BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID M. SHAW, Claimant, v. TRUCKPRO, LLC, Employer, and TRAVELERS PROPERTY & CASUALTY COMPANY OF AMERICA, Surety, Defendants.	**IC 2019-024513** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED DEC 09 2022 INDUSTRIAL COMMISSION

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 Boise, Idaho, on March 16, 2022. Taylor Mossman-Fletcher represented Claimant. W. Scott Wigle represented Defendants. The parties produced oral and documentary evidence at hearing and submitted post-hearing briefs. Two post-hearing depositions were taken. The matter came under advisement on October 3, 2022.

ISSUE

The parties narrowed the issues at hearing, and further in post-hearing briefing, such that the sole issue for resolution is whether and to what extent Claimant is entitled to benefits for permanent partial disability in excess of impairment, up to and including total permanent disability under the odd-lot doctrine.

CONTENTIONS OF THE PARTIES

Claimant injured his left shoulder as the result of an industrial accident which occurred on August 23, 2019. He contends the injury and resulting restrictions and limitations left Claimant totally disabled. A vocational expert determined Claimant lost all access to his labor market. It would be futile for Claimant to seek employment. Even in the unlikely event Claimant secured employment, he still would suffer a permanent disability of at least 81% (inclusive of impairment). Most likely, any new employment opportunities would require additional training and counseling.

Defendants acknowledge Claimant suffered a significant accident with resultant injury. However, they argue he is not totally and permanently disabled. Instead, Claimant was "coasting into retirement" at the time of his accident and has chosen not to seek employment. While he could not return to work at his time-of-injury job, there are a number of employment opportunities available to Claimant which would pay close to or even more than his $20 per hour wage at the time of his accident. Claimant has not made a *prima facie* showing that he is totally disabled under the odd-lot theory. The evidence supports a finding that Claimant has suffered, at most, a "quite modest" disability in excess of impairment, if any such excess disability exists.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The hearing testimony of Claimant;
2. The hearing testimony of witnesses Darlene Shaw and Robert Dixon;
3. Joint exhibits (JE) 1 through 29 admitted at hearing;
4. The post-hearing deposition transcripts of Elaina Donohoe and Barbara Nelson, taken on May 11 and June 8, 2022, respectively.

The sole objection (made during the deposition of Elaina Donohoe) is overruled.

FINDINGS OF FACT

Background

1. At the time of hearing Claimant was a 62 year old married man living on a 40 acre parcel of desert property located between Boise and Mountain Home. (The address is on Ditto Creek Road, which is considerably closer to Mountain Home than to Boise.)

2. Claimant is trained as a welder and certified as a diesel mechanic from Boise State University. Claimant worked in the past as a fabricator and diesel mechanic for Kenworth Trucks in Twin Falls, Miller Construction (where he worked on a variety of machines, from snowmobiles to cranes and semi-trailers), and a farm implement dealer in Mountain Home, performing mechanic work. He also has done mechanic work for Great West Transportation, Great Western Construction, and Dennis Dillon. He also drove a delivery truck for Pepsi for about a year.

3. In the late 1980s, (after working for Dennis Dillon), Claimant opened his own mechanic and fabrication shop. Claimant grew the business from a one-man shop to one employing up to five employees.

4. In about 1982, Claimant sold his business to Six States Distributors. As part of the sale, Claimant agreed to stay on as an employee and bring his clients with him to Six States. Claimant took on more of a managerial role but still worked in the shop as well.

5. A year later, when Six States failed to meet their promised bonus to Claimant, he left there and reopened his own shop with his friend Robert (Bob) Dixon. That business grew over 15 years to one employing over a dozen employees. Claimant continued to provide fabrication and mechanic work.

6. Due to economic downturn in the 1980s, Claimant began driving over-the-road loads as an owner-operator. As his trucking business developed, Claimant obtained his own DOT

authority which allowed him to broker his own loads. He operated in the continental US. He did well financially, estimating his take home pay was in the range of $80,000 to $90,000. Claimant's truck driving career lasted about 15 years, until changes in government regulations negatively affected his livelihood. Additionally, Claimant was in his late 50s and was tired of being gone for weeks at a time. Claimant sold his truck and took six months off.

7. Claimant then briefly worked for a dairy in Kuna as a local truck driver. After a few months, Claimant took a job with Employer as a drivetrain mechanic in April 2019. He earned $20 per hour, plus benefits. It was in this position that he had the industrial accident described below.

Accident and Medical Care

8. On August 23, 2019, while removing a heavy driveline from a truck while working for Employer, Claimant felt a "pop" in his left (non-dominant) shoulder.

9. An MRI showed evidence of a full thickness displaced rupture of the long head of the bicep tendon, together with a complex tear of the superior labrum at the bicep origin. He also had a small high-grade interstitial tear in his supraspinatus and subscapularis tendon fibers. After reviewing treatment options, Claimant elected a surgical route.

10. Orthopedist Andrew Curran, M.D., took Claimant to surgery on September 30, 2019, to resect his distal clavicle, perform an open bicep tenodesis, decompress Claimant's subacromial space, and debride his labrum.

11. Physical therapy began in mid-October. Nevertheless, Claimant developed adhesive capsulitis. He received cortisone injections without lasting benefits. By early 2020, Claimant was still complaining of weakness in his left upper extremity and pain with overhead activities. These complaints continued into March.

12. A follow up MRI disclosed fluid in the AC joint and evidence of a potential intrasubstance supraspinatus tear.

13. On June 1, 2020, Claimant underwent a second left shoulder surgery. This surgery improved Claimant's symptoms, but he still had discomfort, weakness, and limited range of motion issues. Claimant was referred to St. Luke's work hardening program with Robert Friedman, M.D.

14. Claimant completed the program by early December 2020. Dr. Friedman found Claimant was at MMI and assigned him an 11% UE impairment rating. Dr. Friedman also advised Claimant of the following permanent medium work level restrictions; 50 pound occasional, 25 pound frequent lifting, with no over the shoulder activity on the left greater than 20 pounds, all apportioned to the industrial injury.

Time-of-Hearing Status

15. Claimant testified at hearing he could only raise his left arm to shoulder height and has reduced lifting strength in that shoulder. Claimant does no overhead lifting. He takes Tylenol and Aleve to prevent cramping and help him sleep. Overusing his left arm will necessitate extra Aleve. Claimant has no loss of dexterity in his left hand.

16. Claimant agreed he can still lift up to 50 pounds if he "hugs" it to his chest and lifts with his legs. Overhead work now requires Claimant to use a step ladder. Since December 2020 Claimant has not been back to Dr. Curran other than for a staph infection in the shoulder which manifests as a rash that comes and goes. Claimant had no plans for further treatment but does a home exercise program for his shoulder.

17. Claimant's job with Employer was eliminated several months after his injury. He was given no alternative employment opportunities with Employer. Claimant has not worked

since the accident and was unemployed at the time of hearing. He had not applied for any jobs since his accident. Claimant has made no serious effort to find employment since the accident. Instead, it appears Claimant was waiting on the outcome of this case to determine his next employment move. *See,* JE 29, depo. pp. 64, 65. Claimant was on Social Security Disability at the time of hearing.

18. Claimant testified he had accrued savings and was working at a job which paid less than he was previously making when self employed because it was closer to home and had health benefits. He had planned to stay at his time-of-injury job and "coast into retirement" at age 67.

19. When asked what type of job it would take for Claimant to go back to work, he noted he would not take a job which would make his shoulder worse; beyond that, he would like to stay in the fabrication field. Claimant desired a job which paid close to or over $25 per hour.[1]

DISCUSSION AND FURTHER FINDINGS

20. The issue for resolution is whether and to what extent Claimant is entitled to benefits for permanent partial disability in excess of impairment, up to and including total permanent disability under the odd-lot doctrine. 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

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[1] During his deposition taken on October 26, 2021, Claimant testified he would need a minimum wage of $25 per hour with benefits. He was not interested in lower paying jobs, like "flipping burgers" or driving a delivery truck, because with the travel time from his home, a low paying job is not economically feasible to Claimant. He also did not want driving jobs (including "hook and go" jobs, where the driver does not actually deal with loading and unloading) which took him away from his home. JE 29, depo. pp. 66 - 69.

gainful activity as it is affected by the medical factor of impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425.

21. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the 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. 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, 294, 766 P.2d 763, 764 (1988).

22. The burden of establishing permanent disability is upon Claimant. *Seese v. Idaho of Idaho, Inc.,* 110 Idaho 32, 714 P.2d 1 (1986). The Idaho Supreme Court in *Brown v. The Home Depot,* 152 Idaho 605, 272 P.3d 577 (2012) iterated that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing. The extent and causes of permanent disability are factual questions committed to the particular expertise of the Commission, which considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Indus.,* 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund,* 130 Idaho 278, 939 P.2d 854 (1997); *Thom v. Callahan,* 97 Idaho 151, 155, 157, 540 P.2d 1330, 1334, 1336 (1975).

Odd Lot Total Disability

23. Claimant's primary assertion is that he is totally and permanently disabled under the odd-lot doctrine. An odd lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State, Industrial Special Indemnity Fund,* 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), citing *Arnold v. Splendid Bakery,* 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). Such workers are not regularly employable "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 a superhuman effort on their part." *Carey v. Clearwater County Road Department,* 107 Idaho 109, 112, 686 P.2d 54, 57 (1984) citing *Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

24. The burden of establishing odd lot status rests upon Claimant. *Dumaw v. J. L. Norton Logging*, 118 Idaho at 153, 795 P.2d at 315 (1990). He may establish total permanent disability under the odd lot doctrine in any one of three ways:

a. By showing he has attempted other types of employment without success;
b. By showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or
c. By showing that any efforts to find suitable work would be futile.

Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

25. Claimant has chosen to argue the "futility" path to odd lot total disability. This legal path is the most difficult to prove because it does not rely on historical efforts, but rather requires the fact finder to make assumptions based upon the totality of the record as to what is or is not likely to occur *if* the Claimant were to seek employment, rather than focusing on what occurred *when* the Claimant actually attempted (by himself or through the efforts of professionals) to find work. The futility argument relies on the fact that the injuries suffered by Claimant, his resulting

limitations and restrictions, render him so handicapped as to take him out of any well-known branch of the labor market absent certain limited exceptions listed above, and it would be futile to even look for work.

ELAINA DONOHOE

26. Claimant hired vocational rehabilitation expert Elaina Donohoe to prepare a disability evaluation report. She met with Claimant via video conference on October 4, 2021. She also reviewed relevant documentation concerning Claimant's education, work history and income stream from 2014 through 2020, his post-accident medical records, SSI documents, and Claimant's litigation discovery responses.

27. In her report, Ms. Donohoe noted Claimant was well groomed, responsive, knowledgeable, and engaged in the interview, and established rapport with ease. She further noted Claimant holds a Class A commercial driver's license (CDL) with air brake endorsement, is experienced with operating computers (even "seamlessly" adjusting to minor technological difficulties during the video interview).

28. Claimant's income includes SSDI benefits just over $1500 monthly, together with inherited investment income of around $2500 monthly. Claimant's health care is through Medicare.

29. Claimant showed a consistent history of employment going back for decades. His transferable skills, using the *Dictionary of Occupational Titles* and *Revised Handbook of Analyzing Jobs*, include machine repair, troubleshooting, equipment and systems operation and control, operational monitoring to ensure properly working machines and equipment, critical thinking, equipment maintenance, personnel performance monitoring, active listening,

quality control analysis, coordination of individuals, reading comprehension, effective speaking, and management of personnel resources and time.

30. Claimant had no prior medical issues which would impact his employment abilities.

31. Claimant noted during his interview that the effects of his shoulder injury and resultant surgeries "definitely affected his lifestyle," but he had adjusted to his disability well, and "learned to work around it." JE 25, p. 1480. Claimant had also learned to use "compensatory strategies" to accommodate for his loss of function. *Id.* He had gained weight (35 to 40 pounds) since the accident, which he attributed to his relative inactivity.

32. Claimant denied depression, although his motivation had somewhat waned since the accident. He had feelings of anxiety and uncertainty surrounding his work ability and frustration with having to withdraw money from savings earlier than anticipated, as well as the added pressure of being solely responsible for caring for his family, including his wife who had medical issues.

33. Claimant demonstrated his left shoulder limitations and discussed how his pain negatively affected his nightly sleeping and daytime activities. He mentioned taking Etodolac and Tylenol for nightly pain. Claimant had to adapt many of his daily functions such as lifting, pulling, carrying, dressing, twisting, squatting, balancing, and kneeling. He stated he can drive for long periods without difficulty. Claimant still enjoyed fabricating unique art and furniture in his home metal and wood working shop. He would like to learn CNC machining and was interested in training in that field. He understands he could not go back to his time-of-injury employment but was interested in self-employment in making unique furniture, signs, parts, and images. However, he expressed doubt about retraining since he was close to retirement.

34. Ms. Donohoe figured Claimants' pre-accident wage earning capacity at $95,000, based on a review of his income over the past seven years. In reaching that figure, she aggregated Claimant's corporate tax return income and his personal joint tax return income figures. She provided no authority for such a methodology.

35. Ms. Donohoe acknowledged Dr. Friedman's permanent restrictions (medium level work, 50 pounds occasional, 25 pound repetitive, lifting with left upper extremity, and no above left shoulder activity greater than 20 pounds). She also noted Claimant's work history was in semi- to highly skilled professions, with medium to heavy strength categories. Using those restrictions and work history, Ms. Donohoe concluded that when considering Claimant's vocational profile and Dr. Friedman's restrictions, Claimant had lost "complete access" to his labor market. She opined Claimant could not return to truck driving, "as there are no jobs operating industrial trucks that fit within Dr. Friedman's lifting and positional restrictions." JE 25, p. 1485. She did, however, recognize that the potential for retraining existed which would allow Claimant to use his "experience, education, and transferable skills" to "partially restore his labor market access and wage earning capacity." *Id.*

36. Interestingly, Ms. Donohoe then goes on to note that without additional vocational rehabilitation, Claimant has suffered an 81% loss of earning capacity.[2] Perhaps by averaging 100% loss of labor market with 81% wage loss, Ms. Donohoe concluded Claimant's disability, inclusive of impairment, was 90.5% or 91%, which she further concluded rendered Claimant "totally and permanently disabled." *Id.* at 1486.

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[2] Although described as a "loss of earning capacity" it appears, from the context of Ms. Donohoe's report, that she is actually referencing Claimant's wage loss.

37. While Ms. Donohoe believes Claimant is totally and permanently disabled, she feels with short-term CNC training Claimant could earn roughly $35,000 per year for a full time position as a CNC operator. This would result in a 63% loss of wage earning capacity, or if he worked part time, his wage earning capacity would decrease by 64%, but he would still have access to his SSDI benefits, so long as he did not earn more than $1350 per month. She pointed out Boise State University has a 12-month online CNC machinist training program available for $2000.

38. Ms. Donohoe was deposed post hearing. Therein, she confirmed that Claimant presented well, was highly motivated, had a work ethic that employers are looking for, and that his age would not be a substantial barrier for his employment per se. She felt with short term training Claimant could be a CNC machinist if he so chose. She also acknowledged Claimant possessed a current CDL and a valid medical card for commercial driving.

39. In reaching her conclusion that without additional training Claimant had lost 100% of his labor market, Ms. Donohoe testified she inputted Claimant's restrictions into a SkillTRAN software program to find a list of potentially suitable jobs in the Mountain Home/Boise market and then compared the list of potential jobs with Claimant's positional restrictions to see if the potential job was within Claimant's restrictions. If it was not, she eliminated that potential job from consideration. In Claimant's case, all potential jobs identified by SkillTRAN were eliminated by Claimant's overhead lifting/reaching restrictions.

40. In response to Barbara Nelson's opinions on available jobs, discussed below, Ms. Donohoe relied on the Bureau of Labor Statistics' Occupational Requirements Survey to see what percentage of civilian light truck driver delivery jobs required overhead reaching. She determined 86.4% of such jobs did require at least some overhead reaching. Using

that statistic, Ms. Donohoe ruled out all of the potential driving jobs listed by Ms. Nelson. Ms. Donohoe had no opinion on the viability of jobs suggested by Ken Holcomb at ICRD, which included automotive parts sales jobs or parts manager positions.[3]

41. Although at page 36 of her deposition, Ms. Donohoe was asked how she arrived at an 81% loss of income, her response was circular and shed no light on how Claimant could have no jobs available to him, which should reduce his income potential to zero, but nevertheless only have an 81% loss of income.[4]

42. In cross examination, Ms. Donohoe testified that inputting Claimant's restrictions as given by Dr. Friedman into the SkillTRAN program, less than a dozen potential jobs in the Boise market were identified. Of those, she could not reconcile a single job with Claimant's restrictions.

BARBARA NELSON

43. Once Defendants obtained Claimant's vocational report, they asked Barbara Nelson, a local vocational rehabilitation expert, to look at Claimant's vocational profile and his limitations and restrictions to determine if there were readily available jobs in his labor market. She was not asked to do a "full blown" disability analysis.

44. In response, she reviewed selected documents, including ICRD and Lifefit work hardening records, Dr. Friedman's report, physical therapy records, Claimant's deposition, and Ms. Donohoe's report. She then prepared a report. Therein, she listed jobs (limited to local driving jobs) available in Claimant's labor market which appeared to be within Claimant's

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[3] Claimant testified at hearing that these potential job suggestions were given to him before he reached MMI and therefore he did not follow up on the suggestions. Additionally, he felt each suggested job theoretically could have aspects which would not work for him, and he did not pursue those or similar jobs at any time prior to hearing.

[4] One might intuitively think if a person's potential for employment was zero, his potential for income would likewise be zero, but there was no explanation in her deposition to explain why that is not so.

restrictions and expertise. She also found CNC apprentice job openings, which Claimant had expressed a desire to explore, and which required no prior experience. Ms. Nelson then concluded with her opinion that Claimant could "readily obtain employment compatible with his work restrictions that restores his time-of-injury wage of $20 per hour." She noted the unemployment rate for Elmore County at the time of her report (March 1, 2022) was 2.0%, Boise City was 1.7%. JE 27, p. 1506.

45. Ms. Nelson was deposed post hearing. By then she had also reviewed the hearing transcript and Ms. Donohoe's deposition, which she felt bolstered her opinions.

46. Ms. Nelson conceded she had never met Claimant. Nevertheless, she noted records described him as very pleasant; he was articulate, and obviously intelligent. He had started and successfully run his own companies. He was mechanically inclined. All of these traits enhance employment opportunities. His only potential negatives might be his age and his left arm restriction. Claimant's restrictions were standard for shoulder surgery patients in Ms. Nelson's experience.

47. Ms. Nelson spent one day looking for available work for Claimant. She sought out advertised positions available on that date. She looked for and found potential local driving jobs, some of which would require Claimant's CDL, while others (typically lower paying) delivery jobs did not. She limited her listed delivery jobs to those which did not require heavy lifting.

48. Because Claimant had expressed a desire to learn the skill and work in the area of CNC machining, Ms. Nelson looked for, and found, two such jobs willing to train individuals. Ms. Nelson testified that Claimant had also expressed a desire to get into CNC programming but that is a more skilled occupation which Claimant would have to work into if possible. For the time being, he would have to start as an operator. She noted CNC machinist

is a high demand occupation in the local market. There are also on-line courses which train people to operate CNC machines.

49. Ms. Nelson testified the labor market is currently the best she has ever seen in her decades of work in the field; she has never before seen truck drivers offered signing bonuses, and benefits are "better than they've ever been." Job selection is high and "all the way around for job seekers" the market is very favorable. Nelson depo. pp. 21, 22.

50. Ms. Nelson testified that SkillTRAN, as a computer program, can only respond to the quality of the input. If the program found no jobs for Claimant in the Boise/Mountain Home market, then somewhere bad or incomplete information was provided it; "there was a mistake made somewhere." *Id* at 36.

51. In cross examination, Ms. Nelson testified that in her experience it is not true that most driving jobs require overhead work. Instead, she opined that in local driving "there's not a lot of overhead work involved, and [Claimant] has a perfectly fine dominant arm. He just has restrictions on the nondominant arm." *Id* at 29. Ms. Nelson conceded that some truck driving jobs would require overhead activities, like throwing a tarp or climbing into a cab on a large truck.

52. Ms. Nelson agreed that Claimant had sustained a permanent disability and had as a result, suffered some loss of earning capacity.

ODD LOT FUTILITY ANALYSIS

53. The evidence overwhelmingly refutes Claimant's argument that he is an odd lot worker under the theory of futility. The record herein is replete with reasons it would not be futile for Claimant to look for work if he chose to find employment. His restrictions are not oppressive and there are many jobs which would not violate them if Claimant needed to find work. His bank of knowledge, personality, and proven ability to manage time, others, and himself,

coupled with his proven work ethic, would make him a desirable employee. His ability to adapt to his limitations would allow him to "work around" many obstacles his limited left arm may pose.

54. Claimant admitted he still has skills which would allow him to work; he still makes items for sale in his home shop, and there is no reason those same skills could not be used in an employment environment. He has good personnel skills and is likeable. He has a valid CDL and medical card and could drive locally. Jobs such as those listed by Ms. Nelson certainly are worth investigating if Claimant wanted to work. There are CNC apprentice positions open which require no prior experience; Claimant's mechanical and fabrication skills, coupled with his desire to enter that field make it logical for him to at least apply for such a position. There is no credible evidence that Claimant could not find suitable employment if he so chose to look, and more importantly, that it would be futile for him to even try.

55. Obviously, as noted by Ms. Nelson, some mistake was made if the SkillTRAN program identified less than ten medium level jobs in the Boise market that would allow for Claimant's restrictions. While Ms. Donohoe claimed some 84% of driving jobs require overhead work, Claimant is not restricted with his dominant arm. Even if he could not do any overhead work, 16% of driving jobs would still be available to him. Perhaps its possible, although unlikely, all the jobs, such as delivering cookies, lab test results, edible arrangements, or title loan documents would somehow run afoul of Claimant's restrictions, but to say it would be futile to even apply for such a job lacks support in the record. The same holds true for a vehicle pick up and delivery job, or the driver check-in position for Old Dominion Freight Lines.

56. In Mountain Home, which is close to Claimant's home, there is an automotive parts delivery driver position (albeit at a significant hourly wage reduction from Claimant's time-of-injury job), as well as a new CNC shop looking for apprentice members – a job which seems

custom made for Claimant's interests. There are even jobs like the Karst Stage position in Boise, which pays up to $23 per hour with a $2500 signing bonus and Blue Cross health benefits. All these jobs and more were found in one day with a cursory job search.

57. While Claimant testified he is not interested in delivery driving jobs, that does not change the fact such jobs are available to him. He retains the option of not looking for work, but his decision does not obligate Defendants to pay benefits as if he could not find a job. Choosing not to apply for a job is not synonymous with not being able to find a job. More importantly, even the field Claimant *does* want (CNC work) has openings in his market. He has no excuse not to at least pursue those openings he admittedly is interested in.

58. When the record as a whole is considered, Claimant has failed to make a *prima facie* showing he is totally and permanently disabled under the futility branch of the odd lot doctrine.

Disability Less Than Total

59. Claimant argues if he is not totally and permanently disabled under the odd-lot theory, he at least has a significant permanent disability. He has suggested a figure of 81% permanent partial disability, inclusive of impairment.

60. As noted above and worth reiterating, the extent and causes of permanent disability are factual questions committed to the particular expertise of the Commission, which considers the record as a whole, including the purely advisory opinions of vocational experts. The Commission is not required to accept the opinions of any expert witness and is free to weigh them as appropriate. *See,e.g. Clark v. Truss,* 142 Idaho 404, 408, 128 P.3d 941, 945 (2006); *Eacret v. Clearwater Forest Indus.,* 136 Idaho 733, 40 P.3d 91 (2002);

Boley v. State, Industrial Special Indem. Fund, 130 Idaho 278, 939 P.2d 854 (1997). *See also, Rothman v. Your Valet Dry Cleaning*, IIC 2015-010244 (August 31, 2017).

61. In the present case, only Ms. Donohoe calculated a permanent disability rating for Claimant. However, her disability figures are unrealistic, and perhaps based on an overreliance on SkillTRAN output. While that software is important, the data it produces must be considered through the lens of reality in the current labor market. She also failed to explain how there can be *no* jobs available to Claimant with his restrictions and limitations, and yet he would be less than 100% disabled. This inconsistent analysis is suspect without further explanation.

62. Idaho Code § 72-428 provides for a statutory permanent disability rating of 70% for a complete amputation of one's arm at the shoulder joint. Certainly, Claimant has use of his injured non-dominant arm and there is no evidence his injury is somehow more limiting than a complete amputation of that arm. He uses his left arm in any number of day-to-day activities, as per his testimony and the medical record. While he testified to a limitation of use above shoulder height, he still has function of that arm below such height. He testified he can make furniture and other products in his home shop, and even expressed an idea of going into business in that area after the instant proceedings were concluded. He also testified to no limits on his driving, although he eschewed local delivery jobs as being the equivalent of "flipping burgers."

63. Claimant has limited himself to which types of jobs he would be willing to explore. Fortunately, he is at a point in his life where financially he has that luxury. However, just because Claimant is not interested in certain jobs, like local delivery driving, does not mean he can parlay his reluctance into a higher disability rating. Whether he is interested in pursuing various job opportunities which are within his restrictions is not relevant so long as the jobs are appropriate for his conditions and skills.

64. Claimant cannot return to his time-of-accident job as a diesel mechanic. He has lost that segment of his labor market. He has also lost driving jobs which require lifting greater than 50 pounds or more than occasional overhead work. Claimant has expressed a desire to remain close to home and his wife who has medical issues. As such, over the road driving jobs, even "touchless" or "hook and go" jobs, are not appropriate for Claimant.

65. Local jobs, including some delivery driver jobs, as well as other jobs which are medium level lifting and do not require frequent overhead lifting with Claimant's non-dominant left arm, would be appropriate for Claimant. Ms. Nelson identified numerous such jobs in a one-day job search. Included in her report were jobs such as:

- Local dedicated route driver of general mail on a hook and go or "no touch" basis, which pays $325 per shift (roughly $40 per hour on an 8 hour shift, $32.50 on a 10 hour shift, or $27 per hour on a 12 hour shift).
- PODS local driver, specifically noted "no lifting required." It pays $20 per hour with benefits.
- Shuttle bus driver paying $18 to $23 per hour, working full time. Job comes with $2500 signing bonus and health insurance coverage, with a 401k plan available after one year.
- Driver for Title One, delivering documents such as loan packages, checks, title commitment papers, and other such paper documents. Uses company car and may require some reception work. Salary not disclosed.
- Courier for pharmaceuticals, lab test results, samples and supplies to assisted living and skilled nursing facilities. No salary disclosed.
- Commercial Tire had opening for driver to pick up and drop off fleet and customer vehicles. No salary information disclosed.

- Cookie delivery driver. Lifting up to 30 pounds. Hourly wage between $8 and $12 per hour, plus tips, plus a delivery fee of $1.50 per delivery, plus weekly free cookies.
- Old Dominion was looking for a person to check in drivers, duties included checking accuracy of driver paperwork, accounting for bills of lading, scanning records into the system, and other trucking paperwork. No salary disclosed.
- In Mountain Home, there was an auto parts delivery driver position paying between $12 and $15 per hour which required occasional lifting to 50 pounds.

These were a sampling of jobs which appeared to be well within Claimant's physical abilities and work restrictions in the Boise/Mountain Home market. Ms. Nelson also discussed two CNC machinist jobs willing to train apprentices on the job, in a field Claimant was specifically interested in pursuing.

66. Three of the jobs paid at or over Claimant's time-of-injury wage of $20 per hour. The other jobs would likely pay less.

67. Claimant argues his "wage earning capacity" is better reflected by his much higher wages he made when he was self employed as an over the road truck owner/operator. While the math used to calculate his income during that time frame is suspect (combining corporate income and personal income and taking the total of the two and may include passive income), more importantly it is improper. Claimant removed himself from that market well before his accident. He intentionally relegated himself to local jobs for the sake of his family and the fact that he was approaching retirement and was tired of long haul work. Nothing in the record supports the idea that over the road driving was an option for Claimant and thus such jobs should not be used when figuring his earning potential. Instead, the more realistic way to calculate his earning capacity was to consider the local jobs he pursued after leaving the road. Claimant's $20 per hour

wage at the time of his injury is indicative of his earning capacity given the employment constraints Claimant imposed on himself as he "coasted" toward retirement at age 67.

68. Claimant has lost the mechanic segment of his job market. He also lost some driving jobs. He still has the ability to do medium level work within his restrictions. While many jobs fit within that category, Claimant's limitations on his left arm over shoulder height lifting and repetitive work take away the core of Claimant's past work experience. His skills in many areas, including management, truck brokering, and fabrication, tend to lessen the effect of his injury on his ability to maintain employment.

69. Many of the jobs still available to Claimant pay near or just below his time-of-injury job, and his then-current wage earning capacity, while a few pay more. Should Claimant choose to reenter the job market, he might be able to duplicate his time-of-injury wages, but he might end up starting somewhat below that level.

70. After reviewing the record as a whole, and considering all competing arguments of the parties, including the advisory opinions of vocational experts, Claimant did suffer permanent partial disability in excess of his impairment rating as a result of his industrial accident. Claimant was given permanent restrictions which he did not have prior to his injury. These restrictions will impact the number of jobs available to him, including mechanic and some driving jobs, which had been a reliable source of income for Claimant for years.

71. When considering the totality of the evidence, Claimant has proven a permanent partial disability of 30%, inclusive of his permanent impairment previously paid, from his industrial accident of August 23, 2019.

CONCLUSIONS OF LAW

1. When the record as a whole is considered, Claimant has failed to make a *prima facie* showing he is totally and permanently disabled under the futility branch of the odd lot doctrine.

2. When the record as a whole is considered, Claimant has proven he is entitled to additional permanent partial disability benefits of 30%, inclusive of his disability previously paid as permanent impairment.

RECOMMENDATION

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

DATED this 8th day of November, 2022.

INDUSTRIAL COMMISSION

Brian Harper

Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of December, 2022, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by email transmission and by regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID M. SHAW, Claimant, v. TRUCKPRO, LLC, Employer, and TRAVELERS PROPERTY & CASUALTY COMPANY OF AMERICA, Surety, Defendants.	**IC 2019-024513** **ORDER** FILED DEC 09 2022 INDUSTRIAL COMMISSION

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

Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own. Based upon the foregoing, IT IS HEREBY ORDERED that:

1. When the record as a whole is considered, Claimant has failed to make a *prima facie* showing he is totally and permanently disabled under the futility branch of the odd lot doctrine.

2. When the record as a whole is considered, Claimant has proven he is entitled to additional permanent partial disability benefits of 30%, inclusive of his disability previously paid as permanent impairment.

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

DATED this the 9th day of December, 2022.

INDUSTRIAL COMMISSION

Aaron White, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of December, 2022, a true and correct copy of the foregoing **ORDER** was served by email transmission and regular United States Mail upon each of the following:

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