

Defendant Surety, Liberty Northwest Fire Insurance Company, were represented by Monte R. Whittier of Boise; and Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF), was represented by Anthony M. Valdez of Twin Falls. The parties presented oral and documentary evidence. This matter was then continued for the taking of a post-hearing deposition, the submission of briefs, and subsequently came under advisement on December 27, 2004.

ISSUES

The noticed issues to be resolved are:

1. Whether Claimant is entitled to permanent partial impairment (PPI) benefits, and the extent thereof;
2. Whether Claimant is entitled to permanent partial or permanent total disability (PPD/PTD) in excess of permanent impairment, and the extent thereof;
3. Whether Claimant is entitled to total permanent disability pursuant to the “odd-lot” doctrine;
4. Whether ISIF is liable under Idaho Code § 72-332; and,
5. Apportionment under the *Carey* formula.

ARGUMENTS OF THE PARTIES

Claimant argues he is totally and permanently disabled under the odd-lot doctrine since any job search in the Featherville area, where he currently lives, would be futile. In the alternative, should the Commission find he is not totally and permanently disabled, he argues that he is entitled to a PPD rating of 65% of the whole person based on Mr. Spooner’s report, with between 40% and 60% of that rating apportioned to his present injury.

Defendant Employer/Surety counters, that based on Dr. Verst’s opinion, Claimant is entitled

to a PPI rating of 12.8% of the whole person for his May 2002 low back injury, but that he has failed to demonstrate he is an odd-lot worker. They argue Claimant has not attempted to show that he attempted other types of employment without success, that both Mr. Spooner and Dr. Collins opined employment options were available to him, and that he was not interested in returning to work after his neck surgery, but determined to retire and move to Featherville. Employer/Surety further argues that if the Commission should find Claimant entitled to PPD, his disability should be limited to 13% for loss of access and no more than 45% based on lost wages, both inclusive of the 22% PPI rating given by Dr. Verst for his 2002 injury. They argue any disability evaluation as to job loss/availability should be based on the Twin Falls labor market, not Featherville, since Claimant decided to move to Featherville prior to his 2002 injury, after he was notified his job would end, and that he then took \$8000.00 not to compete against Employer. In the alternative, Employer/Surety argues that if the Commission finds Claimant totally and permanently disabled under the odd-lot doctrine, they should only be responsible for an additional 35 weeks of benefits under the *Carey* formula.

Defendant ISIF argues Claimant has not carried his burden in establishing that he is totally and permanently disabled under the odd-lot doctrine. They maintain he has not attempted to work since he retired; that he has not made a genuine attempt to find a job; and that any job search would not be futile since there are numerous job options regularly available to him in the South Central Idaho area, jobs within his work restrictions as both Mr. Spooner and Dr. Collins have opined. ISIF further argues Claimant had no intention of finding other employment after he was laid off by Employer since he was going to retire to his Featherville cabin once he sold his residence in Twin Falls. They also argue the Idaho Supreme Court has determined that a claimant cannot achieve total disability by changing his place of residence. ISIF finally argues, since Claimant has not shown that

he is totally and permanently disabled, he cannot qualify for benefits under Idaho Code § 72-332.

In rebuttal, Claimant argues Defendant Employer/Surety has presented Dr. Verst's testimony in a light inconsistent with his actual statements, specifically the work restrictions imposed on him by Dr. Verst. He concurs with Employer/Surety's analysis of Dr. Verst's final PPI rating of 12.8% for the 2002 low back injury. Claimant further argues the Commission should use the Featherville area as his applicable job market in evaluating his disability, since it was his residence at the time of the hearing. He then argues there are no jobs in the Featherville job market, and that the Commission should look at Employer's conduct and the effect it had on his personal and economic circumstances since they created the circumstances that advanced the date of his move.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and his spouse, Theresa A. Henderson, taken at the August 13, 2004, hearing;
2. Claimant's Exhibits 1 through 11 admitted at the hearing;
3. Defendant ISIF's Exhibits A through P admitted at the hearing;
4. Defendant Employer/Surety's Exhibits Q through U admitted at the hearing;
5. The deposition of David B. Verst, M.D., taken by Claimant on August 27, 2004; and,
6. The *AMA Guides to the Evaluation of Permanent Impairment*, Fifth Edition, (*AMA Guides*) of which the Referee takes notice.

Claimant's objection on p. 30 of Dr. Verst's deposition is sustained; his objection on p. 31 is overruled.

After having fully considered all of the above evidence, and the briefs of the parties, the

Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was born in 1947 into a military family which frequently moved. He graduated from Mountain Home High School in 1965, and from Boise Junior College in 1967 with an AA degree in electronics. He immediately went to work for Employer in Palo Alto, California, as a customer engineer repairing IBM tab card computers and key punches. Claimant later worked on magnetic tape drives for the IBM 360, and then hard disc drives. All of his work involved hardware repair.

2. Claimant transferred to Twin Falls in 1979 and purchased a residence. He began repairing small IBM mainframe computers. As computer equipment evolved he moved into the repair of personal computers (PCs), servers, and cathode ray tubes (CRTs) with keyboards. Claimant's territory extended from Sun Valley to Jackpot, and from Glenns Ferry to Malta. His job title changed to customer service representative, but the work remained the same: hardware repair.

3. In August 1983 Claimant underwent a hemilaminectomy at L5-S1 with the removal of an extruded disk fragment. He had injured his back lifting a tool bag out of the trunk of his vehicle several years earlier. The low back pain had gotten progressively worse and now extended down his left leg. The procedure was performed by Al H. Kuykendall, M.D., upon referral by P. Michael O'Brien, M.D. Apparently no workers' compensation claim was filed for the injury. There is also no indication in the record that either physical restrictions or a PPI rating were given. Claimant, however, exercised more caution with his activities after the surgery. His job responsibilities remained the same.

4. In 1988 Claimant purchased land in Featherville. Featherville is a small mountain community located approximately ten miles above Anderson Ranch Dam on the Boise River. Claimant had a foundation poured at the site in 1991 and started building a log cabin vacation home in 1995. He acted as general contractor; the concrete and log work was done by subcontractors. Claimant did the bulk of the remainder of the work, including the electrical, plumbing, and chinking.

5. Claimant fell off a ladder at his residence in March 1990 and fractured his left radial styloid. He is right handed. The fracture apparently resolved.

6. In early 1996, Claimant underwent nerve conduction studies for possible left carpal tunnel syndrome. The studies were normal, but x-rays showed degeneration at C5-6 and C6-7. John W. Hower, M.D., diagnosed mild left C6 cervical radiculopathy.

7. Employer restructured its operations in the late 1990s and created a subsidiary, Technology Service Solutions, for hardware maintenance. Claimant retired from Employer with 30 years of service, started collecting retirement benefits, and went to work for the subsidiary. Employer then restructured its operations again, absorbed the subsidiary, and Claimant returned to work with Employer in 1999. His job tasks remained the same throughout this period, there were no breaks in service, and after returning to Employer, he continued to receive retirement benefits in addition to his regular pay.

8. Claimant was treated for hypertension and headaches in the late 1990s. In 1999, James E. Scheel, M.D., correlated the headaches to degenerative joint disease in Claimant's cervical spine.

9. Claimant saw Matthew O. Jolley, M.D., in January 2002 complaining of chronic neck and back pain, and upper left extremity paresthesias. X-rays showed degenerative joint disease of the cervical and lumbar spines. A MRI showed multiple levels of stenosis in his cervical spine.

Claimant was referred to David B. Verst, M.D., for a surgical evaluation.

10. Dr. Verst opined Claimant suffered from severe spinal cord compression at C5-6 and C6-7. On March 27, 2002, he performed decompressions and fusions at both levels. Post-surgical diagnoses included cervical spinal stenosis, spondylosis with myelopathy, degenerative disk disease, and facet joint arthropathy.

11. Claimant returned to work with Employer on April 16, 2002. He was informed his employment would end in 30 days due to lack of work.

12. Claimant listed his Twin Falls residence for sale on April 30, 2002.

13. On May 1, 2002, Claimant suffered a low back injury. He picked-up a laptop computer from his van, shut the door, and turned to go into his Twin Falls residence for lunch; he had just returned from a service call in Rupert. During this continuous maneuver, he felt a sharp pain in his low back. The injury was reported as industrial and Surety accepted the claim.

14. According to the Form 1 completed by Employer, Claimant was earning \$400.00 per week, or \$20,800.00 per year, at the time of the accident. Employer's pay records, however, show an hourly rate of \$21.32, or \$44,345.60 per year based on a 40 hour work week. A Surety document shows he was paid \$56,401.02 in the one year period prior to the accident.

15. Claimant now worked out of his residence with an Employer supplied van; Employer had closed its office in Twin Falls in the late 1990s. The laptop was used to reference service manuals contained on CDs. Claimant basically ran diagnostic tests on the PC in question, and then removed and replaced any faulty components. Occasionally, he would install software using CDs. The work was done under service contracts primarily on PCs manufactured by IBM, but also on PCs built by other companies.

16. Claimant returned to Dr. Verst complaining of severe left leg pain with weakness; a

left foot drop was noted. X-rays showed multilevel disk degeneration with collapsed disk spaces. A lumbar MRI showed a very large extruded disk herniation at L4-5 extending down to the L5-S1 disk with significant effect on the L5 nerve root. On May 22, 2002, Dr. Verst performed laminotomies at L4 and L5, and a discectomy at L4-5. His post-operative diagnosis was spinal stenosis at L4-5, extruded disk herniation at L4-5, post-laminectomy syndrome at L4-5, degenerative disk disease, and facet joint arthropathy.

17. Dr. Verst found Claimant medically stable on September 9, 2002, assigned him a PPI rating of 12% of the whole person, and released him to work. He also recommended Claimant wear an ankle/foot arthrosis because of the persistent weakness and instability [the drop foot] in his left lower leg.

18. On September 11, 2002, Dr. Verst approved a modified job site evaluation (JSE) for Claimant with Employer. Claimant, however, was laid off by Employer on September 20, 2002, his first day back to work. The JSE was prepared by Pamela Burkett of the Industrial Commission Rehabilitation Division in Twin Falls with Claimant's cooperation; Employer declined to participate in the process. Consultant Burkett also provided Claimant with information on employment with Dell, another computer manufacturer, and an IT position with the state. Claimant had received training on repairing Dell PCs from Employer.

19. At the time he was laid off, Claimant signed a separation/severance agreement with Employer for which he received \$8,000.00. As part of the agreement, he agreed not to work for any of Employer's customers or repair any equipment Employer had a service contract for. The agreement was for one year. Claimant stated he believed the agreement prohibited him from working for any of Employer's competitors. Another part of the agreement precluded him from filing an age discrimination lawsuit against Employer.

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20. Claimant spoke with Consultant Burkett on October 2, 2002. She noted he had applied for unemployment insurance benefits, that his Twin Falls residence had been sold, and that he was moving to Featherville. Consultant Burkett further noted Claimant had not followed up on the job leads she had provided, but that he had contacted various computer repair businesses to see if work was available.

21. Claimant's spouse left her position as a bank customer service representative in mid-November 2002.

22. Claimant spoke with Consultant Burkett again on November 27, 2002. She noted he had relocated to Featherville, that he was receiving unemployment benefits, that he was registered for work with the Mountain Home Job Service Office, that he had been looking for work in Mountain Home, that he had indicated there was a lot of work in Mountain Home, but nothing within his requirements. The requirements were not given. Consultant Burkett further noted both Claimant and his spouse were receiving retirement benefits, and that he would like to supplement his income, but not necessarily in a full-time year round position. She also noted Claimant discussed acquiring a CDL and driving for a friend during the summer months. Consultant Burkett also gave Claimant several job leads including Boise employers for contract work. She then closed Claimant's case because he had moved out of the area.

23. Claimant received unemployment benefits from October 5, 2002, until July 5, 2003.

24. In response to questions from Claimant's attorney, Dr. Verst opined in a letter dated April 26, 2003, that Claimant could return to work with restrictions primarily related to the amount of time he spent sitting, standing, and walking, *i.e.*, he should be allowed frequent postural changes. He further opined Claimant could lift up to 15 pounds continuously, up to 30 pounds frequently, up to 40 pounds occasionally, but rarely over 40 pounds. Dr. Verst further opined Claimant should

avoid bending. This equates to light-medium work.

25. In the same letter, Dr. Verst noted Claimant had chronic neck pain although recent x-rays of his cervical spine showed no evidence of motion or instability. He further noted Claimant's drop foot was improving.

26. Claimant returned to Dr. Verst on November 4, 2003, complaining of low back pain radiating down into his right lower extremity. A lumbar MRI showed a recurrent disk herniation at L4-5 creating L5 nerve entrapment, and degenerative disk disease at L5-S1 with significant disk collapse creating up/down stenosis with L5 nerve root entrapment. At Dr. Verst's request, Claimant received two right L5 transforaminal epidural injections in November and December 2002 from Clinton L. Dille, M.D. A third injection was not given because the second did not help Claimant.

27. On December 11, 2003, Dr. Verst and Claimant discussed his future medical care. Dr. Verst felt further surgery was inappropriate and Claimant agreed. Claimant believed he could live with his pain, recognize that he had limitations, and that he would have to modify his life-style and activities. Dr. Verst believed Claimant was at a point where he could deal with his pain without further interventions or treatments.

28. In response to questions from Claimant's attorney, Dr. Verst opined in a letter dated February 10, 2004, that Claimant's pre-existing condition represented 80% of his current lumbar condition, and that his overall functional capacity was dramatically diminished.

29. At the request of his attorney, Claimant saw D. Dean Mayes for a functional capacity evaluation (FCE) on June 24, 2004. Mr. Mayes, a physical therapist, opined Claimant could perform work at the light-medium level, that he could lift up to 20 pounds on a frequent basis and 35 pounds on an infrequent basis. He further opined Claimant could not tolerate activities requiring extensive bending, twisting, or getting into awkward positions, and that he should have the freedom to move

around a lot.

30. At the request of Claimant's attorney, Jason L. Spooner, M.S., conducted a disability evaluation of Claimant. His report is dated August 7, 2004. He noted Claimant worked on mainframe computer, PC, network, and printer hardware problems, and that he was certified to work on IBM and some Dell computers. Mr. Spooner opined, based on the FCE conducted by Mr. Mayes and Dr. Verst's restrictions, coupled with the limited labor market in Featherville, it would be very difficult for Claimant to find employment. He further opined that it would be highly unlikely for Claimant to find employment related to his technical background, and that if he were to find employment, it would be in the \$6.00 to \$7.00 per hour range, well below the \$21.00 to \$22.00 per hour he was making at the time of his injury. Mr. Spooner opined Claimant could use his computer background in working as a hotel desk clerk, a cashier, a counter or retail clerk, a retail salesman, a parts salesman, a bill and account collector, or a customer service representative. He further opined, that based on the average entry level wage for these positions, compared to his time of injury wage, Claimant would suffer a wage loss of 65%, and that if he earned the median wage for these positions, he would suffer a wage loss of 55%. Mr. Spooner's opinions were based on the eight counties in the Idaho South Central Labor Market. The counties were not identified.

31. At the request of ISIF, Nancy J. Collins, Ph.D., conducted a vocational assessment of Claimant. Her report is dated August 11, 2004. She defined vocational disability as the effect a work injury has on one's capacity to obtain and sustain competitive work and one's earning capacity. Dr. Collins noted Claimant was a skilled worker who continually updated his electronic knowledge and skills through the training provided by Employer. She further noted Claimant's job with Employer was considered medium work, but that he was able to continue performing the job functions after his 1983 surgery by limiting his lifting and changing positions as needed. Dr. Collins

opined Claimant had lost access to 13% of the Twin Falls labor market as a consequence of his injury. She further opined he was employable in the Twin Falls labor market in customer service jobs, bench assembly and repair jobs, and with accommodation, his time-of-injury job. Dr. Collins opined Claimant would suffer a considerable loss of earning capacity with another employer because of his longevity and seniority with Employer. She agreed with Mr. Spooner's probable employment options and with his assessment of Claimant's loss of earning capacity. Dr. Collins also noted Claimant decided to retire and move to Featherville, a labor market which does not support regularly available work options, while the Twin Falls labor market provided opportunities for someone with his skills, abilities, and limitations.

32. Claimant maintains he intended to retire, sell the Twin Falls residence, and move to the cabin in Featherville after the cabin was completed. The cabin was not completely finished at the time of the hearing.

33. At his post-hearing deposition, Dr. Verst, a board certified orthopedic spine surgeon, opined Claimant's 2002 acute low back injury was not necessarily related to his previous low back condition, that the physical restrictions he had given Claimant after his 2002 lumbar surgery had not changed, that the lifting restrictions for Claimant's cervical fusions would be similar to those he gave him for his lumbar condition, and that he was at a point he could deal with his pain. Dr. Verst also opined Claimant had incurred an additional 10% of the whole person PPI for his lower back, which he attributed to increased back and right leg pain, and he apportioned 80% of the additional PPI to pre-existing conditions at L4-5, *i.e.*, the previous surgeries, previous disk ruptures, and 20% to his current condition for the degenerative extrusion of soft disc material. He had given this additional rating in March 2004; pre-existing meant prior to the time the new rating was given, meaning 80% of the new whole person PPI rating was attributable to the 2002 lifting incident. Dr.

Verst further opined Mr. Mayes' FCE was consistent with the work restrictions he had given Claimant, that the restrictions were greater than those that would have been given after the 1983 surgery, and that Claimant could work provided the work was within his current restrictions. He also noted his 2002 lumbar surgery was complicated by the exorbitant amount of scar tissue present.

34. During his deposition, Dr. Verst apportioned the 12% PPI rating he had previously given Claimant. The apportionment was made after he was provided with records relating to Claimant's pre-existing lumbar condition; the PPI rating itself did not change. Dr. Verst apportioned 60% of the rating to pre-existing conditions, and 40% to the work-related injury.

35. Claimant is a poor historian.

36. Some of the medical records belong to another Jim Henderson.

DISCUSSION

The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leaves no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

1. **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, elevation, traveling, and nonspecialized 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. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

At hearing, both Claimant and Defendant Employer/Surety agreed PPI was not an issue, and that the 12% rating given by Dr. Verst for Claimant's lumbar spine had been paid by Surety. (Transcript, p. 75.) At his deposition, however, it became apparent Dr. Verst had previously increased his lumbar PPI rating to 22% and apportioned part of the rating to pre-existing conditions. He further stated his rating was in accordance with the *AMA Guides*. Employer/Surety calculated the new rating as 12.8% of the whole person in its Responsive Brief; Claimant concurred with the rating in his Reply Brief. Although Dr. Verst's testimony was somewhat confusing on the issue of apportionment, his apportionment leads to the 12.8% rating. Thus, the Referee concludes Claimant is entitled to a permanent partial impairment (PPI) rating of 12.8% of the whole person for the May 2002 injury to his lumbar spine. Defendant Employer/Surety is entitled to credit for the PPI benefits previously paid Claimant.

A disability evaluation includes all permanent impairment ratings. Although a PPI rating was not given Claimant after his 1983 lumbar surgery, one would have been appropriate, and under the First Edition of the *AMA Guides*, would have been 5% of the whole person. Dr. Verst, in assigning Claimant a 22% of the whole person rating for his lumbar spine, included the 1983 surgery and the residual effects of that procedure in his rating. Therefore, the Referee concludes Claimant's total impairment rating for his lumbar spine is 22% of the whole person.

Claimant was also not assigned a PPI rating after his cervical fusions. Under Table 15-5 of the *AMA Guides*, he would be placed in DRE Cervical Category IV for a PPI rating of 25% to 28% of the whole person. Considering his recovery as documented by Dr. Verst, the Referee concludes

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Claimant's impairment rating for his cervical spine is 25% of the whole person. See *Urry*, 115 Idaho at 755; *Smith v. J.B. Parson Company*, 127 Idaho 937, 942, 908 P.2d 1244, 1249 (1996).

There is nothing in the record that would support an impairment rating for Claimant's left wrist fracture. Thus, the Referee further concludes Claimant's total impairment rating is 47% of the whole person for the purpose of evaluating his disability.

2. **Permanent 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. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that permanent partial or total loss or loss of use of a member or organ of the body no additional benefits shall be payable for disfigurement.

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 non-medical factors, has reduced the 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 the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

The initial question here is the location of Claimant's labor market. In *Davaz v. Priest River Glass Company, Inc.*, 125 Idaho 333, 870 P.2d 1292 (1994), the Idaho Supreme Court interpreted the phrase "reasonable geographic area" contained in Idaho Code § 72-430 (1) as the area surrounding the claimant's home at the time of the hearing. Davaz had moved from Priest River, a small labor market and residence at the time of injury, to Missoula, Montana, a much larger labor market, where he lived at the time of the hearing. In that case, the Commission used the Missoula labor market in making a disability evaluation.

The Court, however, qualified their interpretation, noting that there may be instances where a market other than the claimant's residence at the time of the hearing is relevant in a making an Idaho Code § 72-430 (1) inquiry, and that such determinations should be made on a case by case basis based on individual facts and circumstances. The Court continued by citing *Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 565 P.2d 1360 (1977), which held that the Commission may consider the labor market within a reasonable distance of the Claimant's home both at the time of the injury and the time of the hearing to determine a claimant's post-injury employability. The *Lyons* Court only allowed consideration of the former because claimant's new residence provided even less opportunity for employment (Lyon had moved from Orofino to New Meadows), and the Court held that "a claimant should not be permitted to achieve permanent disability by changing his place of residence." *Lyons*, 98 Idaho at 407 n. 3, 565 P.2d at 1364 n. 3.

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There are two methods by which a claimant can demonstrate he or she is totally and permanently disabled. First, a claimant may prove a total and permanent disability if his or her medical impairment together with the pertinent nonmedical factors totals 100%. If the claimant has met this burden, then total and permanent disability has been established. If, however, the claimant has proven something less than 100% disability, he or she can still demonstrate total disability by fitting within the definition of an odd-lot worker. *Boley v. State, Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997). Here, Claimant maintains he is an odd-lot worker. The odd-lot doctrine, however, only comes into play once a claimant has proven something less than 100% disability. *E.g., Hegel v. Kuhlman Brothers, Inc.*, 115 Idaho 855, 857, 771 P.2d 519, 521 (1989).

Claimant decided to sell his Twin Falls residence and move to his Featherville cabin after he was told by Employer that he would be laid off. This decision was made prior to his May 2002 low back injury. He then moved to Featherville after injuring his back, and collected unemployment benefits while looking for work in Mountain Home. According to Claimant, Mountain Home was one-half the distance Twin Falls was from Featherville. Dr. Collins focused her labor market analysis on the Twin Falls area, opining Featherville was not a competitive labor market. Mr. Spooner focused his analysis on what he characterized as the South Central Labor Market which he indicated encompassed eight counties. Unanswered is whether Elmore County is included in the eight; both Mountain Home and Featherville are in Elmore County. Mr. Spooner also opined Featherville was a significantly limited labor market.

Under the circumstances of this case, and considering that the use of Featherville as a labor market, allowing Claimant to increase his permanent disability by simply changing his residence, the Referee finds it is appropriate to look at the Twin Falls labor market he left, the Mountain Home

labor market where he maintains he searched for work after he moved to his cabin, and the Featherville market where he currently resides. In so finding, the Referee notes it was pretty much the consensus of opinion that there were few if any jobs of any type available in the Featherville area.

Dr. Verst released Claimant to return to work with restrictions which equate to light-medium work. Mr. Mayes' FCE found Claimant could work at the light-medium level. Mr. Spooner, Dr. Collins, and Consultant Burkett proposed jobs within those restrictions which they opined Claimant was capable of fulfilling. Claimant also acknowledged there were jobs available in Mountain Home.

Claimant has readily transferable computer and customer service skills for service industry jobs within the work restrictions given him by Dr. Verst. Conversely, his years of service with Employer, and the skill sets he developed during his employment, have resulted in a wage considerably higher than what he would earn as an entry level worker in these other types of jobs. Mr. Spooner placed this wage loss at 65% and Dr. Collins agreed with his opinion.

Claimant is a skilled computer hardware repair technician. He has received continual training in his field since graduating from college. He has worked independently from his Twin Falls residence, covering a large service area, and dealing directly with a variety of customers; he was a customer service representative.

Based on Claimant's total impairment rating of 47% of the whole person and his permanent light-medium work restrictions, and considering his non-medical factors, including his age, college education, the training provided by Employer, transferable skills in computer literacy and customer service, ability to learn new job tasks and work independently, the job opportunities available to him, his labor markets, and his personal situation including the separation agreement with its non-compete clause, the Referee finds Claimant's ability to engage in gainful activity has been

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significantly reduced. Thus, the Referee concludes Claimant is entitled to a permanent total disability of 80% of the whole person inclusive of his permanent impairment. Therefore, Claimant is not 100% totally and permanently disabled.

Claimant can still demonstrate total disability by fitting within the definition of an odd-lot worker. An odd-lot worker is one “so injured that he [or she] 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 lies with the claimant who must prove the unavailability of suitable work. *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990).

A claimant may satisfy his or her burden of proof and establish odd-lot disability status in one of three ways:

1. By showing that he or she has attempted other types of employment without success;
2. By showing that he or she or vocational counselors or employment agencies on his or her behalf have searched for other work and other work is not available; or
3. 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).

Claimant was laid off by Employer the day he was released to return to work by Dr. Verst. He has not worked since. The Referee finds Claimant has not attempted other types of employment

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without success.

Mr. Spooner, Dr. Collins, and Consultant Burkett all proposed jobs which they felt were available and within Claimant's work restrictions. Claimant acknowledged jobs were available in Mountain Home. The Referee finds Claimant has not demonstrated either he or vocational counselors acting in his behalf have searched for other work and that other work is not available.

Citing the Featherville labor market, Claimant asserts any work search would be futile. As stated above, the Idaho Supreme Court has held that a claimant should not be permitted to achieve permanent disability by simply changing his place of residence. Claimant moved from Twin Falls, where work is available, to Featherville, where it is not. The Referee finds Claimant has not demonstrated any work search would be futile. He has not demonstrated the unavailability of suitable work. Thus, the Referee concludes Claimant has not demonstrated that he is an odd-lot worker under any of the three prongs of the *Lethrud* test.

Idaho Code § 72-406 (1) provides that in cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a pre-existing physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease. The Idaho Supreme Court has held that under Idaho Code § 72-406, employers do not become liable for all of the disability resulting from the combined causes of a pre-existing injury and/or infirmity and the work-related injury, but only for that portion of the disability attributable to the work-related injury. *Horton v. Garrett Freightlines, Inc.*, 115 Idaho 912, 929, 772 P.2d 119, 136 (1989). The Court further held that any apportionment under Idaho Code § 72-406 must be explained with sufficient rationale to enable it to review whether the apportionment is supported by substantial and competent evidence. *Reiher v. American Fine Foods*, 126 Idaho 58, 62, 878 P.2d 757, 761 (1994).

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 20

Claimant has a permanent disability rating less than total, and a pre-existing permanent impairment rating of 25% for his cervical spine fusions. He has an additional impairment rating of 22% for his lumbar spine. A portion of this PPI rating is for his pre-existing low back condition dating back to his 1983 lumbar surgery; the remainder, 12.8% , is related to the May 2002 low back injury. This leaves Claimant's total pre-existing impairment at 34.2% of the whole person. Using this apportionment as a percentage [$12.8 \div 34.2 = 37.4\%$], the Referee concludes Defendant Employer/Surety is responsible for that portion of Claimant's PPD above PPI equating to 12.3% of the whole person[$(80 - 47 = 33) \times 37.4\% = 12.3\%$].

3. **ISIF Liability.** Idaho Code § 72-332 (1) provides in pertinent part that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of his or her employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his or her income benefits out of the ISIF account.

Idaho Code § 72-332 (2) further provides that "permanent physical impairment" is as defined in Idaho Code § 72-422, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become employed. This shall be interpreted subjectively as to the particular employee involved, however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing physical impairment was not of such

seriousness as to constitute such hindrance or obstacle to obtaining employment.

In *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court set forth four requirements a claimant must meet in order to establish ISIF liability under Idaho Code § 72-332:

- (1) Whether there was indeed a pre-existing impairment;
- (2) Whether that impairment was manifest;
- (3) Whether the alleged impairment was a subjective hindrance; and
- (4) Whether the alleged impairment in any way combines in causing total disability.

Dumaw, 118 Idaho at 155, 795 P.2d at 317.

To satisfy the “combines” or fourth element, the test is whether, but for the industrial injury, the worker would have been totally and permanently disabled immediately following the occurrence of that injury. *Bybee v. State, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

Assuming arguendo that all prior requirements have been met, Claimant cannot meet the fourth element of the *Dumaw* test. He was not totally and permanently disabled immediately following his May 2002 industrial accident. Dr. Verst found Claimant was medically stable and released him to return to work with Employer. Thus, the Referee concludes ISIF is not liable to Claimant under Idaho Code § 72-332.

4. **Apportionment under *Carey*.** Based on the conclusions set forth above, the Referee further concludes any apportionment under the formula set forth by the Idaho Supreme Court in *Carey v. Clearwater County Road Department*, 107 Idaho 109, 686 P.2d 54 (1984) is moot.

CONCLUSIONS OF LAW

1. Claimant is entitled to a permanent partial impairment (PPI) rating of 12.8% of the whole person for the May 2002 injury to his lumbar spine. Defendant Employer/Surety is entitled to credit for the PPI benefits previously paid Claimant.

2. Claimant is entitled to a permanent partial disability (PPD) rating of 80% of the whole person inclusive of his total PPI of 47% of the whole person. After apportionment under Idaho Code § 72-406, Defendant Employer/Surety is responsible for that portion of Claimant's PPD above PPI equating to 12.3% of the whole person.

3. Claimant has not demonstrated that he is an odd-lot worker under the *Lethrud* test.

4. Defendant ISIF is not liable to Claimant under Idaho Code § 72-332.

5. Apportionment under the *Carey* formula is moot.

RECOMMENDATION

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

DATED In Boise, Idaho, this 3rd day of February, 2005.

INDUSTRIAL COMMISSION

/s/
Robert D. Barclay
Chief Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of February, 2005, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

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kk

/s/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JAMES S. HENDERSON,)	
)	
Claimant,)	IC 02-509450
)	
v.)	ORDER
)	
INTERNATIONAL BUSINESS)	Filed
MACHINES CORPORATION,)	February 17, 2005
)	
Employer,)	
)	
and)	
)	
LIBERTY NORTHWEST FIRE)	
INSURANCE COMPANY,)	
)	
Surety,)	
)	
and)	
)	
STATE OF IDAHO, INDUSTRIAL)	
SPECIAL INDEMNITY FUND,)	
)	
Defendants.)	
_____)	

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

recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. Claimant is entitled to a permanent partial impairment (PPI) rating of 12.8% of the whole person for the May 2002 injury to his lumbar spine. Defendant Employer/Surety is entitled to credit for the PPI benefits previously paid Claimant.

2. Claimant is entitled to a permanent partial disability (PPD) rating of 80% of the whole person inclusive of his total PPI of 47% of the whole person. After apportionment under Idaho Code § 72-406, Defendant Employer/Surety is responsible for that portion of Claimant's PPD above PPI equating to 12.3% of the whole person.

3. Claimant has not demonstrated that he is an odd-lot worker under the *Lethrud* test.

4. Defendant ISIF is not liable to Claimant under Idaho Code § 72-332.

5. Apportionment under the *Carey* formula is moot.

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

DATED This 17th day of February, 2005.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

/s/
James F. Kile, Commissioner

/s/
R. D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of February, 2005, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following:

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/s/