BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LINDA J. TUMA, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2011-022494** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed March 23, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on August 4, 2015. Claimant, Linda Tuma, was present in person and represented by Matthew C. Andrew, of Nampa. Employer, AA Market (AA), and Surety, Employer's Compensation Insurance Company, were represented by Nathan Gamel of Boise. Defendant, State of Idaho, Industrial Special Indemnity Fund (ISIF), was represented by Paul J. Augustine, of Boise. The parties presented oral and documentary evidence. The parties later took post-hearing depositions after which Claimant settled her claim against Employer/Surety. Claimant and ISIF then submitted briefs and the matter came under advisement on December 3, 2015. Referee Taylor submitted his recommendation on March 7, 2016. The Commission disagrees with Referee Taylor's application of the rule of Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984) to these facts and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

The issues to be decided by the Commission were narrowed by Claimant's post-hearing settlement with Employer/Surety and by briefing[1] and are:

1. Whether ISIF is liable under Idaho Code § 72-332.
2. Apportionment under the Carey formula.

CONTENTIONS OF THE PARTIES

Claimant asserts she is totally and permanently disabled pursuant to the odd-lot doctrine due to the combined effects of her pre-existing L4-5 diskectomies, pre-existing rheumatoid arthritis, and her industrial injury. She requests apportionment of liability to ISIF under the Carey formula of 49.84%. ISIF acknowledges that Claimant is totally and permanently disabled but asserts that her two pre-existing L4-5 diskectomies did not constitute a pre-existing hindrance or obstacle to her employability and that none of her pre-existing conditions combined with her industrial accident to render her totally and permanently disabled. In the alternative, ISIF argues that at most liability should be apportioned 75% to her industrial accident and no more than 25% to her pre-existing conditions under the Carey formula.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony of Claimant, Terry Montague, and John Paustian taken at hearing;
3. Claimant's Exhibits 1-15 admitted at hearing;
4. Defendants' (Employer/Surety) Exhibits 1-38 admitted at hearing, excepting the final page of Defendants' (Employer/Surety) Exhibit 9, containing the single page

[1] In its post-hearing brief ISIF conceded Claimant is totally and permanently disabled.

July 24, 2015 report of Dr. Frizzell, which is denied admission as untimely pursuant to JRP 10;[2]

5. The post-hearing deposition testimony Mark Williams, D.O., taken by Claimant on August 13, 2015; and

6. The post-hearing deposition testimony of Kevin R. Krafft, M.D., taken by Employer/Surety on September 23, 2015.

All objections posed during the post-hearing depositions are overruled.

FINDINGS OF FACT

1. Claimant was 65 years old and resided in Caldwell at the time of the hearing. She was born in Missouri and raised in Idaho. She attended high school through the 10th grade and later received her GED. After high school she worked in various clerical, warehouse, retail, and seasonal positions in Idaho and Oregon.

2. Claimant has suffered from bilateral rheumatoid arthritis in her hands and wrists since at least 1994 and for which she has been treated regularly with Prednisone for many years.

3. In November 2000, Claimant began working at Bi-Mart as Christmas help stocking housewares. She later transitioned to hardware clerk and ultimately was promoted to the position of hardware manager where she worked for five years.

4. Claimant's low back gradually became symptomatic over time and in June 2003, she underwent L4-5 microdiskectomy by Michael Malos, M.D. She recovered and returned to work at Bi-Mart as the hardware manager. Her low back bothered her from time to time and

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[2] At hearing ISIF objected to admission of Dr. Frizzell's July 24, 2015 report because it was produced by Employer/Surety the day prior to hearing and was thus untimely pursuant to JRP 10(C). All parties anticipated Dr. Frizzell would testify via post-hearing deposition and ruling on his report's admissibility was reserved. Dr. Frizzell ultimately did not testify post-hearing. ISIF's objection is sustained.

gradually became symptomatic again. On April 25, 2007, Claimant underwent right L4 laminectomy and redo L4-5 diskectomy by Michael Sandquist, M.D.

5. After recovering from her 2007 lumbar surgery, Claimant returned to work at Bi-Mart. However, she left her position as the hardware department manager due to difficulty with the lifting requirements. Claimant became a point of sale clerk for Bi-Mart, checking prices with a scan gun, which was less physically demanding. While working Claimant wore hand/wrist braces due to bilateral hand pain from her rheumatoid arthritis.

6. In November 2008, Claimant commenced working at AA Market in Arco as a store clerk.

7. On September 9, 2011, Claimant suffered an industrial accident while working for AA when she was moving a coffee display and twisted her back while steadying the display to keep it from falling. She noted discomfort in her back which progressed into pain radiating to her left lower extremity. She reported the incident to her supervisor and subsequently sought medical treatment. Claimant has not worked since her accident.

8. A lumbar MRI showed recurrent moderate L4-5 disk protrusion. On November 8, 2011, Claimant underwent L4-5 bilateral laminectomy and microdiskectomy by Christian Zimmerman, M.D.

9. Approximately one week after returning home following surgery, Claimant had a bout of repeated sneezing. Shortly thereafter her back pain significantly increased and her left lower extremity pain returned. A lumbar MRI showed severe right L4-5 neural foraminal stenosis. Dr. Zimmerman thereafter recommended L4-S1 fusion. Surety, upon advice of its consulting physician, Kenneth Little, M.D., authorized only L4-5 fusion. On April 18, 2012, Dr. Zimmerman performed L4-5 fusion.

10. Claimant continued to have back pain and on January 16, 2013, Dr. Little opined her continued back pain was attributable 75% to her industrial accident and 25% to pre-existing conditions. Surety then approved the two-level fusion originally recommended by Dr. Zimmerman.

11. On February 13, 2013, Dr. Zimmerman removed L4-5 hardware and performed L5-S1 fusion extension with instrumentation. Claimant continued to have significant back symptoms. On September 19, 2013, a lumbar CT scan revealed incomplete L4-5 fusion and evidence of loosening sacral screws. On November 5, 2013, Dr. Zimmerman performed a complete redo of the L4-S1 fusion. On July 15, 2014, Tyler Frizzell, M.D., examined Claimant at Surety's request and recommended hardware removal. On August 26, 2014, Dr. Zimmerman performed hardware removal.

12. Claimant later attempted a work hardening program but increasing back symptoms forced her to halt her participation in the program.

13. On December 18, 2014, Kevin Kraftt, M.D., found Claimant medically stable and rated Claimant's permanent impairment due to her back condition at 9% of the whole person, attributing 4% to her industrial accident and 5% to preexisting conditions.

14. On May 18, 2015, Mark Williams, D.O., examined Claimant at her request and rated her total permanent impairment at 23% of the whole person, with 75% (17% impairment) attributable to her 2011 industrial accident and 25% (6% impairment) attributable to her pre-existing conditions. Dr. Williams opined that Claimant's pre-existing conditions combined with her industrial accident to produce her current restrictions. Williams Deposition, pp 10, 40.

15. Claimant is totally and permanently disabled pursuant to the odd-lot doctrine.

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

DISCUSSION AND FURTHER FINDINGS

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). 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).

18. **ISIF liability**. Claimant asserts that ISIF is liable pursuant to Idaho Code § 72-332 which provides that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his income benefits out of the ISIF account. Idaho Code § 72-332(2) further provides that "permanent physical impairment" is as defined in Idaho Code § 72-422, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become unemployed. This shall be interpreted subjectively

as to the particular employee involved; however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

19. In Dumaw v. J. L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court summarized the four requirements a claimant must meet to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was indeed a pre-existing impairment; (2) whether that impairment was manifest; (3) whether the impairment was a subjective hindrance to employment; and (4) whether the impairment in any way combined with the subsequent injury to cause total disability. Dumaw, 118 Idaho at 155, 795 P.2d at 317. Each requirement is addressed below.

20. Pre-existing, manifest impairment. The pre-existing physical impairments at issue herein are Claimant's lumbar condition prior to her 2011 industrial accident and her rheumatoid arthritis.

21. *Lumbar condition.* Claimant underwent L4-5 microdiskectomy in June 2003 and right L4 laminectomy and redo L4-5 diskectomy in April 2007. Dr. Williams rated Claimant's total permanent impairment at 23% of the whole person, with 75%, or 17% impairment, attributable to her 2011 industrial accident and 25%, or 6% impairment, attributable to her pre-existing conditions. Defendants' (Employer/Surety) Exhibit 10, p. 308.

22. Dr. Kraftt rated Claimant's impairment due to her back condition at 9% of the whole person, attributing 4% to her industrial accident and 5% to preexisting conditions. However, when cross-examined regarding his rating he testified:

> Q. So she had a one-level diskectomy that she was symptom-free, and that would give her a higher impairment rating than her fusion at L4-5—L4 through S1. Is that true?
>
> A. No, that's not true.
> ….
>
> Q. So … what you're saying is that of her 9 percent whole person impairment, most of that impairment relates to this L4-5 diskectomy?
>
> A. The L4-5 diskectomy would be preexisting.
>
> Q. Correct. But the way that you put it is that 5 percent, more than half of her impairment is related to that diskectomy?
>
> A. Yeah; and I wasn't looking at it from a percentage of how much of her impairment is related to the diskectomy versus the fusion.

Krafft Deposition, p. 35, ll. 10-14 and p. 36, ll. 8-18.

23. When Dr. Krafft was confronted with the fact that his impairment rating of 4% for Claimant's L4-L5-S1 fusion was less than his impairment rating of 5% for her preexisting L4-5 diskectomy, he testified that the impairment could be modified, and then expressly acknowledged: "This could be in error." Krafft Deposition, p. 38, l. 4.

24. Claimant urges averaging the impairment ratings pursuant to IDAPA 17.02.04.281.02. However, the impairment rating of Dr. Krafft appears questionable on its face and was indeed questioned rather than confirmed by Dr. Krafft himself. The rating of Dr. Williams is more persuasive than that of Dr. Krafft.

25. The credible evidence establishes that the permanent impairment attributable to Claimant's industrial accident is 17%. The permanent impairment attributable to Claimant's pre-existing lumbar condition is 6%.

26. *Rheumatoid arthritis.* Claimant has suffered some degree of bilateral hand and wrist rheumatoid arthritis since approximately 1994. However, it appears this condition was

well controlled by medication by approximately 2008. She has presented no persuasive specific evidence or argument establishing a permanent impairment rating for her bilateral hand and wrist rheumatoid arthritis. In her closing brief Claimant merely urges: "The Commission should apply the Carey formula and should do so based on the pro rata principles espoused in the IDAPA regulation regarding impairments average the ratings of the several doctors who have provided opinions on this matter." Claimant's Closing Brief, p. 9. Claimant has not cited, and the record does not provide, any doctor's opinion rating Claimant's permanent impairment due to her pre-existing rheumatoid arthritis. Dr. Williams, Claimant's own medical expert, testified that rheumatoid arthritis was "very individually variant" and repeatedly declined to speculate on an impairment rating for Claimant's rheumatoid arthritis. Williams Deposition, p. 29, l. 2.

27. The first and second prongs of the Dumaw test have been met as to Claimant's lumbar impairment which existed and was manifest prior to her 2011 industrial accident. Claimant has not proven her rheumatoid arthritis was a pre-existing manifest impairment for purposes of the Dumaw test.

28. Hindrance or obstacle. The third prong of the Dumaw test considers "whether or not the pre-existing condition constituted a hindrance or obstacle to employment for the particular claimant." Archer v. Bonners Ferry Datsun, 117 Idaho 166, 172, 786 P.2d 557, 563 (1990). Claimant asserts, and ISIF disputes, that her pre-existing lumbar impairment was a hindrance to her employability.

29. Claimant's lumbar condition prevented her from doing her work at Bi-Mart as the hardware manager because she was unable to perform the heavy lifting required of the position. She testified: "when I had those first two back surgeries after the second one I thought I have got to get out of that department. There was a lot of lifting, a lot of continuous lifting and I knew

that I couldn't do that anymore." Transcript, p. 65, ll. 17-20. Because of difficulty with the lifting requirements, she became a point of sale clerk, which was less physically demanding. Claimant was fortunate that Bi-Mart was willing to accommodate this condition. Dr. Williams opined that Claimant was restricted to lifting 40 pounds due to her preexisting lumbar condition. The Referee finds that Claimant's low back condition was a hindrance to employment.

30. The third prong of the Dumaw test is met as to Claimant's pre-existing lumbar impairment.

31. Combination. Finally, to establish ISIF liability, the preexisting impairment must combine with the subsequent industrial injury to cause total permanent disability. "[T]he 'but for' standard … is the controlling test for the 'combining effects' requirement. …. The 'but for' test requires a showing by the party invoking liability that the claimant would not have been totally and permanently disabled but for the preexisting impairment." Corgatelli v. Steel W., Inc., 157 Idaho 287, 293, 335 P.3d 1150, 1156 (2014), rehearing denied (Oct. 29, 2014). This test "encompasses both the combination scenario where each element contributes to the total disability, and the case where the subsequent injury accelerates and aggravates the pre-existing impairment." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

32. The record herein contains persuasive evidence that Claimant's low back condition combined with her 2011 industrial injury to render her totally and permanently disabled.

33. Dr. Williams testified that Claimant's pre-existing conditions combined with her industrial accident to produce her current restrictions and state of disability. He testified that she is permanently restricted to lifting no more than 10 pounds. Although he noted it was difficult to

say, Dr. Williams also agreed that but for Claimant's prior lumbar impairment, she would not be in her current physical state. Williams Deposition, pp. 40-41. Significantly, Dr. Williams did not attribute all of Claimant's limitations to her industrial accident. Rather, he apportioned her limitations 25% to her pre-existing condition and 75% to her industrial accident. Dr. Little opined that Claimant's pre-existing lumbar impairment combined with her 2011 industrial accident to produce the severe lumbar condition resulting from her 2011 accident. He stated: "Without question, a patient with a history of two previous disc herniations and surgeries is at a higher risk of developing a third disc herniation as is the condition attributable to her September 9, 2011 injury." Claimant's Exhibit 29, p. 5. Vocational expert Terry Montague testified that Claimant's preexisting conditions combined with her industrial injury to render her totally and permanently disabled and but for her preexisting issues she would not be totally disabled. Transcript, p. 43. This evidence establishes that but for Claimant's preexisting conditions she would not have been totally and permanently disabled by her industrial accident.

34. The weight of the evidence establishes that Claimant's 2011 industrial accident combined with her pre-existing lumbar condition to render her totally and permanently disabled. The final prong of the Dumaw test has been satisfied as to Claimant's pre-existing lumbar impairment.

35. Pursuant to Idaho Code § 72-332, ISIF is liable for Claimant's pre-existing lumbar impairment.

36. **Carey apportionment.** In Carey v. Clearwater County Road Department, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984), the Idaho Supreme Court adopted a formula apportioning liability between ISIF and the employer/surety at the time of the final industrial accident. The formula prorates the non-medical portion of disability between the

employer/surety and ISIF in proportion to their respective percentages of responsibility for the physical impairment. Conditions arising after the injury, but prior to a disability determination, which are not work-related, are not the obligation of ISIF. Horton v. Garrett Freightlines, Inc., 115 Idaho 912, 915, 772 P.2d 119, 122 (1989).

37. Before applying the Carey formula, the portion of Claimant's impairment pre-existing her 2011 industrial accident, and the portion caused by her 2011 accident must be quantified. Claimant's qualifying pre-existing lumbar impairment totals 6% of the whole person. Claimant's low back impairment due to her 2011 accident is 17% of the whole person. Thus, Claimant's impairments for Carey apportionment total 23% (17% due to her 2011 accident, plus 6% qualifying pre-existing). Claimant's 2011 impairment constitutes 73.91% (17/23), and her qualifying pre-existing lumbar impairment constitutes 26.09% (6/23) of her total impairment.

38. By application of the Carey formula, absent settlement as previously noted, Employer/Surety would have been responsible for the medical portion of 17% impairment caused by Claimant's 2011 accident and for 73.91% of the nonmedical portion of Claimant's permanent disability. ISIF is responsible for the pre-existing medical portion of 6% impairment and for 26.09% of the nonmedical portion of Claimant's permanent disability. Thus, absent settlement as previously noted, Employer/Surety would have been liable for 369.55 weeks of statutory benefits commencing on December 18, 2014, the date Dr. Kraft found Claimant medically stable.[3]

[3] Brown v. The Home Depot, 152 Idaho 605, 272 P.3d 577 (2012), establishes that in most cases, the facts and circumstances extant as of the date of hearing are the facts that should be considered by the Commission in assessing disability. However, Brown provides no specific guidance on the question of whether the date of hearing is also the date on which responsibility for payment of a disability award commences. Here, there is no evidence that Claimant's disability was any different between the date of medical stability and the date of the disability determination, i.e. the date of hearing. Therefore, it is appropriate to find Claimant totally and permanently disabled retroactive to the date of medical stability. To hold otherwise would be to deny Claimant any indemnity benefits between December 18, 2014 and August 4, 2015.

39. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: For the 369.55 week period subsequent to December 18, 2014, ISIF is responsible to pay to Claimant the difference between the applicable permanent partial disability rate and the applicable total and permanent disability rate. Thereafter, ISIF is wholly responsible for the payment of total and permanent disability benefits at the applicable statutory rate. See, Carey v. Clearwater County Road Department, Amended Award following remand, 1984 IIC 0431.

CONCLUSIONS OF LAW AND ORDER

1. Pursuant to Idaho Code § 72-332, ISIF is liable for Claimant's pre-existing lumbar impairment.

2. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: For the 369.55 week period subsequent to December 18, 2014, ISIF is responsible to pay to Claimant the difference between the applicable permanent partial disability rate and the applicable total and permanent disability rate. Thereafter, ISIF is wholly responsible for the payment of total and permanent disability benefits at the applicable statutory rate.

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

DATED this 23rd day of March, 2016.

INDUSTRIAL COMMISSION

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

___/s/_____
Thomas E. Limbaugh, Commissioner

___/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of March, 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:

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