

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

JODY LINDSAY, )  
)  
                    Claimant, )  
)  
          v. )  
)  
CEDAR DRAW TRANSPORT, INC., )  
)  
                    Employer, )  
)  
          and )  
)  
STATE INSURANCE FUND, )  
)  
                    Surety, )  
)  
          and )  
)  
STATE OF IDAHO, INDUSTRIAL )  
SPECIAL INDEMNITY FUND, )  
)  
                    Defendants. )  
\_\_\_\_\_ )

**IC 2002-512157**

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

filed November 20, 2007

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Lora Rainey Breen, who conducted a hearing in Twin Falls on December 6, 2006. Claimant was present and represented by L. Clyel Berry of Twin Falls. Gardner W. Skinner, Jr., of Boise represented Employer Cedar Draw Transportation, Inc., and its Surety, Idaho State Insurance Fund (“Surety”). Anthony M. Valdez of Twin Falls represented State of Idaho, Special Indemnity Fund (“ISIF”). Oral and documentary evidence was presented. The record remained open for the taking of one post-hearing deposition. The parties then submitted post-hearing briefs and this matter came under advisement on April 16, 2007. Upon

the resignation of Referee Rainey Breen, this matter was re-assigned to Referee Michael E. Powers.

## **ISSUES**

As referenced in the Notice of Hearing filed May 10, 2006, the issues to be decided are:

1. Whether the conditions for which Claimant seeks benefits were caused by the industrial accident.
2. Whether and to what extent Claimant is entitled to the following benefits:
  - a. Medical care;
  - b. Temporary partial and/or temporary total disability (TPD/TTD)<sup>1</sup>;
  - c. Permanent partial impairment (PPI);
  - d. Psychological impairment pursuant to Idaho Code § 72-451; and
  - e. Disability in excess of impairment.
3. Whether Claimant is entitled to permanent total disability benefits pursuant to the odd-lot theory, or otherwise.
4. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate.
5. Whether ISIF is liable pursuant to Idaho Code § 72-332, and, although not specifically mentioned in the Notice of Hearing but addressed in the post-hearing briefing, the applicability of the *Carey* formula.
6. Whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

Both Surety and ISIF concede that Claimant is totally and permanently disabled; however, they disagree regarding ISIF's liability for that disability.

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<sup>1</sup> This issue and issue number 4 were not addressed in the parties' post-hearing briefing and are deemed abandoned.

## **CONTENTIONS OF THE PARTIES**

Claimant contends that as the result of a combination of certain manifest pre-existing permanent physical impairments that constituted subjective hindrances to her employment, combined with injuries she received in an accident occurring on June 24, 2002, render her totally and permanently disabled. She further contends that Surety is liable for medical costs and related benefits associated with treatment for her low back, left knee, medication reaction, and left hip. Finally, Claimant requests an award of attorney fees for Surety's unreasonable denial of payment for costs associated with her emergency room treatment for a medication reaction and anxiety, as well as the costs associated with the treatment for her left hip.

Surety concedes that Claimant is totally and permanently disabled, but contends that it should share liability for that disability with ISIF in accordance with the *Carey* formula. Surety further contends that Claimant's left hip condition is unrelated to her industrial accident and that medical bills associated with her emergency room presentation for the medication reaction have been paid, as well as medical costs associated with the treatment she received for her left knee. Finally, Surety acted reasonably in denying benefits and is not liable for attorney fees.

ISIF also concedes that Claimant is totally and permanently disabled; however, such disability is due solely to her industrial accident. While Claimant may have had pre-existing physical impairments that were manifest, they did not constitute subjective hindrances to her pre-accident employment and, consequently, they did not combine with her industrial injury to cause permanent disability.

## **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant presented at hearing.

2. Claimant's Exhibits 1-16 admitted at hearing.
3. Surety's Exhibits 1-47 admitted at hearing.
4. Post-Hearing (PH) Exhibits 1-4 admitted by agreement of the parties.
5. The post-hearing deposition of Douglas N. Crum, CDMS, taken by ISIF on December 20, 2006.

After having considered all the above evidence and the briefs 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 48 years of age and resided in Swan Valley, Idaho, at the time of the hearing. Other than a few-hour attempt at light duty employment with Employer, she has not been employed since her industrial accident of June 24, 2002. Except for a short time in Northern Idaho and about two years in Nevada, Claimant has spent most of her adult life in the Magic Valley area. During her lifetime, Claimant has suffered numerous accidents, injuries, and medical and psychological conditions, some work-related, some not, that equal or exceed any before encountered by this Referee. Yet, even though this Referee did not have the opportunity to meet Claimant or observe her testify, the voluminous records reviewed in this matter, as well as comments of counsel and others, leads to no other conclusion than that Claimant is a credible person and, if anything, understates the effects of her various problems on her ability to work. The following is a brief summary of Claimant's accidents/injuries/conditions and treatment both before and after her June 24, 2002, industrial accident that is the subject of this claim. Only the injuries that are pertinent to this claim are discussed.<sup>2</sup>

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<sup>2</sup> Claimant suffered many injuries that did not result in any residual effects and it would serve no purpose to mention all of them here.

**Pre-June 24, 2002, accidents, injuries, and conditions:**

2. On June 11, 1980, while employed as a ‘helper’ at Magic Valley Regional Medical Center, Claimant injured her back. Her claim resulted in a lump sum settlement and a 10% whole person PPI rating.

3. On July 19, 1982, while employed at Herrett’s Gun Stocks, Claimant re-injured her back resulting in an L5-S1 fusion. Her claim resulted in a lump sum settlement and a 25% whole person PPI rating.

4. On May 18, 1990, while living in Nevada, Claimant suffered a non-work-related aneurism resulting in a right frontotemporal craniotomy with clipping of the right posterior communicating artery aneurism on May 19. Around the time of her aneurism, Claimant also suffered a series of strokes that affected her short and long-term memory. Residuals from Claimant’s aneurism will be discussed later in this decision.

5. On October 14, 1994, again while living in Nevada, Claimant suffered a work-related right shoulder injury during the course of welding 14-foot steel panels. Claimant endured three right shoulder surgeries as the result of her injury. Her claim resulted in a lump sum settlement agreement and a 14% whole person PPI rating.

6. After moving back to the Magic Valley area, Claimant suffered a non-work-related injury to her right knee in 1997 that required arthroscopic surgery.

7. On April 3, 1999, Claimant was involved in a non-work-related motor vehicle accident wherein she injured her right knee that required an arthroscopic surgery and medial plicectomy.

8. Before her right knee had healed, on December 9, 2000, Claimant was involved in a non-work-related single-vehicle roll-over. She was thrown from the vehicle and suffered a

distal femur fracture and multiple-level burst fractures of her thoracic spine. Her femur fracture was surgically repaired (ORIF). On June 18, 2001, it was necessary to “re-do” the ORIF due to non-union. Claimant had reached MMI for this injury by December 11, 2001.

9. By March 16, 2001, Claimant began complaining of thoracic spine pain. A CT myelogram revealed burst fractures with a severe compression fracture at T11. Conservative care was recommended.

**June 24, 2002, accident and injuries:**

10. On June 24, 2002, Claimant was operating a roller on Johnson Hill between Gooding and Fairfield. Claimant described the hill as “very steep.” Her crew was chip sealing the highway. Claimant testified at hearing as follows regarding the occurrence of the accident:

Q. (By Mr. Berry): When you very first noticed the problem with regard to your equipment, where were you? Where was the roller in relation to the hill? Was it at the bottom, at the middle, at the top? Where was it?

A. It was at the top. I had just switched it into reverse to come backwards down the hill because the other two rollers were ahead of me. The way you work that is one takes one side of the road, one takes the other side and one comes down the middle. I was the middle roller so I was behind the other two. They were ahead of me. They had no idea what was going on. I started backwards down the hill and it flipped out of gear on me.

Q. The roller did?

A. Yes, and I had no back up brakes, no way to stop it.

Q. What happened?

A. I panicked. All I could think about - - because I could see at the bottom of the hill the other two rollers were almost there. There was a pilot car with a whole string of traffic stopped, the chip sealer was on the other side of the road, and all I could think of was ride it down so nobody gets hurt. Because those things are so big and so heavy if they're out of control, which mine was, it could take out anybody, including me and a whole bunch of people.

Q. Were you concerned about the roller striking the people at the bottom of the hill if you didn't ride it down?

A. Definitely.

Q. So what did you do?

A. I rode it clear down, screaming the whole way, until I got - - I wasn't very far from the chip sealer. And my boss was on the chip sealer, but it's so noisy that he couldn't hear me hollering. So I got almost to him and I took a dive off, I believe it was the left side of the road, which there was just rocks and sagebrush out there. I don't know if I hit something because I can't remember - -

Q. When you say you took a dive off, had you directed the direction of the roller away from these people at the bottom of the hill?

A. Yes, and I correct myself. That's what I meant; I drove the roller off the side of the road. I drove it off the side - -

Hearing Transcript, pp. 77-79.

11. Claimant has little memory of what happened to her physically as she jumped from or was thrown from the roller. The medical records indicate that she was transported by ambulance to Gooding Memorial Hospital, where she was stabilized and then transported to Magic Valley Regional Medical Center ("MVRMC") where she came under the care of John Howar, M.D. Claimant was diagnosed with a right proximal femur fracture and a left knee injury. On June 25, Dr. Howar performed an ORIF of Claimant's right proximal femur fracture. On July 8, 2002, Dr. Howar noted that Claimant had probably torn both the MCL and ACL in her left knee that could have impeded the recovery of her right femur injury. Conservative care was recommended for Claimant's left knee. Claimant also continued to have left knee pain and limited mobility.

12. Claimant's care was resumed by orthopedic surgeon Blake Johnson, M.D., who had previously treated a number of Claimant's orthopedic injuries. On January 23, 2003, Dr. Johnson performed a "re-do" ORIF of Claimant's right proximal femur fracture. A diagnostic study accomplished in June 2003 revealed yet another non-union of Claimant's right femoral neck. Therefore, on September 8, 2003, Dr. Johnson performed a right hip hemiarthroplasty.

13. On December 5, 2003, Dr. Johnson aspirated and injected Claimant's left knee. Dr. Johnson relates Claimant's left knee condition to her June 24, 2002 industrial accident.

14. Due to increasing pain in Claimant's right groin, on April 21, 2004, Dr. Johnson converted Claimant's right hip hemiarthroplasty to a total hip arthroplasty ("THA").

15. By July, 2004, Claimant was experiencing increasing left groin pain. She attributed the pain to her abnormal gait resulting from the extensive treatment of her right upper extremity. Surety has denied treatment for this condition.

16. In a December 2, 2004, follow-up for Claimant's left hip problem, a CT myelogram revealed an L4-L5 disc protrusion that Dr. Johnson believed might be responsible for her left leg radiculopathy. He referred Claimant to orthopedic surgeon David Christensen, M.D., for further evaluation.

17. Dr. Christensen saw Claimant on December 13, 2004. She informed him that her back pain came on gradually after being weaned off her crutches after her right hip replacement. Upon examination and diagnostic studies, Dr. Christensen concluded that Claimant still had some residual tingling from her 1985 surgery at L5-S1. Further, he opined that much of her back pain is related to injuries to her right lower extremity and extension due to her abnormal gait. Dr. Christensen did not believe Claimant was a surgical candidate.

18. Based on the results of a bone scan, on December 8, 2005, Dr. Johnson recommended a left hip arthroscopy which the Surety denied. However, on January 6, 2006, post-hearing, Claimant went ahead with the left hip arthroscopy that revealed significant posterior and anterolateral labral tears.

## **DISCUSSION AND FURTHER FINDINGS**

### **Medical benefits:**

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for

a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995). “Probable” is defined as “having more evidence for than against.” *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). No “magic” words are necessary where a physician plainly and unequivocally conveys his or her conviction that events are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). A physician’s oral testimony is not required in every case, but his or her medical records may be utilized to provide “medical testimony.” *Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

**Low back:**

19. As previously indicated, Dr. Johnson referred Claimant to Dr. Christensen to further evaluate the cause of her left hip pain. *See* finding of fact number 17 above. Dr. Christensen opined that Claimant’s low back condition was related to her industrial accident: “The low back pain she experiences now I feel is in large part due to many of her right lower extremity injuries from her accident in 2002.” Claimant’s Exhibit 6(d), p. 4. Further, “A portion of the patient’s back pain does appear to be related to extension. Due to the focal kyphosis at T11-12 the patient is hyperextending in her low lumbar spine to maintain sagittal balance and this may be causing some facet joint irritation.” *Id.*

20. On May 12, 2006, Claimant saw Richard Hammond, M.D., a board certified neurologist, at her attorney’s request. He reviewed records and examined Claimant. Dr.

Hammond indicated, “Review of the reports [*sic*] the lumbar myelogram dated February 25, 2002, and comparing this to the myelogram [*sic* – of] November 24, 2004. The 2004 study now reports that there is a right paracentral protrusion at L3 4 and L4 5.” Claimant’s Exhibit 6(e), p. 3. Dr. Hammond characterized the disc protrusions as new injuries related to the subject accident.

21. On February 15, 2006, Michael T. Phillips, M.D., examined Claimant and reviewed medical records at Surety’s request. He was asked to address the issue of the causation of Claimant’s left hip problem. He reviewed the report from the February 25, 2002, myelogram but not the film itself. He did not review any x-rays. He did not review the report or the film from the November 24, 2004, myelogram upon which Dr. Hammond based his causation opinion. Dr. Phillips did not address Claimant’s low back injury in his February 16, 2006, report. However, in response to a letter from Surety dated August 9, 2006, posing various questions, he indicated that because Claimant had preexisting back problems resulting in a fusion, he opined, without explanation, that her low back condition was not related to the subject accident.

22. The Referee finds the opinions of Drs. Johnson, Christensen, and Hammond more persuasive than that of Dr. Phillips. Drs. Christensen and Hammond provided credible bases for their opinions, while Dr. Phillips provided none. The Referee finds that Claimant’s protruding discs at L3-4 and L4-5 are causally related to her industrial accident and Surety is liable for the costs associated with any treatment related thereto.

**Left knee:**

23. Although Claimant has not required invasive medical treatment or received a PPI rating or restrictions regarding her left knee, she nonetheless requests a finding regarding a

causal connection between her left knee problems and her accident. Surety does not deny that Claimant injured her left knee in her accident and assert that they have paid for any treatment she received for her left knee condition. The Referee finds that Claimant injured her left knee in the industrial accident and Surety is liable for any treatment received relative thereto. Surety is, of course, entitled to credit for any amounts paid in that regard.

**February 2, 2003, presentment at MVRMC:**

24. Shortly after the “re-do” of her right proximal ORIF, Claimant presented to MVRMC and came under the care of Kevin Krall, M.D. She was complaining of chest tightness and shortness of breath. Dr. Krall noted her medications to be Coumadin, iron, Premarin, Prozac, Vicodin, and an unknown muscle relaxant she began taking two days before. Because the onset of Claimant’s more severe presenting symptoms corresponded to the date she began taking the muscle relaxants, Dr. Krall recommended that she discontinue them. In a letter to Surety dated April 1, 2003, Dr. Krall opined that her presentment to MVRMC was not due to pre-existing respiratory problems and, as such, “was not related to her pre-existing chronic bronchitis and asthma but was, much more, related to her problem which was the result of her accident.” Claimant’s Exhibit 6(f), p. 15. Surety maintains that all bills associated with this presentment have been paid. In any event, the Referee finds that Claimant’s February 2, 2003, presentment to MVRMC is Surety’s responsibility and they are entitled to credit for any amounts paid.

**Left hip:**

25. On August 4, 2004, Claimant presented to Dr. Johnson with a one-month history of left groin pain. Dr. Johnson’s impression was, “Early stage AVN versus unrecognized DJD.” Claimant’s Exhibit 6(c), p. 49. He wanted to obtain an MRI of her left hip but could not due to

the clips from her previous cerebral aneurism. He therefore requested that the radiologist perform an interarticular hip injection and would recheck Claimant in six weeks with repeat x-rays to make sure there were no advancing stages of AVN. This presentment was approximately two-and-a-half months following Claimant's right THA.

26. Claimant testified that following her THA, the more she could bear weight, the worse her left hip became. She further testified that prior to the subject accident, she had never experienced left hip problems. Dr. Phillip noted at his February 15, 2006 IME that Claimant ambulated with a hesitant bilateral antalgic gait. Dr. Hammond noted on May 12, 2006, that, "she has a very odd gait as she does not flex at the left hip to bring her left leg through." Drs. Christensen and Johnson believe that Claimant's left hip problems stem from her right hip THA. Dr. Johnson ruled out AVN or DJD as he initially suspected and, on July 7, 2005, based on the results of a bone scan, recommended a left hip arthroscopy, which Surety has denied.

27. As previously indicated, Dr. Phillips saw Claimant at Surety's request on February 15, 2006, to address the left hip issue. Because Claimant did not complain of left hip problems until about two years and two months post-accident, Dr. Phillips concluded that there was no causal relationship between the two. He provided no potential alternative causes.

28. After having had the opportunity to review Dr. Phillips' report, Dr. Johnson authored a letter dated February 28, 2006, to Surety. Therein he expressed his disagreement with Dr. Phillips:

I have reviewed this [Dr. Phillips' February 16, 2006, report] and do not agree with his findings. He is relating the onset of hip pain two- and-one-half years past the injury. Throughout this time the patient had a significant inability to bear weight on the right side due to her condition. She has had increasing stress going across her hip during that time. She has had resultant pain associated with this. Due to the fact that she was walking differently and had increasing stress across the hip from the problems on her right side, I believe this is directly related to her accident.

Claimant's Exhibit 6(c), p. 61.

29. In Dr. Hammond's May 12, 2006, report he opined:

The left hip probably has a labral tear as the cause of her significant pain. This was more than likely caused by her having to bear the majority of her weight on her left leg and hip as her right leg was fractured. There might have been some trauma from the accident in and of itself but it was overshadowed by the much more severe pain and injury to the right hip.

Claimant's Exhibit 6(e), p. 3.

30. On January 29, 2007, Claimant underwent the arthroscopic surgery recommended by Dr. Johnson. At surgery, a large labral tear was observed. In letters dated February 6, 2007, and February 7, 2007, to Claimant's counsel, Drs. Johnson and Hammond respectively adhere to their previous opinions that Claimant's left hip condition is causally connected to her accident and resultant four surgeries to Claimant's right hip. In an undated letter received by Surety's counsel on February 26, 2007, Dr. Phillips indicated that a review of Dr. Hammond's February 26, 2007, letter did not change his causation opinion, "It is possible but not probable that the labral tear of the left hip acetabulum is related to the June 24, 2002, industrial injury." Post Hearing Exhibit 4. Again, Dr. Phillips based his opinion on the delay in the development of left hip symptomatology.

31. The Referee is more persuaded by the opinions of Drs. Johnson and Hammond over those of Dr. Phillips. There is no question that Claimant altered her gait as she was weaned off crutches and began weight bearing following her various right hip surgeries. Dr. Phillips himself so observed. The opinions of Drs. Johnson and Hammond are consistent with common sense and were ultimately confirmed by observations at surgery. Dr. Phillips offers no alternative reason for Claimant's left hip difficulties and apparently did not review the operative report or Dr. Johnson's February 6, 2007, letter. The Referee finds that Claimant's left hip

condition is causally related to her accident and injury to her right hip creating an alteration of gait resulting in damage to Claimant's left hip. Surety is liable for the costs associated with the treatment Claimant received for that condition.

**Psychiatric impairment:**

Idaho Code § 72-451 provides:

**Psychological accidents and injuries.** - - Psychological injuries, disorders or conditions shall not be compensated under this title, unless the following conditions are met:

(1) Such injuries of any kind or nature emanating from the workplace shall be compensated only if caused by an accident and physical injury as defined in section 72-102(18)(a) through 18(c), Idaho Code, or only if accompanying an occupational disease with resultant physical injury, except that a psychological mishap or event may constitute an accident where (i) it results in resultant physical injury so long as the psychological mishap or event meets the other criteria of this section, and (ii) it is readily recognized and identifiable as having occurred in the workplace, and (iii) it must be the product of a sudden and extraordinary event; and

(2) No compensation shall be paid for such injuries arising from conditions generally inherent in every working situation or from personnel related action including, but not limited to, disciplinary action, changes in duty, job evaluation or employment termination; and

(3) Such accident and injury must be the predominate cause as compared to all other causes combined of any consequence for which benefits are claimed under this section; and

(4) Where psychological causes or injuries are recognized by this section, such causes or injuries must exist in a real and objective sense; and

(5) Any permanent impairment or permanent disability for psychological injury recognizable under the Idaho workers' compensation law must be based on a condition sufficient to constitute a diagnosis using the terminology and criteria of the American psychiatric association's diagnostic and statistics manual of mental disorders, third edition revised, or any successor manual promulgated by the American psychiatric association, and must be made by a psychologist, or psychiatrist duly licensed to practice in the jurisdiction in which treatment is rendered, and

(6) Clear and convincing evidence that the psychological injuries arose out of and in the course of the employment from an accident or occupational disease as contemplated in this section is required.

Nothing herein shall be construed as allowing compensation for psychological injuries from psychological causes without accompanying physical injury.

This section shall apply to accidents and injuries occurring on or after July 1, 1994, and to causes of action for benefits accruing on or after July 1, 1994, notwithstanding that the original worker's compensation claim may have occurred prior to July 1, 1994.

32. Claimant bases her claim for psychiatric impairment on the report of Richard W. Worst, M.D., a psychiatrist. Claimant met with Dr. Worst at her attorney's request on October 16, 2006, for a three-hour and fifteen-minute personal interview. The purpose of Dr. Worst's retention was to establish an impairment rating. Dr. Worst reached the following diagnoses using the criteria set forth by the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR):

*Axis I: Adjustment Disorder with mixed anxiety and depressed mood (309.28)*

*Alcohol abuse-partial remission (305.00)*

*Axis II: Personality Disorder NOS<sup>3</sup> (301.9) dependent, histrionic, obsessive compulsive*

*Axis III: Post aneurism, multiple orthopedic injuries and surgeries*

*Axis IV: Psychosocial stressors have been extreme to catastrophic, and include difficulties with occupation, social, and medical*

*Axis V: Current Global Assessment of Function is 50 to 55, indicating serious impairment in social and occupational functioning.*

Claimant's Exhibit 6(k), p. 5.

33. Dr. Worst utilized the 2<sup>nd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> editions of the AMA Guides to the Evaluation of Permanent Impairment (*Guides*) in determining Claimant's psychiatric impairment. He assigned an overall whole person PPI rating of 46.6% exclusive of her aneurism. Of that, he apportioned 31.66% to the subject accident and stated:

Finally, in regard to the subject's psychological and psychiatric impairments, it is my medical opinion that the predominate causes for her current

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<sup>3</sup> Not Otherwise Specified.

diagnosis and condition are the physical limitations from the June 24, 2002, accident, which prevent her from what has been her primary source of self-esteem and sense of value. Her fundamental limitations are placed on her by orthopedic problems that have resulted from the accident, however, these physical limitations have created the psychiatric disorder which did not preexist, and now gives her so much difficulty.

*Id.*, p. 7.

34. Before Claimant saw Dr. Worst, she saw psychiatrist Eric F. Holt, M/D., at Surety's request on October 12, 2006. He interviewed and tested Claimant and reviewed medical records. Dr. Holt concluded that Claimant did not suffer a traumatic brain injury in the subject accident and assigned a 2.5% whole person impairment rating secondary to her ruptured aneurism and December 2000 motor vehicle accident. He agreed that Claimant suffered an Axis I adjustment disorder but that condition had resolved by the time he saw her.

35. Surety contends that Dr. Worst's report and opinions are flawed in a number of respects. First, Dr. Worst based his PPI rating on the 4<sup>th</sup>, rather than the 5<sup>th</sup>, edition of the *Guides*. Second, Dr. Worst was only provided a select portion of Claimant's prior medical records and, instead, relied on Claimant's counsel's version of her prior medical history. As a result, Surety contends that Dr. Worst relied on inaccurate information. Surety cites Dr. Worst's understanding of Claimant's alcohol abuse between 1996 and June 2002 as being not near as significant as in fact it was as an example. Therefore, his conclusion that Claimant's alcohol abuse began after the subject accident is erroneous. Surety further contends that Claimant's demeanor at hearing was inconsistent with someone with the significant psychological impairment assigned by Dr. Worst.

36. Regarding Dr. Worst's utilization of the 4<sup>th</sup> edition of the *Guides*, the 5<sup>th</sup> edition does not provide percentages of impairment. The 5<sup>th</sup> edition refers to the 4<sup>th</sup> and 2<sup>nd</sup> editions for the assignment of percentages of impairment. On page 5 of Dr. Worst's report, he indicated that

he used the 2<sup>nd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> editions in order to arrive at an impairment rating. The Referee can find no fault with Dr. Worst's impairment analysis and defers to his expertise in that regard. It is also noted that Dr. Holt provides no basis or guidance as to how he arrived at his PPI rating.

37. Claimant's counsel provided Dr. Worst certain pertinent medical records and provided a summary of the rest, which are voluminous. Surety does not reference how Dr. Worst's reliance on Claimant's counsel's summaries somehow rendered his ultimate conclusions inaccurate or unreliable. Even if Dr. Worst may have been somewhat in error regarding the extent of Claimant's alcohol abuse before her last industrial accident, when taken in context with the extent of her physical injuries and related psychological issues post-accident, the Referee is still persuaded that Dr. Worst's opinion is more persuasive than that of Dr. Holt regarding psychological impairment. Therefore, the Referee finds that Claimant has incurred a 31.66% whole person PPI for her psychological condition attributable solely to her June 24, 2002, industrial accident and injury.

**Attorney's fees:**

Idaho Code § 72-804 provides for an award of attorney's fees in the event an employer or its surety unreasonably denies a claim or neglects or refuses to pay an injured employee compensation within a reasonable time.

38. Claimant contends that she is entitled to an award of attorney's fees for Surety's unreasonable denial of medical benefits associated with her February 2, 2003, presentment to MVRMC and their denial of treatment for her left hip condition. Surety responds that they have paid the bills associated with the February 2 presentment and that they have legitimately contested the causal connection between Claimant's accident and her left hip condition. Because

Surety has paid for the costs associated with her February 2 ER visit, attorney's fees in that regard are denied.

39. Regarding Claimant's left hip treatment, Dr. Johnson originally failed to relate that condition to Claimant's industrial accident. Claimant's late development of symptoms regarding her left hip further complicated matters. Moreover, once Dr. Johnson recommended a left hip arthroscopy, Claimant took about five months to "think about it." Once Dr. Johnson sought authority for the arthroscopy, Surety arranged for Dr. Phillips' IME about two months later. Dr. Phillips failed to relate Claimant's left hip condition to her accident. Claimant did not undergo the arthroscopy until after the hearing in this matter. At that time, Dr. Johnson indicated that trauma was the likely cause of the labral tear he found. Such trauma may be seen as contrary to the gradual "wear and tear" envisioned by an altered gait. While the Referee did not find Dr. Phillips' opinion persuasive, nonetheless, it can not be found that his opinion was blatantly unreasonable or that Surety's reliance thereon could support an award of attorney's fees.

**ISIF liability:**

Idaho Code § 72-332 provides

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

(2) “Permanent physical impairment” is as defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or occupational disease, of such seriousness to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become unemployed. This shall be interpreted subjectively as to the particular employee involved, however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

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

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

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

40. Based on the stipulation of the parties and support in the record, the Referee finds Claimant totally and permanently disabled as of the date of her last industrial accident, June 24, 2002.

(a) Pre-existing physical impairments:

BACK:

41. June 11, 1980: Injured low back while employed at MVRMC. Settled by way of lump sum settlement. 10% whole person PPI.

42. July 19, 1982. Injured low back while employed at Herrett’s Gunstocks. Settled by way of lump sum settlement. Additional 15% whole person PPI with permanent restrictions.

ANEURISM:

43. May 18, 1990. Suffered a non-industrial aneurism and subarachnoid hemorrhage. 9% whole person PPI by Dr. Clay Ward and 2.5% for the aneurism and December 2000 motor vehicle accident by Dr. Eric Holt.

RIGHT SHOULDER:

44. October 14, 1994. Injured right shoulder while employed at Humbolt Livestock in Nevada. Settled by way of lump sum settlement. 14% whole person PPI with permanent restrictions.

RIGHT KNEE:

45. In 1997, suffered a non-industrial right knee injury. In 1999, suffered another non-industrial right knee injury. 10% whole person PPI with permanent restrictions.

THORACIC SPINE:

46. December 9, 2000, non-industrial motor vehicle accident resulting in compression fracture at T12. 15% whole person PPI with permanent restrictions.

(b) Manifest:

47. “‘Manifest’ means that either the employer or employee is aware of the condition so that the condition can be established as existing prior to the injury.” *Royce v. Southwest Pipe of Idaho*, 103 Idaho, 290, 294, 647 P.2d 746, 750 (1982). Each of the above-referenced physical impairments was certainly manifest in that they resulted from conditions that were obvious to Claimant and others.

(c) Subjective hindrance to employment:

48. ISIF argues that while Claimant had certain pre-existing physical impairment, she was, nonetheless, able pre-accident to obtain and perform jobs requiring hard work. However,

after her June 24, 2002, accident and injuries, “It stopped me. I was able to come back from every other one, and usually without very much time. This one I have never come back from.” Hearing Transcript, p. 128. While the June 24, 2002 accident may have “stopped her,” that does not mean her pre-existing injuries did not create a hindrance or obstacle to her employment.

49. Douglas N. Crum, CDMS, is the only vocational expert to testify in this matter. He testified that Claimant’s pre-existing back problems and limitations would have been an obstacle or hindrance to employment pre-subject accident. He testified similarly regarding her pre-existing aneurism (memory and concentration), her pre-existing right shoulder, right knee, and thoracic fractures constituted hindrances and obstacles to obtaining employment before June 24, 2002. His testimony in that regard is un rebutted. Further, Claimant herself testified by example regarding how she compensated for her various pre-existing injuries, both before and at her time-of-injury employment, and acknowledged that there were certain physical activities and jobs that she could not do as a result of those injuries. Finally, as Claimant points out in her post-hearing brief, Claimant’s attitude toward whether or not her pre-existing conditions constitutes a hindrance to employment is not determinative of that issue:

While the claimant’s attitude toward the condition is some evidence whether it was a hindrance, we now declare that the claimant’s attitude does not necessarily play a decisive role in determining whether a ‘permanent physical impairment’ exists under Idaho Code § 72-332(2).

*Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 170, 786 P.2d 557, 562 (1990).

50. The Referee finds that Claimant’s pre-existing physical impairments regarding her back, aneurism, right shoulder, right knee, and thoracic spine constituted obstacles and hindrances to employment.

(d) Combines with:

51. ISIF argues that it was the subject accident alone that resulted in Claimant's total and permanent disability and, thus, there was not "combining with" her pre-existing physical impairments. In *Garcia v. J.R. Simplot Co.*, 115 Idaho 966, 772 P.2d 173 (1989), our Supreme Court first articulated the "but for" test:

We acknowledge that the "but for" standard is the appropriate test to determine whether the total permanent disability is the result of the combined effects of the pre-existing condition and the work-related injury.

52. Here, Claimant's pre-existing physical impairments are numerous and significant. Claimant's work-related accident was, as described in ISIF's post-hearing brief, "horrific." Mr. Crum testified that it was the combination of Claimant's pre-existing physical impairment including her back, aneurism, right shoulder, right knee, and thoracic injury, and her work-related accident that has resulted in her unemployability. Again, his testimony in that regard is un rebutted.

53. The Referee finds that "but for" Claimant's pre-existing physical impairments, she would not now be totally and permanently disabled. Or, stated another way, Claimant's pre-existing physical impairments combined with the injuries she sustained in the June 24, 2002, industrial accident have rendered her totally and permanently disabled.

54. The Referee further finds that ISIF is liable for payment of a proportional share of total permanent disability benefits to Claimant.

**The Carey formula:**

In *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984), the Idaho Supreme Court stated, "that the appropriate solution to the problem of apportioning the non-medical factors in an odd-lot case where [ISIF] is involved, is to prorate the non-medical portion

of disability between the employer and [ISIF], in proportion to their respective percentages of responsibility for the physical impairment.” *Id.*, at 118.

The problem here with engaging the *Carey* formula is that Claimant is 100% disabled medically, leaving no non-medical factors to apportion.

Pre-existing physical impairments attributable to ISIF :

55. Back 1980	<b><u>10%</u></b>
1982	<b><u>15%</u></b>
Aneurism 1990	<b><u>9%</u></b> <sup>4</sup>
Right Shoulder 1994	<b><u>14%</u></b>
Right knee 1997 and 1999	<b><u>10%</u></b>
Thoracic spine 2000	<b><u>15%</u></b>
TOTAL	<b><u>73%</u></b>

Physical impairments attributable to Surety:

56. As previously found, the following impairments flow from the June 24, 2002, industrial accident:

Proximal right femur fracture – right hip replacement	<b><u>30%</u></b>
Low back	<b><u>7%</u></b>
Left hip	<b><u>5%</u></b> <sup>5</sup>
Psychological	<b><u>31.66%</u></b>
TOTAL	<b><u>79.66%</u></b>

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<sup>4</sup> Dr. Holt assigned a 2.5% impairment for a combination of the aneurism and the December 2000 motor vehicle accident. Because he did not distinguish between the two events, the Referee elects to utilize the 9% assigned by Dr. Ward.

<sup>5</sup> Dr. Hammond assigned a 16% whole person PPI rating for Claimant’s left hip condition before her January 29, 2007, surgery. Claimant reported “significant improvement” post-surgery. Dr. Phillips opined that with good results, he would anticipate a 5-7% PPI. The Referee agrees with Surety that the PPI for the left hip condition should be in that range in the event the left hip is found to be compensable, which has been so found. Therefore, it is reasonable to assign a 5% PPI for Claimant’s left hip condition.

Application of Carey:

57. Claimant is 100% disabled due to her medical physical impairments totaling 152.66%. Therefore, Surety is liable for 400 weeks of benefits (80% PPI rounded up from 79.66% x 500 weeks = 400). ISIF is responsible for the remaining statutory benefits.

Date of stability:

58. ISIF argues that the pertinent date of medical stability should be at some date established after her January 29, 2007, left hip surgery. Surety argues that the correct date of stability is July 10, 2004, the date Dr. Johnson declared her at MMI regarding her right hip. *See* Claimant's Exhibit 6(c), p. 48. Surety asserts that they should not be liable for Claimant's delay in seeking treatment for that condition and her left hip is of no consequence in terms of her total and permanent disability. The Referee agrees and finds that Claimant was medically stable as of July 10, 2004, and Surety is responsible for Claimant's total permanent disability benefits for 400 weeks from that date and ISIF is responsible for those benefits thereafter.

**CONCLUSIONS OF LAW**

1. Surety is liable for medical benefits associated with Claimant's protruding discs at L3-4 and L4-5.
2. Surety is liable for medical benefits associated with Claimant's left knee condition.
3. Surety is liable for Claimant's presentment at MVRMC on February 2, 2003.
4. Surety is liable for Claimant's left hip condition.
5. Surety is liable for Claimant's psychological impairment and the 31.66% whole person PPI rating associated therewith.
6. Claimant is not entitled to an award of attorney's fees.
7. Surety is liable for 400 weeks of total permanent disability benefits commencing July 10, 2004.
8. ISIF is liable for total permanent disability commencing upon the satisfaction of Surety's liability above.
9. Surety is entitled to a credit for any amounts paid to date.

**RECOMMENDATION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 20 day of November \_\_\_\_\_ 2007.

INDUSTRIAL COMMISSION

\_\_\_\_\_  
/s/ Michael E. Powers, Referee

ATTEST:

\_\_\_\_\_  
/s/ Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the   20   day of   November  , 2007, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

L CLYEL BERRY  
P O BOX 302  
TWIN FALLS ID 83303-0302

GARDNER W SKINNER JR  
P O BOX 359  
BOISE ID 83701

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

jkc

  /s/  \_\_\_\_\_

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

JODY LINDSAY, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 CEDAR DRAW TRANSPORT, INC., )  
 )  
 Employer, )  
 )  
 and )  
 )  
 STATE INSURANCE FUND, )  
 )  
 Surety, )  
 )  
 and )  
 )  
 STATE OF IDAHO, INDUSTRIAL )  
 SPECIAL INDEMNITY FUND, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 2002-512157**

**ORDER**

filed November 20, 2007

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. 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. Surety is liable for medical benefits associated with Claimant’s protruding discs at L3-4 and L4-5.
2. Surety is liable for medical benefits associated with Claimant’s left knee condition.

3. Surety is liable for Claimant's presentment at MVRMC on February 2, 2003.
4. Surety is liable for Claimant's left hip condition.
5. Surety is liable for Claimant's psychological impairment and the 31.66% whole person permanent partial impairment rating associated therewith.
6. Claimant is not entitled to an award of attorney's fees.
7. Surety is liable for 400 weeks of total permanent disability benefits commencing July 10, 2004.
8. ISIF is liable for total permanent disability commencing upon the satisfaction of Surety's liability above.
9. Surety is entitled to a credit for any amounts paid to date.
10. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this   20   day of   November  , 2007.

INDUSTRIAL COMMISSION

  /s/    
James F. Kile, Chairman

  /s/    
R. D. Maynard, Commissioner

  /s/    
Thomas E. Limbaugh, Commissioner

ATTEST:

  /s/    
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the   20   day of   November  , 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

L CLYEL BERRY  
PO BOX 302  
TWIN FALLS ID 83303-0302

GARDNER W SKINNER  
PO BOX 359  
BOISE ID 83701-0359

ANTHONY M VALDEZ  
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  /s/  \_\_\_\_\_