BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LORI (Stogner) BROWNLEE, Claimant, v. GLANBIA FOODS, INC., Employer, and EMPLOYERS COMPENSATION INSURANCE COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2007-017523** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed July 20, 2015

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue who conducted a hearing in Twin Falls on July 30, 2013. James Arnold represented Claimant. Commissioner Baskin initially represented Employer and Surety until his appointment to the Commission. Alan Hull represented Defendants Employer and Surety at hearing. Thomas High represented ISIF. The parties presented oral and documentary evidence. An extended post-hearing deposition period ensued. The parties later submitted briefs. The case came under advisement on March 9, 2015. This matter is now ready for decision.

ISSUES

The issues to be decided according to the Notice of Hearing are:

1. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;
2. Whether apportionment of permanent disability for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate;
3. Whether and to what extent Claimant is entitled to medical care and future medical care;

4. Whether and to what extent Claimant is entitled to permanent disability in excess of impairment, including 100% total permanent disability,

5. Whether Claimant is permanently and totally disabled under the odd-lot doctrine;

6. Whether ISIF is liable under Idaho Code § 72-332; and

7. Defendants' respective liability, if any, upon apportionment under *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984).

CONTENTIONS OF THE PARTIES

Claimant contends she is totally and permanently disabled as an odd-lot worker because an attempt to obtain suitable employment would be futile. Claimant leaves to the Defendants to sort out what proportions of liability they respectively bear. Despite a mental handicap, Claimant worked until May 15, 2007 when she injured her shoulder. On or about March 18, 2010 upon becoming medically stable after treatment, she suffered a permanent impairment with restrictions from heavy lifting over 10 pounds with her injured arm and from overhead lifting. She seeks disability benefits from that date.

Employer and Surety contend the primary issue is whether and to what extent ISIF is liable for an apportionment of Claimant's total and permanent disability. They admit Claimant is totally and permanently disabled. Claimant's preexisting cognitive dysfunction is a ratable physical condition for purposes of determining ISIF liability. The cognitive dysfunction is due to a brain injury which arose as a consequence of measles while Claimant was an infant. ISIF experts express contrary opinions without sufficient foundation; they stray from medical opinions into legal opinions, the latter of which they are not competent to express. The record shows that ISIF liability is present and that disability should be apportioned to ISIF. The apportionment should result in 48.2% liability to Employer and Surety, or about 241 weeks, with the remainder to ISIF. Moreover, Employer and Surety have paid some of these benefits

in a manner distinguishable from the facts in *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150, (2014), such that these payments should be recognized to offset their liability for additional permanent disability.

ISIF contends its liability depends upon whether Claimant is mentally retarded or suffers from dementia. According to ISIF's experts, *AMA Guides* prohibits rating mental retardation for PPI, absolving ISIF from liability. No objective medical record supports a diagnosis which results in ISIF liability. Surety's medical experts' opinions are based primarily upon the subjective recollections of Claimant's family. Even these experts have used the term "retarded" to describe Claimant's condition, which term would preclude ISIF liability.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant, her mother Linda Ferrero, and HR supervisor Brad Wilson;
2. Joint exhibits 1 through 26;
3. ISIF's exhibits A through E;
4. Depositions of Claimant, Linda Ferrero, Tom Naylor, Brad Wilson, Michael McClay, Ph.D., William Mays, M.D., George Lyons, M.D., Craig Beaver, Ph.D., Rodde Cox, M.D., expert contributors to *AMA Guides* Steven Leclair, Ph.D. and Christopher Brigham, M.D., and vocational experts Delyn Porter, and Douglas Crum; and
5. A video recording of Claimant's oral testimony taken under the control of Employer and Surety at hearing, admitted post-hearing pursuant to motion by Employer and Surety, without objection.

All objections made in post-hearing depositions are overruled, except the following objections are sustained:

In the deposition of Steven Leclair, Ph.D., the objection at page 17 to the admission of the untimely, posthearing report, proposed deposition exhibit 3, is sustained; the objection at page 25 is sustained. Nevertheless, Dr. Leclair's opinions about the subject of depo exhibit 3

appear to have been arrived at timely, therefore, Dr. Leclair's testimony is allowed.

Similarly in the deposition of Christopher Brigham, M.D., the same document was objected to at page 14; the objection to its admission there is also sustained.

The Referee submits the following findings of fact and conclusions of law for the approval of the Commission and recommends it approve and adopt the same.

FINDINGS OF FACT

1. "Mental retardation" is a term long used by the medical community without pejorative intent; the *AMA Guides* and *DSM-IV TR* still use it; some physicians and the *DSM-V* now prefer "intellectual disability." These terms are used interchangeably herein. By contrast the term "dementia" refers in this case to a separate condition relating to the central nervous system; such "dementia," if present, is a stable, chronic condition unlike a progressive type of dementia such as occurs in Alzheimer's disease. As will be evident in findings below, at least one treating physician used the phrase "mental retardation" in a way which some experts might have preferred to say "dementia." Where the Referee uses the phrases "cognitive dysfunction" or "mental condition," they are used more generally to include either or both of the above conditions without bias toward "mental retardation," "dementia," or any other potential diagnosis within that realm.

2. The parties do not strenuously dispute that Claimant is totally and permanently disabled, either 100% or as an odd-lot worker or by both measures.

3. Claimant has a preexisting condition, a cognitive dysfunction, which affects her activities of daily living. She receives help from her parents and children in performing activities of daily living. She lost a job as a cashier in a convenience store because she was unable to accurately and quickly make change. She had difficulty performing the minimal paperwork associated with her job in packaging for Employer and required help in this and other aspects

of her job. Before April 15, 2007 Claimant successfully obtained and worked unskilled, manual labor jobs. Claimant lives in Richfield. She drives, but only slowly and carefully. In her words, she "cruises." Claimant proudly expresses her ability to read Dr. Seuss books to her children. In her late teens she left school, functioning in special education in the range of 7th to 9th grade.

4. On April 15, 2007 Claimant injured her shoulder in a compensable accident. She was working a packaging line for Employer. She had difficulty performing this task before the accident. Co-workers assisted her more than they assisted each other. The job requires lifting heavy weights with one's arms above shoulder level. Before being promoted to packaging, Claimant worked successfully for Employer as a janitor. Friend and coworker, Tom Naylor, testified in deposition that she could not perform that job or any other with Employer now.

5. On May 22, 2007 she sought medical attention complaining that she "repeated the injury" lifting heavy bags at work earlier that day. A shoulder X-ray was negative. Physical therapy began the next day.

6. A May 29, 2007 note by PA Ian Kunz states that Claimant was off work because she could not perform the light duty Employer offered.

7. On June 12, 2007 PA Kunz noted:

> The injury occurred on the 15th of April and she is still not able to work. The Physical Therapist said she was off of work for four to six more weeks. This is intolerable and the patient will instead be referred to an orthopaedic surgeon.

It is unclear what was "intolerable." Rodde Cox, M.D., later interpreted this note to mean Claimant's pain was intolerable to her.

8. A February 27, 2008 ER note states: "Pt. was doing PT & seeing Ian Koonz for possible surgery but Glanbia fired/laid off in July 07 & hasn't had any workmen's comp." Other medical records state Claimant did not get enough physical therapy because of cost.

9. In August 2008 William May, M.D., recommended shoulder surgery, but Claimant's pregnancy required surgery be postponed.

10. A January 19, 2009 psychotherapy note by social worker Mike Wolfe, taken during Claimant's divorce, identifies *DSM-IV* diagnoses including Axis I – Cognitive disorder NOS (provisional), Axis II – moderate mental retardation (by history), and current GAF – 50. It is unclear whether these diagnoses were made by Mr. Wolfe or Dr. Keith Davis, M.D.

11. An April 10, 2009 hospital note states by history that Claimant's right rotator cuff tear became more painful during delivery of her baby one week prior.

12. The rotator cuff injury was confirmed by MRI on May 4, 2009. Surgery was performed May 15, 2009. Both the surgeon and physical therapist noted Claimant's reaction to surgery included anxiety with movement of the shoulder joint. Dr. May described an incident reported by Claimant occurring about one week postsurgery which involved sudden shoulder pain. She recovered slowly. She remained protective of her shoulder and used it sparingly. Muscle atrophy ensued; she was evaluated to determine if a neurological cause was present.

13. By no later than October 6, 2009, Dr. Davis considered Claimant's right shoulder had evolved into chronic pain syndrome.

14. On October 14, 2009 John Steffens, M.D., performed electrodiagnostic neurological testing. He opined Claimant's claims of continuing right arm problems showed pain behavior, nociceptive protection, without evidence of neurologic injury.

15. On October 27, 2009 Dr. May released her to light-duty work, no lifting or overhead lifting. On November 3, 2009 he opined she was not yet medically stable.

16. On February 9, 2010 Claimant asked Dr. May to release her to work. He restricted her from lifting over 10 pounds with no overhead lifting, but otherwise okayed a return to work.

17. A March 17, 2010 MRI showed bursal fluid and tendinosis, but was otherwise normal with an absence of atrophy. Some artifacts of the study made interpretation incomplete. On March 18, 2010 Dr. May rated her PPI at 15% of the upper extremity.

18. On June 29, 2010 Michael McClay, Ph.D., performed a psychological evaluation as part of a panel evaluation with Dr. Cox at Surety's request. Dr. McClay did not personally perform IQ testing, but noted an outside report of a 66 IQ score. On July 1, 2010 he opined, "It is generally accepted that there is a difference in the physical nature of the brain structure of mentally slow people. There is limited brain function effectively lowers their IQ. This would be a physical component." On October 26, 2010 he assigned a 10% whole person impairment which, in deposition he clarified, related to anxiety and depression, a preexisting condition.

19. Dr. Cox performed his part of a panel IME on June 30, 2010. He rated Claimant's shoulder at 24% upper extremity, or 14% whole person, PPI. He recommended she avoid repetitive work overhead with the right arm.

20. On April 4, 2012 Craig Beaver, Ph.D., performed a neuropsychological evaluation at Surety's request. Upon testing Claimant showed an IQ of 59. Neuropsychological testing and separate interviews with Claimant and her parents formed a significant portion of the basis for his opinions. He opined her cognitive dysfunction was consistent, according to epidemiological research, with encephalopathy secondary to measles. He rated her mental impairment at 15% whole person. He well described how her mental condition would be an obstacle to or a hindrance in working many jobs. He opined that post-accident exacerbation, if any, of any

preexisting personality disorder was not predominantly caused by the industrial accident. Dr. Beaver did not rate Claimant's preexisting anxiety, depression, or other personality disorder.

21. On April 5, 2012, George Lyons, M.D., performed a neurological evaluation at Surety's request. He opined she suffered mild mental retardation caused by measles encephalitis at age 9 months. He concurred with Dr. Beaver's 15% PPI rating for this condition.

22. On July 12, 2013 Dr. Beaver clarified that his diagnoses and opinions were consistent with *DSM-IV-TR* and with *DSM-V*, although the latter uses new nomenclature, as does *American Association on Intellectual and Developmental Disabilities*, 11th ed. Claimant's intellectual performance was two standard deviations below the mean. He disagreed with Drs. Brigham and Leclair about whether Claimant's mental function constituted a ratable impairment. He clarified his diagnosis to include Axis I dementia due to other medical condition, the medical condition being encephalopathy from measles, and was therefore ratable even by the criteria of Drs. Brigham and Leclair. Finally, Dr. Beaver opined "the combination of her physical limitations and neurocognitive limitations results in her being totally disabled."

Prior Medical Records

23. A January 3, 2006 CT of Claimant's head, taken in response to complaints of headache and blurred vision after she hit her head a few days earlier, showed no abnormalities.

Medical Opinions

24. Dr. McClay opined a 10% PPI rating on the basis of Claimant's preexisting psychological condition—anxiety and depression—not on her mental function, that is, IQ. He testified in deposition that he had never rated impairment on the basis of mental function alone. He opined that if the history of measles were accurate, it would be the probable cause

of her impaired mental function. He opined that Claimant's "intellectual problems strongly suggest that there are certain areas of the brain that are damaged." He opined that none of this is causally related to the industrial injury. He opined that Claimant's mental condition does not require the imposition of restrictions but that she is limited in what she can do. He opined that it is "generally accepted" that the physical brain structure of mentally slow people is different. At deposition, he could not quantify "generally accepted" nor specify how or where in the brain a physical difference exists.

25. Dr. Cox evaluated Claimant's shoulder, primarily. In deposition he opined it is not uncommon for brain damage to occur which does not show on electrodiagnostic scans and neurological studies; Claimant's mental condition is consistent with the described history of measles; Claimant's chronic pain syndrome and her mental function combine to limit her physical shoulder function beyond the physical injury alone.

26. At deposition, Dr. Beaver explained why electrodiagnostic testing will sometimes fail to show brain injuries or changes resulting from fever. Dr. Beaver explained the comparison and contrast between mental retardation and dementia, particularly as editions of *DSM* relate to assessment of very young patients. Claimant showed components of both. Dr. Beaver opined that Claimant's brain injury likely involves the outer cortical area diffusely.

27. At deposition, Dr. May described his treatment of Claimant's shoulder. Until after the surgery, he was not aware she suffered cognitive dysfunction. Her recovery was complicated by her lack of understanding that her shoulder would continue to hurt as she rehabilitated it. Although concerned about possible CRPS, Dr. May did not actually diagnose it in Claimant. At the time he rated Claimant in March 2010, Dr. May imposed

"probably permanent" restrictions against heavy lifting over 10 pounds or overhead work. By the time of the deposition Dr. May expected the restrictions to be effective for life.

28. At deposition, Dr. Leclair disagreed with Dr. Beaver's diagnosis. He opined Claimant does not have dementia. He opined that under *AMA Guides*, mental retardation is not ratable as a permanent impairment. He opined that, as a result of the combination of Claimant's shoulder injury and cognitive dysfunction, Claimant is limited to unskilled employment. He viewed the video of Claimant's hearing testimony. That observation was a factor in reaching some of his opinions. He has not otherwise met or observed Claimant. He opined that Claimant may well have suffered from measles and encephalitis. Dr. Leclair disagrees with Mr. Porter's use of the word "futile" when assessing the probable likelihood of a successful job search; he considers it to be "hyperbole"; he prefers the phrase, "in all likelihood it would not be productive."

29. At deposition, Dr. Brigham noted he had not viewed the video of Claimant's testimony. He has not met Claimant. He concurred with Dr. Leclair that Dr. Beaver's diagnosis was inappropriate and that mental retardation is not ratable as a permanent impairment under *AMA Guides*. He disagreed with Dr. Leclair's acceptance that measles and encephalitis likely relate to Claimant's cognitive dysfunction. He distinguished between "rubella" (German measles) and "rubeola" (measles) and opined the incidence of encephalitis is greater for the latter. With either, full recovery from comorbid encephalitis is likely. He noted that studies support his opinion that an examinee's reporting medical history has been shown, in general, to be unreliable where litigation is a factor. He opined the data and facts preclude finding to a reasonable degree of probability that Claimant's cognitive dysfunction was caused by encephalitis secondary to measles of either type. He opined the lack of data and reliable facts

about when or whether Claimant suffered a regression in function at an early age preclude a diagnosis of dementia. He agreed with Dr. Leclair that Claimant's cognitive dysfunction has affected her personal efficiency and activities of daily living. Dr. Brigham admitted that "it is probable that the underlying cause of most of these [bases for mental retardation] would be – would be physical." He identified genetic causes, metabolic disorders, birth trauma, inflammatory disorders and infectious disorders as potential physical causes of mental retardation.

Vocational Opinions

30. On December 17, 2009 Douglas Crum evaluated Claimant at Surety's request. His report is dated September 21, 2010. Using Dr. May's restrictions and Dr. McClay's opinions—and having expressly asked Dr. May about what jobs Dr. May believed Claimant could perform—Mr. Crum opined Claimant could perform "maybe some" daycare worker jobs and possibly some assembly line worker positions requiring only one hand.

31. On July 9, 2013 Delyn Porter evaluated Claimant at her request. Claimant's self-reporting of restrictions was significantly greater than the restrictions imposed by Dr. May or recommended by Dr. Cox. Mr. Porter opined the combination of Claimant's preexisting mental condition combined with restrictions from her work injury leaves Claimant with "very minimal at best" options for competing in the labor market. He opined that before the work accident she had access to 10% of the labor marked but now has access to only 0.5% of the labor market, a 95% reduction. Her loss of wage earning capacity was opined to be 26%. Mr. Porter went on to offer legal opinions about whether Claimant was an odd-lot worker and whether it would be futile for her to seek work. At deposition, Mr. Porter could not identify a job in her local labor market for which she could compete and perform. Although he could not

specify a job for which she could compete and perform based upon her shoulder condition alone, Mr. Porter opined there were some regularly available.

32. On July 18, 2013 Mr. Crum reviewed additional records. He provided additional data about the labor market around her Richfield home. The Richfield/Shoshone area labor market is so small that statistical calculation is inappropriate. Mr. Crum opined that using Dr. Cox's restriction recommendations Claimant suffered a 47% wage reduction and a 24% overall disability. Adding weight to Claimant's chronic pain condition, Mr. Crum opined a job search would be futile. He opined she was totally and permanently disabled as a combination of her preexisting cognitive disabilities and the industrial injury, in so opining, he quoted the legal language associated with odd-lot analysis. Mr. Crum reported about jobs Dr. May and/or Dr. McClay thought Claimant could perform; Mr. Crum opined Claimant was totally and permanently disabled by the combination of physical and mental impairments, again stating a job search would be futile and reciting the legal language associated with odd-lot analysis. Considering only Dr. May's opinions about her labor access, Mr. Crum opined Claimant suffered 21% overall disability.

33. At deposition, Mr. Crum explained that although by his estimates the disabilities from her shoulder and from her cognitive issues do not add to 100%, she is totally and permanently disabled as an odd-lot worker. Because he is not aware of a failed attempt to work or an unsuccessful job search, he believes she qualifies because a job search would be futile.

DISCUSSION AND FURTHER FINDINGS OF FACT

34. 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).

35. 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). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447−48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 626−27, 603 P.2d 575, 581−82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

36. Claimant makes a good first impression as a sincere and honest person. She is motivated to perform well in order to be liked and to receive praise. Indeed, physicians agree that her self-imposed disuse of her shoulder is "real to her." Her obvious obstacles mean that if her recollection and understanding are inconsistent with documented facts, the documentation receives more weight.

Causation

37. The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be evidence of medical opinion—by way of physician's testimony or written medical record—supporting the claim for compensation to a reasonable degree of medical probability. No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969

(1993). A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973).

38. The foregoing applies to a claimant's burden of proof vis-à-vis a compensable accident and injury. It does not apply to require a claimant to prove causation with respect to a preexisting condition for purposes of ISIF liability. Idaho Code § 72-332(1) applies to "a permanent physical impairment from *any cause or origin*." Idaho Code § 72-332(2) allows a permanent condition to qualify "whether congenital or due to injury or disease."

39. ISIF cites *Clark v. Idaho Truss*, 142 Idaho 404, 128 P.3d 931 (2006), as a basis for distinguishing some cognitive dysfunction from brain injury when assessing "permanent *physical* impairment" for purposes of Idaho Code § 72-332(1). In *Clark* a claimant presented evidence of borderline mental functioning. Dr. Beaver tested him and opined the claimant suffered from an "organic brain dysfunction." The *Clark* Court quoted with approval a portion of the Commission's decision as follows:

> [Employer relies] upon Dr. Beaver's opinions to argue that Claimant's brain dysfunction is a permanent *physical* impairment as required by Idaho Code § 72-332. However, Dr. Beaver's tests–at most–indirectly suggest Claimant may have suffered some injury to his brain tissue. No X-ray, MRI, PET scan, or similar diagnostic study directly shows damage to Claimant's brain tissue. There is no cyst or tumor. There is no indication that Claimant suffers from a chromosomal abnormality as one would find, for example, in an individual with Down's syndrome. There is no direct evidence of an imbalance of chemicals in Claimant's brain. Absent direct evidence of an injury to Claimant's brain tissue, any suggestion of causation or of a *physical* component to Claimant's learning disability or borderline intellectual functioning is too speculative to be given weight. Surely, every person less intelligent than Einstein should not be considered permanently physically impaired under Idaho Worker's Compensation Law. (Emphasis in original.)

Id., at 408.

40. This Referee presided at that hearing and observed John Clark. (*Clark v. Idaho Truss*, 2004 IIC 0761 (2004).) This Referee authored the language quoted above. This Referee remembers John Clark. Lori Brownlee is not John Clark. Each case and claimant is viewed separately and independently.

41. In *Clark*, the approved language allows several nonexclusive examples by which evidentiary support for a *physical* basis for cognitive dysfunction may exist. It does not create a presumption against the existence of a physical basis nor preclude acceptance of other or stronger proofs to support the existence of a physical basis. It does not preclude use of indirect psychological test results, but rather finds that opining from such testing alone is speculative.

42. Here, the record offers additional evidentiary support which is entitled to weight. First, more than one expert has testified that Claimant's mental condition is consistent with encephalopathy resulting from a fever of significant intensity and duration. Second, Claimant's mother testified about Claimant contracting measles about age nine months and suffering a significant fever for a significant period of time followed by a regression in ability. Dr. Beaver accepts the evidence of this history; Dr. Brigham refuses to credit this unrefuted history. Medical records repeatedly show Claimant has tested positive for rubella antibodies; without medical evidence, whether this result is from having had the measles or from a vaccination—acknowledging that Claimant's mother stated Claimant was never vaccinated against measles—this evidence is not considered for or against. Third, the phrase "borderline intellectual function" is general and describes a spectrum of function. Claimant's presentation, obvious to a layman as trier of fact, is that her function is significantly more impaired than was the function of Mr. Clark. A comparison of the Commission's findings of fact relative to each

claimant's work history and abilities would make this obvious without resort to actually observing Mr. Clark at hearing. Essentially, Claimant is on one side of the "borderline," with Mr. Clark on the other.[1] Fourth, Claimant is not required to show the likely cause of her preexisting cognitive condition under Idaho Code § 72-332; whether the condition is from a fever, from a congenital chromosomal abnormality, from an umbilical cord depriving her of oxygen in utero, or from some other event or cause, the evidence and expert opinions of record combine to show it likely that her preexisting cognitive impairment has a physical component. No single factor is decisive. Not every factor identified above is necessary to reach this finding of fact; indeed some support one physical cause, some another. Additional supporting factors exist in the evidentiary record.

43. In *Clark*, the Court held that the Commission is "not bound to accept" expert testimony; it is "advisory only." *Id.* The Commission has discretion to weigh such opinions. Here, unlike *Clark*, Dr. Beaver's indirect testing is supported by additional consistent, credible evidence. The expert opinions favoring a physical component to Claimant's cognitive function weigh more strongly persuasive than those of the expert opinions against.

PPI

44. Permanent impairment is defined and evaluated by statute. Idaho Code § 72-422 and 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

[1] Expressing this factor does not imply that an extreme dysfunction is necessary to establish a physical component. See, e.g., *Pragnell v. Mower Office Systems, Inc*., 2014 IIC 0078 (2014), for a case of traumatic brain injury where Claimant's change in function after a head trauma was discernible although not outside the range of normal for the population.

45. On March 18, 2010 Dr. May opined Claimant was medically stable and rated her shoulder impairment at 14% of the upper extremity. This date of medical stability is well supported by the preponderance of the evidence.

46. Claimant's shoulder impairment has been rated at 14% of the whole person by Dr. Cox. This rating is somewhat higher than Dr. May's. Dr. Cox has more experience rating impairment for workers' compensation cases than Dr. May. Dr. Cox's IME appears more thoroughly considered. The preponderance of evidence supports a 14% whole person PPI related to the compensable shoulder injury.

47. Claimant's impairment for cognitive dysfunction, including preexisting personality disorder with anxiety, depression, or both, is the crux of the issue. It is primarily relevant for purposes of assigning ISIF liability, if any, and apportionment under the *Carey* formula.

48. Drs. Leclair and Brigham are articulate and impressive within their realm as contributors to *AMA Guides*. They well explained the thinking underlying *AMA Guides*' refusal to rate impairment for mental retardation, particularly where the condition in a particular individual has been evident for life or nearly so. Indeed, they more articulately expressed some aspects of that reasoning which were consistent with the reasoning of the Commission in the *Clark* decision. *AMA Guides* is a standard reference in Idaho workers' compensation; these physicians' contributions to it are substantial and well respected.

49. These physicians identify discrete diagnoses and potential causes relating to Claimant's cognitive dysfunction. They opine about why each is insufficient in attempting to establish any such diagnosis or potential cause to a medical probability. This approach is more like tagging individual trees for removal than clear-cutting a forest. Again, Idaho Code

§ 72-332(1) applies to *any cause or origin*. Claimant is not required to perch in any particular causal or diagnostic tree to establish a preexisting physical impairment. It is not reasonably disputable that cognitive dysfunction is present. That it constitutes a physical impairment has been shown likely by a preponderance of evidence, including a combination of the factors discussed above. The forest remains standing, to a standard of preponderance of evidence.

50. A major difficulty with accepting the position in *AMA Guides* about ratability of cognitive dysfunction as expressed by Drs. Leclair and Brigham is that this approach is inconsistent with Idaho Workers' Compensation Law. The Idaho Legislature created the ISIF to encourage employers to hire Idaho workers who faced employment challenges caused by preexisting physical impairments. Claimant is among the workers for whom the Legislature created the ISIF. Once established by preponderance of evidence as a preexisting physical impairment, Claimant's cognitive dysfunction does not become disqualified somehow just because authors of *AMA Guides* say so. The statutes of Title 72 govern.

51. No physician comprehensively evaluated and rated Claimant. Dr. Beaver rated her cognitive dysfunction without adding for personality impairment. Dr. McClay rated her personality disorder without well describing how it should qualify as a "physical impairment." Physicians who rated Claimant's shoulder did not rate her cognitive dysfunction. Dr. Brigham admitted in deposition that if ratable, considering the medical record of her cognitive dysfunction, *AMA Guides* would support a PPI in the range of 1% to 20%. The preponderance of evidence shows it likely that Claimant's preexisting physical impairment for cognitive dysfunction is appropriately rated at 15% of the whole person.

52. Dr. Beaver's rating considered the preexisting anxiety and depression in assigning a global neuropsychological impairment. The record does not show it likely that

the shoulder injury permanently exacerbated her preexisting anxiety and depression.

53. Claimant's preexisting physical impairment for cognitive impairment, considering all neuropsychological and personality function, is 15% of the whole person.

Application of *Corgatelli*

54. Surety paid Claimant impairment benefits based upon the rating by Dr. May. Dr. May opined Claimant medically stable on March 18, 2010. Physicians who evaluated Claimant at later dates opined Claimant was medically stable when evaluated. These opinions are not inconsistent. Neither these physicians who performed later evaluations nor the parties dispute Dr. May's opinion. The preponderance of evidence shows this date is the actual date of medical stability.

55. Surety seeks recognition that the impairment benefits paid constitute a portion of its obligation to Claimant for disability benefits. Surety acknowledges that the holding of *Corgatelli* appears to deny Surety credit for such payments.

56. The facts of *Corgatelli* are distinguishable from the facts of Ms. Brownlee's case. In *Corgatelli*, the claim involved a 2005 low back injury; Mr. Corgatelli had suffered a prior injury to his low back in 1994. After treatment for the 2005 injury a physician opined a date of medical stability and rated impairment and the surety immediately began paying impairment benefits and continued to do so from February 2006 to April 2007. After further evaluation of Mr. Corgatelli, another physician opined an August 4, 2010 date of medical stability and a different impairment rating. The Commission found the August 4, 2010 date represented Mr. Corgatelli's actual date of medical stability. The issue of temporary disability benefits was not raised at either the Commission or Idaho Supreme Court level; neither decision provides

information about whether and to what extent Mr. Corgatelli received temporary disability benefits.

57. The date of medical stability marks the threshold between temporary versus permanent disability. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001). Impairment is founded upon a prerequisite of medical stability. Idaho Code § 72-422. Permanent disability is determined as of the date of hearing. *Brown v. The Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012). However, a surety's liability for impairment and permanent disability benefits dates to the date of medical stability. *Jarvis*, *supra.*

58. Before the *Corgatelli* decision, it was usual practice in the Idaho workers' compensation industry for a surety to cease paying temporary disability benefits and to begin paying the rated impairment promptly upon a physician's opinion about the date of medical stability. If, after a hearing, the Commission determined impairment was rated higher than the initial impairment rating, a surety paid any additional impairment, inclusive of permanent disability in excess of impairment, if any. Similarly, if the Commission determined impairment was rated lower than the initial impairment rating, a surety was allowed to recognize the resulting difference as a prepayment of permanent disability, the actual lower impairment remained inclusive of permanent disability. If this resulted in an overpayment, the credit was taken at the latter end of a surety's obligation—merely waiting for the calendar to "catch up" to the overpayment was not allowed. Idaho Code § 72-316. Naturally, in the case of total and permanent disability benefits paid for life, recouping the overpayment would be problematic. Within this usual custom, prepayment before final adjudication was approved and encouraged by the Commission. Obviously, such payments assist claimants, many of whom remain unable to work throughout the period of litigation.

59. As described above, the decisions in *Corgatelli*, both at the Commission and Supreme Court levels, are silent about temporary disability benefits. If usual practice were followed there, Mr. Corgatelli's entitlement to income benefits would have changed, in the eyes of the surety, from temporary to permanent disability as of the date of the initial impairment rating and opinion about medical stability—sometime in or just before February 2006. Upon adjudicative finding that the actual date of medical stability was not until August 4, 2010, and without opportunity visit the absent issue of temporary disability liability, there is an inherent gap of more than three years between the April 2007 discontinuance of impairment benefits payments and the ultimate date of medical stability. To credit that surety for its impairment benefits payments would exacerbate the onus to Claimant of that inherent gap.

60. Here, there is no dispute about the date upon which Ms. Brownlee reached medical stability. Hence, there is no potential gap in payment of income benefits as they change from temporary to permanent income benefits. Although the gap resulting in *Corgatelli* is not present here, the language used by the *Corgatelli* court does not appear to suggest this factual difference would require a different result.

The Relationship of Impairment and Permanent Disability

61. Surety expressly addresses the impact of *Corgatelli* on whether it should be entitled to "credit" for PPI paid as a result of the shoulder injury. The unambiguous language of the Legislature in statutes defining and applying "impairment" and "disability" show that impairment involves dysfunction caused by medical factors without regard to its impact on employment; permanent disability involves dysfunction caused by medical and nonmedical factors. Idaho Code §§ 72-422 and -423 respectively. Permanent disability is measured against

a claimant's ability "to engage in gainful activity," that is, to compete for and work at suitable employment, regularly available in that claimant's local labor market. Idaho Code § 72-425.

62. Thus, Idaho Supreme Court pronouncements in *Corgatelli* and other cases are accurate when describing impairment and permanent disability as distinct and independent. The concepts are definitionally separate.

63. The *Corgatelli* Court correctly identified Idaho Code § 72-408 for purposes of referencing how to establish the maximum and minimum applicable rates when computing total and permanent disability. But Idaho Code § 72-408 does not address whether impairment is inclusive or exclusive of total permanent disability.

64. When analyzing Idaho Code § 72-425, the *Corgatelli* Court disconnects the "evaluation" of permanent disability from the "computation" of permanent disability benefits. However, the Court did not analyze Idaho Code § 72-427. The statute states:

> The 'whole man' income benefit evaluation for purposes of computing scheduled and unscheduled permanent impairment shall not be deemed to be exclusive for purposes of fixing the evaluation of permanent disability.

It appears that this statute expressly connects computation of impairment and permanent disability. It does not discriminate between partial permanent disability and total permanent disability; it requires that when "computing" impairment and "fixing" the evaluation of permanent disability, impairment is computationally inclusive, making it an inherent subset of permanent disability.

65. Indeed, the *Corgatelli* Court quoted *Christensen v. SL. Start & Assocs., Inc.*, 147 Idaho 289, 207 P.3d 1020 (2009) when it stated, "Total and permanent disability may be proven either by showing that the claimant's permanent impairment together with nonmedical factors totals 100% or by showing that the claimant fits within the definition of an odd-lot

worker." *Corgatelli*, *supra*. The language of *Christensen* leads one to calculate I + D = 100% rather than I + D = 100% + I. Considering § 427 and the *Christensen* language, the consistency of this approach comports well with the context of the Legislature's usage of "impairment" and "permanent disability" throughout Idaho Code, Title 72, chapter 4. There does not appear to be any question that if I + D = 99% that the computation should be paid as I + D = 99% and not as I + D = 99% + I.

66. Impairment and permanent disability are based upon a statutorily defined concept—the "whole man." Idaho code § 72-426. This concept is defined as equaling 500 weeks. *Id.* Impairment generally does not exceed 100%. To facilitate computation, *inter alia*, where multiple impairments would sum to something more than 100%, *AMA Guides* provides a combining table at pages 604-606 for both the 5th and 6th editions. Similarly, whenever permanent disability would reach or exceed 100%—or whenever odd-lot status is established—a claimant is deemed "totally and permanently disabled." Once this determination is made, the 500 weeks no longer stands as the maximum time limit against which permanent disability benefits are paid; such a claimant thereafter receives permanent disability benefits for life.

67. The sections within Title 72, particularly chapter 4, have historically been read and applied in *pari materia*. Some sections provide definitional guidance. Some sections guide evaluation to determine how much, in percentage of the "whole man," impairment and permanent disability should be rated. Some sections guide calculation of minimum and maximum rates. Some sections guide by providing a schedule linking specific types of injury to specific amounts of impairment and/or permanent disability. Some sections guide what is included or excluded from calculations. It appears that when section 427 is analyzed in context,

computing impairment is inherently to be included in fixing the evaluation of permanent disability benefits.

68. It is advantageous for a claimant to receive undisputed benefits as soon as possible. The impact of *Corgatelli* seems to encourage a surety to delay paying undisputed impairment so as to avoid paying it twice if a claimant is later deemed totally and permanently disabled.

69. The holding in *Corgatelli* preventing a credit for previously paid PPI benefits potentially leaves the defendants to a workers' compensation action vulnerable to Idaho Code § 72-804 sanctions. Should a surety decide to withhold PPI benefits during litigation to protect itself from a double payment of benefits during and after litigation, a claimant could pursue attorney fees under the statute for unreasonable delay or denial of the "compensation provided by law justly due and owing to the employee or his dependents" and collect for those efforts under Idaho Code § 72-804. A surety thusly attempting to protect itself could potentially pay fees in addition to paying out PPI to a claimant after the Commission renders its decision. Either a surety pays timely and possibly twice, or a claimant goes without owed PPI benefits during litigation; neither outcome is ideal.

70. Another factual distinction appears because both injuries—the preexisting and the currently compensable—to Mr. Corgatelli involved his low back; here, entirely separate anatomical parts and systems are involved. This factual distinction does not logically justify a different result. As the facts of this case apply to the holding in *Corgatelli*, this Referee is bound by precedent to adhere to *Corgatelli*'s sea change in approach to impairment and permanent disability in cases involving total permanent disability. Surety is not entitled to

recognize permanent impairment paid as a result of Claimant's shoulder injury when calculating its remaining disability obligation to Claimant.

71. It seems possible that the holding of *Corgatelli* was intended to be limited to those factual situations in which competing medical stability dates create the gap described above. However, this Referee will not presume to limit the impact of *Corgatelli*.

Permanent Disability

72. **"**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.

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

74. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423 and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See*, *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733,

40 P.3d 91 (2002); *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

75. If a claimant is able to perform only services so limited in quality, quantity, or dependability that no reasonably stable market for those services exists, she is to be considered totally and permanently disabled. *Id.* Such is the definition of an odd-lot worker. *Reifsteck v. Lantern Motel & Cafe*, 101 Idaho 699, 700, 619 P.2d 1152, 1153 (1980). Taken from, *Fowble v. Snowline Express*, 146 Idaho 70, 190 P.3d 889 (2008). Odd-lot presumption arises upon showing that a claimant has attempted other types of employment without success, by showing that she or vocational counselors or employment agencies on her behalf have searched for other work and other work is not available, or by showing that any efforts to find suitable work would be futile. *Boley*, *supra.*; *Dehlbom v. ISIF*, 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997).

76. The Richfield/Shoshone labor market involves too small a population for quantitative statistical analysis. Mr. Porter's calculation resulting in suggesting that Claimant had only 0.5% of the jobs left available to her was based in part, on physicians' speculation about types of jobs Claimant might be able to perform and was, therefore, without foundation.

77. Dr. Leclair, from Maine, speculated the combination of cognitive dysfunction and shoulder injury might limit Claimant to unskilled labor. This opinion is without sufficient foundation. There is no evidence that Dr. Leclair has been trained or become sufficiently familiar with the Richfield/Shoshone labor market to credit this opinion. Indeed, before the shoulder injury Claimant was essentially limited to unskilled, manual labor. With the impact of restrictions to her shoulder, the record does not identify any specific job in that labor market which remains regularly available to her.

78. Dr. Beaver opined the combination of cognitive dysfunction and shoulder injury left Clamant totally and permanently disabled. As with Dr. Leclair, there is insufficient evidence that Dr. Beaver has been trained or become sufficiently familiar with the Richfield/Shoshone labor market to credit this opinion.

79. Considering all relevant medical and nonmedical factors, here, the preponderance of the evidence supports a finding that Claimant likely is 100% totally and permanently disabled by the combination of her cognitive dysfunction and shoulder impairment.

80. **Odd lot.** Given the finding that Claimant is 100% totally and permanently disabled, resort to odd-lot analysis is unnecessary. However, the posture of this case presents problems of analysis appropriate for comment.

81. The record does not establish a likely basis upon which one could reasonably find that any jobs are regularly available to Claimant in her local labor market. Neither Mr. Crum nor Mr. Porter identified a specific job and employer, which Claimant was capable of performing and was regularly available for Claimant's job search. Both considered a job search "futile." Dr. May's and Dr. McClay's speculation about job types lacked foundation.

82. Nevertheless, Mr. Crum consulted Dr. May about types of jobs she might be able to perform. The record does not show Dr. May has training or expertise in opining about the local labor market nor about the physical requirements of specific types of jobs.

83. Commonly in workers' compensation cases a vocational expert, evaluating a specific job for its physical requirements, contacts both a claimant and employer to verify the accuracy of those requirements, and submits the data to a physician for approval or disapproval of that specific job as related to the physician's assessment of a claimant's

capability. This submission is commonly referred to as a jobsite evaluation ("JSE"). The record does not show that Mr. Crum submitted a JSE to Dr. May.

84. Outside of a specific JSE, physicians are not commonly expected to be familiar with labor market conditions and, therefore, are not qualified as vocational experts. Vocational experts' testimony is commonly helpful when assessing the nonmedical factors inherent in assessing permanent disability. Physicians' opinions of nonmedical factors are, without more foundation, not applicable to nonmedical factors considered in rating a claimant's permanent disability.

85. Vocational experts generally and appropriately defer to physicians about anatomical conditions including restrictions which address and/or limit a claimant's physical activity—that is, about medical factors. To the extent that they address medical factors, physicians' opinions weigh into disability analysis. When physicians stray into nonmedical factors without evidence of a genuine foundation for such opinions, weight should be appropriately reduced.

86. In this case, in large part because Dr. May speculated about types of jobs Claimant could perform, Mr. Crum opined that Claimant's permanent disability might not total 100%. Others followed suit. Nevertheless, both vocational experts opined Claimant was an odd-lot worker because a job search would be futile. The record shows Claimant would likely have failed to establish an unsuccessful work attempt or job search to the extent required to prove odd-lot worker status.

87. It is unclear why Dr. May was consulted in this way or why his comments outside his training and expertise were given deference or consideration. But it seems to have

forced the vocational experts into a box from which only by use of the "futile" prong of the odd-lot analysis could they extricate a factually accurate result.

88. The question of whether a job search is sufficient—or lack of one should be excused as futile—for purposes of odd-lot worker status is, under the parameters of the Idaho Workers' Compensation Law, within the discretion of the Commission. In this case, if forced to use odd-lot analysis and not 100% disability, this Referee would agree that Claimant's disability is so great that the "futile" prong is satisfied. However, were this a close case, an evaluator, with discretion to analyze and weigh expert testimony about impairment and disability, may be reluctant to substitute out the requirement for a job search in favor of an excuse of "futile" on the say so of a vocational expert without a more explicit foundation for opining "futility" than either expert provided here. Fortunately this is not a close case. Claimant is 100% totally and permanently disabled.

89. Still, to the extent that a medical expert was allowed to direct a vocational expert's opinions about *nonmedical* factors, unease remains that such a sketchy practice may become unduly common.

ISIF Liability and Carey Formula

90. ISIF liability is predicated upon statutory factors. Idaho Code § 72-332. Four elements of a prima facie case for apportioning liability to ISIF include: (1) a preexisting permanent physical impairment which was (2) manifest and a (3) subjective hindrance to a claimant, which (4) combines with the compensable injury causing total and permanent disability. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990). The appropriate test for establishing the combining element is a "but for" test. *Bybee v. ISIF*, 129 Idaho 76, 921 P.2d 1200 (1996).

91. The preponderance of the evidence shows that but for the presence of both the cognitive dysfunction and the shoulder injury, Claimant would not be totally and permanently disabled, neither 100%, nor as an odd-lot worker. The absence of either factor would leave her able to compete for a finite but regularly available set of jobs in her local labor market. Dr. Beaver so opined about "combination." Once more, the record fails to show a competent basis upon which any physician involved has the expertise required to give weight to such an opinion.

92. Consistent testimony among expert vocational witnesses establishes that Claimant's cognitive dysfunction was both manifest and a subjective hindrance to her obtaining and keeping employment. Moreover, her work history and the testimony of prior coworkers and supervisors show that her cognitive dysfunction was obvious and considered a hindrance by those working around her. As to these two elements of ISIF liability, this is not a close case.

93. The record shows all four elements of ISIF liability are well satisfied. Apportionment is determined as set forth in *Carey v. Clearwater County Road Department*, 107 Idaho 109, 686 P.2d 54 (1983).

94. In *Carey*, the claimant's permanent physical impairment totaled 50% of the whole person, with 10% relating to a pre-existing condition and 40% relating to the work accident. Claimant was ultimately found to be totally and permanently disabled, and the question before the Court was how to apportion the 50% disability from nonmedical factors between the employer and ISIF. The Court held:

> We believe that the appropriate solution to the problem of apportioning the nonmedical disability factors, in an odd-lot case where the fund is involved, is to prorate the nonmedical portion of disability between the employer and the fund, in proportion to their respective percentages of responsibility for the physical impairment. Thus, in the instant case, Mr. Carey's preexisting impairment was 10% of the whole man, and his physical impairment from the accident is an

> additional 40%, resulting in a 50% impairment. Claimant is 100% disabled, by virtue of the odd-lot doctrine, so an additional 50% nonmedical factors, over and above the 50% physical impairment, need to be allocated between the employer/surety and the fund. The fund is therefore responsible for 10/50, or 1/5 (20%), of the nonmedical portion of disability, and the employer is liable for 40/50, or 4/5 (80%), of the nonmedical factors.

Carey, at 118, P.2d 63.

95. In the current case, Claimant's permanent physical impairments total 29% of the whole person, with 15% related to the preexisting condition and 14% related to the work accident. With 29% of the disability from medical factors already divided between the employer/surety and ISIF, the Commission is left to partition the remaining 71% disability attributable to nonmedical factors. Thus, application of the *Carey* formula apportions Employer/Surety's responsibility for disability from nonmedical factors to 34.28% (14/29 x 71). Adding back the 14%, Employer/Surety's total responsibility for the payment of disability is 48.28%, which translates to 241.4 weeks. Employer/Surety paid the 14% impairment rating prior to hearing. Following *Corgatelli*, Employer/Surety is responsible to pay disability of 48.28% (14% PPI + 34.28% disability from nonmedical factors), and will not be allowed a credit for the 14% PPI previously paid. ISIF is liable for benefits thereafter.

CONCLUSIONS

1. Claimant suffered a compensable shoulder injury which became medically stable on March 18, 2010 and resulted in 14% whole person permanent partial impairment;

2. Claimant is 100% totally and permanently disabled;

3. The record establishes that ISIF is liable as a result of a qualifying preexisting condition which constitutes a 15% whole person permanent partial impairment;

4. Under Carey apportionment, Surety is liable for 241.4 weeks of permanent disability with ISIF liability thereafter;

5. Under *Corgatelli*, the Commission is required to disacknowledge Surety's payment of PPI for the shoulder injury as an inherent portion of Surety's obligation for permanent disability; and

6. 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 4TH day of JUNE, 2015.

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:

/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 20TH day of JULY, 2015, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** were served by regular United States Mail upon each of the following:

JAMES C. ARNOLD
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ALAN K. HULL
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BOISE, ID 83707

THOMAS B. HIGH
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TWIN FALLS, ID 83303-0366

ka/dkb

/S/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LORI (Stogner) BROWNLEE, Claimant, v. GLANBIA FOODS, INC., Employer, and EMPLOYERS COMPENSATION INSURANCE COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2007-017523** **ORDER** Filed July 20, 2015

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-titled 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 on the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant suffered a compensable shoulder injury which became medically stable on March 18, 2010 and resulted in 14% whole person permanent partial impairment;

2. Claimant is 100% totally and permanently disabled;

3. The record establishes that ISIF is liable as a result of a qualifying preexisting condition which constitutes a 15% whole person permanent partial impairment;

4. Under *Carey* apportionment, Surety is liable for 241.4 weeks of permanent disability with ISIF liability thereafter;

5. Under *Corgatelli*, the Commission is required to disacknowledge Surety's payment of PPI for the shoulder injury as an inherent portion of Surety's obligation for permanent disability; and

6. All other issues are moot.

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

DATED this 20TH day of JULY, 2015.

INDUSTRIAL COMMISSION

/S/_____
R.D. Maynard, Chairman

/S/_____
Thomas E. Limbaugh, Commissioner

RECUSED
_____
Thomas P. Baskin, Commissioner

ATTEST:
/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 20TH day of JULY, 2015, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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