

**DAVID WELCH, Claimant,**

**v.**

**REGULUS STUD MILLS, INC., Employer,**

**and**

**LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.**

**No. IC 2004-525313**

**Idaho Workers Compensation**

**Before the Industrial Commission of the State of Idaho**

**June 5, 2012**

## **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

Thomas E. Limbaugh, Chairman

### **INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee LaDawn Marsters, who conducted a hearing in Coeur d'Alene, Idaho on September 19, 2011. Claimant, David V. Welch, was present in person and represented by Michael T. Kessinger of Lewiston. Defendant Employer ("Regulus"), and Defendant Surety were represented by E. Scott Harmon of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on April 26, 2012.

### **ISSUES**

The issues to be decided by the Commission as the result of the hearing are:

1. Whether and to what extent Claimant is entitled to permanent partial disability benefits; and
2. Whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise.

### **CONTENTIONS OF THE PARTIES**

Claimant contends that he is totally and permanently disabled as an odd-lot worker as a result of a 2004 industrial saw mill accident in which all of his left-hand fingers were amputated. Defendants counter that Claimant has suffered no more than 41% permanent partial disability, inclusive of 38% permanent partial impairment, for which Claimant has already been paid.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. Joint Exhibits A through K admitted at the hearing;
2. The testimony of Claimant taken at the hearing; and
3. The post-hearing deposition testimony of Mary Barros-Bailey and Shannon R. Purvis taken on November 29, 2011.

After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

### **FINDINGS OF FACT**

#### *CLAIMANT'S PRE-ACCIDENT VOCATIONAL HISTORY*

1. Claimant graduated from high school in 1989 in Kalispell, Montana. He achieved passing grades, but he had trouble in spelling, science, history and math. He has no computer skills or experience. Following high

school, Claimant enlisted in the U.S. Army as a mechanized motorman. He was honorably discharged in 1990 to serve a four-year prison sentence on a felony sexual assault charge.

2. Thereafter, Claimant worked at a bark plant in Superior, Montana, as a laborer. In another bark plant, in Osburn, Idaho, he was trained to operate a front-end loader. Claimant next relocated to St. Regis, Montana, where he worked for a log home builder for about six months, assisting with all aspects of log home construction. Then, Claimant moved to Kellogg, Idaho, where he worked as a residential mover, packing up and loading household items, and driving them in a 26' truck to locations across the U.S. He also worked as a ski lift operator at the Kellogg Ski Resort.

3. In 1998, Claimant moved to western Washington, where he worked as a commercial construction laborer at Pacific Piling, then as a gopher at Highland Portafab. At these jobs, he gained experience driving a backhoe and a forklift. He also used a 150-pound hammer to drive pipe into the ground and a 90-pound jackhammer to break up concrete. Some of the jobs he did included lifting and stabilizing buildings, pouring slabs and driveways with a concrete pump, laying rebar, digging ditches and foundations, welding parts and pipes, cutting steel and fabricating items with a welding torch, demolishing concrete structures, painting, remodeling, completing paperwork, and supervising other workers on the job.<sup>1</sup>

4. On March 8, 2004, Claimant was hired at Regulus, a saw mill located in St. Maries, Idaho, to stack and sort boards on the round table, to sort and cut boards and clean out chains as a resaw helper, to sort lumber at the tailsaw and to clean up on weekends using a shovel, bobcat and backhoe. He was working at the resaw on November 8, 2004, the date of his industrial accident.

#### *INDUSTRIAL ACCIDENT*

5. On November 8, 2004, Claimant sustained an industrial accident at Regulus, in which he caught all of his left-hand fingers in a chain sprocket, amputating them and degloving his hand. By the time he reached MMI from those injuries, Claimant underwent various surgeries to remove the fragments of his left-hand fingers, to successfully graft skin harvested from his groin<sup>2</sup> and to remove a retained suture. Thereafter, he required additional surgery to relieve symptoms associated with carpal and cubital tunnel syndrome and a carpal boss.

6. As observed at the hearing, Claimant's left upper extremity ends distally in a rounded stump covered by shiny, thin, fragile-looking skin, with a fully functioning thumb.

7. Claimant, who is right-handed, was 35 years old at the time of his industrial accident. Previously, he sustained an injury to his right eye which blurs his vision and makes it difficult to see with that eye beyond ten feet or so. He also has a history of California encephalitis, a mosquito-carried virus that can cause headaches and seizures. Claimant was asymptomatic with respect to this condition for several years prior to his industrial left hand injury. Claimant also reports some degenerative changes in his spine. Claimant does not allege that any of these conditions contribute to his current disability. He does, however, assert that residual pain and numbness in his leg at his skin graft harvest area causes him to fall off of his forklift periodically.

#### *RECOVERY*

8. *Prosthetic and hand therapy consultations:* From December 22, 2004 through May 2, 2005, Claimant consulted with therapists at Coeur d'Alene Hand Therapy and Healing Center, primarily to find ways to improve his left-side gripping ability. Pain associated with his groin graft site, phantom pain related to his missing fingers, and edema in his stump and thumb were also addressed. By the conclusion of his therapy sessions, Claimant had obtained a protective leather glove, a protective orthoplast cuff and a functional outrigger orthoplast cuff. "On 3-17-05 we made him a second custom orthoplast-gauntlet-cuff with outrigger type extension to protect and to assist functionally with picking up boards, on 3-24-05 we modified it to work better." JE-185. Darla Noel, physical therapist, noted, "He was a very motivated patient." JE-189.

9. Over the years, Claimant has also obtained one or more cosmetic "hands" from Kootenai Prosthetics. These do not improve Claimant's functionality. In fact, they hinder his ability to work, so he only wears the leather glove at work. According to Claimant, no currently available prosthetic can help him perform his job duties better. Mechanical prosthetics would wear through the thin skin over his left hand, and electrical prosthetics would not hold up to the heavy duty, dusty conditions in which he works. He remains open to the possibility that a useful prosthetic may become available in the future.

10. *Psychological effects:* Claimant attended eight psychotherapy sessions with Daniel S. Hayes, Ph.D., from February 8, 2005 through May 26, 2005. Some were joint sessions in which Claimant's wife also participated. Dr. Hayes initially diagnosed Claimant with post traumatic stress syndrome (PTSD) as a result of his industrial accident, based upon "a variety of recurrent, intrusive, and distressing recollections,

persistent avoidance, and symptoms of increased arousal." JE-315. Of note, Claimant had significant anxiety reactions when he was around the resaw area at work. As of the last session, Dr. Hayes opined that initial treatment goals had been reached because Claimant's stress level had decreased, his mood had improved and he seemed to be doing fairly well. Dr. Hayes recommended further psychotherapy on an as-needed basis. According to the record, Claimant never sought additional psychological care.

#### *OCCUPATIONAL AND VOCATIONAL REHABILITATION*

11. Claimant returned to modified, one-handed, duty (no use of the left upper extremity) at Regulus at the end of January 2005. He worked "painting the handrails and guards around the mill site for safety awareness and sorting the bolts, pipe fittings and small parts - generally organizing the machine shop of the mill." JE-25. Thereafter, various evaluations were conducted to determine the extent of his Claimant's abilities to continue working there.

12. *Shannon Thunstrom, OT.* Shannon Thunstrom, occupational therapist at Benewah Community Hospital, prepared a Work Site Analysis (WSA) in or around the end of February 2005, at the request of Peter C. Jones, M.D., Claimant's treating physician.<sup>3</sup> Ms. Thunstrom opined that Claimant could perform jobs as a resaw helper, round table worker and resaw operator with the following accommodations:

a. *Resaw helper:* Claimant would need an adaptive device or splint for his left hand to enable him to grip the lumber, and resultant fatigue from overuse of the left upper extremity may lead to medical restrictions, depending on Claimant's tolerance.

b. *Round table worker:* Claimant would need an elongated left arm splint, to cover his left arm because he needs to slide lumber over his left forearm with his right hand in order to stack it on the pallets.

c. *Resaw operator:* Claimant could perform this job if the machine were refitted with a joystick he can operate with his left thumb. Ms. Thunstrom noted, "The left upper extremity is generally used only for control panel operation and the right upper extremity is where the demand is placed to slide, push-pull, lumber through the re-saw." JE-215.

13. *Industrial Commission Rehabilitation Division (ICRD).* Lois Bishop, ICRD consultant, followed Claimant from December 2, 2004 until April 18, 2005. Following her initial interview with Claimant in January 2005, Ms. Bishop opined that he had "strong transferable skills in Welding, Equipment Operation: Loaders and Forklifts, Carpentry and Auto Mechanics." JE-4.

14. On February 25, 2005, Ms. Bishop prepared additional job site evaluations (JSEs), for Claimant's pre-injury re-saw helper position and alternate positions including forklift driver and re-saw operator. Ms. Bishop provided these JSEs to Dr. Jones along with videos of employees working at all three positions. As discussed below, Dr. Jones opined that the forklift driver job was the only one of the three that Claimant could reasonably perform. Regulus agreed to allow Claimant to train for the forklift driver position. Claimant's retraining opportunity was possible due to Ms. Bishop's assistance, as well as his own exemplary prior performance on the job at Regulus and his prior experience operating equipment including a forklift.

15. On March 3, 2005, Claimant began training for the forklift driver position. By April 18, 2005, he had completed his training, and both Claimant and his supervisor were pleased with his performance at his new position. "The Claimant is very pleased with his new position as a Forklift Operator, as it was his chosen vocational goal. His Supervisor, George Wine [*sic*] is happy to have the Claimant in the role because of the Claimant's positive attendance and energy." JE-8.

16. Ms. Bishop noted on April 18, 2005, "At the time of injury the Claimant was working as a Re-Saw Helper for Regulus Stud Mills, Inc., earning \$10.41 per hour. Currently the Claimant is working as a Forklift Operator for Regulus on the Swing Shift, 40 hours per week, earning \$12.57 per hour - \$502.80 per week." JE-9.

17. At the time of the hearing, Claimant was 42 years of age and working as a forklift driver for Stimson Lumber Mill (Stimson), formerly known as Regulus, earning \$16 per hour. He operates the forklift with a suicide knob, wearing a leather glove on his left hand. Otherwise, Claimant requires no accommodations to perform his work. He is concerned about his job security as a result of the economic recession and feels that his supervisor is unhappy with his work. He has had confrontations about his inability to do certain tasks, like picking up boards, which are incidental to his job. He also feels that his employer is dissatisfied because he cannot do a variety of jobs like his coworkers.

#### *PERMANENT IMPAIRMENT AND RESTRICTIONS*

18. The nature and extent of Claimant's permanent restrictions and limitations is a central factual issue in

dispute. Although Dr. Jones is the only physician to opine on this subject, his opinions are ambiguous and confusing. Nevertheless, neither party attempted to alleviate this confusion by obtaining his testimony or otherwise seeking clarification from him. Findings regarding Dr. Jones's writings relevant to Claimant's permanent restrictions follow.

a. On January 25, 2005, Dr. Jones released Claimant to light-duty "one-handed work" with no reference to any restrictions on the right. JE-71.

b. On January 28, 2005, Lois Bishop, ICRD consultant (see below), prepared a JSE for a job titled "Modified Duty - Right Hand Only" which detailed Claimant's return-to-work responsibilities while he continued to recover. JE-20. Consistent with Claimant's testimony at the hearing, the position entailed painting small areas and fixtures, sorting bolts and pipe fittings and organizing small parts in the machine shop. The JSE specifically states, "Worker has no weight restrictions on his right arm." JE-21. It is not clear from the record whether Dr. Jones ever saw this JSE; however, Claimant signed off on it on January 28, 2005.

c. On March 2, 2005, after reviewing information about various jobs at Regulus including video tapes of individuals performing those jobs, as well as JSEs for each job coordinated by Ms. Bishop and a WSA prepared by Ms. Thunstrom, Dr. Jones addressed Claimant's ability to return to work in a number of documents:

i. Dr. Jones completed a check-box form in which he limited Claimant's lifting to 20 pounds, with neither extremity specifically identified. He also restricted Claimant's repetitive hand/arm activity and reach, noting "right only", after each activity, in parentheses. (See JE-74). The "right only" notes follow the reaching and movement restrictions, but not the lifting restriction. Given the context of Claimant's injuries, Dr. Jones must have meant that Claimant should only *use* his right hand/arm to reach and perform repetitive motion activities even though, in another context, the note could indicate that only right-sided movements should be restricted. Dr. Jones relies upon the reader to understand the context in which he wrote "right only" to get his meaning across. Taking the context of Claimant's condition into consideration, this notation could be interpreted to apply to either the left upper extremity alone, or to both upper extremities.

ii. Dr. Jones wrote in a chart note:

David Welch was seen in follow-up. We discussed return to work issues, etc. I filled out paper work regarding his job sites. I reviewed his video tapes. I think the patient can go back to work as a forklift operator. I don't think he can perform as a re-saw helper. We will release him to that position.

JE-71.

iii. Dr. Jones completed a form in which he assessed permanent restrictions on Claimant's lifting (20-pound maximum), repetitive hand/arm activity, and reaching. Accordingly, he opined that only the forklift driver position was appropriate for Claimant.

iv. Dr. Jones completed a work release form in which he completely restricted Claimant's left-side use, is but there is no reference at all to right-side use. (See JE-75).

d. On work release forms prepared April 26, 2005 and June 27, 2005, the reader is directed to "[s]ee job site evaluation", apparently referring to the forklift driver JSE, which evidences no change in Dr. Jones's prior opinions. JE-80, 81. This JSE advises that the worker may need to pick up boards in the forklift's way (2x4s or 2x6s) weighing up to 22 pounds, once or twice per day. (See JE-22). As indicated, above, it is unclear whether Dr. Jones ever saw the January 28, 2005 "modified duty" JSE which specifically stated Claimant had full use of his right arm.

e. On July 14, 2005, following surgery to further amputate his left fifth finger, Claimant was restricted via a work release form to no use of his left hand/wrist until July 18, 2005, then returned to work "with no limitations" on July 18, 2005. (See JE-95). Claimant's functionality improved after this surgery to the extent that he experienced less pain in his left hand, and this form evidences that Dr. Jones may have wished to override his previous "permanent" restrictions. However, it is also consistent with an intent to merely issue no *new* restrictions since, by now, he was very familiar with Claimant's case and knew that Claimant's work and life were settled around his impaired left hand.

f. On January 13, 2006, July 6, 2006, September 12, 2006 and October 3, 2006, Dr. Jones prepared work release forms indicating Claimant is able to return to work with no limitations, that his previous work status was "full work" and that he was being returned to "full work". JE-101. Dr. Jones was aware of Claimant's previous work status (as a forklift driver) and the permanent restrictions he considered in opining that work was appropriate. Therefore, "full work" could indicate a return to his prior permanent restriction baseline, or it could reflect an intent to eliminate those restrictions altogether. Claimant's job

and general medical condition had remained unchanged since approximately July 2005.

g. On December 13, 2006 and December 19, 2006, Dr. Jones prepared work release forms taking Claimant off work until December 28, 2006 for initial recovery from surgery on his left wrist and carpal and cubital tunnels. These address a temporary condition while Claimant recovered and are not particularly relevant to determining his permanent medical restrictions.

h. In January 2007, Dr. Jones completed work release forms indicating Claimant would be able to return to work on January 18, 2006 with minimal use of the left hand and wrist. (*See* JE-137). He checked boxes indicating both "light duty" and "full work" with an illegible note. Again, Claimant is recovering, so his restrictions are related to that process and not necessarily to his permanent condition.

i. In February and July 2007, Dr. Jones completed work release forms indicating Claimant would be able to return to "full work" with no limitations as of February 13, 2007 and July 3, 2007. (*See* JE-139, 140). The question, as regards previous work releases, is what is Dr. Jones considering to be "full work" with no limitations? Is he relying upon his March 2005 baseline or, after two additional surgeries, did he believe Claimant's overall condition had improved?

19. Claimant last saw Dr. Jones in July 2007. He testified that he believed he had a 20-pound lifting restriction on his right arm and a 5-pound lifting restriction on his left arm although, when pressed, he admitted that he had no direct recollection of any specific restrictions assessed by Dr. Jones. Unfortunately, Claimant's assertion of a 5-pound restriction on the left is not found elsewhere in the record, bringing the accuracy of his recollection on this general point under scrutiny. As for his right upper extremity, Claimant's failure to recall what Dr. Jones directed is of no assistance in determining what restrictions Dr. Jones assessed or when. Claimant's testimony is only relevant to the extent that it clarifies Dr. Jones's opinion, which it fails to do. As a result, Claimant's testimony on this point is afforded no weight in determining the nature of his medical restrictions, if any. Further, his statements to the vocational experts in this regard are unreliable and lack credibility.

20. Both vocational experts (see below) believed Claimant was operating under a 20-pound lifting restriction on the right at the time of their respective evaluations in 2010. However, neither vocational expert consulted with Dr. Jones, so their information was derived from his records, which do not settle the issue, and from Claimant, whose statements as to the nature of Dr. Jones's restrictions have been determined to be unreliable.

21. No evidence in the medical records unambiguously confirms any right-side restrictions, at any time, or explains why Dr. Jones would issue a right-sided lifting limit, when Claimant's right upper extremity was unharmed. Further, more than a month before he issued his "permanent restrictions", Dr. Jones had released Claimant to "one-handed work" with no mention of any restrictions on the right at all, and the January 28, 2005 JSE related to the modified duty position, which Claimant apparently reviewed without objection, specifically states he had no right-side lifting restriction.

22. The Referee finds that Claimant has failed to prove by a preponderance of evidence that he is currently under any medical restrictions at all, and particularly no right-sided restrictions. However, regardless of medical restrictions, which are issued by a physician to protect an individual from undue risk of further injury, Claimant has obviously incurred permanent functional limitations on his left side which significantly reduce or eliminate his ability to reach, perform repetitive motion or fine manipulation activities, grasp, or engage in bilateral upper extremity activities.

23. Sometime in fall 2005, Dr. Jones opined Claimant was medically stable and that he had incurred permanent partial impairment (PPI). (*See* JE-96). However, he needed to examine Claimant before he could assign a rating. On January 13, 2006, after examining Claimant, Dr. Jones again opined that Claimant's condition was fixed and stable. Referencing the *AMA Guides, Fifth Edition*, he assessed 70% PPI of Claimant's left hand (60% for the amputations, plus 10% for residual scar-related pain), or 38% of the whole person. (*See* JE-99). Surety does not dispute this assessment. It has paid Claimant a benefit reflecting this PPI rating.

24. Thereafter, Claimant was diagnosed with left carpal and cubital tunnel syndromes, as well as a painful carpal boss. In December 2006, he underwent carpal and cubital tunnel releases with medial epicondylectomy and excision of the carpal boss. On February 13, 2007 and July 3, 2007, Dr. Jones completed work release forms, releasing Claimant to "full work." JE-140. Apparently, no updated PPI assessment was made.

#### *VOCATIONAL EXPERT OPINIONS*

25. *Mary Barros-Bailey, Ph.D.* Dr. Barros-Bailey conducted a vocational evaluation, at Defendants' request, on February 25, 2010. As part of her evaluation, Dr. Barros-Bailey performed a transferable skills analysis based upon Claimant's education and work experience, using *O\*NET* software. Based on those results, she

opined that Claimant's transferable skills all exist within semi-skilled work categories, including: material moving; transporting; lumber and wood products; furniture and fixtures; motor freight transportation and warehousing; and concrete, gypsum and plaster products.

26. Regarding nonmedical factors other than education and work experience, Dr. Barros-Bailey opined Claimant's age was not a significant factor, that his high school education could be considered an advantage because workers in his labor pool often lacked a high school education, and that his felony sexual assault conviction would preclude him from working with vulnerable populations.

27. In her report, Dr. Barros-Bailey acknowledged Claimant's medical restrictions and limitations due to his industrial physical impairment, including a 20-pound lifting restriction and no work requiring bilateral use of his upper extremities. In her deposition, however, she was presented with information from Dr. Jones's medical records from which it could be determined that Claimant's medical restrictions had been lifted. In that event, according to Dr. Barros-Bailey, Claimant has suffered 0% disability. Dr. Barros-Bailey's substantive opinion in this regard is altogether unpersuasive. A man with Claimant's vocational profile, who has lost all of the fingers on one of his hands, has clearly suffered some disability.

28. Dr. Barros-Bailey opined that Claimant "retains the ability to gauge velocities and distances, operate steering wheels and operating controls, and follow rules." JE-46. She also opined that Claimant retains full use of his dominant (right) arm, so he is still competitive in his local labor market for jobs such as ski lift operator, forklift driver, delivery driver, dump truck driver, deli worker, cashier and fast food restaurant worker.

29. Based upon Claimant's current job and rate of pay, Dr. Barros-Bailey opined that he has suffered no disability. In the event he loses his job, however, she opined that Claimant has suffered disability of 41% (inclusive of impairment) based on the apparent average of his lost access to jobs of 45% and his lost wage-earning capacity of 37.5%.

30. Dr. Barros-Bailey's report does not divulge the method by which she performed her loss of access analysis, and she was entirely unable to quantify her opinion at her deposition. She quite ably communicated her starting premise (that the universe of jobs comprising Claimant's pre-industrial injury labor market constituted the relevant whole, or "100%"), but she failed entirely to identify either the number of jobs within that universe, or the number of jobs by which it was depleted post-accident, with sufficient specificity to derive any mathematically sound conclusions. Numbers aside, Dr. Barros-Bailey was also unable to identify what geographical areas comprised the labor market assumed by *O\*NET* in performing the relevant calculations.

31. Similarly, Dr. Barros-Bailey provided insufficient raw data from which to assess the accuracy of her wage loss disability opinion of 37.5%. She discussed Claimant's pre-injury wage of \$11 per hour and his \$16 hourly wage at the time of the hearing, and opined that other forklift driver jobs paid at least \$16 per hour, but she did not elaborate upon what, if any, other jobs or wages from his local labor market she considered.

32. Prior to the hearing, Dr. Barros-Bailey conducted a telephone survey of eight employers concerning their willingness to hire workers who lack use of their nondominant hand. She did not ask about the effect, if any, of amputations such as Claimant's. Further, she did not identify all of the employers surveyed, explain her rationale for choosing these employers or estimate what portion of Claimant's local labor market they represented. Moreover, her written report data concerning the survey findings indicated such nonuse would be quite detrimental to Claimant's ability to find work, whereas her deposition testimony stated the opposite. Dr. Barros-Bailey explained that the report contained a typographical error, but she did not provide a rationale or provide any documentation for the record to establish why her testimonial opinions about information developed specifically for the written report should be viewed as more credible. The Referee finds the data derived from Dr. Barros-Bailey's telephone survey cannot be determined with sufficient accuracy or specificity to be of assistance in determining Claimant's disability.

33. *Shannon R. Purvis, CRC*. Ms. Purvis conducted a vocational evaluation, at Claimant's request, on May 13, 2010. She prepared an analysis of Claimant's loss of access to gainful employment by broadly comparing the work available to him pre-accident, to the work available post-accident, in the St. Maries local labor market.

34. Ms. Purvis did not describe the state of the St. Maries local labor market prior to Claimant's industrial accident. However, she did address the work opportunities in St. Maries as of the time of her report:

St. Maries is a small town (population: 2800) dependent on the timber industry, with two lumber mills operating there. Although extensive outdoor recreation opportunities exist in the St. Maries area, tourism is not a significant source of revenue. St. Maries has a small hospital, K-12 public schools, and a long-term care facility. A small number of stores, restaurants, gas stations, and hotels support the population. The timber industry slowdown has likewise affected the rest of the

economy in St. Maries, and the current unemployment rate of 16.8% in Benewah County reflect [*sic*] the economic difficulties of the area. The closest metropolitan area is Coeur d'Alene, approximately 60 miles north. Per the Department of Labor, approximately 15% of workers in St. Maries commute to Coeur d'Alene. Winter commuting can be difficult due to snow and road conditions. There is a tribal casino approximately 45 minutes away from St. Maries; hiring preference is given to tribal members.

JE-34. By the time of Ms. Purvis's deposition, the unemployment rate had decreased to 11.4%. Also, the Referee takes judicial notice of facts posted on mapquest.com, city-data.com and the website for Kellogg, Idaho, that Kellogg, with a population of approximately 2,100, is situated approximately 30 miles from St. Maries, and is the location of a gondola to a year-round ski and recreational area, as well as hotels, restaurants, and various other businesses.

35. Ms. Purvis opined that, *pre-accident*, Claimant regularly utilized industrial skills including: precision working; taking instructions; operating, manipulating and controlling equipment and objects; working with others; manipulating objects; installing and repairing; mechanical knowledge; verbal communication; and physical activities such as reaching, handling, grasping, bending, stooping, twisting, kneeling, crouching, lifting and climbing. She did not list the job options available to Claimant pre-accident, but they would include, at least, those jobs he actually performed in the past.

36. *Post-accident*, Ms. Purvis opined Claimant retained skills in taking instructions, mechanical knowledge, verbal communication, and physical activities including operating, manipulating and controlling equipment and objects, though these are limited to what he can do one-handed or with adaptive devices. Possible post-accident job options for Claimant include forklift driver (with accommodations), transportation driver (private, non-CDL, subject to further limitations due to his felony sexual assault conviction and limited ability to assist passengers), restaurant host (with training), casino switchboard operator (with training and assistive devices), and heavy equipment operator (with restrictions). Ms. Purvis did not detail the training, assistive devices, restrictions or accommodations she thought Claimant would need for each of these jobs.

37. Claimant's pertinent non-medical factors, according to Ms. Purvis, include his high school education level (detrimental to sedentary and light-duty work options), age (over 40, so limited by being an "older worker"), work experience (primarily in heavy duty jobs), and criminal history (felony sexual assault). In addition, she conducted a job search, addressed more fully below, and concluded that Claimant was not competitive for any jobs at that time. She opined that a prosthetic device could increase Claimant's competitiveness for jobs, but that the extent to which any given employer would be willing to accommodate his limitations is a confounding variable that must also be taken into consideration.

38. Ms. Purvis concluded that, should Claimant lose his job, he would be totally and permanently disabled, chiefly due to the facts that he has the use of only his right hand, a 20-pound lifting restriction on the right, no formal education beyond high school, work experience concentrated in heavy-duty labor jobs, a felony sexual assault conviction, and no skills he could transfer to the sedentary and light-duty jobs otherwise within his work capabilities. She noted in her report, "Due to the economic slowdown, Mr. Welch is worried about his job security." JE-32. Further, "He does receive complaints from other drivers who feel he is being treated preferentially when he drives the newer forklift. Mr. Welch has considerable concerns about his vocational future if he is [*sic*] loses his job." JE-32.

39. Nevertheless, Claimant was still employed at the time of the hearing, nearly two years after Ms. Purvis's evaluation, and still concerned about his job security, though he admitted that the supervisor he had the most trouble with had been transferred to another work location. He offered no proof, such as disciplinary action slips or witness testimony, to establish that unemployment is imminent.

40. Job security concerns are common, regardless of labor market or industry. The evidence, however, fails to establish that Claimant is at any heightened risk of losing his job in the near future.

#### *CLAIMANT'S CREDIBILITY*

41. Claimant is a credible witness, with an understandable focus on what he is unable to do, given the circumstances of these proceedings.

#### **DISCUSSION AND FURTHER FINDINGS**

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

## PERMANENT PARTIAL DISABILITY

42. *Permanent impairment and medical stability.* "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. I.C. § 72-423. Here, there is no dispute that Claimant incurred work-related permanent impairment of 38% of the whole person, nor that his condition is medically stable; therefore, the matter is ripe for a determination of Claimant's disability.

43. There is, however, broad disagreement as to the exact nature of Claimant's impairment-related medical restrictions and limitations. As determined above, Claimant's disability determination will be based upon his permanent left-side limitations which significantly reduce or eliminate his ability to reach, perform repetitive motion or fine manipulation activities, grasp, or engage in bilateral upper extremity activities. Neither vocational expert addressed whether or not a prosthetic device is likely to increase Claimant's ability to engage in lighter-duty employment in cleaner environments than Claimant's current workplace. Therefore, only Claimant's abilities without the use of a prosthetic will be considered.

44. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423 and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the purely advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

45. *Local labor market.* In evaluating Claimant's disability, consideration must be given to identifying the labor market in which Claimant's disability should be assessed. Claimant resided and worked at the same location - St. Maries - during all relevant times, so the labor market reasonably geographically proximal to St. Maries is the appropriate market from which to analyze Claimant's disability.

46. The Idaho Supreme Court in *Brown v. The Home Depot*, WL 718795 (March 7, 2012) acknowledged the impact of on-going changes in the local labor market on a claimant's disability finding. However, it, also cautioned against allocating too much weight to the effects of temporary labor market fluctuations:

We do not intend to suggest that an injured worker is automatically qualified for odd-lot status solely due to a lack of employment opportunities in the applicable labor market due to temporary economic conditions at the time of hearing. Nor do we suggest that a worker may be disqualified from odd-lot status due to a labor market that is unusually favorable to prospective employees at the time of hearing. Rather, there are ebbs and flows in broad economic conditions which may affect local labor markets. Given the humane objectives underlying our worker's compensation scheme, the Commission may disregard the effects of temporary fluctuations in the applicable labor market resulting from changing economic conditions when determining whether the employee's personal circumstances demonstrate a compensable need.

*Id.*

47. Along these lines, in determining Claimant's disability, it must be recognized that Idaho is slowly emerging from a profound economic recession. According to Ms. Purvis, the unemployment rate in St. Maries has improved, from 16.8% at the time of her report in 2010, to 11.4% in April 2011, the most recent month for which she had data. No data identifying economic conditions at the time of Claimant's industrial accident were provided for comparison. Fortunately, Claimant, 42, remained well-employed through the deepest part of the downturn and it is likely that economic conditions will continue to improve within his reasonable future work life.

48. *Time of disability determination.* The *Brown* court this year reiterated that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing. Under Idaho Code § 72-425, a permanent disability rating is a measure of the injured worker's "present and probable future ability to engage in gainful activity." Therefore, the Court reasoned, in order to assess the injured worker's "present" ability to engage in gainful activity, it necessarily follows that the labor market, as it exists at the time of hearing, is the labor market which must be considered. Although the Commission is afforded latitude in making alternate determinations based upon the particular facts of a given case, the parties have not argued that Claimant's disability should be determined as of any other point in time; therefore, it will be determined as of the hearing date.

49. *Effect of current employment.* "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 I.C. § 72-430. Defendants cite *Paz v. Crookham*, 2005 IIC 0166, in arguing that Claimant has not suffered a compensable disability because, continuously since his recovery, he has been "presently and actually" employed at a

higher rate of pay than he was before his industrial accident.

50. Claimant does not dispute that he has maintained employment, first with Regulus then with its successor (Stimson Lumber), continuously since his industrial accident in 2004, nor that his wages increased when he became a forklift operator due to circumstances brought about by his accident. However, Claimant argues that ignoring his reduced ability to obtain employment in his local labor market outside his present employment would be contrary to Idaho law. The Referee agrees. The Commission in *Paz* apparently saw fit, based upon the particular facts of that case, to allocate significantly more weight to the evidence of claimant's "present and actual" ability to engage in gainful employment than to the evidence of her "probable future ability". However, where, as here, there is no evidence that both employer and claimant envision that claimant will remain employed at the company indefinitely, there is insufficient basis to discount the claimant's probable future ability to obtain employment in the disability analysis.

51. Likewise, there are insufficient grounds from which to determine that Claimant's present well-employed circumstances should not be considered. As a result, Ms. Purvis's opinion that Claimant is totally and permanently disabled is unpersuasive because it fails to consider his continued employment, by two separate employers, at a wage that has steadily increased over the years to 160% of his pre-accident wage.

52. Claimant's disability will be determined, as per the statute, based upon factors including both his present and his probable future ability to engage in gainful employment.

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

54. In determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement; the disfigurement, if of a kind likely to handicap the employee in procuring or holding employment; the cumulative effect of multiple injuries; the occupation of the employee; and his or her age at the time of accident causing the injury, or manifestation of the occupational disease. Consideration should also be 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. I.C. §§ 72-425, 72-430(1).

55. Claimant's relevant nonmedical factors are weighed as follows:

a. *Age:* Over the age of 40 (Claimant is 42), Ms. Purvis opined that is an "older worker" and, thus, he is less likely to be hired from an employee pool containing younger applicants. Dr. Barros-Bailey countered that, over the past few years, Bureau of Labor Statistics data shows that older workers have been more successful at obtaining employment than younger workers, so Claimant's age may actually be an advantage. However, she ultimately opined that this is not a significant factor. The Referee agrees with Dr. Barros-Bailey and finds Claimant's age is not a significant factor influencing his disability determination.

b. *Education:* Claimant is a high school graduate without additional formal vocational training or computer skills. Ms. Purvis opines, as a result, that Claimant is limited to jobs to which he can bring specific work skills or training. Even when such a fit with a potential employer is achieved, Ms. Purvis opined, "applicants with additional vocational training or education are more desired than applicants with basic educational achievement." JE-34. Dr. Barros-Bailey opined that in St. Maries, Claimant is actually more educated than many, so his education is an advantage. The Referee finds there is insufficient evidence in the record from which to determine whether Claimant's high school education is generally a benefit or a detriment to finding work. However, given his lack of advanced formal education and training, the record establishes that Claimant's access to jobs that do not require manual labor is significantly limited by his lack of advanced formal education or training.

c. *Work experience:* Both vocational experts agree that Claimant has developed job-specific skills in heavy labor positions, including heavy equipment operation, concentrated in the construction and timber industries. Ms. Purvis opines that Claimant's work history leaves him with no skills transferable to light-duty or one-handed work. Dr. Barros-Bailey opines that Claimant retains abilities to gauge velocities and distances, operate steering wheels and controls and follow rules. She believes Claimant would be competitive in his local labor market for jobs such as ski lift operator, forklift driver, delivery driver, dump truck driver, deli worker, cashier and fast food restaurant worker. Claimant has no experience in the food service industry. This, along with his

left-hand disfigurement, greatly reduces his ability to compete for front-house positions. Also, being one-handed with no prior experience greatly reduces his ability to compete for back-house positions, which require proficiency with commercial cutting machines, fryers, knives and/or grills, as well as coordinated use of both hands. Too little evidence as to the requirements of a ski lift operator exists to determine whether or not Claimant could perform this job. It would appear that Claimant probably has the basic abilities to work as a cashier. Even though he has no prior experience, the training period for such a job is minimal. The Referee finds Claimant's work experience leaves him with skills transferrable to occupations primarily including forklift driver, delivery driver and dump truck driver, as further limited to the extent that any individual job may also require additional abilities that are beyond his physical limitations.

d. *Criminal conviction*: Neither vocational expert knew that Claimant's felony assault conviction involved a sex crime until their respective depositions. They agreed that this conviction would exclude employment that would place Claimant in environments with vulnerable populations. Most notably, this could limit some of the driving/transportation jobs available to him.

e. *Disfigurement*. Some employers will consider the appearance of Claimant's left hand detrimental to hiring for some positions.

56. Ms. Thunstrom opined that Claimant could return to the jobs of resaw helper, resaw operator and roundtable worker, with specific accommodations. However, Dr. Jones apparently rejected Ms. Thunstrom's conclusions because, although he requested her opinion, he opined, in March 2005, that Claimant could not safely perform these jobs. Dr. Jones's opinion supercedes Ms. Thunstrom's in this regard.

57. In 2005, Ms. Bishop opined that Claimant has strong transferrable skills in welding, operating forklifts and loaders, carpentry and auto mechanics. In 2010, Ms. Barros-Bailey opined that Claimant was qualified and able to work as a ski lift operator, forklift driver, delivery driver, dump truck driver, deli worker, cashier and fast food restaurant worker, and Ms. Purvis thought that, with accommodations or restrictions, Claimant could work as a forklift driver, transportation driver (private, non-CDL, subject to further limitations due to his felony sexual assault conviction), restaurant host (with training), casino switchboard operator (with training) and heavy equipment operator.

58. Although the Referee is skeptical about Claimant's ability to obtain and maintain employment in the restaurant industry or the casino, which extends preference to members of the tribe for which Claimant would not qualify, Claimant has considerable proven skills and experience, particularly driving a forklift and other equipment. Before his industrial accident, Claimant was eligible for a broader array of lower-paying jobs; by the time of the hearing, he was eligible for a narrower array of jobs, many of which carry a significantly higher wage than he was earning pre-accident.

59. Having considered and weighed the opinions of Ms. Purvis and Dr. Barros-Bailey, as well as those of Ms. Thunstrom and Ms. Bishop, the Referee finds Claimant has met his burden of demonstrating disability of 75% of the whole person, inclusive of impairment, due to medical and non-medical factors.

#### *ODD-LOT DOCTRINE*

60. A claimant who is not 100% permanently disabled may still prove total permanent disability by establishing he is an odd-lot worker. 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). 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). The burden of establishing odd-lot status rests upon the claimant. *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990).

A claimant may satisfy his burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways:

- a. By showing that 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).

61. Claimant has been continuously employed, first by Regulus and then by Stimson, since the time of his

industrial accident. He has not attempted other types of employment without success.

62. Setting aside, for the moment, the fact of Claimant's continuous employment, there is evidence in the record that he has searched for work and found none available. However, Claimant's job search was less than earnest, consisting mainly of one-time contacts to past employers (one of which had previously fired him) outside the St. Maries local labor market and speaking to two Colorado employers, to whom he was introduced by his stepdaughter, over the telephone. One of the few new contacts Claimant made in St. Maries was to a person without hiring authority at Always Drilling, who advised that the company was not presently hiring. No doubt, the sting of each of these rejections made a convincing impression on Claimant, that his job prospects are few. Nevertheless, his methodology appears poorly calculated to succeed in winning him a job in the St. Maries local labor market.

63. Ms. Purvis also conducted a work search on Claimant's behalf, by reviewing job postings at the Department of Labor and on indeed.com. In addition, she discussed Claimant's case with Annie Frederick, a consultant at the Department of Labor. Apparently, these were one-time events. Ms. Purvis concluded that there were no jobs available to Claimant.

64. As addressed, above, evidence of Dr. Barros-Bailey's job search survey is not credible and will not be considered.

65. The St. Maries local labor market is a slow-moving creature. It takes most job-seekers significant time to find work there regardless of disability due to its size and the current state of the economy, which is improving but still anemic. Yet, none of the job search evidence in the record consists of longitudinal data that demonstrate that Claimant, or anyone on his behalf, took anything but a static picture of the job market at one point in time before determining that he had no prospects. As such, even notwithstanding the fact that Claimant is well-employed, the evidence is insufficient to establish either the second or third prongs of the *Lethrud* test.

66. Claimant is an otherwise able-bodied man, with marketable skills, most notably in driving and moving equipment operation, and an impressive employment history both before and following his industrial accident. He demonstrated at Regulus that he is a desirable employee and, despite Claimant's concerns, his continued tenure at Stimson demonstrates that he has been a valued employee at that company, as well. Neither employer was a "sympathetic employer". Claimant's years of success working as a forklift driver following his industrial accident, though it has not always been easy for him, have allowed him to become and remain competitive for all kinds of work within his capabilities.

67. The Referee finds Claimant has failed to establish any of the three *Lethrud* requirements necessary to prove odd-lot status.

## **CONCLUSIONS OF LAW**

1. Claimant has proven that he has sustained permanent partial disability of 75% inclusive of 38% permanent partial impairment, which Surety has already paid.
2. Claimant has failed to prove that he is totally and permanently disabled as an odd-lot worker.

## **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 22<sup>nd</sup> day of May, 2012.

INDUSTRIAL COMMISSION

LaDawn Marsters, Referee

## **ORDER**

Pursuant to Idaho Code § 72-717, Referee LaDawn Marsters submitted the record in the above-entitled matter, together with her 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 proven that he has sustained permanent partial disability of 75% inclusive of 38% permanent partial impairment, which Surety has already paid.
2. Claimant has failed to prove that he is totally and permanently disabled as an odd-lot worker.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

INDUSTRIAL COMMISSION

Thomas P. Baskin, Commissioner, R.D. Maynard, Commissioner

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Notes:

[1] Claimant had no hiring or firing authority. He essentially relayed instructions on the job site and kept track of a handful of employees.

[2] Claimant's initial skin graft was unsuccessful, so he was required to undergo a subsequent revision surgery. That surgery resulted in a successful partial-thickness graft. In addition, his fifth metacarpal required additional excision (at the base) after the others had healed.

[3] Ms. Thunstrom's report is undated, but the context of its placement in the record, as well as Dr. Jones's February 9, 2005 email confirming that she had completed the WSA on the prior day, suggests it was prepared in February 2005.

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