BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MANUEL GARZA, Claimant, v. PARTSCHANNEL, INC., Employer, and AMERICAN HOME ASSURANCE, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Surety, Defendants.	**IC 2008-017549** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed April 23, 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. He conducted a hearing in Boise on December 18, 2012. Daniel Luker represented Claimant. Alan Hull represented Defendants Employer and Surety. Kenneth Mallea represented Defendant ISIF. The parties presented oral and documentary evidence. After a lengthy period for posthearing depositions, they submitted briefs. The case came under advisement on December 11, 2013. This matter is now ready for decision. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

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

1. Whether and to what extent Claimant is entitled to benefits for:
    a. Temporary disability,
    b. Permanent partial impairment (PPI),
    c. Permanent disability (including 100% total), and
    d. Medical care;
2. Whether Claimant is permanently and totally disabled under the odd-lot doctrine;

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

4. Defendants' respective liability upon apportionment under *Carey*.

CONTENTIONS OF THE PARTIES

Claimant contends he is totally and permanently disabled, either 100% or as an odd-lot worker as a result of a compensable back injury in May 2008 and compensable complications, including the need for a spinal cord stimulator. He suffered a compensable injury in an industrial accident on May 19, 2008 which required L4-5 surgery. After a recurrent herniation and a second L4-5 surgery, Claimant suffered lingering problems. He was being evaluated for a spinal cord stimulator when he suffered an intervening L3-4 injury (the "baby gate" incident). The spinal stimulator was reasonable under the *Sprague* criteria. Surety is liable for unpaid medical care, including required travel. MMI occurred about December 5, 2011, not September 25, 2009 and Claimant is owed temporary disability benefits. Despite having tried to work, Claimant is totally and permanently disabled. His preexisting back condition, together with diabetes, other conditions, and preexisting injuries to his hip and ankle combine to make ISIF liable as well.

Employer and Surety contend Claimant's compensable injury involves L4-5 but does not involve subsequent injury to L3-4 with its attendant need for a spinal cord stimulator. All relevant medical care and temporary disability has been paid. Claimant was found to be at MMI on September 25, 2009, assigned a 7% whole person PPI, and released to medium-duty work. After the May 2008 industrial accident, Claimant actually worked for Employer until the August 2008 surgery and remained on the payroll through January 2011. From June 2008 to January 2010 Claimant worked for Job Corps. This employment terminated, not because of Claimant's injury or condition but because the position was eliminated. Claimant was a self-employed automobile restorer with significant earning from that as well. Claimant was capable of working when he suffered the baby gate incident in May 2010. Having been denied

his application for Social Security Disability before this incident, Claimant in September 2011 was granted SSD benefits for conditions including depression, diabetes, hypertension, degenerative disc disease with chronic pain syndrome, and obesity. Claimant is not totally and permanently disabled under the 100% standard or under the odd-lot standard.

Surety contends that if he is deemed totally and permanently disabled, disability should be properly assigned to the baby gate incident. If he is deemed totally and permanently disabled before that incident, disability should be properly apportioned in appropriate amount to ISIF, leaving Employer liable for no more than 30.43%.

ISIF contends Claimant is not totally and permanently disabled under either standard. If he is deemed to be totally and permanently disabled, he does not meet any of the prerequisites demanded by Idaho Code § 72-332. These preclude ISIF liability.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant and his wife;
2. Joint exhibits 1 through 58, to the extent admitted at hearing (a written report of *sub rosa* surveillance, pages 2215 A-D of exhibit 45 were not admitted); and
3. Post-hearing depositions of neuropsychologist Robert Calhoun, Ph.D., of neurosurgeons Barry Birch, M.D., Paul Montalbano, M.D., and Tyler Frizzell, M.D., of physiatrist Rodde Cox, M.D., and of vocational experts Douglas Crum, Bill Jordan, and Barbara Nelson.

All objections made in depositions are overruled, except Defendants' objection on pages 19 and 20 of Barbara Nelson's deposition is sustained and her related testimony is not taken as a physician's opinion; because such testimony is not given any weight as a medical opinion but rather serves to show Ms. Nelson's analysis in reaching her opinions, Defendants' accompanying motion to strike is denied.

FINDINGS OF FACT

The Accident

1. Claimant worked for Employer delivering aftermarket automobile parts to autobody shops, car dealerships, and scrapyard/retail parts places. The weight of parts varied greatly from very light to over 200 pounds.

2. On May 19, 2008 Claimant was on the ground unloading a heavy box—bumpers or hoods—from a semitrailer. Its weight shifted, bent him backwards, and he knew he had injured his back. He notified Employer immediately, but finished the shift. He telephoned his physician from his home that evening.

3. On succeeding days Claimant continued to work despite back pain from this accident. By August he had stopped working because activity increased his pain.

2008 Medical Care

4. On May 22 a lumbar MRI showed a herniated L4-5 disc impinging the spinal canal, worse on the left. Evidence of degenerative disease at L4-5 and L5-S1 was consistent with a prior MRI taken in September 1995. Fred Fender, M.D., recommended referral to a neurosurgeon.

5. D. Peter Reedy, M.D., first saw Claimant on June 30, 2008. After extensive examination and evaluation of diagnostic imaging studies, he recommended surgery.

6. On August 11 Dr. Fender opined Claimant's condition was caused by the industrial accident and that his preexisting osteoarthritis was distinct and noncontributory to the disc herniation.

7. On August 27 Dr. Reedy performed a left L4-5 partial hemi-laminectomy and discectomy.

8. Claimant was recovering well until late October when he reherniated the disc arising from a toilet. A November 24 MRI confirmed the reherniation at L4-5.

9. On December 26 Dr. Reedy performed a "re-do" at L4-5.

Medical care: 2009 through April 2010

10. On February 10, 2009, oral surgeon J. Brett Comstock, DDS, opined regarding a right mandible infection, "I believe that his [mandible] got secondarily infected due to his diabetes after being traumatized with a laryngoscope [during back surgery].

11. Dr. Reedy performed follow-up visits as Claimant recovered from back surgery. Claimant's recovery after the second back surgery was slower than after the first. By March 6, 2009, Dr. Reedy characterized Claimant's condition as "mechanical sounding back pain." An April 9, 2009 MRI was consistent with prior imaging and showed increased scar tissue in the surgical area which may have been affecting the left L5 nerve root. Dr. Reedy did not recommend additional surgery. He considered Claimant a "terrible" candidate for a fusion. He recommended physical therapy and work hardening; he referred Claimant to Michael McMartin, M.D., for that.

12. Claimant visited Dr. Fender on March 2, 2009 for a sore chest wall after an illness left him with an aggressive cough. Although Dr. Fender diagnosed a rib fracture or costochondral strain, the record does not show that follow-up visits were involved.

13. Claimant first visited Dr. McMartin's office on June 17, 2009. Dr. McMartin outlined a physical therapy program. He noted pain amplification signs. He recommended neuropsychological consultation through Dr. Calhoun. After a few visits with Claimant, Dr. McMartin became increasingly focused upon Claimant's pain syndrome pain amplification signs, and psychosocial and behavioral components to Claimant's condition.

14. On a July 29, 2009 visit to Dr. Fender, Claimant noted he had returned to part-time work as a driver for Job Corps. Claimant reported he was essentially sedentary because of his back pain. Dr. Fender noted Claimant was discouraged about the situation.

Dr. Fender further noted, "He does have chronic pain and tingling in his legs due to degenerative disk disease."

15. On September 14, 2009, Robert Calhoun, Ph.D., evaluated Claimant. He opined the psychological and behavioral factors surrounding Claimant's perception of pain supported a poor prognosis for functional rehabilitation; he recommended closure of Claimant's workers' compensation claim; he recommended long term psychological treatment with continued antidepressant medication. Dr. Calhoun again visited with Claimant on October 12, 2009. He did not see Claimant again until February 8, 2011.

16. On a September 25, 2009 visit, Dr. McMartin opined Claimant was at MMI. He rated Claimant's industrial back condition at 7% of the whole person. Regarding restrictions, Dr. McMartin stated Claimant was capable of "at least a medium work capacity."

17. On November 10, 2009, Claimant underwent a functional capacity assessment performed by Sharik Peck. The results showed Claimant to be significantly more unable to function than any medical professional had recommended or restricted.

18. Claimant returned to Dr. McMartin on November 20, 2009, with more complaints. Dr. McMartin stated, "My concerns on behalf of Mr. Garza's overall spinal condition and ultimate well being today are specific to whether or not there has truly been residual abnormality affecting his lumbar spine to explain his profound functional deficit and complex pain syndrome at this time." Dr. McMartin requested one more MRI to confirm his opinion about MMI.

19. On a December 20, 2009 visit to Dr. Reedy, Claimant reported continuing part-time work. Dr. Reedy opined Claimant was ready for an impairment rating but did not offer one.

20. On January 29, 2010, Claimant began his visits to Mayo Clinic in Scottsdale, Arizona. Barry Birch, M.D., was Claimant's primary treater there.

21. On February 4, 2010, Dr. Coughlin evaluated Claimant's ankles after a two-year hiatus.

22. A March 16, 2010 lumbar MRI was consistent with prior imaging and also reported a finding of marked atrophy of the right psoas muscle. Dr. Birch recommended medication and conservative measures and, if those were unsuccessful, consideration of implantation of a dorsal column stimulator. Follow-up visits discussed only the effectiveness of conservative measures.

23. On March 22, 2010, Leslie Arnold, M.D., reviewed records and authored a Physical Residual Functional Capacity Assessment for Claimant's Social Security Disability application. The functional limitations exceeded restrictions imposed by any physician. Dr. Arnold noted, "There is credibility regarding the presence of the problem and discomfort, but not as to severity and the limiting vocational factors."

24. On April 14, 2010, psychologist Barney Greenspan, Ph.D., evaluated Claimant. His Axis I diagnosis was: Major depressive disorder, recurrent, severe, without psychotic features. He characterized Claimant's demonstrated mental function as "inconsistent."

25. Dr. Fender noted sleep apnea in an April 16, 2010 note. Also on that date, Dr. Fender noted that Claimant was receptive to consideration of a lap-band procedure; Claimant had been unreceptive for at least a year prior.

26. On April 23, 2010, Mack Stephenson, Ph.D., completed a Mental Residual Functional Capacity Assessment for Claimant's Social Security Disability application. He relied upon Dr. Greenspan's diagnosis.

27. On May 5 2010, George Lyons, M.D., performed a sleep study. It showed sleep apnea.

Medical Care May 2010 to Hearing

28. Around May 22, 2010, Claimant reached to move a baby gate which he used to contain his dogs. He felt sudden low back pain.

29. Claimant contacted Mayo Clinic to report this new accident.

30. A May 28, 2010 lumbar MRI was compared to prior studies. It showed some progression of Claimant's degenerative condition and an L3-4 disk herniation.

31. A June 21, 2010 abdominal ultrasound showed liver dysfunction and a normal gallbladder.

32. On June 22, 2010, Angie Coyne, PA-C, physician's assistant to Howard King, M.D., examined Claimant. The examination was consistent with known medical history and the new L3-4 disc herniation. She noted Claimant met with Dr. King and Dr. King did not consider Claimant to be a very good surgical candidate.

33. In July 2010 Dr. Birch performed nerve root blocks and steroid injections at L3-4. EMG findings were compatible with an acute right L3 radiculopathy. After additional conservative measures, Dr. Birch performed an L3-4 microdiscectomy on September 3, 2010; he found and removed a disc fragment impinging the right L3 nerve root and abutting the L4 nerve root. While the surgery helped ameliorate pain in one leg, Dr. Birch recommended the dorsal column stimulator for contralateral leg pain.

34. Dr. Fender's notes of 2010 reflect his opinion that the dorsal column stimulator was being recommended for chronic neuropathic pain related to Claimant's degenerative lumbar disk disease. The dorsal column stimulator was paid for, less deductible and co-pay, through Employer's health insurance after an appeal to the California Insurance Board.

35. Mayo Clinic was prepared to conduct a stimulation trial in October 2010, but this was postponed for psychological testing and a possible lap-band procedure.

36. In November 2010, Duane Hurst, Ph.D., and Kari Civalier, M.D., performed a psychological evaluation for Mayo Clinic. Dr. Hurst noted that although test results suggested a somatoform disorder, he discounted the possibility. Dr. Civalier found Claimant in better psychiatric condition than Dr. Calhoun had in 2009, but still recommended long-term psychotherapy. She approved Claimant for the stimulation trial. The trial stimulator implantation occurred on November 29, 2010.

37. At a February 8, 2011 visit, Dr. Calhoun found Claimant's psychological condition greatly improved; Dr. Calhoun approved the permanent implantation of the dorsal column stimulator; he recommended additional psychological therapy for pain management and rehabilitation.

38. After the successful trial and after another MRI on May 25, a dorsal column stimulator was permanently implanted on May 27, 2011. Afterward, Claimant required some adjustments to achieve maximal effectiveness.

39. On July 21, 2011, Claimant underwent a lap-band procedure.

40. On November 11, 2011, Dr. Fender noted that Claimant reported a sudden and significant exacerbation of pain and burning in both legs. The note does not describe or relate this to a traumatic event. A lumbar CT scan showed no new trauma. It was of inadequate resolution to distinguish whether material at the L3 nerve root was disc material or scar tissue.

41. On December 5, 2011, Kevin Krafft, M.D., performed an EMG. It showed some left leg deficits.

42. On January 24, 2012, Dr. Birch checked boxes acknowledging agreement with statements by Claimant's attorney about a causal link between the need for a stimulator and prior L4-5 surgeries and that Claimant was not medically stable before the implantation.

43. On January 30, 2012, physical therapist R. Bret Adams performed an FCE. He opined Claimant demonstrated sufficient effort and produced restrictions much more restrictive than recommended by any medical doctor.

Other History and Prior Medical Care

44. At age 10 in 1972 Claimant underwent a right elbow arthrotomy to remove bone chips. Except for mild loss of endpoint extension and occasional pain, Claimant experienced no residual difficulties. In 1982 two more surgeries for the condition were performed to remove loose bodies and to remove the radial head. The continuing lack of endpoint extension has not hindered his function.

45. In 1974 Claimant underwent ankle surgery to remove bone chips or calcium deposits after a baseball injury. The records inconsistently identify sometimes the left ankle, sometimes the right. Claimant recalled it was his left ankle which was treated. Another surgery to remove scar tissue was performed when he was about age 20.

46. Claimant is and has been a smoker for most of his adult life. His usage has varied in wide swings between two packs per day down to three cigarettes per day. Surgeons have cautioned him about smoking having adverse potential effects on postsurgical healing.

47. Claimant was hospitalized following a car accident in 1984. His generalized left rib and neck pain resolved after about one week.

48. In 1990 Claimant had a pharyngeal mass removed.

49. Claimant suffered three bouts of painful pustules on his shins. These were diagnosed a cellulitis or early phlebitis. This has not been a problem for at least 20 years.

50. Joseph Daines, M.D., performed right hip replacement surgery in 1995. The operative report confirmed end-stage degenerative arthritis of the right hip. Claimant's arthritic hip affected his stance and gait, resulting in back and leg pain, tingling in his shins, and his right leg gave way. At about seven weeks after surgery, Claimant was returned to full weightbearing. After surgery, he felt intermittent hip pain which waxed and waned. About four months later, bursal fluid was removed. At about nine months post-surgery, hip pain remained but was lessening; also noted was a chronic lumbar sprain. More than ten months after surgery, he reported hip, back, leg and knee pain, along with a traumatic left elbow ulnar neuritis. At the surgical anniversary mark, Dr. Daines recorded, "Manuel continues to be a problem." Claimant's hip complaints and treatment continued intermittently for years.

51. A one-time complaint in 1996 to Dr. Daines involved right heel pain.

52. In 1997 Claimant was diagnosed with high blood pressure. It has been monitored and treated, controlled by medication since.

53. In February 1999, Matthew Schwarz, M.D., evaluated Claimant's sleep apnea.

54. Claimant twisted his right ankle in May 1999. Dr. Daines diagnosed a sprain.

55. In late 1999 Dr. Fender considered a possible diagnosis of psoriatic arthritis or of Reiter's Syndrome, a rheumatological disorder. A November 1999 X-ray supported either diagnosis.

56. In December 1999, Claimant Complained to Dr. Fender of left knee pain. An MRI showed bursitis.

57. In January 2000, Claimant reported to Dr. Coughlin that his left ankle condition required him to use a cart on the back nine to complete a round of golf. Later, in June 2000, Dr. Coughlin performed a fourth or fifth left ankle surgery to debride the joint.

58. In December 2000, Claimant first visited Daryl MacCarter, M.D., for right shoulder and rib pain. Dr. MacCarter also evaluated Claimant's peripheral arthritis and spondylitic low back pain. Dr. MacCarter actually first diagnosed Claimant as having Reiter's Syndrome. Incidentally, June 2001 lab data ordered by Dr. MacCarter includes a report of blood glucose at 93, within the normal range of 65-115. Even by the modern definition of normal range expressed in lab data (60-100), there was not a basis for suggesting Claimant was diabetic at this time.

59. In 2001 the pain had moved, affecting his right flank rather than his hip; combined with other symptoms, Dr. Daines suspected degenerative disease in Claimant's lumbosacral spine.

60. In June 2001, Dr. Fender attributed Claimant's complaints of low back and pelvic girdle pain to inactivity after noting that Claimant was working a desk job.

61. A July 2001 lumbar MRI showed some degeneration at L4-5, less so at L5-S1. A focal bulge at L4-5—noted in a 1995 exam—had resolved. The MRI did not support a basis for Claimant's symptoms. A bone scan showed no problems with his hip replacement. Dr. Daines diagnosed trochanteric bursitis.

62. Although Claimant had been diagnosed with diabetes in or before 2004, his last A1C was 5.7%, a number "in the normal range." He has been on and off Metformin as his blood glucose numbers have varied over the years. His diabetes exacerbated in late 2008 and throughout 2009. A lab report notes 6.0% or less is considered "non-diabetic." One note indicates that he had taken "oral insulin" before he lost significant weight by way of the lap-band procedure in 2011. Without any corresponding evidence, it is ambiguous whether this reference to "oral insulin" may have meant Metformin.

63. In June 2005 Dr. Daines performed a thorough physical examination paying particular attention to Claimant's right hip replacement and right ankle complaints. When, six months later, Claimant reported no improvement in his right ankle, Dr. Daines ordered an MRI and diagnosed osteochondritis desiccans of the talar dome without any loose body formation. Dr. Daines recommended continued work using a work boot and avoiding stress to the ankle.

64. In November 2005, Dr. Coughlin recommended right ankle surgery. This he performed in January 2006. About two months after surgery, the hardware was removed. Claimant began weight bearing about one month after that. Dr. Coughlin's May 2006 note involves consultation with Claimant and a workers' compensation attorney. Dr. Coughlin expected recovery to continue until about one year post-surgery.

65. Dr. Coughlin's notes are ambiguous about whether he would restrict Claimant from working for the railroad. He noted some pessimism; he suggested a light-duty railroad job during recovery; he noted Claimant had been terminated by Union Pacific. The notes do not expressly restrict Claimant from railroad work because of his ankle conditions.

66. A September 2006 lumbar X-ray was performed as a preemployment screen. It showed "very minimal" degenerative disk disease especially at L4-5 and minimal anterior wedging of the T12 and L1 vertebrae. Claimant did not get the job.

67. A July 2007 visit to Dr. Fender resulted in a diagnosis of probable sciatica down his left leg. Claimant also complained of some emotional lability and situational depression.

68. In October 2007, a left ankle CT scan was performed. Claimant had reported increased pain. It showed advanced osteoarthritis and other degenerative changes.

69. A February 27, 2008 recheck of Claimant's right ankle by Dr. Coughlin noted Claimant was working for Employer, "doing pretty well." Dr. Coughlin's next note is dated February 4, 2010.

Surveillance Videos

70. Video evidence of surveillance conducted November 29, 2011 shows, *inter alia*, Claimant driving, walking a few steps, and bending a few times at the waist to pick up something on the ground. He does not use a cane. His activity shown on the DVD does not exceed the restrictions of light to moderate work imposed by physicians.

Expert Medical Opinions

71. The physicians do not materially dispute key terms related to this case. "Radiculopathy" refers to nerve damage and symptoms arising from a nerve root exiting the spinal column. "Peripheral neuropathy" refers to nerve damage and symptoms arising from the nerve endings in the extremities without regard to cause. "Plexopathy" refers to nerve damage and symptoms arising from a problem at a nerve bundle or plexus along the nerve pathway. Anatomically, a nerve root is highly likely to be affected by a problem in the disc space from which it exits, i.e., the S1 nerve root exits the L5-S1 disc space, the L5 nerve root exits the L4-5 disc space, etc. It is possible, but unlikely, that a herniated disc fragment would migrate to affect another nerve root, and, if this occurred, it would likely be obvious on an MRI.

Dr. Birch

72. Claimant was first seen by Dr. Birch on January 10, 2010, prior to the May 22, 2010 dog-gate incident. Following his examination of Claimant and review of relevant records/studies, Dr. Birch proposed that Claimant suffered from a "neuropathic pain syndrome." At his April 4, 2013 deposition, Dr. Birch explained this diagnosis as follows:

Q. Could you explain, in layman's terms, what you were saying there?

A. I was saying that the scar tissue and the effects of diabetes of Mr. Garza's nerves had caused them to function abnormally.

Q. Now, the effect of diabetes would be diabetic neuropathy?

A. Either that or a neuropathic pain syndrome.

Q. And how does diabetes cause a neuropathic pain syndrome?

A. The metabolic products of the excess sugar deposit themselves in the coatings of the nerves and cause the nerves to function pathologically.

Dr. Birch testified that the first-line treatment choice for neuropathic pain syndrome is medication such as Neurontin or Lyrica. If medications failed to offer relief, he testified that a dorsal column stimulator might be entertained. (Birch deposition 10/18-11/9.) In January of 2010, Dr. Birch did prescribe medications in an effort to control Claimant's neuropathic pain syndrome. Dr. Birch's notes of April 2010 reflect that Claimant responded favorably to this therapy.

73. Following the dog-gate incident, additional MRI evaluation revealed a small posterolateral disc herniation at L3-4. Dr. Birch was unsure whether Claimant's new complaints were due to this herniation or, instead, to a diabetic plexopathy. Further testing, including an L3-4 nerve block and EMG studies, strongly suggested that Claimant's complaints were more consistent with a right L3 radiculopathy. The L3-4 surgery performed by Dr. Birch relieved the radicular pain associated with the L3-4 lesion, but left Claimant with the underlying neuropathic pain originally seen in January of 2010. It was for this underlying neuropathic pain that Dr. Birch eventually recommended and implanted a dorsal column stimulator. Dr. Birch testified that in his opinion the dog-gate incident and attendant L3-4 surgery has nothing to do with Claimant's need for a dorsal column stimulator. (Birch deposition 22/25-24/6; 43/23-44/16). If Dr. Birch is correct, then in order to understand whether the subject accident has anything to do

with Claimant's need for the dorsal column stimulator, it is important to understand whether the neuropathic pain syndrome first noted by Dr. Birch in January of 2010 is causally related to the subject accident. As noted above, Dr. Birch testified that Claimant's neuropathic pain syndrome has its genesis in "scar tissue and the effects of diabetes". (*See* Birch deposition 9/12-14). It is not entirely clear whether the "scar tissue" referred to by Dr. Birch is scar tissue related to Claimant's two L4-5 surgeries. On cross examination, Dr. Birch added to this confusion:

> Q. Just very quickly, do you have - - so what is your opinion on the relationship between the spinal cord stimulator and - - the need for the spinal cord stimulator and Mannie's L4-5 disk condition?
>
> A. They're unrelated.
>
> Q. The lumbar L4-5 condition? I'm not talking about the disk herniation that you operated on.
>
> A. The need for the stimulator was predicated upon preexisting neuropathic pain that was evident in March of 2010. The patient subsequently had a herniated disk which caused a different pain syndrome for which he had an entirely different surgical treatment, and thereafter, improved in terms of the pain that resulted from the herniated disk, but as my record reflected, the preexisting neuropathic pain did not improve, and he, thereafter, having failed medical therapy, went on to proceed with dorsal column spinal stimulator therapy for that neuropathic pain.

This passage creates further doubt as to whether or not Dr. Birch is actually of the view that the work-related L4-5 injury and attendant surgeries is responsible for causing or contributing to Claimant's neuropathic pain syndrome.

Dr. Montalbano

74. Paul J. Montalbano, M.D., reviewed records and on May 13, 2009 examined Claimant at Surety's request. He recommended additional X-rays and a bone scan. Based on these Dr. Montalbano did not recommend further surgery.

75. In deposition Dr. Montalbano opined that Claimant was not a good candidate for

surgery. He based this opinion, in part, upon a negative diagnostic imaging, MRI, bone scan, and X-ray, plus alternative causes, such as diabetes, smoking and alcohol use, for his complaints of neuropathy and pain in his legs; the objective diagnostic imaging does not support Claimant's subjective complaints. Dr. Montalbano opined that Claimant was at MMI when evaluated on May 13, 2009.

Dr. Calhoun

76. In deposition Dr. Calhoun opined that although he examined Claimant on September 14 and October 12, 2009 upon referral from Dr. McMartin, Dr. Calhoun considered himself an evaluator rather than a treating physician of Claimant. Dr. Calhoun reviewed Dr. McMartin's records and conducted a mental status examination of Claimant. Dr. Calhoun described Claimant's difficulties with depression, anger, somatization, and other personality factors.

77. Dr. Calhoun also visited with Claimant on February 8 and 15, 2011 as Claimant was being considered for a dorsal column stimulator. Based upon his 2009 contact with Claimant, Dr. Calhoun considered Claimant a psychologically poor candidate for implantation. On the 2011 visit, Claimant's mood and other personality aspects appeared somewhat improved compared to 2009. Dr. Calhoun found no psychological factors which would preclude Claimant from being considered a reasonable candidate for a dorsal column stimulator.

78. In deposition Dr. Calhoun opined Claimant still would likely benefit from psychological counseling. He opined that while, generally, one's chronic pain could hinder one's ability to function at tasks, working is generally helpful in reducing one's perceived impact of that chronic pain.

Dr. Cox

79. On November 29, 2011, Rodde Cox, M.D., reviewed records and examined

Claimant at Surety's request. Dr. Cox noted some objective and some nonanatomic findings. He noted that Claimant reported inconsistently about whether the stimulator had lessened his pain. Claimant provided an incomplete medical history as well as an incomplete work history. Claimant perceived himself as severely disabled, although the objective findings did not support Claimant's conviction.

80. Dr. Cox concluded, "The subjective complaints are not consistent with the objective findings. Symptom magnification behavior was evident." Dr. Cox opined that Claimant's two L4-5 surgeries were industrially related but that the Mayo Clinic treatment and L3-4 surgery were not. He opined that the industrial accident produced no causal relationship with Claimant's obesity, diabetes, sleep apnea, or hip or ankle problems. Dr. Cox opined about the relationship between Reiter's Syndrome and chronic longstanding back pain; specifically to Claimant, he deemed this relationship "very possible." He opined that Claimant was at MMI and likely had been since September 25, 2009. He opined that Claimant had suffered PPI relating to his lumbar spine rated at 15% whole person, with 7 percentage points relating to the industrial accident and 8 percentage points relating to nonindustrial causes including Reiter's Syndrome and the more recent L3-4 injury. He opined that Claimant had suffered PPI relating to his hip rated at 9% whole person, relating to his left ankle rated at 6% whole person, and relating to his right ankle rated at 1% whole person. He opined that Claimant's diabetes and sleep apnea were unstable and not ratable. He recommended restrictions of lifting 25 pounds occasionally, with some position and motion restrictions and avoidance of prolonged exposure to low frequency vibration; absent the L3-4 injury, this restriction likely would have been 35 pounds with some position and motion restrictions. He opined that Claimant's ankle condition likely would require some

restrictions “in terms of walking, standing, and walking on uneven terrain,” but did not specify the extent.

81. In deposition Dr. Cox opined that Claimant exhibited chronic pain syndrome with symptom magnification. Dr. Cox opined that on examination, Claimant exhibited inconsistent and nonanatomical weakness. Similarly, his complaints of pain were nonphysiological. Claimant rated positive on four of five Waddell’s signs. Dr. Cox opined that typically, a spinal cord stimulator is implanted to help leg pain, but not back pain; it is unlikely to help where Waddell’s signs are present. He opined that any use of the stimulator was unrelated to the industrial accident.

82. Dr. Cox opined that Claimant’s symptoms resembled a peripheral neuropathy rather than a radiculopathy.

83. Dr. Cox opined Claimant to be at MMI, and rated his PPI as follows: low back at 15% whole person, right hip at 9% whole person, left ankle 6% whole person, right ankle at 2% lower extremity, and low back at an additional 8 percent for nonindustrial back complaints such as a possible Reiter's Syndrome and the recent L3-4 discectomy. Considering that 8 percent, Dr. Cox opined he was unable to separate the preexisting component from the subsequent L3-4 surgery. Using the *Guides*, sixth edition, this combined to a 29% whole person PPI. Because Claimant’s diabetes and sleep apnea were not considered stable, Dr. Cox declined to rate those conditions.

84. Dr. Cox opined that a lifting restriction of 25 pounds occasionally, with avoidance of certain positions and motions, would be reasonable. Without the L3-4 surgery, a 35-pound lifting restriction, including avoidance of positions and motions, would be reasonable. After viewing the surveillance video, Dr. Cox opined that Claimant’s mobility was inconsistent

with the mobility he exhibited upon examination. As a result, Dr. Cox would probably relax the position and motion restrictions somewhat. Dr. Cox opined that Claimant would be physically better off working than not working.

Dr. Frizzell

85. On February 7, 2012, R. Tyler Frizzell, M.D., reviewed records and examined Claimant at Claimant's request. He opined that Claimant's L4-5 injury was industrially related but that the L3-4 injury was not. He opined that the dorsal column stimulator was two-thirds related to the L4-5 injury, based partially upon having two L4-5 surgeries and one at L3-4. He opined Claimant was at MMI and had suffered PPI rated at 19% whole person with a one percentage point increase for EMG findings, but backed out six percentage points for the L3-4 contribution, leaving a 14% whole person PPI to be industrially related. Dr. Frizzell, when asked to opine about work restrictions, deferred to the FCE performed by Mr. Adams without further comment.

86. In deposition Dr. Frizzell opined that Claimant's examination and correlated with Dr. Krafft's EMG showed a left L5 radiculopathy, without evidence of peripheral neuropathy or L4 radiculopathy. He opined that in the May 18, 2008 industrial accident, Claimant suffered a herniated lumbar disc with associated left L4-5 radiculopathy. He opined Claimant could have been declared to be at MMI from the industrial accident upon receipt of Dr. Krafft's EMG. He opined that upon recent consideration of the prior MRIs he would apportion 2 percentage points of the 14% PPI to Claimant's back condition, which preexisted the industrial accident, thus reducing the industrially related PPI to 12% whole person.

Vocational Factors

87. Born June 23, 1961, Claimant was 51 years old on the date of hearing. But for a few months living and working in western Washington, he has lived in the Treasure Valley

from 1969 to the present.

88. A graduate of Vallivue High School, Claimant is literate in English, somewhat literate in Spanish and orally bilingual. Claimant attended Boise State University taking general courses. He dropped out because of the left ankle surgery. Claimant appears intelligent and articulate. He makes a positive first impression.

89. Claimant played sports during his school years, including four years of high school varsity golf. His handicap has been as low as four. He continued to golf frequently. In May 2010 back spasms interfered with his golf game. Nevertheless, in his most recent golf tournament, he completed 18 holes one day and 15 the next.

90. Claimant is familiar with computers and can use Microsoft Word, Excel, and PowerPoint programs. When applying for the job with Employer, Claimant described himself as having "strong and diverse experience" in "Intermodal/Trucking/Marine/Distribution . . . Customer service experienced and oriented . . . accounts receivable/payable and purchasing . . . Inventory control/scheduling . . . Highly organized, multitasking and detailed oriented . . . Coordinating worldwide import and export shipments . . . Bilingual." The record and Claimant's demeanor at hearing support the accuracy of these statements.

91. Beginning with work in the cotton fields in Arizona at age five, Claimant has been a good and hard worker for various employers at various jobs. During his school years, Claimant worked for farmers, for ranchers, at orchards, for Ruben's Auto Body in Nampa, and at the Caldwell Simplot plant.

92. After high school, Claimant worked maintaining rental machines for Roots Rents. Claimant's testimony is deemed more probative than this employer's records clerk's inability to find records verifying his employment.

93. Claimant worked for Nestle for a season, trimming potatoes. He also worked for Rich Transfer.

94. Claimant began working for Hewlett-Packard from 1983 into 1987—Claimant's two resumes included with his employment records are inconsistent; one says "1997," another says "1989" as the year of termination—after he dropped out of college. He verified orders and shipped custom printers to customers including retailers. He next worked in the kitting department packaging cables and accessories for larger model printers, often to be shipped to international customers. This work required him to be familiar with tariffs, overseas shipping regulations, recognizing foreign alphabets, etc. Claimant's testimony is deemed more probative than this employer's records clerk's inability to find records verifying his employment.

95. Regarding the resume which identifies 1997 as the date of termination from HP: Because the next listed job began in 1997, this date is not a typographical error. It covers a ten-year gap in underemployment, self-employment, and unemployment which would not be impressive or contributory to the job he was seeking at the time. Indeed, in the paragraphs immediately below, the jobs included on the other, earlier resume are noted.

96. Claimant has been self-employed rebuilding classic cars, dba Paragon Auto Concepts. He worked at this full time for about four years in the late 1980s and/or 1990s, then part-time afterward. One resume dates self employment as "1989-4/1994."

97. Claimant worked at PowerBar operating a control panel for a fructose machine. He left PowerBar for hip replacement surgery in about 1995. One resume says "5/1994-7/1996." Claimant's testimony is deemed more probative than this employer's records clerk's written assertion that he had never been employed there.

98. In 1995 Claimant worked through an employment service for a couple of jobs, then worked at Idaho Beef in its stock room. He worked very briefly making beer for Tablerock Brewery, making billboard signs for H&H, Inc., and for a hardware—nuts, bolts, and screws—company, Kowallis & Richards. He delivered packages for Pony Express.

99. In 1996 Claimant assembled parts for Western Electronics/DBSI. He worked a second job, part time, for two years at Sun Valley Marble pouring and shaping synthetic marble into molds.

100. Also in 1996 Claimant worked about one week for Micron, but his hip had not healed enough yet and he quit the job. He also worked briefly as a baker for Fred Meyer but a left heel problem interfered.

101. Claimant drove a Hyster for about one year at an RC Cola plant. One resume identifies RC Cola "7/1996-12/1996" as his next job after Power Bar/Power Foods.

102. Claimant was a counterman for a backhoe parts house, Arnold Machinery. One resume says "1/1997-6/1997."

103. From June 1997 to August 1998, Claimant worked for Decision One where he ordered and shipped computer parts.

104. From 1998 into 2000 at EC Power Systems, Claimant ordered parts for pumps, generators, and motors.

105. From July 2000 to July 2003, Claimant worked in containerized shipping by rail for Maersk, Inc. From Boise he managed international shipments arriving at various ports to be delivered throughout the United States. Although Claimant testified that he worked for Maersk SeaLand, that company denied ever having employed him. Maersk Inc. provided records verifying his employment. This distinction between companies is not deemed material to

this matter.

106. From July 2003 to April 2004, Claimant worked in the Federal Way, Washington area for Weyerhaeuser coordinating and negotiating prices for shipments from mills in the US and Canada.

107. Beginning in April 2004, Claimant worked for Union Pacific as a brakeman, conductor, and engineer. A broken heel and ankle injury ended his tenure at UP. He stopped working about December 2005. Termination was official about June 2006.

108. Also in 2005 Claimant also worked for Coors Distributing coordinating beer shipments.

109. In 2006 Claimant worked for Idaho Northern Railroad as a temporary employee through Intermountain Staffing. He coordinated shipments.

110. Claimant worked briefly for Global Logistics aka Stonepath Logistics, a freight broker around Seattle; then for Genie, shipping their lift equipment. One resume says UP employment terminated "11/2005" and Genie began "11/2005." No unaccounted for time or intervening employment or unemployment is indicated.

111. Claimant worked as a store stocker for Winco for one day in 2007.

112. In 2008 Claimant worked for Cargo Express brokering freight.

113. While employed with Employer, Claimant also worked for Job Corps. He drove a van transporting students. He obtained this job before the industrial accident, but did not actually start until a few weeks afterward. The position disappeared about January 2010 when Job Corps was transferred from Bureau of Reclamation to Forest Service.

114. Claimant's Social Security earnings statement, exhibit 58, where inconsistent with Claimant's testimony, is deemed to be of greater weight than Claimant's testimony for

all instances of employment other than self-employment. Claimant's testimony about the inaccuracies of reporting self-employment is deemed to be of greater weight concerning those facts.

115. IDVR evaluated Claimant beginning November 16, 2009. IDVR found Claimant eligible for Schedule A appointment authority. Despite this assistance, he was unable to outscore those with veterans' preferences for a return to work with Job Corps.

116. Claimant provided a handwritten list of potential employers which he contacted via an online job search.

117. The record establishes that Claimant knows how to search for and find jobs. He is adept at personal networking, at conventional job searches, and at internet job searches. He described jobs he believes he can perform when he testified about his job searches.

118. Claimant's resumes of record are inconsistent with his testimony and with each other. Allowing for and ignoring puffing in the descriptions of job duties, there remain irreconcilable factual inaccuracies and germane omissions. Other inconsistencies, factual inaccuracies, and germane omissions arise when various written job applications of record are compared to Claimant's testimony and resumes. Because there is insufficient information about whether these were carefully prepared or "on-the-spot" recollections when prepared, these applications are not considered relevant to Claimant's actual job history or credibility.

119. Drs. Reedy, Calhoun, and McMartin all recommended in 2009 that it was in Claimant's best interest that his worker's compensation claim be closed.

120. At hearing, Claimant described the condition of his ankles as "fine . . . nothing debilitating." Claimant's deposition testimony reveals he was not hindered in activities of daily living by any of his conditions which preceded the industrial accident on May 19, 2008.

121. Claimant was already at MMI when he first interviewed with ICRD at the end of August 2010 and was therefore ineligible for service.

122. Claimant has received Social Security Disability since September 8, 2011, backdated effective to April 1, 2010. The physical conditions upon which approval was based included: "major depressive disorder; type II diabetes mellitus; hypertension; obstructive sleep apnea; degenerative disk disease with chronic pain syndrome; and obesity." The determination noted that Claimant could perform sedentary work but not full-time.

Vocational experts

Ms. Nelson

123. Vocational expert Barbara Nelson evaluated Claimant at Claimant's request. She examined Claimant's work and earnings history, transferrable skills, and administered vocational testing. She prepared two written reports with later addenda. On the date of her first report, she did not have all relevant medical records or work history which might have reduced her disability opinion, but Claimant's chronic pain had not yet been significantly treated either, and the result of such treatment would be relevant to disability. After all data had been reviewed, Ms. Nelson opined as follows: Claimant's preexisting conditions contributed to permanent disability before the industrial injury and continue to factor into a disability analysis. The preexisting permanent disability she rated at 22%, inclusive of PPI. Accepting Mr. Adams' FCE, Claimant would be incapable of most light and sedentary jobs because of a need to frequently change between sitting and standing. Claimant is less than 50% likely to ever work again, based upon his history, restrictions, and Claimant's subjective, self-imposed limitations. Chronic pain syndrome likely has a significant effect upon Claimant's ability to work on a regular, full-time basis. By the time of hearing the general employment picture had improved since her original report as exemplified by a reduction in the unemployment rate from 9.9% to

6.7%. Ms. Nelson described Claimant's job search as "spotty" despite what she characterized as online applications "for well over 100 jobs." Her final opinion is that under Mr. Adams' FCE, which she considered to have been adopted by Dr. Frizzell, Claimant was totally and permanently disabled. Further job search likely would be futile. Considering only Dr. Cox's restrictions, Claimant's permanent disability would be 59%, inclusive of the 22% preexisting disability and inclusive of PPI.

Mr. Crum

124. Vocational expert Douglas Crum evaluated Claimant at Surety's request. He identified Claimant's transferrable skills and compared Claimants pre- and post-injury labor market access. He opined as follows: Claimant had a 15 to 20 percent loss of labor market access as a result of preexisting conditions. Based upon Dr. McMartin's restrictions, Claimant suffered no additional loss of labor market access as a result of the industrial accident and injury. Based upon Dr. Arnold's restrictions for Social Security Disability purposes, Claimant suffered a 49 percent reduction in labor market access, yielding a 50 percent disability. Based upon Dr. Cox's restrictions, Claimant suffered a 40 percent reduction in labor market access, yielding a 40 percent disability. Based upon FCE analyst and physical therapist Adams, Claimant suffered a 79 percent reduction in labor market access, yielding a 65 percent disability. However, no physiatrist has endorsed restrictions suggested by the FCE. Moreover, Mr. Crum observed Claimant showing he has the ability to sit for periods substantially longer than recommended by the FCE. Under the more restrictive FCE criteria, Claimant would be a competitive candidate for jobs in the local labor market involving telephone sales and/or customer service, as a bill collector, in certain security jobs, as a service writer for automobile service businesses, and for various types of shipping and receiving clerk positions. Mr. Crum agreed with Ms. Nelson's reluctance concerning the quality of Claimant's job search which

began only after August 2010.

125. Mr. Crum also submitted a video purporting to reflect Claimant's duties while working for Employer. However, Mr. Treitsch who provided the information did not work for Employer contemporaneously with Claimant. He was initially hired to temporarily replace Claimant after Claimant's injury. The video was made more than two years after Claimant's industrial injury. Moreover, it shows two men helping each other with the unloading. Claimant testified that he was required to unload these boxes of parts without help. As a result, the video is of limited usefulness as an illustration of what Claimant actually did.

Mr. Jordan

126. Vocational expert Bill Jordan evaluated Claimant at ISIF's request. He opined as follows: Claimant is not totally and permanently disabled. There are regularly available jobs within his medical restrictions; some were specifically identified. Mr. Jordan was not asked to quantify Claimant's partial disability.

DISCUSSION AND FURTHER FINDINGS OF FACT

127. 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).

128. 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).

129. By observation at hearing, the Referee found Claimant credible. He appeared to testify factually without exaggeration or confabulation and without undue emotional components. In depositions, his testimony appears direct and responsive without evasion. His singular obvious exaggeration in testimony—he stated his pain was a "12" on a 0-to-10 scale—is deemed to be a facetious rather than histrionic response. Nevertheless, Claimant's factual and substantive omissions and inconsistencies with written records must speak for itself. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility

Causation

130. The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Langley v. State, ISIF*, 126 Idaho 781, 890 P.2d 732 (1995); *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).

131. Here, Claimant's L4-5 injury and two surgeries is work-related according to all opining physicians. That condition has been accepted and medical care benefits paid

by Defendants.

132. Similarly, there is no substantial dispute among opining physicians that Claimant's L3-4 injury and surgery is not work related.

133. Whether there exists a relationship between the industrial injury and Claimant's continuing chronic pain syndrome after the L3-4 injury is a focal inquiry. Specifically, the implantation of the dorsal column stimulator is a subject of controversy among opining physicians.

134. Claimant sought medical attention at Mayo Clinic outside the chain of referral. At his first visit there, Dr. Birch evaluated his continuing pain complaints. In his initial records Dr. Birch was less than clear about whether he thought Claimant's leg complaints were related to the industrial injury, to diabetic neuropathy, to degenerative lumbar disease and arthritis, or to some combination of these. Moreover, Dr. Birch's testimony was ambiguous, often frankly inconsistent, with his own statements in contemporaneously made medical records and with his response to written input from Claimant's attorney. Dr. Birch's bare mention of a possible implantation after—and if—conservative measures fail is a tenuous basis upon which to ignore preexisting arthritis, Reiter's Syndrome, and the subsequent intervening L3-4 nonindustrial baby gate accident and injury. Dr. Birch did not again raise consideration of the possibility of implantation until after Claimant failed to respond completely to the L3-4 surgery.

135. Dr. Frizzell's suggestion that the need for implantation should be apportioned two-thirds/one-third based upon two L4-5 surgeries versus on the L3-4 surgery may sound practical, but it ignores any scientific underpinning. Moreover, it ignores the preexisting lumbar conditions.

136. Dr. Montalbano and, especially, Dr. Cox, each provided a well-reasoned basis

for considering the question. Their opinions carry greater weight. The preponderance of evidence shows it likely that Claimant's need for a dorsal column stimulator was caused by sequela from the L3-4 injury and surgery.

Medical Care and Temporary Disability

137. Claimant seeks recovery of medical expenses incurred in connection with his evaluation/treatment by Dr. Birch, a physician chosen by Claimant, and outside the chain of referral. We need not address whether Claimant has shown sufficient grounds for a change of physician since, as developed above, we have found that the treatment rendered by Dr. Birch, in particular, the L3-4 surgery and dorsal column stimulator implantation, are not causally related to the subject accident. Therefore, Claimant is not entitled to recovery of these expenses.

138. Since Claimant has failed to establish that the care rendered by Dr. Birch is causally related to the subject accident, we also find that Claimant became medically stable as of September 25, 2009, when he was seen and rated by Dr. McMartin. In December of 2009, Dr. Reedy confirmed that Claimant was medically stable. We conclude that Claimant is entitled to medical care through December 20, 2009, the date on which he was seen by Dr. Reedy.

PPI and Permanent Disability

139. 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).

140. The opining physicians are in substantial agreement about the extent of permanent impairment which is relatable to the L4-5 injury. The range includes 7% to 12% whole person. To decide for the higher, lower, or some number in between represents an exercise in futility where, as here, permanent disability is substantially greater than the

higher of these numbers. Only for purposes of *Carey* apportionment could a choice of PPI rating matter.

141. **"**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.

142. 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 the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

143. 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. State, Industrial Special Indem. Fund*, 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).

144. Here, to the extent they rely upon actual physicians' restrictions, all vocational

experts agree Claimant is not 100% totally and permanently disabled. He has job skills which allow light to sedentary work well within the restrictions recommended.

145. Even under the more limiting findings of the FCEs performed by Mr. Peck or Mr. Adams, Claimant is capable of such work which allows *ad lib* position changes. No physician has expressly adopted or approved either of these FCEs. Mr. Adams' FCE is manifestly inconsistent with the Referee's observation at hearing with respect to Claimant's ability to tolerate sitting. Claimant on the witness stand, despite being informed he could sit or stand at will while testifying, was able to sit for more than an hour and again for periods approaching one hour during the course of the hearing. This sharply contrasts with Mr. Adams' suggestion of a 10-minute sitting limitation. Without express support of a medical doctor and being contrary to Claimant's demonstrated ability at hearing, the FCEs are deemed to carry less weight than the restrictions recommended by Drs. Cox, Montalbano, and Birch.

146. Ms. Nelson's comments regarding the effect of chronic pain syndrome are well-taken. Certainly, Claimant's life has become habituated to the avoidance of pain. However, medical testimony supports the proposition that this learned behavior is contraindicated, that work and movement, though painful, would in the long term result in Claimant experiencing less intense chronic pain and would be beneficial. As early as 2009 doctors having Claimant's best interests in mind were recommending that Claimant settle his workers' compensation claim. Claimant's subjective, self-imposed limitations do not carry greater weight than the expert medical opinions of his treating and IME physicians alike.

147. Relying upon the reasonable, differing opinions of the vocational experts, and considering all relevant medical and non-medical factors, Claimant's permanent partial disability from all causes at the time of hearing is 60%.

148. **Odd lot.** 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, he 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 he or vocational counselors or employment agencies on his 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).

149. Claimant did work after the accident. He worked successfully for the Job Corps. His medical restrictions and work history show it likely that efforts to find suitable work would not be futile. Ms. Nelson's speculation about futility to the contrary was based, in large part, on an over emphasis upon Claimant's subjective, self-imposed limitations. If Claimant is to qualify as an odd-lot worker, he must do so by showing that his work search establishes it likely that other work is not available.

150. As set forth in earlier findings, Claimant is capable and experienced at searching for and securing a job when he wants to. Inherent in Claimant's knowledge of how to tailor a resume to enhance his competitive employability is the knowledge of how to reduce it. Nothing in Claimant's list of his online job search supports a genuine attempt to find and secure work. Claimant's networking skills and presentation abilities show that he is well aware finding a job requires more than pinging a potential employer's website. The record does not show he did substantially more.

151. We need not find that Claimant intentionally sabotaged his work search. Indeed, it appears likely from testimony of Claimant and his wife that Claimant's somatization tendencies and chronic pain syndrome are real psychological obstacles to his day-to-day quality of life. Nevertheless, Claimant's documentation of his work search does not show it likely that other work is not available. Both Mr. Jordan and Mr. Crum identified regularly occurring job opportunities in the local labor market which are available and within his restrictions.

152. Claimant failed to show it likely that he qualifies as an odd-lot worker.

ISIF Liability

153. Total and permanent disability is the primary prerequisite to ISIF liability. Idaho Code § 72-332. Further discussion of potential ISIF liability is moot.

Apportionment Under Idaho Code § 72-406

154. While it might be said to be axiomatic that an employer takes the employee as it finds him, it can be said with equal conviction that an employer can only be held responsible for the disability attributable to the industrial injury. *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008). In less than total disability cases, apportionment is governed by the provisions of Idaho Code § 72-406. That section provides:

> **72-406. Deductions for preexisting injuries and infirmities. –**
> (1) In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.
> (2) Any income benefits previously paid an injured workman for permanent disability to any member or part of his body shall be deducted from the amount of income benefits provided for the permanent disability to the same member or part of his body caused by a change in his physical condition or by a subsequent injury or occupational disease.

Page v. McCain Foods, Inc., *supra*, envisions a two-step process for determining whether disability should be apportioned between a preexisting condition and a work accident. First, the

Commission should determine disability from all causes combined. Here, we have determined that Claimant's disability from all causes as of the date of hearing is 60%, inclusive of PPI. Claimant's disability from all causes includes disability related to conditions predating the subject accident, disability referable to the subject accident and disability referable to what we have found to be a subsequent non-work-related L3-4 lesion.

155. Having identified Claimant's disability from all causes combined, *Page* next requires that the Commission determine what part of this disability is referable to the subject accident. Idaho Code § 72-406(1) anticipates that a prerequisite to apportionment is a finding that Claimant suffers from a "preexisting physical impairment." Here, the record amply illustrates that Claimant has preexisting physical impairments relating to his low back, hip, and ankles.

156. Although the existence of a preexisting physical impairment is a prerequisite to apportionment under Idaho Code § 72-406, it is perhaps more important to the process to understand how various impairments at issue in a case have impacted the claimant's functional ability both before and after the subject accident. As we said in *Poljarevic v. Independent Food Corp.*, 2010 IIC 0001 (2010), the *sine qua non* of a decision to apportion disability under Idaho Code § 72-406 is a determination that claimant suffered from preexisting conditions that detrimentally impacted the claimant's ability to engage in gainful work.

157. This case is somewhat unusual in that Claimant suffers from both preexisting and superseding conditions which contribute to his ultimate disability from all causes combined. Dr. Cox opined that but for the intervening L3-4 injury he would have imposed a 35-pound lifting restriction on Claimant instead of the 25-pound lifting restriction he imposed for Claimant's low-back condition from all causes. Based on the testimony of the vocational

specialists and consideration of Claimant's medical and non-medical factors, Claimant's permanent disability excluding conditions arising subsequent to his date of medical stability from the subject accident is 50% of the whole person.

158. Ms. Nelson and Mr. Crum rated Claimant's preexisting disability, inclusive of preexisting PPI, to be in the range of 10-20%. Despite Claimant's hip, ankles and other conditions, he was able to maintain regular employment prior to the subject accident. Even Dr. Coughlin's suggestion that he avoid railroad work where it involved walking on uneven ground was not imposed as a firm restriction. Considering all factors, we find that 10% of Claimant's disability should be apportioned to Claimant's preexisting conditions under Idaho Code § 72-406. We conclude that Claimant's ratable disability related to the subject accident, inclusive of PPI, is 40% of the whole person.

CONCLUSIONS OF LAW AND ORDER

1. Claimant suffered an L4-5 injury caused by a compensable industrial accident on May 19, 2008 and became medically stable on September 25, 2009;

2. Claimant is entitled to medical care benefits to the date of medical stability and for reasonable palliative care to the end of 2009, but not for medical care provided outside the chain of referral in January 2010 and thereafter;

3. Claimant is not entitled to temporary disability benefits after the period of recovery which ended September 25, 2009;

4. Claimant's disability from all causes combined is 60% of the whole person, inclusive of impairment;

5. Claimant does not qualify for total and permanent disability under the odd-lot doctrine;

6. Claimant has failed to establish ISIF liability; and

7. Claimant's disability should be apportioned between the subject accident and preexisting/intervening events. Claimant has suffered disability of 40% of the whole person referable to the subject accident, inclusive of PPI.

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

DATED this _23rd_ day of ___April_____, 2014.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Chairman

_/s/_____
R.D. Maynard, Commissioner

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _23rd_ day of __April_____, 2014, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

DANIEL J. LUKER P.O. BOX 6190 BOISE, ID 83707-6190	ALAN K. HULL P.O. BOX 7426 BOISE, ID 83707	KENNETH L. MALLEA P.O. BOX 857 MERIDIAN, ID 83680

_/s/_____