

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RAYMOND MALLO,

Claimant,

v.

OMNIPURE FILTER COMPANY, INC.,

Employer,

STATE INSURANCE FUND

Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND,

Defendants.

IC 2007-006350

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION**

Filed June 13, 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee LaDawn Marsters, who conducted a hearing in Boise, Idaho on December 17, 2013. Claimant was present at the hearing and represented by Todd M. Joyner of Nampa. Kenneth L. Mallea of Boise represented the Industrial Special Indemnity Fund (ISIF). Claimant settled his claims against Employer (Omnipure) and Surety via lump sum settlement agreement prior to the hearing. Claimant and ISIF presented oral and documentary evidence at the hearing, and five post-hearing depositions were taken. Post-hearing briefs were filed, and the matter came under advisement on June 3, 2014. The case is now ready for decision.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 1

ISSUES

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

1. Whether ISIF is liable pursuant to Idaho Code § 72-332; and, if so:
2. *Carey* apportionment.

CONTENTIONS OF THE PARTIES

In 1979, Claimant lost all of the fingers on his left hand in a meat grinder. He was 17. He subsequently entered a vocational rehabilitation program where he learned to do injection molding. Claimant worked as a full-time injection molder for more than thirty years. In addition, he has also regularly worked secondary, part-time jobs in positions such as cashier and pizza delivery driver.

On February 16, 2007, Claimant's right upper extremity, including his right hand and wrist, were injured when a 400-pound mold fell on him at work at Omnipure. Following a long course of conservative care managed by a number of physicians, Claimant still had significant pain, so he underwent a right wrist fusion with plating on January 11, 2012. Thereafter, Claimant's right wrist movement was permanently limited, causing his employer at the time (Adaptive Technologies, Inc., or "ATI") to lay him off in September 2013.

Claimant relocated to the Sun Valley area, where his girlfriend was employed, at the end of September 2013. He worked as a pizza delivery man, first for Domino's, and then for Smoky Mountain Pizza and Pasta, which paid better. Claimant was more or less continuously employed following his right wrist fusion surgery, at least on a part-time basis, at the time of the hearing.

Claimant asserts that, notwithstanding his continuous employment, he is totally and permanently disabled as an odd-lot worker such that ISIF is liable for his benefits. He relies upon the vocational opinions of Mary Barros-Bailey, Ph.D.

Defendants counter that Claimant is not totally and permanently disabled because he remains capable of gainful employment. Therefore, ISIF is not liable. They rely upon the vocational opinions of Barbara Nelson, M.S., CRC, and William Jordan, M.A., CRC, vocational rehabilitation consultants, as well as Mark Clawson, M.D., Claimant's treating physician.

OBJECTIONS

All pending objections preserved in the deposition transcripts are overruled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The prehearing deposition transcript of Claimant recorded on July 19, 2013;
2. The testimony of Claimant, Bret Adams, M.P.T., and Bruce LaVassar taken at the hearing;
3. Joint Exhibits (JE) A-X admitted at the hearing; and
4. The post-hearing depositions of:
 - a. Mark Campion Clawson, M.D. taken January 15, 2014; and
 - b. Mary Barros-Bailey, Ph.D.; Shaun D. Byrne, ICRD Consultant; William C. Jordan, M.A., CRC; and Barbara K. Nelson, M.S., CRC taken January 28, 2014.

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

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 3

FINDINGS OF FACT

1. Claimant has significant preexisting impairment and disability as the result of a 1979 meat grinder accident that took all of the fingers (sparing the thumb) of his left hand. Following his recovery, Claimant received retraining assistance from Idaho Division of Vocational Rehabilitation (IDVR) to become a mold injector. He was initially told that he could not do this type of work with his left finger amputations, but he was persistent and IDVR relented. Claimant went on to a successful career as a mold injector for approximately 30 years, in locations such as Idaho Falls, Bellevue, Boise, and Phoenix, Arizona. Claimant also has significant impairment and disability related to his 2007 industrial right upper extremity injury which required surgery to fuse and plate his right wrist in January 2012. He has no other relevant impairments.

2. Claimant continued to work for Omnipure, his time-of-injury employer, for approximately two years after his industrial accident and injury. Subsequently, Claimant was employed by ATI, from 2009-2013. According to the owner, Bruce LaVassar, Claimant was faster at the job than others before his industrial injury, even one-handed. He found Claimant very motivated and able to adapt. Claimant did similar work at every molding plant. For example, at ATI he was responsible for setting up machines to create plastic molding. He was regularly required to climb ladders, position heavy steel objects, and reach into awkward spots to tighten bolts or manipulate clamps. ATI has five machines, each requiring mold changes two to five times each shift.

3. Four months after his January 2012 industrial wrist fusion surgery, Claimant returned to his time-of-injury job at ATI. Although he tried to perform to his pre-injury standards, Claimant was unable to do so. He developed right shoulder pain that he attributed to twisting, reaching, and performing fine manipulation activities at the odd angle required of his fused right wrist. By July 2012, Mr. LaVassar determined that Claimant was unsafe to perform his job and planned to lay him off in a couple of months, after Claimant finished training his replacement.

4. Claimant was laid off from ATI for about four months, but he was hired back in November 2012 for 10-12 hours per week doing product testing. He was hired back full-time in March 2013 when his replacement proved unfit, and he trained another replacement. He was laid off for good in September 2013. Claimant had been working 45-50 hours per week, earning \$18 per hour, before he left ATI. He was one of the top three non-executive workers, supervising others on his shift, performing quality control, and planning how to execute projects. Mr. LaVassar would have kept Claimant employed if he had sufficient work that Claimant could do. He will not refer Claimant for a similar job because he is afraid Claimant might get hurt. Claimant loved his job at ATI, but he conceded that he probably was no longer able to safely do it with the speed required to remain effective after his fusion surgery.

5. Claimant worked a part-time job while he also worked full-time as a mold injector for most of his life. His part-time jobs have included pizza delivery person and cashier/shelf stocker for Walmart. He also has experience in, for instance, bowling alley management, disability counseling/life coaching, construction clean-up, farm labor, harvester operation, and mine labor.

6. Claimant is not ready to retire. He wants to return to full-time work and is confident that he will, after he has had time to determine the outer boundaries of his limitations. Along those lines, Claimant does not think he could return to Walmart because he cannot throw freight. He cannot type, though he can use the Internet. He can only do fingering activities for a short time, and he has difficulty lifting more than a gallon of milk due to pain. He does not believe he can do quality control work because there is some lifting involved and he is not trained to do it.

7. Although Claimant was a working supervisor of other employees at ATI and other companies, both Mr. LaVassar and Claimant testified that Claimant does not possess the demeanor required of an executive manager (with few or no hands-on duties) because he speaks honestly and bluntly, and would rather do the job himself than wait for someone else to learn to do it. Claimant describes why he believes he was laid off by a prior employer:

Q. Well, what happened?

A. I was brought into the office and the - - one of the owners was upset with me, because my production wasn't up to par and I informed him that I had people on my shift that weren't pulling their weight and he says, well, get rid of them, so I went down and I fired both his kids.

Q. I take it that that did not go well?

A. That did not go well.

...

A. I have always been that way. It's just - - if you don't like my opinion definitely don't ask.

TR-51. Claimant also believes that a personality conflict with a manager at ATI contributed to his lay off in September 2013; however, Mr. LaVassar did not confirm this suspicion.

8. Claimant was 51 years of age at the time of the hearing and residing in Hailey. He was working approximately 20 hours per week at Smoky Mountain Pizza as a delivery driver earning \$7.50 per hour, plus tips. Upon first moving to Hailey in September 2013 to be with his girlfriend, who was already employed and living there, he worked for Domino's Pizza. He left Domino's to work at Smoky Mountain because the tips were better. Claimant has known the store manager at Smoky Mountain for ten years and considers him a friend. Claimant can only drive 30-45 minutes before his hand cramps up and becomes painful.

9. Claimant has not searched for work in the Sun Valley area outside his pizza delivery jobs. He submitted a few job applications via the Internet in Boise before he left the area, without success. He felt he was not called back because he listed his upper extremity disabilities on the applications. Claimant had not yet contacted the Industrial Commission Rehabilitation Division (ICRD) office in the Sun Valley area, nor any other vocational assistant, for job placement assistance.

PHYSICAL FUNCTION OPINIONS

10. **R. Bret Adams, M.P.T.** Mr. Adams conducted a functional capacity evaluation (FCE) on October 17, 2012. He is qualified to render an opinion regarding Claimant's functional abilities.

11. Mr. Adams explained that Claimant's loss of function in his right hand/wrist is difficult to assess because he does not have a fully functioning left hand with which to compare it. Claimant's right hand does not fully flex or extend, and his side-to-side motion is limited. For example, rather than the 15 to 30 degrees of functional extension considered normal, Claimant has only eight degrees. He also explained that Claimant had trouble positioning his

hand to pick up flat weights from the ground. Mr. Adams opined that Claimant could grasp/handle objects of no more than five pounds frequently (50% of the time), but not constantly (greater than 67% of the time). Claimant's lifting restrictions include:

- 50 pounds: Occasionally (floor to mid-thigh*, mid-thigh to waist*, carrying with both hands*, pushing, pulling).
- 25 pounds: Frequently (floor to mid-thigh*, mid-thigh to waist*, carrying with both hands*, pushing, pulling).
- 20 pounds: Occasionally (waist to shoulder, above shoulder).
- 10 pounds: Constantly (floor to mid-thigh*, mid-thigh to waist*, carrying with both hands*, pushing, pulling); Frequently (waist to shoulder, above shoulder).
- Claimant should avoid all constant lifting from waist to shoulder and above.
- (Items denoted with an "*" should be limited to half the value for right hand-only lifting).

12. **Mark Clawson, M.D.** Dr. Clawson, Claimant's treating surgeon, is qualified to render an opinion as to Claimant's right wrist functionality. On August 20, 2012, Dr. Clawson opined Claimant was medically stable and rated his industrial permanent partial impairment (PPI) at 28% of the right upper extremity.

13. Dr. Clawson noted Claimant had complained of stiffness and difficulty positioning his hand into small spaces, and that these complaints were not unusual from someone who had undergone a right wrist fusion. Like Mr. Adams, Dr. Clawson explained that Claimant cannot flex his right wrist (bend his hand down), and that he cannot extend his wrist (pull his hand back) more than ten degrees, which is the position of his fusion. He also has limitations in

side-to-side movement. For instance, he cannot form a fist and move his hand in a circle. His lifting ability is limited by his ability to grasp with his fingers, as well as the strength through the rest of his right upper extremity.

14. Dr. Clawson opined that Claimant *may* use his hand normally, without any restrictions. However, he does not mean to say that Claimant *can* use his hand normally. He clarified, “Within the constraints of his wrist fusion, the limb can be used without other restriction.” Clawson Dep., p. 13. Along those lines, Dr. Clawson concurred in the FCE results reported by Mr. Adams (see below) by signing a letter provided by Claimant’s counsel on January 17, 2013, and by confirming his agreement with the statements in that letter at his deposition. He further opined, generally, that Claimant can work at a medium-duty level.

15. Dr. Clawson also opined that Claimant’s shoulder pain following his wrist fusion was likely related; however, he did not discuss whether he believed this condition was permanent.

VOCATIONAL EXPERT OPINIONS

16. **Shaun Byrne, ICRD consultant.** Mr. Byrne began assisting Claimant with his job search in November 2012. Given that Claimant was reemployed by ATI at this time, Mr. Byrne’s role was limited. He completed a Job Site Evaluation (JSE) and suggested medium-duty job possibilities that he believed Claimant could do. At his deposition in January 2014, Mr. Byrne opined that Claimant was employable, though not at his time-of-injury wage, which exceeded \$40,000 annually, in any position other than mold injector.

17. **Mary Barros-Bailey, Ph.D., vocational consultant.** Dr. Barros-Bailey's education and experience in the vocational disability field are well known to the Commission. She is qualified to render a vocational opinion.

18. Dr. Barros-Bailey conducted a vocational evaluation, at Claimant's request, on September 26, 2013. In advance of preparing her report, Dr. Barros-Bailey reviewed Claimant's relevant medical and vocational records, and interviewed him (on August 6, 2013). By the time of her deposition in January 2014, she had also reviewed the transcript of the deposition of Dr. Clawson, the time-of-injury JSE, and the vocational evaluation reports of Ms. Nelson and Mr. Jordan.

19. Dr. Barros-Bailey found Claimant to be likeable and motivated to work. In her report, she noted Claimant's available annual earnings information since 2007, the year of his industrial accident (\$34,986 (2007), \$39,726 (2008), \$30,281 (2009), \$40,229 (2010), \$43,939 (2011)). She also deduced that he retained the following transferable and cross-functional skills:

- Balance cash and receipts
- Clean work areas
- Locate and retrieve merchandise from storage
- Process credit or debit card transactions
- Provide customer service
- Receive payments and make change
- Sell products
- Stock, organize and clean shelves
- Use basic mathematics
- Use cash registers
- Use electronic scanners

20. She opined that, as a result mainly of his industrial right-sided impairment, Claimant has suffered an 86% loss of access to the Boise area labor market, plus significant loss of wage earning capacity. She thought he could probably continue to work delivering pizzas and

that he could do some cashiering jobs. As to whether Claimant is totally and permanently disabled as an odd-lot worker, Dr. Barros-Bailey thought not when she authored her report:

...it is this evaluator's opinion that [Claimant] has sustained a 76% disability, inclusive of impairment. These factors combined with his pre-existing limitations and the function in his right dominant upper extremity based on the evaluation could substantially further limit his potential and may possibly indicate him to be an odd lot worker. However, his demonstrated past and present persistence to remain in the labor market, motivation, and presentation suggest that although he might have prolonged periods of unemployment compared to his previous experience, he seems to retain a small pool of jobs available to him.

JE-S12.

At her deposition, Dr. Barros-Bailey equivocated as to Claimant's odd-lot status, but she did not opine that looking for suitable full-time employment would be futile:

A. Well, he has got a very small pool of jobs, even given just the injury at hand. When you couple it with his age and the visible nature of his disability, it becomes an incredible gray area of whether he is able to be continuously employed in the labor market.

So I would say it would be closer to probably Odd Lot than anything. He will probably continue to find jobs. They will probably continue to be part-time jobs. Whether we can say he will consistently be employed because of the combination? I would doubt it.

Barros-Bailey Dep., p. 19.

21. **William C. Jordan, M.A., CRC.** Mr. Jordan, a former ICRD consultant and IDVR counselor, has worked as a vocational consultant with Northwest Consulting, Inc. since 1993. He is qualified to render a vocational opinion.

22. Mr. Jordan prepared an Employability Report on November 12, 2013 at the request of Defendants. His opinions therein are based upon interviews with Claimant, as well as his review of Claimant's relevant medical and vocational records, and interviews with Claimant's supervisor at ATI (Martin Squires), Mr. LaVassar, and Dr. Clawson. By the time of

his deposition, he had also reviewed the hearing transcript, the transcripts of the depositions of Claimant and Dr. Clawson, and the report of Dr. Barros-Bailey.

23. Mr. Jordan prepared job descriptions for 20 positions, including Claimant's time-of-injury job, which Dr. Clawson reviewed and opined Claimant could do, from a medical standpoint. The approved positions include: shift supervisor, Adaptive Technology; molding room technician, Omnipure; developmental disability aide; job development specialist; stock control clerk; rail car operator, mines; dump truck driver; tractor operator; preventive maintenance coordinator; mold setter; building manager; bowling alley manager; pin setter mechanic; desk clerk, bowling floor; cafeteria cashier; plastic prep/packaging; school bus driver; assembler II-rework department; general production worker; and supervisor, plastics fabrication. Mr. Jordan explained that this is not an exhaustive list of the jobs he believes Claimant can do.

24. Utilizing Mr. Adams' FCE results, Mr. Jordan opined that Claimant has lost access to 85% of his pre-injury Boise area labor market and 32% of his pre-injury wage earning capacity due to his industrial right wrist fusion, for a combined 58-59% permanent disability inclusive of permanent impairment. Utilizing Dr. Clawson's opinions, he opined that Claimant has incurred permanent disability of 29% inclusive of permanent impairment. Mr. Jordan did not consider the Sun Valley area labor market. He does not believe a job search in either the Boise or Sun Valley areas would be futile.

25. **Barbara K. Nelson, M.S., CRC, vocational consultant.** Ms. Nelson, a former ICRD consultant and supervisor, has maintained a sole proprietorship as a vocational consultant since 1999. She is qualified to render a vocational opinion.

26. Ms. Nelson conducted a vocational evaluation on November 26, 2013 at the request of ISIF. She interviewed Claimant, finding him to be cooperative and to possess excellent communication skills. He was a reasonably good historian, although he had some trouble recalling the dates on which he worked for prior employers. Ms. Nelson also reviewed Claimant's relevant medical and vocational records, specifically including his July 2013 deposition transcript, and the vocational reports of Dr. Barros-Bailey and Mr. Jordan. By the time of her deposition, she had also reviewed the hearing transcript and the transcripts of the depositions of Dr. Clawson, Mr. Jordan, and Dr. Barros-Bailey.

27. Ms. Nelson determined that Claimant's only permanent disability prior to his industrial accident was related to his left finger amputations. She referred to his condition as "mitten hand," and noted that he "was able to perform hand intensive work most of his life despite this rather significant impairment to his non-dominant hand." JE-U4.

28. Ms. Nelson was not asked to do a disability rating or calculate wage loss or labor market access loss. She was only asked to opine as to whether Claimant is totally and permanently disabled. She responded, "I could see no reason to consider him permanently and totally disabled as a result of his 2007 industrial right hand injury, in combination with his earlier left hand injury." Nelson Dep., pp. 13-14. However, she disagreed with some of the conclusions of Dr. Clawson and Mr. Jordan; for instance, that Claimant could likely be employed in his time-of-injury job (too slow); as a job development specialist (not enough education and experience); as a plastics fabrication supervisor (he would probably have to do the work, too, which he cannot do); dump truck driver (too much shoveling); tractor operator (probably would have to perform

other duties, as well); or as a general production worker or rail car operator (likely too hand-intensive).

29. Ms. Nelson agreed that Claimant would likely be competitive for the other jobs Mr. Jordan proposed, that they were within his residual capabilities, that they are regularly and continuously available in the Boise area, and that they are suitable. Therefore, Ms. Nelson does not believe that it would be futile for Claimant to attempt to find employment, either in the Boise or Sun Valley areas. She specifically agreed with Mr. Jordan and Dr. Clawson's recommendation that Claimant should consider becoming a developmental disability aide. Although the wage would be lower than he was making before his industrial injury, this job typically comes with benefits and, Ms. Nelson believed, it would not be too physically taxing. Further, Claimant's lack of a disability mindset would be inspirational to others. She also thought Claimant could be employed as a cashier, security officer, bus driver, stock control clerk, preventive maintenance coordinator, and in other positions, as well.

CREDIBILITY

30. Claimant presented as a thoughtful, well-spoken, well-mannered, well-dressed and bright man. He demonstrated an ability to recall and articulate relevant facts clearly and persuasively. He was not defensive on questioning. Claimant is a credible witness; however, like most witnesses, he did not always have clear recall of relevant treatment and employment dates. Where otherwise credible evidence in the record conflicts with Claimant's recollections of such dates, Claimant's testimony will be allocated less weight.

DISCUSSION AND FURTHER FINDINGS

The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *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, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

TOTAL PERMANENT DISABILITY

31. **100% method.** "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. I.C. § 72-423. Here, there is no dispute that Claimant incurred work-related permanent impairment, nor that his condition is medically stable; therefore, the matter is ripe for a determination of whether Claimant is totally and permanently disabled. If he is not, then ISIF is not liable for his benefits. I.C. § 72-332. Claimant concedes that he is not totally and permanently disabled by the 100% method; however, he seeks a finding that he is thusly disabled as an odd-lot worker.

32. **Odd-lot doctrine.** A claimant who is not 100% permanently disabled may still prove total permanent disability by establishing he is an odd-lot worker. An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 15

(1996). Such workers are not regularly employable “in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part.” *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status rests upon the claimant. *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990).

A claimant may satisfy his burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways:

- a. By showing that he has attempted other types of employment without success;
- b. By showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or
- c. By showing that any efforts to find suitable work would be futile.

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

33. Notwithstanding his medical and nonmedical factors, which each vocational expert considered, Claimant has been continuously employed, with the exception of a four-month layoff period, first by ATI in Nampa, and then by Domino’s and Smoky Mountain in the Sun Valley area, since the time of his industrial accident. He also testified that he submitted some online applications, without success. Evidence from Claimant, Mr. LaVassar, Dr. Barros-Bailey, and Ms. Nelson is sufficient to establish that Claimant will not likely be competitive for any mold injector jobs – even supervisory positions – because he can no longer perform the work fast enough and even supervisors must perform the hands-on work. The evidence of Claimant’s job search, however, is insufficient to prove by a preponderance that he has made a reasonable attempt at other types of employment without success. Claimant has failed to establish he is an odd-lot worker under the first *Lethrud* prong.

34. No vocational worker has sought work on Claimant's behalf. Claimant has failed to establish he is an odd-lot worker under the second *Lethrud* prong.

35. As for the third *Lethrud* prong, Mr. Jordan and Ms. Nelson both opined that it would not be futile for Claimant to attempt to find full-time employment in either the Boise or Sun Valley areas. They detailed a number of jobs they thought he could do that are regularly and continuously available in both labor markets. The Referee is persuaded by Ms. Nelson's testimony that Mr. Jordan's long list of potential jobs includes a fair number of positions beyond Claimant's abilities. Once these are eliminated, however, there remain others that he can do. These include, but are not limited to, some driver/delivery jobs, such as he held at the time of the hearing, and some cashiering, disability counselor, and management positions, such as he has held in the past. Although Claimant has not proved to be an ideal supervisor in the past, the record discloses no medical or psychological reason why he could not choose to behave more diplomatically in such positions if motivated to do so. All of the vocational experts commented on his amiable nature and positive attitude.

36. Even Dr. Barros-Bailey believed that Claimant could probably find some work. Although she opined in her deposition that Claimant was probably closest to an odd-lot worker, her explanation that this is a gray area in combination with her reported opinion (that he is probably not an odd-lot worker) undermine this position. Moreover, Dr. Barros-Bailey did not opine that it would be futile for Claimant to attempt to find suitable employment.

37. Claimant is a bright, motivated individual with marketable skills and experience, most notably in driving, disability counseling, management and planning, and an impressive employment history both before and following his industrial accident. Although Mr. LaVassar

would not refer Claimant for a mold injector job due to the safety risk, he thinks highly of Claimant and would likely recommend him for other positions. Claimant's lack of fingers on his left hand and, to the extent it is visible to an employer, his right wrist fusion, may dissuade some employers. However, he has overcome this detriment in the past and will likely continue to do so in the future.

38. The record fails to establish that ATI, Domino's, or Smoky Mountain were "sympathetic employers". Claimant's experience and abilities were key to securing each of these post-injury jobs, though it is apparent that ATI only needed him temporarily, to train others. Further, Claimant's efforts in maintaining employment have not been proven to be superhuman.

39. Claimant compares his situation to the Claimant's in the recently decided Commission case of *Green v. Green*, 2014 IIC 0009. That case is inapposite, however, because it turned largely on the very limited St. Maries labor market, Claimant's notoriety in that market, and the testimony of several potential employers who persuasively explained that they would like to employ Claimant, but declined to do so because they believed his preexisting back condition placed them at undue risk for liability. Similar evidence is not found in this case.

40. The Referee finds Claimant has failed to establish any of the three *Lethrud* requirements necessary to prove odd-lot status.

41. Claimant has failed to prove that he is totally and permanently disabled, by any method. Therefore, ISIF is not liable for his benefits.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that he is totally and permanently disabled, under any method.

2. ISIF is not liable for his benefits.

RECOMMENDATION

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

DATED this 11th day of June, 2014.

INDUSTRIAL COMMISSION

/s/
LaDawn Marsters, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June, 2014, 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:

TODD M JOYNER
GOICOECHEA LAW OFFICES
1226 E KARCHER RD
NAMPA ID 83687

KENNETH L MALLEA
MALLEA LAW OFFICES
PO BOX 857
MERIDIAN ID 83680-0857

sjw

/s/ _____

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OMNIPURE FILTER COMPANY, INC.,

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STATE OF IDAHO, INDUSTRIAL SPECIAL
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IC 2007-006350

ORDER

Filed June 13, 2014

Pursuant to Idaho Code § 72-717, Referee LaDawn Marsters submitted the record in the above-entitled matter, together with her 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 has failed to prove that he is totally and permanently disabled, under any method.
2. ISIF is not liable for his benefits.

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

DATED this 13th day of June, 2014.

INDUSTRIAL COMMISSION

/s/
Thomas P. Baskin, Chairman

/s/
R.D. Maynard, Commissioner

/s/
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June, 2014, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

TODD M JOYNER
GOICOECHEA LAW OFFICES
1226 E KARCHER RD
NAMPA ID 83687

KENNETH L MALLEA
MALLEA LAW OFFICES
PO BOX 857
MERIDIAN ID 83680-0857

sjw

/s/