BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BILLY L. REYNOLDS, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2011-014411** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED APR 27 2015**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue who conducted a hearing in Boise on September 12, 2014. Daniel Luker represented Claimant. Kenneth Mallea represented Defendant ISIF. Employer (TTFN, Inc.) and Surety (Idaho State Insurance Fund) settled previously. The parties presented oral and documentary evidence and later submitted briefs. The case came under advisement on January 5, 2015. This matter now ready for decision regarding all issues remaining between Claimant and ISIF.

ISSUES

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

1. Whether Claimant has complied with the notice and limitations requirements of Idaho Code §§ 72-701 through -706 and whether these are tolled under Idaho Code § 72-604;

2. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;

3. Whether Claimant's condition is due in whole or in part to a subsequent intervening cause;

4. Whether the claim against ISIF is barred by the doctrine of *res judicata*;

5. Whether the claim against ISIF is barred by the doctrine of collateral estoppel;

6. Whether the claim against ISIF is barred by the doctrine of judicial estoppel; (In a prior case between the parties Claimant asserted in his Complaint and throughout the proceedings and testified under oath that he at that time was totally and permanently disabled. Claimant and ISIF stipulated and agreed in a Lump Sum Settlement Agreement ("LSSA") that he was totally and permanently disabled. He is barred from taking or asserting a conflicting or contrary position in this case);

7. Whether this claim against ISIF is barred under and pursuant to the LSSA entered into between the parties in 1995;

8. Whether this claim against ISIF is barred by the doctrine of waiver and release and by the Claimant's agreement to waive all claims against ISIF and release the ISIF from all claims;

9. If ISIF is found liable to Claimant in this case, should it receive a credit for all sums previously paid to Claimant together with interest thereon at the legal rate of interest from the day of payment until the date any liability to the ISIF is ordered;

10. Whether and to what extent Claimant is entitled to permanent partial impairment and disability in excess of impairment including total permanent disability;

11. Whether Claimant is entitled to permanent total disability under the odd-lot doctrine;

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

13. Apportionment under *Carey*; and

14. If ISIF is found liable to Claimant, what is the amount of credit ISIF should receive for Lump Sum payment of $15,000.00 paid under the LSSA approved by the Commission on November 22, 1995. This issue included present value of the $15,000.00 payment paid under the 1995 Agreement.

At hearing, ISIF admitted the claim was timely; the issue of notice and limitations (Issue 1) is dismissed. Also at hearing, Claimant objected to the wording of Issue 6; as discussed at hearing, the parenthetical text of Issue 6 merely recites an alleged basis for inclusion of the issue and does not represent a finding of fact.

CONTENTIONS OF THE PARTIES

Claimant contends his last injury combined with preexisting permanent impairment to render him totally and permanently disabled. A settlement of a prior accident and injury with ISIF in 1995 is invalid. Claimant meets all criteria for imposition of liability to ISIF.

ISIF contends Claimant's doctor opined Claimant suffered no increase in permanent impairment as a result of the subject accident and injury. Therefore no basis for imposition of additional permanent disability exists. Moreover, Claimant asserted total permanent disability in an earlier workers' compensation accident and injury. ISIF paid based upon that assertion. Claimant is legally precluded from denying prior total permanent disability. Finally, Claimant has failed to prove the existence of all factors prerequisite to ISIF liability relating to the instant accident and injury.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant;

2. Coordinated Exhibits 1 through 22 (Claimant's) and 23 through 26 (ISIF's), admitted at hearing; and

3. Post-hearing depositions of vocational experts Douglas Crum and Barbara Nelson, and of Robert Lange, CPA.

All objections in depositions are overruled.

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

FINDINGS OF FACT

1. A 1985 accident and injury resulted in a Commission-approved LSSA which specified a 10% whole person permanent partial disability. Although this arose primarily as

an injury to Claimant's lumbar spine, the LSSA expressly included multiple body systems as well as psychological conditions. This LSSA was approved July 1, 1988.

2. A 1989 accident and injury resulted in a Commission-approved LSSA which specified a permanent partial impairment rated at 5% of the loss of the right lower extremity at the knee with no additional permanent partial disability calculation. This LSSA was approved March 29, 1993.

3. A 1991 accident and injury resulted in a Commission-approved LSSA entered solely between Claimant and ISIF. After reciting denials and issues regarding ISIF liability, the LSSA included this language: "[B]ut for the purposes of this Stipulation and Agreement of Lump Sum Settlement, the parties agree that Claimant is totally and permanently disabled." The LSSA recited that physicians had opined that Claimant suffered permanent partial impairment rated at 15% of the right lower extremity and 15% of the left lower extremity; the LSSA did not otherwise include a finding upon which the Commission would approve an amount of PPI and did not include mention of potential *Carey* apportionment. The LSSA did include a waiver of any party's right to reopen or to receive any other award. It expressly included that Claimant's acceptance "shall fully and completely discharge the Fund (ISIF) from liability for any claims forever," even if related to a subsequent accident or injury. This LSSA was approved November 22, 1995.

4. Surety for Claimant's employer combined other unresolved claims by Claimant with the accident and injury which was the subject of the LSSA with ISIF described immediately above. These combined claims arose from accidents in 1989 and 1991. A Commission-approved LSSA specified PPI rated at 21% of the lower extremity plus unapportioned disputed impairment and additional disability rated at 45% of the whole person. It does not mention any

allegation by Claimant that he was then totally and permanently disabled. This LSSA was approved July 26, 1995.

5. Although not expressly recited in these two 1995 LSSAs, the record shows the parties and the Commission were aware Claimant was receiving Social Security Disability at the times of the approvals by the Commission.

6. Between 1995 and 2011 Claimant received regular medical treatment for chronic low back pain and other issues. He received narcotic pain medication throughout those years.

7. On February 25, 1998 Claimant had low back surgery. Ronald Jutzy, M.D., performed a L3-4 discectomy.

8. In March 2007 Claimant reported a work injury to his back after lifting a wheel. On May 1 Paul Montalbano, M.D., performed an L2-3 microdiscectomy.

9. On October 19, 2007 Christian Gussner, M.D., evaluated Claimant at Surety's request. He noted Claimant "returned to work performing his regular job on 07/02/07." He described the work as entailing "eight hours per week, which he has done for the last seven years." He opined Claimant demonstrated a 23% whole person PPI, mostly preexisting, in his lumbar spine.

10. On May 25, 2011 Claimant visited Walter Knox Memorial Hospital complaining of a growth on the bottom of his right foot, back pain, and a darkening about his medial right ankle. He mentioned having "lifted something heavy at work today." Claimant denied treatment for back pain and described his regimen for chronic back pain. The nurse practitioner he saw suggested a pain specialist. On a May 27, 2011 visit to James Thomson, M.D., Claimant described the "something heavy" as a "heavy pull behind mower" This event is the basis for the current claim.

11. Beginning August 9, 2011 and continuing to March 1, 2013, ICRD assisted Claimant in a job search. Consultants noted Claimant was receiving monthly SSDI checks. Claimant reported a job history from 1985 to 1999 as a logger and carpet installer, from 1999 to 2005 with Stallions Chainsaw, and from June 2005 to "present" with Emmett Saws & Lawns. Claimant's vocational goal was to return to work in an amount to enhance his SSDI income. Consultants identified several potential jobs for Claimant. Claimant's unwillingness to work full-time and experience a reduction of his SSDI was a noted barrier to obtaining employment. Claimant discussed his idea of self-employment.

12. Beginning in May 2011 and continuing well into 2012, Claimant received significant treatment for myoblastic anemia. This complicated treatment, including surgery, for his low back.

13. On November 21, 2011 Dr. Montalbano performed a right L2-3 "re-do" microdiscectomy.

14. On March 5, 2012 Dr. Montalbano performed laminectomies and foraminotomies from L2 through L5 and the lumbar spine was fused.

15. On June 8, 2012 Dr. Gussner again evaluated Claimant at Surety's request. After examination Dr. Gussner opined Claimant's lumbar PPI was rated at 19% whole person in contrast to his 2007 rating of 23%; thus, Dr. Gussner opined, Claimant suffered 0% PPI related to the May 25, 2011 injury. In follow-up correspondence, Dr. Gussner explained that the reduction represented the difference between *AMA Guides*, 5th and 6th editions; if he had used the 5th edition in the 2012 IME, the PPI would be rated at 23%. He reiterated Claimant suffered 0% PPI from the May 25, 2011 accident.

16. Nevertheless, in 2012 Dr. Gussner restricted Claimant to lifting 20 pounds occasionally, 10 pounds frequently as compared to his 2007 restrictions of lifting 35 pounds occasionally and 20 pounds repetitively.

DISCUSSION AND FURTHER FINDINGS OF FACT

17. 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).

18. Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447−48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 626−27, 603 P.2d 575, 581−82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

Causation

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

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

20. Claimant asserted and the Commission approved a stipulation, that Claimant was totally and permanently disabled in 1995. Claimant had begun receiving SSDI payments before the date of Commission approval and has been receiving SSDI payments since. For nearly 20 years Claimant has maintained he was totally and permanently disabled. He has worked and sought work only to the limited extent which would not reduce his SSDI payments.

21. Claimant has received workers' compensation medical care and temporary disability benefits for compensable accidents subsequent to the 1995 LSSA, including this most recent claim.

22. ICRD notes show Claimant declined the benefits of a job search in order to preserve his SSDI benefits.

23. Claimant's underlying degenerative condition, identified no later than 1985 has progressed during the last 30 years.

PPI and Permanent Disability

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

25. The sole PPI rating relevant to Claimant's May 25, 2011 accident comes from Dr. Gussner. Dr. Gussner opined that Claimant suffered 0% PPI referable to this accident. Dr. Gussner's opinion is entitled to enhanced weight because he provided a PPI rating in 2007 after an earlier compensable accident.

26. Claimant argues that Dr. Gussner's recommendation of more significant lifting restrictions than those imposed in 2007 establishes some additional PPI is present. This argument is not well taken. While Dr. Gussner did impose more severe restrictions on Claimant after his final accident, he also specifically addressed the question of whether the final accident entitled Claimant to further impairment. Dr. Gussner is very familiar with Claimant's case. His perspective is unique. He had the opportunity to rate Claimant both before and after the last accident. One could speculate why Dr. Gussner increased Claimant's restrictions, yet failed to recognize an impairment rating for the last accident. Quite possibly, the more onerous restrictions have nothing to do with the 2011 accident. We do not know, since this question was never addressed to Dr. Gussner. We are satisfied that Dr. Gussner, who was cognizant of Claimant's total situation, found it appropriate to give Claimant 0% impairment related to the 2011 accident. The increased restrictions, whatever their genesis, do not denigrate Dr. Gussner's opinion on impairment.

27. **"**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.

28. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful

employment." *Graybill v. Swift & Company*, 115 Idaho 293, 766 P.2d 763 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

29. Permanent disability is defined and evaluated by statute. Idaho Code § 72-423 and 72-425 *et. seq*. Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See*, *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

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

31. The 1995 LSSA did not specify upon what basis—100% versus odd lot—Claimant's total and permanent disability arose. His 20-year work history shows he could and did perform work thereafter. Such work does not show Claimant was not totally and

permanently disabled as an odd-lot worker during that period and continuing through the date of hearing, because an odd-lot worker is not necessarily incapable of performing all work..

32. Claimant failed to prove by a preponderance of evidence that he was not totally and permanently disabled before the 2011 accident. His representations in 1995 and his continuing refusal of work more than allowed for full SSDI benefits are two factors among many which establish Claimant is and has been totally and permanently disabled for 20 years.

33. More importantly, medical loss of function—PPI—is prerequisite to a permanent disability rating and award. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 753, 769 P.2d 1122, 1125 (1989)(As we have explained, impairment and disability are conceptually distinct; but there must be impairment for disability to exist.); *Selzer v. Ross Point Baptist Camp*, 2013 IIC 0015. The sole medical opinion of record establishes Claimant has no medical loss of function—no PPI—related to the 2011 accident. Clamant has presented insufficient evidence to persuade the Commission of some other basis upon which to award Claimant PPI related to the 2011 accident, notwithstanding the opinion of Dr. Gussner.

34. The parties have included several issues and well argued their positions about the factors of ISIF liability and about recent Idaho Supreme Court pronouncements regarding LSSAs involving ISIF. These issues and arguments are moot. We need not reach them given the basis of this decision.

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CONCLUSIONS

1. Claimant failed to show it likely that he suffered permanent impairment caused by his 2011 accident;

2. All other issues are moot.

DATED this 3RD day of APRIL, 2015.

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:

/S/_____
Assistant Commission Secretary dkb

CERTIFICATE OF SERVICE

I hereby certify that on the 27TH day of APRIL, 2015, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** were served by regular United States Mail upon each of the following:

DANIEL J. LUKER
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dkb/ka

/S/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BILLY L. REYNOLDS, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2011-014411** **ORDER** **FILED APR 27 2015**

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue 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 failed to show it likely that he suffered permanent impairment caused by his 2011 accident.

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 27TH day of APRIL, 2015.

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 27TH day of APRIL, 2015, a true and correct copy of the **ORDER** was served by regular United States Mail upon each of the following:

DANIEL J. LUKER
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