BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KELLEY ANDERSON, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)	**IC 2006-502988** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed April 21, 2010

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 Idaho Falls on June 18, 2009. Claimant was present and represented by Lance G. Nalder, of Idaho Falls. Employer settled with Claimant prior to the hearing. Paul B. Rippel of Idaho Falls represented the State Industrial Special Indemnity Fund ("ISIF"). The parties presented oral and documentary evidence. Claimant and Defendant then each submitted post-hearing briefs, after which Claimant submitted a reply brief. This matter came under advisement on January 14, 2010.

ISSUES

The issues to be decided are:

1. Whether ISIF is liable for a portion of Claimant's benefits pursuant to Idaho Code § 72-332 and, if so,

2. The date Claimant reached medical stability, and

3. Apportionment pursuant to the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant contends that he is permanently and totally disabled as a result of the combination of his pre-existing physical impairments and the shoulder injury he sustained in his last industrial accident in January 2006. He seeks findings that his pre-existing impairments were manifest, constituted subjective hindrances to employment, and "combined" with injuries sustained in Claimant's last accident such as to trigger ISIF liability.

ISIF maintains that Claimant's preexisting injuries did not combine with his January 2006 shoulder injury. ISIF seeks a finding that Claimant became totally and permanently disabled solely as a result of his January 2006 accident and, consequently, that it is not liable for Claimant's benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the hearing;
2. Claimant's Exhibits 1-29 admitted at the hearing; and
3. Defendant's Exhibit A admitted at the hearing.

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

FINDINGS OF FACT

1. Claimant was 52 years of age at the time of the hearing and resided in Blackfoot. He has a ninth grade education and a G.E.D.; however, he still has trouble with "big words" and higher math, and possesses no computer skills. Further, although Claimant holds a commercial driver's license, he is unable to qualify for the medical card necessary to validate it. Claimant

has been employed as a truck driver, farm laborer, and farm equipment operator during most of his work life.

2. Claimant has suffered several relevant industrial accidents in his lifetime. In 1975 Claimant fractured his femur, requiring surgery to implant a rod; in 1979 all the fingers on Claimant's left hand were amputated, after which 2 were reattached; in 1985, 1990, and 2000 Claimant incurred back injuries, for which he underwent lumbar surgery in 1990 and cervical surgery in 2002; and in 2006, Claimant fell and injured his right shoulder, requiring two corrective surgeries that year.

3. Prior to his final industrial accident ("the 2006 accident"), Claimant had pre-existing whole person permanent partial impairment ratings following the injuries to his lumbar vertebra (10%) and his cervical vertebra (25%). After the 2006 accident, Claimant was examined by Robert Ward, M.D., a board certified independent medical examiner. On November 14, 2007, Dr. Ward assessed a total combined whole person permanent impairment rating of 19%[1], as follows: 13% for the shoulder injury and surgeries attributable to the 2006 accident; 6% for the cervical vertebra per the 2006 accident; 3% for the thoracic vertebra due to preexisting degenerative change; and 3% for the lumbar vertebra attributable to aggravation by the 2006 accident. Claimant has never been assessed an impairment rating in consideration of the amputation of his left hand fingers.

4. Notwithstanding his preexisting impairments, Claimant was working as a truck driver for Employer, delivering office supplies, at the time of the 2006 accident. Claimant was making $185 per night, 5 nights a week, with holiday and vacation pay.

[1] It cannot be determined how Dr. Ward arrived at a total of 19%.

5. When Employer hired Claimant in 2003, he was under a 50-pound lifting restriction. Because of this restriction and/or his left hand injury, Claimant had lost two jobs and had also been refused employment on at least one occasion just prior to landing his job with Employer. Employer, unlike the aforementioned employers, accepted both Claimant's lifting restriction and his left hand limitations. Claimant called his job at Employer "the greatest job I ever had in my life." Transcript, p. 52.

6. Even so, while working for Employer, Claimant's low back and leg would sometimes ache from sitting and from operating the clutch. In addition, he had to turn his whole body to look in the truck mirrors due to his cervical spine impairment, which sometimes caused kinks in his neck, inducing severe pain. As time progressed, Claimant's left hand developed arthritis and he had increasing trouble grabbing and gripping.

7. By the time of the 2006 accident, Claimant had otherwise adapted to the physical demands of the job as well as he could. When his left hand got tired steering, for instance, he would switch to his right.

8. The 2006 accident occurred on January 18, 2006. While working for Employer, Claimant slipped on some ice and fell while hooking up his pup trailer. He landed on the back of his head and his right elbow. The fall "tore up [Claimant's] right shoulder" and lacerated his right elbow. Transcript, p. 55. He felt pain in his right shoulder, as well as in his low back up to the base of his head. Claimant subsequently developed severe headaches and shoulder and back pain related to this accident. He was diagnosed with bursitis secondary to impingement from the acromion and a tear of his superior glenoid labrum.

9. Claimant underwent subacromial decompression and arthroscopic repair of the right labrum on March 20, 2006. Subsequently, Claimant's pain returned and he underwent follow-up right shoulder arthroscopy surgery on July 12, 2006. Claimant then completed a course of physical therapy and his symptoms appeared to improve for a time.

10. Claimant attempted to return to work at Employer's in approximately early 2007, but he suffered a flare-up of residual neck and arm pain and severe headaches. He has not been employed since then.

11. On February 8, 2007, W. Scott Huneycutt, M.D., examined Claimant and referred him to Michael P. Garbarini, M.D., for a pain management evaluation. Dr. Garbarini diagnosed cervical and thoracic sprain and strain and tension headaches, and noted that cervical facet disease should be ruled out. He prescribed headache medication and scheduled Claimant for cervical and thoracic pain injections, which he administered on February 26, 2007.

12. On March 6, 2007, Mary M. Himmler, M.D., a physiatrist, examined Claimant. She concluded that a spinal cord stimulator should be considered because Claimant had not responded to other pain treatments. Dr. Himmler further opined that additional surgery was not an option.

13. On May 11, 2007, Claimant was evaluated and approved for a spinal cord stimulator trial by Donald M. Whitley, II, Ph.D., a licensed psychologist. Doctors Huneycutt and Himmler, as well as Marc Porot, M.D., a pain management specialist, all believed Claimant to be a good candidate for the device.

14. In a report dated July 18, 2007, however, Richard W. Wilson, M.D., a neurologist conducting a defense independent medical evaluation, concluded that Claimant was not a good

candidate for a spinal cord stimulator. According to Dr. Wilson,"[Claimant's] functional findings on neurological examination today are likely a reflection of his underlying personality structure and possibly factors of secondary gain." Exhibit 20, p. 594. As a result of Dr. Wilson's report, Surety denied payment for the spinal cord stimulator, and Claimant did not undergo the procedure.

15. On August 13, 2007, Casey Huntsman, M.D., the orthopedic surgeon who performed Claimant's second shoulder surgery (in July 2006), evaluated Claimant for residual shoulder pain. Dr. Huntsman stated that Claimant's "biggest problem is just pain management," and that he did not see a need for further surgery. Exhibit 15, p. 512.

16. On December 5, 2007, Claimant was evaluated by Douglas N. Crum, C.D.M.S., a vocational rehabilitation consultant. Mr. Crum concluded that, but for Claimant's preexisting impairments, there would be some work available to him.

17. At the time of hearing, Claimant was under a 25-pound lifting restriction, had limited tolerance for standing and low frequency vibration, and had limited abilities for bilateral use of his arms and hands. Methadone controlled, but did not eliminate, his chronic pain. He believed that, if he had the full use of his left hand, he could work at jobs such as sorting potatoes or assembling products on an assembly line, because he could alternate between sitting and standing and would not need to lift heavy objects.

DISCUSSION AND FURTHER FINDINGS

The provisions of the 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). However, the Commission is not required to construe facts 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).

ISIF liability.

Idaho Code § 72-332 (2) 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 preexisting physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

In *Dumaw v. J. L. Norton Logging,* 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court listed four requirements a claimant must meet to establish ISIF liability under Idaho Code § 72-332:

(1) Whether there was indeed a preexisting impairment;

(2) Whether that impairment was manifest;

(3) Whether the alleged impairment was a subjective hindrance to employment; and

(4) Whether the alleged impairment in any way combines with the subsequent injury to cause total disability.

Dumaw, 118 Idaho at 155, 795 P.2d at 317.

18. Defendant does not dispute that Claimant is totally and permanently disabled or that Claimant had manifest preexisting impairments at the time of the 2006 accident. Further, Defendant does not assert that any of Claimant's preexisting impairments were not hindrances. However, since Defendant expressly refused to concede this element, it is addressed below.

19. At the time of the 2006 accident, Claimant was, by all accounts, functioning well in his job at Employer's. However, just because a claimant is working does not necessarily preclude him from proving that his impairment is a subjective hindrance. I.C. § 72-332(2). In *Garcia v. J. R. Simplot Co.*, 115 Idaho 966, 772 P.2d 173 (1989), the Court reiterated that the subjective hindrance requirement "is to eliminate those claimants who have had an earlier injury, but have not suffered any loss of ***potential*** earning capacity."

20. Claimant's preexisting impairments include his left hand condition (amputation of his left fingers) and his back condition (due to lumbar and cervical industrial injuries and degeneration of his thoracic vertabra). Although he testified that he had adapted his left hand injury to his past truck driving jobs, Claimant also admitted that "grasping a steering wheel . . . is getting harder and harder because the arthritis – this first knuckle is getting so big I have a hard time grabbing anything anymore with it." Claimant Dep., p. 11. Claimant further explained that he relied on his right hand to pick up the slack from his left. With respect to his back injuries, Claimant had to turn his whole body to look out his truck mirrors and he experienced low-back and leg pain while driving. In addition, after his 2002 cervical vertebra surgery, Claimant lost two jobs because of his weight-lifting restrictions attributable to his back injuries, and he was also refused a job due to his lifting restriction and his left hand injury. Further, the open and obvious nature of Claimant's left hand injury is, in itself, a deterrent to hiring.

21. The Referee finds sufficient evidence in the record that Claimant's preexisting left hand and back impairments constitute obstacles to further employment. Claimant has established his left hand and multiple back injuries are subjective hindrances to employment pursuant to Idaho Code § 72-332.

22. We next address Defendant's prime argument that Claimant has failed to establish the fourth prong of his *prima facie* case. Specifically, Defendant argues that it is not liable for Claimant's benefits because the injuries from the 2006 accident did not combine with his preexisting conditions to render him totally and permanently disabled. Instead, Defendant asserts that Claimant was totally and permanently disabled by the 2006 shoulder injury alone.

23. Defendant cites *Selzler v. State of Idaho, Industrial Special Indemnity Fund,* 124 Idaho 144, 857 P.2d 623 (1993), in which the claimant suffered a back injury requiring several surgeries, after which he continued to experience severe physical problems. There, the Idaho Supreme Court wrote, "ISIF is not liable unless the disability would not have been total but for a preexisting condition." *Id., citing Garcia v. J.R. Simplot Co.,* 115 Idaho 966, 772 P.2d 173 (1989). The Court went on to hold that ISIF was not liable for the claimant's benefits, affirming the Commission's findings that his learning disabilities did not "combine" with his last injury because the last injury, itself, rendered Selzler totally and permanently disabled. The *Garcia* Court previously applied the same rule, holding ISIF liable in that case, because the claimant's preexisting back and left thumb conditions did combine with her right arm amputation and right knee injury to leave her totally and permanently disabled. *Id.*

24. The Referee agrees that the "but for" standard is the appropriate test to determine whether total permanent disability is the result of the combined effects of the preexisting

condition and the work-related injury, but rejects the argument that Claimant did not meet this standard.

25. Defendant relies upon the opinion of Dr. Ward to support its position. However, Dr. Ward expressly opined that Claimant suffered a whole person impairment of 3% as a result of preexisting degenerative change of his thoracic vertebra. The Referee finds Dr. Ward's unrebutted opinion on this point credible, and further finds that Claimant was properly assessed the described 3% impairment rating due to his preexisting condition. It is unrefuted that Claimant's residual back pain and weakness is a significant factor contributing to his permanent and total disablement. Given the 3% impairment rating for his preexisting thoracic degeneration, together with the lumbar and cervical impairment ratings issued by Dr. Ward as attributable to the 2006 industrial accident, the Referee finds that Claimant's residual back pain and weakness is attributable to a combination of preexisting impairment and the new injury.

26. The Referee further finds that Claimant's left hand condition also constitutes a preexisting injury that combined with his 2006 shoulder injury to render him totally and permanently disabled.

27. Mr. Crum opined that, but for his preexisting hand injury, which he estimated to constitute a 1% whole person impairment, Claimant would still be employable at some jobs, even after accounting for the impairment attributable to his 2006 shoulder injury. Mr. Crum identified such jobs as sandwich maker, pizza maker, other food preparer, dishwasher, busser, and perhaps potato processor or potato bag machine operator, if tasks requiring reaching could be limited. He also opined that such jobs are available in Claimant's relevant labor market. Mr. Crum based his opinion on Claimant's medical records and other factors, including his

impression that Claimant was "like the Energizer Bunny," had a strong work ethic, and that, even though Claimant had suffered so many injuries, he kept bouncing back, going back to work at physically demanding jobs. Crum Dep., p. 15.

28. Claimant's testimony on this point was also persuasive. Claimant credibly testified that, if his left hand were fully functioning, he thinks he could work at a job sorting potatoes or on an assembly line. He explained that he had witnessed potato sorting work and, since he would be able to stand or sit at will, he thought he could do it. Claimant also denied that the Methadone he takes for pain, which he took prior to the hearing, with no obvious effects on his functioning, would impair his ability to perform that job.

29. The Referee finds that Claimant would not be totally and permanently disabled, but for his preexisting back condition and left hand injury. As a result, the Referee finds that Claimant has met his burden of proving that Defendant is liable for paying a proportionate share of his benefits.

30. Mr. Crum's "estimated" impairment rating for Claimant's left hand condition, however, is rejected. Mr. Crum is not a medical doctor and is not qualified to assess (or estimate) an impairment rating. That being said, the Referee acknowledges Mr. Crum's difficulty. Although Dr. Ward acknowledged Claimant's left finger amputations, he failed either to assess a corresponding impairment rating or to state an opinion as to why an impairment rating should not be issued.

31. Claimant described his left hand after the amputations as having no index finger, a middle finger missing the first knuckle, a "1-inch stub" for a ring finger, and a pinky finger that has a permanent bend. While this Referee has historically resisted "creating" impairment

ratings, where an impairment is statutory, Idaho Code § 72-428 may be used for guidance. Accordingly, the Referee finds that Claimant suffered a 25% whole person impairment rating with respect to this preexisting condition.

32. To reach that impairment rating, the Referee adopted and added together the statutory periods of disability associated with the injury to each digit,[2] and found that, together, they comprise partial permanent impairment of 25% of the whole person.

Carey formula.

In *Carey v. Clearwater County, Road Dept.,* 107 Idaho 109, 686 P.2d 54 (1984), the Idaho Supreme Court stated, "the appropriate solution to the problem of apportioning the non-medical factors in an odd-lot case where [ISIF] is involved, is to prorate the non-medical portion of disability between the employer and [ISIF], in proportion to their respective percentages of responsibility for the physical impairment." *Id.*, at 118.

33. Claimant's preexisting whole person physical impairment, consisting of 3% due to thoracic degeneration plus 25% from his hand injury, totals 28%. In addition, the Referee finds Claimant's whole person physical impairment due to his 2006 shoulder injury to be 22% (13% for the shoulder injury and surgeries, plus 6% cervical vertebra, plus 3% lumbar vertebra). According to the *Carey* formula then, ISIF is responsible for 28/50ths, or 56% of Claimant's benefits.

Date of maximum medical improvement.

34. The date of maximum medical improvement must be determined in order to properly calculate the commencement of ISIF liability. The record lacks a physician's express

[2] The following periods were assessed, for a total of 125 weeks: index finger (70 weeks) and ring finger (20 weeks) and, after assessing a 50% loss of use per I.C. § 72-428(5), middle finger (27 weeks, rounded down) and pinky finger (8 weeks, rounded up).

opinion as to the date on which Claimant reached maximum medical improvement. However, by August 13, 2007, Dr. Huneycutt, Dr. Himmler, and Dr. Huntsman had all determined that Claimant's only remaining medical issue was pain management and, given Claimant's financial limitations, that the spinal cord stimulator was not an option. As a result, the Referee deems August 13, 2007 to be the date of maximum medical improvement.

CONCLUSIONS OF LAW

1. Claimant has proven that ISIF is liable pursuant to Idaho Code § 72-332.

2. ISIF is liable for permanent and total disability benefits commencing 221 weeks from August 13, 2007.

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 __19th__ day of April, 2010.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __21st__ day of ___April___, 2010, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KELLEY ANDERSON, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)	**IC 2006-502988** **ORDER** Filed April 21, 2010

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 this recommendation. 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 has proven that ISIF is liable pursuant to Idaho Code § 72-332.

2. ISIF is liable for permanent and total disability benefits commencing 221 weeks from August 13, 2007.

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

DATED this __21st____ day of __April__, 2010.

INDUSTRIAL COMMISSION

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

___/s/_____
Thomas E. Limbaugh, Commissioner

_____
Thomas P. Baskin, Commissioner

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __21st___ day of __April___ 2010, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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