BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STEVEN ANDREWS, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2009-007783** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed May 10, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers who conducted a hearing in Pocatello on June 16, 2015. Claimant was present and represented by Reed W. Larsen of Pocatello. Employer/Surety settled with Claimant prior to hearing. Thomas B. High of Twin Falls represented State of Idaho, Industrial Special Indemnity Fund (ISIF). Oral and documentary evidence was presented and the record remained open for the taking of two post-hearing depositions. The parties then submitted post-hearing briefs, and this matter came under advisement on November 10, 2016 and is now ready for decision.

ISSUES

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

1. Whether Claimant is totally and permanently disabled by way of the odd-lot doctrine or otherwise;

2. If so, whether ISIF is liable; and, if so,

3. Whether the *Carey* formula applies; and

4. Whether Idaho Code § 72-406(2) allows for the deduction of previously paid income benefits paid for the previous injury to the same body part and, if so, whether the deduction inures to the benefit of ISIF.

CONTENTIONS OF THE PARTIES

Claimant contends that he is totally and permanently disabled by either the 100% method or by application of the odd-lot doctrine.

ISIF contends that Claimant is not totally and permanently disabled by any method; however, if the Commission so finds, his total disability is solely the result of his last industrial accident. While it is true that Claimant has pre-existing conditions that may have affected his ability to work, he was able to perform his work without much difficulty at the time of his last industrial accident and there was no combination of pre-existing impairments with the impairment resulting from his last accident that would trigger ISIF liability.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant presented at the hearing.

2. Claimant's Exhibits A-P admitted at the hearing.

3. ISIF Exhibits A-B admitted at the hearing.

4. The post-hearing deposition of Nancy Collins, Ph.D., taken by Claimant on August 19, 2015.

5. The post-hearing deposition of Hugh S. Selznick, M.D., taken by Claimant on September 1, 2005.

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

FINDINGS OF FACT

Claimant's hearing testimony:

1. Claimant was 57 years of age at the time of the hearing (he was 53 at the time of his last industrial accident) and residing in Pocatello with his wife of 35 years. He stands 5'9" tall and weighs 300 pounds. He has long white hair,[1] a long, braided white beard,[2] wears sandals due to foot problems and walks with a staff or walking stick as using a cane hurts his back.

2. Claimant graduated from Marsh Valley High School in 1977. Other than a defensive driving course required to obtain a commercial truck driver's license, Claimant has received no formal education or training since high school. Claimant worked as a commercial truck driver for a year or so in the early 1980's but has not had a CDL since 1984.

3. Claimant testified to the following work history from high school to 1985: landscaper/sod layer;[3] oil field fracking work; and four years as a grounds supervisor at State Hospital South where he supervised a crew and performed maintenance on sprinkler and irrigation lines, as well as winter maintenance on the buildings and snow removal.

4. In 1988, Claimant began his employment with the LDS church as a custodian. After about three months, he was moved up to a mechanic position. His duties included maintenance of the HVAC and fixing "…anything that was broke." HT., p. 19. He was responsible for between 32 and 42 buildings in the Blackfoot/Pocatello area. More specifically, Claimant "… maintained all the drinking fountains, all the toilets, all of the door hardware, locks, programming the locks because they had computerized doors, HVAC systems, maintenance and repair, lighting, electrical. Pretty much everything in the building that could go wrong." HT., p. 20.

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[1] Claimant testified that when he first met his wife he had long hair which she "loved." He promised her that he would grow his hair long again once he "retired."

[2] Claimant testified that he has grown his beard since 1976 because shaving gives him hives. He has a letter from the first presidency of the LDS church permitting Claimant to grow and maintain his beard.

[3] Claimant injured his right knee while landscaping in 1984 which made his knee unstable, especially when walking downhill.

5. Claimant worked for Employer just under 23 years and "loved" his job.[4] Unfortunately, he suffered a number of work-related injuries mostly involving his back. A major event occurred in March 2009 (subject accident) when Claimant fell from a 12-foot upper mezzanine and landed on his shoulders onto a stage floor. Ultimately, Claimant underwent surgery (fusion) on his low back. He had prior back surgeries in the 1990s that limited his ability to bend and twist. Claimant was unable to return to work after the back surgery following the subject accident[5] and has not worked since; however, he is receiving Social Security Disability Insurance benefits of about $1300.00 a month before deductions.

Prior physical conditions:

6. (a) **Feet**

> I don't remember the dates. I think the first foot surgery I had would be in the late '80s, early '90s. And it was with my right foot. And it was - - he called it turf toe, which there is fancy name for it that I can't remember. But, basically, it's - - you have an impingement where your big toe meets your foot, you form an arthritic bump there so that your toe won't bend backwards like most people's bend. So it just stops your toe straight. And it hurts. And so they went in there. And Dr. Mott did that surgery. And he went in and trimmed the top of the toe off. And I believe he did the one on my left foot also. I can't remember for sure. I think he did the left foot also, like a couple of years after the right foot. It might not have been that long.
>
> And then the right foot got re-aggravated, or it just grew another one, and so they had to go in and do it again on the right foot.
>
> And the last time I went and had my foot looked at on the right foot, they said they were probably either going to have to take the big toe off or fuse it. And I didn't want to do either one yet, so I limp around.
>
> I can't put boots on. Like a cowboy boot, there's no way because I can't bend my toe to get into them.
>
> * * *
>
> I do have a pair of boots that has a tongue that pulls clear out. But because my feet are so fat, as subtle as I can be there, I have thick feet, so then I can't find one that's big enough. I have triple-E boots right now, and if I wear them for a couple of hours, my feet hurt so bad I have to take them off. That's why I wear these (sandals), because I can get in and out of them by myself. Because I can't touch my toes. And

[4] Claimant also ran a business "on the side" where he designed/redesigned automatic sprinkler systems.

[5] Claimant attempted to return to work with Employer; however, Employer decided Claimant's restrictions of no lifting over 10 pounds and no twisting, turning, crawling, and ladder climbing posed too big a risk, so Claimant's employment was terminated.

> if I have to put on socks, my wife has to help me put my socks on. And these (sandals), I don't normally wear socks with. And once I - - I can slide my foot into them and I can undo them with, you know, my other foot. But once I get them on, then I have to go to a chair, or something, and put my foot up on the chair so I can reach the tab and tighten them.

HT., pp. 33-35.

7. As of the time of the hearing, Claimant's feet ache all the time. He can walk on even surfaces, with the help of a walking stick, for about a quarter of a mile before he has to stop and rest. He can stand without his walking stick for about 5 minutes. Claimant testified that he cannot use a cane because he has to leverage off his lower back which causes him to twist, which hurts his lower back. His doctor recommended a staff or walking stick. Claimant also indicated that he is developing arthritis in both feet.

8. (b) **Knees**

Claimant has had five surgeries on his right knee, including a TKA performed in 2010, after his last industrial accident. He has had one operation on his left knee, which, according to his physician, will also need to be replaced in the future due to arthritis. Claimant's right knee only partially bends which prevents him from crawling and ascending/descending ladders. His has developed arthritis in his left knee which aches at night because he favors that side when ambulating due to his right knee, back, and right foot problems.

9. (c) **Low back**

Claimant's last low back surgery was necessitated following a fall he took in 2013. He broke two screws that needed to be replaced. He described his recovery from that surgery as, "I'm almost as good as I was before it." HT., p. 40. Claimant cannot twist because of his low back injury and has difficulty with certain personal hygiene activities that may interfere with any potential employment due to the time it takes for him to complete those tasks. He testified in his deposition that it was his back that that was disqualifying him from most jobs.

10. (c) **Shoulders**

Claimant testified that he is unable to perform overhead work due to bilateral shoulder impingement issues. He has had open surgery on his right shoulder and arthroscopic surgery on his left shoulder, which bothers him more than his right.

11. (d) **Neck**

Claimant has yet to have any surgeries on his neck; however, he testified that he has a "bad disk" that limits his ability to sit for over about 15 minutes at a time. He also has difficulty turning his head to his left.

DISCUSSION AND FURTHER FINDINGS

Claimant contends that he is totally and permanently disabled. Such total disability may be proven by showing that Claimant's medical impairment together with pertinent nonmedical factors totals 100%.

12. On September 1, 2015, Claimant took the deposition of **Hugh Selznick, M.D**., a Board Certified orthopedic surgeon practicing in Pocatello. He has testified in a number of cases before the Commission and is qualified to testify as an expert in this matter. Dr. Selznick maintains a clinical practice as well as conducts independent orthopedic forensic evaluations.

13. Dr. Selznick performed an orthopedic evaluation of Claimant resulting in a report dated March 30, 2011 (Ex. B) and a supplemental report dated May 26, 2011 (Ex. C). Dr. Selznick interviewed and examined Claimant on January 24, 2011.

14. Regarding Claimant's orthopedically relevant pre-last accident musculoskeletal condition, Dr. Selznick testified:

> Yes. He had prior low back issues, which we can discuss; prior knee issues which we can discuss. He also had other musculoskeletal areas, both shoulders. He had a hallux or big toe arthritic issue [sic]. But the main issues here of concern, mostly the low back and his right knee, and he did have past history in both of these areas.

Dr. Selznick Depo., p. 9.

15. During the course of Dr. Selznick's deposition, Claimant's counsel asked him a series of hypothetical questions regarding whether or not Claimant's preexisting conditions resulted in any permanent partial impairments. Dr. Selznick responded that Claimant's 2007 back surgery would result in whole person PPI of approximately 10% utilizing the 6th edition of the *AMA Guides to the Evaluation of Physical Impairment (Guides)*. Dr. Selznick rated Claimant's right knee ACL deficiency at between 5% and 10%. He rated Claimant's left knee at between 1% and 2%. He rated Claimant's left shoulder at approximately 3%. Claimant's right shoulder would also be in the 3% to 4% range. Finally, Dr. Selznick rated Claimant's right great toe at 1% to 2%.

16. Even though Claimant had preexisting impairments, Dr. Selznick testified that Claimant was not restricted:

> Basically, based on the data points that I have, and most importantly those data points are he was working full-time for the LDS church as a maintenance mechanic, from his - - essentially from his last low back surgery, which was October of 2007, up and through the subject accident, without issue, he was able to do during that time period his full employ, which was of a - - if my recall is correct, is of medium load; so it is my opinion that he was able to do that without issue up and through the subject accident.

Id., p. 10.

17. Regarding Claimant's March 17, 2009 accident, Dr. Selznick testified that he injured his back and permanently aggravated his asymptomatic preexisting right knee condition. Utilizing the *Guides,* 6th edition, Dr. Selznick assigned whole person PPI of 31%. Regarding Claimant's right knee, Dr. Selznick assigned a whole person PPI rating of 22% equaling a combined whole person rating of 46%.

18. Claimant informed Dr. Selznick how he felt before his March 2009 accident and how he felt after:

> And I asked him to very specifically outline how he felt right before the 3/17/09 event and how he felt after, up and through the surgical intervention by Dr. Allen. He stated, prior to the incident, he could bend, sleep, and walk without difficulty. He stated he could work overhead without difficulty. He stated that after the event, but before the surgical intervention, I quote, he couldn't do anything. He

> maybe could do some light inventory work, he stated, but no physical work. He had difficulty with bending, with sleeping, with walking after the accident. He stated, and I remember this, because very few patients say this, he had difficulty wiping his behind after - - being on the toilet after subject incident, but before surgery, because twisting required to do so, he couldn't do.
>
> Even landscaping and sprinkler maintenance, he couldn't do after the incident, but he could do prior to the incident.
>
> He also mentioned hobbies, such as fishing and hunting, which he was able to do before the incident but was unable to do so after the incident, except from a car.
>
> After surgical intervention he improved, but he still has difficulties with activities of daily living, and he stated he has not even been able to do landscaping or even sprinkler chores personally, and he's unable to fish or hunt like he used to.

Dr. Selznick Depo., pp. 19-20.

19. Claimant informed Dr. Selznick that he had no issues with his low back before his 2009 accident and rated his pain at zero out of ten. Other than two follow-up appointments post-surgery in August 2008, Claimant received no treatment for his low back until the subject accident. Claimant was "grossly asymptomatic" regarding his low back, meaning he continued with his vocational and avocational activities without restriction insofar as his back was concerned. Finally, all of PA Fagan's[6] restrictions are as a result of Claimant's last accident alone.

20. Dr. Selznick expressed his agreement with Dr. Collins that Claimant cannot return to work at Employer's. Further, he agreed with Dr. Collins that Claimant "could be" totally disabled.

The vocational experts

21. Claimant retained **Nancy J. Collins, Ph.D.,** to assess his employability. Dr. Collins' credentials are well-known to the Commission and will not be repeated here. She is qualified to testify as a vocational expert in this matter.

22. Dr. Collins met with Claimant in 2011 and again in 2013. She testified in her deposition that in preparing her evaluations she performed the following:

[6] PA Fagan is the physician assistant to the physician who performed Claimant's back surgery following his 2009 industrial accident.

Well, I typically will request all the medical and vocational records, and then I review those prior to doing an interview. I did meet with this gentleman twice, once in 2011, and once on 2013.

I do the evaluation and then consider the restrictions, the physical restrictions from the physicians, the functional limitations from my other functional capacities eval, or from subjective complaints.

Then I do a transferrable skills analysis, look at loss of access to the labor market, and earning capacity pre and post. And then I typically will do a report outlining my conclusions.

Dr. Collins' Depo., p. 5.

23. Dr. Collins noted Claimant's **physical restrictions** to be:

June 28, 2010 by Sarah Fagan, P.A.

* Sitting, standing and walking 1-3 hours each per day.
* Driving 1-3 hours per day.
* Lift 10# 5-8 hours/10-15# 3-5 hours/15-35# 1-3 hours/50# with a co-worker.
* Bend, stoop, push/pull, twist, climb, squat, kneel, reach, grasp and perform repetitive movements 1-3 hours a day.
* Balance and crawl not at all.
* Will require frequent change of positions.

Exhibit 2 to Dr. Collins' Depo., p. 1.

24. On September 20, 2010, Craig Stevens, M.D., a physiatrist who performed an IME for Defendants, agreed with a 35# lifting restriction alone and 50# with the help of a co-worker.

25. Dr. Collins noted Claimant's **subjective limitations** to be:

* Physical stamina – feels fatigued daily and does take a nap.
* Loss of sensation – left foot and leg.
* Sitting – limited to 30 minutes.
* Standing – limited to 5 – 10 minutes.
* Walking – limited and tends to stumble.
* Reaching – hurts to lean back to reach up.
* Dexterity – as [sic] arthritis in his fingers.
* Stooping – increases pain.
* Squatting – cannot perform.

* Climbing – no over 6 foot ladder, hills hurt his knees.
* Lifting – tries not to lift over 25#.
* Bend/twist – avoids as increases pain.
* Kneeling – cannot do because of knees.
* Balance – left leg is weak and he doesn't trust it.
* Headaches – increase with back tension.
* Bowel/bladder – colonoscopy surgery caused loss of sphincter control.
* Driving – does not drive on medication.
* Hearing, vision, grip strength, speech, respiration all good.
* Allergic to latex, codeine, antibiotics, anesthesia, lanolin, pesticides, perfume.
* Weather – more painful in the cold.

Exhibit 2 to Dr. Collins' Depo.

26. Dr. Collins placed Claimant's **prior work history** at **the medium to heavy work** levels that exceeds his current capabilities. She noted that Claimant's time of injury job with Employer was the most skilled job he had ever performed and he was able to delegate work to others when he felt he could not physically perform it or it required mechanical skills beyond his expertise.

27. Dr. Collins testified as follows regarding Claimant's **preexisting conditions** or restrictions that would have impacted his access to his labor market:

> Well, he had a significant right knee condition. He had injuries in 1984, 1987, 1991; had complained about it for many years. He had a left knee surgery in 1993, but his right knee seemed to be the one that caused him the most problem - - the most difficulty.
>
> And he did tell me during the interview that he was - - had a really difficult time squatting, crouching, kneeling before the accident and would make accommodations if those - - if that position was required. It also caused him to have some difficulty climbing and standing for long periods.
>
> He also had previous back injuries and surgeries. He had a surgery, I think in '92 and '94 and then again in 2007.
>
> And, again, he discussed that in his job he'd been there - - well, he worked there for like 25 years. He - - and he was a supervisor, so he was able to delegate work that he felt was too heavy, or it required kneeling, squatting, twisting, bending. But he felt like he was still able to do his job, and his expertise allowed him to still be a valuable worker.

> He also had pretty significant foot problems that are discussed in the records in 1999, 2000, and 2004. He'd had surgeries. In the records it talks about that he has difficulty wearing regular shoes. He wore Birkenstocks or open-toed shoes. When I met him, he had sandals on. If he did have to wear a closed-toe boot or shoe, it had to be, I think, three times or - - not his shoe size, but bigger than he wore on - - would wear traditionally.
>
> And he limped, both because he had radicular pain down his leg from the 2009 injury, and then also because he had preexisting pain in his feet from those injuries and conditions on his foot.
>
> And then he had bilateral shoulder injuries, and I think surgeries on both. And those had gone pretty well. He'd returned to work after those. He actually returned to work after all these surgeries, and in the records he would request a return to work.
>
> So prior to the 2009 injury, he did have some limitation for standing, walking, kneeling, crouching, squatting, climbing.

Dr. Collins' Depo., pp. 8-9.

28. Regarding Claimant's pre-2009 accident limitations, Dr. Collins opined that he could self-accommodate as he was a supervisor who could delegate heavier tasks. Dr. Collins testified that he had no permanent restrictions *per se* pre-2009, and had always returned to work after each pre-2009 injury but could not have done so without some accommodations. She does not believe the LDS church was a sympathetic employer because Claimant did "real" supervisory work.

29. While acknowledging that loss of access is "really hard to estimate," Dr. Collins places such loss at 60%.

30. Dr. Collins lists the following restrictions placed upon Claimant post-2009 accident by Sarah Fagan, P.A., and defense IME examiner Dr. Stevens :

> Well, he had sitting, standing, and walking restrictions of one to three hours per day. So he needed to be able to alternate positions. This would be considered to be occasional. And that was pretty significant for him.
>
> He did have a restriction for changing positions before 2009, but it wasn't specified as to how long. So those are pretty significant restrictions for him because his work didn't really require sitting, you know, as part of his job.
>
> He also had a restriction for driving one to three hours per day. That's pretty significant for him because he had some experience and background in truck driving.
>
> His lifting was realistically in the light/medium category with three to five hours at 15 to 30 pounds. He could only lift 50 pounds with a coworker. So that doesn't give him access to all medium level jobs.

> More importantly for him with his background were his restrictions for bending, stooping, pushing, pulling, twisting, climbing, squatting, kneeling. Those are all positions that would be required from occasional to frequent in any kind of maintenance/mechanic job. And then, even more significant, he had occasional restriction [sic] for reaching, grasping, and performing repetitive movements on an occasional basis. And at least in the DOT, reaching and grasping, handling, fingering are required in 90 - - over 93 percent of the jobs in the labor market. So that was pretty significant. Those don't really appear to be related to his back injury. So I'm not sure why they're there, but they're there.
>
> And then he was not to balance or crawl at all. So he couldn't work at heights. He shouldn't be on a ladder, and no crawling. And then, again, frequent changes of positions. So pretty significant restrictions.
>
> You know, oftentimes, what we look at are those strength designations, light, medium, heavy. But in addition to those, you really have to pay attention to what the positional restrictions are, and in this case for him, they were pretty significant.

Dr. Collins' Depo., pp. 14-15.

31. Dr. Collins could not indentify any jobs that Claimant held pre-2009 that he could now perform.

32. Dr. Collins noted that at the time of Claimant's injury, he was making $18.00 an hour with a "significant" benefit package. If Claimant could return to truck driving or light maintenance work, he could expect to earn $8.00 to $11.00 per hour for a wage loss of about 50% based on his back restrictions alone. Dr. Collins did not include in her analysis any pre-existing restrictions or Claimant's pain narcotics medications which would keep him from any driving jobs.

33. Dr. Collins testified as follows regarding her ultimate conclusions in this matter:

> Well, I really felt at the time that when you considered this gentleman as a whole, he was - - he was an older worker and appeared older than he was. He was in his 50's then. He had long gray hair and a beard. He walked in sandals very slowly with a limp. He had a physical work history, having been terminated from his long-time employer. It was during a very poor economy. And his work history didn't give him light transferrable skills.
>
> So I felt that he could certainly be an odd-lot worker, if you took into consideration all of his medical conditions, the labor market, his age, his presentation, his education.

Dr. Collins' Depo., pp. 23-24.

34. In her 2013 report, Dr. Collins indicated that she had received additional medical records between 2011 and 2013 revealing preexisting conditions that resulted in more onerous restrictions than those imposed following Claimant's 2009 injury. Dr. Collins remained of the opinion that Claimant was permanently and totally disabled based on all his medical conditions and not just his back injury suffered in 2009:

> I felt in 2013 that his condition had certainly not improved. In combining his restrictions for his back injury and considering all the limitations he had with his feet, his knees, his shoulder, his neck, his chronic pain, his narcotic pain usage, his age, that it would be very difficult for him to find an employer to hire him, and he would need significant accommodations in any job.

Id., pp. 26-27.

35. Dr. Collins believes Claimant made a reasonable job search; he tried to return to Employer's and cooperated with the ICRD. He even went outside his labor market on occasion without success.

36. ISIF retained **Delyn Porter, M.A.**, to assess Claimant's employability. Mr. Porter prepared a Vocational Evaluation Report dated April 24, 2013 and an Addendum Vocational Evaluation report dated June 3, 2015. Mr. Porter is qualified to testify as an expert in this matter.

37. Mr. Porter met with Claimant on October 24, 2012; reviewed pertinent medical[7] and vocational records, including Dr. Collins' 2013 report; tax records, and the parties' discovery responses.

38. Mr. Porter noted that Claimant had a high school diploma (1977), was a slow reader and suffered from some degree of dyslexia. He has never served in the military. Claimant has six adult children and has been married to his wife for 43 years. Claimant has Type II diabetes, bilateral shoulder impingement, osteoarthritis, bilateral feet issues, right knee problems, hypertension, and two prior back injuries resulting in two surgeries.

[7] Mr. Porter summarizes Claimant's extensive medical records (from 1985 to 2011) at pages 2-14 of his April 24, 2013 report. See ISIF Exhibit 1.

39. When Mr. Porter interviewed Claimant on January 13, 2012 he noted, "He (Claimant) was dressed casually in a t-shirt, cargo pants, and socks/sandals. He was observed to wear glasses and has long hair and a long beard that reaches almost to his belly." DE 1, pp. 16-17. Mr. Porter also observed that Claimant appeared older than his 55 years.

40. Mr. Porter indicated that Claimant actively participated in the interview, exhibited good English verbal communications skills, and was personable and pleasant. Claimant shifted around in his chair almost constantly during the one and three-quarter-hour interview and also shifted between sitting and standing. His short and long-term memory corresponded to the medical and vocational reports that Mr. Porter reviewed in preparing his evaluation.

41. Mr. Porter understood Claimant's permanent work restrictions in 2010 assigned by PA Fagan to be:

> Maximum lifting of 50 pounds with a co-worker; occasional lifting of 15-35 pounds; frequent lifting of 10-15 pounds; and no constant lifting above 10 pounds. In addition, he is restricted to occasional sitting, standing, walking, and driving; occasional bending, stooping, pushing/pulling, twisting, climbing, squatting, kneeling, reaching, grasping, and performing repetitive movements. He is unable to crawl, and will require frequent changes of position.
>
> On September 20, 2010, Dr. Stevens opined that Mr. Andrews had permanent work restrictions including: no lifting over 35 pounds alone and 50 pounds in combination with a co-worker.

Id., pp. 24-25.

42. Mr. Porter opined that Claimant's restrictions place him in the light/medium work categories.

43. Mr. Porter further opined that the residual function capacity (RFC) component of his assessment would place Claimant in the sedentary or below work category. He described the RFC as being developed based on Claimant's subjective complaints and self-identified restrictions. However, Mr. Porter expressed some concerns:

> There is a significant discrepancy between the objective work restrictions identified in this case and the subjective complaints and restrictions identified by Mr.

> Andrews. Mr. Andrews reports that he is subjectively more disabled than is evidenced by the objective medical facts in this case.

DE 1, p. 25. (Emphasis in original).

44. Mr. Porter noted that Claimant's vocational profile is limited by his past work history, limited education and limited transferrable skills. Also, even though Claimant had numerous industrial and non-industrial accidents, he continued working in maintenance for Employer and had no documented work restrictions before 2009.

45. Mr. Porter recorded the following **pre-existing physical impairments**:

> On December 27, 2010, Dr. Stevens opined that Mr. Andrews had a 31% total pre-injury whole person impairment (15% prior lumbar related; 6% right shoulder impairment; 4% left shoulder impairment; 1% left knee impairment; 1% toe condition; 2% for diabetic polyneuropathy. Dr. Stevens noted that this was an estimate based on unmodified diagnosis based ratings.
>
> On May 26, 2011, Dr. Selznick opined that Mr. Andrews had a pre-existing whole person impairment of 10% for the claimant's three simple decompressive surgeries at L3-4 and L3-5. Dr. Selznick further opined a 4% pre-existing whole person impairment attributable to pre-existing right knee problems. This equates to a total 14% pre-existing whole person impairment in this case.

Id, p. 30. (Emphasis in original).

46. Mr. Porter recorded the following regarding **PPI** ratings assigned following Claimant's **2009 accident/injury**:

> On May 26, 2011, Dr. Selznick awarded Mr. Andrews a total 31% whole person impairment rating with 10% apportioned for pre-existing back issues. This results in a whole person PPI rating of 21% apportioned to the back injury on March 17, 2009.
>
> Dr. Selznick also awarded a total 22% whole person impairment for the right knee with 4% apportioned for pre-existing right knee issues. This results in a whole person impairment rating of 18% apportioned to the right knee injury that occurred on March 17, 2009.

DE 1., p. 30.

47. Mr. Porter agrees with Dr. Collins that the SkillTran system is unable to adjust for Claimant's need to change positions from sitting to standing to walking throughout the day. Dr. Collins concluded, based on the SkillTran program, that Claimant has lost between 66% and 99% of

his labor market access. However, when considering the "closely transferrable occupations" and "generally transferrable occupations" that are closely related to the type of work Claimant has performed in the past, his loss of access would be 44% to 76%.[8]

DE 1, p. 35.

48. Mr. Porter places Claimant in the light/medium work level. Because Claimant's work for employer involved about 30% dealing with locks, Mr. Porter believed Claimant could benefit from locksmith training; however, Claimant is apparently not interested in retraining.

49. Mr. Porter listed various current job openings that Claimant could perform within his restrictions or could perform with minimal additional training. Those jobs include HVAC Technician; Final Assembler; Parts and Sales Person; Materials Handler; HVAC Journeyman; Maintenance/Janitorial; Telephone Interviewer; Truck Driver; Warehouse/Delivery Driver; Hotel Shuttle Driver/Sales Representative; and School Bus Driver.

50. Mr. Porter concluded that although Claimant has many pre-existing conditions, both industrial and non-industrial, he was able, nevertheless, to continue working as a maintenance mechanic and has not had any documented permanent activity restrictions prior to his March 17, 2009 accident with Employer. In support of the foregoing, Mr. Porter quotes Dr. Selznick:

> . . . the gross silence of the medical records from 10/16/2007 through 3/17/2009 subject incident and his ongoing continuing employ [sic] as a "maintenance mechanic" bespeaks the lack of any objective hindrance to this claimant performing his vocational responsibilities despite having objective asymptomatic degenerative multilevel findings in evidence in his lumbar spine. He was indeed grossly asymptomatic specifically in the 18-month period prior to [sic] subject industrial accident.

Id.., p. 38.

[8] However, later in his report, Mr. Porter states: "By inclusion of the unskilled occupations into the calculated labor market loss, Mr. Andrews' labor market loss in the SkillTran program ranges from 25.8% to 48.9%.

51. Because Claimant had no activity restrictions prior to his March 2009 industrial accident, and because he was assigned PPI and restrictions for that accident, Mr. Porter does not believe (assuming Claimant is totally and permanently disabled) such disability is the result of any combination of pre-existing medical conditions and his last industrial accident.

52. Mr. Porter prepared an Addendum Vocational Evaluation Report on June 3, 2015 to address any changes in Claimant's situation since his original report of April 24, 2013. He concluded that: "Based upon the lack of any additional medical evidence of non-industrial permanent work restrictions, this evaluator has determined that Mr. Andrews continues to have the same work capacity as he possessed prior to the industrial accident as it relates to his non-industrial medical issues."

ISIF Exhibit B., p. 2.

53. Mr. Porter continues to believe that "There is a significant discrepancy between the objective work restrictions identified in this case and the subjective complaints and restrictions identified by Mr. Andrews. Mr. Andrews reports that he is significantly more disabled than is evidenced by the objective medical facts in this case."

Id., p. 4.

54. As of the date of his addendum, Mr. Porter identified the following types of jobs that Claimant could perform as well as some he could perform with some minimal retraining or simple job modifications/accommodations: Residential/commercial Job Estimator; ISU Facilities Maintenance Coordinator; Building Official-Public Works, Bannock County; Shilo Inn Groundskeeper; Parts Counterperson; Mountain West Research Center Telephone Interviewer; Construction Equipment Operator; HVAC Technician; HVAC Installer; and School District Substitute Custodian.

55. Mr. Porter reiterated his understanding of Claimant's 2009 accident whole person PPI ratings of between 14% (Dr. Selznick) and 31% (Dr. Stevens). Dr. Selznick also awarded 22%

whole person PPI for Claimant's post 2009 right knee condition with 4% apportioned to pre-existing right knee issues. Claimant's total combined whole person PPI assigned is between 53% to 70% depending on the evaluator selected.

56. Mr. Porter remains of the opinion that Claimant's subjective limitations are not supported by objective medical evidence. Claimant is not totally and permanently disabled as there are many jobs in the light/limited medium that he could perform within his labor market.

57. The Referee is unable to find, and neither party argues, that Claimant's medical impairment together with pertinent nonmedical factors equals 100%.

Odd-lot

58. Claimant may also establish total disability above his PPI showing that he is an odd-lot worker. An injured worker may prove that he or she is an odd-lot worker in one of three ways: (1) by showing he or she has attempted other types of employment without success; (2) by showing that he or she or vocational counselors or employment agencies on his or her behalf have searched for other suitable work and such work is not available; or, (3) by showing that any effort to find suitable employment would be futile. *Hamilton v. Ted Beamis Logging and Construction,* 127 Idaho 221, 224, 899 P.2d 434, 437 (1995).

Work attempted

59. After his 2009 injury, Claimant returned to light-duty work with Employer between the time of his injury and his subsequent back surgery. Post-surgery, Claimant's restrictions regarding his back were such that Employer could no longer assume the risk of continued employment. The Referee finds that Claimant attempted work without success.

Work search

60. After Employer informed Claimant that he could no longer return to work with them, Surety referred him to Chris Horton at ICRD to assist with employment issues. Claimant testified that he followed-up on every lead provided by Mr. Horton without success. Claimant also

attempted to find work on his own by applying for employment at all school districts in Southeast Idaho as well as the Idaho Women's' Prison and State Hospital South. He contemplated obtaining a CDL, but because of his use of Percocet to control his back pain, he did not do so.

61. ISIF is critical of the reasonableness of Claimant's job search. It claims that there were jobs identified by Mr. Horton and Mr. Porter that Claimant was capable of performing. Further, Claimant has elected to be "retired" as he expressed at hearing in the context of letting his hair grow long now that he was "retired." Moreover, "[it] cannot be said that applying for a handful of jobs while inappropriately groomed constitutes a valid job search." ISIF Closing Brief, p. 15. While the Referee tends to agree, nonetheless, Claimant proffered reasonable explanations for his sandals ("turf toes"), beard (shaving gives him hives),[9] and walking staff (cane hurts his back due to the twisting required). Claimant did apply for various jobs without success. The Referee finds that most, if not all, of the potential jobs identified by Mr. Porter are either beyond Claimant's physical restrictions or his skill level, or both. While a close call, the Referee finds that Claimant's job search was reasonable.

Futility

62. Claimant eventually informed ICRD that he would be proceeding with a job search on his own and, based thereon, ICRD closed its file on Claimant in July of 2011 with the recommendation that ". . . claimant obtain some sort of training or that he change his job search approach." Claimant's Exhibit 0, p. 758. Claimant has not found employment and to continue to search for employment given his quite onerous post-2009 physical restrictions and personal circumstances would be futile.

63. The Referee finds that Claimant has proven he is an odd-lot worker.

[9] No explanation was given regarding what would prevent Claimant from trimming his beard and/or hair.

ISIF liability

Idaho Code § 72-332 provides

> **Payment for second injuries from industrial special indemnity account, --** (1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of his [or her] employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account.
>
> (2) "Permanent physical impairment" is as defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or occupational disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become unemployed. This shall be interpreted subjectively as to the particular employee involved, however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

There are four elements that must be proven in order to establish liability of ISIF:

1. A pre-existing impairment;

2. The impairment was manifest;

3. The impairment was a subjective hindrance to employment; and

4. The impairment combines with the industrial accident in causing total disability.

Dumaw v. J.L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990).

64. Claimant, through Dr. Selznick, has established hypothetically at least, that he has incurred **certain pre-existing physical impairments** to which Dr. Selznick assigned, hypothetically at least, permanent impartial impairment ratings.

65. Even though manifest, Claimant has, however, failed to establish that such pre-existing permanent partial impairments were **subjective hindrances** to employment. Claimant's own testimony, bolstered by Dr. Selznick, is fairly clear that he was doing his job without any

physician-imposed restrictions at the time of his accident of March 17, 2009. While it may be true that Claimant was afforded certain accommodations from time to time, it would not be unusual for that to be the case, especially in light of his twenty-plus years as a valued and worthwhile employee of Employer and his supervisory position. It must be remembered that virtually all Claimant's current restrictions stem from his 2009 back and right knee injuries alone. Claimant testified to the effect that he was fine before his 2009 accident. Dr. Selznick reported that it had been about 18 months since Claimant had sought any treatment (and that was in follow-up for his post-2009 back injury) before his 2009 accident and resultant lumbar fusion. Further, Dr. Selznick determined that Claimant had never been assigned any formal work restrictions prior to Claimant's 2009 accident and injury.

66. To satisfy the "**combined with**" element of the *Dumaw* test above, the Idaho Supreme Court has held that "but for" the pre-existing impairments, a claimant would not be totally and permanently disabled. See *Eckhart v. State Indus. Special Indem. Fund.*, 133 Idaho 260, 985 P. 2d 685 (1999). Here, it cannot be found that but for Claimant's pre-existing impairments he would not be totally and permanently disabled.

Dr. Collins explained her understanding of the "combined with" element the Commission utilizes in odd-lot cases involving ISIF:

> Well, pre-2009 he was obviously working. He was able to perform enough of the job tasks that his employer felt he was valuable. He did need accommodation. I think outside of that job, he would have been able to do some light driving jobs and maybe some light janitorial jobs. But, again, he worked until the 2009 injury, but again needed accommodation. So I think there were jobs available pre-2009 that Mr. Andrews would have been able to perform, but very limited.
>
> Post-injury I think he loses access to all those jobs, number one, because he's on narcotic medication and chronic pain management. So he's dealing with chronic pain which is, you know, hard to deal with, and he's on narcotics, which eliminates the driving jobs.
>
> In addition, you know, his - - I think what changed a little bit was his need for more frequent position changes.

> So pre-injury he had that restriction, but he was able to stand and walk enough that he could do some driving. After the injury, that seemed to become more significant.
>
> And when I met him, he had a really difficult time sitting, you know, longer than 15, 20 minutes, and then he had to stand, and lean on the chair. Before the accident in 2009, I don't think he had the same - - I think he was able to do more of the standing and walking tasks.
>
> So I think that the problems he had with his feet, his knees, his shoulders, his neck, and his back allowed him to do a very limited number of jobs, but he was still able to do those.
>
> And after the injury, with the increase in back pain, radicular leg pain, and frequent position changes, it really eliminated those jobs.

Id., pp. 31-32.

67. On cross-examination, Dr. Collins testified that even without considering Claimant's back restrictions from his 2009 accident, he was "realistically unemployable" based on his pre-existing conditions.

68. Dr. Collins would not recommend that Claimant present to prospective employers with long hair and long beard, wearing sandals and carrying a staff or walking stick, thus bringing into question the reasonableness of his job search.

69. Dr. Collins testified that the restrictions from Claimant's 2009 back injury alone render him totally and permanently disabled in the Pocatello area labor market.

The Referee finds that Claimant's total and permanent disability is solely due to his March 17, 2009 industrial accident and ISIF is not liable.

CONCLUSIONS OF LAW

1. Claimant has proven he is an odd-lot worker.

2. Claimant has failed to prove that ISIF is liable for any portion of his total and permanent disability.

3. The Complaint against ISIF should be dismissed with prejudice.

4. All other issues are moot.

RECOMMENDATION

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

DATED this 25th day of February, 2016.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 2016, 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:

REED W LARSEN
PO BOX 4229
POCATELLO ID 83205-4229

THOMAS B HIGH
PO BOX 366
TWIN FALLS ID 83303-0366

ge __/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STEVEN ANDREWS, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2009-007783** **ORDER** Filed May 10, 2016

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers 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 recommendation of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

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

1. Claimant has proven he is an odd-lot worker.

2. Claimant has failed to prove that ISIF is liable for any portion of his total and permanent disability.

3. The Complaint against ISIF is dismissed with prejudice.

4. All other issues are moot.

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

DATED this 10th day of May, 2016.

INDUSTRIAL COMMISSION

__/s/_____
R. D. Maynard, Chairman

__/s/_____
Thomas E. Limbaugh, Commissioner

PARTICIPATED BUT DECLINED TO SIGN
Thomas P. Baskin, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 2016, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

REED W LARSEN
PO BOX 4229
POCATELLO ID 83205-4229

THOMAS B HIGH
PO BOX 366
TWIN FALLS ID 83303-0366

ge __/s/_____