BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

WILLIAM J. WATERS, Claimant, v. JOHNNY AGUINAGA dba ALL PHASE CONSTRUCTION, Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2006-522008** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED: December 1, 2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee LaDawn Marsters, who conducted a hearing in Idaho Falls, Idaho on May 4, 2010. Claimant, William J. Waters, was present in person and represented by James Arnold, of Idaho Falls. Defendant Employer, Johnny Aguinaga dba All Phase Construction, and Defendant Surety, State Insurance Fund, were represented by Steven R. Fuller, of Preston. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on August 19, 2011.

ISSUES

The issues to be decided by the Commission as the result of the hearing are:

1. Whether and to what extent Claimant is entitled to permanent partial disability benefits; and

2. Whether apportionment for preexisting condition pursuant to Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant suffered a work-related cervical spine injury requiring anterior cervical discectomy and fusion surgery at C5-6 on February 26, 2007. Claimant's residual symptoms, restrictions and limitations resulting from that event are at the center of the parties' controversy.

Claimant, a high school graduate with no formal post-high school training or education, contends that he is entitled to no less than 58.4% permanent partial disability (PPD), inclusive of impairment, because he can no longer do the above-shoulder work required in drywalling and other construction-type work. He relies upon the medical opinions of Gregory West, M.D., his treating orthopedist, and the vocational opinions of Kent Granat. Claimant also maintains that there is no basis to apportion any of his PPD to any preexisting cause, or to conclude that any post-industrial accident injuries are responsible for any of his cervical symptoms.

Defendants counter that Claimant is entitled to no more than 25% PPD, inclusive of impairment. They also seek apportionment to preexisting causes in an unspecified amount, acknowledging that no medical professional has opined that such apportionment would be appropriate. Defendants rely upon the opinions of Claimant's treating orthopedic surgeon, Philip McCowin, and a vocational consultant, William Jordan.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition testimony of William J. Waters taken August 11, 2009 (also identified as Joint Exhibit B);
3. Joint Exhibit A, admitted at the hearing;
4. The testimony of Claimant taken at the hearing;
5. The post-hearing deposition testimony of Kent Granat taken July 14, 2010;
6. The post-hearing deposition testimony of William (Bill) Jordan taken August 25, 2010; and
7. The post-hearing deposition testimony of Gregory West, M.D. taken April 26, 2011.

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

OBJECTIONS

All pending objections are overruled.

FINDINGS OF FACT

CLAIMANT'S VOCATIONAL HISTORY

1. At the time of his industrial accident on June 15, 2006, Claimant was 33 years of age, and working for Employer as a drywall hanger and taper. Previously, he had worked elsewhere in the construction industry doing concrete, drywall and other types of work. He had also worked as a bartender. Following his industrial injury, until he underwent cervical fusion surgery in February 2007, Claimant also worked as a drywall installer. After his surgery, Claimant had a job doing construction cleanup, which led to a position as a framer at the same

company. He was eventually laid off. At that time, Claimant wished to work for two other individuals starting up their own construction business, but that did not pan out.

2. Concerning his education, Claimant graduated from high school with barely passing grades. He has no education or training other than high school and what he has learned on-the-job. Claimant took several welding classes in high school but, apparently, he has never actually worked as a welder.

3. Claimant considers himself an alcoholic and, therefore, he no longer believes bartending work is suitable for him. Until 2003 or so, Claimant felt that drinking overran his life and made him an undependable worker. Claimant estimates, "…probably from the time period of 2003 to the present I have become quite a bit more reliable and more dependable." Tr., p. 15.

4. Historically, Claimant has not been a high wage earner, although information concerning his preinjury income is sketchy. Mr. Jordan reported that in the five years preceding the year of the subject accident, Claimant had annual income as follows:

2001 $4,063.00
2002 No recorded income
2003 No recorded income
2004 $8,424.00
2005 No recorded income

However, at the time of his deposition on August 11, 2009, Claimant acknowledged, in response to a question put to him by defense counsel, that in 2003 his adjusted income was $12,774.00. (*See* Claimant's Dep., pp. 27). Also, at the time of his deposition, Claimant confirmed that he actually did have income in 2005, but it was significantly less than he had earned in other years. (Claimant's Dep., pp. 27-28). For 2004, although Mr. Jordan correctly noted that Claimant earned wages in the amount of $8,424.00, he neglected to note that Claimant also had unemployment compensation in 2004 totaling $2,424.00. Therefore, Claimant's adjusted gross

income for 2004 was actually $10,848.00. Suffice to say, however, that in the five years preceding the year of the subject accident, Claimant never earned more than $12,774.00. Assuming a 52-week work year, at forty hours per week, Claimant would need to find a job paying $6.14 per hour to replace this annual income.

CLAIMANT'S PRIOR MEDICAL HISTORY

5. Claimant sustained a neck injury while wrestling at school on March 7, 1991. He was transported by ambulance to Eastern Idaho Regional Medical Center (EIRMC), where he complained of persistent neck pain, but denied pops, paresthesias, numbness, changes in either his upper or his lower extremities, and prior neck injury. Claimant also denied that he lost consciousness following his injury. Cervical spine x-rays revealed no fractures, normal alignment of vertebral bones and facet joints, normal disc spaces and no soft tissue swelling. Claimant was diagnosed with a cervical strain due to hyperflexion of his cervical spine. He was treated with a cervical soft collar and medications, and was instructed to follow up with Dr. Brunt for additional difficulties.

6. On February 10, 1993, Claimant was treated with two stitches for a forehead laceration he sustained in a motor vehicle accident in which his vehicle was struck on the passenger side. The hospital chart note indicates he denied the accident was work-related.

7. On April 19, 2002, Claimant sustained more serious injuries to his head, neck and right hand when he was again involved in a motor vehicle accident when the vehicle in which he rode as an unrestrained passenger hit a bridge rail, forcing him through the windshield. He reported no loss of consciousness or memory. Computer tomography (CT) x-rays of Claimant's head and cervical spine revealed no abnormalities. However, Claimant did sustain a 12 centimeter-long laceration to his forehead and scalp with arterial bleeding. Claimant's wounds

were treated with more than 30 staples and sutures, and he was provided with pain and antibiotic medications.

8. In follow-up on May 14, 2002, Claimant reported residual difficulties related to his April 2002 head wound. The chart note, by an unidentified provider, states a diagnosis of cervical and thoracic somatic dysfunction and post-concussive headaches. Claimant described his headaches as a "sudden onset of fleeting type headache, sharp and feels like a 'freezing' headache" that lasted from a few minutes to three hours, without nausea, vomiting or visual changes. Claimant reported no difficulties with gait or confusion, and he denied problems with headaches prior to the 2002 accident. Examination revealed tenderness at C1 and T2-4. Claimant was treated with myofascial massage and stretching and was prescribed Celebrex for 5-7 days. Claimant was instructed to follow up, if necessary. There is no evidence of any follow-up in the record.

INDUSTRIAL ACCIDENT AND RELATED CARE

9. On July 29, 2006, Claimant sought treatment from Terry L. Burke, D.C., a chiropractor, for an injury he sustained at work on June 15, 2006. On the intake sheet, Claimant explained:

> I was hanging sheetrock on a cieling [*sic*] with my supervisor [*sic*] Trent Buckmaster. He said to push the sheetrock up harder with my head, so I did. I imediately [*sic*] told him I felt something. He said he could tell by the look on my face.

JE-A, p. 37. Claimant described his neck and right shoulder area pain as "constant" and "stabbing" with an intensity of "8" on a scale of 1-10. *Id.* In addition, he described his pain as "aching" and reported arm symptoms including pain, tingling and/or numbness and weakness in his arms and/or legs. JE-A, pp. 46, 50. Claimant also reported a number of difficulties performing activities of daily living but, notably, he reported no headaches associated with the

industrial injury. His cervical exam revealed tenderness and muscle stiffness to palpation; some loss of active range of motion, particularly in his right chin to shoulder rotation; and other difficulties.

10. Following Claimant's chiropractic treatment, Surety accepted Claimant's claim for workers' compensation benefits.

11. Over the next couple of weeks, Claimant's pain improved, but he developed some numbness in his right thumb and what felt like muscle soreness in his neck and shoulder area.

12. On September 26, 2006, Claimant was examined by Gregory West, M.D., an orthopedic traumatologist, for continuing shoulder pain and weakness. Dr. West reported that Claimant had worked off and on since his June 2006 industrial accident, with intermittent shoulder pain but no neck pain, contrary to Dr. Burke's chart notes. In any event, Claimant's chief complaint on presentment to Dr. West was shoulder pain and weakness, and his exam revealed no cervical spine tenderness.

13. Dr. West did, however, note neurological deficits on exam, so he recommended upper extremity EMG testing to map out these problems before determining whether, and which, imaging studies to order:

> The patient has multiple objective areas of neurologic deficit. They are pretty widely separated and probably cannot be explained by a single cervical disc; even though he has a fairly abnormal looking cervical spine. I have talked to Dr. Gary Walker about this and rather than chase down multiple MRI's [*sic*] we will start with EMG's [*sic*] and we would like to define his neurologic deficit and then we can determine whether we do cervical spine MRI, brachial plexus MRI even to rule out tumor or a shoulder MRI.

JE-A, p. 54. Dr. West took Claimant completely off work pending EMG testing.

14. Based upon the results of Claimant's EMG studies, Dr. West diagnosed "a significant radiculopathy pattern at C6" and recommended an MRI of Claimant's cervical spine.

JE-A, p. 55. Pending Surety's approval for an MRI, Dr. West restricted Claimant to light-duty work; specifically, sedentary work with no use of his arms above mid-chest level.

15. On December 28, 2006, an MRI of Claimant's cervical spine (without contrast) revealed findings leading to the radiologist's diagnosis of degenerative disc disease at C5-6 with a diffuse disc bulge and mild right foraminal and central canal stenosis, as well as findings consistent with an annular tear at C5-6. Upon review of the MRI findings,[1] Dr. West noted, "It appears that the patient has an annular tear which is probably a new finding related to his injury. He does have persisting and reproducible nerve root findings at that same level." JE-A, p. 68.

16. Dr. West referred Claimant to Gary C. Walker, M.D., a physiatrist, for evaluation for a cervical epidural. Dr. Walker performed nerve conduction studies, which he opined were normal, and a needle exam, which produced findings consistent with active C6 radiculopathy. He opined the findings did not support a diagnosis of peripheral or entrapment neuropathy.

17. On January 31, 2007, Dr. West opined that conservative therapies, including exercises and anti-inflammatories, had failed. He recommended an anterior cervical discectomy and fusion surgery at C5-6 and took Claimant off work. Claimant underwent the procedure on February 26, 2007, by Philip McCowin, orthopedic surgeon. Dr. McCowin noted in his operative report that the soft tissue underlying the removed disc was markedly degenerated, and his opinion in this regard was confirmed by the pathologist, who noted degenerative changes on the preserved fragments of intervertebral soft tissue disc material.

18. On April 11, 2007, Dr. McCowin examined Claimant and recorded his condition relevant to his cervical surgery:

[1] Dr. West inaccurately refers to the imaging study as a CT scan in the referenced January 3, 2007 chart note.

> The patient really has minimal pain. Normal neurologic function in the upper extremities. He has no numbness or tingling. The only dysphagia is when he is in the shower, when he stretches his neck and hyper-extends and notes when he swallows he has a little discomfort. Apart from that, the patient has no problems. The patient has no dysphonia. I am going to see the patient back in six weeks time and obtain a follow-up film and allow him to return to full activities at that time. In the interim, I will let him return to work on April 23, 2007 with a 45 pound lifting restriction.

JE-A, p. 87.

19. Dr. McCowin returned Claimant to light-duty work on April 23, 2007, with, apparently, a 45-pound lifting restriction. Thereafter, on May 23, 2007, Claimant again followed up with Dr. McCowin. Dr. McCowin noted Claimant's x-rays identified good hardware positioning and an intact arthrodesis. He also noted that Claimant has some loss of normal inward spine curvature (lordosis) above the fusion which, Dr. McCowin posited, was attributable to muscular dysfunction in his neck. He provided Claimant with exercises and opined that Claimant had reached medical stability. He released Claimant to "full activities", restricting him only from impact loading with axial activities, such as diving and gymnastics, explaining, "I think with reasonable work accommodations this should not be a problem." JE-A, p. 87.

20. On May 23, 2007, Dr. McCowin rated Claimant's permanent partial impairment (PPI) at 9% of the whole person:

> He can be rated at a single level fusion with mild residual symptoms, as his range of motion is not going to contribute significantly to his impairment. His rating based on specific spine disorder, Table 15.7, AMA Guides III, would be surgically treated disc lesion with residual medically documented pain and rigidity and his motion of the cervical spine today about 30 degrees flexion and 40 degrees extension; however, this has been changing over different visits and I do not believe this is reproducible and cannot be used as a reproducible part of the impairment, so his permanent impairment rating will be a 9% whole person impairment, with healed fusion and some loss of muscle function and some mild residual symptoms.

JE-A, p. 87.

21. During the subsequent two months, Claimant testified, he experienced significant pain in his right shoulder and right side of his neck when he did drywall work. Claimant described his recovery and return to work:

> Q. How were you feeling after the surgery and Dr. McCowin's follow-up with you?
>
> A. Well, the stabbing pain in my neck was gone so I felt a lot better there. I had still I guess you could call it a muscle cramping sensation around my shoulder blade to my shoulder (indicating), across and up to my neck. I felt pretty good for a while [*sic*].
>
> Q. Did Dr. McCowin have you do any physical therapy?
>
> A. No, sir, he gave me a pamphlet that was two weeks' worth of stretches that were just like stand on all fours and put one arm above your head type stretches. I followed them for two weeks. He told me shortly after that, after he took the collars off of me, that I could start being more physical and I could drive and go back to work possibly. And I tried to go back to work, and I really couldn't keep up. I worked with a gentleman that I worked with at All Phase - - [Mr. Buckmaster]
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> …
>
> Q. Do you remember what period of time this is that you were working for Mr. Buckmaster?
>
> A. Roughly from May 23, 24 or somewhere around there to mid to end of July.
>
> Q. That's of 2007?
>
> A. Yes, sir.
>
> Q. Were you working full time for Mr. Buckmaster?
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> A. No, sir, we didn't have full-time work. It was more like two to four hours a day.
>
> Q. How did that work go for you from a physical standpoint?
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> A. It was, from my point of view, grueling to me. I enjoyed it because I enjoyed the work I was doing, but it was painful.

> Q. In what way was it painful, what hurt?
>
> A. My right shoulder and the right side of my neck would start to ache and once you have the drywall mud on the wall, you don't have long to wipe it off, and I couldn't keep up, it was drying faster than I could wipe it down.

Tr., pp. 24-25. No contemporaneous evidence in the record corroborates Claimant's testimony that pain limited his ability to do drywall work. The only contemporaneous records are those of Dan Wolford, ICRD consultant (see below), which confirm Claimant's return to work and other details, but which fail to mention any physical limitations. Mr. Wolford's notes in this regard indicate that Claimant's file was closed because he had successfully returned to work. Presumably, had Claimant reported significant trouble working, Mr. Wolford would have noted this and continued working with him.

22. Claimant's difficulty keeping up at work eventually led to his being laid off. He applied for jobs at a convenience store and at rental car agencies (detailing cars), without success. He had an interview at Enterprise, but failed to receive an offer of employment after discussing his restrictions and limitations with his interviewer.

23. In July 2007, Claimant was involved in a rear-end motor vehicle accident, in which he sustained a whiplash-type injury to his neck. Claimant could not recall the name of the emergency care facility at which he received treatment for his injury, but he described its location. Claimant was queried about the July 2007 accident at the time of his deposition. Evidently, Claimant had agreed to obtain, and provide to defense counsel, copies of medical records generated in connection with this visit. However, the medical records were never provided. (Tr., pp. 48-49). Similarly, Claimant did not provide counsel with medical records generated at the same facility in connection with the slip and fall accident Claimant suffered while walking home from the Golden Crown, discussed below.

24. For the next ten to twelve months, Claimant testified, he lived off his permanent partial impairment benefits. At some point, he took a job bartending at the Golden Crown Lounge. One early morning after completing a shift there, Claimant tripped and fell while running home from work. Although he testified that he fell on the back of his right shoulder, he also testified that he sustained a bruise to the front of his right shoulder but no bruise to his back. *See* Tr., pp. 51-52. In any event, Claimant did obtain medical treatment for this injury, which he estimated at the hearing occurred in either October or November 2008. Claimant did not provide medical records associated with this injury to Defendants or seek to have them admitted into evidence at the hearing.

25. The timing of Claimant's slip-and-fall injury is relevant to determining whether this event may be responsible for the residual symptoms he described at the hearing. Although Claimant's above-referenced testimony indicates he fell in October or November 2008, while he worked at the Golden Crown, other evidence disputes that he worked at the Golden Crown during this period, raising the question of whether he sustained this injury earlier.

25. Claimant's work history reported by Mr. Jordan, discussed below, indicates that Claimant worked at the Golden Crown from January through February 2008.[2] Claimant's earnings information in the record is not so specific, but it does indicate Claimant only earned income from the Golden Crown in 2008. Claimant's deposition testimony, within the span of just a few questions, is inconsistent as to the period during which he tended bar at the Golden Crown:

> Q. Okay. Then you worked for Golden Crown as a part-time bartender; is that right?

[2] Mr. Jordan's report indicates Claimant worked as a bartender at the "Golden Corral". JE-A, p. 121. The weight of the evidence in the record persuades the Referee that Mr. Jordan inaccurately recorded the name of the "Golden Crown".

A. Yes, sir. *Until I got the job I'm currently attached to now.*

Q. Let's back up to the Golden Crown. For what period of time did you work there?

A. I'm not sure. It wasn't very long.

Q. Well, you worked through July with Mr. Buckmaster. And then, according to your Answers to Interrogatories, you worked from May of 2008 to the present with J & R Construction.

A. Yes.

Q. So, between July of 2007 and May of 2008, did you work for Golden Crown?

A. I did as a bartender, but I can't remember for how long. It was just a month or two or three. *I did some part-time work after I got the job that I have now* - -

Q. Okay.

A. - - that I'm attached to.

Q. Part-time work in, like, construction work?

A. Pardon me?

Q. Part-time work, such as construction work?

A. At the Crown?

Q. No. You said you did some part-time work in between. I wondered what else you did.

A. No, no, for the Crown.

Q. Oh, okay.

A. If someone needed - - or was going on vacation, I substituted for them a day on the schedule.

Q. You just don't recall what period of time.

A. Yeah, I don't know when the last one I did was, so - -

Q. And you were making $10 an hour at the Golden Crown?

A. Yes.

Q. *So, you started work in May of 2008 with J & R Construction?*

A. *Yes.*

Claimant Dep., pp. 13-15 (emphasis added). So, according to Claimant's equivocal testimony and the otherwise undecisive evidence on this point, the record establishes only that Claimant sustained his slip-and-fall accident while working at the Golden Crown for 1-3 months, in 2008.

26. Claimant's job at the Golden Crown included mixing drinks and restocking the cooler, where he performed tasks including lifting beer kegs. Claimant testified that he was unable to lift a beer keg over a 6-inch lip without assistance. Claimant quit this job because it exacerbated his difficulties with proximity to alcohol.

27. As indicated, above, Claimant began working for J & R Construction in May 2008, doing cleanup and framing. He testified at his deposition on August 8, 2009, that he was able to perform this job adequately, though perhaps a little slowly. He did not specifically describe any of his duties at this job. Claimant testified that he was not working much at that time due to a lack of available work at the company.

28. On August 28, 2008, Claimant returned to Dr. West for treatment of right shoulder pain. Dr. West noted muscle atrophy that could precipitate impingement, as well as Claimant's former EMG test results indicating fibrillations and fasciculations in C6 muscles enervated distally. Dr. West diagnosed non-radiating impingement symptoms and recommended a Cybex test, which was much less expensive than additional EMG testing, to isolate and measure Claimant's infraspinatus. That test was conducted on September 23, 2008.[3] On

[3] The copy of the test results in the record indicates, in type-writing, that the test was conducted on July 12,

November 11, 2008, Dr. West noted that the Cybex test results demonstrated Claimant has weakness in both internal and external rotation, attributable to C5 and C6 ennervation. He opined that Claimant's weakness is likely due to his industrial accident, that there is no additional treatment to improve Claimant's condition, and that an increased PPI rating may be warranted:

> I think it is on a more probable than not basis shoulder weakness related to his radiculopathy and subsequent discectomy surgery. I do not think there are other treatments for this; other than he may have an increased impairment rating. However, I have not seen his actual rating, so I cannot comment on whether or not this process was related. I would be willing to look at his prior records and increase his rating if so necessary.

JE-A, p. 90. At this time, Dr. West was unaware of either Claimant's July 2007 car accident injury to his neck, described by Claimant as a whiplash injury, or his subsequent slip-and-fall injury to his right shoulder. Dr. West opined at his deposition that a whiplash injury would affect Claimant's musculature, not his nerves, which he opined are responsible for Claimant's residual symptomatology. Nevertheless, the nature and extent of each of these injuries remains a mystery because Claimant did not produce the medical records related to these events.

29. After reviewing Claimant's records, Dr. West confirmed on November 20, 2008, that a PPI assessment of 9% of the whole person was still appropriate, according to the *Guides to the Evaluation of Permanent Impairment, Fifth Edition (Fifth Edition)*, even considering Claimant's residual symptoms.

30. On March 31, 2009, however, Dr. West revised his PPI opinion to 12% of the whole person, this time relying upon the *Guides to the Evaluation of Permanent Impairment, Sixth Edition (Sixth Edition)*, which was published in 2008. He did not note any changes in

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1980 and, in hand-writing, that it was conducted on September 23, 2008. Claimant was less than two years of age at the earlier date, so it is highly unlikely that this report represents prior testing. It is much more likely that a mistake was made in recording the date when the test report was prepared, and that the hand-writing represents a correction.

Claimant's condition following his November 20, 2008, PPI opinion, but relied only upon the new guidance from the *Sixth Edition* to support the additional 3% assessment:

> I have reviewed the Sixth Edition, AMA Guides, which is much better than the Fifth Edition for nerve based processes. Based on Table 17 2 [*sic*-17.2] from the Sixth Edition, the patient's cervical spine regional grid is a Class II cervical spine disease with surgery and with radiculopathy is 11%. A pain disability questionnaire [*sic*] and he scored 52, which puts him in the milder Grade B. The patient's functional history is Modifier II; physical examination would be Modifier II. His net adjustment would be 1, so from his default of 11, he would be a 12% impairment.

JE-A, p. 94. Surety subsequently paid Claimant benefits equivalent to the additional 3% whole person PPI assessment.

31. Dr. West also opined that Claimant should look for work that is less physically demanding than construction work because his shoulders get sore after just a couple of hours of work, and he gets weakness and numbness in his hands:

> I think the patient does have enough impairment that he would be expected to have difficulty working at a construction job. Following his initial release, he said that Vocational Rehab bought him some tools and sent him back to work doing construction. He says that he has difficulty with that. He said after a couple of hours his shoulders get weak and sore. The patient can get some weakness or numb feelings in his hands. I think he would be best served with a job that is more sedentary than framing and construction. I think he should have a second look from Voc Rehab with consideration of re-training or finding him a job where he does not have to lift heavy tools or 2x4's and 2x6's. Certainly something in the construction field such as an estimator would be reasonable for this patient. However, I will leave this up to Vocational Rehab.

JE-A, p. 94. Dr. West also anticipated Claimant may require additional treatment in the future, possibly including physical therapy. If so, "This would supersede his previous impairment." *Id.*

32. On January 21, 2010, Dr. West opined, without further examination, that Claimant carries risks associated with his cervical fusion surgery of developing disc disease and degenerative changes that may require future surgical intervention. He also opined that Claimant

had a "viable future medical care need" for additional pain management because he had only been treated with "rudimentary" means to that date. JE-A, p. 101.

33. In approximately February 2010, Dr. West assessed the following restrictions:

a. Standing and walking: up to two-thirds of the workday (frequently);

b. Sitting: up to two-thirds of the workday (frequently);

c. Lifting and pulling, for up to one-third of the workday, or up to 20 minutes of every hour: no more than 10 pounds;

d. Bending or stooping: less than one-third of each workday ("seldom");

e. Reaching: less than one-third of the time ("occasional");

f. Handling: up to two-thirds of the time ("frequent"); and

g. Fingering: up to two-thirds of the time ("frequent"). *See,* JE-A, p. 102.

VOCATIONAL REHABILITATION

34. Industrial Commission Rehabilitation Division (ICRD). Dan Wolford, ICRD consultant, followed Claimant from November 21, 2006, until July 16, 2007, when his file was closed because Claimant had been declared medically stable and had returned to work. Mr. Wolford noted on July 16, 2007, "Based on the restrictions/limitations from this industrial injury, the claimant is able to return to his customary occupation." JE-A, p. 116. His detailed notes reveal no indication that Claimant experienced pain at his post-surgical drywall job between May and July 2007 even though he advised Claimant, on May 31, June 11 and July 12 to contact him in the event return to work problems arise.

35. Mr. Wolford's June 11 and July 12 notes are cited at length to demonstrate the level of detail, as well as the lack of reference to any return-to-work issues:

> [June 11, 2007]: **CLAIMANT CONTACT:** I placed a telephone call to the claimant. The claimant indicated that he has returned to work with

> Trent Buckmaster. He has been working part-time. He received a letter from State Insurance Fund, dated 5/31/07. That letter outlined a permanent partial impairment award of 9% which will begin 5/24/07. The claimant's current employer has talked with him about the possibility of becoming an independent contractor and sharing available work. The claimant talked about licensing, workers' compensation insurance, and other such items. I referred the claimant to the small Business Administration for answers to his questions. I recommended the claimant contact me in the event return to work issues arise.
>
> …
>
> [July 12, 2007]: **CLAIMANT CONTACT:** I placed a telephone call to the claimant. The claimant indicated that he is still working at $8 per hour. Overall, he is doing fairly well. He is trying to get more into the taping end of drywall work. He is still interested in starting his own small business, but was unable to obtain assistance through IDVR. However, he did follow up with Commerce & Labor and has been referred to another person there for assistance. However, he has been too busy to follow up with that contact, but plans to do so in the future. I recommended that the claimant contact me in the event return-to-work problems arise.

JE-A, pp. 116-117 (reproduced as in original).

36. Kent Granat. Mr. Granat, a vocational rehabilitation consultant retained by Claimant, prepared a disability evaluation on December 9, 2009. He concluded that Claimant has suffered 58.4% permanent partial disability (PPD), inclusive of impairment.

37. William C. Jordan. Mr. Jordan, a vocational rehabilitation consultant retained by Defendants, prepared a disability evaluation on April 21, 2010. He concluded that Claimant has suffered 25-27% PPD, inclusive of impairment.

CLAIMANT'S CREDIBILITY

38. A claimant's credibility is always a factor considered in workers' compensation proceedings. Here, the scrutiny is heightened because the record indicates Claimant did not disclose medical and employment records (and related information), in his possession or under his control, related to injuries to his neck and right shoulder following his industrial accident and,

further, that Claimant's recollection of time periods relevant to onset to symptomatology he attributes to the industrial injury has been, at times, inconsistent with his own prior statements or other evidence in the record. The Referee finds inadequate evidence to establish that Claimant has engaged in any activities intended to mislead this tribunal; however, with respect to time of onset of his relevant symptomatology, Claimant's testimony is not credible. Therefore, it will be afforded little weight on this point in the absence of persuasive corroborating evidence.

DISCUSSION AND FURTHER FINDINGS

39. 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).

PERMANENT PARTIAL DISABILITY

"Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. I.C. § 72-423.

"Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. In determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement; the disfigurement (except in certain cases), if of a kind likely

to handicap the employee in procuring or holding employment; the cumulative effect of multiple injuries; the occupation of the employee; and his or her age at the time of accident causing the injury, or manifestation of the occupational disease. Consideration should also be given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. I.C. §§ 72-425, 72-430(1).

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 766 P.2d 763 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

40. Maximum Medical Improvement (MMI). Although the parties did not specifically raise the issue, a determination of when Claimant reached MMI must be made in order to assess his PPD related to his industrial accident. The date on which Claimant reached MMI is the operative point in time at which to assess PPD. Only one physician, Dr. McCowin, opined on this subject. He determined that Claimant reached MMI as of May 23, 2007, even though he was still experiencing some residual symptoms. At that time, Claimant agreed that his condition had improved, although he still had what felt like a muscle cramp in his neck.

41. The next medical record in evidence is dated August 28, 2008, and prepared by Dr. West. Dr. West documents Claimant's complaints of shoulder pain at that time, but he does not address the issue of medical stability. In November 2008 and March 2009, he reviewed Claimant's PPI rating, but he still did not address the date on which Claimant reached MMI

following his industrial accident. Dr. West's recognition of Claimant's functional deficits as of August 2008 prompted him to review Dr. McCowin's PPI assessment; however, he never disputed Dr. McCowin's MMI assessment. Ultimately, Dr. West never disputed any of Dr. McCowin's assessments; it was only based on new guidance from the *Sixth Edition* that he ultimately revised Dr. McCowin's 9% whole person PPI assessment to 12%.

42. The only evidence of deterioration in Claimant's condition, different from that observed by Dr. McCowin, for fifteen months following May 2008, consists of Claimant's testimony. As determined, above, Claimant's testimony is not credible with respect to the time of onset of his symptoms. Furthermore, there is inadequate evidence to corroborate Claimant's testimony that he experienced significant pain with drywall work before July 2007 which, if proven, may have constituted grounds for finding Dr. McCowin's MMI finding premature.

43. Similarly, after May 2007 but before he consulted Dr. West in August 2008, Claimant sustained a whiplash-type injury to his neck, and, possibly, a trip and fall injury to his right shoulder. It is undisputed that Claimant sustained these injuries to the very locations he claims were only permanently injured as a result of his industrial accident. Claimant has failed to prove that the complaints with which he presented after August 28, 2008 are referable to the subject accident as opposed to one or more of the intervening events. Therefore, the symptoms reported to Dr. West cannot be assumed to have existed, either as of the date Dr. McCowin found Claimant reached MMI, or because of the industrial injury. As a result, Dr. West's opinions with respect to Claimant's industrially-related limitations and restrictions lack foundation, are given no weight, and are unpersuasive for the purpose of challenging Dr. McCowin's MMI assessment.

44. The weight of evidence in the record establishes that, as of May 23, 2008, "no fundamental or marked change in the future [could] be reasonably expected" in Claimant's condition. *See* I.C. § 72-423. Therefore, Claimant reached MMI as of May 23, 2008.

45. PPD as of May 23, 2008. No vocational expert specifically assessed Claimant's ability to obtain gainful employment as of May 23, 2008. At that time, Dr. McCowin released Claimant to full duty, restricting him only from activities involving significant axial loading, like gymnastics and diving. These examples are not directly relevant, since Claimant is neither a gymnast nor a diver. They do illustrate, however, that activities which exert weight or resistance onto Claimant's head, like the activity in which he was engaged when he incurred his industrial injury (pushing sheet rock onto a ceiling with his head and neck), are problematic.

46. Neither vocational expert provided data to illustrate how Claimant's restriction on axial loading activities has reduced his ability to obtain or perform gainful employment. Therefore, there is inadequate evidence in the record to establish that Claimant has sustained any permanent partial disability in excess of his permanent partial impairment.

47. Even if it be assumed that the limitations proposed by Dr. McCowin should be rejected in favor of those suggested by Dr. West, the facts of the case still support the Commission's finding that Claimant is not entitled to disability over and above impairment. First, as Defendants have pointed out, there is some ambiguity in the opinions offered by Dr. West concerning Claimant's permanent limitations/restrictions. The opinions expressed by Dr. West in connection with the form he filled out at the request of Claimant's counsel, appear to differ from the opinions that he expressed at the time of his deposition:

> Q. (BY MR. FULLER:) Okay. Could Mr. Waters perform a janitorial-type position OF [sic] of some combination from his employer? Could he do that kind of job, do you think?

A. It's just looking at this description: Washes walls, ceilings, that's – you know, occasionally, maybe. It really has to do with exert force of twenty, fifty pounds. If that's pushing a wheeled cart on level ground, you know, that probably – he probably can't exert that much force. If that is lifting, probably won't be able to.

So , again, it really, even though his form is a little detailed, it's a little bit hard to say.

Q. Okay.

A. What it says: Strength, medium, which would kind of be where I'd put him, in the medium category.

Twenty, fifty pounds occasionally, ten to twenty-five frequently. Up to ten pounds constantly. But he's not going to be able to wash ceilings, walls frequently.

West Dep., pp 17-18.

48. Also, as noted by Defendants, Dr. West clearly felt that the best way to evaluate Claimant's functional capacity is to put him through a functional capacities evaluation, an exercise that was not performed by him in this case.

49. It is apparent that Claimant has not been highly motivated to search for employment following his date of medical stability. For a number of months, possibly ten to twelve, he simply turned into a "recluse" living off his PPI award. Also, although Claimant did perform an employment search during the time he was receiving unemployment benefits, this work search was half-hearted at best. Indeed, even though Claimant had been released without restrictions by Dr. McCowin, he divulged facts about his injury at the time he applied for work at Enterprise. Predictably, this led to no job offer being extended to him.

50. Further, even notwithstanding his post-industrial accident injuries, the work that Claimant performed following his date of medical stability seems to be at odds with the limitations/restrictions identified by Dr. West at the invitation of Claimant's counsel. The work which Claimant performed for Mr. Buckmaster, the Golden Crown, and for J.R. Corporation,

seems to be of a type that exceeds a number of the limitations/restrictions initially imposed by Dr. West, and which suggests that Claimant has the functional capabilities to perform this type of work in the future. For example, in response to Counsel's questionnaire Dr. West proposed that Claimant should lift/pull no more than 10 pounds on an occasional basis. *See* JE-A, p. 102. Claimant's performance of the three jobs referenced above demonstrates functional capacity in excess of Dr. West's limitation.

51. Relatedly, if Claimant can continue to work at the types of jobs he performed subsequent to his date of medical stability, then there is reason to believe that he will be able to replace even the highest annual earnings he enjoyed in the five years immediately preceding the year of injury. Indeed, even if Claimant has "medium" limitations/restrictions as discussed by Dr. West at the time of his deposition, he should have no difficulty obtaining employment enabling him to meet, if not exceed, the annual income he earned in 2003.

52. For these reasons as well, and assuming that Dr. West's testimony is sufficient to support a finding of some permanent limitations/restrictions, the Commission declines to find that Claimant has suffered any disability in excess of the 12% PPI rating paid to date.

53. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that he has sustained any permanent partial disability in excess of his 12% whole person permanent partial impairment, which Surety has paid.

2. All other issues are moot.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __22nd___ day of November, 2011.

INDUSTRIAL COMMISSION

/s/_____
LaDawn Marsters, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___1st___ day of December, 2011, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

JAMES C ARNOLD
PO BOX 1645
IDAHO FALLS ID 83403-1645

STEVEN R FULLER
PO BOX 191
PRESTON ID 83263-0191

srn /s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

WILLIAM J. WATERS, Claimant, v. JOHNNY AGUINAGA dba ALL PHASE CONSTRUCTION, Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2006-522008** **ORDER** FILED: December 1, 2011

Pursuant to Idaho Code § 72-717, Referee LaDawn Marsters submitted the record in the above-entitled matter, together with her 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 has failed to prove that he has sustained any permanent partial disability in excess of his 12% whole person permanent partial impairment, which Surety has paid.
2. All other issues are moot.

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

DATED this __1st___ day of _December_____, 2011.

INDUSTRIAL COMMISSION

/s/_____
Thomas E. Limbaugh, Chairman

/s/_____
Thomas P. Baskin, Commissioner

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

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __1st____ day of _December_____, 2011, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

JAMES C ARNOLD
PO BOX 1645
IDAHO FALLS ID 83403-1645

STEVEN R FULLER
PO BOX 191
PRESTON ID 83263-0191

sc /s/_____