

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

LUCIA MALLEA,	)	
	)	
Claimant,	)	<b>IC 96-000396</b>
	)	<b>IC 99-004626</b>
v.	)	
	)	
STATE OF IDAHO, INDUSTRIAL	)	<b>FINDINGS OF FACT,</b>
SPECIAL INDEMNITY FUND,	)	<b>CONCLUSIONS OF LAW,</b>
	)	<b>AND RECOMMENDATION</b>
Defendant.	)	Filed
_____	)	February 9, 2005

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Robert D. Barclay, who conducted a hearing in Boise on August 31, 2004. Claimant, Lucia Mallea, was present in person and represented by W. Scott Wigle of Boise. Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF), was represented by Thomas B. High of Twin Falls. Dolores Salutregui of Mountain Home interpreted for Claimant. The parties presented oral and documentary evidence. This matter was then continued for the submission of briefs and subsequently came under advisement on November 24, 2004. There were no post-hearing depositions.

**BACKGROUND**

These two matters were consolidated by the Commission on November 26, 2002. Claimant subsequently settled her claim for compensation with Defendant Employer, Mountain Home School

District #193, and Defendant Surety, State Insurance Fund, in a Lump Sum Settlement Agreement approved by the Commission on November 26, 2003. Employer and Surety were represented by David R. Skinner of Boise in that matter.

### **ISSUES**

The noticed issues to be resolved as a result of the hearing are:

1. Whether ISIF is liable under Idaho Code § 72-332; and,
2. Apportionment under the *Carey* formula.

### **ARGUMENTS OF THE PARTIES**

Claimant argues she is totally and permanently disabled under the “odd-lot” doctrine as a consequence of the combined effects of the pre-existing degenerative condition of her cervical spine and the February 2, 1999, industrial injury, in which she re-injured her neck. She further argues she has demonstrated a *prima facie* odd-lot status by proving a job search would be futile, and that ISIF has made no effort to rebut her case by showing that an actual job she could perform was available. Claimant also argues ISIF is liable under Idaho Code § 72-332 because her degenerative condition was a pre-existing physical impairment, that the impairment was manifest, that it was a hindrance or obstacle to her employment, and that it combined with her industrial injury to result in total and permanent disability. She argues ISIF is liable for 50% of her total permanent disability under the *Carey* formula, commencing 250 weeks after she was found medically stable on June 1, 1999.

ISIF counters Claimant has not demonstrated she is an odd-lot worker under any of the three methods available, and is therefore not totally and permanently disabled. They maintain she has made no attempt to find work since she retired, that she has made no effort to perform a job search, and that she has offered no evidence to show that a job search would be futile. ISIF further argues

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2**

Claimant's impairment from employment fails to meet the "combined with" test, thereby invoking ISIF liability under Idaho Code § 72-332. They also argue Claimant was not medically stable until January 16, 2003, when she was rated after her two cervical surgeries, and that any apportionment must include only those conditions as of the date of her industrial injury.

Claimant counters she has provided ample evidence that a job search would have been futile, and that the industrial accident resulted in a permanent aggravation of her underlying degenerative problems, thereby combining to render her totally and permanently disabled in 1999. She further argues her ongoing degenerative condition and subsequent knee and hip problems do not change the fact she was totally and permanently disabled after her industrial accident, and does not relieve ISIF of liability simply because the aging process may have resulted in additional problems for her later in life. Claimant points out ISIF has not disagreed with her 50/50 apportionment argument under *Carey*. She also argues ISIF's reference to her having "retired" is a non-issue since she was working full-time at the time of the industrial accident and ISIF liability does not end when a claimant reaches retirement age.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant and her daughter, Theresa Mallea, taken at the hearing;  
and,
2. Joint Exhibits 1 through 16 admitted at the hearing.

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. At the time of the hearing, Claimant was 70 years old. She was born in Spain and attended school there between the ages of seven and 12. In 1961, she and her daughter emigrated to the United States and joined her spouse in Idaho. He was working on a ranch in Grand View; she began doing babysitting and housework there. Beginning in 1964, Claimant and her spouse ran a Basque boardinghouse in Mountain Home; her spouse also continued to work on the ranch. She did “everything” while running the boardinghouse, including the cooking, cleaning, gardening, and collecting rent. (Hearing Transcript, p. 24). Claimant ran the boarding house for approximately 14 years, returned to Spain for an extended visit, and then returned to Mountain Home to run the boarding house for another four years.

2. Claimant began working as a custodian for Employer in 1981. Initially, she worked at either an elementary school or the junior high school; in 1983 she was transferred to the high school where she continued to work until 1999.

3. Claimant pinched a nerve in her neck in 1984. She subsequently underwent surgery by a Dr. Cindrich; the condition apparently resolved. Claimant returned to work after a four to five month recovery period. She stated she was told to refrain from heavy lifting. Dr. Cindrich’s medical records are not contained in the record. The injury was apparently not considered work-related.

4. Claimant fell on May 11, 1990, injuring her cervical spine, left shoulder, and right knee. X-rays showed fanning of the C5-6 spinous processes indicating either an acute or a previous capsular and ligamentous injury, and underlying disc disease at C6-7.

5. In 1991, Claimant underwent a high tibial osteotomy of her right knee. The medical

records relating to the procedure are not contained in the record.

6. Claimant injured her cervical spine in a June 13, 1995, industrial accident while dumping a bucket into a sink. She was treated conservatively by Michael P. Koelsch, M.D., her family physician in Mountain Home. Treatments included medications, an exercise program, and physical therapy. Claimant continued to complain of neck pain radiating down her left arm. An April 12, 1996, MRI showed degenerative changes from C3 through C7 with a broad based posterior disc bulge at C5-6 and degenerative disc bulging at C6-7.

7. On May 7, 1996, Dr. Koelsch noted a Dr. Bowman had seen Claimant and felt she did not have any significant problems which would impede her ability to return to work. Dr. Koelsch, however, felt Claimant could not return to work. He referred her to R. Tyler Frizzell, M.D., for a cervical spine evaluation.

8. Claimant saw Dr. Frizzell on May 17, 1996. He noted the MRI showed some spondylosis, but nothing to explain her neck pain and left hand finger numbness. He diagnosed a cervical strain, and mild upper left extremity carpal tunnel syndrome (CTS) based on EMG studies performed by a Dr. Wilson. The EMG studies were apparently done to rule out any radiculopathy and had been ordered by Dr. Koelsch. Dr. Frizzell further opined Claimant was not a surgical candidate and recommended trigger point injections to her neck. He referred her to Monte H. Moore, M.D., for the injections, and for an evaluation.

9. Dr. Moore performed the injections and released Claimant to return to work with Employer on June 11, 1996. The only work restrictions given were no repetitive heavy lifting, and no vibrating power tools or repetitive activities because of her CTS. Dr. Moore opined Claimant had no permanent partial impairment (PPI) relative to her industrial injury, and that her CTS was not

related to the neck injury.

10. Claimant returned to full-time work with Employer as a custodian. The Referee notes Dr. Koelsch had recommended in January 1996 that she file for early disability. In February 1996 he gave Claimant a work release, but also suggested to her that she take a medical retirement.

11. Claimant was treated for right shoulder bursitis in 1997 and 1998 by Dr. Koelsch. His records indicated the condition was recurring. Cortisone injections relieved her pain.

12. Claimant injured her cervical spine in a February 2, 1999, industrial accident when a student struck her in the side of the head while he was engaged in horse-play. Dr. Koelsch referred her back to Dr. Frizzell. His chart notes are not contained in the record. A February 8, 1999, MRI, when compared to the April 1996 MRI, showed progressive degenerative changes in Claimant's cervical spine. The changes were noted to be advanced at the lower levels. A March 16, 1999, EMG showed acute and chronic left C7-8 motor radiculopathy. Claimant underwent an epidural at C6-7 without relief. Physical therapy involving cervical traction, however, did provide some relief.

13. Dr. Koelsch began treating Claimant for hypertension in April 1999. He also continued to treat her for conditions unrelated to her cervical injury.

14. Dr. Frizzell apparently released Claimant to return to light-duty work effective May 1, 1999, with a ten pound lifting restriction and no pushing or pulling. Employer could not accommodate the restrictions and sent her home. Claimant could not perform office work because of her limited English. She was required to use her sick leave to maintain employment.

15. Claimant was seen by Nancy E. Greenwald, M.D., on May 4, 1999, in Dr. Frizzell's absence. She opined Claimant suffered from severe pre-existing cervical arthritis, that the blow by the student resulted in a myofascial pain syndrome in the left upper trapezius and neck as well as

## **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 6**

possible left C7 radiculopathy. Dr. Greenwald concurred with Dr. Frizzell's work restrictions, noted Claimant was not medically stable, and opined, that due to her arthritis, she could never return to work restriction free.

16. Dr. Greenwald conducted EMG/nerve conduction studies of Claimant's upper left extremity on May 18, 1999. She opined the studies showed left CTS, but no evidence of a C7 radiculopathy. On June 1, 1999, Dr. Greenwald opined Claimant was medically stable, but not pain free, a condition which would be ongoing. She further opined Claimant could return to work with a 45 pound lifting restriction and occasional over-the-shoulder activities.

17. Dr. Frizzell also found Claimant medically stable on June 1, 1999, and assigned her a PPI rating of 5% of the whole person, 50% of which he attributed to her pre-existing arthritis.

18. Claimant never returned to work after her 1999 industrial accident. She left Employer after turning 65 in June 1999 and applied for retirement benefits; her effective retirement date was August 1999. She also began receiving social security retirement benefits at age 65. Claimant did not apply for any disability benefits. Claimant maintains, however, that she intended to continue working on a part-time basis because she did not want to stay at home.

19. Claimant continued to treat with Dr. Koelsch for a variety of conditions including neck pain. He noted her pain continued in spite of time and aggressive conservative treatment. Dr. Koelsch referred her to Bruce J. Anderson, M.D., for a surgical consultation.

20. Claimant saw Dr. Anderson on June 16, 2000. He noted a MRI showed a herniated disc at C6-7. On July 7, 2000, Dr. Anderson performed an anterior cervical discectomy and fusion (ACDF) at C6-7.

21. In December 2000 Surety requested the Industrial Commission Rehabilitation

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Division to assist Claimant in returning to work. The case was assigned to Consultant Ken Halcomb. He met with Claimant and her daughter, Theresa, and with Employer. After meeting with Employer, Consultant Halcomb prepared a job site evaluation (JSE) of Claimant's pre-injury position with Employer.

22. In response to an inquiry from Consultant Halcomb, Dr. Anderson opined Claimant could return to work with Employer as a custodian without restrictions.

23. Claimant returned to Dr. Anderson on March 26, 2001, stating her pre-op neck pain was gone, but that she still had left arm pain going down to her fingers, pain which pre-existed her ACDF. Dr. Anderson ordered a cervical CT myelogram. The CT scan showed a new herniated disc at C5-6. Dr. Anderson attributed the new herniation to the stress and strain caused by the ACDF. On May 10, 2001, he performed a ACDF at C5-6.

24. On October 9, 2001, Consultant Halcomb closed Claimant's case because she was not actively seeking employment.

25. On November 16, 2001, Jeffrey P. Menzer, M.D., performed a right total knee arthroplasty on Claimant. He noted advanced degenerative changes and a long term history of right knee pain. Claimant had been referred to him by Dr. Koelsch. Dr. Menzer's chart notes also indicate she was complaining of pain in her left knee, and that she was receiving cortisone injections in her left knee in late 2002 and early 2003.

26. On August 21, 2002, Dr. Anderson opined Claimant could return to her position as a custodian with Employer, and that she could work in any capacity; he did not indicate Claimant would have any work restrictions. He referenced the JSE.

27. At the request of Claimant's counsel, Richard T. Knoebel, M.D., conducted a review

of her medical records. His report is dated January 16, 2003. Dr. Knoebel opined Claimant had pre-existing degenerative arthritis and symptoms of neck pain dating back to at least May 1990. He further opined she had a temporary exacerbation of her pre-existing condition in the December 1995 industrial accident, and that she had returned to baseline in June 1996 when she returned to work. Dr. Knoebel opined Claimant had a second industrial accident in February 1999 with significant and permanent functional restrictions and symptoms. He characterized the 1999 injury as a permanent aggravation of her pre-existing neck condition, and noted she had permanent functional restrictions assigned which would not allow her to return to work as a custodian. Dr. Knoebel further opined, that based on Dr. Frizzell's assessment, Claimant's subsequent elective surgery [the ACDF] would be 50% related to the pre-existing degenerative changes, and 50% to the February 1999 permanent aggravation.

28. Dr. Knoebel further opined Claimant had incurred a PPI rating of 25% of the whole person for her two ACDF procedures. He further opined that it was not unreasonable to assume that Claimant could return to regular duty work after her two fusions with no greater restrictions than those imposed by Dr. Greenwald.

29. In response to an inquiry from Claimant's counsel, and after reviewing Dr. Knoebel's report, Dr. Koelsch opined in a letter dated February 24, 2003, that Dr. Knoebel's history of Claimant's neck problems was accurate and succinct. He further opined Claimant's neck injuries resulted in her present inability to work, and that he considered her completely disabled because of the neck and arm pain that she had.

30. Claimant underwent a hip arthroplasty in July 2004. The medical records are not contained in the record.

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31. Claimant stated she had no hip problems in 1999, and that her left knee did not bother her in 1999. She further stated her shoulders hurt due to the crutches she uses, and that her knee condition hinders her ability to walk.

32. Theresa Mallea stated Claimant's primary language is Basque, and that Claimant lives independently although she helps her with grocery shopping and paying bills, but that she had also done that prior to Claimant's work-related accidents. Ms. Mallea stated Claimant was able to return to work following her 1995 accident, but that Claimant was not able to do even light-duty work following the 1999 accident. Ms. Mallea also stated Claimant could not drive because of her neck, her hip, her knee, and everything else.

33. Claimant has not worked, applied for work, or looked for work since her February 1999 industrial accident.

## **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. **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 all prior requirements have been met, Claimant cannot meet the fourth element of

the *Dumaw* test. Both Dr. Frizzell and Dr. Greenwald found she was medically stable on June 1, 1999, following her February 1999 industrial accident. Dr. Greenwald, a physical rehabilitation specialist, then released her to return to work with a 45 pound lifting restriction and occasional over-the-shoulder activities. These restrictions were significantly greater than those given earlier by Dr. Frizzell, and which Employer could not accommodate. Dr. Anderson, after performing both ACDFs, also opined Claimant could return to work. Dr. Knoebel, after his record review, opined Claimant could not return to work as a custodian with Employer after her two ACDFs, but that any anticipated activities should be within Dr. Greenwald's restrictions.

The only physician to the contrary is Dr. Koelsch, who opined Claimant was completely disabled due to her neck condition. It should be noted he also recommended Claimant seek disability or medically retire after her 1995 industrial accident. Claimant, however, was able to return to work as a custodian, calling into question his opinion. Based on the weight of the medical evidence, the Referee finds the 1999 industrial accident did not immediately render Claimant totally and permanently disabled. Moreover, Claimant's reliance on an odd-lot determination is misplaced. She did not attempt other types of work without success, there has not been an unsuccessful work search on her behalf, and she has not demonstrated that any effort to find suitable work would have been futile. Thus, the Referee concludes ISIF is not liable to Claimant under Idaho Code § 72-332.

3. **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. ISIF is not liable to Claimant under Idaho Code § 72-332.

2. The question of 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 This 21st day of January, 2005.

INDUSTRIAL COMMISSION

/s/  
Robert D. Barclay  
Chief Referee

ATTEST:

/s/  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 9th 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:

W SCOTT WIGLE  
BOWEN & BAILEY, LLP  
PO BOX 1007  
BOISE ID 83701-1007

THOMAS B HIGH  
BENOIT ALEXANDER HARWOOD HIGH & VALDEZ, LLP  
PO BOX 366  
TWIN FALLS ID 83303-0366

kk

/s/ \_\_\_\_\_

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

LUCIA MALLEA,	)	
	)	
Claimant,	)	
	)	<b>IC 99-004626</b>
v.	)	
	)	<b>ORDER</b>
STATE OF IDAHO, INDUSTRIAL	)	Filed
SPECIAL INDEMNITY FUND,	)	February 9, 2005
	)	
Defendant.	)	
_____	)	

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. ISIF is not liable to Claimant under Idaho Code § 72-332.
2. The question of apportionment under the *Carey* formula is moot.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to the matters adjudicated.

DATED This 9th 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 9th 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:

W SCOTT WIGLE  
BOWEN & BAILEY, LLP  
PO BOX 1007  
BOISE ID 83701-1007

THOMAS B HIGH  
BENOIT ALEXANDER HARWOOD HIGH & VALDEZ, LLP  
PO BOX 366  
TWIN FALLS ID 83303-0366

kk

/s/ \_\_\_\_\_