BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KEVIN PFENNING, Claimant, v. CITY OF COEUR D'ALENE, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2008-036858** **2009-027896** **2011-001907** **2012-004107** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed 2/5/18**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Coeur d'Alene, Idaho, on May 11, 2017. Claimant was represented by Stephen Nemec, of Coeur d'Alene. Bradley Stoddard, of Coeur d'Alene, represented City of Coeur d'Alene, ("Employer"), and Idaho State Insurance Fund ("Surety"), Defendants. Oral and documentary evidence was admitted. Post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on October 26, 2017. The undersigned Commissioners have reviewed the proposed decision and are in general agreement with the Referee's analysis and conclusions. However, the Commission believes that slightly

different treatment must be given to IDAPA 17.02.04.281. Therefore, the Commission issues its own findings of fact and conclusions of law.

ISSUES

The issues to be decided are:

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

2. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury or condition;

3. Whether and to what extent Claimant is entitled to the following benefits:
    a. Permanent Partial Impairment (PPI);
    b. Disability in excess of Impairment (PPD); and
    c. Attorney fees;

4. Whether Claimant is totally and permanently disabled; and

5. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

Claimant argues he became totally and permanently disabled due to a left arm injury sustained in 2012 while acting within the course and scope of his employment with the City. The injury led to multiple shoulder surgeries which left Claimant with a non-functional left arm by 2015. Claimant subsequently developed increasing symptoms in his right arm from overusing it. Claimant's loss of function in his right arm is a compensable consequence of his inability to use his left arm from 2015 onward.

Defendants contend Claimant's right shoulder condition was pre-existing, and was not caused, accelerated, or aggravated by the industrial accident in question. Furthermore Claimant's right shoulder complaints are not due to "overuse syndrome". Claimant is not totally and permanently disabled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Claimant's wife, taken at hearing;

2. Claimant's Exhibits (CE) A through R, admitted at hearing;

3. Defendants' Exhibits (DE) 1 through 27, admitted at hearing;

4. The post-hearing deposition transcript of John McNulty, M.D., taken on May 22, 2017;

5. The post-hearing deposition transcript of Daniel Brownell, taken on July 14, 2017;

6. The post-hearing deposition transcript of Roger Dunteman, M.D., taken on July 17, 2017; and

7. The post-hearing deposition transcript of Douglas Crum, taken on July 27, 2017.

All objections and Motions to Strike preserved during the depositions are overruled.[1]

FINDINGS OF FACT

1. Claimant graduated high school in 1981. Thereafter he worked in mining and lumber mills until he injured his low back and could no longer do such work. He underwent retraining with the assistance of the Idaho Industrial Commission Rehabilitation Division (ICRD), through which he obtained a wastewater treatment technology certificate from Boise State University in 1989. From there he worked as a wastewater operator over a 25 year career, which ended with

[1] Both parties moved to strike reports and testimony of opposing vocational rehabilitation experts. Those motions were dealt with, and denied, in a separate proceeding.

the industrial accident at issue.

2. On February 13, 2012, Claimant tripped over an extension cord and fell while working for Employer.[2] He injured his left shoulder and right ankle during this accident. His ankle healed uneventfully and is not part of this controversy.

3. After initial medical treatments, physical therapy, and a positive left shoulder MRI, Claimant was referred to Coeur d'Alene/Post Falls orthopedic surgeon Adam Olscamp. Dr. Olscamp had previously operated on Claimant's right shoulder for rotator cuff repair and labral debridement (2006) and left knee ligament reconstruction, meniscectomy and chondroplasty (2011).

4. Records from Claimant's first visit with Dr. Olscamp on March 8, 2012 list Claimant's chief complaint as pain in the left shoulder. Although all of Dr. Olscamp's narration and testing done that day center on Claimant's left shoulder, the history portion of the doctor's notes contains the following;

> [Claimant] is a 49 year old right-handed male who is seen today for the above listed complaint [pain in left shoulder]. Since the onset, there has been no change in the symptoms. His symptoms have been present for 1 month. Right side pain is moderate to severe with a rating of 7/10. Left side pain is moderate to severe with a rating of 7/10.

DE 16, p. 27. X-rays and an MRI of Claimant's left shoulder were reviewed. There is no evidence in the record that Claimant's right shoulder was evaluated or assessed for further treatment. Left shoulder surgery was discussed.

5. Claimant saw Dr. Olscamp in followup on April 8, 2012. It appears Dr. Olscamp's history from the March 8 visit cited above was copied verbatim in

[2] Claimant had two previous left shoulder industrial accidents while working for Employer. The first was in 2009, was treated conservatively and resulted in no time loss. Eleven days post accident Claimant returned to his time-of-injury duties with Employer. The second injury was in late 2010, diagnosed as left shoulder impingement syndrome. The injury was treated with injections. Claimant returned to his regular work duties thereafter.

a "cut and paste" fashion into his office notes of April 8. Claimant agreed to undergo surgery to address his left shoulder injury during this April visit.

6. On April 11, 2012, Claimant underwent a left shoulder arthroscopic rotator cuff repair, left biceps tenodesis, and superior labral debridement surgery to fix what Dr. Olscamp called a "massive rotator cuff tear." DE 16, p. 30.

7. Claimant's post-surgery recovery stalled, and Dr. Olscamp suspected arthrofibrosis. Claimant underwent an arthrogram which uncovered a recurrent left rotator cuff tear. The tear was repaired on August 6, 2012.

2013

8. Claimant again developed stiffness and failed to progress with his physical therapy goals. On January 9, 2013, Dr. Olscamp performed another arthrogram. No further rotator cuff tears were noted. Dr. Olscamp then manipulated the shoulder with audible and palpable lysis of adhesion. The manipulation restored Claimant's left shoulder range of motion.

9. After the January procedure Claimant continued to complain of continuing pain and lack of movement in his left shoulder. Physical therapy did not help. PA-C Robert Davis, who works in Dr. Olscamp's office, noted his disappointment in Claimant's condition. Mr. Davis felt Claimant would not be able to return to his previous employment at that time due to his ongoing left shoulder issues. Mr. Davis suggested Claimant consider retraining or applying for Social Security disability.

10. Defendants sent Claimant to J. Craig Stevens, M.D., a northern Idaho physical medicine doctor, for an IME on March 6, 2013. Dr. Stevens noted "discrepancy

and inconsistency… with significant variance between his passive and active ranges particularly in regard to flexion range." DE 19, p. 13. Dr. Stevens also found that Claimant had a greater loss of range of motion with his right arm than his left, but nevertheless Claimant indicated his right arm was "doing fine" since his non-industrial right shoulder surgery. This finding led Dr. Stevens to suspect Claimant was attempting to magnify the dysfunction and disability of his industrial left shoulder.

11. Dr. Stevens found Claimant to be at MMI, with no need for further treatment. Dr. Stevens suggested Claimant discontinue narcotic opioids, and perform home exercises. Dr. Stevens felt Claimant could return to work with a temporary 20 pound lifting restriction to shoulder level, and 5 pounds above shoulder. After three months Claimant could advance to his permanent restrictions of 30 pounds to shoulder level, 10 pounds above shoulder.

12. Dr. Stevens assigned Claimant a 14% left upper extremity (UE) impairment rating, with apportionment of 4% to "preexisting impingement" and 10% to the industrial accident of 2012, which equates to 6% whole person PPI due to the 2012 subject industrial accident.[3]

13. By his March 26, 2013 visit with Dr. Olscamp, Claimant's left shoulder pain was moderate, but his active range of motion was still quite limited. His passive ROM was nearly full, but with pain at the extremes of flexion. Dr. Olscamp was puzzled by Claimant's continued active ROM findings.[4] Claimant was upset by Dr. Stevens' recent IME findings. Dr. Olscamp agreed with Dr. Stevens that Claimant was at MMI,

[3] The "pre-existing" apportionment nevertheless was due to an industrial accident while Claimant was employed by Employer.

[4] Active ROM is determined by Claimant moving the joint; passive ROM is measured by the physician moving the joint for Claimant.

although he disagreed with Dr. Stevens' other findings and conclusions. Dr. Olscamp suggested a second opinion examination with Spencer Greendyke, M.D.

14. Defendants next asked Michael Ludwig, M.D., a Coeur d'Alene physical medicine and rehabilitation doctor, to examine Claimant in an IME setting.[5] Dr. Ludwig was also asked to provide a PPI rating and discuss Claimant's restrictions. He was provided with available medical records from Surety, including the IME report from Dr. Stevens.

15. Dr. Ludwig examined Claimant on May 9, 2013, and responded to the Surety's requests. Dr. Ludwig's PPI rating mirrored that of Dr. Stevens (14% UE PPI with 4% attributed to preexisting factors). Dr. Ludwig justified his 4% UE apportionment to preexisting causes by noting that there were degenerative changes present in Claimant's left shoulder at the time of his 2012 work accident which "likely contributed to the development of the rotator cuff tear that may not have occurred in an otherwise healthy shoulder. [Claimant] also has comorbities of diabetes and prior contralateral rotator cuff tear, placing him at higher risk of cuff tear." DE 18, p. 33.

16. Dr. Ludwig anticipated Claimant's ROM would improve with time, but considering Claimant's active ROM at the time of examination, the doctor felt Claimant should not lift above shoulder level, and no more than 10 pounds frequent and 30 pounds occasional below shoulder height.

17. It appears Dr. Olscamp was provided a copy of Dr. Ludwig's IME report in late May, and checked the "yes, I agree with the findings" box. While the correspondence from Surety does not list the specific IME report it provided

[5] Dr. Ludwig had seen Claimant in 2012 for a brief time as a treater prior to referring Claimant to Dr. Olscamp. Dr. Ludwig also treated Claimant for left shoulder pain in 2009 from Claimant's previous industrial accident.

to Dr. Olscamp at that time, the record does not contain any other IMEs done in or around April or May of that year.

18. Spencer Greendyke, M.D., a Coeur d'Alene orthopedic surgeon examined Claimant on September 12, 2013, at Defendants' request. Specifically, Dr. Greendyke was asked to opine on all of Claimant's impairments and permanent restrictions which existed immediately preceding his industrial accident of February 13, 2012.

19. Dr. Greendyke authored a report in September 2013 in which he found no impairment or restrictions regarding Claimant's low back, left knee, right knee, right shoulder, right thumb, right foot, or right elbow (all of which had some medical history) as of the date immediately preceding the above-referenced accident.

20. These findings led Defendants to send Dr. Greendyke additional records, while noting a panel exam in 1988 found Claimant had sustained a 10% whole person impairment due to his low back injury, with permanent restrictions assigned. Dr. Greendyke responded to this additional information in October, after reviewing the materials and speaking with Defendants' representative on the phone. Dr. Greendyke changed his findings to reflect a 10% lower extremity impairment for Claimant's left knee meniscectomies, with no restrictions, a right shoulder impairment of 3% UE, no permanent restrictions, and a 10% whole person impairment for the lumbar spine with restrictions of 50 pounds lifting, with no repetitive bending, stooping or twisting.

21. Also in October Dr. Olscamp listed Claimant's permanent restrictions due to his left shoulder as lifting 50 pounds rarely, 20 pounds frequently, with reaching limitations for his left arm in front of body for 50% of a regular work day, with no overhead reaching with Claimant's left arm, and 50% with his right.

No restrictions were imposed for twisting, stooping, crouching, climbing, grasping, or fine manipulation due to the 2012 industrial left shoulder injury.

22. At Claimant's request, Virginia Taft conducted a functional capacity evaluation (FCE) on October 22, 2013. She noted significant limitations in Claimant's left shoulder and neck ROM, with increasing pain as the testing progressed. Hand function was within normal limits, although slower than normal. Ms. Taft felt Claimant could not return to his time-of-injury job. She felt retraining could be an option for Claimant. Subsequently, Drs. Stevens and Ludwig were critical of the FCE procedure and findings, noting a lack of validity measures, subjectivity, and lack of reproducibility with the testing. Also, Dr. Stevens found it was inappropriate for Ms. Taft to discuss job retraining as part of the FCE, as he felt it showed a bias in favor of Claimant.

2014

23. On February 4, 2014, Claimant presented to Dr. Olscamp for a new onset of acute pain in his left shoulder. He complained of severe pain after attempting to open a jar held in his left hand. Subsequently Claimant was diagnosed with a complete rotator cuff tear with minor retraction, and a superior gleno-labral injury. Dr. Olscamp performed a surgical procedure on April 30 to address the injuries.

24. By mid-August Claimant still complained of continued pain and stiffness. Dr. Olscamp was unable to explain why, but he suspected the possibility (later ruled out) of regional pain syndrome. He noted a great deal of atrophy in spite of Claimant's continued physical therapy. Dr. Olscamp was pessimistic about Claimant's chance of returning to any job requiring the use of his left shoulder.

25. On December 17, 2014, Dr. Stevens conducted another IME on Claimant, this time to analyze Claimant's conditions other than left shoulder. Dr. Stevens attributed a 1% WP PPI for Claimant's left knee surgery, no permanent restrictions. Claimant's right shoulder, which at the time of examination was post 2006 surgery and "stiff" with some loss of ROM, was assigned a 7% WP impairment. No permanent restrictions indicated.

26. Dr. Stevens felt Claimant's left shoulder condition was caused by a combination of industrial injuries from 2009, 2010, and February 2012, with the latter being the most significant. Although the notes are not clear, it appears Dr. Stevens now rated Claimant's impairment at 10% WP (17% left UE – up from 14% UE previously) from the 2012 accident, with an additional 4% preexisting the 2012 accident. Permanent restrictions were increased to 5 pound left arm lift/push/pull and no lifting above shoulder level on left.

27. In late 2014, Dr. Olscamp referred Claimant to his partner, Roger Dunteman, M.D., an orthopedic surgeon who devotes much of his practice to treating shoulders. X-rays and an MRI studies were ordered. By year's end, Dr. Dunteman proposed a left shoulder arthroscopy with debridement and capsular release.

2015

28. On February 26, 2015, Dr. Dunteman operated on Claimant's left shoulder. At surgery he found a recurrent longitudinal rotator cuff tear, severe chronic subacromial impingement, and no evidence of adhesive capsulitis.

29. Post surgery Claimant complained of worsening pain. A follow up left shoulder MRI in June was read by a radiologist as evidencing a pinhole full-thickness tear of the rotator cuff and a subluxated biceps tendon; Dr. Dunteman, reading the same

MRI, felt it showed an intact rotator cuff without a full thickness tear. Dr. Dunteman suggested a second radiologist review the MRI with a subacromial cortisone injection to follow if no tear was noted on the second reading.

30. The injection took place on July 22, 2015. It was ineffective per Claimant. Dr. Dunteman suggested long term pain management with Claimant's primary care physician, Morgan Ford, M.D., a physician at Post Falls Family Medicine, PA. Dr. Ford had treated Claimant for various conditions since at least the late 1990s.

31. Dr. Ford treated Claimant with MS Contin and hydrocodone with acetaminophen, as well as OTC Tylenol Extra Strength tablets as needed. He also referred Claimant to a pain counselor for treatment of "chronic pain syndrome."

32. On September 18, 2015, Surety sent Claimant to yet another IME, this one with Joshua Moss, M.D., an orthopedic doctor associated with OMAC. Dr. Moss was asked to evaluate Claimant's low back, left knee, both shoulders, and right foot.

33. Dr. Moss' report focused on Claimant's shoulders, as Claimant had no complaints regarding his back, knee, or foot. Dr. Moss did assign a 1% WP PPI for Claimant's knee surgery, even though asymptomatic.

34. Regarding Claimant's left shoulder, Dr. Moss found Claimant's efforts during the examination to be invalid. Dr. Moss found "no gross deformity, no real difference from side to side other than well-healed surgical incisions about the left shoulder." Dr. Moss found no profound rotator cuff atrophy, no skin or hair pattern changes or any other indicia of regional pain syndrome. Claimant's complaints of tenderness appeared to be "nonanatomic" as Claimant complained of pain when palpated not only in places such as the bony surface of the scapular acromion and scapular spine

and clavicle, but also in the anterior shoulder region, coracoid, lateral peri-acromial region, and posterior parascapular region. No area was more tender than any other over this region. DE 25, p. 35.

35. Dr. Moss found Claimant's ROM testing showed substantial symptom magnification as well. Claimant's left shoulder ROM was markedly restricted *vis a vis* his right. When Dr. Moss attempted to perform active ROM measurements, he felt Claimant actively contracting against the doctor rather than trying to move in the plane of motion being measured.

36. Rotator cuff strength testing was 5/5 in internal and external rotation with moderate pain. Claimant declined certain abduction movements. Dr. Moss found normal strength in all distal upper extremity motors including elbow and wrist, although "curiously on gross grip strength testing, with isolated composite grip around [the doctor's] two fingers, [Claimant] reported severe pain up in the shoulder, which is surely a nonanatomic finding." DE 25 p. 36.

37. Dr. Moss found Claimant to be fixed and stable with no independent opinion regarding Claimant's impairment for his left shoulder due to an invalid examination. However, he had no reason to quibble with Dr. Stevens, whose rating for Claimant's impairment was 21% UE with 4% preexisting (17% UE PPI from 2012 industrial accident) using the *AMA Guides*, 6th Ed.

38. Dr. Moss found that Claimant's right shoulder complaints were not caused or permanently aggravated by any industrial accident, and declined permanent restrictions for Claimant's right shoulder.

39. Dr. Moss found no permanent restrictions were appropriate for Claimant's left shoulder prior to the February 2012 industrial accident. Post-accident, Dr. Moss concurred with Dr. Stevens' recommended permanent restrictions for the left upper extremity of 5 pounds left arm pushing/pulling, no lifting above shoulder level. No further treatment indicated (other than pain management, as per subsequent report).

40. By October 2015, Dr. Ford diagnosed cervical disc disorder with pain radiating to Claimant's right and left arms. Dr. Ford was treating Claimant with Lyrica in addition to narcotic pain medication. Dr. Ford sought, but was denied by Surety, an MRI for Claimant's neck.

41. In November, Dr. Ford authored his assessment/disagreement of Dr. Moss' IME report. First, Dr. Ford thought the discrepancy between the radiologist's reading of the June MRI and the interpretation of the study by Drs. Dunteman and Moss regarding a full thickness rotator cuff tear precluded a finding of medical stability. Dr. Ford felt the radiologist would have "less bias" than the surgeons in this case. Second, Dr. Ford was critical of Dr. Moss "reverting back" to the IME findings from the previous year simply because the doctor found the current testing to be invalid, especially since Claimant had told Dr. Ford that his shoulder hurt the most after the final surgery. Finally, Dr. Ford was incredulous that the IME doctors rated Claimant with a 17% UE impairment from the industrial accident. Dr. Ford felt the rating was absurd. The doctor argued that he had known Claimant for more than 10 years professionally, and had noticed a change in Claimant over time, from a happy vibrant man who enjoyed work to a despondent, hopeless individual who "carries his left arm with his right and hardly dares to move his left shoulder…" Dr. Ford noted Claimant

"doesn't sleep well, cannot lay [sic] on his left side, cannot do any of the things he enjoyed historically, has to take narcotics during the day (even though he hates to take them)…. Certainly not the picture of someone 17% disabled." DE 14, pp. 102, 103. Dr. Ford felt a repeat MRI of Claimant's left shoulder and a repeat FCE were in order.

2016 to Date of Hearing

42. Claimant continued through 2016 to treat with narcotic and non-narcotic pain medications, and trials of prescription medicines including, among others, Cymbalta, Lyrica, and Trileptal for left, and to a lesser degree, right upper extremity pain and dysfunction. Dr. Ford also continued to treat Claimant for other longstanding unrelated conditions such as poorly-controlled hypertension, hyperlipidemia, and uncontrolled type II diabetes with associated diabetic nephropathy.

43. On February 2, 2017, Virginia Taft conducted a second FCE. Therein she noted Claimant was complaining of increased and spreading left shoulder pain with further functional limitations as compared to his 2013 evaluation. Claimant also complained of right shoulder aches which had increased since his last surgery. Claimant used a sling for his left arm.

44. Ms. Taft concluded at the completion of her testing that Claimant had significantly decreased functional capacity compared to his 2013 examination. She also noted what she termed overuse effects in his right shoulder/arm. She suggested a different type of left shoulder support (other than his sling, which does not appear to be

mandated by any physician's records) may relieve or minimize Claimant's right shoulder symptoms.[6] Ms. Taft encouraged Claimant to continue with an exercise program.

45. Claimant sought a medical opinion from John McNulty, M.D., an orthopedic surgeon from north Idaho. After taking an oral history from Claimant, reviewing medical records, and performing an examination, in a report dated February 27, 2017, Dr. McNulty diagnosed adhesive capsulitis and post-surgical weakness in Claimant's left shoulder, with an unspecified (not CRPS or fibromyalgia for example) chronic pain syndrome. Dr. McNulty also opined that Claimant suffered from tendinitis with mild adhesive capsulitis in his right shoulder. Dr. McNulty determined that Claimant was at MMI. He gave Claimant an impairment rating for his left shoulder of 20% WP related to his industrial accident of 2012. For Claimant's right shoulder, Dr. McNulty calculated a PPI rating of 6% WP for impairment "secondary to overuse and his work-related injury" of February 2012.[7] CE H, p. 120. Dr. McNulty agreed with the FCE finding that Claimant's left shoulder was nonfunctional. He placed a 3 pound maximum lift/pull/push (occasional to rare) permanent restriction on Claimant's left shoulder use. No further surgery was indicated for Claimant's left shoulder. Dr. McNulty did not mention any restrictions in his report for Claimant's right shoulder.

46. On April 25, 2017, Defendants sent a letter, medical records, and questionnaire to Dr. Dunteman for his comments on issues related to Claimant.

[6] At the outset of testing in 2017, Ms. Taft noted a right shoulder "divot" due to pressure of sling. Claimant also noted the pressure of the sling produces numbness and tingling in his right arm over time.

[7] Dr. McNulty's report calculated Claimant's right shoulder impairment at 15% UE, which consisted of 5% preexisting and related to Claimant's previous right shoulder rotator cuff surgery in 2006, and 10% UE for the "overuse" following Claimant's 2012 industrial accident. The conversion from UE to WP resulted in the 6% WP PPI cited above. At his deposition he was presented with additional medical information which caused him to revise his opinion (over objection) to reflect that the 15% UE should be calculated at 10% pre-existing and 5% related to overuse. A 5% UE rating converts to a 3% WP PPI.

First, he was asked for a diagnosis related to Claimant's left shoulder. The doctor diagnosed left shoulder pain with a possible recurrent rotator cuff tear. Next he put a 5 pound occasional lifting to shoulder level restriction on Claimant, with no repetitive overhead lifting. Next, Dr. Dunteman diagnosed severe osteoarthritis in Claimant's right shoulder and was not related to "overuse" after Claimant's 2012 left shoulder injury. Rather Dr. Dunteman opined that Claimant's right shoulder symptoms were the result of a natural progression of his pre-existing rotator cuff tear and pre-existing degenerative process of his right shoulder. Dr. Dunteman deferred right shoulder permanent restrictions to previous physician and IME restrictions from other physicians.

Vocational Experts

47. Both Claimant and Defendants hired vocational experts to assist in determining the extent of Claimant's permanent disability. Claimant used Dan Brownell of Coeur d'Alene. Defendants hired Douglas Crum of Boise.

Dan Brownell

48. Claimant hired Mr. Brownell in 2013 to prepare a report on Claimant's employability and permanent partial disability factors. On November 7, 2013, Mr. Brownell authored a two page report in which he concluded that Claimant was 80% permanently disabled, inclusive of impairment. The report contained very little underlying data on which Mr. Brownell may have relied. Instead it appears the thrust of his conclusion was based upon either data not set out in the report, or Mr. Brownell's personal experience as a rehabilitation consultant in north Idaho. He did claim to have utilized SkillTran, ONET and VDARE processes, as well as the Handbook for Analyzing Jobs by Jist, the Dictionary of Occupational Titles, and the Idaho

Department of Labor statistics, but did not provide any details on how he used these items, what they established, or how they integrated into his conclusion.

49. In April 2017, Mr. Brownell updated and supplemented his 2013 report by concluding that due to "significant changes" since his last report, including additional surgeries, IME and FCE findings, as well as SSA determination that Claimant was totally disabled in 2015, Claimant was now totally disabled. Mr. Brownell again claimed to have utilized the same reference materials cited above, and again failed to provide details of how he reached his conclusion.

50. Standing alone, Mr. Brownell's reports are afforded little weight due to the obvious flaws discussed above.

51. Mr. Brownell was deposed on July 14, 2017. The deposition did little to "flesh out" his report conclusions. Primarily it focused (in direct examination) on why Claimant could not do the various jobs which had been proposed as suitable by Defendants' rehabilitation expert. Most such jobs exceeded Claimant's restrictions; a few did not.

52. In cross examination, Mr. Brownell could not identify what percentage of job access Claimant lost due to his 2012 accident. He could not say what Claimant's access to the labor market was prior to his 2012 accident. Mr. Brownell stated that there is "no big reason to do that other than to cut down the Claimant's disability rating…." Brownell depo. p. 71. Mr. Brownell testified it might be "interesting to know" what one's labor market consisted of prior to an industrial accident, compared to the individual's post-accident labor market, but it is not of significance. *Id.* at p. 72.

53. Mr. Brownell has considerable experience in vocational rehabilitation due to his 30 year career with the ICRD rehabilitation division. In fact, he was instrumental

in helping Claimant obtain retraining in the wastewater management field after a prior industrial accident. Mr. Brownell knows a great many employers in the north Idaho area. He has real-world experience in trying to place injured employees with appropriate jobs. The difficulty comes when he leaves the "hands-on" field of assisting workers and enters the forensic field of calculating disability. In the latter, the parties seek a particularized assessment of the degree to which a work injury has reduced a worker's capacity to engage in gainful activity. Typically, this involves, *inter alia*, calculating the number of jobs the worker qualified for prior to the accident and comparing it to the number of suitable jobs post-accident. This was not the approach taken by Mr. Brownell. Instead, he used more of a "gut instinct" approach.

54. The weight given Mr. Brownell's opinion is hampered by his lack of a well-defined, concrete methodology in arriving at his conclusions. He may believe from past experience that a given worker will have a hard time finding work in the applicable market, but to transform "hard time" into a percentage loss takes more than just knowledge based upon experience. Even here, where Mr. Brownell's conclusion is that Claimant will be unable to find a suitable job within the local labor market, his methodology is suspect in that it is not supported by his demonstrated use of any underlying market data establishing how many jobs were available to Claimant pre-and post-accident. Unless Mr. Brownell can establish that he knows the requirements of every job in the market area, (which he reasonably could not), and Claimant fails to qualify for any of them, Mr. Brownell's opinion that Claimant is "not employable within the competitive labor market" CE I, p. 123, carries little weight. His claim to have utilized various reference and resource materials without demonstrating how he used them,

what they showed, and how such information led him to his conclusions, does not remedy the defects noted above.

Douglas Crum

55. Defendants hired Mr. Crum, vocational rehabilitation consultant, to conduct a vocational assessment of Claimant. On March 4, 2016, Mr. Crum authored a disability assessment report. Therein he detailed Claimant's prior medical history, summarized his interview findings with Claimant, reviewed Claimant's educational, work, salary, and social history. He also evaluated Claimant's pre-and post-accident labor market access and wage earning capacity prior to reaching his conclusions.

56. Mr. Crum acknowledged that at the time of his February 2012 injury Claimant was employed as a water treatment plant operator for the city of Coeur d'Alene, and had worked there in that capacity since 1997. Prior to that employment Claimant had worked in a similar capacity for Post Falls and the Hayden Area Regional Sewer Board since 1986. These jobs fell in the "heavy to very heavy" physical demand category.

57. Mr. Crum also noted that Claimant had prior injuries including a back injury which led to a fifty pound lifting restriction (occasional). Claimant also had non-industrial conditions which apparently did not result in any permanent work restrictions.

58. Claimant had a high school education with additional vocational training. Mr. Crum felt Claimant had pre-2012 access to approximately 11.4% of the jobs available in his labor market. He relied on data from the *Idaho Occupational Employment and Wage Survey 2015* for the Kootenai County labor market to reach his conclusion.

59. Since the industrial accident in question, Claimant has been assigned permanent restrictions. Mr. Crum identified the following restrictions in reaching his post-

accident labor market access figures; no lifting in excess of five pounds with Claimant's non-dominant left arm; no pushing/pulling in excess of five pounds with Claimant's upper left extremity; and no lifting with the left upper extremity above shoulder level. Mr. Crum assumed no other permanent restrictions, and further assumed Claimant could lift up to thirty pounds, "as he is able to use his dominant upper extremity in a non-impaired fashion." DE 7, p. 75.

60. With the above parameters considered, Mr. Crum felt that post-accident Claimant had the ability to access approximately 5.3% of the jobs in his labor market, using the *Wage Survey* mentioned above. In Mr. Crum's opinion (in March 2016), Claimant had suffered a 53.5% labor market reduction due to his industrial accident.

61. Mr. Crum then considered Claimant's loss of wage earning capacity. He noted Claimant was making $27.59 per hour on a full time basis, as well as state employee health benefits, which Mr. Crum estimated at 9% of Claimant's wage.[8] Jobs which Mr. Crum felt Claimant would qualify for post-accident paid between $8.13 and $9.82 per hour, not including benefits. As such, Claimant would be expected to have a wage earning capacity loss of between 64% to 70%, which increased to 73% to 79% when health benefit value is included in the calculation.

62. Mr. Crum also felt that Claimant could improve his employability by improving his keyboarding skills on his own with repetition and practice. Mr. Crum also felt Claimant would be a good candidate for some retraining. However, since retraining is not an issue herein, (and Defendants have made no offer

[8] Mr. Crum used data from a 2015 Kaiser Family Foundation Employer Health Benefits Survey to calculate Claimant's health insurance value. He did not include other state employee benefits such as long term disability and retirement benefits when calculating the cumulative value of Claimant's employment with the city. Mr. Brownell had estimated Claimant's state benefits at approximately 30% of his salary.

to provide retraining), and there is no end to how a person could become more marketable with skill acquisition, Mr. Crum's discussion of jobs and wages which could be available *if* Claimant had better keyboarding skills will not be discussed or considered.

63. Two observations worth noting in Mr. Crum's first report include the fact that Claimant was receiving long term disability benefits, which Mr. Crum opined can provide a disincentive for individuals to seek employment, and that workers over age fifty are at risk for age-based employment or hiring bias. Both of these observations could apply in this case.

64. Considering all factors, Mr. Crum felt that Claimant's permanent disability, inclusive of benefits, and inclusive of PPI, was 65%. Averaging the high end wage loss number of 79% and the loss of access of 53.5%, Claimant's PPD would be 66.25%.

65. After reviewing additional medical and FCE records provided by Defendants, Mr. Crum prepared a supplemental report dated May 1, 2017.

66. Mr. Crum noted that Claimant was receiving approximately $2869 per month in disability and SSDI benefits, and had not acquired any additional skills. He observed that Dr. McNulty had imposed a three pound lifting (rarely) restriction for Claimant's left UE. Mr. Crum found no appreciable difference between a five pound and three pound lifting restriction when it came to Claimant's job loss figures.

67. Mr. Crum noted that Drs. Moss and Stevens indicated that Claimant's right shoulder was not related to his industrial accident, Claimant may have cervical spine issues (non-industrial) affecting his right shoulder, a 2016 right shoulder X-ray showed severe degenerative changes in Claimant's right shoulder, and Drs. Stevens and Ludwig criticized

Claimant's FCEs, based on improper methodology and validity issues, and inconsistent results in the second FCE, with no ROM measurements taken at the follow up FCE.

68. Mr. Crum was advised to consider Claimant's current permanent restrictions of no overhead repetitive lifting (bilateral), lifting to shoulder level of no more than ten pounds (bilateral). Mr. Crum was also advised that he was to assume Claimant's right shoulder condition was not due to overuse post 2012, but was a natural progression of a pre-existing rotator cuff tear.

69. With the additional information and assumptions, Mr. Crum increased Claimant's available jobs post-accident from 5.3% to 6.5%, keeping loss of wage earning capacity unchanged. Mr. Crum dropped Claimant's PPD inclusive of PPI to 55% from 65%. Mr. Crum also corrected a math error in his original report, but claimed the error did not impact his final determinations made therein, although it did change his percentage loss of job market access.

70. Mr. Crum was deposed on July 27, 2017. He answered questions regarding his reports and his methodology for determining disability using pre- and post-accident access and wage comparison. His methodology is well known to the Commission and need not be reiterated in detail herein. It is a standard procedure utilized by most local rehabilitation forensic experts. Mr. Crum testified consistent with his reports.

71. On the day before hearing, Mr. Crum spoke with several potential employers to ascertain the suitability of employment for someone with Claimant's restrictions. Most of the employers were "call centers." One, Qualfon, had between 30 and 40 openings. They prefer candidates to be able to type at 30 WPM (Claimant typed at 13 in a DOL test), but claim they will work with candidates to improve typing skills.

Starting wage was $9.25 per hour plus bonus for unspecified "incentives." Workers would be involved with Sirius XM accounts. Day and swing shift positions were available. The Qualfon representative indicated there was high demand for telemarketing/teleservice workers. When asked in deposition if Claimant could physically perform the call center job, Mr. Crum answered a bit equivocally – "based on his left upper extremities restrictions, yes." Crum depo. pp. 38, 48. At the time of his deposition Mr. Crum was aware that Claimant had right UE restrictions as well, so his answer is a bit puzzling.

72. Another call center, Alliance Data, an employer which is "always hiring," Crum depo. p. 45, had positions available for people who could type 20 to 25 WPM, but they were willing to assist employees improve their typing skills. There is a four-to-five week training program for new employees. (Mr. Crum did not indicate if an employee was paid during the training period, nor did he testify to starting wage or if the position came with benefits.) Mr. Crum also spoke with two other call centers in the Coeur d'Alene job market. Both had positions open.

73. Mr. Crum commented on several jobs Claimant had listed as either something ICRD suggested, or that he had actually applied for. On many job listings, it was not possible to tell if Claimant actually applied, or just reviewed the opening. Examples included a seasonal job as a golf course gate attendant at Coeur d'Alene Resort which did not appear to violate Claimant's restrictions. Other Resort jobs did. There were several sales positions, a sales representative job with the Lottery Commission, and other similar positions involving limited lifting. Mr. Crum felt Claimant could do these jobs. However, if Claimant had applied, he obviously did not get the job.

74. Claimant did apply on several occasions for sales positions at Cabela's but without success. He also applied for, but did not get, a sales job with a pest control company.

75. Mr. Crum listed areas of occupation for which he thought Claimant was suited with his restrictions. They included food prep, fast food cook, cashier, parking lot attendant, shuttle driver for retirement home or automotive dealership, light assembly at Buck Knives, security guard, equipment or vehicle cleaner, and call service operator.

76. Mr. Crum was specifically asked in deposition if he felt it would be futile for Claimant to search for work. Mr. Crum replied "[a]ssuming that his limitations from the industrial injury are associated only with the left upper extremity, I do not believe it would be futile." Crum depo. p. 84. He was not asked if it would be futile for Claimant to seek employment with all of his current conditions, both industrial and non-industrial. Accordingly the Commission has no idea if Mr. Crum was specifically limiting his answer to his assumption that Claimant had only the left UE limitations, such that if all of Claimant's impairments were considered, industrial or not, his answer would have been different. His failure to answer the question in a more direct fashion creates doubt as to Mr. Crum's opinion.

77. When asked about Claimant's ability to do certain specific jobs which had actual openings on April 14 through May 8, 2017, Mr. Crum qualified almost all his answers with limiting language such as "assuming he's unrestricted with his right upper extremity" or "assuming the right upper extremity is not industrially impaired…" *See*, Crum depo. pp. 87 to 89. These jobs included working at McDonald's, cashier at Shopko or Dick's Sporting Goods, court house screener, prep cook, and tech

support jobs. Mr. Crum rejected the idea that Claimant could not do sales jobs simply because he had no prior sales experience, a theory promoted by Mr. Brownell. Mr. Crum reasoned that the jobs were entry level positions, where training was often supplied.

78. On cross examination, Mr. Crum acknowledged that Dr. McNulty had given Claimant an impairment rating for his right UE, but assumed when listing jobs for which Claimant was qualified that he had no restrictions on his right UE. Mr. Crum also agreed that if Claimant could not use his left arm in any capacity (as implied by Dr. Ford) it would impact Claimant's employability. Mr. Crum further acknowledged that Claimant was found to have right shoulder Stage IV degenerative arthritis, long standing, with bone-on-bone. Mr. Crum acknowledged that at hearing Claimant demonstrated a reduced ROM with his right shoulder.

79. Mr. Crum agreed that ICRD notes end in December 2016 with the notation that Claimant did not have the skills necessary to work in available sedentary work at the time his case was closed. At that time, ICRD felt Claimant needed to obtain some minimal computer training to allow him to have a chance to find sedentary employment.

80. The weight given to Mr. Crum's analysis is reduced by several facts; his equivocal answers to several pivotal questions, his failure to fully account for Claimant's right UE limitations, and his assumption that Claimant can improve (or acquire) skills needed for several of the proposed "suitable employment" opportunities.

DISCUSSION AND FURTHER FINDINGS

Right Shoulder

81. Claimant has the burden of proving, by a preponderance of the evidence, all facts essential to recovery to his claims. He carries the burden of proving that

the condition for which compensation is sought is causally related to an industrial accident. *Duncan v. Navajo Trucking*, 134 Idaho 202, 203, 998 P.2d 1115, 1116 (2000). The proof required is "a reasonable degree of medical probability" that Claimant's condition was caused by an industrial accident. *Anderson v. Harper's Inc.*, 143 Idaho 193, 196, 141 P.3d 1062, 1065 (2006). In determining causation, it is the role of the Commission to determine the weight and credibility, and to resolve conflicting interpretations, of testimony.

82. In the present case Claimant contends his right shoulder is caused by an "overuse syndrome" resulting from his inability to use his left arm. As such, his right shoulder condition is a compensable consequence of his industrial injury to his left shoulder. The first two stated issues for resolution involve this contention[9], and were well summarized by Defendants when they noted the issue was "whether Claimant's right shoulder condition was caused by the industrial accident and injury of February 13, 2012, including whether it is due to "overuse" syndrome related to the left shoulder injury, or whether the right shoulder condition is a preexisting and/or subsequent injury or condition unrelated to the industrial left shoulder injury." D's brief, p. 6.

83. The Commission recognizes the concept of compensable consequences. *See e.g., Miller v. Gem State Paper and Supply, 2007 IIC 0163* (March 2007), and has applied it in cases of overuse syndrome. *E.g., Quenton* 2003, IIC 0244 (2003).

84. The medical records contain repeated reference to Claimant's symptomatic right shoulder for years prior to the industrial accident, as well as immediately post accident. In 2006 Claimant had right shoulder surgery which revealed "extensive amounts of wear

[9] The issues as stated at hearing are:
1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident; and
2. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury or condition.

of the entire glenohumeral surface with grade IV bone-on-bone wear over a good portion of the contact area." DE 16, pp. 2, 3. Other damage was noted at the time of surgery as well. In fact, even in 2006, Dr. Olscamp, who performed the surgery, believed there was a good likelihood, given the state of Claimant's shoulder, that Claimant would need a total shoulder arthroplasty in the future.

85. Claimant was seen for shoulder pain in 2009 and 2010. In 2012, immediately after the accident in question, Claimant complained of right and left shoulder pain. Throughout 2014, Claimant complained of right shoulder pain to Dr. Olscamp.

86. At hearing, Claimant testified his right shoulder did not begin to bother him until after his 2015 left shoulder surgery. While he may have been experiencing increasing pain at that time, his medical records show he was having pain issues with his right shoulder well before then. At hearing, Claimant said his right shoulder pain was at that time 7/10; medical records show that level of pain complaints all the way back to 2012.

87. Dr. Dunteman's 2016 X-rays of Claimant's right shoulder showed severe degenerative changes about the glenohumeral joint with narrowing of the joint space, sclerosis, humeral head osteophyte, degenerative changes about the ACV joint and type III acromion. Dr. Dunteman diagnosed osteoarthritis in the right shoulder. Dr. Dunteman suggested a total right shoulder arthroplasty might be necessary, as predicted ten years previously by Dr. Olscamp.

88. In support of the overuse theory, Claimant notes the Dr. Olscamp predicted in 2014 that although Claimant's right shoulder was "not bothering him much today, [but] will likely be a problem if having to take over full time from not being able to use the left." CE N, p. 563. In addition, Claimant points to several medical records prior to 2015 which show he was not having significant problems with his right shoulder.

89. Claimant also notes that during his last FCE, Ms. Taft noted Claimant's sensation changes in his right upper extremity, which she felt "appear to be related to pressure in the shoulder from use of a sling to support the left arm." CE G, p. 97. Likewise, Ms. Taft, at Claimant's second FCE, noted "overuse effects in the right arm." *Id*., p. 19.

90. Defendants argue against placing weight on the FCEs due to their lack of consistency testing for purposes of validating her findings. At most, the FCEs were nothing more than documentation of Claimant's subjective effort given on the day of the testing. Dr. Dunteman further found the testing suspect in that no ROM was even noted for Claimant. He pointed out that the testing would be impossible to reproduce since it contained no protocol for objectively validating Claimant's effort as being full.

91. Next, Claimant points out Dr. McNulty opined that Claimant had tendinitis with mild adhesive capsulitis in his right shoulder, which the doctor attributed to "overuse because of lack of function in this left shoulder." DE H, p. 119.

92. Defendants are critical of Dr. McNulty's pronouncement on several grounds. First, in the cover letter from Claimant's attorney to Dr. McNulty, counsel indicated that Claimant did not have problems with his right shoulder initially, but was "now experiencing pain in his right shoulder due to overuse stemming from injuries to the left shoulder." McNulty depo. p.17. At the time of that cover letter, no physician had diagnosed overuse syndrome. Additionally, Claimant told Dr. McNulty that Claimant's right shoulder began bothering him after his last shoulder surgery, and that Claimant could not even get his left hand to his mouth to eat. Dr. McNulty testified at his deposition that it was his understanding that Claimant's shoulder was doing well, and then "out of nowhere" he started having significant problems with his right shoulder, at a time when his left shoulder

was "nonfunctional." *Id.* at p. 36. Dr. McNulty admitted he did not review Claimant's right shoulder X-ray.

93. Defendants further note that five different physicians who have examined Claimant, including Dr. Dunteman, who treated Claimant, all concur that Claimant's right shoulder is not related to Claimant's 2012 industrial injury. They point out that during Claimant's 2013 IME with Dr. Stevens, Claimant reported only minimal problems with his right shoulder, but the doctor found Claimant had severe loss of ROM in the right shoulder. Dr. Stevens at that time diagnosed significant pathology in Claimant's right shoulder, unrelated to the industrial accident. In 2014, Dr. Stevens disagreed with Claimant's theory that his right shoulder stiffness was due to overuse of his left, instead noting that Claimant was post repair of his right shoulder rotator cuff, and attributed Claimant's right shoulder issues to degenerative changes. At various times, Drs. Ludwig, Olscamp, Greendyke, Moss, and Dunteman concluded Claimant's right shoulder is non-industrial.

94. Dr. Dunteman treated Claimant. He reviewed all the medical records including IMEs from both parties. He reviewed relevant films. He also testified at deposition. His records and testimony provide insight into this issue more than any other opinion contained herein.

95. Dr. Dunteman testified that the surgical report from 2006 showed Claimant had extensive arthritis of the glenohumeral surface, grade IV, which is the "most severe form." Dunteman depo. pp. 10, 11. From the 2006 surgical notes, Dr. Dunteman also predicted Claimant would need a total shoulder arthroplasty in the future. In reviewing Claimant's 2016 right shoulder X-rays, the doctor felt it showed a progression based upon a ten year history of arthritis. Dr. Dunteman felt that Claimant's current complaints were due to his severe

degenerative osteoarthritis. He found no signs of acute injury, but rather a natural progression of Claimant's condition as identified in 2006.

96. Dr. Dunteman specifically rejected a theory of overuse syndrome as the root of Claimant's right shoulder complaints. He noted that overuse depends on doing something repetitively, typically causing tendonitis, such as tennis elbow, or plantar fascitis by running too much, for example. Dr. Dunteman testified that if Claimant had been using his right arm in a repetitive capacity, such as pounding nails, doing non-stop labor with it exclusively, or in some way overtaxing it for years, he could have accelerated the preexisting arthritis. But in Claimant's case, he was not working, doing no repetitive heavy labor at home or elsewhere, and thus not putting the shoulder in a situation which would accelerate his underlying condition. Instead, as Dr. Dunteman noted "I just don't see how just being unemployed and not working and using [his right arm] to eat, to mop a floor, is going to cause progression of arthritis that severe." Dunteman depo. p. 38.

97. Dr. Dunteman testified that Claimant's right shoulder was caused by having severe osteoarthritis in 2006, which naturally progressed as it must (being a progressive condition) to the current status, independent of any "overuse."

98. Dr. Dunteman's opinions are given the most weight in this matter. His analysis is based upon a thorough review of all relevant medical documents (unlike Dr. McNulty) and comes from a treating physician. Just as importantly, his explanation for overuse syndrome makes sense logically. Claimant was right handed before the accident. He produced no evidence of repetitive things he was forced to do post accident which he would have done with his left hand (or both hands) prior to 2012. For a considerable time, he has not worked, does not help out even minimally at home, as per his wife, who testified convincingly at hearing,

and has failed to demonstrate a marked increase in tasks he now must do solely with his right hand. The notion that he now has to do "everything" with his right hand says nothing without knowing what "everything" entails. Claimant testified to a very sedentary lifestyle which does not lend support to his theory.

99. Claimant has the burden of establishing the causal connection between his 2012 industrial accident and his current right shoulder condition. In light of his significant preexisting and degenerating condition present in his right shoulder since at least 2006, Claimant has not established his right shoulder as a compensable consequence of his industrial left shoulder injury.

100. Claimant has failed to prove his right shoulder is a covered compensable consequence of his industrial left shoulder injury due to the concept of overuse syndrome or otherwise.[10]

Impairment Benefits and Attorney Fees

101. Claimant has alternatively argued either that (1) he is entitled to a 20% WP PPI rating for his left shoulder and a 5% UE rating for his right, or that (2) PPI should have been averaged between Dr. McNulty's 20% WP figure and defense doctors' 10% WP rating for Claimant's left shoulder. Interestingly, Claimant made no argument regarding PPI in his opening brief, and had Defendants not raised the issue in their briefing, the matter would have been declared waived. However, since Defendants brought up the issue in their briefing, and Claimant responded to it in his reply brief, the matter will be addressed.

[10] In briefing Claimant argues for medical treatment related to his right shoulder. Since the right shoulder is not a compensable condition, no medical benefits would be allowed. Furthermore, Claimant did not list medical treatment as an issue for resolution, but even if he had it would not be allowed for the reason stated above.

102. Turning first to Claimant's fallback position, he argues that per IDAPA 17.02.04.281.02, Defendants are obligated to pay the average of Dr. McNulty's 20% impairment and the 10% impairment favored by Dr. Stevens and Moss. That rule provides:

> "Where more than one (1) evaluating physician has given such ratings, these shall be similarly converted to the statutory percentage of the whole man, and an average obtained for the applicable rating."

The rule is not absolute. IDAPA 17.02.04.281.03 provides:

> "In the event that the Commission deems a manifest injustice would result from the above ruling, it may at its discretion take steps necessary to correct such injustice."

Therefore, where the Commission determines that it would be unjust to require the averaging of impairment ratings, the Commission may take such steps as may be necessary to prevent or correct this result. Obviously, refusing to endorse the averaging of impairment ratings is among the remedies the Commission may employ to correct the injustice that would obtain by enforcing the rule of averaging.

103. The rules above quoted govern the calculation of impairment in those cases in which Claimant's entitlement to impairment has not (yet) been litigated. It contemplates the payment of the average of two or more impairment ratings given for a particular injury. Impairment is a component of disability, and is a benefit to which Claimant may be entitled under the Act. However, it is well established in a long line of cases that in any proceeding before the Industrial Commission, a claimant has the burden of proving, by a preponderance of the evidence, all facts essential to his recovery. *Ball v. Daw Forest Products Co.*, 136 Idaho 155, 30 P.3d 933 (2001); *Evans v. Hara's Inc.*, 123 Idaho 473, 849 P.2d 932 (1993); *Ellis v. Dravo Corp.*, 97 Idaho 109, 540 P.2d 294 (1975). Therefore, Claimant's burden extends to proof of impairment. The question before us is whether the averaging rule changes this basic

understanding. Does it establish a presumption that Claimant is entitled to the average of the two or more ratings that happen to have been given, and shift to Defendants the burden of demonstrating that an averaged impairment rating is not owed? We believe this question must be answered in the negative. The averaging rule is a tool of ministerial convenience intended to be applied before hearing, where medical proof on Claimant's entitlement to an impairment rating may be in conflict, yet some path forward during the pendency of a Commission decision must be identified to treat multiple ratings for a particular injury. This convention has no application where impairment is the subject of a contested proceeding before the Commission following filing of a complaint. To apply the rule in the setting of a litigated case would be inconsistent with Claimant's burden of proving all aspects of his claim by a preponderance of the evidence. Reliance on mathematical averaging to prove impairment would substitute a mathematical operation for actual proof of the nature and extent of his anatomic injury. Therefore, we reject reliance on the rule as a substitute for actual proof of impairment.[11]

104. However, consideration of the rule is nevertheless relevant to Claimant's claim for attorney fees. Claimant maintains that even if the Commission rejects averaging at this juncture, Defendant's failure to pay the average of the impairment ratings at the time those ratings were issued warrants an award of attorneys fees under Idaho Code § 72-804. In other words, at the time Defendants were obligated to take action pursuant to the IDAPA rule, they had no factual basis to justify their refusal to average. In *Salinas v. Bridgeview Estates*, 162 Idaho 91, 394 P.3d 793 (2017), the Court ruled that even though a surety may have acted unreasonably in declining to pay a benefit, before Idaho Code § 72-804 fees can be awarded, it must be shown that the benefits in question were "justly due and owing." Since we do not find that averaging of

[11] This is not to say that what appears to be the averaging of impairment ratings is never appropriate. Evidence adduced at hearing may support an impairment rating that falls between two competing opinions.

impairment ratings is indicated in this case, we conclude Claimant is not entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

105. In the present case Dr. McNulty's 20% WP PPI rating is based on information and assumptions not conceded by Drs. Stevens and Moss when figuring their 10% WP PPI rating. In part, Dr. McNulty's rating takes into consideration the FCE findings, which are suspect due to the fact there was insufficient validity testing. Objective tests, such as blood pressure taken before and after exertion in the FCE showed no difference. In fact, only subjective evidence of limitations, such as pain complaints, heavy breathing, active ROM limitations, and refusal to do certain tests were noted. At best, the testing showed Claimant's willingness to perform physical tasks on the day of the test; at worst, the results were subject to Claimant's manipulation. Dr. McNulty's reliance on the FCE in determining PPI was misplaced.

106. Likewise, Dr. Ford's impassioned critique of Claimant was again based purely on Claimant's subjective presentation. Dr. Ford did no objective testing to validate Claimant's left shoulder complaints. Instead he relied on Claimant's actions to suggest a disabling injury, such as Claimant holding his left arm with his right, not moving his left shoulder, and appearing "hopeless" – all of which are mannerisms subject to Claimant's manipulation at worst or self-imposed limitations at best.

107. Conversely, Dr. Dunteman and Dr. Olscamp both expressed some puzzlement over discrepancies in Claimant's ROM from active to passive. Most striking was Dr. Dunteman's observation that while awake Claimant's left UE had an extremely limited ROM, but under sedation there was no such limitation. Dr. Dunteman could find no objective reason for this discrepancy. Dr. Moss went further, noting that Claimant resisted the doctor's attempt to move Claimant's shoulder during passive ROM testing, suggesting that Claimant tried

to limit his ROM. Claimant's statement to Dr. McNulty that Claimant could not even reach his mouth to eat is patently not true. During hearing, Claimant was asked to show the limit of his left shoulder ROM. He did not move his shoulder, but instead flexed his forearm at the elbow, raising his hand up off the table sufficiently far to place food in the vicinity of his mouth, albeit with his elbow on the table. Claimant does not have an objectively dysfunctional left arm, although the concept, raised by Ms. Taft, was accepted by Dr. McNulty in determining PPI.

108. Claimant's last argument, that the radiologist found tears in Claimant's left shoulder even after his last surgery, is rejected. While she found such evidence, more than one surgeon disagreed with her finding, and Dr. Dunteman gave cogent reasons why she could not be correct. His opinion carries more weight in this regard.

109. When the totality of the evidence is considered, the weight of the evidence supports a finding of a PPI rating of 10% WP, as endorsed by Drs. Stevens and Moss.

110. Claimant has failed to prove he is entitled to a PPI rating above 10% whole person.

Permanent Disability Less-Than-Total

111. **"**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. That section 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." 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).

112. 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).

113. In this case, Claimant's vocational expert opined that Claimant is 100% disabled. Defendants' vocational expert ultimately argued that Claimant is 55% disabled, down from 65% in his initial report.

114. Claimant's expert, Mr. Brownell, rendered his opinion with little more than his knowledge of the market based on his years working for ICRD. However, he has not worked in that capacity for years. He claims to have kept up with the changing market since he left the Industrial Commission, but in the final analysis, Mr. Brownell's opinion lacks the type of analysis required in the forensic arena, as discussed previously.

115. Defendants' expert, Doug Crum, failed to fully account for Claimant's non-industrial right shoulder impairment when discussing Claimant's disability. There is a significant difference between having one shoulder with limitations versus both shoulders. Also, Mr. Crum's analysis presupposes that Claimant can improve his typing skills to meet minimum requirements for several of the jobs he listed as available to Claimant. That assumption is discussed further below, but impacts the weight to be given Mr. Crum's advisory opinions.

116. The evidence taken as a whole demonstrates Claimant suffered a significant permanent disability as a result of his 2012 industrial accident coupled with his non-industrial right shoulder degenerative condition. Claimant's lack of transferable skills, his age (over 50), his self-perception as one who is incapable of improving (Dr. Ford specifically discussed Claimant's hopelessness), his very significant loss of wages for any work he could possibly attain, and the constant pain Claimant experienced in both shoulders factor into the analysis.

117. Mr. Crum's loss of market access understated Claimant's true situation. With the physicians' restrictions and Claimant's limitations, it is unlikely that in his current condition Claimant can still qualify for over half of the jobs he qualified for pre-accident, (from 11.4% to 6.5%). This is especially true when the majority of those proposed jobs include typing skills beyond those Claimant currently possesses. Also, Mr. Crum substantially underrated the value of benefits associated with Claimant's time-of-injury government employment. Mr. Crum's opinions devalue Claimant's permanent disability by nearly 50% when the entire record is examined.

118. Considering and weighing the totality of the evidence, Claimant has proven a 75% permanent disability inclusive of his 10% impairment.

Total Permanent Disability Under the Odd Lot Doctrine

119. Claimant argues he is totally disabled pursuant to the odd-lot doctrine. Odd-lot total disability occurs when one is able to perform only services so limited in quality, quantity, or dependability that no reasonably stable market for those services exists. *Bybee v. Industrial Special Indem. Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Odd-lot presumption arises upon showing that a claimant has attempted other types of employment without success, by showing that the claimant or vocational counselors or employment agencies on behalf of the claimant have searched for other work and other work is not available, or by showing that any efforts to find suitable work would be futile. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). Odd-lot workers are not regularly employable in any well-known branch of the labor market absent a business boom, the sympathy of a particular employer, temporary good luck, or a superhuman effort on the worker's part. *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1977).

120. After his industrial accident in February 2012, Claimant returned to work part time for Employer in a light duty capacity for a short period, but was laid off due to his physical restrictions. Since then he has not worked in any capacity.

121. Claimant testified in deposition and at hearing that he has applied for numerous jobs since he was laid off. It is difficult to determine the exact number of positions which were within Claimant's restrictions, and for which he actually applied. He indicated the number is between 75 and 100. However, job applications for positions exceeding Claimant's restrictions will not be considered as serious applications. Additionally, in at least two instances when Claimant received an in-person interview, he either discussed or delivered a written set of his restrictions at the interview; both times he failed to get the job, and in one case he angered the potential employer.

122. The record does not support the fact that Claimant's left arm is as dysfunctional as he claims it to be. Passive ROM under anesthetic sedation demonstrated Claimant had a range of motion far in excess of his perceived limitation. At hearing Claimant even refused to move his shoulder when asked to do so, instead simply bending his forearm at the elbow; yet supposedly he does home exercises with that same arm which would involve more movement than he demonstrated. Claimant has convinced himself (with the endorsement of Dr. Ford and Ms. Taft) that his left arm is nonfunctional, and his right arm is not far behind. There is no objective medical evidence to substantiate Claimant's demonstrated level of dysfunction.

123. Claimant's exaggerated dysfunction does not negate the very real restrictions placed on him by various physicians. Even the most generous restrictions still limit Claimant's job access to sedentary positions. Furthermore, even though Claimant's right shoulder is non-industrial, its function is nevertheless impaired. Because Claimant's right shoulder condition is degenerative and progressive it will only get worse in time, absent medical intervention. Even with intervention there is no guarantee it will regain full use.

124. At the time of hearing Claimant had restrictions of no overhead repetitive lifting, and lifting to shoulder level of up to three or five pounds. At his deposition, Dr. Dunteman also limited Claimant to lifting 10 to 20 pounds from floor to waist. Dr. Greendyke also imposed restrictions of no repetitive bending, stooping or twisting due to Claimant's previous lumbar spine injury. With those restrictions, and after a reasonable but not extensive search, Claimant failed to find suitable employment.

125. Claimant worked with ICRD from 2012 through 2016. While at one point he mentioned that he did not want to consider jobs in sales, in fact he applied for several

sales positions – at Cabela's, a pest control business, a fly fishing shop, and a lawn care business. ICRD provided numerous employment leads but none worked out, mainly due to lifting requirements greater than Claimant's restrictions, or typing skills beyond Claimant's 13 word-per-minute limit.

126. On December 7, 2016, ICRD closed its file on Claimant. A notation therein stated that the reason for closure was the fact that Claimant had chosen not to look for work at that time. By then Claimant was receiving disability benefits as mentioned earlier. This same document noted that with minimal training Claimant could acquire additional skills (typing and word processing) which could enhance his ability to find work, although not in jobs which would come close to restoring his pre-accident wage and status. ICRD estimated the cost of such training at $636.00, and it could be completed in as little as 12 weeks. DE 6, p. 70. Without such training, ICRD felt Claimant "lacked the skills necessary to work in available sedentary work." *Id.*, p. 72.

127. While an examination of all the evidence supports a finding that Claimant was not aggressively seeking employment with an overwhelming desire to return to any employment (perhaps understandable in light of his substantial disability payments and the rather menial job offerings compared to his prior position), he nevertheless satisfied his obligation to seek suitable employment in good faith (but hardly with a "superhuman effort") over a substantial time frame.

128. One way to prove odd-lot total disability is by showing that Claimant or vocational counselors on his behalf have searched unsuccessfully for other work and it was not available. In the present case Claimant and ICRD did just that. Furthermore,

ICRD's notes indicate Claimant did not have the skills to perform the sedentary work available in his job market.

129. Claimant has met his burden of proof to establish a *prima facie* case for odd-lot total permanent disability under the criteria above.

130. Once Claimant establishes his *prima facie* showing of odd-lot disability, the burden shifts to Defendants to show that some kind of suitable work is regularly and continuously available to Claimant. They must also introduce evidence that there is an actual job in Claimant's job market area which he is able to perform or for which he can be trained. *Rodriguez v. Consolidated Farms, LLC*, 161 Idaho 735, 390 P.3d 856, (2017).

131. Defendants attempt to satisfy their burden by pointing to a number of jobs they argue Claimant could do in his Kootenai County, Spokane Valley labor market. Many of these jobs may be dismissed summarily. Jobs that require fast-paced manual labor, such as fast food service, or assembler at Buck Knives, or jobs that require a pleasant, attractive persona, such as receptionist at public service establishments (Mr. Crum mentioned Master Cuts hair salon) or car salesman can be eliminated. Claimant is over six feet tall and nearly 300 pounds in weight; at hearing he presented with a flat effect. Cashier jobs also require stocking duties in many instances, as per the testimony of Mr. Brownell. Two plausible areas of employment include driving (without lifting), and call center jobs.

132. Call center jobs are regularly and continuously available, and call centers are "always hiring" new employees. This suggests there is a high turnover rate for such employment. Clearly call center jobs are not for everyone. Leaving that issue aside, the call centers with which Mr. Crum communicated require a minimum typing speed proficiency which Claimant currently lacks.

133. Defendants argue Claimant could always improve his typing speed with practice. Furthermore, Mr. Crum testified the call centers will work with Claimant to improve his typing skills. The fact remains that Claimant currently does not possess the requisite minimum skills for the job. Perhaps he could gain the skill, as argued by Defendants, but that is speculation. Also, whether he could increase his typing and computer skills within the time frame allowed by the employer is anyone's guess. The reality is that Claimant currently lacks the skills required for such jobs.

134. Driving jobs, such as delivery driver of railroad crews, or car dealership courtesy drivers, or retirement community van drivers, or valet driver, (all mentioned by Mr. Crum) might be within Claimant's ability and restrictions. Although Mr. Crum testified to a few particular jobs in the driving market, it is questionable if such jobs are regularly and continuously available. But even if they are, Mr. Brownell testified that because Claimant is taking narcotics he would not be hired as a driver. While there is no proof of such, the burden rests with Defendants to show Claimant, while taking narcotics at night to help him sleep (at a minimum), would nevertheless qualify as a driver with a reasonable chance of being hired in such market. Mr. Brownell's testimony on this subject raises a legitimate point, and causes the Commission to question Claimant's access to such positions.

135. Defendants are critical of the fact that Claimant sought no other work with the City of Coeur d'Alene, his former employer. However, they cite to no available positions with the city within Claimant's restrictions. Simply because Claimant had a good relationship with Employer prior to being laid off does not mean the city would rehire him or that there are jobs at the city within Claimant's limitations and skill set.

136. Defendants are also critical of the fact that Claimant did not pursue services with the Idaho Division of Vocational Rehabilitation, for job coaching and job placement programs. The Commission is not aware of any legal authority requiring such effort as a prerequisite to claiming total disability. The same observation applies to Defendants' argument that Claimant did not seek retraining, which argument is especially specious since Defendants made no offer to assist Claimant with retraining.

137. While this is a close question, Claimant has established on a more-probable-than-not basis that he is totally disabled under the odd-lot doctrine, and Defendants have failed to show that some kind of suitable work is regularly and continuously available to Claimant, and/or that there is an actual job in Claimant's job market area which he is able to perform or for which he can be trained.

138. Apportionment under Idaho Code § 72-406 is inapplicable to the present case, as it only applies to cases of disability less-than-total.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has failed to prove his right shoulder is a covered compensable consequence of his industrial left shoulder injury under to the concept of overuse syndrome.

2. Claimant has failed to prove he is entitled to a PPI rating above 10% whole person.

3. Claimant has proven 75% permanent disability inclusive of his 10% impairment.

4. Claimant has proven he is totally and permanently disabled under the odd-lot doctrine.

5. Apportionment under Idaho Code § 72-406 is inapplicable.

6. Claimant has failed to prove he is entitled to attorney fees for Defendants' failure to average PPI ratings as set out in IDAPA 17.02.04.281.02.

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

DATED this __5th__ day of __February__, 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 __5th__ day of ___February___, 2018, 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:

STEPHEN NEMEC
1626 LINCOLN WAY
COEUR D ALENE ID 83814

BRADLEY STODDARD
PO BOX 896
COEUR D ALENE ID 83816

_____/s/_____

jsk