

depositions, the submission of briefs, and subsequently came under advisement on August 29, 2005.

Referee Barclay retired from the Idaho Industrial Commission and the matter was reassigned to Referee Alan Taylor.

ISSUES

The noticed issues to be resolved are:

1. Whether Claimant is entitled to permanent partial impairment benefits, and the extent thereof;
2. Whether Claimant is entitled to permanent partial or permanent total disability 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 apportionment for a preexisting condition pursuant to Idaho Code § 72-406 is appropriate;
5. Whether ISIF is liable under Idaho Code § 72-332; and,
6. Apportionment pursuant to the formula set forth in Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984).

ARGUMENTS OF THE PARTIES

Claimant argues he is 100% permanently disabled, or is totally and permanently disabled under the odd-lot doctrine, noting that two vocational experts, Douglas Crum and Nancy Collins, have concluded he is unemployable. Claimant’s treating physician, Dr. Monte Moore, opined Claimant suffers 2.3% impairment of the whole person due to his 2003 industrial accident and an additional 20.7% whole person impairment due to prior back injury. Claimant asserts that he had a

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substantial preexisting physical impairment to his back, which impairment was manifest, was a hindrance to obtaining employment, and which combined with his industrial injury to render him totally and permanently disabled. Claimant therefore argues that ISIF bears substantial liability in this case. In the alternative, should the Commission find Claimant is not totally and permanently disabled, he argues that he is entitled to a permanent disability rating of at least 80% of the whole person, with only 20.7% apportioned to preexisting conditions.

Defendants Employer and Surety speculate that Claimant may not be medically stable and further counter that if Claimant is totally and permanently disabled under the odd-lot doctrine, they bear responsibility for only 10% (2.3% permanent impairment plus 7.7% non-medical disability) of his total permanent disability under the Carey formula. In the alternative, they assert that if Claimant is not an odd-lot worker, he has permanent disability including impairment of 70-80%, of which they bear responsibility for approximately 45% of his non-medical disability.

Defendant ISIF argues Claimant has not carried his burden of establishing that he is totally and permanently disabled. In the alternative, ISIF asserts that the vast majority of Claimant's permanent impairment is attributable to his 2003 industrial accident and not to any preexisting impairment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Claimant's spouse Debbie Greenfield, and Rick Hartley taken at the April 29, 2005, hearing;
2. Claimant's Exhibits A through C admitted at the hearing;
3. Defendants Employer and Surety's Exhibits 1 through 20 admitted at the hearing;

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4. Defendant ISIF's Exhibits D and E admitted at the hearing;
5. The deposition of Monte H. Moore, M.D., taken by Claimant on May 18, 2005;
6. The deposition of Douglas Crum, taken by Claimant on May 19, 2005; and
7. The deposition of Nancy J. Collins, Ph.D., taken by Defendant ISIF on May 19, 2005.

After having fully considered all of 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

1. Claimant was born in 1945 and was raised in Richfield, Idaho. He had resided in Kuna for about two years at the time of the hearing. Claimant is right-handed. He finished the sixth grade, however, during his seventh grade year his mother passed away and Claimant dropped out of school. He struggled academically and has never obtained a GED. Throughout his life, he has relied upon others to read and write for him.

2. In his teens and early adulthood Claimant rode horses and participated in rodeos as a saddle bronc and bull rider. During this time he fractured both arms about six times apiece, fractured his wrist and ribs, and injured his knee cap, pelvis, and shoulder. All of these fractures and injuries healed and none permanently hampered his ability to work.

3. After dropping out of seventh grade Claimant began working, at approximately age 12 or 13, performing general farm labor including feeding and herding cows and irrigating. By age 16 he was also driving tractor, cultivating row crops, and milking cows. He continued as a farm laborer until approximately 1976, when he moved to Montana. There he worked three or four years

for Anaconda Company in a smelter, stripping and loading 45 pound plates of zinc continuously during the day. At night he worked as a janitor mopping and waxing retail stores. In approximately 1980, Claimant moved to Burley where he worked as a hod carrier mixing cement, cutting and packing brick and block weighing from 20 to 80 pounds. Commencing in approximately 1984, Claimant trained and worked as a wet line mechanic at J.R. Simplot Company's Heyburn plant where he repaired 170 foot vulcanized rubber belts, changed knives on 65 pound cutter heads, and performed various other heavy repair and maintenance work. During approximately this same period Claimant became familiar with auto mechanics by volunteering his help to an auto mechanic friend. In approximately 1992, Claimant left Simplot and worked as a ranch mechanic in Hermiston, Oregon, repairing tractors, caterpillars, and road graders. Part of Claimant's duties included moving 50 gallon drums of oil and changing heavy equipment tires weighing approximately 1,000 pounds. In approximately 1993, Claimant returned to Idaho and worked in the Marsing area as a ranch hand gathering and feeding cattle, irrigating, digging ditches, loading and stacking hay, changing truck and tractor tires, and other general ranch work. In approximately 1995, Claimant worked in Gooding as a farm mechanic and in Buhl irrigating row crops. In 1996, Claimant worked briefly for Spears Manufacturing making pipe connectors and 90 degree angle pieces weighing up to 500 pounds for use in large installations. Claimant later worked near Shoshone as a ranch and feedlot mechanic and general farm laborer.

4. In 1998, Claimant fell while working as a farm laborer installing a heater on top of a sprinkler pivot and injured his right wrist and elbow. He received medical treatment, was off work for approximately one month while his injuries healed, and then returned to work.

5. Later in 1998 or 1999, Claimant began working for Sage Basin in Jerome as a farm

mechanic and general farm laborer. Claimant simultaneously worked as an apartment maintenance person in Jerome hanging, patching, and painting sheetrock, removing carpet, caring for the apartment grounds, and changing hot water heaters and refrigerators.

6. While working at Sage Basin during the potato harvest on the evening of October 30, 1999, Claimant injured his low back when he attempted to lift a large piler belt weighing several hundred pounds and heard a loud pop or crack in his back. Claimant felt immediate back pain. He ceased work and his wife drove him home. After several hours trying to rest at home, he was unable to get up and was taken by ambulance to St. Benedict's Hospital where he was admitted on October 31, 1999. X-rays revealed mild superior and inferior end plate compression fractures involving the L4 vertebral body. Claimant was treated by James D. Lohmann, M.D., and Thomas H. Zepeda, M.D., who prescribed medications and physical therapy. Sage Basin went bankrupt not long thereafter and Claimant never filed a workers' compensation claim for this injury. After his discharge from the hospital on November 1, 1999, he attended approximately three physical therapy sessions. Claimant did not seek further medical care or therapy because neither he nor his wife had medical insurance and he could not afford any further treatment. Claimant did not work for approximately one month. Although he continued with back pain, he returned to his work at Sage Basin and in apartment maintenance. He worked at Sage Basin for about another month or two preparing for a farm sale. He limited his lifting to 100 to 200 pounds. Claimant's employment with Sage Basin ended when the farm sold, however, Claimant continued working in apartment maintenance in Jerome for approximately three more years.

7. After the 1999 back injury, Claimant's back pain was approximately a constant four on a scale of one to ten. Due to his ongoing back pain, Claimant limited his bending, stooping, and

lifting. He also took more frequent rest breaks.

8. In approximately 2002, Claimant moved to Caldwell and worked as a maintenance man and groundskeeper for a trailer court complex. He replaced roofing, repaired swamp coolers, hung sheetrock, repaired plumbing, and performed various similar work.

9. In 2002, Claimant commenced work for Employer, Moo Brew, Inc., as a farm mechanic. His duties soon expanded to include other aspects of farming. He drove tractor for 16 to 17 hours daily during planting and harvest seasons. He was cautious because of his constant back pain, but he was able to do his job—although not as fast as prior to his 1999 injury. The mechanic shop had concrete floors and Claimant's toes began to tingle and burn when he was on his feet in the shop. Nevertheless, Claimant routinely worked well over 100 hours each two week period and occasionally as much as 181 hours in two weeks. Claimant testified that there wasn't anything that he could not do in his job because of his back, although he modified his approach to various tasks.

10. On August 6, 2003, at approximately 5:00 p.m., Claimant was repairing a truck for Employer when his pry bar came loose and Claimant fell backward abruptly, landing on his buttocks and back in the gravel. He felt shaken up, with the wind knocked out of him, and noted increased back pain. He stopped work for the day and went home and to bed. The next morning he was hardly able to move. He advised Employer of the accident and sought medical attention from Michael Green, D.C. On August 8, 2003, Claimant presented to another chiropractor in Dr. Green's office, David N. Price, D.C., who provided Claimant with exercises, acupuncture, and chiropractic treatments. On August 18, 2003, Dr. Price referred Claimant to Monte H. Moore, M.D. Dr. Moore began treating Claimant and also encouraged Claimant's continued periodic treatments with Dr. Price.

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11. On August 20, 2003, an MRI revealed Claimant suffered spinal canal stenosis with disk bulge and facet disease moderate at L3-4, and moderate to severe at L4-5. It also disclosed superior and inferior L4 endplate compression fractures which were approximately 90% centrally and approximately 60% anteriorly. Lateral lumbar flexion and extension x-rays of Claimant's spine taken September 9, 2003, demonstrated an advanced compression fracture of the L4 vertebral body with some posterior protrusion of the collapsed bone into the lumbar spinal canal.

12. Dr. Moore encouraged pacing and exercise, and also performed two caudal epidural injections. The first injection on September 15, 2003, improved Claimant's back temporarily; the second on September 29, 2003, also improved Claimant's back condition but only for approximately one month.

13. Dr. Moore declared Claimant medically stable on October 20, 2003, and permanently restricted Claimant to limited bending, twisting, and stooping; self-paced activities; and no high-impact activities. Dr. Moore opined Claimant was capable of light or sedentary work, and should probably not lift more than 25 pounds. In his note of October 6, 2003, Dr. Moore indicated Claimant could lift 25 pounds occasionally, 12 pounds frequently, and 10 pounds continuously.

14. Dr. Moore provided Claimant with written work restrictions that he conveyed to his supervisor who indicated Employer had no work available that Claimant could perform given the doctor's restrictions. Claimant has not worked since.

15. Over the past year, Claimant's back symptoms have been relatively stable. He rates his back pain at seven or eight on a scale of one to ten. His back pain is ever present and increases with prolonged sitting or standing. At the time of hearing, Claimant was only able to sit for approximately one hour, stand for one hour if allowed to move around as needed, and walk three-

quarters of a mile. The numbness and burning in his toes has progressed to now include the balls of his feet. Claimant takes no pain medication for his back because after a preliminary trial he realized that to obtain noticeable pain relief he needed four or five Darvocet daily and he feared becoming addicted to the medication.

16. After the 1999 injury, Claimant was able to sleep eight hours each night. Since the 2003 injury, Claimant has only been able to sleep a few hours at a time. He averages four to five total hours of sleep every other night, with only two to four hours of sleep on the nights in between. Increased activity during the day, such as mowing the lawn, results in a less restful night.

17. Prior to his 2003 accident, Claimant enjoyed tubing, water-skiing, ATV riding, horseback riding, bicycling, and weight-lifting. Since his 2003 accident, Claimant is not able to do any of those activities. He is still able to fish and boat, but only with assistance in loading the boat. Claimant and his wife no longer go camping. His routine activities are limited and include watching TV, loading the dishwasher, and mowing the lawn weekly with a small self-propelled lawnmower. Claimant now has difficulty negotiating stairs.

18. Claimant has been incarcerated three times over the years. He served five years for a DUI, three years and eight months for a drug charge, and three years and five months on another felony charge.

DISCUSSION AND FURTHER FINDINGS

19. 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 leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1996).

20. **Impairment.** "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

21. Dr. Moore, Claimant's treating physician, testified that Claimant had preexisting spinal stenosis and L4 compression fractures prior to his 2003 back injury. Dr. Moore opined that due to the combined effects of his back injuries Claimant suffers permanent impairment of 23% of the whole person in accordance with DRE diagnostic category IV, according to the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Moore initially apportioned half of that impairment to Claimant's 1999 back injury and half to his 2003 injury. However, by letter dated June 14, 2004, Steven V. Marx, M.D., conveyed his reading and comparison of Claimant's lumbar spine x-rays taken October 31, 1999 with his lumbar spine x-rays and MRI taken August 8, 2003 and August 20, 2003 respectively. Dr. Marx noted: "Marrow signal is mildly heterogeneous throughout, but it is not significantly different within the L4 vertebral body vs. adjacent non-fractured L5 and L3 vertebral bodies. As such, no acute edema identified suggesting that this is a chronic fracture." Defendants' Exhibit 11. Significantly, Todd B. Burt, M.D., who initially read the August 20, 2003 MRI scan also commented: "although the L4 vertebral

marrow is slightly heterogeneous, it is similar to the other levels suggesting this most likely represents an old fracture.” Defendants’ Exhibit 8d.

22. After reviewing the MRI report from Dr. Marx, Dr. Moore reaffirmed his total rating of Claimant’s impairment at 23% of the whole person, but changed his allocation of impairment. Dr. Moore concluded that Claimant’s increased L4 compression fracture had been present for at least three months prior to Claimant’s August 2003 industrial accident. Dr. Moore therefore opined that Claimant’s 2003 injury only contributed 10% (or 2.3% whole person) to Claimant’s overall impairment, and his prior injuries contributed the other 90% (or 20.7% whole person) to his impairment. Dr. Moore indicated that Claimant may need spinal decompression surgery at some future time, but declared Claimant’s condition medically stable as of October 20, 2003. There is no other impairment rating in the record and no medical opinion asserting Claimant is not medically stable.

23. Dr. Moore’s opinion of Claimant’s permanent partial impairment due to his spine has consistently been 23% of the whole person, is well explained, and is credible. There is no persuasive evidence in the record supporting an impairment rating for Claimant’s multiple prior injuries including his arm, wrist, and rib fractures, or his knee, pelvic, and shoulder injuries. The Referee concludes Claimant’s total impairment rating is 23% of the whole person for the purpose of evaluating his disability.

24. **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.

25. 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).

26. 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 fails to prove 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).

27. In the present case, Claimant asserts he is 100% totally and permanently disabled, or that he is an odd-lot worker. The odd-lot doctrine only comes into play if 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).

28. Dr. Price, who treated Claimant initially after the 2003 injury, in his letter of January 29, 2004, to the Idaho Department of Labor Disability Determinations noted:

[Claimant] experienced prior substantial injury to his back that included a significant fracture of L4. I am rather amazed that the patient has even been able to work as long as he has. In my judgment, this patient's spinal condition with the degenerative changes present, the underlying previous fracture, the weakness in his lower extremities and his lack of endurance because of the nerve irritation and impingement that is [sic] occurring, I do not believe this patient is capable of maintaining a viable occupation.

Defendants' Exhibit 10, p. 1.

29. Dr. Price restricted Claimant from prolonged sitting or standing; repetitive bending, lifting, or twisting; and from lifting over 25 pounds occasionally. Dr. Moore agreed with these physical restrictions.

30. As limiting as are Claimant's physical restrictions, his illiteracy is perhaps equally problematic. Claimant does not read magazines. He does not read the newspaper except for the simplest of want ads. He avoids writing. His wife fills out forms for him, including all work and medical related forms. Claimant's wife tried to help Claimant improve his reading abilities, but after a week or two he still struggled with very simple words and became frustrated. Claimant's wife testified that Claimant frequently reverses his letters when trying to write, and cannot sound out letters. She believes that Claimant is dyslexic although he has never been formally evaluated.

31. Douglas Crum, a private vocational rehabilitation consultant, interviewed Claimant

on December 2, 2004, at Claimant's request to evaluate his disability. Claimant told Crum that he could not read a newspaper, do multiplication or division. Crum had Claimant evaluated through the Weschler Individual Achievement Test that placed Claimant below the functional level, and the Wide Range Achievement Test which placed Claimant's reading ability at the second grade level, his spelling at the first grade level, and his arithmetic at the third grade level. Considering the sixth grade a functional level, Claimant was deemed functionally illiterate. Although no neuropsychometric evaluation has been performed, Crum noted Claimant's academic struggles even from his early school years and sensed that Claimant probably has a fairly significant learning disability. Crum opined that there is likely no realistic manner to improve Claimant's reading, spelling, and arithmetic skills. Crum's opinion is not contradicted by any evidence in the record and is supported by Claimant's wife's account of her unsuccessful efforts to help Claimant improve his reading.

32. Over the years, Claimant has driven a truck, forklift, potato harvester, combine, and swather often for many consecutive hours. He has welded, managed a feedlot (except for the necessary paper work), and has also worked as a carpenter's helper. He has extensive experience in farming, ranching, and farm and other heavy equipment repair. Crum opined that Claimant has been employed in heavy to very heavy work almost all of his adult life and that he could no longer perform any of his pre-2003 injury jobs due to his physical restrictions as prescribed by Dr. Moore and Dr. Price. Crum further noted that Claimant has no experience in sales, cashiering, customer service, clerical positions, or computer use, and that Claimant is illiterate. Crum opined that Claimant would not be able to write even basic reports as required of a security watchman, nor be on his feet as required of a mechanic's parts person. Crum opined that Claimant's age, illiteracy, and

lack of transferable skills would all combine to render him unemployable. Crum concluded that Claimant is totally and permanently disabled. Crum also opined it would be futile for Claimant to look for work and that Claimant is not likely to be employed regularly in any well-known branch of the Treasure Valley labor market absent a sympathetic employer or a superhuman effort on Claimant's part. Crum opined that Claimant's physical restrictions, limited transferable skills, and illiteracy were the most significant factors in his disability.

33. Nancy J. Collins, Ph.D., conducted a vocational assessment of Claimant at Defendant ISIF's request and concluded in her report dated August 11, 2004, that Claimant "is probably totally disabled." Defendant ISIF's Exhibit E, p. 9. Dr. Collins testified that Claimant's total disability was permanent, and that Claimant is not likely to be employed regularly in any well-known branch of the Boise area labor market, and that it would be futile for Claimant to look for work. Dr. Collins attributed all of Claimant's disability to the 2003 accident.

34. Industrial Commission rehabilitation consultant Rick Hartley assisted Claimant commencing October 21, 2003. Hartley observed Claimant's illiteracy. Hartley prepared a job site evaluation that prescribed continuous lifting of up to 20 pounds, frequent lifting of 21 to 35 pounds, and occasional lifting of 36 to 50 pounds, however, Employer had no such work available. Hartley identified one potential job for Claimant delivering telephone books. However, Claimant had no transportation and doubted he could read well enough to find the delivery locations so he did not pursue the lead.

35. On April 18, 2005, Hartley contacted eight potential employers, who often needed light or sedentary workers, to evaluate Claimant's employability. These employers included Wal-Mart, Salvation Army, Boise City, Allied Security, Laidlaw Educational, AMOCO Parking,

United Security, and Home Care Aides. Hartley provided each potential employer with an accurate summary of Claimant's age, background, limited education, illiteracy, and medical restrictions limiting standing, lifting, and requiring frequent position changes. One employer indicated it had no suitable opening at that time. All the rest of these potential employers indicated Claimant's medical restrictions and/or illiteracy precluded him from any positions with them. None of the potential employers expressed any interest in an individual with Claimant's limitations.

36. Based on Claimant's total impairment rating of 23% of the whole person and his permanent light-medium work restrictions, and considering his non-medical factors, including his age, lack of formal education, functional illiteracy, lack of transferable skills in sedentary and light occupations such as computer, clerical, and customer service, and his inability to return to any previous occupation, Claimant's ability to engage in gainful activity has been significantly reduced. The Referee concludes Claimant has established a permanent disability of 85% of the whole person, inclusive of his permanent impairment.

37. **Odd-lot.** A claimant who is not 100% permanently disabled may still prove total permanent disability by establishing he or she is 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 rests upon the claimant. Dumaw v. J. L. Norton

Logging, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990).

38. A claimant may satisfy his or her burden of proof and establish total permanent disability under the odd-lot doctrine in any 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).

39. In the present case, Claimant has not worked since his 2003 industrial injury, thus Claimant has not proven that he attempted other types of employment without success.

40. Claimant and others on his behalf have unsuccessfully searched for work. Claimant searched for work by visiting the Meridian Employment Office. With his wife's assistance, Claimant reviewed the computer posted job leads but found nothing. He also provided his doctor's restrictions to the Employment Office personnel who found no job listing for which Claimant was qualified given his education and physical restrictions. After consulting several likely potential employers, Rick Hartley found none with an opening for an individual with Claimant's limitations.

41. Lastly, both Douglas Crum, retained by Claimant, and Dr. Collins, retained by Defendant ISIF, unhesitatingly opined that Claimant was not employable. Their opinions that Claimant is not likely to be employed regularly in any well-known branch of the Treasure Valley area labor market and that it would be futile for Claimant to look for work are well reasoned and

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persuasive.

42. The Referee finds that Claimant has demonstrated that he or vocational counselors acting in his behalf have searched for other work and that other work is not available and has also proven that it would be futile for Claimant to look for work. Claimant has demonstrated that he is an odd-lot worker, totally and permanently disabled, under the Lethrud test.

43. **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.

44. 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 unemployed. 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.

45. In Dumaw v. J. L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court listed four requirements a claimant must meet 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 to employment;
and,
- (4) Whether the alleged impairment in any way combines with the subsequent injury to cause total disability.

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

46. The physical impairment at issue here is Claimant's L4 vertebral compression fracture. The compression fracture was clearly manifested on x-rays and diagnosed the day after Claimant's 1999 accident. The first and second prongs of the Dumaw test have been met. The more disputed issue is whether Claimant's L4 compression fracture was a subjective hindrance or obstacle to employment or reemployment if Claimant had become unemployed.

47. Claimant testified that prior to his August 2003 industrial injury he could perform all of his job duties. However he also testified that after his 1999 injury he did not do things as he had before. Specifically, Claimant had to slow down and could not perform his work as fast. Due to his ongoing back pain, Claimant took more breaks during his work. He avoided bending over. Instead of bending over to pick something up, Claimant had to drop to one knee to pick things up. Lifting increased his back pain so instead of moving and lifting heavy things such as refrigerators and hot water heaters alone, Claimant had to ask for help. Claimant's wife helped him replace refrigerators and water heaters after his 1999 injury while Claimant worked in apartment maintenance. Claimant had to hire a helper to assist him in hanging sheet rock in his apartment maintenance duties.

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48. When Claimant worked for Employer he was cautious because of his constant back pain, and not able to do work as fast as prior to his 1999 injury. Claimant adjusted his work methods to manage his ongoing back pain. Instead of picking up a transmission by hand, he used a cart or a winch. Instead of rolling large tractor tires into position by hand, he used a loader. He sought assistance from a helper whenever possible for heavy projects Employer assigned him.

49. Rick Hartley testified that Claimant's limitations from his 1999 back injury very well could have constituted a hindrance or obstacle to Claimant obtaining employment as a farm mechanic, farm equipment operator, or apartment maintenance worker prior to his 2003 accident at Moo Brew. Doug Crum opined that the condition of Claimant's back after his 1999 injury but before his 2003 injury was a subjective hindrance to employment because Claimant found it necessary to self-modify his activities in order to perform his work. Both Doug Crum and Dr. Collins testified that some potential employers would have been reluctant to hire Claimant prior to his 2003 industrial injury if they had been aware of his lumbar compression fracture and ongoing back pain.

50. The Referee finds that Claimant's L4 compression fracture constituted a hindrance to Claimant's employment. All his jobs have involved heavy to very heavy manual labor. Claimant's ability to work was negatively impacted by his compression fracture. The third prong of the Dumaw test has been met.

51. Finally, to satisfy the "combines" 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. This test "encompasses both the combination scenario where each element contributes to the total disability, and the case where the subsequent injury accelerates and aggravates the preexisting impairment." Bybee v. State, Industrial Special Indemnity Fund, 129

Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

52. In the present case, there is no allegation that Claimant was already an odd-lot worker prior to his 2003 accident. However there is persuasive evidence that Claimant's 2003 accident accelerated and aggravated his preexisting impairment resulting in total permanent disability.

53. As noted previously, Dr. Marx compared Claimant's lumbar spine x-rays taken October 31, 1999 with his lumbar spine x-rays and MRI taken in August 2003 and reported that the 1999 exam demonstrated an L4 compression fracture measuring approximately 10% posterior height loss and 20-30% mid to anterior height loss, while the 2003 studies demonstrated increased posterior height loss at approximately 20%, increased anterior height loss at approximately 60%, and essentially near complete central height loss. Dr. Moore testified that given the bone marrow changes present on Claimant's August 2003 MRI, the increased L4 compression fracture occurred at least three months prior to Claimant's 2003 accident. However, Dr. Moore also firmly opined that Claimant "had a pre-existing degenerative condition, and pre-existing compression fracture, and that, more probably than not, his symptoms were aggravated by the fall." Deposition of Monte Moore, M.D., p. 27, Ll. 9-12. Dr. Moore further explained that persons with degenerative conditions may experience significant aggravation of symptoms from a fall as compared to persons without degenerative conditions. Dr. Moore's testimony is persuasive and satisfies the fourth prong of the Dumaw test.

54. The Referee concludes Claimant has proven ISIF's liability under Idaho Code § 72-332.

55. **Carey Apportionment**. The Idaho Supreme Court has adopted a formula dividing liability between ISIF and the employer/surety at the time of the industrial accident in question. The

formula provides for the apportionment of non-medical factors by determining the proportion of the non-medical portion of disability between ISIF and the employer/surety by the proportion which the pre-existing physical impairment bears to the additional impairment resulting from the industrial accident. Carey v. Clearwater County Road Department, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984). Conditions arising after the injury, but prior to a disability determination, which are not work-related, are not the obligation of ISIF. Horton v. Garrett Freightlines, Inc., 115 Idaho 912, 915, 772 P.2d 119, 122 (1989).

56. Before applying the formula, however, it must be determined which portion of Claimant's impairment pre-existed the industrial accident, and what portion was caused by the industrial injury. The impairment rating given by Dr. Moore for Claimant's 2003 industrial injury is the only rating in the record, is well explained and is persuasive. Dr. Moore assigned Claimant a permanent partial impairment (PPI) rating of 23% of the whole person. He attributed 10% of that amount, or 2.3%, to Claimant's 2003 injury and the balance, 20.7%, to Claimant's preexisting compression fracture and stenosis.

57. By application of the Carey formula Employer and Surety are responsible for the medical portion of 2.3% impairment caused by Claimant's 2003 accident and for 10% of the nonmedical portion of Claimant's permanent disability. ISIF is responsible for the pre-existing medical portion of 20.7% impairment and for 90% of the nonmedical portion of Claimant's permanent disability. Thus, Employer and Surety are collectively liable for 50 weeks of statutory benefits, and ISIF is responsible for payment of full statutory benefits commencing 50 weeks after October 20, 2003, the date Dr. Moore found Claimant medically stable.

58. **Section 406 Apportionment.** 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 conclusions set forth above render apportionment under Idaho Code § 72-406 moot.

CONCLUSIONS OF LAW

1. Claimant has proven he suffers permanent partial impairment (PPI) of 23% of the whole person, including 2.3% due to his August 2003 industrial accident and 20.7% due to his preexisting spinal condition.

2. Claimant has failed to prove he is 100% disabled, however Claimant has proven that he is an odd-lot worker, totally and permanently disabled, under the Lethrud test.

3. Defendant ISIF is liable to Claimant under Idaho Code § 72-332.

4. Apportionment under the formula set forth in Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: Employer and Surety are liable for payment of 50 weeks of statutory benefits to Claimant, and ISIF is responsible for payment of full statutory benefits commencing 50 weeks after October 20, 2003, the date Claimant was medically stable.

5. Defendants Employer and Surety are entitled to credit for all PPI benefits previously paid Claimant.

6. Apportionment pursuant to Idaho Code § 72-406 is moot.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own, and issue an appropriate final order.

DATED this 5th day of December, 2005.

INDUSTRIAL COMMISSION

/s/ _____
Alan Reed Taylor, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of December, 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:

BRADFORD S EIDAM
PO BOX 1677
BOISE ID 83701-1677

GARDNER W SKINNER
PO BOX 359
BOISE ID 83701-0359

THOMAS HIGH
PO BOX 366
TWIN FALLS ID 83303-0366

kk

/s/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DICK M. GREENFIELD,)	
)	
Claimant,)	IC 03-517328
)	
v.)	
)	
MOO BREW, INC.,)	
)	
Employer,)	ORDER
)	
STATE INSURANCE FUND,)	FILED
)	December 9, 2005
Surety,)	
)	
STATE OF IDAHO, INDUSTRIAL)	
SPECIAL INDEMNITY FUND,)	
)	
Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his proposed 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 he suffers permanent partial impairment (PPI) of 23% of the whole person, including 2.3% due to his August 2003 industrial accident and 20.7% due to his preexisting spinal condition.

2. Claimant has failed to prove he is 100% disabled, however Claimant has proven that he is an odd-lot worker, totally and permanently disabled, under the Lethrud test.

3. Defendant ISIF is liable to Claimant under Idaho Code § 72-332.

4. Apportionment under the formula set forth in Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: Employer and Surety are liable for payment of 50 weeks of statutory benefits to Claimant, and ISIF is responsible for payment of full statutory benefits commencing 50 weeks after October 20, 2003, the date Claimant was medically stable.

5. Defendants Employer and Surety are entitled to credit for all PPI benefits previously paid Claimant.

6. Apportionment pursuant to Idaho Code § 72-406 is moot.

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

DATED this 9th day of December, 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 December, 2005, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

BRADFORD S EIDAM
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BOISE ID 83701-1677

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PO BOX 359
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/s/ _____