BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MIGUEL ARREDONDO, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2009-024792** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED 08/09/2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee LaDawn Marsters, who conducted a hearing in Boise on March 15, 2012. Claimant, who testified with the assistance of a Spanish-English translator, was present and represented by Richard S. Owen. Paul J. Augustine represented the Industrial Special Indemnity Fund ("ISIF").[1] The parties presented oral and documentary evidence, took three post-hearing depositions and filed briefs. This matter came under advisement on July 11, 2012.

ISSUES

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

1. Whether Claimant's condition is due in whole or in part to a preexisting and/or subsequent injury/condition;

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

[1] Prior to the hearing, Claimant settled his claims against his time-of-injury employer (Asumendi Farms) and its surety through a lump-sum settlement agreement.

3. Whether the Industrial Special Indemnity Fund is liable under Idaho Code § 72-332; and, if so,

4. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

There is no dispute that: 1) Claimant's right ankle was fractured in a workplace accident on September 20, 2009, when he was struck by a machine being moved by a coworker at the Asumendi Farms packing shed; 2) Claimant suffers permanent impairment due to pain, instability and other symptoms related to that injury; 3) Claimant's only relevant preexisting physical impairments include his lower left leg amputation and significant bilateral hearing loss; 4) Claimant's work experience over his entire lifetime consists of farm labor positions for which he must stand all day to work; and 5) Claimant has no skills transferrable to sedentary work.

Claimant contends that ISIF is liable for a portion of his benefits because he is totally and permanently disabled due to a combination of his preexisting and industrial permanent impairments, and considering non-medical factors affecting his ability to maintain gainful employment. He relies primarily upon the opinions of Robert G. Hansen, M.D. (his treating orthopedic surgeon with respect to his industrial ankle injury) and Nancy Collins, Ph.D., a vocational disability consultant.

ISIF does not dispute that Claimant is totally and permanently disabled *now*, but it maintains that Claimant was either thusly disabled *before* his industrial accident, or, alternatively, he would have been rendered so as a result of the industrial accident, alone, even in the absence of his preexisting impairments. Either way, Claimant's disability is not referable to a combination of his preexisting and industrial injuries. Relying upon Roman Schwartsman, M.D., who performed an independent medical examination ("IME") and Douglas

N. Crum, CDMS, a vocational disability consultant, ISIF seeks a holding that it is not liable for any of Claimant's benefits.

OBJECTIONS

ISIF's objections at pages 8 and 9 of Dr. Collins' deposition are sustained to the extent that they call for Dr. Collins to provide medical opinion testimony. All other pending objections are overruled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The prehearing deposition testimony of:
    a. Claimant taken January 5, 2012; and
    b. Brian Davis, Asumendi Farms sales manager, taken on March 6, 2012;
2. Exhibits admitted at the hearing:
    a. Claimant's Exhibits A-R;[2] and
    b. Defendant's Exhibits 1-5;
3. Testimony taken at the hearing from:
    a. Claimant;
    b. Miguel Arredondo, Jr., Claimant's son; and
    c. Abelardo ("Abel") Zamora, Asumendi Farms foreman; and
4. The post-hearing deposition testimony of:
    a. Robert G. Hansen, M.D., an orthopedic surgeon, taken on April 10, 2012;
    b. Nancy Collins, Ph.D., a vocational disability consultant, taken on April 12, 2012; and

[2] According to the hearing transcript, Claimant's Exhibits "A – L" were admitted. Tr., p. 8. The transcript should read "A – R".

c. Douglas N. Crum, CDMS, a vocational disability consultant, taken on April 12, 2012.

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

BACKGROUND

1. Claimant was 73 years of age and resided in Wilder at the time of the hearing. He was born in Michoacán, Mexico, where he attended school through the second grade. Thereafter, he received no further formal education. As a result, Claimant speaks very little English and is a weak reader. Claimant began working as a farm laborer as a child and continued this type of work until his industrial accident in September 2009, addressed below. He has never operated commercial vehicles or heavy equipment.

2. Claimant is a resident alien by virtue of a "green card" he obtained in 1979. Previously, beginning in 1970, Claimant embarked upon a number of remarkable adventures characterizing his determination, undiminished by several deportations, to emigrate to the United States. On one of his returns, in 1975, Claimant was run over by a train, necessitating the amputation of his lower left leg.

3. Following the amputation, Claimant obtained a prosthetic limb and resumed working at agricultural labor jobs. From the 1970's until the early 1990's, Claimant annually tended roses (in California) and worked in the packing shed (in Idaho) in alternating seasons. He also worked tending field crops in Idaho in the 1970's; however, it is difficult to tell whether this field work ended when Claimant began working in the onion shed or whether he sometimes worked in the fields after he began working in the packing shed.

4. In any event, in the 1970's, Claimant met and worked with Abelardo Zamora as a field laborer, as well as at the onion packing shed that is now part of Asumendi Farms. According to Mr. Zamora, Claimant was fully able to do his job after his lower left leg was amputated. For example, he walked up and down crop rows working in the fields and climbed up to string lines for hop fields. He also worked as a bagger in the packing shed, lifting 50-pound onion sacks throughout the workday.

5. Through the early 1990's, Claimant continued to work in the packing shed and rose-tending positions. Then, he began having trouble with his prosthesis. According to Claimant, it broke and he could not afford to replace it. As a result, Claimant had trouble walking and was unable to work.

6. Also in or around the early 1990's, Claimant began having trouble hearing. Subsequently, he tried hearing aids but he quit wearing them because they did not work well, he lost them, or they broke. Claimant's aural perception continued to decline. Nevertheless, at the time of the hearing, Claimant continued to deny any desire to try hearing aids again. He also denied that his hearing problem hampered his ability to work.

7. With the assistance of a Legal Aid of Idaho attorney[3], Claimant obtained Social Security Disability Insurance ("SSDI") in or around 1994.[4] With his SSDI benefits, Claimant obtained a new prosthesis in January 1995, which restored his ability to walk and work. Nevertheless, Claimant did not return to work until approximately 2003. Claimant estimates he was off work for about ten years during which time his wife worked outside the home while he took care of his small children, the house, and the yard and garden.

[3] Claimant testified that Sergio Gutierrez, currently serving as an Idaho Appellate Court judge, was his Legal Aid attorney.

[4] Claimant testified that he obtained SSDI and his new prosthesis in 1993; however, his medical records indicate that he obtained his new prosthesis during the first part of January 1995. The exact date is not relevant to anything except Claimant's ability to accurately recall the timing of events, which is addressed further, below.

8. ISIF posits that Claimant was physically unable to work during this time. However, no medical or vocational records support this allegation. Also, Claimant testified that he did not return to work, even though he believed he was physically capable of doing so, because he thought no one would hire him if they knew he was drawing SSDI, and further, because he thought he would lose his benefits if he were to accept paid employment.

9. Miguel Arredondo, Jr., Claimant's son, testified as to Claimant's activity level during his ten-year farm work hiatus. Mr. Arredondo lives about 15 miles from Claimant and sees him every two to four weeks. He recalled that Claimant did not work from approximately 1993 through 2003. "…he was approved for Social Security Disability and with that he was under the impression that he could not work, otherwise, he stood to lose his benefits." Tr., p. 86. Mr. Arredondo testified that, prior to obtaining SSDI, Claimant had a great deal of trouble with his prosthetic and his ability to work had, as a result, greatly declined. However, after obtaining a new prosthetic, Claimant did things like carry bags of fertilizer, move dirt in a wheelbarrow, shovel and hoe sufficiently to maintain his large garden, and keep up his own house as well as a house across the street. According to Mr. Arredondo:

> You know, physically he was - - he was really active as I recall. He stayed really busy around the house doing a lot of gardening. A lot of cleaning. He has a - - he bought a property from my little brother and has a little extra house across from his and he would always be working and maintaining that little house.

Tr., pp. 86-87.

10. Mr. Arredondo is a credible witness.

11. It is undisputed that Claimant has not worked in the fields since approximately 1993. However, the evidence in the record fails to establish that Claimant was physically unable to return to any kind of work between 1993 and 2003.

12. When Claimant turned 65, he began drawing Social Security retirement benefits (as opposed to SSDI) and returned to work at the onion shed at Asumendi Farms.

CLAIMANT'S WORK AT ASUMENDI FARMS

13. Claimant was hired in or around 2003, by Abel Zamora, foreman at Asumendi Farms, to work seasonally (approximately September through March) in the onion packing shed. Mr. Zamora, 77 years of age at the time of the hearing, also worked in the packing shed and anticipated returning for the next season.

14. Mr. Zamora testified that he hired Claimant because he is a good, dependable worker and not just because he is a friend. He explained that he hired young people to do the heavy lifting work and others, mostly women, to do the sorting. Sorters were not required to do any heavy lifting.

15. Claimant was not hired to do any heavy lifting work. His job duties included clean-up work and helping where he was needed with bagging (as he could) and sorting. Claimant was unable to work as a full-time bagger because that job required repetitive heavy lifting of 50-pound bags all day long. However, he helped out during busy periods by placing bags to be filled and then tying them off while others did the lifting. Claimant was able to work full-time as either a clean-up worker or a sorter. Claimant described sorting as, essentially, standing by a conveyor belt and separating onions in a quality control-type of capacity. As to the nature of the clean-up work, Mr. Zamora testified that onion skins fall off the onions during the sorting and packing process, leaving a continual mess on the ground to be cleaned up:

> Q. What was - - what's required in the clean-up job that Mr. Arredondo did in those few years before his accident?
>
> A. Okay. Well, before, you know, the onions when they are moved in this chain and belts, they release their skin and it goes into the ground, so you need a crew to clean it out, otherwise, you will be covered with onions - - those onion skins.

Q. How much of the time does that take during the - - during a day?

A. Well, some days - - some days were ten hours. Eight hours. Usually eight hours. But sometimes it's ten hours.

Tr., pp. 79-80.

16. Although the balance of Claimant's job duties may have shifted somewhat over time, his essential position never changed. Like everyone else, Claimant stood all day to do his job.

17. In or around September 2008, Brian Davis became the sales manager at Asumendi Farms. He supervised the packing shed manager and handled sales, trucking shipments, customer complaints, and food safety monitoring. He also participated in employee training and had some duties involving accounts payable, accounts receivable and hiring. As to hiring, Mr. Davis testified that he did not make final decisions, but he did provide input, in varying degrees over the years, as part of a team. Mr. Asumendi was the ultimate decision-maker in that regard, and Mr. Zamora played a key role by maintaining relationships with workers and, for the most part, rehiring the same people year after year.

18. Claimant had been working at the onion shed for five seasons before Mr. Davis arrived. Mr. Davis estimated that he (himself) spent one to two hours per day in the packing shed. He speaks very little Spanish and did not often speak directly with Claimant. Mr. Davis was unaware that Claimant had a hearing impairment. He observed that Claimant walked with a little limp and was aware that he had a prosthetic limb because his predecessor had advised him of this fact.

19. Mr. Davis explained that there are two work locations at Employer's, each with separate job duties. Farm laborers work on the farm and onion sorters work in the packing shed. Some workers, but not many, work at both locations. Those who do work year-round.

20. Claimant worked only in the packing shed. He did not work during the off-seasons because he could not find a job even though he inquired at local ranches for field labor work, which he believed he could perform. "The thing is there's seasons, and there's times that they just don't have work." Cl. Dep., p. 49. "…normally, this whole time, there's just no work. There's nothing. There's nothing until - - maybe around May or something you might start seeing work coming back up again." Cl. Dep., p. 55. Claimant drew unemployment benefits during the off-seasons.

21. Mr. Davis testified that Claimant primarily did clean-up and sometimes helped the ladies on the onion-sorting line. Although he initially denied that Claimant had any bagging duties, Mr. Davis later agreed that Claimant could have assisted the baggers by placing bags on the machines and tying them, as Claimant described. Mr. Davis also agreed that, at times, such assistance could be very helpful. However, he explained that there is not a consistent need for the type of bagging assistance Claimant could provide.

22. Mr. Davis is not a medical professional. However, from his observations of Claimant doing his work, he did not dispute that, physically, Claimant could have sorted onions full-time before his industrial accident. However, he did not believe Claimant would have been hired as a full-time onion sorter because this job is reserved for women. "The same ladies come back almost every year. We just put the ladies up there." Davis Dep., p. 61.

23. Mr. Davis speculated that Mr. Asumendi hired both Claimant and Mr. Zamora each year "out of the kindness of his heart" because they were unable to do jobs requiring

continuous heavy lifting, for which younger, stronger men were hired. Davis Dep. p. 25. He explained that he would not have hired Claimant to work in the packing shed because he was incapable of doing every job there.

24. Mr. Zamora and Mr. Davis agreed that the tasks Claimant performed were necessary to the operation of the business; however, Mr. Davis asserted that there is no need to concentrate these jobs in a single employee because others can parse them out amongst themselves. After Claimant departed, some of his clean-up job duties were absorbed by one or two other employees who came in an hour early, before their regular shifts. Mr. Zamora concurred that others were assigned to do these jobs when Claimant left. Neither discussed the effect, if any, Claimant's absence had on the bagging or sorting lines.

25. Mr. Davis described Claimant as a good worker. "Well, Miguel was great to have around. I mean, the guy was - - actually, for what he did, he was a good worker. He stayed busy. He swept. We gave him pretty easy work to do, but he always - - he did his work. When breaks came, he took his breaks; but he was always there." *Id.* He also liked Mr. Zamora even though he testified that Mr. Zamora did not really do anything. Mr. Davis agreed that, with 40 years' experience at the onion shed, Mr. Zamora's presence is comforting. He also acknowledged that Mr. Zamora serves an important function because he speaks both Spanish and English, even though his responsibilities beyond hiring and communicating with the workers seem limited.

26. Mr. Davis testified sincerely. However, he demonstrated little knowledge of Claimant and he was not in a position to directly hire or fire him or to evaluate the monetary effect, if any, of Claimant's work on the operation of Asumendi Farms. As such, Mr. Davis' testimony as to the ultimate value Claimant brought to Asumendi Farms is unpersuasive.

27. Mr. Zamora also testified sincerely; however, he confused some time frames on occasion. For example, he did not know precise dates on which Claimant worked at the packing shed or in California. In addition, where questions did not clearly indicate a timeframe, it is sometimes difficult to determine the meaning of Mr. Zamora's responses because Claimant worked at the packing shed during two distinct periods, performing different jobs in each one. To the extent that other credible evidence establishes dates on which relevant events occurred, Mr. Zamora's contradictory testimony on such points will carry less weight. Otherwise, Mr. Zamora is a credible witness and his testimony is afforded full weight.

INDUSTRIAL INJURY AND RESULTING CONDITION

28. On September 20, 2009, Claimant suffered a broken right ankle at work when he was hit by a wheeled machine operated by a coworker. He testified that the machine made "no" noise because it was electric; however, if he had heard it coming, he would have gotten out of the way.

29. Mr. Zamora assisted Claimant following his industrial accident. Claimant was taken to the hospital by ambulance, where he was admitted and diagnosed (by Dr. Hansen) with a lateral malleolus dislocation of the right ankle. At first, Dr. Hansen expected Claimant to fully recover and return to work. However, Claimant's recovery was complicated by additional stresses borne by his right ankle as a result of his preexisting left limb amputation.

30. At the hearing, Claimant ambulated with the assistance of a cane. Although Claimant attributed his ability to walk at all to the surgical care he received, he also testified that his right ankle is still very painful and he is unable to walk or stand on it for long periods.

31. It is undisputed that Claimant was unable to stand all day to work, at any time following his industrial accident. Claimant believes he could get around better, and stand up

longer, if his left leg were unimpaired. However, he also firmly attributes the lion's share of his reduction in ability to stand and ambulate post-accident to his right ankle pain and instability:

> Q. Do you feel if your left leg wasn't sick that you would still need a cane based upon what happened to your right leg?
>
> A. If this leg would be fine and this one is sick and I would still have to use the cane.
>
> Q. Even if your left leg was good you would still need a cane; right?
>
> A. Yeah. Yeah. This one - - this one that is hurt - - this leg that hurts is more out of balance than the one that was amputated.

Tr., pp. 67-68.

32. Following his industrial injury, Claimant's son testified, Claimant still lifts fertilizer bags, shovels and does what is necessary to maintain his garden. Mr. Arredondo mused, "I have learned that he is an extremely hard worker and regardless of whether he had any disability or any pains or hurts, he would still find a way to get things done." Tr., p. 91.

MEDICAL OPINIONS

33. **Robert G. Hansen, M.D.** Dr. Hansen is an orthopedic surgeon specializing in hand surgery. Approximately 60% of his practice is devoted to evaluation and treatment of upper extremity conditions. He also treats ankle injuries. On September 21, 2009, Dr. Hansen performed an open reduction internal fixation of Claimant's right ankle fracture. On March 22, 2010, he performed another surgery to remove the hardware. Dr. Hansen continued to treat Claimant's ankle condition as of the date of the hearing.

34. Dr. Hansen attributes Claimant's right ankle pain and instability to both his preexisting left leg amputation and his industrial right ankle fracture because Claimant's industrial injury recovery was complicated by his inability to keep weight off his right lower extremity while it healed:

Q. So the initial complication is that once Mr. Arredondo is in his healing process for his fractured right ankle, you want him nonweightbearing for quite a period of time, and with the prosthetic on the left side, that's going to present a problem?

A. Yes; that's correct.

Hansen Dep., p. 8.

Q. How did he do postoperatively?

A. Actually, very well. It was a bit of a challenge, you know, trying to keep him as much nonweightbearing as we could. Which, during the healing process, for balance, and, you know, just daily care and hygiene, he ended up putting some weight on the injured extremity.

Q. Okay. I only have a layman's understanding of what it must be like to have a prosthetic foot, a below-the-knee amputation. But I assume - - and this is what I wanted to ask you about, Doctor. I assume that puts more pressure on the opposite side when you have a prosthetic on the left?

A. Yes.

Q. It disturbs the gait and makes him walk differently?

A. Yes; they have some gait disturbance usually.

Q. Do those problems compound the significance of an injury to the other side?

A. Yes.

Hansen Dep., pp. 11-12.

35. Dr. Hansen's chart notes are consistent with his opinion that Claimant's left leg amputation complicated his recovery. For example, on December 1, 2009, Dr. Hansen believed Claimant would fully recover, at least to the point where he could return to his time-of-injury job. "It is probably going to be about six or eight weeks before he can get back doing regular

duty." CE-217. Claimant's physical therapy notes from this time also reflect good recovery progress.

36. Thereafter, on January 8 and 28, 2010, Dr. Hansen sought the workers' compensation surety's approval for home healthcare assistance for Claimant because, given his left leg amputation, Claimant's activities needed to remain severely restricted while he recovered. These requests were apparently not approved.

37. On January 19, 2010, Claimant was again examined by Dr. Hansen. He was placing full weight on his right ankle and using a cane for assistance walking. Dr. Hansen's optimism for a smooth recovery began to fade:

> I think it is going to require probably another month or two for this gentleman of his age and given his physical challenges to be independent and ambulatory at a fairly high level of functioning. In fact, being ambulatory all day long with work boots with the type of labor which he has done, it may be a requisite to remove the metal actually before turning him loose and being full weight bearing in the heavy labor situation where he has been working.

CE-219.

38. Following surgery to remove the hardware from his right ankle, Claimant ambulated to a follow-up appointment on March 30, 2010 in a postop shoe. He was doing well, with only some tenderness over the incision site, and it was anticipated he would reach medical stability by July 1, 2010. By May 17, 2010, it was apparent that Claimant would not achieve a full recovery. Dr. Hansen described Claimant's condition on that day in a letter to the surety:

> He has about 0 to 35 degrees of plantarflexion...His x-rays show that he has developed some increased diastasis of the tibia and fibula with some widening of the ankle mortise at this point…He continues to walk with a cane with some persistent pain in the ankle with a finding of the diastasis and posttraumatic degenerative changes being present. On a long-term basis he is probably going to be limited to [*sic*] sedentary type of work situation particularly at his age.

CE-224.

39. Dr. Hansen opined in a May 17, 2010 letter to Surety that Claimant is likely permanently limited to sedentary work. At his deposition, Dr. Hansen explained that he issued this restriction because Claimant is a significant slip-and-fall risk due to a combination of his left lower extremity amputation and his industrial right ankle fracture:

> Q. All right, sir. I see here, on May 17 of 2010, you wrote to the State Fund and said, on a long-term basis, he is probably going to be limited to a sedentary type of work situation, particularly at his age.
>
> Was that recommendation based on the factors that you just talked about, Dr. Hansen? The fear of him slipping and falling?
>
> A. Yes.
>
> Q. And that fear is at least partially motivated by the fact that he has a prosthetic on the left side and now a broken ankle on the right?
>
> A. Yes.
>
> Q. Dr. Hansen, if this gentleman had not had a prosthetic - - if he had a good side, as it were - - would he have been more likely to have been able to do more things following his ankle fracture?
>
> A. Probably.

Hansen Dep., p. 19.

40. Dr. Hansen provided some insight into Claimant's likely capabilities over the years following his lower left leg amputation. He gave no reason to doubt, from a medical standpoint, that Claimant was quite active before he fractured his right ankle:

> Q. Okay. Let me tell you what Mr. Arredondo said in court, Doctor, and ask you for your reaction to that.
>
> He testified in court that, prior to this time, he was involved in a job at an onion shed, where he was basically on his feet most all day. He testified he didn't really have any trouble with that. As long as his prosthetic was in good repair, he could stay on his feet all day.

> He went up and down ladders by using his right leg first and dragging the left leg up behind; that he would lift and move 50-pound bags of onions from time to time, and that he did all these activities without any difficulty.
>
> Does that surprise you, as an orthopedic doctor?
>
> A. Not particularly, in that, you know, folks can be very active and carry on with very physical type of work activities with an impairment such as a below-knee amputation.

Hansen Dep., p. 9.

41. **Roman Schwartsman, M.D.** Dr. Schwartsman, an orthopedic surgeon, performed an IME at Defendant's request on September 16, 2010. Prior to rendering his opinions, Dr. Schwartsman familiarized himself with Claimant's industrial injury treatment and his left leg amputation. However, the record does not disclose how. He also interviewed Claimant, through Claimant's son's interpretation assistance, and performed an examination. Dr. Schwartsman noted that he found no evidence of symptom magnification.

42. Claimant complained of no symptoms other than pain in his right ankle. On examination, Dr. Schwartsman noted "slight discomfort" along the medial and anterior aspects of Claimant's right ankle. CE-272. X-rays taken that day demonstrate advanced degenerative changes in the mid foot, characterized by advanced arthritic change around the tarsal navicular, degenerative change in the tibiotalar joint, and medial joint space widening of approximately 2 mm in the ankle mortise. Fracture of the distal fibula was well-healed and there was no evidence of retained hardware.

43. Dr. Schwartsman diagnosed a left ankle fracture as a result of the industrial injury, with preexisting advanced degenerative joint disease of the left foot and ankle. He noted that Claimant had no ankle instability. Since Claimant's left foot and ankle are operatively missing, and his examination notes refer to Claimant's right foot and ankle, it is clear that

Dr. Schwartsman intended his diagnoses to pertain to Claimant's right side. Dr. Schwartsman opined that Claimant had reached maximum medical improvement ("MMI") and recommended an over-the-counter orthotic to help him better control his ankle motion. He also opined that Claimant could return to work, provided that he observe permanent medical restrictions, including no working on uneven surfaces, no lifting greater than 30 pounds, and no ladder-climbing. Based upon the *AMA Guides, Sixth Edition,* Dr. Schwartsman assessed PPI of 10% of the lower extremity on the basis of Claimant's right lateral malleolar ankle injury with mild motion deficits and mild malalignment.

44. **Kevin Krafft, M.D.** Dr. Krafft, a physiatrist, evaluated Claimant's binaural hearing loss on September 26, 2011, at Claimant's request, in order to assess his related PPI. Dr. Krafft interviewed Claimant, performed an examination, and reviewed chart notes prepared by the audiological physician who examined him on June 7, 2011.

45. Dr. Krafft diagnosed profound sensorineural hearing loss and, apparently, opined that Claimant had reached MMI because he was still uninterested in obtaining hearing aids. He assessed PPI, under the *Sixth Edition*, of 32% of the whole person and recommended that Claimant avoid situations in which hearing is required for safety.

INDUSTRIAL COMMISSION REHABILITATION DIVISION

46. Martha Torrez and Teresa Ballard, consultants with ICRD, assisted Claimant from October 20, 2009 through December 17, 2009. Ms. Torrez prepared a job site evaluation ("JSE") and contacted Asumendi Farms to determine whether Claimant would be able to return to work there. Neither she nor Ms. Ballard attempted to find work for Claimant elsewhere.

47. Claimant's ICRD case was closed because, according to Dr. Schwartsman, Claimant had reached medical stability but had elected not to return to work due to "issues

related to the work injury of 09-20-09 combined with the impact from a prior work injury as well as his age." DE-155. A note by Ms. Ballard regarding Claimant's case outlines his primary impediments to work as she sees them and speculates that Asumendi Farms may offer him a sedentary sorting line position due to their "sympathetic" relationship:

> Of further note is the claimant's age at the time of injury (71). Additionally, the claimant had suffered a prior injury and does employ a prosthetic appliance on the left lower extremity. He has limited education and is primarily monolingual, Spanish-speaking. These factors combined are very limiting to the claimant's outlook for return to work within his customary labor market in the Wilder/Greenleaf area. The claimant had worked for approximately 36 years for the time of injury employer as well as the previous owner. Both the employer and the claimant indicated a strong desire to continue their very compatible relationship. It would be likely that the claimant's restrictions would limit his ability to work in the time of injury position, however, he may be able to work in a sedentary position on the sorting line or in other similar types of jobs, given this sympathetic relationship. The pay range for seasonal packing shed positions is normally $7.50 per hour with the number of hours typically varying according to the volume of the crop, weather and other factors related to this industry.

DE-156.

VOCATIONAL REHABILITATION CONSULTANT OPINIONS

48. **Nancy Collins, Ph.D.** Dr. Collins, a vocational disability rehabilitation consultant, performed a vocational disability assessment on March 9, 2011 at Claimant's request. Prior to rendering her opinion, Dr. Collins reviewed Claimant's medical and vocational records. She also interviewed Claimant, with the assistance of a translator and Claimant's wife. Although Claimant's hearing difficulty was apparent, Dr. Collins testified that she believed Claimant understood her questions and answered them sincerely. Before her deposition on April 12, 2012, Dr. Collins also reviewed the hearing transcript, observed the deposition of Brian Davis, and spoke with Mr. Asumendi.

49. Dr. Collins opined that, before the industrial accident, Claimant was qualified "for a variety of light, unskilled jobs, particularly in that labor market where there are a lot of

Spanish-speaking individuals: Janitorial work, light cleaning, sorting, packing, irrigation, laundry work, car detailing, [and] working as a dishwasher." Collins Dep., p. 11. However, following the industrial accident, he was totally and permanently disabled:

> Considering his age of 72, his inability to speak English, his second grade education, his lack of transferrable skill and his rural labor market, I do think it would be futile for Mr. Arredondo to look for work. In my opinion, he is totally disabled as a result of his industrial injury and pre-existing medical conditions, in combination with non medical [*sic*] factors of age, labor market, language and lack of transferrable skill.

CE-288. The preexisting medical conditions to which Dr. Collins refers are Claimant's hearing loss and his left lower leg amputation.

50. As mentioned, above, Dr. Collins relied, in part, on information provided by Mr. Asumendi in developing her opinions. She testified that Mr. Asumendi reported Claimant was a good, reliable worker who, like Mr. Zamora, was employed to do the lighter work in the onion shed. He did not speak to Claimant often, but he knew Claimant was able to perform all of the jobs he was assigned and that he worked on a seasonal basis. He did not know that Claimant had a hearing deficit.

51. **Douglas N. Crum, CDMS.** Mr. Crum, a vocational disability consultant, performed a vocational disability assessment on February 14, 2012 at ISIF's request. In preparation, he reviewed Claimant's medical and wage records, workers' compensation complaint, deposition, and lump sum settlement agreement with Employer; Dr. Collins' report and addendum; and ICRD case notes and JSE. Mr. Crum also had a telephone conversation with Mr. Davis and interviewed Claimant with the assistance of a professional interpreter. Mr. Crum noted in his report that Claimant sometimes did not understand, or got mixed up when answering questions; however, he further documented, in italics for emphasis, *"Note: I believe that [Claimant] was honestly trying to be accurate in the information he told me."* DE-186.

52. Mr. Crum provided two ultimate opinions. First, he opined that Claimant was totally and permanently disabled prior to his industrial injury. He also opined that Claimant's industrial injury, alone, would have rendered him totally and permanently disabled in the absence of his preexisting impairments. In addition to the factors considered by Dr. Collins, Mr. Crum focused on the facts that Claimant was hired by his "good friend" (Mr. Zamora), that he never obtained work from other employers during the off-season even though he tried, and that, according to information he obtained from Mr. Davis, Claimant's job at Asumendi Farms "seemed to have been a special arrangement with the employer; … it seemed, clearly, to be a sympathetic employment situation to me." Crum Dep., p. 17.

53. Mr. Crum also relied upon Mr. Davis's testimony to conclude that Claimant and Mr. Zamora were in a special class of workers at Asumendi Farms. As determined, above, Mr. Davis's testimony in this regard is of little persuasive value. Consequently, to the extent that Mr. Crum's opinion rests on Mr. Davis's assertions, it, too, is unpersuasive.

54. In addition, Mr. Crum offered what amounts to medical opinion testimony, which he is not qualified to render. As a result, his testimony assessing Dr. Schwartsman's post-accident medical restrictions to Claimant's pre-accident condition, and preferring Dr. Hansen's post-accident medical restrictions to Dr. Schwartsman's, are given no weight. Only Mr. Crum's opinions based upon Claimant's condition, as determined by credible evidence in the record, are herein considered. Along those lines, Mr. Crum testified that Claimant would be totally and permanently disabled, given Dr. Hansen's medical restriction to sedentary work.

55. Mr. Crum also opined that Claimant would be totally and permanently disabled as a result of his industrial right ankle fracture, alone. The credible evidence supporting his opinion includes Claimant's medical records documenting his treatment and recovery, Dr. Hansen's post-

accident restriction to sedentary work and Claimant's description of his right ankle symptoms, which Mr. Crum recalled were quite significant:

> It was my opinion that the claimant sustained a very significant injury to his right foot and ankle, requiring two surgeries.
>
> He had very significant subjective complaints that indicated he had very little tolerance for being on his feet, again, after the right ankle injury.
>
> He had a significant issue with pain in the right foot, with or without activity. He had to elevate the leg a good part of the day. He had to wrap it to keep it warm; and he required the use of a cane for safe ambulation, which would pose a hazard in an industrial setting.

Crum Dep., pp. 23-24.

CLAIMANT'S CREDIBILITY

56. At the hearing, Claimant ambulated with a cane. His testimony and demeanor persuaded the Referee that he could no longer stand to work all day as he had before his industrial accident and injury. In addition, Claimant was often confused about the questions put to him, and his answers were sometimes unresponsive or of questionable accuracy. Dr. Schwartsman, Dr. Collins and Mr. Crum all noted and/or testified to similar experiences while interviewing Claimant, yet each expressly stated that they believed Claimant was being truthful.

57. Claimant appeared at all times sincere in his attempts to accurately answer the queries posed at the hearing. Nonetheless, his confusion, whether due to problems with his hearing, the translation process, the ambiguity of certain questions, or his memory, impaired the quality of his testimony and, thus, its ability to persuade, particularly in terms of placing certain events in time. Where the totality of the credible evidence supports a conclusion at odds with a statement made by Claimant, Claimant's statement will be afforded less weight.

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).

MEDICAL STABILITY, PREEXISTING PPI, AND MEDICAL RESTRICTIONS

58. **Medical stability.** In his May 17, 2010 letter to the surety, Dr. Hansen opined that Claimant's condition would likely be medically stable in six weeks. However, Claimant continued to have pain and inflammation, and Dr. Hansen continued to treat Claimant without ever explicitly opining that he had reached medical stability, through the time of the hearing. On August 5, 2010, Dr. Hansen anticipated Claimant would continue to increase his activity level. On September 16, 2010, Dr. Schwartsman found Claimant medically stable and recommended no further treatment but recommended a shoe insert.

59. Thereafter, Claimant followed up with Dr. Hansen approximately every three to six months. Over time, Dr. Hansen prescribed anti-inflammatories and a neoprene ankle brace, among other recommendations, none of which significantly altered Claimant's right ankle condition. The Referee finds Claimant reached medical stability as of September 16, 2010.

60. **Preexisting PPI.** It is undisputed that Claimant has relevant preexisting permanent impairments as a result of his lower left leg amputation and his binaural hearing loss. No physician has formally assessed a PPI rating regarding Claimant's left leg amputation;

however, Idaho Code § 72-428 provides a scheduled benefit in the amount of 180 weeks, or 36% of the whole person. Dr. Krafft's assessment of 32% of the whole person in regard to Claimant's hearing loss is undisputed and adequately supported by medical evidence.

61. The Referee finds Claimant has preexisting permanent impairments to his left lower extremity in the amount of 36% of the whole person and to his hearing in the amount of 32% of the whole person.

62. **Impairment due to industrial injury.** Dr. Schwartsman assessed PPI of 10% of the lower right extremity in consideration of Claimant's industrial right ankle fracture. Under the Idaho Code § 72-428 and IDAPA 17.02.04.281, this amounts to 4% of the whole person.[5] Dr. Schwartsman's assessment is undisputed. The Referee finds Claimant suffered 4% PPI of the whole person as a result of his industrial injury.

63. **Medical restrictions.** In May 2010, Dr. Hansen opined that Claimant would likely be permanently limited to sedentary work because he is at significant risk for a fall injury. In September 2010, Dr. Schwartsman contradicted Dr. Hansen's opinion by recommending that Claimant could return to any kind of work so long as he did not need to lift more than 30 pounds, work on uneven ground, or climb ladders. According to the evidence in the record of Claimant's job duties at Asumendi Farms, Dr. Schwartsman's restrictions arguably would not stop Claimant from taking back his time-of-injury job, but Dr. Hansen's would.

64. Dr. Hansen has treated Claimant's right ankle fracture since he was first seen in the emergency room following his industrial accident. He is significantly more familiar with Claimant's physical capabilities than Dr. Schwartsman, who only examined Claimant one time. Further, Dr. Schwartsman's documentation of Claimant's right ankle symptoms fails to reflect

[5] Idaho Code § 72-428 provides that the loss of a lower extremity represents 200 weeks of disability for purposes of calculating disability. IDAPA 17.02.04.281 provides that 500 weeks equals a "whole man." Thus, 10% of 200 weeks equals 20 weeks which, divided by 500 weeks, equals 4% PPI of the whole person.

the full extent of his lingering pain, swelling and instability established by other credible medical evidence in the record. In addition, Claimant persuasively testified that he is no longer able to stand and walk without an assistive device (a cane) since his industrial injury. Claimant is clearly not confident in his ability to get around without a cane, which would preclude him from working on his feet all day in a labor-oriented position. The Referee finds Dr. Hansen's medical restriction to sedentary work more consistent with Claimant's abilities at the time of the hearing than Dr. Schwartsman's lighter restrictions and, thus, more persuasive.

PERMANENT DISABILITY

65. "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. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 766 P.2d 763 (1988).

66. "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 nonprogressive at the time of evaluation. Idaho Code § 72-422. 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 nature of any disfigurement, the

cumulative effect of multiple injuries, the occupation of the employee, and the employee's age at the time of the relevant accident or occupational disease manifestation. In addition, consideration should be given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area in light of all of the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. 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).

67. **Time of disability determination.** The Idaho Supreme Court in *Brown v. The Home Depot,* WL 718795 (March 7, 2012) this year reiterated that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing. Under Idaho Code § 72-425, a permanent disability rating is a measure of the injured worker's "present and probable future ability to engage in gainful activity." Therefore, the Court reasoned, in order to assess the injured worker's "present" ability to engage in gainful activity, it necessarily follows that the labor market, as it exists at the time of hearing, is the labor market which must be considered. Although the Commission is afforded latitude in making alternate determinations based upon the particular facts of a given case, the parties have not argued that Claimant's disability should be determined as of any other point in time; therefore, it will be determined as of the hearing date.

68. Given ISIF's primary argument that Claimant was totally disabled prior to his industrial accident, his disability must also be determined as of September 20, 2009.

69. **Non-medical factors.** Claimant's relevant nonmedical factors contributing to his disability on September 20, 2009 and at the time of the hearing are undisputed. They include his age (over 70), his inability to speak or write English, his second-grade education, his limited

agricultural labor market, and his lack of any skills transferrable to sedentary work.

70. **Permanent disability/odd-lot status as of September 20, 2009.** Claimant was employed on September 20, 2009, the day of his industrial right ankle fracture. ISIF argues that, nevertheless, Claimant was totally and permanently disabled as an odd-lot worker. An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State, Industrial Special Indemnity Fund,* 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department,* 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of proof to establish total permanent disability under the odd-lot doctrine may be established in any one of three ways:

a. By showing that the claimant has attempted other types of employment without success;

b. By showing that the claimant or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or

c. By showing that any efforts to find suitable work would be futile.

Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995). In this case, ISIF is asserting the doctrine as an affirmative defense, so it carries the burden of proof. *Bybee.*

71. First *Lethrud* method. ISIF contends that Claimant tried, but failed, to obtain work between 2003 and 2009 such as to satisfy the first *Lethrud* test. Support for ISIF's position

consists of persuasive evidence that Claimant was unable to find alternate work in the off-seasons.

72. ISIF posits that Claimant was unemployable during the off-seasons because he was physically incapable of doing the field work available at that time, which consists of walking up and down crop rows, weeding and otherwise tending them. Claimant, on the other hand, believed he was physically capable of doing the work, but there was too little work available during those periods for everyone who applied. The fact that Claimant drew unemployment in the off-seasons, which is only available to able-bodied workers seeking employment, tends to support the sincerity of Claimant's belief that he could do the work. So does his son's testimony that Claimant continued to tend his large garden at home during this period. Nevertheless, Claimant does not dispute that he was never offered any off-season positions.

73. Claimant and Brian Davis agreed that, at Asumendi Farms, very few of the men who worked in the packing shed were also selected to work in the fields. This is not surprising because field work requires a different set of capabilities than does packing shed work. Claimant's inability to obtain such employment, in spite of his efforts over six off-seasons combined with his years of prior experience, strongly indicates that he was not employable in the labor market for field work, most likely because younger, stronger workers were selected instead. However, this does not amount to a finding that no reasonably stable market for Claimant's services existed between 2003 and 2009. Indeed, Claimant returned to work at the packing shed, year after year prior to his industrial injury, as he had done previously during his entire work life in other seasonal positions. Further, Dr. Collins persuasively testified that Claimant's skills and abilities qualified him for other positions during this time, as well.

74. The Referee finds Claimant was not competitive as a field laborer as of September 20, 2009. However, the evidence of Claimant's failure to obtain work as a field worker is insufficient to establish that he was so injured that he could "perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Carey.* ISIF has failed to establish Claimant was an odd-lot worker by the first *Lethrud* method based on his failure to obtain seasonal employment each year.

75. Second and third *Lethrud* methods. No one assisted Claimant in securing work before his industrial accident, so there is insufficient evidence in the record from which to find Claimant was an odd-lot worker under the second method. As for the third method, however, Mr. Crum opined that it would have been futile for Claimant to seek employment after 2003 because of his age, education, skill level and preexisting impairments. Dr. Collins disagreed. She opined that Claimant was not totally and permanently disabled at that time because 1) he was able to do his assigned duties at Asumendi Farms, which were necessary to that business (and presumably to other similar businesses), 2) he performed his duties on a full-time (though seasonal) basis, 3) he was able to stand all day to work, and 4) there were other light-duty jobs in his local labor market he could have performed outside of the packing shed.

76. **Sympathetic employer.** ISIF urges the Commission to find that Asumendi Farms was a sympathetic employer, such that Claimant was not actually competitive for any jobs, at any time during the year, even though he was employed at the time of his accident. "Sympathetic employer" has been defined as an employer that is willing to make accommodations that are out of the ordinary in order to obtain an employee's beneficial services. *Christensen v. S.L. Start & Associates, Inc.*, 147 Idaho 289, 207 P.3d 1020, 1024

(2009). In addition, both parties cited cases in their briefing to provide further guidance as to what factors should be considered in terms of deeming an employer "sympathetic." Claimant directs the Commission's attention to *Bittick v. Hennis,* 2010 IIC 0342, in support of the proposition that Claimant's longevity with Asumendi Farms, his reliability and diligence on the job, and the fact that he was doing real work, should be sufficient to establish that his employment was not just the result of a sympathetic relationship.

77. Citing *Hamilton v. Ted Beamis Logging & Constr.,* 127 Idaho 221, 899 P.2d 434 (1995), ISIF focuses on the fact that Claimant was hired by his friend, Mr. Zamora, and alleges that Claimant was given special work conditions, to establish that Asumendi Farms was, indeed, a sympathetic employer. The claimant in that case, a sawyer, argued that he was totally and permanently disabled following a work accident in 1985. However, the issue was never decided because he entered into a lump sum settlement in 1989 regarding that claim. Thereafter, he returned to work but only lasted one day due to pain from his 1985 injury. Subsequently, the claimant was again hired as a sawyer, but was given extra work breaks and was only required to work on flat ground, even though most available work needed to be performed on uneven ground. Four days into work at this accommodated position, the claimant sustained an injury that resulted in his total and permanent disability.

78. ISIF also relies upon *Bybee*. According to ISIF, the Commission should consider the fact that that claimant, like Claimant in the instant case, was employed full-time for several years before her industrial accident but, nevertheless, the employer was deemed sympathetic. A close read of *Bybee*, however, reveals that this argument misconstrues the facts set forth in that decision, in which it is written that the claimant worked several jobs, then underwent cervical (neck) surgery in 1989, then was employed for only six months at her time-of-injury position

before her industrial accident in 1991. In any event, the Idaho Supreme Court did not explicitly rely on the length of Claimant's employment as a factor in determining whether her employer was "sympathetic". Instead, it placed great weight on the fact that she was unable to perform a number of the duties listed on her personalized written job description at the time she was hired.

79. The most relevant facts pertaining to a determination of whether Asumendi Farms was a sympathetic employer include Claimant's relationship with Mr. Zamora, Claimant's ability to perform his job duties at Asumendi Farms, whether Claimant's employment was a "real job", and the extent of any special accommodations afforded to Claimant to enable him to do his job.

a. Claimant's relationship with Mr. Zamora. It is true that Mr. Zamora and Claimant have been friends for a very long time. However, that friendship did not extend past the workplace, at which Mr. Zamora was employed for over 40 years and at which Claimant worked for approximately 36 years, under several different owners. It is perfectly natural that, when Claimant went looking for work in 2003, he started with the packing shed at the farm where he had previously worked, and with Mr. Zamora. It is common for any work-seeker to first approach familiar people and places, particularly those with whom a favorable employment relationship has already been established, as is here the case. In addition, Mr. Zamora did not have the final hiring authority; Mr. Asumendi did. It is unlikely that Mr. Asumendi hired Claimant over and over, year after year, just because Mr. Zamora liked him. There is no direct evidence regarding Claimant's relationship with Mr. Asumendi. However, Dr. Collins' second-hand report in this regard tends to show that he valued Claimant as an

employee because he was a hard worker and reliable. Under the circumstances of this case, the fact that Mr. Zamora and Claimant are friends ultimately fails to support the allegation that Asumendi Farms was a sympathetic employer.

b. Claimant's ability to perform his job duties. Claimant was hired, essentially, as a fill-in person or, as Claimant termed it in his brief, as a "floater." He filled in where necessary, except where heavy lifting was required, and did clean-up work. He stayed busy, working all day. Claimant was fully capable of performing the job duties for which he was hired. Mr. Davis's testimony that Claimant was incapable of doing the work of a bagger is undisputed, but also irrelevant. Claimant was not hired as a bagger. Not only could Claimant perform his duties as a floater, but Mr. Davis also admitted that Claimant performed these duties well, and that he could have probably worked as a full-time sorter.

c. Whether Claimant's employment was a "real job." Claimant cleaned, sorted and assisted with bagging, all of which were real and necessary jobs to be done at the packing shed, and he did them well and reliably. Nevertheless, Mr. Davis testified that Claimant's job was not necessary, not a "real job", because all of the duties he performed could have been easily subsumed into jobs performed by other workers. In support of this position, ISIF points out that when Claimant left Asumendi Farms, no new worker was hired to replace him. Instead, one or two other workers came in an hour early to do clean-up, and the baggers and sorters were left without an extra helping hand. Proof that all of Claimant's job duties were integrated into other positions at a cost savings to Asumendi Farms after his departure would support ISIF's position. However,

only Mr. Davis and Mr. Crum, relying up on Mr. Davis's opinion, testified that Claimant did not work a bona fide job. Mr. Davis's testimony lacks sufficient foundation to support such a conclusion, for the following reasons:

i. Mr. Davis's hiring authority was limited. He did not know how Claimant's value as an employee was calculated by those who made the decision to hire him year after year. Mr. Davis only speculated that Claimant was a sympathy hire because he did not do any heavy lifting.

ii. Mr. Davis rarely spoke to Claimant and was only vaguely aware of the specific tasks Claimant performed on a day-to-day basis.

iii. Mr. Davis's testimony was unduly focused on the fact that Claimant could not fit into what he believed to be the typical male job at Asumendi Farms. His bias extended to his low opinion of Mr. Zamora's value to the company, even though his dependability, employee relations capabilities and communications skills would appear to be highly valuable.

iv. The record lacks sufficient wage information from which to determine the comparative cost of Claimant's services versus the cost of replacing those services.

v. The record lacks information as to the composition and labor hours expended by the bagging and sorting crews from which to determine the monetary effect, if any, of Claimant's departure.

Claimant's work history and the necessity of the duties he performed at Asumendi Farms, as attested by both Mr. Zamora and Mr. Davis, establish that he

worked a real job there from 2003-2009 for purposes of determining whether his employment was due to a sympathetic relationship with his employer.

d. Extent of special accommodations afforded to Claimant. Mr. Davis testified, essentially, that Claimant's entire job was a special accommodation because he could not work as a bagger. Claimant's job was established, above, to be a "real" job, so it is beside the point that he could not work as a bagger. The record is void of evidence that Claimant was given any special accommodations, at all, before his industrial accident. For example, there is no evidence to suggest that Claimant was given extra breaks or allowed excessive days off work. There is, however, some evidence that Asumendi Farms may have been willing to offer Claimant special accommodations *following* his industrial accident. Ms. Ballard, ICRD consultant, surmised that Asumendi Farms may have been amenable to allowing Claimant to work as a *seated* sorting line worker, even though this job normally entails standing all day, "given this sympathetic relationship." DE-156. To determine what she meant, the earlier statement to which she refers must be considered. In that statement, Ms. Ballard wrote, "Both the employer and the claimant indicated a strong desire to continue their very compatible relationship." *Id.* This reference appears to convey Ms. Ballard's impression that while Claimant was an employee, sufficient value was given and received by both parties to the relationship, such that Asumendi Farms may have been willing to take Claimant back, even in his weakened post-accident condition. Had Asumendi Farms thusly employed Claimant, such employment may have been sufficient to render Asumendi Farms a sympathetic employer. However,

Ms. Ballard's comment, based upon her impression after speaking with both employer and Claimant, fails to support the proposition that Claimant received any special accommodations at Asumendi Farms prior to his industrial accident, or that she regarded Asumendi Farms as a sympathetic employer for workers' compensation purposes.

80. The Referee finds the evidence in the record insufficient to prove that Asumendi Farms was a sympathetic employer.

81. The Referee further finds Claimant was employable within a narrow range of his local agricultural labor market on September 20, 2009. Thus, he was not an odd-lot worker prior to his industrial accident and injury.

82. **Permanent disability as of the hearing date.** ISIF does not dispute that Claimant was totally and permanently disabled as of the hearing date; in fact, one of its chief arguments, addressed above, is premised upon the allegation that Claimant was already totally and permanently disabled *before* he went to work at Asumendi Farms in 2003. Further, the facts in the record established by the testimony of Mr. Crum, Dr. Collins and Dr. Hansen prove that Claimant could no longer work following his industrial injury because he could no longer stand and walk without significantly risking a fall injury. This relegation to sedentary work makes Claimant ineligible for any jobs previously available in his labor market based upon his medical and non-medical factors, alone, as well as under the odd-lot doctrine. The Referee finds Claimant was totally and permanently disabled as of the hearing date.

ISIF LIABILITY

83. Idaho Code § 72-332 (2) provides that ISIF is liable for the remainder of an employee's income benefits, over and above the benefits to which an employee is entitled solely attributable to an industrial injury, when the industrial injury combines with a preexisting

permanent physical impairment to result in total and permanent disablement of the employee. "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. *Id.* 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.

84. 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.

85. ISIF does not dispute the first three *Dumaw* factors with respect to Claimant's left leg amputation; therefore, the Referee finds that Claimant's left leg amputation constitutes a preexisting impairment that was manifest and constituted a subjective hindrance to employment. However, ISIF disputes that Claimant's hearing deficit constitutes a subjective hindrance, so it should not be liable for any of Claimant's benefits related to that impairment.

86. ISIF also asserts that it bears no liability because Claimant's industrial injury did not combine with his preexisting impairments to cause total and permanent disability. It was

determined, above, that Claimant was not totally and permanently disabled as an odd-lot worker due to his preexisting conditions, alone. ISIF's remaining argument is that Claimant was rendered totally and permanently disabled by his industrial injury, notwithstanding his preexisting hearing and left leg impairments.

87. **"Subjective hindrance."** The "subjective hindrance" prong of the test for ISIF liability finds its genesis in the statutory definition of permanent impairment together with additional language enacted by the legislature in 1981:

> "Permanent physical impairment" is 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 disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become employed. **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 permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.**

Idaho Code § 72-332(2) (emphasis added).

88. The Idaho Supreme Court set out the definitive explanation of the "subjective hindrance" language in *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 172, 686 P.2d 557, 563 (1990):

> Under this test, evidence of the claimant's attitude toward the preexisting condition, the claimant's medical condition before and after the injury or disease for which compensation is sought, nonmedical factors concerning the claimant, as well as expert opinions and other evidence concerning the effect of the preexisting condition on the claimant's employability will all be admissible. No longer will the result turn merely on the claimant's attitude toward the condition and expert opinion concerning whether a reasonable employer would consider the claimant's condition to make it more likely that any subsequent injury would make the claimant totally and permanently disabled. The result now will be determined by the Commission's weighing of the evidence presented on the question of whether or not the preexisting condition constituted a hindrance or obstacle to employment for the particular claimant.

89. With respect to Claimant's preexisting hearing impairment, the record bears scant evidence from which to establish that it constituted a subjective hindrance to Claimant prior to the 2009 accident. Claimant testified that it was not a problem, Mr. Davis testified that he did not know Claimant had trouble hearing, and Dr. Collins's impression from speaking with Mr. Asumendi is that he was also unaware. Claimant was asked at the hearing if he would have gotten out of the way of the machine that struck him and broke his right ankle if he had heard it coming. Of course, Claimant responded that he would have gotten out of the way. However, he followed by explaining that he would not have been able to hear the machine anyway because it made no sound. Claimant is poorly qualified to opine as to how loud the machine was, or whether a person with normal hearing could have heard it coming. Further, it would appear that Claimant prefers to downplay this impairment, so his own impressions are not terribly reliable. Dr. Collins testified that Claimant's hearing impairment would limit his ability to take instructions or work safely in an environment where it was important to hear equipment. However, she did not cite this impairment as a disqualifier for any particular job.

90. The Referee finds the evidence showing that Claimant's supervisors were unaware of his hearing impairment is most compelling on the question of whether it constituted a subjective hindrance. If Claimant was able to complete his job for six seasons with this employer without such information becoming common knowledge, it is likely that he would be able to prevent it from hindering his ability to gain and maintain employment in the future. As a result, the Referee finds Claimant's hearing impairment is not a subjective hindrance to employment. ISIF is not liable for benefits related to Claimant's hearing impairment.

91. **"Combining with."** As part of his prima facie case, Claimant bears the burden of establishing that his preexisting permanent physical impairments "combined with" his impairments related to his industrial accident so as to result in total and permanent disablement. Claimant bears the burden of demonstrating that he would not have been totally disabled in the absence of his preexisting impairments. See *Garcia v. J.R. Simplot Company*, 115 Idaho 966,

772 P.2d 1973 (1989); *Bybee v. State Industrial Special Indemnity Fund*, 129 Idaho 76, 921 P.2d 1200 (1996).

92. The Referee concluded, above, that Claimant has a preexisting permanent impairment to his left lower extremity which is manifest and constitutes a subjective hindrance to employment, as well as an industrially-related permanent impairment to his right lower extremity. Further, Claimant became totally and permanently disabled after his industrial injury because he was no longer able to stand and walk all day. ISIF argues that Claimant's right ankle injury as of the hearing date would relegate Claimant to sedentary work, even in the absence of his preexisting impairments.

93. The Referee agrees that Claimant's right ankle injury is the reason he can no longer stand all day to work. However, the evidence does not support the conclusion that Claimant's right ankle injury was a result of the industrial accident, alone. Instead, the evidence establishes that Claimant's improperly healed right ankle condition is, in part, due to his left leg amputation. Based upon Dr. Hansen's testimony, it is reasonable to conclude that without his preexisting left leg amputation, Claimant's right ankle fracture probably would have healed more fully. He explained that, due to Claimant's preexisting condition, he placed weight on his right ankle earlier than was advisable, and he walked with an altered gait pattern, both of which are activities likely to hamper recovery from an ankle fracture like Claimant's. (See Hansen's Dep. Pp 10-13). During the first several months of Claimant's recovery, Dr. Hansen was optimistic for a full recovery. However, when it became apparent that Claimant was not healing properly, he revised his prognosis.

94. It is impossible to know with certainty whether Claimant's right ankle would have healed sufficiently to allow him to return to work in the absence of his left leg impairment. It is possible that the injury would not have healed properly regardless of Claimant's preexisting

impairment. However, a claimant must only provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Further, magic words are not necessary to show a doctor's opinion was held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *See, Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001).

95. The Referee finds the medical evidence in the record, consisting of Dr. Hansen's chart notes and unrebutted testimony, establishes that he expected Claimant to recover sufficiently to return to his time-of-injury employment until complications due to his left leg amputation ensued. As a result, Claimant would not be totally and permanently disabled, but for his permanent impairments related to both his preexisting left leg amputation and his accident-induced right ankle fracture. Therefore, Claimant has proven that this preexisting left leg impairment combined with his industrial right leg impairment to render him totally and permanently disabled.

CAREY APPORTIONMENT

96. As developed above, Claimant's preexisting permanent physical impairment to his left lower extremity totals 36% of the whole person. His relevant accident-produced impairment is 4% of the whole person.

97. Therefore, Claimant's total impairment from all sources is 40%, leaving 60% disability to be apportioned under the *Carey* formula.

Employer's responsibility is as follows: 4/40 x 60 = 6 + 4 = 10%

ISIF's responsibility is described as follows: 36/40 x 60 = 54 + 36 = 90%

98. A 10% whole person impairment rating equates to 50 weeks of benefits owed by Employer following the date of medical stability. The Referee has determined that Claimant reached the point of medical stability on September 16, 2010. Therefore, ISIF liability for the payment of permanent and total disability benefits commenced September 1, 2011.

CONCLUSIONS OF LAW

1. Claimant's current disablement is due in part to preexisting conditions.
2. Claimant has proven that he is totally and permanently disabled due to medical and non-medical factors, as well as under the odd lot doctrine.
3. ISIF is liable for Claimant's benefits commencing September 1, 2011.

RECOMMENDATION

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

DATED this 26th day of July, 2012.

INDUSTRIAL COMMISSION

_____/s/_____
LaDawn Marsters, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of August, 2012, 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
P O BOX 278
NAMPA ID 83653

PAUL J. AUGUSTINE
AUGUSTINE & MCKENZIE, PLLC
PO BOX 1521
BOISE ID 83701

_____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MIGUEL ARREDONDO, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2009-024792** **ORDER** FILED 08/09/2012

Pursuant to Idaho Code § 72-717, Referee LaDawn Marsters submitted the record in the above-entitled matter, together with her recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant's current disablement is due in part to preexisting conditions.

2. Claimant has proven that he is totally and permanently disabled due to medical and non-medical factors, as well as under the odd lot doctrine.

3. ISIF is liable for Claimant's benefits commencing September 1, 2011.

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

DATED this 9th day of August, 2012.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

_____/s/_____
Thomas P. Baskin, Commissioner

_____/s/_____
R.D. Maynard, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of August, 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

RICHARD S OWEN
P O BOX 278
NAMPA ID 83653

PAUL J. AUGUSTINE
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sjw

_____/s/_____