BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

EUGENE HOPWOOD, Claimant, v. KIMBERLY SEEDS INTERNATIONAL, Employer, and STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2005-505872** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed January 15, 2014**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Twin Falls on April 9, 2013. Claimant was present and represented by Patrick D. Brown of Twin Falls. Neil D. McFeeley of Boise represented Employer/Surety. Thomas B. High of Twin Falls represented State of Idaho, Industrial Special Indemnity Fund (ISIF). Oral and documentary evidence was presented. The record remained open for the taking of two post-hearing depositions. This matter came under advisement on August 23, 2013 and is now ready for decision. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own Findings of Fact, Conclusions of Law and Order.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant's condition is due in whole or in part to a pre-existing injury or disease not work-related;

2. Whether and to what extent Claimant is entitled to reasonable and necessary medical care;

3. The determination of Claimant's average weekly wage;

4. Whether and to what extent Claimant is entitled to total temporary or temporary partial disability benefits (TTD/TPD);[1]

5. Whether Claimant is entitled to total permanent disability benefits pursuant to the odd-lot doctrine or otherwise;

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

7. Whether the *Carey* formula should apply; and

8. In the event Claimant is found to be less than totally and permanently disabled, whether apportionment pursuant to Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

The primary issue here is the extent of Claimant's disability above impairment, if any. Claimant contends that he is totally and permanently disabled as an odd-lot worker when taking into account his subjective limitations on his ability to walk, stand, or sit for any significant amount of time. He attributes those restrictions and his inability to work solely to a hip injury he sustained in his last industrial accident. While Claimant admits that he is of retirement age and is receiving Social Security Retirement benefits, and has

[1] Claimant withdrew this issue at hearing, and it will not be decided.

stated to others that he does not want a full-time job, he nonetheless would be willing to work within his restrictions if suitable work could be located. He has conducted a reasonable job search, and a further search would be futile.

Employer/Surety contend that Claimant is not totally and permanently disabled if Claimant's self-imposed restrictions are not considered. No physician has imposed restrictions on Claimant's ability to walk, sit, or stand, nor has Claimant made any complaints regarding the same to any physician. Further, Claimant conducted no real job search and considers himself to be retired. Claimant continued to work at his time-of-injury job for over three years after his industrial accident and is able to drive a beet truck as is evidenced by a harvesting job he obtained after his last hip surgery. In the event the Commission disagrees and finds Claimant to be totally and permanently disabled, liability should be apportioned between Surety and ISIF, as such disability would be the result of a combination of Claimant's last hip injury and various pre-existing conditions.

ISIF also argues that Claimant is not totally and permanently disabled by any method. It would not be futile for Claimant to seek employment. Claimant's self-imposed ambulatory restrictions were not medically assigned or approved. Claimant's stated desire to be retired certainly plays a role in his less-than-stellar job search endeavor. Without considering Claimant's self-limiting restrictions, there are jobs available within his labor market that he can perform. In the event that the Commission disagrees, Claimant's total disability was the result of his last accident alone and not by any combination with pre-existing injuries or conditions.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and his vocational expert Nancy Collins, Ph.D., adduced at the hearing.

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

3. Employer/Surety's Exhibits A-K, admitted at the hearing.

4. ISIF's Exhibits 101-107, admitted at the hearing.

5. The post-hearing deposition of orthopedic surgeon R. Tyler McKee, taken by Claimant on April 23, 2013.

6. The post-hearing deposition of vocational consultant William C. Jordan, MA, CRC, CDMS, taken by Employer/Surety on May 9, 2013.

All objections made during the taking of the above-referenced depositions are overruled.

PRELIMINARY MATTERS

On August 12, 2013 Employer/Surety filed their closing brief, along with a Motion to Strike Or For Sanctions against Claimant's opening brief as being untimely. The Order Establishing Briefing Schedule (requested by Claimant) filed June 4, 2013 initially gave Claimant until June 24, 2013 to file his opening brief. On June 27, 2013, Claimant was granted an extension to July 9, 2013 to file his opening brief, even though Claimant's Motion for Extension was untimely. When Claimant's opening brief was not filed on or before July, 19, 2013, the Referee's administrative assistant contacted Claimant's counsel, who informed her that he had misread the amended briefing schedule and believed his opening brief was not due until July 19, 2013 (the date he filed his opening brief). Based thereon, a Second Order Amending Briefing Schedule was filed on July 22, 2013, allowing

Defendants more time within which to file their respective closing briefs and allowing Claimant additional time for filing his reply brief (filed one day after the due date).

Because Defendants were allowed additional time to file their respective briefs and based on Claimant's counsel's representations that he misread the date upon which his brief was due, Employer/Surety's motion is DENIED.

On August 16, 2013, ISIF filed its objection to Employer/Surety's references to knee ostearthritis on the ground that no such diagnosis was ever made by a medical doctor and Employer/Surety's counsel is not a medical doctor and, based on *Mazzone v. Texas Roadhouse, Inc.*, 39337 SC2 IIC 1308 (2013), any references in ISIF's closing brief to any undiagnosed knee condition should be stricken.

Employer/Surety responded, "Although counsel for Employer/Surety does have a Ph.D. (University of Texas at Austin, 1975) and is entitled to be addressed as "Dr.," he has been unable to convince either the Industrial Commission Referees or his spouse to so address him. He does admit that he does not have an M.D." *See,* Defendants Kimberly Seeds International and State Insurance Fund's Response to the State of Idaho, Special Indemnity Fund's Objection to Defendants Kimberly Seeds International and State Insurance Fund's Closing Brief and Motion to Strike, p. 2, FN 1.

Employer/Surety also attached a chart note from Kurt Seppi, M.D., dated March 9, 2005, where in he noted, "Also some bilateral knee pain due to arthritis." There is no doubt that Claimant was experiencing bilateral knee problems both before and after his last industrial accident, even though he never sought treatment specifically for his knees and never obtained a PPI rating or had restrictions assigned for any knee condition. Therefore, ISIF's Motion to Strike is DENIED. However, the Commission will not be

persuaded by any references by Employer/Surety to "osteoarthritis" or "arthritis" of Claimant's knees without medical support.

On August 23, 2013, in his Reply Brief, Claimant responded to Employer/Surety's motion to strike Claimant's opening brief as untimely by asserting that Employer/Surety's brief was also untimely. However, such is not the case as Employer/Surety's brief was filed on August 12, 2013, the date it was due based on the Second Order Amending Briefing Schedule. Claimant's Motion to Strike Employer/Surety's brief is DENIED.

FINDINGS OF FACT

1. Claimant was 69 years of age and residing in Twin Falls at the time of the hearing.

2. His education was through the 11th grade at Buhl High School. He obtained his GED at CSI in 1964 or 1965. He has no further formal education.

3. Claimant's work history consists of mostly labor intensive agricultural-type jobs including as a laborer on farms and dairies and, for a while, as a miner and as a laborer at a fish farm. According to Claimant, he has worked hard all his life.

4. Claimant began working in Employer's seed warehouse in 1994. His time-of-injury job was as an electric "color machine" operator sorting beans and peas and involved "Setting up the machines to pick different colors out of product, running Hyster, dumping boxes, feeding the machine, taking finished product away, putting them away in the warehouse." Hearing Transcript, p. 20.

5. Prior to the subject accident, Employer had installed a one-floor elevator between the warehouse's basement and main floor because Claimant's knees could no longer navigate the stairs between the two floors. On January 19, 2005, Claimant was

ascending in the elevator when its cable broke and the elevator and Claimant fell an unknown distance to the basement floor, injuring Claimant's right hip.

6. On February 8, 2005, Claimant presented to Employer's preferred provider, Kurt Seppi, M.D., complaining of: "Back pain. Sixty-one-year-old with five-day history of low back pain. No appreciating trauma, but he does remember slipping at work and twisting his back slightly a day or two before the pain became severe."[2] Claimant's Exhibit G, p. 296. Dr. Seppi diagnosed right low back pain with spasms. He took Claimant off work for two days and released to regular work after that if symptoms did not persist. Claimant was prescribed pain medications, instructed regarding a home exercise program, and advised to quit smoking. Claimant did not mention any hip pain or problems walking, sitting, or standing.

7. Claimant saw Douglas Stagg, M.D., (Dr. Seppi's partner) on March 9, 2005 complaining of mid-thoracic-low back and right hip pain. He was having trouble working. Claimant revealed for the first time the elevator incident and that it was a workers' compensation claim. Claimant did not mention right hip pain. Thoracic and lumbar spine x-rays showed significant degenerative changes but no acute pathology. Dr. Stagg noted that, "He ambulates a bit stiffly, slowly and cautiously." Claimant's Exhibit G., p. 302. Dr. Stagg took Claimant off work and prescribed physical therapy and continued with his previously prescribed medications.

8. Claimant returned to Dr. Stagg on March 14, 2005 with improving but persistent right mid and low back and hip strains. Claimant had been to physical therapy

[2] Although not contained in Dr. Seppi's records, Claimant testified at hearing that ". . . it finally got to [*sic* – where] I couldn't even walk." *See,* Hearing Transcript, p. 34.

twice with some improvement in his symptoms. Dr. Stagg continued to keep Claimant off work.

9. On March 16, 2005, Dr. Stagg released Claimant to return to work with restrictions.

10. In a return visit to Dr. Stagg on March 23, 2005, Claimant was "miserable." Even so, Dr. Stagg noted, "He ambulates without difficulty with a normal gait." *Id.*, p. 306. Dr. Stagg again took Claimant off work.

11. On March 28, 2005, Dr. Stagg released Claimant to sedentary work and continued treating him conservatively.

12. On April 5, 2005, Dr. Stagg noted that he wanted Claimant to try to remain active with plenty of walking.

13. On April 11, 2005, Dr. Stagg released Claimant to regular work.

14. On April 19, 2005, Dr. Stagg noted that Claimant was tolerating work, and ambulating without difficulty with a normal gait. He released Claimant from his care.

15. Claimant returned to Dr. Stagg on May 27, 2008 with a chief complaint of right hip pain. He informed Dr. Stagg that he had been working since his April 19, 2005 unrestricted work release, "He said his mid and low back have done fine since. He said his right hip had never completely got back to normal but he continued to work with it and now he is noticing about the last year and a half gradually increasing right hip pain." *Id.,* pp. 333-334. Dr. Stagg continued Claimant on regular duty work and referred him to orthopedic surgeon R. Tyler McGee.

16. Claimant first saw Dr. McKee for his right hip problem[3] on June 5, 2008. One week later, Dr. McKee performed an arthroscopic trochanteric bursectomy on Claimant's right hip. By September 3, 2009, Dr. McKee wrote, "I told him (Claimant) I am disappointed with the surgery results and I really expected a much better outcome." Claimant's Exhibit F, p. 256.

17. Based on a diagnosis of a rupture of the anterior portion of the gluteus medius, Dr. McKee performed an adductor repair for the right hip as well as a Z-plasty lengthening of the right IT band on December 21, 2009.

18. Dr. McKee found Claimant to be at MMI as of May 18, 2010 and released him to return to work with restrictions (to be discussed later).

DISCUSSION AND FURTHER FINDINGS

19. The Idaho Workers' Compensation Act places an emphasis on the element of causation in determining whether a worker is entitled to compensation. In order to obtain workers' compensation benefits, a claimant's disability must result from an injury, which was caused by an accident arising out of and in the course of employment. *Green v. Columbia Foods, Inc.,* 104 Idaho 204, 657 P.2d 1072 (1983); *Tipton v. Jannson*, 91 Idaho 904, 435 P.2d 244 (1967).

20. The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Linen Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Dravo*

[3] Dr. McKee had previously performed a left shoulder rotator cuff repair on Claimant in January 2008.

Corporation, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973), *overruled on other grounds by Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000). *See also*, *Callantine*, *Id*.

21. The Idaho Supreme Court has held that no special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.,* 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Mfg. Co., Inc*., 124 Idaho 946, 866 P.2d 969 (1993).

22. Finally, it is well settled in Idaho that the Workers' Compensation Law is to be liberally construed in favor of the claimant in order to effect the object of the law and to promote justice. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). However, our Supreme Court has also held that the Commission is not required to construe facts 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).

Is Claimant's condition due in whole or in part to a pre-existing injury or disease or cause not work-related?

23. While there is evidence in this matter that Claimant suffered from various pre-existing injuries or conditions (to be discussed later), there is no evidence that any of these pre-existing injuries or conditions caused the condition(s) for which Claimant seeks benefits. Employer/Surety does not dispute that Claimant's last industrial accident resulted in an 8% lower extremity PPI for his right hip injury.

24. The Commission finds that Claimant's right hip injury was caused solely by his industrial accident (the elevator incident).

Reasonable medical care

25. Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See Sprague v. Caldwell Transp., Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

26. Claimant is entitled to ongoing reasonable medical care for his compensable injury. However, it does not appear that any specifically proposed treatment is in dispute at this time.

Average weekly wage

27. The parties agree that Claimant's average weekly wage is $500.00.

PPD/Odd-Lot

28. "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 impairment and by pertinent non-medical 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 the 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, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

29. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Co.*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

30. Both Nancy Collins, Ph.D., and Bill Jordan, MA, CRC, CDMS, were retained to render opinions on the extent and degree of Claimant's disability. Their reports and testimony are relevant to the determination of whether Claimant is totally and permanently disabled, and if not, the extent and degree of his less than total impairment and disability. Because of the peculiar facts of this case, both Dr. Collins and Mr. Jordan offered several alternative opinions on the extent and degree of Claimant's disability based on a variety of assumptions concerning Claimant's permanent physical limitations/restrictions. These opinions warrant examination in some detail.

William Jordan

31. Mr. Jordan was retained by Employer/Surety for the purpose of conducting a vocational evaluation. Mr. Jordan's credentials and qualifications are well known to the Commission, and will not be repeated here. Mr. Jordan met with the Claimant on November, 9, 2012. In conducting his evaluation of Claimant's residual employability, he assumed that Claimant had the limitations/restrictions imposed by Dr. McKee in connection with the hip injury. He testified, and his report reflects, that he was unaware of any other physician-imposed limitations/restrictions. However, in performing his evaluation Mr. Jordan also considered Claimant's subjective limitations/restrictions. (*See* Jordan Deposition pp. 38, l. 23 – 52, l. 20). Claimant's subjective limitations arise from his pre-existing neck, knee and shoulder injuries, as well as from the subject accident. As noted, Claimant described significant subjective limitations against standing, walking, and sitting because of his hip injury, limitations which have not been imposed by Dr. McKee. Because Claimant's subjective limitations/restrictions are much greater than those imposed by Claimant's treating physician, Mr. Jordan evaluated Claimant's disability under two sets of assumptions. First, he evaluated Claimant's disability under the assumption that Dr. McKee identified Claimant's only relevant limitations/restrictions. Utilizing these restrictions, he arrived at the following synthesis of Claimant's disability:

> Q. Based on what you did you came to certain conclusions regarding the claimant's disabilities; is that correct?
> A. Yes, I did.
>
> Q. And, again, I think you have laid those out in the report. But what is your understanding or what is your analysis of the difference or the effect of the specific medical restrictions on the wage earning capacity?
> A. If you look at what he was able to make at the time of the injury, which was $12.50, it looks like he would have been able to do an average of $10.55 per hour in other jobs he could pursue. So that would be wage loss of about 16 percent.

Q. And then did you also do an analysis of the access to labor market loss?
A. Yes, I did. And because he has light work recommendations with no repetitive squatting, no repetitive kneeling, no repetitive stair climbing, and no repetitive ladder climbing, he had a reduction in his labor market of about 46 percent.

Q. And that includes – as part of that analysis you assumed that the no repetitive stair climbing and so on was due exclusively or entirely to the hip injury; is that correct?
A. Yes.

Q. So you didn't calculate what, if anything was due to the knee as compared to the hip; is that correct?
A. No, I did not.

Q. So you did the wage loss and the labor market access. What did you do then?
A. I averaged these two figures together as the commission has outlined that this is what we should do in figuring suggested PPD ratings. And it came out to be 31-percent PPD suggestion as it relates to the hip injury. And that is inclusive of PPI.

Jordan Deposition, pp. 36, l. 16 – 38, l. 1.

In his next scenario, Mr. Jordan evaluated Claimant's disability under the assumption that Claimant's subjective sense of his limitations/restrictions for both his pre-existing conditions and his accident-caused condition accurately describe his functional capacity. Under these assumptions, Mr. Jordan described Claimant's disability as being total and permanent:

> The first scenario considers Claimant's current perceptions of his functional abilities (as noted in deposition testimony as well as expressed during the vocational interview). Despite the variety of medical conditions Claimant experienced pre-injury (regarding his shoulders, finger, back, knees, etc.), he had demonstrated a full capacity to work prior to the 01/19/05 injury. Although there do not appear to be any medical documentation concerning restrictions, limitations relating to the various pre-existing medical conditions. Combining his current perception of how his other maladies impacted his employability prior to the injury with documented restrictions from his treating physician for the 01/19/05 injury, the Claimant would not be capable to employment as a result of the combines effects of his pre-existing conditions and the 01/19/05 right hip injury.
>
> Jordan Deposition Exhibit 1.

Parenthetically, the quoted excerpt does not specifically reflect that among Claimant's subjective limitations/restrictions considered by Mr. Jordan are those against standing, walking, and sitting which Claimant related to the hip injury. However, Mr. Jordan's deposition testimony strongly suggests that he considered the universe of Claimant's subjective limitations/restrictions when evaluating Claimant's disability under scenario 1. (*See* Jordan Deposition, pp. 38, l.23-40, l. 25).

32. In summary, per Mr. Jordan, if Claimant is taken at his word, and full credence is given to his subjective limitations/restrictions, Claimant is totally and permanently disabled. On the other hand, if Claimant's limitations/restrictions are as assigned by Dr. McKee, Claimant is physically able to perform his time of injury job, and many other light duty jobs as approved by Dr. McKee. He has therefore suffered a disability in the range of 31% of the whole person, inclusive of impairment.

Nancy Collins

33. Like Mr. Jordan, Dr. Collins struggled with how to evaluate Claimant's disability in light of physician-imposed limitations/restrictions, which differed significantly from Claimant's subjective sense of what he could and could not do.

34. For purposes of her evaluation, Dr. Collins assumed that Claimant was given certain physician-imposed limitations/restrictions on a pre-injury basis. Her report reflects that Robert Porter, M.D., gave Claimant permanent limitations/restrictions in 1999 following shoulder surgery. Dr. Porter advised Claimant to avoid repetitive lifting involving over 30 to 40 pounds, and also recommended he avoid work above shoulder level. Dr. Collins was unaware of any other physician-imposed limitations/restrictions pre-dating the subject accident. However, Dr. Collins believed that these limitations/restrictions imposed by Dr. Porter in 1999 were sufficient to limit Claimant to medium duty work. Dr. Collins opined that on a pre-injury

basis, Claimant had access to 21 different occupations. As a result of the medium duty restrictions imposed by Dr. Porter, Claimant lost access to all but 13 of those occupations, resulting in a loss of access to the labor market of 38.1%. (*See* Claimant's Exhibit Q at 441). Next, Dr. Collins considered the impact of the limitations/restrictions imposed by Dr. McKee, but excluding Claimant's subjective sense that the 2005 injury left him with an inability to walk stand or sit for any significant period. Dr. Collins opined that the restrictions imposed by Dr. McKee limited Claimant to light-duty work. Increasing Claimant's limitations/restrictions to light duty, afforded Claimant access to only two of the 21 occupations, thus resulting in a loss of labor market access of 90.5%. Therefore, assuming only the physician-imposed limitations/restrictions, Claimant had loss of labor market access of 90.5% from all causes.

35. At page 9 of her report, Dr. Collins used another method to calculate Claimant's loss of access to the labor market due to the subject accident. Using figures from the South Central Idaho Employment and Wage Survey of 2010, Dr. Collins attempted to determine how many medium duty jobs would be taken away from Claimant as a result of more stringent light duty restrictions. Unlike the Skill Tran Analysis she described on page 8 of her report, the loss of labor market analysis she performed using the South Central Idaho Employment and Wage Survey of 2010 used, as its starting point, jobs for which Claimant could compete with his medium-duty restrictions. From this starting point, Dr. Collins proposed that the imposition of light-duty restrictions caused Claimant to lose access to 64% of the medium duty jobs he had been able to perform immediately prior to the subject accident. The analysis performed by Dr. Collins at page 9 of her report does not yield an estimate of Claimant's loss of labor market from all causes, only an estimate of the number of medium duty jobs he lost as a consequence of the subject accident. In summary, when considering only Claimant's physician-imposed

limitations/restrictions, the only analysis provided by Dr. Collins which affords a picture of Claimant's loss of labor market from all causes, is the portion of the Skills Tran Analysis which identifies a 90.5% loss of access to the labor market from Claimant's physician-imposed light duty restrictions. This is in significant contrast to Mr. Jordan's opinion that Claimant has suffered a 46% loss of labor market access as a result of the limitations/restrictions imposed by Dr. McKee.

36. Like Mr. Jordan, Dr. Collins, too, considered whether Claimant had suffered any wage loss as a consequence of the subject accident. Mr. Jordan compared Claimant's time of injury hourly wage of $12.50 per hour with what he thought Claimant could earn after reaching medical stability, i.e. $10.55 per hour. This comparison of Claimant's pre-injury and post-injury wage earning capacity yields a loss of 16%. Dr. Collins acknowledged that Mr. Jordan utilized the correct time of injury hourly wage, but noted that in the last full year Claimant worked before the subject accident he earned $38,964.00. Assuming a 2,080 hour work year, Claimant earned, on average, the equivalent of $18.73 per hour. Therefore, per Dr. Collins, the correct calculation is to compare an hourly wage of $18.73 per hour to what Claimant could be expected to earn at the present time, $8.00 to $11.00 per hour per Dr. Collins. The mid-point of this range yields a loss of wage earning capacity in the range of 50%.

37. The wage loss calculations made by both Mr. Jordan and Dr. Collins start with Claimant's time of injury wage, <u>not</u> the wage he could have been expected to earn before he developed the medium duty restrictions from which he suffered at the time of the subject accident. Therefore, there is no extant loss of wage earning capacity analysis "from all causes" in the record before us. However, in view of Claimant's education, transferrable skills, and other relevant nonmedical factors, it seems doubtful that the medium duty restrictions with which he

was saddled at the time of injury had done very much to reduce his wage earning capacity. Accordingly, a comparison of Claimant's time of injury wage with the wage which he can currently earn is probably a fairly good assessment of his loss of wage earning capacity from all causes.

38. Finally, Dr. Collins too made an effort to evaluate Claimant's disability in light of the additional subjective limitations/restrictions he had described. Like Mr. Jordan, Dr. Collins testified that when the limitations against standing, walking and sitting were taken into account, Claimant was essentially totally and permanently disabled.

39. The Commission is troubled by Claimant's self-imposed physical limitations regarding sitting, standing, and walking. If such are adopted as appropriate, then both Mr. Jordan and Dr. Collins agree that Claimant would be totally and permanently disabled. However, no physician has imposed such permanent limitations[4] or related such limitations to Claimant's right hip injury. Other than what Claimant tells us, there is no way of objectively quantifying how far Claimant can walk, or how long he can sit or stand. Dr. McKee was unwilling to impose any additional physical restrictions without an FCE (which was never done).[5]

40. Because of the importance of Claimant's self-imposed restrictions in determining disability in this matter, such must be carefully examined. While the Commission is reluctant to find that Claimant's perception of his limitations is not credible, it must be remembered that Claimant has told others that he intended to retire when he became eligible for Social Security Retirement (versus disability) in January

[4] Dr. McKee did impose temporary limitations on walking more than two hours a day in March 2010, after Claimant stepped wrong when descending a stepladder.

[5] Claimant testified that Dr. McKee discussed sitting and walking limitations with him; Dr. McKee denies this.

2010. He never mentioned his self-imposed restrictions to Dr. McKee (in spite of his testimony to the contrary) or to any other physician. Claimant worked for over four years after his hip injury before his surgeries. He knew, or should have known, well prior to the hearing, that Dr. McKee did not permanently limit his walking, etc. Even so, Claimant did not contact Dr. McKee to further discuss his own perception of his limitations. Neither Dr. McKee, Dr. Collins, Mr. Jordan, nor the Commission knows how far Claimant can walk, or how long he can stand or sit. Because those limitations, if accepted, can make the difference between Claimant being totally and permanently disabled and something less, the Commission is unable to find that they are reliable enough upon which to base an accurate measurement of Claimant's disability.

41. Discounting Claimant's subjective limitations, Dr. Collins concluded that Claimant suffered loss of labor market access of 90.5%, and loss of wage earning capacity of 50%. The average of Dr. Collins' findings on labor market access loss and loss of wage earning capacity yields a disability figure in the range of 70% of the whole person. For his part, Mr. Jordan concluded that Claimant had loss of access to the labor market of 46% and loss of wage earning capacity of 16%, yielding a final disability figure of 31% of the whole person. The two experts differ significantly in their approaches to both loss of earning capacity and loss of labor market access. With respect to loss of wage earning capacity, it is notable that Claimant's wages in the year immediately preceding the accident are not an aberration. For the years 2004 through 2007, Claimant earned between $36,549.00 and $38,949.00 annually. Clearly, Claimant worked a good deal of overtime prior to the subject accident. However, this is nevertheless a component of his earning capacity at the time of injury. We believe that Dr. Collins has employed the most accurate approach to evaluating the loss of wage earning capacity in this case.

42. With respect to the differing views on Claimant's loss of labor market access, we find that the record does not lend itself to a detailed appraisal of the methodology used by each of the experts in conducting this portion of the analysis. After a careful review of the information that has been provided, we conclude that both experts have made valid points concerning Claimant's access to the labor market, and that Claimant has likely suffered loss of access to his labor market in the range of 68% of the whole person from all causes combined. Averaging what we have found to be Claimant's loss of access to the labor market (68%) and his loss of wage earning capacity (50%), we conclude that Claimant has a disability from all causes in the range of 59% of the whole person.

Odd-Lot

43. Although Claimant has failed to establish that he is totally and permanently disabled by the 100% method, he may still be able to establish such disability via the odd-lot doctrine. An injured worker may prove that he or she is an odd-lot worker in one of three ways: 1) by showing he or she has attempted other types of employment without success; 2) by showing that he or she or vocational counselors or employment agencies on his or her behalf have searched for other suitable work and such work is not available; or, 3) by showing that any effort to find suitable employment would be futile. *Hamilton v. Ted Beamis Logging & Const.,* 127 Idaho 221, 224, 899 P.2d 434, 437 (1995).

44. Claimant attempted work and succeeded by obtaining a job driving a beet truck during the 2012 harvest. He testified that he was able to perform the job and would return if needed. Claimant has failed to prove odd-lot status by the first method.

45. Claimant has failed to show that he, or others on his behalf, has searched for other suitable work without success. ICRD closed its file on Claimant because he did not

wish to pursue full-time employment. Claimant's job search was inadequate as he filed no applications for employment and considered himself to be retired. Claimant has failed to prove odd-lot status by the second method.

46. There are jobs Claimant can perform within his medically driven restrictions. In fact, he found such a job driving a beet truck. It is the Commission's impression that Claimant is not interested in employment and is content with living on his (and his wife's) retirement benefits. Claimant has failed to prove odd-lot status by the third method.

ISIF Liability

47. Because Claimant has failed to prove he is totally and permanently disabled, ISIF cannot be found to be liable.

Apportionment

48. Idaho Code §72-406(1) provides:

> In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

49. Thus, where permanent disability is less than total, it is a "statutory dictate that an employer is only liable for the disability attributable to the industrial injury." *Page v. McCain Foods, Inc.*, 145 Idaho 302, 309 fn. 2, 179 P.3d 265, 272 fn. 2 (2008). Consequently, where, as here, apportionment under Idaho Code § 72-406 is at issue, a "two-step approach is envisioned for making an apportionment." *Brooks v. Gooding County EMS*, 2013 IIC 0064.29 (September 12, 2013). First, the claimant's permanent disability from all causes combined must be determined; second, a determination must be

made of the extent to which the injured worker's permanent disability is attributable to the industrial accident. *Id*.

50. Apportionment is not an affirmative defense; Claimant bears the ultimate burden of persuasion on the issue of whether he has suffered disability referable to the subject accident. *See Page*, 145 Idaho at 309 fn. 2, 179 P.3d at 272 fn. 2; *Hinckley v. J.C. Penney*, 2012 IIC 0054.16 (June 19, 2012). However, once a claimant makes a *prima facie* showing in this regard, the burden of going forward with evidence that some portion of the claimant's disability is referable to a pre-existing physical impairment shifts to the defendants. *Hinckley*, 2012 IIC at 0054.16.

51. A pre-requisite to the application of Idaho Code § 72-406 is a finding that Claimant suffered from a "pre-existing physical impairment". Here, although Claimant suffered from a number of pre-existing conditions that might well be ratable, the record is devoid of medical evidence which actually establishes that Claimant suffered pre-existing physical impairments. Recognizing this deficiency, Employer/Surety urges the Commission to itself calculate Claimant's pre-existing physical impairments under the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition. Per *Pomerinke v. Excel Trucking Transport, Inc.*, 124 Idaho 301, 859 P.2d 337 (1993), it is "somewhat unclear" whether the Commission may use the AMA Guides on its own motion without expert testimony to support them. Certainly, the Commission would be disinclined to attempt to apply the AMA Guides in order to quantify the extent and degree of Claimant's pre-existing permanent physical impairments. Indeed, the recent case of *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 302 P. 3d 718 (2013), strongly suggests that the Commission is not entitled to independently apply and interpret medical guides in order to make some judgment about a claimant's health.

52. On the other hand, *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,*[6] establishes that 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 of the evidence of pain and other pertinent factors. Although Idaho Code § 72-424 specifies that the evaluation of permanent impairment is a "medical appraisal", these words do not obscure the fundamental principle that the Industrial Commission, rather than a treating or evaluating physician, is the fact finder and the 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. *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. In that case, the claimant suffered from a number of pre-existing 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 pre-existing conditions constituted pre-existing physical impairments. One of the conditions from which the claimant suffered was a blood disorder called Polycythemia vera. Although medical records documented that the claimant suffered from this pre-existing 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

[6] *See Matthews v. Department 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).

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, 769 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. It is somewhat difficult to square this holding in *Smith* with the Court's direction in *Mazzone*, *supra*. Perhaps the distinction lies in the fact that *Mazzone*, *supra*, involved an attempt by the Commission to apply a medical guide, while *Urry*, *supra*, and its progeny, recognizes the Commission's power to consider a variety of other factors in determining impairment. Reference to the *AMA Guides* is not necessary in order to determine whether Claimant suffers from a pre-existing physical impairment under Idaho Code § 72-406. Rather, all that Idaho Code

§ 72-406 requires is that the Commission be satisfied that Claimant suffers from a pre-existing physical impairment of some type, which increases or prolongs Claimant's disability. As long as the Commission is satisfied that Claimant suffers from a pre-existing physical impairment that increased or prolonged the work-caused disability, apportionment under Idaho Code § 72-406 may be appropriate, even though the record does not contain medical evidence which quantifies the extent and degree of that pre-existing physical impairment.

53. Here, past experience informs our judgment that Claimant assuredly suffers from pre-existing conditions which qualify as pre-existing physical impairments. Prior to the subject accident Claimant underwent multiple shoulder surgeries which left him with permanent limitations/restrictions. In 2003, Claimant underwent a C4-5 anterior cervical discectomy and fusion, which also left him with certain functional limitations. In the years prior to the subject accident, Claimant's knees became so painful that his ability to work was saved only by his employer's agreement to install an elevator for Claimant's use. Both Dr. Collins and Mr. Jordan have recognized that if credence is given to Claimant's testimony, his pre-existing conditions were of such significance to limit him to medium duty work at the time of the subject accident. In summary, we believe the record amply illustrates that Claimant suffered pre-existing physical impairments unrelated to the subject accident. Moreover, we believe the record demonstrates that these pre-existing physical impairments increased Claimant's accident-caused disability. Nothing in the provisions of Idaho Code § 72-406 requires the Commission to quantify the extent and degree of Claimant's pre-existing physical impairments in order to consider whether Claimant's disability should be apportioned.

54. As developed above, we have concluded that Claimant has disability from all causes in the range of 59% of the whole person. We must next ascertain the extent and degree of

the permanent disability referable to the industrial accident alone. As between Dr. Collins and Mr. Jordan, only Dr. Collins has provided meaningful input on this portion of the two-step approach approved in *Page v. McCain Foods, Inc., supra*.[7] Dr. Collins proposed that Claimant suffered a 38.1% loss of access to the labor market as a consequence of the imposition of medium duty restrictions, and a 90.5% loss of access to the labor market as a consequence of the imposition of accident-caused light duty restrictions. As noted above, although Dr. Collins did not identify what Claimant's wage earning capacity was before the imposition of medium duty restrictions, we doubt very much, based on Claimant's relevant nonmedical factors, that Claimant's medium duty restrictions resulted in any significant loss of wage earning capacity. Therefore, the average of Claimant's pre-injury loss of labor market access (38%) and his pre-injury loss of wage earning capacity (0%) yields a disability referable to Claimant's pre-existing physical impairments of 19% of the whole person. Subtracting this from what we have determined to be Claimant's disability from all causes combined (59%) yields disability referable to the subject accident of 40% of the whole person.

CONCLUSIONS OF LAW AND ORDER

1. Claimant's hip condition is not due in whole or in part to a pre-existing injury or disease not work-related.

2. Claimant is entitled to ongoing reasonable medical care for his hip condition; however, it does not appear that any specifically proposed treatment is in dispute at this time.

3. Claimant's average weekly wage is $500.00.

[7] It is human nature to harbor selfish desires for things that will ease life's burdens. The task of evaluating apportionment under Idaho Code § 72-406 would be made simpler if retained vocational experts could be persuaded to evaluate apportionment in less than total cases using the two-step approach endorsed by the Court in *Page v. McCain Foods, Inc., supra.*

4. Claimant has proven his entitlement to 40% PPD inclusive of his 8% LE PPI.

5. Claimant has failed to prove he is an odd-lot worker.

6. Employer/Surety has failed to prove ISIF liability.

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

DATED this 15th day of January 2014.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Chairman

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

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of January 2014, 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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