BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SAMMIE J. HURLBUT, Claimant, v. J. R. SIMPLOT COMPANY, Employer, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2010-019334** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **Filed May 14, 2014**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on September 26, 2013. Claimant was present and represented by Richard S. Owen of Nampa. Self-insured Employer Simplot (Simplot) was represented by Daniel A. Miller of Boise. Paul J. Augustine, also of Boise, represented State of Idaho, Industrial Special Indemnity Fund (ISIF). Oral and documentary evidence was presented and the record remained open for the taking of post-hearing depositions. The parties then submitted post-hearing briefs and this matter came under advisement on January 15, 2014.

ISSUES

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

1. Whether and to what extent Claimant is entitled to permanent partial disability (PPD) benefits; and, if so

2. Whether apportionment pursuant to Idaho Code § 72-406 is appropriate;

3. Whether Claimant is totally and permanently disabled pursuant to either the "odd-lot" doctrine or the "100 % method"; and, if so

4. Whether ISIF is liable for any portion of Claimant's total disability; and, if so

5. Whether apportionment under the *Carey* formula is appropriate.

CONTENTIONS OF THE PARTIES

Claimant contends that he is totally and permanently disabled by both the 100% method and the odd-lot doctrine. Claimant's vocational expert has opined that Claimant is totally and permanently disabled due to his industrial back injury alone and pertinent non-medical factors. Claimant has satisfied all three prongs of the *Dumaw* test in that he tried to return to light-duty work without success, he, his wife, and an ICRD consultant unsuccessfully searched for work, and any further work search would be futile.

Simplot agrees that Claimant is totally and permanently disabled as of the time of the hearing. However, they attribute that total disability to an acute embolic stroke Claimant suffered between the time of his industrial accident and the time of the hearing. Regarding Claimant's back injury, the restrictions imposed exceeded the requirements of his time-of-injury job at Simplot. Claimant was placed in the medium to high-medium exertion levels after completing a work hardening program. Claimant's back restrictions do not eliminate "thousands" of jobs still available within his labor market that will restore his time-of-injury wage. Rather than being totally and permanently disabled, Claimant has incurred PPD of 21.5% inclusive of his 13% PPI as the result of his industrial back injury. Furthermore, even though Claimant is not arguing that his COPD contributes to his

disability, he was in fact totally disabled by that condition prior to his accident at Simplot as is evidenced by his application for Social Security Disability (SSD) benefits. Finally, in the event the Commission finds Claimant to be less than totally disabled, such disability should be apportioned between his pre-existing non-industrial COPD and his back injury.

ISIF agrees that Claimant is presently totally and permanently disabled due to his stroke that prevents him from driving. However, all of the vocational experts in this matter have concluded that Claimant's pre-existing COPD did not contribute to his disability. Claimant is not an odd-lot worker due to any industrial injuries; however, should the Commission find otherwise such disability is not due to any combination of his pre-existing COPD and his industrial back injury, but rather from his stroke and/or his back injury. His COPD was not a subjective hindrance or obstacle to Claimant's employment prior to his back injury. There has been no showing that there exists a job Claimant could perform "but for" his pre-existing impairment (COPD).

Claimant responds by reiterating that it was Simplot who joined ISIF and it is Simplot, not Claimant that carries the burden of establishing a *prima facie* case against them and this they have failed to do. Further, in the event that the Commission finds disability less than total, they should be skeptical of Dr. Collins' loss of access analysis because she failed to include many jobs Claimant had performed pre-injury that he can no longer perform. Thus, her analysis underestimates Claimant's loss of access and her overall disability figure should be increased.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Simplot's HR manager Brandy Sielaff adduced at the hearing.

2. Claimant's Exhibits (CE) A-I admitted at the hearing.

3. Simplot's Exhibits (SE) 1-24 admitted at the hearing.

4. ISIF's Exhibits 1-4 admitted at the hearing.

5. The pre-hearing deposition of Claimant taken by Simplot on November 14, 2012.

6. The pre-hearing deposition of Claimant taken by ISIF on June 3, 2013.

7. The post-hearing deposition of Douglas Crum, CDMS, taken by Claimant on October 4, 2013.

8. The post-hearing deposition of Nancy Collins, Ph.D., taken by Simplot on October 16, 2013.

9. The post-hearing deposition of William Jordan, CRC, CDMS, taken by ISIF on October 23, 2013.

All pending objections are overruled with the exception of Claimant's objection at page 49 of Mr. Crum's deposition, which is sustained.

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

FINDINGS OF FACT

Claimant's Hearing Testimony

Education

1. Claimant was 57 years of age and resided in Nampa at the time of the hearing. His childhood took him from Texas to the Los Angeles area and then on to Sacramento where he started kindergarten and finished the 10th grade. Claimant testified that he was a poor student with a learning problem: "Remembering. Things wouldn't stick in my brain." Hearing Transcript, p. 17. Claimant was placed in special education classes throughout his formal schooling.

2. After completing the 10th grade in California, Claimant moved to Eugene, Oregon. He intended to continue his education there, but he was placed in mainstream classes that he was unable to complete. Although Claimant has attempted, he has not obtained his GED. He has trouble retaining what it is he is trying to learn.

3. After about a year in Eugene, Claimant returned to Sacramento and tried to get back into special education classes there. However, he was told that it was "too late" and he would have to enroll in mainstream classes; Claimant never did so.

Work

4. Claimant began his employment in the fast food industry, first as a cook, then in maintenance. After a year or so, Claimant got into the construction business hand-shoveling residential foundations in a five-person crew in Modesto. After a year, Claimant returned to Sacramento where he began working as an orderly in a convalescent hospital. He did that type of work for approximately two-and-a-half years. After that, Claimant got married, moved, and went to work as a dry wall scrapper (picking up excess sheetrock out

of completed commercial jobs). He then secured an apprenticeship and joined a painters union to learn how to tape. After about a year, Claimant went to a sandblasting/painting company where he helped run a sandblaster.

5. Claimant remained in sandblasting for roughly two years then began work as a truck driver. He had a friend who was a truck driver and taught Claimant "the ropes." Claimant obtained his class one CDL and began a two-and-a-half year career as a truck driver. Regarding how he did as a truck driver, Claimant testified that he got tired being lost all of the time due to his difficulties reading maps and street signs (before GPS). He would, at times, have to call the telephone numbers on his bills of lading to get directions.[1] While he was never disciplined or terminated due to late deliveries resulting from getting lost, Claimant testified that it was a big inconvenience to his employers. After about two years, Claimant quit truck driving.

6. Claimant's next employment was building and installing garage and steel roll-up doors. He enjoyed this work and could not remember at hearing why he left that type of work after four-and-a-half or five years.

7. For the next year or so Claimant worked as a warehouseman for a moving and storage company. Because his hours were being cut, Claimant quit and began a series of odd jobs. He eventually went to work for a door manufacturer. Claimant stayed at various door-making companies for over ten years.

8. Claimant then moved to Nampa and went to work for a temporary employment agency with the idea of getting a job with Simplot (who only hired through temporary agencies). After about a year at Simplot as "heavy duty" (cleanup), Claimant

[1] Claimant did not have this problem when he was assigned a route.

was transferred to a class five relief operator. Claimant testified that from the beginning his exposure to starch and other chemicals caused him to have breathing/coughing problems; however, he obtained some Albuterol that instantly gave him relief. After the Albuterol ran out, Claimant obtained another inhaler from a physician. Claimant was able to perform all aspects of his job with the help of his inhaler.

COPD

9. On August 27, 2008, Claimant was awakened by an acute inability to breathe; he thought he was having a heart attack. He presented to Mercy Medical Center ER where he was diagnosed with COPD. He was prescribed Advair and advised to quit smoking. He returned to work without problems in most areas of the plant.[2] Claimant began wearing a dust mask and it "… was the difference between night and day." Hearing Transcript, p. 63.

10. Claimant never turned down work due to lung problems and missed no work related thereto except for the time he was hospitalized as mentioned in the above finding. Even so, because he did not know exactly what would happen to his lungs in the future, on July 10, 2010, Claimant filed an online claim for SSD benefits for his COPD. See SE 5, p. 9. He subsequently added his back condition post-accident to his application. The disability examiner found Claimant to be disabled effective August 8, 2010, the date of Claimant's industrial accident. The primary cause of Claimant's disability was his degenerative disk disease and the secondary cause was his COPD.

[2] Claimant requested that he not be required to work in the "wet end," an area where potatoes are first processed with steam and various chemicals. His request was granted and for about a year he was not required to work in the wet end other than cleanup. He also had problems with freezers and the peel room where steam is used to peel the potatoes.

The accident

11. On August 8, 2010, Claimant suffered an accident and injury he described at hearing as follows:

> Well, when I got on shift I went up there (the fryer deck), got my wet suit on and went up there, grabbed a wheelbarrow and grabbed a shovel and a broom and started pulling the potatoes out and shoveling them in and filling up the wheelbarrow and I did a first wheelbarrow load, and, then, I wheeled it over to the drain, dumped it down the drain and I came back to get another wheelbarrow load and I started shoveling those potatoes and I bent over and got a big shovel full and lifted it up and all of a sudden I got a bad burning sensation in my back.

Hearing Transcript, pp. 77-78.

12. Claimant eventually came under the care of orthopedic surgeon Timothy Doerr, M.D., who tried conservative measures including epidural steroid injections. When those failed, Dr. Doerr performed a right L4-5 laminotomy, foraminotomy, partial medial facetectomy and foraminal diskectomy on February 2, 2011. Claimant testified that his right leg pain initially improved with surgery but the right leg pain and numbness down to his right knee returned and was still present at the time of the hearing.

13. Post-surgery, Claimant attempted to return to light-duty work at Simplot in the peeling room sorting potatoes. Due to the bending and twisting involved, Claimant was unable to perform the light-duty job and was terminated effective September 7, 2011 for excessive absences.

14. After a discogram revealed that Claimant's lumbar spine was not the cause of his continued complaints of back pain, he was placed in a graduated work-hardening program in November 2011. He completed the program with the ability to perform medium to medium-heavy level work.

15. Claimant's treating physician found Claimant to be at MMI as of December 29, 2011 regarding his back injury. He assigned a 13% whole person PPI rating (without apportionment) utilizing the 6th Edition of the *AMA Guides to the Evaluation of Permanent Impairment* (Guides). He also assigned certain permanent physical restrictions to be discussed below.

16. After completing the work-hardening program, Claimant, with his wife's assistance, began a work search by looking in the newspaper, going online, and working with ICRD. Claimant also attempted without success to have Simplot hire him back so he could attempt light-duty work with them again. Even though he knew he could not handle a driving job due to his back, Claimant nonetheless applied for truck driving positions because he did not think he was qualified for any other jobs and did not know what else to do.

17. On February 5, 2013, Claimant suffered an acute embolic stroke involving his right occipital cortex. Claimant was discharged after five days in the hospital with a prohibition against driving due to visual issues (no left peripheral vision) stemming from his stroke.

18. Claimant has not worked since his attempt at light duty with Simplot in July 2011.

DISCUSSION AND FURTHER FINDINGS

"Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an

appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease. Consideration should be given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

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

Permanent partial disability is determined as of the date of the hearing. See *Brown v. The Home Depot,* WL 718795 (March 7, 2012).

THE VOCATIONAL EXPERTS

Douglas Crum, CDMS

19. Claimant retained Mr. Crum to assist in assessing Claimant's employability. Mr. Crum's credentials are well known to the Commission and will not be repeated here. Mr. Crum interviewed Claimant, reviewed pertinent medical records, ICRD records, the vocational reports of William Jordan and Nancy Collins, Ph.D., as well as Claimant's SSD application. He generated reports dated May 2, 2012 and September 13, 2013. See CE- H.

20. Regarding permanent restrictions assigned for Claimant's back injury, Mr. Crum testified that Dr. Rodde Cox, after Claimant completed a work-hardening program, imposed lifting restrictions in the 55 to 65-pound range depending on the type of lift, 58 pounds of force for pushing/pulling occasionally, 48 pounds frequently, bend, stoop, and twist occasionally, and being on his feet no more than four hours in an eight-hour day interspersed throughout the day.[3]

21. Regarding Claimant's education, Mr. Crum testified:

> Mr. Hurlbut completed the 10th grade back in 1972 in Sacramento, California. He told me he was a poor student all through school. He was in special education classes all through school. He told me that he thought he may have had ADD. I don't know that he was ever diagnosed with that specifically. And essentially he was socially promoted through school, through the grades he got through. Attempts were made to mainstream him. And those never succeeded. He apparently started but never finished the 10th grade in Eugene, Oregon. I think actually the Social Security records say he completed the 11th grade. But that is not right, I understand.

Crum Deposition, pp. 16-17.

[3] Mr. Crum testified that Claimant needed to stand at least twice during his 90-minute interview. The Referee noted at hearing that Claimant needed to stand after 45 minutes of testimony.

22. Mr. Crum noted that Claimant had unsuccessfully attempted to obtain his GED.

23. Regarding Claimant returning to truck driving, Mr. Crum testified:

> I don't think he would be a good candidate [for truck driving] for the reasons stated in terms of his literacy issues, also now in terms of his abilities for standing, walking, bending, twisting, stooping, those kind of things. I think those would all potentially be issues for him. And when you combine all the things together, it makes him not a very good candidate.[4]

Crum Deposition, pp. 20-21.

24. Mr. Crum testified that Claimant's COMPASS test[5] reading score placing him at the 7.8 grade level which is on the lower end of the literacy scale but does place him in the literate category. His writing grade level of 3.9 demonstrates that Claimant can read better than he can write, which explains why his wife fills out most applications for employment, SSD, etc.

25. Regarding Claimant's prior employment in the door-related business, Mr. Crum opined that he could no longer perform any of the jobs he performed within that business due to the restrictions assigned by Dr. Cox stemming from Claimant's back injury. Mr. Crum further opined that Claimant could not return to his time-of-injury job for the same reasons.

26. Mr. Crum concluded that Claimant is totally and permanently disabled as the result of his back injury and nonmedical factors alone. Any further attempts by Claimant to locate suitable employment would be futile. Regarding the implication of Claimant's back condition as well as his COPD on his employability, Mr. Crum testified:

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[4] In his initial report, Mr. Crum indicated that there may be certain truck driving jobs that Claimant could *theoretically* perform, but, as a practical matter, could not.

[5] Dr. Nancy Collins describes this test in finding number 30 below.

> I don't think he's going to be competitive. Again, that's because of his back condition and the other nonmedical factors that we've talked about here today. I think if you have several people standing in line for the same job, he's not going to be competitive. He's probably not going to get the job because of all the issues we talked about.
>
> Q. (By Mr. Owen): Okay. Are there jobs now that are beyond Mr. Hurlbut's reach because of his COPD that are not also beyond his reach because of his back?
>
> A. No.
>
> Q. Explain that for me.
>
> A. Well, because I believe just from his back and the other nonmedical factors, he's not employable. So, the COPD condition certainly doesn't help. But my feeling is that he was already disabled because of the back.

Crum Deposition, pp. 44-45.

27. The nonmedical factors alluded to by Mr. Crum include Claimant's age (57), his education, his work history (hard manual labor), his personality, his communication skills, and presentation (does not come across as a sophisticated individual).

Nancy Collins, Ph.D., C.R.C.

28. Simplot retained Dr. Collins to perform an evaluation of Claimant's employability. Dr. Collins' credentials are well known to the Commission and will not be repeated here. Dr. Collins interviewed Claimant, reviewed both of his deposition transcripts as well as the hearing transcript, reviewed pertinent medical records, reviewed ICRD records, reviewed Claimant's education (learning difficulties) and work histories (indicating medium/heavy-unskilled/semi-skilled work), and authored a report dated January 19, 2012 with two supplements.

29. Dr. Collins understood Claimant's restrictions to be:

> Well, he has restrictions from Dr. Cox that are based on the results of a functional capacities evaluation following a rehab program. And he had a -- still has, I guess - - a medium-heavy strength designation - - or lifting limit, that was 65 pounds.

> And then clarification after my first report came that he also had a standing-walking restriction of no more than four hours a day, and there was an additional restriction for occasional bend-stoop-twist.

Dr. Collins' Deposition, p. 8.

30. Claimant took a COMPASS test suggested by ICRD that Dr. Collins described as ". . . a college placement exam, and it helps the counselor predict whether somebody needs remedial education before they put them in actual college-level classes." Dr. Collins' Deposition, p. 9. Claimant's score on the reading portion of the test demonstrated a 5.7 to 8.9 grade level (a newspaper is typically written at the 5th grade level and the CDL exam at the 6th to 8th grade level).

31. In her initial report, Dr. Collins opined that Claimant has suffered a 7% PPD rating in excess of his PPI based on restrictions of medium to medium-heavy work, which exceeded his time-of-injury job requirements. Subsequently, when provided with Dr. Cox's restrictions on standing, squatting, etc., she increased her PPD to 21.5%. Dr. Collins testified that Claimant's stroke effectively eliminated him from the labor market due to peripheral vision issues.

32. Claimant informed Dr. Collins that he could only sit for an hour at a time before needing to get up and stretch. She testified as follows regarding how subjective complaints are considered:

> Q. (By Mr. Miller): Okay. As a vocational consultant who is doing an employability analysis, how do you take into account the subjective complaints, if you will, of the person you're evaluating versus what the medical community has said? How do you go about doing that?
>
> A. Well, all vocational rehab experts or counselors, really, we need to rely on what the objective physical restrictions are. And at times we have the luxury of a functional capacities evaluation, so then you have both; you have an objective measure of what their subjective complaints are in the functional capacities eval, and then you have the physical restrictions which

> are typically in place so that they don't cause further harm. So we had both of those in this case.
>
> And his - - when I talked to him, his subjective complaints were fairly similar to what the functional capacities evaluation showed.

Dr. Collins' Deposition, pp. 17-18.

33. Dr. Collins discounts Claimant's alleged inability to read street signs because he passed the test for his CDL and at least one test at Simplot so he has a basic, yet functional, reading level. She believes there were several driving-type jobs he could have performed before his stroke.

34. Based on the additional restrictions imposed by Dr. Cox on Claimant's ability to stand, walk, bend, twist, and stop, Dr. Collins upped Claimant's loss of access to 43% not including his COPD.[6] She agreed that if Claimant's COPD was added to the mix, his loss of access would increase, but she did not quantify by how much. Dr. Collins agreed with Claimant's counsel (and Dr. Bardana) that Claimant's COPD had gotten worse from 2012 until the time of the hearing and that it would be difficult for him to obtain work in the future based on his COPD alone. In fact, in her second report (August 8, 2012), Dr. Collins opined that Claimant's COPD was more limiting than his back condition.

35. Dr. Collins did not give a PPD rating for Claimant's COPD because she was not asked to. She agreed that if the restrictions from Claimant's SSD application and determination, his PPD rating (loss of access) would be higher than 43%; however, Dr. Collins still opined that there were certain truck driving jobs he could do such as shuttle and bus driving.

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[6] Dr. Emil Bardana, to whom Defendants sent Claimant for an IME regarding his COPD, offered the following restriction(s): "I feel comfortable saying he would be capable of performing mild to moderate work of a sedentary type from a pulmonary point of view." Dr. Collins' Deposition, p. 26. Dr. Collins opined that Dr. Bardana meant sit-down work, but not sedentary regarding lifting.

William Jordan, M.A., C.R.C., C.D.M.S.

36. ISIF retained Mr. Jordan to assist them with vocational issues. Mr. Jordan's credentials are well known to the Commission and will not be repeated here. He interviewed Claimant, reviewed pertinent medical and vocational records, sent JSEs to physicians for approval/disapproval, and authored an Employability Report dated September 13, 2013.

37. Mr. Jordan testified by deposition that Claimant's COPD which pre-existed his industrial accident was not an obstacle to his employment at Simplot and was managed with the use of a dust mask. He was aware of Dr. Cox's restrictions regarding walking and standing.

38. Mr. Jordan testified as follows regarding his assessment of Claimant's disability:

> I did a vocational diagnostic interview where I reviewed his medical history and restrictions, his perception of the situation, his previous injuries and disabilities that might impact his ability to work. I took a social and family history. I looked at his financial history, his education and employment history, and vocational objectives that he had developed. And I looked at his placeability, his social skills, interview behavior. And I used all of that in an employability analysis to determine what's realistic as far as a vocational objective after an injury and look at all the information and put it to the appropriate tests before making a decision on what would be reasonable as far as jobs for him.

Jordan Deposition, p. 11.

39. Mr. Jordan was aware of Claimant's learning difficulties as well as his inability to obtain his GED. He was also aware of the COMPASS test scores placing Claimant at the fifth grade level. Mr. Jordan took this information into account when he only identified potential jobs in the unskilled or semiskilled areas.

40. Mr. Jordan sent various job descriptions to Dr. Bardana (CE 1, pp. 33-54) that did not, for the most part, require a high school diploma or GED. Dr. Bardana approved (some with modifications) the job descriptions as being suitable for Claimant from a pulmonary standpoint (COPD).

41. Mr. Jordan also sent Dr. Cox the job descriptions that he provided to Dr. Bardana. The jobs not approved by Dr. Cox due to Claimant's back restrictions were those requiring prolonged standing and/or walking. Jobs approved by Drs. Bardana and Cox that are within his restrictions and readily available in Claimant's labor market include van and bus driver, security officer, electronic manufacturing worker, truck driver, harvest graders and samplers, locate technician, taxi driver, pizza delivery driver, weekend courier, and security officer.[7]

42. When asked about the effects of a combination of Claimant's back injury and his COPD on his employability, Mr. Jordan responded:

> Dr. Cox identified - - we were able to identify jobs he could do through Dr. Cox and also through Dr. Bardana, so. And Cox of course addressed the back difficulty. Dr. Bardana addressed the COPD difficulty. We were able to find jobs considering both of those problems that the claimant could do in the job market.

Jordan Deposition, p. 29.

43. Mr. Jordan did not determine Claimant's disability regarding his back injury because he was not asked to; however, he conceded that Claimant incurred <u>some</u> disability due to that injury.

[7] Mr. Jordan testified that when considering the visual impairment arising from Claimant's stroke, he would not be able to perform any of the jobs he identified or any jobs at all.

ICRD

44. Claimant worked with ICRD consultant Don Thompson originally, then consultant Darrel Holloway. Mr. Holloway prepared a status report and vocational recommendations on March 2, 2012. He noted Claimant's medical treatment, Dr. Cox's permanent restrictions after Claimant's work-hardening program (before his restrictions on standing, bending, etc.,) Claimant's SSD award for his back, COPD, and asthma, Claimant's restrictions for his lungs, and Claimant's difficulties in school. He also noted that Claimant's time-of-injury job was no longer available to him.

45. Mr. Holloway summarized his recommendations as follows:

> I have spent considerable time searching for employment opportunities for claimant. Claimant and his wife also looked for job opportunities.
>
> Claimant's lack of education is the first barrier which eliminates claimant from competing for many jobs.
>
> Claimant's COPD and asthma must also be considered. Claimant's strongest skills come from his years in the door manufacturing industry but the dust eliminates that as an option. There are a number of door mills in the Treasure Valley which could have presented employment opportunities.
>
> Any jobs requiring good communication skills, either by telephone or computer, are unsuitable for claimant. At this time I am unable to identify any employment opportunities. Claimant knows very few people in this geographical area so any efforts at networking have been ineffective.

SE 16, p. 5.

PPD

46. The Idaho Supreme Court in *Brown v. The Home Depot,* WL 718795 (March 7, 2012), held that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing. The Referee finds that at the time of the hearing, Claimant was totally and permanently disabled as the result of his industrial back injury, nonindustrial COPD, and nonindustrial stroke. However, Claimant's nonindustrial stroke, which

occurred after his final industrial accident, provides an appropriate basis to conclude that Claimant's disability would be more accurately measured before Claimant's stroke. Therefore, for the purposes of workers' compensation and ISIF liability, the degree of disability is best assessed before Claimant's stroke.

47. Claimant contends he is totally and permanently disabled either by the 100% method or by way of the odd-lot doctrine. The 100% method can establish total and permanent disability by showing a claimant's medical impairment and nonmedical factors total 100%. The Referee is unable to find, based on the vocational evidence presented, that Claimant's 13% PPI for his back injury and the nonmedical factors of his age, transferrable skills, learning disability, etc., add up to 100%.

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

49. Claimant attempted to return to Simplot at light-duty work as a sorter. However, the twisting (65% of the time) and reaching (100% of the time) was more than Claimant could tolerate, so he was eventually terminated due to excessive absences. The Referee finds that Claimant has proven odd-lot status by the first method.

50. Claimant, his wife, and Mr. Holloway at ICRD attempted to find suitable work for Claimant and could not. While Mr. Jordan and Dr. Collins identified various jobs or job titles they believed Claimant could perform, when provided with Dr. Cox's restrictions on standing, walking, bending, twisting, and stooping, they agreed that many, if not most, of the jobs they identified would be impossible, or at least problematic for Claimant to actually perform. Further, neither Dr. Collins nor Mr. Jordan were concerned about actually finding Claimant a job, whereas Mr. Holloway was and could not find Claimant employment. The Referee finds that Claimant has proven odd-lot status by the second method.

51. Mr. Crum testified that it would have been futile for Claimant to have continued his work search (before his stroke). Based on Mr. Holloway's and Claimant's lack of success in locating a job, the Referee agrees. The Referee finds that Claimant has proven odd-lot status by the third method.

52. Once a claimant established a *prima facie* odd-lot case, the burden shifts to the employer to show there is:

> An actual job within a reasonable distance from [claimant's] home which [claimant] is able to perform or for which [claimant] can be trained. In addition, the [employer] must show that [claimant] has a reasonable opportunity to be employed at that job. It is of no significance that there is a job [claimant] is capable of performing if he would in fact not be considered for the job due to his injuries, lack of education, lack of training, or other reasons.

Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 407, 565 P.2d 1360, 1364 (1977). Emphases added.

53. The Referee finds that Simplot has failed to rebut Claimant's *prima facie* odd-lot case by proving there is an actual job within his labor market for which he would be considered and for which he would have a reasonable chance of being hired to perform.

ISIF liability

54. Simplot joined ISIF to share their burden should the Commission find Claimant to be totally and permanently disabled. Idaho Code § 72-332 provides: **Payment for second injuries from industrial special indemnity account. --** 1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of his [or her] employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account.

2) "Permanent physical impairment" is as defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or occupational disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become unemployed. This shall be interpreted subjectively as to the particular employee involved; however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing permanent

physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

There are four elements that must be proven in order to establish liability of ISIF:

1. A pre-existing impairment;

2. The impairment was manifest;

3. The impairment was a subjective hindrance to employment; and

4. The impairment combines with the industrial accident in causing total disability.

Dumaw v. J.L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990).

55. Simplot contends that Claimant's COPD constitutes a subjective hindrance to Claimant's employment, or re-employment, and combined with his back injury to cause total disability and renders ISIF liable for a portion of that disability. Claimant and ISIF disagree and contend that it was Claimant's back injury alone that caused his total disability.

In *Colpaert v. Larson's Inc.,* 115 Idaho 825, 771 P.2d 46 (1989), the Court considered how physically progressive conditions, which by definition are unstable and changing, should be evaluated for impairment ratings in an ISIF case. ISIF argued that the claimant's progressive condition could not satisfy the definition of a permanent physical impairment under Idaho Code § 72-332, and therefore, the progressive condition could not be a preexisting condition for ISIF liability. The Court rejected ISIF's argument. The Court held that progressive conditions could be the basis for an impairment rating, and ISIF liability, but noted that the impairment rating needed to be made at a specific point in time.

> The rating of the permanent physical impairment is made at a point in time just prior to a claimant's industrial accident or injury. In other words, the rating is made, based on expert testimony, **at a specific point in time.** Thus,

> whether the condition is progressive or not does not impact this rating and the income benefits which flow from it.

Colpaert v. Larson's Inc., 115 Idaho 825, 771 P.2d 46 (1989). (Emphasis in original). *Brusseau v. State of Idaho, Industrial Special Indemnity Fund,* 2011 IIC 0095 (Dec. 2011). The Court reiterated its acceptance of *Colpaert v. Larson's Inc., supra*, in *Smith v. J.B. Parson Co.,* 127 Idaho 937, 908 P.2d 1244 (1996). Accordingly, preexisting impairment for a progressive disease or condition is to be assessed as of the date of the subject industrial injury.

COPD

56. Claimant was first diagnosed with COPD on August 27, 2008, two years before his industrial accident. Since that time, he has undergone two IMEs and was given restrictions (post-accident) by his treating physician of avoiding dusty and very cold or very dry environments.

IMEs

57. Simplot retained **Robert Cox, M.D.,** of Edmonds, Washington to evaluate Claimant's COPD. He examined Claimant and authored a report dated May 28, 2013 (SE-6). Claimant informed Dr. Cox that he was unable to work due to his back injury. He also told Dr. Cox that he was still smoking cigarettes, but was trying to quit. Utilizing the 6th edition of the *Guides*, Dr. Cox assigned a 17% whole person permanent partial impairment rating and restricted Claimant to performing moderate work.

58. ISIF retained **Emil Bardana, M.D.,** of Oregon Health and Science University to conduct an evaluation of Claimant's COPD which was accomplished on August 28, 2013, after Claimant's stroke and before the hearing. Dr. Bardana noted that six days before his industrial accident, John Johnson, M.D., who was seeing Claimant for

his COPD, reported that Claimant had been using his inhalers and that his COPD had returned to baseline. Dr. Bardana opined that the "overwhelming majority" of Claimant's progressive COPD is caused by his chronic history of tobacco use over 47 years and continues presently. ISIF Exhibit 3, p. 35.

59. Dr. Bardana questioned when Claimant's COPD was first diagnosed:

> Mr. Hurlbut claims that his respiratory symptoms began in 2008 soon after starting work at Simplot. However, his medical records do not demonstrate any symptoms related to his work in 2008 and 2009 and there are no medical records prior to 2007 in order to verify when respiratory symptoms may have begun.

ISIF Exhibit 3, p. 37.

60. Claimant apparently told Dr. Bardana that his disability was due to a combination of his back injury and his COPD. This is contrary to the position Claimant expressed at hearing and in his briefing.

61. Dr. Bardana opined that Claimant suffered a 10% whole person PPI (utilizing the 6th Edition of the *Guides*) for his COPD before his industrial accident.

62. Because there were no medical records of adverse work exposures in 2008 or 2009 and because Claimant was working at his job with no recorded problems prior to his industrial accident, Dr. Bardana would have assigned no physical restrictions for Claimant's COPD pre-accident other than to wear a 3M industrial respirator to avoid dust and particulates.

63. Dr. Bardana noted that Claimant's COPD has progressed since Claimant's industrial accident. As of the date of his report, Dr. Bardana would assign Claimant a 35% PPI rating. He believes Claimant capable of performing ". . . mild to moderate work of a

sedentary type from a pulmonary point of view." *Id*., p. 40. Dr. Bardana was not asked to explain what he meant by that somewhat confusing restriction.

Claimant's Social Security Disability Application

64. Claimant began an online application for SSD benefits in June or July 2010 based on his COPD alone. On or about September 11, 2010, while off work due to his back injury, Claimant filled out a formal application for SSD benefits for his COPD and low back conditions. Claimant provided the following information about how those conditions limit his ability to work:

> My COPD limits my ability to breathe on a constant basis. My breathing is worse anytime I am active, taking a shower, mowing the lawn, or anything I do causes me to have to use my inhalers & I feel like I am slowly suffocating. I also have a ruptured disk in my lower back (L3, 4, L4, 5) which limits standing, sitting, & laying down without pain killers. Have tingling and numbness in right leg. My breathing is getting progressively worse. Due to emphysema & COPD my lung function has deteriorated rapidly to the point where I'm not able to do household and outside chores. I feel like it won't be long before I will be living on oxygen.

SE- 5, p. 144.

65. Claimant was awarded SSD benefits based on his low back injury, COPD and asthma ". . . based on exertional limitations alone." *Id*., p. 20.

66. The Referee finds, based on conflicting evidence, that Claimant's total and permanent disability is attributable solely to his back injury. Claimant testified at hearing that, at the time of his back injury, his COPD was under control with his inhalers and dust mask and did not constitute a hindrance in performing his job duties.[8] Claimant continued to smoke and his COPD continued its natural progression. On the other hand, Claimant's

[8] Dr. Bardana reported that he would have not imposed any restrictions pre-accident for Claimant's COPD other than to wear a 3M industrial respirator.

back injury resulted in fairly significant restrictions that, realistically, put him out of his pre-injury labor market when combined with nonmedical factors.

67. None of the vocational experts weighing in on this matter have opined that Claimant's COPD combined with his back condition or was an independent cause of his disability. Dr. Collins and Mr. Jordan placed the source of Claimant's total disability to his non-industrial stroke which took him out of driving jobs. Mr. Crum, Claimant's expert, testified that it was his back injury alone that has rendered him totally disabled. When Claimant returned to work at a light-duty job post-accident, it was his back that prevented him from continuing; not his COPD.

68. Having previously found that Claimant's pre-accident COPD did not constitute a subjective hindrance to his employment or re-employment, the Referee further finds that Claimant's pre-existing COPD did not combine with his low back condition to create total and permanent disability. Claimant's significant positional restrictions from his back injury as well as his learning disability and other non-medical factors combined with his back injury to cause total and permanent disability.

69. While Claimant may have filed for SSD benefits based on his COPD alone before his back injury, he testified that he did so because he was worried about how that condition was going to progress (which it has) and perhaps adversely affect his future employability (which it likely will). This testimony is bolstered by the fact that Claimant was working at his regular job without apparent breathing difficulties at the time he submitted his online application. The progression of his smoking-caused COPD after his industrial accident is of no concern. What is of concern is the extent and nature of

Claimant's COPD as it pre-existed his industrial accident. See, *Colpaert v. Larson's Inc.,* 115 Idaho 825, 771 P.2d 46 (1989).

CONCLUSIONS OF LAW

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

2. ISIF is not liable for any of Claimant's total and permanent disability and the Complaint filed against it should be dismissed with prejudice.

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 __30th__ day of April, 2014.

INDUSTRIAL COMMISSION

___/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the _14th__ day of __May__, 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:

RICHARD S OWEN
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DANIEL A MILLER
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PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701

ge Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SAMMIE J. HURLBUT, Claimant, v. J. R. SIMPLOT COMPANY, Employer, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2010-019334** **ORDER** **Filed May 14, 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 is totally and permanently disabled pursuant to the odd-lot doctrine.

2. ISIF is not liable for any of Claimant's total and permanent disability and the Complaint filed against it is dismissed with prejudice.

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

DATED this __14th___ day of __May__, 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 _14th__ day of __May__ 2014, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

RICHARD S OWEN
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ge ___/s/_____