

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

DON V. MILLS, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 J.R. SIMPLOT COMPANY, )  
 )  
 Self-Insured Employer, )  
 )  
 and )  
 )  
 STATE OF IDAHO, INDUSTRIAL )  
 SPECIAL INDEMNITY FUND, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 2001-022763**

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

Filed: December 14, 2007

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Pocatello, Idaho, on March 7, 2007. Fred J. Lewis of Pocatello represented Claimant. Wes L. Scrivner of Boise represented Employer/Surety (Simplot). Lawrence E. Kirkendall of Boise represented State of Idaho, Industrial Special Indemnity Fund (ISIF). The parties submitted oral and documentary evidence and filed post-hearing briefs. The matter came under advisement on June 20, 2007, and is now ready for decision.

**ISSUES**

By stipulation of the parties, the issues to be decided are:

1. Whether ISIF is liable under Idaho Code § 72-332, and more particularly:

- a. Whether Claimant's pre-existing physical impairments were a hindrance or obstacle to his employment; and
  - b. Whether Claimant's total and permanent disability is the result of a combination of his pre-existing physical impairments and his last injury;
2. Apportionment under the *Carey* formula.

### **CONTENTIONS OF THE PARTIES**

Claimant asserts, and the parties have stipulated, that he is totally and permanently disabled. Claimant seeks to have the Commission determine the relative liabilities of Simplot and ISIF for payment of Claimant's disability benefits.

Simplot argues that Claimant's pre-existing physical impairments were a hindrance or obstacle to his re-employment, and that those pre-existing impairments combined with the impairment from his last accident on July 9, 2001, to render him totally disabled as of November 7, 2005. Simplot contends that ISIF is liable, pursuant to Idaho Code § 72-332, for a portion of Claimant's disability benefits, and asks the Commission to apportion Claimant's disability benefits between Simplot and ISIF pursuant to the *Carey* formula.

ISIF contends that while Claimant had pre-existing impairments, he has failed to prove either that they were a hindrance or obstacle to his employment or that they combined with his last injury to render him totally disabled. Claimant's failure to prove these elements relieves ISIF of any liability for Claimant's disability benefits.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant, Diana Mills, Danny Jones, Kelby Flowers, and Nancy Collins, Ph.D., offered at hearing; and

2. Joint Exhibits 1 through 37 admitted at hearing.<sup>1</sup>

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 fifty-two years of age at the time of hearing. He lived in Pocatello with his wife, Diane.

2. Claimant began working for Simplot on July 30, 1974, at the Don fertilizer plant. During the nearly thirty years that Claimant worked at the Don plant, he held a number of different positions. He started as a maintenance laborer, then became an assistant operator, a filter operator, and ultimately a senior operator. In 1982, Claimant bid into a position as a maintenance trainee as a way to get off shift work. Eventually he became a Class A maintenance worker, a position he held until the late 1990s. In 1998 or 1999, Claimant became an oiler at the Don plant.

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<sup>1</sup> Once again the Referee feels compelled to comment upon the exhibits that were jointly offered by the parties at hearing. For the fact that the exhibits were jointly offered, and were generally in good order, the Referee is most grateful. However, the record in this proceeding comprised 1,658 pages. Of that number, more than half were irrelevant to determining the issues set for hearing. Hundreds of pages of hospital daily charts (a number of which were duplicates), cardiology records, surgical records for gall bladder removal, records of billing disputes from the surgery center that performed Claimant's carpal tunnel release, laboratory and pathology reports, EEG and EKG results, Simplot records documenting every cut, scrape, chemical burn, and slip of the welding torch, and physical therapy reports related to Claimant's carpal tunnel syndrome are all examples of documents contained in the proffered exhibits that have no bearing on determining ISIF liability or apportionment between Surety and ISIF.

The Referee has heard it said that counsel do not know what the Commission wants or needs, so they submit everything. Given the practice and litigation experience of most members of the workers' compensation bar, it is ludicrous to suggest that they are incapable of reviewing proposed exhibits and making determinations regarding their relevance and probative value. To expect the Commission staff to read through nearly nine hundred pages of meaningless documents is an extravagant waste of resources, not the least of which is the Commission's time.

3. Simplot had a policy of not allowing an employee to return to work following an industrial injury until the injured worker was released without restrictions.

### **PRE-EXISTING CONDITIONS**

4. During his years as a worker at the Don plant, Claimant suffered a number of industrial accidents, most of them minor. In its opening remarks, Simplot referenced approximately thirty-three industrial accidents. Only those that bear on the case at bar are discussed herein.

5. In 1987, Claimant was crushed by a man lift, resulting in separations of the pubic and sacroiliac joints and a fracture of the left transverse process at L5. Claimant recovered, returned to work, and was rated at 8% whole person impairment as a result of the injuries he sustained in the accident. At his own request, Claimant was returned to work without restrictions.

6. In 1991, Claimant underwent laminectomies at L2-3 and L3-4. James M. Lansche, M.D., performed the surgery, and ultimately it was determined that the need for the surgery related back to the 1987 injuries. Claimant was awarded an additional 1% whole person impairment for the lumbar surgery. Dr. Lansche released Claimant with a forty-five pound lifting restriction, but Simplot refused to allow Claimant to return to work with a lifting restriction, so Dr. Lansche released Claimant without restrictions. Claimant's impairments made some parts of his job more difficult, but Claimant was able to work around his limitations and still perform his time-of-injury duties.

7. Claimant sustained a right shoulder injury in November 1996. He was evaluated for a rotator cuff tear after conservative treatment did not relieve his symptoms. Ultimately, it was determined that Claimant did not have a torn rotator cuff, but did have impingement

syndrome. Claimant was treated with injections. Claimant was released on a *prn* basis on March 17, 1997, with orders to avoid overhead lifting. Claimant's shoulder continued to be painful at least through April of 1997, at which time reference to the shoulder disappears from the treatment records.

8. In 1998, Claimant underwent a carpal tunnel release on the right upper extremity. He was awarded a whole person impairment of 3% for the carpal tunnel syndrome. Claimant sustained loss of grip strength of about 20%, and sustained a loss of fine motor control in his right hand as a result of the carpal tunnel release. These impairments made it more difficult for him to perform his job, but once again, he was able to self-accommodate for his limitations and continued to perform his job duties.

9. In 2000, Claimant hit his head on a low hanging piece of equipment, sustaining cervical injuries. He underwent surgery on January 26, 2001, for a C4-5 fusion. Claimant was declared medically stable and released to return to his time-of-injury position on May 18, 2001, but no impairment rating was given for the cervical fusion at that time. On November 7, 2001, Gary C. Walker, M.D., examined Claimant and awarded a whole person impairment of 25% for the cervical fusion. Simplot could not accommodate a return to work with modified duties, and Claimant returned to work without restrictions. Once again his injuries made certain aspects of his job more difficult, and once again Claimant found ways to accomplish his duties in spite of his accumulating impairments.

10. Claimant also has a seizure disorder of unknown etiology, for which he takes Dilantin.

### ***THE LAST ACCIDENT AND SUBSEQUENT MEDICAL CARE***

11. On July 9, 2001, Claimant was carrying a three-gallon oil jug up a stair when he slipped and fell. He immediately felt a pain in his back that radiated down into his left buttock and thigh. Claimant reported the accident to the company nurse the same day. On the following day, Claimant went to the emergency room, where he was diagnosed with a lumbar strain. At the request of Simplot, John Jones, M.D., took over Claimant's care. Dr. Jones referred Claimant to physical therapy and released him to his time-of-injury position on August 7. Dr. Jones managed Claimant's continuing care, which consisted primarily of work hardening coupled with a rigorous home exercise program, through mid-February 2002. At that time, Dr. Jones released Claimant from care. Throughout Claimant's treatment by Dr. Jones, he continued to work and continued to experience and report worsening low back and leg pain.

12. On March 20, 2002, Claimant saw D. Peter Reedy, M.D., upon a referral from Simplot. An MRI ordered by Dr. Reedy showed a large disc herniation at L2-3, which Dr. Reedy believed to be the cause of Claimant's worsening low back and radiating leg pain. A CT myelogram confirmed a nerve root encroachment. Dr. Reedy recommended a lumbar laminectomy with bilateral foraminotomies, and perhaps a decompression. Surety was reluctant to authorize any treatment for Claimant's low back and radicular pain, asserting that Claimant's back problems were the result of obesity, deconditioning, and arthritis. Dr. Reedy emphatically disagreed with Surety's assessment.

13. Surety subsequently accepted responsibility for Claimant's injury arising from the July 2001 accident. Dr. Reedy performed a re-do of Claimant's 1991 lumbar decompression at L2 bilaterally with bilateral foraminotomies on May 28, 2002. Claimant was off work for seven months.

14. Although Claimant continued to have problems with his low back and legs, an MRI showed some disc protrusion but no evidence of nerve root involvement, and he was released to return to work on December 10, 2002, with a thirty-five pound lifting restriction. On December 26, at the request of Claimant, Dr. Reedy removed the lifting restriction so Claimant could return to work. Dr. Reedy released Claimant from his care and declared him medically stable on January 23, 2003.

15. Claimant returned to his time-of-injury position, and continued to work as his symptoms continued to worsen, finding ways to complete his duties despite his increasing pain and decreasing physical capabilities. In September 2003, Claimant wrote Dr. Reedy with a plea for help, complaining that his symptoms had continually gotten worse since he had been released to work in December 2002 and were now so bad that he could not stand up straight, experienced shooting pain every time he coughed or sneezed, and experienced constant pain and numbness in his right leg from the top of his buttocks to his knee. Despite his condition, Claimant continued to work. Dr. Reedy saw Claimant again on November 14, 2003, and admitted that the May 2002 surgery had not given Claimant the relief he was looking for, and acknowledged that perhaps the November 2002 MRI had been “under read” as to the amount of stenosis present at L2-3. Dr. Reedy recommended a CT myelogram and a consult with another neurosurgeon.

16. New imaging showed significant stenosis at L2-3 despite Claimant’s two previous decompressions. Dr. Reedy sent Claimant to Timothy E. Doerr, M.D., for a neurosurgical consult. Dr. Doerr reviewed Claimant’s records and films, and after ruling out degenerative arthritis in Claimant’s right hip as a cause of his back and leg pain, Drs. Doerr and Reedy scheduled an L2-3 laminectomy and discectomy for March 12, 2004. Dr. Reedy did not do fusions, so if a fusion was necessary, Dr. Doerr would be present to perform it.

17. Claimant worked through March 9, 2004—just days before his scheduled surgery. As the surgery progressed, Dr. Reedy encountered extensive amounts of scar tissue that made access to the spinal column difficult. After unsuccessful attempts to expose the discs, and inflicting two dural tears, Dr. Reedy abandoned the surgery. In attempting to access the injured discs, some decompression of the disc was accomplished, but the planned laminectomies and foraminotomies were canceled. Dr. Reedy hoped that Claimant might get some relief from what decompression had been accomplished.

18. Claimant saw Dr. Doerr following the failed surgery. Dr. Doerr recommended a right L3 nerve block for diagnostic purposes. If the block improved Claimant's low back and leg symptoms, then he was willing to consider a complete facetectomy and discectomy with posterior interbody fusion. Dr. Doerr explained that such surgery carried great risks, especially in light of Claimant's two prior surgeries at that level. Claimant returned to Dr. Reedy, who opined that Dr. Doerr's approach was reasonable, and that he was willing to hand off Claimant's care to Dr. Doerr for the fusion.

19. Dr. Doerr ordered another MRI, and a right L3 nerve block. Claimant reported that the nerve block helped for about a week before the pain returned. Based on that result, Dr. Doerr recommended a right L2-3 transforaminal discectomy and posterior interbody fusion.

20. Claimant sought the advice of Scott Huneycutt, M.D., a Pocatello neurosurgeon. After obtaining the imaging and reviewing Claimant's medical history, Dr. Huneycutt confirmed Dr. Doerr's diagnosis. Dr. Huneycutt reviewed Claimant's treatment options, including the risk inherent in such a surgery, opining that there was a 50% chance that Claimant's condition would improve with surgery and a 50% chance it could worsen. Claimant opted to have the surgery, and Dr. Huneycutt performed the surgery on October 6, 2004.

21. One year after the last surgery, Claimant was in worse condition than before, despite making every effort at rehabilitation. Throughout the year, Claimant continued to believe that if he worked hard enough, he would be able to return to his job with Simplot. Claimant worked with two different physiatrists, tried epidural steroidal injections, and did everything that was asked of him, all to no avail. Claimant never returned to work after the aborted March 2004 surgery. On October 13, 2005, Dr. Huneycutt opined that Claimant was 100% disabled as a result of his lumbar spinal injury. The following month, on November 7, 2005, Gary C. Walker, M.D., declared Claimant medically stable and awarded him a 31% whole person impairment for his lumbar spine, which encompassed all four lumbar surgeries together with loss of range of motion. The parties stipulated that Claimant was totally and permanently disabled as of November 7, 2005.

## **DISCUSSION AND FURTHER FINDINGS**

### ***ISIF LIABILITY***

22. Claimant's undisputed total disability is a necessary, but not a sufficient basis for finding ISIF liability. Once total disability has been determined, there are four requirements that must be proven in order for a claimant to establish ISIF liability under Idaho Code § 72-332.

1. Whether there was a preexisting impairment;
2. Whether the impairment was manifest;
3. Whether the impairment was a subjective hindrance; and
4. Whether the impairment in any way combines in causing total permanent disability.

*Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 155, 795 P.2d 312, 317 (1990). ISIF has conceded the first two elements. Only the third and fourth requirements are at issue in this proceeding.

### *Claimant's Impairments Were A Subjective Hindrance*

23. The “subjective hindrance” prong of the test for ISIF liability finds its genesis in the statutory definition of permanent impairment together with additional language enacted by the legislature in 1981:

"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 disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become employed. *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 preexisting permanent physical impairment was not of such seriousness as to constitute such a hindrance or obstacle to obtaining employment.*

Idaho Code § 332(2), Idaho Sess. Laws, ch. 261, Sec. 2, pp. 552, 554 (emphasis added). The Idaho Supreme Court set out the definitive explanation of the “subjective hindrance” language in *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 172, 786 P.2d 557, 563 (1990):

Under this test, evidence of the claimant's attitude toward the preexisting condition, the claimant's medical condition before and after the injury or disease for which compensation is sought, nonmedical factors concerning the claimant, as well as expert opinions and other evidence concerning the effect of the preexisting condition on the claimant's employability will all be admissible. No longer will the result turn merely on the claimant's attitude toward the condition and expert opinion concerning whether a reasonable employer would consider the claimant's condition to make it more likely that any subsequent injury would make the claimant totally and permanently disabled. The result now will be determined by the Commission's weighing of the evidence presented on the question of whether or not the preexisting condition constituted a hindrance or obstacle to employment for the particular claimant.

24. The Referee finds that Claimant’s pre-existing impairments were, in fact, a subjective hindrance to his employment. Claimant demonstrated a remarkable work ethic during

his lengthy employment with Simplot. He loved his job, and despite serious debilitating injuries, he always “cowboy’d up” as Dr. Collins phrased it, and returned to work. Claimant neither whined nor complained, but figured out ways to do his job that allowed him to work around his impairments, including changing jobs when he could bid into a position that was easier for him to perform. His co-workers assisted Claimant by dividing up projects in ways that allowed Claimant to perform the tasks that he could do more easily, but they by no means “carried him.” No matter the injury, or how lengthy or complicated his recovery, Claimant invariably asked his physicians to release him without restrictions so he could return to his job.

25. Before his last injury, Claimant had significantly reduced grip strength, a loss of dexterity in his right hand, was limited in the amount of overhead work he could perform, had sustained a substantial low back impairment, and, but for his grit and determination, would have had a forty-five-pound lifting restriction. As discussed by Dr. Collins in her report, moving Claimant from a heavy to a medium exertion level and accounting for some limitation on overhead work reduced the number of job titles for which Claimant had transferrable skills by approximately one-third. When Dr. Collins added in the loss of dexterity and grip strength in Claimant’s right hand, the number of job titles for which Claimant had transferrable skills was reduced by over one-half. Claimant may not have considered his impairments to be a particular obstacle or hindrance in his work for Simplot, and, in fact, Simplot may not have even considered Claimant impaired, since he returned to work without restrictions. As explained by the legislature in Idaho Code § 72-332(2), and the Idaho Court in *Archer*, neither Claimant’s personal attitude toward his impairments, nor Simplot’s attitude, implicit in Claimant’s continued employment, is dispositive when determining whether pre-existing impairments constitute an obstacle or hindrance to employment.

### ***Combined With***

26. To satisfy the ‘combined effects’ requirement in I.C. § 72-332(1), a claimant must show that *but for* the pre-existing impairments, he would not have been totally disabled. *Garcia v. J.R. Simplot Co.*, 115 Idaho 966, 772 P. 2d 1973 (1989). (Emphasis added). Although the “combined with” requirement of Idaho Code § 72-332 has generated a number of appellate decisions, most of the cases in which ISIF has been relieved of liability involve two common scenarios: 1) where the claimant was already totally disabled as an odd-lot worker prior to the last industrial injury; and 2) where the claimant became totally disabled solely as a result of the last industrial injury. The Court has carefully laid out a framework for analyzing these two common situations and determined that the “combined with” requirement has not been met in either situation.

27. ISIF’s position on the “combines with” requirement in this proceeding is that Claimant’s pre-existing degenerative spine condition just continued to degenerate until he was disabled, and the “minor event that occurred in July of 2001” was inconsequential. *See*, ISIF’s Post-Hearing Brief, p. 14.

28. The Referee is not persuaded by the ISIF arguments in support of its position any more than the Idaho Supreme Court was persuaded by the same argument when made by the claimant in *Bybee v. State, Indus. Special Indem. Fund*, 129 Idaho 76, 921 P.2d 1200 (1996). In *Bybee*, the Commission had determined that the claimant’s pre-existing injuries did not combine with her subsequent industrial accident because she was totally and permanently disabled as an odd-lot worker before her last accident. Bybee appealed the Commission’s determination that ISIF was not liable for a portion of her disability, arguing that the Commission misapplied *Garcia*.

Bybee appears to contend that this formulation of the Garcia rule is fatally flawed because it does not account for a case where an industrial injury accelerates preexisting impairments. According to Bybee, in such a case it cannot be said that total disability would not have occurred but for the industrial injury since it would have eventually resulted from the preexisting impairment alone.

Bybee's contentions are misguided. The Commission did not base its determination on any finding that Bybee would eventually become totally permanently disabled by operation of the preexisting impairments, but on the finding that she was, at the time of the injuries, already an odd-lot worker. Moreover, given the requirement in Section 72-332(1) that the preexisting impairment and subsequent injury combine to result in total disability, it is implicit in the Garcia test that the relevant point in time is the point at which the injury occurs. *Stated more specifically, the test is whether, but for the industrial injury, the worker would have been totally and permanently disabled immediately following the occurrence of the injury.* This statement of the rule encompasses both the combination scenario where each element contributes to the total disability, and the case where the subsequent injury accelerates and aggravates the preexisting impairment. For these reasons, we conclude that the Commission did not err in its application of Garcia in this case.

Id. at 801, P.2d at 1204 (*Emphasis added.*) ISIF makes the same argument in the case at bar—it was Claimant's pre-existing impairments that eventually led to his disability, and since he would have been disabled as a result of degenerative spine problems, his pre-existing impairments just continued, they did not combine with his last accident. That argument didn't fly in *Bybee*, and it doesn't fly here.

29. Applying the *Garcia* test as set out in *Bybee* to the facts of this case, it is clear that Claimant was not totally disabled before the July 2001 accident. On the day before the accident, he was working at the job he had held for many years. He was not working in a light duty position, and while he had worked out some self-accommodations, he received no accommodations from Simplot.

Neither can it be said that Claimant was totally disabled solely as a result of the last

accident. After the July 2001 accident, Claimant continued to work at his regular job up until his surgery in May 2002. After a lengthy recovery, Claimant returned to his time-of-injury work and continued in that position until March 9, 2004. When Claimant left the Don plant at the end of his shift on March 9, 2004, he fully expected to return to work there following his recovery.

30. While Claimant's lumbar spine problems that resulted from the July 2001 accident and subsequent surgeries contributed to Claimant's disability, it was only when the last accident and its sequelae *combined with* his pre-existing limitations that Claimant became totally disabled. As discussed by Dr. Collins in her report, there were job titles for which Claimant had transferrable skills when taking into account his restrictions on overhead work and loss of grip and dexterity in his right hand. Using the limitations imposed by Dr. Walker relating solely to his low back, there were job titles available that matched Claimant's transferrable skills. It was only when Dr. Collins combined the pre-existing limitations with the limitations from the last accident that there were no job titles matching Claimant's transferrable skills. No other vocational expert offered an opinion regarding Claimant's disability, and Dr. Collins' testimony and report are unchallenged. The Referee finds them well reasoned, factually accurate, and persuasive.

### ***CAREY APPORTIONMENT***

31. Having found that Claimant has proven both that his pre-existing impairments presented an obstacle or hindrance to re-employment, and that his pre-existing impairments combined with the impairment from his last accident to render him totally disabled, the Commission is left with the issue of apportioning liability for Claimant's total disability between Simplot and ISIF.

32. The *Carey* formula only applies when a preexisting impairment combines with

the current injury to create total and permanent disability. *Hamilton v. Ted Beamis Logging & Constr.*, 127 Idaho 221, 899 P.2d 434 (1995). Its purpose is to apportion the nonmedical disability factors between the employer and the ISIF. The formula comes from *Carey v. Clearwater County Road Department*, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984), in which the Idaho Supreme Court held:

[T]he appropriate solution to the problem of apportioning the nonmedical disability factors, in an odd-lot<sup>2</sup> case where the fund is involved, is to prorate the nonmedical portion of disability between the employer and the fund, in proportion to their respective percentages of responsibility for the physical impairment.

*Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 567, 130 P.3d 1097, 1105 (2006).

33. Claimant's pre-existing whole person impairments included 9% for the 1987 crush injury and the related 1991 surgery, 3% for the carpal tunnel syndrome and subsequent surgical release, and 25% for the 2000 cervical injury and subsequent fusion. Combining these three impairment ratings pursuant to the Combined Values Chart found at p. 604 of the *AMA Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed.), results in a combined pre-existing impairment of 34% of the whole person. Claimant's impairment from the July 2001 accident, as determined by Dr. Walker, and which is uncontroverted, was 22% of the whole person (31% for all four lumbar surgeries less the 9% already accounted for as pre-existing). Applying the formula, ISIF is liable for 60.71% of Claimant's disability benefits (34/56), and Simplot is liable for the remaining 39.29% of his benefits (22/56).

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<sup>2</sup> In *Carey*, the Claimant was deemed totally and permanently disabled as an odd-lot worker. Application of *Carey* is not limited to cases in which the claimant's total disability is a result of the application of the odd lot doctrine. At bottom, *Carey* is a method of allocating liability for non-medical factors in total perm cases. Whether a claimant is found totally disabled because of the application of the odd-lot doctrine, or because his or her impairments together with non-medical factors total 100%, has no bearing on the application of the *Carey* formula, so long as the statutory requirements of Idaho Code § 72-332 for ISIF liability are met.

**CONCLUSIONS OF LAW**

1. Claimant is totally and permanently disabled, as stipulated by the parties to the proceeding;
2. Claimant had pre-existing impairments that were manifest, as stipulated by the parties to the proceeding;
3. Claimant has carried his burden of establishing ISIF liability for a portion of his total disability benefits by proving that his pre-existing impairments were a subjective obstacle or hindrance to his re-employment, and that his pre-existing impairments combined with the impairment from his last accident to render him totally and permanently disabled; and
4. Pursuant to the *Carey* formula, ISIF is liable for 60.71% of Claimant's total disability benefits, and Simplot is liable for 39.29% of Claimant's total disability benefits.

**RECOMMENDATION**

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 6 day of December, 2007.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_  
Rinda Just, Referee

ATTEST:

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

**CERTIFICATE OF SERVICE**

I hereby certify that on the 14 day of December, 2007 a true and correct copy of FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION was served by regular United States Mail upon:

FRED J LEWIS  
PO BOX 1391  
POCATELLO ID 83204-1391

WES L SCRIVNER  
PO BOX 27  
BOISE ID 83707-0027

LAWRENCE E KIRKENDALL  
2995 N COLE RD STE 260  
BOISE ID 83704-5976

djb

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

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

DON V. MILLS, )  
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 Claimant, )  
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 v. )  
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 J.R. SIMPLOT COMPANY, )  
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 Self-Insured Employer, )  
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 and )  
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 STATE OF IDAHO, INDUSTRIAL )  
 SPECIAL INDEMNITY FUND, )  
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 Defendants. )  
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**IC 2001-022763**

**ORDER**

Filed: December 14, 2007

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her 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. Claimant is totally and permanently disabled, as stipulated by the parties to the proceeding;
2. Claimant had pre-existing impairments that were manifest, as stipulated by the parties to the proceeding;
3. Claimant has carried his burden of establishing ISIF liability for a portion of his total disability benefits by proving that his pre-existing impairments were a subjective obstacle or hindrance to his re-employment, and that his pre-existing impairments combined with the

impairment from his last accident to render him totally and permanently disabled;

4. Pursuant to the *Carey* formula, ISIF is liable for 60.71% of Claimant's total disability benefits, and Simplot is liable for 39.29% of Claimant's total disability benefits; and

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

DATED this 14 day of December, 2007.

INDUSTRIAL COMMISSION

\_\_\_\_\_  
James F. Kile, Chairman

/s/\_\_\_\_\_  
R.D. Maynard, Commissioner

/s/\_\_\_\_\_  
Thomas E. Limbaugh, Commissioner

ATTEST:

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

**CERTIFICATE OF SERVICE**

I hereby certify that on the 14 day of December, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

FRED J LEWIS  
PO BOX 1391  
POCATELLO ID 83204-1391

WES L SCRIVNER  
PO BOX 27  
BOISE ID 83707-0027

LAWRENCE E KIRKENDALL  
2995 N COLE RD STE 260  
BOISE ID 83704-5976

djb

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