BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARLIN C. DARRAH,	)	
	)	
Claimant,	)	**IC 1997-017923**
	)	**1999-026375**
v.	)	
	)	**FINDINGS OF FACT,**
STATE OF IDAHO, INDUSTRIAL	)	**CONCLUSIONS OF LAW,**
SPECIAL INDEMNITY FUND,	)	**AND RECOMMENDATION**
	)	
Defendant.	)	Filed: July 6, 2010
	)	
	)	
	)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Coeur d'Alene, Idaho, on November 13, 2009. Richard Whitehead of Coeur d'Alene represented Claimant. Lawrence E. Kirkendall of Boise represented Defendant State of Idaho Industrial Special Indemnity Fund (ISIF). Prior to hearing, Claimant entered into a lump sum settlement agreement with Employer and Surety and the Commission dismissed them from the proceeding. Claimant and ISIF submitted oral and documentary evidence at hearing, and took three post-hearing depositions. The parties made oral closing arguments in lieu of briefing in Boise on February 25, 2010. The matter came under advisement on March 2, 2010 and is now ready for decision.

ISSUES

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

1. Whether Claimant is totally and permanently disabled, either pursuant to the odd-lot doctrine, or because his impairment, together with other non-medical factors, results in 100%

disability;

2. Whether ISIF is liable for a portion of Claimant's total permanent disability pursuant to Idaho Code § 72-332; and

3. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant asserts that, prior to his May 1997 industrial injury, he had permanent impairments that were manifest, were a subjective hindrance to employment, and combined with the industrial accident of May 1997 to render him completely and totally disabled.

ISIF argues that while Claimant had pre-existing impairments, some of which were manifest and a subjective hindrance to employment, those impairments did not combine with his May 1997 accident to render him totally and permanently disabled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Teddi Darrah, Dan Brownell and William Jordan, taken at hearing;

2. ISIF Exhibits 1 through 47 as supplemented by Claimant, admitted at hearing;

3. Claimant's Exhibits 48 through 50, admitted at hearing;

4. Post-hearing depositions of John M. McNulty, M.D., taken January 13, 2010; Robert H. Friedman, M.D., taken January 22, 2010; and Carl D. Haugen, Ph.D., taken February 11, 2010.

All objections made by ISIF during the deposition of Dr. McNulty are overruled. After having considered all the above evidence and the oral closing arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the

Commission.

FINDINGS OF FACT

BACKGROUND

1. Claimant was fifty years of age at the time of hearing. He lived in Sagle, Idaho, with his wife, Teddi, and their two children.

2. Claimant graduated from high school in Nevada in 1977. As an adult, testing confirmed a diagnosis that Teddi Darrah, a teacher, had assumed--that Claimant suffered from ADHD (attention deficit/hyperactivity disorder). The testing also confirmed that Claimant is functionally illiterate in reading, performing at a second- or third-grade level. Claimant's writing skills are similarly lacking.

3. Claimant first worked in the Silver Valley in 1978 as a laborer at the Bunker Hill lead smelter. In 1979, he began working underground as motorman at the Bunker Hill Mine, a position he held until 1984.

4. When Claimant left Bunker Hill, he went to work as a gyppo[1] miner for ASARCO at its Galena Mine. As a gyppo miner, Claimant (and a partner) worked independently under contract with the employer. Gyppos receive a weekly salary at a base rate. The base rate of pay presumes that the miners will produce a minimum amount of ore each day, lengthening the drift, or tunnel, in the process. Quantities of ore produced above the minimum constitute a "bonus." Gyppo miners have the ability, if they work very hard and are very good at what they do, to double or triple their base wage.

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[1] Variously spelled "gypo" or "gyppo," the term is used often in mining and logging industries to describe individuals who work independently. The term may have originated from the word "gypsy," an allusion to the gyppo's travel from job to job, and is not considered a pejorative.

5. Claimant worked at the Galena Mine until mining stopped in 1991 or 1992 because the price of ore made further work unprofitable. During the time that the mine remained closed, Claimant worked the green chain at a lumber mill, set paving stones, and worked for a friend pouring concrete foundations.

6. Silver Valley Resources acquired the Galena mine and resumed mining in about 1995. Claimant was one of the first gyppo miners returned to work at the Galena because he was familiar with the mine, having worked it for ASARCO for eight years. Claimant continued to work at the Galena as a gyppo miner until January 2000.

7. Sometime around 2000, the Galena Mine experienced another change in ownership from Silver Valley Resources to Coeur Silver Valley. About the same time, it became apparent that Claimant could no longer work underground. Employer offered and Claimant accepted a position as sandhouse operator, where he remained until he left the Galena Mine in late October 2001.

PRE-EXISTING INJURIES AND CONDITIONS

Right Foot

8. When Claimant was an adolescent, a school bus ran over his right foot, causing extensive crush injuries. A successful surgery allowed Claimant to keep his foot, but the injuries marked the beginning of a degenerative process in that foot. Claimant's foot swelled every day, and every night he slept with the foot elevated on pillows to reduce the swelling. By the time Claimant was working at the Galena, he was wearing special boots that would accommodate the swelling in the right foot. After work, Claimant used a variety of appliances and methods to relieve the discomfort and reduce the swelling in his foot. As Claimant aged and his right foot

continued to degenerate, Claimant's weight-bearing on the right foot shifted to the lateral side of the foot, causing an antalgic gait and other related problems.

9. Claimant testified that he was able to continue to work underground despite his right foot—in part, because of the extreme temperature and humidity deep in the mine. Additionally, Claimant did not walk long distances while at work, and was able to bear most of his weight on his left foot while drilling. In addition, Claimant had a partner who helped carry heavy equipment and perform the tasks that were more difficult for Claimant. The two also employed a well-paid laborer to fetch and carry for them.

Right Shoulder

10. Claimant first complained of right shoulder pain in late 1987. Diagnosed with tendonitis/bursitis, the shoulder pain resolved with conservative treatment. Shortly after the industrial injury leading to this proceeding, Claimant's right shoulder once again became symptomatic. There was apparently confusion regarding whether the right shoulder problems were industrial. There is little doubt that the shoulder did not become symptomatic as a result of the May 1997 industrial injury, but there is evidence in the record that Claimant's work as a miner either caused or exacerbated his shoulder problems.

Low Back

11. In July 1988, Claimant injured his low back at work. He received conservative treatment including rigorous physical therapy at the Sports Conditioning and Rehabilitation Clinic (SCAR) in Wallace. By January 1989, Claimant had completed the SCAR program and was doing much better. X-rays taken in January 1989 showed no sign of degenerative changes in his lumbar spine. His doctors urged him to continue working as a miner.

MAY 1997 INDUSTRIAL INJURY

12. The injury that is the focus of this proceeding occurred on May 17, 1997. Claimant was moving equipment from the skip (elevator that lifts equipment from level to level in the mine). Claimant described the event succinctly:

> And I just didn't duck enough, and I hit right above my light, and it sat me right down, boom.
>
> I sat there for five minutes or so, ten minutes, and got up and just went back to work. Well, the next morning, I believe it was the next morning or the second day, I couldn't bring my arms up, and that's scary when you can't pick the toilet seat up. And I knew then I was in some serious problems, so I went to the doctor.

Tr., p. 88.

MEDICAL CARE

13. On May 23, 1997, Claimant sought treatment at Comler Management, Inc., (CMI) where Galena sent employees for industrial injuries. Terry Spohr, P.A., saw Claimant and ordered x-rays. The films showed degenerative changes at C4-C5 and C5-C6, but no acute injury or fracture. Mr. Spohr diagnosed cephalgia, cervical spine muscle spasms, and osteoarthritis of the neck. He prescribed Lodine and Soma. Mr. Spohr advised Claimant to use ice packs, perform range-of-motion exercises, and follow up in ten days. He gave Claimant a one-day release from work, and then returned him to light-duty work.

14. Claimant returned to CMI on June 4, reporting some improvement. Mr. Spohr started Claimant on a physical therapy program and continued his light-duty restrictions and his medications. Claimant returned for follow up on June 12 and reported that he had been doing well in physical therapy until the therapist tried traction, which caused discomfort around C6-C7. Mr. Spohr advised Claimant to continue the physical therapy minus traction, continue his medication, and remain on light-duty.

15. Claimant did not return to CMI until August 1. His presenting complaint was his neck. On this visit, Claimant saw Thomas F. Heston, M.D. He advised Dr. Heston of the May cervical injury and the treatment with physical therapy and medication. Claimant told Dr. Heston that his neck had not gotten any better "and this last week, it was much worse." Ex. 6, p. 8. Dr. Heston recommended Claimant resume physical therapy and added Vicodin to his other medications. Dr. Heston may also have placed Claimant on light-duty or limited his work hours.

16. Claimant continued conservative treatment under Dr. Heston's care through late October. During that period, he began complaining of right shoulder pain in addition to his neck pain. By October 20, Claimant showed significant improvement in his cervical symptoms, but his right shoulder was not responding to therapy or anti-inflammatories.

17. In late 1997 or early 1998, Claimant began having symptoms that suggested bilateral carpal tunnel syndrome. Manual testing by Mr. Spohr and EMG studies confirmed the diagnosis, and Mr. Spohr referred Claimant to a hand-and-wrist surgeon. The surgeon confirmed the diagnosis, but additional neurological testing showed no nerve compression. Claimant continued receiving conservative treatment.

18. In June of 1998, Claimant's right foot began to bother him more than usual. X-rays ordered by CMI showed marked osteoarthritic changes.

19. In July 1999, Claimant presented at CMI with complaints of right shoulder and chest pain. Additional testing ruled out initial concerns of cardiac involvement. An x-ray of Claimant's right shoulder showed widening of the AC joint, indications of an old fracture, and partial separation of the AC joints resulting in degenerative arthritis.

20. Claimant saw Dr. McNulty for further evaluation of the right shoulder. Claimant demonstrated full range-of-motion with the right arm, but in light of Claimant's pain complaints, Dr. McNulty ordered an MRI. The imaging was consistent with a right rotator cuff tear, and Dr. McNulty took Claimant to surgery on August 23, 1999. Dr. McNulty opined that it was Claimant's work as a miner, but not the May 1997 injury, that caused his torn rotator cuff.

21. Claimant had a normal recovery from his shoulder surgery, but had increasing cervical spine complaints as his shoulder improved, visiting CMI four times between September and November 1999. He was off work due to the shoulder surgery until mid-November 1999 at which time Dr. McNulty released him to return to light-duty work (no overhead activities). By the end of December 1999, Claimant's shoulder was much improved and Dr. McNulty released Claimant to work without restrictions for his shoulder.

22. In mid-December 1999, Employer sent Claimant to James Damon, M.D., for an independent medical examination (IME) related to Claimant's 1997 cervical injury. Dr. Damon diagnosed degenerative arthritis of the cervical spine, "aggravated by the industrial injury of May 17, 1997, on a more probable than not basis." Ex. 19, p. 5. Dr. Damon noted no previous history of any cervical complaints. Dr. Damon did not believe Claimant was medically stable and recommended eight to twelve weeks of additional physical therapy and anti-inflammatory medication. Dr. Damon restricted Claimant from performing extreme movements of the cervical spine, particularly extension and rapid rotation.

23. In late December, Claimant again saw Mr. Spohr and they discussed Claimant's neck. Mr. Spohr advised that if Claimant's cervical problem was degenerative, there was nothing to do but treat the symptoms, but if there was a herniated disc, that would be another matter. Mr. Spohr ordered an MRI to determine whether Claimant's cervical spine problem was

degenerative or the result of a herniation. The MRI showed the documented problems at C4-5 and C5-6, along with some central spinal stenosis and mild narrowing of the neuroforamina at C4-5 and spondylolysis of C5-6. Mr. Spohr referred Claimant to Bret A. Dirks, M.D., for a consultation.

24. Claimant saw Dr. Dirks on January 24, 2000. Based on his review of the recent imaging, it was Dr. Dirks' opinion that that the spondylosis at C4-5 was compressing the spinal cord, causing early myelopathy and some radicular findings. Claimant and Dr. Dirks discussed treatment options, including an anterior cervical discectomy and fusion (ACDF). Claimant opted to proceed with the surgery, which Dr. Dirks performed on February 7, 2000.

25. Claimant recovered fairly well from the ACDF, and by early April 2000, Dr. Dirks released him to light-duty work.

26. Expecting their first child, Claimant's wife had quit her teaching job in the spring of 1997, just before Claimant's industrial injury. By the spring of 2000, Claimant had been off work or performing light-duty at substantially reduced pay for seven or eight months, and things were becoming increasingly difficult financially. Claimant's wife re-entered the job market in early 2000, and in June she received an offer of a part-time teaching position in the Lake Pend Oreille School District near Sandpoint. Her family owned property, including an unoccupied house, in Sagle that was available rent-free, so it made sense for her to take the position and move to Sagle. Claimant planned to continue working at the mine, commuting to Sagle on the weekends. He believed that once released from light-duty restrictions, he would be able to return to work underground.

27. In early June 2000, Claimant became concerned about increased neck pain he experienced when he shrugged his shoulders or tilted his head back. Claimant continued to have

complaints about increasing pain in his neck, and in late June, Dr. Dirks ordered more physical therapy. Claimant continued to complain of neck pain through the fall. X-rays and an MRI of his C-spine showed no evidence of new herniation, good alignment of the C-spine, and incorporation of the bone graft that was part of the ACDF. By November 27, 2000, Dr. Dirks had run out of options for treating Claimant's continuing neck pain. He recommended that Claimant continue with physical therapy and have an IME.

28. On January 10, 2001, Richard Wilson, M.D., of Boise Neurological Consultants, performed an IME at the request of Surety. Claimant presented with constant right-sided neck pain and interscapular pain. The neck pain increased with neck flexion, extension, or side-to-side movement. Lifting and painting, a part of Claimant's light-duty assignment, aggravated Claimant's interscapular pain.

29. Dr. Wilson examined Claimant and conducted a thorough record review. He concluded that Claimant had asymptomatic cervical spondylosis at the time of his 1997 work injury, which condition was aggravated by the injury, causing the spondylosis to become symptomatic. Following the C4-5 ACDF, Claimant had a solid fusion and "minor neurologic residua consisting of diminished right biceps and brachioradialis reflexes consistent with right C5 radiculopathy which is otherwise asymptomatic." Ex. 3, p. 6. Dr. Wilson described Claimant's right-sided cervical pain to be "of uncertain etiology." *Id.* Dr. Wilson opined that "tense tight muscles" were the cause of some of Claimant's neck and interscapular pain. *Id.* Dr. Wilson declared Claimant medically stable and counseled Claimant against returning to work underground. He imposed a maximum lifting limit of sixty pounds on an occasional basis and advised Claimant to avoid activities requiring prolonged or repetitive neck extension or rotation.

Finally, Dr. Wilson determined that Claimant had sustained 10% whole person impairment but apportioned 25% to Claimant's "pre-existing albeit asymptomatic cervical spondylosis." *Id.*[2]

POST 2001 EMPLOYMENT AND MEDICAL CARE

30. Once Dr. Wilson declared Claimant to be medically stable, his light-duty assignment at the mine ended. Employer would not allow Claimant to return to underground work due to restrictions imposed by Dr. Wilson. Claimant was devastated that he could not return to mining. Employer offered Claimant a choice among three permanent above-ground positions at the mine: Surface motorman on the afternoon shift, sandhouse operator, or dryman. By letter dated February 20, 2001, Employer advised Claimant that failure to elect one of the positions would constitute a voluntary resignation.

31. Claimant had previously worked as a motorman and dryman, and had personal knowledge that he would not be able to perform those jobs because of his neck and shoulder injuries. He had never worked in the sandhouse and knew little about the job. Having no other options and needing to work, he accepted the job.

32. Once Claimant started working in the sandhouse, it became apparent that he was not going to be able to do the job for very long. He testified that the job required working in areas with little overhead clearance and he was often hitting his head. He had to climb and descend stairs, which was difficult with his right foot injuries. Floors and stairs in the work area were wet and slick, increasing the chances of injury from frequent slips and falls.

33. After his return to work in the sandhouse, Claimant believed that Employer was trying to force him out. Dan Brownell, then a rehabilitation consultant for the Industrial

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[2] Dr. Wilson's apportionment of an asymptomatic condition contravenes both Idaho Code § 72-424 and *Smith v. J.B. Parson Co.*, 127 Idaho 937, 908 P.2d 1244 (1996).

Commission Rehabilitation Division (ICRD), corroborated Claimant's belief. Mr. Brownell testified on cross examination:

> Q. [by Kirkendall] You stated in your testimony that this employer didn't want [Claimant] around much because of the challenges up there?
> A. Yes.
> Q. What did you mean by that?
> A. Several different challenges. The reality was is [sic] it was a high-risk case. The exposure was getting greater by the day.
>
> Secondly, [Claimant] was not the easiest guy for Larry Nelson to get along with. There had been disruption with him and Larry ever since they did the union situation. Bumped heads, so to speak.
>
> There was also a sense of urgency because it was starting to be documented that he was even having problems in the sandhouse. So, of course, they knew that if we—out of the three jobs that were offered to him, if he couldn't do that sandhouse even, then he was—we were looking at a very large case.

Tr., at pp. 283-284.

34. Mr. Brownell began assisting Claimant with a job search in July 2001. He met with Claimant and Claimant's wife, and actively worked his contacts in the government and business sector in the Sandpoint area, where Claimant's wife and children were living. Mr. Brownell obtained letters of reference for Claimant from officials at the Galena Mine, and assisted Claimant in preparing job applications. When Mr. Brownell saw an announcement for a night custodian job with the Lake Pend Oreille School District, he believed the position was within the Claimant's restrictions and would be consonant with Claimant's work ethic and personality. Mr. Brownell assisted Claimant through the application and interview process, and the district hired Claimant from among three-hundred applicants for the position. Claimant quit the Galena on Friday, October 26, 2001, and started work with the school district the following Monday, October 29, 2001. At the school district, Claimant earned $8.45 per hour.

35. After he started working for the school district, Claimant's right foot became more of a problem for him. He testified that he had no idea how hard it would be on his foot to

have to stand and walk on concrete for a full work shift. Claimant continued to experience shoulder and cervical pain, and the equipment he used in his job exacerbated those complaints. Particularly troublesome were the backpack vacuum and the floor mop. Claimant testified that in addition to the pain in his foot, his neck, and his shoulder, he would get excruciating headaches. At times he had to leave work early because of the headaches and feared whether he would be able to get home safely. Claimant testified:

> I knew something else was wrong. Because when I would be at work and I'd turn my neck like this a little bit, it would pop, and I'd get this "zzzz" right down my fingers.

Id., pp. 110-111.

36. In January 2002, Claimant saw Dr. Dirks again and had a C-spine x-ray. It showed good incorporation of the fusion at C4-5. An MRI done in April 2002 showed mild circumferential spondylitic ridging at C5-6 with circumferentially bulging disc annulus resulting in "mild ventral impression of the thecal sac without focally impinging or lateralizing lesions." Ex. 37, p. 12.

37. Claimant returned to Dr. McNulty about his shoulder at the end of January 2002. He complained of shoulder pain of a year's duration, difficulty sleeping due to the shoulder, and pain when reaching or lifting and performing overhead activities with the right upper extremity. Dr. McNulty diagnosed tendonitis and a possible rotator cuff tear and ordered an MRI. The MRI was unremarkable, except for the post-operative changes due to the first surgery. Dr. McNulty thought perhaps it was bursitis or bicipital tendonitis and offered Claimant a steroid injection, which he declined.

38. In late May or early June 2003, Claimant left work early one evening because of a debilitating headache. He was in such discomfort that he left without phoning the district office

to leave a voice message regarding his early departure. He sought medical care on June 3 from Frazier King, M.D. During the course of Dr. King's treatment of Claimant, the school district terminated him, primarily because of his failure to call the office, but also due to his increasing inability to complete a work shift. Claimant has not worked since.

39. After leaving the school district position, Claimant applied for Social Security Disability (SSD). The Social Security Administration approved Claimant's application in 2005 with benefits retroactive to November 2003.

40. In March 2005, Claimant returned to Dr. McNulty with worsening shoulder complaints. Following additional diagnostic imaging, Dr. McNulty performed a right shoulder arthroscopy in April 2005. The surgery relieved some of Claimant's shoulder pain, but he still had pain radiating down the right side of his neck and through his arm.

41. Claimant returned to Dr. Dirks following the shoulder surgery to evaluate the on-going cervical pain. Dr. Dirks ordered additional diagnostic imaging which showed some instability at C5-6, the level just below his original ACDF. Dr. Dirks took Claimant to surgery on June 2, 2005, removed the existing hardware, and performed an ACDF at C5-6 with plating and allograft. Claimant described substantial immediate relief following the 2005 ACDF.

42. In the summer of 2007, Claimant started having pain in his left foot. He saw Jeanne Arnold, D.P.M., who performed transverse osteotomies on the second and third metatarsals of the left foot and an intermetatarsal ligament release on August 31, 2007.

43. In January 2008, Claimant returned to Dr. McNulty, complaining of pain in his right shoulder and his left foot. The foot pain was due to a bony bump on the top of his foot that appeared after Dr. Arnold's surgery. She had advised Claimant that the bump was a bony callus which would naturally reabsorb over time. Dr. McNulty confirmed that the best option regarding

the left foot was to do nothing, noting that surgical removal of the bone fragment was an option for the future. Dr. McNulty did not recommend treatment of the shoulder, either, recommending they just keep an eye on it.

44. Claimant returned to Dr. McNulty in early June 2008 with complaints of right foot pain. Dr. McNulty diagnosed severe post-traumatic osteoarthritis in the right first tarsometatarsal joint and recommended activity restriction and use of an orthotic.

45. By early November 2009, Claimant was experiencing right knee pain in addition to his right foot problems:

> He has been having increasing difficulty ambulating. He has been walking on the lateral side of his foot. He has been having pain, mostly in the medial aspect of his knee. At times the pain can be sharp. He has not had any recent knee injury.

Ex. 17, p. 18. Imaging showed only minimal degenerative changes in the knee. Dr. McNulty diagnosed "right foot pain secondary to crush injury and right knee pain secondary to altered gait." *Id.* Dr. McNulty did not believe that surgery could help Claimant's foot. He suggested using an orthotic, believing that the knee pain would resolve if Claimant's gait improved.

IMEs

46. The IMEs of Dr. Damon and Dr. Wilson occurred at a relatively early stage of Claimant's lengthy history, and are discussed *infra,* in Claimant's treatment chronology.

Robert H. Friedman, M.D.

47. Dr. Friedman performed an IME at the behest of Employer/Surety and issued his report on September 11, 2004. Medical issues addressed in the IME, either as reported by Claimant or noted by Dr. Friedman included: His long-standing right foot injury, with recent increasing dysfunction in his great toe and middle toe on the injured foot; the May 1997 cervical

injury;[3] the right shoulder complaints; and low back problems. Dr. Friedman identified a number of pre-existing conditions relevant to this proceeding in his report:

- Right AC joint injury from the 1980s;
- Right shoulder tendonitis;
- Right foot injury with subsequent injury in 1988, resolved;
- Low back pain with complaints since 1988;
- Cervical degenerative arthritis with reported trauma in 1997, requiring subsequent cervical surgical stabilization at C4-5;
- Rotator cuff tear diagnosed by Dr. McNulty; and
- Depression.

48. Dr. Friedman rated Claimant's pre-existing conditions using the *AMA Guides to the Evaluation of Permanent Impairment*, 5th Ed. (*AMA Guides)*:

- C-Spine--based on cervical x-rays taken after Claimant's May 1997 injury but before his ACDF, Dr. Friedman identified Claimant as a DRE Category II, as set out in the *AMA Guides*, and rated Claimant at 8% whole person;
- Right Shoulder—Dr. Friedman used Table 16-18 of the *AMA Guides* and rated Claimant at 3% whole person. Table 16-18 provides for a maximum of 15% whole person impairment, but Dr. Friedman rated Claimant at the low end of the scale because he had normal range of motion and strength;
- Lumbar Spine—Based on negative x-rays, Dr. Friedman placed Claimant in Lumbar Category 1 (continued painful symptoms with no anatomic disease, muscle spasm or neurologic changes) of the *AMA Guides*, and rated Claimant's impairment at 0%;
- Right Foot—Dr. Friedman lacked x-rays or imaging reports on Claimant's right foot, but based on his examination, Dr. Friedman used Table 17-31 of the *AMA Guides* to estimate a 4% whole person impairment, with the caveat that the rating could change based on a requested x-ray; and

[3] Dr. Friedman's initial reference to this injury on page 2 of his report mistakenly places the injury in 1977.

- Depression—Dr. Friedman rated Claimant at 0% PPI because the depression would likely respond to treatment.

49. Dr. Friedman opined that Claimant's May 1997 cervical injury was an exacerbation of his pre-existing cervical degenerative condition. He believed that the ACDF was necessary because of the pre-existing degenerative condition, and not because of the industrial injury. Dr. Friedman noted that the ACDF would bump Claimant's PPI for his cervical condition an additional 17%, but that the increase was not due to the industrial accident. Dr. Friedman specifically found Claimant's rotator cuff tear unrelated to the May 1997 injury. Using the Combined Value Chart at pp. 604-605 of the *AMA Guides,* Claimant's whole person PPI as rated by Dr. Friedman would be 30%. Adding the impairments, the rating would be 32%.

50. Dr. Friedman concluded that Claimant did not require further treatment and recommended a home stretching and flexibility program for his C-spine, shoulder, and low back. Dr. Friedman restricted Claimant to a medium-exertion work level (up to fifty pounds occasionally and twenty-five pounds repetitively), and limited repetitive over-shoulder activities at no more than twenty pounds. Dr. Friedman believed that these restrictions would preclude Claimant from returning to mining and possibly the custodial position he held with the school district. Dr. Friedman imposed no restrictions related to Claimant's right foot problem. Finally, Dr. Friedman opined that Claimant was a good candidate for treatment of his reactive depression.

51. On October 9, 2004, Claimant had his right foot x-rayed as requested by Dr. Friedman. On December 12, 2004, Dr. Friedman reviewed the x-ray and wrote to Employer/Surety confirming his 4% whole person impairment for Claimant's right mid-foot condition. He imposed no additional restrictions on Claimant relating to the pre-existing foot injury.

Dr. McNulty

52. In May 2005, Dr. McNulty prepared an evaluation of Claimant following his recovery from his April 2005 right shoulder arthroscopy. Dr. McNulty was well-acquainted with much of Claimant's medical history, having treated Claimant since 1999 for his right shoulder. In addition, Dr. McNulty reviewed Dr. Wilson's IME and Dr. Friedman's September 2004 IME and performed a physical examination of Claimant.

53. In his May 18, 2005 report, Dr. McNulty provided the following ratings for Claimant's various impairments using the *AMA Guides*:

- C-Spine—DRE Category 4, post-surgical arthrodesis rated at 28% whole person. The rating included recognition of Claimant's residual cervical pain and loss of range of motion. Dr. McNulty specifically opined that "the 28% whole person impairment is a direct result of his work-related injury on 05/17/97." Ex. 2, p. 4;

- Right Shoulder—3% whole person impairment using Figures 16-40, 16-43 and 16-46 and Table 16-3 to convert the upper extremity impairment to whole person impairment;

- Right Foot/Ankle—Dr. McNulty did not dispute the 4% whole person impairment that Dr. Friedman awarded Claimant for his right foot injuries; however, Dr. McNulty also diagnosed laxity in the deltoid ligament of the right ankle, and awarded an additional 4% whole person impairment for the ankle instability.

54. Dr. McNulty did not rate Claimant's low back. Using the Combined Values Chart at pp. 604-605 of the *AMA Guides*, Claimant's whole person PPI as rated by Dr. McNulty is 36%. When cumulated, Dr. McNulty's ratings total 39%.

Dr. Friedman Redux

55. Dr. Friedman performed a follow-up IME of Claimant on or about June 30, 2007. Dr. Friedman noted that since his last visit with Claimant, he had two additional surgeries—a second ACDF and a right shoulder arthroscopy. Claimant reported to Dr. Friedman that both surgeries helped and his neck and shoulder were both improved. Claimant reported that he had

started having trouble with his left foot and was seeing a podiatrist for evaluation and possible treatment.

56. Dr. Friedman had Claimant complete a Beck's questionnaire and an Oswestry functional test, reviewed his medical history, and then performed an exam. In relevant part, Dr. Friedman noted the following impressions:

- Cervical fusion times two;
- Right shoulder arthroplasty times two;
- Pre-existing history of right foot fracture with osteoarthritis of the first metatarsal phalangeal joint;
- Left third metatarsalgia;
- Intermittent low back pain; and
- "Numerous psychological and social issues, non work related." Ex. 12, p. 28.

Although not identified in the "Impressions" section of his report, Dr. Friedman also noted that Claimant had osteoarthritis in his hands.

57. Dr. Friedman concluded his report with a number of "recommendations":

- Claimant was not credible; "There are numerous statements made by the patient that are not supported by the medical records, and occasionally actually contradictive." *Id.*, at p. 29;
- Claimant can return to work fulltime at a medium work level with appropriate footwear;
- Claimant's second ACDF adds at most 2% PPI for the second surgery and 1% PPI for an additional level, bringing his impairment for his cervical injuries to 28% whole person, but did not change any of his restrictions or limitations;
- Claimant's bilateral foot problems should be treated with special shoes and orthotics; his impairment is unchanged and he has no additional limitations or restrictions. Claimant will always have pain in his right foot because of the osteoarthritis, and he has the same type of arthritis in his hands;
- Claimant's impairment for his right foot remains unchanged and there is no impairment related to the left foot; the c-spine impairment but with no new restrictions or limitations;

Based on the additional surgeries, Dr. Friedman's ratings total 35% when added and 33% when combined.

VOCATIONAL EVIDENCE

58. Both parties retained vocational experts to evaluate Claimant's employability. ISIF retained Bill Jordan, M.A., C.R.C., C.D.M.S. Mr. Jordan's report, dated January 25, 2008, is Exhibit 36 in Volume 2 of Defendants' exhibits. Claimant retained Douglas N. Crum, C.D.M.S. Mr. Crum's report, dated April 17, 2007, is Exhibit 37 in Volume 2 of Defendants' exhibits. In addition, Claimant called Dan Brownell, former ICRD rehabilitation consultant, as a witness at hearing. The Commission is well acquainted with all three vocational experts and their individual qualifications do not need repeating here.

Mr. Jordan

59. Mr. Jordan reviewed pertinent medical and vocational records and interviewed Claimant as part of his vocational assessment. In addition, he contacted Claimant's time-of-injury employer, his last employer—the Lake Pend Oreille School District—and met with Dr. Friedman to review job descriptions.

60. Mr. Jordan determined that Claimant's time-of-injury wage was $11.75 per hour. Relying on Dr. Friedman's restrictions (medium exertion level, fifty pounds occasionally, twenty-five pounds repetitively, no repetitive over-shoulder activities greater than twenty pounds), he concluded that Claimant had a wealth of employment opportunities open to him, paying anywhere from $6.50 per hour to almost $12.00 per hour.

Mr. Crum

61. In preparing his report, dated April 17, 2007, Mr. Crum reviewed relevant medical and vocational records and met with Claimant. Based on Claimant's social security

earnings history, he determined that at the time of his cervical injury, Claimant was earning $32.59 per hour[4] and enjoyed a generous benefits package paid for in full by Employer. Prior to his injury, he had always performed work that required heavy to very heavy physical exertion.

62. Based on Dr. Wilson's restrictions (issued prior to the last shoulder and cervical surgeries of record), Mr. Crum calculated Claimant would lose access to about 60% of the labor market. Using the restrictions imposed by Dr. Friedman (from his 2004 IME), Mr. Crum estimated a loss of labor market access of 70%.

63. Mr. Crum determined that Claimant suffered a 67.5% reduction in wage-earning capacity when he went to work as a custodian for the school district. Since Claimant's attempt to return to work as a custodian failed, Mr. Crum thought it unlikely that Claimant could obtain work paying more than $6.00 per hour, a 79% loss of earning capacity.

Mr. Brownell

64. Just days before the scheduled hearing, Claimant retained Dan Brownell as an expert witness. In his capacity as an ICRD rehabilitation consultant, Mr. Brownell was instrumental in facilitating Claimant's employment by the school district. Mr. Brownell was aware of the difficulty that his colleague, Terry Parsons, had trying to find Claimant alternative employment in the Silver Valley once it became clear that his days at the mine were numbered. Mr. Brownell was also privy to information that management at the Galena Mine wanted Claimant off the payroll because he had become a workers' compensation liability.

65. During the time that Mr. Brownell was assisting Claimant with his 2001 job search, he worked closely with Claimant and his wife, and in the process learned that Claimant

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[4] Mr. Crum based his calculation on Claimant's social security earnings in 1998, which were higher than his earnings in 1997, the year of his injury. Claimant earned $54,150.00 in 1997, which is approximately $26.03 per hour.

was adept at hiding his disabilities from employers. Mr. Brownell was the first individual, other than Claimant's wife, to figure out that Claimant could neither read nor write at a functional level. Mr. Brownell testified that Claimant hid his disabilities so well that he was unaware of Claimant's right foot dysfunction at the time he helped Claimant get the position with the school district.

66. Mr. Brownell testified as a rebuttal witness at hearing. The gist of his testimony was that it had taken a near super-human effort for Claimant to obtain the custodial position at the school district. That work attempt had ultimately failed, and it was now eight years and several surgeries later. Mr. Brownell opined that Claimant was not employable in a competitive labor market "absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort" on his part. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 584 38 P.3d 617, 622 (2001) citing *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 565 P.2d 1360 (1977).

DISCUSSION AND FURTHER FINDINGS

DISABILITY

67. At hearing, ISIF presented the written report and testimony of Mr. Jordan in support of its position that Claimant was not totally and permanently disabled. If the Commission made such a finding, there would be no need to address the issue of ISIF liability. However, by the time the parties made their closing arguments in February 2010, ISIF was ambivalent at best regarding the issue of total permanent disability. It did not concede the issue, but neither did it make a strong argument on the matter. Instead, ISIF's closing argument focused instead on why ISIF was not liable for any of Claimant's disability based on the statutory requirements of Idaho Code § 72-332. Before the Commission can get to the

application of Idaho Code § 72-332 on the facts of this case, the issue of Claimant's disability status must be resolved.

68. The Idaho worker's compensation law defines "disability" as "a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors." Idaho Code § 72-102(11). A claimant's permanent disability rating is determined by appraising the combined effect of those medical and nonmedical factors on the "injured employee's present and probable future ability to engage in gainful activity." Idaho Code § 72-425.

69. A claimant may prove total and permanent disability in either of two ways. First, a claimant may prove a total and permanent disability if his or her medical impairment, together with relevant nonmedical factors, total 100%. If the Commission finds that a claimant has met his or her burden of proving 100% disability *via* the claimant's medical impairment and pertinent nonmedical factors, there is no need for the Commission to continue. Total and permanent disability is established at that stage. See *Hegel v. Kuhlman Bros., Inc*., 115 Idaho 855, 857, 771 P.2d 519, 521 (1989) (Bakes, J., specially concurring) ("Once 100% disability is found by the Commission on the merits of a claimant's case, claimant has proved his entitlement to 100% disability benefits, and there is no need to employ the burden-shifting odd lot doctrine"). *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997). When a claimant cannot make the showing required for 100% disability, then a second methodology is available:

> The odd-lot category is for those workers who are so injured that they can perform no services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.

Id. The worker need not be physically unable to perform any work:

> 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.

Id.

70. As noted above, findings regarding the issue of disability rely on both medical and non-medical factors. The Commission looks to the medical evidence for opinions regarding impairment and work restrictions, and to the vocational evidence for opinions on employability and loss of earning capacity. To the extent that disability is an issue, however, the determination of whether a claimant is an odd-lot worker is a factual determination within the discretion of the Commission. *Thompson v. Motel 6*, 135 Idaho 373, 17 P.3d 874 (2001). For the reasons discussed below, the Referee disregards Dr. Friedman's December 2008 IME report and Mr. Jordan's vocational opinions.

Dr. Friedman

71. Dr. Friedman's initial IME, prepared in 2004, was unremarkable except for his opinion that there was no causal relationship between Claimant's industrial injury and his cervical surgery. All of Claimant's treating physicians and every other IME physician found a causal connection between the industrial accident and Claimant's cervical injury. The December 2008 IME, however, is a horse of a different color. Dr. Friedman's December 2008 report includes a number of opinions that are markedly at odds with the mass of evidence in this proceeding:

A. Credibility. Dr. Friedman charged Claimant with lying about his symptoms. Claimant had hundreds of encounters with medical providers between 1997 and the date of hearing. Despite the elusive etiology of some of Claimant's symptoms, not a single medical professional (including Dr. Friedman in 2004) ever impugned Claimant's credibility, suggested

that he was seeking secondary gain, or characterized him as anything other than an honest, hard-working man. Dr. Friedman gave no explanation or cited any specific example in support of his opinion, and it stands as a singularity in the record.

B. Literacy. Dr. Friedman stated that Claimant "successfully" completed a Beck's questionnaire and an Oswestry test at the outset of the IME. This would be a noteworthy event, as it is undisputed that Claimant neither reads nor writes and depends upon his wife to fill out forms by reading him questions and writing out the answers.

C. Ability to Walk and Stand. According to Dr. Friedman's chart notes, Claimant was able to ambulate normally in his bare feet, despite the documented severe deterioration of his right foot. Every other doctor who looked at Claimant's feet noted an antalgic gait and observed that Claimant's right shoe showed evidence of break-down on the outside or lateral portion of the shoe's upper—indicating that Claimant was weight-bearing on the outside of his right foot instead of on the heel and forefoot. Both Claimant and his wife testified that he replaced his shoes frequently because they would break down as a result of the way he walked on his right foot. By 2005, Claimant was beginning to have trouble with his left foot, and the records include findings that Claimant was walking on the medial (inside) portion of his left foot because of the advancing osteoarthritis. The dysfunction in both of Claimant's feet so affected his gait that he began exhibiting problems with his knees. The record is replete with evidence that Claimant was very good at hiding his disabilities, and his apparent ability to take a few steps in Dr. Friedman's office is not indicative of his ability to walk or stand for long periods of time.

D. Cervical Range of Motion. Although Dr. Friedman found that Claimant had "excellent cervical spine range of motion," Ex. 12, p. 29, his measurements of all cervical spinal range of motion were less than the normal range. Dr. Dirks and Dr. McNulty both found

Claimant to have reduced range-of-motion in some planes. The Referee had the opportunity to observe Claimant for an extended period of time, both when he knew he was under observation and when he was unaware of any scrutiny. Claimant consistently demonstrated extremely restricted cervical range of motion, most noticeable with right and left rotation. When asked to address the Referee, Claimant would rotate his entire upper body instead of rotating his head and neck.

Mr. Jordan

72. Mr. Jordan's report contains a number of flaws:

A. The DOT. Mr. Jordan based his analysis on the Dictionary of Occupational Titles (DOT). As pointed out by Mr. Brownell in this and in other proceedings, the DOT is merely a listing of all occupational titles that might exist in the United States. It provides no insight into specific job openings in a particular labor market. In fact, Mr. Brownell pointed out that many of the job titles identified by Mr. Jordan did not actually exist in the Claimant's labor market.

B. Errors of Fact. Mr. Jordan's report contains critical errors of fact, including, most notably, an incorrect statement of Claimant's time-of-injury wage. Claimant's social security earnings record, Ex. 45, shows that in 1997 Claimant's social security wages were $54,150.00. Claimant's yearly earnings provide a ballpark time-of-injury wage of $26.03 per hour.

C. Loss of Earning Capacity. Mr. Jordan provided no analysis of Claimant's loss of earning capacity despite substantial differences in pay between his work as a gyppo miner, his work as a custodian, and the wage he could expect if he could find employment. If Claimant could find a job that paid $12.00 per hour (the top of Mr. Jordan's wage range), he would still sustain a 54% loss of earning capacity, and that percentage increases to 75% if he can only earn $6.50 per hour (the bottom of Mr. Jordan's wage range).

D. Loss of Labor Market Access. Mr. Jordan's analysis of Claimant's loss of labor market access is flawed. Mr. Jordan concluded that Claimant was "capable of resuming work activities in a variety of occupations," Ex. 36, p. 17, and that "there are a number of other employers in the Claimant's Labor Market [sic] who hire on a regular and continuous basis for jobs that would have physical activities that fall within the restrictions/limitations outlined." *Id.*, at p. 18. Mr. Jordan even included Claimant's last job at the Galena, and his custodial job as available to him, despite the fact that even Dr. Friedman had opined that he could not return to either position. Mr. Brownell testified that a number of the employers that Mr. Jordan identified as hiring on a regular basis were laying workers off, due to the economic downturn. More importantly, Mr. Brownell pointed out that even if such jobs were available, Claimant lacked the skills to perform them.

E. Non-Medical Factors. Mr. Jordan produced a list of occupational titles that he believed were within Claimant's physical capacity and then obtained Dr. Friedman's imprimatur that Claimant could perform those occupations. As noted previously, the fact that an occupational title exists is not evidence that such jobs are regularly available in the Claimant's labor market. More to the point, however, Mr. Jordan's occupational listing failed to consider non-medical factors that bear directly on Claimant's employability—his age, his difficulty with basic reading and writing skills, his poor math skills, his inability to use a computer, his lack of keyboarding skills, and his disinclination for social interaction. To suggest that Claimant could work as an insurance sales agent, hotel clerk, estimator, or in retail sales, to name but a few of Mr. Jordan's suggestions, is inconsistent with the evidence of record. Claimant possesses innate intelligence and a strong work ethic. But it was not by accident that Claimant spent his work life in a field where his circle of co-workers was small (his partner), and the ability to work hard,

work fast, work safe, and make money were far more important to success than a penchant for schmoozing one's superiors, subordinates, colleagues, or customers.

73. The Referee finds ample reliable evidence in the record to establish that Claimant was as an odd-lot worker at the time of the hearing. Using the most conservative view of Claimant's medical impairments as rated by Dr. Friedman, (28% for cervical, 4% for right foot, and 3% for right shoulder), Claimant's total impairment is 35%. Mr. Crum's most conservative estimate of wage loss is 67% and his most conservative estimate of loss of access to the labor market is 60%. Claimant's medical impairment together with the relevant non-medical factors leads to the conclusion that Claimant was an odd-lot worker at the time of the hearing. This finding, however, is merely the beginning and not the end of the analysis of the real issue in this case.

ISIF LIABILITY

74. The determination that Claimant's disability is total and permanent necessarily leads to the real issue of this proceeding—whether ISIF is liable for a portion of Claimant's total disability income benefits. Under Idaho Code § 72-332, ISIF pays a portion of income benefits for workers who, while partially disabled from previous injury, become totally disabled in a subsequent industrial accident. This provision encourages the employment of individuals with pre-existing impairments by relieving their current employer from liability for possible aggravations of the worker's previous condition by a subsequent accident.

75. There are four requirements that must be proven by a claimant to establish ISIF liability under Idaho Code § 72-332:

1. Whether there was a preexisting impairment;
2. Whether the impairment was manifest;
3. Whether the impairment was a subjective hindrance; and

4. Whether the impairment in any way combines in causing total permanent disability.

Dumaw v. J. L. Norton Logging, 118 Idaho 150, 155, 795 P.2d 312, 317 (1990). Here, only the fourth element is at issue, but it is the most challenging aspect of the case.

Combined With

76. To satisfy the "combined with" requirement in I.C. § 72-332(1), a claimant must show that *but for* the pre-existing impairments, he would not have been totally and permanently disabled following the last accident. *Garcia v. J.R. Simplot Co.,* 115 Idaho 966, 772 P. 2d 1973 (1989). (Emphasis added).

77. Although the "combined with" requirement of Idaho Code § 72-332 has generated a number of appellate decisions, most of the cases in which ISIF has been relieved of liability involve two common scenarios. Either the claimant was an odd-lot worker prior to the last industrial injury or the claimant's disability became totally solely as a result of the last industrial injury. The Court has carefully laid out a framework for analyzing these two common situations and determined that neither meets the "combined with" requirement. This is not to suggest, however, that these are the *only* circumstances in which ISIF escapes liability.

78. Neither party in this proceeding was inclined to prepare post-hearing briefs, and opted instead to present oral closing arguments. In retrospect, the Referee would have appreciated the structure that briefing requires—particularly regarding ISIF's theory of the case. ISIF's destination is clear—it has no liability because of a failure of the "combined with" requirement of Idaho Code § 72-332; its road to that conclusion, however, is hidden in the underbrush. ISIF does not suggest that Claimant was an odd-lot worker prior to his last injury. The kind of work Claimant was performing at the time of his industrial accident makes such an argument a non-starter. Less clear is whether ISIF relies on the proposition that it was the last

accident alone that caused Claimant's disability, or is proposing some other analysis that will work to elude the "combined with" requirement.

79. In its closing argument ISIF emphasized the degenerative nature of Claimant's conditions and the nearly thirteen years that had passed between the time of Claimant's industrial injury and the hearing in this proceeding. ISIF asserted that it should not be held liable for Claimant's eventual total disability because his pre-existing degenerative conditions (including his cervical spine) would likely have led to the same end had the industrial accident not occurred.

80. Claimant's cervical condition, though pre-existing in the sense that Claimant suffered from degenerative changes likely predating the accident, did not become symptomatic until the occurrence of the 1997 accident. *Smith v. J.B. Parson Co.*, 127 Idaho 937, 908 P.2d 1244 (1996). It is certainly possible, perhaps even likely, that Claimant would have eventually become totally disabled solely as a result of his other pre-existing conditions, most notably his right foot. But the fact that Claimant's pre-existing conditions were degenerative does not by itself relieve ISIF of liability.

81. Idaho Code § 72-332(1) takes "permanent physical impairment from any cause or origin…" into consideration and is sufficiently broad to include progressive conditions which result in permanent physical impairment. *Colpaert v. Larson's*, 115 Idaho 825, 771 P.2d 46 (1989). In *Colpaert*, the claimant had preexisting ataxia, a progressive condition resulting in neurological and muscular degeneration. Prior to her industrial injury, the claimant had limitations attributable to her ataxia which prevented her from climbing stairs and standing for long periods of time. The claimant suffered an industrial injury to her right shoulder as the result of a slip and fall. When her doctor released the claimant to return to work, she returned to her time-of-injury employer and worked approximately three weeks before employer terminated her

for reasons unrelated to her injury. The claimant subsequently performed part-time work for an alternate employer for eight months, after which she became unable to work because of the progression of her ataxic condition. The Industrial Commission determined that the claimant had established ISIF liability because her impairment associated with ataxia was manifest prior to her industrial injury; she was totally and permanently disabled by reason of the combined effects of both her preexisting impairment and her industrial injury; and that the claimant's ataxia constituted a hindrance or obstacle to her employment. *Id*.

82. The *Colpaert* Court affirmed the decision of the Industrial Commission and specifically rejected ISIF's argument that a progressive condition could not constitute a permanent physical impairment sufficient to trigger ISIF liability. The Court found substantial competent evidence to support the Industrial Commission's determination that claimant met the "combined with" test in spite of contrary medical evidence that the natural progression of her ataxic condition caused her total disability, even without an intervening industrial injury. *Id* at 830. The case at bar is factually similar to *Colpaert* in that Claimant had pre-existing manifest impairments that were a hindrance to employment and were degenerative. The two cases differ only in that in this case there is no medical evidence that Claimant would have become totally and permanently disabled by his degenerative foot condition alone.

Disability Date

83. Since an injured worker's condition may change over time, it is necessary to determine when to apply the "combined with" requirement. The Idaho Supreme Court answered the question in *Garcia*:

> Moreover, given the requirement in § 72-332(1) that the preexisting impairment and subsequent injury combine to result in disability, *it is implicit in the Garcia test that the relevant point in time is the point at which the injury occurs.* Stated more specifically, the test is whether, but for the industrial injury, the worker

> would have been totally and permanently disabled immediately following the occurrence of the last industrial injury. This statement of the rule encompasses both the combination scenario where each element contributes to the total disability, and the case where the subsequent injury accelerated and aggravates the preexisting impairment.

Bybee v. State, Indus. Special Indem. Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996) (Emphasis added.)

84. Prior to his industrial injury, Claimant's pre-existing foot and shoulder impairments did not prevent him from performing very heavy work in an extremely harsh environment. Had Claimant's cervical injuries not prevented him from returning to work *in* the mine, Claimant would likely have continued to work underground. Dr. Wilson's IME report changed Claimant's life. Because he could not return to underground work, only three jobs remained available to him at the mine. Claimant lost more than half of his income as a result of moving "up top" and he knew that he was on borrowed time at the Galena.

85. At the time Claimant reached medical stability from the last accident in January 2001, he could not return to mining, was limited to medium-duty work, and had restrictions on extension and rotation of his neck resulting from the industrial injury. The industrial injury made Claimant's asymptomatic cervical condition symptomatic. Claimant's impairments, both pre-existing and as a result of the ACDF, together with his difficulty reading and writing, and lack of marketable skills made it difficult for him to find alternative employment. With the one-on-one help of Mr. Brownell, a desire to work and a work ethic that would tax the average overachiever, Claimant was able to obtain employment as a custodian for the Lake Pend Oreille School District.

86. The job with the school district seemed a good fit for Claimant initially, but he soon discovered that his prior injuries made many aspects of the job intolerable. Claimant's right

foot became more symptomatic once he started the custodial job. Away from the heat and humidity of the mine, the pain increased. The custodial job required more time on his feet and more walking than operating the jackleg did, and he was unable to shift his weight to the left foot for much of the time as he had done in the mine. The backpack vacuum he used aggravated his shoulder and neck pain, as did the large heavy floor mops he used to sweep and clean floors. For two years, Claimant struggled to perform his job until it became clear that the desire to work and a stoic constitution could not overcome the effects of twenty years of punishing work on a human body. His life as a worker ended the day he left the school district in June 2003 due to the combined effects of his cervical injury, a bad right shoulder, and the crush injury to his right foot he sustained as an adolescent.

CAREY APPORTIONMENT

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

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

Henderson v. McCain Foods, Inc., 142 Idaho 559, 567, 130 P.3d 1097, 1105 (2006). As discussed previously, the Referee finds Dr. McNulty's ratings to be more credible than those of Dr. Friedman. Adding the ratings given by Dr. McNulty, Claimant's whole person impairment was 39% of which 11% was pre-existing. Applying the *Carey* formula, ISIF's liability on

Claimant's total disability should be in the same proportion as Claimant's pre-existing impairment was to his total impairment (11/39 or 28%). Applying this formula, Employer is responsible for the first 360 weeks of benefits, and ISIF is liable thereafter.

CONCLUSIONS OF LAW

1. Claimant's disability became total and permanent under the odd lot doctrine on or about June 1, 2003.

2. ISIF is liable for a portion of Claimant's total permanent disability benefits.

3. Applying the *Carey* formula to the facts of this case, ISIF is liable for all total permanent disability benefits after the first 360 weeks.

RECOMMENDATION

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

DATED this 9 day of June, 2010.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARLIN C. DARRAH,	)	
	)	
Claimant,	)	**IC 1997-017923**
	)	**1999-026375**
v.	)	
	)	**ORDER**
STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,	)	Filed: July 6, 2010
	)	
Defendant.	)	
	)	

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

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

1. Claimant's disability became total and permanent under the odd lot doctrine on or about June 1, 2003.

2. ISIF is liable for a portion of Claimant's total permanent disability benefits.

3. Applying the *Carey* formula to the facts of this case, ISIF is liable for all total permanent disability benefits after the first 360 weeks.

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

matters adjudicated.

DATED this 6 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 6 day of July, 2010, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS,** and **ORDER** were served by regular United States Mail upon each of the following persons:

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djb /s/_____