BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KIM GRAY Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2011-002751** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed May 5, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Idaho Falls, Idaho, on August 5, 2015. Claimant was represented by Robert Beck, of Idaho Falls. Paul Rippel, of Idaho Falls, represented State of Idaho, Industrial Indemnity Fund ("ISIF"), Defendant. Oral and documentary evidence was admitted. Post-hearing depositions were taken and the parties thereafter submitted briefs. The matter came under advisement on March 18, 2016.

ISSUES

The issues to be decided are:

1. Whether Claimant is totally and permanently disabled;
2. Whether ISIF is liable under Idaho Code § 72-332;
3. Apportionment under the *Carey* Formula; and
4. ISIF's entitlement to credit from Claimant's settlement in related civil litigation.

CONTENTIONS OF THE PARTIES

Claimant argues that he is totally and permanently disabled due to the combined effects of his pre-existing neck and back impairments and injuries sustained in his most recent accident of December 19, 2010. Defendant is responsible for apportioned benefits equal to Claimant's pre-existing impairments as they relate to Claimant's total disability. ISIF should not be allowed a credit under Idaho Code § 72-223 for Claimant's civil suit settlement arising from the 2010 accident, and certainly not on the gross amount of the settlement.

Defendant argues Claimant failed to establish the requisite criteria for recovery under Idaho Code § 72-332 and related case law. As such, ISIF is not liable to Claimant for any benefits. If Defendant was liable, it would be entitled to a credit under Idaho Code § 72-223 against Claimant's civil third-party settlement stemming from the subject accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's hearing testimony;
2. Claimant's Exhibits (CE) 1 through 15, admitted at hearing[1];
3. Defendant's Exhibits (DE) 1 through 4, admitted at hearing;

[1] It should be noted that contrary to the Order Governing Preparation of Exhibits issued in this matter, Claimant's exhibits were not organized in chronological order. For example, his exhibit 9 begins with records from May 2014, exhibit 10 records begin in October 2000, exhibits 11, 12, and 13 contain records from 1998, and exhibit 14 begins with physician records commencing in late 2014. This kind of jumbled record production makes it difficult to track Claimant's treatment, and vastly increases the likelihood that some record of import could be overlooked, or its significance unrealized when the Referee is reviewing the documents from first page to last. Also, there were numerous duplicate records, often appearing one right after the other. In the future, such haphazardly-organized and presented exhibits will be returned to the offending attorney for reorganization in a chronological fashion, as required by the above-referenced order.

4. The post-hearing deposition transcript of Kent Granat, taken on October 19, 2015; and

5. The post-hearing deposition transcript of Douglas Crum, taken on October 28, 2015.

All objections preserved during the depositions are overruled.

Having considered the evidence and briefing of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant has a ninth grade education and no GED. For the majority of his adult life, he was a truck driver. At the time of hearing he was 54 years old, married, and living in Idaho Falls.

Historical Injury Synopsis

2. In 1980, Claimant had right knee surgery. In 1998, he injured his low back and neck. Claimant had neck surgery that same year. He reinjured his neck in a motor vehicle accident several months after the surgery.

3. In January, 1999, Dr. Robert Ward, an Idaho Falls area chiropractor, conducted a medical evaluation on Claimant for the purpose of establishing an impairment rating. Using the American Medical Association's *Guides to the Evaluation of Permanent Impairment,* 4th edition, Dr. Ward assigned Claimant a 15% whole person permanent impairment due to ongoing occipital headaches, temporal headaches, and cervicothoracic spine injury. Dr. Ward opined that Claimant would be unable to perform strenuous activities indefinitely into the future.

4. In 2000, Claimant fell from the top of a truck. He injured his left shoulder, mid and low back. Eventually, Dr. Ward was again asked to rate Claimant's PPI from all his injuries. Dr. Ward calculated Claimant's whole person impairment to be 31% total combined as of February 19, 2002.

5. For the next several years, Claimant continued to have ongoing neck, back, and headache symptoms and complaints. He was also seen medically for radicular pain, both in his arms and legs, and right hand pain. He continued to drive long haul during this time.

6. Until late 2006, Claimant often hauled convertible flat bed trailers, which typically required throwing heavy tarps, strapping loads, and setting up the sides for cargo such as grain or sawdust. These activities were physically demanding. In 2004, Claimant began driving a truck which vibrated much less than his previous one. Also at that time, and into 2005, Claimant's brother and/or son drove with Claimant, and helped with the tarping and strapping on Claimant's flat bed trailer. These changes helped reduce Claimant's symptoms.

7. In late 2006, Claimant began pulling "reefer" or "dry box" trailers. These trailers did not require the physically-demanding tasks associated with the flat bed trailers. Claimant was not required to load or unload the cargo.

8. When Claimant converted to the box-type trailers in 2006, his symptoms improved greatly. He sought no medical care for his neck, back, or related symptoms after 2006 until December 19, 2010, the date of his most-recent accident.

9. While Claimant testified at hearing that he had no pain-free days from 2006 through 2010, his discomfort level was such that he controlled his aches, pains, and

headaches with an occasional over-the-counter pain medication. He continued to drive long-haul at the rate of seventy hours per week from 2006 through the middle of December 2010. Claimant's medical records show that just prior to his 2010 accident, his pain level was essentially 0/10, and he took OTC pain medication for headaches on average of once per month. He never had a "dirty" drug test during this time frame. His cross-examination hearing testimony is consistent with the medical records.

10. Claimant worked for six different trucking companies from 2006 through 2010. He would change carriers due to payment issues, or other practices which Claimant found objectionable. He had no trouble finding trucking employment. He was never fired. He was never unable to do his trucking duties during this time frame.

2010 Injury Discussion

11. On December 19, 2010, Claimant was sleeping in the "sleeper" compartment of his semi-truck cab (tractor) at the Echo Canyon rest area near the Utah - Wyoming border. While he was sleeping, a semi-truck owned by C.R. England sideswiped Claimant's rig, jostling him from the sleeper compartment into the cab. Claimant recalled waking up between the seats in his cab, with his truck shaking and the England truck scraping along the side of Claimant's tractor. Claimant managed to get the England driver's attention, and it stopped. Police investigated the incident.

12. The accident damaged Claimant's rig's power steering. He had to drive from Utah to Firth, Idaho with no power steering. By the time he arrived in Firth, Claimant was in severe pain between his shoulder blades. Claimant continued to drive truck thereafter, but was in pain the entire time. His areas of complaint included his head, neck, right arm and hand, mid to low back, and right leg.

13. Eventually Claimant returned to Stephen Marano, M.D., the Idaho Falls surgeon who performed Claimant's original neck surgery in 1998. In reviewing an MRI of Claimant's neck taken in February 2011, Dr. Marano noted Claimant's previous fusion at C6-7 was in tact, but Claimant had an osteophyte complex at C5-6, as well as disc protrusions at C3 and C4. Dr. Marano first recommended conservative treatment to treat Claimant's complaints. Next, a C6 nerve block injection was unsuccessful in relieving Claimant's ongoing symptoms.

14. Sarah Vlach, M.D. performed an EMG on Claimant's right upper extremity in early March 2011. She noted abnormal findings indicative of mild carpal tunnel syndrome, and evidence of right cervical radiculopathy. Surety did not authorize left-sided studies, so Claimant's left-sided complaints of that day went untested.

15. In May 2011, Dr. Marano performed an anterior discectomy and decompression, and fusion with plating surgery at C5-6. Claimant continued to have complaints post-surgery.

16. Claimant had more cervical injections throughout the fall of 2011. He continued to complain of pain in his arms, right more than left, with weakness and numbness in his right hand, as well as bi-lateral neck pain. On occasion, Claimant also experienced pain into his right leg and foot.

17. On January 10, 2012, Dr. Ward performed another independent evaluation at Claimant's request. At that time, Claimant complained of bilateral neck pain, right arm pain, and unaddressed left arm pain. Dr. Ward found Claimant was exaggerating his pain complaints on that day by approximately 50%, but felt it could have been Claimant's misunderstanding of the numeric pain scale. Dr. Ward did note Claimant sat continuously

for 75 minutes during the examination with no significant pain behaviors. Claimant indicated he could not lift, walk for long distances, or drive. He had current work restrictions of no lifting over 25 pounds, and no pulling with his arms. Claimant's upper extremities muscle strength was 4/5 on right and 5/5 on left.

18. Dr. Ward diagnosed Claimant as post C6-7 disc excision and fusion (from 1998) with C5-6 disc osteophyte complex and right-sided C6 radiculopathy. Dr. Ward noted Claimant was status post-C3-4 disc surgery, (which does not correlate with Dr. Marano's records, which show the surgery at C5-6). Dr. Ward rated Claimant's permanent impairment using the *AMA Guides to the Evaluation of Permanent Impairment*, 6th Ed. as follows; first surgery 4% whole person; second surgery 12%, with a net 8% whole person impairment from the 2010 truck accident injuries. Dr. Ward recommended further cervical surgery to address additional unspecified issues.

19. In December 2011, Claimant began pain treatment with Jason Poston,M.D., an Idaho Falls pain specialist, who treated Claimant well into 2012. In addition to prescribing pain medication, muscle relaxers, and gabapentin, Dr. Poston performed several cervical medial branch block injections. Subsequently, he began cervical radiofrequency ablation of Claimant's medial branch nerve when the injections did not provide adequate relief. The ablation procedure significantly reduced Claimant's headache pain, but his other complaints continued.

20. Dr. Poston ordered a repeat cervical MRI. The MRI, taken on August 14, 2012, showed mild interval increase in Claimant's posterior disc osteophyte complex at C4-C5, contributing to his moderate spinal canal stenosis, unchanged posterior disc osteophyte complex at C3-C4 contributing to moderate spinal canal stenosis with moderate

right-sided neural foraminal narrowing secondary to uncovertebral arthropathy, and unchanged postoperative changes from prior surgeries spanning C5-C7. While Dr. Poston's notes indicate he wanted to perform either additional ablation or epidural injections based upon the MRI findings, his records end with the MRI.

21. On December 5, 2013, Claimant presented to Brent Greenwald, M.D., an Idaho Falls neurosurgeon, in referral from Dr. Marano. Claimant continued to complain of pain from his neck into his arms (right worse than left) and down to the fourth and fifth fingers of each hand. He had trouble with his grip.

22. A subsequent EMG showed Claimant was suffering from moderate to severe carpal tunnel syndrome bilaterally, along with cervical stenosis and myelopathy.

23. On February 3, 2014, Dr. Greenwald performed a cervical discectomy fusion and fixation at C3-C4 and C4-C5, with previous hardware removal and cage placement from C3 through C5. He also performed a right-sided carpal tunnel release at the same time as the neck surgery.

24. Claimant's post-surgical course was varied. Through the three-month mark, he continued to complain of neck pain and pain in his right arm and weakness in his right hand. Claimant noticed an increase in migraine headaches after the surgery. Dr. Greenwald's notes indicated physical therapy was appropriate.

25. When Claimant presented six months post-surgery he stated his neck had not felt that good in years, and denied any pain in his arms. Claimant had a bit of numbness in his right hand immediately distal to the incision scar. Claimant's chief complaint on that day was lower back pain which increased with sitting for long periods.

26. At his October 2014 office visit, Claimant noted he had good and bad days, with continuing headaches and bilateral leg pain, worse on right. Dr. Greenwald recorded good lower extremity strength. His review of a recently-taken lumbar MRI showed no nerve root impingement. No further office notes are provided after this date.

DISCUSSION AND FURTHER FINDINGS

Odd-Lot Total Disability

27. The parties dispute whether or not Claimant was totally disabled under the odd-lot doctrine, a prerequisite to ISIF liability. *See e.g. Hope v. Indus. Special Indemn. Fund*, 157 Idaho 567, 571, 338 P.3d 546, 550 (2014), (*After* the Commission determines a worker is totally and permanently disabled, the worker must establish four elements to apportion liability to the ISIF….)

28. 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 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 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 cumulative effect of multiple injuries, the age and occupation of the employee at the time of the accident causing the injury, consideration being given to the diminished ability of the 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.

29. 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 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).

Kent Granat

30. As noted above, on January 31, 2012, Kent Granat prepared a Vocational Evaluation Report for Claimant.

31. Mr. Granat met with Claimant and took his educational and employment history. He also noted Claimant's self-reported limitations regarding lifting,

standing, walking, ability to do physical activity, reaching, and dexterity. Mr. Granat also reviewed some, if not all, of Claimant's medical records. He analyzed Claimant's income information back to 2007.

32. Mr. Granat felt that Claimant's self-reported limitations of,

- lifting no more than 5 to 10 pounds,
- standing for no more than 15 minutes,
- walking for one block,
- difficulties climbing stairs,
- sitting for no more than 30 minutes,
- headaches from physical exertion,
- hand and finger numbness causing lack of grip strength;
- neck and right arm pain when using right hand,
- limits on reaching, and
- difficulty in doing overhead work,

coupled with the medical records Mr. Granat reviewed, placed Claimant in a light-sedentary work category. Mr. Granat noted that post-2010 accident, Claimant attempted to return to his truck driving job, but after one trip to the Midwest, Claimant had such increased pain he was unable to continue in that profession.

33. Mr. Granat looked at the jobs which would fit within Claimant's transferable skill set, and determined that none of them were within the job limitations he set out for Claimant. Of the eleven transferable occupations, Mr. Granat noted five were medium-duty, and five were heavy physical labor. These were beyond Claimant's limitations.

One job, duct maker, was a light physical demand job. However, even that job exceeded Claimant's work modifications and limitations as suggested by Mr. Granat, which include,

- at-will position changes,
- rare to occasional reaching, grasping, and bi-lateral fingering, with no overhead reaching,
- avoiding positions requiring neck movement more than rarely; and
- avoiding cold temperatures, vibrations, heights, and moving machinery.

34. Mr. Granat found Claimant had no job opportunities within his capabilities, even when his transferable skills were considered. He had a 100% loss of labor market access.

35. On top of Claimant's total loss of labor market access, Mr. Granat calculated Claimant's loss of wage earning capacity to be 57.7% based on a "handful of occupations that have a Light-Sedentary physical demand, are unskilled or entry-level semi-skilled, and may match [Claimant's residual functional capacity]." CE 7 253.

36. Mr. Granat stated that if Claimant is found to be not totally disabled, then, using a combination of labor market access loss and earning capacity loss, at a minimum Claimant has a 78.9% permanent disability.

37. Mr. Granat felt that it would be futile for Claimant to attempt to look for work. Not only does he have a nearly 100% loss of labor market access, when he did attempt to return to trucking work after his 2010 injury, he was unable to sustain such employment due to increased pain levels. His lack of education, age, and paucity of transferable skills would further hamper Claimant's ability to find employment within his restrictions.

38. Mr. Granat prepared a (first) addendum to his initial report on March 3, 2012, after reviewing a labor market summary and COBRA information regarding Claimant's

health insurance coverage. The additional documentation did not alter Mr. Granat's ultimate conclusion on Claimant's status as totally and permanently disabled, but it did increase Claimant's estimated loss of earning capacity from 57.7% to 58.3%.

39. Mr. Granat also reviewed a labor market survey prepared by Dan Wolford of ICRD.[2] Apparently, the labor market survey listed jobs, ten in number, which Claimant could qualify to do. Mr. Granat dismissed each of the proposed jobs as violating the limitations which Mr. Granat assigned to Claimant.

40. On July 19, 2014, Mr. Granat prepared a (second) addendum to his vocational evaluation report. On that date, he reviewed a functional capacity evaluation report (FCE) prepared by Jay Ellis of Ellis Physical Therapy of Idaho Falls. The testing had been conducted on May 28, 2014, at Claimant's request.

41. Mr. Granat summarized his reading of the FCE by noting Claimant had increased pain in his neck and back during lifting, carrying, bending, reaching, prolonged sitting, and driving, with radiculopathy into the right hand and leg with lifting and carrying, but could sit or stand without significant pain complaints. Specifically, Mr. Granat noted Claimant's reported complaints were consistent with the FCE findings. The testing showed Claimant was limited in lifting, bending, standing and climbing, and should only occasionally (at most) lift and carry weight up to 40 pounds, but could frequently carry up to 15 pounds. Claimant could only occasionally walk or sit, (for less than 30 minutes), crouch, kneel, or work from elevation. Claimant demonstrated reduced grip and pinch strength in both hands. He had a reduced ROM in his neck, as well as some loss of ROM in his trunk, shoulders, and right wrist.

[2] This report was not identified in either party's exhibits, and does not appear to have been admitted as such. To the extent it was discussed in Mr. Granat's addendum, it will be considered.

42. In light of the FCE findings, Mr. Granat modified his previous restrictions to include lifting weighted objects from bench height only, with rare forward bending, standing, and ladder work. Mr. Granat also imposed restrictions for lateral trunk rotation, flexion and extension, as well as limiting shoulder movement and right wrist movement. Finally, Mr. Granat added restrictions of occasional crouching, kneeling, elevated work, and positional activity to his previously-imposed restrictions. However, he did raise Claimant's work category from light-sedentary to light.

43. The FCE findings did not change, but rather reinforced Mr. Granat's belief that it would be futile for Claimant to look for suitable work.

44. Claimant's counsel sent a letter of January 7, 2015, to Mr. Granat, along with selected medical records, and asked him to "identify the pre-existing vocational issues and physical limitations from the neck impairments that combine with the physical limitations from [Claimant's] last accident in December of 2010 to render him totally and permanently disabled." CE 7 267. In response, Mr. Granat prepared his third addendum, entitled Vocational Evaluation Report – Addendum #2, dated January 10, 2015. Therein, he listed findings from Claimant's earlier injuries, and his non-medical factors, and summarized some post-2010 medical records. He did not, and was not asked to, opine on whether he felt Claimant's total disability was due to a combination of the 2010 accident and Claimant's previous injuries and conditions.

45. In that same January 7 letter, Mr. Granat was asked to opine on his belief regarding Claimant's subjective hindrance to employment due to his pre-2010 conditions, and his response was discussed above. Finally, Mr. Granat was asked if Dr. Greenwald's 2014 surgery changed any of his opinions, and he affirmed the surgery did not alter his opinions.

Douglas Crum

46. Defendant hired vocational rehabilitation consultant Douglas Crum to "evaluate the case on the basis of potential for ISIF liability from the standpoint of combined impairments and restrictions for all conditions." DE 1 421. He prepared a written report on May 20, 2015. He was subsequently deposed.

47. Mr. Crum began his written report by compiling a detailed, eleven page medical history summary. He also met with Claimant. At the time of the interview, Claimant listed the following subjective complaints;

- neck and low back pain made worse by vibration, and walking more than 30 minutes; prolonged sitting, standing or lifting bothers low back;
- self-limits lifting to 30 pounds maximum; uncertain of specific physician-imposed lifting restrictions;
- neck improved since last surgery (2014 with Dr. Greenwald); not taking pain medications, but turning neck can flare pain;
- arm pain is reduced, but still present in bilateral forearms, with about a 4/10 pain level;
- since carpal tunnel surgery, hands are better and no longer wake him at night;
- reports hearing loss, and tinnitus for past 4-5 years, since 2010 accident;
- feet swell at night and bilateral knee pain – wonders if its from his low back;
- driving causes neck pain, headaches, shoulder pain, and back stiffness.

DE 1 433. Mr. Crum also reviewed Claimant's educational and employment history. Claimant related that he had not applied for any jobs over the past two years, and had only

applied for one job since his 2010 accident. He was not hired. He was receiving Social Security disability payments of over $1500 per month; the payments had been ongoing for about two years.

48. After summarizing Claimant's work/medical history since 1998 to the time of the report, Mr. Crum opined that Claimant was not totally disabled, whether due to his 2010 accident, his pre-existing impairments, or some combination thereof. Further Mr. Crum stated "with his current restrictions, including the FCE, a sustained and competent job search would not be futile." DE 1 439.

49. As support for his opinions, Mr. Crum noted that Claimant was asymptomatic for 3-4 years prior to his 2010 accident, and was able to consistently work 70 hour weeks driving "no touch" loads long haul. Prior to the 2010, Claimant was not given any permanent restrictions which would result in total disability. In fact, while Dr. Ward recommended against "strenuous work" indefinitely, he never defined the term in terms useful to a vocational analysis.

50. Mr. Crum was critical of the May 2014 FCE. First, he noted the restrictions imposed by the FCE were not echoed by any physician, nor "endorsed" by any doctor. Mr. Crum felt the FCE was "an outlier" regarding Claimant's restrictions. DE 1 439. Mr. Crum also noted discrepancies between the FCE notes and Claimant's deposition testimony regarding his low back and knee pain.

51. Mr. Crum pointed out that by July 2014, Dr. Greenwald indicated Claimant's low back was his biggest issue after his last surgery, while his neck felt better than it had in years. At that time Claimant also denied pain in his arms, and only a little painful numbness near the incision site of his carpal tunnel surgery.

52. Mr. Crum felt the FCE placed Claimant at the upper end of light to medium category of physical demand activities. Mr. Crum felt that Claimant could possibly even return to "no touch" truck driving, which is common in the trucking industry, although Mr. Crum did note that Dr. Greenwald indicated Claimant had pain in his low back, and down his legs, which was worse when Claimant sat for a long time. Finally, Mr. Crum felt Claimant had a disincentive to return to work once he got on Social Security, and in fact looked only once for work and none since he began receiving such payments.

Vocational Expert Comparison

53. Both vocational experts were highly critical of the other's opinions and methodology. For example, in his deposition, Mr. Granat could not wait to excoriate Mr. Crum – even re-directing Claimant's attorney's questions to "get to Mr. Crum's report, [so] I can point out what he doesn't say…." Granat depo. p. 21, ll. 5,6. For his part, Mr. Crum was critical of Mr. Granat's over-reliance on Claimant's subjective complaints and the FCE, without addressing what restrictions, if any, a physician placed on Claimant. The two positions will be briefly reviewed below.

Criticism of Mr. Crum's Report

54. Mr. Granat felt Mr. Crum's report could be summarized as "unless a doctor has specifically given a person a physical restriction, my hands are tied, and I [the vocational rehabilitation expert] can do nothing." Granat depo. p. 21, ll. 23-25; p. 22, ll. 1,2. Mr. Granat felt the proper approach when there are no physician restrictions is for the vocational rehabilitation expert to use his or her best professional judgment to determine what the person's restrictions may be. Mr. Granat pointed out that he combined Claimant's medical records with Claimant's self-reporting to come up with proper restrictions for Claimant. Mr. Granat noted

that in 1999 and 2002, Dr. Ward indicated Claimant should not be involved in strenuous work. Mr. Granat was dismayed that Mr. Crum felt that admonition was not specific enough to be useful.

55. Mr. Granat also denounced Mr. Crum's analysis of Claimant's FCE. Mr. Crum noted the FCE was never "endorsed" by any of Claimant's physicians, and therefore was of little use in analyzing his restrictions. Regardless of whether a physician gave Claimant restrictions, (which Mr. Granat believes doctors are oftentimes "uncomfortable" doing), Mr. Granat felt the FCE findings "fit right into what [Claimant's] restrictions are."[3] Granat depo. p. 25, ll. 2,3.

56. Mr. Granat scoffed at Mr. Crum's suggestion that Claimant, based on FCE finding, could still drive a truck. Mr. Granat felt Mr. Crum must have made the statement tongue in cheek, since Mr. Crum was dismissive of the FCE findings, but then used those findings to point out that based on the FCE Claimant could return to "no touch" trucking. Also, Mr. Granat was disappointed that Mr. Crum did not set out real jobs that Claimant could do. Finally, Mr. Granat thought it was farfetched that Claimant might not want to look for a job once he started receiving Social Security payments, since those payments were not even half of what Claimant made in his previous profession.

57. During his deposition, Mr. Crum was able to elaborate on his report. Mr. Crum was critical of the FCE because the recommendations flowing from it were never reviewed or commented upon by any physician. Mr. Crum felt the FCE was not "medical evidence." He also felt the FCE's restrictions were not in line with the remainder of the medical evidence, and contained limitations on such things as kneeling, bending, twisting, and stooping, which were never discussed in any medical record as issues afflicting Claimant.

[3] The Referee assumes Mr. Granat means the restrictions he set out for Claimant in his original report, since Mr. Granat acknowledged no physician had given Claimant specific permanent restrictions after his 2010 accident.

58. Mr. Crum agreed Claimant might be too limited in sitting to return to long haul trucking, but did list several jobs Claimant should be able to do. Those included shuttle driver for a car dealership, car rental company, or retirement home. Claimant could work as a recreational vehicle delivery transport driver. Mr. Crum felt Claimant could work in fast food.

59. Mr. Crum reiterated his belief that Social Security payments could be a disincentive for work. On Social Security, people can only work a limited amount or lose their benefits. Mr. Crum has seen very few times when people choose work over the benefits.

60. Finally, Mr. Crum felt Claimant did not perform a competent, sustained job search. He did not utilize services available to him, such as a professional job developer like the ICRD, or veteran's representatives at his local job services office, who are people specifically employed to help veterans like Claimant.

61. Mr. Crum defended his positions during spirited cross-examination. Mr. Crum acknowledged he typically relies on physician recommendations for physical capacities. Therefore an FCE not reviewed and adopted by a physician is not useful to his analysis. Mr. Crum testified he does not have the expertise to fashion restrictions based upon the employee's complaints. He relies solely on physicians to do that.

Criticism of Mr. Granat's Report

62. Defendant notes a number of issues with Mr. Granat's report and methodology. First, it notes Mr. Granat did not review and consider all of Claimant's medical records. Specifically, he had not seen those from Dr. Gary Walker. In his report, he only mentions the records helpful to his position. He based his opinion on those selected records, and Claimant's subjective complaints, without fully considering the entire record. He asserted, based on FCE findings, that Claimant could not grip with his right hand, and needed to lie down for two hours

per day due to headaches. There are no medical records to support these assertions. Defendant also notes Mr. Granat relied on records from 1999 and 2002 to impose restrictions, even though he acknowledged that Claimant was essentially symptom-free from 2007 through most of 2010. Finally, Mr. Granat heavily relied on the FCE performed just three months after Claimant's February 2014 neck surgery, at a time when Claimant was still in a period of recovery. Eventually, and after the FCE, Claimant reported improvement in his symptoms from that surgery.

63. Mr. Crum was also critical of Mr. Granat's methodology. He noted Claimant was not medically stable at the time of his FCE, so use of that procedure in determining disability would not be valid. Also, Mr. Crum felt the most important information to consider is the physician testimony; for a non-physician, such as Mr. Granat, to assign restrictions, mainly based upon Claimant's self-reporting, and then reach disability conclusions based upon those assigned restrictions, is inappropriate. Finally, Mr. Crum did not feel it would be futile for Claimant to seek employment based upon one unsuccessful job inquiry.

Total Permanent Disabilty Conclusion

64. Claimant bears the burden of proving that he is totally and permanently disabled under the odd-lot doctrine. He has chosen to attempt to meet his burden by utilizing the third prong under the *Lethrud* test, by showing that any efforts to find suitable work would be futile. He did not attempt to find work to any significant degree – one job inquiry is not a good faith job search. No physician imposed restrictions of such a magnitude that it would be futile for Claimant to even *attempt* to find work. After Claimant reached MMI following his February 2014 neck and carpal tunnel surgery, his symptoms lessened. While he

had significant pain while driving his motor home to go fishing on one occasion, that isolated incident can not be extrapolated to prove Claimant could not work in any capacity.

65. Mr. Granat relied too heavily on Claimant's subjective complaints, did not consider all medical records, and fashioned restrictions on his own, which then he defended by noting he has reviewed a lot of medical records over the years and was therefore qualified to impose restrictions. Using his own restrictions, he then found Claimant would not be able to find work in line with his restrictions. He bolsters his opinion by utilizing an FCE undertaken while Claimant is in a period of recovery from neck surgery. This approach is inappropriate for workers' compensation proceedings. *Accord. Erickson v. State of Idaho, Industrial Special Indemnity Fund*, IC 2007-012947 (January 19, 2016) (Claimant's vocational expert's view discounted in part because the opinions were materially based upon Claimant's subjective reporting.)

66. Mr. Crum may have been a bit myopic in his approach to considering Claimant's disability. Certainly, Claimant's subjective complaints and FCE should have some relevance to the forensic vocational rehabilitation expert; otherwise, why interview the Claimant. To ignore subjective complaints and the FCE is not appropriate. However, Mr. Crum was reasonable to look first to what physician-imposed restrictions are in play. Physicians are uniquely positioned and trained to impose restrictions to prevent further injury to the patient. It is not the job of vocational rehabilitation counselors to fashion such restrictions. Mr. Crum's opinion carries more weight.

67. Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Indus.,* 136 Idaho 733, 40 P.3d 91

(2002); *Boley v. State, Industrial Special Indem. Fund,* 130 Idaho 278, 939 P.2d 854 (1997). In the present case, it appears that several of the jobs listed by ICRD and/or Mr. Crum could be within Claimant's abilities, with little to no training. For example, security guard, hotel desk clerk (as proposed by ICRD), and shuttle driver for various entities (as proposed by Mr. Crum) certainly appear to fall within Claimant's capabilities.

68. When considering the totality of the evidence, both medical and vocational, and Claimant's non-medical factors, Claimant has not met his burden of establishing that it would be futile for him to seek employment, and that he is totally and permanently disabled under the odd-lot doctrine.

69. Since Claimant has not shown he is totally disabled, the remaining noticed issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove he is totally and permanently disabled as an odd lot worker;

2. All other issues are moot.

RECOMMENDATION

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

DATED this 15th day of April, 2016.

INDUSTRIAL COMMISSION

___/s/_____
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of May, 2016, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

ROBERT BECK
3456 E 17TH ST, STE 215
IDAHO FALLS ID 83406

PAUL RIPPEL
428 PARK AVE
IDAHO FALLS ID 83402

___/s/_____

jsk

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KIM GRAY Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2011-002751** **ORDER** Filed May 5, 2016

Pursuant to Idaho Code § 72-717, Referee Brian Harper submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations.

Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

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

1. Claimant has failed to prove he is totally and permanently disabled as an odd lot worker.

2. All other issues are moot.

3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to

all matters adjudicated.

DATED this 5th day of May, 2016.

INDUSTRIAL COMMISSION

Not available for signature
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 5th day of May, 2016, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

ROBERT BECK
3456 E 17TH ST, STE 215
IDAHO FALLS ID 83406

PAUL RIPPEL
428 PARK AVE
IDAHO FALLS ID 83402

___/s/_____

jsk