BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DENNIS CULLEY, Claimant, v. MARINE COMPANY, INC., Employer, and FEDERAL INSURANCE COMPANY, Surety, Defendants.	**IC 2014-022170** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed February 23, 2017

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Coeur d'Alene on August 24, 2016. Claimant, Dennis Culley, was present in person and represented by Richard Whitehead, of Coeur d'Alene. Defendant Employer, Marine Company, Inc., and Defendant Surety, Federal Insurance Company, were represented by Eric S. Bailey, of Boise. The parties presented oral and documentary evidence. One post-hearing deposition was taken and briefs were later submitted. The matter came under advisement on January 13, 2017. Referee Taylor submitted proposed findings of fact and conclusions of law to the Commission for review. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

The issues to be decided by the Commission were narrowed at hearing and are:

1. Claimant's entitlement to retraining; and

2. The extent of Claimant's permanent partial disability in excess of impairment.

CONTENTIONS OF THE PARTIES

The parties acknowledge that Claimant sustained an industrial accident resulting in right shoulder and cervical injuries while working for Marine Company in Harrison, Idaho. Claimant subsequently moved to St. Maries. Defendants provided medical and time loss benefits, and at the time of hearing were paying permanent impairment benefits. Claimant asserts he is entitled to permanent disability benefits of 65% in addition to his 12% permanent impairment. Defendants counter that Claimant has neglected to apply himself and earn a GED which would qualify him for employment that would nearly restore his pre-injury wage earning ability. They assert that even assuming Claimant does not obtain a GED; he would have permanent disability of approximately 34%, inclusive of his permanent impairment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony of Claimant and his father Dennis W. Culley taken at the hearing on August 24, 2016;
3. Claimant's Exhibits A through U and Defendants' Exhibits 1 through 11, admitted at the hearing; and
4. The post-hearing deposition of Maria Goodwin taken by Defendants on November 7, 2016.

All pending objections are overruled.

FINDINGS OF FACT

1. Claimant was 41 years old and resided in St. Maries at the time of the hearing. He is right-handed. Claimant was raised in Oregon where he struggled with formal education and left high school in Corvallis after the first month of his junior year, having earned only three high school credits by that time. As of the date of hearing, he had not obtained a GED.

2. After leaving high school, Claimant commenced logging in Oregon. He worked for his father and other logging businesses. Claimant started as a chaser, bucking and limbing logs. Over the course of approximately 15 years he progressed to setting chokers and pulling lines, went on to hook tending, and finally to operating a belt swing loader. Claimant worked full-time and regularly earned $17.00 to $20.00 per hour in logging.

3. Claimant struggled with methamphetamine addiction for a time and eventually moved to Idaho where he successfully completed a formal recovery program and thereafter worked in logging in Idaho. In approximately 2012, Claimant started his own tree topping and removal business in north Idaho. Although not immediately profitable due to start up costs, his business grew steadily.

4. In January 2014, during the off-season for tree removals, Claimant commenced working in Harrison for Marine Company, Inc., doing business as Harrison Dock Builders (Dock Builders). Claimant was hired as a temporary dock repairer performing all aspects of dock construction, maintenance and repair. Claimant proved his abilities and Dock Builders made his position permanent and increased his wages. By August 2014, he was earning $12.50 per hour and working full-time. Claimant enjoyed his work. On occasion he worked overtime at Dock Builders at which times he earned as much as $900.00 per week. He continued to operate his

tree removal business on weekends. He also served as a volunteer firefighter with specialized training in hazmat operations, propane fires, and ice water rescue.

5. On August 5, 2014, Claimant was working from a boat for Dock Builders when he stepped onto a generator that suddenly tipped. Claimant grabbed a dock cross-member with his right hand to keep from falling and in the process wrenched his right shoulder. He noted immediate shoulder pain but completed his work day. The following day he could hardly move his right shoulder. Diagnostic testing revealed right rotator cuff and SLAP tear. Conservative treatment, including physical therapy, was unsuccessful.

6. On November 18, 2014, John McNulty, M.D., performed right shoulder arthroscopy, right shoulder type II SLAP repair, subacromial decompression, and open right rotator cuff repair. Claimant's shoulder range of motion remained significantly limited. In February 2015, Dr. McNulty diagnosed frozen shoulder. On March 5, 2015, Dr. McNulty performed right shoulder manipulation under anesthesia.

7. In March 2015, Industrial Commission rehabilitation consultant Maria Goodwin began assisting Claimant with job search and development.

8. Claimant continued to experience neck pain and upper extremity weakness. Further testing revealed C4-5, C5-6, and C6-7 disc herniations. On July 27, 2015, Brett Dirks, M.D., performed C4-7 fusion. Dr. Dirks related Claimant's cervical injuries to his industrial accident.

9. By May 2016, Dr. McNulty found Claimant medically stable, imposed permanent work restrictions, and rated his permanent impairment at 8% of the whole person for his cervical injury and 4% of the whole person for his right shoulder injury.

10. **Condition at the time of hearing.** At the time of hearing, Claimant noted his right shoulder continued to be weak and painful. Retrieving a box of cereal from an upper shelf with his right hand was painful. He could not reach into the back of a pickup to retrieve items with his right hand. He experienced neck pain with prolonged driving or when looking up or down. Operating a chainsaw, even at or below waist level, produced neck pain, headache, and right shoulder pain radiating down his arm within 30 minutes. He could not operate a skill saw with his right hand for any appreciable time. Dock Builders had no positions compatible with Claimant's permanent work restrictions. Claimant can no longer safely perform logging related activities. He is afraid to operate heavy machinery because his limited neck range of motion hinders turning his head from side to side. He is no longer able to serve as a volunteer fireman.

11. Claimant reads adequately but finds spelling difficult. He is able to complete on-line job applications but is only a hunt and peck typist. Claimant would like to restart his tree business and perhaps hire others to perform the heavier work; however, he had to sell all of his prior equipment, including his pickup, to make ends meet after his industrial accident.

12. Claimant treats regularly with Terry Davenport, D.O., for chronic pain management. Claimant's neck and shoulder pain interfere with his sleep. He takes hydrocodone at night to sleep.

13. **Credibility.** Having observed Claimant and his father at hearing, and compared their testimony with other evidence in the record, the Referee found that both are credible witnesses. The undersigned Commissioners see no reason to disturb the Referee's findings on credibility.

DISCUSSION AND FURTHER FINDINGS

14. 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).

15. **Retraining.** The first issue is Claimant's entitlement to retraining. Idaho Code § 72-450 provides:

> Following a hearing upon a motion of the employer, the employee, or the commission, if the commission deems a permanently disabled employee, after the period of recovery, is receptive to and in need of retraining in another field, skill or vocation in order to restore his earning capacity, the commission may authorize or order such retraining and during the period of retraining or any extension thereof, the employer shall continue to pay the disabled employee, as a subsistence benefit, temporary total or temporary partial disability benefits as the case may be. The period of retraining shall be fixed by the commission but shall not exceed fifty-two (52) weeks unless the commission, following application and hearing, deems it advisable to extend the period of retraining, in which case the increased period shall not exceed fifty-two (52) weeks. An employer and employee may mutually agree to a retraining program without the necessity of a hearing before the commission.

Significantly, the statute provides the Commission may authorize retraining if the disabled worker is both receptive to and in need thereof.

16. In the present case Defendants raise the issue of retraining. They assert that Claimant should obtain his GED, as encouraged by Industrial Commission rehabilitation consultant Maria Goodwin. Ms. Goodwin strongly recommended that Claimant obtain his GED. She encouraged Claimant at least nine times to obtain his GED and provided information regarding resources to help with his GED. For a time Claimant pursued what he believed to be

an on-line GED course only to discover the course was not accredited and was actually a scam. He did not thereafter follow through with Ms. Goodwin's recommendation that he obtain his GED.

17. Claimant has made no request or persuasive showing that he is presently receptive to or willing to engage in a retraining program. At hearing, when strongly pressed by Defense counsel, Claimant very reluctantly agreed that if Defendants paid for a course and paid him total temporary disability benefits during his attempt, he would try to obtain his GED. However, there is no indication Defendants have or will voluntarily provide such support or that Claimant will attempt to obtain his GED. Claimant asserts he has ADHD that precludes him from obtaining his GED. Although the record contains no supporting expert evidence establishing Claimant's alleged ADHD, it is clear that Claimant was not academically successful in high school. His testimony that he earned only three high school credits before leaving at the beginning of his junior year is uncontested. The Commission is not persuaded that partial completion of an unaccredited on-line scam GED course is a reliable indicator of Claimant's ability to obtain his GED. Considering the record as a whole, we do not find Claimant to be receptive to retraining.

18. The record does not establish that Claimant is receptive to formal retraining.

19. **Permanent disability**. The next issue is the extent of Claimant's permanent 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. Idaho Code § 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. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement 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 being 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.

20. 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, 7, 896 P.2d 329, 333 (1995). The extent and causes of permanent disability "are factual questions committed to the particular expertise of the Commission." Thom v. Callahan, 97 Idaho 151, 155, 157, 540 P.2d 1330, 1334, 1336 (1975). A disability evaluation requires "the Commission evaluate [claimant's] disability according to the factors in I.C. § 72–430(1), and make findings as to her permanent disability in light of all of her physical impairments, including pre-existing conditions, and that it then apportion the amount of the permanent disability attributable to [claimant's] accident." Page v. McCain Foods, Inc., 145 Idaho 302, 309, 179 P.3d 265, 272 (2008). As Claimant in the present case had no pre-existing impairment there is no basis for apportioning any of his permanent disability to a pre-existing condition.

21. The labor market to be considered for purposes of disability evaluation is claimant's labor market as it exists as of the date of hearing. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012). Claimant lived in Harrison at the time of his accident, but relocated to

the larger community of St. Maries by the time of the hearing. Claimant's permanent disability must be evaluated in the more favorable St. Maries labor market. See Davaz v. Priest River Glass Company, Inc., 125 Idaho 333, 870 P.2d 1292 (1994).

22. Work restrictions. Work restrictions assigned by medical experts are critical in determining permanent disability. In the instant case, Dr. McNulty assessed permanent restrictions to Claimant's dominant right arm including lifting, pushing or pulling 50 pounds rarely, 30 pounds occasionally, and 10 pounds frequently, and reaching above shoulder level rarely. Dr. Dirks assessed permanent cervical restrictions including lifting, pushing or pulling up to 50 pounds occasionally. Additionally, Dr. McNulty recorded that Claimant "had a separate business as a tree climber, and I feel he will not be able to do that concerning his neck and shoulder conditions." Defendants' Exhibit 3, p. 192.

23. Opportunities for gainful activity. Suitable employment opportunities identified by Claimant or vocational experts are particularly relevant in determining permanent disability. In the present case, Claimant's potential for employment is established by his attempts to return to work, his unsuccessful work search, and by the opinion of consultant Maria Goodwin.

24. *Return to work attempts.* After his industrial accident and cervical and shoulder surgeries, Claimant attempted to work at a car dealership in St. Maries buffing and detailing cars. He lasted eight hours the first day, but only six hours the second day and then sought medical treatment at the emergency room for his resulting extreme neck pain. Claimant also attempted to work at CJ Construction but he could not tolerate the increasing right shoulder pain.

25. Claimant worked for one day at Gem State Café but was then laid off due to lack of work. He worked with his father in July 2016 for two days at $13.00 per hour and earned a

total of $150.00. Claimant used a saw to cut small diameter trees and then stacked them. He required frequent rest breaks because of increasing right shoulder pain.

26. *Unsuccessful work search.* Since his industrial accident, Claimant has investigated several positions in the St. Maries area. He sought opportunities at Best Buy; however, the application required a high school diploma. Claimant inquired about work in St. Maries at NAPA, St. Maries Saw and Cycle, Benewah Motors, Aspine Sound, IGA, and Ace Hardware; however none had work available. He unsuccessfully sought additional work at Gem State Café.

27. *Maria Goodwin.* Industrial Commission rehabilitation consultant Maria Goodwin assisted Claimant in his post-accident job search and testified via post-hearing deposition. She interviewed Claimant, reviewed his work history, and communicated regularly with his medical providers during his recovery. She looked for actual jobs for Claimant. Ms. Goodwin regularly advised Claimant of employment opportunities in the St. Maries area. She found several minimum wage jobs in his area. Claimant declined to pursue some job leads because the positions paid less than he was receiving in worker's compensation benefits: "The jobs that she –the jobs that she came to me with were jobs that didn't pay anything at all. They were less than what I was getting on—for my benefits, workman's comp benefits. I—and I just—just didn't do it." Defendants' Exhibit 11, p. 533. Claimant asserted that his lifestyle required more than minimum wage earnings. Claimant also declined to pursue some job leads Ms. Goodwin provided because the positions were not "physical enough." Claimant advised that he did not want to seek a truck driving position because he wanted "hands on" employment. He asserted that with ADHD he would be unable to sit still for prolonged driving.

28. In May 2016, Claimant ceased working with Ms. Goodwin because his marriage was faltering. His wife had left him and returned to Oregon. On May 20, 2016, Claimant advised Ms. Goodwin that he had "too many things going on in his life to effectively look for work." Claimant's Exhibit G, p. 20. She consequently closed his case file.

29. At her deposition, Ms. Goodwin affirmed that St. Maries is a smaller community of approximately 3,500 people and that word travels quickly among the limited number of local employers regarding unemployed and/or injured individuals. She opined that Claimant's permanent medical restrictions would preclude him from virtually all aspects of logging with the possible exception of yarder operator. She identified some potential employment opportunities in truck driving based out of Lewiston or Spokane and also dishwasher and laundry attendant positions at the Coeur d'Alene Casino where Native Americans—not Claimant—would receive hiring preference. Ms. Goodwin recorded in her notes summarizing Claimant's vocational options and also reaffirmed in her post-hearing deposition that: "Employment leads could not be found in the claimant's current labor market that would fall within the permanent restrictions given from John McNulty, M.D., and return the claimant to his pre-injury wage and status." Claimant's Exhibit G, p. 25.

30. *Weighing the vocational evidence.* Given Claimant's overall lifting restriction of 50 pounds and restrictions to his dominant right arm of lifting, pushing or pulling 30 pounds occasionally and 10 pounds frequently, and reaching above shoulder level rarely, Claimant is clearly limited, although able to work. Certainly in the smaller labor market of St. Maries, his employment options are fewer. However, the record indicates he is resistant to seeking a minimum wage job. Furthermore, Claimant eliminates himself from better paying ostensibly suitable driving positions by asserting that because he has ADHD, sedentary jobs are not feasible

for him; only physically active jobs. While none of the positions Ms. Goodwin identified would fully restore his pre-accident wages, Claimant's reluctance to avail himself of jobs within the work restrictions imposed by his treating physicians does not reflect well on his motivation.

31. A full-time minimum wage job would produce annual earnings of approximately $15,080 ($7.25 x 40 hours per week x 52 weeks per year). Exhibit N details Claimant's earnings for the last six years as follows: 2014 $805, 2013 $14,200, 2012 $18,000, 2011 $0, 2010 $587, and 2009 $1,168. Any full-time minimum wage job would nearly restore his highest actual annual earnings from the five years preceding his accident. However, Claimant was earning at least $12.50 per hour at the time of the accident—approximately 70% more than minimum wage. He also enjoyed overtime and health insurance benefits. Dock Builders had previously sent him for several weeks to work on out-of-state dock building projects with earnings occasionally as high as $30.00 per hour. Furthermore, Claimant demonstrated his ability to earn up to $20.00 per hour while logging in Oregon and Idaho before his industrial accident. In 2006, he earned $29,057 while logging. His permanent restrictions now prevent him from returning to dock building, virtually all aspects of logging, and tree removals.

32. Based upon Claimant's permanent impairment of 12% of the whole person, overall 50-pound lifting restriction, 30 pound occasional and 10 pound frequent lifting, pushing, or pulling restriction to his dominant right arm, and considering all of Claimant's medical and non-medical factors including but not limited to his limited transferable skills, inability to return to any position at Dock Builders, inability to return to nearly all positions in logging, lack of a high school diploma, GED, or other substantial formal education, and his age of 39 at the time of the industrial accident and 41 at the time of the hearing, Claimant's ability to compete in the St. Maries area labor market and engage in regular gainful activity has been greatly reduced by his

industrial accident. Claimant has proven permanent disability of 50%, inclusive of his 12% whole person permanent impairment.

CONCLUSIONS OF LAW AND ORDER

1. The record does not establish that Claimant is receptive to formal retraining.

2. Claimant has proven permanent partial disability due to his industrial accident of 50%, inclusive of the 12% permanent partial impairment from his industrial accident.

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

DATED this 23rd day of February, 2017.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

_____/s/_____
Thomas P. Baskin, Commissioner

_____/s/_____
R.D. Maynard, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February, 2017, 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:

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_____/s/_____