

then continued for the taking of a post-hearing deposition, the submission of briefs, and subsequently came under advisement on March 12, 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; 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 Terry L. Montague has concluded he is unemployable. Claimant asserts he suffers 5% impairment of the whole person due to his 2005 industrial accident plus an additional 48% impairment of the whole person due to pre-existing right knee, left hand, Hepatitis B infection, chronic obstructive pulmonary disorder, and lumbar and cervical conditions. Claimant asserts that his pre-existing physical impairments were manifest, hindered him in obtaining employment, and have combined with his 2005 industrial injury to render him totally and permanently disabled.

ISIF argues that Claimant has not carried his burden of establishing that he is totally and permanently disabled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the November 22, 2006, hearing;
2. Joint Exhibits A through S admitted at the hearing; and

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3. The deposition of Terry L. Montague, taken by Claimant on December 5, 2006.

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 1955. He was 51 years old and had resided in Pocatello for several years at the time of the hearing. Claimant is right-handed. His father served in the military and Claimant resided in a number of locations as a youth. He did not complete high school. Claimant joined the Army where he obtained his GED and received training in artillery. Claimant left the Army after serving for three years and then worked in construction and played the guitar in a band in southern California before moving to Idaho. Claimant played by ear and has never read music.

2. In 1980, Claimant took a machinist tech class but was never employed as a machinist. After moving to Idaho, Claimant worked mostly in construction, including concrete flatwork, and continued to perform as a musician and teach guitar lessons.

3. In approximately 1991, Claimant was employed by STS marking and locating underground utilities. In this work he pulled manhole covers and used a pick and shovel and other devices to locate underground cables. Claimant's position ended when STS lost its contract.

4. Claimant was employed as a groundskeeper at Idaho State University (ISU) for a number of years. While working for ISU, on November 15, 1993, Claimant fractured his right patella. He recovered substantially from that injury but continues to experience occasional locking and soreness in his right knee. He was given a 2% whole person impairment rating for his residual

right knee condition.

5. While working in 1994, approximately 600 pounds fell on, and crushed, Claimant's left hand, fracturing his left thumb. He largely recovered from this injury but continues to experience numbness in his left thumb, ring, and little fingers to the extent that he drops things occasionally and can no longer play the guitar well. He was given a 6% left hand impairment rating for his residual left hand condition.

6. In 1997, Claimant's vehicle was rear-ended and he suffered a wrenched neck.

7. In approximately 1999, Claimant began experiencing intense coughing episodes, severe enough to cause a rib fracture on more than one occasion. In approximately 2001, Claimant was diagnosed with chronic obstructive pulmonary disease (COPD). His COPD is aggravated and triggered by extensive talking and strong aromas, including fumes from diesel fuel, fresh asphalt, paints, and some cooking oils and perfumes.

8. In 2002, Claimant became ill with prolonged flu-like symptoms. He was eventually diagnosed with Hepatitis B. Claimant had no customary risk factors, and believes he contracted the disease from eating food contaminated by a Hepatitis B infected food-handler. Although now in remission, medical providers have advised Claimant that his infection will be life-long. Claimant has sought employment in the food services and health care fields, but has been advised that he is not employable in these fields because of having contracted Hepatitis B and the risks of transmission.

9. In approximately 2002, Claimant was granted Social Security Disability benefits when his COPD became severely debilitating. He received benefits for 16 months. Claimant learned to better manage his COPD by walking for exercise and avoiding aggravating fumes. He

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ultimately advised the disability judge that he wanted to return to work.

10. In 2003, Claimant returned to work for the City of Pocatello in the water department. He did not advise the city of his COPD or other physical challenges because he wanted the job. His work duties included the regular use of a pick, shovel, and jack hammer. When faced with work tasks such as painting, which he knew from experience would aggravate his COPD, he volunteered for other strenuous work assignments. Claimant dropped tools occasionally due to his left hand numbness.

11. After working for two years in the water department, Claimant's back became sore from the strenuous physical work, prompting him to transfer to the Pocatello Zoo. After a few months he transferred to the water treatment plant. Claimant earned \$9.75 per hour and usually worked 40 hours per week, nine or ten months of the year. Depending upon the weather, he was laid off for approximately two months each year.

12. On July 1, 2005, Claimant was at work helping remove fence posts along the Portneuf River when an undercut riverbank gave way and he fell approximately eight feet injuring his back and neck. Claimant completed his shift with difficulty, hoping to recuperate over the July 4th holiday. Unfortunately his symptoms worsened, and he sought medical care.

13. Claimant was ultimately treated by Dr. Eric Roberts and MRI scans revealed two bulging lumbar disks and a bulging cervical disk. Claimant received medications and underwent physical therapy, however, he continues to experience headaches, back pain, and leg pain.

14. Claimant was assisted by Industrial Commission rehabilitation consultant Sarah Brown in Pocatello in his search for employment. Their efforts resulted in only one employment lead which was with a telemarketing firm. Claimant's COPD and repeated coughing

precluded his employment in telemarketing.

15. Claimant underwent functional testing, which placed his abilities at the sedentary level. Dr. Roberts has imposed extensive permanent physical restrictions.

16. Since his 2005 injury, Claimant has been unable to engage in many of his favorite pre-injury recreational activities including hiking, gardening, and hunting.

17. At the time of hearing, Claimant continued to suffer back, neck, and leg pain. Having reviewed the evidence and observed Claimant at hearing, the Referee finds that Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

18. 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).

19. **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.

20. **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).

21. Claimant alleges permanent impairments due to the condition of his lumbar and cervical spine, right knee, left hand, COPD, and Hepatitis B infection.

22. Dr. Roberts rated Claimant's lumbar and cervical spine impairment at 10% of the whole person. He apportioned 50% of this impairment to Claimant's 2005 industrial accident and 50% to pre-existing conditions. The medical evidence indicates pre-existing scoliosis. Dr. Roberts' rating is adequately explained and persuasive.

23. Dr. Hugh Selznick rated Claimant's right knee impairment at 2% of the whole person due to his patellar fracture. His rating is adequately explained and persuasive.

24. Dr. Stephen Maloff rated Claimant's left hand impairment at 6% of the hand due to his left hand crush injury. His rating is adequately explained and persuasive. This equates to 3% impairment of the whole person.

25. Dr. George Pfortner rated Claimant's impairment from COPD at 33% of the whole person. At hearing Claimant coughed repeatedly. The medical evidence establishes recurring episodes of coughing sufficiently severe to result in fractured ribs on multiple occasions. Dr. Pfortner's rating is supported by the concurrence of Dr. Lee Kornfield, is well explained and persuasive.

26. The record contains no impairment rating for Claimant's Hepatitis B infection. Nevertheless, Claimant urges an impairment of 5%. While this infection will apparently be life-

long, Drs. Pfortner and Kornfield found no impairment was warranted since it was in remission. The Referee declines to speculatively assess a rating for Claimant's Hepatitis B infection.

27. Claimant has proven he suffers permanent physical impairments of 10% of the whole person due to his lumbar and cervical condition, 2% of the whole person due to his right knee condition, 3% of the whole person due to his left hand condition, and 33% of the whole person due to his COPD, thus totaling 48% of the whole person.

28. 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).

29. 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.

30. As noted above, Claimant has permanent physical impairments totaling 48% of the whole person.

31. Dr. Roberts found Claimant's lumbar and cervical spine had reached maximum medical improvement on November 17, 2005. After a two-day functional capacity evaluation, Dr. Roberts permanently restricted Claimant to sedentary work. Dr. Roberts noted that Claimant will require positional changes every 10 to 20 minutes. He restricted Claimant to lifting no more than 10 pounds, no pushing more than 99 pounds, and no pulling more than 60 pounds. Dr. Roberts further restricted Claimant from repetitive bending, lifting, or squatting. He allowed occasional reaching with right and left upper extremities, prolonged sitting, bending, lifting, stair climbing, elevated work, balancing, and bending with reaching. Dr. Roberts also restricted Claimant from extreme of neck range of motion activities.

32. Industrial Commission rehabilitation consultant Sarah Brown assisted Claimant in searching for employment in the Pocatello area. In spite of assistance from Brown, Claimant did not obtain employment.

33. Claimant retained vocational rehabilitation expert Terry Montague to evaluate his

employability. Montague recognized Claimant's considerable restrictions and limited transferable skills and opined that Claimant suffered a 100% loss of access to the labor market. He concluded Claimant was totally and permanently disabled.

34. Based on Claimant's impairment ratings totaling 48% of the whole person, his permanent work restrictions arising from his lumbar and cervical spine condition, and considering non-medical factors including his age of 51 at the time of the accident, limited formal education, lack of experience and transferable skills in sedentary and light occupations, computer illiteracy, inability to return to his previous occupations, and Hepatitis B infection, Claimant's ability to engage in gainful activity has been significantly reduced. The Referee finds Claimant has established a permanent disability of 90%, inclusive of his 48% whole person impairment.

35. 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).

36. In the present case, since his industrial accident, Claimant has unsuccessfully attempted other work as a taxi driver. Passengers' perfumes and other odors aggravated his COPD. He was forced to quit after two days. This single failed work attempt alone is not sufficient to satisfy his burden of proof under Lethrud. However, Claimant and others on his behalf have unsuccessfully searched for work. Commission consultant Sarah Brown assisted Claimant in an unsuccessful work search. Furthermore, vocational expert Terry Montague testified for Claimant and opined that he is totally and permanently disabled. Montague testified that Claimant is not likely to be employed regularly in any well-known branch of the relevant labor market.

37. 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.

38. 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).

39. ISIF asserts that Brown believed there were jobs that Claimant could perform.

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Brown performed a labor market survey upon closing Claimant's file and listed several potential jobs including manager trainee, bus driver, claims representative service trainee, truck driver, forklift operator, personal home care aide, library clerk, substitute teacher, food store retail, and evening desk clerk. Montague specifically examined the jobs listed and testified they were at least light duty positions and incompatible with Claimant's physical restrictions and transferable skills. Montague's opinion is thorough and persuasive.

40. ISIF also contends that cognitive testing establishes that Claimant is capable of competing in college level retraining and thus should not be considered totally permanently disabled. Montague persuasively opined, based upon the medical evidence, that although Claimant is cognitively capable of college level retraining, his physical limitations—especially arising from COPD—make successful retraining followed by employment doubtful.

41. 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.

42. **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.

43. 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.

44. 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.

45. The pre-existing physical impairments at issue here are Claimant’s right knee, left hand, COPD, and the condition of his lumbar and cervical spine prior to his 2005 industrial accident. His right knee impairment was rated by 1996. His left hand impairment was also rated by 1996. His COPD was diagnosed in 2002. His pre-2005 lumbar and cervical spine impairment was established by Dr. Roberts. Each of these conditions preexisted, and was manifest prior to, his 2005 industrial

accident. The first and second prongs of the Dumaw test have been met.

46. Claimant asserts, and Defendant contests, that his pre-existing conditions were a significant hindrance to his employability. Claimant testified that his right knee patellar fracture resulted in chronic right knee soreness. Physical therapist's notes document some gait limitations due to his right knee condition. However, permanent restrictions due to this condition are lacking, and the impact Claimant's right knee condition had on his employability is unclear.

47. Claimant testified that his left hand numbness caused him to drop tools, and also prevented him from teaching or playing the guitar well. His COPD precluded his employment in areas with exposure to strong vapors, caused him to fatigue more readily, and miss work due to frequent respiratory illness. His pre-existing lumbar and cervical spine symptoms compelled him to transfer out of the very strenuous jackhammer work at the water department to the city zoo.

48. The Referee finds that Claimant's pre-existing left hand, COPD, and lumbar and cervical conditions constituted hindrances to his employment. The third prong of the Dumaw test is met as to these conditions.

49. 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 pre-existing impairment." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

50. The record contains no persuasive evidence that Claimant's right knee condition combined with his 2005 industrial injury to render him totally and permanently disabled. It appears

the impact of the 2005 injury eclipsed the effects of his right knee condition. However, there is persuasive evidence that the 2005 accident combined with Claimant's pre-existing left hand, COPD, lumbar and cervical conditions to result in total permanent disability. As noted, Claimant's 2005 injury has restricted him to sedentary employment. With numbness in three of five digits, Claimant's left hand condition makes it difficult for him to type well, significantly improve his computer literacy, or perform many bilateral functions. It precludes him from teaching or playing the guitar well. These limitations render Claimant uncompetitive for a number of sedentary positions. Claimant's COPD further precludes him from sedentary jobs requiring extensive speaking or subjecting him to paint, perfumes, fresh asphalt, or other strongly aromatic compounds. His COPD also causes him to fatigue easily and renders him more vulnerable to respiratory illness and resulting in work absences. His COPD clearly thwarted his attempts at employment as a taxi driver and telemarketer. Claimant's pre-existing lumbar and cervical condition reduced his capacity for heavy work. As previously noted, Dr. Roberts apportioned 50% of Claimant's lumbar and cervical spine impairment rating to pre-existing conditions. Dr. Roberts similarly opined that 50% of Claimant's permanent restrictions and limitations pertaining to his lumbar and cervical spine condition are due to his pre-existing symptomatic conditions. Claimant's pre-existing lumbar and cervical conditions combine with his 2005 injury to produce the extensive physical limitations quantified by Dr. Roberts.

51. The final prong of the Dumaw test has been satisfied as to Claimant's pre-existing left hand, COPD, lumbar and cervical conditions. The Referee concludes Claimant has proven ISIF's liability under Idaho Code § 72-332 for his pre-existing left hand, COPD, lumbar and cervical conditions.

52. **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).

53. 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. Roberts rated the permanent impairment of Claimant's lumbar and cervical spine at 10% of the whole person, attributing 50% to Claimant's 2005 industrial injury and the balance to his pre-existing condition. Thus, 5% of Claimant's lumbar and cervical impairment pre-existed his 2005 industrial accident. As noted above, the record further establishes pre-existing impairments of 33% for Claimant's COPD and 3% for Claimant's left hand condition. Claimant's qualifying pre-existing impairments thus total 41% of the whole person.

54. By application of the Carey formula ISIF is responsible for the pre-existing medical portion of 41% impairment and for $41/48^{\text{th}}$, or 85.42%, of the nonmedical portion of Claimant's permanent disability. Thus, ISIF is responsible for payment of full statutory benefits commencing 72.9 weeks after November 17, 2005, the date Dr. Roberts found Claimant medically stable.

CONCLUSIONS OF LAW

1. Claimant has proven he suffers permanent impairment of 48% of the whole person, including 5% due to his 2005 industrial accident, 5% due to his pre-existing lumbar and cervical impairment, 2% due to his right knee fracture, 3% due to his left hand condition, and 33% due to his COPD. 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 as to Claimant's pre-existing left hand, COPD, lumbar and cervical conditions.

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 72.9 weeks after November 17, 2005, 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 21st day of June, 2007.

INDUSTRIAL COMMISSION

/s/
Alan Reed Taylor, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the this 21st 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:

DANIEL J LUKER
P O BOX 2196
POCATELLO ID 83206-2196

ANTHONY M VALDEZ
P O BOX 366
TWIN FALLS ID 83303-0366

lbs

_____/s/_____

then continued for the taking of a post-hearing deposition, the submission of briefs, and subsequently came under advisement on March 12, 2007. The case is now ready for decision.

ISSUES

The issues to be resolved are:

1. Whether Claimant is totally and permanently disabled;
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3. The deposition of Terry L. Montague, taken by Claimant on December 5, 2006.

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 1955. He was 51 years old and had resided in Pocatello for several years at the time of the hearing. Claimant is right-handed. His father served in the military and Claimant resided in a number of locations as a youth. He did not complete high school. Claimant joined the Army where he obtained his GED and received training in artillery. Claimant left the Army after serving for three years and then worked in construction and played the guitar in a band in southern California before moving to Idaho. Claimant played by ear and has never read music.

2. In 1980, Claimant took a machinist tech class but was never employed as a machinist. After moving to Idaho, Claimant worked mostly in construction, including concrete flatwork, and continued to perform as a musician and teach guitar lessons.

3. In approximately 1991, Claimant was employed by STS marking and locating underground utilities. In this work he pulled manhole covers and used a pick and shovel and other devices to locate underground cables. Claimant's position ended when STS lost its contract.

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right knee condition.

5. While working in 1994, approximately 600 pounds fell on, and crushed, Claimant's left hand, fracturing his left thumb. He largely recovered from this injury but continues to experience numbness in his left thumb, ring, and little fingers to the extent that he drops things occasionally and can no longer play the guitar well. He was given a 6% left hand impairment rating for his residual left hand condition.

6. In 1997, Claimant's vehicle was rear-ended and he suffered a wrenched neck.

7. In approximately 1999, Claimant began experiencing intense coughing episodes, severe enough to cause a rib fracture on more than one occasion. In approximately 2001, Claimant was diagnosed with chronic obstructive pulmonary disease (COPD). His COPD is aggravated and triggered by extensive talking and strong aromas, including fumes from diesel fuel, fresh asphalt, paints, and some cooking oils and perfumes.

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9. In approximately 2002, Claimant was granted Social Security Disability benefits when his COPD became severely debilitating. He received benefits for 16 months. Claimant learned to better manage his COPD by walking for exercise and avoiding aggravating fumes. He

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 4

ultimately advised the disability judge that he wanted to return to work.

10. In 2003, Claimant returned to work for the City of Pocatello in the water department. He did not advise the city of his COPD or other physical challenges because he wanted the job. His work duties included the regular use of a pick, shovel, and jack hammer. When faced with work tasks such as painting, which he knew from experience would aggravate his COPD, he volunteered for other strenuous work assignments. Claimant dropped tools occasionally due to his left hand numbness.

11. After working for two years in the water department, Claimant's back became sore from the strenuous physical work, prompting him to transfer to the Pocatello Zoo. After a few months he transferred to the water treatment plant. Claimant earned \$9.75 per hour and usually worked 40 hours per week, nine or ten months of the year. Depending upon the weather, he was laid off for approximately two months each year.

12. On July 1, 2005, Claimant was at work helping remove fence posts along the Portneuf River when an undercut riverbank gave way and he fell approximately eight feet injuring his back and neck. Claimant completed his shift with difficulty, hoping to recuperate over the July 4th holiday. Unfortunately his symptoms worsened, and he sought medical care.

13. Claimant was ultimately treated by Dr. Eric Roberts and MRI scans revealed two bulging lumbar disks and a bulging cervical disk. Claimant received medications and underwent physical therapy, however, he continues to experience headaches, back pain, and leg pain.

14. Claimant was assisted by Industrial Commission rehabilitation consultant Sarah Brown in Pocatello in his search for employment. Their efforts resulted in only one employment lead which was with a telemarketing firm. Claimant's COPD and repeated coughing

precluded his employment in telemarketing.

15. Claimant underwent functional testing, which placed his abilities at the sedentary level. Dr. Roberts has imposed extensive permanent physical restrictions.

16. Since his 2005 injury, Claimant has been unable to engage in many of his favorite pre-injury recreational activities including hiking, gardening, and hunting.

17. At the time of hearing, Claimant continued to suffer back, neck, and leg pain. Having reviewed the evidence and observed Claimant at hearing, the Referee finds that Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

18. 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).

19. **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.

20. **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).

21. Claimant alleges permanent impairments due to the condition of his lumbar and cervical spine, right knee, left hand, COPD, and Hepatitis B infection.

22. Dr. Roberts rated Claimant's lumbar and cervical spine impairment at 10% of the whole person. He apportioned 50% of this impairment to Claimant's 2005 industrial accident and 50% to pre-existing conditions. The medical evidence indicates pre-existing scoliosis. Dr. Roberts' rating is adequately explained and persuasive.

23. Dr. Hugh Selznick rated Claimant's right knee impairment at 2% of the whole person due to his patellar fracture. His rating is adequately explained and persuasive.

24. Dr. Stephen Maloff rated Claimant's left hand impairment at 6% of the hand due to his left hand crush injury. His rating is adequately explained and persuasive. This equates to 3% impairment of the whole person.

25. Dr. George Pfortner rated Claimant's impairment from COPD at 33% of the whole person. At hearing Claimant coughed repeatedly. The medical evidence establishes recurring episodes of coughing sufficiently severe to result in fractured ribs on multiple occasions. Dr. Pfortner's rating is supported by the concurrence of Dr. Lee Kornfield, is well explained and persuasive.

26. The record contains no impairment rating for Claimant's Hepatitis B infection. Nevertheless, Claimant urges an impairment of 5%. While this infection will apparently be life-

long, Drs. Pfortner and Kornfield found no impairment was warranted since it was in remission. The Referee declines to speculatively assess a rating for Claimant's Hepatitis B infection.

27. Claimant has proven he suffers permanent physical impairments of 10% of the whole person due to his lumbar and cervical condition, 2% of the whole person due to his right knee condition, 3% of the whole person due to his left hand condition, and 33% of the whole person due to his COPD, thus totaling 48% of the whole person.

28. 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).

29. 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.

30. As noted above, Claimant has permanent physical impairments totaling 48% of the whole person.

31. Dr. Roberts found Claimant's lumbar and cervical spine had reached maximum medical improvement on November 17, 2005. After a two-day functional capacity evaluation, Dr. Roberts permanently restricted Claimant to sedentary work. Dr. Roberts noted that Claimant will require positional changes every 10 to 20 minutes. He restricted Claimant to lifting no more than 10 pounds, no pushing more than 99 pounds, and no pulling more than 60 pounds. Dr. Roberts further restricted Claimant from repetitive bending, lifting, or squatting. He allowed occasional reaching with right and left upper extremities, prolonged sitting, bending, lifting, stair climbing, elevated work, balancing, and bending with reaching. Dr. Roberts also restricted Claimant from extreme of neck range of motion activities.

32. Industrial Commission rehabilitation consultant Sarah Brown assisted Claimant in searching for employment in the Pocatello area. In spite of assistance from Brown, Claimant did not obtain employment.

33. Claimant retained vocational rehabilitation expert Terry Montague to evaluate his

employability. Montague recognized Claimant's considerable restrictions and limited transferable skills and opined that Claimant suffered a 100% loss of access to the labor market. He concluded Claimant was totally and permanently disabled.

34. Based on Claimant's impairment ratings totaling 48% of the whole person, his permanent work restrictions arising from his lumbar and cervical spine condition, and considering non-medical factors including his age of 51 at the time of the accident, limited formal education, lack of experience and transferable skills in sedentary and light occupations, computer illiteracy, inability to return to his previous occupations, and Hepatitis B infection, Claimant's ability to engage in gainful activity has been significantly reduced. The Referee finds Claimant has established a permanent disability of 90%, inclusive of his 48% whole person impairment.

35. 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).

36. In the present case, since his industrial accident, Claimant has unsuccessfully attempted other work as a taxi driver. Passengers' perfumes and other odors aggravated his COPD. He was forced to quit after two days. This single failed work attempt alone is not sufficient to satisfy his burden of proof under Lethrud. However, Claimant and others on his behalf have unsuccessfully searched for work. Commission consultant Sarah Brown assisted Claimant in an unsuccessful work search. Furthermore, vocational expert Terry Montague testified for Claimant and opined that he is totally and permanently disabled. Montague testified that Claimant is not likely to be employed regularly in any well-known branch of the relevant labor market.

37. 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.

38. 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).

39. ISIF asserts that Brown believed there were jobs that Claimant could perform.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 11

Brown performed a labor market survey upon closing Claimant's file and listed several potential jobs including manager trainee, bus driver, claims representative service trainee, truck driver, forklift operator, personal home care aide, library clerk, substitute teacher, food store retail, and evening desk clerk. Montague specifically examined the jobs listed and testified they were at least light duty positions and incompatible with Claimant's physical restrictions and transferable skills. Montague's opinion is thorough and persuasive.

40. ISIF also contends that cognitive testing establishes that Claimant is capable of competing in college level retraining and thus should not be considered totally permanently disabled. Montague persuasively opined, based upon the medical evidence, that although Claimant is cognitively capable of college level retraining, his physical limitations—especially arising from COPD—make successful retraining followed by employment doubtful.

41. 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.

42. **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.

43. 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.

44. 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.

45. The pre-existing physical impairments at issue here are Claimant’s right knee, left hand, COPD, and the condition of his lumbar and cervical spine prior to his 2005 industrial accident. His right knee impairment was rated by 1996. His left hand impairment was also rated by 1996. His COPD was diagnosed in 2002. His pre-2005 lumbar and cervical spine impairment was established by Dr. Roberts. Each of these conditions preexisted, and was manifest prior to, his 2005 industrial

accident. The first and second prongs of the Dumaw test have been met.

46. Claimant asserts, and Defendant contests, that his pre-existing conditions were a significant hindrance to his employability. Claimant testified that his right knee patellar fracture resulted in chronic right knee soreness. Physical therapist's notes document some gait limitations due to his right knee condition. However, permanent restrictions due to this condition are lacking, and the impact Claimant's right knee condition had on his employability is unclear.

47. Claimant testified that his left hand numbness caused him to drop tools, and also prevented him from teaching or playing the guitar well. His COPD precluded his employment in areas with exposure to strong vapors, caused him to fatigue more readily, and miss work due to frequent respiratory illness. His pre-existing lumbar and cervical spine symptoms compelled him to transfer out of the very strenuous jackhammer work at the water department to the city zoo.

48. The Referee finds that Claimant's pre-existing left hand, COPD, and lumbar and cervical conditions constituted hindrances to his employment. The third prong of the Dumaw test is met as to these conditions.

49. 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 pre-existing impairment." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

50. The record contains no persuasive evidence that Claimant's right knee condition combined with his 2005 industrial injury to render him totally and permanently disabled. It appears

the impact of the 2005 injury eclipsed the effects of his right knee condition. However, there is persuasive evidence that the 2005 accident combined with Claimant's pre-existing left hand, COPD, lumbar and cervical conditions to result in total permanent disability. As noted, Claimant's 2005 injury has restricted him to sedentary employment. With numbness in three of five digits, Claimant's left hand condition makes it difficult for him to type well, significantly improve his computer literacy, or perform many bilateral functions. It precludes him from teaching or playing the guitar well. These limitations render Claimant uncompetitive for a number of sedentary positions. Claimant's COPD further precludes him from sedentary jobs requiring extensive speaking or subjecting him to paint, perfumes, fresh asphalt, or other strongly aromatic compounds. His COPD also causes him to fatigue easily and renders him more vulnerable to respiratory illness and resulting in work absences. His COPD clearly thwarted his attempts at employment as a taxi driver and telemarketer. Claimant's pre-existing lumbar and cervical condition reduced his capacity for heavy work. As previously noted, Dr. Roberts apportioned 50% of Claimant's lumbar and cervical spine impairment rating to pre-existing conditions. Dr. Roberts similarly opined that 50% of Claimant's permanent restrictions and limitations pertaining to his lumbar and cervical spine condition are due to his pre-existing symptomatic conditions. Claimant's pre-existing lumbar and cervical conditions combine with his 2005 injury to produce the extensive physical limitations quantified by Dr. Roberts.

51. The final prong of the Dumaw test has been satisfied as to Claimant's pre-existing left hand, COPD, lumbar and cervical conditions. The Referee concludes Claimant has proven ISIF's liability under Idaho Code § 72-332 for his pre-existing left hand, COPD, lumbar and cervical conditions.

52. **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).

53. 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. Roberts rated the permanent impairment of Claimant's lumbar and cervical spine at 10% of the whole person, attributing 50% to Claimant's 2005 industrial injury and the balance to his pre-existing condition. Thus, 5% of Claimant's lumbar and cervical impairment pre-existed his 2005 industrial accident. As noted above, the record further establishes pre-existing impairments of 33% for Claimant's COPD and 3% for Claimant's left hand condition. Claimant's qualifying pre-existing impairments thus total 41% of the whole person.

54. By application of the Carey formula ISIF is responsible for the pre-existing medical portion of 41% impairment and for $41/48^{\text{th}}$, or 85.42%, of the nonmedical portion of Claimant's permanent disability. Thus, ISIF is responsible for payment of full statutory benefits commencing 72.9 weeks after November 17, 2005, the date Dr. Roberts found Claimant medically stable.

CONCLUSIONS OF LAW

1. Claimant has proven he suffers permanent impairment of 48% of the whole person, including 5% due to his 2005 industrial accident, 5% due to his pre-existing lumbar and cervical impairment, 2% due to his right knee fracture, 3% due to his left hand condition, and 33% due to his COPD. 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 as to Claimant's pre-existing left hand, COPD, lumbar and cervical conditions.

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 72.9 weeks after November 17, 2005, 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 21st day of June, 2007.

INDUSTRIAL COMMISSION

/s/
Alan Reed Taylor, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the this 21st 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:

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lbs

_____/s/_____
