

3. Whether ISIF is liable under Idaho Code § 72-332; and
4. Apportionment under the Carey formula.

Although Issue #1 was noticed for hearing, this issue is no longer appropriate after Employer settled its dispute with Claimant prior to this hearing. Therefore, it will not be considered herein.

CONTENTIONS OF THE PARTIES

Claimant contends he previously suffered an ankle fracture, the loss of vision in his left eye, and back injuries superimposed upon a degenerative back condition. These impairments combined with a low back injury on November 5, 2002, to render him totally and permanently disabled. ISIF is liable for benefits under the apportionment required by the Carey formula.

ISIF challenges Claimant's credibility and raises a new issue of whether the November 5, 2002 accident actually occurred. ISIF contends Claimant is not totally and permanently disabled. Alternatively, if he is so disabled, he was totally and permanently disabled before the subject accident. ISIF disputes other bases for liability, as well.

EVIDENCE CONSIDERED

The record in the instant case consists of:

1. Oral testimony at hearing of Claimant;
2. Claimant's Exhibits 1 – 49;
3. ISIF's Exhibits 1 – 35 (Exhibit 7 appears to be the wrong person); and
4. The posthearing depositions, with exhibits, of vocational experts Douglas Crum and William Jordan, claims examiner Sandra Newton, and physiatrist Michael O. Sant, M.D.

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

After having considered all the above evidence, the briefs of the parties and the Recommendation of the Referee, the Commission hereby issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Introduction and Accident

1. Claimant has worked as a roofer for about 15 years. Claimant began working for Modern Roofing (“Employer”) about January 15, 2002. On November 5, 2002, Claimant earned \$15.00 per hour.

2. On November 5, 2002, Claimant experienced a dramatic increase in back pain while working on a roof for Employer. At varying times, Claimant has described an accident with sufficient particularity to constitute a compensable accident. At other times, Claimant has vaguely referred to working on a roof or has denied being able to recall a specific incident. Immediately after the accident, Claimant was unable to continue working. He notified Employer and sought medical care the next day. Although Claimant suffered from intermittent chronic back pain, he had worked without seeking medical attention for it for nearly one year.

Medical Care

3. On November 6, 2002, he visited Michael Chenore, M.D., for his low back. Historically since at least 1981, Claimant mostly visited Saltzer Medical Group doctors such as Dr. Chenore for treatment.

4. On November 11, 2002, a lumbar X-ray showed a degenerative condition including spondylolysis with spondylolisthesis at L5-S1. The injury was diagnosed a lumbar strain. Claimant was referred to physiatrist Michael Sant, M.D., for rehabilitation.

5. On January 7, 2003, an MRI confirmed the degenerative condition and showed

a possible L2-3 fissure of the annulus of the disk. Dr. Sant tried epidural steroid injections in February. A repeat MRI on February 28 showed the same findings. March 5 X-rays confirmed the degenerative condition. On March 24, Paul Montalbano, M.D., performed a one-level fusion and decompression surgery. Claimant underwent extensive physical therapy. On July 6, Dr. Montalbano opined he expected Claimant able to work light duty, no lifting over 40 pounds, by August 1. A repeat MRI taken July 11 showed the surgery stabilized his back and relieved the crowding around the nerve roots.

6. In August 2003, Claimant began psychological treatment with Jamie Champion, Ph.D., who treated Claimant for depression and signs of psychosis. Dr. Champion discharged Claimant from care on June 4, 2004, with a medication regimen that included Risperdol.

7. On September 30, 2003, Dr. Sant opined Claimant medically stable with a 23% PPI for his low back condition and apportioned it $\frac{1}{4}$ preexisting, $\frac{3}{4}$ due to the injury. He provided permanent restrictions of lifting 30 pounds occasionally, 20 frequently, and 15 continuously, based upon a combination of his back symptoms and leg length discrepancy. He opined Claimant would need continuing treatment for pain. In posthearing deposition, Dr. Sant emphasized Claimant's need for *ad lib* position changes. Also, after being specifically directed to certain pre-accident medical records, Dr. Sant testified he likely would have apportioned as much as $\frac{1}{2}$ or $\frac{3}{4}$ of the PPI to Claimant's preexisting back condition.

8. On January 6, 2004, lumbar X-rays showed the degenerative condition, the previous surgery, and disruption of anterior abdominal wire sutures.

9. A repeat MRI taken October 2, 2004, showed the surgical changes were stable and the degenerative condition had progressed a little.

10. On March 10, 2005, a panel, Richard Wilson, M.D., Michael Philips, M.D.,

and Eric Holt, M.D., evaluated Claimant at Employer's Surety's request. The panel rated Claimant's low back PPI at 20-25%, either all preexisting or apportioned 50/50. The panel questioned whether he suffered a back injury on November 5, 2002. The panel recommended a 20-pound lifting limit because of Claimant's low back and right ankle and noted that a light duty occupation would be appropriate. Dr. Holt opined Claimant did not suffer any psychiatric disorder as a result of the work injury. He found Claimant's psychiatric condition to be preexisting. Dr. Holt opined that Claimant also showed functional overlay with exaggeration of symptoms and that Claimant was seeking secondary gain. The panel also recommended that Claimant's narcotic medications be tapered and discontinued and that Claimant should be encouraged to increase his level of activity.

11. On April 27, 2005, Dr. Sant agreed with the panel recommendations regarding impairment and work restrictions. He disagreed with its recommendation regarding pain medication.

12. Claimant continued to require treatment, including occasional emergency room visits when his pain increased.

Prior Illnesses and Injuries

13. Claimant has been blind in his left eye since a BB-gun accident about age 6. He has suffered from glaucoma at least since 1996. Also in 1996, Claimant underwent left eye surgery to allow the blind eye to move in conjunction with his good right eye, minimizing disfigurement and potential stigma by possible employers and others.

14. Claimant broke his right ankle about age 9. The growth plate was affected, leaving him with a leg length discrepancy. This resulted in chronic ankle pain and arthritis, difficulty walking on uneven surfaces, and occasional back pain from his altered gait.

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On August 28, 1995, Gary Botimer, M.D., stated, "I do not anticipate that he would ever be able to work long-term in construction or any other type of work on uneven ground or walking on roofs." On October 14, 1996, Dr. Chenore imposed a permanent restriction to avoid walking and recommended a "seated job should be OK." On December 20, 2006, Kevin Krafft, M.D., examined Claimant at the request of Claimant's attorney. He opined Claimant suffered 11% PPI from his ankle injury.

15. Claimant suffered a low back strain at work in August 1993. After about 10 days, he returned to light-duty work. He returned to work without restriction in October 1993.

16. Claimant injured his right knee in April 1994. This injury does not appear to have resulted in any permanent impairment.

17. In 1995, Claimant underwent a flexor tendon repair of his hand.

18. In October 1995, Claimant was rear ended in a motor vehicle accident. He sought emergency medical attention and complained of low back pain. Lumbar X-rays were reportedly normal. The doctor diagnosed a lumbar muscle strain. He termed Claimant a "difficult patient" and related exaggerated symptoms to anxiety.

19. Later in October 1995, Douglas Hill, M.D., examined Claimant for Idaho Disability Determinations. Claimant described chronic back pain, right ankle pain, pain from an old abdominal stab wound, and left eye blindness. Dr. Hill noted his pelvis was unlevel as a result of the leg length discrepancy and noted other findings consistent with Claimant's complaints. He opined, "It is this examiner's opinion that this individual has a significant impairment relative to his right leg that would impede his ability to perform tasks involving walking more than short distances, standing for long periods of time, lifting,

bending, stooping, and crawling.” Claimant’s application for Social Security disability benefits was denied in 1995.

20. Just before Christmas 1997, Claimant sought medical treatment for a low back injury. He was released to return to work on January 2, 1998. The doctor encouraged the use of an orthotic for leg length discrepancy and cautioned him to avoid excessive exertion but did not formalize any restrictions. X-rays showed a degenerative lumbar condition. Claimant remained in physical therapy.

21. In 2000, Claimant underwent surgery for a ventral hernia repair.

22. Claimant has a history of gastrointestinal discomfort with bleeding and anemia.

23. In November 2001, Claimant strained his left hip at work. Two weeks later, he was released to “full work” by Lowell Schuknecht, M.D.

24. Upon reapplication for Social Security disability benefits after the November 2002 injury, he was granted these benefits.

Nonmedical Factors and Vocational Evaluators

25. Born July 31, 1955, Claimant was 47 years old on the date of the accident.

26. Claimant finished the 8th grade and obtained a GED as an adult. He has taken additional courses in automobile mechanics, medical terminology, and basic education.

27. In addition to work as a roofer, Claimant performed agricultural field work for five or six years, peeled potatoes for a couple of years, and drove a feed truck for five years.

28. Industrial Commission Rehabilitation Division consultant Martha Torrez assisted Claimant from January 2003 to April 2004. Ms. Torrez’s notes from the last two occasions she spoke with Claimant in March and April of 2004, show that Claimant stated he had on going medical issues as well as a lot of pain and that he had no plans of engaging in job

search activities. Ms. Torrez identified three job types which she believed Claimant could perform based on his education, customary labor market, age, transferable skills, restrictions, and physician's recommendations.

29. Vocational expert Doug Crum evaluated Claimant at Claimant's request. He opined that as a result of the accident Claimant lost access to 85% to 90% of the jobs previously available to him. Adding in Claimant's left eye blindness, he opined Claimant 100% disabled. Further, Mr. Crum noted that Claimant presented as being physically and mentally slow. This would impede Claimant's ability to make a good first impression when applying for jobs.

30. On December 8, 2006, vocational expert William Jordan opined Claimant was not totally and permanently disabled. He opined that Claimant did have permanent disability related to the November 2002 back injury, but did not quantify it. He identified specific available jobs which he believed Claimant could perform based upon the restrictions specified by physicians, as well as Claimant's knowledge, skills and abilities. Some of the jobs found by Mr. Jordan are cashier, auto parts salesperson, security guard, patrol officer, bindery worker, assembly worker, meter reader, stock room attendant, deli food service worker, sweeper operator, parking specialist, and demo associate. Mr. Jordan's report notes that although he attempted to schedule an interview with Claimant, "this was not allowed per his Attorney's policy concerning his clients meeting with vocational specialists." Defendant's Exhibit 26. Mr. Jordan did observe Claimant's deposition taken on October 30, 2006.

31. At hearing, Claimant moved and spoke slowly. Claimant testified he had taken his prescription narcotic medication very early that morning to minimize its effect on his ability to testify.

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Subsequent Illness and Injury

32. In March 2004, Claimant was hospitalized for severe anemia.

33. In response to correspondence from Employer's Surety, an unknown author (possibly Chris Vetsch, M.D.) from Saltzer Medical Group replied that Claimant was disabled from September 2004 through February 7, 2005. The "Full Release" box was checked allowing Claimant to return to work. Although Surety's correspondence identifies the November 5, 2002 accident, the response appeared related to hemorrhoid surgery on November 4, 2004, or to a hernia which was surgically repaired on December 16, 2004. There is no medical opinion to support a finding that these conditions were likely caused by the November 2002 accident. At best, Dr. Vetsch opined they "could be" related.

34. On May 31, 2006, Claimant suffered a contusion or strain to his back in a motor vehicle accident. This event does not appear to contribute to Claimant's condition at hearing.

Discussion and Further Findings

35. **Credibility.** ISIF infers that Claimant's character is questionable because of an incident in which he was stabbed by a neighbor around age 18. From this premise, ISIF contends Claimant is not to be believed. The Commission finds that this event has nothing to do with honesty or credibility.

36. ISIF contends inconsistencies in his memory or medical records support a finding that Claimant is not credible. Claimant is, at best, an average historian. Indeed, where a relevant discrepancy exists between Claimant's testimony and a medical record, the Commission assigned greater weight to the medical record. Moreover, Claimant demonstrated a tendency to exaggerate whatever pain was under consideration by a physician on any given visit and to discount pain from other conditions which were not salient in his mind at

the moment. However, neither Claimant's normal and reasonable memory lapses nor his imbalance of focus demonstrate that Claimant is not credible.

37. **Accident.** In its posthearing brief, ISIF raised a new issue, contending Claimant did not suffer a compensable accident on November 5, 2002. In the workers' compensation arena, many issues raised in a Complaint or an Answer are resolved or partially resolved before hearing, leaving only the remaining disputed issues to be decided. Thus, the parties are required to specify unresolved issues at the time a request for calendaring or a response thereto is filed. The Notice of Hearing sets forth the issues to be decided at hearing. A major purpose of providing a Notice of Hearing is to give the parties an opportunity to confirm that all issues to be decided have been identified. This procedure affords due process to all parties through notice of the issues to be decided. The parties have an opportunity well before hearing to add or modify the issues so identified.

38. ISIF did not request this issue to be included for hearing. ISIF did not timely ask for the addition of this issue after it received the Notice of Hearing. It did not raise the issue until its posthearing brief. Claimant's brief appropriately identifies examples of the Commission's longstanding practice to refuse to add issues not set forth in the Notice of Hearing. Therefore, the question concerning Claimant's compensable accident is not properly before the Commission and will not be considered herein.

39. **Permanent disability.** There are two methods by which a claimant can demonstrate he is totally and permanently disabled. First, a claimant may prove a total and permanent disability if his medical impairment together with the pertinent nonmedical factors totals 100%. If a claimant has met this burden, then total and permanent disability has been established. The parties did not present this issue to the Commission for consideration.

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40. **Odd-lot.** The second method of proving total and permanent disability is by showing that he fits within the definition of an odd-lot worker. The parties specifically submitted this issue for resolution. An odd-lot worker is one “so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.” Bybee v. ISIF, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), citing Arnold v. Splendid Bakery, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). Such workers are not regularly employable “in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part.” Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984), citing Lyons v. ISIF, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

41. A claimant may satisfy his 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. ISIF, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

A prima facie case of odd-lot status is only established if “the evidence is undisputed and is reasonably susceptible to only one interpretation.” Magee v. Thompson Creek Mining Co., 142 Idaho 761, 766, 133 P.3d 1226 (2006) (quoting Thompson v. Motel 6, 135 Idaho 373, 376, 17 P.3d 874, 877 (2001)).

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42. Claimant has not attempted other types of employment since his industrial accident. Therefore, Claimant has failed to prove odd-lot status by the first method discussed in Lethrud.

43. Claimant contends that suitable work is not available. However, Mr. Jordan found several jobs which Claimant is able to perform or for which he can be trained, resulting in a reasonable opportunity to be employed. Defendant's Exhibit 26. Furthermore, prior to receiving social security disability, Claimant states that he applied for a variety of jobs. Claimant could not detail the exact positions he applied for because he lost his employer contact log. Mr. Crum's report discusses that when Ms. Torrez, an Industrial Commission Rehabilitation Division consultant, suggested Claimant try to get a job peeling potatoes, he indicated that he really was not interested in that kind of work and if he can work at all, he would like to have a job with more of a future. Defendant's Exhibit 27. While Claimant may not be in the position to find the perfect career, not being interested in a particular kind of work does not prove an unsuccessful search for work or that such a search would be futile. If Claimant is to prove himself odd-lot, he must make an effort to perform suitable jobs, not just ideal career paths.

44. Ms. Torrez's notes from the last two occasions she spoke with Claimant in March and April of 2004, show that Claimant stated he had no plans of engaging in job search activities. The Commission has already found Mr. Jordan's analysis, which found jobs within Claimant's restrictions and abilities, more persuasive. Claimant has failed to prove odd-lot by the second method outlined in Lethrud.

45. Finally, Claimant argues that work is not available and that efforts to find suitable work would be futile. Both Mr. Crum and Mr. Jordan submitted comprehensive and thorough reports addressing Claimant's work situation. But the Commission finds several inconsistencies

in Mr. Crum's report which diminish its persuasiveness. Mr. Crum notes that before the industrial injury, Claimant could access and perform approximately 5.5% of the jobs in the Boise area. Using the same analytical method, Mr. Crum calculated Claimant's post industrial injury job access to be 0.5%, which represents a loss of labor market access of 85% to 90%. Mr. Crum then states that the industrial injury combined with the pre-existing vision problems, result in a 100% loss of access to jobs for Claimant. It is illogical and difficult to understand why the original assessment of 5.5% would not already include Claimant's loss of vision which occurred when he was age 6. Mr. Crum also reported that Claimant might be able to hold a light local delivery driving job, but that such a position was not available to Claimant due to his pre-existing vision problems. Claimant has no medically documented driving restrictions and held a position as a feed truck driver for five years with the same pre-existing vision problem.

46. Mr. Jordan opined that Claimant did have permanent disability related to the November 2002 back injury, but that he was not totally and permanently disabled. Mr. Jordan identified specific available jobs which he believed Claimant could perform based upon the restrictions specified by physicians. Mr. Jordan's report is thorough and takes into account the sometimes conflicting medical reports. The Commission finds that Mr. Jordan's vocational assessment is more persuasive than Mr. Crum's report.

47. The Commission is persuaded by Mr. Jordan's analysis and report, finding that positions exist which are suitable for Claimant. Claimant has failed to prove any efforts to find suitable work would be futile. Therefore, the Commission finds that Claimant has not proven his entitlement to total and permanent disability under the odd-lot doctrine described in Lethrud.

48. Because Claimant is not totally and permanently disabled, the issues of ISIF liability pursuant to Idaho Code § 72-332 and apportionment under the Carey formula are moot.

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CONCLUSIONS OF LAW AND ORDER

1. Claimant has failed to prove that he is entitled to total and permanent disability benefits pursuant to the odd-lot doctrine.

2. The remaining issues are moot.

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

DATED this __12th day of __September____, 2007.

INDUSTRIAL COMMISSION

_____/s/_____
James F. Kile, Chairman

____Participated but did not sign____
R.D. Maynard, Commissioner

_____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of Sept., 2007, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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