BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JERRY GORMLEY, Claimant, v. SOUTH STATE TRAILER SUPPLY, Employer, and LIBERTY NORTHWEST INSURANCE CORP., Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2010-019605** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed March 4, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Idaho Falls on May 13, 2015. Claimant, Jerry Gormley, was present in person and represented by Michael R. McBride, of Idaho Falls. Defendant Employer, South State Trailer Supply (Employer), and Defendant Surety, Liberty Northwest Insurance Corp., were represented by Lea L. Kear, of Boise. Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF) was represented by Paul B. Rippel, of Idaho Falls. The parties presented oral and documentary evidence. One post-hearing deposition was taken and briefs were later submitted. The matter came under advisement on October 21, 2015. Referee Taylor submitted proposed findings of fact, conclusions of law to the Commission on February 3, 2016. The Commission has reviewed Referee Taylor's recommendation and disagrees with the treatment given by Referee Taylor to Claimant's pre-existing low-back impairment, the evaluation of Claimant's disability and the apportionment of Claimant's disability between his pre-existing condition and the effects of the subject accident. For these

reasons, the Commission declines to adopt those portions of the recommendation with which it disagrees and substitutes its own analysis.

ISSUES

The noticed issues were narrowed at hearing and presently are:

1. The extent of Claimant's permanent partial impairment;
2. The extent of Claimant's permanent disability, including whether Claimant is permanently and totally disabled pursuant to the odd-lot doctrine or otherwise;
3. Whether the Industrial Special Indemnity Fund is liable pursuant to Idaho Code § 72-332; and
4. Apportionment under the Carey formula.

CONTENTIONS OF THE PARTIES

Claimant sustained an industrial accident on July 28, 2010, injuring his right knee. He claims 12% whole person impairment for his knee and contends that he is totally and permanently disabled due to his industrial accident. He also asserts pre-existing lumbar spine impairment of 17 to 33% of the whole person. Claimant provides no vocational expert evidence but requests a finding of 100% or odd-lot permanent total disability.

Employer relies upon the testimony of vocational expert Mary Barros-Bailey, Ph.D., and contends that Claimant is not totally and permanently disabled but suffers a 35% permanent disability inclusive of impairment, with 9% attributable to pre-existing conditions.

ISIF asserts that Claimant is not totally and permanently disabled and that his disability is solely attributable to his final industrial accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. Claimant's Exhibits A-C and Defendants' Exhibits A-S, admitted at the hearing;

3. The testimony of Claimant and Claimant's wife, Terry Gormley, taken at hearing; and

4. The post-hearing deposition of Mary Barros-Bailey, Ph.D., CRC, taken by Defendants Employer/Surety.

All objections posed during the deposition are overruled and all motions to strike are denied.

FINDINGS OF FACT

1. Claimant was born in 1944 and is left-handed. He resided in Idaho Falls and was 70 years old at the time of the hearing. He was raised in Wyoming until age 14 and thereafter in California where he graduated from high school in 1963.

2. **Work and health history.** After graduating from high school, Claimant took two semesters of college in California focusing on business administration. He was a professional surfer and speed skier. Claimant also worked as the quality control manager for Columbia Yacht, a contract administrator, and a drafting and engineer worker for Martin Decker Corporation. He moved to Idaho Falls in 1977. In Idaho Falls Claimant farmed and worked as a farm manager irrigating, plowing, drilling, and planting potatoes. In 1983, he worked for A&R Equipment building and selling large commercial agricultural equipment.

3. In approximately 1985, Claimant started his own business. He worked from his home as a sales representative of several major agricultural equipment suppliers in southeast Idaho, eight other states, and parts of Canada. He sold large agricultural equipment, including flour milling equipment, grain bins, and elevators that transferred grain to storage bins and

processing plants. Claimant consulted with large processing companies including General Mills, Anheuser-Busch, Coors, and Pillsbury. He was paid commissions on sales of new and replacement equipment by the suppliers. Claimant's first project was to design and equip a $1.7 million modern feed mill in southwest Idaho. He estimated his profit at about 30%. Claimant worked approximately 25 years in large commercial agricultural equipment sales. He traveled extensively by plane and vehicle to visit clients and customers. Claimant retired due to low back problems in 2006.

4. Claimant experienced the insidious onset of low-back pain in approximately 1995. In June of 2005, he was evaluated by Lynn Stromberg, M.D., for his low-back complaints. He was eventually found to be suffering from severe degenerative lumbar disease from L2 through S1. On or about November 1, 2006, Dr. Stromberg performed L3-S1 spinal decompression and fusion. The surgery initially helped with Claimant's symptoms, but eventually his discomfort returned. (Transcript, 35/25-36/8.) At the suggestion of Dr. Stromberg, Claimant applied for Social Security disability in August of 2006. (Transcript, 64/14-24.) He testified that he was honest in all the statements he made in support of his application for Social Security disability. (Transcript, 65/5-9.) He was initially denied Social Security disability benefits, but following appeal, was found to be entitled to benefits by order dated April 23, 2007. (See Defendants' Exhibit S, 492.) Claimant's low-back problems continued. Further workup revealed significant lumbar stenosis at L2-3 and a pseudo arthrosis at L5-S1. On December 22, 2008, Claimant underwent a second lumbar spine procedure, again performed by Dr. Stromberg. He was fused at L2-3, and the pseudoarthrosis at L5-S1 was repaired. (See Defendants' Exhibit B, 122.) Claimant testified that his back felt better following

the second lumbar spine surgery, but he was nevertheless left with a "gnawing ache" at the bottom of his back. (Transcript, 36/18-23.)

5. After his 2008 surgery, Claimant continued steelhead fishing, boating, and golfing. However, his golfing changed from walking 18 holes to driving 9 holes in a cart and he stopped wading to fish because he was unsure of his footing.

6. In 2009, Claimant began receiving Social Security retirement benefits.

7. In February 2009, Claimant received an unsolicited telephone call from Employer notifying him that they were opening an RV store in Idaho Falls and encouraging him to apply for employment as a retail floor sales clerk. Claimant was then 65 years old and his wife was still working. Claimant subsequently interviewed with Employer and specified that he was only interested in seasonal part-time work and that he had a 30-pound lifting restriction. Employer hired Claimant immediately and allowed him to determine his own schedule averaging four to six hours per day, 20 hours per week, and earning approximately $10.00 per hour. His duties involved retail sales of RV equipment including refrigerators, axles, wheels, awnings, and pick-nick tables. Standing on the concrete floors made his back ache after several hours. He rated his back pain at 2-3 out of 10 before work, increasing to 7-8 after working several hours. He took over-the-counter medications to manage his back pain. In spite of back pain, Claimant never missed an assigned shift for Employer. He avoided lifting air conditioners, refrigerators, trailer axels, and similar heavy items. He worked seasonally from approximately April or May until October.

8. **Industrial accident and treatment.** On July 28, 2010, Claimant was at work stocking shelves from a short step ladder when he fell approximately three feet and landed stiffly on his right leg. His right knee buckled sideways at a 90 degree angle and he collapsed to the

floor. He had never before had a knee injury. Claimant was taken by ambulance to the hospital where his dislocated right knee was put in a cast. Right knee MRI documented tears of the anterior cruciate, medial collateral, and posterior cruciate ligaments and a complex medial meniscus tear.

9. On September 28, 2010, Claimant underwent right knee surgery by Joseph Liljenquist, M.D., who performed anterior cruciate ligament reconstruction with tibialis anterior autograft, open medial collateral ligament repair, and partial medial meniscectomy. The torn posterior cruciate ligament was intentionally not repaired. Even after a period of convalescence, Claimant's right knee swelled and remained painful. X-rays revealed progressive degenerative changes in the medial compartment. Dr. Liljenquist found that Claimant's graft had ruptured.

10. On April 19, 2011, Claimant returned to Dr. Liljenquist who completed a total right knee arthroplasty. Claimant returned to work with Employer for approximately three weeks in August 2011, and had difficulty performing his job. In September he was laid off for the season and did not return to work in 2012 because he did not believe he could perform his job duties. Approximately one year after his total knee arthroplasty, Claimant continued to experience significant instability, swelling, and pain in his right knee resulting in an altered gait which aggravated his back pain. Dr. Liljenquist referred Claimant to Aaron Altenburg, M.D. Dr. Altenburg examined Claimant and noted significant dynamic flexion instability with imbalance of the supporting ligaments during active motion. On September 23, 2013, Dr. Altenburg performed a revision total right knee arthroplasty. Thereafter Claimant's knee pain improved, but did not entirely resolve.

11. Following his recovery from his last knee surgery, Claimant returned to Employer's place of business to inquire whether there was any type of work, part-time or fill-in,

that might be available to him. Claimant testified that after reviewing the restrictions imposed by Dr. Altenburg, Employer declined to bring Claimant back to work, explaining that it did not want to take a chance that Claimant might be reinjured. (Transcript, 55/17-56/8.)

12. **Condition at the time of hearing.** At the time of hearing, Claimant had ongoing aching in his right knee that extended down his lower leg of 2-3 out of 10. Claimant's persisting knee pain affected his gait which increased his back pain from 2-3 in the morning, to 6-7 by the end of the day, depending on his activities. He takes Naproxen and ices his knee which swells each day and limits his walking. He cannot kneel, crawl, or climb ladders. He is limited in stair climbing and very limited in bending. Driving from Idaho Falls to Pocatello leaves his knee and back sore and aching. He drives very little around town because repetitive lower right leg motion from the brake to the gas pedal increases his right knee pain. Prolonged sitting in one position makes his right knee ache and swell.

13. Claimant's knee injury has compelled him to sell his hobby farm and downsize to a smaller home and yard because he cannot do farming, irrigating, or extensive yard work. Claimant must lie on his side to help with gardening. He cannot arise from kneeling on his right knee and any kneeling results in knee swelling and pain. He is fatigued after walking around the grocery store once. He can walk only about a block before he must sit down or stop and lean on something to relieve the pressure on his knee. Since his right knee injury, Claimant is unable to golf, fly-fish, or launch his boat.

14. Other than one inquiry about re-employment with Employer, Claimant has not sought employment since his accident. He has not used job service or any vocational consultant to help him search for employment. At hearing, Claimant testified he does not believe anyone would hire him due to his age and right knee condition:

> There isn't an employer that would take me, No. 1. No. 2, there is no way that I could give my best to any employer with the limitations that I have. …. I'm an old man. I don't want to work. …. I mean nobody is going to rehabilitate me, that's for sure. Nobody's going to want me.

(Defendants' Exhibit Q, 409/11-14, 22-25.) He does not believe he could perform even part-time work now, as it would exacerbate his knee pain. Claimant's wife testified that his knee swells most everyday by mid-morning. She does not believe Claimant could return to work. She performs the plumbing and yard work at their home.

15. **Credibility.** Having observed Claimant and his wife at hearing, and compared their testimony with other evidence in the record, the Referee found that both are credible witnesses. The Commission finds no reason to disturb the Referee's observational assessment of the credibility of Claimant and his wife.

DISCUSSION AND FURTHER FINDINGS

16. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

17. **Permanent partial impairment.** The first issue is the extent of Claimant's permanent impairment. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. (Idaho Code § 72-422.) "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency

in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. (Idaho Code § 72-424.) A determination of physical impairment is a question of fact for the Commission. The record of the instant case reveals two conditions qualifying as permanent impairments: Claimant's industrial right knee injury and his pre-existing lumbar spine condition. Each is addressed below.

18. **Right knee**. On November 22, 2011, Gary Walker, M.D., examined Claimant and rated his right knee impairment at 34% of the right lower extremity, equating to 14% of the whole person, pursuant to the AMA Guides to the Evaluation of Permanent Impairment, (Guides) Sixth Edition. On May 18, 2012, Brian Tallerico, D.O., examined Claimant and rated his right knee impairment at 25% of the right lower extremity, equating to 10% of the whole person, pursuant to the Sixth Edition of the Guides. Claimant subsequently underwent a revision total knee arthroplasty in 2013 and on May 1, 2014, Richard Wathne, M.D., examined Claimant and rated his right knee impairment at 31% of the right lower extremity, equating to 12% of the whole person, pursuant to the Sixth Edition of the Guides. The Commission finds the impairment rating of Dr. Wathne after Claimant's final total knee arthroplasty the most current and persuasive and concludes that Claimant suffers permanent impairment of 12% of the whole person attributable to his right knee condition due to his industrial accident.[1]

19. **Lumbar Spine**. Claimant alleges that as a result of the subject accident he suffered additional injuries to his lumbar spine, either as a direct result of the fall or as a result of gait alterations caused by the right knee injury. A CT scan obtained shortly after the subject accident demonstrated degenerative disk disease above the level of Claimant's fusion, but no

[1] Claimant and Employer/Surety stipulated to payment of 12% permanent impairment benefits for Claimant's right knee condition. ISIF did not so stipulate.

evidence of an acute injury. Dr. Stromberg has not proposed that Claimant suffered any additional injury to his lumbar spine as a result of the subject accident. Dr. Tallerico examined Claimant on May 18, 2012. He concluded that Claimant's significant lumbar spine problems, including progressive degeneration seen at L1-2, were unrelated to the subject accident. The most he would acknowledge was that Claimant may have suffered a temporary, self-limiting lumbar strain as a result of the accident. Dr. Stromberg signified his agreement with Dr. Tallerico's conclusions in this regard. (See Defendants' Exhibit D, 137.) The Commission concludes that Claimant has failed to show that he suffered any permanent injury to his lumbar spine as a consequence of the subject accident. However, Claimant does suffer from a significant, pre-existing lumbar spine condition. As noted, he has extensive pre-existing degenerative disease of the lumbar spine for which he has undergone L2 through S1 fusion surgery. Claimant contends that he is totally and permanently disabled. Defendants deny that Claimant is totally and permanently disabled, but assert that if he is, responsibility for such total and permanent disability should be shared between Defendants and the ISIF. In filing their complaint, Defendants assumed the burden of proving all elements of ISIF liability. One such element is that Claimant suffers from a pre-existing permanent physical impairment. That impairment must be quantified in order to apportion responsibility between the ISIF and Employer as contemplated by Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984).

20. There is no evidence of record quantifying the extent and degree of Claimant's lumbar spine impairment. Claimant invites the Commission to calculate Claimant's impairment by reference to either the 5th or 6th editions of the AMA Guides to the Evaluation of Permanent Impairment. We decline to do so. Idaho Code § 72-424 provides:

> "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members.

At first blush that section appears to rule out anything but a "medical appraisal" of an injured worker's impairment. However, as made clear in Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 769 P.2d 1122 (1989), and a long line of subsequent decisions supporting the rule in Urry[2], supra, a physician's opinion is advisory only to the Industrial Commission which, as the ultimate finder of fact, is empowered to determine the extent of impairment based on all pertinent factors. The term "medical appraisal" cannot obscure the fundamental principle that the Industrial Commission, rather than a treating or evaluating physician, is the fact finder and ultimate evaluator of impairment. A physician may provide information helpful to the Commission, but there is no distinction between expert testimony and evidence of other character as regards to the evaluation of an injured worker's impairment.

21. Smith v. J.B. Parson Co., 127 Idaho 937, 908 P.2d 1244 (1996), involved a claim against employer and the Industrial Special Indemnity Fund (ISIF). In that case, the claimant suffered from a number of preexisting conditions which implicated the liability of the ISIF. As part of the *prima facie* case against the ISIF it was important to determine whether or not Smith's preexisting conditions constituted preexisting physical impairments. One of the conditions from which the claimant suffered was a blood disorder called Polycythemia vera. Although medical

[2] See Matthews v. Dep't of Corrections, 121 Idaho 680, 827 P.2d 693 (1992); Bingham Memorial Hosp. v. Industrial Special Indem. Fund, 122 Idaho 937, 842 P.2d 273 (1992); Baker v. Louisiana Pacific Corp., 123 Idaho 799, 853 P.2d 544 (1993); Selzler v. State of Idaho, Industrial Special Indem. Fund, 124 Idaho 144, 857 P.2d 623 (1993); Hipwell v. Challenger Pallett and Supply, 124 Idaho 294, 859 P.2d 330 (1993); Nelson v. David L. Hill Logging, 124 Idaho 855, 865 P.2d 946 (1993); Smith v. J.B. Parson Co., 127 Idaho 937, 908 P.2d 1244 (1996); Clark v. City of Lewiston, 133 Idaho 723, 992 P.2d 172 (1999); Vargas v. Keegan, Inc., 134 Idaho 125, 997 P.2d 586 (2000); Rivas v. K.C. Logging, 134 Idaho 603, 7 P.3d 212 (2000); Fowble v. Snoline Express, Inc., 146 Idaho 70, 190 P.3d 889 (2008); Davidson v. Riverland Excavating, Inc., 147 Idaho 339, 209 P.3d 636 (2009).

records documented that the claimant suffered from this preexisting condition and that it impacted his functional capacity, the record contained no evidence that a physician had ever rated the claimant's impairment due to this condition. Even though the record was devoid of a physician-imposed impairment rating, the referee determined that based on claimant's testimony and the medical records which referenced claimant's treatment for the condition, the blood disorder did constitute a functional abnormality which constituted a permanent impairment under Idaho law. Based on the Commission's authorized role as the "ultimate evaluator of impairment" per Urry, supra, the referee found that the claimant suffered from a 3% impairment based on fatigue and pain. The Commission's finding in this regard was challenged on appeal, but the Court upheld the Commission's treatment of the issue of impairment as follows:

> As the fact finder and the evaluator of impairment, the Commission made its own determination of the impairment rating of Smith's blood disease. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755 P.2d 1122, 1127 (1989). The Commission's impairment rating of Smith's blood condition was based upon the testimony of Smith and the reports of Smith's physicians. We conclude that the Commission's rating is supported by substantial and competent evidence in the record.

Smith v. J.B. Parson Co., 127 Idaho 937, 908 P.2d 1244 (1996).

Smith involved a claim against the Industrial Special Indemnity Fund, where, for purposes of Carey apportionment, a specific numerical impairment rating is required in order to evaluate the extent to which the ISIF shall share responsibility for an injured worker's total and permanent disability. In Smith, the Court recognized that the Commission has the inherent power to make its own judgment concerning such a rating where the record fails to reveal a physician-calculated rating.

22. However, in the recent case of Mazzone v. Texas Roadhouse, Inc., 154 Idaho 750, 302 P.3d 718 (2013), the Supreme Court made it clear that the Industrial Commission is not

empowered to apply its own interpretation to medical guides in an effort to decide whether an injured worker qualifies for a particular diagnosis. In Mazzone, the referee assigned to the case reviewed the DSM-IV-TR manual in an effort to inform her evaluation of whether or not Claimant qualified for the diagnosis of PTSD. Though the DSM-IV-TR manual is referenced in Idaho Code § 72-451 dealing with psychological injuries, the manual had not been admitted into evidence in that case. Though noting that the Commission has wide discretion to consider reliable evidence that might not be admissible in a court of law, the Court cautioned that such medical treatises and guides must first be admitted into evidence through a witness able to testify as to their authority. Moreover, the Court ruled that the Commission is not entitled to use medical guides to assess claimants and formulate its own opinions regarding a claimant's health. The Court concluded that the referee improperly interpreted the DSM-IV-TR manual to arrive at an unqualified medical opinion. It is somewhat difficult to square the holding of Smith with the Court's direction in Mazzone. Perhaps the distinction lies in the fact that Mazzone, supra, involved an attempt by the Commission to apply a medical guide, while Urry, and its progeny, recognized the Commission's power to consider a variety of other factors in determining impairment. At any rate, we believe that this case is more like Mazzone than Urry, and we believe that Mazzone makes it very clear that the Commission is not itself empowered to apply and interpret the AMA Guides to the Evaluation of Permanent Impairment to assess the impairment of an injured worker. Impairment evaluation requires medical knowledge, and the Guides makes it clear that it is the intention of the editors that impairment evaluations performed pursuant to the guides be conducted by medical professionals. (See Guides to the Evaluation of Permanent Impairment, 6th Edition at 23.) Therefore, were all the other elements of ISIF liability satisfied, including a finding that Claimant is, indeed, totally and permanently disabled, the

evidence of record would leave us unable to apportion responsibility between the employer and the ISIF under the Carey formula, since this formula requires the assignment of a specific value to both the pre-existing and accident-caused impairments. The Commission has had occasion in the recent past to reiterate to practitioners the importance of coming to hearing armed with all facts necessary to prove apportionment in both total and less-than-total cases. (See Remarks of Commissioner Baskin, March 7, 2014 meeting of the Workers' Compensation Section of the Idaho State Bar.) It seems necessary to repeat that failure to prove such a foundational element of the case against the ISIF will ordinarily leave the Commission with no choice but to conclude that the elements of ISIF liability have not been satisfied.

23. While the failure to assess an impairment rating for Claimant's pre-existing lumbar spine condition would be an impediment to the establishment of ISIF liability, it poses no such problem where the issue is how disability should be apportioned in a less-than-total case under the provisions of Idaho Code § 72-406. In such cases, all that need be demonstrated is that Claimant suffers from a pre-existing impairment of some type prior to the subject accident. The extent and degree of an impairment need not be quantified. See Hopwood v. Kimberly Seeds Int'l, 2014 IIC 0007 (2014); Duncan v. Varsity Contractors, 2014 IIC 0041 (2014). We need only draw on our experience in many similar cases to conclude that Claimant's multilevel degenerative disease of the lumbar spine with concomitant four-level fusion procedure and residual symptomatology/limitations leave him qualified for a permanent physical impairment rating of some type.

24. **Permanent disability**. The next issue is the extent of Claimant's permanent disability, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise. "Permanent disability" or "under a permanent disability" results when the

actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. (Idaho Code § 72-423.) "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. (Idaho Code § 72-425.) Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant.

25. 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, 7, 896 P.2d 329, 333 (1995). The extent and causes of permanent disability "are factual questions committed to the particular expertise of the Commission." Thom v. Callahan, 97 Idaho 151, 155, 157, 540 P.2d 1330, 1334, 1336 (1975). Page v. McCain Foods, Inc., 145 Idaho 302, 179 P.3d 265 (2008), envisions a two-step process when evaluating disability and apportionment. First, Claimant's permanent disability from all causes combined must be determined utilizing the factors referenced in Idaho Code § 72-430. Second, a determination must be made of the extent to which the injured worker's permanent disability is attributable to the industrial accident as anticipated by Idaho

Code § 72-406. The proper date for disability analysis is the date of the hearing, not the date the injured worker reaches maximum medical improvement. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012). Work restrictions assigned by medical experts and suitable employment opportunities identified by vocational experts may be particularly relevant in determining permanent disability.

26. Therefore, in evaluating disability and apportionment of the same, the Commission's first task is to evaluate Claimant's disability from all causes as of the date of hearing. The *sine qua non* of that determination are Claimant's permanent limitations/restrictions at the time of hearing considered in the light of relevant non-medical factors. Here, in evaluating Claimant's disability from all causes combined we need not consider Claimant's limitations/restrictions from his pre-existing lumbar spine condition since, as explained in more detail below, the limitations/restrictions stemming from Claimant's right-knee condition altogether subsume the less onerous limitations/restrictions stemming from Claimant's lumbar spine. Although Claimant has been given a number of different sets of restrictions since the subject accident, we conclude that the most recent restrictions given by Dr. Altenburg subsequent to the second total knee replacement surgery are the restrictions that should be utilized to define Claimant's functional ability. On April 10, 2014, Dr. Altenburg described Claimant's permanent limitations/restrictions from his right-knee injury as follows:

1. In an 8-hour day, patient can:	**Hours at a time**	**Total hours a day**
Stand	0 to 2	4 to 6
Sit	4 to 6	4 to 6
Walk	0 to 2	4 to 6

2. Please check the line which most likely approximates the number of pounds the patient can lift/carry during the day.
Sedentary: Up to *5* pounds frequently with occasional carrying of up to *10* pounds max.

3. Which is patient's dominant hand?	Right		
4. Patient can use hands for repetitive:	**A. Simple Grasping**	**B. Pushing and Pulling**	**C. Fine Manipulation**

Right Hand	Yes	20 lbs	Yes
Left Hand	Yes	20 lbs	Yes
5. Patient can use upper extremity for repetitive:	**A. Pushing and Pulling**	**B. Reaching above shoulder level**	
	Both	Both	
6. Patient can use feet for repetitive raising and lowering and pushing in operating foot controls:	Yes. If Yes, weight limit if any: (left blank)		
7. Patient is able to:			
A. Bend	Occasionally (1-33%)		
B. Squat	Occasionally (1-33%)		
C. Kneel	Not at all		
D. Climb	Not at all		
E. Reach Overhead	Frequently (34-67%)		
8. Is patient restricted by environmental factors, such as heat/cold, dust, dampness, height, etc.?		No restrictions	
9. Is patient involved with treatment and/or medication that might affect his/her ability to work?		No restrictions	
10. Has Patient been released to work?		Yes Release Date: (indecipherable) 2 weeks ago. Restricted Duty	
11. Has an impairment rating been given?		? Don't know	
04/10/14		Physician's Signature	

(See Defendants Exhibit N at 361-362.)

27. Opportunities for gainful activity. After Claimant's first total knee replacement, he returned to work for Employer for about the last three weeks of the 2011 season and experienced difficulty performing his job duties. Claimant did not return to work for Employer when the season resumed in 2012 because he did not believe he could perform the job. (Defendants' Exhibit L, 318.) Claimant ultimately sought employment with Employer after his final total knee arthroplasty by Dr. Altenburg, but Employer was unable to accommodate Dr. Altenburg's restrictions. Except for Claimant's one inquiry to Employer, he has not attempted to find work since his industrial accident. It is apparent that Claimant is not motivated to find work.

28. Mary Barros-Bailey, Ph.D., a vocational expert retained by Employer/Surety, interviewed Claimant on April 9, 2013, and prepared a report evaluating his disability. From Claimant's career as a sales representative, Dr. Barros-Bailey opined he retained transferable skills including: apply product knowledge, technical sales techniques, and telephone communication to market goods; conduct sales presentations; describe and demonstrate goods and services; evaluate product quality, monitor consumer and marketing trends, and develop marketing strategies; obtain information from clients and customers; process records, forms, and files; provide customer service; understand sales contracts; and use computers to enter, access, and retrieve data.

29. For most of his work life, Claimant was self-employed. Dr. Barros-Bailey testified that self-employed individuals necessarily acquire a broad range of skills and expertise necessary to run a business. Dr. Barros-Bailey described Claimant as a reverse transitioner, i.e. an older worker who comes out of retirement to return to the workforce, frequently in an area in which he has no prior experience. This sometimes happens because retirement turns out to be more expensive than predicted or because the worker is bored in retirement. In Claimant's case, he testified that his wife was still working at the time he got the call from Employer and the part-time employment that Employer proposed would give him something to do with his time. Per Dr. Barros-Bailey, Claimant has significant transferrable skills that are cognitive in nature, and that his most significant skills are not likely to be impacted by physical injury.

30. In conducting her evaluation, Dr. Barros-Bailey reviewed all limitations authored by medical providers and also made her own inquiries of Claimant concerning his subjective sense of what he could and could not do, both before the subject accident and afterwards. Dr. Barros-Bailey evaluated Claimant's disability under a number of different assumptions about his

functional ability. However, the most relevant evaluation performed by Dr. Barros-Bailey is the last, dated February 19, 2015, and incorporating the limitations/restrictions imposed by Dr. Altenburg. Based on the sedentary and positional restrictions imposed by Dr. Altenburg, Dr. Barros-Bailey opined that Claimant has lost access to 46% of his pre-injury labor market. She had previously determined that Claimant could probably find work paying between $7.25 and $9.75 per hour post accident. Claimant's time of injury wage was $10.00 per hour. Dr. Barros-Bailey evidently felt that these wage loss comparisons were still valid at the time of her February 19, 2015 evaluation. She testified that she did give some consideration to Claimant's age (70 at time of hearing) in performing her analysis. She gave Claimant an additional 5% disability to account for his age, noting that it is always harder for older workers to find a job. In all, Dr. Barros-Bailey proposed that Claimant suffered a 35% disability, inclusive of impairment, as a consequence of the subject accident. Her deposition testimony suggests that this figure is lower than it might otherwise have been due to the significance Dr. Barros-Bailey placed on what she described as Claimant's cognitive skill set, a skill set that was not significantly impacted as a result of the subject accident.

31. The analysis in each of Dr. Barros-Bailey's reports and addendums—most significantly that regarding loss of labor market access—rests upon data for individuals of customary working age. She readily admitted that she had no data for individuals beyond customary working age, indeed "there aren't statistics that you can consider that include all of those variables." (Barros-Bailey Deposition, 54/15-16.) She acknowledged that reverse transitioners are not well captured in current labor statistics.

32. Claimant argues that vocational evidence from his Social Security hearing indicates he is totally and permanently disabled. Specifically, he denies possessing transferable skills because the Social Security vocational expert:

> noted that the Claimant had acquired skills related to marketing, solicitation, demonstration, sales, records keeping, report generation and file maintenance. However, given the Claimant's age his residual functional capacity and the need to change his area of sales specialization, it was the opinion of the vocational expert that there would be considerable adjustment needed for the Claimant to transfer these skills. Therefore the vocational expert concluded that the Claimant had no skills transferable to other occupations within the residual functional capacity.

Claimant's Brief, 9 (quoting Defendants' Exhibit S, 499.) The Social Security disability finding is not entirely persuasive as that proceeding occurred in 2006—prior to Claimant's successful 2008 lumbar fusion and well prior to his 2010 industrial accident and treatment. As noted above, Dr. Barros-Bailey testified Claimant had a number of transferable sales-related skills. Moreover, after his 2008 back fusion, Claimant successfully transferred a variety of his sales skills to his job with Employer.

33. Claimant also asserts that a comparison of several cases tends to show he is totally and permanently disabled. He cites to Stoddard v. Hagadone Corp., 147 Idaho 186, 207 P.3d 162 (2009), Tarbet v. J.R. Simplot Co., 151 Idaho 755, 264 P.3d 394 (2011), Soto v. Simplot, 126 Idaho 536, 887 P.2d 1043 (1994), Dumaw v. J.L. Norton Logging, 118 Idaho 150, 154, 795 P.2d 312, 316 (1990), and Garcia v. J.R. Simplot Co., 115 Idaho 966, 772 P.2d 173 (1989) overruled by Archer v. Bonners Ferry Datsun, 117 Idaho 166, 786 P.2d 557 (1990).

34. In Stoddard v. Hagadone Corp., 147 Idaho 186, 207 P.3d 162 (2009), the Commission found Stoddard's physical condition due to his low back, left shoulder, and hernia constituted permanent impairments totaling 40% and given the Coeur d'Alene labor market and his age of 64 at the time of the first hearing and 70 at the time of the second hearing, concluded

he sustained "total and permanent disability … due to the lack of transferable skills to the sedentary labor market and his advanced age." Stoddard v. Hagadone Corp., 147 Idaho 186, 189-90, 207 P.3d 162, 165-66 (2009). Stoddard had presented expert vocational testimony he was totally permanently disabled when considering his age and lack of transferable skills to the sedentary labor market. Stoddard v, Hagadone Corp., 2007 IIC 0348 (2007).

35. In Tarbet v. J.R. Simplot Co., 151 Idaho 755, 264 P.3d 394 (2011), Tarbet was 62 years old, had a 10th grade education and had performed heavy physical labor during his 36 years with the employer. He lived in Soda Springs, a small somewhat isolated community of 3,500 residents. The Court affirmed the Commission's application of the odd-lot doctrine and finding that Claimant was totally and permanently disabled solely as a result of his 10–pound lifting restriction and nonmedical factors. Vocational experts testified Tarbet was totally and permanently disabled and Tarbet had unsuccessfully sought employment for more than a year. Tarbet v. J.R. Simplot Co., 2010 IIC 0336 (2010).

36. In Soto v. Simplot, 126 Idaho 536, 887 P.2d 1043 (1994), the Court affirmed the Commission's finding that Soto had no permanent physical impairment and thus no permanent disability from his industrial injury. Soto provides relevant guidance in evaluating impairment but does not otherwise support Claimant's assertion of total permanent disability.

37. In Dumaw v. J.L. Norton Logging, 118 Idaho 150, 154, 795 P.2d 312, 316 (1990), the Commission found it would have been futile for Dumaw to have sought other employment, given the lack of available work he could perform based on his limitations. Dumaw was 46 years old, had a ninth grade education, and was a lifetime resident of the small community of Newport, Washington. He spent his entire working life as a heavy equipment operator, logging truck operator, and mechanic. He had 28% permanent impairment and was medically restricted

from returning to any of his pre-injury work. Expert vocational evidence established Dumaw was precluded from 80% of the jobs he could have performed pre-injury, that light and sedentary jobs were extremely limited in the Newport area, and that his restrictions precluded him from performing the full scope of light and sedentary jobs. The Court affirmed the Commission's finding that Dumaw was an odd-lot worker, totally and permanently disabled when permanent physical impairment and nonmedical factors of age, education, experience, and geographic locale were considered.

38. In Garcia v. J.R. Simplot Co., 115 Idaho 966, 967-68, 772 P.2d 173, 174-75 (1989) overruled by Archer v. Bonners Ferry Datsun, 117 Idaho 166, 786 P.2d 557 (1990),[3] Garcia sustained permanent impairment of 62% due to her right arm amputation and knee injury from her industrial accident, and 10% due to her preexisting back and thumb conditions. A vocational expert testified that given the loss of Garcia's right arm and her other impairments, there were no jobs among the 2,500 he considered, that she could perform. The Court affirmed the Commission's finding that Garcia was totally permanently disabled.

39. In contrast to the cases of Stoddard, Tarbet, Dumaw, and Garcia, in the instant case the only expert vocational evidence indicating Claimant is entirely precluded from employment is from his Social Security Disability proceeding in 2006—prior to his successful 2008 lumbar fusion and well prior to his 2010 industrial accident. Claimant's current 10-pound lifting restriction is very significant; however, he is a high school graduate, completed at least one semester of college, successfully ran his own sales-related business for decades, lives in a very sizeable community—Idaho Falls, and demonstrated his ability to successfully transfer a variety of his sales-related skills to his job with Employer.

[3] Archer overruled Garcia's apportionment of liability between employer and ISIF, but not the finding of total and permanent disability.

40. Claimant has permanent impairment of at least 12% of the whole person, and probably greater, were it possible to quantify the pre-existing impairment relating to his lumbar spine fusion. Claimant's limitations/restrictions are profound, placing him in the sedentary work category. These restrictions are significant enough to preclude him from performing the vast majority of unskilled jobs. However, as Dr. Barros-Bailey has noted, Claimant has significant transferable skills, and these skills are still vocationally relevant for Claimant, his physical limitations notwithstanding. (Barros-Bailey Deposition, 25/14-27/18.) Therefore, the skills that Claimant acquired and developed during his long self-employment are likely transferable to sedentary employment which he is physically capable of performing. Claimant is an older worker, and as Dr. Barros-Bailey has conceded, it is harder for older workers to obtain employment. Dr. Barros-Bailey was unable to accurately quantify the impact of Claimant's limitations/restrictions on an older worker such as Claimant. However, Claimant's age and personal circumstances cut another way as well. Claimant considered himself retired and may have remained so were it not for Employer's uninvited solicitation. Claimant did not need to return to work.[4] He expressed only the need to seek relief from boredom. (Transcript, 40/1-15; 65/17-23.) To significantly increase Claimant's disability award because he is an older worker would ignore the fact that he considered himself retired, and was working primarily in order to find something to do with his spare time. However, we must also be mindful of our obligation to measure Claimant's present and probable future disability. (See Idaho Code § 72-425.) In assessing the future impact of Claimant's limitations on his ability to engage in gainful activity we must acknowledge that Claimant's situation may change in the future, and that he may find

[4] During his deposition, counsel for ISIF suggested that Claimant took a part-time job with Employer to supplement his SSDI benefits. Claimant denied that money was the point of his part-time job. The point was to do something he enjoyed. (Claimant's Deposition, 17/24-18/25.

himself in need of supplementing his retirement income to make ends meet. Limitations which are not vocationally significant to someone who has the luxury to work or not in retirement might someday become a real impediment to supplementing retirement income. Considering all these factors, we believe that Dr. Barros-Bailey still understated Claimant's disability from all causes combined, but not by as much as proposed by Referee Taylor. Considering Claimant's limitations/restrictions, his age, personal circumstances and other nonmedical factors, we conclude that Claimant has suffered disability of 55% from all causes combined, inclusive of his 12% PPI rating for his right knee condition and whatever impairment he may have for his pre-existing low back condition.

41. **Odd-lot.** Claimant also alleges he is totally and permanently disabled pursuant to the odd-lot doctrine. A claimant who is not 100% permanently disabled may prove total permanent disability by establishing he is an odd-lot worker. An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market - absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status rests upon the claimant. Dumaw v. J. L. Norton Logging, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). A claimant may satisfy his burden of proof and establish a *prima facie* case of total permanent disability under the odd-lot doctrine in any one of three ways:

1. By showing that he has attempted other types of employment without success;

2. By showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or

3. By showing that any efforts to find suitable work would be futile.

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

42. In the instant case, Claimant has presented no evidence of any failed attempts at other types of employment. He has presented no evidence of any unsuccessful work search. However, Claimant alleges that a work search would be futile.

43. Claimant candidly acknowledged that he does not want to work and believes he is not employable. He has presented only his testimony and that of his wife that a work search would be futile. Claimant testified that he sought work with Employer after recovering from his second total knee arthroplasty but was advised no work was available within his restrictions. The record establishes that Claimant returned to work for approximately three weeks with Employer in August 2011 after his first total knee replacement. After Claimant's second total knee arthroplasty, Industrial Commission rehabilitation consultant Dan Wolford closed Claimant's file on February 6, 2014, noting: "The case is closed from referral status because neither the claimant, nor the employer, expressed interest in having the claimant return to work at South State Trailer Supply." (Defendants' Exhibit G, 202.)

44. Although Dr. Barros-Bailey's opinion is not entirely persuasive as to the extent of Claimant's disability, she concluded that there were positions available in the Idaho Falls labor market consistent with the restrictions imposed by Dr. Altenburg. Claimant has not proven that a work search would be futile. He has not established a *prima facie* case that he is an odd-lot worker under the Lethrud test. Claimant has not proven he is totally and permanently disabled pursuant to the odd-lot doctrine.

45. **ISIF liability**. Inasmuch as Claimant has not proven he is totally and permanently disabled, ISIF bears no liability pursuant to Idaho Code § 72-332.

46. Apportionment under Idaho Code § 72-406. Having determined that Claimant suffers disability from all causes combined of 55%, it is next necessary to consider what portion of that disability is referable to the subject accident. While it is axiomatic that employer takes employee as it finds him, it is equally true that employer can only be held responsible for the additional disability caused by the industrial accident. Therefore, it is necessary to understand what limitations/restrictions attach to the pre-existing low back condition in order that an assessment of Claimant's disability can be performed as of a date immediately preceding the subject accident. Therefore, although the existence of a pre-existing physical impairment is a prerequisite to apportionment under Idaho Code § 72-406, what really informs our judgment about whether apportionment is appropriate is an understanding of how the various impairments at issue in a case impact a claimant's functional ability both before and after the subject accident. In other words, a pre-existing impairment which carried with it no evidence of functional limitations/restrictions will not support a conclusion that some part of a claimant's disability from all causes should be assigned to that pre-existing condition. See Poljarevic v. Independent Food Corp., 2010 IIC 0001 (2010). As developed above, we accept that Claimant did have a ratable permanent physical impairment of some severity as the result of his pre-existing lumbar spine condition. We need not quantify the exact extent of that impairment. It is necessary, however, to develop some understanding of the extent and degree of Claimant's functional limitations immediately preceding the subject accident. The record creates some difficulties in making this assessment.

47. The medical records before the Commission do not reflect that any physician gave Claimant permanent limitations/restrictions prior to the subject accident. Claimant has testified that Dr. Stromberg gave Claimant permanent restrictions against lifting more than 30 pounds subsequent to his last back surgery. However, at the time he applied for Social Security disability in September of 2006 he described himself as "unable to work". (See Defendants' Exhibit S, 434.) He also described significant limitations on daily functions due to his low-back condition. (See Defendants' Exhibit S, 440-445.) A physical residual functional capacity assessment performed by Leslie Arnold, M.D., on November 27, 2006 endorsed Claimant's ability to occasionally lift up to 20 pounds, and frequently lift up to 10 pounds. This report also described limitations on walking, standing, climbing and kneeling. Although these restrictions, both those self-reported by Claimant and those identified by Dr. Arnold, appear to be somewhat more onerous than those described by Claimant at hearing, it is important to recall that Claimant's application for Social Security disability benefits was made prior to his second low-back surgery, a surgery which, according to Claimant, resulted in some improvement in his condition. However, the record also reflects that Claimant was referred to the ICRD by Surety on October 6, 2010, long after he had undergone his last low-back surgery. To ICRD Consultant Wolford, Claimant reported having a 10-pound lifting restriction as a result of his low-back fusion. (See Defendants' Exhibit G at 184.) In his note of October 4, 2010, Consultant Wolford noted that at the time of injury Claimant was under a 10-pound lifting restriction due to a prior injury (his low back) and worked within those restrictions at Employer's place of business. (See Defendants' Exhibit G, 188.)

48. In her initial report, Dr. Barros-Bailey noted the 10-pound lifting restriction referenced in the ICRD notes, but remarked that there was a paucity of medical information

establishing this as a pre-existing limitation. However, on April 9, 2013, Dr. Barros-Bailey took a history from Claimant that he had a pre-existing 30-pound lifting limitation for his low back. Interestingly, Claimant did not admit to his low back causing him any other limitations/restrictions when he met with Dr. Barros-Bailey on April 9, 2013. (See Defendants' Exhibit L, 312-314.) Other than the 30-pound lifting limitation he related all of his current limitations including more onerous lifting limitations to his knee injury.

49. That the November 11, 2006 physical residual functional capacity assessment performed by Dr. Arnold suggests that Claimant's low back limitations are considerably more significant than those described by Claimant at hearing or by Dr. Barros-Bailey may be explained by the fact that Claimant underwent his second low back surgery in 2008, a surgery which resulted, by Claimant's report, in some improvement in his low back symptomatology. However, this does not explain the more onerous low back limitations described by Claimant to consultant Wolford in 2010. To consultant Wolford, Claimant described having a 10-pound lifting restriction. The ICRD notes in this regard are notable for their brevity. They do not reflect whether this "10-pound lifting restriction" represented a recommendation that he should never lift more than 10 pounds or whether he should limit occasional or frequent lifting to 10 pounds.

50. In ascertaining the nature and extent of Claimant's pre-existing limitations/restrictions, we think that the best evidence of Claimant's pre-injury abilities is found in the evidence relating to the type of work he did at Defendant's place of business. When Defendant Employer solicited Claimant to interview for a job in 2009, Claimant advised employer that he had a 30-pound lifting restriction. Employer was able to accommodate this restriction. Claimant testified that he worked approximately 20 hours per week because he found

that working more than this caused excessive back pain. (Transcript, 44/12-45/24; 66/13-67/18.) At Defendant's place of business, Claimant avoided heavier lifting activities, and also certain other activities that required him to crouch or squat. (Transcript, 67/24-70/12.)

51. In her February 19, 2015 Addendum, Dr. Barros-Bailey concluded that Claimant suffered disability from all causes in the range of 35% of the whole person, inclusive of impairment. She assigned 9% of Claimant's disability to his pre-existing condition, but did so on the basis of the November 2006 physical residual functional capacity assessment performed as part of Claimant's application for Social Security disability benefits. As noted, these limitations are somewhat more onerous than Claimant's demonstrated functional capacity following his third knee surgery. Arguably, then, Dr. Barros-Bailey might have apportioned less of Claimant's disability to his pre-existing low back condition had she considered what we have identified as his pre-existing limitations/restrictions, limitations which allowed him to perform light-duty work, at the very least. However, the record also establishes that while Claimant was capable of performing his time-of-injury job, he was only able to do so on a part-time basis, and only then by scrupulously abiding by his lifting and positional limitations. Based on the foregoing, we conclude that of Claimant's 55% disability, 9% is referable to his pre-existing low back condition.

52. Claimant has proven permanent partial disability due to his industrial accident of 46% inclusive of his 12% permanent impairment from his industrial accident.

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CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven permanent impairment of 12% of the whole person for his industrial right knee injury.

2. Claimant has proven permanent disability of 55%, inclusive of his 12% impairment for his right knee. Claimant has not proven that he is totally and permanently disabled.

3. ISIF bears no liability pursuant to Idaho Code § 72-332.

4. Pursuant to Idaho Code § 72-406, Claimant's 55% disability from all causes is appropriately apportioned between the subject accident and his documented pre-existing condition. Claimant has 9% disability referable to his pre-existing condition and 46% (inclusive of impairment) referable to the subject accident.

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

DATED this 4th day of March, 2016

INDUSTRIAL COMMISSION

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

___/s/_____
Thomas E. Limbaugh, Commissioner

___/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 2016, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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