BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DANIEL MOORE, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2017-015549** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED JAN 28 2022 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John Hummel, who conducted a hearing in Boise on December 23, 2020. Daniel Luker, of Boise, represented Claimant, Daniel Moore, who was present in person. Paul J. Augustine, of Boise, represented Defendant, State of Idaho, Industrial Special Indemnity Fund (ISIF). The parties presented oral and documentary evidence, took post-hearing depositions and submitted briefs. The matter came under advisement on July 6, 2021.

ISSUES

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

1. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine or otherwise.
2. Whether ISIF is liable for a portion of Claimant's disability under Idaho Code § 72-332.
3. If ISIF is liable, what is the correct apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant alleges that he suffered pelvic fractures while working at Volt Information Sciences, Inc. in 2017. He further alleges that his pelvic fractures caused his recovery from his pre-existing knee conditions to falter. He contends that the combination of his pre-existing lower extremity injuries from 1999 and his 2017 industrial pelvic injury caused him to suffer a precipitous decline in his functional ability to work, resulting in his total and permanent disability for which ISIF is partially liable under Idaho Code § 72-332.

ISIF alleges that Claimant has failed to prove that he is totally and permanently disabled due to the combined effects of his pre-existing physical impairments to his right knee and his 2017 industrial injury to his right pelvis. ISIF further contends that Claimant was able to return to gainful employment for three years following his recovery from industrial injury in 2017, and had no work restrictions in his employment, however Claimant unilaterally chose to quit his employment. Finally, ISIF claims that the medical evidence does not support a finding that Claimant's 2017 industrial injury aggravated or accelerated his pre-existing impairments to his bilateral knees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The transcript of the hearing held December 23, 2020;
3. Joint Exhibits 1 through 41, admitted at the hearing;
4. The post hearing deposition testimony of Robert Friedman, MD, taken on February 17, 2021 by Claimant;

5. The post hearing deposition testimony of Nancy J. Collins, PhD, taken on March 16, 2021 by Claimant;

6. The post hearing deposition testimony of Paul Collins, M.D., taken on March 2, 2021 by ISIF; and

7. The post hearing deposition testimony of Barbara K. Nelson, M.S., CRC, taken on March 16, 2021 by ISIF.

Outstanding objections from the post-hearing depositions are hereby overruled.

After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. **Claimant's Background; Education; Employment History to 1999**. Claimant was born on January 9, 1963, Ex. 33:18019, and was 55 years old at the time of hearing. Tr., 15:10-11. He graduated from Minidoka High School in Rupert, Idaho, in 1981. *Id.* at 15:14-15; Ex. 33:18019. He did not participate in any post-secondary education. Tr., 15:16-19; Ex. 33:18019.

2. During high school, Claimant worked in a veterinary clinic as a kennel worker. Ex. 34:5 (8:6-21) (Claimant's Dep.).

3. From 1981 to 1983, Claimant worked for J.C. Penny's in the stockroom in both Burley and Idaho Falls. *Id.* (8:22-9:6).

4. Claimant is a United States Army veteran. He entered the military in or about 1983 and was honorably discharged in or about 1989. He started as an artillery specialist in 82nd Airborne Division and finished his army career in ordinances and explosives in the 59th Ordinance Brigade. He qualified for VA benefits. Tr., 15:20-25; Ex. 33:18019.

5. After leaving the military, Claimant moved to Eagle, Idaho, where he briefly worked for an event setup company. The Idaho Department of Transportation then employed Claimant on a traffic survey crew as a transportation technician for three seasons. He also worked for a few months as a car salesperson and as a salesperson for Herbal Life products. Ex. 33:18021; Ex. 34:5 (10:4-11:6).

6. After working for the Idaho Department of Transportation, Claimant worked for the Bureau of Supplies for the Idaho Department of Administration. He worked in a warehouse. He worked there for approximately four years. Ex. 34:6 (12:15-13:6).

7. Claimant next worked for approximately three years installing HVAC systems for Sunshine Heating and Cooling. Ex. 33:18021; Ex. 34:6 (14:21-15:11).

8. Claimant next worked for six months as a self-employed handyman. Ex. 33:18021.

9. From 1995 to 1999, Claimant was employed as a hotel maintenance worker for a company that owned four hotels in Boise -- University Inn, Boisean Inn, Safari Inn, and Statehouse Inn. *Id.*; Ex. 34:7 (16:6-22).

10. **1999 Industrial Injury**. On or about September 15, 1999, while working at the University Inn, Claimant was engaged in sealing the roof when he slipped on cinder blocks that gave way. Claimant fell twenty feet from the roof to the sidewalk below and injured both of his legs. Among other injuries, Claimant sustained a left calcaneus fracture, left comminuted tibial fracture, left fibula fracture, fracture dislocation of the right knee with severe disruption of boney and soft tissue architecture (anterior cruciate, lateral and medial lateral collateral ligaments and severely torn medial meniscus), and commuted fracture of the right wrist. Tr., 16:9-17:2; Ex. 43:2.

11. Claimant's understanding of the medical care he received following this industrial accident was a "lot of metal work in my legs and several surgeries." Tr., 17:5-6.

12. Ronald M. Kristensen, M.D., treated Claimant's lower left extremity injury with intramedullary rodding of the tibia as well as ORIF (open reduction and internal fixation) of the fibula and calcaneus. Robert Walker, M.D., another orthopedic surgeon in the Boise Orthopedic Clinic, together with Dr. Kristensen, performed further surgery on Claimant, with open reduction internal fixation of his tibial plateau fracture. Postoperatively, Claimant was protected with a long-leg hinged brace and subsequently was placed in a custom long-leg hinged brace. Mark Meier, M.D., was consulted and felt that Claimant would likely require a narrowing catectomy of his proximal tibia followed by a right total knee replacement at some point in the future. Dr. Walker referred Claimant to Robert A. Winquist, M.D., of Seattle Washington, for another opinion as to whether Claimant required reconstructive surgery. Ex. 2:114-116. On October 23, 2000, Dr. Walker observed that Claimant "has had a significant joint injury with significant post-traumatic arthritis which I believe will progress relentlessly over time." *Id.* at 112.

13. Dr. Winquist did not recommend any further surgical intervention at that time. Ex. 2:112. Dr. Walker was not convinced that a total knee arthroplasty was indicated at that time, and that Claimant could do well for the next several years until needing a total knee arthroplasty. *Id.*

14. After his recovery from his September 15, 1999 industrial injury, Claimant received a release by several physicians to sedentary work. In an IME dated May 29, 2001, Michael T. Phillips, M.D., opined that the Claimant "currently is capable of little more than sedentary work. He would not tolerate standing or walking for any length of time. He cannot run,

jump, climb, kneel, squat or crawl. Mr. Moore would be incapable of lifting objects of any size or carrying them any distance. These limitations could be improved with additional treatment of the left and right lower extremities." Dr. Phillips assigned Claimant a 54% lower extremity impairment to his right lower extremity, that would likely be improved by reconstructive surgery. Ex. 13:7-8.

15. On behalf of a panel of physicians at the Elks Rehabilitation Hospital, Lynn McGlothin, M.D., evaluated Claimant in an IME dated April 2, 2002. The panel found that Claimant would be limited to sedentary to light work, including lifting 10 to 25 pounds occasionally, 10 pounds frequently, limitations from prolonged walking or standing, no stairs or ladders, no repetitive kneeling, stooping or crawling. As far as impairments, the panel found that Claimant had 72% of the right lower extremity, or 29% of the whole person, with a 4% of the left lower extremity, or 2% of the whole person. Ex. 14:9-10.

16. Claimant filed a workers compensation complaint concerning his September 1999 industrial accident and injuries. He later entered into a lump sum settlement concerning his claims, which provided for $100,363.10 in past medical care paid, TTD paid in the amount of $37,620.00, permanent partial impairment disability benefits of 18% whole person, amounting to $22,572.00, and $99,228.32 lump sum consideration. Future medical benefits were left open. Ex. 43:6-7.

17. **Post-1999 Injury Employment**. After sustaining his September 15, 1999 industrial accident at the University Inn, Claimant's employment with hotels and motels ended. He stated as follows: "Well, it ended. I could never do that type of work again." Tr., 17:24-25. Nevertheless, he did engage in employment that was more than mere sedentary or light, as several physicians had found would be appropriate for him.

18. After initially trying, but failing, to secure employment through working with the Idaho Industrial Commission Rehabilitation Division (ICRD), Claimant found work with Singer's Insta Cash and Pawn Shops. Tr., 18:13-22.

19. Beginning in or about March 2001, Claimant worked for nine to ten years in collections and repossessions for Singer's Insta Cash & Pawn Shops. Singer's operated 13 short-term check cashing or vehicle collateral stores and 3 pawn shops in Boise, Mountain Home, and Caldwell. Claimant obtained the job with help from a family member who owned the company. *Id.* "Dan's hiring was a special circumstance because he was basically family, and we knew he wouldn't pass the background check." Claimant did not have any practical experience in the business. When the business wound down, Claimant was the last employee to be let go. Ex. 40:1 (David Peterson declaration).

20. Claimant described Singer's business as providing short-term loans. Singer's hired Claimant to work in the collections department, recovering funds. Within one year, Claimant received a promotion to the manager of the collections department. On a day-to-day basis, he was trying to retrieve funds on checks that had been dishonored, and/or recover assets on any short-term loans. Mostly, his job involved execution of small claims paperwork and making small claims in person. Tr., 19:6-20:19.

21. When Claimant started working for Singer's, he was using a full brace on the right leg. Eventually that became shortened to a partial permanent brace and then Claimant ultimately stopped using a brace. *Id.* at 21:8-24. He similarly discontinued using his left leg brace after approximately two months of working for Singer's. *Id.* at 21:16-18.

22. Claimant used crutches for the first two months that he worked at Singer's. He used a cane "occasionally" instead, depending upon how he felt. *Id.* at 22:8-9.

23. After his employment with Singer's ended, Claimant obtained temporary employment working on pools and spas. Tr., 22:23-23:1.

24. Claimant then became employed with TitleCash. The employer hired him to work in collections, however Claimant became more involved in the issuing loans side of the business. Claimant was also involved in skip tracing and repossession of vehicles for which TitleCash had liens on the titles. The latter involved some physical work, like pushing a vehicle towards a tow truck or clearing a vehicle engine for driving. *Id.* at 25:7-14.

25. Claimant used his right knee brace while working for TitleCash. He also occasionally used crutches or a cane as a safety precaution. *Id.* at 25:21-26:11.

26. TitleCash dismissed Claimant from his employment after money was short out of the till at a store where he was working. *Id.* at 26:12-25.

27. From May 2014 until May 2016, Claimant worked as a custodian for Health Care Services at the Idaho State Veterans Home. As a custodian he was responsible to clean floors by mopping, sweeping, waxing, and vacuuming/shampooing the carpets. Ex. 33:18021; Tr., 28:13-18. This new job affected his knee in that he felt more pain. The job required Claimant to clean floors using scrubbers, buffers and carpet extractors weighing between 100 and 200 pounds.

28. Claimant returned to treatment at the VA Medical Center where he received steroid injections in his right knee. Claimant's physicians discussed amputation as an alternative treatment. Tr., 28:13-30:6; Ex. 34 (86:64:1-18).

29. Claimant described the physical demands of the Veterans Home job in pertinent part as follows: "It wasn't a lot of lifting weight, that would be just the chemicals that I was using. The restrictions were more on my legs, because I was running an auto scrubber, I was running buffers, I was running a lot of things where I was twisting and turning and the pieces of

equipment would weigh anywhere between 50 and 200 pounds." Tr., 30:19-25. Claimant was on his feet 90% of the time at work for the Veterans Home. *Id.* at 31:1-3.

30. **Subject Employment**. From May 2016 until May 2017, Claimant worked for Volt Workforce Solutions as a warehouse clerk. This involved general warehouse work with lifting up to 50 pounds several times per day. Ex. 33:18021; Tr.. 35:1-16. This job required him to handle pallets of electronics, scales, and other items that could weigh 50 to 100 pounds. Ex. 34 (86:8-13).

31. Volt hired employees to work at a warehouse for SuperValu. "SuperValu was a company that bought out… [mostly] grocery stores" according to Claimant. SuperValu took the equipment inventories from stores that had been purchased and reorganized the equipment and sold it off. When Claimant worked for Volt, it was mostly Albertson's and Safeway's stores whose equipment inventories Volt purchased. At the warehouse where Claimant worked, they took in "all of their electronic equipment from scales to large servers to – basically any of the electronics that would – they would work with the company, take them in, clean them up, get identification from serial numbers and get all the parts and components together and pack them for redistribution." Tr., 34:9-23. Claimant explained that once "we got a pallet into the area it was working on each item and transferring it from pallet to pallet. So, there wasn't a lot of walking in between each area after we got into what we were doing." *Id.* at 36:2-6.

32. Volt's managers told Claimant that he was hired to do warehouse work with lifting up to 50 pounds several times per day. *Id.* at 35:1-2. In practice, Claimant found that the lifting up to 50 pounds occurred multiple times per day. *Id.* at 35:27-19. 90% of the job was performed on his feet. *Id.* at 35:20-22.

33. While working for Volt, Claimant "always" wore his brace. He did so for his own safety and also it made him look better because he walked a little "cockeyed." Tr., 36:7-19. He did not use crutches while working for Volt. *Id.* at 37:4-10.

34. **2017 Industrial Accident**. Claimant's industrial accident at Volt occurred on April 13, 2017. Ex. 34 (87:25-88:2); Ex. 1 (notice of injury). Claimant was moving around a pallet "towards the end of a campaign." A campaign consisted of equipment from one particular store or area, such as an Albertson's store from Texas. He was moving the pallet to an area where it would be considered done, so he needed to move the pallet out of the way so that he and his coworkers could work on a new campaign. The pallet was full of butcher scales, each weighing about 42 pounds. Claimant was pulling the pallet out to put it back in its spot, however the pallet turned. Claimant tried to stop the turn and make the pallet go straight forward but it stopped, and he dropped it. Claimant then fell down. Tr., 37:16-39:6.

35. Claimant felt severe pain in his groin area between his legs. He found it very difficult to stand. The workday was almost over. A coworker, Troy Conlin, knew what happened to him because he was working in the same area. Conlin assisted Claimant in leaving the facility because he could not walk unassisted. Claimant felt like he was going to fall to the right side and Conlin braced him on the right side. *Id.* at 39:15-40:6.

36. **Medical Care following Industrial Accident.** Claimant thought he had pulled a groin muscle. He first went to the VA Medical Center for treatment. His primary care physician was not in the office that day. Another physician examined him and advised him to stay off work for "three or four days" to let the injury heal. *Id.* at 40:7-21.

37. Claimant then received a referral for evaluation and treatment at Saint Luke's Occupational Health, facilitated by Surety/Employer. Tr., 41:1-3. Claimant's first appointment

was on April 17, 2017. Physician Assistant Paige W. Cline examined him. PA Cline noted that Claimant had been "moving 700–800-pound pallets and felt a pull and sharp pain in the right inguinal area." She further noted Claimant's past medical history with the 1999 industrial accident. Claimant complained of moderate pain in the right inguinal area that was worse with walking, although the pain had improved since the incident. He had been using a crutch to walk. PA Cline ordered imaging tests. X-rays of the right hip and pelvis were normal. Ultrasound did not reveal any hernia. PA Cline continued Claimant on Aleve and Tylenol, ice/heat and restricted him from working. Ex. 17:1-11.

38. Claimant returned for follow-up on April 24, 2017. He described worsening symptoms of inguinal area pain on the right side. PA Cline prescribed Tramadol for pain. She noted in pertinent part as follows: "Right Inguinal Area – Pain in the anterior hip has worsened progressively over the past several days with any weight on the leg. He is now having to use 2 crutches." Claimant did not report any swelling or lumps in the groin area. PA Cline ordered an MRI. She kept Claimant off work. *Id.* at 12-17.

39. Claimant returned to Saint Luke's Occupational Health for follow-up on May 2, 2017. This time Cody D. Heiner, M.D., examined him. Dr. Heiner reviewed PA Cline's notes. He agreed with having an MRI performed, which had not been done yet. Claimant complained of persistent and stable right groin pain and medial thigh pain. There was no swelling or lumps in the area. *Id.* at 18-20.

40. Claimant underwent an MRI arthrogram on May 9, 2017. The images, as read by Radiologist J. Andrew Hill, M.D., disclosed "nondisplaced superior pubic root and inferior pubic ramus fractures." Ex. 17:22.

41. Claimant received an injection for pain relief in his right hip at the clinic, ordered by PA Cline, on May 9, 2017. Ex. 17:25-27.

42. Upon referral, Stanley J. Waters, MD, an orthopedic specialist with Americana Orthopedics in Boise, examined Claimant for the first time on May 25, 2017. Claimant's pain scale was 4/10 and he reported that his pain had improved. He was using a Canadian crutch to ambulate. He was still taking Tramadol for pain. Dr. Waters reviewed Claimant's MRI and noted that it showed non-displaced superior and inferior rami fractures. Ex. 18:1-5.

43. Claimant returned to Dr. Waters for further evaluation of his pubic fracture on June 22, 2017. He was still having moderate to severe pain in the right side of his hip and pelvis with a pain scale of 6/10. When Claimant was sitting he was OK, but if he tried to walk, the pain kicked in. A few weeks after the initial injury, Claimant fell while using his crutches on a wet pavement area. Claimant hurt his ribs in this incident. The maximum area he was able to walk was inside his house and he could not climb stairs. Dr. Waters noted that the fractures disclosed on the MRI were healing. He referred Claimant to physical therapy. *Id.* at 6-10.

44. On July 3, 2017, Claimant consulted Dr. Kristensen concerning his pelvic injury. Dr. Kristensen noted that Claimant was ambulating with a single cane/crutch and was wearing a right knee brace. Claimant reported he was unable to climb stairs. Claimant felt that his pelvic injury was slowly improving, and he could now walk 20 steps without the aid of a cane. Dr. Kristensen suggested that Claimant continue to follow-up with Dr. Waters. Ex. 19:1-4.

45. On August 2, 2017, Claimant reported to Dr. Waters that his pubic fracture is "doing great." The most pain Claimant was having was from his ribs from his fall on his crutches. Claimant was able to walk a short distance without the crutch. Claimant's pain scale

was 6/10, mostly attributable to his ribs. Dr. Waters noted that Claimant's pelvic fracture was healing. Dr. Waters ordered Claimant to be kept off work for six weeks. Ex. 18:11-15.

46. Claimant returned to Dr. Waters for further evaluation of his right pubis on September 16, 2017. Dr. Waters noted that Claimant "is doing well. His pubic pain is gone. He has no more concerns with his pelvic fracture. He is ready to return to work in that aspect. He is concerned that he will not be able to continue the job he is currently doing due to his instability from his knees. He has been falling more recently and is unable to walk without his cane." New radiology reports showed a healed pelvic fracture. *Id.* at 16-20.

47. On October 11, 2017, Robin J. DeLeon, M.D., Claimant's provider at the VA, diagnosed Claimant with "deconditioning with underlying severe right bone djd [degenerative joint disease]." Dr. DeLeon's assessment was as follows: "Patient reports … right LE weakness and gait instability that had significantly increased since pelvis and rib fractures in April. He has significant right genu valgus and impaired gait since injury in 1999 but had been accommodating for this well prior to April. He demonstrated significant hip weakness." Ex. 22:35-40.

48. On January 31, 2018, Dr. DeLeon filled out a "Health Status Questionnaire" concerning Claimant. Ex. 22:771-773. The diagnosis was "severe right knee arthritis." Claimant's prognosis was "poor. The knee will continue to worsen. Biomechanically he has low reserves to compensate." Dr. DeLeon opined that Claimant's condition would occasionally interfere with attention or concentration needed to perform even simple work tasks. Dr. DeLeon stated that Claimant can walk only one to two city blocks without rest or severe pain. Claimant was limited to standing/walking less than 2 hours per working day. He also required a job that allowed sitting at will. Claimant was restricted from lifting in excess of 50 pounds. Claimant

would likely be absent from work four days out of each month due to his condition. Ex. 22:771-773.

49. On September 26, 2018, Dr. Waters gave Claimant an impairment rating for his pubic fractures. The final diagnosis was as follows: 1. Nondisplaced superior pubic root and inferior public ramus fractures. 2. Mild hip osteoarthrosis. 3. Labral tear. Claimant's current pain scale for his pubic fractures was 0/10. Using the 6th Edition of the *AMA Guides to Evaluation of Permanent Impairment*, Dr. Waters assigned a 3% whole person impairment to Claimant's pubic fractures. He released Claimant back to full duty at work with no restrictions. *Id.* at 21-26.

50. **Post-Injury Condition & Activities**. Melanie Moore, Claimant's wife, observed in pertinent part as follows:

> Q. While he [Claimant] was at home recovering from the – the hip fracture, what kind of activities was he doing?
> A. Not a whole lot.
> Q. Okay.
> A. Couldn't – we – he would – honestly, he would – he would spend a lot of time outside sitting in his wheelchair or – and navigating around the yard in his wheelchair, because it was – it was easier for him to do that than to try to walk.
> Q. And was that a change from how he would spend his time prior to the hip injury?
> A. Absolutely.
> ▪▪
> Q. Now after – you mentioned after the hip injury he – while recovering from the hip injury he would be spending time in his wheelchair. Did – after the hip injury were there any other changes that – that you noticed during his recovery?
> A. Well, he started to gain weight because he wasn't physically active anymore.[1]
> Q. Okay.
> A. It was hard on him mentally because he wasn't able to do the things that he was used to doing for his whole life. He was used to doing a lot of physical work – you know, physical labor, physical activities and he just couldn't do it.

Tr., 123:16-124:3; 125:8-20.

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[1] Claimant's weight upon his first examination by Dr. Waters on May 25, 2017 was 250 pounds. Ex. 18:3. At his last office visit with Dr. Waters on September 26, 2018, Claimant's weight had increased to 269 pounds. Ex. 18:24. This was a weight gain of 19 pounds.

51. **Post-Injury Employment**. Following his 2017 industrial injury, Claimant did not return to working for Employer. At the time, the company was already shutting down operations and Claimant was not rehired. Tr., 43:1-9.

52. Claimant was "pretty positive" that he was not capable of doing physical work. Thus, he decided to take a training course on how to become certified as a peer support specialist. His wife already worked in the mental health industry, and it did not require a degree to qualify. *Id.* at 65:21-66:3. He then obtained a job as a certified peer support specialist (CPSS) with About Balance Counseling Services. About Balance hired him on or about September 10, 2017. Ex. 42:9.

53. Claimant explained the job of CPSS in pertinent part as follows:

> It is someone who has some type of diagnosed mental health issue in their past, who is in recovery, and is – some people would say it's like a paid companion, but it's much more in depth than that, because of the mental health aspects and the rules and guidelines that are determined by Optum – then Health and Welfare, now Optum.

Tr., 66:16-22.

54. Claimant's mental health diagnoses that qualified him to be a CPSS included alcoholism, PTSD, and methamphetamine addiction, from all of which he was in recovery. *Id.* at 67:2-5.

55. When Claimant worked with clients as a CPSS, he would help them set goals and engage in a weekly update as to how those goals were being met. He would also engage clients in a dialogue about any issues concerning them. *Id.* at 67:22-24. He would also help them by taking them to appointments. It is not a desk job but rather one that is "out and about in the community." Tr. 68:15-16. This often involved driving clients. *Id.* at 69:1-2.

56. Working for About Balance was a part-time job for Claimant. Initially Claimant worked approximately billable 14 hours per week. By the time he left the company, he was working 6 billable hours per week. Tr., 69:11-12. Claimant believed he was not capable of performing a 40 hour per week, full-time job. *Id.* at 69:19-20.

57. Claimant's physical abilities gradually declined and led him to make the decision to quit his employment with About Balance. That is why Claimant made the decision not to renew his license as a CPSS. He noted as follows: "I felt I was safe, but I wasn't sure about the safety of my clients…" *Id.* at 76:4-5. In particular, Claimant felt unsafe walking and driving. Claimant's employment with About Balance terminated on or about September 10, 2020. Ex. 42:8.

58. **Independent Medical Examinations**. ***Robert H. Friedman, M.D.*** Dr. Friedman, a physiatrist based in Boise, completed an IME of Claimant on October 3, 2018, at Claimant's request. Ex. 25:2. Dr. Friedman's qualifications, which are reflected in his curriculum vitae contained in Ex. 24, are known to the Commission.

59. Dr. Friedman summarized his main findings as follows:

> Mr. Moore sustained pelvic fractures as a result of his industrial injury. *The subsequent treatment, including limiting weight bearing and decline in function resulted in progressive weakness of his lower extremities, worsening of his gait pattern.* He is now dependent on forearm crutches for mobility, and should continue on bilateral forearm crutches, given the progressive deformity that is appearing in his right knee.

Ex. 25:6 (Emphasis added).

60. Dr. Friedman observed further that Claimant "now has a progressive deformity of his right knee with subsequent lower extremity weakness and fatigue due to immobilization." *Id.*

61. Dr. Friedman opined that Claimant was limited to sedentary-level activities. Ex. 25:6.

62. Future medical care, according to Dr. Friedman, would include the need for a right knee total arthroplasty, which pre-existed his industrial injury of 2017, but there was no evidence that the industrial injury aggravated or accelerated the need for a total knee arthroplasty. Ex. 25:6.

63. Dr. Friedman assigned a 3% whole person impairment to Claimant's pelvic fractures, 100% of which would be attributable to the industrial accident. *Id.* at 6-7.

64. In Dr. Friedman's opinion, Claimant's transition to full-time use of bilateral forearm crutches was because of his industrial injury of April 13, 2017. *Id.* at 7.

65. On December 6, 2020, Dr. Friedman authored a letter after reviewing additional medical records and the IME of Dr. Paul Collins, and a deposition of Claimant. He stated in pertinent part as follows: "Based on my review of the provided medical records, I remain of the opinion that Mr. Moore's 4/13/2017 pelvic fracture remained symptomatic, necessitating an impairment rating. Treatment aggravated his difficulties, including his carpal tunnel, with continued progression of his right knee degenerative disease." *Id.* at 12.

66. ***Friedman Deposition***. Claimant took the deposition of Dr. Friedman on February 17, 2021. Friedman Dep., 2:1-3.

67. Dr. Friedman testified as to the effect of going "non-weight-bearing" for even several weeks on someone who already has a compromised lower extremity, as follows:

> Q. I'd like to kind of go through a few – well, actually, so if someone has an already compromised orthopedic structure, if they've got joint problems already, such as a bad knee, what potential problems are there from being non-weight-bearing? What kind of – what kind of side effects can happen?
> A. Well, the biggest issue will be that you will have a very rapidly – have a loss of strength and endurance in your muscles. So even a two-, maybe three-week non-weight-bearing physical rest causes a significant reduction in your – I'm going to use the word "aerobic capacity." But it basically is muscle strength and function, and we've known that for a long time.

So there's a rapid loss and a long time to recover after you've been on prolonged bed rest.

Friedman Dep., 18:9-22; 19:8-9.

68. One consequence of loss of aerobic capacity, according to Dr. Friedman, is an increased risk of falling, if the muscles "buckle." *Id.* at 25:11-25. Dr. Friedman agreed that Claimant had reported falling incidents in the medical records. *Id.* at 26:3-5.

69. Dr. Friedman answered as follows regarding whether being non-weight-bearing aggravated and/or accelerated Claimant's functional loss in his lower extremities:

> Q. Now, from a – when someone uses the term "aggravation" to you, what – as a physician, what do you understand "aggravation" to mean?
> A. I understand "aggravation" to mean a permanent worsening of an already existing condition.
> Q. So did – in your opinion, did being non-weight-bearing following the pelvic fracture aggravate claimant's functional loss in his lower extremities?
> A. Yes.
> Q. What do you understand, as a physician, the term "accelerate" means?
> A. It means it makes a condition that has a predictable, normal, natural history get worse faster.
> Q. Now, did being non-weight-bearing following the pelvic fracture accelerate claimant's functional loss of his lower extremities?
> A. The answer is yes, in the sense that it caused it to happen.
> I don't know, nor could I predict, that it would have occurred regardless of whether he had the fracture or not, meaning an acceleration of a condition requires that they have a normal, natural history. And I think he was stable for a long time.
> He had his leg fractures in the nineties. He's walking around. He's back at work. I don't think he would be walking on crutches or in a wheelchair but for the accident and immobilization.

Id. at 46:9-47:11.

70. Dr. Friedman admitted that "I would expect his knee only to get worse, and that would not be from the industrial accident. It, well, just happened." *Id.* at 66:1-3.

71. ***Beth S. Rogers, M.D.*** Employer and Surety requested that Dr. Rogers perform an IME of Claimant, which she completed on March 30, 2018. Ex. 26. Dr. Rogers is a physiatrist.

The Commission is familiar with her qualifications. The specific purpose of the IME was to provide impairment ratings for Claimant's pre-2017 injury conditions, using the 6th Edition of the *Guides*. Ex. 26:1.

72. For Claimant's status post left type II open tibia and fibula fracture sustained after a 20-foot fall in 1999, Dr. Rogers assigned 11% lower extremity impairment. *Id.* at 2.

73. For Claimant's left calcaneus fracture, sustained in fall 1999, Dr. Rogers assigned a 5% lower extremity impairment. *Id.*

74. For Claimant's left ankle pain/left ankle degenerative changes related to the 1999 fall, Dr. Rogers opined that these did not constitute a rateable impairment per the *Guides*. *Id.* at 3.

75. Combining all rateable impairments from Claimant's left lower extremity from the 1999 injury, Dr. Rogers opined that Claimant had a 15% lower left extremity impairment. *Id.*

76. For Claimant's multiple injuries to his lower right extremity, including the dislocation of the right knee, sustained in the 1999 fall, Dr. Rogers assigned a 68% lower extremity impairment. Restrictions included sedentary work only. *Id.* at 3-5.

77. The combined whole person impairment for both of Claimant's lower extremities, based upon the combined values chart, would be 31%, according to Dr. Rogers. *Id.* at 5.

78. The right hamate fracture did not warrant an impairment rating, according to Dr. Rogers. *Id.*

79. For Claimant's hypertension/cardiovascular disease, Dr. Rogers assigned a 6% whole person impairment. *Id.* at 6.

80. For Claimant's atrial fibrillation/dysrhythmia, Dr. Rogers assigned a 3% whole person impairment. Restrictions would include no heavy work, specifically no lifting greater than 50 pounds, with frequent carrying of objects weighing no greater than 25 pounds. Ex. 26:6.

81. Dr. Rogers opined that there were no independent rateable impairments for either Claimant's tobacco use/possible COPD or ETOH dependence abuse. *Id.*

82. For Claimant's lumbar spondylosis, Dr. Rogers assigned a whole person impairment of 3%, with restrictions of no heavy or very heavy work. *Id.* at 7.

83. For Claimant's right hip arthritis/DJD, Dr. Rogers opined that there was no rateable impairment. *Id.*

84. Dr. Rogers opined that Claimant's umbilical hernia rated a whole person impairment of 7%. *Id.*

85. Dr. Rogers assigned no impairment to Claimant's carpal tunnel syndrome. *Id.*

86. Summarizing and combining all rated impairments, Dr. Rogers found as follows:

1999 injuries, WPI....................................31%
Umbilical Hernia..7%
Hypertensive Cardiovascular Disease.................6%
Atrial Fibrillation/Dysrhythmia.........................4%
Lumbar Spondylosis....................................3%
Total Combined WPI.............................44%*
*Note: combined using the combined values chart of the *Guides*.

Ex. 26:8.

87. Dr. Rogers opined that Claimant was predisposed by his 1999 lower right extremity injury to sustain the April 13, 2017 injury. The fractures of the rami that Claimant sustained are most commonly found in elderly individuals and do not require trauma to occur. The pre-existing trauma would dispose Claimant to osteopenia in his right leg likely contributing to the fractures. *Id.*

88. ***Paul Collins, M.D.*** At the request of ISIF, Paul Collins, M.D., completed an IME of Claimant on November 19, 2020. Ex. 27:1. Dr. P. Collins is an orthopedic surgeon. His qualifications are known to the Commission.

89. Dr. P. Collins stated that the current diagnosis for Claimant's right knee was traumatic progressive degenerative arthritis. His diagnosis for the future of the right knee was more likely than not to be further surgery up to and including a total knee replacement. *Id.* at 5.

90. As to Claimant's left hip, Dr. P. Collins' diagnosis and prognosis was degenerative arthritis of the left hip with the likelihood that a total hip replacement would be required. *Id.*

91. Dr. P. Collins found that Claimant was limited by his right knee and left hip, but not his pelvis. Based upon his limitations, he would only be capable of sedentary work. *Id.* at 6.

92. Dr. P. Collins expounded further on Claimant's pelvic fracture as follows:

> [W]hile it is common for patients to try to combine incidents in their medical history, *the fracture of the pelvis appears to have been relatively atraumatic.* I suspect given the patient's alcohol abuse history, his chronic smoking, his obesity, and his limitation in activity from his right knee, that he suffers from osteopenia or osteoporosis. This would increase his risk for the fracture in the pelvis from relatively minor activities and probably is a factor in his right knee fracture. In any event, as noted by Dr. Waters, and on an exam today, *that pelvic fracture has resolved.*

Id. (Emphasis added.)

93. Dr. P. Collins further opined as follows:

> [I]t does appear that Mr. Moore's current orthopedic problems are the progressive worsening of his preexisting and progressive degenerative changes. They would not be due to the 2017 industrial accident which may have caused short-term irritation of those conditions, but they have continued on their course without any significant change from the fracture of the pelvis.

Id.

94. In terms of an impairment rating, Dr. P. Collins agreed with a 30% whole person impairment. He would assign no impairment to the pelvic fracture based upon his exam. Ex. 27:6.

95. ***Dr. P. Collins Deposition***. ISIF took the deposition of Dr. P. Collins on March 2, 2021. P. Collins Dep., 4:1-11.

96. Dr. P. Collins stated regarding his diagnosis in pertinent part as follows: "Anyway, he [Claimant] suffered a nondisplaced, relatively atraumatic strain to the pelvis, which caused a crack. I have seen pelvic fractures that I've had to operate on because they have been so displaced and so severe. This is not one of those." *Id.* at 7:6-10.

97. Dr. P. Collins opined that Claimant's industrial injury from 2017 was caused as follows: Claimant "strained himself pushing a pallet holding 1,000 pounds." *Id.* at 14:23-24. "But in this case, based on the description, it appears that the bone density was so low that the inferior and superior pubic rami, the parts – the bony part of the pelvis in the front, actually suffered a crack." *Id.* at 15:7-11.

98. The fact that X-rays did not show Claimant's pubic fractures, but an MRI did demonstrate that it was not a significant traumatic fracture, according to Dr. P. Collins. *Id.* at 17:5-12.

99. In the records that Dr. P. Collins reviewed, Claimant's physicians did not direct him to be non-weight-bearing following his pubic fractures. Rather, Dr. Waters told Claimant to be "weight bearing as tolerated." *Id.* at 18:6-13.

100. Asked about Dr. Friedman's opinion that Claimant's gait pattern had changed, with negative consequences for his lower extremities, Dr. P. Collins stated as follows:

Q. Now, Dr. Friedman felt that this comment showed that his gait pattern had changed and that the muscles were tighter and weaker from not being used, which put more stress on the muscles that keep his hips and knees from buckling. Would you agree with that comment?
A. No.
Q. Why not?
A. Well, when I saw him, his limitations are more due to his left leg than his right. He's using his right leg, if you will, to function. His pelvis fracture healed, nondisplaced. And the notes that I have from Dr. Waters, especially, indicate that he really went on to heal as one would expect. Therefore, I don't see any limitation based on the pelvic fracture.

P. Collins Dep., 23:10-25.

101. On the issue of non-weight-bearing, Dr. P. Collins stated as follows:

Q. Now, let me ask you this. Dr. Friedman also talked about being non-weight-bearing. And he talked about the side effects, including loss of strength and muscle atrophy, those kinds of things.
How long would someone have to be non-weight-bearing before you would see that kind of side effects that would affect their functioning?
A. And you would have to be totally non-weight-bearing for months before you would see that kind of loss. And again, that's just from observation of multiple patients, not particularly this patient. But that's generally what we see.
Q. And in this particular case with Mr. Moore, is there any evidence that he was non-weight-bearing for two to three weeks, much less months?
A. Well, based on what I saw from the description from the physicians treating him, I did not see that.

Id. at 24:1-20.

102. When asked to comment on whether his pelvic fracture permanently accelerated or aggravated Claimant's loss of function in his right leg, Dr. P. Collins stated as follows:

Q. So in other words, just putting it in layman's terms, if his pelvic fracture permanently aggravated or accelerated his loss of function in the right leg, would you expect the right hip to have more discomfort and greater limitations than the left hip when you examined him?
A. That's correct and it didn't – the right hip did not.
Q. So, in fact, as far as what was affecting his function at the time that you examined him was his left hip; is that correct?
A. In terms of looking at the hips, his left hip was significantly limited in motion relative to the right.

Id. at 26:19-27:7.

103. Dr. P. Collins did not find any evidence that Claimant was on prolonged rest following his pelvic fractures. "No, in fact, from the notes provided by Dr. Waters, he came back pretty quickly." P. Collins Dep., 27:13-16.

104. Dr. P. Collins did not agree with Dr. Friedman's opinion about the progression of Claimant's loss of function, as follows: "I do not agree with that. I do believe he has undergone, and will continue to undergo, a decrease in activity and functional abilities because of the osteoarthritis in his knees and his left hip. But it does not appear that it is due to the incident in question [2017 industrial accident]." *Id.* at 29:4-9.

105. Based upon his examination of Claimant and review of medical records, Dr. P. Collins would place Claimant at the level of sedentary work only. This could include occasional driving and walking inside of a store, like his CPSS job entailed. Furthermore, Dr. P. Collins would not put any limitation on the number of hours per day that Claimant could work. *Id.* at 30:17-31:8.

106. Dr. P. Collins analogized Claimant's pelvic fractures as follows: "In other words, the fracture of the pelvis was like scratching your finger and, after a week, it heals. It was that kind of thing. I'm not trying to make light of it. But I'm saying the degenerative changes in his knee, and now we know his left hip, are going to progress mainly because of his comorbidity, such as obesity." *Id.* at 33:11-17.

107. Dr. P. Collins stated as follows with regard to Claimant's loss of function: "Well, I believe his ongoing loss of function is due to his pre-existing progressive conditions, including the habits that he has as well as his obesity and the fact that he has traumatic degenerative arthritis in multiple joints." *Id.* at 35:21-36:1.

108. When asked whether Claimant's pubic fractures aggravated or accelerated his functional loss, Dr. P. Collins stated as follows: "Based on the review of the records and my physical exam in 2020, I would say that it was a short-term issue which was resolved as one would expect and that the future of his musculoskeletal system is unfortunately based on his pre-existing conditions." P. Collins Dep., 36:5-10.

109. **Vocational Assessments.** ***Nancy J. Collins, PhD***. On January 14, 2019, Dr. N. Collins delivered a vocational analysis report at the request of Claimant. Ex. 29:1. The Commission is familiar with the qualifications of Dr. N. Collins, which are reflected in her curriculum vitae contained in Ex. 28.

110. Dr. N. Collins observed, upon meeting Claimant in an in-person interview, that he "presents as significantly disabled, walking with forearm crutches and a very slow awkward gait. His right leg bends internally, and he indicates he has to watch his feet when walking or he will trip." *Id.* at 6.

111. Claimant told Dr. N. Collins that "he was much more functional prior to his last industrial accident as he had learned to walk without crutches and performed fairly physical work without accommodation. He now requires forearm crutches for mobility and at times a wheelchair. He indicated he had not required the forearm crutches for 12 years prior to his last industrial accident." Ex. 28:6-7.

112. Dr. N. Collins identified the following job titles for occupations that Claimant had performed over the years: transporter, patients; janitor; cleaner, industrial; collector (clerical); laborer, stores; lane-marker installer (construction); and swimming pool servicer. *Id.* at 10-11.

113. Based upon his work experience and education, Dr. N. Collins classified Claimant as having worked in unskilled and semi-skilled occupations. *Id.* at 11.

114. As far as physical exertion level(s), Dr. N. Collins found that Claimant had worked in heavy, medium and light occupations; he was now limited to sedentary work. Ex. 28:12.

115. Nevertheless, Dr. N. Collins found that it was unrealistic to expect Claimant to perform most sedentary work, as follows: "Realistically, he does not have the education or work experience to work in a sedentary job. His computer skills are very basic, and he does not know how to keyboard. He has no experience or knowledge of office software. He has carpal tunnel syndrome that makes it difficult for him to "hunt and peck" type for very long." *Id.* at 12.

116. For a transferable skills analysis, Dr. N. Collins found that with "a sedentary work restriction, Mr. Moore has very few transferable skills." Although he can talk to people, his limited computer skills would not qualify him for a customer service or telemarketer work. His past misdemeanor convictions disqualify him from returning to collections work, which in any event is light work, not sedentary. While he can drive, employers would be concerned about his ability to do so due to his lower extremity limitations. *Id.* at 13.

117. The ultimate conclusion of Dr. N. Collins as to Claimant's disability status is summarized as follows:

> While Mr. Moore wants to work and has shown in the past that he can make accommodations and perform work that would appear to exceed his functional capacities, he is so limited by his current mobility problems that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonable stable market for him does not exist. While he is not totally disabled, I do think he should be considered an odd lot worker.

Id. at 13.

118. Dr. N. Collins observed further in pertinent part as follows:

> For an employer to consider him for work, Mr. Moore would need to offer the employer a skill set that would off-set his limitations and he does not have those skills. In my opinion, it would take a sympathetic employer, significant

> accommodations and superhuman effort on Mr. Moore's part to find and keep any kind of regularly available competitive work.

Ex. 28:14.

119. Counsel for Claimant asked Dr. N. Collins to update her analysis based upon records received after the date of her report. She did so in a letter dated December 8, 2020. Her primary conclusion was as follows:

> After reviewing all of these records, my opinion that Mr. Moore is an odd lot worker is unchanged. He was working in a heavy physical job at the time of his 2017 industrial accident and was obviously not totally disabled. He now has sedentary work restrictions and no sedentary work history. While his right knee injury was significant, he was not working with mobility assistance before his hip injury and had access to sedentary to light work. It does appear that the left hip injury[2] decreased his ability to stand and walk, leaving him with access to sedentary work only.

Id. at 18.

120. ***Dr. N. Collins Deposition.*** Claimant took the deposition of Dr. N. Collins on March 16, 2021. N. Collins Dep., 2:1-4.

121. Dr. N. Collins met with Claimant personally and interviewed him after reviewing vocational and medical records. *Id.* at 12:9-14:17.

122. Dr. N. Collins observed that "particularly in this case, Mr. Moore, when he came in the office, appeared very disabled. He walked in a very awkward manner. He was very slow. My office is in an old building, and it took him a while to find the elevator. And then he still had to go up a ramp. So he was very tired by the time he got here… This gentleman looks very disabled." *Id.* at 15:3-8; 14-15.

123. When asked whether presentation affects hireability, Dr. N. Collins stated "Yes, absolutely." *Id.* at 16:2-3.

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[2] Dr. N. Collins mistakenly referenced a left hip injury. Claimant sustained right pelvic fractures in the

124. When asked to explain why she considered Claimant an odd-lot worker, Dr. N. Collins stated as follows:

> Well, he was working at the time that I interviewed him. He was working on a very limited basis and a very specific occupation. But outside of that limited part time job, I just didn't think there was anything regularly available for him on a full-time basis where he would be -- where he would realistically be hired and be successful.

N. Collins Dep., 41:8-14.

125. Dr. N. Collins explained her use of the term "superhuman effort" in her report as follows:

> Well, because, I mean, realistically, with his injuries, most workers would have – especially once they got Social Security Disability – would have said, okay, you know, I just can't do it, it hurts, I can't – I can't physically work. But he didn't do that. He went out and found something [About Balance peer support position], tried to do it.
>
> And I think it took a superhuman effort. If you watch this man walk, it looks like superhuman effort. And if you had to do that over a two-hour period while working with clients who are unpredictable, to me, that's superhuman effort. And because his condition is degenerative, it's only going to get worse.
>
> So you know, I just think he really tried his hardest to be able to work both – from both injuries, not just this latest accident, he tried both times. And he did his best. And he gave forth, I think, superhuman effort.

Id. at 44:14-45:5.

126. Regarding access to labor markets, Dr. N. Collins stated as follows:

> Q. Do you think that Mr. Moore has access to a dependable well-known branch of the labor market?
>
> A. I can't think of one that he has the skills for and that he could physically perform or that he would be hired to do so.

Id. at 45:6-10.

> So, you know, I think it would be very difficult for him to find work in the regularly competitive labor market. A lot of the jobs that he had in collections is not a job everyone wants to do. It's a horrible job. You're going out and repossessing the only car a family has. And the peer support is a very limited

2017 industrial accident.

> employment market. Working for the instant cash companies, you know, they don't have a great reputation. You're going in and asking for a loan at 18%, you know. Those are -- and that's kind of why he got those jobs, these are not jobs most people want to do, unfortunately.

N. Collins Dep., 48:16-49:2.

127. Dr. N. Collins admitted that Claimant occasionally used crutches and a wheelchair (at home) prior to the 2017 industrial accident. *Id.* at 51:5-8.

128. ***Barbara K. Nelson, MS, CRC.*** ISIF commissioned Barbara K. Nelson, MS, CRC, to produce a vocational analysis report concerning Claimant. Ms. Nelson's report is dated May 6, 2020. Ex. 31:1. The Commission is familiar with Ms. Nelson's qualifications, which are reflected in her curriculum vitae contained in Ex. 30.

129. Ms. Nelson performed a records review of Claimant's medical and vocational records but did not meet with or otherwise interview Claimant. Ex. 31:1. She noted in pertinent part as follows: "While perhaps not ideal to miss meeting an evaluee, this is not a *required* step in forensic work." (Emphasis supplied.) *Id.* She pointed to the Social Security Administration as the "largest disability determining agency in our country" as basing its mainline determinations solely upon records reviews. *Id.*

130. The first item in Ms. Nelson's report is a "pre-injury medical history" which consists of the following:

> Daniel Moore's medical history reflects that he engaged in practices generally felt to be unhealthy at different times in his life. In his early years he participated in the use of illicit injected drugs and intranasal cocaine. He had tattoos and body piercings. He had multiple sexual partners. These practices were all considered risk factors for Hepatitis C, although it does not appear that he was ever diagnosed with the infection. His record reflects that he was a heavy smoker for some years and that he often abused alcohol.[3]

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[3] It is difficult to understand how this paragraph about Claimant's young lifestyle, years before he was ever injured in (either!) industrial accident, is relevant to a vocational analysis, especially the information about "multiple sexual partners," tattoos and body piercings.

Ex. 31:1.

131. Ms. Nelson next notes, that according to the medical records, Claimant allegedly exaggerated over time through various retellings the distance of his fall from the roof in the 1999 industrial accident, ranging from 20 feet at first to 38 feet. She noted, however, that regardless of the distance of his fall, Claimant did sustain significant injuries in the accident. *Id.* at 2.

132. Ms. Nelson detailed 19 infractions and criminal misdemeanors that Claimant had, most of which except for two occurred prior to 1998. Most of these offenses were traffic-related, such as speeding or failure to register. *Id.* at 7-8.

133. In the section entitled "Pre-Injury Physical Functional Abilities," in her "Vocational Analysis" portion of the report, Ms. Nelson noted in pertinent part as follows: "Although Mr. Moore had engaged in some rather unsafe and unhealthy practices before 1999, he really did not have any restrictions that limited his ability to work." Ex. 31:12. She next details the 1999 industrial accident as a "terrible fall off the roof while at work" and describes the medical treatment he received for it. *Id.* She noted that a medical panel in April 2002 restricted Claimant to sedentary to light work (10-25 pounds occasionally, 10 pounds frequently; limitations from prolonged walking or standing; no stairs or ladders; and no repetitive kneeling, stooping or crawling). *Id.* Ms. Nelson next noted that Claimant returned to work within his restrictions as a bill collector/financial customer service representative and would perform in that industry for ten years with no known doctors' visits. *Id.* Ms. Nelson noted that Claimant next went to work as a floor maintenance worker at the Veterans Home, but physically exceeded his restrictions outlined in 2002. He then obtained the job with Employer Volt, which was even more physically demanding. By October 2014, Claimant was seeking medical treatment for his

right knee. He sought treatment from medical providers and orthotic specialists "to keep going." Ex. 31:13-14.

134. Ms. Nelson questioned Claimant's credibility about participating in physical hobbies and activities prior to 2017, as follows:

> Mr. Moore indicated that he was still able to fish, hunt, canoe, hike, etc. between 2015 to 2017, but it seems unlikely to me that he was doing these rigorous activities[4] over uneven surfaces while concurrently needing to get injections, braces, neoprene sleeves, etc. for his right knee. Mr. Moore has been known on other occasions to embellish such as when he increased the distance of his 1999 nine fall by about 20 feet, and when he attributed the reason for his rib fractures shortly after his pubic industrial injury to a coughing spell, then a fall in his kitchen, and then a fall on wet surface due to his crutch slipping.
>
> What we do know is that pre-injury, Mr. Moore had been working in two sequential jobs for three years that grossly exceeded the restrictions that had been recommended for him. Concurrently, he was experiencing advanced right knee degenerative joint disease in the setting of medial femoral condyle subluxation medially with marked genu valgus deformity and mechanical limits on range of motion.

Id. at 14.

135. Ms. Nelson noted that Claimant suffered a pubic fracture on April 13, 2017, but that there was no medical dispute that "this stable fracture" had fully healed within five months or that based solely on the pubic fracture, Claimant had no restrictions. *Id.*

136. Ms. Nelson noted that Claimant's "functional abilities have significantly declined since his accident in 2017, and there is no medical dispute that his decline is due to advancing problems in his right knee." *Id.* She observed that Dr. Waters and Dr. Rogers did not attribute the pubic fractures of 2017 to advancing problems with his right knee. She termed Dr. Friedman an "outlier" who attributed Claimant's current need for crutches for his knee condition as a result of his 2017 industrial injury and the consequent need for immobilization following that injury. *Id.*

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[4] Claimant provided for the record copies of photos showing him fishing and camping, among other

137. Based upon the lack of restrictions given by either Dr. Waters or Dr. Rogers attributable to the pubic fracture/2017 industrial injury, Ms. Nelson opined that there was no disability related to the April 13, 2017 industrial injury. Ex. 31:14-15.

138. If Dr. Friedman's restrictions were used and his opinion accepted, and "Mr. Moore's current need to use crutches is the result of the reduced mobility he had after his industrial pelvic fracture," then Ms. Nelson opined that Claimant would have some disability over impairment. *Id.* at 15. She disagreed with Dr. N. Collins and Mr. Porter, however, that he would be totally and permanently disabled. Ms. Nelson opined that Claimant would have "regularly available and clearly attainable employment opportunities as a full-time, or close to full-time certified peer support specialist (CPSS)." *Id.*

139. Ms. Nelson believed that Claimant "misled" Dr. N. Collins and Mr. Porter regarding the physical demands of CPSS work. *Id.* She alleged that Claimant told them that many of the clients of CPSS work would require physical assistance, whereas very few of them do. She also noted that Claimant claimed that some clients needed to be restrained, which is not true. Finally, Claimant informed the vocational experts that the referrals for clients "exhaust him so much that he could not take on more assignments." *Id.* at 15.

140. Ms. Nelson spoke to the representatives of three agencies who hire CPSS workers. She claims that they told her that very few consumers of CPSS services require physical assistance, and that some CPSS workers are themselves physically disabled. *Id.*

141. Ms. Nelson opined that there is current shortage of CPSS workers, based upon her conversations with agencies, and that full-time work (at least 32 billable hours per week) would be available to Claimant. She further states in pertinent part as follows: "I do believe that Mr.

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outdoor activities, during this time period, as testified to by both Claimant and his wife Melanie Moore. *See*, Ex. 36.

Moore could physically work full time (32 billable hours) a week as a CPSS. No doctor has limited him to part-time work[.] There are many of these jobs currently available." Ex. 31:16.

142. Similar to CPSS workers, Direct Service Providers (DSP) work with disabled communities. Ms. Nelson opined in pertinent part as follows: "I see no reason why Mr. Moore could not work as a DSP for adult clients primarily using his motorized cart. Community Partnerships is currently recruiting. The educational requirement is only a high school diploma or GED." *Id.* at 17.

143. Ms. Nelson states that "I believe that Mr. Moore has indicated to Nancy Collins and Delyn Porter that he can no longer perform instacash lending work for mendacious reasons." He allegedly cited the fact that he got his first and longest job from a family connection and that his legal history would preclude him from working for other companies. Ms. Nelson said that her research with such companies assured her that someone with Claimant's background would not be precluded from working in instacash lending. *Id.*

144. Ms. Nelson stated that she was dubious of Claimant's claim to have limited computer skills, because he would have had to use computers in at least a basic manner to work in the instacash industry and to work as CPSS. She stated as follows: "I simply do not buy this excuse." *Id.* at 31:17-18.

145. ***Nelson Deposition***. ISIF took the deposition of Ms. Nelson on March 11, 2021. Nelson Dep., 2:1-4.

146. Ms. Nelson stated as follows with regards to personally interviewing Claimant:

Q. Now in this particular case – ordinarily you interview people when – like the claimant, injured workers, when you're performing this type of assessment?
A. Almost always I do.
Q. In this particular case you did not; is that accurate?
A. That's true.

Nelson Dep., 8:13-20.

147. Ms. Nelson answered as follows when asked about medical records that were important to her analysis pre-injury:

> Q. Other than the restrictions that were imposed back around the time he had injured himself in 1999, was there anything more – any other additional records that affected your vocational analysis that you thought were important pre-injury?
> A. Pre-injury, no.[5]

Id. at 13:16-22.

148. Ms. Nelson noticed in Claimant's personnel file from About Balance that he received high evaluation marks for "always getting his computer work submitted in a timely fashion." *Id.* at 25:22-25.

149. ***Delyn D. Porter, M.A., CRC, CIWICS.*** Employer and Surety commissioned Delyn D. Porter, M.A., CRC, CIWICS, to evaluate Claimant and produce a vocational evaluation report. He delivered the report on February 27, 2020. Ex. 33. The Commission is familiar with Mr. Porter's qualifications, which are stated in his curriculum vitae contained in Ex. 32 in the record.

150. Mr. Porter identified the following job titles from the *Dictionary of Job Titles* as being relevant to Claimant's past work experience: Resident Care Aide; Stock Clerk; Material Handler; Laborer, Stores; Maintenance Repairer, Building; Collections Clerk; Heating and Air Conditioning Installer Servicer; Salesperson, Automobiles; and Swimming Pool Servicer. *Id.* at 21-27.

151. For a transferable skills analysis, Mr. Porter determined that Claimant had worked in occupations ranging from unskilled to skilled. His work history comprises a specific

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[5] Thus, Ms. Nelson did not think the medical information concerning Claimant's early lifestyle, with which she began her report, was important to her vocational analysis.

vocational preparation (SVP) of jobs ranging from SVP 2 (unskilled) to SVP 7 (skilled) (requiring over 2 years up to and including 4 years of preparation time). Mr. Porter determined that Claimant had the capacity to work in occupations of SVP 2 to SVP 7. Ex. 33:27.

152. Mr. Porter next reviewed Claimant's assigned impairments and work restrictions by physicians concerning the 1999 industrial injury. He detailed the panel review that Claimant had on April 2, 2002 and noted that the panel assigned functional limitations included restriction to sedentary to light work. He reviewed Dr. Kristensen's limitations and found that on June 5, 2002, Dr. Kristensen limited Claimant to sedentary work. Reviewing the restrictions of Dr. Rogers on March 30, 2019, Mr. Porter noted that she restricted Claimant to sedentary work only. *Id.* at 28-31.

153. For impairments and restrictions following the 4/13/2017 injury, Mr. Porter first noted that Dr. DeLeon opined that Claimant can only walk 1 to 2 blocks without rest or severe pain; stand or walk less than 2 hours in an 8 hour working day; Claimant may sit 6 hours per day but needs a job that permits shifting position at will; Claimant will occasionally need unscheduled breaks once every hour for 5 minutes; Claimant may lift less than 10 pounds frequently, 10 pounds occasionally, and 20 pounds rarely; Claimant may perform occasional twisting, rare stooping and climbing stairs; Claimant may not crouch, squat or climb ladders; and Dr. DeLeon opined that Claimant is likely to be absent from work about four days per month due to his impairments. *Id.* at 31.

154. Mr. Porter observed that Dr. Friedman assigned Claimant a sedentary activity level. Furthermore, He also found it significant that Dr. Friedman opined that Claimant would not be able to wean from use of bilateral crutches. *Id.* at 31-32.

155. According to Mr. Porter, Claimant's educational history (high school graduate) would place him at General Education Level 3. His overall Experience GED was also at a Level 3, successful work experience requiring common sense understanding to solve problems. Ex. 33:32.

156. For a viable labor market, Mr. Porter determined that a 50-mile radius from Claimant's residence in Boise was correct. *Id.*

157. Mr. Porter described Claimant's vocational profile as follows: "Mr. Moore's vocational profile is based upon his limited educational background, his limited work history and transferable skills, his pre-existing medical history and assigned impairments/permanent work restrictions combined with the impairments and work restrictions resulting from his 04/13/2017 industrial accident." *Id.* at 33.

158. Mr. Porter described Claimant's time of injury job in 2017 as follows: "Mr. Moore eventually recovered sufficiently from the 1999 accident that he was able to begin walking without crutches and began working in the time of injury job. This job [Volt] would be correctly defined as a MEDIUM physical demand job." *Id.*

159. Mr. Porter noted that Claimant "now walks with bilateral forearm crutches. He has significant mobility issues and functional limitations." *Id.* at 34.

160. Mr. Porter noted that there were differing medical opinions on Claimant's impairments and functional limitations. *Id.* at 34.

161. Commenting on Dr. Waters' lack of restrictions, Mr. Porter observed as follows: "Dr. Waters released Mr. Moore to return to full-duty work without restrictions. Based upon the opinions of Dr. Waters, Mr. Moore would not qualify for disability in excess of impairment." *Id.* at 35.

162. As for Dr. Friedman, Mr. Porter noted as follows: "Dr. Friedman has opined that the current functional limitations resulted from the industrial accident as the healing process was significant causing him to lose his muscle mass in the right leg that had allowed him to walk prior to the injury." Ex. 33:35. Mr. Porter further noted that Dr. Friedman opined that Claimant would not be able to wean from using bilateral crutches and that Mr. Moore had decreased to a sedentary activity level. *Id.*

163. Meanwhile, according to Mr. Porter, Dr. DeLeon opined that the 2017 industrial injury had caused "significant decompensation" in Claimant's functional level. Dr. DeLeon's restrictions placed Claimant in the SEDENDTARY physical demand category, post-injury. *Id.*

164. Per Mr. Porter, Dr. Rogers disagreed with Dr. DeLeon that the pubic ramus fractures caused significant decompensation in Claimant's functional level. *Id.* Dr. Rogers opined that Claimant's prior right knee injury was "devastating" and the cause of Claimant's decline. *Id.* at 35-36.

165. Mr. Porter noted as follows: "Regardless of whether you use a pre-injury physical demand work capacity of light or medium physical demand work, Mr. Moore is currently restricted to no more than sedentary employment post-injury. *Id.* at 36.

166. Mr. Porter further noted as follows: "Although Mr. Moore is working in a part-time job as a peer support specialist, he only works 8 hours per week and is limited in the clients that he can work with based upon his functional limitations." *Id.*

167. Mr. Porter agreed with "Dr. [N] Collins that Mr. Moore does not have the educational or work experience to work in a competitive sedentary work setting. He lacks the experience or skills typically required for this type of work. He has limited computer skills and is

a hunt and peck typist. He also has preexisting carpal tunnel syndrome that would make sedentary office work difficult." Ex. 33:36.

168. Mr. Porter opined as to ISIF liability as follows: "Medical authorities have identified numerous industrial and non-industrial pre-existing impairments for Claimant. Based upon Mr. Porter's review, these pre-existing impairments were a significant subjective hindrance to employment for Claimant based upon his vocational history. Following the 1999 injuries, Claimant began working in a pawn shop for a sympathetic employer. Claimant then went on to perform two jobs that exceeded his assigned work restrictions, which would be classified as MEDIUM physical demand category jobs. Nevertheless, Claimant was still unable to work in jobs he had previously performed that were in a HEAVY category." *Id.* at 37-38.

169. Mr. Porter noted that as a result of the 4/13/2017 industrial injury, Claimant is now restricted to SEDENTARY physical demand occupations. *Id.* at 38.

170. Mr. Porter concluded his analysis, as follows:

> Dr. Collins has opined that Mr. Moore is an odd-lot worker. She concludes that while Mr. Moore is working a very limited schedule in a sedentary job, he does not have the education or experience to perform sedentary work on a regular competitive basis.
>
> I agree with Dr. Collins that Mr. Moore does not have the education or work experience to work in a competitive sedentary work setting. In my opinion, a viable competitive labor market for Mr. Moore does not exist based upon his vocational profile. He lacks the experience or skills typically required for this type of work. He has limited computer skills and is a hunt and peck typist. He also has preexisting carpal tunnel syndrome that would make sedentary office work difficult.
>
> In my opinion, Mr. Moore was restricted to LIGHT or MEDIUM physical demand work prior to the 04/13/2017 industrial accident. He has been assigned a three percent whole person impairment for his 04/13/2017 industrial accident and is now restricted to SEDENTARY physical demand employment.
>
> In my professional opinion, the preexisting impairments and restrictions combine with the impairments and restrictions from the 04/13/2017 industrial accident to cause total and permanent disability under the odd-lot criteria.

Id.

171. Mr. Porter calculated the applicable *Carey* formula as follows:

> Dr. Rogers assigned Claimant a combined 44% whole person impairment rating for his preexisting medical conditions. Dr. Waters and Dr. Friedman assigned Claimant a 3% whole person impairment rating for the 04/13/2017 industrial injury. This would result in a *Carey* calculation as follows:
> Employer (Volt) would be responsible for the 3% whole person impairment resulting from the industrial accident and 3.4% of the non-medical portion of total and permanent disability.
> ISIF would be responsible for the preexisting 44% whole person impairment and 49.6% of the non-medical portion of total and permanent disability.

Ex. 33:39.

172. **Social Security Disability**. On June 3, 2018, the Social Security Administration determined that Claimant was eligible for Social Security Disability (SSD) benefits effective October 2017. Ex. 37:19. Claimant was eligible for $1,359.00 per month. *Id.* The date that Claimant became disabled under SSA's rules was April 21, 2017. *Id.*

173. **Claimant's Condition at Hearing**. Claimant walked with great difficulty and used two forearm crutches to ambulate at the hearing.

174. Claimant's wife Melanie Moore detailed Claimant's "decline" over the past year prior to the hearing as follows:

> Q. So, the decline you have seen over the past year, what – what things have you seen that led you to conclude that he has declined in the past year?
> A. Well, he spends the majority of the day outside in his wheelchair and not moving around a whole lot and – you know. Or he will sit in his wheelchair to use the blower to blow the leaves. You know, doesn't – we used to walk to Jackson's a couple of times a week and that doesn't happen. We bought a three wheeled bicycle for him, so that he could get some exercise and I think he tried it once, he said I just – it's not working.
> Q. Did he explain to you why he felt like it wasn't working?
> A. It's too painful. He said it's – it hurts and it wasn't his – it wasn't his knee that was hurting, it was – it was his hip that was hurting.

Tr., 133:14-134:6.

175. **Credibility**. Claimant and Ms. Moore testified credibly at hearing.

DISCUSSION AND FURTHER FINDINGS

176. 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).

177. **Disability**. "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. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425.

178. The test for determining whether Claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced Claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on Claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

179. Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Industries*, 136 Idaho 733, 40

P.3d 91 (2002); *Boley v. State of Idaho, Industrial Special Indemnity Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon Claimant. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

180. Total permanent disability may be established using either the 100% method or the Odd-Lot Doctrine. Under the 100% method, Claimant must prove his medical impairment and non-medical factors combine to equal a 100% disability. Under the Odd-Lot Doctrine, Claimant must show he was 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, absent business boom, the sympathy of the employer, temporary good luck, or a superhuman effort on Claimant's part. *See, e.g. Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984).

181. Claimant has the burden of proving Odd-Lot status. *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). He may establish total permanent disability under the Odd-Lot Doctrine in any one of three ways: (1) by showing that he has attempted other types of employment without success; (2) 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 (3) 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).

182. ***Evaluation of the Medical Evidence***. It is important for the Commission to consider all of the relevant factors, including medical factors, in factually determining whether Claimant is totally and permanently disabled. In that regard, it must be acknowledged that all of the medical authorities in this case, with the exception of Dr. Waters, assigned Claimant a sedentary physical exertion work level after his 2017 industrial accident. This includes Dr.

DeLeon, Ex. 22:771-773, Dr. Friedman, Ex. 25:6, Dr. Rogers, Ex. 26:3-5, and Dr. P. Collins. Ex. 27.6.

183. Claimant, therefore, went from performing two jobs in a row for three years that would be reasonably described as medium level exertion occupations (the janitorial job at the Veterans Home and the subject employment at Volt), to being restricted after his industrial accident in 2017 to sedentary exertion levels by the great majority of medical authorities.

184. The consequential conflict in the medical evidence in this case, with corresponding direct impact on the question of Claimant's disability, is between Dr. Friedman's opinion concerning the permanent effect of Claimant's 2017 pubic fractures on his right lower extremity, *see*, Ex. 25:6, and the disagreement of Dr. P. Collins with that opinion, holding that the pubic fractures were but a temporary aggravation at best and did not lead to a permanent effect on Claimant's right lower extremity. *See*, Ex. 27:6. Greater weight should be afforded the opinion of Dr. Friedman, for the reasons expressed below.

185. One statement from Dr. Friedman's deposition demonstrates why it is reasonable to subscribe to his opinion, as follows: "He [Claimant] had his leg fractures in the nineties. He's walking around. He's back at work. I don't think he would be walking on crutches or in a wheelchair but for the [2017] accident and immobilization." Friedman Dep., 47:8-11. Thus, the timing in this case demonstrates that Claimant was physically active outside work (camping and fishing, *see*, Ex. 36) and working a medium-strength job prior to April 2017, and then quickly decompensated thereafter, pointing to the industrial accident as the cause. He was "walking around" before the industrial accident and using crutches and a wheelchair after.

186. Furthermore, although Dr. P. Collins was correct that no physician instructed Claimant to restrict his activity level to complete bedrest for months or even weeks, the evidence

shows that he had significantly restricted level of physical activity following the 2017 industrial accident. Claimant's wife Melanie Moore testified that Claimant was doing "not a whole lot." Claimant spent most of his time in a wheelchair. Additionally, the obesity which Dr. P. Collins attributed in part to his decline, instead of the industrial accident, was exacerbated after the accident, to the tune of a 19-pound weight gain from April to September. Claimant was unable to do the physical things he was used to doing and instead had a greatly decreased physical activity level. *See*, Tr. 123:16-124:3; 125:8-20. This would have been sufficient to affect his lower extremities so that he encountered difficulty in walking and balance, as opined by Dr. Friedman.

187. Dr. Friedman was not the only physician to comment on Claimant's loss of strength and mobility following the 2017 industrial accident. Dr. DeLeon attributed the weakness to the pelvic fracture and noted that the weakness was a new development, corresponding with the pelvic fractures. *See*. Ex. 22:64.

188. Finally, Dr. Friedman is a physiatrist who specializes in both muscular orthopedic and orthopedic dysfunctions. *See*, Friedman Dep., 7:11-8:12. He was uniquely qualified to diagnose and identify Claimant's lower extremity issues, as opposed to Dr. P. Collins, who is an orthopedic surgeon.

189. In summary, Claimant has proven his industrial accident aggravated/accelerated his pre-existing lower extremity condition based upon the medical evidence, and thus contributing to his total and permanent disability in conjunction with his non-medical factors, discussed below.

190. ***Evaluation of the Vocational Evidence***. There are three vocational experts in this case – Dr. N. Collins, Ms. Nelson, and Mr. Porter. Mr. Porter agreed with Dr. N. Collins that Claimant is totally and permanently disabled pursuant to the Odd-Lot doctrine; Ms. Nelson did

not. For the reasons stated below, the more credible vocational analyses are those of Dr. N. Collins and Mr. Porter.

191. Ms. Nelson's analysis appears biased. She began her report with a completely gratuitous paragraph about Claimant's youthful lifestyle that does not belong in a vocational analysis and is irrelevant thereto. From there she repeatedly assails Claimant's honesty and integrity in ways that also appear gratuitous. Does it really matter how many feet Claimant fell in his 1999 industrial accident? Whether it was 20 feet or 38 feet, it was still a horrific accident, as Ms. Nelson admitted, and Claimant could not make up or invent the very real injuries he suffered to his lower extremities as a result.

192. What Ms. Nelson attributes to mendacious embellishment on Claimant's part may have merely been a mistake in medical records where the 38-foot fall was recorded, or there may be some other reasonable explanation that Ms. Nelson could have explored with Claimant had she conducted an in-person interview with him. That brings up another reason to find her analysis less credible – the fact that she did not meet with or interview Claimant. While not doing so may not be a violation of her professional ethics as a vocational rehabilitation expert, nevertheless much would have been missed without an in-person interview. As. Dr. N. Collins noted, her in-person interview with Claimant revealed how "significantly disabled" he appeared, walking with forearm crutches and a slow, awkward gait. Ex. 29.1. Further, "presentability" is absolutely relevant to a vocational analysis per Dr. N. Collins.

193. That Claimant told Dr. N. Collins that he was much more functional prior to his last industrial accident (2017) is corroborated by the medical evidence and Claimant's photographs of his reactional activities detailed above. Prior to the accident, Claimant was working in a job which required him to lift 50 pounds often and to be on his feet for much of the

day. He also participated in physical outdoor activities such as fishing and camping. The 2017 industrial accident had a very real consequence for Claimant's functioning because he is now restricted to sedentary work and is no longer able to participate in those recreational activities. Dr. N. Collins further accurately described the physical exertion levels that Claimant had worked in over the course of his career as heavy, medium, and light occupations; now he was limited by the industrial accident to sedentary level work. Ex. 28:12.

194. Dr. N. Collins accurately concluded that it was unrealistic to expect Claimant to perform most sedentary work because with his high school education and work experience (Singer's was the closest to sedentary work that Claimant performed), Claimant does not have the necessary transferable skills to succeed in sedentary (mostly office) work. His lack of computer and keyboarding skills and lack of familiarity with office software disqualify him from working in sedentary settings. Furthermore, Claimant's carpal tunnel syndrome would make it difficult for him to type for very long. Ex. 28:12-13. Claimant's current age at 55 years also puts him in a category of older workers for whom obtaining employment is more difficult and particularly if he were trying to obtain a sedentary job with which he had no previous experience.

195. As Dr. N. Collins points out, there's no question that Claimant cannot return to jobs with heavier physical demands, like his janitorial job at the VA or the subject employment with Volt. The question is whether he can perform sedentary work. The CPSS job with About Balance, rather than demonstrating that there is a sedentary (actually, sedentary/light) job he can perform, shows otherwise. Claimant went out on his own after the 2017 accident and secured that employment and performed it part-time for approximately three years. Ultimately, he self-selected out of that position because of his concerns for his clients' safety and his concerns about his abilities to perform it. In any event, he was never capable of performing the PCSS job full

time. This demonstrates that he "performed other types of employment without success." *Lethrud*, 126 Idaho at 563, 887 P.2d at 1070.

196. Both Dr. N. Collins and Mr. Porter correctly found that Claimant was so injured, by the combination of his 1999 and 2017 injuries, 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, absent business boom, the sympathy of the employer, temporary good luck, or a superhuman effort on Claimant's part. *Carey*, 107 Idaho 109 at 112, 686 P.2d at 57. In addition to proving the first prong of the *Lethrud* test, Claimant has also shown the third prong, that any efforts to find suitable work would be futile. *Id.*,126 Idaho at 563, 887 P.2d at 1070. Rather, it would take a sympathetic employer or superhuman effort on Claimant's part to secure employment.

197. ***Disability Conclusion.*** Based upon all the medical and nonmedical factors, Claimant is totally and permanently disabled according to the Odd Lot doctrine and as a result of a combination of his 1999 and 2017 industrial injuries. The majority of vocational experts (Dr. N. Collins and Mr. Porter) support this finding. The analysis of Ms. Nelson is an outlier that is deserving of less credence.

198. **ISIF Liability**. Idaho Code § 72-332(1) provides as follows:

> 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 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.

199. In *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court specified the following four-part test for determining liability under Idaho Code § 72-332(1): 1.) Whether there was a preexisting impairment; 2.) Whether the impairment was manifest; 3.) Whether the impairment was a subjective hindrance to employment; and 4.) Whether the impairment in any way combines in causing total permanent disability. *Id.*, 118 Idaho 155, 795 P.2d at 317. The party asserting ISIF liability (in this case, Claimant) bears the burden of proving all four elements. *Eckhart v. State Industrial Special Indemnity Fund*, 133 Idaho 260, 263, 985 P.2d 685, 688 (1999). *See also*, *Andrews v. State Industrial Special Indemnity Fund*, 162 Idaho 156, 158, 395 P.3d 375, 377 (2017).

200. There is no dispute that Claimant had multiple preexisting impairments in this case. He had multiple injuries to his lower extremities sustained in the 1999 industrial accident that affected him both temporarily and permanently. Dr. Rogers assigned a 31% whole person impairment to Claimant's lower extremity injuries. Ex. 26:5. Restrictions included to sedentary work only. *Id.* The lower extremity injuries were manifest in that they were plainly evident when they were incurred. They also had a subjective hindrance to Claimant's employment prospects, in that he acknowledged that he could not return to his time of injury employment. ("I could never do that type of work again." Tr., 17:24-25.)

201. Claimant had other preexisting impairments, including an umbilical hernia, hypertensive cardiovascular disease, atrial fibrillation/dysrhythmia, and lumbar spondylosis. *See*, Ex. 26.8. Dr. Rogers rated all of these conditions as impairments. There is no dispute that they were manifest at the time they were discovered, nevertheless there is insufficient evidence in the record to demonstrate that they constituted a subjective hindrance to employment, unlike Claimant's lower extremity impairments from his 1999 industrial accident.

202. The final and crucial issue in assessing ISIF liability in this case is whether Claimant's 1999 lower extremity injuries combine with, in any way, the 2017 industrial injury to cause Claimant to become totally and permanently disabled. For evidence of the same, it bears returning to Dr. Friedman's statement in deposition, as follows: "He had his leg fractures in the nineties. He's walking around. He's back at work. I don't think he would be walking on crutches or in a wheelchair but for the [2017] accident and immobilization." Friedman Dep., 47:5-11.

203. This has already been addressed above, but per Dr. Friedman and Dr. DeLeon, Claimant's 2017 injury exacerbated and/or accelerated Claimant's 1999 injuries. His period of immobility following the 2017 accident caused him to lose muscle mass and strength.

204. Furthermore, Dr. Rogers opined that Claimant's 1999 injuries caused "osteopenia in his right leg quite likely contributing to the [pelvic] fracture." Ex. 40:8. Such fractures ordinarily occur only in elderly individuals. *Id.* Thus, Claimant would likely not have experienced a pelvic fracture in the first place without the preexisting condition of the 1999 injuries.

205. It is the combined effect of the 2017 industrial injury and 1999 industrial injuries that caused Claimant's functional loss after 2017. There is sufficient evidence, therefore, to find that the 1999 and 2017 injuries combined to cause Claimant's total and permanent disability.

206. ***Carey* Formula**. Next, the apportionment of Claimant's total disability between Employer/Surety and ISIF must be addressed. The Idaho Supreme Court in *Carey v. Clearwater County Road Department*, 107 Idaho 109, 686 P.2d 54 (1984) held that "the appropriate solution of the problem of apportioning the non-medical factors in an odd-lot case where [ISIF] is involved, is to prorate the non-medical portion of disability between the employer and [ISIF] in proportion to their respective percentages of responsibility for the physical impairment." *Id.* at

107 Idaho 118, 686 P.2d at 63. *See also, Garcia v. J.R. Simplot Company*, 115 Idaho at 971, 772 P.2d at 178.

207. The first step is to define the respective percentages of the applicable pre-existing impairments and accident produced impairments. Claimant's impairment from his relevant pre-existing conditions equals 31% of the whole person. Claimant's accident-related impairment equals 3% of the whole person. Combined, Claimant's impairments equal 34% of the whole person, leaving 66% disability from non-medical factors to apportion between Employer and the ISIF.

208. Employer's responsibility may be calculated as follows per *Carey*: 3% (percentage industrial injury PPI)/34% (total percentage PPI) = 8.82% (percentage Employer's portion of total PPI) x 66% (percentage nonmedical factors) = 5.82% (percentage Employer's portion of non-medical factors). Under *Carey*, Employer is responsible for the payment of 5.82% disability at the PPD rate (55% of the average state wage). 5.82% permanent partial disability equates to 29 weeks commencing September 26, 2018, Claimant's date of medical stability, at $400.40 per week. Employer is credited for the 3% PPI rating previously paid. During the 29 weeks following Claimant's date of medical stability, ISIF shall make such additional payments to Claimant as may be necessary to compensate Claimant for any difference between the PPD rate and the TTD rate to which he is entitled pursuant to the provisions of Idaho Code § 72-408. Subsequent to 29 weeks following Claimant's date of medical stability, ISIF shall be solely responsible for the payment of total and permanent disability benefits as authorized by Idaho Code § 72-408.

CONCLUSIONS OF LAW

1. Claimant is totally and permanently disabled pursuant to the Odd-Lot doctrine.

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

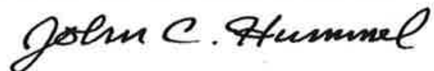
3. Under *Carey*, Employer is responsible for the payment of 5.82% disability at the PPD rate (55% of the average state wage). 5.82% permanent partial disability equates to 29 weeks commencing September 26, 2018, Claimant's date of medical stability, at $400.40 per week. Employer is credited for the 3% PPI rating previously paid. During the 29 weeks following Claimant's date of medical stability, ISIF shall make such additional payments to Claimant as may be necessary to compensate Claimant for any difference between the PPD rate and the TTD rate to which he is entitled pursuant to the provisions of Idaho Code § 72-408. Subsequent to 29 weeks following Claimant's date of medical stability, ISIF shall be solely responsible for the payment of total and permanent disability benefits as authorized by Idaho Code § 72-408.

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 27th day of January, 2022.

INDUSTRIAL COMMISSION



John C. Hummel, Referee

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of January, 2022, 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:

DANIEL J LUKER
PO BOX 6190
BOISE ID 83707-6190
dan@goicoechealaw.com

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701
pja@augustinelaw.com

Shannowa Carver

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DANIEL MOORE, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	IC 2017-015549 ORDER

FILED
JAN 28 2022
INDUSTRIAL COMMISSION

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

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

1. Claimant is totally and permanently disabled pursuant to the Odd-Lot doctrine.
2. ISIF is liable for a portion of Claimant's total and permanent disability pursuant to Idaho Code § 72-332.
3. Under *Carey*, Employer is responsible for the payment of 5.82% disability at the PPD rate (55% of the average state wage). 5.82% permanent partial disability equates to 29 weeks commencing September 26, 2018, Claimant's date of medical stability, at $400.40 per week. Employer is credited for the 3% PPI rating previously paid. During the 29 weeks following Claimant's date of medical stability, ISIF shall make such additional payments to Claimant as

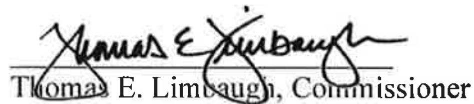
may be necessary to compensate Claimant for any difference between the PPD rate and the TTD rate to which he is entitled pursuant to the provisions of Idaho Code § 72-408. Subsequent to 29 weeks following Claimant's date of medical stability, ISIF shall be solely responsible for the payment of total and permanent disability benefits as authorized by Idaho Code § 72-408.

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

DATED this 27th day of January, 2022.

INDUSTRIAL COMMISSION

Aaron White, Chairman



Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of January, 2022, a true and correct copy of the foregoing **ORDER** was served by regular United States mail and email upon each of the following:

DANIEL J LUKER
PO BOX 6190
BOISE ID 83707-6190
dan@goicoechealaw.com

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701
pja@augustinelaw.com

sc