BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID DUNCAN,

Claimant,

v.

VARSITY CONTRACTORS,

Employer,

and

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,

Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,

Defendants.

IC 2010-013130
2012-001259

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

Filed June 2, 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael Powers, who conducted a hearing in Boise, Idaho, on June 26, 2013. Hugh V. Mossman, of Boise represented Claimant. Eric S. Bailey, of Boise, represented Employer and Surety. Paul J. Augustine, of Boise, represented State of Idaho, Industrial Indemnity Fund (ISIF). Oral and documentary evidence was admitted. Post-hearing depositions were taken. The parties filed post-hearing briefs. The matter came under advisement on December 30, 2013.

ISSUES

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

1. Whether Claimant suffered personal injury arising out of and in the course of employment[1];

2. Whether Claimant's injury was the result of an accident arising out of and in the course of employment;

3. Whether Claimant is entitled to additional temporary partial and/or temporary total disability (TPD/TTD) benefits, and the extent thereof; and

4. Whether Claimant is entitled to additional permanent partial impairment (PPI) benefits, and the extent thereof;

5. Whether Claimant is entitled to permanent partial disability (PPD) in excess of permanent impairment, and the extent thereof;

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

7. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate;

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

9. Apportionment under the *Carey* formula; and

10. Whether Claimant is entitled to attorney fees due to Employer/Surety's unreasonable denial of compensation as provided for by Idaho Code § 72-804.

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[1] The Commission consolidated Claimant's April 7, 2010 and May 7, 2011 claims on May 16, 2012.

CONTENTIONS OF THE PARTIES

The main thrust of Claimant's argument is that as the result of one or more industrial accidents, in combination with a host of pre-existing impairments, he is totally disabled from future employment under the odd-lot doctrine. Even if Claimant is not totally disabled, his permanent disability exceeds his impairment.

Employer/Surety takes the position that Claimant had but one industrial accident, which was covered, and Surety has fully paid all applicable benefits. Additionally, Claimant's disability does not exceed the PPI previously paid. Claimant is entitled to no additional benefits.

ISIF argues that Claimant has failed to prove his total disablement under the odd-lot doctrine and failed to prove all pre-requisite conditions for ISIF liability under Idaho Code § 72-332. As such, ISIF is not liable for any of Claimant's disability.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, taken at hearing.

2. Joint Exhibits (JE) 1-27, admitted at hearing.

3. The pre-hearing deposition transcript of Claimant, which is Joint Exhibit 22.

4. The post-hearing deposition transcripts of Nancy J. Collins, Ph.D., and Douglas Crum, CDMS, both of which were taken on September 30, 2013;

5. The post-hearing deposition transcript of Benjamin Blair, M.D., taken August 7, 2013;

6. The post-hearing deposition transcript of Gary Walker, M.D., taken September 5, 2013.

All objections in the depositions are overruled.

After having considered the above evidence and briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

BACKGROUND AND PRE-INDUSTIAL INJURY EMPLOYMENT

1. At the time of hearing, Claimant was a 62-year-old married man residing in Pocatello, Idaho, with his wife of 40-one years.

2. Claimant has a high school education, with no further formal education or vocational training. He does, however, possess skills he acquired through a lifetime of working, mostly as a roofer, where he ran his own business, and more recently in janitorial services.

3. Claimant graduated from Rigby High School in 1969. Thereafter, he went to work for a local roofing company, and ultimately pursued a roofing career for over 40 years.

4. In approximately 1988, Claimant formed his own roofing company, which he ran until about 2006. Primarily, the company was a family affair, although from time to time he hired day labor to help remove old roofing. Claimant's wife Sandra kept the books.

5. In 1999, Claimant accidently shot himself in the right kneecap with a nail fired from a nail gun. The injury did not cause any permanent limitations or residual impairments after the wound healed.

6. In August 2000, Claimant fell from a rooftop and landed in a pile of rocks approximately 30 feet below. He severely injured his left wrist and his right elbow, and broke his right leg. His right radial bone was shoved through the back of his elbow and the

head of the bone was broken off in the rocks. His left wrist was broken in over 50 places. Claimant's upper extremity injuries were surgically repaired using plates and wires. He had follow-up surgery on his left wrist and right elbow a year post-accident. The following year, he had his elbow plate removed when it began to work its way through his skin. As a result of this accident and subsequent surgeries, Claimant lost some range of motion in his right arm and claims to have lost dexterity in his hands and fingers.

7. Claimant returned to roofing within a few months after his rooftop fall, and continued his business until late 2005. He then began to develop anxiety and a fear of climbing ladders. His anxiety and depression became disabling, which led to the decline, and eventual closing, of his roofing business. Claimant ran out of money and had to sell the family residence. He and his family for a time had to live with others, or in the family travel trailer. Claimant eventually overcame his depression and crippling anxiety with medical help. His mental condition is currently controlled with medication.

8. After his roofing business failed, Claimant and his family moved to Boise, where one of his daughters lived. While in Boise, Claimant took a janitorial job for Boise Janitorial, which did not last long as it did not provide him with enough work hours per week. He then went to work for a Boise area company known as We Clean Everything, where he worked from late 2008 to 2009. Claimant testified he chose the janitorial field because it allowed him to work at night with his wife, who also hired on with him at both jobs, and he would not have to be around many people as he worked his way back from his mental depression and anxiety issues.

9. In or around August 2009, Claimant was put in contact with Varsity Contractors (Employer) of Pocatello, which offered him a job in the janitorial field.

10. Claimant went to work for Employer in mid-August 2009 as a supervisor.

His duties focused on cleaning office buildings. Within six weeks, he was promoted to area manager. In this position, Claimant hired and fired employees and helped with training. He also did some computer work, such as inputting employees' time and ordering supplies on-line. When needed, he would also do some cleaning floor work. As he put it, "[a]nything that needed to be done was my responsibility to make sure it got done." HT, p. 43, ll. 14, 15.

11. As an area manager, Claimant was responsible for a large geographic area; his territory extended from about Twin Falls to northern Utah. He drove for five to six hours per day, to inspect buildings, arrange supplies, and meet with clients. He oversaw as many as 100 employees. Additionally, at times he would assist with cleaning carpets and stripping/waxing floors. His business day could extend to 20 hours on occasion. In 2010 he was a salaried employee, making about $2,600 per month.

CLAIMANT'S WORKERS' COMPENSATION CLAIM INJURIES

12. On April 7, 2010, Claimant cleaned carpets for four to five hours, using mechanized cleaning equipment weighing an estimated 70 to 80 pounds. Claimant testified the work took a lot of effort. After finishing the project, Claimant went home and went to bed. The next morning, Claimant's neck was sore. He advised his boss of his condition.

13. Claimant's neck symptoms did not improve with time. On Employer's advice, Claimant went to Country Chiropractic on May 24, 2010. That same day, Claimant had an MRI performed at Idaho Medical Imaging. The MRI showed herniated discs at C5-6 through C7-T1, with a prominent disc extrusion noted at C6-7. An additional finding of spinal stenosis at C5-6 without neural foraminal narrowing was noted.

14. Surety sent Claimant to Benjamin Blair, M.D., a board certified orthopaedic surgeon in Pocatello for further treatment. Claimant first saw Dr. Blair on June 3, 2010, at

which time Claimant presented with "neck pain radiating into the bilateral lower extremities, right far greater than left."[2] JE 3, p. 87. Dr. Blair took cervical spine x-rays. He suggested a trial of epidural steroid injections and put Claimant on light-duty work restrictions, with a lifting cap of 25 pounds.

15. Claimant submitted to a steroid injection on June 9, 2010. It produced minimal beneficial effects.

16. After Claimant's July 9, 2010 office visit with Dr. Blair, Claimant elected to forego any further treatment. While he was at that time continuing to improve, he still had symptoms when engaged in overhead activities. Due to his decision to stop treatment, Dr. Blair declared Claimant at MMI and gave him a 50-pound lifting restriction, with instructions to return on an as-needed basis. Claimant testified he discontinued treatment because his only options were more steroid injections, which did not work, or surgery, which he was not willing to do at that time.

17. In September, 2010, at Surety's request, Dr. Blair assigned Claimant a 16% whole person PPI rating, 100% attributable to the industrial accident. He reiterated his 50-pound lifting restriction and assigned a permanent work restriction of no overhead work with Claimant's right upper extremity. Surety paid Claimant PPI benefits in accordance with Dr. Blair's assessment.

18. Claimant continued his employment, working within his permanent restrictions. His neck remained sore through April 2011, but not to the point where he sought further medical treatment.

19. Claimant had an exceptionally difficult work schedule over the weekend of

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[2] Dr. Blair testified in his deposition the note should have read bilateral *upper* extremities, not lower extremities.

May 7 and 8, 2011. On the night of May 7, Claimant and one supervisor had to undertake a project which had been scheduled for a three-person crew. The two of them cleaned carpets, stripped and waxed floors, washed windows and cleaned an entire office building. Claimant estimated the project took six hours. Claimant had no physical symptoms immediately afterwards, but he was tired. The following evening, Claimant again found himself short-handed, with a large building scheduled for cleaning. Although a five- or six-person crew was scheduled, only three people showed up. Claimant and the others worked hard at cleaning carpets, stripping floors and cleaning from around 4:00 p.m. on May 8 to approximately 5 a.m. the next morning. Claimant then went home to bed.

20. When Claimant awoke on the morning of May 9, 2011, he had no feeling in his hands and feet. He surmised he aggravated his neck working that weekend. Claimant had his wife drive him to work, where he met with his boss, and explained his condition. Claimant was directed to speak with Employer's risk management department. He was advised to go home, and schedule an appointment with Dr. Blair. Claimant did not fill out any injury forms that day.

21. On May 11, 2011, Claimant presented at Dr. Blair's office. The doctor's office notes indicate Claimant was there for a follow-up of his cervical spine. Dr. Blair noted Claimant's pain radiated into his upper and lower extremities and was severe. He indicated Claimant was now leaning toward surgery and was not interested in more injections. Dr. Blair ordered an MRI and took Claimant off work until the findings could be reviewed.

22. Claimant returned to Dr. Blair on May 18, 2011 to review the MRI findings and discuss options. The MRI showed a two-level disc herniation, largely unchanged from the previous year. Claimant testified he chose surgery at that time, because the steroid

option did not work and Claimant was afraid he was doing more damage by waiting. He was concerned by the increase in symptoms, which included his hands and feet "going to sleep" and increased neck pain. HT p. 80, ll. 9-25.

23. On June 3, 2011, Claimant underwent an anterior cervical diskectomy and fusion with allograft, performed by Dr. Blair.

24. Dr. Blair's office notes of June 22, 2011 indicate Claimant was still in pain, although the x-rays showed good positioning of the hardware and bone graft. Dr. Blair also made the following entry; "[o]f note, he [Claimant] notes continued low back pain radiating into the bilateral lower extremities. He states this has been ongoing since the injury." JE 3, p. 60. Dr. Blair kept Claimant off all work activities[3].

25. On July 20, 2011, Claimant presented for his six-week post-operative check-up. He told the doctor his leg symptoms were much improved and he denied any lower extremity symptomatology. Dr. Blair gave Claimant a prescription for "aggressive" physical therapy and kept him off work for an additional six weeks.

26. At his August 2, 2011 office visit, Claimant complained of right elbow and left wrist pain, which he associated with aggravation from physical therapy. Dr. Blair took Claimant off physical therapy. Thereafter, his right elbow pain eventually subsided. While his notes do not show it, Dr. Blair referred Claimant to Vermon Esplin, M.D., of Idaho Orthopaedic & Sports Clinic of Pocatello, for evaluation and treatment of Claimant's wrist issues.

27. By the time Claimant first saw Dr. Esplin on September 20, 2011, his elbow pain had returned to baseline, but his left wrist was still bothersome. Dr. Esplin diagnosed

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[3] In fact, Claimant has never gone back to work since his injury in May, 2012. He eventually quit or was let go by Employer, and, as discussed below, has not sought employment elsewhere.

extensor tendinitis irritation associated with a plate which had been installed in Claimant's wrist in 2000. Dr. Esplin noted this particular type of plate commonly causes tendon irritation. Claimant received a steroid injection for his tendonitis on September 20, 2011.

28. The steroid injection was not successful long-term, and eventually Claimant underwent surgery to remove the plate from his wrist. This surgery alleviated Claimant's wrist pain.

29. On October 31, 2011, at his follow-up visit with Dr. Blair, Claimant complained of severe low back pain radiating into his lower extremities. He traced the start of the back pain to the time when his neck began hurting in 2010. X-rays taken that day showed degenerative spondylosis with probable stenosis. In response to Claimant's causation inquiry, Dr. Blair could not connect Claimant's low back condition to an industrial accident to a reasonable medical probability, and suggested Claimant see a physiatrist or occupational specialist to explore the causation issue.

30. Subsequently, a lumbar spine MRI was ordered, which showed multi-level foraminal stenosis. During his November 10, 2011 office visit, Claimant (and his wife) pressed Dr. Blair on the issue of causation, trying to tie Claimant's low back condition to an industrial accident. Dr. Blair again suggested Claimant pursue the matter with a physiatrist.

31. Claimant reached medical stability for his neck on November 30, 2011. He was given a permanent lifting restriction of no greater than 15 pounds.

32. In a letter to Surety dated January 4, 2012, Dr. Blair assigned to Claimant a 28% whole person PPI based upon his continued symptomatology post-surgery.

33. On February 29, 2012, Claimant presented for an IME with Eric Walker, M.D., a board certified physical medicine and rehabilitation physician. At that time,

Claimant indicated his neck slowly and gradually got better, and he was basically pain-free unless he "overstretched" it. Claimant also noted on an infrequent basis he still got tingling and numbness in his hands. His major complaint was his low back, which Claimant recalled got much worse beginning in November 2011.

34. On March 5, 2012, Claimant presented for follow-up examination with Dr. Blair, at which time he told the doctor his neck was doing fairly well and he was happy with his functional abilities.

35. Claimant's low back pain continued throughout the first half of 2012, and on July 24, 2012, he underwent laminectomy surgery on his lumbar spine. Surgery "greatly improved" Claimant's low back pain, but at hearing he testified it still hurt, although not as badly as his neck. *See, e.g.* HT p. 98, ll. 13-16; p. 130, ll. 5-16.

CLAIMANT'S OTHER DISABILITY FACTORS

36. In addition to his cervical, low back, and bilateral upper extremity issues, and his history of mental issues and depression, Claimant lists a number of other conditions and ailments which he argues will factor into the discussion of his permanent disability. Except for his claims of chronic pain and pain pill usage, each of the below-listed conditions pre-date Claimant's most recent employment. The most significant impediment is bilateral hearing loss of some degree. Claimant uses hearing aids to address the problem, but claims they are set at maximum volume.[4] He also has various ailments which historically have bothered him, but are not constant issues and are generally controlled. They include asthma or allergies, which can flare up in certain environments, sleep issues, and epigastric problems. Finally, since his neck injury, Claimant contends he has been in

[4] Claimant's hearing aids are several years old. There was no medical testimony as to the extent of his hearing loss, and having them at maximum volume really says nothing about the extent of his hearing loss. It could be he needs new hearing aids, new batteries, or a different type of aid.

chronic pain, with a corresponding daily use of prescription pain medicine. He claims his pain disrupts his sleeping and prevents him from driving.

DISCUSSION AND FURTHER FINDINGS

ISSUES REGARDING MAY 7, 2011 CLAIM

New Neck and/or Low Back Injury

37. Claimant contends that on May 7, 2011, he suffered new injuries to his cervical and lumbar spine as the result of a compensable industrial accident. Assuming *arguendo* his activities of May 7, 2011 constitute an accident, Claimant still must prove a causally connected injury in order to recover benefits. *See, McGuire v. Jak's Refinishing Corp. et. al.*, IC 2012-018513, February 6, 2014.

38. In order for Claimant to prove a causal connection between the events of May 7, 2011 and his medical conditions, he must supply 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).

39. The record is devoid of evidence that Claimant suffered a *new* neck injury in May, 2011. Both Claimant and his treating physician, Dr. Blair, reference Claimant's 2010 industrial accident when discussing his cervical injury. Dr. Blair's May 11, 2011 office

notes starts off; "[Claimant] presents for follow up of his cervical spine. His symptomatology is slowly returning." JE 3, p. 71. The 2011 MRI disclosed no new injury. *Compare*, JE 3, p. 70 *and* 87. *See also* JE 22, p. 719, ll. 3-19. Dr. Blair's operative notes equate Claimant's need for surgery with his 2010 injury; no mention is made of a new injury, or permanent aggravation of an old injury in 2011. Claimant has failed to prove he suffered a new neck injury in 2011.

40. Claimant next asserts he injured his lumbar spine on May 7, 2011. Not only is there no medical evidence to support his contention, Claimant's treating physician repeatedly refused to correlate Claimant's low back condition to an industrial accident of any sort. *See, e.g.* JE 3, p. 41, 43; *See also,* Depo. Benjamin Blair, M.D., p. 33, ll. 18-21. While Employer makes numerous other cogent arguments against this claim in its post-hearing brief, all of which are meritorious, the fact there is no medical evidence tying Claimant's low back injury to an industrial accident is fatal to the claim. Thus, the issue of timely notice of the claim under Idaho Code § 72-448 need not be addressed.

41. Claimant is not entitled to temporary disability benefits related to his May 7, 2011 claim.

Wrist and Arm Injury

42. Claimant argues he experienced an aggravation of his pre-existing right elbow and left wrist injuries as a result of the May 2011 accident. The sequence of events put forth by Claimant is as follows:

- Work activities of May 7 and 8, 2011 injured Claimant's neck;
- As a result of Claimant's neck injury, he underwent surgery on June 3, 2011;
- As part of Claimant's post-surgery recovery regime, he participated in physical therapy;

- Physical therapy led to aggravation of Claimant's previously injured right elbow and left wrist;

- Aggravation of Claimant's wrist necessitated surgery on the wrist.

In reality, Claimant's surgery in June 2011 was necessitated by an industrial accident which occurred in April, 2010. Surety accepted the 2010 claim, including the 2011 surgery. If Claimant's wrist surgery in March, 2012 is a compensable consequence of Claimant's 2010 industrial accident, Surety is likewise liable for Claimant's wrist surgery and related compensation.

43. Claimant's right elbow pain was short-lived. By the time he first saw Dr. Esplin, his elbow pain had returned to baseline. Assuming it was physical therapy which "lit up" Claimant's pre-existing condition, he nevertheless suffered no compensable damages to his elbow from physical therapy.

44. Claimant's wrist apparently did not return to baseline, because in March, 2012, Dr. Esplin operated to remove a plate previously placed in Claimant's wrist as a result of his 2000 injury. Dr. Esplin was not deposed. His medical records regarding Claimant's treatment in 2011 and 2012 are sketchy at best. There are only three pages of office notes, no surgical notes, and no notation anywhere which links Claimant's tendonitis or surgery to remove the plate to physical therapy. In fact, the only mention of physical therapy aggravating Claimant's upper extremities is contained in the patient history portion of Claimant's initial visit, and it only references Claimant's elbow. Nowhere in the provided records does Dr. Esplin opine to a reasonable medical probability that post-surgical physical therapy necessitated Claimant's hardware removal surgery. Without that medical causation connection, Claimant has not met his burden of proof on the issue of causation with regard to his wrist surgery in 2012.

Claimant's Credibility

45. Claimant's credibility is at issue. While in general, Claimant appears to be credible on many issues, when it comes to his disability, he clearly tries to put his "worst" foot forward. His testimony tended to exaggerate his disability and minimize his abilities, in the Referee's opinion, based upon personal observations, as well as certain statements Claimant has made. For this analysis, the following points are noteworthy:

- Claimant testified it was his goal to retire when he turned sixty-two (his age at hearing). HT p. 94, ll. 23-25; p. 95, ll. 9-17;
- When Claimant became eligible for SSDI benefits, he told ICRD to close his file as he was not interested in pursuing employment;
- Other than a lifting restriction, all other "restrictions" Claimant is under, as discussed below, are self-imposed, and even his lifting restriction is based upon his subjective representations.

46. Some of Claimant's limitations vary depending on where one looks in the record. For example, Claimant's alleged limitation on sitting varies from a low of ten to 15 minutes, as he told Mr. Porter, up to an hour, as he stated in his deposition. In any event, no doctor has imposed limits on Claimant's sitting ability, and Claimant sat at counsel's table for well over an hour at a time during the hearing. At one point in the hearing, defense counsel even noted on the record that Claimant had been sitting for greater than an hour. Claimant told Mr. Porter he could drive himself locally, but at his deposition and the hearing he testified he does not drive at all. Claimant told Mr. Porter he could walk no further than four blocks, and then only on even, flat surfaces. At hearing he mentioned going on eight to ten block walks, and going grocery shopping with his wife. HT p. 105, ll. 15-18. Other examples of restrictions Claimant has placed on himself include limiting his standing to ten to fifteen minutes, no pushing anything, not even an empty shopping cart,

no climbing in or out of a bathtub, no twisting his neck to the side. No doctor placed such limitations on him for any of these activities.

47. Many of Claimant's alleged self-imposed limitations are inherently improbable after observing Claimant during the hearing. Claimant sat through the hearing, as mentioned above. Claimant was able move his neck, at least somewhat, from side to side. It is inherently improbable that Claimant could not push an empty shopping cart, or climb into a bath tub. Most surprisingly, Claimant testified in his deposition he could not even hire and fire employees in his current state of disability. He claimed his pain (and the litigation) leads to stress, and his stress levels are too high to allow him to hire or fire an employee. He also claimed he could not do building inspections such as he used to do for Employer, although he acknowledged he has no doctor-imposed restrictions which would preclude him from doing so.

48. Other limitations do not correlate with Claimant's testimony. For example, while he told Mr. Porter he had no hobbies, Claimant elsewhere indicated he has several which he pursues. He and his wife periodically go to garage sales on the weekends. Claimant refurbishes and refinishes small furniture, such as end tables and chairs. He does most of the cooking at home. Claimant enjoys going on fishing trips, and occasionally goes camping. Claimant testified he does most of his fishing at Clark Canyon, Montana, which he stated is about 70 miles from Pocatello. The Referee takes judicial notice Clark Canyon reservoir in Montana is over 170 miles from Pocatello. Claimant also fishes at Blackfoot reservoir in Idaho, which he acknowledged is located over 70 miles from Pocatello. Driving over 170 miles each way to fishing spots, going camping, or spending the day going around town shopping garage sales does not comport with Claimant's

attempt to portray himself as hobbled by pain, and incapable of doing many day-to-day activities, much less hold down a job.

49. When Claimant wanted to work, he was capable of overcoming tremendous difficulties, such as his fall in 2000. When he does not want to work, and is content to live on his and his wife's disability payments,[5] he is good at maximizing his limitations. The Referee finds Claimant's self-described limitations to be overstated, and not supported objectively in the record. As to Claimant's self-report of his subjective limitations, the Referee finds him not credible.

PPI

50. Dr. Blair, Claimant's treating physician, assigned Claimant a 28% whole person permanent impairment rating (PPI) for his cervical spine after his 2011 neck surgery. Dr. Blair utilized *The AMA Guides to the Evaluation of Permanent Impairment*, Fifth Ed., to reach his impairment ratings, even though he acknowledges the fifth edition is not current. He justified his use of the Fifth Edition Guidelines by stating that he believes "very, very strongly that the Sixth Edition is incredibly inaccurate." Depo Benjamin Blair, M.D., p. 22, ll. 16, 17.

51. Employer hired Gary Walker, M.D., to conduct an IME on Claimant. The examination took place on February 9, 2012, which was after Claimant's neck surgery. Thereafter, Dr. Walker assigned Claimant a PPI rating of 15% whole person for his cervical spine, utilizing the *The AMA Guides to the Evaluation of Permanent Impairment*, Sixth Ed.

52. Pursuant to IDAPA 17.02.04.281.02, Employer averaged the two PPI ratings (28% and 15%) and arrived at a PPI of 21.5%, which it paid Claimant. While the parties

[5] Claimant testified his wife injured her low back in approximately 2007 while working for the Rigby School District and has been drawing SSDI benefits since then.

may wish to debate the relative validity of the two different AMA Guidelines editions (5th and 6th), resolution of that issue is not necessary in this case, because even if the higher rating is assumed to be correct, Claimant's disability as discussed *infra*, exceeds his impairment rating.

PERMANENT DISABILITY

53. 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 nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the 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, 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. The test for determining whether Claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced [his] capacity for gainful employment." *Graybill v. Swift*

& Company, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). Claimant bears the burden of establishing his claim for permanent disability benefits.

54. After the Commission has determined Claimant's disability from all causes combined, the Commission must next determine what portion of that disability is attributable to the industrial accident. *See Page v. McCain Foods, Inc.,* 145 Idaho 302, 179 P.3d 265 (2008). Having met his burden of demonstrating the extent and degree of his disability from all causes combined, the burden of going forward with evidence that some portion of Claimant's disability is referable to a preexisting condition shifts to Defendants. *See Barton v. Seventh Heaven Recreation*, 2010 IIC 0379 (2010). Idaho Code § 72-406 allows for apportionment of disability between a work caused condition and preexisting impairment. That section specifies in pertinent part:

> 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.

Idaho Code § 72-406(1).

55. Surety previously paid Claimant benefits due for a 21.5% PPI rating. He seeks disability benefits above this impairment rating. A major component of his disability claim is Dr. Blair's 15-pound lifting restriction. His other medical and non-medical conditions, as previously set out above; arguably increase his permanent disability to various extents, as discussed below.

Claimant's Lifting Restrictions

56. Every vocational expert in this case lists Claimant's 15-pound lifting restriction as a significant hindrance to employment. In fact, Mr. Porter noted if Claimant's restriction was but 20 pounds, it would open up additional employment

opportunities. Dr. Collins opined that without Claimant's severe lifting restrictions, his disability rating for the cervical fusion would be no greater than 15%.

57. Employer is highly critical of Claimant's lifting restriction, primarily based upon the following facts:

- Fifteen-pound lifting restriction is considerably more stringent than typical for a cervical spine fusion surgery; 30 to 50 pounds is more typical, according to Dr. Blair;
- Dr. Blair imposed the restriction based primarily on Claimant's own subjective account of his lifting limitations;
- Claimant told Dr. Walker in late February 2012 that his neck was nearly pain-free, and he had no radicular symptoms;
- Dr. Walker opined a 15-pound restriction would be excessive simply for Claimant's cervical fusion and he would be inclined not to place any lifting restrictions on Claimant solely for the fusion surgery.

58. Dr. Blair, who imposed the restriction, was questioned on the rationale for his restriction during his deposition. Therein, he agreed a 30- to 50-pound restriction is more typical for neck fusion patients, and 15 pounds is at the low end of an acceptable lifting restriction. He acknowledged the restriction was mainly based on Claimant's representation as to how much he could lift. Dr. Blair stressed he would have ordered a functional capacity evaluation (FCE), if Surety had asked for it. Had Claimant stated a lower lifting maximum, Dr. Blair would have demanded a FCE but since 15 pounds is within the lower end of reasonable, he imposed that weight restriction based on Claimant's representation.

59. Dr. Blair seemed to imply his restriction is not meant to preclude Claimant from ever lifting more than 15 pounds. Rather, he suggested in his deposition the restriction applies to a repetitive work environment. As noted therein:

> **A. [Dr. Blair] -- and we're assuming one thing is being at home and activities of daily living, another thing is his physical job, eight hours a day, five days a week, and his knowledge of his job and what he has to do, and him saying "I feel great, but there's no way I would be able to lift more than 15 pounds every day, eight hours a day, five days a week and not be symptomatic."**
>
> **So, you know, I run into this all the time. I watch videos that workmen's comp sends me, showing people doing one hour, one day a week. This is based on the workweek. As so if he's feeling great, that's good, but I think based on work would I – based on what he had told me, he would be able to work just fine, I think that's reasonable.**

Depo Dr. Blair, p. 37, ll. 20-25; p. 38, ll. 1-9. Even if Dr. Blair meant to impose the restriction for frequent, as opposed to occasional lifting, he nevertheless confirmed in his deposition that Claimant's restriction, although much more severe than typical, is not unreasonable for Claimant based upon his subjective complaints.

60. Dr. Walker testified a 15-pound restriction is not generally necessary for successful neck fusion patients. In fact, he noted most surgeons do not give any lifting restrictions for a successful cervical fusion, because lifting forces impact the lumbar spine, not the neck to any great extent. However, Dr. Walker also noted "if the surgeon that did his spine fusion said 'I'm most comfortable giving a 15-pound lifting restriction on my cervical fusions,' then I would not disagree with that." Dr. Walker Depo. p. 25, ll. 21-24.

61. It does not appear Dr. Blair was convinced Claimant needed a 15-pound lifting restriction, but was willing to go along with Claimant's assertions regarding his lifting limitations. He acknowledged a 30- to 50-pound limitation was more standard, but where there was no FCE, Dr. Blair deferred to Claimant on this issue. This was a case in which an FCE might have been beneficially employed to better define Claimant's limitations/restrictions.

62. When Dr. Walker examined Claimant in February 2012, his neck fusion was solid, with no evidence of a non-union. Claimant was pleased with the surgery's result. His neck was mainly pain-free, although it would flare up from time to time. Dr. Walker had reservations about a 15-pound lifting restriction based solely on Claimant's cervical fusion, but ultimately deferred to Dr. Blair. As noted previously, Dr. Blair imposed the 15-pound lifting restriction based primarily upon Claimant's representation. Dr. Blair found this restriction to be the most stringent which would still be "reasonable," and therefore he allowed it without doing an FCE. The 15-pound lifting limitation was more restrictive than that imposed before Claimant's surgery, when he was in unrelenting pain, with herniated discs pressing on nerves and causing radiculopathy into Claimant's upper extremities. The 15-pound lifting restriction for Claimant's cervical injury remains the only physician-imposed restriction in the record, but as indicated above is it based on the suspect foundation of Claimant's subjective complaints.

Disability from all Causes

63. Claimant suffered a cervical spine injury related to his industrial accident of April 7, 2010. Dr. Collins determined Claimant has a 60% permanent disability due to his cervical spine <u>if</u> there is a corresponding 15-pound lifting restriction. If there is a 35- to 50-pound lifting restriction associated with Claimant's cervical spine condition, Dr. Collins opined Claimant's PPD for his cervical spine would not exceed 15%.

64. However, Dr. Collins noted even with the less restrictive lifting requirement for his cervical spine, Claimant still would have a total PPD of 60%, because of the co-extensive restrictions Dr. Walker suggested for Claimant regarding his low back, and most

notably his upper extremities.[6] As Dr. Collins noted in her supplemental report of June 14, 2013:

> This letter is supplemental to my report of 6-11-13 where I opined [Claimant] had a disability of 60%, inclusive of his impairment, relative to his cervical condition. This opinion assumed his 15 pound restriction was for the cervical spine and he did not have permanent restrictions for his left wrist, right elbow or low back.
>
> ***
>
> When questioned about specific restrictions for his various conditions, [Dr. Walker] opined [Claimant's] lifting limitation for his cervical condition was 35 to 50 pounds or a medium level restriction. He felt [Claimant] should have a low back lifting restriction of 25 to 30 pounds or a light/medium level restriction. His opinion regarding the left wrist and right elbow conditions is that he should restrict lifting with his left arm to 15 pounds and he should be able to lift 20 pounds with the right arm.
>
> ***
>
> Considering [Claimant's] [medium-level or 35 to 50 pounds] cervical restrictions alone, he would not experience any loss of earning capacity and a small loss of labor market access. His disability would not exceed his impairment of 15%.
>
> ***
>
> If this option is assumed, [Claimant's] disability would still be 60%. Consideration of apportionment should be taken because of the light restrictions that are in place for his pre-existing upper extremity conditions.

JE 27, pp. 836, 837.

65. Claimant hired Mr. Delyn Porter, M.A., CRC, CIWCS, a vocational rehabilitation counselor and specialist, to complete a vocational assessment and disability evaluation to determine Claimant's "current employability, future vocational potential, and disability options." JE 18, p. 532. Mr. Porter prepared his initial report on October 12,

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[6] The Referee has not located any written document from Dr. Walker with these restrictions, but apparently they were conveyed to Dr. Collins, who used them in her analysis. These figures were not contested by opposing counsel during Dr. Collins' deposition.

2012. He prepared a supplemental report on June 13, 2013, to address the conclusions of Defendants' and ISIF's vocational experts.

66. Mr. Porter interviewed Claimant and his wife in person at their home in Pocatello on September 12, 2012. He also reviewed Claimant's medical history and a host of work-related records, informational books and guides, and on-line resources relevant to his assignment. After reviewing the Dictionary of Occupational Titles (DOT) to determine Claimant's range of duties in his prior employment, and looking for transferable skills for use in compatible occupations, Mr. Porter factored in Claimant's educational background and medical/functional restrictions to determine Claimant's loss of access to the job market in his geographical area. Mr. Porter, using the Idaho Occupational Employment and Wage Survey for Southeastern Idaho, determined Claimant had access to 36% of the total jobs in his labor market pre-industrial injury. His report then factored in Claimant's medical restrictions, most notably the 15-pound lifting restriction and something Mr. Porter labeled Claimant's "residual functional capacity."[7] Mr. Porter was aware of Dr. Walker's February 12, 2012 impairment ratings for the low back and the wrist and elbow impairments, but it is unclear whether Dr. Walker's restrictions for the left wrist/right elbow were relayed to him as they were to Dr. Collins. In any event, Mr. Porter's analysis centers on the cervical spine lifting restriction of 15 pounds, and his addendum report insists that "whether the 15 pound restriction contributed to the cervical or lumbar injury is not necessarily important. The fact remains, that Mr. Duncan has a PERMANENT 15 pound lifting restriction." JE 18, p. 560. Mr. Porter found Claimant had access to just 4% of the labor market with his

[7] Mr. Porter's "residual functional capacity" appears to be little more than a list of Claimant's self-professed limitations.

current medical limitations. Mr. Porter thus found Claimant has an 89% reduction in access to the labor market.

67. Mr. Porter looked at Claimant's pre-injury wage earnings and compared it to the average median wage as determined by applying data from various Idaho-specific wage sources and his personal knowledge, and determined Claimant has a 12% loss of wage earning capacity. Mr. Porter did not synthesize a final numerical disability rating from all causes combined, but instead concluded that Claimant was totally and permanently disabled under the odd-lot doctrine.

68. The ISIF hired Doug Crum, C.D.M.S., a vocational rehabilitation consultant from Boise, to evaluate the "factors that might lead to a finding of permanent and total disability, with or without ISIF liability" for the present case. JE 19, p. 568. In other words, he was asked to determine if Claimant was totally and permanently disabled. Mr. Crum reviewed Claimant's medical records, the parties' interrogatories, Social Security Administration records, Varsity Contractor's employment file, wage information, Dr. Collins' and Mr. Porter's vocational assessment reports, Claimant's deposition, Claimant's educational background and work history. Mr. Crum did not provide a PPD rating for Claimant's disability from all causes. Mr. Crum simply opined that Claimant was not totally and permanently disabled.

69. Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Indus.,* 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund,* 130 Idaho 278, 939 P.2d 854 (1997). The Idaho Supreme Court, in *Brown v. The Home Depot,* 152 Idaho 605, 272 P.3d

577 (2012) iterated that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing.

70. Of the three vocational witnesses utilized in this case, Dr. Collins is the most persuasive. Dr. Collins was the only expert who attempted to synthesize an opinion on disability from all causes combined. Her analysis was similar to the other experts, but she took an even-handed approach when considering Claimant's permanent disability. Her assessment was similar to Claimant's expert with regard to Claimant's loss of access and wage loss potential. The difference between the two was highlighted not in the math, but in the logic. Mr. Porter concentrated his analysis on what Claimant could not do, and most of those restrictions came directly from Claimant, not from any doctor or third party. Dr. Collins found actual jobs Claimant could perform, and pointed out Claimant could have returned to Employer, but chose not to for unspecified, vague reasons.[8]

71. After reviewing and considering all relevant medical and nonmedical factors and evaluating the advisory opinions, the Referee finds the Claimant suffered disability from all causes combined of 60%.

Odd-lot Doctrine

72. Neither party argued that Claimant is totally and permanently disabled under the 100% method. Even though Claimant has failed to prove he is totally and permanently disabled under the 100% method, Claimant asserts his permanent disability is such that he is totally disabled, under the "odd-lot" doctrine. An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State, Industrial*

[8] Mr. Porter also noted Claimant could return to his former line of work *if* Employer made accommodations to make sure Claimant was not required to work outside his restrictions. *See* JE 18, p. 551.

Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market - absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status rests upon the claimant. *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990).

73. Claimant may satisfy his burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways: 1) by showing that he has attempted other types of employment without success; 2) by showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or 3) by showing that any efforts to find suitable work would be futile. *Lethrud v. Industrial Special Indemnity Fund*, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

74. Claimant is only pursuing odd-lot status under the third method by arguing that it would be futile for him to find suitable work. Claimant asserts the following medical injuries, conditions, or restrictions must be considered when assessing the extent of his permanent disability:

- Cervical fusion surgery, resulting in PPI rating of 21.5% whole person;
- Permanent lifting limitations of no greater than 15 pounds, imposed by Dr. Blair, due to cervical injury and surgery;
- Restriction of no overhead work, imposed by Dr. Blair due to cervical injury and surgery;
- Lumbar stenosis, which required surgery in 2012;

- Pre-existing right elbow and left wrist impairments, which include loss of dexterity and post-traumatic arthritis;
- Pre-existing bilateral hearing loss, for which Claimant uses hearing aids "at full volume" but still results in some hearing difficulties in noisy environments and phone conversations;
- History of periodic asthma/allergies in certain environments;
- Various epigastric disorders which can become symptomatic on occasion;
- History of sleep apnea;
- Difficulty sleeping due to pain;
- History of mental issues and depression;
- Chronic use of opiate pain medication prescribed by Dr. Blair due to chronic pain.

75. In addition to his claimed medical issues, Claimant supports his argument for odd-lot status disability with a list of non-medical factors he believes further limit his opportunity for employment. They include:

- Claimant's age at hearing – 62;
- High school education;
- Majority of adult life spent as roofer, with limited transferable skills;
- Claimant refrains from driving due to his various medical issues;
- Negative economy.

76. In spite of Claimant's 60% permanent disability finding, Dr. Collins believed Claimant could find work in his labor market. She noted several of Claimant's positive aspects which would favorably impact his job search. They included the fact Claimant was an attractive person who presented well. He was articulate, and historically progressed swiftly in his last job. He quickly moved into a management position,

overseeing as many as 100 people. In the past, he always managed to work around his deficits. He overcame severe anxiety and depression. He overcame his partial hearing loss to work in a field with significant interpersonal interaction, both face-to-face and over the telephone. He was hired as an older worker when he went to work for Employer.

77. Dr. Collins did not feel it would be futile for Claimant to seek employment. As noted in her report of June 11, 2013:

> [Claimant] is 62 years of age. He was an older worker when he was hired by [Employer]. He had a high school education which allowed him to move in to supervisory and management level work in this industry. The ICRD counselor indicated he could have returned with the employer in a different position, but due to another unrelated health issue, he chose not to return to work. Susan Burt, the counselor felt with his physical capacities, education, age, transferability of skills and physician's recommendations, employment options were available in the community. I agree with this opinion. I do not feel a job search would have been futile based on the sedentary/light work restrictions placed on him.

JE 21, p. 619.

78. Dr. Collins was deposed on September 30, 2013. During her deposition, she identified several jobs which were available in the Pocatello area at the time of hearing for which Claimant was qualified. They included some of the same jobs listed by Mr. Crum, and other similar positions, such as housekeeping supervisor, front desk clerk at Red Lion hotel, and assistant manager at The Cash Store.

79. Mr. Porter did not attempt to figure a PPD rating for Claimant, nor did he attempt to find any jobs in Claimant's labor market area for which Claimant would qualify. Rather, relying in large part on the self-reported, subjective limitations provided by Claimant and Dr. Blair's lifting restrictions; Mr. Porter concluded Claimant's job market

was so limited in quality, dependability, or quantity that a reasonably stable market for him does not exist. He opined that Claimant was totally disabled as an odd-lot worker.

80. Subsequently, Mr. Porter reviewed Defendants' and ISIF's vocational experts' reports, and on June 13, 2013, prepared what he called an Addendum Vocational Evaluation Report. It somewhat mirrors his original report, but also incorporates information not available at the time of his first report, and to a degree rebuts the defense experts' opinions. His ultimate conclusion, that Claimant is totally disabled under the odd-lot doctrine, remained intact.

81. Mr. Crum reviewed Claimant's medical records and attended his deposition, and subsequently reviewed the transcript as well. He reviewed Claimant's discovery responses and Social Security application, Dr. Collins' report, discussed below, and Claimant's employment records.

82. Mr. Crum listed the positive and negative factors affecting Claimant's employability. He determined the most significant barrier to employment was Claimant's 15-pound lifting restriction, although he did consider Claimant's other limitations and attributes as well. He then rendered the opinion that Claimant, with his level of education, knowledge, experience, personality and "presentability" would be able to secure and maintain work within his restrictions. He went on to list several types of jobs for which Claimant would be suited, even with his restrictions. They included such things as:

- Custodial supervisor/head of housekeeping at a hotel;[9]
- Basic customer service/cashier at kiosk or movie theater/desk clerk/night auditor at small hotel;

[9] Mr. Crum acknowledged this position would not work for Claimant if it involved a considerable amount of physical labor.

- Fast food first line supervisor if on-site training was available;
- Fast food cook/cashier/dining room attendant;
- Telephone sales or service if provided with headphones for hearing issues;
- Patient sitter;
- Car service center shuttle van driver;
- Car rental agent;
- Car rental shuttle driver.

83. In addition to theoretical job types for which Claimant would qualify in his geographical area, Mr. Crum located then-current actual jobs listings in the Pocatello area which were hiring for positions within Claimant's job restrictions. They were:

- Cashier at St. Vincent de Paul thrift store; 20 hours per week to start, with review in three months;
- Habilitation specialist at Adolescent and Child Development Center, full time;
- Full-time cook, full-time cashier, and full-time shift supervisor at Burger King, training provided;
- Front desk clerk, Ramada Inn, full-time and no experience needed;
- Customer service associate at Convergys, full-time.

In light of these job openings and his evaluation of Claimant's strengths and weaknesses, Mr. Crum concluded "[i]n my opinion, with a dedicated, competent job search, [Claimant] would likely be able to secure physically compatible employment in his labor market. In my opinion, more likely than not, a job search would not be futile. [Claimant] has not attempted any sort of a job search, and so has not demonstrated that such a search would be

futile. In my opinion, [Claimant] is not permanently disabled [and] is not an 'odd lot worker.'" JE 19, pp. 591, 592.

84. Mr. Porter was critical of the jobs Mr. Crum and Dr. Collins found, and made valid points about the difficulty Claimant might have with some of them, but he did not rebut them all. Given the totality of the information, it does not appear it would be futile for Claimant to attempt employment, and it is more likely than not he could have found suitable employment had he been motivated to do so. The Referee adopts Dr. Collins' findings on the issue of Claimant's odd-lot disability claim.

85. Claimant has not proven he is totally disabled under the odd-lot doctrine.

86. Because Claimant is not totally disabled, there is no basis for liability against ISIF under Idaho Code § 72-332. Also, apportionment under the *Carey* formula is inapplicable.

Apportionment

87. 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.

Page v. McCain Foods, Inc., 145 Idaho 302, 179 P.3d 265 (2008) instructs us that where apportionment under Idaho Code § 72-406 is at issue, a two-step approach is envisioned for making an apportionment. First, 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. A prerequisite to the application of

Idaho Code § 72-406 is a finding that Claimant suffered from a "pre-existing physical impairment".

88. Here, the record reflects that Claimant did suffer from pre-existing conditions which constitute pre-existing physical impairments as anticipated by the statute. Claimant suffered a bilateral upper extremity injury on August 14, 2000 for which he was eventually given a 10% PPI rating. It is somewhat more difficult to ascertain whether or not Claimant's low-back condition constitutes a pre-existing physical impairment. Of course, Claimant has testified that he believes his low-back condition is causally related to the subject accident. He believes that he did not initially note the onset of low-back discomfort because it was masked by his cervical spine pain. Claimant's physicians did not endorse this theory of causation. Radiologic studies of Claimant's low back demonstrated the existence of moderate degenerative changes. Dr. Blair diagnosed Claimant as suffering from degenerative spondylosis and probable associated stenosis. Followup studies demonstrated the existence of significant multilevel foraminal stenosis. Dr. Blair was unable to associate these changes with the subject accident, and stated that Claimant's lumbar spine problems most likely started five or ten years ago:

> Q. Okay. Okay. With regard to the low-back surgery that you performed, what was the physical condition that caused you to perform that surgery?
>
> A. (Dr. Blair) Spinal stenosis.
>
> Q. There weren't any disc issues, no impingement of the nerves, anything like that, as a result of the discs?
>
> A. No.
>
> Q. It was all boney problems?
>
> A. That's correct.

Q. Based upon what you saw when you entered the lumbar spine, do you have any opinions on how long it may have taken to develop those type of stenosis problems?

A. How long? No. I guess I need a range.

Q. Was this something that would have developed in a year?

A. Very unlikely.

Q. Two to five years?

A. More likely.

Q. Greater than five?

A. Five to ten is probably the most likely.

Dr. Blair Depo., pp. 32/6-33/2.

89. It was these degenerative changes, changes which predated the subject accident that led to Claimant's lumbar spine surgery on July 24, 2012. Post surgery, Dr. Walker rated Claimant's low-back condition at 2% of the whole person. (Walker deposition 18/25-19/9). Although the record does not disclose what type of impairment rating Claimant might have been entitled to for his low back immediately prior to the subject accident, we believe that the record does establish that he would likely have been entitled to an impairment rating of some type for his low-back condition prior to the subject accident. *See Hopwood v. Kimberly Seeds, Int'l*, 2014 IIC 0007 (2014). Idaho Code § 72-406 does not require that the extent and degree of Claimant's pre-existing physical impairment for his low-back condition be quantified in order to be considered for purposes of application of Idaho Code § 72-406.

90. In order to understand the extent and degree to which Claimant's pre-existing upper extremity and low-back impairments contributed to his disability from all causes combined, it is also necessary to understand something about the limitations/restrictions that

flow from those conditions. Following surgical treatment for the 2000 accident, Claimant suffered a gradual increase in symptoms affecting his bilateral upper extremities, with left wrist more troubling than the right elbow. Dr. Walker opined that Claimant's pre-existing left wrist and right arm conditions warranted restrictions against lifting more than 15 and 20 pounds, respectively. (Collins deposition pp. 15-16). Dr. Collins categorized these restrictions as "light" in nature.

91. With respect to Claimant's low back, Dr. Blair did not offer an opinion on the extent and degree to which Claimant has limitations/restrictions for his low-back condition. Per Dr. Collins, Dr. Walker proposed that Claimant should have lifting restrictions of no more than 25-30 pounds for his low-back condition. (Collins deposition pp. 15-16).

92. Dr. Collins was the only expert who attempted to separate Claimant's preexisting disability from his disability related to the subject accident. When considering Claimant's preexisting cervical spine restrictions, Dr. Collins opined that Claimant's total disability was 60% whether Claimant had a restrictions of 15 pounds for his cervical spine injury or medium level restrictions of 35-50 pounds, because "[Claimant] would have been limited to light work, realistically, for the other conditions, so his restrictions for the cervical condition wouldn't have added much, maybe some because Dr. Walker, you know, also felt he shouldn't do repetitive head-lifting or bouncing kind of things . . .". Collins Depo., pp. 16-17. In other words, because Claimant already had significant restrictions related to his upper extremity condition, the impact of the limitations referable to the subject accident is blunted, if not extinguished, depending on what Claimant's restrictions should actually be for the cervical spine condition.

93. As discussed above, the Commission is skeptical of the cervical spine restrictions given by Dr. Blair and endorsed by Dr. Walker. The 15-pound restriction relies heavily on Claimant's subjective complaints, complaints which may not be entirely credible. However, Dr. Blair had ample opportunity to observe Claimant's clinical presentation, yet still decided that a 15-pound lifting restriction was appropriate.

94. If it be assumed that Claimant does have a 15-pound lifting restriction for his cervical spine condition, Dr. Collins has understated the significance of those restrictions as compared to Claimant's pre-existing limitations/restrictions. As reported by Dr. Collins, Dr. Walker recommended that Claimant should lift no more than 15 pounds with his left upper extremity, and no more than 20 pounds with his right upper extremity. These are unilateral restrictions, and admit the conclusion that by using both upper extremities to perform tasks, Claimant could lift objects weighing between 30-40 pounds, yet still stay within the limitations/restrictions recommended by Dr. Walker. The cervical spine limitations endorsed by Dr. Blair prohibit lifting objects weighing more than 15 pounds. Therefore, the accident-produced limitations/restrictions, if accurate, are more significant than those arising from Claimant's pre-existing conditions. However, we must also be cautious of attaching too much significance to the 15-pound cervical spine restrictions based, as it is, on Claimant's subjective complaints. Our synthesis of these facts is that it is appropriate to apportion responsibility for Claimant's disability between his pre-existing and accident-produced impairments. We conclude that Claimant's 60% disability, inclusive of PPI, is properly apportioned in the amount of 30% to Claimant's documented pre-existing condition and 30% to the subject accident.

ATTORNEY FEES

95. Claimant has not demonstrated an entitlement to attorney fees under Idaho Code § 72-804. Defendants' conduct was not unreasonable, nor did Claimant prevail on his issues.

CONCLUSIONS OF LAW

1. Claimant did not suffer personal injury arising out of and in the course of employment on or about May 7, 2011.

2. Claimant is not entitled to additional TPD and/or TTD benefits.

3. Claimant is not entitled to additional PPI benefits.

4. Claimant is entitled to a PPD rating of 60%, inclusive of PPI.

5. Claimant is not entitled to permanent total disability pursuant to the odd-lot doctrine.

6. ISIF is not liable for benefits under Idaho Code § 72-332.

7. Apportionment under the *Carey* formula is inapplicable to the facts.

8. Apportionment under Idaho Code § 72-406 is appropriate. After applying Idaho Code § 72-406 apportionment to the facts, Claimant is entitled to PPD of 30%, inclusive of PPI.

9. Claimant is not entitled to an award of attorney fees under Idaho Code § 72-804.

RECOMMENDATION

Based upon 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 _28th_ day of February, 2014.

INDUSTRIAL COMMISSION

_/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __2nd___ day of __June___, 2014, 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:

HUGH MOSSMAN
611 W HAYS ST
BOISE ID 83702

ERIC S BAILEY
PO BOX 1007
BOISE ID 83701-1007

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701

ge Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID DUNCAN,

Claimant,

v.

VARSITY CONTRACTORS,

Employer,

and

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,

Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,

Defendants.

IC 2010-013130
2012-001259

ORDER

Filed June 2, 2014

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers 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 recommendation 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 did not suffer personal injury arising out of and in the course of employment on or about May 7, 2011.

2. Claimant is not entitled to additional TPD and/or TTD benefits.

3. Claimant is not entitled to additional PPI benefits.

4. Claimant is entitled to a PPD rating of 60%, inclusive of PPI.

5. Claimant is not entitled to permanent total disability pursuant to the odd-lot doctrine.

6. ISIF is not liable for benefits under Idaho Code § 72-332.

7. Apportionment under the *Carey* formula is inapplicable to the facts.

8. Apportionment under Idaho Code § 72-406 is appropriate. After applying Idaho Code § 72-406 apportionment to the facts, Claimant is entitled to PPD of 30%, inclusive of PPI.

9. Claimant is not entitled to an award of attorney fees under Idaho Code § 72-804.

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

DATED this _2nd__ day of ___June___, 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 _2nd__ day of __June__ 2014, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

HUGH MOSSMAN
611 W HAYS ST
BOISE ID 83702

ERIC S BAILEY
PO BOX 1007
BOISE ID 83701-1007

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701

ge Gina Espinosa