

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

ROBBY MOWREY,

Claimant,

v.

BOWEN PETROLEUM, INC., Employer, and  
IDAHO STATE INSURANCE FUND, Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL  
INDEMNITY FUND,

Defendants.

**IC 2005-514768**

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

**Filed July 31, 2014**

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**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 Pocatello, Idaho on September 17, 2013. Claimant, Robby Mowrey, was present and represented by M. Brent Morgan, of Pocatello. Defendant, State of Idaho, Industrial Special Indemnity Fund (ISIF), was represented by Paul B. Rippel, of Idaho Falls, Idaho. Claimant settled with his former employer, Bowen Petroleum, Inc. (Bowen Petroleum), and Idaho State Insurance Fund, prior to hearing.<sup>1</sup> The parties presented oral and documentary evidence.

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<sup>1</sup> The settlement terms are not in the record before the Referee; however, Claimant's Opening Brief (p. 23), recites:

Mr. Mowrey settled his claim with the State Insurance Fund on behalf of Bowen Petroleum Company, accepting payment in the amount of \$144,489.50 for medical benefits to date, with future medical care to remain open and subject to approval under Idaho Code §72-432; \$58,486.97 in temporary total disability benefits; \$29,479.57 in permanent partial impairment benefits; and, \$48,000.00 pursuant to an approved Lump Sum Agreement to cover remaining claims as to the State Insurance Fund.

Three post-hearing depositions were taken. The parties submitted post-hearing briefs and this matter came under advisement on March 31, 2014.

### **ISSUES**

The issues to be decided as the result of the hearing are:

1. Whether Claimant is permanently and totally disabled.
2. Whether the ISIF is liable pursuant to Idaho Code § 72-332.
3. Apportionment under the *Carey* formula.

### **CONTENTIONS OF THE PARTIES**

Claimant contends that he is permanently and totally disabled as a result of his pre-existing lumbar and left ankle conditions, and his 2005 industrial accident at Bowen Petroleum. He contends that ISIF is liable for a portion of his total permanent disability benefits pursuant to Idaho Code § 72-332. ISIF contends that Claimant is employable and not permanently and totally disabled. In the alternative, ISIF contends that if Claimant is permanently and totally disabled, such is not due to the combination of any pre-existing permanent impairment and his industrial accident at Bowen Petroleum, but is solely due to his accident at Bowen Petroleum.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Joint Exhibits 1-19, admitted at the hearing;
3. Joint Exhibits 20-29, conditionally admitted at the hearing and hereby admitted without condition;<sup>2</sup>

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<sup>2</sup> In ISIF's Post-Hearing Brief (pp. 1-2), objections to the admission of Exhibits 20-29 were withdrawn.

4. The testimony of Claimant and Claimant's wife Kim Mowrey, taken at the September 17, 2013 hearing;
5. The post-hearing deposition of Douglas Crum, taken by ISIF on October 29, 2013;
6. The post-hearing deposition of Robert H. Friedman, M.D., taken by ISIF on October 29, 2013; and
7. The post-hearing deposition of Hugh Selznick, M.D., taken by Claimant on December 30, 2013.

All objections posed during the depositions are overruled and all motions to strike are denied.

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**

1. **Background.** Claimant was born in 1964. He is right-handed. He was 48 years of age and resided in Pocatello at the time of the hearing.

2. In 1983, Claimant graduated from high school with average grades. During and for approximately two years after high school, Claimant worked as a school custodian. Commencing in approximately 1984, he worked for three years at a pawn shop as a pawn broker. In 1988 Claimant attended two semesters at Idaho State University. He left ISU in December 1988 on academic dismissal with a GPA of 1.52.

3. In approximately 1991, Claimant began working at Southern Pacific Railroad as a trainman, conductor. His duties required extremely heavy work including guiding

railroad cars and “changing knuckles—basically, building up trains so they could take them from one spot to another spot.” Transcript, p. 23, ll. 18-20.

4. **Left ankle injuries.** In approximately 1994, Claimant was helping unload a box truck when a van backed up, pinning his left ankle between the truck and the van. Claimant testified that his left ankle did not then affect his work nor did it affect his hobbies or other activities at home. On February 10, 1994, Claimant’s left ankle impairment was rated at 9% of the lower extremity. Exhibit 1, p. 1.

5. On August 31, 1996, Claimant suffered an accident while working for the railroad. Claimant was switching cars when a crossover broke, trapping his left foot and causing him to fall over while his left foot was still trapped. Claimant managed to yank his foot free but noted immediate ankle pain. He sustained a grade III lateral collateral ligament injury of his left ankle and subsequently underwent three left ankle surgeries including a left ankle modified Brostrom lateral ankle reconstruction on February 3, 1997. He was treated by Richard Wathne, M.D., orthopedic surgeon Hugh Selznick, M.D., and orthopedist James Morgan, M.D. Claimant had difficulty returning to work for the railroad after his injury. On June 10, 1997, Dr. Wathne informed Claimant “that he may never be able to return back to the railroad as a switch operator.” Exhibit 2, p. 86. Later in 1997, Claimant left the railroad because the work was too difficult given his left ankle injury. He testified at hearing: “I don’t believe they would hire me since I had an injury. I tried.” Transcript, p. 24, ll. 11-13.

6. **Lumbar injuries.** In 1998, Claimant complained to Dr. Selznick about back pain. At that time Claimant was having left-sided back pain which he attributed to limping because of his left ankle injury. On September 23, 1998, Claimant underwent a lumbar

MRI which revealed a small disc herniation at L5-S1. Claimant testified that he was never restricted in any part of his employment as a result of his back condition in 1998. Transcript, p. 35.

7. In approximately 1999, Claimant obtained his CDL and commenced working as a long haul driver for Montana Express. On May 22, 2002, Claimant was injured at Montana Express when he fell from a truck ladder during a windstorm. He noted low back pain and bilateral leg pain, left greater than right. Claimant treated with Benjamin Blair, M.D., for his injuries. On June 17, 2002, Claimant underwent a lumbar MRI which documented L4-5 posterior disc bulge with moderate central canal stenosis and bilateral neuroforaminal narrowing, and L5-S1 posterior disc protrusion centered slightly to the right. Dr. Blair recommended lumbar epidural steroid injections. Claimant left Montana Express because he no longer wanted to drive over the road.<sup>3</sup>

8. On July 5, 2002, Claimant began working for Bowen Petroleum in Pocatello. Claimant drove a 110-foot super tanker truck and trailer delivering gas to stations, farms, and at least one mine. The truck held approximately 6,000 gallons and the trailer held approximately 10,000 gallons of fuel. He considered this medium-to-heavy work.

9. On April 5, 2005, Claimant presented to the Portneuf Medical Center emergency room complaining of non-radiating lower back pain. He reported a similar episode of lumbar pain one year earlier. He was given prescription medications and released.

10. **Industrial accident.** On June 29, 2005, Claimant was injured while working at Bowen Petroleum's loading facility. He had loaded the first compartment. The counter

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<sup>3</sup> Claimant settled his workers' compensation claim with Montana Express in June 2003 for approximately \$8,000.00.

weight broke off of the swing arm, and as he was pushing the swing arm in a bent-over position, the “swing arm pushed me down to the ground. I thought I broke my hip.” Transcript, p. 38, ll. 20-21. Claimant noted immediate intense back, right hip, and right leg pain. He was taken to the emergency room and given medications. Claimant has not worked since that day.

11. On July 1, 2005, Claimant presented to James Collet, M.D., reporting extreme low back pain radiating down his right leg, as well as right groin pain. Claimant was treated conservatively with oral medications, physical therapy, and epidural steroid injections. A lumbar MRI on July 22, 2005, revealed a large right-sided L4-5 disc herniation with caudal migration extending into the L5-S1 neuroforamen and impinging upon the right L5 nerve root. On August 2, 2005, Claimant presented again to Dr. Collet reporting severe persistent back pain, right lower extremity radicular symptoms, and pain extending into his right groin and testicle. Dr. Collet referred Claimant to Patrick Farrell, M.D., for epidural steroid injections and to neurosurgeon William Scott Huneycutt, M.D., for surgical consultation. On August 13, 2005, Dr. Farrell provided the first of several epidural injections. On August 16, 2005, Dr. Huneycutt examined Claimant and recommended lumbar surgery. However, Claimant declined surgery at that time and elected to continue with epidural injections, physical therapy, and prescription medications.

12. On September 3, 2005, Claimant was standing on some stairs in his home when his right leg suddenly buckled, causing him to fall from the stairs onto his head into a toy box. Upon regaining consciousness he had significant neck pain.

13. **Lumbar and cervical surgeries and further treatment.** On November 4, 2005, Dr. Huneycutt performed a right L4-5 microdiscectomy. Claimant's back and right leg pain initially improved.

14. Claimant's neck pain worsened and he noted pain radiating down his right arm. He continued in physical therapy. Surety accepted responsibility for Claimant's cervical injuries from his fall when his right leg buckled on September 3, 2005. On February 3, 2006, Claimant underwent a cervical MRI which revealed a right paramedial C3-4 disc herniation extending into the right C3-4 foramen.

15. Claimant's back pain worsened and on March 17, 2006, he presented to David Simon, M.D., at Employer/Surety's request. Dr. Simon concluded that Claimant's L4-5 disc herniation and radiculopathy and his C3-4 disc herniation were related to his 2005 industrial accident, that he had not reached maximum medical improvement, and that he was not able to return to work. A March 22, 2006 lumbar MRI revealed an L3-4 annular tear and some distortion of the thecal sac from scarring at L4-5.

16. Dr. Huneycutt referred Claimant to Mary Himmler, M.D., for chronic back pain management. On July 10, 2006, Dr. Himmler noted muscle spasm and back and right leg pain. Claimant desired to return to his work at Bowen Petroleum but Dr. Himmler advised him that was out of the question. However, Claimant consistently performed physical therapy, including home exercises and hydrotherapy as instructed.

17. On July 21, 2006, Dr. Huneycutt performed a C3-4 anterior cervical decompression and fusion with instrumentation. Thereafter Claimant's neck and arm pain improved significantly but did not entirely resolve.

18. On October 19, 2006, Claimant presented to Dr. Himmler who noted that his neck and arm symptoms had improved but his lumbar, right buttock, and right leg pain had worsened. Claimant actually stepped on a needle without feeling it, finding it embedded in his right great toe after noticing blood on his sock. Claimant began using a TENS unit and an RS-4i Stimulator to help manage his chronic back and leg pain. Exhibit 9, p. 282.

19. On January 31, 2007, Claimant underwent another lumbar MRI that showed enhancing epidural scar on the right intravertebral body margin at L4-5 and posteriorly at L3-4, disc material in the left paramedian and posterolateral disc margin with mass effect on the ventral thecal sac, mild attenuation of the left L5 nerve root, and moderate bilateral neuroforaminal narrowing at L4-5. Claimant subsequently received several L4-5 epidural steroid injections which provided only temporary improvement.

20. On April 2, 2007, Dr. Himmler reported that Claimant could not return to truck driving and was restricted from bending, twisting, stooping, prolonged sitting, or lifting more than 20 pounds. Dr. Himmler and Dr. Farrell discussed with Claimant implanting a spinal cord stimulator; however, Claimant was hesitant. He resumed physical therapy and made some progress in physical therapy with Jeremy Jones, M.D. However on July 11, 2007, Dr. Himmler reaffirmed that Claimant would not be able to return to his pre-injury job.

21. On August 30, 2007, Claimant presented to Dr. Himmler reporting back pain and pain in his right hip, testicle, and leg. He also reported urinary incontinence during a physical therapy session earlier that day. Claimant underwent a lumbar MRI that showed no changes from his January 31, 2007 MRI. On September 6, 2007, Claimant presented to Dr. Himmler and reported several additional episodes of urinary incontinence.



22. On September 10, 2007, Claimant was examined again by Dr. Simon at Surety's request. Claimant reported worsening back and right leg pain, and six episodes of urinary incontinence in the previous two weeks. Dr. Simon found Claimant was not yet medically stable and recommended further testing to include electrodiagnostic testing. He did not release Claimant to return to work. On November 5, 2007, Elizabeth Gerard, M.D., performed an EMG study which was essentially normal; however, Dr. Himmler noted that the study demonstrated no response to right peroneal nerve testing and mild prolongation of the right distal tibial latency. Steven Simmons, P.A.-C., found Claimant markedly symptomatic in his right low back and leg on November 13, 2007.

23. On December 6, 2007, Dr. Himmler noted that Claimant had fallen on Thanksgiving and injured his right buttock. Dr. Himmler noted on December 18, 2007 that Claimant's right leg still gave way from time to time, causing him to fall.

24. On January 8, 2008, Claimant was examined yet again by Dr. Simon at Surety's request. Dr. Simon found Claimant medically stable regarding his cervical injuries, but not medically stable regarding his lumbar injuries. Dr. Simon rated Claimant's cervical impairment at 25% of the whole person attributable to his 2005 industrial accident. Claimant continued with significant pain. When the Surety declined to pay for further Kadian, Norco, or Soma prescriptions, Dr. Himmler prescribed less expensive oral morphine sulfate which Claimant paid for out of his own pocket. Exhibit 9, p. 320. On May 13, 2008, Dr. Himmler began prescribing Methadone for long-term chronic pain management. Exhibit 9, p. 323.

25. On November 4, 2008, Claimant presented to Dr. Huneycutt with continued intense low back and right lower extremity pain. Dr. Huneycutt did not recommend further surgery, but did recommend follow-up MRI.

26. Dr. Himmler moved from the Pocatello area and commencing November 10, 2008, Claimant began to treat with Amy Reid, M.D., for management of his chronic pain and muscle spasms. By that time Claimant had begun using a cane to avoid falling when his right leg gave out unexpectedly.

27. On November 24 and 25, 2008, Claimant underwent a Work Well Functional Capacity Evaluation by Bart McDonald, P.T. Claimant demonstrated cooperative behavior and was willing to work to his maximum abilities. Both objective and subjective parameters indicated that Claimant struggled with many parts of the test. Based upon the FCE, Mr. McDonald determined that Claimant could lift 10 pounds occasionally and 30 pounds rarely, and was entirely restricted from repetitively lifting more than 10 pounds, squatting, lifting from a squatting position, frequent carrying, or working on slick surfaces.

28. On February 9, 2009, Dr. Reid opined that “the severity of Mr. Mowrey’s conditions including displaced intervertebral disc; low back, neck, and leg pain, as well as findings from his Functional Capacity Evaluation would make Mr. Mowrey totally disabled at this time.” Exhibit 11, p. 335.

29. On March 3, 2009, Claimant was found eligible for Social Security Disability benefits from June 29, 2005.

30. Claimant continued to treat with Dr. Reid for ongoing back and leg pain and muscle spasms. He received various prescription medications, including Methadone,

Norco, and Flexeril, and trigger point injections. Dr. Reid ordered a lumbar MRI due to Claimant's increasing back and leg pain; however Surety did not approve the study.

31. **LifeFit program.** From September 14 through October 9, 2009, Claimant attended and completed the four-week long LifeFit program offered by St. Luke's Idaho Elks Rehabilitation Services in Boise and directed by Robert Friedman, M.D. Psychologist Michael H. McClay, Ph.D., interviewed Claimant on September 15, 2009, as he commenced the program, and concluded he had elements of chronic pain syndrome and probable symptom magnification syndrome. On September 29, 2009, while enrolled in the LifeFit program, Claimant underwent a lumbar MRI. Dr. Friedman opined the MRI showed no change from the prior MRI. By October 7, 2009, Claimant was demonstrating light-duty work capability and had stopped taking prescription narcotics and ceased using his cane at Dr. Friedman's direction. Dr. Friedman determined to discharge Claimant from the LifeFit program on October 9, 2009, and instructed Claimant to continue in an independent fitness program for the next three months, preferably five days per week. Dr. Friedman noted:

This is not therapy, and no further therapy is indicated; the patient simply needs access to an athletic facility to perform an independent exercise program. With participation in this managed fitness program, the patient would be expected to increase in physical capacity by 10% per week over the next ten weeks, up to the level of permanent [medium work] restrictions, as outlined.

Exhibit 12, p. 422.

32. On October 8, 2009, Dr. Friedman rated Claimant's permanent impairment at 12% of the whole person for his lumbar condition and 11% of the whole person for his cervical condition. Dr. Friedman released Claimant to return to a medium work level lifting 25 pounds repetitively and 50 pounds occasionally. He restricted Claimant from

over-the-shoulder lifting of more than 20 pounds. Exhibit 12, p. 468. Claimant was discharged as having successfully completed the LifeFit program on October 9, 2009; however, he did not believe he was capable of working. Claimant reported increased back pain to Dr. Friedman after completing the program.

33. Claimant testified that the LifeFit program did not help him and was not half the program that physical therapist Bart McDonald had previously designed for him. Claimant developed increased intermittent left thigh numbness and increased lumbar and right leg pain as he participated in the LifeFit program. He also developed increased left ankle pain as he participated in the program without the benefit of his cane. This increased numbness and pain persisted after completing the program. Claimant testified that contrary to Dr. Friedman's notes, the LifeFit program did not wean him off of prescription narcotics and did not wean him off of using his cane.

34. On October 13, 2009, Claimant presented to Dr. Huneycutt reporting increased low back and leg pain from his participation in the LifeFit program. Dr. Huneycutt read the September 29, 2009 MRI from the LifeFit program and recorded: "Recent lumbar MRI from Elks reveals progressive failure of the disks at L3-4 and L4-5 with annular tear and herniation with stenosis of the neural foramen." Exhibit 7, p. 225. Dr. Huneycutt opined that further lumbar surgery offered at best a 50% chance of satisfactory results. Dr. Huneycutt again suggested a spinal cord stimulator. On October 21, 2009, Claimant presented to Dr. Reid who continued Claimant on methadone and hydrocodone. Dr. Reid noted Claimant's continued muscle spasms and use of a cane.

35. On December 14, 2009, Dr. Friedman revised his permanent impairment rating of Claimant's lumbar condition, attributing 7% impairment to Claimant's pre-

existing lumbar condition and 5% impairment to Claimant's 2005 industrial accident. By letter dated December 28, 2009, Dr. Simon agreed with Dr. Friedman's work restrictions and his rating of Claimant's permanent impairment and apportionment thereof for pre-existing conditions.

36. Claimant's left ankle pain aggravated by the LifeFit program worsened and in January 2010, he sought treatment of his left ankle from Dr. Selznick who provided a cortisone injection.

37. **Chronic pain management.** On February 22, 2010, Claimant presented to Dr. Reid reporting flare-ups of back pain with episodes of urinary incontinence every couple of months. Dr. Reid provided trigger point injections. Claimant attempted to be as active as possible by walking and swimming regularly. On June 15, 2010, Dr. Reid examined Claimant and noted cervical pain with muscle spasm and chronic low back and right leg pain with muscle spasms. She continued Claimant on methadone, hydrocodone, and physical therapy.

38. On August 10, 2010, Claimant presented to Mark Mansfield, M.D., reporting back pain and urinary incontinence secondary to back injury. On August 11, 2010, Scott Bontrager, P.A.-C., assistant to Dr. Mansfield, wrote that Claimant had been working with his surgeon, physical therapist, and other providers and "will be unable to return to work at this time or possibly indefinitely." Exhibit 4, p. 159.

39. On November 17, 2010, Dr. Reid recorded Claimant's report that he had trouble sleeping, having increasing back pain if he attempted to sleep on his right side, increasing neck pain if he attempted to sleep on his left side, and difficulty breathing if he

attempted to sleep on his back. Claimant was subsequently diagnosed with and treated for sleep apnea.

40. On February 14, 2011, Claimant again reported episodes of urinary incontinence. He continued treating with Dr. Reid and Dr. Selznick. Claimant continued to walk and swim regularly.

41. On November 14, 2011, Claimant presented to Dr. Selznick reporting severe low back pain. Dr. Selznick noted that Claimant's back pain markedly incapacitated him and that Claimant could not return to any type of full-time work. Dr. Selznick concluded that Claimant was 100% disabled.

42. On June 12, 2012, Claimant presented to Dr. Selznick reporting episodes of urinary incontinence as well as increasing upper extremity weakness. Claimant continued to treat periodically with Dr. Reid for management of his chronic back, lower extremity, neck, and upper right extremity pain.

43. On July 24, 2012, Claimant was examined by Elizabeth Gerard, M.D. EMG testing revealed mild bilateral carpal tunnel syndrome and Guyon canal nerve entrapment.

44. On July 30, 2012, Dr. Selznick examined Claimant and noted L4-5 instability documented by x-rays and C6-7 spondylosis also documented by x-rays. Dr. Selznick recommended MRI evaluation.

45. On November 16, 2012, Claimant underwent a cervical MRI that revealed an open fusion at C3-4 and C5-6, and C6-7 disc changes with bridging posteriorly. Claimant also underwent a lumbar MRI that revealed progressed lower lumbar changes as compared to his 2007 MRI, including moderate spinal stenosis at L4-5 with increasing facet arthropathy, moderate circumferential spinal stenosis at L3-4, and a small annular tear at

L2-3 slightly asymmetric to the left with mild mass effect. On December 8, 2012, Dr. Selznick noted the very significant stenotic changes at L3-4 and L4-5 and concluded ongoing use of chronic pain medication was appropriate. Exhibit 30, p. 2. He recommended trigger point injections and epidural steroid injections. Thereafter Claimant continued to see Dr. Farrell for epidural and trigger point injections.

46. On January 10, 2013, Claimant was examined at Surety's request by Timothy Doerr, M.D., and Dr. Friedman. They concurred in Dr. Friedman's prior impairment ratings and permanent work restrictions for Claimant. Claimant reported ongoing back and neck pain, and episodes of urinary incontinence caused by sharp back pains up to three times per week. Claimant reported that because of urinary incontinence he sleeps and travels in Depends. Dr. Doerr and Dr. Friedman opined that there was no medical need for Claimant to use prescription opiates, a cane, or receive any further medical treatment. Exhibit 12, p. 475-N.

47. On February 9, 2013, Dr. Selznick reviewed and disagreed with the opinions offered by Dr. Doerr and Dr. Friedman. Exhibit 30, p. 4 (S-22).

48. On March 20, 2013, Dr. Huneycutt examined Claimant and recorded markedly positive straight leg raise bilaterally with reports of constant low back pain exacerbated by movement. Claimant reported his lower extremities were engulfed in pain. Dr. Huneycutt did not believe surgical intervention would improve Claimant's condition.

49. On April 22, 2013, Dr. Farrell noted that in contrast to the IME panel that opined Claimant had only partial disability, Drs. Huneycutt and Selznick concluded Claimant suffers significant degenerative changes in his back that prevent him from

working. Dr. Farrell opined that Claimant did “have significant degenerative changes in his back causing him pain.” Exhibit 37, p. F-RM-34.

50. **Condition at time of hearing.** At the time of hearing, Claimant continued to have neck and right arm pain and numbness, as well as low back, hip, right leg and foot pain. He noted burning left thigh pain when seated and his right leg continued to be unstable. At hearing Claimant used a cane and testified that his right leg pain and burning continues to be very severe.

51. Claimant testified he has lost all pleasurable things he enjoyed prior to his accident, including all his hobbies, capacity to make a decent income, and ability to drive more than approximately seven miles. He testified that he could not tolerate truck driving, pawnshop work, sitting more than 30 to 45 minutes, walking more than 300 yards, or lifting more than one gallon of milk. Claimant notes left ankle pain with stair climbing. He also suffers carpal tunnel syndrome and frequently drops things. He may sleep only three or four hours per night because he cannot lie down for a prolonged period. Claimant has urinary incontinence “all the time.” Claimant’s Deposition, p. 39, l. 2. He summarized why his activities are so limited now:

Well, the constant pain in my back, my neck, my arm; and with my incontinence, I urinate. I can’t, I can’t tell when I’m going to go. I just—if I get a sharp pain in my back, I’ll go; and matter of fact, at night I wear Depends so I don’t urinate in bed.

Claimant’s Deposition, p. 55, ll. 6-11.

52. At the time of hearing, Claimant continued treating with Dr. Huneycutt, Dr. Selznick, and Dr. Farrell. Claimant continued receiving Social Security disability. His wife described him as a workaholic prior to his 2005 accident and testified he would go back to work in a heartbeat if he could.



53. **Witness credibility.** Having observed Claimant and his wife at hearing, and compared their testimony with other evidence in the record, the Referee finds that both are credible witnesses.

### **DISCUSSION AND FURTHER FINDINGS**

54. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

55. **Permanent disability.** The first issue is whether Claimant is permanently and totally disabled pursuant to the odd-lot doctrine or otherwise. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. 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 accident causing the injury, or manifestation of the occupational disease, 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. A determination of permanent disability focuses on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995). Pursuant to Idaho Code § 72-422, the proper date for disability analysis of a claimant's labor market access is the date of hearing, and not the date that maximum medical improvement has been reached. *Brown v. Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012). "Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts." *Clark v. Cry Baby Foods*, 2012 WL 2118143 (Idaho Ind. Com. May 2, 2012).

56. Claimant asserts that his 2005 industrial accident at Bowen Petroleum, in combination with his pre-existing lumbar and left ankle conditions and non-medical factors, render him totally and permanently disabled. His permanent disability must be evaluated based upon his medical factors, including his permanent impairments, the physical restrictions arising from his permanent impairments, and his non-medical factors, including his capacity for gainful activity and his ability to compete in the open labor market within his geographical area.

57. Impairment. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of

evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

58. *Maximum medical stability.* Evaluation of permanent impairment presupposes maximum medical improvement, meaning: "the condition is ... well stabilized and unlikely to change substantially in the next year with or without medical treatment." Selznick Deposition, p. 9, ll. 11-13. In his 2013 deposition, Dr. Selznick expressed concern that Claimant's condition, even nearly ten years after his industrial accident, was not stable because his condition continued to change. However, Dr. Friedman and Dr. Doerr found Claimant medically stable on October 8, 2009, when his permanent impairments were rated in the LifeFit program. Moreover, when Dr. Huneycutt examined Claimant on March 20, 2013, he noted Claimant's chronic and increasing low back and lower extremity pain but recorded:

I have reviewed the imaging studies with the patient at length. I have discussed with the patient surgical options. .... I have reviewed the risk of surgery .... I have made it clear there are no guarantees to outcome. In fact, I have informed the patient that in my opinion he has a less than 50% chance of describing surgical intervention as producing satisfaction at six months postop interval. I have made it clear to the patient I do not believe surgical intervention will affect or will improve his reports of incontinence or his reports of back pain.

Exhibit 38, p. H-72. Claimant elected not to pursue additional surgery.

59. In the eight years since his 2005 industrial accident, Claimant has received extensive medical treatment for his industrial injuries, including numerous examinations and consultations, multiple diagnostic tests, lumbar and cervical surgery in 2005 and 2006 respectively, repeated courses of physical therapy, a wide variety of prescription medications, repeated trigger point injections, repeated epidural steroid injections, TENS unit and RS-4i Stimulator therapy, and more. Claimant's condition has remained stable or declined since October 2009. The Referee finds that Claimant is medically stable as of October 8, 2009. The alleged permanent impairments of his left ankle, cervical spine, and lumbar spine can therefore be ascertained.

60. *Left ankle.* In 1994, Claimant's permanent impairment due to his left ankle condition was rated at 9% of the lower extremity. This equates to a 4% whole person permanent impairment. Although Claimant sustained another left ankle injury in 1996, and subsequently underwent three left ankle surgeries, the record contains no other rating of Claimant's left ankle impairment. The Referee finds that Claimant has a 4% whole person permanent impairment of his left ankle.

61. *Cervical spine.* Claimant underwent C3-4 discectomy and fusion in 2006. On October 8, 2009, Dr. Friedman rated Claimant's cervical impairment at 11% of the whole person pursuant to the AMA, *Guides to the Evaluation of Permanent Impairment*, 6<sup>th</sup> Edition. Exhibit 12, p. 469. Dr. Simon initially rated Claimant's C3-4 cervical impairment at 25% of the whole person pursuant to the AMA, *Guides to the Evaluation of Permanent Impairment*, 5<sup>th</sup> Edition, DRE Cervical Category IV. However, on December 28, 2009, Dr. Simon agreed with Dr. Friedman's 11% rating of Claimant's permanent cervical impairment.

62. Dr. Selznick agreed with Dr. Simon's initial 25% whole person impairment per the 5<sup>th</sup> Edition of the *Guides*. Dr. Selznick recognized that Dr. Friedman assessed an 11% whole person impairment rating utilizing the 6<sup>th</sup> Edition of the *Guides*, but believed that the 5<sup>th</sup> Edition was still in use at the time of Claimant's cervical injury and therefore should be relied upon to quantify that impairment.

63. The disparity of ratings between the 5<sup>th</sup> and 6<sup>th</sup> Editions of the Guides can be significant as reflected in rating Claimant's cervical impairment. In choosing between the two editions, the Commission recently elected to rely upon well-reasoned medical evidence utilizing the 6<sup>th</sup> Edition of the *AMA Guides*, as: "the most current edition of the *Guides* because each new edition is an improvement over the last." *Schell v. Payless Shoe Store*, 2013 WL 6699888 (Idaho Ind. Com. Nov. 8, 2013). In the present case, the record provides no persuasive reason to adhere to the older edition. The Referee finds Claimant suffers a permanent cervical impairment of 11% of the whole person.

64. *Lumbar spine*. On October 8, 2009, Dr. Friedman rated Claimant's lumbar impairment at 12% of the whole person pursuant to the 6<sup>th</sup> Edition of the *Guides*. Exhibit 12, p. 469. On December 21, 2010, Dr. Selznick rated Claimant's permanent lumbar impairment at 13% of the whole person pursuant to the 5<sup>th</sup> Edition of the *Guides*. These ratings are nearly identical and the record provides no persuasive reason to adhere to the older edition. The Referee finds Claimant suffers a permanent lumbar impairment of 12% of the whole person.

65. Claimant has proven that he suffers permanent physical impairments of 4% of the whole person due to his left ankle condition, 11% of the whole person due to his cervical condition and 12% of the whole person due to his lumbar condition, thus totaling

27% of the whole person.

66. Physical restrictions. Several medical experts have evaluated Claimant's functional capacity and ability to work. Dr. Friedman and Dr. Doer permanently restricted Claimant to lifting 50 pounds occasionally and 25 pounds repetitively. They restricted Claimant from twisting, torquing of the low back, and frequent bending. Interestingly, Dr. Friedman found Claimant medically stable on October 8, 2009, and observed that Claimant could lift 10 pounds frequently and 20 pounds occasionally, thus placing Claimant in the light work category per the KEY functional capacity test Claimant completed at the WorkFit program. These capacities were substantially similar to those Claimant demonstrated in his 2008 Workwell Functional Capacity Evaluation. Nevertheless, Dr. Friedman opined the KEY test results were invalid and concluded that Claimant could increase his lifting by 10% per week over the next 10 weeks and thereby more than double his lifting capacity to 25 pounds frequently and 50 pounds occasionally, thus placing Claimant in the medium work category. Exhibit 12, p. 468. Dr. Friedman later reviewed Claimant's pre-accident lumbar MRIs and opined that Claimant should have had medium work restrictions prior to his 2005 industrial accident due to his pre-existing lumbar condition.

67. After the LifeFit program, Claimant continued to treat with Drs. Selznick, Huneycutt, Reid, and Farrell. None of these physicians ever released Claimant to return to work.

68. On January 11, 2013, Dr. Friedman examined Claimant at Surety's request and recorded:

On a 15 systems review of systems he reports ... loss of bladder control; he reports when he has a quick pain he voids on himself and this also occurred

after an injection in his back. This occurs up to three times per week, especially when he has pain. He reports he sleeps in Depends and travels with Depends on. He often wakes up with his Depends dry.

Exhibit 12, p. 475-J. Nevertheless, Dr. Friedman reaffirmed his conclusion that Claimant has only a medium work restriction due to his lumbar and cervical conditions and opined that Claimant needed no cane or prescription opioids. Dr. Doerr concurred with Dr. Friedman's conclusions.

69. Drs. Friedman and Doerr criticized Claimant for using a cane because no physician prescribed such. However, Claimant indicated that his physical therapist suggested a cane to reduce his risk of falling. The medical records contain repeated reports of Claimant falling when his right leg gave out on him unexpectedly. His cervical injuries were caused by just such a fall in September 2005. His back condition has been aggravated from time to time by such falls. Shortly before July 31, 2013, Claimant suffered such a fall and dislocated his collarbone resulting in a trip to the emergency room. Furthermore, Claimant's left ankle became increasingly symptomatic when he ceased using a cane per Dr. Friedman's instructions during the LifeFit program. It has continued symptomatic since that time. The Referee finds that Claimant's use of a cane was and is a reasonable precaution to avoid further injury, not an attempted exaggeration.

70. Drs. Friedman and Doerr also criticized Claimant for using prescription narcotics. Claimant has used prescription narcotics since shortly after his 2005 accident, including Methadone. Drs. Reid, Farrell, and Selznick concluded that his chronic pain syndrome justified prescription narcotics.

71. In 2007, Dr. Himmler permanently restricted Claimant from lifting more than 25 pounds occasionally. She also limited Claimant's sitting, standing, reaching, overhead

activities, bending, stooping, kneeling, and crouching. These restrictions are substantially similar to Claimant's demonstrated performance in the KEY Functional Capacity Evaluation at the WorkFit program in 2009 and to his performance at the Workwell Functional Capacity Evaluation in 2008.

72. On December 9, 2009, Dr. Reid concluded that Claimant was totally disabled. Her opinion was based in part upon the 2008 Workwell Functional Capacity Evaluation. Dr. Selznick also concluded Claimant was totally disabled. Dr. Selznick reviewed and expressly disagreed with the opinions offered by Dr. Doerr and Dr. Friedman. On February 9, 2013, Dr. Selznick opined that Claimant had "a frank instability at L4-5." He further opined that Claimant's debilitating symptomatology since his lumbar surgery—known as postlaminectomy syndrome—is objectively confirmed by epidural scarring as documented by multiple MRI scans. Dr. Selznick explained:

It is my opinion Mr. Mowrey has objectively based evidence of epidural scarring per postoperative 03/22/06, 01/31/07 and 08/30/07 MRI evaluations, which more likely than not contributes to ongoing reported symptomatology despite a technically excellent decompressive laminectomy discectomy performed by Dr. Huneycutt on 11/04/05. Epidural scarring is indeed associated with chronic reported pain and treatment of same is difficult.

....

While at his Life Fit Program, he had a fourth MRI evaluation on 09/29/09 which did confirm postoperative changes as well on the right side at L4-5 with no recurrent disc herniation evident. Treatment of epidural scarring and chronic pain following a prior laminectomy, i.e., postlaminectomy syndrome, is difficult... This would include ongoing opiate management, potential for spinal cord stimulator placement, potential for morphine pump implantation, and potential for surgical reconstruction.

Exhibit 1, pp. 38-39. Dr. Selznick observed that further lumbar surgery, while one treatment option, would increase Claimant's permanent lumbar impairment rating to 28%.



He concurred in Dr. Huneycutt's opinion that further surgery offered at best only a 50% chance of improvement. In his post-hearing deposition, Dr. Selznick reaffirmed his conclusion that Claimant is 100% disabled purely from a medical standpoint. Selznick Deposition, p. 44.

73. Dr. Doerr authored a letter on March 20, 2013 disagreeing with Dr. Selznick's opinion that Claimant's flexion and extension x-rays showed pathology caused by his 2005 industrial accident. Exhibit 12, p. 475-P. However, Dr. Doerr did not refute Dr. Selznick's opinion that epidural scarring, as documented on four MRIs, results in Claimant's chronic debilitating back and leg pain.

74. In contrast to Drs. Friedman and Doerr, who opined Claimant can perform medium level work, Drs. Huneycutt and Selznick concluded Claimant suffers significant degenerative changes in his back that prevent him from working. Dr. Farrell also opined that Claimant has significant degenerative changes in his back causing his pain.

75. The Referee finds the opinions of Drs. Selznick, Huneycutt, and Reid as Claimant's treating physician, surgeon, and chronic pain manager respectively, persuasive. Claimant is unable to return to work.

76. Ability to compete in the open labor market. Douglas Crum, C.D.M.S., testified on behalf of ISIF that accepting the opinion of Dr. Friedman and Dr. Simon that Claimant's permanent restrictions due to his 2005 accident were the same as the restrictions for his pre-existing lumbar condition, that Claimant suffered no permanent disability beyond his permanent partial impairment due to his 2005 accident. Exhibit 13 p. 495. In his post-hearing deposition, Mr. Crum addressed whether Claimant realistically has the ability to compete in the open labor market noting: "If his presentation is reflective

of his objective physical capacities, probably not. He's an individual that is having difficulty ambulating. He's walking with a cane. He reported lots of pain problems in a lot of different body parts." Crum Deposition p. 55, l. 24 through p. 56, l. 3.

77. As noted above, Claimant has not been released to work by any of his treating physicians. Drs. Selznick, Huneycutt, and Reid have persuasively opined that Claimant is entirely precluded from working. Based on Claimant's permanent impairments totaling 27% of the whole person, and considering all of his medical and non-medical factors, Claimant's ability to compete in the open labor market and engage in regular gainful activity after his 2005 industrial accident has been eliminated. The Referee concludes that Claimant has established permanent disability of 100%, inclusive of his 27% whole person impairment.

78. **ISIF liability.** The next issue is whether ISIF bears any liability pursuant to Idaho Code § 72-332. Idaho Code § 72-332(1) provides in pertinent part that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his income benefits out of the ISIF account.

79. Idaho Code § 72-332(2) further provides that "permanent physical impairment" is as defined in Idaho Code § 72-422, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to

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

80. In *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court identified four requirements a claimant must meet to establish ISIF liability under Idaho Code § 72-332. These include: 1) whether there was indeed a pre-existing impairment; 2) whether that impairment was manifest; 3) whether the impairment was a subjective hindrance to employment; and 4) whether the impairment in any way combined with the subsequent injury to cause total disability. *Dumaw*, 118 Idaho at 155, 795 P.2d at 317. Conditions arising after the industrial injury, but prior to a disability determination, which are not work-related, are not the obligation of ISIF. *Horton v. Garrett Freightlines, Inc.*, 115 Idaho 912, 915, 772 P.2d 119, 122 (1989).

81. Pre-existing, manifest impairments. The pre-existing physical impairments at issue herein are those to Claimant's left ankle and low back prior to his 2005 industrial accident. There is no dispute that his left ankle condition existed and was manifest no later than 1998 as documented by his multiple left ankle surgeries. His left ankle impairment was ultimately quantified at 4% of the whole person.

82. Claimant's low back condition existed and was manifest well prior to his 2005 accident. His September 23, 1998 lumbar MRI revealed a small disc herniation at L5-S1, and his June 17, 2002 lumbar MRI documented L4-5 disc bulge with moderate

central canal stenosis and bilateral neuroforaminal narrowing, and posterior disc protrusion centered slightly to the right at L5-S1. On December 14, 2009, Dr. Friedman concluded that Claimant suffered permanent lumbar impairment prior to his 2005 accident of 7% of the whole person and that Claimant's 2005 accident caused additional lumbar impairment of 5% of the whole person. Exhibit 12, pp. 474-5. Although Dr. Selznick declined to assign permanent impairment to Claimant's lumbar condition prior to his 2005 industrial accident, the 1998 and 2002 lumbar MRIs provide persuasive evidence of his pre-existing lumbar condition.

83. Claimant's left ankle and low back conditions constitute pre-existing conditions for purposes of Idaho Code § 72-332 because each preexisted and was manifest prior to his 2005 industrial accident. The first and second prongs of the *Dumaw* test have been met.

84. Hindrance or obstacle. The third prong of the *Dumaw* test considers "whether or not the pre-existing condition constituted a hindrance or obstacle to employment for the particular claimant." *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 172, 786 P.2d 557, 563 (1990).

85. *Left ankle.* Claimant testified that he believed he fully recovered from his left ankle injury and that from 2002 to 2005, his left ankle did not cause him problems. However, when questioned closely, he acknowledged chronic limiting left ankle symptoms:

A. Well, ever since I've had my ankle injured, I have had problems with it swelling, being sore. It'd be good for a while and then certain—too much stuff on it would make it sore again.

Q. What kinds of stuff would make it sore?

A. Well, carrying weight or something; stairs; things like that.

Claimant's Deposition, p. 23, ll. 4-10. Claimant also acknowledged that his ankle injury hindered his employability. In 1997, Claimant left the railroad because the work was too difficult given his left ankle injury. Furthermore, regarding returning to railroad work, he testified: "I don't believe they would hire me since I had an injury. I tried." Transcript, p. 24, ll. 11-13. Claimant's left ankle condition constituted a hindrance or obstacle to employment.

86. *Lumbar spine.* As noted, Claimant had 7% impairment of his lumbar spine prior to his 2005 accident. Although Claimant testified that his accident at Montana Express did not leave him with any problems that restricted his employment at Bowen Petroleum, and that he could do all of his required work activities in spite of his back pain, the record establishes such was a hindrance to employment. Dr. Friedman testified that because of Claimant's pre-existing lumbar condition he should have been restricted to lifting 50 pounds occasionally and 25 pounds repetitively before his 2005 industrial accident. Dr. Simon agreed. Exhibit 8, p. 268. Dr. Selznick agreed that Claimant complained of low back pain for which he sought medical treatment and underwent MRI scans prior to his 2005 industrial accident.

87. The Referee finds that Claimant's pre-existing left ankle and lumbar spine impairments constituted a hindrance to his employment. The third prong of the *Dumaw* test is met as to these impairments.

88. Combination. Finally, to satisfy the "combines" element, the test is whether the worker would have been totally and permanently disabled immediately following the occurrence of the industrial injury, irrespective of his pre-existing conditions. This test "encompasses both the combination scenario where each element contributes to the total

disability, and the case where the subsequent injury accelerates and aggravates the pre-existing impairment.” *Bybee v. State, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

89. The record does not contain persuasive evidence that Claimant’s left ankle condition combined with his 2005 industrial injuries to render him permanently and totally disabled. Rather, the record establishes that his lumbar spine condition alone renders him unable to work. Dr. Selznick testified: “simply on the basis of his lumbar back condition, with objective corroboration of progression alone would make him unfit to go back to work.” Selznick Deposition, p. 36, ll. 4-7. Dr. Selznick further described how Claimant’s 2005 industrial accident combined with his pre-existing lumbar pathology to produce his current debilitating condition:

Q. (by Mr. Morgan) What is shown on the post ’05 MRIs, does that suggest that what Mr. Mowrey now has is merely an aggravation or exacerbation of the pre-existing lumbar spine condition, or is it something new?

A. (by Dr. Selznick) Excellent question. As defined in ... the [Guides], exacerbation and aggravation are two different words. Exacerbation means a patient returns to their pre-existent status after a temporary worsening of symptoms. That’s exacerbation. Aggravation implies a distinct change in their status, both clinically and oftentimes with an accompanying corroborating objective data. For Mr. Mowery, he had a distinct aggravation of his low back pain, not an exacerbation. His aggravation was a new discogenic finding at L4-5. He had a neurocompressive lesion. He had a herniated disk at L4-5 extending into the foramen and actually compressing the nerve root in that area. There was a neuroanatomic substrate to corroborate his increase in symptomatology. He had a distinct aggravation from his 06/29/05 accident.

Selznick Deposition, p. 25, l. 15 through p. 26, l. 12. The 2002 MRI clearly identified Claimant’s then bulging L4-5 disc. The post-accident 2005 MRI documented that this bulge had been aggravated or progressed to an L4-5 disc herniation compressing the L5 nerve root.

90. As noted, Dr. Friedman opined Claimant should have had medium work restrictions for his pre-existing lumbar condition before his 2005 accident. Dr. Friedman explained the purpose of work restrictions is to alert Claimant to activities he should avoid because they increase his risk of further injury above that of an average person.

91. ISIF argues, but the Referee is not persuaded, that Claimant's 2005 industrial accident alone rendered him totally and permanently disabled. Claimant's circumstances present a "case where the subsequent injury accelerates and aggravates the pre-existing impairment." *Bybee v. State, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). The weight of the evidence establishes that Claimant's 2005 industrial accident combined with his pre-existing low back impairment to render him totally and permanently disabled. The final prong of the *Dumaw* test has been satisfied as to Claimant's pre-existing low back impairment. Pursuant to Idaho Code § 72-332, ISIF is liable for Claimant's pre-existing lumbar spine impairment.

92. **Carey apportionment.** The final issue is apportionment under the Carey formula. In *Carey v. Clearwater County Road Department*, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984), the Idaho Supreme Court adopted a formula apportioning liability between ISIF and the employer/surety at the time of the final industrial accident. The formula prorates the non-medical portion of disability between the employer/surety and the ISIF in proportion to their respective percentages of responsibility for the physical impairment. "Whether a claimant's total disability resulted from the application of the odd-lot doctrine, from a combination of medical and non-medical factors, or from medical factors alone, the formula set out in Carey is used to apportion the disability between liable parties." *Sommer v. ISIF*, IC 2001-012652, 2008 WL 3090703 (Idaho Ind. Com. July 7, 2008).

However, when “Claimant's total permanent disability is the result of medical factors alone, there is no reason to apply *Carey* to apportion non-medical factors.” *Baccus v. ISIF*, IC 2004-000425, 2010 WL 1832553 (Idaho Ind. Com. Apr. 20, 2010).

93. Before applying the *Carey* formula, the portion of Claimant’s impairment pre-existing his 2005 industrial accident at Bowen Petroleum, and the portion caused by his 2005 industrial accident must be quantified. Claimant’s qualifying pre-existing impairment is 7% of the whole person for his lumbar spine condition. Claimant’s impairments due to his 2005 industrial accident total 16% of the whole person, including 11% for his cervical condition and 5% for his lumbar condition. Thus, Claimant’s impairments for *Carey* apportionment total 23% (16% due to his 2005 accident plus 7% qualifying pre-existing). Claimant’s 2005 impairments constitute 69.57% (16/23), and his qualifying pre-existing impairment constitutes 30.43% (7/23) of his total impairment.

94. By application of the *Carey* formula, Bowen Petroleum and its Surety would be liable for the first 347.85 weeks of permanent disability (69.57%) with ISIF liable thereafter. Thus, ISIF is responsible for payment of full statutory benefits commencing at the conclusion of 347.85 weeks after October 8, 2009, the date Claimant became medically stable after his 2005 industrial accident.

### **CONCLUSIONS OF LAW**

1. Claimant suffers permanent disability of 100%, and has proven in the aftermath of his 2005 industrial accident that he is permanently and totally disabled.
2. ISIF is liable pursuant to Idaho Code § 72-332 for Claimant’s pre-existing lumbar impairment and the proportion of disability attributable thereto.
3. Apportionment pursuant to *Carey v. Clearwater County Road Department*,



107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: ISIF is liable for payment of full statutory benefits commencing at the conclusion of 347.85 weeks after October 8, 2009, the date Claimant became medically stable.

### RECOMMENDATION

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

DATED this 3<sup>rd</sup> day of July, 2014.

INDUSTRIAL COMMISSION

/s/  
Michael E. Powers, Referee

### CERTIFICATE OF SERVICE

I hereby certify that on the 31<sup>st</sup> day of July, 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:

M BRENT MORGAN  
1106 EAST CENTER  
POCATELLO ID 83201-5202

PAUL B. RIPPEL  
428 PARK AVE  
IDAHO FALLS ID 83402-3609

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

ROBBY MOWREY,

Claimant,

v.

BOWEN PETROLEUM, INC., Employer, and  
IDAHO STATE INSURANCE FUND, Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL  
INDEMNITY FUND,

Defendants.

**IC 2005-514768**

**ORDER**

**Filed July 31, 2014**

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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 suffers permanent disability of 100%, and has proven in the aftermath of his 2005 industrial accident that he is permanently and totally disabled.
2. ISIF is liable pursuant to Idaho Code § 72-332 for Claimant's pre-existing lumbar impairment and the proportion of disability attributable thereto.
3. Apportionment pursuant to *Carey v. Clearwater County Road Department*, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: ISIF is liable for payment of

full statutory benefits commencing at the conclusion of 347.85 weeks after October 8, 2009, the date Claimant became medically stable.

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

DATED this 31<sup>st</sup> day of July, 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 31<sup>st</sup> day of July 2014, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

M BRENT MORGAN  
1106 EAST CENTER  
POCATELLO ID 83201-5202

PAUL B. RIPPEL  
428 PARK AVE  
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