BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

WALTER MERRILL, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	))))))))))))	**IC 2005-506275** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed November 12, 2010

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Lewiston on May 19, 2010. Claimant was present and represented by Brit Groom of Cottonwood and Washington, DC. Thomas W. Callery of Lewiston represented State of Idaho, Industrial Special Indemnity Fund ("ISIF"). Claimant and Employer, Grangeville Transit Mix, and its Surety, State Insurance Fund, settled prior to the joinder of ISIF by Claimant and prior to hearing. Oral and documentary evidence was presented. The record remained open for the taking of one post-hearing deposition. The parties then submitted post-hearing briefs and this matter came under advisement on September 23, 2010.

ISSUES

The issues to be decided as the result of the hearing are:

1. Whether ISIF is liable for a portion of Claimant's total and permanent disability ("TPD") benefits.[1]

2. Apportionment under the *Carey* formula.

[1] The parties agree that Claimant is totally and permanently disabled.

CONTENTIONS OF THE PARTIES

Claimant contends that his total and permanent disability resulted from injuries received in a serious motor vehicle accident combined with a pre-existing right knee condition and, thus, ISIF should be liable for a portion of his TPD benefits.

ISIF contends that Claimant's total and permanent disability is the result of a closed head injury Claimant sustained in the motor vehicle accident. He has severe, unpredictable, debilitating headaches and visual disturbances that make him unreliable as a potential employee. Claimant would not be totally and permanently disabled but for his closed head injury, and there is no combination with pre-existing conditions at play here.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and his landlady, Cheryl Bransford, presented at the hearing.

2. Joint Exhibits A-P admitted at the hearing.

3. The post-hearing deposition of Nancy J. Collins, Ph.D., taken by ISIF on June 30, 2010.

FINDINGS OF FACT

1. Claimant was 49 years of age at the time of the March 15, 2005, motor vehicle accident and 54 years of age at the time of the hearing. He resided on a ranch on the Salmon River approximately 22 miles southwest of Grangeville and 8 miles south of White Bird.

2. On March 15, 2005, Claimant was delivering a load of cement from Grangeville to Riggins. He was heading south approximately three miles south of White Bird on U.S. 95, when:

> I was coming across what they call Skoocumchuck Creek and going around a slight corner bending to the left, and the left front tire on the truck blew. I went 90 feet in my lane before I lost control. Then I went 85 feet in the other lane and crossed out it [sic]. And just on the other side of the fog line - - my cab was clear outside the fog line - - a state truck run [sic] into the right rear corner of my cab with the right front corner of their cab.
>
> And the impact rolled my truck up and threw me out through the front window. And the drum of the truck rolled over the state truck and killed the two state workers that were in the truck.

Hearing Transcript, pp. 7-8.

3. Claimant testified at hearing as follows regarding the injuries he received in the above-referenced accident:

> My left hand was mangled really bad. My thumb was jerked out of socket. I – my clavicle joint and my right collar bone was dislocated and jerked out of joint. My right shoulder was tore up. My head was tore up. My neck was jammed. And I had a fracture on my skull. I had five different star fractures in my skull. And then just a lot of abrasions and cuts and bruises.

Id., p. 9.

4. After the accident, Claimant was transported by ambulance to Syringa General Hospital in Grangeville. There he was worked-up and stabilized and was then transported to St. Joseph Regional Medical Center in Lewiston, where he was admitted in serious condition with the following diagnoses:

- Closed head injury with admission Glasgow Coma Score 14.
- Right parietal subarachnoid bleeding and contusions.
- Nondisplaced right parietal skull fracture.
- Right basilar skull fracture.
- Large right scalp avulsion with contusion and jagged laceration.
- Right upper lobe aspiration pneumonitis.
- Right pulmonary contusion.
- Right multiple rib fractures including first and second anterior fractures.
- Right sternoclavicular dissociation.
- Right scapular contusion.

- Tiny right pneumothorax.
- Multiple large abrasions and contusions.

Exhibit N., p. 1514.

5. Claimant also injured his left index finger and thumb, requiring surgery, his right knee, as well as fractures of his right ribs. Claimant was discharged on March 19, 2005. Claimant had a lengthy recuperation period, but eventually was released from treatment with the following whole person impairment ratings: 3% for his right shoulder injury; 3% for his closed head injury; 8% for his left thumb and index finger; 3% for his post-traumatic memory problems based on his subjective complaints; and, 15% for his right total knee arthroplasty (TKA) and profound right foot drop – pre-existing. Surety paid medical bills in excess of $98,000 to treat Claimant's injuries.

6. The parties agree that Claimant is totally and permanently disabled and the Referee so finds.

DISCUSSION AND FURTHER FINDINGS

Idaho Code § 72-332 provides:

> **Payment for second injuries from industrial special indemnity account, --** (1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease 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 or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account.
>
> (2) "Permanent physical impairment" is as defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or occupational disease, of such seriousness as to constitute a hindrance or obstacle to obtaining

> employment or to obtaining re-employment if the claimant should become unemployed. 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 permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.
>
> There are four elements that must be proven in order to establish liability of ISIF:
>
> 1. A pre-existing impairment;
> 2. The impairment was manifest;
> 3. The impairment was a subjective hindrance to employment; and,
> 4. The impairment combines with the industrial accident in causing total disability. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990).

7. Claimant suffered a right knee injury resulting from a Montana industrial accident in 2001. He had three surgeries on his right knee, the last being a total knee arthroplasty in 2002. He was awarded whole person PPI benefits of 15% for gait derangement from his loss of ankle dorsiflexion (drop foot) and the need to wear an ankle/foot orthosis. The physician who assigned the impairment rating did not discuss restrictions. However, Claimant testified at hearing that due to his foot drop, he cannot lift more than 50 pounds, nor can he climb up and down ladders, or walk or run on uneven ground. It is this injury/impairment that Claimant argues combined with the injuries received in the subject accident that caused his total and permanent disability and triggers ISIF liability.

Nancy Collins, Ph.D.:

8. ISIF retained Dr. Collins to assess Claimant's employability in the Riggins/Grangeville area. Dr. Collins' credentials are well-known to the Commission and will not be repeated here. Dr. Collins prepared a report dated February 16, 2010, and was deposed on June 30, 2010. Her curriculum vitae is attached as Exhibit 1 to her deposition. Dr. Collins indentified right knee replacement, right foot drop, and chronic back pain as vocationally

relevant pre-existing medical conditions. Dr. Collins was unable to locate any medical restrictions regarding Claimant's right knee TKA. However, Claimant had restrictions of 50 pounds lifting and no ladder climbing before his right TKA. Other than the addition of no overhead work, Claimant's lifting restrictions before and after the subject accident were not much different. Dr. Collins reported that Claimant described his most disabling condition as his headaches and associated vision loss. His headaches occur multiple times per month and last anywhere from a few hours to a few days. While having a headache, Claimant is unable to function and seeks a dark room as he experiences photophobia. Before the subject accident, Claimant was restricted to medium-level work due to his right foot drop. He is now restricted to light/medium-level work.

9. In her deposition, Dr. Collins expressed her understanding of Claimant's headaches and visual disturbances:

> Q. (By Mr. Callery): And could you summarize the nature of the headaches and visual disturbances and how they might relate to vocational issues?
>
> A. Well, they're somewhat like a migraine headache, but he doesn't really have any triggers and he doesn't know when they're going to happen. He has a little warning at times when he can treat with medication and that at times will keep the headaches at bay, but he still has the headaches. When he gets the bad headaches he has to go to a dark room where it's very quiet.
>
> He is unable to see well enough to drive. He even indicated he had trouble walking. When he gets the visual disturbances they can last for an hour, they can last for a day, they can last for a week. So they are very unpredictable, but they have been constant since the accident and continue today.

Dr. Collins' Deposition, p. 18.

10. Dr. Collins opined Claimant is totally and permanently disabled in his small, somewhat limited labor market. She also opined that he would still be unemployable in the Treasure Valley labor market due to his unreliability secondary to his headaches and visual

problems. Regarding the impact of Claimant's pre-existing right knee and foot drop conditions on his employability, Dr. Collins testified:

> Well, I think that the headaches take him out of the labor market in and of themselves. You know, he does have restrictions for his foot drop. I mean, he certainly has limitations for his foot drop as far as climbing and walking on uneven ground, but he's totally disabled just from the headaches and the visual disturbances in and of themselves. So I don't think that the knee or shoulder - - combined with, I think that the headaches and the visual disturbances really do take him out of the labor market, 100 percent.
>
> Q. (By Mr. Callery): If Mr. Merrill did not have headaches and vision disturbance, would he be employable?
>
> A. Yeah. I think he could have gone back to his employer at injury had his headaches gone away or, you know, somebody would have been able to do something with his visual problems. And I think there are other things he could have done, too. You know, he probably could have fed cattle and done some things; could certainly driven cattle truck; could have worked in a café; could have done things, you know, that are available in his labor market with the restrictions that he had for the shoulder and the knee.
>
> Q. My understanding of your report and your testimony today is that the preexisting knee and ankle condition in your opinion do not combine with the 2005 injury to render him disabled; is that correct?
>
> A. That's correct. I think he's totally disabled based on the head injury alone.

Dr. Collins Deposition, pp. 28-29.

Cheryl Bransford:

11. Ms. Bransford, a friend of Claimant's, has a ranch where she has allowed him to live rent-free since the fall of 2009. She also has an outfitting business and provides trail rides around McCall. Ms. Bransford has not employed Claimant because of his headaches:

> Q. (By Mr. Groom): Okay. And what happens when he gets a headache?
>
> A. He usually gets real quiet and then goes - - I'm assuming he's taking medication. And a lot of times, he'll just go to - - he was staying in the camper. He's now staying in the downstairs bedroom, and just basically disappears for a few hours - - to a day.

Hearing Transcript, p. 47.

12. Regarding Claimant's memory, Ms. Bransford testified:

> Q. Okay. Have you observed any kind of a problem with his memory at all while he's been staying there?
>
> A. Yes.
>
> Q. Okay. Describe those. What problems have you observed?
>
> A. Short-term memory, and the ability to sequentially remember what needs to be done. If at the beginning of the day I say, okay, this is where I'm going, can you feed the dogs, do this, and maybe five or six things needs [sic] to be done, he has a hard time remembering what needs to be done.
>
> Or if there's something that's happened a week ago, say remembering certain horses that - - that he saw in the field, he can't remember, or will get it mixed up. It's a confusion.

Id., pp. 48-49.

13. Ms. Bransford testified further on cross-examination regarding Claimant's unreliability in an employment setting:

> Q. (By Mr. Callery): Ms. Bransford, you indicated that if you're on a time schedule, you can't depend on Mr. Merrill. What do you mean by that?
>
> A. I mean that if - - from the ranch, it's 90 miles to my business in McCall, and I have a trail ride happening at noon, I either have to do it - - I mean, he's not reliable to be able to do that on a time schedule.
>
> Q. Is that because of the headaches?
>
> A. Yes.
>
> Q. Okay.
>
> A. It's - - they are unpredictable.
>
> Q. You simply don't know if he's going to be able to - - if he's going to have a headache that day or not?
>
> A. That's correct.
>
> Q. And as an employer, that's not acceptable to you?
>
> A. That's not acceptable. Actually, you can't depend on him from hour to hour because they seem to come on fairly - - not rapidly; but one hour he can be fine, and in an hour-and-a-half, he will say, I'm getting a headache, I need to go lay down for a while. So, that's - - if he was in the middle of a project, then it would - - he couldn't complete the project.

Id., pp. 49-50.

ICRD Consultant Cris Puckett:

14. Surety referred Claimant to the Industrial Commission Rehabilitation Division in April 2005. ICRD consultant Cris Puckett was assigned to Claimant's case. At the time she first interviewed Claimant, he was not medically stable. He complained of consistent, significant headaches that caused visual disturbance during the course of Claimant's involvement with ICRD. This August 17, 2006, note is telling:

> **EMPLOYER CONTACT:** Sonny Stewart, co-owner of Grangeville Transit was contacted and provided an update regarding this case. He stated he occasionally talks to the claimant. He is usually with his son who drives him because of his headaches/blurry vision. He stated he is sometimes incoherent and thinks he is more "messed up" than the claimant realizes. He stated he would consider bringing him back if he was better.

Exhibit D., p. 506.

15. Because Claimant indicated to Ms. Puckett that he did not want to return to work until he was "fixed," i.e., his headaches were under control, Ms. Puckett closed her file in February 2007. She noted that, at that time, Claimant was medically stable regarding his orthopedic injuries, but not his headaches. Ms. Puckett identified six job titles that Claimant may have been able to perform, but then reported, "It is logical that the claimant could not perform these jobs given these headaches and unpredictable vision problems." *Id*., p. 510.

16. Ms. Puckett was asked to reopen Claimant's file at his attorney's request in August 2008. Claimant had no work release, but indicated he wanted to return to work although he still had unpredictable headaches. The treating physician for his headaches indicated that, absent his headaches, Claimant was able to return to full-duty work. Ms. Puckett did not reopen Claimant's file because, "It would be very difficult for the claimant to maintain gainful employment given his unpredictable disabling headaches." *Id*., p. 519. After her decision to not reopen Claimant's file, Ms. Puckett received a response to her Job Site Evaluation from

Claimant's treating physician for his headaches that indicated, "Walter is limited by severe headaches. When none able to do fairly routine activities. When present, cannot perform any duties." *Id*., p. 542.

Jim Gardner, M.D.:

17. Dr. Gardner, a general practitioner, has followed Claimant for his headaches since the date of the accident. In a November 8, 2007, office note (Claimant's last visit of record), Dr. Gardner noted, "He is not likely to get improvement from here and really there is no particular anticipation of this. This is a chronic headache from a traumatic event." Exhibit M, p. 1400.

Claimant's testimony:

18. Claimant testified as follows at hearing regarding his headaches:

> Q. (By Mr. Groom): Okay. Now I notice in some of the medical records there's indication of headaches?
>
> A. Yes. I get headaches. And that starts when I - - when I feel a headache coming on, if I'm really aggressive with the medication that I got for it, which is Ibuprofen, then I can sometimes get it under control. Sometimes I can't. When I get a headache, though, I lose my eyesight.
>
> Q. And how often does that happen?
>
> A. No telling. It varies from time to time. And it doesn't seem to be regular or unregular [sic]. I just - - sometimes I get them and sometimes I don't.
>
> Q. Have you observed or noticed any particular thing that might start a headache or cause a headache?
>
> A. No, I haven't. And we tracked everything I ate, the amount of time I slept, everything. Nothing seems to affect the regular - - when I get them and when I don't get them.
>
> Q. Okay. And how long do they last?
>
> A. From one day to a week sometimes.

Hearing Transcript, pp. 10-11.

19. Under cross-examination, Claimant described in more detail how his headaches affect his vision:

> Well, it's - - as I get the headache, usually I try to get some Ibuprofen in me and sit down and get calm and quiet. If I don't get started in time, then eventually it just gets so I can't - - I can see the difference between light and dark, but I can't focus on any object. It's everything's just blurry. Nothing comes into focus.

Id., p. 27.

20. Claimant also testified regarding his short-term memory problem:

> Yeah. I don't know if it's the headaches affected my memory or the wreck and the head trauma that I went through. But yes, I do have some short-term memory loss. I have trouble sometime getting my thoughts in order in - - I can tell you all my thoughts, but I might tell you the last one first and the first one last. I mean, my order is not always right.

Id., p. 42.

21. Claimant testified that his pre-existing right knee and foot drop still bother him some and he has restrictions of no lifting over 50 pounds, no kneeling, no going up and down ladders, and no walking on uneven ground or up and down hills. Claimant further testified that, but for his March 2005 accident, he would still be working for Employer. However, post-accident, he believes it would be unsafe to do so due to his headaches.

22. Based on this Referee's observations of Claimant at hearing and comparing his testimony to the voluminous medical and vocational records, the Referee finds that Claimant is a credible witness.

23. The Referee finds that Claimant's total and permanent disability is due solely to his March 2005 accident, more particularly his headaches, visual disturbances, and short-term memory loss stemming from his traumatic head injury. No one who has weighed in on this matter has opined otherwise. Indeed, in his Affidavit in Support of Attorney Fees filed in connection with the Lump Sum Settlement with Employer, Claimant's counsel stated: "Claimant continues to suffer from debilitating headaches that, despite efforts to work, have

rendered him unable to find employment in the Grangeville/Cottonwood areas" and, "Mr. Merrill experiences short term memory loss that required me to keep in constant contact with him and explain his case at the very least on a weekly if not twice a week basis." *See,* Exhibit B., p. 218. The best argument Claimant's counsel has been able to muster is that Claimant is otherwise able to perform work at Moody Construction, Grangeville Transit Mix, and for Cheryl Bransford, but for his pre-existing lower extremity condition and related limitations. However, from the aforementioned it is clear that Claimant's headaches and visual problems alone would prohibit this work since Claimant is unavailable for labor of <u>any</u> kind when he suffers one of his headaches. These episodes are impossible to predict in terms of onset and length, thus making employment in any recognized segment of the labor market untenable. In summary, Claimant's preexisting impairments and related limitations are subsumed by the accident produced limitations, and do not combine with the accident produced limitations.

CONCLUSIONS OF LAW

1. Claimant is totally and permanently disabled.
2. Claimant has failed to prove that ISIF is liable.
3 The application of the *Carey* formula is moot.

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 __3rd___ day of November, 2010.

INDUSTRIAL COMMISSION

___/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __12th____ day of ___November____, 2010, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

BRIT GROOM
9 4TH ST SE
WASHINGTON DC 20003-3803

THOMAS W CALLERY
PO BOX 854
LEWISTON ID 83501

ge Gina Espinosa