



## **ISSUES**

The issues to be decided as the result of the hearing are:

1. Whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine and, if so,
2. Whether ISIF is liable for a proportionate share of disability benefits.

## **CONTENTIONS OF THE PARTIES**

Royal contends that Claimant was found to be an odd-lot worker in a prior decision and the Commission has allowed it to bring in ISIF in order to determine its responsibility to Royal in paying Claimant's total permanent disability benefits. Royal further contends that it should be responsible for 40% of those benefits and ISIF should be responsible for the remaining 60%.

ISIF contends that the Commission erred when it allowed Royal to join it after the first hearing and decision. In the event that the Commission adheres to its Declaratory Ruling allowing the joinder, ISIF nonetheless has no liability because no pre-existing condition(s) combined with Claimant's last industrial injury to cause total and permanent disability, both as a matter of law because the Commission has already decided that Claimant's last accident was the cause of his disability, and as a matter of fact because it was Claimant's last accident and the ensuing five years between hearings that created Claimant's current total disability. Alternatively, the record reveals that Claimant was already totally and permanently disabled before his last accident.

## **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The Industrial Commission legal file.
2. Royal's Exhibits 1-12 admitted at the hearing.

3. ISIF's Exhibits 1-6 admitted at the hearing.

4. The post-hearing depositions of: William M. Shanks, M.D., Tiffany Jaeger-Nystil, and Dan Brownell, all taken by Royal on September 21, 2006, and Douglas M. Crum, CDMS, taken by Royal on October 20, 2006. The objections made during the taking of Mr. Brownell and Mr. Crum's depositions are overruled.

### **PROCEDURAL HISTORY**

This Referee conducted the first hearing in this matter in Coeur d'Alene on March 14, 2001. At that hearing, John T. Mitchell of Coeur d'Alene represented Claimant. Bentley G. Stromberg of Lewiston represented Employer and its surety, General Insurance Company of America (General), for industrial accidents occurring on May 5, 1996 and October 10, 1997. Glenna M. Christensen of Boise represented Employer and its surety, Royal, for Claimant's last industrial accident occurring on May 11, 1999. The three claims were consolidated. ISIF was not joined and thus did not participate in the March 14, 2001, hearing. On September 7, 2001, the Commission issued its Findings of Fact and Conclusions of Law wherein they found Claimant to be totally and permanently disabled pursuant to the odd-lot doctrine. The Commission apportioned liability at 20% for General and 60% for Royal with the remaining 20% attributable to a non-industrial accident for which Claimant was compensated in an arbitration proceeding.

All parties timely moved for reconsideration/clarification of the apportionment aspect of the decision. On December 14, 2001, the Commission issued its Order Regarding Reconsideration wherein they found Royal 100% liable for Claimant's total and permanent disability.

On May 22, 2002, Royal filed a Complaint against ISIF seeking apportionment of liability pursuant to Idaho Code § 72-332. On October 11, 2002, ISIF requested a declaratory ruling seeking dismissal of Royal's Complaint on various grounds. On August 27, 2003, the Commission issued its Declaratory Ruling wherein Royal was permitted to proceed against ISIF. To the extent that ISIF objects to this proceeding based on arguments previously made in support of its petition for the declaratory ruling, those objections are overruled.

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

### **FINDINGS OF FACT**

1. At the time of the second hearing on July 18, 2006, Claimant was 70 years of age and resided in Coeur d'Alene. At all times relevant to this decision, Claimant was employed by the Hagadone Corporation as a caretaker/groundskeeper at Duane Hagadone's summer residence at Casco Bay on Lake Coeur d'Alene. He also owned a business performing topiary or shrubbery work as well as regular shrub trimming. During the course of his employment with Hagadone, Claimant suffered three industrial accidents and one non-industrial motor vehicle accident.

### **The Accidents**

#### **1<sup>st</sup> accident – groin:**

2. On May 5, 1996, Claimant was unloading flowers from a boat when he felt something tear in his left groin area. He was subsequently diagnosed with a left inguinal hernia. He missed no time from work and was able to continue with his topiary business until after his first hernia surgery in February 1997. He returned to work but, at times, needed assistance from co-workers. He could no longer perform his topiary business due to discomfort. Claimant

underwent a second hernia repair in November 1997. He again missed no work as he scheduled the surgery during the time he was otherwise off work for the winter season. He was given permanent physical restrictions relating thereto of lifting no more than 30 pounds on an occasional basis and was assigned a 10% whole person PPI rating.

**2<sup>nd</sup> accident – neck, left shoulder, low back:**

3. On July 24, 1997, Claimant's vehicle was rear-ended while he was waiting at a stoplight. This accident was non-industrial. Claimant missed no work as the result of this accident. Claimant's cervical strain resolved but he continued to experience problems with his back and left shoulder. Claimant's treating physician for this injury assigned PPI at 20% of the whole person for his left shoulder condition and 10% for his lumbar condition. He also assigned the following restrictions: occasionally lift 10 pounds to shoulder height and 5 pounds frequently; 10 pounds above shoulder occasionally and 5 pounds frequently; and 25 pounds to the waist level occasionally and 15 pounds frequently. As Claimant is left-handed, he could no longer perform trimming and/or pruning activities.

**3<sup>rd</sup> accident – low back:**

4. On October 10, 1997, Claimant was moving some flowerpots into a storage shed when he felt something pop in his low back causing pain that has never gone away. Claimant testified at the first hearing that the pain was in a different area than the pain he experienced in his motor vehicle accident. Claimant was able to finish the 1997-1998 season with some accommodation. Claimant incurred no PPI as the result of this accident. *See*, Findings, Conclusions, and Recommendation filed September 7, 2001, Finding 19, pp. 13-14.

**Final accident – low back:**

5. On May 11, 1999, Claimant was mowing a lawn on a slope when his feet slipped out from underneath him and he fell straight down on his buttocks. Claimant was assigned a 10% whole person PPI for this accident with 5% pre-existing. He has not worked since.

**DISCUSSION AND FURTHER FINDINGS**

“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 impairment and by pertinent non-medical 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 the accident causing the injury, or manifestation of the occupational disease. Consideration should also be given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant; provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is “whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant’s capacity for gainful employment.” *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant’s ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment together with the relevant nonmedical factors totals 100%. If a claimant has met this burden, then total and permanent disability has been established. The second method is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939P.2d 854, 857 (1997). An odd-lot worker is one “so injured the he 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 of Idaho, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), *citing Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). 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), *citing Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

Once a claimant established a *prima facie* odd-lot case, the burden shifts to the employer 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 [employer] must show that [claimant] 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).

6. William M. Shanks, M.D., vocational expert Douglas N. Crum, CDMS, and ICRD consultant Dan Brownell of the Coeur d'Alene field office testified by way of deposition after the July 19, 2006, hearing in this matter. All agree that Claimant was totally and permanently disabled as of the time of the first hearing and remains so. Neither party herein questions that Claimant is totally and permanently disabled, the present issue being ISIF's proportionate responsibility for payment of the benefits associated with that total disability.

7. The Referee finds that Claimant is totally and permanently disabled effective on or about July 19, 2006, the date of the second hearing.

Idaho Code § 72-332 provides:

**Payment for second injuries from industrial special indemnity account, --** (1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease 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 or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account.

(2) “Permanent physical impairment” is as defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or occupational disease, of such seriousness 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 permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

There are four elements that must be proven in order to establish liability of ISIF:

1. A pre-existing impairment;
2. The impairment was manifest;
3. The impairment was a subjective hindrance to employment; and,
4. The impairment combines with the industrial accident in causing total

disability. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990).

8. ISIF presents two arguments in support of their position that they bear no responsibility for the payment of benefits in this case. The first is that they are not liable as a matter of law because the Commission, in their Order Regarding Reconsideration filed December 14, 2001, found: “Under the facts of this case, the Commission has determined that the last accident caused Claimant to suffer total and permanent disability. No other facts or circumstances have been presented to the Commission. Accordingly, the Commission finds that Royal should be fully liable for total and permanent disability benefits.” Order Regarding Reconsideration, p. 4. And further, “Claimant is totally and permanently disabled pursuant to the odd-lot doctrine. Royal is liable for all such benefits.” Order Regarding Reconsideration, p. 5.

Thus, ISIF argues, they are free from liability because there can be no “combining with” as a matter of law.

9. ISIF’s first argument is unpersuasive. At the time of the first hearing and the motions for reconsideration, ISIF was not a party so a “traditional” apportionment analysis under Idaho Code § 72-332, *Dumaw* and *Carey*, was not possible. In order to ensure that Claimant was afforded the full benefits awarded, the Commission on reconsideration found Royal to be responsible for the entire amount of those benefits. No appeal was taken. The use of the phrase “No other facts or circumstances have been presented to the Commission” implies that a different analysis of liability would have been utilized had ISIF been a party at that time. Further, the Commission’s Declaratory Ruling allowing the joinder of ISIF by Royal would have been rendered meaningless if the Commission meant to close the door on the “combining” requirement by holding that the last accident was the sole cause of Claimant’s permanent disability. As the Commission stated in the Declaratory Ruling, “The ruling [Reconsideration] was specifically framed in the context of the particular issues presented by the parties to the Commission.” Declaratory Ruling, p. 5, (emphasis added). Further, to illustrate the Commission’s intent to have ISIF’s liability, if any, to be decided on the merits is this passage: “Since no facts have been developed in this proceeding, the elements of ISIF liability under Idaho Code § 72-332 are more appropriate for an administrative hearing.” *Id.*, p. 11. The Referee finds that ISIF has failed to establish that Royal has failed to prove “combination” under the “but for” test of Idaho Code § 72-332 as a matter of law.

10. ISIF’s second, and more compelling, argument supporting their position of non-liability is that Royal has failed to prove a “combination” under the “but for” test under the facts of this case. A response to this argument requires an analysis of those facts under *Dumaw, Id.*

**Pre-existing impairments:**

11. Pre-existing permanent physical impairments have been found to be as follows pursuant to the Commission's Findings of Fact, Conclusions of Law, and Recommendation filed September 7, 2001:

May 5, 1996, hernia – 10%

July 24, 1997, MVA – 20% left shoulder; 5% low back

October 10, 1997, low back – 0%

May 11, 1999, low back – 5%

**Subjective hindrances:**

12. Dr. Shanks, Dan Brownell, and Doug Crum all testified that Claimant's pre-existing hernia condition, low back, and left shoulder problems were manifest and constituted hindrances to his employment and employability. Claimant himself so testified at the first hearing, thus the hindrances were both objective and subjective as to Claimant. He was forced to discontinue his topiary business due to his hernia and given lifting restrictions. Claimant's low back problems resulted in impairment and a caution from one physician that heavy lifting and prolonged bending may be too much for him. Mr. Brownell testified that Claimant went from a heavy work category prior to his hernia injury to medium prior to his last accident. Mr. Crum testified that Claimant had incurred disability of 75% to 80% before his last accident.

**“Combines with” and “but for”:**

13. It is undisputed that Claimant was unemployable after his May 11, 1999, accident and injury. The inquiry thus becomes whether Claimant's pre-existing physical impairments combined with the last accident to render him totally and permanently disabled, or stated another way, whether Claimant would have been totally and permanently disabled but for his last

accident. Prior to the last accident, Claimant was able to work albeit with restrictions and accommodation. He was no longer able to do so after his last accident and Hagadone was unable to accommodate him further. Claimant made a legitimate attempt to locate work but failed. His pre-existing impairments total 35% of the whole person, which is significant. Mr. Brownell testified that pre-last accident, Claimant “most likely” could have found employment. The last accident resulted in significant standing, sitting, and walking restrictions and he could only tolerate a four-hour workday. It placed Claimant in the sedentary work category.

14. The relevant inquiry here is the status of Claimant’s disability at the time of the second hearing wherein ISIF was “allowed” to participate. At that time, Claimant was 70 years of age and was still totally and permanently disabled. However, Mr. Brownell testified, and Mr. Crum did not disagree, that when considering only Claimant’s age and lack of transferable skills to the sedentary labor market, Claimant was totally and permanently disabled. It was Claimant’s last industrial accident, for which ISIF bears no responsibility, that landed him in the sedentary labor market. ISIF’s argument that based on these facts, there has been no showing that any of Claimant’s pre-existing impairments combined with his last industrial accident to render him totally and permanently disabled so as to invoke liability is persuasive.

15. The Referee finds that Claimant’s current total and permanent disability is due to the lack of transferable skills to the sedentary labor market and his advanced age, and not the result of any combination of Claimant’s pre-existing impairment and his last industrial accident.

#### **CONCLUSION OF LAW**

1. Royal has failed to prove ISIF’s liability for any proportionate share of Claimant’s total and permanent disability.





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

DATED this \_\_14<sup>th</sup>\_\_ day of \_\_May\_\_, 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 the \_\_14<sup>th</sup>\_\_ day of \_\_May\_\_, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

ERIC S BAILEY  
PO BOX 1007  
BOISE ID 83701

KENNETH L MALLEA  
PO BOX 857  
MERIDIAN ID 83680

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

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