BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ORLANDO DURAN, Claimant, v. SILVERWOOD, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2011-013270** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed 6/22/2018**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Douglas A. Donohue who conducted a hearing in Coeur d'Alene on January 31, 2017. Starr Kelso represented Claimant. James Magnuson represented Employer and Surety. Thomas Callery represented ISIF. The parties presented oral and documentary evidence. The record was held open, in part, to allow more complete evaluation and response by medical experts regarding the possibility of additional surgery. Post-hearing Motions arose and were decided. The record was supplemented by a medical record dated March 23, 2014 from Bret Dirks, M.D., admitted as Claimant's exhibit PP, and by a letter dated May 10, 2017 from Robert Friedman, M.D., admitted as Surety's exhibit 31. The parties took post-hearing depositions and submitted briefs. The case came under advisement on January 16, 2018. This matter is now ready for decision. 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 for different treatment of the issues of disability and apportionment.

ISSUES

The issues to be decided according to the Notice of Hearing are:

1. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;

2. Whether Claimant's condition is due in whole or in part to a subsequent intervening cause;

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

    a) Temporary disability,
    b) Permanent partial impairment,
    c) Permanent disability in excess of impairment, including total permanent disability,
    d) Medical care, and
    e) Attorney fees;

4. Whether Claimant is entitled to permanent total disability under the odd-lot doctrine;

5. Whether apportionment is appropriate under Idaho Code § 72-406;

6. Whether ISIF is liable under Idaho Code § 72-332; and

7. Apportionment to establish ISIF's share of liability under *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984).

At hearing, issues regarding statute of limitations and course and scope of employment were withdrawn by the parties.

CONTENTIONS OF THE PARTIES

Claimant contends he is totally and permanently disabled by both the 100% method and as an odd-lot worker. He injured his right shoulder on May 25, 2011 while lifting heavy boxes of meat. Among the non-medical factors to be considered, Claimant highlights his age, 77, and asserts he is unemployable. His post-injury work for a restaurant owned by his wife and other relatives does not negate the fact that he qualifies as an odd-lot worker. Contrary to Defendants' assertions, Claimant is not an owner of the business operated by his relatives. Employer failed

to provide suitable employment to Claimant during his recovery, and Claimant was forced to quit. Claimant is entitled to additional temporary disability benefits. Surety's investigation and other handling of this claim were unreasonable, and attorney fees should be awarded.

Employer and Surety contend Claimant received appropriate treatment and was medically stable as of November 10, 2011. He has worked in restaurant management for the majority of his adult life, both before and after the accident. He is part owner of his own Mexican food business. Weeks before the accident, he told Employer that 2011 would be his last season working for Employer. A week or more passed between the alleged accident and the onset of pain. He did not immediately report it or seek medical treatment. He continued working for Employer until he quit. He then resumed working his own business. He suffered no permanent impairment as a result of the accident, and he needed no restrictions for the rotator tendinopathy which was preexisting but exacerbated by the accident. PPI following a shoulder surgery in December 2012 resulted in a 5% upper extremity rating. Claimant has a number of preexisting traumatic as well as degenerative conditions which can be rated for impairments. He has myofascial pain in and around his right shoulder. Permanent impairment and disability are wholly unrelated to the work related accident. If permanent impairment is compensably assigned to his shoulder, his pre-existing shoulder condition requires apportionment. TTDs were paid appropriately. If found totally and permanently disabled, significant other conditions require substantial apportionment to ISIF.

ISIF contends that Claimant cannot establish he is totally and permanently disabled either 100% or as an odd-lot worker. Claimant quit his job while on light duty, returned to work at his own company, and has made significant income in the years since the accident. Claimant failed to establish the factors prerequisite to ISIF liability. Evidence for ISIF liability is so lacking that

Employer and Surety should be required, under Idaho Code § 72-804, to pay ISIF attorney fees for bringing ISIF into this litigation.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant;
2. Claimant's exhibits A through PP;
3. Employer/Surety's exhibits 1 through 31;
4. ISIF's exhibits 1 through 17; and
5. Post-hearing depositions of Robert Friedman, M.D., and vocational experts William Jordan and Douglas Crum.

Claimant objected to and moved to strike Dr. Friedman's post-hearing deposition testimony, together with testimony of all experts who relied in part on Dr. Friedman's testimony. Claimant's objection and motion was based in part upon a misapprehension that the Referee had, by order, limited the scope of inquiry for that deposition. For reasons explained more fully in the subsection "ISIF Issues" below, Claimant's objection and Motion to Strike is DENIED.

All objections raised in post-hearing depositions are OVERRULED.

Certain documents regarding post-hearing electrodiagnostic testing by Craig Stevens, M.D., were offered, but were not admitted. These were deemed outside the scope of the Referee's ruling which allowed the record to be held open for the limited purpose of obtaining medical records regarding Dr. Dirks' surgery recommendation and a response by another physician.

FINDINGS OF FACT

1. Claimant worked for Employer as a working supervisor of a food service area.

The business was named "Orlando's" in Claimant's honor by Employer—and Employer used Claimant's menu—but Claimant had no ownership and received no additional income for Employer's use of his name. This was seasonal employment every summer beginning in 2007. Claimant was rehired about May 16, 2011 for that season. On May 25, 2011, Claimant lifted heavy cases of meat and felt significant pain in the area of his right shoulder blade about two hours later. Claimant did not seek immediate medical treatment, hoping it would get better. It did not.

2. At the time of the industrial injury, Claimant was 72 years old. Prior to the start of the season, he had informed Employer this season would be his last. He had obtained a lease for a business site in March 2011 and intended to open a new restaurant. The new restaurant offered drive-through and take-out Mexican food. It opened November 2011. Claimant testified that his wife is official owner of the corporation.

3. The parties dispute whether Claimant has an ownership interest in the new Orlando's. The record provides no documentary evidence about who owns how many shares of the family corporation that owns the new Orlando's. Regardless, Claimant has acted as a top-level manager in preparing to open and working this business.

4. In the weeks after the industrial injury, Claimant was dissatisfied about the lack of good help Employer provided. Claimant cited that as a reason for leaving Employer. Help with lifting was particularly needed after his industrial injury.

Medical Care: 2011

5. Claimant first sought medical attention at the Kootenai Urgent Care on June 1, 2011. Claimant described the heavy lifting on May 25 with an onset of pain beginning about two hours later. This description was reasonably consistent with his later descriptions of the

event. A note by Jeff Givens, M.D., described right "shoulder blade pain." DE 2, p. 429. An examination showed significant muscle spasm in and around the shoulder and periscapular region. On subsequent visits, the urgent care physicians focused on Claimant's right periscapular region. A right trapezius strain was diagnosed. Physical therapy was prescribed. The physical therapist thought it an "overuse type of injury" and provided treatment.

6. On June 7 and 14, Claimant was improved, but not without symptoms. On the 14th, he was released to work with a 50-pound lifting restriction while continuing physical therapy.

7. On June 29, an examination showed continuing trapezius spasm without further improvement.

8. On July 19, an examination by David Chambers, M.D., at Kootenai Urgent Care found some improvement, but physical therapy was continued for an expected two more weeks. Claimant denied having had any numbness or tingling in his arms or hands.

9. On August 1, a physical therapy report acknowledged Claimant had a good work ethic and was compliant with the physical therapy regimen.

10. Every year since the industrial injury Claimant has undergone significant physical therapy under consecutive periods of prescribed physical therapy and hiatus periods.

11. On August 2, Dr. Chambers noted symptoms were worsening and that Claimant had stopped working on July 29. Temporary restrictions were increased. July 29 was also Claimant's last physical therapy visit under this prescription.

12. On August 9, Claimant underwent an MRI for his shoulder area. The MRI was ordered to examine Claimant regarding pain complaints in both the right shoulder and the scapular region. It ruled out a full tear of the rotator cuff, but found advanced osteoarthritis of

the AC joint, as well as evidence of a partial tear, severe tendinopathy, and a paralabral cyst.

13. On August 19, Claimant visited his primary care physician Don Schmitt, M.D. Dr. Schmitt's records on Claimant date back at least to 1993. He recorded Claimant's shoulder treatment to date, but did not examine his shoulder. He assessed right shoulder "tendonopathy [sic - tendinopathy]" and a labrum tear. CE B, p. 228.

14. On August 22, William Sims, M.D., examined Claimant at Dr. Chamber's request. Claimant reported periscapular pain radiating into his right hand. Dr. Sims diagnosed impingement syndrome.

15. On September 4, Claimant visited Kootenai Urgent Care again with complaints of chest pain. Upon examination, he was transferred to Kootenai Medical Center. The Medical Center physician suspected Claimant's complaints to be muscular and not cardiac in origin. This record does not mention neck issues but acknowledges "some discomfort" in the right shoulder. However, it is relevant about how Claimant described his work:

> He remains a very active man and has been reopening his restaurant, for which he was well known, in the Hayden area. … He is married, owns a Mexican restaurant. He closed down a few years ago and is now reopening.
>
> DE 8, p. 582.

16. On September 19, Dr. Sims again examined Claimant. He reviewed the MRI. He released Claimant to work but with a 10-pound lifting restriction. He recommended additional physical therapy. Claimant began therapy at Rathdum Physical Therapy on September 22.

17. On October 18, Dr. Sims opined surgery was not indicated and recorded "[w]e discussed further PT, but I believe his condition may be as good as it going to be." DE 3, p. 498.

18. On November 10, Craig Stevens, M.D., reviewed records and examined Claimant

at Surety's request. Dr. Stevens incorrectly describes Claimant's history as involving an onset of pain "2 days" rather than 2 hours after Claimant lifted the heavy cases of meat. On examination, Dr. Stevens noted crepitus on shoulder motion, "trace hypesthesia" in the right C7 dermatome, diminished right triceps reflex, and a positive Tinel's sign. He recommended electrodiagnostic testing. Dr. Stevens read the EMG and nerve conduction velocity study as suggesting right C7 radiculitis without actual radiculopathy but with right carpal tunnel syndrome. He noted at the time "[c]ertainly he may have had an episode of right C7 radicular irritation and that appears to be the most likely culprit." DE 4, p. 505. Repeat testing three years later on October 8, 2014 showed actual radiculopathy which was interpreted as being consistent with a progression of degenerative disease at C7. Craig Stevens, M.D., interpreted both these studies. His reports after each were vague about whether he held an opinion of the cause of the C7 condition. Nevertheless, Dr. Stevens opined the C7 radiculitis was not work related because of his mistaken belief that symptoms came on 2 days after the alleged lifting. He deemed Claimant medically stable. Dr. Stevens did not impose restrictions. He opined Claimant did not have any permanent impairment resulting from any work-related injury. Dr. Sims indicated his agreement with Dr. Steven's IME findings by checkmark in a letter faxed November 22.

Medical Care: 2012

19. On January 11, John McNulty, M.D., examined Claimant. He reported a normal examination except for trigger points around the right scapula. He diagnosed periscapular myofascial pain.

20. On February 22, Claimant visited Dr. Schmitt. On the February 22 visit, Claimant described right shoulder blade complaints and some arm and hand paresthesias. He provided a

history of treatment since the May 2011 injury. Upon examination, Dr. Schmitt noted:

> limited range of motion in his neck in turning to the left but not the right. . . . He has a little lateral displacement of his right scapula with provocative maneuvers for trapezius. His reflexes in his arms are equal bilaterally. He has normal testing of his supraspinatus tone on the right and he has no sensory deficits anywhere around his scapula or arm.
>
> CE B, p. 237.

Dr. Schmitt suspected trapezius palsy and noted that Claimant's response to an injection had suggested the injury was not to the shoulder joint. In later notes, Dr. Schmitt mentioned the shoulder area problem, but did not consider himself to be Claimant's primary treating physician for that condition

21. On May 7, James Lea, M.D., examined Claimant on referral from Dr. Schmitt. Claimant reported a flare-up after cutting meat. He assessed a probable tear or injury to the right rhomboid muscle. He reported an absence of abnormal neurologic findings. Dr. Lea noted, "[Claimant] would like to reopen the industrial claim." DE 7, p. 563.

22. On November 1, Jonathan King, M.D., examined Claimant. He diagnosed right shoulder impingement syndrome and osteoarthrosis in the AC joint. An X-ray showed type III acromion and degenerative conditions. He noted the August 2011 MRI "confirmed" a "probable" SLAP tear. He recommended surgery.

23. On December 26, Dr. King performed surgery: a right shoulder arthroscopy with subacromial decompression, distal clavicle excision, and debridement. He repaired "degenerative labral tears"—on June 4, 2015, Dr. King clarified that he meant asymptomatic "fraying"—and an inflamed bursa. He noted a significant degenerative condition throughout the observed right shoulder blade/AC joint area, but no SLAP tear was apparent.

Medical Care: 2013

24. In early January, Dr. King prescribed post-surgical physical therapy from January 7 to March 13. Physical therapy notes document improving pain, ROM, and that Claimant returned to work on January 28. A March 7 report to Dr. King notes that Claimant was continuing to have spasms and recommended additional physical therapy, but also noted that Claimant had made "excellent gains." CE R, p. 582. Claimant began PT again for his shoulder on May 15 prescribed by Dr. Schmitt. Notes reflect Claimant had pain in the lower shoulder/mid-back region. In another report dated July 16, the physical therapist wrote that Claimant continued to have limitation and pain, was motivated to make further gains, and requested authorization for further therapy.

25. On July 29, Dr. Schmitt noted Claimant's pain complaints now also included his left shoulder area.

26. An August 4 cervical spine MRI showed severe degeneration at C3-4, less at lower intervertebral spaces, without evidence of neural compression, which Dr. Schmitt considered to be "arthritis." Dr. Schmitt opined, "objective neck findings are unrelated to [the May 2011 injury]."

27. On August 14, Dr. Schmitt opined Claimant's periscapular pain was related to "fairly severe left foraminal stenosis at C3-4 and facet arthropathy in his neck." He stated, "There's some chance that his bilateral arm pain could be somehow related to a lifting accident in 5/2011, but his objective neck findings are unrelated to that."

28. On September 4, another round of physical therapy began.

29. On October 8, Dr. Schmitt reported a conference with Claimant's attorney and "conceded that he [Claimant] could have" been injured on May 2011 but still opined it unlikely

Claimant's neck and shoulder area condition was related to that. DE 1, p. 56.

30. On October 31, Dr. Schmitt recommended additional physical therapy to treat limited range of motion in Claimant's neck.

31. On December 10, P.Z. Pearce, M.D., examined Claimant. He diagnosed a right sided sprain of the neck, sprain of the thoracic region, and lesion on the right superior glenoid. He recommended Claimant discontinue physical therapy and start chiropractic and massage therapy. At later visits, Dr. Pearce noted crepitus at the right shoulder blade.

Medical Care: 2014

32. The record shows prescriptions for physical therapy dated January 22, May 27, July 30, and November 10.

33. On January 3, Dana Weary, D.C., began providing chiropractic treatment per Dr. Pearce. He provided treatment throughout Claimant's entire spine. After several visits, he ceased treating on February 26.

34. Also in February, Claimant visited acupuncturist Paul Lu.

35. On February 16, Dr. Pearce opined that Claimant's periscapular pain was directly related to the 2011 injury and to the 2013 shoulder surgery. On May 7, Dr. King responded to Dr. Pearce's opinion. Dr. King reported he saw no evidence of a traumatic tear during surgery but agreed Claimant's pre-existing AC joint arthritis and impingement became symptomatic from the 2011 industrial injury.

36. On April 30, Dr. Stevens reviewed additional medical records, some dated before the subject date of injury and some after his 2011 IME report. He reported these additional records did not change his opinions stated in 2011. Notwithstanding that opinion, he wrote:

> While admittedly there are some aspects of the interpretation of his case that may be in a gray area as possibly representing a permanent aggravation of a

> preexisting condition, and I understand that the Industrial Commission appears to be more inclined to accept cases interpreted I [sic-in] that manner.

DE 4, p. 516.

37. On May 5, Dr. Pearce rated Claimant's impairment at 5% upper extremity using the *Guides*, 6th edition.

38. On May 8, Dr. Stevens reviewed additional medical records produced by Dr. Schmitt in 2013. Dr. Stevens retained his opinion that the 2011 work event, at most, temporarily aggravated Claimant's pre-existing degenerative condition. He noted "that Dr. Schmitt appears to be of the same opinion that I had expressed in my IME report." DE 4, p. 523.

39. On July 16, Spencer Greendyke, M.D., reviewed records and examined Claimant at Surety's request. He noted the absence of crepitus in the neck and right shoulder area. He opined Claimant suffered a permanent aggravation of a pre-existing C4-5 neuroforaminal stenosis and disc bulge which produced Claimant's shoulder blade area symptoms, which was industrially related.[1] Other aspects of Claimant's degenerative neck and shoulder conditions were not industrially related and were not aggravated by the injury. Dr. Greendyke opined Dr. King's surgery was not industrially related. Dr. Greendyke opined a surgical recommendation would define whether Claimant was medically stable. He opined Claimant could return to work without restrictions, but should self-limit for discomfort.

40. On July 29, Dr. King—by check mark—agreed with the IME findings. However, on June 4, 2015, Dr. King clarified that he agreed with only some of the IME findings.

41. On August 26, Bret Dirks, M.D., examined Claimant. Noting only some tenderness about the cervical spine, bilateral trapezius, and right scapula, Dr. Dirks assessed

[1] It is unclear if Dr. Greendyke retained this opinion in his later IME; he again listed this condition as "industrially related" but declined to rate for the condition.

cervical pain and radiculopathy and requested additional EMG testing and a cervical MRI.

42. On October 8, Dr. Stevens performed another EMG and nerve conduction velocity study. He opined it showed increasing, chronic C7 radiculopathy and bilateral carpal tunnel syndrome.

43. On October 15, Claimant underwent an MRI of his cervical spine which was compared to the August 2013 MRI. Although the radiologist did not expressly opine about how the two MRIs compared, his language does not show a significant progression, if any, of Claimant's degenerative condition.

44. On November 7, Dr. Dirks again examined Claimant. The EMG showed chronic radiculopathy at C6-7 and carpal tunnel syndrome. He opined against surgery.

Medical Care: 2015

45. In 2015, physical therapy prescriptions are dated February 9, June 22, August 21, and October 21. Claimant was compliant. A physical therapist reported Claimant made objective progress and affirmed symptom amelioration.

46. On June 4, Dr. King disagreed with some of Dr. Greendyke's IME opinions. Dr. King explained that he relied on Claimant's reports to him and his observations upon examination and at surgery to form his current opinions. Dr. King opined Claimant had asymptomatic, pre-existing AC joint arthritis which became symptomatic after the work event; the degenerative fraying was not symptomatic; no SLAP tear was observed. Dr. King would defer to other physicians about Claimant's periscapular pain because Claimant did not report it to him.

47. On June 24 and 26, Claimant visited Dr. Schmitt for a flare-up of neck pain, a headache of one month's duration, and a "falling spell." CE B, p. 292. Dr. Schmitt recorded that

the fall happened at work while Claimant was doing his normal routine and that he had twitches in his left arm on the occasion of the fall. Dr. Schmitt ordered CT scans of Claimant's head and neck. The cervical spine CT scan showed the degenerative condition described in earlier diagnostic imaging and an autofusion of one of his facets at C7. The head CT scan was unremarkable. MRAs of Claimant's head and neck showed no blood flow abnormalities. Based on these results, Dr. Schmitt opined that Claimant should see a neurosurgeon and noted Claimant preferred Dr. Dirks.

48. On correspondence dated June 26, Dr. Greendyke indicated he would not impose any permanent restrictions on Claimant as a result of the surgery performed by Dr. King.

49. On July 14, Dr. Dirks again examined Claimant and opined Claimant was not a candidate for surgery. He noted Claimant should return as needed.

50. On September 29, Dr. Greendyke performed a second records review and examination at Surety's request. Upon consideration of Dr. Dirks' recommendation against surgery, Dr. Greendyke accepted Dr. Dirks' date of medical stability as July 14 and rated Claimant with impairment at 5% of the upper extremity using the *Guides*, 6th edition, for his shoulder condition and pain; he specifically excluded Claimant's pre-existing shoulder conditions from his rating. He did not rate the cervical spine condition. He noted: "[s]ince the repeat MRI, upper extremity EMG study, and neurosurgical consultation did not correlate to any cervical pathology to the ongoing subjective complaints of periscapular pain, no impairment is provided for the cervical spine." DE 19, p. 809. With regard to the industrial accident, he recommended permanent restrictions of no work above shoulder level, no lifting/pushing/pulling over 10 pounds, and recommended an FCE for greater precision.

Medical Care: 2016-Hearing

51. In 2016, physical therapy prescriptions are dated June 30 and November 30.

52. In an August 1, 2016 note, Dr. Schmitt maintained his opinion that Claimant's C5-7 condition could not likely be attributed to the May 2011 industrial injury.

53. On November 18, 2016, Robert Friedman, M.D., reviewed many records, performed testing, and examined Claimant at the request of SIF. He diagnosed right shoulder myofascial pain with trigger points, unrelated cervical spine arthritis with C7 radiculopathy, advanced AC joint arthritis, and a number of Claimant's pre-accident conditions. He opined the cervical spine condition to be not industrially related. He rated Claimant's industrial injury at 1% of the upper extremity, then reduced it to 0% because Claimant was working full time at a supervisory or otherwise light-duty position. Dr. Friedman disagreed with Dr. Greendyke's assessment of impairment because part of Dr. Greendyke's restrictions were based on Claimant's reported pain. However, acknowledging the shoulder area and cervical spine degeneration and pre-existing knee injury, Dr. Friedman recommended medium work restrictions, lifting 50 pounds occasionally, 25 repetitively, no above-shoulder activity over 20 pounds, and occasional kneeling, squatting, and crawling. He deemed these restrictions were not industrially related. Dr. Friedman rated Claimant's other pre-existing conditions at 0% for hypertension, hypercholesterolemia, and GERD. He rated Claimant's AFib at 6% of the whole person, diabetes at 1% of the whole person, reduced from 3% due to lack of treatment compliance, prior shoulder surgery at 3% of the upper extremity, left knee at 10% of the lower extremity, and binaural hearing at 20% of the whole person. He rated Claimant's chronic neck pain at 2% of the whole person as a post-injury, non-industrial impairment.

54. On December 12, 2016, Dr. Pearce examined Claimant for the first time since

July 2014. He noted Claimant now complained of pain radiating into his left arm. He noted a mild decrease in range of motion in his neck when turning to the right and crepitus in the right shoulder blade area. Dr. Pearce treated Claimant in follow-up visits.

55. On January 3, 2017, occupational therapist Virginia Taft performed a functional capacity evaluation (FCE) of Claimant's upper extremity. She considered Claimant cooperative and the FCE results valid. She noted Claimant's blood pressure was increased after testing, but not his heart rate. Taft tested Claimant's ability to push/pull and found he could push/pull 50 pounds but with *left* arm and back pain. She rated Claimant as able to occasionally lift up to 15 pounds, which she noted placed him in the sedentary work category. Lastly, she wrote:

> Separate from the work injury, he also has cardiac issues which may be contributing to his dizziness, decreased lower extremity function, stumbling and decreased endurance. These issues affect his potential for continued work, are a safety concern and need to be addressed.
>
> DE 23, p. 874.

56. On January 12, 2017, Dr. Dirks again examined Claimant. He recommended another set of diagnostic testing, including an MRI, EMG, and nerve conduction velocity studies. He expressed agreement with Dr. Greendyke's 2014 opinion that a C4-5 condition with right-sided radiculopathy caused Claimant's levator scapula/rhomboid pain and was industrially related. Dr. Dirks also checked a box to agree with the FCE limitations and restrictions.

57. On January 17, 2017, Dr. Pearce agreed with the findings of the FCE and adding that he particularly agreed with Ms. Taft's observations regarding endurance: "I also feel there is an issue with endurance. He can perform @ [sic] the stated limits, but for how long?" CE Y, p. 888.

58. On January 24, 2017, a cervical-spine MRI was taken. It showed no new condition when compared to the June 2015 CT scan.

Prior Medical Records

59. Pre-existing chronic conditions include arthritis, an acoustic neuroma causing partial hearing loss, diabetes, heart issues including AFib and other conditions, high blood pressure, high cholesterol, left knee surgery, and a 1996 hernia repair. For these, Claimant received treatment and visited physicians with reasonable frequency. Claimant's ability to manage his diabetes shows he is capable of acting on physicians' recommendations to achieve health.

60. Medical records' earliest mention of potentially relevant information is a 1957 U.S. Air Force examination which states, "Trick rt. Shoulder, car accident 15 Jul 54, when airman picks up something heavy, shoulder slips out of socket. Otherwise No Comp. No Seq."

61. A 1993 note recorded probable carpal tunnel syndrome with some ulnar neuropathy causing paresthesias in all fingers, worse on left. Carpal tunnel syndrome appears neither to have been confirmed nor the subject of significant follow-up.

62. A 1994 note recorded arthralgia, among other joints, in his hands with paresthesias in his hands. Differential diagnosis included two variants of vasculitis as well as a recommendation for a carpal tunnel workup. Again, the carpal tunnel workup does not appear to have been performed.

63. Claimant injured his right shoulder in a motor vehicle accident on December 8, 1997. Lloyd Witham, M.D., examined Claimant on January 29 and February 24, 1998. He suspected bursitis and noted "pain with impingement maneuver."

64. A 1998 note by Dr. Schmitt about a sore shoulder offered a differential diagnosis of shoulder impingement syndrome versus rotator cuff tear. Still in 1998, but 10 months later without intervening relevant medical notes, Claimant returned for treatment after a fainting spell

and incidentally noted left arm numbness and dyscoordination which included an ulnar distribution in his fingers.

65. A 1999 note seven months later recorded intermittent right shoulder symptoms in passing. Physical therapy for the shoulder was ordered. In September 1999, Dr. Schmitt opined Claimant's "waxing and waning right shoulder difficulty" was caused by a motor vehicle accident on December 8, 1997.

66. There is an injury report dated February 6, 2003 diagnosing "lumbar disk syndrome" caused by "probably lifting." CE B, p. 118. The report does not indicate whether the injury was a worker's compensation injury, but follows Dr. Schmitt's notes of sciatica and low back pain. By July 31, 2003, the sciatica had "improved." *Id.* at 126.

67. An August 2008 note recorded a complaint of right periscapular pain among other complaints. An x-ray was negative for "active disease," but did reflect thoracic spondylosis. *Id.* at 190.

68. A September 20, 2010 urgent care note identified a work accident which it says occurred August 5, 2010, which was witnessed but unreported. Claimant hit his back on a door handle. Degenerative disc disease and facet arthropathy in the mid- and lower-thoracic and entire lumbar spine were observed on X-ray and CT scan, but no acute injury was found. A contusion was diagnosed. Claimant was released to return to work without restrictions.

69. At an annual physical examination about two weeks before the subject accident Claimant reported, "He continues to have shoulder pain." Examination findings do not mention any objective signs about it. Dr. Schmitt's assessment was "chronic shoulder trouble." He recommended against "a lot of NSAID's" if Claimant could function without them. Dr. Schmitt next examined Claimant in August after the industrial injury.

Vocational Factors

70. Claimant was 77 at the time of hearing. His education includes a GED which Claimant obtained while in his 40s.

71. Claimant served in the U.S. Air Force. He has worked construction, performed field work, and worked in a foundry. However, most of his career has involved working in, managing, and owning restaurants since about 1968 and specifically in Idaho since 1993.

72. A family corporation owns the current Orlando's which opened in 2011. The record does not reveal who owns how many shares of the corporation, nor whether Mrs. Duran's ownership constitutes her sole and separate property. Documents from the office of the Idaho Secretary of State show that in 2001 Claimant and his wife operated d/b/a Orlando's Food Service; in 2002 Claimant was the incorporator of Orlando's Food Service, Inc.; in 2003, 2004, and 2005 Claimant was not listed as a corporate officer; in 2006 Claimant was corporate secretary; in 2007-2010 Claimant's wife alone was listed as a corporate officer, its president; in 2011 Claimant was identified as vice-president; in 2012, 2013 and 2014 Claimant was identified as Director of the corporation; in 2015 a notification removed Claimant as a Director and as a Secretary Treasurer for the corporation; in 2016 Claimant is not listed as an officer.

73. Claimant has received benefits from the Social Security Administration since about 2007.

74. Also in 2007 he closed a business. It too was called "Orlando's." His reason for closing it pertained to business losses precipitated by prolonged road construction. Later that year he began working for Employer. Claimant signed his paperwork to start the 2011 season on May 16, 2011. At the time of accident Claimant earned $640 per week.

75. The new Orlando's opened in November 2011. It has no inside seating, walk-up

and drive-through only. The business is currently[2] open from 6:30 a.m. to 3:00 p.m., five days per week. It also does "very little" catering of groups up to 50 people.

76. Initially, Claimant would begin work about 4:00 a.m. Typically now, Claimant, unable to sleep well because of his condition, goes to work early—between 1:00 and 4:00 a.m.—and performs light prep work until the first employee arrives at 5:00 a.m. He also orders the food and supplies as well as supervises the employees and family volunteers.

77. Claimant is now salaried at $700 per week. Claimant pays some workers out of his own paycheck because he cannot do all of the lifting required at the business. He reported to Mr. Brownell that he pays out about $300 per week to these additional workers.

78. The business closed the day of the hearing because Claimant was unavailable while testifying.

79. Claimant's earnings history shows $13,233 in 2011, $19,840 in 2012, $24,960 in 2013, $34,400 in 2014, and $29,115 in 2015.

80. Claimant's wife is a full-time school teacher. She also raises and sells some cattle under the business name DD Lowlines. Medical notes occasionally mentioned that Claimant fed cattle or drove a tractor. This does not appear to have been a major component of Claimant's time or efforts.

81. Claimant testified that "every now and then" his wife works at the business. She also does the bookkeeping.

82. ICRD consultant Jeff Hanson provided service. He first interviewed Claimant on September 12, 2011. On December 27, 2011, the file was closed because Claimant had been deemed medically stable by Dr. Stevens and Claimant had "returned to work in

[2] At hearing, Claimant testified that when the new Orlando's initially opened, he was working seven days a week and the restaurant was open until 6:00pm. Tr., p. 52.

self employment."

83. On September 3, 2015, vocational expert Doug Crum authored a disability evaluation. He opined that in the absence of any impairment ratings or physician-imposed restrictions Claimant suffered neither loss of labor market access nor loss of wage-earning capacity; thus, permanent disability from the 2011 industrial injury was zero.

84. On December 30, 2016, with subsequently generated medical records available, Mr. Crum opined that—using Dr. Friedman's evaluation—Claimant suffered no loss of labor market access nor wage-earning capacity, particularly given the fact that his annual earnings in 2012, 2013, 2014, and 2015 were each greater than any years except 2006, 2005, and 1980. Mr. Crum opined that calculating wage loss in this scenario would "require a theoretical leap, ignoring the facts of this case." DE 21, p. 866. Using Dr. Greendyke's evaluations, prior to his injury, Claimant had access to 9.8% of the labor market. Thereafter, Claimant had access to 7.1% of the jobs in his labor market and therefore suffered a 27% reduction in labor market access and no loss of wage-earning capacity. Mr. Crum averaged these factors to arrive at 13.5% permanent disability. He was unable to evaluate the FCE itself but relied upon the varying opinions of physicians who evaluated it. Mr. Crum did not know whether Dr. Greendyke opined the FCE to be accurate about restrictions.[3] Mr. Crum considered Claimant's receipt of Social Security benefits since 2007 to be evidence that Claimant was "semiretired." He did not attempt to discover available jobs because Claimant was gainfully employed or self-employed full time.

85. On December 23, 2016, vocational expert William Jordan authored a disability evaluation. He opined that Claimant's post-injury self-employment and earnings establish that Claimant is not totally and permanently disabled. He identified potential pre-existing

[3] Mr. Crum misdated the date of medical stability; he inserted the date of accident there. This is deemed a typographical error and not an error in Mr. Crum's analysis.

impairments but opined these did not constitute a "significant hindrance to employment." He opined that Claimant's work for the family business constituted "bona[ ]fide tasks that are necessary" and "integral" to the business. ISIF 1, p. 10. He testified about whether various pre-existing conditions would affect Claimant's employability. He relied upon Dr. Friedman's analysis of impairment as a basis for determining how to evaluate these pre-existing conditions. He exhibited some confusion about whether Claimant's AC joint involved his wrist because he read a word as "acromionavicular" instead of acromioclavicular. He did not provide a labor market analysis of jobs available to Claimant (at age 72) before the 2011 accident or at the time of medical stability or at the time of hearing (at age 77) or his potential wage loss.

86. On January 20, 2017, vocational expert Dan Brownell authored a disability evaluation. He opined Claimant would be unemployable but for the family business. It appears that a major basis upon which he assesses disability is Claimant's age. He did not provide a labor market analysis of jobs available to Claimant (at age 72) before the 2011 accident or at the time of medical stability or at the time of hearing (at age 77). He relied upon the FCE findings for restrictions. He did not analyze Claimant's disability based upon Dr. Friedman's restrictions or Dr. Greendyke's. Moreover, his critiques of other vocational experts contained *ad hominem* attacks which are inappropriate and unpersuasive.

Allowed Post-Hearing Medical Records

87. On March 23, 2017, Dr. Dirks examined Claimant. He found nothing new. He maintained his earlier opinion that surgery was not indicated for Claimant.

88. A May 10, 2017, letter from Dr. Friedman responded to Dr. Dirk's examination note. He described Claimant's electrodiagnostic history—which showed no cervical radiculopathy six months after the industrial injury date but with radiculopathy arising three

years afterward—as evidence for his opinion that the degenerative cervical condition was not aggravated by the industrial injury. Dr. Friedman well explained this opinion in deposition. His opinion is undercut somewhat by his deposition statement that Claimant "is not in good control of his diabetes," because Dr. Friedman found peripheral neuropathy in Claimant's legs upon examination. The record shows Claimant's fasting glucose and A1c numbers were good enough for him to discontinue his diabetic medication for a substantial period of time.

DISCUSSION AND FURTHER FINDINGS OF FACT

89. 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).

90. 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). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447−48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 626−27, 603 P.2d 575, 581−82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

91. The Referee observed at hearing that Claimant's demeanor appeared appropriate and forthright at all times. He seemed younger and stronger on cross-examination than on direct, indicating Claimant will rise to a challenge. An admirable initiative and dedication to hard work were evident as he testified. He has a good social demeanor, and the Referee's first impression suggests he would be a good boss. A well controlled emotional component to his testimony

arose as he described his ongoing pain and his frustration with physicians with whom he has met in recent years. (Claimant's frustration arises from his belief that an early physician, hearing Claimant describe "shoulder blade" symptoms, merely recorded "shoulder" and that this notation prevented other physicians from adequately addressing the actual problem.) Claimant was a credible witness. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

Causation

92. A claimant must prove that he was injured as the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001).

93. Claimant suffered an injury to his right periscapular area and surrounding musculature as a result of the May 25, 2011 industrial injury. Kootenai Urgent Care physicians, Claimant's regular treating physician, Dr. Schmitt, as well as Drs. Sims, Stevens, and McNulty who examined Claimant in the first 8 months after the injury confirmed the relationship, although they used varying labels in their diagnoses.

94. These same physicians equivocated or flatly denied a causal relationship between

Claimant pre-existing, degenerative, cervical spine condition and his work.

95. Dr. Pearce entered the scene in December 2013. He tied Claimant's periscapular pain to the industrial injury and to Dr. King's 2013 shoulder surgery. Dr. King has opined the 2011 industrial injury made Claimant's pre-existing degenerative shoulder condition—AC joint and scapular arthritis—to become symptomatic. However, Dr. King denied a causal relationship between the fraying he observed at surgery and the industrial injury. Moreover, he declined to opine about causation regarding Claimant's periscapular pain.

96. Dr. Greendyke's July 2014 IME linked the industrial injury to a permanent aggravation of pre-existing degeneration at C4-5 and, in turn, to a radiation of symptoms into the right shoulder blade area. After Dr. Dirks opined against surgery, Dr. Greendyke declined to rate Claimant for his cervical spine condition and rated him only related to his shoulder condition, excluding any pre-existing shoulder conditions. Later, Dr. Dirks agreed with Dr. Greendyke's 2014 opinion that the C4-5 condition with right-sided radiculopathy was industrially related.

97. Dr. Friedman's November 2016 opinion linked the industrial injury only to "myofascial pain with trigger points." Dr. Friedman well explained how the electrodiagnostic testing from industrial injury to the date of hearing showed an absence of a link between Claimant's cervical spine condition and the industrial injury.

98. The preponderance of evidence establishes it likely that Claimant's pre-existing arthritis in his AC joint and periscapular area was permanently aggravated by the industrial injury. It shows Claimant's condition will wax and wane with overuse and physical therapy, respectively. No subsequent intervening cause has been shown likely related to Claimant's industrial injury.

99. The preponderance of evidence fails to show a likely causal link between the

industrial injury and any other condition.

Medical Care Benefits

100. A claimant is entitled to reasonable medical care for a reasonable period of time for an industrial injury. Idaho Code § 72-432. When determining whether medical treatment was reasonable, a totality of the circumstances approach should be utilized. Hindsight is an insufficient basis for denying reasonable medical care. *Chavez v. Stokes,* 158 Idaho 793, 353 P.3d 414 (2015).

101. Claimant received multiple sets of physical therapy for his upper body. The physical therapists have reported both objective and subjective improvements to the date of medical stability and temporary improvements after flare-ups caused by overactivity. As he continues to work at the restaurant—and occasionally overwork—Claimant will continue to experience symptoms related to his shoulder blade area as well as neck symptoms related to his cervical spondylosis in the future.

102. By the time of hearing, Claimant's symptoms had shifted more to his neck and both shoulders and arms. Claimant's right shoulder blade area is now a lesser source of his pain.

103. Multiple prescriptions for physical therapy in the years since the accident have gradually shifted focus from Claimant's shoulder blade area to the spondylosis in his cervical spine. As this transition occurred the physical nearness and interrelationship between these conditions, together with symptom overlap, required further diagnosis. Some later flare-ups related to overuse sometimes produced primarily shoulder blade symptoms.

104. Attempts to diagnose and treat Claimant to the date of hearing were reasonable and compensable. This includes Dr. King's surgery although it ultimately was determined unrelated to the industrial injury.

105. Although Claimant's cervical spondylosis ultimately has been shown to be unrelated to the industrial accident, while diagnosis and causation were being sorted out all upper body physical therapy was reasonable and compensable. Claimant responded well to this treatment both before and, as palliative treatment, after he became medically stable.

106. Physical therapy for Claimant's right knee was not related to the industrial accident and is not compensable.

107. Claimant should be entitled to medical benefits to the date of hearing for all treatment—whether curative or palliative—to his right periscapular area, cervical spine, and shoulder, but not for carpal tunnel care, if any, or for left-sided upper extremity symptoms. He is not entitled to medical care benefits for lower trunk, lower extremity, or any pre-existing conditions not addressed immediately above.

108. Because symptoms in the right periscapular area will wax with overuse—regardless of any subsequent event—Claimant should be entitled to physical therapy for his shoulder blade area, but not for his cervical spondylosis in the future.

Medical Stability and Temporary Disability

109. Maximum medical improvement (MMI) "does not contemplate that Claimant must regain his pre-accident state to be considered medically stable, but only that his persisting condition is not likely to progress significantly within the foreseeable future. Of course, the persisting condition must be related to a compensable industrial accident." *Snider v. Empro Employer Solutions, LLC* 2013 IIC 72 (November 6, 2013). MMI is not defined by statute, but the Court has considered both Idaho Code § 72-422, § 72-423, and Oregon, Arizona, and New Mexico law in defining MMI. *McGee v. J.D. Lumber*, 135 Idaho 328, 332, 17 P.3d 272, 276 (2000). The Court has held "a person can be medically stable and still have symptoms and pain

from her injury as long as no further material improvement is expected with time or treatment." *Shubert v. Macy's West, Inc.* 158 Idaho 92, 343 P.3d 1099 (2015) (abrogated on other grounds). A claimant receiving palliative care can still be found medical stable. *Rish v. The Home Depot* 161 Idaho 702, 390 P.3d 428 (2017). A pre-existing degenerative condition which is progressive does not preclude a finding of medical stability for an industrial injury which is unrelated to the pre-existing progressive condition. *See, Colpaert v. Larson's Inc.*, 115 Idaho 825, 771 P.2d 46 (1989).

110. Claimant has had multiple rounds conservative and invasive treatment and was declared stable at least four times per the record. Dr. Sims, on October 18, 2011, wrote Claimant was "as good as [he] is going to get," but did authorize further PT to treat Claimant until Dr. Stevens' IME. DE 3, p. 498; CE R, p. 570. Dr. Stevens chose the date of his own examination, November 10, 2011 as Claimant's MMI date. Dr. Pearce rated Claimant on May 5, 2014. Dr. Greendyke's 2014 opinion that Claimant may not have been medically stable was conditional depending upon whether surgery was indicated. Dr. Dirks confirmed it was not indicated, and Dr. Greendyke used the date of Dr. Dirks' exam, July 14, 2015 as the date of medical stability.

111. While Claimant continued to pursue treatment, even surgery, for his condition, the progressive nature of the nonindustrial, pre-existing, degenerative condition does not negate that Claimant was medically stable with regard to the compensable industrial injury. Therefore, Dr. Stevens' MMI date is more persuasive. Claimant's AC arthritis was aggravated by the industrial accident and thereafter continued to deteriorate and cause pain, but Claimant was nevertheless stable from his industrial injury on November 10, 2011.

112. Claimant continued to work from the date of the industrial injury to July 29, 2011. Claimant says he quit because Employer failed to accommodate his recovery needs by hiring

somebody to lift the heavy things. Employer says he quit over certain paperwork requirements. The parties dispute whether the work offered was within his temporary restrictions. Claimant gave direct testimony. Employer provided hearsay documents. Claimant was credible. The record supports a finding that Employer failed to provide suitable work during Claimant's recovery period.

113. Claimant opened the new Orlando's about November 2011. His testimony does not suggest that he lost significant work as a result of his industrial injury.

114. Claimant is entitled to temporary disability benefits from July 29, 2011 to the date of medical stability, November 10, 2011. Claimant failed to establish that temporary disability, if any, from the December 2012 surgery was compensable.

Permanent Impairment

115. Permanent impairment is defined and evaluated by statute. Idaho Code §§ 72-422 and 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975). Impairment is a component of disability. Idaho Code § 72-422; *Mayer v. TPC Holdings, Inc* 160 Idaho 223, 370 P.3d 738 (2016).

116. Claimant's compensable injury remains symptomatic and affects his life and work. After the industrial injury, Claimant required additional hired help, apparently on a part-time basis, to perform the more physical duties which Claimant had performed in his pre-injury business. The two businesses have not been shown to be distinguishable in terms of the work Claimant expected himself to perform. Drs. Stevens' and Friedman's opinions that Claimant suffered no permanent impairment from the industrial injury are not persuasive. The record

shows some permanent impairment is likely.

117. The record establishes that Claimant's compensable permanent impairment is 5% of the upper extremity. Drs. Pearce and Greendyke used differing approaches to the *Guides*, 6th edition, but arrived at essentially the same rating.

Disability

118. "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 as provided by Idaho Code § 72-430, which states:

> [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.

119. 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 a claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

120. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423 and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986). A claimant's labor market is generally evaluated as of the date of hearing. *Brown v. The Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012). 123. Under Idaho Code § 72-406 and *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008), where apportionment is at issue, a two-step analysis must be employed to evaluate disability. First, Claimant's disability must be evaluated in light of all his physical impairments resulting from the industrial accident, and any preexisting conditions. Thereafter, the amount of permanent disability attributable to the industrial accident must be apportioned. Idaho Code § 72-406 provides:

> In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

121. Mr. Jordan and Mr. Brownell did not analyze wage loss or labor market loss, but only offered an ultimate opinion on whether Claimant is totally and permanently disabled. Mr. Crum's report does provide some analysis of wage loss and labor market access; however, his report is problematic. First, Mr. Crum asserts in his December 30, 2016 report that Dr. Greendyke "did not indicate whether the restrictions were solely and exclusively the result of the May 25, 2011 industrial injury." DE 21, p. 856. Mr. Crum makes a similar assertion later: "Dr. Greendyke does not indicate that the restrictions recommended are specifically associated with the May 25, 2011 industrial injury to the right shoulder, or if they are associated with some of the

other conditions which he diagnosed." DE 21, p. 866. However, Dr. Greendyke delineated Claimant's restrictions in response to the following question: "With regard to Mr. Duran's industrial accident, would you assign any restrictions of a temporary or permanent nature? Please specify." DE 19, p. 809. Second, Mr. Crum provided labor market loss access figures premised on Dr. Greendyke's restrictions, but did not account for Claimant's pre-existing conditions in calculating Claimant's pre-injury access, even though he had those restrictions from Dr. Friedman. Third, regarding Dr. Friedman's restrictions, Mr. Crum opined that if those restrictions were considered to result from the subject accident then Claimant would suffer no loss of labor market access or wage loss. Why Mr. Crum would venture such an assumption, when Friedman's restrictions are clearly described as pre-existing, is a mystery. This is especially mystifying when Mr. Crum could have merely said Dr. Friedman did not associate any impairment or restrictions with the subject accident and reached the same conclusion. Fourth, Mr. Crum also opined Claimant had no wage loss by direct comparison of his time of injury wage with his post-accident wage. We take this opportunity to remind the parties that while a direct comparison of pre-injury and post-injury wages is relevant to the evaluation of disability (see *Baldner v. Bennett's, Inc*. 103 Idaho 458, 649 P.2d 1214 (1982)) (holding that a pre-injury and post-injury wage loss comparison actually did accurately measure claimant's loss of ability to engage in gainful activity under the peculiar facts of that case) it is ordinarily inappropriate to rely on such a comparison as the sole measure of disability. *Bennett v. Clark Hereford Ranch*, 106 Idaho 438, 442, 680 P.2d 539, 543 (1984) (holding that consideration of wage loss only in assessing disability was error). Mr. Crum's objection that calculating wage loss would require a "theoretical leap" is not well taken; vocational experts are hired for their expertise in taking the "theoretical leap" of evaluating the earnings a claimant might enjoy in the jobs comprising his

post injury labor market. Accordingly, while we have three vocational opinions to consider in assessing Claimant's disability from all causes, none of them are particularly helpful in evaluating Claimant's disability.

122. Dr. Friedman rated Claimant's pre-existing, injury related, and subsequent conditions for impairment. His was the most comprehensive exam in evaluating Claimant's pre-existing impairments, but how Dr. Friedman assessed Claimant's condition depended in part on how he presented that day. For example, Dr. Friedman rated Claimant's diabetes at 1%, uncontrolled. However, in May 2011, just prior to the accident, Dr. Schmitt stated Claimant's diabetes was stable and well controlled. Therefore Dr. Friedman's opinions are helpful, but are viewed in light of how those same conditions appeared to Claimant's treating physicians closer in time to the subject accident.

123. Dr. Friedman restricted Claimant to occasional kneeling, squatting, and crawling due to his left knee. Dr. Friedman related Claimant's 50 pound lifting restriction and no over the head work of above 20 pounds to his degenerative back/shoulder conditions, and not to the shoulder surgery itself or the industrial injury. Dr. Greendyke issued restrictions related to Claimant's industrial accident of no work above shoulder level, no lifting/pushing/pulling over 10 pounds. We adopt Dr. Friedman's limitations[4] and restrictions regarding Claimant's pre-existing conditions and adopt Dr. Greendyke's limitations and restrictions regarding Claimant's industrial injury. Dr. Greendyke had the advantage of examining Claimant twice, was able to examine Claimant's progressive condition closer in time to the subject accident, and his restrictions and limitations more closely match Claimant's description of his abilities and the

[4] Because Dr. Friedman's lifting and overhead restrictions are subsumed within Dr. Greendyke's, we utilize Dr. Greendyke's lifting/overhead restrictions and Dr. Friedman's knee restrictions in assessing Claimant's disability from all causes.

FCE's depiction of Claimant's limitations.

124. Claimant's relevant non-medical factors include his age, 77 at the time of the hearing, his occupational history of predominantly managerial restaurant work, his limited formal education, his strong work ethic, and his Northern Idaho labor market. In addition, we note that Claimant earned substantially more after the accident than before. The time-of-injury job was seasonal, so year-round employment would naturally be expected to show greater earning. Claimant's weekly wage for Employer was $640, and he draws $700 per week in salary now. However, even though Claimant is earning more now than he was in his pre-injury position, this does not mean that he has no wage loss in other jobs in his residual labor market.

125. Claimant's age, limited education, and smaller labor market increase his disability. Claimant was age 77 at the time of hearing, and while he is extremely experienced and hard working, his age would be a disadvantage if Claimant had to compete against younger workers for work within his restrictions. Claimant earned a GED in his 40s and is not competitive for any work requiring more than minimal education or computer literacy. Claimant's labor market is Northern Idaho. He resides in Athol, but is approximately a 30 minute drive to Coeur d'Alene, where his restaurant is located. Claimant's labor market is somewhat affected by his location (wherever there are people, there are restaurants); Claimant testified it is a seasonal economy and the Northern Idaho market is less urban, therefore this factor slightly increases Claimant's disability. DE 17, p. 776.

126. Claimant possesses a wealth of restaurant knowledge and a very strong work ethic, both of which reduce his disability. Claimant has experience in every aspect of running a restaurant with the exception of bookkeeping. Claimant's experience as a supervisor, both for Silverwood and his own restaurants, is particularly relevant in assessing Claimant's employability because it

reduces the impact of Claimant's lifting restrictions; Claimant could be (and currently is) employed as a supervisor where he can supervise others to do the lifting for him. Lastly, as observed by the Referee and by the Commission in review of the evidence, Claimant has an exceptional will to work best exemplified by his statement to ICRD consultant Jeff Hanson: "The claimant stated his hobby is working." DE 12, p. 693. Based on the relevant medical and non-medical factors, we hold Claimant's disability from all causes is 35%.

Odd-Lot Disability

127. If a claimant is able to perform only services so limited in quality, quantity, or dependability that no reasonably stable market for those services exists, he is to be considered totally and permanently disabled. Such is the definition of an odd-lot worker. *Reifsteck v. Lantern Motel & Cafe*, 101 Idaho 699, 700, 619 P.2d 1152, 1153 (1980); *also see, Fowble v. Snowline Express*, 146 Idaho 70, 190 P.3d 889 (2008). Odd-lot presumption arises upon showing that a claimant has attempted other types of employment without success, by showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available, or by showing that any efforts to find suitable work would be futile. *Boley*, *supra.*; *Dehlbom v. ISIF*, 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997). Once Claimant establishes a *prima facie* odd-lot case, the burden shifts to a defendant to show suitable work is regularly and continuously available. *Rodriguez v. Consolidated Farms, LLC.*, 161 Idaho 735, 390 P.3d 856 (2017).

128. Claimant did not provide evidence he attempted other types of employment without success. Claimant did not show he or others looked for work. He merely continued in his plan to open the new Orlando's. Claimant appears to be arguing that it would be futile for him to look for work. However, Claimant's work as a valued employee is evident; the business

shut down the day he was absent for trial. He is successfully working an actual job. A vocational expert's speculation upon what might happen if Claimant lost this job is unpersuasive. Moreover, Mr. Brownell did not show how or whether he analyzed Claimant's labor market to arrive at his facile conclusion. As noted above, we believe Claimant has valuable experience that continues to make him employable. Claimant failed to establish a *prima facie* case to satisfy the "futility" prong of the odd-lot test.

Idaho Code § 72-406 Apportionment

129. Dr. Greendyke assessed Claimant's accident produced restrictions as follows: no work above shoulder level and no lifting/pushing/pulling over 10 pounds and did not apportion his rating or restrictions. Dr. Friedman determined Claimant's pre-existing conditions limited him to occasional kneeling, squatting, and crawling due to his left knee, a 50 pound lifting restriction and no over the head work of above 20 pounds due to his pre-existing degenerative back and shoulder conditions. When comparing these two sets of limitations, it is clear that Claimant's accident produced restrictions subsume the restrictions given by Dr. Friedman relating to Claimant's back and shoulder. However, Dr. Freidman's restrictions relating to Claimant's left knee are additive to Dr. Greendyke's restrictions. The pre-existing knee condition and associated limitation does increase Claimant's disability from all causes, but there is no vocational evidence before the Commission on exactly how this restriction impacts Claimant's employability. The lifting and overhead restrictions are clearly more impactful to Claimant's ability to perform work in his residual labor market; the record shows Claimant can no longer perform certain tasks because of the injury and that he hired at least one part-time person to perform some of these tasks which he would otherwise perform himself. We are persuaded the knee restriction produces no more than a *de minimis* amount of disability. Claimant's disability

from all causes is 35%, and Claimant's disability related to the subject accident is 30%.

ISIF ISSUES

130. Claimant moved to strike Dr. Friedman's testimony and all testimony from anyone who consulted or relied upon Dr. Friedman's report. Before hearing, the Referee ordered that Dr. Friedman be allowed to examine Claimant at the request of Defendants. Clamant over reads the language of the Referee's pre-hearing interlocutory order which identified a basis for allowing an examination by Dr. Friedman. The order did not limit the scope, nature, or purpose of that examination. Dr. Friedman's testimony was not limited by that order.

131. At hearing, the record was expressly held open to allow more complete medical testimony regarding future surgery from the experts. Two subsequent orders regarding motions to admit specific additional medical records issued. These orders did not—and no party suggests they did—preclude or limit the scope of post-hearing depositions.

132. However, even without Dr. Friedman's testimony, Clamant failed to show he is totally and permanently disabled. He is not an odd-lot worker. No liability can accrue to ISIF.

Attorney Fees

133. Attorney fees are awardable where Defendants have unreasonably delayed or denied a claim. Idaho Code § 72-804. Here, Surety paid substantial medical bills for a condition which was only possibly related. The complications involved in analyzing Claimant's medical needs and surrounding issues of causation were considerable. The fact that these benefits are found compensable even though, in hindsight, some are ultimately not found to be causally related does not create dissonance. Medical professionals were searching for a solution and espoused differing opinions at the time. These benefits paid during the search were compensable and reasonably paid. The record does not show a preponderance of evidence to support a finding of

unreasonable denial or delay. Claimant failed to show that a basis likely exists for an award of attorney fees.

CONCLUSIONS OF LAW AND ORDER

1. Claimant suffered a compensable industrial injury which permanently aggravated a pre-existing degenerative condition in his right AC joint and shoulder blade area on May 25, 2011;

2. Claimant failed to show it likely that his cervical spine condition, carpal tunnel syndrome and/or a possible thoracic spine condition were also aggravated by that event;

3. Defendants failed to show the existence of a subsequent intervening cause which affected Claimant's compensable industrial injury;

4. Claimant is entitled to temporary disability benefits from July 29, 2011 to November 10, 2011;

5. Claimant is entitled to permanent partial impairment rated at 5% of the upper extremity, and to permanent partial disability rated at 30% of the whole person, inclusive of impairment. Claimant failed to show he likely is totally and permanently disabled as an odd-lot worker;

6. Claimant's permanent partial disability from all causes is rated at 35% with 30% apportioned to the industrial accident of May 25, 2011 and 5% to pre-existing conditions;

7. Claimant is entitled to medical care provided to the date of hearing and to future palliative physical therapy as prescribed by a physician from time to time as needed for temporary aggravations and exacerbations of his compensable condition arising from Claimant's overuse of his right arm in his occupation;

8. Claimant failed to show he is entitled to an award of attorney fees; and

9. ISIF bears no liability.

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

DATED this __22nd__ day of _____June_____, 2018.

INDUSTRIAL COMMISSION

__/s/_____
Thomas E. Limbaugh, Chairman

__/s/_____
Thomas P. Baskin, Commissioner

__/s/_____
Aaron White, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _____22nd_____ day of _____June_____, 2018, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

STARR KELSO P.O. BOX 1312 COEUR D'ALENE, ID 83816-1312	H. JAMES MAGNUSON P.O. BOX 2288 COEUR D'ALENE, ID 83814	THOMAS W. CALLERY P.O. BOX 854 LEWISTON, ID 83501

dkb _____/s/_____