BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SAMUEL D. GARNER, Claimant, v. IDAHO ELECTRIC SIGNS, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2015-013089** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed January 28, 2021**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Douglas A. Donohue who conducted a hearing in Boise on December 20, 2019. Brad Eidam represented Claimant. James Ford represented Defendants. The parties presented documentary and testimonial evidence and submitted briefs. The case came under advisement on July 7, 2020 and is ready for decision. The undersigned Commissioners have reviewed the proposed decision and conclude that different treatment is warranted on the issue of whether Claimant is employed by a sympathetic employer, and the extent and degree of Claimant's disability, including whether he is an odd-lot worker. Accordingly, the Commission declines to adopt the proposed decision and issues these findings of fact, conclusions of law and order.

ISSUES

The issues to be decided as amended at hearing are:

1. Whether and to what extent Claimant is entitled to PPD, including total and permanent disability;

2. Whether Claimant is totally and permanently disabled as an odd-lot worker; and

3. Whether apportionment for a pre-existing condition is appropriate

under Idaho Code §72-406.

CONTENTIONS OF THE PARTIES

Claimant Samuel "Derrick" Garner injured his left thumb in a reciprocating saw on May 13, 2015. He contends that the resultant crush injury developed into Chronic Regional Pain Syndrome (CRPS). The chronic pain significantly disrupts his daily activity. Restrictions involving use of his left thumb and hand render him permanently disabled. He should be deemed an odd-lot worker based upon the "futility" factor. Claimant's current employer should be deemed a "sympathetic employer." Defendants failed to show an actual, available job within Claimant's abilities. Alternatively, in the absence of a finding of total and permanent disability, Claimant should be deemed to have suffered an 80% disability, inclusive of impairment.

Defendants contend Claimant has worked full time for three and one-half years since the accident. He received TTDs from the date of surgery October 29, 2015 to December 2016. He has shown the ability to learn and perform new duties. His wage has increased from $13 at the time of injury to $16 at the time of hearing. His actual disability should be rated about 28% to 34%, inclusive of 11% impairment. He is not an odd-lot worker. Claimant has a fifty-pound lifting restriction from a low back injury in the 1990s. Apportionment is appropriate under Idaho Code § 72-406.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant, Employer's owner Rick Barry, and Employer's office manager Jody Bertwell;

2. Joint Exhibits ("JE") 1 through 40, admitted at hearing, and JE 41, offered later and admitted at this time; and

3. Post-hearing depositions of hand surgeon Robert Hansen, M.D, and physiatrist Vic Kadyan, M.D., and vocational experts Nancy

Collins, Ph.D. and William Jordan.

All objections raised in post-hearing depositions are OVERRULED, except Defendants' objections at pages 85 through 94 of Dr. Collins' deposition are SUSTAINED.

FINDINGS OF FACT

1. Claimant had been employed by Employer since 2013 as an apprentice sign installer. He drove trucks and installed signs. This accident occurred about the time he was ready to test for journeyman certification. He did not test.

Medical Care: 2015

2. Working within the course and scope of his employment on May 13, 2015, Claimant injured his left thumb when it was caught and crushed in the mechanism of a reciprocating saw. Immediate medical care consisted of cleaning and splinting the thumb as well as providing temporary pain relief. After follow-up visits, Cory Huffine, FNP, released Claimant to return to work, modified duty, and restricted against gripping or lifting with his left hand. On May 29, Nurse Huffine restricted Claimant from any left-hand use.

3. After conservative medical care, the treating physician recommended Claimant visit a hand specialist. Claimant visited hand surgeon Robert Hansen, M.D. on June 2. Dr. Hansen confirmed the temporary restriction against left hand use. On subsequent visits to Dr. Hansen, Claimant was sometimes seen by Dr. Hansen's PA, Hodaka Abe.

4. As early as June 10, Dr. Hansen expressed concern about hypersensitivity and the potential for CRPS. Dr. Hansen and St. Alphonsus rehabilitation unit (STARS) began working with Claimant on desensitization and mobility exercises. Over the next four months or so, and as a result of significant time and attention from therapists, Claimant made modest improvement.

5. A September X-ray showed the "distal phalanx has reconstituted and healed to a

significant degree." Claimant reported continuing joint pain. By the end of September, Dr. Hansen revised Claimant's temporary restriction to "limited" left-hand use.

6. An October 7 MRI showed a metallic foreign body in the thumb. Surgery was recommended to remove it and to explore the injury. Claimant was taken back off work temporarily.

7. On October 29, Dr. Hansen excised bone fragments and a "long, thin, metallic" foreign body. He performed a tenolysis of the flexor pollicis tendon of Claimant's left thumb.

8. On December 30, Dr. Hansen diagnosed CRPS. He reported the presence of all usual signs of CRPS except hair loss at the site. There is no indication whether Claimant's thumb was formerly hairy. A nerve block was performed.

Medical Care: 2016

9. ICRD case notes begin January 6. An initial interview with Claimant was conducted on January 27 by Megan Brown. Return to light-duty work began to be seriously considered by early December. Shortly after, on December 7, Ken Halcomb began assisting Claimant. ICRD records show Claimant returned to light-duty work for Employer on December 19. ICRD involvement continued as Claimant was not yet medically stable. The final ICRD note is dated February 27, 2019.

10. On January 25, Claimant began treating with Michael Sant, M.D. Differential diagnoses included CRPS versus neuropathic pain.

11. On January 27, signs of carpal tunnel syndrome were observed by Dr. Hansen. Warmth had returned to the thumb, but exquisite hypersensitivity remained.

12. A March 1 bone scan and a nerve conduction study showed consistent indicators of carpal tunnel syndrome. (Dr. Sant reported *right* [sic] carpal tunnel syndrome where testing was

directed at and found positive on *left*.) Also, the bone scan indicated CRPS was more likely than neuropathic pain.

13. On April 11, a left C6 stellate ganglion block was performed. Others followed on May 18 and 23 as well as on December 28. Dr. Sant reported no improvement.

14. A repeat MRI on May 6 showed a possible micro-metallic artifact and expected surgical changes.

15. A carpal tunnel release and thumb debridement was performed on August 4. Claimant recovered slowly. His CRPS did not improve.

16. On September 7, Dr. Hansen prescribed another round of physical therapy.

17. On October 20, Dr. Hansen performed a nerve block and removed surgical pins from Claimant's left thumb.

18. On November 16, Dr. Hansen released Claimant to light duty but still allowed no left-hand use. By December 14, Dr. Hansen modified the release to allow limited left-hand use but no forceful gripping or twisting or tool use.

Medical Care: 2017

19. On January 4, Vic Kadyan, M.D. performed a forensic examination at Surety's request. He reviewed records from the date of the accident forward. He took a history from Claimant and his wife. He examined Claimant and documented physical signs of CRPS. He opined Claimant had not reached medical stability. He agreed with the treating physicians' diagnoses including CRPS. He recommended more physical therapy. He addressed Claimant's "mood disorder." Situational depression complicates Claimant's physical picture. He recommended temporary restrictions of medium-duty work "though his hand would need to be protected."

20. On February 8, Dr. Hansen noted his opinions of Dr. Kadyan's forensic evaluation.

He agreed Claimant was not medically stable. He checked a box that he generally agreed with Dr. Kadyan's treatment proposals.

21. On March 6, a repeat MRI again noted "mild" surgical and degenerative changes.

22. On March 20, Robert Calhoun, Ph.D. performed a forensic psychological evaluation at Surety's request. He reviewed records from the date of the accident forward, took a history, administered psychological tests, and interviewed Claimant.

23. The history described by Dr. Calhoun is inconsistent about Claimant's pre-accident job satisfaction. Dr. Calhoun reports Claimant described "significant job dissatisfaction" and being "tense and edgy" at work. All other expressions by Claimant of record on this point do not indicate anything other than positive feelings for Employer's efforts to bring Claimant back to work and to provide increasingly meaningful tasks as Claimant became able.

24. Dr. Calhoun diagnosed somatic symptom disorder and depression which exacerbate CRPS. He opined that without cognitive restructuring Claimant would not benefit from desensitization therapy. He found no complications of secondary gain nor conscious functional overlay.

25. On May 3, Dr. Hansen recommended pain management. He limited only the amount of keyboarding—and this in a nonspecific amount—and allowed Claimant to work as tolerated.

26. On June 20, Clay Ward, Ph.D. conducted a psychological interview. He agreed with Dr. Calhoun's diagnoses and recommendations. Dr. Ward also recommended mirror therapy. He provided psychological therapy through December of that year when Dr. Ward closed his office to all treatment.

27. On July 25, Dr. Sant tried a botox injection to Claimant's thumb. He noted "some

response."

28. Claimant suffered a whiplash injury and some right wrist pain in September after being rear-ended while stopped. Conservative measures, including physical therapy, were used to treat this pain. After the increased neck pain subsided within about three weeks, it did not seem to complicate Claimant's left thumb treatment.

29. On November 1, a cervical spine MRI showed "mild" degeneration including foraminal narrowing but without impingement from C4 to C7. Dr. Hansen opined these were "not acute." A *right* wrist MRI showed mild osteoarthritis and other indicators of trauma.

Medical Care: 2018-Hearing

30. As with other physical therapy records, occupational therapy records beginning January 18, 2018 show Claimant to have been cooperative in these efforts.

31. Mirror therapy helped some, but symptoms persisted.

32. On August 24, 2018, Dr. Kadyan again performed a forensic evaluation at Surety's request. He reviewed records generated in the interim since his earlier evaluation. After examination he opined Claimant had reached medical stability. He recommended permanent restrictions including medium-duty work, 20-pounds lifting with left arm, avoid repetitive left-hand motion, and protect against harsh temperature changes. He rated permanent impairment at 11% whole person. This is inclusive of the CRPS. Dr. Kadyan referenced the *Guides*, sixth edition. No evaluation or consideration was given to prior conditions, impairments, or apportionments.

33. On October 15, 2018, Dr. Hanson responded to a September 12, 2018 request for his approval or disapproval of the recent IME. Dr. Hanson checked the box stating that he agreed with the findings.

34. On October 1, 2018, Dr. Sant suggested a spinal cord stimulator for Claimant.

35. On December 20, 2018, Dr. Sant allowed a return to full-time work but imposed permanent restrictions. These included allowing Claimant "self-paced work"; no gripping, twisting, power tool use, keyboard work, trauma to the base of the hand and exposure to cold; and limited use of the left hand. About this time, Monte Moore, M.D., another physician in Dr. Sant's office practice, became Claimant's treating physician in place of Dr. Sant.

36. On April 4, 2019, ICRD consultant Ken Halcomb provided a "brief" report in which he noted Claimant could not return to his time-of-injury job and had lost an unquantified access to the labor market as a result of the thumb injury.

37. On April 16, Nancy Collins, Ph.D. performed a vocational evaluation at Claimant's request. This will be discussed *infra*.

38. On August 19, 2019, Dr. Hansen noted his displeasure with his recent contact with Bill Jordan.

39. On August 27, Bill Jordan performed a vocational evaluation at Surety's request. This report will be discussed *infra*.

40. On December 3, 2019, Dr. Collins issued a report expressing "concerns" about Mr. Jordan's evaluation. These will be discussed *infra*.

41. On December 4, 2019, Dr. Hansen met with Claimant's attorney and noted his agreement with Dr. Sant's recommended restrictions.

42. On December 10, 2019, Mr. Jordan responded to Dr. Hansen's comments about their meeting. Mr. Jordan had questioned various supervisors and found their views about Claimant's performance more positive than Dr. Hansen's projections. He evaluated two additional potential jobs with other employers and Dr. Hansen's newly revised restrictions. He opined Claimant's loss of labor market access at 68% with no wage loss for an overall PPD of 34%

inclusive. He noted Claimant's prior low back restriction of medium-duty work without quantifying how this would be considered by the Industrial Commission.

43. Claimant has considered but opposes implantation of a spinal cord stimulator. Depending upon future pain and other factors, he may reconsider someday. He was less resistant to amputation of the thumb, but various physicians have provided information upon which Claimant has deemed it not worth the risk.

44. In deposition, Dr. Hansen opined that mere days after the injury Claimant exhibited symptoms consistent with CRPS. He observed additional symptoms consistent with CRPS in subsequent visits. By December 10, 2015, Dr. Hansen's clinical observations led him to a formal diagnosis of CRPS. He explained that trauma is one of several possible causes for the development of CRPS symptoms. The trauma of the industrial accident is the likely cause of CRPS in Claimant's left thumb.

45. In his deposition, Dr. Hansen explained that he believed it reasonable to revisit Claimant's lifting restrictions and endorsed a restriction of no lifting with the affected left arm greater than five pounds.

46. In deposition, Dr. Kadyan explained his forensic observations and reasoning for recommending restrictions. He explained that Claimant will be more harmed by disuse of his left hand than by reasonably cautious use of it. Essentially, CRPS feeds on the lack of use.

47. In deposition, both physicians opined that Claimant would be better off if he could tolerate the absence of narcotics, but that he showed no signs of substance abuse.

Prior Medical Care

48. A 1990 DOT physical referenced prior "back trouble." Claimant passed the physical. Other medical records that year show symptoms lingered for more than a year and a

TENS unit was tried. He was temporarily off work because of it. Symptoms were complicated by "depressive, vegetative symptomatology" and were diagnosed as "chronic pain syndrome." Ultimately, physicians imposed a 50-pound lifting restriction. The Oregon workers' compensation process resulted in an 8% permanent disability.

49. In 1993, low back symptoms recurred and again depression was a noted complication. Again, symptoms lingered, this time about six months.

50. Later medical records show occasional flare-ups of low back symptoms over the years.

51. Claimant denied that his low back affected his pre-accident work for Employer—work which required some significant lifting.

52. In 2007, Claimant showed a meniscal tear of his right knee. An October 4, 2007 surgery found chondromalacia with the tear. He recovered well and timely from the partial meniscectomy.

53. In 2008, Claimant reported pain about his neck which he treated with chiropractic care.

54. After infrequently recurrent ankle pain over the years, in 2008, Claimant underwent surgical debridement of his left ankle.

55. Other reported conditions over the years were non-orthopedic and non-contributory to any issue at hand here.

Vocational Factors

56. Born December 8, 1956, Claimant was 63 years of age on the date of hearing.

57. He earned a high-school diploma in 1974. He completed no additional formal education.

58. At the time of the accident he earned $13.50 per hour. He now earns $16.00 per hour.

59. Claimant's personnel file with Employer reveals continued post-accident satisfaction with Claimant's willingness and ability to undertake more and more duties.

60. Claimant's annual wages working for Employer in 2015 were reduced slightly more than $4300 from 2014. They took a precipitous dip in 2016. In 2017, Claimant earned $25,832.14, about $450 less than 2014. In 2018, he earned $28,854.29 and in 2019, $30,515.88. In both years his earnings were greater than in 2014.

61. Much earlier, Claimant worked as an automobile mechanic and machinist. He has driven truck, delivering freight. He worked at a cattle feedlot. He has driven tractor.

62. Claimant has a current CDL but believes he cannot pass the DOT medical test so long as he is taking Percocet for pain.

63. Claimant worked for a window-blind company, first briefly as a salesman, later as a showroom designer, and later as an installer. He also drove forklift in the company warehouse. He is certified as a master installer of blinds and has a certification as a shutters installer with Hunter-Douglas.

64. He worked a few months as a sales manager for a Honda motorcycle dealership.

65. For about 10 years, he owned, managed, and worked a window-blind installation business, largely as a contractor for other window-blind sales companies.

66. After moving to Idaho from Oregon, Claimant first worked driving school bus, part time, through two school years and the interim summer. He left that job to begin with Employer.

67. Claimant initially worked as an installer. He erected large commercial signs. The job requires a CDL, as well as knowledge of metalwork and welding, concrete and electrical.

68. Before he began light duty work post-accident, he did not know how to turn a computer on, much less operate one. Employer's owner, Rick Barry, admitted that initially Claimant was accommodated to return to work to optimize Employer's experience mod to reduce Employer's workers' compensation premium; Claimant's return-to-work job duties were vague. However, Claimant's willingness to work and ability to learn new tasks makes him a valuable employee.

69. Since the accident Claimant has learned to enter data on a spreadsheet and another office computer program. He is allowed to work at a pace that suits his left hand and thumb. He performs additional duties as needed to stay busy during the workday. He is self-motivated and does not require frequent assignments to find work to do. His work duties have increased as he has shown capability to learn additional data entry applications. More than half of his 40-hour work week is spent performing various data entry tasks. These tasks gradually have increasingly filled his workday and are continuing to increase in number and volume.

70. Asked, "Do you feel appreciated by Idaho Electric Signs for the value that you bring to their business?", Claimant responded, "I'm pretty sure that I do, because I don't think I would have a job there." He has received positive — "good" — job evaluations since the accident.

71. Claimant is happy in his current position and has not sought other work since the accident. He has no plans to retire soon.

72. Claimant now performs duties which essentially replace one employee and which free up other employees for other valuable tasks. If Claimant were to separate from this employment, Employer would have to hire at least one full-time employee "immediately." Employer has every expectation that Claimant's employment will continue.

73. No physician has opposed Claimant's current physical-work activities, although

Claimant's keyboard use is technically beyond the last restrictions imposed by Dr. Sant.

74. Claimant suffers hearing loss which impacted the hearing and may affect some employment. This has not been quantified.

DISCUSSION AND FURTHER FINDINGS OF FACT

75. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992). 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).

76. The Referee determined that Claimant shows a good understanding of the various medical procedures which have been performed in response to his accident and injury. Inconsistencies in Claimant's recollection about details of his subjective symptoms after various procedures are minor and not material. The Referee determined that Claimant appears as a forthright and credible witness. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

77. Similarly, the Referee found that Employer's representatives who testified also appeared forthright and credible. The Commission finds no reason to disturb the Referee's findings

and observations on the credibility of these witnesses. Furthermore, the Referee determined that, accounting for differences of perspective, only minor inconsistencies arose among all witnesses. Claimant and his supervisors described the same events.

78. A claimant bears the burden of proving that the condition for which compensation is sought is causally related to an industrial accident. *Callantine v Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be evidence of medical opinion—by way of physician's testimony or written medical record—supporting the claim for compensation to a reasonable degree of medical probability. No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993). A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973).

79. Causation is not seriously questioned. Claimant has made a prima facie case that his CRPS is genuine and caused by the accident and injury.

Permanent Impairment and Disability

80. 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 an inclusive factor of permanent disability. Idaho Code § 72-422.

81. The record establishes that Claimant suffered 11% whole person permanent partial

impairment as a result of the industrial accident. There is general agreement on this issue. The major disagreement is the extent of Claimant's permanent disability.

82. **"**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.

83. 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).

84. 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). Where preexisting impairments produce disability, all impairments and disability should be accounted for with a subtraction back for the compensable portions. *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008).

85. Idaho Code § 72-406 allows apportionment of partial permanent disability where a preexisting physical impairment causes an increase of disability, in severity or duration, to the effects of a compensable claim.

86. Claimant alleges that he is totally and permanently disabled under the odd-lot doctrine. Odd-lot workers are those who are so injured as to be unable to perform services other than those which are limited in quality, dependability, or quantity that a reasonably stable labor market for them does not exist. *Boley v. State*, 130 Idaho 278, 939 P.2d 854 (1997). This does not mean that in order to qualify for odd-lot status the worker must be altogether incapable of performing work. Odd-lot workers are those who are so handicapped that they will not be employed regularly in any well-known branch of the labor market absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or superhuman effort. *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 565 P.2d 1360 (1977).

87. An injured worker may prove total and permanent disability under the odd-lot doctrine in any one of three ways. He may show: (1) that he has attempted other types of employment without success; (2) that he, or others on his behalf, have searched for work and found it unavailable; or (3) that it would be futile for claimant to look for work. *Boley*, 130 Idaho 278, 939 P.2d 854.

88. Here, as of the date of hearing, Claimant was employed by his time-of-injury employer in a new position created for him following the subject accident. The original impetus for bringing Claimant back to work was to avoid the deleterious impact of a lost-time accident on Employer's experience modification. Tr. at 144. An employer's experience modification affects premium, and may also impacts an employer's ability to compete for certain work. However, as of the date of the hearing, Claimant's employment no longer had an impact on Employer's E-mod. Tr. at 152. Although Claimant initially struggled to find things to do to fill his day, he eventually found

a way to contribute by supporting the work of Jody Bertwell, Employer's office manager. The assistance that Claimant now provides to Ms. Bertwell and others is so important to Employer's business that Claimant would need to be immediately replaced were he to leave his current position. Nevertheless, it is argued by Claimant that his current employment is not an impediment to his odd-lot claim, since the employment he enjoys is provided by a so-called "sympathetic" employer. To prove odd-lot status, Claimant must prove that he will not be regularly employed in any well-known branch of the labor market as a result of his injuries. The fact that an injured worker is employed as of the date of hearing challenges a claim of odd-lot status, absent a showing that such employment is the result of a business boom, temporary good luck, superhuman effort, or a sympathetic employer or friend. Therefore, an appropriate starting point for the evaluation of Claimant's disability claim is consideration of the question of whether or not Claimant is currently employed by a sympathetic employer. If so, we are free to consider whether Claimant is an odd-lot worker.

89. As noted, Defendants have argued that Claimant is now an indispensable part of Defendant's business operations. He provides essential support for Ms. Bertwell, Employer's Office Manager/Bookkeeper/Corporate Secretary. Employer's owner, Rick Barry, described Ms. Bertwell as being somewhat overtasked and Claimant turned out to be a good fit to provide her with clerical support in order to free her up for other tasks. Although it has been asserted that Claimant's work encompasses spreadsheets, payroll, warranty work, accounts payable, invoices and other tasks associated with running Defendant's business, it is clear that he does not possess any real understanding or expertise in Epicor or Excel, the two main programs Defendants utilize to conduct accounting and payroll functions. Claimant inputs data as directed by Ms. Bertwell. She has set up Claimant's computer so that he has access to the particular spreadsheets or Epicor programs that he has been directed to enter data into. He knows how to open these tabs from his "Favorites" screen

and he knows where the data is to be inputted. Ms. Bertwell prepares work for Claimant, i.e. inputting tasks, that he can begin when he arrives at Employer's place of business at 6:00 a.m. The work that Claimant performs for Employer in this regard is inaccurately described by Mr. Jordan in his deposition:

> Well, [Claimant] said that he was working in an evolving position that – and he was learning new tasks. He was assisting others and performing activities using a desktop computer, developing spreadsheets, calculating information, working in the financial area under Jodi Bertwell, the office manager. And he was maintaining accounting records. So he would do cash receipts, deposit slips. He was learning to do sales tax information, as he was entering information on a computer to use in maintaining their accounting records.

Jordan Depo. 42:14-25.

90. Rather, from Claimant's testimony, it is clear that almost everything he does in support of Ms. Bertwell is done largely by rote; he has no computer or software skills; he simply enters data where he is told to enter it.

91. Even so, it cannot be denied that Employer finds this work valuable, and the testimony of Mr. Barry and Ms. Bertwell is to the effect that Claimant's support has become so important to the business that he would have to be replaced were he to leave his job. Tr. at 148:8 – 149:2; 168:20 – 169:7; 176:2-7. From this, it also follows that Claimant's is a "real" job which exists by reason of business necessity, even though it did not start out that way. Claimant acknowledges that his services are of value to his Employer. However, he argues that this is not sufficient to show that Employer is not a sympathetic employer. By definition, a sympathetic employer is an employer who is willing to employ someone who can perform no services other than those which are so limited in quality, dependability, or quantity, that a reasonable stable labor market for them does not exist. Therefore, one way to evaluate whether Claimant's employment is "sympathetic" is to consider whether other employers, with similar data entry needs, would consider Claimant for employment.

92. Claimant is a "hunt-and-peck" keyboard user. In fact, he is less than that; unlike a conventional two-fingered hunt-and-peck typist, who might use a finger on each hand to operate half the keyboard, Claimant uses the middle finger of his right hand to perform all key strokes, except for operation of the Shift key, which he performs with the middle finger of his left hand. Tr. at 94:25 – 96:7. He has found that doing more with the unaffected fingers of his left hand causes his left thumb pain to increase. Although Employer expressed no concerns about the speed at which Claimant performed his work, it should be obvious that he performs this work more slowly than a hunt-and-peck typist with full use of both hands, and certainly more slowly than a ten-fingered typist with ten-key skills. However, Employer is willing to tolerate Claimant's production speed and this, according to Claimant, amounts to an extraordinary accommodation of the type discussed in *Christensen v. S.L. Start & Associates, Inc.*, 147 Idaho 289, 207 P.3d 1020 (2009) such that Employer should be recognized as a sympathetic employer. In evaluating whether Employer's tolerance for Claimant's poor data entry skillset amounts to an extraordinary accommodation, one might ask whether Claimant could compete for similar data entry work for any other employer. Dr. Collins testified that Claimant could not compete for data entry work in the labor market at large. Collins Depo. 45-47; 56; 127. We doubt very much that any other employer with similar needs would seriously entertain employment for Claimant, if the primary object of the job was to enter data as quickly and efficiently as possible.

93. For this reason, we are inclined to agree with Claimant that Defendant is a sympathetic employer, because Claimant's data entry skills are so limited that a reasonably-stable labor market for such a data entry position does not exist elsewhere for Claimant in the labor market at large. In other words, we find it difficult to believe that any other employer with a primary need for data entry could be persuaded to hire Claimant for such work. We conclude that Claimant has

met his burden of proving that Defendant is a sympathetic employer.

94. Having so found, we do not mean to imply that a labor market does not exist for Claimant with respect to jobs which require some data entry as opposed to the time he devotes to this work in his current job. As of the date of hearing Claimant spent five to six hours per day doing data entry work, although some fraction of this time was consumed by running paperwork back and forth as he completed inputting tasks. Tr. at 124-125. Per Mr. Jordan, Claimant spends most of his workday on the computer. Jordan Depo. 48-50. Moreover, since we must consider Claimant's present and probable future ability to engage in gainful activity, we cannot discount how his data entry skills might be improved by use of an adaptive keyboard, or by learning to operate a ten-key pad with his right hand. *See* JE 24 at p. 1467.

95. Having found that Claimant is currently employed by a sympathetic employer, he is not foreclosed from pursuing his claim for total and permanent disability under the odd-lot doctrine by one or more of the three aforementioned methods. Claimant has not tried and failed at other work. Neither has Claimant, nor anyone on his behalf, searched for other employment for Claimant without success. Rather, Claimant contends that he is totally and permanently disabled under the odd-lot doctrine because in view of his medical restrictions and relevant non-medical factors, it would be futile for him to search for work.

96. The parties have retained vocational rehabilitation experts to provide opinions on this issue. The vocational opinions depend on certain assumptions made about Claimant's physical restrictions for his left thumb injury. Therefore, before discussing the vocational opinions, it is important to make some determination of the restrictions which Claimant must follow as a consequence of the subject accident. Dr. Hansen, Dr. Sant and Dr. Moore, all treaters, have rendered opinions on Claimant's restrictions, as has Dr. Kadyan, the expert retained by Defendants to perform

an independent medical evaluation pursuant to Idaho Code § 72-433.

97. Turning first to Dr. Kadyan's restrictions it will be recalled that he saw Claimant on two occasions, January 4, 2017 and August 24, 2018. It was on the occasion of the second visit that he found Claimant to be medically stable and ratable. At that time, he also proposed certain permanent restrictions for Claimant's diagnosis of left-thumb CRPS:

> I do think [Claimant] will need permanent restrictions including medium duty work. For his left upper limb he is restricted to lifting limited to 20-pounds or less. I do not anticipate him being able to do manual dexterity tasks with his left upper limb and recommend he avoid repetitive motion with that hand. In areas if he is exposed to harsh climate or temperature changes, his left hand would need protection, especially with gloves. These restrictions are anticipated to be permanent.

JE 11 at p. 986.

98. Dr. Kadyan elaborated on these restrictions at the time of his deposition. Kadyan Depo. 38:21 – 42:18. Dr. Kadyan testified that Claimant could probably lift up to 40 pounds bilaterally. He felt that Claimant could use power tools, so long as he operated the tool with his right hand, using the left to stabilize only. He did not believe that Claimant had any significant restrictions against the use of a keyboard except to avoid use of the left thumb. He did not agree that Claimant needed to work at a slower pace, except in the sense that such work involved use of the left hand. Dr. Kadyan felt that even though Claimant may be taking two-to-three Percocet per day, it was not inappropriate for him to operate a motor vehicle, although he later acknowledged it would be best if Claimant could substitute non-narcotic pain medication. At any rate, Claimant does operate a motor vehicle; he commutes from Nampa to Boise every day for work and testified that he is able to operate both a standard and an automatic transmission.

99. As reflected in his report, Dr. Kadyan recommended that Claimant avoid repetitive use of the left hand. However, on cross-examination he appeared to indicate that repetitive activities

were acceptable so long as Claimant did not engage in repetitive activities for more than 20% of every hour. Kadyan Depo. 63:10-23.

100. On cross-examination, Dr. Kadyan reiterated that he did not believe that Claimant's thumb injury precluded keyboard operation with the other fingers of the left hand. He found it difficult to accept that Claimant developed tunnel syndrome as a result of his thumb injury. Moreover, he seemed to question whether this diagnosis, if accurate, would explain Claimant's complaints of pain when using the fingers of his left hand. Kadyan Depo. at 64-67. Nor did he believe that there was any contraindication to Claimant using his left hand to hold the steering wheel of a vehicle.

101. As noted, Dr. Hansen treated Claimant through February 24, 2018, and has not seen Claimant for evaluation or treatment since that date. The last time Dr. Hansen formally addressed Claimant's restrictions prior to February 24, 2018, was on June 28, 2017, when he released Claimant to light-duty work and recommended that he "limit" left-handed keyboard use and avoid trauma to the base of the left hand. Dr. Hansen's letter of February 24, 2018 memorialized his referral of Claimant to Dr. Sant for additional care. Dr. Hansen concluded that letter stating that the only other potential treatment he could suggest for Claimant would be simple pain management and "active use of his hand in a self-directed therapy program." JE 7 at p. 323.

102. Subsequent to February 24, 2018, Dr. Hansen was provided a copy of Dr. Kadyan's August 24, 2018 IME, which included the restrictions quoted above. Dr. Hansen expressed his agreement with Dr. Kadyan's evaluation and findings on October 15, 2018. JE 7 at p. 324. However, over a year later, on December 4, 2019, Dr. Hansen issued a final note memorializing discussions he had had earlier that day with Claimant's counsel. At that meeting, Dr. Hansen was evidently provided with a copy of work restrictions authored by Michael Sant, M.D., discussed *infra*. Dr. Hansen offered

the following comments concerning appropriate restrictions for Claimant:

> I also had the opportunity to review Dr. Michael Sant's work restrictions. I would agree with the permanent restrictions which Dr. Sandt [sic] recommended for his left upper extremity particularly no gripping or twisting, no use of vibrating tools, no keyboard work and that self-paced work his [sic] appropriate. Limitations of exposure to both the cold or significant heat also would be appropriate no repetitive use of his left hand or arm is also recommended as well as limitation on the amount of weight which she [sic] would be able to lift independently with his left hand. In reviewing the restrictions placed on him to previous IME examination limited 20 pounds with the upper left extremity was recommended I think that this is probably excessive if just the left hand issues [sic]. Probably a more reasonable level of the 5 pounds with a 20 pound limitation of lifting with both upper extremities. The limitations indicated by Dr. Sandt [sic] I think should be extended to all of the job descriptions which Mister Jordan had proposed.

JE 7 at p. 326.

103. As developed *infra*, Dr. Sant did not place any lifting restrictions on Claimant's use of his left upper extremity. Nevertheless, from the quoted statement, Dr. Hansen evidently felt it necessary to reconsider the lifting restrictions adopted by Dr. Kadyan, and which he had endorsed in October of 2018. At his deposition, Dr. Hansen was asked to explain the rationale for reducing Claimant's left extremity lifting restriction from 20 pounds to no more than 5 pounds:

> Q. In this note here, the addendum of December 4, 2019, you indicate a limitation with regard to lifting?
>
> A. Yes.
>
> Q. How do – explain your thinking process about – I think it's 5 pounds with his left hand and 20 pounds total. What was your analysis or is your analysis?
>
> A. Well, my thought with that was that, you know, if you're lifting a small object or heavy object, you know, one-handed, he could probably lift 30 to 50 pounds.
>
> Q. With which hand?
>
> A. With his left hand. If you're just lifting up a weight, say you had a weight, you can grab ahold and pick that up. One of the – and the concern I had with one of the job descriptions was, as I recall, parts manager of some kind. And that, as

> an example, getting a box or a part off the shelf may be a little bit more bulky, irregularly shaped so you may not be able to lift, you know, a heavier object one-handed. And so more reasonable restriction, even though you could lift, you know, 30 to 50 pounds off the floor if you were lifting a heavy weight, perhaps getting something, you know, off of a shelf, a part off of the shelf or out of a tight spot one-handed is going to be substantially more difficult. And so the weight restriction that I indicated here I felt was more appropriate in the workplace situation.

Hansen Depo. 41:22 – 43:5.

104. Therefore, while it would be permissible for Claimant to lift a 30 to 50 pound "small object or heavy object" from the floor, it would be more difficult for him to lift something that might be bulky or irregular in shape from a shelf. For these reasons, Dr. Hansen thought it appropriate to adopt a blanket 5-pound restriction for the left upper extremity, 20 pounds bilaterally.

105. As noted, Dr. Sant took over Claimant's care after February 24, 2018. On May 31, 2018 he authored restrictions for Claimant. He advised limited use of the left hand with no gripping or twisting, vibrating power tools, trauma to the base of the hand or keyboard work. He recommended that Claimant be allowed to work at his own pace. Finally, he advised against exposure to cold temperatures. His May 31, 2018 work status report imposes no lifting restrictions. By letter dated September 12, 2018, the State Insurance Fund asked for Dr. Sant's comment on the IME evaluation performed by Dr. Kadyan. In his response of December 12, 2018, Dr. Sant expressed his agreement with Dr. Kadyan's findings, but also recommended that Claimant be evaluated for a spinal column stimulator. JE 10 at p. 925. On December 20, 2018, Dr. Sant issued his final work status report, which contained his permanent restrictions for Claimant. These restrictions are identical to those set forth in his work status report of May 31, 2018, discussed above. Again, no lifting restrictions are identified. JE 10 at p. 929. December 20, 2018 also marks the end of Dr. Sant's care for Claimant, and his referral of Claimant to Dr. Moore.

106. As reflected in his chart note of July 16, 2019, Dr. Moore took a history from

Claimant that Claimant was still working, and still doing some keyboarding, janitorial and other odd jobs. Claimant stated that he was unable to hold on to his lawnmower with his left hand owing to vibration which caused pain. He also described being unable to use his left hand on the steering wheel of his vehicle. He expressed difficulty tying his shoes and being unable to button the top two buttons of his shirt.

107. Dr. Moore met with Mr. Jordan on July 17, 2019, the day after his July 16, 2019 clinic visit with Claimant. Mr. Jordan's report of August 27, 2019 reflects that he had the following discussion with Dr. Moore on July 17, 2019:

> I subsequently met with Monte Moore, MD on 07/17/19. We reviewed that he had taken over patient care from Dr. Sant. We also reviewed that Dr. Kadyan had evaluated the Evaluee for an IME, and had identified restrictions of 25 pounds lifting on the left side, with bilateral lifting of medium duty (e.g. 50 pounds), as well as the recommendation that the Evaluee may need to wear a glove in harsh climates. Also, the Evaluee is not to involve himself in occupations that would involve a lot of manual dexterity with the left hand, as well as avoid repetitive motion. Dr. Moore agreed with the restrictions.
>
> Dr. Moore and I discussed that the Evaluee has a commercial driver's license, and had previous [sic] driven trucks and school bus, and that Dr. Kadyan had stated that the Evaluee could operate bus or truck, or operate equipment, but would need to be off narcotic medications. Dr. Moore advised that the Evaluee could be placed on a different medication called Buprenorphine, which is also a narcotic, but it is a lower risk type of medication that can allow patients to drive commercially. It would depend on how the Evaluee responds to the medication, as individuals respond differently per their genetic make-up. Dr. Moore expressed concern about the Evaluee performing truck driving per his indication that vibration affects him. We discussed that the Claimant had indicated to me that he can drive OK, but the vibration bothers him, so he keeps his left hand off the wheel as much as he can. Dr. Moore indicated that the Claimant had told him something similar.

JE 24 at pp. 1457-1458.

108. Dr. Moore's file contains an email dated October 16, 2019 to Claimant's counsel which reads as follows:

> Per our telephone discussion today: the job descriptions which I signed during

> my meeting with Bill Jordan on July 17, 2019 were signed with the understanding that [Claimant] would not be required to exceed the restrictions placed by Dr. Michael Sant on December 20, 2018. Specifically, limited use of the left upper limb, no gripping or twisting, no vibrating power tools, not [sic] trauma to the base of the hand, no keyboard work, and no exposure to cold. Work should be self-paced. These restrictions apply to the left hand and are permanent as indicated by Dr. Sant. I agree with Dr. Sant's restrictions.

JE 10 at p. 943.

109. Dr. Moore's file does not contain any reference to his meeting with Mr. Jordan on July 17, 2019. However, Mr. Jordan's file does contain an acknowledgment signed by Dr. Moore on July 23, 2019 of the substance of the July 17, 2019 discussions. JE 24 at p. 1477.

110. From all this, it is somewhat difficult to tease-out the opinion or opinions which best reflects Claimant's actual restrictions. Drs. Hansen, Sant and Moore separately endorsed the restrictions authored by Dr. Kadyan. Drs. Hansen and Moore eventually recanted those endorsements. Dr. Sant's endorsement of Dr. Kadyan's findings is bookended by his own restrictions which do not identify any left upper extremity lifting restrictions. Only Dr. Hansen was asked to explain why he first endorsed a 20-pound left upper extremity lifting restriction, only to later reject it in favor of a 5-pound restriction. However, Dr. Hansen's explanation, which proposes a need to distinguish between lifting small or heavy objects from the floor and large bulky objects from a shelf does not explain why a blanket 5-pound lifting restriction is indicated. Perhaps more important, Dr. Hansen has not seen Claimant since February 24, 2018. His opinions on Claimant's current restrictions are suspect for that reason alone. Per Dr. Kadyan, Claimant was not even medically stable at the time Claimant was last seen by Dr. Hansen. We also note that while Dr. Hansen currently endorses Dr. Sant's restriction against all keyboarding, Dr. Hansen's last authored restrictions recognized a need to "limit" keyboarding, not prohibit it. As between Dr. Kadyan and Dr. Hansen, we find Dr. Kadyan's testimony to be more persuasive on the extent and degree of Claimant's

restrictions.

111. The inquiry, however, does not end there, since Dr. Sant, one of Claimant's treaters, has arrived at his own restrictions for Claimant, notwithstanding that he has also agreed with Dr. Kadyan's restrictions. Similarly, while Dr. Moore has expressed his agreement with Dr. Kadyan's findings, he has also expressed his agreement with the restrictions authored by Dr. Sant. This leaves the Commission to consider whether the views expressed by Dr. Kadyan or the views expressed by Dr. Sant better describe the restrictions applicable to Claimant for his left thumb injury. Dr. Sant did approve Dr. Kadyan's evaluation on December 12, 2018, but a scant eight days later, authored his own permanent restrictions which, setting aside for the moment the matter of lifting restrictions, are somewhat narrower than those issued by Dr. Kadyan. Dr. Sant appears to have recommended that Claimant avoid any type of gripping or twisting activity with the left hand. Dr. Kadyan did not endorse such a blanket prohibition, testifying that it depends on the amount, pace and torque of the work involved. Kadyan Depo. 59 – 60. He did agree with Dr. Sant that Claimant should not hold vibratory hand tools in the left hand and should avoid extremes of temperature. He specifically disagreed with Dr. Sant that keyboard use with the left hand was prohibited. Dr. Kadyan's opinions in this regard are well explained and persuasive. Further, Dr. Kadyan's views are backed up by a number of other facts of record. Claimant does use his left hand, albeit in limited fashion, to keyboard several hours each day at his place of employment. He does use his left hand to manipulate, lift and grip things; he simply cannot use his thumb while doing so.

112. Dr. Sant's permanent restrictions are silent as to whether Claimant reasonably has any restrictions against using the left upper extremity in lifting tasks. Accordingly, we find no compelling reason not to endorse the lifting restrictions as proposed by Dr. Kadyan. On balance, the Commission concludes that the restrictions described by Dr. Kadyan in his report, and as further

explained in his deposition, best describe Claimant's restrictions, even though we do not discount Claimant's testimony that use of the fingers of his left hand produces pain in his palm and thumb.

113. Having made this determination, it is possible to evaluate the vocational opinions on the extent and degree of Claimant's disability, including, whether it would be futile for him to look for work in light of his restrictions and relevant non-medical factors.

114. We turn first to the question of the extent and degree of Claimant's disability, and then to whether he has met his burden of proving total and permanent disability under the odd-lot doctrine by the route of futility.

115. Claimant retained the services of Nancy Collins, Ph.D., to perform a forensic vocational evaluation of Claimant's residual employability. She did not look for employment for Claimant on his behalf. She appears to have relied primarily on the restrictions imposed by Dr. Sant in performing her evaluation. She believed that, setting aside the lifting restrictions discussed by Drs. Hansen and Kadyan, all four physicians who have considered Claimant's restrictions have arrived at similar conclusions regarding Claimant's ability to use his left hand. However, Dr. Sant includes an allowance for self-paced work and no keyboarding, whereas Dr. Kadyan envisions no prohibition against keyboard use and did not impose any requirement that Claimant be allowed to self-pace his work. However, all physicians agree that limited use of the left hand is warranted and that gripping, twisting and torquing of movements should be avoided or minimized. Similarly, Claimant will not be able to perform tasks with the left hand requiring fine manual dexterity. As noted, the Commission has concluded that Dr. Kadyan's opinions, as set forth in his report and discussed in his testimony, provide the most credible representation of Claimant's current restrictions. The dispute over the extent and degree of Claimant's lifting restrictions is not of great significance to Dr. Collins. She believes that the most limiting aspect of the subject injury is its impact on Claimant's ability to use

his hand in performing other activities besides lifting. She testified that 99% of jobs in the labor market require the ability to engage in frequent-to-constant handling. Claimant's restrictions are such that he must avoid repetitive motions of the left hand and avoid activities requiring manual dexterity with the left hand. Equally significant to Dr. Collins's evaluation is Dr. Sant's belief that Claimant must be allowed to "self-pace" in the performance of any job he might obtain. Her testimony is that employers will be very reluctant to hire anyone who must be allowed to dictate the pace at which work will be performed. Collins Depo. 28 – 29.

116. Dr. Collins testified that had Claimant remained in his time-of-injury job, he would now be earning in the range of $20-plus per hour. She felt that if Claimant is employable, it is probably in the area of retail sales. Should Claimant be able to find work in retail sales as an estimator, he could expect to earn in the range of $11 per hour. She believed, however, that Claimant's loss of access to the labor market is of much greater significance than his potential wage loss, since his loss of access to the labor market is so profound. Collins Depo. 53 – 54. Dr. Collins opined that Claimant could not compete for work as a parts clerk, customer service technician, front desk clerk or estimator because these jobs are either too fast-paced or require too much computer use, or both. She ruled out new car sales because Claimant might have to be outside from time-to-time in harsh weather and might have to drive a vehicle from time-to-time. Collins Depo. 76. Security guard and asset protection positions were ruled out because Claimant would not be able to self-pace in such work environments. A service writer position, which might make use of Claimant's past work history in automotive repair, was also ruled out because Dr. Collins testified that Claimant would not be able to self-pace in such an environment and would always be on the computer. Collins Depo. 82. She conceded that Claimant might be able to do some limited retail sales, but many jobs would be beyond his physical limitations. Sales representative positions were thought to usually

require a bachelor's degree and would involve a lot of keyboarding. Collins Depo. 81.

117. Dr. Collins recognized that Claimant's current position does require keyboarding. In fact, most of Claimant's workday is spent inputting data via a keyboard. Her objection to applying this demonstrated ability to other employments is that Claimant will not be able to compete with others i.e., the ten-fingered typist, for such employment.

118. Dr. Collins also contacted a number of the businesses that Mr. Jordan reached out to, to discuss Claimant's suitability for current job openings advertised by those employers. She found reason to object to all of these on the basis that the work was either too fast-paced for Claimant or required too much computer use. Collins Depo. 85 – 95.

119. On balance, Dr. Collins was of the belief that Claimant's restrictions vis-à-vis use of the left hand were so significant as to make it futile for him to look for employment. Accordingly, she opined that Claimant is permanently and totally disabled under the odd-lot doctrine.

120. Mr. Jordan was retained by Defendants for the purpose of evaluating Claimant's residual disability following the work accident. He authored an initial report based on his belief that Drs. Kadyan, Moore, and Hansen were more-or-less in agreement as to Claimant's restrictions. He came to this conclusion because he met with Drs. Kadyan, Moore, and Hansen for the purposes of reviewing Claimant's residual employability, and in the course of these meetings, confirmed that Drs. Moore and Hansen were in agreement with the restrictions outlined by Dr. Kadyan in his report. He was also aware that Dr. Sant, with whom he did not meet, had expressed his agreement with Dr. Kadyan's opinion on December 12, 2018. In his meetings with Drs. Kadyan, Moore, and Hansen, Mr. Jordan asked the physicians to review a number of job descriptions he provided, and to comment on their suitability for Claimant. For reasons not entirely clear, Dr. Hansen took some offense to the meeting with Mr. Jordan, stating in an August 19, 2018 chart note, that he felt Mr. Jordan's visit to

review job descriptions was unprofessional and inappropriate. JE 7 at p. 325. It is possible that Dr. Hansen believed that Mr. Jordan falsely represented that he was representing the interests of Claimant, as opposed to conducting a forensic evaluation. Hansen Depo. 44 – 46. The hour was late, Dr. Hansen still had rounds to make, and he conceded on cross-examination that he simply felt rushed in having to respond to a long set of job descriptions in a short period of time. However, Mr. Jordan left the job descriptions with Dr. Hansen, and later sent him a note confirming the substance of their conversations, asking Dr. Hansen to review the note for accuracy. Changes made by Dr. Hansen were to two of the proposed jobs that involved commercial driving. Dr. Hansen retracted his approval of those positions due to his concerns about Claimant's narcotic medication use. He made no other changes to the approvals he had previously rendered. JE 24 at p. 1474. The majority of the positions submitted by Mr. Jordan to Drs. Kadyan, Hansen, and Moore were approved by those physicians as being suitable for Claimant.

121. Mr. Jordan testified that Claimant suffered no wage loss as a consequence of the subject accident. He reached this conclusion based on the fact that Claimant's time-of-injury wage was in the $13.50 per hour range, whereas his wage at the time of hearing in his new position with Employer was in the $16 per hour range. Mr. Jordan proposed that even if Claimant were to lose his current job, his wage loss would still be zero, since the median wage for the other jobs Claimant can still compete for is in the range of $16.88/ hour. JE 24 at p. 1468. Based on Dr. Kadyan's restrictions, Mr. Jordan believed that Claimant suffered loss of labor market access in the range of 56%. He averaged these two figures to arrive at his initial opinion that Claimant suffered disability in the range of 28% of the whole man, inclusive of impairment. Later, after Dr. Sant and Dr. Hansen imposed tighter restrictions, he revised his calculations to conclude that Claimant suffered 68% loss of labor market access. Averaged with 0% wage loss yields disability of 34% of the whole person, inclusive

of impairment. Concerning the additional restrictions imposed by Drs. Sant and Hansen, Mr. Jordan noted that notwithstanding the prohibition against keyboarding, Claimant is using his left hand, albeit in limited fashion, to perform keyboarding work for several hours each day in his current employment. With respect to the further restriction that Claimant be allowed to perform work at his own pace, Mr. Jordan noted that this restriction only pertains to use of the left thumb. Thus understood, "self-pacing" means changing tasks as opposed to taking a break. Jordan Depo. 114 – 118; 142. Indeed, Claimant testified that this is his practice in his current employment. When his left thumb begins to hurt while performing data entry, he takes up some other task. Tr. at 96.

122. As noted in connection with Dr. Collins's testimony, Mr. Jordan interviewed a number of employers with current job openings about whether they would entertain an individual with Claimant's restrictions for such work. Notably, Mr. Jordan does not appear to have identified the need to avoid repetitive activities or work requiring manual dexterity when discussing these jobs with the potential employers. Rather, he only appears to have represented that Claimant has restrictions against "light" work. Jordan Depo. 126 – 132. On cross-examination, he clarified that the only restriction he identified to the aforementioned employers was the admonition that Claimant avoid lifting more than five pounds with the left hand. Jordan Depo. 138.

123. Mr. Jordan acknowledged that Claimant's restrictions are such that he does not retain the ability to do production, typing or word processing. However, per Dr. Kadyan, Claimant retains the ability to do limited data entry, and this is evidenced by his current employment. Based on Dr. Kadyan's restrictions, Mr. Jordan believes that Claimant could perform the keyboarding requirements of the jobs for which he identified current openings. Jordan Depo. 142 – 151.

124. In summary, Mr. Jordan believes that notwithstanding the restrictions imposed by the thumb injury, Claimant can still compete for employment in his residual labor market, a labor market

which affords many opportunities for future employment.

125. **Synthesis of vocational opinions.** Generally speaking, in assessing Claimant's residual employability, the Commission concludes that Dr. Collins was too quick to raise objections to potential avenues of employment, while Mr. Jordan was not critical enough of the impact of Claimant's left-thumb CRPS and associated pain complaints when assessing opportunities for future employment.

126. We have concluded that Dr. Kadyan has offered the most persuasive opinion on Claimant's restrictions. He does not propose that Claimant must engage in "self-paced" work. However, even if that were a restriction which reasonably applies to Claimant, Dr. Collins's reliance on that restriction to rule out most of the jobs proposed by Mr. Jordan is misplaced. Not even Dr. Sant has indicated that in order to self-pace his work Claimant must work slower, although that is the meaning that Dr. Collins appears to have attached to the term. Claimant does not endorse this definition. He has testified that when his thumb pain becomes too great, he finds something else to do. Dr. Collins's blanket objection to the jobs of parts clerk, customer service technician, front desk clerk, estimator and service writer on the basis that they are too fast-paced and require constant computer use is an unpersuasive overgeneralization. The possibility that in an auto sales job Claimant might have to drive a car from time to time or meet with a buyer in inclement weather was offered as a reason that such work is unsuitable for Claimant. The Commission does not find these objections reasonable. Similarly, the Commission is skeptical of Dr. Collins's conclusions that the actual job openings identified by Mr. Jordan are altogether unsuitable is unpersuasive. Dr. Collins concluded that Claimant, whose work history demonstrates the ability to learn new skills, particularly in his current employment, is a poor risk for retraining. She denigrates Claimant's candidacy for any type of retraining because of the short period remaining in his work life before retirement. She posits that

no employer would invest in retraining for such an employee. However, as Mr. Jordan has explained, even a little retraining could potentially pay significant dividends to Claimant. Perhaps he could learn to use an adaptive keyboard. Perhaps he could simply be trained to use a ten key with his right hand. Some familiarity with modern office software, over and above his current rote understanding, would also make Claimant more employable. None of this retraining need be expensive or extensive, yet Dr. Collins did not entertain it.

127. We are more inclined to believe that employment opportunity does exist for Claimant in the areas, or some of them, identified by Mr. Jordan. Claimant has an extensive and varied employment background. Even Dr. Collins conceded that he has a reasonably wide range of transferrable job skills picked up in the course of his working life or obtained by training. He has experience in auto repair, retail sales, and importantly, running his own small business. He is somewhat shy and retiring, but he has good communication skills, and, although he may not like it, is able to deal with members of the general public in sales and similar positions requiring public outreach. He can operate a motor vehicle, both standard and automatic transmission, and does so in his current position on a daily basis. While he uses narcotic pain medication commercial driving may not be suitable for him, but otherwise driving is among his skills. In short, he brings a lot of things to the table that reasonably allow him to compete for employment, notwithstanding the restrictions imposed by Dr. Kadyan. Collins Depo. 111-116. While we have found that it is not reasonable to believe that Claimant could compete for a full-time data entry position, we do not believe that he is unsuitable for a position that requires some data entry as one of the components of the job.

128. Dr. Collins testified that had Claimant not suffered the subject accident he would now be earning $20.00+/hour in his time-of-injury employment. Dr. Collins has proposed that Claimant can earn, at most, wages in the range of $11.00/hour in his residual labor market, leaving

him with a wage loss of 50%. However, in making this assessment we believe that Dr. Collins was too pessimistic about the size of Claimant's post-accident labor market, and his prospects for employment. Nor are we persuaded by Mr. Jordan's opinion on wage loss. Mr. Jordan's calculation of a 0% wage loss is based on Claimant's time-of-injury wage ($13.50/hour) versus his current wage ($16.00/hour). Mr. Jordan's analysis ignores our finding that Claimant is currently employed by a sympathetic employer and that he cannot reasonably compete for the same type of work for other similarly situated employers. However, Mr. Jordan also proposed that in Claimant's residual labor his median wages would be in the range of $16.88/hour.

129. In considering Claimant's wage loss, we believe it is appropriate to compare what he would now be earning in his time-of-injury job had he not been injured vs. what he can now expect to earn in his residual labor market. We conclude that Claimant has suffered a wage loss of 16% as a result of the subject accident.

130. In terms of Claimant's loss of access to the labor market, the Commission concludes that Mr. Jordan's opinion is slightly more persuasive than that rendered by Dr. Collins. Even so, we believe that Mr. Jordan has underestimated the impact of Claimant's compromised grip, loss of manual dexterity and inability to engage in repetitive use of left hand. Though Dr. Kadyan does not believe that Claimant should have any restriction against using the four fingers of his left hand in keyboard work, the manner in which Claimant performs his current work strongly suggests that he is not willing, or not able, to do quite as much as Dr. Kadyan would encourage him to do. Mr. Jordan is also too generous in describing what Claimant has learned to do in his current position; he implies that Claimant has more computer and software skills than he really has. Further, Mr. Jordan did not accurately describe Claimant's true restrictions when vetting Claimant with those employers advertising for applicants. While these shortcomings are not

insignificant, they do not challenge Mr. Jordan's ultimate conclusion that more job opportunities exist for Claimant than Dr. Collins would admit to.

131. Balancing the two vocational opinions leads us to conclude that Claimant has probably suffered loss of access to the labor market in the range of 70%. We believe that Claimant's loss of access to the labor market should receive greater weight than his wage loss; a comparison of Claimant's pre-injury and post-injury wages is less important in calculating the impact of the left upper extremity restrictions on Claimant's ability to engage in gainful activity. While we also conclude that a significant number of employment opportunities exist for Claimant, those jobs will be harder to find owing to his restrictions. Accordingly, we conclude that Claimant has demonstrated disability of 60% of the whole person, inclusive of impairment paid to date.

132. For the reasons set forth above, we also conclude that it would not be futile for Claimant to look for employment consistent with his restrictions. Claimant is not an odd-lot worker.

133. Defendants have raised the issue of apportionment under Idaho Code § 72-406. To paraphrase that statute, if disability from an industrial accident is increased as a result of a pre-existing physical impairment, employer shall only be held responsible for the disability referable to the subject accident. Here, the record reflects that Claimant suffered a low back injury in 1990, for which he received treatment under the Oregon workers' compensation system. Extant records suggest that Claimant was given a "disability" rating of 8% (JE 1 at p. 11) and restrictions against lifting more than 50 pounds (JE 1 at p. 8). It is unclear whether the 8% rating reflects a rating for impairment alone, and if so, how that rating was calculated.

134. It is asserted that some part of Claimant's current disability is related to this prior low back condition. Our path, in such cases, is to identify Claimant's disability from all causes

combined, and then assess the disability referable to the industrial accident alone. Once Claimant has proven disability, the burden shifts to Defendants to prove that some portion of Claimant's disability should be apportioned to the pre-existing condition. *Barton v. Seventh Heaven Recreation, Inc.*, IC 2008-031084 (Idaho Ind. Comm. December 9, 2010). Both vocational experts appear to have been made aware of this issue, yet neither gave anything but passing consideration to the question of whether Claimant's current disability was increased or prolonged by the supposed pre-existing low back impairment. In his follow-up report of December 10, 2019, Mr. Jordan stated:

> It is again noted that [Claimant] had prior restrictions concerning lifting for medium duty exertional levels from a previous unrelated back injury. The Idaho Industrial Commission may determine apportionment of some of the PPD rating in this case as [Claimant] has already been compensated for a loss of access to the labor market at a medium duty exertional level (per the previous unrelated back injury).

JE 39 at p. 1744.

135. However, Mr. Jordan made no effort to quantify the contribution of the low back injury to Claimant's current disability. Moreover, although the record suggests that Claimant has received a "disability" rating of 8%, we do not believe that this evidence is sufficient to demonstrate that Claimant has been previously compensated for his loss of access to the labor market stemming from his low back injury, as asserted by Mr. Jordan. For his part, Claimant acknowledged the prior back injury, but denied that it had impacted him in subsequent employment. The evidence is insufficient to persuade the Commission that apportionment of disability under Idaho Code § 72-406 is indicated.

CONCLUSION OF LAW AND ORDER

1. Claimant has met his burden of demonstrating entitlement to disability of 60%, inclusive of impairment.

2. Claimant is not an odd-lot worker.

3. Claimant has failed to show that any part of his disability is apportionable to a pre-existing condition.

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

DATED this January day of 28th, 2021.

INDUSTRIAL COMMISSION

Aaron White, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Kamerron Sray
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of January, 2021, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by email upon each of the following:

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_____Emma O. Landers_____