

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

PERRY JOE FOWBLE,)
)
 Claimant,)
)
 v.)
)
 SNOLINE EXPRESS,)
)
 Employer,)
)
 and)
)
 LIBERTY NORTHWEST INSURANCE)
 CORPORATION,)
)
 Surety,)
)
 and)
)
 STATE OF IDAHO, INDUSTRIAL)
 SPECIAL INDEMNITY FUND,)
)
 Defendants.)
 _____)

IC 2003-519608

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

Filed March 16, 2007

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on February 9, 2006. Claimant, Perry Fowble, was present in person and represented by Daniel A. Miller of Boise. Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF), was represented by Lawrence E. Kirkendall of Boise. Defendant Employer, Snoline Express, and Defendant Surety, Liberty Northwest Insurance Corporation, settled with Claimant shortly prior to hearing and thus did not appear at hearing. The remaining parties presented oral and documentary evidence. This matter

was then continued for the taking of post-hearing depositions, the submission of briefs, and subsequently came under advisement on May 13, 2006. The case is now ready for decision.

ISSUES

The issues to be resolved were narrowed at hearing and are:

1. Whether Claimant is totally and permanently disabled;
2. Whether ISIF is liable under Idaho Code § 72-332; and,
3. 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 totally and permanently disabled, noting that vocational expert Barbara Nelson has concluded he is unemployable. Claimant asserts he suffers 5% impairment of the whole person due to his 2003 industrial accident and an additional 6% whole person impairment due to preexisting injuries. Claimant asserts that his preexisting physical impairments were manifest, hindered him in obtaining employment, and have combined with his 2003 industrial injury to render him totally and permanently disabled.

ISIF relies upon vocational expert Douglas Crum and argues that Claimant has not carried his burden of establishing that he is totally and permanently disabled. In the alternative, ISIF asserts that if Claimant has proven he is an odd-lot worker, then ISIF bears no responsibility because he was also an odd-lot worker before his 2003 accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Claimant's spouse Elizabeth Ann Fowble, and

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Barbara Nelson taken at the February 9, 2006, hearing;

2. Claimant's Exhibits 1-20 admitted at the hearing;
3. Defendant ISIF's Exhibits 1-29 admitted at the hearing; and
4. The deposition of Douglas Crum, taken by ISIF on February 23, 2006.

Claimant's objection at page 18 of the post-hearing deposition of Douglas Crum is sustained, and admission of Exhibit 2 to Mr. Crum's deposition is denied, pursuant to J.R.P. 10(E)(4) as constituting evidence developed following hearing. 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 1947 and was raised in Nampa, Idaho. He had resided in Greenleaf, Idaho for about ten years and was 58 years old at the time of the hearing. Claimant is right-handed. He graduated from Nampa High School in 1966, although he was and is functionally illiterate.

2. Claimant served in the Air Force in 1966, but was honorably discharged that same year due to a severe ulcer which required surgical treatment. Thereafter he attended evening classes at City College in Los Angeles, attempting to improve his literacy sufficiently to complete job applications for employment in California. He was unsuccessful academically. After approximately two months, Claimant returned to Idaho where he worked in a number of manual labor and truck driving positions over the ensuing decades.

3. In approximately 1969, Claimant was working at a potato processing plant when a stack of boxes fell on him, injuring both of his knees and fracturing his ankle. He underwent open

surgery of both knees for meniscus repair. He recovered well and resumed working.

4. In 1971, Claimant completed training in auto body and fender repair at Boise State University. Due to his illiteracy, he completed all of his examinations orally. Over the next several years he was employed by Peterson Motors, Anderson Buick, and Miller Stephan performing auto body and fender work. Claimant had his own auto body shop from approximately 1979 until 1981 when he closed it. Claimant developed asthma in response to auto body paint and ultimately left that field of work.

5. In approximately 1981, Claimant began driving logging trucks in Cascade, McCall, and Riggins. For a time he owned his own truck, operated his own post-and-pole business, and employed up to 21 other people. His wife handled all of the books and paperwork of the enterprise.

6. In approximately 1986, Claimant's wife left him. He closed his post-and-pole operation, sold his truck, and switched to over-the-road truck driving for Armor Meats. He hauled meat and potatoes and was required to load and unload his truck, which often necessitated loading 200-to 300-pound parcels of beef.

7. In 1989, Claimant began driving a dump truck locally hauling asphalt, sand, and gravel.

8. In 1991, Claimant was involved in a severe automobile accident and sustained a possible cervical fracture, and definite disk herniations at C4-5, C5-6, and C6-7. He ultimately underwent cervical fusion surgery. Claimant spent approximately two years recuperating from his neck injury. He ultimately recovered well and noticed no significant residual limitations.

9. In approximately 1993, Claimant began a work-study program with Idaho Fish & Game. He worked in the fisheries program and drove a truck for approximately two

years until the program was moved to northern Idaho.

10. Commencing in approximately 1994, Claimant began working for Navajo Express as a local truck driver hauling beef from Boise to Ontario. His duties did not require loading or unloading. Claimant suffered several industrial injuries while working for Navajo. In 1998, Claimant slipped on some ice and struck his right knee cap on a truck step. He was treated with arthroscopic surgery by orthopedist Randolph Peterson, M.D., who debrided a complex tear of the lateral meniscus and chondrocalcinosis in various areas. Claimant returned to work within three months. Dr. Peterson later rated Claimant's resulting permanent impairment to his right knee at 10% of the lower extremity.

11. In approximately 1999, Claimant began building his own home while he continued to work full-time for Navajo.

12. In April 2001, Claimant sustained another accident while working for Navajo when his trailer nearly detached from the tractor and Claimant was thrown violently inside the truck cab striking both knees on the metal dash. X-rays revealed an avulsion fracture in his left knee. Dr. Peterson performed arthroscopic removal of multiple loose bodies and debridement of a lateral meniscal tear. He advised Claimant not to return to truck driving. After some recuperation, Claimant attempted to work washing trucks for Navajo, however this required climbing ladders and crawling under trucks in wet and sometimes icy conditions. Dr. Peterson opined that Claimant's knees could not tolerate these activities. Navajo terminated Claimant's employment in September 2001. Robert Friedman, M.D., rated Claimant's left knee impairment at 2% of the whole person.

13. After his 2001 accident at Navajo, Dr. Peterson noted that Claimant experienced

increased symptoms with prolonged knee flexion, and climbing ladders and stairs, and opined that Claimant would highly benefit from retraining. Dr. Peterson directed Claimant to avoid prolonged sitting and climbing. He also recommended Claimant ride a bicycle to rehabilitate his knees. Claimant began riding a stationary bicycle for approximately 30 minutes twice each day. His knees gradually improved to where he was able to walk without a limp and eventually without pain. As his knees improved, Claimant began searching for employment. He submitted approximately 50 applications and was eventually hired by Snoline Express.

14. In June 2003, Claimant started working as a truck driver for Snoline Express. He delivered commodities on a regular circuit to Miami, where he obtained a load of cut flowers, and then drove to various distribution centers delivering flowers as he returned to Idaho. The flowers could not be handled like regular freight, but had to be hand-loaded and unloaded. Claimant loaded and unloaded his truck. He initially worked part-time, but his employment soon progressed to full-time. He typically drove solo for 10 to 15 days, and then was off for five or more days. Claimant was able to perform all of the physical demands of his job and manage his knee symptoms.

15. On September 18, 2003, Claimant was delivering a load of flowers to a store in Ohio when he slipped on some spilled ice and fell on his left knee on the concrete dock. In falling, he also struck his head on a box, breaking one tooth and knocking another tooth loose. He was unable to drive his truck back to Idaho and immediately sought emergency medical attention at a local hospital.

16. After Claimant flew back to Idaho, Snoline's surety directed Claimant to George Nicola, M.D. Dr. Nicola administered steroid knee injections and ordered physical therapy. He did not recommend an MRI or surgery. Claimant's knee swelled and worsened with physical

therapy. On December 1, 2003, Dr. Nicola indicated Claimant could return to work with restrictions attributable solely to his preexisting knee conditions. However, Claimant's left knee continued to be very problematic.

17. Claimant's knee pain continued and on January 28, 2004, he began treating with orthopedist Robert Walker, M.D. Dr. Walker ordered an MRI and on February 27, 2004, performed arthroscopic surgery on Claimant's left knee. Dr. Walker found a band of arthrofibrosis, corresponding to the area where Claimant stuck his left knee in his fall at Snoline, which impinged on the lateral femoral condyle with knee range of motion. Dr. Walker performed a debridement of arthrofibrosis and a lateral retinacular release. Following surgery, Claimant participated in rehabilitation, including stationary bicycling, but with limited progress.

18. As he recovered, Claimant began seeking employment. He worked with Industrial Commission rehabilitation consultant Danny Ozuna and with a consultant at the Idaho Department of Vocational Rehabilitation without success.

19. On December 15, 2004, Claimant filed an application for Social Security Disability benefits. His wife completed the application for him. His application was promptly accepted and approximately February 1, 2005, Claimant received his first Social Security Disability check.

20. At the time of the hearing, Claimant continued riding a stationary bicycle daily in an effort to regain further knee function. Dr. Walker has indicated that total knee replacement may be inevitable, but has encouraged Claimant to make his knees last as long as he can. Claimant's left knee is worse than his right knee, and worse now than before his 2003 accident. His knee is generally better early in the day because the swelling recedes during the night. Claimant can tolerate grocery shopping or similar activities on his feet for a maximum of one and one-half hours before

his knee becomes very swollen and painful. He has trouble getting through the day and generally must lie down. He has noticed some hip discomfort and Dr. Walker has advised Claimant that by favoring his left knee, he will experience increasing hip problems and ultimately increased right knee symptoms also.

21. Claimant is a credible witness. He has shown determination in his physical rehabilitation efforts and tenacity in his work search.

DISCUSSION AND FURTHER FINDINGS

22. 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).

23. **Total Permanent Disability.** Before the ISIF may potentially be held liable for any benefits, Claimant herein must establish that he is totally and permanently disabled. Idaho Code § 72-332.

24. Impairment. An evaluation of permanent disability begins with consideration of permanent 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).

25. Dr. Peterson rated Claimant's right knee impairment at 10% of the lower extremity due to his 1998 injury. In 2001, Dr. Friedman rated Claimant's left knee impairment at 2% of the whole person. Claimant sustained permanent impairments totaling 6% of the whole person due to his bilateral knee injuries prior to his 2003 industrial accident.

26. The record contains no impairment rating for Claimant's cervical fusion or any other preexisting condition. Nor does Claimant assert that any preexisting physical conditions other than his knees were a significant hindrance to his employability.

27. Claimant's treating physician, Dr. Walker, found Claimant medically stable on July 14, 2004, and opined that his 2003 industrial injury to his right knee resulted in a permanent impairment of 5% of the whole person. Dr. Nicola opined Claimant sustained no impairment from his 2003 accident. Dr. Nicola's opinion is not persuasive in that he treated Claimant after the 2003 accident with knee injections and physical therapy which exacerbated Claimant's knee condition, prompting Claimant to seek further treatment from Dr. Walker.

28. The Referee concludes that Claimant suffers preexisting permanent impairments of 6% (2% whole person left knee, plus 10% lower extremity right knee), and an additional impairment due to his 2003 industrial accident of 5% (right knee), totaling 11% of the whole person.

29. 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. 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).

30. There are two methods by which a claimant can demonstrate he or she is totally and permanently disabled. First, a claimant may prove 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).

31. Claimant herein asserts that he is 100% permanently disabled and that he is totally and permanently disabled pursuant to the odd-lot doctrine. 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).

32. The record indicates that Claimant almost certainly has permanent impairments beyond the 11% pertaining to his bilateral knee condition. Claimant suffered a severe cervical injury, including multiple cervical disc herniations, and underwent cervical fusion. The record contains no impairment rating for this condition. There is mention in the record that Claimant suffered a lumbar disc herniation many years ago and was treated with one or more steroid injections. The record contains no impairment rating for this condition. The record suggests that Claimant damaged or lost one or more teeth as a result of his 2003 accident, yet he does not assert any resulting impairment. There is testimony that Claimant developed asthma sufficiently severe to prompt him to leave auto body painting. The record contains no impairment rating for this condition.

33. In consequence of his knee condition, Dr. Walker has instructed Claimant that he cannot return to truck driving and must avoid kneeling, squatting, crawling, or lifting over 35 pounds continuously or 50 pounds occasionally. Claimant may climb stairs or ladders only minimally. Dr. Petersen had previously directed Claimant to avoid prolonged sitting or climbing. Dr. Walker has stressed that Claimant has no more chances with his knee and cannot afford any further knee injury. Claimant's knee discomfort increases after standing or being up for prolonged periods. He is able to tolerate standing for about 30 minutes. He notices increased swelling with prolonged sitting or any standing. Dr. Walker has advised Claimant that his knee will worsen with time and he may eventually require a total knee replacement.

34. Claimant's vocational rehabilitation expert, Barbara Nelson, opined that Claimant was 100% permanently disabled. Nelson administered to Claimant the Wide Range Achievement

Test which placed Claimant's reading abilities at the third grade level, spelling at the second grade level, and arithmetic at the seventh grade level. Claimant was deemed functionally illiterate. His illiteracy is a substantial barrier to his employability. He has been unable to fill out applications on his own, or pursue employment requiring reading skills or any significant recording or written reporting. In prior employment in auto body and fender work Claimant avoided reading even to locate auto parts and relied upon salvage yard attendants or dealers to read and locate appropriate parts for him. Although Claimant is familiar with residential construction, having built his own house, he is unable to read blueprints. Claimant managed the reporting required in truck driving because his father taught him at an early age compensatory strategies to complete his truck log, a process which Claimant testified takes him an hour, but would take an average driver only ten minutes.

35. Defendant's vocational rehabilitation expert, Douglas Crum, opined that Claimant has limited transferable skills and will have to re-enter the labor market in an entry-level job paying at or near minimum wage. Crum testified that Claimant retained sufficient residual physical capacity to perform many entry-level medium physical demand positions and thus was not totally disabled.

36. Based on Claimant's total impairment rating of 11% of the whole person and his permanent medium work restrictions, including restrictions on squatting, kneeling, climbing, prolonged sitting, and crawling, and considering his non-medical factors, most notably his functional illiteracy, but also including his age of 56 at the time of the accident, lack of formal education, lack of experience and transferable skills in sedentary and light occupations, computer illiteracy, and his inability to return to his previous occupations in truck driving, Claimant's ability to engage in

gainful activity has been significantly reduced. Claimant earned \$5,000 in the approximately ten weeks he was employed by Snoline before his 2003 accident. Even Defendant's vocational expert indicates Claimant must now re-enter the work force via an entry-level position at or near minimum wage. The Referee concludes Claimant has established a permanent disability of 65%, inclusive of his 11% whole person 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). 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).

38. In the present case, Claimant has not worked since his 2003 industrial injury, thus he has failed to show that he attempted other types of employment without success. However, Claimant and others on his behalf have unsuccessfully searched for work. Industrial Commission rehabilitation consultant Danny Ozuna assisted Claimant in an extensive work search. Claimant also sought and received assistance in his work search from a counselor at the Division of Vocational Rehabilitation and from placement staff at the Department of Commerce & Labor.

39. Ozuna prepared a resume for Claimant and directed him to numerous positions for which Claimant applied. It appears from a close review of Ozuna's notes, that he was not fully aware of the extent of Claimant's illiteracy. Claimant's wife actually completed all the applications. Nevertheless, with his wife's assistance, Claimant submitted at least 100 applications between March and December 2004. He apparently followed up on most, if not virtually all, job leads Ozuna provided. Claimant applied for work as a caretaker, security guard, bus driver, patient aide, fuel truck driver, delivery truck driver, auto parts supply driver, tow truck driver, van driver, concrete mixing truck driver, custodian, counter sales attendant, car salesperson, inside and outside salesperson, metal yard laborer, customer service representative, car wash attendant, and parking lot attendant—among many others. In spite of Dr. Walker's express directive that Claimant not return to truck driving, Claimant even applied for a number of driving positions. For all the applications submitted, Claimant received only one response. This pertained to a school bus driving position. However, the position required the ability to lift 100 pounds to carry children from the bus in case of an emergency. Claimant's 50-pound lifting restriction disqualified him, and no employment was offered. With this sole exception, Claimant has not even succeeded in obtaining a job interview.

40. Ozuna closed Claimant's file in March 2005, upon learning that Claimant had begun

receiving Social Security disability benefits. Ozuna's concluding notes outline potential employment leads as a parts counterperson, parts counter, car lot attendant, automobile salesperson, counter person (auto salvage), inside sales/customer service representative, carpenter, part-time van driver, metal yard worker, auto parts delivery driver, on-call relief van driver, ready mix transit driver, and fire crew transport bus driver. Most of these positions have reading and writing requirements which significantly exceed Claimant's literacy level, and many require computer skills. Claimant is entirely computer illiterate. He had already unsuccessfully applied for similar, if not these exact, positions.

41. In evaluating Claimant's transferable skills and ability to compete for light or medium duty positions, it is significant that even though Dr. Peterson counseled Claimant not to drive truck after his 2001 knee injuries, Claimant returned to truck driving because, after nearly two years of searching, he could find no other employment. Dr. Walker's restrictions now specifically preclude Claimant from truck driving.

42. Vocational expert Barbara Nelson testified for Claimant and opined that he is not employable. Nelson testified that Claimant has profound non-medical factors which negatively impact his employability, most specifically his illiteracy and age. Nelson opined that Claimant is not likely to be employed regularly in any well-known branch of the relevant labor market and that it would be futile for Claimant to look for work.

43. Claimant's restrictions from kneeling, prolonged sitting, squatting, and crawling, and his need to avoid prolonged standing, preclude him from many positions in production and construction. Claimant has been unable to finish installing the baseboards in his own home because he cannot tolerate kneeling. He sold most of his carpentry tools because he can no longer use them.

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Claimant's left knee condition now precludes him from driving a standard transmission. He sold his pickup, which had a standard transmission, and purchased a lower vehicle, with an automatic transmission, which he can get into and out of without climbing.

44. The Referee finds that Claimant has demonstrated that he and vocational counselors acting in his behalf have searched for other work and that other work is not available. Claimant has established a prima facie case that he is an odd-lot worker, totally and permanently disabled, under the Lethrud test.

45. Once a claimant establishes a prima facie odd-lot case, the burden shifts to the employer or ISIF to show there is:

An actual job within a reasonable distance from [claimant's] home which [claimant] is able to perform or for which [claimant] can be trained. In addition, the Fund must show that appellant has a reasonable opportunity to be employed at that job. It is of no significance that there is a job [claimant] is capable of performing if he would in fact not be considered for the job due to his injuries, lack of education, lack of training, or other reasons.

Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 407, 565 P.2d 1360, 1364 (1977).

46. ISIF notes that Ozuna identified several possible positions in his closure notes. Nelson specifically examined the positions recommended in Ozuna's closure summary and opined that they either exceeded Claimant's academic or physical abilities. As previously noted, Ozuna apparently was unaware of Claimant's significant illiteracy.

47. Vocational expert Douglas Crum testified on behalf of ISIF that given Claimant's restrictions to medium level work, Claimant is employable and there are a number of jobs Claimant could perform in the Boise metropolitan area labor market. Crum opined that due to Claimant's inexperience and lack of transferable skills, he would have to re-enter the labor market in an entry-level position paying at or slightly above minimum wage. Crum opined that Claimant could work

as a cashier, food service aid, route salesperson, kitchen aide, dietary aide, cook/dishwasher, bakery production aide, picture framer, courier driver, floral delivery driver, light delivery driver, shuttle driver, fast food cook, pizza delivery driver, custodian, building cleaner, carpet cleaner, car wash person, fueler, lube technician, parking lot attendant, food prep worker, patient sitter, or deli worker. Crum testified of openings in the Boise metropolitan area labor market for these positions. However, Crum specifically acknowledged that his review of actual job openings focused on Boise area jobs only—as distinguished from the Nampa/Caldwell labor market. Crum also opined that additional positions in the Nampa/Caldwell area would be available to Claimant, however Crum provided no information regarding any such actual positions.

48. Nelson testified that the actual jobs which Crum identified were unrealistic because the vast number of them exceeded Claimant's physical capabilities, and Claimant would not have a realistic chance of being employed at the remainder of them. Nelson opined that Claimant would not be competitive for employment as a patient sitter because such positions were nearly always filled by women with prior medical training. She testified that Claimant's squatting and kneeling restrictions would preclude him from custodial/janitorial positions. Nelson opined that manufacturing or food processing production work would exceed Claimant's sitting and standing limitations. She noted that medical patient shuttle driver positions were very few and Claimant would not be physically able to help patients exit the shuttle in the event of an emergency. Nelson opined that dishwashers are generally required to also clean floors and wipe down surrounding areas near floor level, which requires crouching and kneeling. She testified that employment at the Boise Stage Stop would require Claimant make a 60-mile commute one way, and employment at Bogus Basin would require an even longer commute—making both economically unfeasible.

Nelson testified that Claimant would have no chance of being employed at any of the jobs Crum identified because Claimant has no experience in those areas, is precluded by academic or physical restrictions, or does not fit the profile for the position.

49. Finally, Nelson opined that the pay for the entry-level jobs Crum identified, was so low that Claimant could not afford the commute from Greenleaf to Boise to work. Nelson testified that Claimant's labor market was predominately Canyon County, and included Caldwell and Nampa, as well as Adrian, Nyssa, and Marsing. She opined that Claimant's lack of transferable skills would compel him to seek entry-level positions starting at or near minimum wage, thus it would generally not be economically feasible for Claimant to work in the Boise/Meridian area. Crum acknowledged that Claimant could not afford to travel very far into Boise for minimum wage employment.

50. Greenleaf is approximately 35 miles from Boise. According to the federal or state mileage reimbursement rate of \$0.485 per mile, the cost of a round-trip from Greenleaf to Boise would approximate \$33.95. Gross daily earnings from a minimum wage job would total \$41.20 (8 hours x \$5.15 per hour). Thus, assuming even a modest level of withholding for federal and state taxes, it is almost certain that net daily earnings from a minimum wage job in Boise would hardly cover the cost of the daily commute from Greenleaf.

51. The Referee finds Nelson's analysis thorough and her conclusions persuasive, especially as corroborated by Claimant's extensive and unsuccessful job search. ISIF has not proven there is an actual job within the relevant labor market which Claimant is able to perform, for which he would be considered, and in which he has a reasonable opportunity to be employed. Claimant has proven he is totally and permanently disabled under the odd-lot doctrine.

52. **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.

53. 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.

54. 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.

55. The preexisting physical impairment at issue here is the condition of Claimant's knees. Abundant medical records establish that his 1998 right knee injury and his 2001 left knee injury were existing and manifest prior to his 2003 accident. The first and second prongs of the Dumaw test have been met. However, there is some dispute over whether Claimant's prior knee injuries were a subjective hindrance or obstacle to employment or reemployment if Claimant had become unemployed.

56. Claimant testified that prior to his 2003 industrial injury he could perform all of his job duties. However he also testified that his duties did not require heavy loading. Dr. Peterson had recommended in approximately 2001 that Claimant not return to truck driving because of his bilateral knee condition. At Snoline, Claimant was assigned a truck with a sleeper cab. This permitted him to lie down and elevate his legs when his knees bothered him.

57. Nelson testified that Claimant's limitations from his prior knee injury very well could have constituted a hindrance or obstacle to Claimant obtaining employment. Both Crum and Nelson testified that some potential employers would have been reluctant to hire Claimant prior to his 2003 industrial injury due to his preexisting knee injuries. His preexisting bilateral knee impairments restricted him from prolonged sitting and climbing. Claimant sought work for nearly two years after leaving Navajo before he was hired at Snoline. Claimant's ability to work was negatively impacted by his preexisting knee injuries. The Referee finds that Claimant's preexisting bilateral knee injuries constituted a hindrance to Claimant's employment. The third prong of the Dumaw test has been met.

58. 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).

59. In the present case, ISIF asserts that Claimant was already an odd-lot worker prior to his 2003 accident. Claimant competitively obtained employment with Snoline after his 2001 injuries. Nelson opined that Claimant was employable after his 2001 injuries. Douglas Crum, ISIF’s own expert, opined that Claimant is employable even now. The Referee is not persuaded that Claimant was totally permanently disabled after his 2001 accident at Navajo prior to his hiring at Snoline.

60. There is persuasive evidence that Claimant’s 2003 accident combined with his preexisting impairment to result in total permanent disability. Claimant’s knee conditions prior to his 2003 injury prompted Dr. Peterson to direct Claimant to permanently avoid prolonged sitting or climbing, however Dr. Peterson specifically advised that Claimant could return to truck driving. Following the 2003 accident, Dr. Walker imposed lifting, squatting, and kneeling restrictions, and more significantly, opined that Claimant can no longer drive a truck. Claimant testified that his left knee was his good knee prior to the 2003 accident. Now Claimant is unable to operate the clutch of his own pickup. The final prong of the Dumaw test has been satisfied.

61. The Referee concludes Claimant has proven ISIF’s liability under Idaho Code § 72-32.

62. **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).

63. 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. As previously noted, Dr. Walker rated the permanent impairment from Claimant's 2003 industrial injury at 5% of the whole person; Drs. Peterson and Friedman rated Claimant's preexisting impairments at 6% of the whole person for a total permanent impairment of 11%. Thus, $\frac{6}{11}$ ^{ths} of Claimant's impairment pre-existed his 2003 industrial accident.

64. By application of the Carey formula ISIF is responsible for the pre-existing medical portion of 6% impairment and for $\frac{6}{11}$ ^{ths}, or approximately 54.5%, of the nonmedical portion of Claimant's permanent disability. Thus, ISIF is responsible for payment of full statutory benefits commencing 227.5 weeks after July 14, 2004, the date Dr. Walker found Claimant medically stable.

CONCLUSIONS OF LAW

1. Claimant has proven he suffers permanent partial impairment of 11% of the whole person, including 5% due to his 2003 industrial accident and 6% due to his preexisting bilateral knee conditions. 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.

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

3. 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: ISIF is responsible for payment of full statutory benefits commencing 227.5 weeks after July 14, 2004, the date Claimant was medically stable.

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 6th day of March, 2007.

INDUSTRIAL COMMISSION

/s/
Alan Reed Taylor, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of March, 2007, 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:

DANIEL A MILLER
209 W MAIN
BOISE ID 83702-7263

LAWRENCE E KIRKENDALL
2995 N COLE RD SUITE 260

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 23

BOISE ID 83704

lbs

_____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

PERRY JOE FOWBLE,)
)
 Claimant,) **IC 2003-519608**
)
 v.) **ORDER**
)
 SNOLINE EXPRESS,)
)
 Employer,) **Filed March 16, 2007**
)
 and)
)
 LIBERTY NORTHWEST INSURANCE)
 CORPORATION,)
)
 Surety,)
)
 and)
)
 STATE OF IDAHO, INDUSTRIAL)
 SPECIAL INDEMNITY FUND,)
)
 Defendants.)
 _____)

Pursuant to Idaho Code § 72-717, Referee Alan Reed 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 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 of 11% of the whole person, including 5% due to his 2003 industrial accident and 6% due to his preexisting bilateral knee conditions.
2. Claimant has failed to prove he is 100% disabled.

3. Claimant has proven that he is an odd-lot worker, totally and permanently disabled, under the Lethrud test.
4. Defendant ISIF is liable to Claimant under Idaho Code § 72-332.
5. 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: ISIF is responsible for payment of full statutory benefits commencing 227.5 weeks after July 14, 2004, the date Claimant was medically stable.
6. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this 16th day of March, 2007.

INDUSTRIAL COMMISSION

/s/
James F. Kile, Chairman

/s/
R. D. Maynard, Commissioner

/s/
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on 16th day of March, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

DANIEL A MILLER
209 W MAIN
BOISE ID 83702-7263

LAWRENCE E KIRKENDALL
2995 N COLE RD SUITE 260
BOISE ID 83704

lbs

/s/