

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant sustained an injury as the result of an accident that occurred during the course and scope of employment;
2. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury or condition;
3. Whether and to what extent Claimant is entitled to permanent partial disability and attorney fees;
4. Whether Claimant is totally and permanently disabled, either because permanent impairment, together with nonmedical factors, totals 100%, or because he is an odd-lot worker;
5. Whether apportionment for a pre-existing or subsequent condition pursuant to Idaho Code § 72-406 is appropriate;
6. Whether Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF) is liable under Idaho Code § 72-332;
7. Apportionment under the formula set forth in *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984), if ISIF is found liable.

CONTENTIONS OF THE PARTIES

Claimant contends that he injured his back as the result of a workplace accident on August 15, 2003.¹ This resulted in a posterolateral disc protrusion at L4-5 that was ultimately treated by surgery. Claimant suffers from chronic pain and lack of balance as a result of the injury, and this has rendered him totally and permanently disabled, as it has impacted his ability to find and maintain employment.

¹ There are discrepancies regarding the date of injury in the parties' briefs, but the medical records establish the date of injury as August 15, 2003.

Defendants Employer and Surety concede that there was an accident and injury and have already paid for Claimant's medical care and permanent partial impairment benefits. However, Employer and Surety dispute that there is permanent disability in excess of impairment. Employer and Surety argue that Claimant has not met his burden of proof with regard to total and permanent disability.

Defendant ISIF likewise concedes that there was an accident and injury but argues that Claimant has failed to show that he is permanently and totally disabled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The hearing testimony of Dan Brownell, Ken Clyatt, William C. Jordan, and Nancy Collins;
2. Exhibits 1-23 and Exhibit 25; and
3. The Industrial Commission legal file pertaining to this claim.

Claimant was not present at hearing, but he testified at two depositions. The transcripts of those depositions were admitted into the record as Exhibits 8 and 21.

After having considered all the above evidence and the briefs of the parties, the Commission adopts the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Claimant was born on April 29, 1953, and was 55 years old at the time of hearing. He attended school through eleventh grade and obtained a GED while serving in the United States Army. He attended some college and performed well academically, but he did not earn a degree.

2. Claimant has held a variety of jobs. His employment history includes unskilled, semi-skilled, and skilled work. Most of his jobs involved light or medium work. Some of his jobs involved heavy labor. Claimant is proficient in computer programs such as Microsoft Word, Excel, and Windows.

3. In 2002, Claimant was disqualified as a truck driver by Michael J. Carraher, M.D., who believed that Claimant's degenerative disc disease would be aggravated by continued work as a truck driver. Claimant first started experiencing back pain in 1993.

4. In August 2003, Claimant was hired by Employer as a saw cutter. He earned \$6.00 per hour. On August 15, 2003, while Claimant was working, a stack of boards fell, hit Claimant in the back, and knocked him down.

5. Following the accident, Claimant was treated by medical personnel for minor injuries to his knee and hand. Within days of the accident, he began to experience back pain, which increased over the course of several days. On August 23, 2003, he presented to the emergency room with back pain. He also consulted with medical personnel on September 9, 2003.

6. On September 30, 2003, Claimant presented to Terrance Tisdale, M.D., an orthopedic surgeon, with complaints of low back pain and radicular pain in his right leg. Dr. Tisdale noted that Claimant had degenerative disc disease in his lower back and that the source of Claimant's pain could be a herniated disc. Dr. Tisdale ordered an MRI.

7. An MRI was taken on October 17, 2003. The MRI revealed a right posterolateral disc protrusion at L4-5, which caused a narrowing of the neuroforamen. There was also an abutment of the right L5 nerve. Dr. Tisdale believed this was a problem "best addressed by a neurosurgeon." Claimant was referred to William F. Ganz, M.D., a neurosurgeon.

8. Dr. Ganz evaluated Claimant on October 30, 2003. Dr. Ganz recommended epidural steroid injections for pain management. Dr. Ganz advised Claimant that if Claimant's condition did not improve after the injections, surgery should be considered.

9. On December 3, 2003, Claimant received a transforaminal epidural steroid injection from Scott Magnuson, M.D. Claimant returned to Dr. Magnuson for additional injections on December 24, 2003 and January 27, 2004. The first injection initially helped with the pain, but the pain returned. Claimant experienced little pain relief following the second and third injections.

10. On October 23, 2003, prior to Dr. Ganz's evaluation, Dr. Tisdale advised Surety that it was difficult to determine what work Claimant would be able or unable to perform without a neurological evaluation. Dr. Tisdale said that Claimant should not be working around any power machinery, and that he should avoid bending, lifting, twisting, or "maintaining a single posture for extended periods of time." Dr. Tisdale also advised that Claimant should have short work periods followed by rest periods, and that he should alternate his tasks so that he spent some time sitting, some time standing, and some time walking around.

11. On November 11, 2003, Claimant saw J. Craig Stevens, M.D., for an independent medical evaluation (IME). Dr. Stevens concluded that Claimant had not yet reached maximum medical improvement and that surgical intervention may be necessary.

12. On November 14, 2003, Claimant advised Dr. Ganz that he was in too much pain to work. Dr. Ganz provided Claimant with a temporary release from work until Claimant was re-evaluated on December 13, 2003.

13. On November 20, 2003, Ken Clyatt, the chief executive officer for Employer, called Dr. Ganz's office and asked if Claimant could work on a light duty status. The light duty

work would involve counting lumber while sitting in a chair. Claimant would receive ten-minute breaks every hour and would be free to stand or walk as needed. Dr. Ganz reviewed Claimant's medical charts and determined that Claimant would be able to do light duty work, provided that he did not lift more than twenty-five pounds. Barbara Frey, Dr. Ganz's nurse practitioner, called Claimant to inform him of the release to light duty work.

14. On November 21, 2003, Claimant called Dr. Ganz's office to inquire why he was released to work light duty. Claimant spoke with Ms. Frey and became heated during the conversation. He conveyed that he did not want Dr. Ganz to be his doctor anymore. For a time, Claimant refused to see Dr. Ganz.

15. After Claimant was released to light duty work, Employer offered him a light duty position as an inventory control clerk. Claimant went to work one day and walked off the job after a few hours.

16. On February 22, 2005, Claimant filed a complaint against Employer and Surety with the Industrial Commission. A hearing was scheduled for November 2, 2005 but was ultimately vacated.

17. While the case was pending, Claimant agreed to return to see Dr. Ganz. On August 3, 2005, Dr. Ganz informed Claimant that if Claimant wanted to resolve the pain in his low back and right lower extremity, Claimant should proceed with surgery. Claimant agreed to undergo surgery.

18. On September 12, 2005, Dr. Ganz performed a right L5-S1 decompressive hemilaminectomy and microdiscectomy on Claimant. The surgery was successful. Dr. Ganz noted on October 11, 2005 that Claimant was "doing very well with complete resolution of low

back and right lower extremity pain.” Dr. Ganz noted that Claimant had right paresthesias in his Achilles’ tendon that resolved quickly with rest.

19. While Claimant was recovering from surgery, Claimant’s counsel contacted the Industrial Commission Rehabilitation Division (ICRD), seeking the Division’s assistance in returning Claimant to work. Dan Brownell, a rehabilitation consultant with ICRD, was assigned to the case. Mr. Brownell met with Claimant on October 7, 2005, and decided that he would follow up with Claimant in December to assess how Claimant’s recovery was progressing.

20. Surety contacted Mr. Brownell on December 1, 2005 and informed Mr. Brownell that Employer was interested in re-hiring Claimant in a light duty position as inventory control clerk. The job was a full-time position with a wage of \$6.00 per hour. Mr. Brownell went to Employer’s work site and conducted a job site evaluation.

21. Mr. Brownell contacted Claimant on December 9, 2005 to schedule an appointment to discuss Claimant’s recovery. An appointment was scheduled for December 16, 2005. Mr. Brownell also told Claimant about Employer’s offer of employment and asked Claimant if he would be willing to review the job site evaluation report at the appointment. Claimant agreed to review the report. However, on December 12, 2005, Claimant left Mr. Brownell a telephone message informing Mr. Brownell that Claimant did not want Mr. Brownell’s help. Claimant said that Mr. Brownell should not call him again and cancelled the appointment.

22. Claimant’s counsel contacted Mr. Brownell and volunteered to assist Mr. Brownell in his dealings with Claimant. Mr. Brownell sent his job site evaluation report to Dr. Ganz for review. Dr. Ganz reviewed the report and released Claimant to work as an inventory control clerk.

23. Claimant refused Employer's offer to return to work as an inventory control clerk, and Mr. Brownell closed the ICRD case file based on Claimant's refusal.

24. On July 14, 2006, Claimant underwent an IME with Ronald Vincent, M.D., a neurosurgeon. Dr. Vincent gave Claimant a permanent partial impairment (PPI) rating of 10%, with 5% attributable to the work injury. The rest was attributed to Claimant's pre-existing degenerative disc disease. Dr. Vincent determined that Claimant was capable of returning to medium work. Dr. Ganz reviewed Dr. Vincent's report and agreed with the findings.

25. At some time prior to October 2007, Claimant left Idaho and did not intend to return. While traveling to Los Angeles to visit his younger brother, Claimant's motor home broke down in Arbuckle, California. As of October 2007, Claimant was residing in Arbuckle. Claimant testified at his October 25, 2007 deposition that he was living in his motor home on a farm in Arbuckle. The farm was owned by Jeff Kalfbeeks, who gave Claimant electricity, water, and a place to park his motor home in return for work as a night security guard on the farm. Claimant also engaged in seasonal, part-time work for Mr. Kalfbeeks, watering farm roads with a tractor. Claimant was paid \$8.00 per hour for this work and earned approximately \$624.00 per month.

26. Claimant receives approximately \$872.00 per month in Social Security disability benefits and Medicare benefits. Claimant admitted in his deposition that he "kept a close eye" on how much he earned working part-time for Mr. Kalfbeeks, because he did not want his Social Security disability benefits to be reduced. According to Claimant, his benefits would be reduced or terminated if he earned more than \$630.00 per month.

27. In Arbuckle, Claimant applied for a job as a custodian with the school district but was not hired. He also applied for a job as a sales clerk at Ace Hardware but was not hired. He

applied to work part-time at the Colusa County Casino, but the casino did not hire part-time workers. Claimant testified that he would be able to work at the casino if he was willing to work full-time, but he did not want his Social Security disability benefits to be reduced or terminated.

28. Claimant is no longer in contact with his attorney and was not present at hearing.

DISCUSSION, FURTHER FINDINGS, AND CONCLUSIONS OF LAW

29. While seven issues were noticed for hearing, the parties appear to have abandoned several of those issues in their briefs. It is not disputed that Claimant was injured in an industrial accident; consequently, the Commission finds that Claimant sustained an injury in a workplace accident. Claimant made no argument regarding his entitlement to attorney fees; the Commission finds, therefore, that Claimant abandoned the issue and waived it. The parties made no argument concerning apportionment under Idaho Code § 72-406; the Commission finds that the issue of apportionment was abandoned and waived. The parties made no showing that ISIF should be held liable under Idaho Code § 72-332; the Commission finds that the issue of ISIF liability was abandoned and waived. Because ISIF is not liable, the issue of *Carey* apportionment is moot. The Commission notes that the parties should not raise issues if they do not intend to argue them. If the parties settle issues post-hearing, or determine post-hearing that those issues will be abandoned, that should be noted expressly in the parties' briefs.

30. The parties noticed but did not argue the issue of whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury or condition. The evidence in the record shows that Dr. Vincent assigned to Claimant a PPI rating of 10%, 5% of which was due to the workplace injury. Claimant has presented no evidence disputing Dr. Vincent's conclusions. The Commission finds that Claimant has a 5% PPI rating as a result of his workplace injury. Surety has already paid the benefits on the 5% PPI.

31. The dispute in this case is primarily focused on the extent of Claimant's permanent disability. A claimant has permanent disability when his actual or presumed ability to engage in gainful activity is reduced or absent because of his permanent impairment, and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. A claimant's permanent disability rating is an appraisal of the claimant'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. Idaho Code § 72-425. Pertinent nonmedical factors include the nature of the physical disablement, physical disfigurement that would handicap the claimant in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the claimant, and the claimant's age, as well as other factors the Commission deems relevant. Idaho Code § 72-430(1). 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). In making a determination of permanent disability, the Commission should give consideration to the diminished ability of the claimant to compete in an open labor market within a reasonable geographic area considering all the personal and economic circumstances of the employee. Idaho Code § 72-430(1).

32. A threshold inquiry in determining permanent disability is the appropriate labor market in which Claimant's disability should be evaluated. Generally, this is the labor market in the area surrounding the claimant's home at the time of hearing. *Davaz v. Priest River Glass Col, Inc.*, 125 Idaho 333, 337, 870 P.2d 1292, 1296 (1994). But in certain cases, an alternative labor market may be appropriately considered. *Id.* The Commission may consider the labor market within a reasonable distance of the claimant's home both at the time of injury and at the time of hearing to determine a claimant's post-injury employability, because the claimant

“should not be permitted to achieve permanent disability by changing his place of residence.”
Lyons v. ISIF, 98 Idaho 403, 407 n.3, 565 P.2d 1360, 1364 n.3 (1977).

33. In this case, Claimant lived in Rathdrum, Idaho, in the Coeur d’Alene area, at the time of injury. His last known place of residence, as of October 2007, was in Arbuckle, California. Claimant’s permanent disability is most appropriately evaluated by considering both markets.

34. Claimant asserts that he is permanently and totally disabled. A claimant may establish total and permanent disability by either of two methods. The first method is to prove that his medical impairment combined with non-medical factors equals 100%. *Boley v. ISIF*, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997). The second method is to establish that he is totally and permanently disabled according to the odd-lot doctrine. *Id.* Claimant in this case argues that he is totally and permanently disabled under both methods.

35. 100% method. It is undisputed that Claimant has a 10% whole person PPI. There is no evidence in the record to support a finding that Claimant has additional permanent impairment. For Claimant to be found disabled under the 100% method, then, he must show that he has a 90% disability rating due to non-medical factors that, combined with his 10% PPI, would total 100%.

36. Claimant argues that his disabling factors include the fact that he is a “lone man, without family help or support,” that he is stuck in Arbuckle, without “means of transportation to get anywhere,” and that he is living on “soup and cheese sandwiches.” He also argues that his chronic pain and numbness in his right foot, which has caused him to fall on occasion, render him incapable of holding a normal job. Claimant has provided no evidence on his labor market access or his wage-earning capacity, either in northern Idaho or in the Arbuckle, California area.

Nor has Claimant provided medical evidence that conflicts with the opinions of Dr. Vincent and Dr. Ganz that he is capable of medium work.

37. Defendants Employer and Surety presented, at hearing, the testimony of vocational expert William C. Jordan, a certified rehabilitation counselor and disability management specialist. Mr. Jordan's qualifications are known to the Commission. Mr. Jordan evaluated Claimant's employment history, testimony at deposition, medical records, and the labor markets in the Coeur d'Alene area and the Arbuckle, California area. According to Mr. Jordan, Claimant has no disability in excess of impairment. Claimant is capable of returning to work that is regularly and continuously available in both the Coeur d'Alene area and the Arbuckle area.

38. Mr. Jordan also found, in his analysis, that Claimant's income received on his Social Security benefits is approximately the same as his pre-injury income. Mr. Jordan believes that if Claimant continues to work part-time, his wages and benefits combined will probably exceed his pre-injury earnings. Claimant does not appear to be motivated to return to full-time employment.

39. Nancy J. Collins, Ph.D., a certified rehabilitation counselor, testified on behalf of Defendant ISIF at hearing. Dr. Collins's qualifications are known to the Commission. Dr. Collins evaluated Claimant's employment history, medical records, and testimony. Based on her analysis, Dr. Collins concluded that Claimant's earning capacity has not been affected by his injury. As he has been released to medium work, he is capable of performing his time of injury job as well as many other jobs.

40. The Commission finds that Claimant has not met his burden of proof with regard to permanent and total disability under the 100% method. Though Claimant is not obliged to put

on expert testimony in support of his case, his testimony about his lifestyle in Arbuckle, California does not dispute the medical findings of Dr. Vincent and Dr. Ganz that he is capable of performing medium work. Nor does his personal testimony about his life in Arbuckle overcome the vocational findings of Mr. Jordan and Dr. Collins. Claimant himself testified that he was limiting his work hours so that his Social Security disability benefits would not be reduced or terminated. Prior to Claimant's departure to Arbuckle, he refused to take a full-time position with Employer at his pre-injury rate of pay. The medical evidence, vocational evidence, and Claimant's own testimony establish that Claimant has made a choice not to return to full-time work; his impairment has not prevented him from doing so.

41. Odd-lot method. According to the odd-lot doctrine, a claimant can establish total and permanent disability by showing that he is an odd-lot worker, a person "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. ISIF*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). The claimant may make such a showing in one of three ways: by showing that he has attempted other types of employment without success, by showing that he has searched for other work and other work is not available, or by showing that any efforts to find suitable work would be futile. *Lethrud v. ISIF*, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

42. Claimant argues that he has attempted other types of employment without success. The Commission is unpersuaded by this argument. There is little evidence in the record to support the contention that Claimant has attempted to work at other jobs. Claimant was twice offered an inventory clerk position with Employer. The first time, Claimant walked off the job after a few hours on the first day. The Commission does not consider this a sincere attempt to

work. The second time, Claimant outright refused Employer's offer. In California, Claimant has voluntarily worked part-time on a farm. By his own admission, he has not been seeking full-time work.

43. Claimant next argues that he has searched unsuccessfully for a job. The Commission finds, again, that Claimant's argument is unpersuasive. Claimant declined Employer's offer to return to full-time work. He apparently did not seek other employment in Idaho. He testified at deposition that in Arbuckle, he applied for a job with the school district as a custodian and was not hired; he also applied for a job as a sales clerk at Ace Hardware and was not hired. His employment application at the Colusa County Casino was declined because the casino did not hire part-time workers, not because of Claimant's disability. Three unsuccessful applications do not constitute a failed job search — especially when Claimant is voluntarily limiting himself to part-time work, so as not to lose his Social Security benefits.

44. Finally, Claimant argues that a job search would be futile. He has presented no evidence, testimonial or otherwise, that would establish why this would be so. Indeed, Claimant seemed confident that he could obtain a position at the casino if he were willing to work full-time. He declined a job with the Employer. The expert testimony from Mr. Jordan and Dr. Collins, as well as the reports they authored, indicate that there are many jobs available to Claimant in the Coeur d'Alene and Arbuckle areas, and that his physical impairment would not keep Claimant from performing those jobs. Claimant challenges the validity of the evidence presented by Mr. Jordan and Dr. Collins on the grounds that Defendants must identify "an actual job" available to Claimant within a reasonable distance from his home. But Claimant himself points out that Defendants only bear such a burden after Claimant has established a *prima facie* case placing him in the odd-lot category. Claimant has failed to do so. The evidence in the

record is that Claimant has been working part-time by choice, not that he is unable to find employment due to his disability.

45. The Commission finds that Claimant is not permanently and totally disabled under the odd-lot doctrine.

46. Permanent partial disability. The remaining issue is whether Claimant has permanent disability in excess of his 10% PPI. A claimant bears the burden of proving that he has disability in excess of his impairment. *McCabe v. Jo Ann Stores, Inc.*, 145 Idaho 91, 175 P.3d 780, 785 (2007). If a claimant has not presented significant evidence that there is disability in excess of impairment, “an additional award in excess of the impairment may not be sustained.” *Id.* The test for determining permanent partial disability is not whether a claimant is able to return to work at some employment, but whether the claimant’s future ability to engage in gainful activity is “accurately reflected by the impairment rating.” *Id.* at 786. A worker is disabled if his injury has caused him to suffer a decrease in wage-earning capacity. *Id.*

47. It is possible that Claimant has disability in excess of his impairment, especially when his age is taken into account. According to Dr. Collins, Claimant has approximately a 27% loss of access to the labor market. However, given Claimant’s employment history and transferable skills, Dr. Collins does not believe Claimant has suffered a decrease in wage-earning capacity. As noted earlier, Claimant was earning more per hour in his part-time job in Arbuckle than he earned per hour at his time-of-injury job, and he has voluntarily limited himself to part-time work. Claimant himself has offered no evidence to demonstrate a loss in wage-earning capacity. He has testified about his personal circumstances in Arbuckle, but he has not provided sufficient evidence, expert or otherwise, to show how his impairment has affected his wage-earning capacity or even how it has affected his ability to find employment in general.

48. The Commission finds that Claimant has failed to prove that he has disability in excess of his impairment.

ORDER

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

1. Claimant sustained an injury as the result of an accident that occurred in the course and scope of employment.

2. Claimant has a whole person permanent partial impairment rating of 10%; 5% of the impairment is due to the injury caused by the industrial accident, while the remaining 5% is due to a pre-existing condition.

3. Claimant failed to prove that he is entitled to permanent partial disability in excess of his impairment.

4. The issue of Claimant's entitlement to attorney fees is deemed to be abandoned and waived.

5. Claimant failed to prove that he is permanently and totally disabled, either by the 100% method or under the odd-lot doctrine.

6. The issue of whether apportionment is appropriate pursuant to Idaho Code § 72-406 is deemed to be abandoned and waived.

7. The issue of whether ISIF bears any liability is deemed to be abandoned and waived.

8. *Carey* apportionment is moot, as ISIF has not been found liable.

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

DATED this __16th__ day of December, 2008.

INDUSTRIAL COMMISSION

_____/s/_____
R.D. Maynard, Commissioner

_____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CONCURRING OPINION

I agree with all aspects of the Commission's Order issued in this case. There is one point, however, that deeply disturbs this Commissioner, enough to briefly express my thoughts on the legal position of one of the parties in this case.

As noted in the section entitled "Contentions Of The Parties," the Claimant steadfastly argued that he was totally and permanently disabled as the result of his work injuries in this case. He maintained that he was so disabled through a combination of his medical impairment, together with non-medical factors, that rendered him 100% disabled. Alternatively, he argued that he was totally disabled by reason of the odd-lot doctrine. The evidence did not support these allegations. However, more importantly and impressively, Claimant at no time argued that the Industrial Special Indemnity Fund (ISIF) was somehow liable for his permanent injuries. To Claimant's credit, he took no such position against ISIF.

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _16th day of December, 2008, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS, ORDER AND CONCURRING OPINION** was served by regular United States Mail upon each of the following:

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eb/cjh

_____/s/_____