BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GLENN P. LAME, Claimant, v. KENWORTH SALES COMPANY, Employer, and TRAVELERS CASUALTY & SURETY COMPANY, Surety, Defendants.	**IC 2018-030573** **IC 2019-002788** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED: AUGUST 4, 2023**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John Hummel, who conducted a hearing in Pocatello, Idaho, on July 19, 2022. Claimant, Glenn P. Lame, was present in person; Fred J. Lewis, of Pocatello, Idaho, represented him. Clinton E. Miner, of Middleton, Idaho, was also counsel of record for Claimant. W. Scott Wigle, of Boise, Idaho, represented Defendants Kenworth Sales Company and Travelers Casualty & Insurance Company. The parties presented oral and documentary evidence. Post-hearing depositions took place and the parties later submitted briefs. The matter came under advisement on June 29, 2023.

ISSUES

The noticed issues are as follows:

1. Whether and to what extent Claimant is entitled to the following benefits:

a. Medical care;[1]

b. Permanent partial impairment (PPI); and

c. Permanent partial disability (PPD); and

2. Whether apportionment for a preexisting condition pursuant to Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

Claimant contends that he sustained a 10 percent permanent partial impairment (PPI) based upon permanent work restrictions, as assigned by Dr. Wathne, related to the industrial accidents of October 24, 2018 and January 17, 2019. Claimant further contends that he has sustained an overall permanent partial disability (PPD) in the amount of 59.4 percent, inclusive of impairment, and that the disability should not be apportioned.

Defendants contend that Claimant's impairment and disability are largely accounted for by injuries and wear and tear sustained in Claimant's past work and life as a heavy diesel mechanic. They allege that when Claimant came to work for Employer, "he brought with him a condition of both his shoulders," including severe osteoarthritis in both shoulders. Defendants argue that Claimant's preexisting shoulder condition is relevant to whether he has sustained any PPI or PPD. Nevertheless, Defendants acknowledge that whether Claimant has sustained any PPI and/or PPD as a result of the industrial accidents is a "fair question," and they submit this case to the Industrial Commission for determination of the correct apportionment of Claimant's industrial injuries with his preexisting conditions.

[1] Claimant's Opening Brief argued that Claimant was entitled to PPI and PPD benefits but did not address medical care. Surety already covered Claimant's total shoulder replacement and related medical benefits. Similarly, Defendants did not address health care in their brief. The issue of medical care is thus deemed waived.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony adduced at the hearing held on July 19, 2022;
3. Joint Exhibits 1 through 31;
4. The post-hearing deposition of Richard A. Wathne, M.D., taken on November 29, 2022; and
5. The post-hearing deposition of Cali C. Eby, MPA, CDMS, CIWCS, taken on February 17, 2023.

FINDINGS OF FACT

1. **Claimant's Background**. At the time of hearing, Claimant resided in Inkom, Idaho. He was 53 years of age and was born in Alaska on July 30, 1968. Tr., 17:11-16; Claimant's Dep., Ex 29, 842 (7:5).

2. Claimant comes from a military family and lived in "quite a few states," including Utah, North Carolina, and Oklahoma, before moving to Idaho, while growing up. In Idaho, Claimant lived in Nampa, Caldwell, Idaho City, and Preston. He graduated from high school in Preston, Idaho. Tr., 17:19-22; Claimant's Dep., 842 (6:19-7:12).

3. In high school, Claimant performed poorly academically but excelled in the subjects of auto shop and agriculture. Tr., 17:23-25. In high school, Claimant played freshmen football and also wrestled. *Id*. at 18:1-7. His class rank was 323 out of 331. *Id*. at 18:8-10.

4. After high school, Claimant attended the Wyoming Technical Institute in Laramie, Wyoming. He successfully completed his course of studies and received a certificate or

associate degree in automotive technology; he received mostly As and Bs in his courses. Tr., 18:14-19:1.

5. Prior to entering the military, Claimant worked as an automotive mechanic for six months for West Motor Company in Preston, Idaho. *Id*. at 19:2-9. He then worked for Chrysler Dodge Country, in Logan Utah, as an automotive mechanic. This work included oil changes, changes on tires, front-end mechanic work, work on engines, and interior parts on cars. *Id*. at 19:10-17. *See also*, Claimant's Dep., 843 (10:13-20).

6. At age 20, Claimant joined the Army. For his first four years of service, Claimant was an infantryman with the 82nd Airborne Division, stationed at Fort Bragg, North Carolina. He received a deployment to Operation Just Cause that "captured Noriega," and then he served in Saudi Arabia during Operation Desert Shield. His rank after four years of service was E-5, Sergeant. Claimant ended his military career as a motor sergeant at Fort Still, Oklahoma. He received an honorable discharge when his term of service expired. He did not have any disability upon completion of his term of military service, although he would later develop service-related hearing loss. Tr., 19:18-21:13; Claimant's Dep., 842 (7:13-8:18).

7. **Post-Military Employment History**. After the military, Claimant worked in various diesel mechanic positions. He worked on everything from "cars to tractors, mining equipment, motors, shovels," backhoes, hydraulic systems and "everything in between." Claimant's Dep., 843 (13:9-17).

8. Claimant first went to work post-miliary for Watson Enterprises in Pocatello, Idaho as a heavy wheel mechanic or semi mechanic. This job involved heavy duty work including oil changes, brakes, clutches, drive lines, U-joints, front end alignments, and trailer

maintenance for semi-trucks. Claimant received $8.00 per hour for this work. He worked for Watson for six months. Tr., 21:14-22:6.

9. Claimant next worked for the Pocatello School District. First hired as a light duty maintenance mechanic. Claimant received a promotion to full-time duty as a mechanic for $8.53 an hour. He then received a promotion to mechanic supervisor. He worked for the district from December 1994 through June 2012. His ending salary was $21.83 an hour. In this job he took care of "all the vehicles and equipment" of the school district. Tr., 22:7-24; Claimant's Dep., 844 (15:14-17).

10. Claimant then worked for Western States Equipment, a heavy truck repair facility, as a truck shop mechanic working on wheel bearings, wheel seals, engine rebuilds, clutches, drive lines, and anything else "that the truck needed at the time." Claimant worked mainly on 18-wheeler semi-trucks, motor homes, school buses, and even light duty vehicles. He held this job for approximately six months. Tr., 22:25-23:18; Claimant's Dep., 844 (15:12-17.) He earned $22.50 per hour at Western States Equipment. Tr., 24:1-4.

11. Claimant next worked for the City of Pocatello maintaining the city's fleet of vehicles as a mechanic. He held this job for five years until 2016 and his ending salary was $20.83 per hour. He lost this job when he lost his CDL certification due to a drunk driving charge. *Id.* at 24:5-18. Claimant's Dep., 845 (19:18-24).

12. After the City of Pocatello job and after regaining his CDL, Claimant worked for Kiewit Mining Group in Soda Springs, Idaho, as a heavy equipment mechanic. He worked on "everything from light duty pickups to haul trucks to track hoes to water pumps… all the equipment they had to run the mine." He earned $28.50 an hour in this job and worked it for eight months. Tr., 24:19-25:5; Claimant's Dep., 844 (15:18-19).

13. **Subject Employment**. Claimant began working for Employer in Pocatello on October 1, 2017. Claimant's Dep., 846 (22:8-15.) His job duties at Employer were to repair and work on "anything" he was assigned, including 18-wheeler semi-trucks with trailers, motor homes, school buses, and similar vehicles. He received a wage of $25.00 per hour for a 40-hour work week. Tr., 25:6-25.

14. Examples of work that he did for Employer "depended upon what pulled in that day. We could be doing a turbo replacement. We could be doing a water pump, radiator replacement, a clutch replacement, drive lines, U-joints in a drive line, wheel seals, wheel bearings, brakes on a tractor and trailer. We could be doing fifth wheel rebuilds, right down to the electrical wiring in the cab on the outside, installing driver seats, passenger seats, changing windshields." *Id*. at 26:3-11.

15. Tire and wheel assemblies that Claimant worked on weighed in at 180 pounds. Brake drums weighed 100 to 150 pounds. Drive lines weighed 100 pounds. Flywheels weighed between 200 and 300 pounds. Differentials weighed 300 to 400 pounds. Axle shafts weighed 80 to 100 pounds, however the entire axle assembly weighed as much as 600 or 700 pounds. Fifth wheel hitch plates weighed 150 to 250 pounds. Alternators weighed 40 to 50 pounds. Leaf springs weighed between 300 and 600 pounds. Claimant was able to lift these amounts, with or without the aid of other workers, and performed these duties without accommodation at Employer up until his first accident on October 24, 2018. *Id*. at 26:20-30:4; 39:10-13; 40:11-15; 42:1-3; 42:11-43:5.

16. Claimant's performance evaluation, delivered two weeks prior to his second industrial accident, showed that Claimant was performing at a high level, ranking in the 91st percentile, above the 88th percentile required by Employer. Ex. 14:502.

17. **Pre-Industrial Accident Medical History**. Claimant did not have any significant injuries in military service. As he put it, "About the only thing I ever did was road march too far and swelled up my Achilles tendon." He received medical treatment but the problem resolved. He also suffered hearing loss as a result of military service that later required hearing aids. Claimant's Dep., 849 (36:24-37:25).

18. Claimant had a gout condition extending back twelve to thirteen years from the date of his deposition in December 2020. Claimant's Dep., 850 (38:14-39:16).

19. As a child, Claimant broke his wrist and his thumb in separate accidents. He did not have any consequences from those incidents. Claimant's Dep., 850 (40:25-15).

20. Other than the industrial accidents at Employer, Claimant did not have any significant prior injuries while on the job, other than minor "cuts and bruises," nothing that required medical attention. His records on file with the Industrial Commission show only the two industrial accidents in this case. *Id*. at 851 (45:9-16); Ex. 15:000514.

21. Claimant did not at first recall any problems with either shoulder prior to the industrial accidents at Employer in his deposition. Claimant's Dep., 852 (46:5-47:1). Under questioning, however, he admitted waking up every day with pain in his right shoulder at least six months prior to the first industrial accident. *Id*. at 852 (49:10-19).

22. Dr. Evan Holmstead, M.D., of Mountain View Family Medicine, who was Claimant's primary care physician, referred Claimant for a lumbar spine X-ray on April 13, 2007. Claimant had been complaining of low back pain with right leg pain for five days. The results of the X-ray were essentially normal. Ex. 1:00002.

23. Claimant complained to Dr. Holmstead on November 1, 2007 of right inguinal pain that had been bothering him for approximately a week. Claimant did not think he injured it

but acknowledged that he had a "very strenuous job." Dr. Holmstead diagnosed an abdominal strain. Ex. 1:00005.

24. On August 28, 2009, Claimant complained to Dr. Holmstead of numb toes on both feet. Dr. Holmstead diagnosed parasthesia stemming from peroneal nerve entrapment. Ex. 1:000011.

25. Dr. Holmstead diagnosed Claimant with a back contusion on March 17, 2019. Ex. 1:000012.

26. On September 7, 2017, Dr. Holmstead saw Claimant in his office following a "syncopal" (fainting) episode at work, in which Claimant was transported to the emergency room by ambulance. Dr. Holmstead released Claimant back to work. Ex. 1:000026.

27. Claimant had an electroencephalogram after sustaining two bouts of losing consciousness. No abnormalities were seen in the study. Ex. 1:000028.

28. Claimant presented to Dr. Bradley M. Burton, M.D., of Mountain View Family Medicine, on March 21, 2018, for an initial evaluation of "atraumatic" bilateral shoulder pain, which Claimant had been suffering from for a week. Both of Claimant's shoulders were sore and he could not lift them over his head. He reported that he worked in a heavy mechanic job. Both shoulders were "popping," but the left shoulder did not pop as much. Claimant felt that his right shoulder was dislocated. Claimant was not interested in an orthopedic referral because he did not wish to do surgery. Dr. Burton referred him for physical therapy, performed a right shoulder cortisone injection, and encouraged Claimant to return in two weeks. There is no record that Claimant returned. Ex. 1:000029.

29. The parties produced records of Claimant's care by the Veteran's Administration (VA) in Exhibits 3 and 4. Most of the records had to do with non-industrial related conditions of

Claimant, such as service-connected hearing loss and Claimant's alcohol and tobacco use. The VA incidentally evaluated Claimant on July 3, 2018 and July 1, 2019, during annual visits, for his right shoulder injury in the context of other issues, such as tobacco and alcohol use.

30. In a July 3, 2018 VA visit, Dr. Mark Butler, MD, noted in pertinent part as follows: "R shoulder w/ rot cuff partial tear, he has handouts from brother who is PT [sic] as of prior dislocations on the right shoulder w/ prior injuries, no prior surgeries, seems to have rot cuff possibly labral tear?[2] Will start w/ PT for now, and f/u. May need ortho referral if PT[3] is ineffective." Claimant did not receive any work restrictions, according to the medical record. Ex. 3:000121.

31. Nic Hale, PA-C, evaluated Claimant on July 27, 2018 at Physicians Immediate Care Center in Pocatello. Claimant presented with a chief complaint of "intermittent muscle pain of the right shoulder since Mon. July 25, 2018." Claimant described the pain as "sharp" and the severity as "mild." Without a work-up, PA-C Hale diagnosed radiculopathy, site unspecified and encouraged Claimant to return to the clinic if symptoms did not abate. PA-C Hale was unable to reproduce the symptoms with neck/shoulder ROM and testing. Claimant apparently did not return to the VA clinic with further complaints of shoulder pain. He did not receive any work restrictions at this visit. Ex. 2:000048-49.

32. **First Industrial Accident**. On October 24, 2018, Claimant had his first industrial accident at Employer. Claimant was scrubbing steam bay walls with a brush on a pole when his shoulder "popped." Claimant observed that "it didn't quite send me to my knees, but I knew something wasn't right." Tr., 53:16-24.

[2] The provider did not order a work-up related to the right shoulder.

[3] There are no records of physical therapy in Claimant's VA records.

33. Claimant explained that before the accident, "it was normal aches and pains. You know, a little stiffness, but like I said, I could control it with ibuprofen usually. And then after the accident, it was night and day difference. I could tell I'd either put something out of place or something got – just popped wrong or something, but I knew something wasn't right because it hurt." Tr., 54:9-16.

34. Within a week, Claimant returned to full duty at Employer, performing all the lifting duties he previously performed. *Id*. at 57:2-10.

35. **Second Industrial Accident**. On January 17, 2019, Claimant was changing a wheel seal on a truck, an inboard style system assembly. This was significant because it required Claimant to "pull the duals, the hub, and the brake drum all together as one;" the entire assembly weighed 500 pounds. Claimant was also using a defective wheel dolly to lift the assembly, which was tilted to the right. Claimant was able to lift the assembly off with the dolly, but in putting it back on, the dolly was up too high, so he picked up the entire assembly and dolly and as he was walking it forward, his right shoulder "popped." Claimant had never felt pain at this level before. Nevertheless, Claimant was able to replace the assembly on the truck and finished the job. Tr., 61:4-65:22.

36. Claimant tried to tell his supervisor, Dustin Whitehead, about the accident, but he was busy with a customer that day. Tr., 65:23-25. Claimant was able to tell his supervisor the following day. Claimant iced his right shoulder and took ibuprofen the night following the accident. He also ended up sleeping in his recliner because he couldn't lie on his arm. He also taped his arm to his body. *Id*. at 66:1-25.

37. Compared to his "aches and pains" preceding the October 24th accident, the pain from after the January 17th accident was "excruciating" to Claimant. *Id.* at 67:3-12.

38. **Medical Care Following Industrial Accidents**. On October 31, 2018, Claimant received a referral for an upper extremity CT scan of Claimant's right shoulder at Portneuf Medical Center. The findings were as follows: "Severe osteoarthritis of the glenhumeral joint. Prominent inferior osteopohytic spurs are present greatest of the inferior medial humeral head. Subcortical solerosis and cystic changes are present. There is bone on bone contact anteriorly and inferiorly. Glenhumeral joint effusion with fluid extending into the subscapular recess. Rotator cuff tendons are grossly intact. AC joint maintained. No subacromial spur. No acute fracture or evidence of recent dislocation. No soft tissue mass." Ex. 1:000032.

39. On November 7, 2018, Dr. Holmstead met with Claimant. He discussed the results of Claimant's CT scan with him. Dr. Holmstead noted, in pertinent part, as follows: "He [Claimant] injured his right shoulder on October 24 while he was at work. He felt a pop and then had significant pain in the shoulder. He was seen at workmed they did an x-ray there was a question of a fracture. He had a CT scan of his right shoulder done on October 31. This showed severe osteoarthritis of the right shoulder. He has been taking ibuprofen but is having difficulty sleeping and moving the right arm because of the pain." The physical exam showed that Claimant had a "significant reduction in range of motion secondary to pain." Dr. Holmstead assessed that Claimant needed to see an orthopedic surgeon to discuss options. He made a referral. If Claimant chose not to accept the orthopedic referral, Dr. Holmstead opined that they could perform a steroid injection. Ex. 1:000034.

40. Claimant presented to Lana Borghothaus, PA-C, of Physicians Immediate Care Center on November 28, 2018. His chief complaint was pain in the scapular region of both shoulders since November 25, 2018. Claimant reported it was the result of an injury at work. Claimant "also report[ed] muscle pain, numbness/tingling, weakness, and back pain as abnormal

symptoms related to the complaint." PA-C Borghothaus released Claimant with instructions to return to the clinic if symptoms did not improve and to perform stretching exercises, as tolerated, but to limit weight lifting. Ex. 2:000061-64.

41. Claimant returned to Dr. Holmstead on December 20, 2018. Dr. Holmstead noted Claimant's chief complaint as follows: "SHOULDER RIGHT, BACK. Started day after Thanksgiving, tried prednisone no benefits. He went to urgent care and they gave him some stretches to do for his back. He has been seeing an orthopedic surgeon for his right shoulder. He said he needed a shoulder replacement. He works as a mechanic and is afraid he will not be able to go back to work after shoulder replacement surgery." Claimant appeared very uncomfortable in the physical examination. Dr. Holmstead talked to Claimant about his options and thought it likely that at that point Claimant would need a shoulder replacement. Claimant wanted a referral for a second opinion from an orthopedic surgeon, which Dr. Holmstead provided.[4] Ex. 1:000036-37.

42. Claimant returned to Physicians Immediate Care Center on January 21, 2019, and received an evaluation from D. Hamill, PA-C. The triage notes read: "Pain – Right Shoulder. Pt was lifting at work and felt/heard a pop in his right shoulder, and progressively getting worse. Pt kept ice on it all weekend. Since last Thursday. Originally injured in October." Claimant described his pain at this visit as moderate. He also reported muscle pain, swelling, and weakness. PA-C Hamill prescribed Norco and took Claimant off work until January 24, 2019. He gave Claimant instructions to follow-up with his primary care physician within four days. Ex. 2:000068-70.

[4] There are no records of Claimant meeting with an orthopedic surgeon other than Dr. Wathne. *See*, ¶ 47 below.

43. Claimant presented to the Medical Practices Division of Portneuf Medical Center in Pocatello on October 25, 2018, where Dr. Randall Fowler, MD, evaluated his right shoulder. Dr. Fowler ordered an X-ray which he reviewed with Claimant. The X-ray showed a "lucency through the inferior margin of the right bony glenoid only seen on the external rotation view. There is spurring along the inferior margin of the right humeral head near the glenohumeral joint." The impression was as follows: "Possible nondisplaced fracture involving inferior margin of right bony glenoid. CT scans could be performed to confirm." Claimant reported a past history of right shoulder soreness with a cortisone injection 8 months beforehand by Dr. Holmstead's PA, but Claimant denied past specific injury but rather arthritis. Claimant's right shoulder improved with the cortisone injection. The immediate reason for Claimant's visit was an injury at work the day before while Claimant was scrubbing walls. Claimant received instructions to follow up with WorkMed in one week for reevaluation, sooner if any intervening problems or concerns arose. Ex. 5:000229-234.

44. On November 1, 2018, Claimant returned to the Portneuf Medical Center WorkMed, where Dr. Fowler evaluated him again. Claimant reported that he was working modified duty but was ready to return to full duty at work. Dr. Fowler noted that Claimant had had a CT scan done of his right shoulder due to the abnormality shown on the X-ray. The CT scan revealed severe osteoarthritis of the glenohumeral joint, however there was no subacromial spur, no acute fracture or evidence of recent dislocation. Dr. Fowler approved Claimant returning to full duty. *Id.* at 000240-243.

45. S. Boe Simmons, PA-C, of Ortho Idaho in Pocatello, saw Claimant in his office for an evaluation on November 16, 2018. Claimant continued to have pain in the right shoulder from his October 24, 2018 accident. PA-C Simmons noted in pertinent part as follows:

> At this point, Glenn is remarkably symptomatic in regard to his right shoulder. I reviewed his x-rays and his CT scan. He has advanced degenerative changes in the glenohumeral joint with a large osteophyte off the humeral head inferiorly. He reports that he is having a difficult time with his job duties secondary to his pain. He is having significant pain with any attempted overhead activities. He is not able to sleep well at night. He has taken anti-inflammatories but has not had any recent treatment for this condition. He has advanced arthritis and most likely will need a primary total shoulder arthroplasty. He is only 50 years old. I would like to see if we can get him back to a functional level with an intra-articular corticosteroid injection. He tolerated the injection well. I will see him back in 4 weeks so I can continue to monitor his progress.

Ex. 6:000254.

46. Claimant presented to PA-C Simmons again on December 13, 2018. He was still having "significant" pain in his right shoulder. PA-C Simmons repeated his opinion that a total shoulder arthroplasty was indicated. Claimant stated that he would consider surgical intervention. *Id*. at 000255,

47. Claimant returned to Dr. Fowler on January 24, 2019. Dr. Fowler prescribed ibuprofen, icing the shoulder, a sling, and physical therapy. He noted that Claimant had received a referral to Dr. Wathne "for evaluation and consideration of shoulder joint replacement." *Id*. at 244. The chart note read in pertinent part as follows: "The patient had a previous right shoulder injury. X-rays were obtained showing significant degenerative changes confirmed on a follow-up CT scan due to suspicion of a possible humeral head fracture. He states despite being full-duty he has never fully been pain-free with his right shoulder. Is being seen by both Simmons and Dr. Wathne in his office and for previous right shoulder symptoms." Ex. 5:000245.

48. Dr. Richard Wathne, MD, also of Ortho Idaho, evaluated Claimant on February 5, 2019, for the first time. Dr. Wathne noted that Claimant had had two work-related accidents on October 24, 2018 and January 17, 2019. Claimant indicated that "he was not having any pain in

his shoulder whatsoever until the on-the-job injury in October 2018."[5] Dr. Wathne noted in pertinent part as follows: "While he [Claimant] does have some underlying glenohumeral arthritis, the majority of his symptoms appear to be rotator cuff related, and I am concerned that he has sustained both a rotator cuff and long head biceps tendon injury." Dr. Wathne recommended proceeding with an MRI and stated that he would obtain WC authorization for the same. Ex. 6:000256-257.

49. The MRI, performed on February 12, 2019, as read by Dr. Jared Bailey, MD, found a "near full thickness supraspinatus tendon tear approximately 13 mm in width," an "infraspinatus tendinopathy with distal insertional predominantly intrasubstance tear," and a "full thickness distal subscapularis tendon tear with mild muscle atrophy," among other findings. The MRI also found severe osteoarthritis with "bone on bone articulation and subchondral edema." *Id*. at 000258-259.

50. Claimant followed up with Dr. Wathne on February 14, 2019. After reviewing Claimant's MRI with him, Dr. Wathne had a cortical steroid injection performed by PA Simmons into Claimant's right shoulder, which he tolerated well. Dr. Wathne prescribed PT for Claimant. He stated in pertinent part as follows: "It is my opinion that his current treatment is directly related to his on-the-job injury on a more probable than not basis. I do not believe that his pre-existing osteoarthritis is causing his current symptoms." Claimant was taken off of work until the next appointment in 3 and ½ weeks. *Id*. at 000260.

51. On March 12, 2019, PA Simmons performed another cortical steroid injection into Claimant's right shoulder; Claimant tolerated the procedure well. Dr. Wathne noted that if "the injection is unsuccessful, we may need to consider possible total shoulder arthroplasty

[5] Apparently, Claimant did not report to Dr. Wathne his medical evaluations for right shoulder pain in 2018. Nevertheless, Dr. Wathne *was* aware of preexisting right shoulder pain.

surgery." *Id*. at 000262. Dr. Wathne continued Claimant's work restrictions, which included no lifting or repetitive activities with the upper right extremity. Ex. 6:000264.

52. At their April 9, 2019 appointment, Dr. Wathne observed that Claimant was still remarkably symptomatic with his right shoulder, and that the medical team had exhausted conservative measures. Dr. Wathne now recommended that Claimant receive a total shoulder replacement surgery on his right shoulder. On a more probable than not basis, Dr. Wathne found such treatment to be industrially related to the accidents of October 2018 and January 2019. He sought WC approval for the surgery. *Id.*at 000265. He also continued work restrictions for Claimant. *Id*. at 000266.

53. On May 14, 2019, Dr. Wathne prepared a report finding that Claimant required surgical intervention due to his industrial accidents and forwarded the same to Surety for its approval. *Id*. at 000272-274.

54. Having obtained approval from Surety, Dr. Wathne took Claimant to right shoulder total arthroplasty surgery on May 20, 2019, at Portneuf Medical Center. The preoperative diagnosis was as follows: "Advanced osteoarthritis, right shoulder glenohumeral joint with severe dysfunction following an on-the-job injury." The postoperative diagnosis was the same, except that it noted the rotator cuff was intact, but extensive synovitis existed in the glenohumeral joint. There were no complications of surgery. *Id*. at 000276-278.

55. Claimant was doing well at the June 5, 2019, follow-up appointment with Dr. Wathne. Dr. Wathne ordered PT for Claimant. *Id*. at 000279. He also continued Claimant remaining off work until reevaluation. Ex. 6:000280-282.

56. Dr. Wathne reevaluated Claimant on July 2, 2019. He determined that Claimant was doing well, but his return to work was complicated by the fact that Claimant drove a manual

truck and Dr. Wathne did not recommend overworking the right shoulder at that point. If Claimant returned to work, it would be with light duty restrictions. Claimant was to continue PT and wean from using a sling, with follow-up in 6 weeks. Ex. 6:000285.

57. At the next appointment on August 1, 2019, Claimant was doing well and continuing PT. He had been to work in a light duty capacity. Next follow-up was scheduled for four weeks out. Dr. Wathne continued Claimant's light duty restrictions. *Id.* at 000287-288.

58. On September 10, 2019, Claimant was doing "much better." He continued PT and light duty at work. Examination revealed an improved range of motion for Claimant's upper right extremity. Claimant had made "excellent progress." Dr. Wathne continued light duty restrictions and had plans of releasing him at the next appointment. *Id*. at 000296.

59. At the next appointment on October 15, 2019, Claimant reported that he had minimal improvement during the past month. Dr. Wathne assessed ongoing rotator cuff inflammation and prescribed medication. Claimant was continued under work restrictions. *Id*. at 000297-299.

60. On November 21, 2019, Dr. Wathne recommended proceeding with a functional capacity examination (FCE) because of Claimant's limited progress. Claimant had continued difficulty with above-shoulder activities. *Id*. at 000300.

61. Claimant underwent an FCE on January 21, 2020, by Nathan Hunsaker, PT, of DSI Work Solutions, which indicated that Claimant was capable of a light demand job duty capacity with limited lifting in the right extremity. *See*, Ex. 10. Claimant expressed concern "that he may lose his job as he feels they could hire someone and pay them much less than what they are paying him to do what he is doing right now, which is mainly cleaning." Claimant had an average pain level of 5-8/10. He was worse at the end of the workday and used ice and ibuprofen

to ease the pain. Claimant was unable to pursue previous pastimes, like hunting and fishing, feeding cows and horses, and similar pursuits. He also had difficulty driving his stick shift truck. Ex. 10:000459-460.

62. While Claimant's other joints were within normal limits, his upper right extremity was limited in motion and by weakness, according to the FCE. This included vertical lifts, elevated activity, and lift-carry functions. He was able to lift-carry, and from the floor, 30 pounds occasionally, 15 pounds frequently, and 7.5 pounds constantly. To the shoulder, he was able to lift 15 pounds occasionally, 7.5 pounds frequently, and 0.0 pounds constantly. Push-pull was limited to 50 pounds push, 61 pounds pull occasionally, 25 pounds push frequently, 30 pounds pull frequently, 12 pounds push constantly, and 15 pounds pull constantly. He was also unable to perform elevated activities at or above 70" in height. Claimant was not limited in other areas such as hand grip, pinch grip, and hand coordination. Overall, Claimant demonstrated functional abilities in the light demand capacity category. *Id.* at 000461-464.

63. At the 10th month follow-up examination with Dr. Wathne, on March 31, 2020, Claimant reported that he had been unable to return to full duty at work. Dr. Wathne determined that Claimant had reached maximum medical improvement (MMI) and assigned him a 24% right upper extremity impairment rating, of which a third was attributable to preexisting osteoarthritis, leaving Claimant with a 16% right upper extremity impairment rating, which equaled a 10% whole person impairment rating. Dr. Wathne recommended permanent restrictions of no lifting greater than 30 pounds to the waist level, 15 pounds to the shoulder level, and no more than 5 pounds above the shoulder. Claimant was instructed to limit any repetitive lifting activities in the upper right extremity. Claimant was capable of light demand job duty capacity as outlined in the FCE. He would now be followed on an as needed basis. Ex. 6:000307-308.

64. On February 4, 2020, Dr. Wathne signed a statement that he accepted the findings of the FCE and that it was his opinion, on a more probable than not basis, that the restrictions stated in the FCE were related to the industrial accidents. Ex. 6:000322.

65. **Deposition of Dr. Wathne**. Claimant took the post-hearing deposition of Dr. Wathne on November 29, 2022. Wathne Dep., 2:1-7. The Commission is familiar with his credentials. Dr. Wathne operated a private practice in orthopedic surgery for primarily the knees and shoulders, and also engaged in forensic work such as IMEs. *Id*. at 5:3-22.

66. Dr. Wathne, based upon the first MRI, "was not impressed with significant muscle atrophy in that supraspinatus [as was Dr. Chen, *see infra*]. The radiologist referred to it as mild. Certainly, if you have significant muscle atrophy, then that's a chronic condition and usually takes a couple of years to develop." Thus, Dr. Wathne did not think Claimant suffered from significant muscle atrophy in his right shoulder. *Id*. at 10:17-11:9.

67. Commenting on the need for surgery, Dr. Wathne described the causation as follows:

> Well, you know, obviously he was working at a high level, lifting heavy parts and installing them on trucks prior to the October injury. And then in the January injury, I think the – like I said, that's kind of the straw that broke the camel's back. He was, you know, shifting the cart or – or dolly and just had this immediate pop with pain in his shoulder, and I was unable to bring him back without surgery. And I really attribute all of that to the – both the injuries, initially, but certainly the January injury seemed to be the straw that broke the camel's back because he was still functioning and doing his job duties prior to that.

Id. at 15:9-21.

68. During the operation on Claimant, Dr. Wathne found "a lot of inflammatory tissue in his joint," synovitis, which contributed to his pain, as well as a "very degenerative biceps tendon with inflammation around it" that was a pain producer. Dr. Wathne further found an

intact rotator cuff, although it had degeneration, thus it was not necessary for him to perform a rotator cuff repair in addition to the total shoulder replacement. "And obviously, he [Claimant] had advanced arthritis in the joint, in the glenohumeral joint." Nevertheless, the surgery did not change Dr. Wathne's opinion about causation, for the following reasons:

> Because while he had underlying pre-existing arthritis, he was functioning at a high level until he had these two on-the-job injuries, and – working jobs without restrictions. And basically, that's what threw him over the hump and, you know, led to that – led to that surgery. And I was expecting to encounter exactly what I did encounter in that surgery.

Wathne Dep.,16:1-17:8.

69. Dr. Wathne agreed with Defendants' counsel that given "the status of the arthritis that [Claimant] had in his right shoulder," he probably should not have been doing heavy diesel mechanic work in 2018. *Id*. at 22:8-12. Dr. Wathne further agreed that Claimant had end-stage arthritis prior to his industrial accidents, and not caused by his industrial accidents. *Id*. at 22:13-23:2.

70. The following exchange occurred between Defendants' counsel and Dr. Wathne regarding the lack of a finding on Claimant's rotator cuff:

> Q. … But at surgery, the rotator cuff was intact, apparently?
>
> A. It didn't need to be repaired, right. It was intact. There was definitely inflammation there.
>
> Q. Is inflammation something that, by its very nature, has to be acute?
>
> A. No, you can have chron – you can have chronic inflammation.
>
> Q. Can you say for sure that it was caused by either or both of his accidents, this level of inflammation?
>
> A. Well, I think putting together the onset of his significant pain that he had, and then encountering that type of inflammation at the time of surgery, that I could say that that was more than likely the cause of it rather than just his pre-existing arthritis.

Id. at 28:3-19.

71. Dr. Wathne admitted that Claimant was having pain in his shoulder before October of 2018. Wathne Dep., 29:3-8.

72. Dr. Wathne admitted that the need for a total shoulder surgery was present by December 3, 2018, the date that Mr. Simmons evaluated him. *Id.* at 32:1-6.

73. Counsel for Defendants and Dr. Wathne had the following relevant exchange to whether there was any "objective" evidence supporting Dr. Wathne's opinions:

> Q. From your review of the diagnostic studies, including the MRI that you ordered, did you come across any findings in those diagnostic studies that can be explained only by an acute traumatic injury?
>
> A. The reaction in fluid around his biceps tendon and the rotator cuff.
>
> A. … For the most part, it happens as a result of trauma there. And, you know, you sort – you sort of reach this, I think, tipping point in the arthritis, you know, that a certain amount of insults and then you kind of go down – I kind of say you fall off the curve and – on this bell-shaped curve – and you can't go back to your – to your baseline where you were functioning.
>
> Q. Is there anything else in the diagnostic studies, other than the fluid buildup, that you think could only have arisen as a result of trauma as opposed to his ongoing degenerative issues?
>
> A. well, you know, partial tearing in his rotator cuff tendon, signal within his long head of the biceps tendon –
>
> Q. Those have come about by trauma?
>
> A. More than likely they – they came about by a micro trauma, right; so it's just a repetitive type of thing, such as had that insult when he was scrubbing the wall in October.

Id. at 33:3-34:6.

74. Dr. Wathne admitted that Claimant did not tell him he had any medical treatment and/or a cortisone shot for his right shoulder before the industrial accidents. He learned of it after

the fact from other medical records. Nevertheless, the fact that Claimant did not tell him about previous treatment did not change Dr. Wathne's opinion on causation. *See, e.g.*, Wathne Dep., 42:5-18; 46:11-25. *Id.* at 39:15-40:4.

75. **Independent Medical Evaluation**. Dr. Qing-Min Chen, MD, performed an IME at the request of Surety on April 12, 2019. Ex. 9:000438. His primary finding was as follows:

> "The MRI that was done on February 12, 2019, showed a high-grade distal supraspinatus tendon tear without restriction as well as mild muscular atrophy. It takes almost 18 months before you see muscular atrophy. The claimant's initial report of injury was in October 2018 and a secondary injury in January 2019. *He cannot have gotten muscular atrophy so quickly from the initial date of injury, thus the only conclusion we can draw from this is that he already had a chronic tear across his rotator cuff tendon.* Likewise, the act of lifting a wheeled dolly is pretty benign, it is not like he got hit by a car or when he had a fall from a height. He was literally just lifting a wheeled dolly, to rupture his supraspinatus, infraspinatus as well as subscapularis tear from such a benign act along with the longitudinal split and tear of the biceps tendon would be highly unlikely and improbable. Thus I can only conclude that the majority of these findings across his right shoulder are pre-existing in nature. *The act of lifting the dolly was the proverbial straw that broke the camel's back.*[Emphasis added.]

Id. at 00044.

76. Dr. Chen explained in pertinent further as follows: "The act of lifting the dolly tore the few remaining fibers of the rotator cuff and did pathologically worsen the pre-existing condition. Thus I assigned a 10% work-related rating for the rotator cuff tear. However, as a whole, the shoulder is only 2.5% work-related as the glenohumeral arthritis, biceps tendon tear, AC joint arthritis are all ongoing problems that are pre-existing in nature." *Id.* He further noted, importantly, that based on records, Claimant "did not have any restrictions prior to the industrial injury." *Id.* at 000445.

77. Dr. Chen opined that Claimant would need some kind of surgical intervention depending upon whether the rotator cuff can be repaired, if so, then a total shoulder replacement plus rotator cuff repair would be in order. 2.5% of the need for surgery would be apportioned to

the work-related accidents, while the rest of the need for surgery would be apportioned to pre-existing conditions. Ex. 9:000445.

78. Dr. Chen did not assign any permanent impairment because, as of that time, Claimant's condition was not fixed and stable. *Id*. at 000446.

79. Dr. Chen issued a second IME report on January 14, 2020. *Id*. at 000447. He noted that Claimant had his injury on January 17, 2019, and in May 2019, had a right total shoulder replacement. *Id*.

80. Based upon the actual surgical findings, Dr. Chen walked back his previous opinion. He took special note of Dr. Wathne's surgical report that found advanced osteoarthritis of the right shoulder, but with an *intact rotator cuff*, with extensive synovitis in the glenohumeral joint. Therefore, Claimant "did not have any objective findings during surgery that related to the industrial injury" thus "there are no findings that … are work-related from January 17, 2019 industrial injury." *Id*. at 000449 *and* 000451. Further, the "right total shoulder arthroplasty would have been needed regardless of the work-related injury on January 17, 2019." *Id*. at 000452.

81. Dr. Chen would not place any restrictions on Claimant at that time. "If he were to have restrictions on the road for his right shoulder, they will not be work related." *Id*.

82. Claimant had reached MMI, according to Dr. Chen. *Id*.

83. Dr. Chen assigned Claimant a 25% right upper extremity impairment, 100% apportioned to pre-existing conditions. "Again, there is no work-related injury that is causing his current condition especially given the fact that the operative note noted no rotator cuff tear." *Id*. at 000453.[6]

84. Defendants did not take the deposition of Dr. Chen.

[6] Dr. Chen was not deposed, post-hearing.

85. **Vocational Assessment.** Cali C. Eby, MPA, CDMS, CIWCS, delivered a vocational assessment at the request of Claimant on March 10, 2022. *See*, Ex. 11. Ms. Eby's qualifications are known to the Commission.

86. Ms. Eby interviewed Claimant on January 20, 2022, ***via Zoom video conference***. Claimant appeared promptly from his attorney's office, appeared his stated age, and dressed casually. He was a pleasant participant and a good historian. He had no difficulty in sitting through the interview of a little over an hour. Ex. 11:000468.

87. According to Ms. Eby's review, Claimant had no psychological condition that limits the kind or amount of work he could perform and he "had no pre-existing permanent physical restrictions." Claimant had the following permanent physical restrictions as a result of the industrial accidents:

- Dr. Chen, 1/14/20: 100% apportionment to pre-existing conditions. Return to work without restrictions.
- Dr. Wathne, 2/4/20: Adopted the restrictions set forth in the 1/21/20 FCA; overall demonstrated functional abilities at Light demand capacity with ability to lift/carry up to 30 pounds on an occasional basis.
- Dr. Wathne, 3/31/20: Determined Claimant was at MMI; 10% whole person impairment (WPI); permanent restrictions – no lifting greater than 30 pounds to the waist level, no lifting greater than 15 pounds to the shoulder level, and no lifting greater than 5 pounds above the shoulder; Claimant is capable of light demand job duties as outlined in the FCE.

Id. at 000468-469.

88. Claimant's subjective complaints were consistent with his diagnoses, according to Ms. Eby. Dr. Chen observed that objective evidence, substantiated Claimant's subjective complaints in his original IME report. Claimant is right arm dominant and continued to have pain with activity and significantly limited range of motion, despite surgical intervention and therapy. He was most limited with reaching overhead. He used over-the-counter medication and ice to treat his pain. *Id*. at 000469.

89. Claimant reported that prior to the industrial accidents to his right shoulder, he was diagnosed with high blood pressure, controlled with medication, and a heart arrhythmia, which resolved. He had previous injuries to his left wrist, left thumb, and a cracked rib. He had no previous head injuries or motor vehicle accidents. There were no reports of prior physical restrictions and he worked in his time-of-injury position without accommodation. Ex. 11:000469.

90. Claimant described to Ms. Eby the following physical capacities and limitations: no limitations in sitting, standing, walking, reclining, bending/stooping, and performing fine manipulation. He was able to carry between 30 to 35 pounds with both arms; 20 to 30 pounds with his right arm to waist level; and 8 pounds right arm waist to chest. He had some limitations in kneeling, crawling and crouching. Repetitive stair climbing bothered Claimant's right knee and shoulder; could stand on a ladder for a short time. As for reaching overhead, Claimant could demonstrate raising arm with a bent elbow overhead, but he was not able to lift with weight; no limits to left arm. Claimant demonstrated lifting his right arm to the front, just above his shoulder level; side lift to shoulder level only; and no limitations to left arm. He avoided using his right arm to push/pull whenever possible. As for driving, Claimant had difficulty holding his right arm on the steering wheel for more than five minutes. He also had trouble getting in and out of a vehicle with his right arm. *Id*. at 000469-470.

91. Claimant lived alone and was independent in most activities of daily living. He was no longer able to hunt or fish and even had trouble camping. *Id*. at 000470.

92. Claimant was 53 years of age at the time of evaluation. He was divorced and lived alone in a 1-story home on a regular city block. He had adult children and was able to see his three grandchildren. There were no barriers beyond his disability to work, including legal or criminal history. Growing up as an "army brat," Claimant joined the military himself, and was

eligible for VA medical services. He was also receiving VA vocational services, which paid him to retrain as a surveyor. He worked as a student custodian at ISU. Ex. 11:000470-471.

93. Claimant graduated from high school, completed a six month vocational program at Wyoming Technical College in 1986, and had a number of other certifications and training experiences. He had some computer experience, but his skills were fairly weak. He was working to improve his computer skills. *Id.* at 000471.

94. Claimant was working as a heavy-duty diesel mechanic at the time of injuries but was unable to return to that position. He also worked as a parts clerk and custodian post-industrial accidents. *Id.* at 000471-472.

95. The following occupational titles applied to Claimant's work history: parts clerk, janitor, garage supervisor, automobile mechanic, construction-equipment mechanic, diesel mechanic, maintenance mechanic, exhaust emissions inspector, highway maintenance worker, and municipal maintenance worker. *Id.* at 000472.

96. The Dictionary of Occupational Titles lists mechanic as a skilled/highly skilled profession. Claimant held many mechanic positions, including the time-of-injury position. He also performed semi-skilled jobs in equipment operation, cleaning, and maintenance. He was retraining as a surveyor, which is highly skilled. *Id*. at 000473.

97. Claimant has worked most of his life in heavy demand jobs. He has also performed medium level work for municipalities, with light supervising duties as part of otherwise heavy jobs. The only light job he performed was in emissions inspection many years earlier. *Id*. at 000474.

98. Claimant had no restrictions or limitations until he experienced his industrial accidents and Dr. Wathne limited him to light duty work. This eliminated all mechanic work for

him. Dr. Chen does not assign restrictions to Claimant from his industrial injuries but rather contends that his symptoms are entirely due to pre-existing conditions. Ex. 11:000474.

99. According to O*NET, Claimant had the following knowledge and skills: Knowledge of administration and management, mechanical, transportation, customer and personal service, mathematics, computers and electronics, building and construction, public safety and security. Skills of repairing, troubleshooting, equipment maintenance, operations monitoring, operation and control, critical thinking, management of personnel resources, and coordination. *Id*.

100. Related jobs to Claimant's work history include electric motor, power tool and related repairers; farm equipment mechanics; motorboat mechanics; and maintenance and repair workers. *Id*. at 000475.

101. For Claimant's labor market, Claimant lived in Inkom, Idaho, a twenty minute drive from Pocatello. The majority of his jobs came from Pocatello, but he also found work in Idaho Falls, Blackfoot, Chubbuck, Fort Hall, Ammon, and Shelley, Idaho. *Id*.

102. Ms. Eby considered the following restrictions relevant to Claimant's labor market analysis and accessibility: Dr. Chen: No restrictions. Dr. Wathne: Claimant was capable of light demand job duties as outlined in the FCE. *Id*.

103. Claimant's occupational titles included the following: surveying and mapping technicians; janitors and cleaners; construction laborers; highway maintenance workers; superintendent of mechanics, installers, etc.; AST and mechanics; bus/truck mechanics; mobile heavy equipment mechanics; industrial machinery mechanics; inspectors, testers, sorters, etc.; industrial truck and tractor operators; and stockers and order fillers. The total number of

positions in labor market relevant to these positions was 2,575. Ex. 11:000475-476. For these occupations, the wages range from $11.36 to $37.07. *Id*.

104. If Dr. Chen's analysis were used, Claimant could return to work with no restrictions and had lost no access to his pre-injury labor market, based upon the industrial accidents, according to Ms. Eby. *Id*. at 000476.

105. If Dr. Wathne's restrictions were accepted, Claimant had access to only light jobs, which resulted in a 74.5% loss of job market access, according to Ms. Eby. *Id*. If adjusted for loss of access to overhead reaching, according to the FCA, which Dr. Wathne approved, his loss of job access increased to 88%. *Id.* at 000475.

106. Claimant primarily worked in heavy duty positions, and lost access to those. He was no longer able to perform such heavy physical work, according to Dr. Wathne's restrictions. *Id*.

107. Based upon his past wages, and labor market wages applicable to his job titles, Claimant sustained a 35.75% loss of earning capacity as a result of his industrial injuries. *Id*. at 000477.

108. Dr. Chen found that Claimant's impairment was due entirely to pre-existing conditions. He would have no disability according to this opinion. *Id*.

109. If Dr. Wathne's restrictions were used, Claimant was capable of performing only light work. His loss of job market access was between 74.5% and 88.1%, for an average of 81%. His loss of wage-earning capacity was 35.75%. If these two vocational factors were considered equal, Claimant's permanent partial disability (PPD) was 59.4%, inclusive of his 10% impairment rating. *Id*.

110. **Eby Post-Hearing Deposition**. Claimant took the deposition of Ms. Eby on February 17, 2023. *See*, Eby Dep., 2:1-8. As noted above, the Commission is familiar with her credentials.

111. Ms. Eby commented in pertinent part as follows regarding the restrictions as found in Claimant's FCA: "This is significant to me. It puts him in a light, very low medium category for lifting at the floor level, but less than light to shoulder level, which is pretty significant for a mechanic." Eby Dep., 10:12-16.

112. Ms. Eby further remarked that the restriction on overhead lifting at 60°, while not impactful to most people, it is significant for a mechanic who frequently is required to lift overhead. Also, Claimant was right-hand dominant, which made his restrictions "all that more significant." Dominant hands are weighed more heavily because it is the hand one uses more frequently. *Id.* at 10:22-12:8.

113. Ms. Eby also limited Claimant to light-demand duty in her labor market analysis. She offered numbers for both generic light-demand duty and the restriction for overhead lifting, but she averaged the two restrictions at 81%. This was in line with Dr. Wathne's restrictions. *Id*. at 14:13-15:23.

114. To Ms. Eby, the vocational significance of Dr. Wathne's observation that "there is no way a total shoulder replacement can withstand the demands imposed on a – a heavy-duty mechanic, diesel-machinic-type job," was that Dr. Wathne "didn't believe that after the surgery he provided, that after someone undergoes a total shoulder, that, while they may be improved, that they're not able to withstand heavy-duty work…" *Id*. at 16:7-21.

115. Claimant's jobs with Employer and the Kiewit Mine were the two-highest paying jobs that he held. *Id*. at 17:19-23.

116. Based upon the lifting requirements of the job, Ms. Eby determined that Claimant's job with employer was a "very heavy job," placing him into the heavy-demand category. If a worker has to lift over a hundred pounds, "That's very heavy." Eby Dep., 17:24-19:2.

117. Ms. Eby summarized her disability finding as follows: "I find that, based on Dr. Wathne's restrictions and opinions, that his [Claimant's] loss of access is between 74.5 percent and 88 percent, which I believe averages to 81 percent. So, his loss of access, based on Dr. Wathne's opinion, is 81 percent, and I found a loss of earning capacity of 35.75 percent. *Id*. at 19:15-20.

118. Ms. Eby calculated loss of labor market access by, first, limiting Claimant to light duty at 74.5 percent, and second, eliminating reaching overhead jobs, which resulted in 88 percent loss of access, which she then averaged to arrive at a net loss of labor market access at 81 percent. *Id*. at 21:4-15.

119. Ms. Eby calculated loss of earning capacity by using Claimant's highest past earning capacity, which was $28.50 at the Kiewit Mine, and his next highest wage, which was $18.31 for forklift operation, "and the difference was 35.75 percent." *Id*. at 19:23-20:9.

120. Averaging loss of labor market access and loss of wage-earning capacity resulted in a disability of 59.4 percent. Rather than weighing loss of labor market access higher, Ms. Eby concluded that Claimant was "really right on the line of where I would typically weight rather than average." To Ms. Eby, this was a "very fair" disability assessment of disability. *Id*. at 21:16-22:8.

121. After reviewing Dr. Wathne's deposition, Ms. Eby determined that this did not change her opinions on loss of labor market access and loss of earning capacity. Neither did she

find the hearing transcript or Claimant's deposition inconsistent with her opinions, because the "evaluee" (Claimant) consistently reported the same facts to her during her interview. Eby Dep., 22:9-23:8.

122. Ms. Eby agreed that Claimant was not totally and permanently disabled. *Id.* at 22:13-16.

123. Summarizing her reason for concluding that Claimant was unlimited, particularly with regard to his right shoulder, prior to the industrial accidents, Ms. Eby stated as follows: "He was performing a very heavy job without accommodations or restrictions." *Id.* at 24:15-19.

124. Claimant reported a pre-existing condition to Ms. Eby of both shoulders, but she did not review any medical records pertaining to treatment of those conditions. *Id*. at 24:20-25:7.[7]

125. **Claimant's Job Search Log**. Claimant submitted, for the record, 27 pages of a job search log consisting of three (3) job applications listed on each page, from the dates 7/1/20 through 2/12/21. *See*, Ex. 26.

126. **Surety's Payments of Medical and Indemnity Benefits**. Surety paid for Claimant's total shoulder surgery and related care. Tr., 73:20-22. *See also*, Ex. 17.

127. Surety paid for Claimant's temporary disability benefits for four weeks following surgery, until Claimant was approved for light duty at Employer. Tr., 73:23-74:13. *See also*, Ex. 18.

128. Surety did not pay Claimant PPI or PPD because, according to Defendants, "however, subsequent developments, particularly Dr. Wathne's findings at surgery, brought to

[7] Defendants did not commission any vocational expert opinions, nor was there a deposition pertaining to the same.

light that there was no causal connection between Claimant's industrial accident and the need for surgery." Defendants' Brief at 16.

129. **Light Duty to Termination of Employment and Thereafter**. Claimant worked light duty for Employer from approximately July 2019 to February 2020. Tr., 77:5-8.

130. After he received a copy of his FCA report, Claimant took a copy of it to Employer and gave it to his supervisor Dustin Whitehead. Shortly thereafter, Claimant's employment was terminated. Tr., 77:18-79:3.

131. Claimant went on unemployment insurance benefits after the termination of his employment with Employer. After a period of unemployment, Claimant found work as a parts clerk for Great Rift Transportation at $15 per hour for a 40 hour work week. *Id*. at 79:16-80:17.

132. Until January 2022, Claimant was employed as an overnight custodian at Idaho State University, also for $15 per hour and later $9.83 per hour. *Id*. at 82:22-83:24.

133. As of the date of the hearing, Claimant was taking courses at ISU to become a surveyor. Claimant struggled with math, so he took a remedial math course to help complete his surveying degree. *Id*. at 84:2-21.

134. For most jobs that Claimant applied for, *see*, Ex. 26 (Claimant's IDOL job search log), employers told him he could not be hired because of his permanent work restrictions. *Id.* at 85:6-11.

135. When asked to describe how his shoulder was at the time of hearing, Claimant replied as follows: "It's better. It's not 100 percent, but, you know, parts wear out and I got a remanned part in there, and she's better than she was in January of '19." Claimant no longer had to tape his shoulder to his body to ameliorate pain. As long as Claimant stayed within Dr.

Wathne's restrictions, he was essentially pain-free. Claimant further stated that he could not return to mechanic work because he could not lift the weight anymore. Tr., 85:12-86:11.

136. **Credibility**. Claimant testified both credibly and non-credibly at hearing and in his pre-hearing deposition. Claimant's lack of credibility consisted of claiming that he was totally asymptomatic before the industrial accidents in his right shoulder, when that was not true, and claiming to not recall any treatment for, and/or medical attention to, his right shoulder before the industrial accidents, which occurred. Nevertheless, lack of credibility on these matters does not necessarily disqualify Claimant from compensability, as the following discussion illustrates. Where Claimant's recollections differ from the documentary record, the latter will be relied upon.

FURTHER FINDINGS AND ANALYSIS

137. 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 leaves 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).

138. **Causation; Pre-existing Condition.** 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). There must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. A claimant is required to establish a probable, not merely a possible, connection between cause

and effect to support his contention. *Dean v. Dravo Corporation*, 95 Idaho 958, 560-61, 511 P.2d 1334, 1336-37 (1973).

139. The compensable consequences doctrine is recognized in Idaho. A subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if there is a demonstrable causal connection between the compensation sought and the work-connected injury. *Sharp v. Thomas Brothers Plumbing*, 510 P.3d 1136 (2022). The permanent aggravation of a preexisting condition or disease is compensable. *Bowman v. Twin Falls Construction Company, Inc*., 99 Idaho 312, 581 P.2d 770 (1978).

140. 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, 901, 591 P.2d 143, 148 (1979). While a temporal relationship is always required to support a finding of causation between an accident and the injury, the existence of a temporal relationship alone, in the absence of substantive medical evidence establishing causation, is insufficient to satisfy Claimant's burden of proof. *Swain v. Data Dispatch, Inc.* IIC 2005-528388 (February 24, 2012).

141. The Industrial Commission, as the fact finder, is free to determine the weight to be given to the testimony of a medical expert. *Rivas v. K.C. Loggin*g, 134 Idaho 603, 608, 7 P.3d 212, 217 (2000). "When deciding the weight to be given an expert opinion, the Commission can certainly consider whether the expert's reasoning and methodology has been sufficiently disclosed and whether or not the opinion takes into consideration all relevant facts." *Eacret v. Clearwater Forest Industries,* 136 Idaho 733, 737, 40 P.3d 91, 95 (2002).

142. In *Konvalinka v. Bonneville County*, 140 Idaho 477, 95 P3d 628 (2004), the Idaho Supreme Court held in pertinent part as follows: "The definition of 'injury' is further restricted

by Idaho Code § 72-102(17)(c), which states that the term 'shall be construed to include *only an injury caused by an accident, which results in violence to the physical structure of the body.'" Id.*, 140 Idaho at 479, 95 P3d at 630 [Emphasis added.] *See also, Hutton v. Manpower, Inc.*, 143 Idaho 573, 575, 149 P3d 848, 850 (2006) ("In fact, the Court has previously held that an accident occurs if 'the strain of the claimant's ordinary and usual work resulted in violence to the physical structure of the body.'" [Citations omitted.] The *Konvalinka* Court further held that "[t]o establish that a mishap or event occurred, an injured worker must do more than show an onset of pain while at work." 140 Idaho at 479, 95 P3d at 630.

143. ***Wynn v. Simplot***. Claimant's argument relied heavily upon *Wynn v. J.R. Simplot Company*, 105 Idaho 102, 666 P.2d 629 (1983). Claimant asserted that he did not have "to be in perfect health prior to his work accidents for his claims to be found compensable." Claimant's Opening Brief at 14-15.

144. Defendants made a vigorous argument against construing this case, in light of the holding of *Wynn*, noting that "simply reciting that adage from the *Wynn* decision does not solve the causation problem in this case. It is not a substitute for necessary proof that the benefits being sought are causally related to the industrial accident." Defendants' Brief at 14.

145. That "adage" from *Wynn* is that "an employer takes an employee as he finds him." 105 Idaho at 104, 666 P.2d 631. The full context of the adage was as follows: "The fact that Wynn's spine may have been weak and predisposed him to a ruptured disc does not prevent an award since our compensation law does not limit awards to workmen who, prior to injury, were in sound condition and health. Rather, an employer takes an employee as he finds him." *Wynn, Id.*

146. In *Wynn*, the claimant's injury arose out of an accident while he was engaged in his normal and ordinary work for his employer, thus the injury was compensable even though his spine had preexisting conditions which made it weak and predisposed to a ruptured disc. The Idaho Supreme Court held that the evidence supported a finding that a disc rupture caused by the accident led to the claimant's symptoms and reversed the Commission's finding otherwise. *Wynn*, 105 Idaho 102, 666 P.2d 629. *See also*, *Stevens v. McAtee v. Potlatch Corporation*, 145 Idaho 325, 179 P.3d 288 (2008) (The "fact that McAtee's spine may have been weak and predisposed him to a herniated disc does not prevent an award since under our compensation law an employer takes a worker as he finds him." 145 Idaho 325, 179 P.3d at 299.)

147. Here, like the claimant's weak back in *Wynn* and *McAtee*, there was evidence that Claimant had a preexisting arthritic condition of his right shoulder that predisposed him to serious injury while working for Employer in the heavy mechanic position. Claimant had one office visit with Nic Hale PA-C on July 27, 2016 concerning intermittent pain in Claimant's right shoulder. PA-C Hale was unable to reproduce the symptoms through manipulation of the shoulder and testing. Ex. 2;000047-49. Claimant's problem was thought to be self-limiting. Follow-up was recommended if the problem persisted. Work restrictions were not addressed.

148. Claimant was seen by Dr. Burton about bilateral shoulder pain on March 21, 2018; Claimant received a cortical steroid injection in his right shoulder and a referral to PT. Work restrictions were not addressed and there is no record that Claimant returned to Dr. Burton about this complaint. Ex. 1:000029.

149. A third office visit occurred on July 3, 2018, for a yearly checkup, with Dr. Mark Butler, to whom Claimant reported "right shoulder problems, prior injuries, and now bothersome painful, feels like a torn cuff…" Ex. 4:000212.Dr. Butler speculated that Claimant might have a

rotator cuff or labral tear. He recommended that Claimant start PT "for now" and that he might need an orthopedic referral. Again, work restrictions were not addressed.

150. There are no further records of Claimant being treated for his right shoulder prior to the industrial accidents, although the last of these three office visits occurred within six months of the first industrial accident. Nevertheless, Defendants drilled down to these visits to suggest that they are disqualifying for Claimant under *Wynn*, 105 Idaho at 104, 666 P.2d 631, however, they are not.

151. Based on these three office visits, Defendants contended that "the need for surgery likely preexisted either of the industrial accidents." Defendants' Brief at 15. This is a stretch. There was no pronouncement by any doctor that Claimant was in need of a total right shoulder replacement at these appointments. Claimant was apparently medically stable during this time period (immediately prior to the industrial accidents), and no doctor assigned him any work restrictions. Furthermore, Claimant performed his job at Employer without restrictions and received an excellent performance review.

152. Defendants further contended that "*Wynn* and its progeny provide a path for an injured worker to obtain medical benefits in situations where an industrial accident aggravates a preexisting condition that was *asymptomatic* causing it to become symptomatic and disabling." [Emphasis added.] Defendants' Brief at 16. This is a misreading of *Wynn*. There is no requirement stated in *Wynn* that a preexisting condition be asymptomatic to qualify. If that were the case, then any mention of complaints of a particular condition in previous medical records would disqualify the claimant from compensability. Now, if Claimant had been told by a physician prior to the industrial accident that he needed a total shoulder replacement, or had

received significant work restrictions or an impairment, that would be a different case. That, however, is not what happened here.

153. Claimant's complaints were not mere "aches and pains" as he stated, but rather a much more serious issue. Nevertheless, this handful of office visits does not amount to a disqualifying series of events.

154. Defendants' counsel stated at the Hearing that "preexisting conditions don't eliminate entitlement to workers' compensation benefits," Tr., 13:25-14:1, and that when Claimant came to work for Employer, "he brought with him a condition of both his shoulders actually." Precisely. This is exactly what *Wynn*, 105 Idaho at 104, 666 P.2d 631, stands for. Claimant had a career as a heavy-duty truck mechanic and it is not surprising that a worker who routinely lifted hundreds of pounds came to Employer with significant wear and tear on his shoulders. The suggestion that Claimant should have desisted from his chosen career is unfounded; workers' compensation is a no-fault system and if Claimant's symptoms can be traced to the industrial accident(s), then responsibility lies with Defendants. Furthermore, the record shows that Claimant performed excellently at Employer, receiving a strong performance evaluation just prior to his second industrial accident. Claimant also worked for Employer for a full year prior to the industrial accidents.

155. The analysis does not stop there, however, because Defendants were correct when they argued that there still must be competent evidence substantiating that the industrial accident or accidents led to the need for medical treatment. *See*, Defendants' Brief at 14. That is what the next section will address.

156. ***Medical Evidence***. There are two competing medical opinions in the record, that of Dr. Wathne who was Claimant's treating surgeon, who found causation, and that of

Defendants' IME physician, Dr. Chen, who did not after revising his original opinion that the condition of Claimant's right shoulder related to the industrial accident(s). For the reasons discussed below, Dr. Wathne's opinion is entitled to more weight in this decision.

157. Dr. Wathne based his causation opinion on the fact that Claimant "was functioning in his normal job duties until he was injured on the job, without restrictions. He had some preexisting arthritis in his shoulder but was never missing work as a result of it and was – was functioning without any restrictions. So that's why I would attribute the restrictions to his on-the-job injuries, which led to his surgeries." Wathne Dep., 19:18-24. The fact that Claimant complained of shoulder pain to Dr. Butler of the VA three and a half months prior to his first industrial accident in October 2018, did not change Dr. Wathne's opinion on causation because Claimant "still continued to function at his normal level. He complained of shoulder pain, which is not unusual given the fact that he had arthritis in that shoulder, but he was still able to do his job." *Id*. at 21:24-22:2.

158. Despite the fact that a torn rotator cuff was not found in Claimant's surgery, Dr. Wathne pointed to the "reaction in fluid around his biceps tendon and the rotator cuff," as well as the "partial tearing in his rotator cuff tendon, signal within his long head of the biceps tendon" as evidence of an acute traumatic injury, objective factors that "came about by some kind of trauma." Wathne Dep., 33:3-34:6.

159. After initially opining that a potentially torn rotator cuff was sufficient to relate the need for surgery to the industrial accident(s), Dr. Chen reversed course after the surgery in which a torn rotator cuff was not found. Based upon the lack of a finding on the rotator cuff, he therefore ascribed the entire need for surgery as stemming from preexisting conditions. Ex. 9:000452. Defendants emphasized this point in their briefing. *See*, Defendants' Brief at 16-17.

160. Dr. Chen's and Defendants' reliance on the lack of a torn rotator cuff is misplaced. They ignored other objective medical findings, noted by Dr. Wathne, that substantiated that an acute injury occurred to Claimant's right shoulder. Dr. Wathne's observation during surgery of fluid around Claimant's biceps tendon and rotator cuff, together with the fact that there was partial tearing of the rotator cuff, provides sufficient medical evidence correlating the injury to the industrial accident(s).

161. Moreover, the muscle atrophy in Claimant's shoulder, per Dr. Wathne, was not significant, but rather mild. This contrasted with Dr. Chen's conclusion that muscle atrophy in the right shoulder equated to proof that Claimant's problematic right shoulder was due to preexisting osteoarthritis, not the industrial accident(s). Dr. Wathne, as Claimant's treating surgeon, was in a better position to assess the state of Claimant's muscle atrophy than Dr. Chen.

162. ***Claimant's Credibility***. Defendants argued that because Claimant testified inconsistently with the facts around his preexisting right shoulder condition that his subjective complaints should be disregarded. *See*, Defendants' Brief at 18-20.

163. However, Claimant's failure to acknowledge that he sought treatment for his right shoulder prior to the industrial accident(s) is overshadowed by the objective medical evidence described by Dr. Wathne which supports a conclusion that the industrial accident(s) caused Claimant's right shoulder injury. Where Claimant's subjective complaints differ from the documentary records, the latter are relied upon.

164. ***Other Considerations***. Unlike Dr. Wathne, Dr. Chen was an IME physician who reviewed Claimant's records and did not personally provide treatment to him. Dr. Wathne not only provided Claimant's surgery, but he also provided Claimant with pre-surgical and post-surgical treatment. On this basis, Dr. Wathne's opinion on causation is entitled to more weight.

165. Dr. Wathne was also subject to cross-examination in his post-hearing deposition, whereas Dr. Chen did not undergo a deposition. Dr. Wathne's opinion withstood scrutiny in his deposition and is entitled to more weight in this decision.

166. ***Conclusion***. Claimant has sustained his burden of proving causation. *Wynn v. Simplot*, controls this case. 105 Idaho at 104, 666 P.2d 631. Claimant's industrial accident(s) materially contributed to the injury to his shoulder, thus justifying the need for surgery. Claimant's inconsistent testimony is of less significance. Dr. Wathne's opinion on causation is entitled to more weight.

167. **Impairment**. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Waters v. All Phase Construction*, 156 Idaho 259, 262, 322 P.3d 992, 995 (2014).

168. Claimant has been given a 24% right upper extremity rating for his right shoulder. This rating is inclusive of impairment from all causes. Wathne Dep., 18. This is the only PPI rating of record. Therefore, the Commission concludes that Claimant has proven impairment of 24% of the upper extremity for his right shoulder, which equates to 14% of the whole man.

169. **Disability.** "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425.

170. The test for determining whether Claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced Claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on Claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

171. Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Industries,* 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State of Idaho, Industrial Special Indemnity Fund,* 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon Claimant. *Seese v. Ideal of Idaho, Inc*., 110 Idaho 32, 714 P.2d 1 (1986).

172. The opinions of medical and vocational experts are not controlling on the Commission. The evidence of vocational experts, like the opinions of medical experts, should be entitled to the weight that they deserve, and are not definitive *per se*. *See, e.g., Urry v. Walker and Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989) ("[T]he Industrial

Commission, rather than the claimant's treating physician, is the fact finder and ultimate evaluator of impairment. The physician, as an expert witness, *may provide information helpful to the Commission*… Medical testimony should not be held to be conclusive irrespective of other evidence." [Citations omitted.] 115 Idaho at 755-756 [Emphasis added.].

173. ***Ms. Eby's Vocational Assessment***. There is only one vocational assessment from a vocational professional in the record, that of Ms. Eby, who was hired by Claimant. Defendants chose not to hire a vocational expert. Thus, if Ms. Eby's assessment is credible, it is entitled to substantial weight in this decision.

174. It is true, as Defendants point out, that Ms. Eby did not have the benefit of Claimant's pre-accident medical records. *See*, Defendants' Brief at 21. It is not true, however, that her vocational opinions rely entirely on Claimant's subjective complaints for their validity. Ms. Eby reviewed extensive medical records in the course of performing her vocational analysis, including the full breadth of Claimant's post-accident medical treatment. She also personally interviewed. Claimant.

175. Furthermore, Ms. Eby's conclusion that Claimant did not have any preexisting medical restrictions from a medical doctor was correct. Even though Claimant saw three different physicians prior to his industrial accident(s), none of them addressed work restrictions or an impairment for his right shoulder condition. Additionally, there is a valid distinction between symptoms and a doctor's restrictions. Claimant clearly had right shoulder symptoms prior to his industrial accident(s), but he did not have doctors' restrictions. He was also able to competently perform the mechanical job at Employer for a full year prior to the industrial accident(s), which lends further credence to Ms. Eby's opinions.

176. Defendants further criticized Ms. Eby's treatment of Claimant's lifting restrictions, claiming that she "seems to have assumed that the lifting restrictions prescribed by Claimant's treating physician, Dr. Wathne, were intended to limit overall lifting, when in fact the doctor was prescribing lifting restrictions applicable to Claimant's right upper extremity." *See*, Defendants' Brief at 22. Nevertheless, in fact, Ms. Eby's treatment of lifting restrictions was more nuanced than as portrayed by Defendants. She adequately answered this criticism in her report when she explained that Claimant was dominant right-handed, thus the limitation on his right shoulder impacted his overall lifting. Ex. 11:000469. She also provided other examples of how Claimant's right shoulder limitation impacted his overall functioning, such as his ability to drive his automobile. Ex. 11:000470.

177. Defendants further criticized Ms. Eby's report because she "ignored or took no account of the fact that Dr. Wathne had apportioned one-third of Claimant's assessed permanent physical impairment to pre-existing conditions. Her disability findings do not reflect that apportionment." *See*, Defendants' Brief at 22. Nevertheless, there is no requirement that the apportionment of disability in excess of impairment mirror the apportionment of impairment, so this criticism, like Defendants' other criticisms, is without merit.

178. Ms. Eby appropriately included Dr. Chen's analysis in her report, noting that if Dr. Chen's lack of restrictions were used, Claimant had lost no access to his pre-injury labor market. Ex. 11:000476. Based upon Dr. Wathne's restrictions, however, Ms. Eby determined that Claimant had suffered a disability loss.

179. Ms. Eby's conclusions are adequately summarized above. *See, supra* at pp. 24-29. Therefore, they will not be repeated exhaustively here. Nevertheless, her ultimate conclusions on labor market access, earning capacity loss, and disability will be reviewed, as follows:

180. If Dr. Wathne's restrictions were accepted, Claimant had access to only light jobs, which resulted in a 74.5% loss of job market access, according to Ms. Eby. Ex. 11:000476. If adjusted for loss of access to overhead reaching, as provided in the FCE, which Dr. Wathne approved, Claimant's loss of job access increased to 88%. *Id*. Ms. Eby averaged these two numbers to arrive at a net loss of labor market access at 81%. Eby Dep., 21:4-15.

181. Ms. Eby calculated loss of earning capacity by using Claimant's highest paying job at $28.50/hr and his next highest wage, $18.31, and the difference was 35.75 percent. *Id*. at 19:23-20:9.

182. Averaging loss of labor market access a loss of wage-earning capacity, Ms. Eby determined that Claimant had a resulting disability of 59.4 percent. Rather than averaging Claimant's loss of labor market access higher, Ms. Eby gave equal weight to the two factors. *Id*. at 21:16-22.8.

183. Ms. Eby assessed Claimant's disability at 59.4%, inclusive of impairment. Ex. 11:000477; Eby Dep., 21:21-25. Although she did not explain that this figure represents Claimant's disability from all causes, that is essentially what it is. Ms. Eby assumed that Claimant had no pre-existing restrictions. She assumed that all of the restrictions given by Dr. Wathne are related to the subject accident. She identified no other contemporaneous restrictions. Therefore her 59.04 disability rating must represent disability from all causes, inclusive of Claimant's 14% physical impairment.

184. A 59.4 percent disability is supported by Claimant's impairment and by factors related to Claimant's impairment that include his inability to lift beyond the shoulder range, age, other injuries and conditions (including his hearing loss), his personal family circumstances, his bilateral shoulder condition implicating his left shoulder, his continuing to work despite having

an obvious and real impairment in his shoulder, his subjective experience of pain based upon his industrial and non-industrial conditions following the industrial accident(s), his limited educational background and lack of any background with technology and computers, his foreclosed opportunities for working in heavy equipment maintenance and repair as a heavy diesel mechanic, his attendance at school to retrain as a land surveyor and his restrictions based upon the light demand job duty capacity as outlined in the FCE, therefore Claimant suffered a permanent partial disability from all causes in the amount of 59.4 percent, inclusive of impairment.

Apportionment

185. Having established that Claimant suffered permanent partial disability from all causes in the amount of 59.4 percent, it must be determined whether that disability should be apportioned between the subject accident and a pre-existing impairment per Idaho Code § 72-406(1) and *Page v. McCain Foods*, 141 Idaho 342, 109 P3d 1084 (2005). Defendants bear the burden of proving that some portion of Claimant's disability should be apportioned to a pre-existing physical impairment. *Baldner v. Bennett's, Inc.*, 103 Idaho 458, 649 P.2d 1214 (1982).

186. After Claimant reached MMI, Dr. Wathne assigned impairment of 24% of the upper extremity, or 14% of the whole person. He apportioned one third of this impairment to Claimants pre-existing end-stage shoulder arthritis, with two thirds apportioned to the subject accident. Wathne Dep., 18. Therefore, per Dr. Wathne, Claimant's pre-existing impairment is 4.7% of the whole person, and his accident produced impairment is 9.3% of the whole person. No other pre-existing impairments that might provide a basis to apportion disability under Idaho Code § 72-406 are identified.

187. Per *Oliveros v. Rule Steel Tanks, Inc.*, 165 Idaho 53, 438 P.3d 291 (2019), impairment is a component of disability, determined in this case to be 59.4% of the whole person. Claimant's impairment is demonstrated to be apportionable between his pre-existing condition and the subject accident. However, the evidence does not support apportionment of disability in excess of impairment between the subject accident and the pre-existing condition. While Claimant did have symptomatic shoulder complaints in the years prior to the subject accident, it is undisputed that he continued to perform heavy labor up until his day of injury. Moreover, the medical evidence does not establish that any of his pre-injury physicians gave him restrictions in order to protect his shoulder. While Dr. Wathne did testify that given his pre-existing arthritis Claimant probably should not have been performing heavy diesel mechanic work prior to the subject accident (Wathne Dep., 22), there is little to no evidence which quantifies the nature and extent of such a pre-injury restriction, nor how such a restriction would have impacted Claimant's labor market access on a pre-injury basis.

188. From the foregoing we conclude that Defendants have proven that Claimant's 59.4% disability should be apportioned 54.7% to the subject accident and 4.7% to his pre-existing condition. Defendants are entitled to credit for any impairment previously paid.

CONCLUSIONS OF LAW

1. Claimant has sustained his burden of proving that the industrial accidents are causally related to his right shoulder condition, thus justifying the total replacement shoulder surgery.

2. Claimant has sustained an accident-produced permanent partial impairment (PPI) of 9.3%.

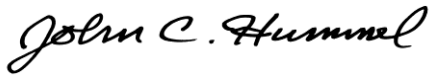
3. Claimant is entitled to a payment for a 54.7% permanent partial disability (PPD), inclusive of impairment.

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 4th day of August, 2023.

INDUSTRIAL COMMISSION



John C. Hummel, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of August, 2023, a true and correct copy of the foregoing ***FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION*** was served ***via* regular *United States Mail*** and by ***email transmission*** upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GLENN P. LAME, Claimant, v. KENWORTH SALES COMPANY, Employer, and TRAVELERS CASUALTY & SURETY COMPANY, Surety, Defendants	**IC 2018-030573** **IC 2019-002788** **ORDER** FILED AUG 04 2023 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee John Hummel 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 recommendations of the Referee. The Commission concurs with these recommendations. 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 reasons, IT IS HEREBY ORDERED that:

1. Claimant has sustained his burden of proving that the industrial accidents are causally related to his right shoulder condition, thus justifying the total replacement shoulder surgery.

2. Claimant has sustained an accident-produced permanent partial impairment (PPI) of 9.3%.

3. Claimant is entitled to a payment for a 54.7% permanent partial disability (PPD), inclusive of impairment.

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

DATED this 4th day of August, 2023.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Aaron White, Commissioner

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of August, 2023, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail and Electronic Mail upon each of the following:

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