

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DUAIN L. COX,)	
)	
Claimant,)	IC 2003-013803
)	
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
ARNOLD MACHINERY,)	AND RECOMMENDATION
)	
Employer,)	
)	
and)	
)	filed June 1, 2007
ADVANTAGE WORKERS)	
COMPENSATION INS. CO.,)	
)	
Surety,)	
)	
and)	
)	
STATE OF IDAHO, INDUSTRIAL)	
SPECIAL INDEMNITY FUND,)	
)	
Defendants.)	
_____)	

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 Idaho Falls on August 18, 2006. Claimant, Duain Cox, was present in person and represented by Robert K. Beck of Idaho Falls. Defendant, State of Idaho, Industrial Special Indemnity Fund (ISIF), was represented by Thomas B. High of Twin Falls. Defendant Employer, Arnold Machinery, and Defendant Surety, Advantage Workers Compensation Insurance Company, settled with Claimant 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 January 9, 2007. The case is now ready for decision.

ISSUES

The issues to be resolved are:

1. Whether Claimant is totally and permanently disabled;
2. Whether ISIF is liable under Idaho Code § 72-332;
3. Apportionment pursuant to the formula set forth in Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984); and
4. Whether Claimant is entitled to attorney fees.

ARGUMENTS OF THE PARTIES

Claimant argues he is totally and permanently disabled, noting that vocational expert Douglas Crum has concluded he is unemployable. Claimant asserts he suffers 6% impairment of the whole person due to his 2003 industrial accident and an additional 64% impairment of the whole person due to preexisting right shoulder, hearing, speech, vision, and other conditions. 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. He further asserts entitlement to attorney fees for ISIF's denial of his claim.

ISIF relies upon vocational expert Nancy Collins and argues that Claimant has not carried his burden of establishing that he is totally and permanently disabled. Furthermore, ISIF asserts there is no basis for any claim of attorney fees.

EVIDENCE CONSIDERED

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

The record in this matter consists of the following:

1. The testimony of Claimant and William Angell taken at the August 18, 2006, hearing;
2. Claimant's Exhibits 1-17 admitted at the hearing;
3. ISIF's Exhibits A-D, I, L-N, R-U, X-Y, AA-DD admitted at the hearing;
4. The deposition of Elisa Rust, taken by Claimant on August 9, 2006; and
5. The deposition of Douglas Crum, taken by Claimant on August 29, 2006.

All objections made during the depositions of Nancy Collins and Douglas Crum are overruled.

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 1952. He was 54 years old and had resided in St. Anthony for nine years at the time of the hearing. Claimant is right-handed. He was born prematurely and has experienced hearing, vision, and stuttering problems since childhood. Claimant's vision in his right eye is extremely blurry. He has been diagnosed with amblyopia. Claimant's stuttering problems decreased as he reached his teen years. However, he still stutters when under stress, especially in group settings. Claimant testified he was born with incomplete hip sockets and has experienced hip problems most of his life.

2. Claimant completed the 11th grade and dropped out of school during the 12th grade. For a time he farmed and then worked for a sign advertising company. Claimant avoided jobs in sales and customer service because of his stuttering.

3. In 1974, Claimant fell approximately 65 feet when a cable broke while he was working on a billboard. He injured his right wrist, knee, and hip, and subsequently underwent knee surgery. Claimant has had intermittent difficulty with his right knee since that time.

4. After recovering from his fall, Claimant served in the U.S. Air Force for four years. He specialized in equipment repair, material handling, and loading trucks and aircraft. He was honorably discharged. He served for several more years in various branches of the military. In later years, Claimant attempted to reenter the military but failed the required hearing test.

5. Claimant has worked as a farmer, advertising sign displayer, precision grinder, light auto mechanic, forklift mechanic, exhaust pipe fabricator, sawyer, logging mechanic, and irrigation pump repairman. He lived and worked in Ohio and Arkansas before coming to Idaho.

6. In approximately 1991, Claimant sought medical treatment for right shoulder pain and was diagnosed with a worn rotator cuff and bone spurs. Claimant worked with increasing right shoulder symptoms for many years until they became unbearable. In May 2002, Gregory West, M.D., performed surgical repair of Claimant's torn right rotator cuff and also removed bone spurs. Shortly after surgery, infection set in and significantly damaged the surgical site and surrounding tissues. Claimant underwent a second right shoulder surgery in June 2002, to address the infection-related concerns.

7. Claimant lost his job in forklift repair due to his prolonged absence from his 2002 shoulder surgeries. After recuperating, he worked as a truck mechanic and irrigation pump repairman. This was extremely heavy work. Claimant's ability to work overhead was somewhat reduced because of his right shoulder, but he developed compensatory strategies.

8. Claimant returned to forklift repair work when he took a job with Arnold Machinery

(Arnold). On November 12, 2003, Claimant injured his right shoulder while at work when he lifted a forklift tire onto a press and felt a pop with immediate pain and weakness in his right shoulder. He was earning \$14.50 per hour at the time of the accident.

9. In January 2004, John Andary, M.D., performed surgical repair of Claimant's right rotator cuff tear. While recovering, Claimant injured his right shoulder during physical therapy. In June 2004, he underwent yet another right shoulder surgery to address the injury suffered in physical therapy. Following this fourth shoulder surgery, Claimant again participated in physical therapy, but was unable to regain significant strength and motion in his right shoulder. Dr. Andary advised Claimant that his days as a mechanic were over.

10. Prior to 2004, Claimant had rare panic attacks. Since his fourth shoulder surgery, his panic attacks have become more frequent. These attacks are stress-induced and occur approximately every other month, with more minor anxiety episodes approximately every other week. Claimant takes anti-anxiety medication.

11. Following Claimant's fourth shoulder surgery, he returned to work part-time for Arnold performing light duty custodial work and sorting parts for two hours per day. He applied for a full-time permanent parts position in Arnold's Boise office but was not hired. Arnold ultimately terminated Claimant's employment because he could not return to his regular job as a mechanic.

12. Claimant was assisted by Industrial Commission rehabilitation consultant Kari Rohrbach in Idaho Falls in his search for employment. Rohrbach later directed Claimant to Department of Commerce & Labor rehabilitation counselor William Angell in Rexburg, who also helped Claimant search for employment.

13. In October 2004, Dr. Andary rated Claimant's right shoulder impairment at 12% of

the whole person and restricted Claimant to lifting 30 pounds with both arms, no extensive pushing or pulling, and no work above shoulder level. Claimant's functional capacity evaluation performed by physical therapist Jay T. Ellis, established that Claimant cannot lift even two pounds with his right arm higher than waist level. Total right shoulder replacement has been considered, but would likely not be helpful because of the extensive loss of shoulder muscle.

14. Donald R. Bjornson, M.D., of the Disability Determinations Service Division, examined Claimant on February 23, 2005, and evaluated his impairment to do work-related activities. Dr. Bjornson concluded that Claimant is not impaired in sitting for periods of half an hour or longer, standing for shorter periods or walking, carrying 20 to 30 pounds provided he does not lift objects above waist height. Dr. Bjornson concluded Claimant cannot perform two-handed activities above shoulder height, but has no impairment of manual dexterity, hearing, or speaking.

15. Claimant attempted to work for Pro-Fusion Technologies in Rexburg as a precision grinder. He started November 15, 2005, earning \$7.00 per hour grinding tungsten electrodes used in welding. Grinding required him to work at chest height with both hands in front of him. His work quality was good, however he was expected to grind approximately 100 electrodes per hour but was only able to complete 60 per hour. The repetitive motion required aggravated his right shoulder and forced him to quit after three days.

16. On June 13, 2006, Claimant was granted Social Security disability benefits. He had filed an application in May 2004. The Social Security examiner considered Claimant capable of only one arm work and without transferable skills.

17. Claimant considered starting his own repair business and spent \$1,400 of his own funds to complete out-of-state training in repairing motorized scooters and chairs for the

Rascal Scooter Company (Rascal). Claimant has a contract with Rascal to perform warrantee work and service Rascal's motorized chairs. This provides Claimant only part-time work from time to time. Claimant is also an approved repairman for Little Tykes products and does occasional repairs for them. This work is also infrequent. Claimant works occasionally diagnosing forklift repair problems for Forklift Sales & Service (Forklift Sales). After Claimant diagnoses the problem, Forklift Sales employees make the necessary repairs. Claimant testified that he works only approximately 15 hours per month in all of these activities combined. Claimant also works occasionally for Parker's Welding in St. Anthony, where he performs light cleaning and limited welding.

18. At the time of hearing, Claimant continued to suffer right shoulder pain with most right arm work. His hearing has worsened significantly in the last three years, however he has learned to compensate by reading lips. His vision is 20/200 in his right eye and 20/20 in his left eye. At hearing, Claimant stuttered in the clear majority of his sentences. Claimant is a credible witness.

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

21. Impairment. An evaluation of permanent disability begins with consideration of

permanent physical 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).

22. Claimant alleges permanent impairments of his right shoulder, right eye, speech (stuttering), bilateral hearing, right knee, right hip, and low back.

23. Dr. Andary rated Claimant's right shoulder impairment at 12% of the whole person due to his rotator cuff injuries. He apportioned 50% of this impairment to Claimant's shoulder injuries and surgeries prior to November 2003, and the balance to his most recent industrial accident. Robert E. Ward, D.C., evaluated Claimant on November 19, 2004, and concluded that Claimant suffers a permanent impairment of 15% of the whole person due to range of motion limitations of his right shoulder. The Referee finds the impairment rating of Dr. Andary, as Claimant's treating physician, persuasive, and concludes that Claimant suffers 12% permanent impairment of the whole person due to his right shoulder injuries; 6% impairment attributable to his 2003 industrial accident, and 6% attributable to his prior right shoulder condition.

24. Claimant's vision in his right eye is 20/200 uncorrected, and 20/80 with refraction. Dwight Hansen, O.D., opined that Claimant suffers refractive amblyopia resulting in functional

blindness of his right eye. Claimant asserts, pursuant to Idaho Code § 72-428(3), he suffers permanent impairment of 30% of the whole person due to the loss of vision of his right eye. Defendant does not contest this assertion. The Referee finds that Claimant suffers 30% permanent impairment of the whole person due to the loss of functional vision in his right eye.

25. Speech language pathologist Alyson Elsethagen, MS CCC-SLP, evaluated Claimant's speech fluency on June 30, 2006, and concluded that Claimant had a moderate to severe speech impairment. At Claimant's counsel's request, she reviewed the AMA Guides to the Evaluation of Permanent Impairment ("Guides"). Elsethagen then opined Claimant fell in the Class 3 Speech Impairment, and rated Claimant's speech impairment at 16% of the whole person. Elsethagen is not a physician. At hearing, Claimant stuttered in the clear majority of his sentences. However, in each instance, with effort, he was able to verbalize and communicate adequately. His speech volume was satisfactory, as was his articulation, albeit at times requiring repeated efforts. Clearly, Claimant suffers from a speech impediment, however, having reviewed the various speech impairment classes set forth in the AMA Guides, which describe causative physical conditions such as gastroesophageal reflux; vocal fold scars, masses, hemorrhages, paresis, and polyps, the Referee is not persuaded that Claimant's speech impediment fits within any described class. Dr. Bjornson who evaluated Claimant for a disability determination, concluded that Claimant had no impairment of speaking. The Referee finds that Claimant has not proven he suffers any permanent physical impairment due to his stuttering speech.

26. Claimant's hearing has been deficient from birth, but has worsened over the last few years. He owns hearing aids, but often does not use them because in noisy environments, or when he has an episode of persistent ringing in his ears, they are ineffective. He did not wear them at

hearing, and although he asked that questions be repeated from time to time, he was able to understand and respond adequately. Claimant asserts a 10% permanent impairment of the whole person due to his hearing loss based upon the records of U-Select Hearing Aid Service, contained in Claimant's Exhibit 5. Exhibit 5 contains various notes, including an audiogram and sound pressure evaluation, however, having carefully reviewed Exhibit 5, the Referee is unable to discern from it any permanent impairment rating. Dr. Bjornson's disability determination report concluded that Claimant had no impairment of hearing. The Referee finds that Claimant has not proven he suffers any specific degree of permanent impairment due to his hearing loss.

27. On March 9, 2005, Brent Baldree, Ph.D., performed a psychological evaluation of Claimant and concluded that his mental status examination reflected intellectual functioning in the average range. Baldree diagnosed major depressive disorder, recurrent and severe, and generalized anxiety disorder. The record contains no impairment rating for Claimant's depression or anxiety disorder. Similarly, the record contains little specific information, and no impairment rating, for Claimant's right knee, right hip, low back, or any other preexisting condition. The Referee declines to speculatively assess ratings for these conditions.

28. Claimant has proven he suffers permanent physical impairments of 12% of the whole person due to his right shoulder and 30% of the whole person due to his functional right eye blindness, thus totaling 42% 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 pertinent nonmedical factors totals 100%. 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). Claimant herein asserts that he is 100% permanently disabled and also that he is totally and permanently disabled pursuant to the odd-lot doctrine.

31. As noted above, Claimant has permanent physical impairments totaling 42% of the whole person. No physical restrictions have been imposed due to Claimant's right eye impairment.

32. On October 6, 2004, Dr. Andary found Claimant's right shoulder had reached maximum medical improvement and permanently restricted Claimant from overhead work, with no lifting greater than 30 pounds. Dr. Andary expressly noted that Claimant can work with his right arm down at his side, cannot work overhead, and can do some occasional reaching. Dr. Andary noted that after Claimant's multiple surgeries and infection he has essentially no right rotator cuff remaining. In consequence of his right shoulder condition, Dr. Andary has instructed Claimant that he cannot work as a forklift mechanic. Chiropractor Robert Ward restricted Claimant to lifting no more than 25-35 pounds due to his right shoulder condition. Dr. Bjornson concluded that Claimant is not impaired in carrying 20 to 30 pounds, provided he does not lift objects above waist height. Dr. Bjornson found Claimant cannot perform two-handed activities above shoulder height, but has no impairment of manual dexterity.

33. Some of Claimant's personal circumstances significantly impacting his employability include his right hand dominance, age of 51 at the time of the accident, hearing difficulty, residence in St. Anthony, and stuttering. Claimant's stuttering was conspicuous at hearing and fully corroborated by the testimony of other witnesses. Claimant stutters less in one-on-one situations and more when subject to the additional stress of a group setting. Claimant's depression and periodic anxiety attacks apparently increased after his 2003 industrial accident. He is generally not computer literate.

34. Industrial Commission rehabilitation consultant Kari Rohrbach assisted Claimant in searching for employment. She helped him develop and distribute resumes, and referred him to a number of jobs in the Idaho Falls area. When Rohrbach was unsuccessful in helping Claimant find employment, she enlisted assistance from Department of Commerce & Labor vocational

rehabilitation consultant William Angell. Angell helped Claimant search for work in the Idaho Falls, Rexburg, and St. Anthony areas. Angell considered Claimant's physical restrictions of light duty non-repetitive work. He also considered Claimant's hearing and stuttering problems and sought employment for Claimant in light mechanical positions that did not require dealing with the public. In spite of assistance from Rohrbach and Angell, Claimant did not obtain regular continuous employment. He was only successful in obtaining part-time work with Rascal, Little Tykes, and Forklift Sales, collectively totaling approximately 15 hours per month. After considering a number of possible jobs, Angell testified that he did not know if there are jobs in Claimant's area that he could perform within his physical restrictions given his stuttering speech.

35. ISIF retained Nancy Collins, Ph.D., to evaluate Claimant's employability. She interviewed Claimant in March 2005. She noted that Claimant had worked and developed skills as a forklift mechanic, automobile mechanic, heavy equipment mechanic, sign builder, precision grinder, lathe operator, lay-out operator, and machinist. Collins noted that Claimant had performed medium, heavy, and very heavy work in the past. She recognized Claimant's limited transferable skills, but opined Claimant retained sufficient residual physical capacity to perform many light physical demand positions and thus was not totally disabled. Collins opined that Claimant suffered a 79-84% loss of access to the labor market due to his industrial injury and his hearing loss. This figure apparently did not consider the impact of his stuttering speech. She concluded that Claimant would be limited to unskilled positions with wages of \$7.00 to \$9.00 per hour and would suffer a 50% loss of earning capacity. She estimated Claimant's disability at 65-70%, inclusive of impairment.

36. Vocational expert, Douglas Crum, interviewed Claimant, examined his records, and concluded he was totally and permanently disabled. Crum opined that Claimant's location was

limiting and he would not be able to afford to travel 40 miles from St. Anthony to Idaho Falls for minimum wage employment. Crum opined that Claimant's preexisting knee pain; vision, hearing, and speech deficits; and lack of education and transferable skills; combined with his shoulder injury and residence in St. Anthony to render him totally unemployable.

37. Based on Claimant's impairment ratings totaling 42% of the whole person, his permanent work restrictions arising from his right shoulder condition, and considering non-medical factors including his age of 51 at the time of the accident, right hand dominance, stuttering, limited formal education, lack of experience and transferable skills in sedentary and light occupations, computer illiteracy, inability to return to his previous occupations, and his residence in St. Anthony, Claimant's ability to engage in gainful activity has been significantly reduced. The Referee concludes Claimant has established a permanent disability of 80%, inclusive of his 42% whole person impairment

38. 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).

39. In the present case, Claimant has unsuccessfully attempted other work since his industrial accident. He worked full-time as a precision grinder for Pro-Fusion Technologies in Rexburg for three days before increasing right shoulder symptoms caused him to quit. This work was performed largely at chest height and, in this respect, exceeded Dr. Andary's restrictions. This attempt alone is not sufficient to satisfy Claimant's burden of proof under Lethrud.

40. Claimant and others on his behalf have unsuccessfully searched for work. Collins opined that Claimant did not perform a very serious job search. She believed that Claimant may have only looked at 10 to 20 jobs total, rather than 10 to 20 jobs per week—which she opined would constitute a serious job search. Claimant testified he checked about 15 job leads per week, including on-line job listings and those in the newspaper. In support of Claimant's efforts, Industrial Commission rehabilitation consultant Kari Rohrbach assisted Claimant in an extensive but unsuccessful work search. The record suggests, and Claimant testified, that he followed up on most, if not virtually all, job leads Rohrbach provided. Rohrbach also directed Claimant to William Angell who further assisted Claimant in his work search. Angell testified that Claimant had a good attitude, was excited to look for work, and followed up on all job leads. Rohrbach closed Claimant's file

upon learning that Claimant had begun receiving Social Security disability benefits.

41. It is noteworthy that in his work search, Claimant located three part-time positions in which he collectively works approximately 15 hours per month. These work opportunities are so limited that they do not constitute permanent work regularly and continuously available to Claimant. Furthermore, it is significant that Claimant invested approximately \$1,400 of his own funds for training with Rascal to expand his marketable skills and enhance his work search. Claimant has demonstrated that he, with the assistance of vocational counselors, has searched for other work and that other work is not regularly and continuously available.

42. Vocational expert Douglas Crum testified for Claimant and opined that he is totally and permanently disabled. Crum testified that Claimant is not likely to be employed regularly in any well-known branch of the relevant labor market.

43. The Referee finds that Claimant has established a prima facie case that he is an odd-lot worker, totally and permanently disabled, under the Lethrud test.

44. Once a claimant establishes a prima facie odd-lot case, the burden shifts to the 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).

45. ISIF asserts that Rohrbach and Angell believed there were jobs which Claimant could perform. Rohrbach referred Claimant to several actual jobs, however none resulted in regular employment and some were unsuitable. Claimant was unable to perform a boiler operator job

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Rohrbach advised him of because he could not climb up and down a ladder while carrying 50 pound sacks of chemicals. Claimant could not perform a maintenance job Rohrbach advised him of because he could not perform the necessary lifting nor work above shoulder level. Claimant testified that Rohrbach referred him to Angell because she could provide no further help. Angell referred Claimant to a number of jobs also. Claimant checked out potato sorter and other positions suggested by Angell. Many had been filled. None resulted in regular employment. As previously noted, after reviewing Claimant's job search efforts and possible jobs in Claimant's area, Angell testified that he did not know if there were jobs in the area that Claimant could perform given his physical restrictions and stuttering.

46. Vocational expert Nancy Collins, Ph. D. testified on behalf of ISIF that given Claimant's restrictions to light or sedentary level work, he is employable in a number of jobs in his area labor market and that actual openings exist in the labor market for these positions. Collins acknowledged that Claimant's speech impediment would be a hindrance to employment particularly in areas of high volume sales, telemarketing and similar positions interacting with the public. She did not believe that Claimant's vision or hearing loss hindered his employability. Collins opined that Claimant should be able to perform jobs in bench mechanics, production or assembly work, agricultural sorting, light parts delivery driving, medical supplies delivery, documents delivery, light janitorial, security, cashiering, and convenience store clerking. She testified that there were quite a few production facilities in Claimant's labor market area and that actual jobs were available. Collins concluded that Claimant would be limited to unskilled wages of \$7.00 to \$9.00 per hour. She focused on jobs in the St. Anthony, Rexburg, and Idaho Falls area.

47. Prior to his accident, Claimant drove approximately 50 miles from his home in

St. Anthony to Idaho Falls while working for Arnold, however he was then earning over \$14.00 per hour.

48. Crum believed that Collins had not considered the February 18, 2005, report of Dr. Andary, the November 13, 2004, report of chiropractor Robert Ward, and the April 11, 2005, functional capacity evaluation of physical therapist Jay Ellis. Collins generated her report on April 27, 2005. She testified by deposition in May 2006 of actual job openings at that time which she believed Claimant could perform. Significantly, the April 11, 2005, functional capacity report of Jay Ellis determined Claimant could not lift even two pounds with his right arm higher than waist level. Ellis' evaluation is not listed in Collins' report among the records she reviewed, and there is no indication that Collins was ever advised of, nor considered it, in formulating her opinions.

49. Crum specifically examined the jobs recommended in Collins' report and testified they were incompatible with Claimant's physical restrictions, stuttering, and poor hearing. Claimant testified he considered a position in bench mechanics, but could not meet the lifting requirements. Crum testified Claimant would be unable to perform production, line assembly, agricultural sorting, light janitorial, sewing machine operator, and packaging and filling machine operator positions because all such require bimanual work, and that Claimant would not be able to sustain repetitive reaching and motion with his right shoulder even at waist height. Crum testified that Claimant would not be competitive as a social service assistant due to his hearing and stuttering difficulties, and lack of clerical skills. Crum noted Claimant would not be competitive for driving and delivery work because he lacks vigorous forceful use of his right arm. Crum testified Claimant would not be competitive for security guard positions because his stuttering speech and hearing difficulties would preclude effective communication in event of emergency. Crum testified that Claimant would not be

competitive for cashiering and convenience store work because of the physical reaching, telephone answering and dialogue with the public usually required. Collins' opinion that Claimant could work as a cashier or convenience store clerk is not persuasive given Angell's observation of Claimant's ineffective phone conversation in which the caller hung up on Claimant because of his hearing and stuttering difficulties.

50. The Referee finds that ISIF has not rebutted Claimant's showing that he is an odd-lot worker by proving 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.

51. **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.

52. 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.

53. 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.

54. The preexisting physical impairments at issue here are Claimant's right eye blindness and the condition of his right shoulder prior to his 2003 industrial accident.

55. Claimant's amblyopia with resulting functional right eye blindness arose in childhood. It clearly preexisted, and was manifest prior to, his 2003 accident. Similarly his right shoulder condition was well documented at the time of his first and second right shoulder surgeries in 2002, even though the impairment from this condition was apparently not rated until Dr. Andary found Claimant stable from his 2003 industrial accident on October 6, 2004. The first and second prongs of the Dumaw test have been met.

56. Claimant asserts that his preexisting shoulder condition and right eye blindness were a significant hindrance to his employability. Claimant testified that after his 2002 right shoulder surgeries, he never regained the full strength of his right shoulder. He noted this when he worked as

an irrigation pump repairman, which was extremely heavy work. Furthermore, his ability to work overhead was also reduced after his 2002 shoulder surgeries and he had to develop compensatory strategies.

57. The more contested issue is whether Claimant's functional right eye blindness was a hindrance to his employment. Crum opined that it would have been a hindrance, however Collins testified that Claimant's vision had not been a hindrance to employment for him. At hearing, Claimant responded to two compound questions regarding how his speech, hearing, and vision hindered his employability by discussing only the hindrance of stuttering. Claimant's own testimony does not clearly assert, let alone describe, his right eye blindness as a hindrance or obstacle to his employability.

58. The Referee finds that Claimant's preexisting right shoulder condition constituted a hindrance to Claimant's employment. However, the record does not establish that Claimant's functional right eye blindness constituted a hindrance to employment. The third prong of the Dumaw test is met only as to Claimant's right shoulder condition.

59. 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).

60. There is persuasive evidence that Claimant's 2003 accident combined with his preexisting right shoulder impairment to result in total permanent disability. The record does not

establish that Claimant's 2003 accident combines with his functional right eye blindness to result in total permanent disability. The final prong of the Dumaw test has been satisfied only as to Claimant's right shoulder impairment.

61. The Referee concludes Claimant has proven ISIF's liability under Idaho Code § 72-332 as to the preexisting condition of his right shoulder.

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. Andary rated the permanent impairment of Claimant's right shoulder at 12% of the whole person, and attributed 6% whole person impairment to Claimant's 2003 industrial injury and the balance to his preexisting right shoulder condition. Thus, 6/12^{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 6/12^{ths}, or 50%, of the nonmedical portion of Claimant's

permanent disability. Thus, ISIF is responsible for payment of full statutory benefits commencing 250 weeks after October 6, 2004, the date Dr. Andary found Claimant medically stable.

65. **Attorney fees.** Claimant asserts entitlement to attorney fees against ISIF. Claimant entirely fails to cite any authority supporting his assertion. Claimant has not proven his entitlement to attorney fees against ISIF.

CONCLUSIONS OF LAW

1. Claimant has proven he suffers permanent impairment of 12% of the whole person, including 6% due to his 2003 industrial accident, 6% due to his preexisting right shoulder impairment, and 30% due to his functional right eye blindness. 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 250 weeks after October 6, 2004, the date Claimant was medically stable.

4. Claimant has not proven his entitlement to attorney fees against ISIF.

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 29th day of May, 2007.

INDUSTRIAL COMMISSION

/s/
Alan Reed Taylor, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of June, 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:

ROBERT K BECK
2450 E 25TH ST STE A
IDAHO FALLS ID 83404

THOMAS B HIGH
P O BOX 366
TWIN FALLS ID 83303-0366

lbs

/s/

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DUAIN L. COX,)	
)	
Claimant,)	IC 2003-013803
)	
v.)	ORDER
)	
ARNOLD MACHINERY,)	
)	
Employer,)	filed June 1, 2007
)	
and)	
)	
ADVANTAGE WORKERS)	
COMPENSATION INS. CO.,)	
)	
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 impairment of 12% of the whole person, including 6% due to his 2003 industrial accident, 6% due to his preexisting right

shoulder impairment, and 30% due to his functional right eye blindness. 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 250 weeks after October 6, 2004, the date Claimant was medically stable.

4. Claimant has not proven his entitlement to attorney fees against ISIF.

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

DATED this 1st day of June, 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 1st day of June, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

ROBERT K BECK
2450 E 25TH ST STE A
IDAHO FALLS ID 83404

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/s/