan Brownell is granted. All other objections posed during the depositions are overruled.

FINDINGS OF FACT

1. Claimant was 49 years old at the time of the hearing and living in the Spokane Valley. Claimant is married to Debbie Selzer and they have two sons.

2. Claimant was a good student in high school and continued on to Bellevue Community College for one school year. Claimant later received a degree from South Seattle Community College in culinary arts and kitchen management. Additionally, Claimant has been certified in CPR and first aid by the American Red Cross.

3. After high school Claimant managed a Baskin Robins for a couple years and then managed a restaurant called Patchworks Deli. In these positions Claimant handled the day to day operations, hiring, inventory, ordering, and observing health department regulations.

4. Claimant next worked for Community Home Health Care for seven years providing support, education, and guidance to developmentally disabled adults in their own home. Claimant was later employed at Egghead Software supervising from 4 to 20 people. The position at Egghead Software required proficient keyboard and ten-key skills.

5. Claimant left Egghead Software to pursue his lifelong desire to be a chef. Claimant obtained his culinary arts degree and secured employment as a sous chef. As a sous

chef Claimant made appetizers, salads, and desserts. He also prepped food which required a large volume of chopping and cutting.

6. Additionally, Claimant worked as a manger for a Blimpie restaurant and as an office manager for the YMCA in Seattle.

7. In 2004, Claimant and his family moved to Prescott, Arizona where Claimant worked in food service management for Whispering Pines Camp. Claimant's duties there included food production, kitchen management, inventory, and ordering. On July 11, 2006, Claimant suffered a work related back injury at Whispering Pines while lifting a case of frozen peas out of a chest freezer. The Arizona accident is discussed in further detail below. In December 2006, Claimant left Whispering Pines to come to Ross Point in Post Falls, Idaho.

8. In January 2007, Claimant began working for Employer at the camp as a kitchen manager and chef. Claimant's beginning salary was $28,000 plus housing, utilities, health care for his family, retirement benefits, and paid time off. Claimant's wife was employed by the camp as an assistant cook. Claimant was in charge of food production, inventory, ordering, following health department guidelines, and supervising other kitchen staff.

9. **Idaho Industrial Accident.** Claimant suffered an industrial accident while working for Employer on May 5, 2007, when he activated the garage disposal by pressing the button with his right middle finger. The switch shorted out and Claimant sustained an electrical shock and burn, from 110 current, to his right middle finger. Claimant is right hand dominant.

10. Debbie Selzer immediately called 911 and Claimant was transported to Kootenai Medical Center. An examination showed a 1 square centimeter blister on Claimant's right middle finger which was cleaned and dressed. Claimant was given some pain medication,

Silvadene cream for application to the burn, and a splint. Claimant was instructed to not use his right hand until he had a wound check in 3 days or less if a referral was accomplished sooner.

11. Medical records show that Claimant was restricted to no use of his right hand on the day of the accident. After Claimant's initial treatment at the emergency room, he was under the care of Michael Ludwig, M.D. Two days after the accident his restrictions were modified to include no grasping with the right hand, no lifting, pushing, or pulling more than 2 pounds. On May 14, 2007, Claimant's restrictions were changes to occasional grasping and no lifting or pushing more than 15 pounds. Claimant then started occupational therapy. On May 31, 2007, the restrictions were increased to occasional grasping with the right hand and no lifting over 5-10 pounds with the right hand. A nerve conduction study performed on June 11, 2007, found right distal median neuropathy with temporal dispersion without evidence of axonal loss. Claimant was treated by Dr. Ludwig, who continued the restrictions of occasional grasping with the right hand and no lifting over 10 pounds with the right hand on July 12, 2007. On August 9, 2007, Claimant's restrictions were occasional grasping with his right hand, occasional pushing and pulling of up to 15 pounds with the right hand, and occasional lifting limited to 10 pounds with the right hand. On September 17, 2007, Dr. Ludwig declared Claimant was at maximum medical improvement and was ready for an impairment rating. Dr. Ludwig noted that Claimant could return to regular work, but he also made a notation that Claimant was restricted to occasional grasping with the right hand.

12. Claimant testified that after the accident he was off work for a couple of days. Employer then moved an extra employee onto the kitchen staff to assist Claimant with tasks he was unable to perform. The assistant worked with Claimant from May until August 2007, through the busy summer camp season. Thereafter Claimant was able to perform his job duties,

although he was still having trouble gripping and holding. Claimant never asked Employer for an additional assistant but Claimant's wife would step in and help when needed. Claimant's wife was also employed by Ross Point in a kitchen staff position.

13. Claimant was laid off from his position with Employer in October of 2010 for reasons unrelated to his industrial injury. At the time of his layoff Claimant reported that he was functioning well at work, though he was not able to use his right hand fully.

14. After leaving Ross Point Claimant applied for positions as a teaching assistance and paraprofessional in the Post Falls School District. Claimant was not hired for those positions but he has worked intermittently as an on-call substitute teacher in the Post Falls School District at a rate of $70 per day without benefits. In the month prior to the hearing, Claimant was able to substitute teach four or five times. Claimant has not applied for any cooking or chef positions since leaving Ross Point.

15. At the time of hearing, Claimant and his family lived in a church parsonage in exchange for Claimant's ministerial services, some counseling, and maintenance of the lawn performed by Claimant's son.

16. Claimant still has trouble with his shirt buttons and tying his shoes. Claimant testified that he constantly drops things and that he has tried to train his left hand to manage more of the lifting and tasks of daily living. Claimant's keyboarding skills have also diminished due to his right hand injury. Claimant and his sons do not play catch anymore, nor do they wrestle as before.

17. Claimant rates his right hand pain at a three on a scale of one to ten. On days when he decides to use his right hand more, such as cooking for guests, Claimant's hand pain will increase the next day to a four or six. Claimant is not taking any prescription medication for

his hand but he will take two Aleve tablets anywhere from one to four times a week for right hand pain.

18. **Prior Industrial Accident in Arizona.** On July 11, 2006, Claimant injured his back lifting a case of frozen peas from a chest freezer. At the time of the accident Claimant was working at Whispering Pines in Arizona. Claimant's pain started in his back, predominately on the right, and extended into his right shoulder and neck. Claimant was a weight lifter prior to the Arizona accident. Subsequent to the accident Claimant could not do much weight lifting and lost about 40 pounds. Claimant received conservative treatment in Arizona and his treatment continued when he moved to Idaho.

19. Claimant's back injury was still symptomatic when he began work for Ross Point. Claimant continued physical therapy in Idaho from January through May 2007. On April 25, 2007, Claimant presented to North Idaho Medical Care Center with complaints of neck pain from his July 2006 back strain injury. Claimant was treated by Dr. Hjeltness and on Claimant's returned on May 8, 2007, he was given a pushing, pulling, and lifting restriction of 20 pounds. He was also referred for chiropractic care where he reported pain when lifting and difficulty sleeping, among other back related issues. Claimant continued with chiropractic care until August 29, 2007.

20. On August 16, 2007, Claimant's restrictions remained unchanged and he was referred for an independent medical examination. Jennifer J. James, M.D., performed an IME on January 18, 2008 at the request of the surety liable for the 2006 Arizona back injury. Claimant complained of cervical pain and pain in the right scapula that radiates into underneath the shoulder blade. Dr. James noted that a review of systems was unremarkable with the exception of difficulty sleeping due to the pain on his medial inferior scapular border. Dr. James found

Claimant's back injury had not yet reached a fixed and stable status and she recommended further diagnostic evaluation. Dr. James restricted Claimant from lifting more than 20 pounds in a position where the weight is directly in front of his body and further noted that more restrictions can be determined by Claimant's treating physician. There is no mention of Claimant's finger and hand injury in Dr. James's report.

21. Claimant participated in physical therapy and chiropractic care from February 2008 through March 2008. Larry K. Lamb, M.D., examined Claimant on March 11, 2008. Dr. Lamb found less severe winging of the right scapula and recommended an MRI which was completed on March 22, 2008. The MRI found no abnormality involving the right brachial plexus structures and mild multilevel degenerative changes of the cervical spine causing minimal right lateral recess stenosis at C5-6 with no spinal canal or neural foraminal stenosis in the cervical spine. Dr. Lamb read the MRI as essentially flat normal. Imaging done of Claimant's right shoulder on April 1, 2008, found no evidence of fracture or dislocation, no significant degenerative changes, AC joint intact, no focal soft tissue abnormality, and the visualized lung parenchyma was clear. Dr. Lamb recommended strain/counter strain physical therapy and a C4-5 facet injection, neither improved Claimant's condition. On August 28, 2008, Dr. Lamb reported that he had no treatment options left for Claimant. Dr. Lamb stated that it was difficult to accept Claimant's pain conviction with minimally identified pathology.

22. On September 30, 2008, Judith A. Heusner, M.D. performed an independent medical examination of Claimant regarding his Arizona back injury. Dr. Heusner's report does not mention an additional Idaho finger or hand injury. Dr. Heusner diagnosed a localized muscle tear complicated by muscle spasm and guarding. She opined that Claimant was not stable but

that he would be stable after another 4 to 6 weeks of chiropractic care in combination with massage therapy.

23. On April 3, 2009, Peter T. Zografos, D.C., reviewed Claimant's medical records and found Claimant has reached maximum medical improvement. Dr. Zografos had previously treated Claimant in October and November of 2008.

24. On April 16, 2009, Dr. Heusner evaluated Claimant again, found him not yet stable, and recommended more conservative care. Dr. Heusner did find improvement in Claimant's range of motion in his neck and right shoulder.

25. On May 8, 2009, Michael Errico, M.D., an orthopedic surgeon, performed an IME regarding Claimant's Arizona injury. Dr. Errico reviewed some of Claimant's medical records and opined that Claimant was stable from his 2006 Arizona back, neck and shoulder injury. Dr. Errico rated Claimant's permanent partial impairment at 10% due to the 2006 Arizona injuries. Dr. Errico also imposed permanent restrictions of no heavy lifting beyond 20 pounds, allowing periods of rest after an hour or two of standing on his feet, and a restriction on working with his head and neck in an overextended, upward position. No carrying, pushing, pulling, or lifting over 20 pounds and restricted bending.

26. On June 23, 2010, Spencer D. Greendyke, M.D., performed an independent medical examination concerning Claimant's back and neck injuries from the 2006 Arizona accident. Dr. Greendyke examined Claimant and reviewed medical records. He opined that Claimant was stable with a 5% permanent partial impairment rating, and permanently restricted to no lifting more than 20 pounds and no work above the shoulder.

27. At the time of hearing Claimant continued to have intermittent right back pain due to the Arizona Accident.

28. Having observed Claimant at hearing and compared his testimony with other evidence in the record, the Commission finds that Claimant is generally credible. Where Claimant's recollection conflict with contemporaneously prepared medical records, preference will be given to the medical record.

29. Claimant did not disclose any information about this Idaho finger injury with his back providers. Claimant did not disclose any information about this Arizona back injury with his finger and hand providers.

30. **Prior Medical Issues.** Claimant reported to medical providers that he was diagnosed with obsessive compulsive disorder and depression many years before either accident discussed above. Claimant also stated that he has had difficulty with sleep as long as he can remember, but that it became worse after his back injury. Medications have helped minimize the symptoms.

31. **Dr. Shanks' 2007 IME.** Dr. William Shanks, an orthopedist, conducted an independent medical examination of Claimant on October 23, 2007 regarding his Idaho finger and hand injury. Testing showed mild grip and pinch strength weakness on the right and decreased sensation in the median nerve distribution and slightly in the radial nerve distribution of the right hand. Dr. Shanks diagnosed an electrical burn injury of the right hand with residual sensory impairment and strength loss.

32. Dr. Shanks reported that Claimant denied problems in the right upper extremity prior to the finger injury. "There is no evidence, either by history given by the patient or by the records provided that this man had any pre-existing condition in the right upper extremity." Cl. Ex. 1, p. 3. Claimant did not inform Dr. Shanks of his Arizona accident or resultant back, neck, and shoulder injury and treatment.

33. Dr. Shanks agreed with Dr. Ludwig's opinion that Claimant's right hand was likely to continue to improve over the next year. Thus, Dr. Shanks did not find Claimant had reached a point of being fixed and stable yet no further treatment was recommended. Dr. Shanks went on to state that if an impairment rating were based on the current objective findings it would be 10% for sensory loss and 10% for strength loss, for an overall rating of 19% of the right upper extremity as a result of the finger and hand injury. No physical restrictions were given.

34. **Dr. Shanks' 2008 IME**. Dr. Shanks conducted a second IME on June 3, 2008. In reviewing Claimant's current status, Dr. Shanks noted that Claimant still had weakness in the hand, dropped things easily, and could not lift objects overhead with the right arm. Dr. Shanks found Claimant's sensory loss to be consistent with his prior exam but found that Claimant's upper extremity condition has actually worsened since his 2007 exam. Again, Dr. Shanks did not know of Claimant's Arizona back, neck and shoulder injury. Dr. Shanks opined that Claimant suffered an overall impairment rating of 28% of the right upper extremity, with 20% for strength loss and 10% for sensory loss. Again, no physical restrictions were given. Defendants paid the 28% upper extremity impairment rating to Claimant.

35. **Dr. Stevens' 2011 IME.** J. Craig Stevens, M.D., evaluated Claimant on November 16, 2011. Dr. Stevens was the only doctor given medical records from Claimant's finger and hand injury as well as his back, neck, and shoulder injury. Dr. Stevens diagnosed Claimant with a prior history of right parascapular strain and right-sided carpal tunnel syndrome unrelated to the 2007 Idaho industrial accident. Dr. Stevens reported that he was unable to objectively identify any persisting permanent anatomic change or permanent condition or current diagnosis that would be causally related to the industrial injury of May 5, 2007. Therefore,

Claimant is at maximum medial improvement from the 2007 Idaho injury and he requires no further treatment. Dr. Stevens gave no restrictions because there was no demonstrated persisting condition.

36. Dr. Stevens was also asked about the Arizona injury and he opined that Claimant at most sustained a shoulder strain or parascapular muscle strain which resolved long ago. Dr. Stevens gave no restrictions for the Arizona injury and no impairment rating due to the fact that he found no objective basis.

37. **Dan Brownell**. Claimant hired Dan Brownell as a vocation expert in this case. Mr. Brownell worked with the Idaho Industrial Commission Rehabilitation Division for 29 years and has been a self-employed vocational expert for about two and a half years. He specializes in the area of north Idaho and the adjacent area of Washington.

38. On November 30, 2010, Mr. Brownell submitted his summary report of Claimant's employability. Mr. Brownell interviewed Claimant in October of 2010 and reviewed medical records from Dr. Ludwig as well as both IME reports from Dr. Shanks. Claimant provided Mr. Brownell with additional information about Claimant's problems sleeping at night, difficulty dressing, limited ability to perform household chores, challenges driving, and instability problems.

39. Mr. Brownell's report indicates that Claimant felt his balance was impaired. At hearing Claimant attributed his balance trouble to his back injury from his Arizona accident. Yet, Mr. Brownell was not given any of the medical records pre-dating Claimant's finger injury. There was no distinction made between physical restrictions due to the back injury in Arizona and the finger injury in Idaho. Claimant reported all his subjective physical information to Mr. Brownell and all the information was used in Mr. Brownell's assessment of Claimant's

disability. Mr. Brownell opined Claimant suffered 70% permanent partial disability inclusive of impairment.

40. After the hearing, one day prior to his post-hearing deposition, Mr. Brownell was given a copy of Dr. Stevens' IME report, Spender Greendyke's IME report, and Doug Crum's employability report. Mr. Brownell testified that those reports contained totally new information (about Claimant's Arizona back, neck, and shoulder injury) which would impact his opinion and the information would change the whole perspective of the case. Mr. Brownell was unable to render a revised opinion as to Claimant's employability and disability.

41. **Douglas Crum.** Defendants hired Mr. Crum to perform a disability assessment in this case. Mr. Crum is a vocational rehabilitation consultant in Boise, Idaho. He is a certified disability management specialist and has handled around 500 cases since becoming self-employed as a vocational rehabilitation consultant.

42. Mr. Crum met with Claimant on March 9, 2012 and reviewed records including information from Dr. Errico, Dr. Greendyke, Dr. Stevens, Dr. Hjeltness, Dr. Shanks, Dan Brownell's report, a Social Security earnings statement, and records from the Arizona Industrial Commission associated with Claimant's 2006 spine injury.

43. Mr. Crum noted that Claimant's earnings increased in 2008 and 2009, the years following his finger and hand injury. In contrast to Mr. Brownell's report, Mr. Crum was informed of Claimant's spine injury which resulted in a 5% impairment rating and a restriction for light duty work and limited work above shoulder level. Mr. Crum acknowledged the impairment rating given by Dr. Shanks for the finger injury but, because there were no permanent restrictions assigned to the finger and hand injury, there were no limiting factors which impacted his ability to engage in gainful activity. Mr. Crum opined that because there

were no permanent restrictions assigned to the May 5, 2007 right upper extremity injury and because Claimant earned more in the two years following the accident, there is no basis to conclude that Claimant sustained any permanent partial disability in excess of impairment.

44. If the restrictions by Dr. Ludwig of decreased grip strength are utilized, Mr. Crum opined that Claimant would have suffered disability of 35% due to the combined effects of the 2006 Arizona injury and the 2007 Idaho injury, with 5% of the total disability attributable to the Idaho finger and hand injury.

DISCUSSION AND FURTHER FINDINGS

45. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

46. **Permanent partial impairment**. Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss is considered stable at the time of evaluation. Idaho Code § 72-422. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

47. Claimant was evaluated by two doctors regarding an impairment rating for his 2007 Idaho injury, Drs. Shanks and Stevens. At Claimant's first evaluation with Dr. Shanks, on October 23, 2007, Claimant was found not yet stable. Thus, any reference to prospective

impairment ratings is not particularly probative on the issue of Claimant's impairment. Dr. Shanks' second IME with Claimant occurred on June 3, 2008. Dr. Shanks reported Claimant's current status as follows:

> Mr. Selzer tells me that he does not feel the condition of his hand has improved at all since I last examined him in October 2007. He still has weakness in the hand and drops things easily. He cannot lift objects overhead with the right arm. He has persistent numbness in the hand and especially notes this when he awakens in the morning. He tries to protect the right hand and uses the left arm more for activities such as lifting pans and kettles at work. He feels the symptoms in the hand are worse at the end of a busy work day.
> Claimant's Ex. 2.

48. Dr. Shanks examined Claimant's right shoulder, elbow, wrist, and hand. The conclusions he drew were clearly informed by findings related to both the Arizona and Idaho accidents, even though the Arizona accident was entirely unknown to him. Dr. Shanks concluded Claimant "currently rates at 20% of the extremity for strength loss. In addition, he continues to show decreased sensation in the right upper extremity equal to 10% of the extremity. In combining the 20% strength loss with the 10% sensory loss, he would have a combined total of 28% impairment of the right upper extremity as a result of the injury in question." Claimant's Ex. 2. From those conclusions it is impossible to parse out what impairment might be related to Claimant's 2007 Idaho industrial injury. The treatment for the Arizona injuries focused on the right upper extremity and continued through the same time period as the Idaho injury and treatment for the same. The medical records from Claimant's back, neck and shoulder treatment consistently give a 20 pound lifting restriction. Without a comprehensive understanding of Claimant's separate injuries and an explanation of how the resultant impairments can be divided, Dr. Shanks' analysis is not helpful. The Commission finds Dr. Shanks' opinions on Claimant's impairment due to the Idaho accident to be unpersuasive.

49. Dr. Stevens is the only doctor to evaluate Claimant with the benefit of medical records from the Arizona injury and the Idaho injury. Because of the close proximity of the injured areas, the overlap in treatment timelines, and the related physical restrictions, the Commission finds the fact that Dr. Stevens knew about both injuries to be a critical factor in the persuasiveness of his opinion.

50. Dr. Stevens was closely questioned about Claimant's right hand grip strength and the results of the grip strength testing. Dr. Stevens performed grip strength testing on Claimant's hand which indicated a variability he found troubling. The results of the three tests were 10, 20, and 15 kilograms. The left hand grip strength testing results were 30, 28, and 26 kilograms. Dr. Stevens recognizes a variability of 10% to be acceptable and Claimant's right hand grip strength was well beyond that range. Dr. Stevens found that the large variance could be explained by pain, but if that was the case one would expect a larger number on the first test and a lower number thereafter because the patient is avoiding the pain response, which was not the case here. The second explanation, an obscure neurologic disorder, was also not applicable in Claimant's case. The final explanation posited by Dr. Stevens was that an individual may be attempting to purport a degree of strength that they do not actually have, which is difficult to do on repetitive testing which alternates between left and right hand testing. The grip strength testing performed by Claimant was performed in this type of alternating pattern to determine if such variability in results was extant. As noted, right hand testing did show significant variability in grip strength. Thus, there is a concern about the validity of Claimant's right hand grip strength test results.

51. Dr. Stevens opined that Claimant's carpal tunnel syndrome might have reduced his right hand grip strength but it would not have contributed to the variability that he demonstrated.

52. Dr. Stevens did diagnose Claimant with right-sided carpal tunnel syndrome but found it was unrelated to the 2007 Idaho industrial accident. Dr. Stevens reported that he was unable to objectively identify any permanent condition that would be causally related to the industrial injury of May 5, 2007. Therefore, he opined that Claimant is at maximum medial improvement from the 2007 Idaho injury and he requires no further treatment.

53. Dr. Stevens' opinion is well reasoned and it was developed with a complete knowledge of Claimant's physical history. The evidence supports a finding that Claimant suffers no permanent partial impairment.

54. Claimant has not proven he suffers any permanent impairment due to his 2007 Idaho industrial accident involving his finger and hand.

55. **Permanent disability**. "Permanent disability" results when the claimant's 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 reasonable expected. Idaho Code § 72-423. Absent permanent impairment, there can be no permanent disability. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 753, 769 P.2d 1122, 1125 (1989). Having failed to prove any permanent impairment, Claimant herein has not proven he suffers any permanent disability due to his 2007 industrial accident.

56. **Apportionment**. Apportionment of permanent disability pursuant to Idaho Code § 72-406 is moot.

57. **Idaho Code § 72-316.** The final issue is whether Defendants are entitled to a

reimbursement for the overpayment of PPI benefits pursuant to Idaho Code §72-316. In 2008 Dr. Shanks gave Claimant a 28% upper extremity impairment rating. Defendants promptly began payments and as of May 27, 2009 payment in full had been made in the amount of $26,980.80. As stated above, the Commission finds that Claimant is entitled to no impairment.

58. Defendants argue that Idaho Code §72-316 supports a conclusion that they are entitled to be reimbursed for the payments made. That section provides:

> 72-316. Voluntary payments of income benefits. – Any payments made by the employer or his insurer to a workman injured or afflicted with an occupational disease, during the period of disability, or to his dependents, which under the provisions of this law, were not due and payable when made, may, subject to the approval of the commission, be deducted from the amount yet owing and to be paid as income benefits; provided, that in case of disability such deduction shall be made by shortening the period during which income benefits must be paid, and not by reducing the amount of the weekly payments.

Therefore, when voluntary payments of income benefits have been made when they were not due, the Commission may order a deduction from future income benefits. The statute is unambiguous and is clearly tailored to address one specific scenario, *i.e.* how credit for overpayment is to be applied against other benefits yet due. The instant facts make application of the statute problematic. First, in the present case, no additional benefits are owed. As discussed above, Claimant has not proven his entitlement to PPI benefits or PPD benefits. Therefore, there are no future benefits from which Defendants may deduct any overpayments. Second, it is arguable that the PPI award paid by Defendants was "due and payable when made". Defendants appropriately paid the PPI award, having no medical predicate upon which to set up a dispute over Claimant's entitlement to the same. Indeed, had they refused to do so, they might be subject to liability for the payment of attorney fees under Idaho Code § 72-804.

59. The first distinction between the situation contemplated by the statute and the instant facts is relatively easy to resolve. Clearly, the purpose underlying the statute is that an

employer ought to have some ability to recoup benefits which were paid but were not owed. The statute addresses how to accomplish this goal where future benefits are payable to the injured worker. The statute specifies that in such case, an employer is not allowed to recoup the overpayment by decreasing the amount of an injured workers' periodic benefits payment. Rather, the overpayment is to be recouped by cutting short the period during which the future benefits would otherwise be paid. Because, in this case, there are no future benefits against which the credit may be applied, the only way to advance the goal of the statute is to order Claimant to reimburse Defendants in the amount of the PPI award. Notably, there is nothing in the language of Idaho Code § 72-316 which prohibits the Commission from entering such an award. Again, Idaho Code § 72-316 only deals with how the overpayment is to be recouped where additional benefits are payable to the injured worker.

60. Next, Idaho Code § 72-316 specifies that the credit for overpayment exists where the benefits in question "were not due and payable when made." Here, it is at least arguable that the PPI award was due and payable when made. However, the extent and degree of Claimant's impairment from the work accident did not change with the passage of time. As the facts of this case illustrate, he was neither more, nor less, entitled to a PPI award for his finger injury at the time of his evaluation by Dr. Shanks, than he was at the time of his evaluation by Dr. Stevens. Without a medical predicate to challenge Dr. Shanks' conclusion, Defendants had no choice but to pay the PPI award. However, that award has ultimately been demonstrated to have been not due and payable either at the time it was made, or at any other time. That our determination concerning Claimant's entitlement to the PPI award is retrospective does nothing to diminish the fact that the PPI award paid by Employer following Dr. Shanks' evaluation was not due and payable when made.

61. The purpose underlying Idaho Code § 72-316 is advanced by our ruling today; it is desirable to encourage employers to err on the side of making voluntary payments to injured workers in situations of questionable liability. During a period of recovery, an injured worker can ill-afford interruptions in his or her benefits stream. Such interruptions are less likely to occur where an employer knows that if it makes a benefits payment to an injured worker which ultimately turns out not to have been owed, a mechanism exists for the employer to seek reimbursement for the overpayment. Idaho Code § 72-316 encourages voluntary payments of compensation, as does our ruling today.

62. It is important to note, however, that Idaho Code § 72-316 allows flexibility in ordering deductions from future benefits. "Any payments made … may, subject to the approval of the commission, be deducted from the amount yet owing." Idaho Code § 72-316, (emphasis supplied). The Commission makes overpayment determinations on a case by case basis, with a view towards the attainment of justice in each individual case. "[T]he Commission has historically been imbued with certain powers that specifically enable it to simplify proceedings and enhance the likelihood of equitable and just results." Hagler v. Micron Technology, Inc., 118 Idaho 596, 599, 798 P.2d 55, 58 (1990). The Commission's equitable jurisdiction was recognized by the Supreme Court in Brooks v. Standard Fire Insurance Company, 117 Idaho 1066, 793 P.2d 1238 (1990). In Brooks, the Court affirmed the Commission's adjudication of the equitable right of contribution and reimbursement between sureties in a workers' compensation dispute where Idaho Code §72-313 did not provide an adequate remedy. Brooks supports the existence of equitable remedies where, as in the instant case, Idaho law does not provide an adequate remedy at law.

63. We recognize the seemingly harsh result of holding Claimant responsible for the overpayment; Claimant might well argue that he ought not to bear responsibility for repayment where payment was occasioned only as a result of a unilateral decision to pay made by Defendants. However, that payment was made in good faith, and in an effort by Employer to satisfy what it then thought was its obligation under the Idaho Workers' Compensation Laws. Since Claimant does not now have, and has never had, an entitlement to a PPI award for the subject accident, the better solution is to order repayment of that award to Employer, all to encourage payment on questionable claims under these laws. Further, to allow Claimant to retain the benefit of the PPI award under the facts of this case would amount to an unjust enrichment, and this too should be guarded against in our administration of the Workers' Compensation Laws. Therefore, Defendants are entitled to reimbursement from Claimant in the amount of $26,980.8.0, representing the PPI award which Claimant was paid, but to which we have determined he is not entitled.

CONCLUSIONS OF LAW

1. Claimant has not proven he suffers any permanent impairment due to his 2007 Idaho industrial accident involving his finger and hand.

2. Claimant has not proven he suffers any permanent disability due to his 2007 industrial accident.

3. Claimant shall reimburse Defendants the sum of $26,980.80, representing the overpayment of PPI benefits.

4. Apportionment pursuant to Idaho Code § 72-406 is moot.

ORDER

1. Claimant has not proven he suffers any permanent impairment due to his 2007 Idaho industrial accident involving his finger and hand.

2. Claimant has not proven he suffers any permanent disability due to his 2007 industrial accident.

3. Claimant shall reimburse Defendants the sum of $26,980.80, representing the overpayment of PPI benefits.

4. Apportionment pursuant to Idaho Code § 72-406 is moot.

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

IT IS SO ORDERED.

DATED this __27th_____ day of __February_____, 2013.

INDUSTRIAL COMMISSION

/s/_____
Thomas P. Baskin, Chairman

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

/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __27th_____ day of _February _____, 2013, 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:

THOMAS B AMBERSON
PO BOX 3724
COEUR D'ALENE ID 83816-1349

BRADLEY J STODDARD
PO BOX 896
COEUR D'ALENE ID 83816-0896

/s/_____