



5. Whether and to what extent Claimant is entitled to disability in excess of permanent impairment;
6. Whether Claimant is entitled to permanent and total disability under the odd-lot doctrine;
7. Whether and to what extent ISIF is liable for any benefits to Claimant pursuant to Idaho Code § 72-332; and
8. Apportionment under the Carey formula.

### **CONTENTIONS OF THE PARTIES**

Claimant contends he injured his left shoulder when his car hit a deer in a compensable accident which occurred on November 24, 2000. As a result of this accident and prior injuries, he is totally and permanently disabled. Claimant's pre-existing physical impairments of sleep apnea and an ankle injury are conditions upon which ISIF liability should be based. Any post-accident employment has been obtained because of a sympathetic employer. Other attempts at post-accident employment have resulted in failure.

ISIF contends Claimant's medical records and post-accident work history show that, at the time of medical stability, he was not totally and permanently disabled by any standard of analysis.

### **EVIDENCE CONSIDERED**

The record in the instant case consists of:

1. Oral testimony at hearing of Claimant, Deputy Sheriff Pulford, and ICRD consultant Dan Brownell;
2. Claimant's Exhibits A1 – 12, B – F;
3. ISIF's Exhibits 1 – 19; and
4. The post-hearing deposition of vocational expert, Tom L. Moreland.

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

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

## **FINDINGS OF FACT**

1. On November 24, 2000, Claimant worked as a volunteer for Bonner County Search and Rescue. He was transporting food and supplies to other rescue workers when his vehicle hit a deer. Claimant was wearing his seatbelt. He reported the accident but did not seek immediate medical attention. He made an appointment to see a doctor on November 28, but did not see that doctor until December 5.

2. On November 26, 2000, Claimant was in the emergency room on behalf of a friend. He reported sudden and extreme pain in his left shoulder. Medical treatment was provided.

### **Prior Medical History**

3. In 1981, Claimant injured his right shoulder while steer wrestling. By 1987, this had degenerated to bursitis.

4. In 1991, Claimant suffered a broken right ankle. While hospitalized following surgery, Claimant suffered documented periods of sleep apnea.

5. On January 13, 1992, Claimant was diagnosed with left shoulder bursitis, and lumbar and cervical strains following an automobile accident. While working as a volunteer, his vehicle was struck from behind by another vehicle. By the end of February, his doctor was recommending he return to work, but noted "I see minimal motivation that he wants any part of returning to work at this point."

6. In 1998, a surgical screw causing pain was removed.

### **Post-Accident Medical Care**

7. On November 26, 2000, Claimant was seen in the emergency room complaining of left shoulder and back pain. This was diagnosed as a muscle strain. He was released to return to work effective December 11, 2000. He received treatment on February 19 and April 6, 2001,

when the diagnosis was changed to bursitis. He was treated on July 23 and October 17, 2001. In November 2001 through March 2002, he received therapy for a left AC joint arthropathy which he related to the 2000 accident. In November 2002, the diagnosis changed to osteoarthritis.

8. On May 14, 2001, Claimant was evaluated by Richard T. Knoebel, M.D. He diagnosed left shoulder impingement syndrome. He opined Claimant was not medically stable at that time.

9. On August 1, 2001, a left shoulder MRI showed mild degenerative changes at the AC joint but was otherwise unremarkable.

10. On April 25, 2002, Claimant was evaluated by Robert H. Friedman, M.D. He opined Claimant was medically stable and rated Claimant's left shoulder permanently impaired at 3% of the whole person, but apportioned all of it to preexisting conditions. He opined Claimant had no permanent impairment related to the 2000 accident.

11. On September 26, 2003, Claimant was evaluated by Robert E. Rust, Jr., M.D., for purposes of social security disability. He opined Claimant was limited to sedentary work that did not require the use of his left arm.

12. On January 14, 2004, Claimant was evaluated by J. Craig Stevens, M.D., for purposes of social security disability. He opined Claimant has "reliable features suggesting a degree of frozen shoulder syndrome" on top of AC joint disease. Without specifically imposing restrictions, Dr. Stevens noted Claimant has "no impairment" in his ability to sit, stand, hear, speak, or travel. He noted Claimant found it "difficult" to reach above shoulder level or lift over 10 pounds with his left, nondominant, arm.

13. On January 14, 2004, a C-spine X-ray showed mild to moderate degenerative changes.

14. On January 30, 2004, a right ankle X-ray showed osteoarthritis in the surgically repaired ankle.

15. On January 23, 2006, Claimant underwent a functional capacity evaluation (FCE). It showed significant physical limitations but was considered to be of questionable validity due to uncertain effort on Claimant's part.

### **Vocational and Disability Factors**

16. Claimant was born June 28, 1944. He wears glasses and has suffered a 60 per cent hearing loss in his left ear since age 15. He left school in the 11<sup>th</sup> grade and obtained a GED in 1998.

17. Claimant has worked as a house painter and as a pharmaceutical manufacturer where he supervised 10 to 15 people. The majority of his work life has involved brakes for semi-trucks and trailers. He owned his own brake business in California with a partner until he moved to Idaho from California in 1985. In Idaho, Claimant opened a new brake business as a sole proprietor. The Idaho business was "on and off for several years." He stopped altogether in 2003 or 2004.

18. In 1998, Claimant had worked as a detention officer in Bonner County. His supervisor, Deputy Pulford observed no physical impairments that hindered Claimant's performance. Claimant did tell Deputy Pulford that Claimant had high blood pressure. Claimant was fired, allegedly for sleeping on the job, an allegation which Deputy Pulford does not believe to be true.

19. Claimant worked as a volunteer for Bonner County Search and Rescue. It was while working in this capacity that he suffered the November 24, 2000 accident.

20. After the accident, Claimant worked as a motel clerk for five months, but was unable to operate the computer fast enough.

21. After the accident for “four or five” years, seasonally, Claimant worked as a night security guard for a campground called Sandy Beach Resort. The campground eventually closed and that job was no longer available.

22. Basing his opinion largely upon a functional capacity evaluation (FCE), ICRD consultant Dan Brownell opined that as of January 31, 2006, when he interviewed Claimant, Claimant was not readily employable in the competitive labor market. He acknowledged Claimant might be employable if only the restrictions of certain doctors were considered, or if Claimant obtained some training.

23. Vocational Consultant Tom Moreland conducted a vocational assessment after meeting Claimant on February 10, 2006. He contacted potential employers in the Sandpoint labor market. He opined that based upon various doctors’ restrictions, Claimant was employable; based upon the FCE, he was not. He opined Claimant’s realistic chance of obtaining employment depended upon Claimant’s motivation and financial need to work.

24. Claimant receives social security disability benefits.

#### **Discussion and Further Findings**

25. **Permanent disability.** Permanent disability and its evaluation is defined by statute. Idaho Code §§ 72-423, -425, -430. The factors pertaining to disability are considered at the time of medical stability. Thus, the impact of Claimant’s age and other factors are relevant as of the date of medical stability, April 25, 2002. At that time, and for some years afterward, Claimant was working at the campground.

26. There are two methods by which a claimant can demonstrate he is totally and permanently disabled. First, a claimant may prove a total and permanent disability if his 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 can still demonstrate total disability by fitting within the definition of an odd-lot worker. Boley v. ISIF, 130 Idaho 278, 939 P.2d 854 (1997). Claimant failed to show he was 100% disabled.

27. A claimant may satisfy his burden of proof and establish odd-lot disability by showing that he has attempted other types of employment without success, by showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available, or by showing that any efforts to find suitable work would be futile. Id.

28. Claimant actually worked the security guard job until the campground closed. This job did not involve a sympathetic employer. Rather, it appears to have satisfactorily balanced Claimant's financial needs and retirement preferences. Claimant was successful at working this job.

29. Claimant failed to show he meets the requirements of any of the three criteria to establish he is an odd-lot worker. Vocational evaluations, to the extent they attempted to find a suitable job, were conducted in 2006, long after he was medically stable and had worked the security job at the campground.

30. More importantly, permanent disability must be preceded by permanent impairment. The only doctor who actually provided an impairment rating apportioned impairment entirely to preexisting conditions. The medical evidence shows Claimant suffered a significant preexisting left shoulder condition which was temporarily aggravated by a mild temporary muscle strain incurred as a result of the subject accident. The weight of medical evidence does not support a finding that Claimant suffered additional permanent injury to his left shoulder as a result of the subject accident.

## CONCLUSIONS OF LAW

1. Claimant failed to show he is totally and permanently disabled by any method of establishing permanent disability;
2. ISIF bears no liability as a result of the accident; and
3. All other issues are moot.

## RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 8<sup>TH</sup> day of September, 2006.

INDUSTRIAL COMMISSION

/S/ \_\_\_\_\_  
Douglas A. Donohue, Referee

ATTEST:

/S/ \_\_\_\_\_  
Assistant Commission Secretary

## CERTIFICATE OF SERVICE

I hereby certify that on the 15<sup>TH</sup> day of SEPTEMBER, 2006, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

Thomas B. Amberson  
P.O. Box 1319  
Coeur d'Alene, ID 83816-1319

Thomas W. Callery  
P.O. Box 854  
Lewiston, ID 83501

db

/S/ \_\_\_\_\_



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

DATED this 15<sup>TH</sup> day of SEPTEMBER, 2006.

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 15<sup>TH</sup> day of SEPTEMBER, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

Thomas B. Amberson  
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