

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KURT FELLOW,)	
)	
Claimant,)	IC 2001-520903
)	
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
)	AND RECOMMENDATION
IDAHO DEPARTMENT OF CORRECTIONS,)	
)	
Employer,)	
)	
and)	Filed March 4, 2008
)	
IDAHO STATE INSURANCE FUND,)	
)	
Surety,)	
)	
and)	
)	
STATE OF IDAHO, INDUSTRIAL)	
SPECIAL INDEMNITY FUND,)	
)	
Defendants.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on April 12, 2007. Claimant, Kurt Fellom, was present in person and represented by Robert Huntley and John Greenfield of Boise. Defendant Employer, Idaho Department of Corrections, and Defendant Surety, Idaho State Insurance Fund, were represented by Paul Augustine of Boise. Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF), was represented by Ken Mallea of Boise. The parties presented oral and documentary evidence. This matter was continued for the taking of post-

hearing depositions and the submission of briefs and came under advisement on August 7, 2007. It is now ready for decision.

ISSUES

The issues to be resolved are:

1. Whether Claimant should be required to attend retraining pursuant to Idaho Code § 72-450;
2. Whether Claimant is entitled to additional total temporary disability benefits and the extent thereof;
3. Whether Claimant is entitled to additional reasonable and necessary medical care pursuant to Idaho Code § 72-432 and the extent thereof;
4. The extent of Claimant's permanent partial impairment;
5. The extent of Claimant's permanent disability, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise;
6. Whether ISIF is liable pursuant to Idaho Code § 72-332;
7. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984);
8. Apportionment pursuant to Idaho Code § 72-406; and
9. Employer/Surety's entitlement to offset pursuant to Idaho Code § 72-223.

ARGUMENTS OF THE PARTIES

Claimant argues he is totally and permanently disabled in both the Boise labor market where Claimant was injured, and the Riggins labor markets where he resided at the time of the hearing, due to the combined effects of his November 27, 2001, industrial accident and his pre-existing right

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shoulder condition.

Employer and Surety assert that Boise is the appropriate labor market in which to evaluate Claimant's permanent disability. They assert Claimant is not totally and permanently disabled, but capable of regular gainful employment in both the Boise and Riggins labor markets. Employer and Surety also maintain that Claimant is entitled to no further medical care or temporary disability benefits because he failed to appear for a duly scheduled independent medical examination. Lastly, Employer/Surety assert entitlement to reimbursement and offset from Claimant's recovery against a third party.

ISIF maintains that Claimant is employable and not totally and permanently disabled. ISIF further argues that Claimant's pre-existing impairment was not a hindrance to his employability.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, John Janzen, Ed.D., C.R.C., Raymond Payton, Craig Mickelsen, James Roll, Jewel Owen, and Bill Jordan, C.R.C., C.D.M.S., taken at the April 12, 2007, hearing;
2. Claimant's Exhibits 1, 1a, 2 through 6, and 10 admitted at hearing;
3. Defendants' (Employer/Surety and ISIF) Joint Exhibits A through P admitted at hearing; and
4. The post-hearing deposition of Jeffrey Hessing, M.D., taken by Claimant on May 24, 2007.

All objections posed in Claimant's deposition of September 1, 2005 (Defendants' Exhibit J), are overruled.

After having fully considered all of the above evidence, and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant is six feet three inches tall and weighs 190 pounds. He is right hand dominant. Claimant was born in 1967 in Missouri and was raised in Riggins where he attended high school through the 11th grade. He finished his senior year and graduated from high school in Oklahoma in 1985. After high school Claimant worked driving locomotive engines in Colorado. In 1987, Claimant joined the U.S. Army where he became an Army Ranger and served in the Special Forces. He qualified as an expert marksman and trained recruits in weapons operation. While in the Special Forces, Claimant was injured when his parachute collapsed and he fell approximately 180 feet. He fractured his right clavicle, hip, both feet, and the transverse processes of L2 and L3. He also tore the long thoracic nerve in his right shoulder. He was hospitalized for several weeks and then recovered from these injuries sufficiently to complete his tour of duty and was honorably discharged with the rank of Specialist Four. His service disability was evaluated at 70%, with 60% compensable. He was later recalled to active duty and served approximately six months in combat in Desert Storm.

2. After his discharge, Claimant worked as a welder and fitter, hanging steel nationwide for approximately two years. In approximately 1992, Claimant attended college for one year at Boise State University where he studied pre-forestry and wildlife management. He subsequently attended Treasure Valley Community College where he studied range management for approximately one year. While attending college, Claimant lived in Emmett and worked breaking

horses and framing houses.

3. Claimant's right shoulder became increasingly symptomatic and limiting due to the thoracic nerve damage he sustained in the military which resulted in progressive weakness of his right shoulder musculature. In 1995, Claimant underwent tendon transfer surgery in an attempt to stabilize his hypermobile right scapula. This was unsuccessful. In 1997, VA orthopedist Howard Chansky, M.D., performed a rare scapulothoracic fusion of Claimant's right shoulder in which he stripped away the musculature between Claimant's right scapula and thoracic ribs, then used cadaver bone grafts together with wire cables and a metal plate to affix Claimant's right scapula to his thoracic ribs. The procedure was very successful in producing a clinical fusion and stabilizing Claimant's right shoulder. After a period of recovery, he was able to resume strenuous activities although he still experienced right shoulder pain which produced depression. Claimant was able to manage his pain and pain-induced depression with prescription medications.

4. Claimant owned and operated his own ranch near Emmett where he broke and trained horses. He cut, baled, and hand-stacked approximately 160 tons of hay each year. He also worked for several years during the summer and fall guiding big game hunts on horseback for McKay Bar Corporation on the main Salmon River. Claimant later ran his own outfitting and guiding company. He also worked for Gem County managing the county's fair and rodeo.

5. In early 1997, Claimant commenced working for Defendant Employer as a correctional officer at its facility near Boise. Claimant performed his duties well and became proficient in using the Employer's computer system. He eventually supervised 12 other employees. Claimant also became part of Employer's special response team and received merit citations for forcibly restraining rioting inmates on a number of occasions. On one such occasion an inmate

attacked Claimant, striking and lacerating Claimant's forehead. Claimant subdued the inmate by lifting him up and slamming him to the floor. Claimant was subsequently promoted to the position of transport officer and transported dangerous prisoners between detention facilities throughout the state.

6. On November 27, 2001, Claimant was preparing to transport prisoners when he exited the sally port area at Employer's Boise facility, carrying his shotgun in his right hand and his partner's weapon and ammunition in his left hand. Claimant slipped on ice and fell to the pavement. In trying to protect the firearms, he landed on his right elbow and shoulder. He experienced immediate severe right shoulder pain and notified his supervisor. Claimant completed his transport duties that day with difficulty and sought emergency medical care that evening. He was 34 years old and earning \$12.98 per hour at the time of the accident.

7. Claimant was treated by orthopedist George Nicola, M.D., who concluded that the fall had damaged Claimant's scapulothoracic hardware causing it to become symptomatic. On January 16, 2002, Dr. Nicola surgically removed the wire cables affixing Claimant's right scapula to his thoracic ribs. One cable could not be completely removed because it had migrated deeply into a thoracic rib. Claimant's right shoulder pain did not improve following surgery and within months right scapula winging was observed. It became apparent that his scapulothoracic fusion had been disrupted and Claimant suffered scapulothoracic pseudoarthrosis.

8. Dr. Chansky was not apprised of Claimant's condition prior to the hardware removal. He later examined Claimant. Some of the wire cables affixed during the prior fusion had partially migrated into the bone of Claimant's thoracic ribs and once removed, left the ribs too fragile to tolerate the focal stress of new wire cables. Dr. Chansky opined that a scapulothoracic fusion could

not be redone.

9. In approximately April 2002, Claimant moved to Riggins.

10. On April 16, 2002, Dr. Nicola examined Claimant, noted that his right shoulder continued to be very symptomatic, and recommended a Botox injection. Dr. Nicola opined Claimant was disabled from the date of his injury through June 1, 2002. Claimant ceased communication with Dr. Nicola thereafter because Claimant's VA doctor, Christopher Nielson, M.D., discouraged any Botox injection.

11. In June 2002, Claimant met with an Industrial Commission rehabilitation consultant at his home in Riggins. Thereafter the counselor attempted numerous times to contact Claimant both telephonically and via written correspondence. During this time Claimant drove to Alaska. It appears Claimant did not receive, and undisputedly did not respond to, the consultant's messages.

12. From approximately May 27 through August 20, 2003, Claimant was employed on a Forest Service trail maintenance crew. He experienced increasing right shoulder pain and consulted his VA doctors who advised him to cease trail maintenance work immediately due to his right shoulder condition.

13. Between 2002 and 2007, Claimant performed a number of odd-jobs in the Riggins area. He shod horses for several days earning \$40 per horse; raised, trained, and sold three bear and cougar hounds for a total of \$2,300; assisted local outfitters in guiding spring bear and winter cougar hunters for 35 to 40 days; and assisted a local construction company on at least six occasions for \$50 per day cleaning tools, and at least in one instance screeding a concrete slab and perhaps using a power trowel.

14. Claimant gave the following testimony in his July 24, 2006, deposition:

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Q. Aside from the work with the Forest Service that you've just told us about, have you done any other kind of employment?

A. No.

Q. Have you worked on your own account?

A. No.

Q. Have you maintained any type of work activity for income?

A. No.

Defendants' Exhibit P (Fellom Deposition July 24, 2006, p. 57, L. 19 through p. 58, L. 2).

15. At hearing, Claimant acknowledged that he raises and trains bear and cougar hounds. In May 2006, Claimant helped guide a professional hunter on a bear hunt. The professional hunter was unable to keep up with Claimant as he followed the hounds. Claimant has guided for a least six paying clients for an outfitter near Riggins. In December 2006 and January 2007, Claimant used a pickup and snowmobile and ran his hounds approximately five days per week helping guide cougar hunters in the Riggins area.

16. Claimant discussed with his VA rehabilitation counselor the possibility of training for and operating a micro-tannery and/or taxidermy business in Riggins. Claimant was unable to obtain VA support for his idea.

17. At the time of hearing, Claimant continued to reside in Riggins. He receives a veteran's disability pension of approximately \$1,040 per month. Claimant presently cares for three horses, three mules, and from four to nine bear and cougar hounds on property he rents near Riggins for \$200 per month. When pursuing game, he typically runs two of his own hounds at a time so he can leash them and pull them away from a tree with only his left arm. He has bartered the use of his hounds to local outfitters in exchange for a snowmobile engine, gas, and other commodities.

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Claimant runs hounds as much as 100 days each year and maintains a current license as a hunting guide through the Idaho Outfitters & Guides Licensing Board. Claimant rides a horse on a regular basis. He switches from horseback riding to walking throughout the day when the jarring of his right shoulder becomes too painful. He is capable of horseback riding and walking 12 miles or more into the backcountry. He loads his pack horse or mule by hanging the empty pack bags on the animal and then loading one item at a time into the pack bags. He uses a break-away tied to the back of his saddle to lead his pack string. Claimant hikes in mountainous terrain regularly and carries his gear in a fanny pack. He may also carry a backpack using only the left shoulder strap. Claimant rides a 4-wheeler with a right thumb throttle and operates a snowmobile on occasion. He has developed greater proficiency with his left hand. His right shoulder pain precludes him from shooting a firearm right-handed. However, he has re-taught himself to shoot left-handed—a skill he was required to master as an expert marksman while in the service.

18. Claimant has chronic pain in his right shoulder between his spine and scapula, which increases with movement, and may extend around his torso to the right pectoral area. Movement of his right shoulder produces traction and bone-on-bone contact between his right scapula and thoracic ribs. Claimant can raise his right arm overhead, but only with significant pain. He cannot sustain overhead reaching. He experiences stinging burning pain in his right shoulder and right pectoral area if he leans against the back of a chair too hard. Claimant has discomfort washing his hair or brushing his teeth with his right hand. He takes prescription hydrocodone and Motrin several times daily. He also takes prescription antidepressants. Claimant only sleeps approximately four hours per night with the aid of prescription sleep medication.

19. Having met and observed Claimant at hearing and carefully reviewed the evidence,

the Referee finds that Claimant is extremely determined, resourceful, and ingenious in devising compensatory strategies to lessen the limitations resulting from his industrial injury. However Claimant has not always been forthright in disclosing the full extent of his post-accident activities. In this regard he is not an entirely credible witness.

DISCUSSION AND FURTHER FINDINGS

20. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1996).

21. **Retraining.** The first issue is whether Claimant should be required to attend retraining pursuant to Idaho Code § 72-450. Claimant initially expressed interest in completing taxidermy and micro-tannery training at the Montana School of Taxidermy and thereafter establishing his own taxidermy business in Riggins. Employer/Surety at one time encouraged this retraining, although there was some question whether Claimant could perform taxidermy and micro-tannery work given his physical restrictions. Dr. Waters indicated that Claimant could perform the work of a taxidermist using his uninjured left arm for heavy lifting and his right arm merely as a "helper hand." At hearing Claimant's counsel asserted that Claimant was willing to be retrained, but even with retraining in taxidermy, he would not be able to obtain gainful employment or make worthwhile earnings. No other retraining has been identified.

22. Idaho Code § 72-450 expressly applies when a claimant "is receptive to and in need of retraining." Inasmuch as Claimant is no longer seeking retraining and believes retraining in taxidermy would not result in adequate gainful employment, it appears retraining would not be

worthwhile. The Referee finds Claimant is not entitled to retraining.

23. **Temporary disability benefits.** The next issue is whether Claimant is entitled to additional temporary disability benefits and the extent thereof. Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees “during the period of recovery.” The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980). Furthermore:

[O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986) (emphasis in original).

24. Defendants allege Claimant is precluded from receiving additional temporary disability benefits because he failed to appear for a July 22, 2002, medical examination.

25. On or about May 31, 2002, Surety sent Claimant a letter directing him to attend a medical evaluation scheduled July 22, 2002, providing him a mileage reimbursement form, and advising him that failure to attend could result in termination of benefits and liability for no show fees. Claimant did not attend the evaluation. Claimant does not dispute receiving the notice and admitted that he made no effort to inquire about the purpose of the medical evaluation or to notify Surety that he would not attend. Claimant did not communicate further with Surety until he filed his

Complaint herein.

26. Idaho Code § 72-434 provides:

If an injured employee unreasonably fails to submit to or in any way obstructs an examination by a physician or surgeon designated by the commission or the employer, the injured employee's right to take or prosecute any proceedings under this law shall be suspended until such failure or obstruction ceases, and no compensation shall be payable for the period during which such failure or obstruction continues.

27. Claimant testified at hearing that he did not attend the July 22, 2002, medical evaluation because he did not want to receive a Botox injection, as had been recommended by Dr. Nicola in April 2002. The July 2002 medical examination was to be an evaluation and did not contemplate any Botox injection or any other specific treatment.

28. Claimant failed to communicate to Surety any concerns he may have had about the purpose of the scheduled medical evaluation. Surety's May 31, 2002, letter provided a toll free phone number and expressly encouraged Claimant to call or contact Surety's representative with any questions. Claimant was unreasonable in failing to notify Surety that he would not attend the scheduled evaluation. Surety appropriately terminated his temporary disability benefits pursuant to Idaho Code § 72-434. Claimant has not proven his entitlement to additional temporary disability benefits after July 22, 2002.

29. Dr. Nicola opined Claimant was disabled from the date of his accident through June 1, 2002. Surety paid Claimant temporary disability benefits through this date. There is no indication Claimant was released to work and that Employer offered suitable work or demonstrated that suitable work was available between June 1 and July 21, 2002. There is no indication that temporary disability benefits were paid from June 2, 2002, through July 21, 2002. Claimant was not found medically stable until September 1, 2005, when he was examined by Dr. O'Brien.

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30. Claimant is entitled to additional total temporary disability benefits from June 2, 2002, through July 21, 2002. Claimant is not entitled to any temporary disability benefits after July 21, 2002.

31. **Medical care.** The next issue is whether Claimant is entitled to additional medical benefits pursuant to Idaho Code § 72-432 and the extent thereof. Claimant last received medical treatment provided by Surety through Dr. Nicola on April 19, 2002. Surety provided no further medical treatment after that time; however, Claimant thereafter received extensive medical care through his VA physicians, including prescription pain medications and anti-depressants.

32. As noted above, Claimant's unreasonable failure to attend a duly noticed medical evaluation on July 22, 2002, precludes his entitlement to compensation during that period pursuant to Idaho Code § 72-434. Compensation, as defined by Idaho Code § 72-102(7), includes both income and medical benefits. Claimant has not proven his entitlement to additional medical benefits.

33. **Impairment.** "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

34. On October 19, 2005, orthopedist Stanley Waters, M.D., rated Claimant's permanent impairment at 10% of the whole person due solely to his November 2001 accident. Significantly, Dr. Waters examined Claimant and found good upper arm and forearm muscle symmetry and no difference in the measurements of the circumference of Claimant's upper arms or forearms.

35. On March 23, 2007, orthopedist Jeffrey Hessing, M.D., rated Claimant's permanent partial impairment due to his right shoulder at 44% of the upper extremity which equates to 26% of the whole person according to Table 16-3 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Hessing attributed 10% impairment of the upper extremity (which equates to 6% whole person impairment) to Claimant's pre-existing scapulothoracic fusion and the remaining 34% impairment of the upper extremity (which equates to 20% whole person impairment) to Claimant's November 2001, industrial accident.

36. On September 1, 2005, and June 28, 2006, neurologist Michael O'Brien, M.D., rated Claimant's overall permanent impairment at 50% of the upper extremity which equates to 30% of the whole person, and attributed 25% of that rating, which equals 7.5%, to Claimant's pre-existing right shoulder condition, and the balance of 22.5% to Claimant's industrial accident.

37. The ratings offered by Dr. O'Brien and Dr. Hessing are very similar. Dr. Hessing's rating is more persuasive as supported by a more detailed explanation of his rating rationale.

38. Although the record establishes that Claimant suffered various other severe injuries, including fractured feet, pelvis, ribs, and a low back injury, he does not assert, and the record does not contain, impairment ratings for any of these other conditions.

39. Claimant has proven he suffers permanent impairment of 26% of the whole person, 20% impairment due to his 2001 industrial accident and 6% impairment due to his pre-existing right

shoulder condition.

40. **Permanent Disability.** "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant.

41. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." Graybill v. Swift & Company, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

42. Presumptive total permanent disability. Claimant alleges he is presumptively totally

and permanently disabled pursuant to Idaho Code § 72-407. Section 72-407 enumerates various losses as presumptively totally and permanently disabling, including the loss of both eyes, both hands, both feet, one hand and one foot, and complete paralysis of both legs or both arms. Claimant notes that the statutory list is not exclusive and asserts his right shoulder injury also qualifies. While Claimant's right shoulder injury is severe, his condition does not rise to the same level of disability as the loss of both hands, feet, or eyes. The Referee is not persuaded that Claimant is presumptively totally and permanently disabled pursuant to Idaho Code § 72-407.

43. Failing presumptive statutory total disability, there are yet two methods by which a claimant can demonstrate total and permanent disability. First, a claimant may prove total and permanent disability if his medical impairment together with pertinent nonmedical factors totals 100%. If the claimant fails to prove 100% disability, he can still demonstrate total disability by fitting within the definition of an odd-lot worker. Boley v. State, Industrial Special Indemnity Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997). Claimant herein asserts he is 100% disabled, or alternatively, an odd-lot worker. To evaluate Claimant's permanent disability several items merit examination including the relevant labor market, physical restrictions resulting from his permanent impairment, and his potential employment opportunities as identified by vocational rehabilitation experts.

44. Relevant labor market. A threshold inquiry is the appropriate labor market in which Claimant's disability must be evaluated. In Davaz v. Priest River Glass Company, Inc., 125 Idaho 333, 870 P.2d 1292 (1994), the Idaho Supreme Court interpreted the phrase "reasonable geographic area" contained in Idaho Code § 72-430(1) as the area surrounding the claimant's home at the time of the hearing. However, the Court noted there may be instances where a market other than the

claimant's residence at the time of the hearing is relevant in making an Idaho Code § 72-430(1) inquiry. In Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 565 P.2d 1360 (1977), the Court held that the Commission may consider the labor market within a reasonable distance of the claimant's home both at the time of the injury and the time of the hearing to determine a claimant's post-injury employability. The Court declared: "a claimant should not be permitted to achieve permanent disability by changing his place of residence." Lyons, 98 Idaho at 407 n. 3, 565 P.2d at 1364 n. 3.

45. In the present case, Claimant resided in Emmett and worked in the Boise labor market at the time of his 2001 industrial accident. In April 2002, he moved to Riggins—a smaller labor market. Under the circumstances of this case, it is appropriate to look at both the Boise and Riggins labor markets in evaluating Claimant's disability.

46. Physical restrictions. Claimant's permanent physical restrictions from his injuries have been evaluated by several physicians. Dr. Waters provided the following permanent physical restrictions on Claimant's activities due to his 2001 industrial accident:

He clearly would need to avoid any overhead activities with the upper extremity. He can not [sic] be lifting more than 10 lbs. with the right upper extremity. This lifting of 10 lbs. should not be in any continuous or repetitive manner.

Defendants' Exhibit C, p. 5. Dr. Waters did not specifically consider whether Claimant's pre-existing condition might warrant any additional restrictions.

47. Dr. Hessing considered Claimant's pre-existing and industrial injury and explained the function of Claimant's right shoulder, including the mechanism of his right shoulder pain. Dr. Hessing testified that Claimant would suffer significant shoulder pain in using his right arm. He opined Claimant cannot perform any repetitive motion work with his right arm regardless of weight,

and that Claimant can perform only very sedentary type work with his right arm at table-top level with minimal reaching and lifting. The Referee finds the restrictions imposed by Dr. Hessing thoroughly explained, comprehensive, and persuasive. Dr. Hessing also testified that Claimant's prescription medications and minimal sleep—approximately four hours per night—would impair his ability to think and function.

48. There are no medical restrictions in the record for any other condition. Claimant has no restrictions pertaining to his left arm.

49. Employment opportunities. John Janzen, Claimant's vocational rehabilitation expert, opined that Claimant is totally and permanently disabled from gainful employment in both the Boise and Riggins labor markets. He opined that Claimant's prior work experience involved heavy physical labor which he can no longer perform, and that Claimant does not have transferable skills to qualify him for competitive employment consistent with his physical limitations. Janzen testified Claimant would need formal training to upgrade his academic skills prior to pursuing a college degree but that Claimant's pain, prescription medications, and pain-disturbed sleep patterns would greatly hinder him from concentrating and succeeding in academic work. Moreover, Janzen noted that Claimant had no interest in pursuing a college degree. Janzen opined that the occupations for which Claimant had expressed interest in retraining, including taxidermy, fly-tying, and saddle making, would either be incompatible with Claimant's physical restrictions or not produce adequate revenue.

50. Janzen produced a written report and testified live at hearing about Claimant's employability. Significantly, all of Janzen's opinions, including his live testimony at hearing, preceded Claimant's hearing testimony. Janzen did not remain at hearing after he testified and thus

did not have the benefit of Claimant's hearing testimony. Only after Janzen left did Claimant testify of a number of his post-accident physical activities which collectively help define his physical capacity and activity level. Similarly, prior to testifying at hearing Janzen did not review Chad Mohr's deposition nor Claimant's July 24, 2006, deposition which provide additional indications of Claimant's post-accident capabilities. Janzen acknowledged at hearing that he had not reviewed any accounts of Claimant performing any work, riding horses, hunting, or engaging in any physical activity after his industrial accident. Janzen testified that even assuming Claimant could saddle a horse, raise and train hunting dogs, and drive a pickup on steep mountain roads, Janzen's opinion would not change because he did not know the degree of sustained activity which Claimant had performed. Transcript, p. 65, Ll. 3-6, and p. 66, Ll. 1-4.

51. Janzen's opinion is based, at least in part, on misinformation. Janzen reported that Claimant advised him he could not use his right arm even for driving a car. However, Claimant acknowledged at hearing that he is able to use his right arm to shift gears in his pickup, occasionally drive a 4-wheeler with a right thumb throttle, ride a snowmobile, and shoe horses from the hip position. Janzen testified that Claimant advised him he essentially could not ride a horse due to his right shoulder pain. Claimant acknowledged at hearing that he can and does ride a horse regularly and can walk and ride a horse most of the day into the backcountry. Janzen testified that Claimant reported he could not load supplies on a horse. Claimant testified that he modifies the usual loading process by placing empty pack bags on the horse and then loading items into the pack bags one at a time. Janzen reported that Claimant could not perform sustained physical activity and that Claimant did not advise him of his hound training activities. Claimant acknowledged at hearing that during December 2006 and January 2007, he trained and ran his bear and cougar hounds approximately five

days per week for several hours each day, which included following the hounds while they pursued game in steep mountainous terrain. Janzen testified that Claimant reported he had tried on several occasions but could no longer tolerate working as a guide. Claimant acknowledged that he has guided at least six bear or cougar hunters and that he has developed compensatory strategies for loading and leading pack horses and mules, and now shoots a rifle left-handed. Janzen concluded in his report that Claimant's shoulder pain forced him to lead an inactive lifestyle. Claimant acknowledged that he runs his bear and cougar hounds approximately 100 days every year.

52. Bill Jordan, Defendants' vocational expert, opined that Claimant is not totally and permanently disabled in either the Boise or Riggins labor markets. Jordan testified of actual openings in the Boise labor market for flaggers, telemarketers, special service associates, control room operators, control room dispatchers, sales representatives, sporting goods sales associates, security shift supervisors, security officers, security guards, customer care representatives, call service representatives, and collection representatives. He opined that Claimant could perform these jobs given his current skills and physical restrictions. Dr. Waters also approved these positions for Claimant.

53. Jordan testified that in the Riggins area there were jobs available for flaggers, fire lookouts, and motel front desk/night auditors which Claimant could perform. Jordan contacted possible employers in the Riggins area and found several actual openings for bartenders, cooks, and motel clerks. Jordan testified that the U.S. Forest Service provided non-competitive placement for veterans with over 30% disability and Claimant would have an excellent chance to be employed.

54. Jordan researched taxidermy schools and proposed a taxidermy training plan for Claimant which Dr. Waters approved. Jordan noted Claimant's hound training activities and

testified that hound training is medium duty work. Jordan testified that in his dealings with Claimant, he observed no difficulty with concentration. Jordan concluded there are jobs regularly and continuously available in Boise and in Riggins which Claimant could perform given his physical restrictions and transferable skills.

55. Jordan opined that assuming Dr. Waters' 10% whole person permanent impairment rating and restrictions; Claimant suffers a permanent partial disability of 30% inclusive of impairment in the Boise area labor market. Claimant argues that Jordan misunderstood Dr. Waters' restrictions in that Jordan believed Claimant could use his right arm for repetitive lifting up to 10 pounds, whereas Dr. Waters restricted Claimant entirely from any repetitive lifting with his right arm and from lifting more than 10 pounds occasionally. Jordan's restatement of Dr. Waters' restrictions is reasonable and is reiterated in Jordan's March 5, 2007, letter to which Dr. Waters took no exception. Claimant also asserts that the restrictions imposed by Dr. Waters do not consider Claimant's pre-existing right shoulder condition.

56. Jordan opined that assuming Dr. O'Brien's 30% whole person impairment rating and a complete restriction against using his right arm, Claimant suffers a permanent partial disability of 52%, inclusive of his impairment in the Boise area labor market. While no physician has entirely restricted Claimant from using his right arm, Dr. Hessing's opinion comes closest by essentially limiting Claimant to only very sedentary type work with his right arm at table-top level with minimal reaching and lifting. As noted above, Dr. Hessing's opinion of Claimant's work restrictions is comprehensive and the most persuasive.

57. Dr. Hessing testified Claimant could not work as a bartender because of the repetitive reaching required, or as a school bus driver because of his prescription pain medications. Dr.

Hessing also opined that Claimant could probably not operate a snowmobile over rough terrain for prolonged lengths of time and it would not be a good idea for Claimant to operate a pickup on steep mountain roads given his right shoulder condition and his prescription hydrocodone regimen and sleep deprivation.

58. Claimant asserts that per Dr. Hessing, his mental capacity is significantly compromised due to his prescription medications and sleep deprivation. Claimant argues that nearly all of the jobs Jordan identified are beyond Claimant's compromised mental capacity. While Claimant may not be a viable candidate for some positions, such as school bus driver or other commercial driving positions, or for demanding academic studies, because of his prescription medication regime, the record clearly establishes that Claimant's mental capacities are not so compromised as to prevent him from hiking, snowmobiling, or driving hunters around the narrow steep roads of the mountains around Riggins; navigating the steep narrow road to his home; driving to Boise or Alaska; or performing any of his routine hound hunting, backcountry camping, horsehoeing, or other activities. The record suggests that Claimant has adequate command of his mental faculties for these activities in spite of his prescription medication regime.

59. Janzen reviewed Bill Jordan's report and specifically commented on several positions identified as potential employment options. Janzen testified that a security guard position was not compatible with Claimant's limitations because of the hands on requirements and that dispatching was not compatible because Claimant does not have adequate computer skills. Janzen testified that a telemarketer position would not be viable because it requires computer skills while Claimant has only "hunt and peck" keyboarding skills. Lastly, Janzen opined that a flagger position which he recently reviewed in Wyoming would require putting out barrels and cones which Janzen believed

was beyond Claimant's ability, and that a hardware salesperson position was not compatible based on Janzen's consultation with two hardware stores in Grangeville which would require stocking shelves and helping customers remove items from overhead shelves. Janzen provided no testimony as to hardware salesperson requirements in the Boise area or flagger positions in the Boise or Riggins areas.

60. Claimant alleges that, in approving a number of employment opportunities, Jordan and Dr. Waters ignored the physical restrictions which Dr. Waters himself placed upon Claimant. However, Claimant does not explain why a right arm lifting restriction precludes him from lifting with his uninjured left arm. The record contains absolutely no evidence of any restrictions pertaining to Claimant's use of his left arm. Significantly, Janzen's opinion does not address why Claimant at six feet three inches tall and weighing 190 pounds, who was physically capable of bodily picking up a rioting prison inmate with two hands and slamming him to the floor, and who admittedly now routinely pulls two cougar and bear hounds away from a tree with his left hand, could not manipulate cones and barrels, or lift 20 pounds to stock shelves with his left hand alone.

61. Janzen did not specifically comment on, let alone refute, Jordan's report that Claimant could also perform the following positions: sporting goods retail salesperson, receptionist, bill collector, meter reader, apartment manager, motel clerk, motor vehicle inspector, and business services sales agent.

62. The Referee finds Jordan's ultimate conclusions arise from a more thorough understanding of Claimant's demonstrated abilities and are generally more persuasive than Janzen's conclusions.

63. Claimant was earning \$12.98 per hour at the time of his industrial accident. Based on

Claimant's total impairment rating of 26% of the whole person, his permanent work restrictions and inability to use his dominant right arm for any overhead activity, any repetitive activity, or occasional lifting of more than ten pounds, and considering his non-medical factors, including his age, high school education with approximately two years of college, extremely limited transferable skills in sedentary and light occupations, his prescription medication regime precluding commercial driving and academic training, and his inability to return to his previous rigorous occupations, Claimant's ability to engage in gainful activity has been significantly reduced. The Referee concludes Claimant has established a permanent disability of 55% of the whole person, inclusive of his permanent impairment.

64. Odd-lot. A claimant who is not 100% permanently disabled may still prove total permanent disability by establishing he is an odd-lot worker. 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. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market - absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status rests upon the claimant. Dumaw v. J. L. Norton Logging, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990).

65. 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 has attempted other types of employment without success;

2. By showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or
3. By showing that any efforts to find suitable work would be futile.

Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

66. In the present case, Claimant has testified of one failed work attempt on a Forest Service trail crew, since his 2001 industrial injury. This lone attempt does not sufficiently prove that he attempted other types of employment without success. Claimant has not presented evidence of a serious but unsuccessful work search. He has presented Janzen's expert opinion that Claimant is totally disabled, thus inferring it would be futile for Claimant to look for work. As noted above, Janzen's opinion in this regard is not persuasive. Even assuming that Claimant had established a prima facie odd-lot case under the Lethrud test, Defendants have persuasively borne their burden of showing there are actual jobs within both the Boise and the Riggins labor markets which Claimant is able to perform or for which he can be trained and in which Claimant has a reasonable opportunity to be employed. Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 407, 565 P.2d 1360, 1364 (1977). Claimant has not established that he is an odd-lot worker.

67. **ISIF Liability.** Inasmuch as Claimant has not proven he is totally and permanently disabled, ISIF bears no liability pursuant to Idaho Code § 72-332.

68. **Carey Apportionment.** The issue of apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984), is moot.

69. **Idaho Code 72-406 apportionment.** Idaho Code § 72-406 (1) provides that in cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a pre-existing physical

impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

70. Claimant herein was highly functional after his scapulothoracic fusion and capable of many strenuous physical activities including breaking horses, hand-stacking hay, and forcibly subduing rioting prison inmates. He did not suffer any appreciable disability beyond his permanent impairment prior to his 2001 industrial accident. Claimant's permanent disability should be apportioned to his pre-existing condition only to the extent of his 6% pre-existing permanent physical impairment.

71. **Offset.** The final issue is Employer/Surety's entitlement to offset. Idaho Code § 72-223 provides that an employer having paid compensation or having become liable for compensation, is subrogated to the rights of the employee, to recover against any liable third party to the extent of the employer's compensation liability, and that the employer shall have deducted from its subrogated portion a proportionate share of the costs and attorney's fees incurred by the employee in recovering from a third party. Idaho Code § 72-223(5) also provides in part:

If the amount recovered from the third party exceeds the amount of the subrogated portion payable to the employer for past compensation benefits paid, then to the extent the employer has a future subrogated interest in that portion of the third party recovery paid to the employee, the employer shall receive a credit against its future liability for compensation benefits. Such credit shall apply as future compensation benefits become payable, and the employer shall reimburse the employee for the proportionate share of attorney's fees and costs paid by the employee in obtaining that portion of the third party recovery corresponding to the credit claimed.

72. After his 2001 industrial accident, Claimant sued a third party, Corrections Corporation of America, for negligently failing to de-ice the sally port where Claimant fell and was injured. Corrections Corporation of America settled the suit with a \$100,000 payment to Claimant. Claimant testified he paid his attorney a one-third contingency fee.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 26

73. Surety has paid Claimant benefits totaling \$32,828.02 to date, including a 10% permanent partial impairment rating. Employer/Surety allege entitlement to reimbursement of this amount less one-third attorney fees. Employer/Surety also allege entitlement to credit of \$67,171.98 (\$100,000 - \$32,828.02) less one-third attorney fees for benefits owed to Claimant hereafter.

74. Pursuant to Idaho Code § 72-223, Defendants are entitled to reimbursement of \$21,885.35 (\$32,828.02 less one-third attorney fees) for benefits already paid, and to credit of \$44,781.32 (\$67,171.98 less one-third attorney fees) against any additional benefits owed.

CONCLUSIONS OF LAW

1. Claimant is not entitled to retraining pursuant to Idaho Code 72-450.
2. Claimant is entitled to total temporary disability benefits from June 2, 2002, through July 21, 2002. Claimant is not entitled to temporary disability benefits after July 21, 2002.
3. Claimant is not presently entitled to additional medical benefits.
4. Claimant has proven he suffers permanent partial impairment of 20% of the whole person due to his 2001 industrial accident and 6% due to his preexisting right shoulder condition.
5. Claimant has proven he suffers a permanent partial disability of 55%, inclusive of his permanent impairment. Claimant has not proven he is totally and permanently disabled.
6. Defendant ISIF is not liable pursuant to Idaho Code § 72-332.
7. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is moot.
8. Claimant's permanent partial disability should be apportioned to his pre-existing right shoulder condition pursuant to Idaho Code § 72-406 only to the extent of his 6% pre-existing permanent physical impairment.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 2008, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

ROBERT C HUNTLEY
PO BOX 2188
BOISE ID 83701

JOHN F GREENFIELD
PO BOX 854
BOISE ID 83701

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701

KENNETH L MALLEA
PO BOX 857
MERIDIAN ID 83680

ka

/s/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KURT FELLOW,)
)
 Claimant,) **IC 2001-520903**
)
 v.) **ORDER**
)
 IDAHO DEPARTMENT OF CORRECTIONS,)
)
 Employer,)
)
 and)
)
 IDAHO STATE INSURANCE FUND,)
)
 Surety,) Filed March 4, 2008
)
 and)
)
 STATE OF IDAHO, INDUSTRIAL)
 SPECIAL INDEMNITY FUND,)
)
 Defendants.)
 _____)

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. Claimant is not entitled to retraining pursuant to Idaho Code 72-450.
2. Claimant is entitled to total temporary disability benefits from June 2, 2002,

through July 21, 2002. Claimant is not entitled to temporary disability benefits after July 21, 2002.

3. Claimant is not presently entitled to additional medical benefits.

4. Claimant has proven he suffers permanent partial impairment of 20% of the whole person due to his 2001 industrial accident and 6% due to his preexisting right shoulder condition.

5. Claimant has proven he suffers a permanent partial disability of 55%, inclusive of his permanent impairment. Claimant has not proven he is totally and permanently disabled.

6. Defendant ISIF is not liable pursuant to Idaho Code § 72-332.

7. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is moot.

8. Claimant's permanent partial disability should be apportioned to his pre-existing right shoulder condition pursuant to Idaho Code § 72-406 only to the extent of his 6% pre-existing permanent physical impairment.

9. Pursuant to Idaho Code § 72-223, Defendants Employer/Surety are entitled to reimbursement of \$21,885.35 from Claimant for benefits already paid, and to credit of \$44,781.32 against any additional benefits owed.

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

DATED this 4th day of March, 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 4th day of March, 2007, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

ROBERT C HUNTLEY
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ka

/s/

ORDER - 3