BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RANDY T. ERICKSON, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2007-012947** **IC 2008-014429** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed January 19, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Douglas A. Donohue who conducted a hearing in Boise on June 3, 2015. Todd Joyner represented Claimant. Daniel Miller represented ISIF. Employer and Surety settled with Claimant prior to hearing and did not appear. The parties presented oral and documentary evidence. After post-hearing depositions, the parties submitted briefs. The case came under advisement on November 16, 2015. This matter is now ready for decision.

ISSUES

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

1. Whether ISIF is liable under Idaho Code § 72-332, (including whether Claimant is totally and permanently disabled as an odd-lot worker); and
2. Apportionment to establish ISIF's share of liability under *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984).

CONTENTIONS OF THE PARTIES

Claimant contends he is totally and permanently disabled as an odd-lot worker. He injured his head and arm when he tripped over a mat at work on April 9, 2007. Neck surgeries resulted. He injured his right elbow on April 20, 2008 when he collided with a co-worker. Elbow surgeries resulted. He may be deemed an odd-lot worker under any one or all three tests which qualify an odd-lot worker. The additional factors required for ISIF liability are present. (Claimant's brief does not argue for any particular apportionment result.)

ISIF contends Claimant's receipt of Social Security and PERSI benefits have resulted in his failure to seek or to attempt work he can perform. He has not met any of the tests to obtain odd-lot worker status. He is not credible; physicians have branded him a "dishonest man, manipulative." Objective restrictions imposed by physicians do not take him out of the work force. Suitable jobs are available. The vocational expert hired by Claimant who opined that a job search attempt by Claimant would be "futile" did so without any basis consistent with the record.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant;
2. Claimant's exhibits 1 through 57;
3. Defendants' exhibits 1 through 42; and
4. Depositions of treating internist Louis Schlickman, M.D., physiatrist Beth Rogers, M.D., and vocational experts Terry Montague, Douglas Crum and Delyn Porter.

All objections made in post-hearing depositions are overruled, EXCEPT that objections in Mr. Montague's deposition at page 27 are sustained.

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. Claimant cooked for Employer. He supervised inmates and staff to provide food service to the juvenile corrections facility.

2. Prescription records show Claimant's significant use of opiates preceded both alleged industrial accidents. Medical records show essentially continuous narcotic use after 1999. Pre- and post-accident medical records show a willingness by Claimant to blame his opiate

overuse on theft of medications by his wife, ex-wife, brother-in-law, and two of his daughters. He has claimed his narcotics were confiscated by customs officials while on a trip to Mexico and that his wife had hidden them from him and they could not be found. The record is replete with excuses why he needed early refills of narcotics.

2007 Accident

3. On April 9, 2007 Claimant tripped over a floor mat, fell, struck his head, and injured his head and right arm. Claimant began working light duty, partial hours, in July. After a setback, he progressed during his recovery.

4. On April 18, 2007 Claimant began treating with Jeff Hartford, M.D. Dr. Hartford's initial diagnosis included chronic pain syndrome and noted his longstanding prescription for opiates.

5. In April and May 2007 Claimant attended three physical therapy sessions. He was uncooperative and discharged for failure to make and keep appointments.

6. A May 16, 2007 MRI showed a C6-7 disc bulge with foraminal narrowing on the right, a lesser bulge at C5-6, and mild degenerative changes throughout.

7. On June 5, 2007 Timothy Johans, M.D. performed diskectomies, foraminotomies, and a C5-7 fusion. He noted preexisting avascular necrosis in the right wrist.

8. On June 21, 2007 James Bates, M.D. began treating Claimant. He noted his concerns about Claimant's chronic use of OxyContin before the accident.

9. On July 5, 2007 Dr. Johans was "thrilled" with Claimant's recovery and proposed a light-duty release to return to work. Claimant expressed reservations about Employer's willingness to accommodate light-duty work.

10. On July 9, 2007 Dr. Hartford agreed with a release to return to work.

11. On July 27, 2007 Dr. Hartford took Claimant off work for three weeks for mental health concerns.

12. On August 9, 2007 Dr. Johans recommended follow-up visit with Dr. Bates to address narcotic usage. Claimant refused. Claimant reported "horrible" pain symptoms. By August 23 Dr. Johans found Claimant's radicular pain was gone. On September 10 Claimant reported symptoms which Dr. Johans believed to be a "recurrent C7 radiculopathy." Imaging showed some collapse of the fusion spacing, but without impingement upon the nerve roots. On September 25 Dr. Johans attributed Claimant's reported symptoms to a recent flare-up of gout.

13. By October 10 Dr. Johans opined Claimant had returned to pre-accident baseline and was ready to return to full-duty work.

14. Dr. Johans rated Claimant's PPI at 18% whole person for cervical spine injury, including its effects on his head and arm. Claimant continued to seek treatment.

2008 Accident

15. On April 20, 2008 Claimant fell and landed on his elbow. Claimant believes he aggravated his prior wrist, neck, arm, shoulder, and head conditions.

16. On May 6, 2008 Dr. Johans took claimant off work for an expected one to two months. On May 7 he performed right ulnar nerve decompression surgery and observed the swollen nerve. Two weeks later, Dr. Johans opined Claimant was "doing exceptionally well." He recommended physical therapy.

17. Beginning May 23, 2008 Claimant attended three physical therapy sessions. He was discharged after six consecutive no-shows to scheduled appointments.

18. A May 29, 2008 C-spine MRI was compared to the May 2007 imaging. No significant change was observed.

19. On June 6, 2008 Dr. Johans released Claimant to full duty as tolerated.

20. In July 2008 Claimant made a trip to Texas transporting inmates. Medical records refer to Claimant working two jobs.

Medical Care: August 2008 – Hearing Date
(Diagnostic imaging, surgeries and instances of inconsistent reporting by Claimant)

21. On August 13, 2008 Dr. Hartford released Claimant to return to work, full time, full activity. Dr. Hartford continued to treat Claimant, focusing on attempts to taper Claimant's chronic opiate use. He repeatedly expressed a preference that he be Claimant's only opiate prescriber.

22. On September 15, 2008 orthopedist David Lamey, M.D., performed a repair of Claimant's right ulnar collateral ligament. He found and removed scar tissue in Claimant's elbow which appeared to be compressing the nerve.

23. On December 11, 2008 an EMG showed mild slowing in both ulnar sensory nerves, worse on right, along with some other "minimal" abnormalities.

24. On December 29, 2008 Dr. Lamey opined that Claimant's electrodiagnostic tests and clinical findings "are not typical of a carpal tunnel syndrome." Neurologist Richard Wilson, M.D., who in 2010 would chair a panel evaluation of Claimant, performed the EMG.

25. On January 7, 2009 Claimant's right upper extremity was evaluated for physical therapy. Services were provided through February 11, 2009.

26. In April 2009 Dr. Hartford identified situational stressors affecting Claimant's mood and mental health.

27. On April 28, 2009 Claimant was admitted to Meridian St. Luke's ER after overdosing. The history provided by Claimant's wife is materially inconsistent with every history Claimant has provided at any time. Most notably, she reported their 10-year-old daughter

had died several years ago and another daughter had attempted suicide last summer; this was not Claimant's first suicide attempt. Claimant recovered and was discharged on the third day.

28. On May 4, 2009 Claimant was admitted to Intermountain Hospital on a voluntary basis after overdosing on Lorazepam. This was considered a suicide attempt by mental health physicians. Claimant attributed the event to his wife leaving him. To another physician he attributed it to his daughter's death eight months prior. To the examining physician, Claimant reported gout and an ingrown hair but did not mention any physical problems relatable to the industrial accidents. Claimant did mention his neck and right arm conditions to a social worker who interviewed him and included neck and arm pain together with stress over "several recent deaths" as factors contributing to his suicide attempt; he denied drug or prescription abuse; the social worker was aware that these denials were inconsistent with available medical records. Upon examination, Claimant was discharged.

29. In May 2009 Dr. Quattrone ordered an EMG. It showed normal except for residua from the earlier ulnar surgery. Dr. Quattrone considered a diagnosis of CRPS but ultimately diagnosed carpal tunnel syndrome. She expressed caution when allowing a refill of Percocet. She recommended that Claimant attend occupational therapy. Claimant refused.

30. A medication profile for April through June 2009 showed Claimant obtained 23 prescriptions, mostly opiates, from seven different physicians through five different pharmacies.

31. On May 15, 2009, Dr. Hartford's nurse practitioner released Claimant to work "full time, full duty [with] no restrictions" on May 16, 2009.

32. On July 12, 2009 pain management physician Daniel Marsh, M.D., evaluated Claimant. He reported an absence of objective evidence of CRPS.

33. In July 2009 Dr. Hartford linked possible CRPS in Claimant's right upper extremity, along with other symptoms, to chronic opiate use. He noted Claimant recently became responsible for a 9 month-old granddaughter after his ex-wife and a daughter encountered legal trouble over methamphetamine use.

34. On August 5, 2009 Dr. Lamey opined that the EMGs performed December 11, 2008 and August 3, 2009 showed significant improvement in Claimant's ulnar nerve function. He opined against further elbow surgery. He opined Claimant's elbow injury had reached maximum medical improvement. He suggested pain management.

35. About August 18, 2009 Claimant was terminated from his job with Employer for reasons unrelated to any industrial accident or medical care.

36. Claimant attended four physical therapy sessions in September and October 2009. He was given home exercises upon discharge.

37. On September 29, 2009 Dr. Marsh refused to allow early refill of narcotics which Claimant claimed had been stolen. Dr. Marsh noted this was the second time Claimant had lost them since he first evaluated Claimant in July 2009. On October 30, 2009, while Dr. Marsh was out of town, Claimant asked Dr. Marsh's PA for an early refill of narcotics because he was planning to leave town for a time. The PA refused. Testing in August, September, and October showed Claimant's blood levels were inconsistent with his representations about taking narcotics.

38. On November 6, 2009 Clay Ward, Ph.D. provided a neuropsychological consultation. Claimant denied alcohol and drug abuse and did not complete the MMPI-2. Dr. Ward identified situational stressors but found no significant psychological disorders.

39. A December 29, 2009 CT scan showed C3-4 stenosis primarily on the left along

with other "minor degenerative changes" none of which were significantly different than as seen on the prior MRI.

40. On January 21, 2010 physiatrist Vic Kadyan, M.D., performed electrodiagnostic testing. He reported the results as indicative of:

> . . . chronic C7 radiculopathy. [Fibrillation] potentials are small and would be consistent with his previous surgery at that level. Findings are not thought to be suggestive of acute radiculopathy. Sensory nerve amplitudes are small bilaterally.

He suggested clinical correlation with a potential radial tunnel syndrome to confirm or rule out that possibility.

41. Testing in early February 2010 showed blood levels to be inconsistent with Claimant's representations about narcotic use. Marijuana use was detected; Claimant denied marijuana use. Dr. Marsh refused Claimant's request for an early refill of narcotics despite Claimant's allegation that his brother-in-law had stolen them. Testing in late February 2010 was consistent with prescribed medications.

42. Upon Dr. Marsh's agreement, Claimant was returned to baseline narcotic dosages which he received before the industrial injuries, and Surety discontinued payment for narcotics which were not related to the industrial injuries. This process took several months. Claimant resisted all reductions in his narcotic prescriptions.

43. On May 19, 2010 Dr. Zimmerman extended Claimant's prior C-spine fusion upward two levels.

44. On July 7, 2010 Dr. Kadyan repeated the neurologic testing. He reported Claimant's testing showed that Claimant was stable since the January testing. Dr. Kadyan reported that ulnar nerve testing produced normal results.

45. A July 13, 2010 CT scan with nerve root blocks at C5-6 and C6-7 produced

no change in symptomatology.

46. On July 26, 2010 Dr. Marsh diagnosed CRPS based upon Claimant's representations of absence of sweat and presence of edema in his right arm. This despite observing the absence of change in hair growth and no skin color changes. No note by Dr. Marsh confirmed having observed clinically that Claimant's representations were accurate.

47. After neck surgery Claimant attended 6 physical therapy sessions in August and September 2010. He was discharged upon failure to make progress.

48. On August 18, 2010 psychologist Clay Ward, Ph.D., evaluated Claimant and administered psychological tests. He provided some follow-up counselling sessions. The report shows Claimant alleged a history materially inconsistent with contemporaneously made evidence of record regarding both employment and non-occupational stressors.

49. On September 8, 2010 a right wrist arthrogram showed a chronic nonunion of the scaphoid with arthritic changes.

50. On October 12, 2010 Dr. Marsh reprised Claimant's history of representations about stolen narcotics and concluded, "I am incredulous." He discharged Claimant, refusing to see him again. He stated, "I believe he is a dishonest man, manipulative and I have run out of patience for the web of tales with which he has suckered me."

51. On November 3, 2010 Claimant wrote Dr. Hartford and begged him to take him back as a patient. Dr. Hartford had refused to see Claimant because of opioid abuse. Claimant was obtaining multiple prescriptions from multiple providers. Claimant stated, "Please reconsider and try and understand it was all about work comp, and not wanting them to think I was pain free, as I'm not."

52. On November 23, 2010, neurologist Richard Wilson, M.D., and psychiatrist

Eric Holt, M.D., reviewed medical records, performed another EMG, and evaluated Claimant at Surety's request. Examination revealed "diffuse giveaway weakness in the right arm." Dr. Holt recorded numerous inconsistencies in content and affect as he interviewed Claimant to obtain a history. The panel opined, "It is felt that he is exaggerating his clinical symptoms for secondary gain." They opined Claimant had reached maximum medical improvement from his 2008 accident and rated PPI at 10% right upper extremity for his residual right ulnar neuropathy. They opined Dr. Johans' 2007 PPI rating of 18% whole person for Claimant's cervical spine represented a maximum PPI. Dr. Holt opined Claimant suffered no psychological permanent impairment from any source or cause, despite the psychological diagnosis provided.

53. In late November 2010 physicians at the Raymond Clinic required that Claimant agree to a narcotic-use contract before they would provide treatment. In February 2011 Raymond Clinic physicians noted Claimant had broken the contract and they would prescribe no more narcotics. An April 2012 urine test showed positive for marijuana. Except for a single outlier in late April 2012, repeated testing to assess depression reported Claimant's "functionality is not impaired."

54. Beginning June 16, 2011 Claimant was treated by John Mahan, M.D. From the initial visit, Claimant made representations which were inconsistent with his documented medical history. Dr. Mahan was aware of Claimant's earlier treatment by Dr. Marsh. Dr. Mahan required a pain contract. In late August Claimant requested an early refill of Dilaudid, another narcotic analgesic. Claimant avoided a physician-ordered urine test by giving the lab an excuse. A few days later he requested Oxycodone. Dr. Mahan prescribed it. On September 14 Dr. Mahan required Claimant to return his unused Oxycodone and expected 110 of 120 pills back. Claimant refused to return the unused Oxycodone and essentially accused Dr. Mahan of

attempting to divert them for Dr. Mahan's gain. When Dr. Mahan attempted to substitute non-narcotic analgesics, Claimant reported allergies to essentially all non-narcotic analgesics. This report was inconsistent with Claimant's history of prescription use. Throughout the record he has made inconsistent claims about whether or to what drugs he suffers allergies.

55. A July 8, 2011 lumbar MRI showed some degenerative changes throughout and a disc bulge at L4-5 with probable nerve root compression.

56. Claimant attended physical therapy in August 2011 but did not return after two sessions.

57. On October 24, 2011 Dr. Zimmerman performed a laminectomy and microdiscectomy at L4-5. Testing in anticipation of surgery revealed myocardial ischemia, chronic and nonsurgical. This did not preclude the lumbar surgery. In follow-up with Dr. Zimmerman, he expected Claimant's permanent restrictions to eventually allow lifting 50 pounds unassisted.

58. On October 31 2011 Dr. Mahan reluctantly prescribed one last 27-day refill of Dilaudid. He noted Claimant's noncompliance with the contract and vowed he would not prescribe any more narcotics for Claimant. In November 2011 Dr. Mahan refused Claimant's request for more Dilaudid. On December 12 Dr. Mahan refilled the Dilaudid prescription at Claimant's request, a month's supply. On December 29 Claimant requested an early refill. Dr. Mahan prescribed it.

59. On November 10, 2011 Kevin Krafft, M.D. evaluated Claimant. Claimant reported he had stopped taking Dilaudid. He reviewed Claimant's history and recommended a functional capacity evaluation (FCE).

60. Claimant received physical therapy from November 16, 2011 through January 19,

2012.

61. On January 31, 2012 Claimant was evaluated with a KEY FCE. The therapist deemed Claimant's effort valid.

62. A February 3, 2012 NCV/EMG was consistent with "mild to moderate" cubital tunnel syndrome of Claimant's right arm. It did not show any radiculopathy.

63. On February 16, 2012, after the FCE, Dr. Krafft allowed a return to work with restrictions including occasional lifting of 50 pounds, 15-minute position changes, and frequent walking of moderate distances for 3 to 4 hours. He noted Claimant had difficulty with "continuous right hand grasp and find grasp" and limited this to "occasional."

64. Claimant visited Drs. Mahan about monthly, usually to request narcotics. In March 2012 Dr. Mahan noted his repeated efforts to obtain a drug screen but that Claimant always had an excuse for not giving a urine sample. He noted a recent drug screen showed the presence of methadone which is not a metabolite of Dilaudid. A search showed Claimant's last methadone prescription was over one year prior. Dr. Mahan again vowed never to prescribe narcotics to Claimant, but allowed one last Dilaudid prescription. On May 8 Claimant returned requesting more Dilaudid. Dr. Mahan prescribed it. Also on that date Claimant gave a urine sample, but it was of insufficient volume to test. When Dr. Mahan left the State, his partner, Louis Schlickman, M.D., took over treatment of Claimant.

65. Claimant first visited Dr. Schlickman on July 17, 2012. (Dr. Schlickman's first record largely reprints Dr. Mahan's template and historical information.) Dr. Schlickman refilled Claimant's Dilaudid prescription. Thereafter, Claimant visited essentially monthly, usually seeking a Dilaudid refill. As Dr. Schlickman noted his intention to use Suboxone to taper Claimant's narcotics use, Claimant's visits became less frequent for a few months.

By spring 2014 Dr. Schlickman was prescribing fewer Dilaudid, and Claimant began visiting more often. Despite more than three months of actively attempting to assist him, Claimant never did undergo the Suboxone therapy. He did make one visit to Grant Belnap, M.D., whom Dr. Schlickman had recommended to evaluate and implement Suboxone treatment.

66. In March 2014 Dr. Schlickman referred Claimant to Svetlana Meier, M.D., for evaluation of Claimant's arthritis and gout.

67. Dr. Schlickman first denied Claimant a Dilaudid refill on July 11, 2014. On that date Claimant first alleged customs officials confiscated his narcotics, then alleged he had miscounted his remaining pills at the prior month's visit, then alleged that he may have taken Dilaudid contrary to the prescribed amounts, and then alleged he had left some of his pills with his daughter on the flight back from Cancun.

68. On July 31, 2014 and at visits thereafter Dr. Schlickman did refill Claimant's Dilaudid prescription.

69. On September 2, 2014 Dr. Schlickman attempted a long-acting narcotic analgesic, Exalgo, to help reduce Claimant's use of Dilaudid. The record does not show a later visit with Dr. Schlickman.

70. On March 20, 2015 a C-spine CT scan reported no significant change from the prior January 2014 CT scan.

Additional Medical Opinions

71. On September 25, 2012 Beth Rogers, M.D., reviewed records and opined Claimant's whole-man PPI for cardiac issues would range from 10-19%; for preexisting right upper extremity issues, 8%, with subsequent surgeries considered, 18-24%; for C-spine issues 15-28% depending upon which edition of *AMA Guides* is used; for L-spine issues 5%;

other issues, including COPD and psychiatric, were considered. (The Commission commends this effort to provide a complete set of PPI ratings, which is vital to an adequate basis for *Carey* formula apportionment.) In post-hearing deposition, Dr. Rogers well explained her bases for the PPI ratings to which she had earlier opined.

72. In post-hearing deposition, Dr. Schlickman was generous in describing Claimant as being "[a]t times compliant[,] [a]t other times not compliant." He opined Claimant's various chronic conditions would continue to wax and wane throughout Claimant's life. In describing the relationship between pain and function Dr. Schlickman commented, "So when you are winning the Super Bowl, you can play with a broken hand. So – if you are losing, you kind of go out with a bruised calf."

Prior Medical Conditions

73. About 1966 Claimant broke his wrist.

74. About 1989 Claimant injured his right wrist in a California workers' compensation accident. Surgery resulted. Claimant believes it never fully healed.

75. In 1993 Claimant underwent cardiac catheterization and angioplasty of his right coronary artery.

76. In 1994 a repeat cardiac catheterization was performed for diagnostic purposes.

77. In 1995 Claimant sprained his right wrist. X-rays showed an old surgery.

78. Also in 1995 Claimant visited an ER for what he thought were cardiac symptoms. After testing, physicians opined this unlikely and diagnosed "bilateral arm and left knee pain."

79. Also in 1995 treatment for left shoulder and arm symptoms was diagnosed as bursitis. Imaging revealed soft tissue calcifications about the left humeral head and neck.

80. Beginning in 1996 Claimant occasionally visited an ER for chest pain.

81. In 1996 Claimant visited an ER. Physicians diagnosed "chronic right wrist pain." Although initially less frequent than his visits for chest pain, Claimant occasionally visited an ER for right wrist pain. In 1999 the record first notes Claimant receiving narcotics for chronic wrist pain. In subsequent years ER physicians usually prescribed narcotics upon Claimant's appearances with complaints of right wrist, left shoulder, low back, or other pain.

82. Dr. Hartford had treated Claimant for a left rotator cuff tear in 2000. He prescribed narcotics. His office discontinued treatment a few months later for nonpayment of bills.

83. In 2000 a Primary Health record shows Claimant's wife telephoning to request narcotics of behalf of Claimant. The physician refused to prescribe narcotics without actually seeing the patient, despite the wife's claims of Claimant's extreme pain. The next day Claimant telephoned, described his pain, admitted taking narcotics in excess of the prescription (due to pain) and having only one pill left. He asked for "something stronger." Primary health refused.

84. Generally, ER records before 2007 often show visits for another recent fall usually involving pain to his head, neck, and/or right wrist, but occasionally involving other body parts also or instead.

85. In 2002 Claimant visited an ER for low back and **left** wrist pain. Claimant asserted an allergy to nonsteroidal anti-inflammatories. With these medications unavailable because of Claimant's assertion, narcotics were prescribed. (In preparation for at least two of his surgeries, Claimant denied that he knew of any allergies. At other times, he would often claim allergies to various non-narcotic analgesics and other medications which might be prescribed in place of narcotics.)

86. In 2004 Claimant suffered a cervical strain in a motor vehicle accident. A CT

scan showed soft tissue calcifications. An X-ray showed disc space loss at C5-6.

87. A 2004 MRI of Claimant's right hand showed old surgical changes as well as advanced degenerative changes consistent with arthritis. An October 2006 MRI was consistent.

88. With records beginning April 28, 2005, Richard Radnovich, D.O., was regularly treating Claimant from January 3, 2006, forward, for multiple pains including right shoulder and/or wrist issues before the April 2007 industrial accident. Claimant attended at least three treatment visits in March 2007. Dr. Radnovich prescribed oxycodone and allowed an early refill upon Claimant's assertion that his daughter had stolen his medication. Dr. Radnovich was expecting Claimant to undergo right wrist surgery in April 2007. Dr. Radnovich had allowed early refills of narcotics before, but this time stated it would be the last time. Claimant's last visit is dated March 30, 2007.

Vocational Factors

89. Claimant was born October 27, 1956.

90. Claimant's first job as a teenager involved loading and unloading a catering truck. While still attending high school he worked a fabrication press.

91. He left high school about tenth grade, but attended somewhat thereafter. He did not receive a diploma.

92. About 1975 working as a plant manager for K&W Automotive Products, Claimant attended courses in work simplification, elements of supervision, and quality assurance at a junior college. Later, he delivered cheese and worked in a cheese warehouse. For another employer he worked in a milk pasteurization and evaporation plant at various jobs. He obtained a commercial driver's license (CDL) and a USDA license to work in the dairy industry.

93. Claimant obtained a GED about 1989. He enrolled in a six-week course given

by the Montana Law Enforcement Academy. Upon graduation he worked for the Montana corrections department supervising a dairy plant and other food service operations, including ranch and slaughterhouse work. Corrections officer work was unofficially a part of that job.

94. Claimant performed similar food service supervision after coming to Idaho about 1992. He worked in Idaho for Meadow Gold and at nursing homes as a food service director.

95. About 2005 Claimant attended a course to become a certified dietary manager.

96. Claimant began working for Employer about November 6, 2006 at a pay rate of $11.05 per hour. At termination in 2009 he earned $12.05 per hour.

97. Claimant received assistance from ICRD in 2007. The ICRD assistance closed after Claimant returned to work with Employer.

98. Claimant again received assistance from ICRD in 2010. Claimant was generally uncooperative and stated SSD placed a ceiling on the amount he could earn each month. In April 2011 Claimant reported he had declined two job offers because he did not know whether they might exceed his permanent restrictions. ICRD identified specific jobs available to Claimant, within his restrictions and which offered part-time work compatible with Social Security earnings ceilings. In 2012 ICRD closed the file based, in part, upon Claimant's lack of cooperation and failure to attend job search and development appointments.

99. In September 2011 Dr. Wilson approved a job site evaluation (JSE) for Claimant to work as a cook for juvenile corrections. In February 2012 Dr. Krafft approved this same JSE with modifications.

100. Claimant receives Social Security Disability benefits of $1,611.00 per month as of November 2011. He receives PERSI benefits of nearly $500.00 per month. His wife works full time and they receive an annuity as a result of his daughter's demise.

101. On April 16, 2014 another FCE was performed and deemed valid. It showed Claimant capable of work in the light to light-medium range.

Post-Accident Employment and Job Search

102. After the 2007 accident Claimant returned to work for Employer. Except for periods of recovery from surgeries he continued to work full time, full duty. During portions of these recovery periods Claimant performed some part-time and light-duty work.

103. About August 18, 2009 Employer terminated Claimant for misconduct unrelated to either accident. Both before and after these accidents, Claimant had received oral and written warnings for misconduct similar to the events that precipitated discharge from employment.

104. Claimant applied for a similar job with Ada County corrections. He did not get an interview.

105. Claimant has not been employed since mid-August 2009. He received unemployment insurance benefits from September 2009 through October 2011. Despite a Department of Labor requirement that a recipient of unemployment benefits conduct a weekly job search to remain eligible, Claimant admitted he did not always do so. He could not identify a significant number of potential employers which he allegedly contacted in conducting a job search.

Expert Vocational Opinions

106. Terry Montague reviewed records and evaluated Claimant at Claimant's request. His written report is dated December 13, 2014. His major opinion is that Claimant is totally and permanently disabled. Mr. Montague's records review leads him to blame the physicians for Claimant's narcotic abuse while ignoring Claimant's untruthfulness with physicians, changing of physicians when they attempt to wean him from his dependence, and obtaining multiple prescriptions from multiple physicians and filling them at multiple pharmacies.

Mr. Montague places major importance upon Claimant's "relentless pain" and drug dependency as a basis for opining Claimant totally and permanently disabled as an odd-lot worker.

107. Delyn Porter reviewed records and evaluated Claimant at Surety's request. His written report is dated March 24, 2014. (His report dates the 2007 accident to March 15, 2007, not April 9, 2007.) He noted the absence of contemporaneous physician opinions about permanent impairment or restrictions for any preexisting conditions. He relied upon Dr. Rogers' opinion about preexisting restrictions in his analysis. He noted that Claimant alleged significant subjective limitations. He opined Claimant was capable of limited light-to-medium duty work. He opined Claimant's restrictions amount to a 22% loss of labor market access and a 3-14% loss of wage earning capacity. He opined Claimant suffered a 12.5% to 18% permanent disability, exclusive of PPI.

108. Douglas Crum reviewed records and evaluated Claimant at ISIF's request. His written report is dated April 10, 2015. He identified physicians' restrictions related to Claimant's preexisting coronary artery disease and right wrist. He noted the absence of physicians' restrictions for any other preexisting physical or psychological condition. He opined that before the 2007 accident, restrictions described would allow light-to-medium duty work. He identified job types available within those restrictions. He opined Claimant was not totally and permanently disabled before the 2007 accident. Mr. Crum evaluated physicians' restrictions imposed as a result of the 2007 and 2008 accidents. He opined that these restrictions do not render Claimant totally and permanently disabled. He further opined that "the above restrictions do not significantly add to restrictions recommended by Dr. Rogers, on a *post hoc* basis for the pre-existing fused right wrist condition." He opined that the combination of restrictions do not render Claimant totally and permanently disabled.

DISCUSSION AND FURTHER FINDINGS OF FACT

109. 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).

110. 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).

111. At hearing Claimant smoothly testified that he had never taken a trip to Cancun, Mexico. However, his demeanor—voice hesitation, body language, and eye contact—changed in a manner that indicated to the Referee that Claimant was being deceptive as this issue was pursued. Claimant then explained that he had considered a trip to Cancun and later admitted he had gone to evaluate purchase of a home "ten miles out of Cancun." He claimed not to recall going to Mexico after his daughter's wedding. (Dr. Schlickman's June 18, 2014 note states Claimant would be "flying to Cancun," gone about three weeks.).

112. Claimant's hearing testimony is replete with evasions and assertions materially inconsistent with contemporaneously made medical records.

113. In deposition on January 24, 2014 Claimant denied having traveled except for going to Butte, Montana and Aberdeen, Idaho – "nothing far out of Boise." Records indicate

he took at least one trip to Mexico, likely two or more, and probably another to Banff, Canada.

114. Claimant has been untruthful with many of his physicians. For example, an Ascent Behavioral Health Services "Diagnostic Summary" dated April 22, 2009 shows Claimant provided a history which is frankly and materially inconsistent with other medical records about substance abuse and other issues which would be relevant to that facility's attempt to treat him. Among medical records of other physicians, such inconsistencies abound. Only some are noted in findings of fact above.

115. Claimant's narcotic use does not impeach him *per se*; his untruthfulness about this and other factual matters does.

116. Dr. Holt's lengthy recitation of instances of "limited credibility" exhibited by Claimant when interviewed is persuasive and consistent with the Referee's observation of Claimant at hearing.

Permanent Disability

117. **"**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.

118. 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).

119. 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. ISIF, 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).

120. 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). Taken from, *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).

121. Claimant's objective findings noted upon diagnostic imaging and observed at surgeries confirm Claimant suffers permanent impairments. Though significant, they total much less than 100% of the whole man. His PPI related to the industrial accidents is a minority portion of his overall PPI. Only upon a finding of total and permanent disability would a

more precise particularization of these PPIs become relevant.

122. Claimant failed to show by a preponderance of evidence that he is totally and permanently disabled. His claims of disability are not credible because they are based materially upon his subjective reporting. Moreover, medical and vocational experts who have given opinions favorable to Claimant's workers' compensation claim base those opinions materially upon Claimant's subjective reporting.

123. Particularly, Mr. Crum and Mr. Porter in their post-hearing depositions well explained the objective medical bases upon which they relied to evaluate work restrictions and labor market access. By contrast, Mr. Montague, upon review of records, did not do a transferable skills set analysis because he believed Claimant "would be unable to find gainful activity." Essentially, he facilely opined that because Claimant is a chronic pain patient, he can't work; it would be futile to seek work. The opinions of Mr. Crum and Mr. Porter, based upon analysis of physician-imposed restrictions and Claimant's local labor market, are entitled to greater weight.

124. Contrary to the general tenor of Mr. Montague's deposition testimony, a Social Security finding of disability is not a guiding factor in establishing whether a claimant is totally and permanently disabled according to Idaho Workers' Compensation Law. The definitional standards of the two forums are different; some conditions which qualify in SSD's analysis, such as obesity for example, do not qualify under Idaho Workers' Compensation Law. Generally, we look to the underlying conditions, and medical records about their severity. Conversely, Social Security does not consider a claimant's local labor market access, a factor quite significant to any permanent disability analysis in Idaho worker's compensation.

125. Considering all medical and vocational factors, Claimant's disability is

significantly less than 100% of the whole person.

126. Claimant failed to show by a preponderance of evidence that he is totally and permanently disabled as an odd-lot worker. He returned to work after the industrial accident. He ceased working for Employer for reasons unrelated to the industrial accident.

127. Claimant's job search has been minimal. Essentially he attempted to make a showing to obtain unemployment and workers' compensation benefits. The record shows he failed to cooperate with or otherwise sabotaged attempts by vocational experts to assist him in a job search. The fact that Claimant refused to consider jobs which would pay more than the Social Security earnings ceiling augurs ill for odd-lot status. The record does not support a finding that he satisfied either the first or second prongs of the test for an odd-lot worker.

128. In the same way that little weight could be afforded an opinion that Claimant "conducted a job search" without evidence of it, little weight can be afforded Mr. Montague's conclusion of "futile" without identifying facts to support it. Indeed, the record well establishes that Claimant's falsehoods were accepted by Mr. Montague and formed a material basis for that opinion.

129. For lack of a job search, essentially, Claimant relies upon the "futile" prong of the test for qualification as an odd-lot worker. First, Mr. Montague's analysis is inconsistent with facts of record and too cursory, without analysis, to support his opinion that the "futile" prong applies to Claimant. Second, assuming *arguendo* that the odd-lot worker presumption had been established, ICRD showed specific available jobs within his limitations.

130. Upon Claimant's failure to show it likely that he is totally and permanently disabled under any analysis of Idaho Workers' Compensation Law, all other issues pertaining to potential ISIF liability are moot.

CONCLUSIONS

1. Claimant failed to show he was totally and permanently disabled either 100% or as an odd-lot worker;

2. All other issues relating to potential ISIF liability are moot.

RECOMMENDATION

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

DATED this 11th day of January, 2016.

INDUSTRIAL COMMISSION

__/s/_____
Douglas A. Donohue, Referee

ATTEST:
__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of January, 2016, 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:

TODD M. JOYNER
1226 EAST KARCHER ROAD
NAMPA, ID 83687

DANIEL A. MILLER
401 W. FRONT ST., STE. 401
BOISE, ID 83702

dkb __/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RANDY T. ERICKSON, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2007-012947** **IC 2008-014429** **ORDER** Filed January 19, 2016

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:

3. Claimant failed to show he was totally and permanently disabled either 100% or as an odd-lot worker.

4. All other issues relating to potential ISIF liability are moot.

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

DATED this 19th day of January, 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 19th day of January, 2016, a true and correct copy of the **ORDER** was served by regular United States Mail upon each of the following:

TODD M. JOYNER
1226 EAST KARCHER ROAD
NAMPA, ID 83687

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__/s/_____