BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

NICK GDONTAKIS, Claimant, v. PETERSEN, INC., Employer, and ZURICH AMERICAN INSURANCE CO., Surety, Defendants.	**IC 2017-022779** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** **Filed 10/15/19**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Pocatello, Idaho, on May 9, 2019. Patrick George represented Claimant, and David Gardner represented Defendants. The parties produced oral and documentary evidence at the hearing, took post-hearing depositions, and submitted briefs. The matter came under advisement on September 20, 2019.

ISSUE

The sole issue for resolution is the determination of the extent, if any, of Claimant's permanent partial disability in excess of impairment.

CONTENTIONS OF THE PARTIES

Claimant suffered a compensable injury to his dominant right shoulder on July 20, 2017.

Surgery resulted with residual permanent restrictions. Claimant asserts he can no longer do his time-of-injury job, and is quite limited in his employment prospects, with a corresponding loss of income. He has sustained permanent partial disability in the amount of 66% inclusive of his 8% whole person impairment.

Defendants assert Claimant continued his employment with Employer for several months post-accident, up to the time of his surgery. Thereafter he chose to retire, but could have returned to his time-of-injury employment with accommodations. Employer kept Claimant's position open and was ready and willing to have him return to work once he was released back to work after his surgery. Claimant likely suffered no permanent partial disability above his 8% impairment, and at most suffered permanent disability of no more than 21%.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;

2. Joint exhibits (JE) 1 through 24 admitted at hearing;

3. The deposition testimony of witness Jeffrey Schutte, taken on June 19, 2019, pursuant to an agreement of the parties to allow such belated testimony; and

4. The post-hearing deposition transcript of Nancy Collins, PhD, taken on June 26, 2019.

Objections in the depositions are overruled.

FINDINGS OF FACT

1. Claimant turned 66 years old the day before his hearing and lived in Pocatello, Idaho. He emigrated from Greece over forty years ago. In Greece Claimant obtained a college

education with an engineering degree.[1] In the United States Claimant took welding and blueprint reading courses and consistently worked as a skilled welder and fabricator. He has gained significant expertise as a welder through the years.

2. Claimant began working for Employer in 2012 as a fitter-welder. He was classified as a Welder III, or top-tier welder.

3. On July 20, 2017, Claimant was drilling into metal when the drill bit "caught" causing the drill to forcefully spin, injuring Claimant's right shoulder.

4. Claimant's post-accident medical care included physical therapy (pre-and post-surgery) and surgery to repair Claimant's torn rotator cuff and bicep. Claimant reached MMI by May 15, 2018. Surety paid for the medical treatment, time loss during Claimant's period of recovery, and permanent impairment benefits based on an 8% whole-person impairment rating. The sole remaining issue is to determine Claimant's entitlement to permanent partial disability benefits.

DISCUSSION AND FURTHER FINDINGS

5. Idaho Code § 72-422 defines permanent disability as "any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation." One is under a permanent disability "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. As defined in I.C. § 72-425, "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

[1] Claimant's engineering degree was not recognized in the U.S. and Claimant has not practiced in that field.

permanent impairment and by pertinent nonmedical factors…." Those "pertinent nonmedical factors" include the nature of the physical disablement, the disfigurement and its effect on procuring or holding employment, the cumulative effect of multiple injuries, the employee's occupation and age at the time of the accident, the employee's diminished ability to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, in addition to other factors the Commission may deem relevant. I.C. § 72-430.

6. The test for determining if 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 & Co.*, 115 Idaho 293, 294, 66 P.2d 763, 766 (1988). The burden of establishing permanent disability is upon a claimant. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

7. Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Industries,* 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund,* 130 Idaho 278, 939 P.2d 854 (1997). The Idaho Supreme Court in *Brown v. The Home Depot,* 152 Idaho 605, 272 P.3d 577 (2012) iterated that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing.

Disability in Excess of Impairment

8. The controversy herein first centers on whether Claimant could have returned to work for Employer post-surgery but chose not to, arguably foreclosing his claim for

PPD benefits in excess of impairment. Claimant asserts he was precluded by his limitations and practical considerations from performing his job duties for Employer, and was therefore justified in "retiring" from his position therein and seeking lighter work elsewhere, with resulting loss of job opportunities and wages.

9. Claimant notes that the job description for a Welder III lists as essential functions "lifting, stooping, bending, and stretching" for extended periods of time, as well as "ability to work at different heights." JE 24, p. 584. Claimant testified as to the lifting and carrying he regularly was required to do, as well as the various arm positions he employed when welding on different assignments. He argues he can no longer do the lifting and welding required in his employment.

Claimant's FCE

10. After Claimant was released by his treating physician, Richard Wathne, M.D., without any stated restrictions[2], but with some residual weakness to resistive supraspinatus testing and some slight loss of rotation, Claimant elected to participate in a two-day functional capacity evaluation (FCE). As a result of that evaluation, the supervising physical therapist concluded Claimant could not return to work as a steel fabricator/welder, his lifting and reaching abilities placed him in a sedentary work category, and his overall results placed Claimant in a sedentary to light physical demand capacity. Specifically, the therapist determined Claimant should be restricted to five pounds occasional lifting to shoulder height, and lift carry of 25 pounds occasionally. Claimant also was given a ten-pound occasional limit in lifting from floor level, and only occasional reaching, with no elevated work activity with Claimant's

[2] Perhaps no restrictions were given since Claimant indicated to his physician that he was going to "retire from his job position." JE 7, p. 63.

right shoulder. Six months later, Dr. Wathne, without re-examining Claimant, signed off on these restrictions in a "check-the-box" letter format.

11. In response, Defendants note that Claimant continued to work for Employer post-accident for four months until his surgery, even though Claimant had a temporary five-pound lifting restriction during this time. Employer modified Claimant's work station at a cost of over $6000 to accommodate him, and provided assistance to Claimant when needed.[3] Employer replaced Claimant's drill which had caused his injury with one with a clutch to prevent future binding. During Claimant's period of recovery, Employer provided Claimant not only regular hourly work, but also gave him overtime assignments. Further, Employer held Claimant's job open for him post-surgery, and expected Claimant to return to work when he was medically stable. After his surgery, Claimant voluntarily quit his position, cashed out his 401k and ESOP, and did not discuss the potential for continued employment with Employer. Defendants argue that in this situation Claimant is not entitled to disability benefits in excess of his impairment rating.

Dr. Stromberg IME

12. Defendants sent Claimant to Lynn Stromberg, M.D., an orthopedic surgeon, on January 24, 2019 for an independent medical examination. Dr. Stromberg examined Claimant and reviewed medical and work records concerning Claimant.[4] Thereafter he authored a report.

---

[3] There is testimony that the modifications to Claimant's work station might not have been in direct response to his work restrictions, but rather as part of an ongoing effort to make all employee's work stations more "user friendly." Regardless of the reason, the modifications did make Claimant's work station more accommodating to his restrictions.

[4] The records reviewed by Dr. Stromberg, as well as some testimony of Employer seem to suggest Claimant had an ongoing issue with his shoulder from repetitive work for a time prior to the date of his accepted injury. Since this discrepancy is not at issue and Defendants accepted the claim on the basis of an accident on the stated date, such discrepancy is not material to the analysis and will not be discussed in detail. It is assumed Claimant had a sudden accident on July 20, 2017, which led to his current condition.

13. In his report, Dr. Stromberg noted that during his examination he found nothing indicating Claimant had a failure of his surgical repair. While Claimant did have some "minor compromise" of his range of motion, the FCE recommendations were not appropriate given the level of function Claimant demonstrated during his IME examination. Furthermore, Dr. Stromberg pointed out the FCE recommendations were not in line with Dr. Wathne's records.

14. While Dr. Stromberg felt that statistically speaking, Claimant, due to his age and occupation, had a 50% chance of having a torn rotator cuff even before his work accident, the doctor did not make an apportionment calculation.

15. Dr. Stromberg reviewed a job description for Claimant's time-of-injury job title provided by Employer. He concluded Claimant presented no risk to himself or others by returning to his prior employment, with restrictions in the area of prolonged overhead work. Dr. Stromberg found Claimant's shoulder was neurologically intact and structurally sound; Claimant could work at his time-of-injury job so long as he avoided prolonged over-shoulder-height activities for extended periods of time.

Jeffrey Schutte Testimony

16. Employer's fabrication manager and mechanical engineer, Jeffrey Schutte, provided deposition testimony. His job duties with Employer included managing supervisors, as well as division capacity and profitability. He was not Claimant's direct supervisor.

17. Mr. Schutte has known Claimant for many years, even prior to Claimant working for Employer.

18. Mr. Schutte did not recall any specific accident involving Claimant but rather remembers Claimant first complaining of a sore shoulder for no particular reason, and then

as a result of repetitive tasks at work. In any event, Claimant's instant claim was accepted and medical treatment provided. Thereafter, Claimant continued to work for a time, missing no days due to his injury. Employer changed Claimant's work station at a cost of approximately $6,000 to improve ergonomics and make his job easier. Claimant was also provided help with tasks when needed after his accident. Mr. Schutte testified Claimant was able to perform 90 to 95% of his tasks after his accident and before surgery, even with restrictions in place. Mr. Schutte anticipated Claimant would have been able to perform at that level or better after surgery, and do so with less discomfort than before his surgery. Mr. Schutte kept in contact with Claimant during the recovery period, checking on his progress, and indicating to Claimant that he was looking forward to having Claimant back at work.

19. Mr. Schutte testified repeatedly that even with a five-pound lifting restriction Claimant could do most of his work tasks. He did acknowledge he did not know the weight of various drills and grinders Claimant used in his job. Mr. Schutte also testified there were no ladders involved in Claimant's job, though prior to his workstation modifications there may have been some work done on step stools. Mr. Schutte also felt Claimant could do his job tasks without stretching and reaching with his right arm while holding a grinder. Mr. Schutte was unaware if Claimant used a tool bucket, and if so, what it weighed.

20. Mr. Schutte knew of no reason why Claimant would need to weld or grind overhead. He felt if Claimant did so it was by his own election, not necessity. Also, while Claimant had different types of hammers, they were primarily just used to tap metal plates into position.

21. After his surgery Claimant retired on the day he was released to return to work. Up to that time his job had been kept open for him on his return. Claimant did not tell Mr. Schutte the reason for his retirement.

Vocational Expert Testiony

22. Both parties hired vocational experts who rendered opinions regarding Claimant's permanent disability. Claimant utilized Nancy Collins, Ph.D, while Defendants hired William Jordan. Each expert prepared a written report. Dr. Collins was deposed.

23. The methodology utilized by the two experts was not that different. Both heard from Claimant, reviewed records, considered Claimant's background and history, and utilized occupational data in a fashion appropriate to their profession. Their reports are advisory only. They need not be accepted in whole or in part. *Miller v. Callear*, 140 Idaho 213, 218, 91 P.3d 1117, 1122 (2004). (The opinion of an expert is not binding on the fact finder.); *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002). (With regard to PPD analysis, the Commission considers all relevant medical and nonmedical factors and evaluates the *purely advisory opinions of vocational experts*.) (Emphasis added.) In the present case, neither expert's report is accepted, although they do contain information useful to and used in the analysis and final determination of PPD.

Dr. Collins

24. Dr. Collins relied in large part on Claimant's subjective assertions of his limitations and the results of a functional capacity evaluation, which according to the evaluator, determined Claimant had significant lifting restrictions resulting in Claimant's work opportunities being limited to sedentary to light physical demand capacity. These restrictions were subsequently endorsed by Dr. Wathne. Dr. Collins found Claimant's

subjective complaints and observations were consistent with FCE findings to the extent Claimant asserted he has difficulty using his right arm away from his body in repetitive tasks for any length of time. He also has difficulty reaching behind his back, lifting his elbow past chest height, getting dressed, and some personal hygiene tasks. Claimant admitted to Dr. Collins his limitations do not extend to tasks beyond his right upper extremity, such as bending, walking, stooping, kneeling, handling objects, fingering, or working with hand tools close to his body.

25. Dr. Collins noted Claimant's past work was in the medium to heavy category, and in her opinion he could not return to his time-of-injury job. While she felt Claimant could do all sedentary and most light-duty jobs, he could not do light welding jobs which require overhead work or gripping. Dr. Collins opined Claimant had a 65% loss of access to his labor market.

26. In addition to his sizable loss of access figure, Dr. Collins felt Claimant's remaining job market opportunities topped out around $14 per hour, with some much lower, compared to Claimant's time-of-injury hourly wage of $25 per hour.[5] She calculated Claimant had suffered loss of wage earning capacity of between 52% and 67%.

27. Considering Claimant's loss of access and loss of earning capacity, Dr. Collins felt Claimant had a permanent partial disability rating of between 58.5% and 66%.

Mr. Jordan

28. Mr. Jordan took a more "global" approach to his analysis, focusing not only on Claimant's limitations (both documented and subjective), but also on a totality of the evidence

[5] Actually, Dr. Collins noted Claimant was paid an hourly wage of $25 per hour regular time (which is slightly overstated from his actual hourly wage of just under $24) and $35 per hour overtime, and by looking at his past tax returns she calculated his "true" hour wage at $29 per hour.

in favor of Claimant's limited disability. He accentuated Claimant's inconsistencies between range of motion recorded at the FCE and those recorded in physical therapy and by Claimant's treating physician. He sought information from Employer's Safety Officer, John Rasband. In Sgeneral, Mr. Jordan reviewed the record for evidence rebutting the notion that Claimant suffered significant permanent partial disability from this accident.

29. Mr. Jordan noted that neither the Claimant's treating physician, Dr. Wathne, nor the IME physician, Dr. Stromberg, assigned Claimant any permanent restrictions contemporaneously with their examinations.[6] Mr. Jordan argued that under the circumstances Claimant suffered no loss of labor market, as he could have returned to work without restrictions.

30. Mr. Jordan acknowledged that Claimant did undergo an FCE, and if those recommended restrictions were adopted, Claimant could be an odd-lot worker, an idea endorsed by no one in this case. However, if the actual data from the FCE is utilized, which included 25 pounds lifting and restrictions on reaching, as opposed to the suggested restrictions from that data, then Claimant suffered a 51% loss of labor market.

31. Another option considered by Mr. Jordan used Claimant's own stated ability to lift up to 20 pounds with his right arm and 50 pounds with his left. Using this information, Mr. Jordan felt Claimant suffered a 25% loss of access to the labor market.

32. In Mr. Jordan's opinion Claimant's wage loss could be either none, if he had returned to work with Employer, or 17% if he sought work for which he was qualified other than with Employer. Mr. Jordan noted Claimant's pre-injury wage was $23.92, and opined his post-accident his earning capacity outside of working for Employer would be $20.03. He calculated

---

[6] Mr. Jordan did not acknowledge in his report the fact that Dr. Wathne did sign off on the FCE permanent restrictions months after he last examined Claimant.

the wage loss by reviewing the available jobs he felt Claimant could perform and taking an average of those jobs' mid range wages to arrive at the $20.03 figure, which is 17% less than his actual wages with Employer.

33. Mr. Jordan calculated Claimant's permanent partial disability in four scenarios. All figures other than total disability are inclusive of PPI.

34. First, if the FCE restrictions were adopted, Claimant would be totally and permanently disabled. Next, if the FCE actual data was utilized, Claimant' disability would be 34%, calculated by averaging his loss of access (51%) and his lost wage earning capacity (17%). Third, using Claimant's own subjective assessment of his limitations, he would have suffered a 21% permanent disability, determined by averaging his loss of access (25%) and his lost wage earning capacity (17%). Finally, if one considers that Claimant could have returned to his time-of-injury employment with no permanent restrictions, he would have suffered no permanent disability over his impairment rating.

Permanent Disability Rating and Conclusion

Job Market Access

35. The troubling aspect of this case is that Claimant worked doing meaningful tasks for Employer after his injury and before his surgery. There were accommodations made, but the record is devoid of any suggestion that Claimant performed "make work" tasks, which could not have continued indefinitely. To the contrary, Claimant worked not only his regular hours but also overtime, manufacturing necessary items for Employer. Claimant missed no substantial time from work during the four months between his accident and his surgery.

36. Claimant's surgery and recovery were unremarkable. His treating physician made no reference in his office notes to any difficulties with Claimant's recovery. While Dr. Wathne felt it might take Claimant a couple of years to fully recuperate (as much as he was going to), there were no neurological deficits from this surgery, and after surgery Claimant's shoulder was structurally sound as noted by Dr. Stromberg. In other words, Claimant had a successful shoulder surgery with only some relatively minor range of motion and strength limits thereafter.

37. The evidence supports Claimant's subjective belief that he would have trouble with repetitive work away from his body or overhead. The issue is how much of that type of work was unavoidable at his employment. Claimant testified to lifting heavy weights and working overhead "all the time", but Employer's representatives John Rasband and Jeffrey Schutte both felt such work would be quite limited. As Mr. Rasband noted in an e-mail to Mr. Jordan, some overhead drilling was required, (approximately six holes per day, compared to Claimant's testimony of 50 holes per day), but otherwise Claimant's welding jobs were done at waist to chest height. Overhead welding was rarely done or encouraged as such weld "usually ends with poor weld quality … and is unsafe." Further, Claimant "built the same part day after day. The welding and subsequent grinding … [was] performed flat with the weld being made between waist and chest high." Also, while lifting was required up to shoulder level, '[a]n overhead crane was available and should have been used for lifting parts." JE 9, p. 81. This e-mail is consistent with Mr. Schutte's testimony, although contradicted by Claimant.

38. While there is agreement Claimant would have some limitations at work, he continued to do the majority of his tasks after his injury, and was kept busy working full duty,

with some accommodations, until his surgery. Mr. Rasband noted other workers have had rotator cuff injuries and returned to work for Employer thereafter, even if it meant moving the employee to a different position. The record establishes that Claimant would have had continuing employment with Employer waiting for him when he was released by Dr. Wathne had he not chosen to retire from his position. Mr. Schutte testified Claimant could do the majority of his pre-accident functions after his injury, and would have had work available to him after surgery. Claimant was a valued worker with Employer, with considerable skills and experience. There was a job waiting for him when Claimant chose to "retire."

39. Claimant testified he does not feel he is able to do his former job, although he admitted in his deposition he could "probably" do his job with the modifications Employer made to his work station. Gdontakis Depo. p. 29. Claimant's testimony establishes that his decision to "retire" from working for Employer was not solely based on his limitations and prior job functions, but also due to his fear of re-injuring his shoulder, coupled with the fact that he felt uncomfortable returning to work for an employer he was suing.

40. Claimant presents as a hard-working individual who wants to work for the next several years (until age 70), but has chosen to limit his activity level with his right arm so as not to risk reinjury. Further, it is undisputed he does have some restrictions with overhead lifting and lifting away from his body.

41. The FCE findings were criticized by Dr. Stromberg, who presented a well-reasoned explanation for their rejection. Certainly the limitations appear disproportional to Dr. Stromberg's findings. Mr. Jordan prepared a chart at JE p. 78 showing how the FCE range of motion findings were inconsistent with Claimant's prior ROM findings in therapy and by his treating physician. There is no explanation in the record justifying the decreased

ROM during the FCE, which are also inconsistent with Dr. Stromberg's findings at the time of his examination.

42. While Dr. Wathne signed off on the findings, he had not seen Claimant for eight months prior, and had no first-hand knowledge of Claimant's condition at the time of the FCE. While a "check the box" opinion from a medical doctor is admissible evidence, without corroborating evidence, Dr. Wathne's opinion is afforded little weight. Dr. Wathne was not deposed, did not testify, and provided no follow up explanation as to why he concurred with the FCE limitations when he himself gave Claimant no permanent restrictions.

43. On the other hand, Dr. Stromberg examined Claimant contemporaneously with his report. Dr. Stromberg's conclusions were logical, and were corroborated not just by his own observations, but also Claimant's previous medical records and diagnostic studies. Dr. Stromberg's opinions carry more weight than Dr. Wathne's on Claimant's permanent restrictions.

44. Even Dr. Stromberg acknowledged Claimant would have some limitations with overhead work and strength/tolerance issues. As such, Claimant has proven he incurred some permanent partial disability as the result of his work accident. Even though Claimant could have returned to work for Employer, had he lost such employment, his job market would be reduced and he would not have been able to make the same wages he would make with Employer.

45. When these factors are considered, together with the record as a whole, the weight of the evidence supports Mr. Jordan's calculation on loss of job market access at 25%. While Mr. Jordan may have overstated the job categories he felt Claimant would qualify for, as noted by Dr. Collins in her deposition, the fact that Claimant could have returned to work

for Employer cannot be overlooked or minimalized. There is a good chance Claimant could have returned to such employment until he chose to retire at age seventy. Also, Claimant had no trouble finding lighter work once he quit his employment with Employer, consistent with his work attitude, skill and desire.

Wage Earning Capacity

46. Dr. Collins correctly noted that wage earning capacity is not the same thing as the actual earnings that a worker is making at any point in time. Instead it represents the capability of a worker to sell his or her services in their job market. Had Claimant returned to work for Employer, he would have been able to sell his services to Employer for the same wage he was making at the time of his injury. Arguably then Claimant had no loss of wage earning capacity. On the other hand, it is uncontested that if Claimant sought work beyond returning to Employer, he would experience a drop in his wages. Neither vocational rehabilitation expert opined that other employers would hire Claimant at his time-of-injury wages. Dr. Collins testified light-duty work restrictions would limit Claimant's earning capacity to around $14 per hour. Mr. Jordan's methodology in determining Claimant's wage loss was to average the median wages for all job categories for which he felt Claimant had transferable skills, and arrive at a composite wage of $20.03 per hour if Claimant sought employment in the open market. However, many of the jobs listed by Mr. Jordan were persuasively disputed by Dr. Collins as not being available or suitable for Claimant.

47. Mr. Jordan also listed actual jobs available in Claimant's job market which he felt Claimant was qualified to perform. One such job was a parts delivery person for Auto Zone, which paid $17 per hour or more, DOE. While Dr. Collins felt that job was too heavy for Claimant, such contention is rejected. Claimant can lift, by his own admission, 50 pounds

with his left hand. Parts delivery person would be suitable employment. Also, there were welder jobs available through Elwood Staffing paying between $16 and $20 per hour. At least one of those jobs might have been suitable, but there was not enough information provided to analyze.

48. It appears Claimant could, if not working for Employer, find work in the $17 per hour range for which he would be well suited. This hourly rate is approximately 29% less than Claimant's hourly wage at the time of his injury ($23.92). However, Claimant had work available to him with no wage loss which he chose to not pursue. This fact must be factored in when analyzing Claimant's loss of earning capacity. After all, so long as Claimant continued to work for Employer, he would have had *no* wage loss. There is a very real chance Claimant would have experienced no wage loss between the time of his accident and his retirement.

49. Claimant's wage earning capacity loss must be weighted to account for the fact he could have returned, at least for a time, to a job with no wage loss. The Referee finds, when considering all factors affecting Claimant's loss of wage earning capacity that Claimant's loss of wage earning capacity equals 10%.

PPD Finding

50. Idaho Code § 72-102(11) defines "disability" as "a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as defined in § 72-430, Idaho Code."

51. The Commission routinely considers both the wage loss and the job market access when determining permanent disability. While a straight averaging is not always applied by the Commission, it is common to consider both elements of work (access and wages)

when determining disability. *See, e.g., Deon v. H&J, Inc.*, IIC 2007-005950 (May 3, 2013). (Discussion of wages and loss of access when determining permanent disability.) A straight averaging is applicable in the present case. When the average is taken of Claimant's loss of market access of 25% and his loss of earning capacity of 10%, [(25 + 10)/2], Claimant's permanent partial disability rating is 17.5%, inclusive of Claimant's 8% medical disability rating (PPI). Medical disability (PPI) must be taken into account when calculating Claimant's permanent partial disability benefits. *See, Oliveros v. Rule Steel Tanks, Inc.*, 165 Idaho 53, 438 P.3d 291 (2019).

52. In the present case, Claimant has proven a 17.5% permanent partial disability rating, inclusive of his 8% whole person PPI rating. This figure is supported by the weight of the evidence as a whole and takes into account all factors affecting Claimant's ability to find or maintain employment, including his physical disablement and its effect on procuring or holding employment, Claimant's occupation, skills, and age at the time of the accident, the results of his job search, his anticipated residual work life, and his diminished ability to compete in an open labor market within the Pocatello labor market, considering all the personal and economic circumstances of the Claimant as evidenced by the totality of the record herein.

53. Claimant is entitled to permanent partial disability benefits in the amount of 17.5%, inclusive of his PPI of 8%.

CONCLUSION OF LAW

Claimant is entitled to permanent partial disability (PPD) of 17.5%, inclusive of his 8% whole person PPI.

RECOMMENDATION

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

DATED this 7th day of October, 2019.

INDUSTRIAL COMMISSION

/s/
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of October, 2019, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

PATRICK GEORGE
PO BOX 1391
POCATELLO ID 83204

DAVID GARDNER
412 W CENTER ST, STE 2000
POCATELLO ID 83204

/s/

jsk

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

NICK GDONTAKIS, Claimant, v. PETERSEN, INC., Employer, and ZURICH AMERICAN INSURANCE CO., Surety, Defendants.	**IC 2017-022779** **ORDER** **Filed 10/15/19**

Pursuant to Idaho Code § 72-717, Referee Brian Harper submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusion of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation.

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, IT IS HEREBY ORDERED that:

1. Claimant is entitled to permanent partial disability (PPD) of 17.5%, inclusive of his 8% whole person PPI.

2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to

all matters adjudicated.

DATED this 15th day of October, 2019.

INDUSTRIAL COMMISSION

/s/
Thomas P. Baskin, Chairman

/s/
Aaron White, Commissioner

/s/
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of October, 2019, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

PATRICK GEORGE
PO BOX 1391
POCATELLO ID 83204

DAVID GARDNER
412 W CENTER ST, STE 2000
POCATELLO ID 83204

/s/

jsk