

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

LYNNARD W. BITTICK,	)	
Claimant,	)	<b>IC 2005-524817</b>
v.	)	
JESS HENNIS, INC.,	)	<b>FINDINGS OF FACT</b>
Employer,	)	<b>CONCLUSIONS OF LAW,</b>
and	)	<b>AND RECOMMENDATION</b>
IDAHO STATE INSURANCE FUND,	)	
Surety,	)	<b>FILED JULY 7 2010</b>
and	)	
STATE OF IDAHO, INDUSTRIAL	)	
SPECIAL INDEMNITY FUND,	)	
Defendants.	)	
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Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Boise on September 22, 2009. Robert A. Nauman represented Claimant. Bridget A. Vaughan represented Employer and Surety. Kenneth L. Mallea represented Industrial Special Indemnity Fund (“ISIF”). The parties presented oral and documentary evidence, took a post hearing deposition, and submitted briefs. The case came under advisement on December 17, 2009. It is now ready for decision.

**ISSUES**

The issues to be resolved according to the amended notice of hearing are:

1. Whether the condition for which Claimant is seeking benefits was caused by the alleged industrial accident;
2. Whether and to what extent Claimant is entitled to disability in excess of impairment (including total disability);
3. Whether Claimant is entitled to permanent total disability under the odd-lot doctrine;
4. Whether ISIF is liable under Idaho Code § 72-332; and

5. Apportionment under the Carey formula.

### **CONTENTIONS OF THE PARTIES**

Claimant contends he injured multiple body parts – particularly suffering a closed head injury – in a compensable accident. He is totally and permanently disabled. His impairment from the accident combines with prior permanent physical impairments which invoke ISIF liability.

Defendants agree Claimant is totally and permanently disabled. However, they contend he was totally and permanently disabled prior to the subject accident. Employer was a sympathetic employer.

### **EVIDENCE CONSIDERED**

The record in the instant case consists of the following:

1. Hearing testimony of Claimant, of Jess Hennis, of Claimant’s vocational rehabilitation expert Barbara Nelson, and of ICRD rehabilitation counselor Donald Thompson; and
2. Joint Exhibits 1 through 16.

Having examined the evidence, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

### **FINDINGS OF FACT**

1. Claimant is a truck driver. He drove truck for Employer for at least 18 years. On October 31, 2005, while at work, he was pulling a strap to open a curtain van. The strap broke. Claimant fell backwards. He landed on his back and head. He suffers from persistent vertigo caused by inner ear damage. He has not worked since this accident (the “2005 Accident”).

2. Claimant has been working for Employer since, at latest, 1992. There are some indications he began working for Employer as early as 1988.

3. Employer owns an older model truck (“Diamond T”) with which Claimant

was familiar. Its transmission was unusual and difficult to operate. Claimant was experienced in operating the Diamond T.

4. Originally, Claimant drove truck for Employer on a temporary basis, e.g., six days in July 1992, 30 days in October and November 1992. He has worked seasonally or part time since. His greatest earnings occurred in 2005 when he earned \$10,552.50. On the date of the 2005 Accident, he was earning \$11.00 per hour.

5. Mr. Hennis, owner of Employer, hired Claimant for his ability and skill driving the Diamond T. As he became aware of Claimant's various preexisting medical conditions, Mr. Hennis accommodated Claimant's preexisting medical conditions by gradually confining Claimant's duties nearer and nearer to his core function of driving the Diamond T. For example, in 1992, Employer did not require Claimant to pick up beets from the ground as some other drivers did. At some point in time and as an accommodation, Employer switched Claimant's assigned truck to another one with power steering.

6. Mr. Hennis appreciated Claimant's skillful and gentle handling of the Employer's trucks.

7. The record contains references concerning Claimant's characterization of his work over the years. These include, in part:

- a.) On October 5, 2004, a Veterans' Administration Medical Center ("VA") nurse recorded that Claimant described his work status as, "Retired, works part-time driving truck."
- b.) On February 6, 2002, Claimant told a physician's assistant at the VA that he was "helping a friend hauling alfalfa seed. [He] [s]tates this doesn't require any exertion except to drive the truck."
- c.) On December 22, 1998, Claimant told a social worker at the VA that he "passes the time by doing odd jobs of a[n] agricultural nature and lives rurally."
- d.) On October 9, 1998, Claimant told a social worker at the VA that he was "doing some part-time farm work." The VA record contains several

references to “part-time work,” “on-call” truck driving and “part-time farming.”

- e.) On December 30, 1997, Claimant described himself as a “retired truck driver” to a VA physician following an admission to the VA for various conditions.

8. Just over 16 months before the 2005 Accident, Claimant suffered another industrial accident (the “2004 Accident”). On June 16, 2004, he was struck in the head by a sheet of plywood. He was knocked to the ground. He suffered a skull fracture involving his left temporal bone. He was initially released to return to work without restriction effective June 18. He returned to work on June 22, 23 and 24. He called in sick complaining of nausea and dizziness on June 25. His treating physician released him to return to work without restriction effective July 5. He returned to work on July 8. By the end of August 2004 Claimant was deemed medically stable, having sustained no permanent partial impairment from the 2004 Accident. His only residual complaint was occasional headaches. It is significant that he did not report persistent or recurring vertigo or dizziness after the 2004 Accident.

9. Claimant returned to work from the 2004 Accident. He worked for Employer until the 2005 Accident.

#### **Medical Care Immediately After The 2005 Accident**

10. The emergency room records for October 31, 2005 describe the 2005 Accident consistently with Claimant’s testimony at hearing. The emergency room treaters initially diagnosed an “acute low back strain” and “minor head trauma,”

11. Douglas Hill, M.D., became Claimant’s primary treating physician. He treated Claimant for a closed head injury and a low back injury resulting from the 2005 Accident. Early on, Claimant described “feeling unsteady.” This initially was considered not

representative of vertigo *per se* but developed into vertigo and persistent dizziness. Dr. Hill released Claimant from all work. Dr. Hill never lifted the restriction from commercial driving. Drs. Lawrence Green, M.D., and Hill agreed that right inner ear damage caused by the 2005 Accident was the source of Claimant's vertigo.

12. On December 29, 2005, Dr. Green refused to approve the Job Site Evaluation prepared by ICRD consultant Don Thompson. Dr. Green opined Claimant's restrictions would preclude Claimant from returning to professional truck driving.

13. Therapists associated with Nampa Hearing and Balance Center of Idaho Elks Rehabilitation Hospital ("Elks") treated Claimant. Claimant's major complaint involved vertigo which he experienced whenever his head moved from upright neutral position. Physical therapy and a home exercise program helped but did not resolve the problem. On January 12, 2006, clinical audiologists reported that testing showed a right ear injury caused the symptoms.

14. On March 27, 2006, Dr. Green opined Claimant was not yet medically stable.

15. On June 1, 2006, Nancy Greenwald, M.D., conducted an independent evaluation at Surety's request. Dr. Greenwald did not have access to Claimant's medical records prior to the date of the 2005 Accident. She opined Claimant was "very close" to medical stability and imposed permanent restrictions. She opined Claimant would likely never be able to return to professional truck driving. She rated Claimant's PPI and apportioned the rating without seeing any pre-accident medical records. She rated the vestibular component of PPI at 10% of the whole person and Claimant's back injury at 5%. She apportioned these 50/50 to preexisting conditions, diabetes and arthritis respectively, and rounded and added to arrive at 8% whole person PPI caused by the industrial injury. At hearing, the parties did not address or dispute Dr. Greenwald's ultimate PPI rating of 8% whole person attributable to the 2005 Accident.

Significantly, Dr. Greenwald's lack of access to prior medical records left her in no position to apportion vertigo or to assess PPI for Claimant's preexisting physical impairments. Regarding these, she merely opined, "Not work related."

16. On October 13, 2006, Dr. Hill declared Claimant medically stable. He approved Dr. Greenwald's PPI rating.

### **Prior Medical History**

17. Standing 5'8", Claimant's weight during the last 20 years has ranged from a low of about 267 to a high of about 322. Claimant's obesity has negatively impacted nearly every medical condition he has faced.

18. The medical records demonstrate that Claimant has suffered from a clinical depression which has waxed and waned for several years.

19. As a young man, Claimant enlisted in the U.S. Air Force but was discharged 10 weeks later when it was discovered that a foot condition, hammer toes, required a medical discharge.

20. In 1955, Claimant broke his leg when he was run over by tractor. The record reveals no residual problems arose from this incident.

21. In 1965, Claimant fractured a cervical vertebra. No surgery was required. It healed without residual problems.

22. In 1975, Claimant was pinned between two trucks. He was off work about one week but suffered no residual problems.

23. Claimant's prior medical records contain a few references to episodes of dizziness, lightheadedness, syncope, and vertigo. These include:

- a.) On November 20, 1998, in the context of evaluating chest pains, a VA physician's assistant noted that Claimant had reported, "Yesterday he became weak and lightheaded [sic] but no diaphoresis, palpitations, [sic]

unusually [sic] no lightheaded episodes. Took NTG yesterday for chest pain and it relieved [symptoms].”

- b.) On January 12, 1999, a social worker at the VA noted that Claimant complained of an episode of dizziness when he stood up. Claimant attributed this to having just increased his dosage of a medication. Claimant discontinued the medication.
- c.) On April 20, 1999, Claimant complained of dizziness “when he lays down, some sense of syncope and vertigo.” The physician’s assistant at the VA attributed this to hypoxia arising from obesity and chronic respiratory problems.
- d.) On October 4, 2004, Claimant denied a history of “dizziness or syncope.” This was recorded by a VA nurse practitioner providing a cardiology consultation.

24. During and around November and December 2004, Claimant was successfully treated for colon cancer. The record does not show that Claimant should be rated for PPI relating to this disease.

25. Claimant was off work temporarily in Summer 2004 for medical treatment when he was struck in the head by plywood as described above. The doctor opined Claimant incurred no PPI rating for that event.

26. Claimant has suffered from longstanding chronic diseases including: cardiovascular problems including congestive heart failure, carotid artery stenosis, atherosclerosis, hypertension, and other cardiovascular diagnoses; insulin dependent diabetes with blood sugar levels at various times ranging from uncontrolled to under well-controlled; pulmonary conditions including chronic pulmonary insufficiency, COPD, emphysema and other pulmonary diagnoses; arthritis of his back, hips and knees, shoulders and elbows; gout, sleep apnea and other chronic diseases of lesser significance.

27. For several years before the 2005 Accident, Claimant was prescribed the use of oxygen, full time, 24/7. He used it only occasionally and seldom carried oxygen while driving for work.

28. Claimant has suffered from various temporary diseases – some serious, some not so – but none of particular importance to the analysis of his permanent disability.

### **Social Security Disability**

29. Claimant applied for Social Security Disability benefits in 1988. He was initially found ineligible and he appealed. On January 31, 1990, Claimant was determined eligible for disability benefits effective October 15, 1988.

30. The Administrative Law Judge who issued the determination identified the bases for eligibility. He identified the combination of conditions related to Claimant's chronic pulmonary insufficiency, congestive heart failure, diabetes, hypertension, obesity, and degenerative arthritis in Claimant's back and knees as the determinative factors.

31. After becoming eligible, Claimant worked seasonally and part-time so his income stayed below the agency's definition of "substantial gainful activity." He worked for Dunlap Hatchery and later for Employer.

32. Every few years, Claimant was required to document his continued eligibility for Social Security disability benefits. He repeatedly checked boxes stating he did not feel he could work while simultaneously reporting his employment.

33. In 1993, the agency discovered Claimant had been using his daughter's Social Security number in his work for Dunlap Hatchery. On October 4, 1993, an investigator reported, "The beneficiary has been using his daughter's SSN (. . .) to work because he was afraid his benefits would stop." Further investigation, including a fraud investigation, revealed Claimant's income from work was still below the "substantial gainful activity" standard. No change in his eligibility resulted from this incident.

34. In 2006, the agency determined that Claimant's work exceeded the "substantial gainful activity" threshold effective January 2005. By February 2007, the agency had calculated

an overpayment had been made, repayment of which would not be waived.

35. In his various applications for Social Security Disability or for continuation of benefits, Claimant has made statements which would indicate a substantial or total level of disability. Some of these statements include: "I was not able to do anything"; "I can hardly work at all and some days are much worse"; and others. On more than one occasion, Claimant checked the "No" box when responding to the question, "Do you feel you are able to return to work?"

36. At hearing, Claimant reported his then current sole source of income was his Social Security retirement benefits of \$1068.00 per month.

#### **Non-Medical Factors**

37. Born March 11, 1941, Claimant was 64 years of age on the date of the 2005 Accident.

38. Claimant's education extended into 11<sup>th</sup> grade. He has not completed a GED. He did attend a business course at Treasure Valley Community College ("TVCC") in Ontario, Oregon but earned no degree.

39. Claimant has worked primarily as a truck driver his entire adult life. He has performed other jobs and operated other equipment occasionally over the years.

40. Other relevant non-medical factors were considered. In light of the consensus among the parties that Claimant was totally and permanently disabled, they are not further enumerated herein.

#### **Vocational Experts**

41. Claimant was evaluated by Barbara Nelson at Claimant's request. She opined that Claimant was totally and permanently disabled following the 2005 Accident, but not before. She cited the fact that Social Security revoked his disability in early 2005 and the fact

that Claimant had been working for years at the time of the 2005 Accident as important factors in her opinion.

42. Claimant was evaluated by Shannon Purvis at ISIF's request. She opined Claimant was totally and permanently disabled before the subject accident. She believed Employer was a sympathetic employer and emphasized Social Security's determination of disability. These were important factors in forming her opinion.

43. ICRD consultant Don Thompson worked with Claimant. He prepared the Job Site Evaluation ("JSE") on Claimant's job with Employer. He opened his file because he believed he could assist Claimant in returning to some work. He closed his file upon Claimant's persistent conviction that he was totally and permanently disabled. In testimony, Mr. Thompson was careful to distinguish between returning to work and being "competitively employable" when describing his work with Claimant.

### **DISCUSSION AND FURTHER FINDINGS OF FACT**

44. It is well settled in Idaho that the Workers' Compensation Law is to be liberally construed in favor of the claimant in order to effect the object of the law and to promote justice. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1966). Although the worker's compensation law is to be liberally construed in favor of a claimant, conflicting evidence need not be. Aldrich v. Lamb-Weston, Inc., 122 Idaho 316, 834 P.2d 878 (1992).

### **Causation**

45. A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). Magic words are not required.

Jensen v. City of Pocatello, 135 Idaho 406, 18 P.3d 211 (2000). “Probable” is defined as “having more evidence for than against.” Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

46. The record establishes that Claimant suffered a compensable injury as a result of the 2005 Accident. The injury to his inner ear causes his persistent vertigo and dizziness to an extent that results in PPI and permanent disability. Dr. Greenwald’s opinion establishes Claimant suffered a ratable permanent back injury caused by the 2005 Accident as well.

#### **Permanent Impairment (from the 2005 Accident)**

47. Permanent impairment is defined and evaluated by statute. Idaho Code § 72-422 and 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, 115 Idaho 750, 769 P.2d 1122 (1989); Thom v. Callahan, 97 Idaho 151, 540 P.2d 1330 (1975).

48. Dr. Greenwald’s PPI rating for Claimant’s back – 5% of the whole person, apportioned 50/50 (with rounding) based upon longstanding degenerative arthritis – is reasonable and persuasive. Her 10% PPI rating for Claimant’s vertigo is similarly reasonable and persuasive. However, Dr. Greenwald repeatedly noted that she did not have Claimant’s medical records which documented his conditions before the 2005 Accident. Careful review of these prior medical records reveals very few discrete episodes of vertigo or similar symptoms. Each episode was related by medical professionals at the time to be specifically related to a cause other than diabetes. Therefore, Dr. Greenwald’s apportionment of PPI for vertigo as attributable to preexisting diabetes is speculative and contrary to the evidence. Moreover, because Claimant’s earlier complaints in this area described discrete episodes, they differ substantially from his post-2005 Accident complaints of recurring and persistent vertigo. PPI for vertigo should not be apportioned.

49. Claimant established he incurred permanent impairment as a result of the 2005 Accident in the amount of 13% percent of the whole person.

### **Permanent Disability**

50. Permanent disability is defined and evaluated by statute. Idaho Code § 72-423 and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

51. Here, the parties agree Claimant is totally and permanently disabled. Moreover, considering all medical and non-medical factors, the evidence establishes that Claimant is 100% totally and permanently disabled.

53. Having established 100% total and permanent disability, resort to the analysis of the odd-lot doctrine is unnecessary. *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). However, if odd-lot considerations were utilized, Claimant would independently qualify as an odd-lot worker based upon either Mr. Thompson's unsuccessful attempts to find work for Claimant or that a job search would be futile. *See, Dehlbom v. ISIF*, 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997).

53. The real dispute concerns whether Claimant was totally and permanently disabled before the 2005 Accident.

### **When Did Claimant Become Totally and Permanently Disabled?**

54. The primary factor supporting a finding that Claimant was not totally and permanently disabled before the 2005 Accident is that Claimant was working for Employer and

had been working for at least 18 years at the time of the 2005 Accident. He performed his core function as a truck driver. His skill, diligence and effort were valued by Employer, that is, Employer accrued business profit from Claimant's labor. Claimant was performing real work.

55. Additional support for Claimant's position is that he resumed work after the 2004 Accident. He could as easily have "retired" then. He did not. Moreover, after a break for colon cancer treatment he again returned to work. Indeed, it appears Employer's need for Claimant's services increased from 1992 to 2005 because Claimant's hours and earnings increased. They increased to the point that Claimant exceeded the Social Security limit of "substantial gainful activity."

56. Defendants assert that Claimant was totally and permanently disabled under the Idaho Worker's Compensation Law some time before the 2005 Accident. Defendants' burden of proof on this assertion is the same as a claimant's would be.

57. There are two methods by which a claimant can demonstrate he is totally and permanently disabled. First, a claimant may prove a total and permanent disability if his medical impairment together with the pertinent nonmedical factors totals 100%. If a claimant has met this burden, then total and permanent disability has been established. Alternatively, a claimant may establish himself as an odd-lot worker. Boley, supra. "[Odd-lot] workers need not be physically unable to perform any work at all. They are simply 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." Gooby v. Lake Shore Management Co., 136 Idaho 79, 83, 29 P.3d 390, 394 (2001) (citations omitted).

58. The standard of proof does not change where a defendant argues as an affirmative defense that a claimant was totally and permanently disabled before the subject accident.

On prior occasions, the Commission and this Referee have found that a preexisting total and permanent disability precludes liability even though a claimant has returned to work. Christensen v. S.L. Stuart & Associates, Inc., 147 Idaho 289, 207 P.3d 1020 (2009); Redman v. ISIF, 137 Idaho 915, 71 P.3d 1062 (2003)(upon recommendation by Referee Donohue).

59. Defendants point to a number of reasons why, independently or cumulatively, Claimant should be considered totally and permanently disabled before the 2005 Accident.

60. First, Defendants rely upon the determination by the Social Security Administration that Claimant was totally disabled as of October 15, 1988. By itself, this evidence does not establish total and permanent disability under the Idaho Worker's Compensation Law.

61. The Social Security system has its own laws and rules which differ from the Idaho Worker's Compensation Law. A major touchstone for the Social Security system is whether Claimant can perform "substantial gainful activity." Idaho Worker's Compensation Law analyzes whether Claimant is 100% totally and permanently disabled, that is, unable to engage in any activity worthy of compensation. *See, Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). Alternatively, if a claimant is able to perform only services so limited in quality, quantity, or dependability that no reasonably stable market for those services exists, he is to be considered totally and permanently disabled. *Id.* Such is the definition of an odd-lot worker. Reifsteck v. Lantern Motel & Cafe, 101 Idaho 699, 700, 619 P.2d 1152, 1153 (1980). *Taken from, Fowble v. Snowline Express*, 146 Idaho 70, 190 P.3d 889 (2008).

62. The salient differences between the two systems are shown by the facts of this case. Both the focus and criteria by which the systems determine disability differ.

63. Idaho Worker's Compensation Law looks to a claimant's ability to perform work and to compete for jobs in the labor market. The Social Security system looks to a

claimant's income.

64. Under Social Security rules, "substantial gainful activity" is defined as a threshold of income, not physical exertion, capacity, nor labor market competitiveness. Claimant could have worked a very physically demanding job and maintained his disability status. Similarly, Claimant could have worked as many hours as he liked and maintained his disability status. He could have worked full-time so long as his wages were low enough to remain under the income threshold which defined "substantial gainful activity."

65. The systems differ as to determinative criteria as well. Here, most salient is the factor of Claimant's obesity. Social Security treats it as a disease like any other for purposes of determining disability. The Commission considers obesity a temporary condition, not a disease. Obesity is not considered in establishing PPI. Cunningham v. ISIF, 2007 IIC 0100 (2007); *and see*, Carter v. Garrett Freightlines, 105 Idaho 59, 665 P.2d 1069 (1983) (modification of compensation agreement denied where change of condition linked substantially to obesity.) Claimant's obesity pervasively affects his other medical conditions and daily living. Social Security considered it a factor in its initial determination approving Claimant as totally disabled. The Commission acknowledges non-occupational obesity as only a temporary condition, not a basis for PPI or disability. These facts severely undercut the assignment of weight to the decision of Social Security as evidence for purposes of this analysis.

66. Second, Defendants assert that regardless of differences between the two systems, the documentation and Claimant's statements in his Social Security applications show that Claimant was totally and permanently disabled before the 2005 Accident.

67. Here, Defendants marshal the evidence to make a nearly persuasive argument. Their briefs present cogent, well-reasoned facts and analysis. Claimant did repeatedly make statements to Social Security which could be construed as claiming or admitting a total

incapacity to work. Arguably, he did describe Employer in terms that could qualify Employer as a sympathetic employer.

68. However, a claimant's statements are not dispositive. Indeed, the history of Idaho Worker's Compensation Law shows that claimants, other parties and witnesses often believe things which are – as ultimately revealed at hearing – mistaken, untrue, or different from the legal definition of the thing.

69. Further, while Claimant's demeanor at hearing was credible and consistent with his allegations about his various medical conditions, his history of candor toward a tribunal is not unblemished. Social Security documents show Claimant falsely used his daughter's Social Security number for purposes of potentially avoiding the loss of disability benefits. Thus, when Claimant testified he was always truthful with Social Security, that testimony was misleading.<sup>1</sup>

70. Third, Defendants assert that Employer was a "sympathetic employer." The standard for establishing an employer as a "sympathetic employer" requires that accommodations made were "out of the ordinary." Christensen, *supra*. In a world where the Americans with Disabilities Act holds sway, the mere fact that an employer has made accommodations does not indicate the employer was "sympathetic" for purposes of odd-lot analysis. Here, Employer's accommodations are not out of the ordinary. They represent reasonable and perhaps legally required accommodations made for an employee whose core work was real and valued.

71. Fourth, Defendants assert that Ms. Purvis' opinions demonstrate that Claimant was totally and permanently disabled before the 2005 Accident. An analysis of the

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<sup>1</sup>All findings herein are based upon independent evidence which supports Claimant's testimony on material points necessary to the conclusions reached.

competing evaluations by vocational experts shows Ms. Nelson's opinions about labor market access and competitiveness are entitled to more weight than Ms. Purvis'. Ms. Nelson relied upon the independent evaluation of Dr. Greenwald. Ms. Purvis relied upon an extrapolation of old Social Security records which included the impact of Claimant's obesity. Moreover, ICRD consultant Mr. Thompson actually attempted to return Claimant to work and persisted in this effort until it was clear that Claimant would not be released to truck driving and that Claimant's unwillingness to attempt other work precluded employment.

72. Independently or combined, the factors which Defendants assert for preexisting total and permanent disability do not outweigh the fact that Claimant was, at the time of the 2005 Accident, working a real job which provided a real benefit to Employer. The preponderance of the evidence supports a finding that Claimant was neither 100% totally and permanently disabled nor an odd-lot worker at any time prior to the 2005 Accident.

#### **ISIF Liability**

73. Idaho Code § 72-332 (1) provides in pertinent part that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of his or her employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his or her income benefits out of the ISIF account.

74. Idaho Code § 72-332 (2) further provides that "permanent physical impairment" is as defined in Idaho Code § 72-422, 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 pre-existing physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment. In Dumaw v. J. L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court set forth four requirements a claimant must meet in order to establish ISIF liability under Idaho Code § 72-332:

- (1) Whether there was indeed a pre-existing physical impairment;
- (2) Whether that impairment was manifest;
- (3) Whether the alleged impairment was a subjective hindrance; and
- (4) Whether the alleged impairment in any way combines in causing total disability.

Dumaw, 118 Idaho at 155, 795 P.2d at 317. The analysis of the “combined effects” criterion can be assessed using a “but for” test. The test is whether, but for the work-related accident, the worker would not have been totally and permanently disabled immediately following the occurrence of that injury. Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

75. Here, Claimant suffered from a number of preexisting physical impairments. These “anatomic or functional abnormalit[ies]” (Idaho Code § 72-422) impacted his “personal efficiency in the activities of daily living” (Idaho Code § 72-424) to the extent that he had to obtain in-home assistance.

76. Claimant established he suffered permanent impairment from conditions relating to his cardiovascular system, his pulmonary system, arthritis in his major joints, diabetes, and hammer toes. These constitute preexisting physical impairments for purposes of determining ISIF liability. Unfortunately, except for her 2% rating for preexisting arthritis in

Claimant's back, Dr. Greenwald was not assigned the task of rating these impairments or did not have the medical records with which to do so.

77. Claimant failed to establish he suffered permanent impairments from his conditions of gout, sleep apnea, depression, or any other permanent or temporary conditions.

78. A preponderance of the evidence shows that all of the preexisting physical impairments enumerated above were manifest at some time prior to the 2005 Accident. Voluminous VA records establish that Claimant's conditions were well known to him and to his treaters throughout the years he worked for Employer. Testimony at hearing establishes that Employer was aware of Claimant's conditions to the extent that he needed accommodations.

79. A preponderance of the evidence shows that all of the preexisting physical impairments enumerated above – except for diabetes – were a subjective hindrance to Claimant's ability to work. Although Claimant's blood sugar levels were at times uncontrolled or poorly controlled, Claimant failed to show it affected his ability to work or his efficiency at work. Again, Employer's accommodations to Claimant's job functions show that Claimant's conditions impeded his ability to work.

80. But for Claimant's persistent vertigo and low back injury resulting from the 2005 Accident Claimant likely would not be totally and permanently disabled by the preexisting physical impairments. But for the preexisting physical impairments, Claimant likely would not be totally and permanently disabled as a result of the back injury and vertigo caused by the 2005 Accident. Therefore, the preexisting physical impairments combined to cause Claimant to be totally and permanently disabled after the 2005 Accident. ISIF is liable for the portion of disability attributable to qualifying preexisting physical impairments.

### **Carey Formula**

81. Determination of the amount of ISIF liability is a matter of calculation set forth by the Idaho Supreme Court. Carey v. Clearwater County Road Dept., 107 Idaho 109, 686 P.2d 54 (1984). To establish the amount of ISIF liability, the extent – in percentage of the whole person – of qualifying permanent physical impairments is required. Here, no party provided sufficient evidence to find, without speculation or arbitrary assignment, what the extent of those impairments are. Claimant met his burden of establishing all elements necessary for establishing the fact of ISIF liability. Therefore, under the Commission’s investigatory authority, Idaho Code § 72-714(3), this matter is retained for purposes of determining the PPI rating due for Claimant’s preexisting cardiovascular, pulmonary, arthritis (in excess of 2% whole person for his preexisting back condition), and hammer toe conditions. *See, Hartman v. Double L Manufacturing*, 141 Idaho 456, 111 P.3d 141 (2005)(matter retained, parties to acquire evidence of PPI for Carey apportionment). The parties should promptly schedule an examination, records review, or such other means or method to ascertain sufficient evidence upon which the Commission may establish this PPI rating.

### **CONCLUSIONS OF LAW**

1. Claimant is totally and permanently disabled. He became so after the 2005 Accident and as a result of the combination of PPI from the 2005 Accident and preexisting physical impairments and applicable non-medical factors;

2. PPI from the 2005 Accident is awardable rated at 13% of the whole person;

3. Employer is liable for its portion of disability as may be established by application of the Carey formula and it should begin paying total and permanent disability benefits immediately, based upon the date of medical stability October 13, 2006, with opportunity for adjustment with ISIF after relevant preexisting PPI and Carey formula

applications have been ascertained;

4. ISIF is liable for its portion of disability as may be established by application of the Carey formula;

5. This matter should be retained for the parties promptly to produce evidence sufficient to make a finding of the extent of an appropriate PPI rating for Claimant's preexisting cardiovascular disease, pulmonary disease, arthritis (in excess of 2% whole person for preexisting arthritis in his back), and hammer toe.

### **RECOMMENDATION**

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED this 25<sup>TH</sup> day of June, 2010.

INDUSTRIAL COMMISSION

/S/ \_\_\_\_\_  
Douglas A. Donohue, Referee

ATTEST:

/S/ \_\_\_\_\_  
Assistant Commission Secretary

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

LYNNARD W. BITTICK,	)	
Claimant,	)	<b>IC 2005-524817</b>
v.	)	
JESS HENNIS, INC.,	)	<b><u>AMENDED</u></b>
Employer,	)	<b>CERTIFICATE OF SERVICE</b>
and	)	
IDAHO STATE INSURANCE FUND,	)	
Surety,	)	
and	)	filed July 8, 2010
STATE OF IDAHO, INDUSTRIAL	)	
SPECIAL INDEMNITY FUND,	)	
Defendants.	)	

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I hereby certify that on the \_\_8th\_\_\_\_ day of July, 2010, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

**Kenneth L. Mallea**  
**P.O. Box 857**  
**Meridian, ID 83680**

INDUSTRIAL COMMISSION

\_\_\_\_\_/s/\_\_\_\_\_  
Dena K. Burke  
Assistant Commission Secretary

cc of Amended Certificate of Service only:

Robert A. Nauman  
3501 W. Elder Street, Ste. 108  
Boise, ID 83705

Bridget A. Vaughan  
1001 North 22<sup>nd</sup> Street  
Boise, ID 83702

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

LYNNARD W. BITTICK,	)	
Claimant,	)	<b>IC 2005-524817</b>
v.	)	
JESS HENNIS, INC.,	)	
Employer,	)	<b>ORDER</b>
and	)	
IDAHO STATE INSURANCE FUND,	)	FILED JULY 7 2010
Surety,	)	
and	)	
STATE OF IDAHO, INDUSTRIAL	)	
SPECIAL INDEMNITY FUND,	)	
Defendants.	)	
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Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his recommended 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 totally and permanently disabled. He became so after the 2005 Accident and as a result of the combination of PPI from the 2005 Accident and preexisting physical impairments and applicable non-medical factors;
2. PPI from the 2005 Accident is awardable rated at 13% of the whole person;
3. Employer is liable for its portion of disability as may be established by application of the Carey formula and it shall begin paying total and permanent disability benefits

immediately, based upon the date of medical stability October 13, 2006, with opportunity for adjustment with ISIF after relevant preexisting PPI and Carey formula applications have been ascertained;

4. ISIF is liable for its portion of disability as may be established by application of the Carey formula;

5. This matter should be retained for the parties promptly to produce evidence sufficient to make a finding of the extent of an appropriate PPI rating for Claimant's preexisting cardiovascular disease, pulmonary disease, arthritis (in excess of 2% whole person for preexisting arthritis in his back), and hammer toe.

The Commission's retention of jurisdiction shall not be taken as our endorsement of what amounts to an unrequested bifurcation of this case. The issue of apportionment under the Carey formula was a noticed issue for which none of the parties presented sufficient evidence. This piecemeal approach to case preparation does not promote judicial economy or the efficient resolution of this case.

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

DATED this 7<sup>TH</sup> day of JULY, 2010.

INDUSTRIAL COMMISSION

/S/ \_\_\_\_\_  
R. D. Maynard, Chairman

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

/S/ \_\_\_\_\_  
Thomas P. Baskin, Commissioner

ATTEST:

/S/ \_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 7<sup>TH</sup> day of JULY, 2010, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

Robert A. Nauman  
3501 W. Elder Street, Ste. 108  
Boise, ID 83705

Bridget A. Vaughan  
1001 North 22<sup>nd</sup> Street  
Boise, ID 83702

db

/S/ \_\_\_\_\_