BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARIO AVILA, Claimant, v. ATLAS MECHANICAL, Employer, and HARTFORD INSURANCE COMPANY OF THE MIDWEST, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2002-016620** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed January 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 Pocatello on July 29, 2009. Claimant was present and represented by Gary L. Cooper of Pocatello. Gardner W. Skinner, Jr., of Boise represented Employer, Atlas Mechanical, and its Surety, Hartford Insurance Company of the Midwest ("Defendants"). Paul B. Rippel of Idaho Falls represented the State of Idaho, Industrial Special Indemnity Fund ("ISIF"). Oral and documentary evidence was presented and the record remained open for the taking of three post-hearing depositions. The parties then submitted post-hearing briefs and this matter came under advisement on November 5, 2009.

ISSUES

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

1. Whether Claimant is entitled to future medical care, and the extent thereof;[1]

2. Whether Claimant is entitled to total temporary disability (TTD) benefits, and the extent thereof;

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

4. Whether Claimant is entitled to permanent partial disability (PPD) benefits, and the extent thereof;

5. Whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine, or otherwise;

6. If so, whether ISIF is liable, and, if so,

7. Apportionment under the *Carey* formula, and

8. Whether Claimant is entitled to an award of attorney fees for Defendants' unreasonable denial of TTD benefits following Claimant's last surgery.

CONTENTIONS OF THE PARTIES

Claimant worked as a pipe-fitter for nearly 30 years. He contends that as the result of pre-existing bilateral knee and low back conditions combined with a left elbow injury requiring six surgeries, he is either 100% disabled or an odd-lot worker. Claimant's vocational expert has opined that while Claimant has not looked for work since his third surgery, to have done so would have been futile. Claimant's only chance for employment is with a sympathetic employer. Further, Defendants' vocational expert agrees Claimant is unemployable when considering both his back and elbow conditions. Finally, in the event Claimant is found to be less than total, he is

[1] Claimant did not address this issue in his Post-Hearing Memorandum, and it is deemed waived.

entitled to TTD benefits from the date of his last surgery until he reached MMI and Defendants are liable for attorney fees for wrongfully failing to pay the same.

Defendants contend that Claimant is not an odd-lot worker because, for various reasons, the opinions of those he relies upon in that regard are "flawed." Specifically, Claimant's vocational expert and his treating physician should not have relied upon a functional capacities evaluation for restrictions as such evaluation is merely a "snapshot in time" and is too subjective to be of any benefit in establishing permanent physical restrictions. Further, there are jobs available to Claimant consistent with his restrictions in his labor market; two such light-duty jobs were offered by Defendants to Claimant, but he refused them. Claimant has no incentive to return to work as he is making over $79,000 a year in Social Security, union disability benefits, and total permanent disability benefits if so ordered. Moreover, in the event Claimant is found to be totally and permanently disabled, ISIF should share in Defendants liability under the *Carey* formula. Finally, if Claimant is found to be totally and permanently disabled as of the date of his last surgery, no TTDs are owed and no attorney fees should be awarded.

ISIF contends that Claimant is not totally and permanently disabled. Even if the Commission finds otherwise, Claimant sought no treatment for his back or knees since the initial treatment, those conditions did not cause any problems for Claimant immediately prior to his last accident, and those conditions did not combine with his elbow injury to render him totally and permanently disabled.

Claimant responds that the two job offers extended to Claimant by Defendants were not suitable in that he would have been required to handle materials that only members of other unions could handle, thus putting claimant's union disability benefits in jeopardy, the two jobs were only temporary part-time positions not regularly and continuously available in his labor

market, and the jobs were not within Claimant's physical restrictions. Further, the two FCEs conducted in this case were internally consistent as well as consistent with one another and provide a valid and useful insight into Claimant's functionality. Finally, Claimant has proven his odd-lot status as a matter of law, and Defendants/ISIF have not presented credible evidence regarding the existence and suitability of employment in Claimant's labor market.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, vocational expert John Janzen, Ed.D., C.R.C, and physical therapist Sharik Peck, taken at the hearing.

2. Claimant's Exhibits 1-24 and 26-28.

3. Defendants' Exhibits 1-33.

4. The post-hearing deposition of Benjamin Blair, M.D., taken by Claimant on August 5, 2009.

5. The post-hearing deposition of Vermon S. Esplin, M.D., taken by Claimant on August 5, 2009.

6. The post-hearing deposition of William Jordan, M.A., C.R.M, C.D.M.S, taken by Defendants on August 24, 2009.

The objections made during the taking of Dr. Blair's deposition are overruled.

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 56 years of age and resided in Pocatello at the time of the hearing.

2. Claimant has worked as an apprentice/journeyman pipe-fitter for nearly 30 years. Pipe-fitters team with a plumber and set up the pipe, cut it, thread it if needed, grind the bevel on the end, and wait for the welder to weld the fitting. Once welded, the pipe-fitter grinds down the weld, cleans it, and then installs the finished product. Pipe-fitting is characterized as heavy labor.

3. On October 16, 2002, at age 49, Claimant and a co-worker were in the process of replacing a heavy valve when a pry bar Claimant was using slipped and he hit his left elbow on the valve.

4. Claimant has had a long and complicated course of medical treatment for his left elbow injury. He has endured a total of six surgeries on his left elbow between 2003 and 2008 including arthroscopic and open debridements, ulnar nerve transposition, ulnar nerve neurolysis, radial head excision, and shortening of the ulna. These surgical procedures have not relieved swelling, pain, and catching in Claimant's left elbow and arm.

5. Claimant was able to perform certain light-duty positions with Employer until his third surgery on December 15, 2003; he has not worked since.

6. After having observed Claimant's demeanor while testifying at hearing and comparing his hearing testimony to the record as a whole, the Referee finds Claimant to be a credible witness.

DISCUSSION AND FURTHER FINDINGS

There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment together with the relevant nonmedical factors totals 100%. If a claimant has met this burden, then total and permanent disability has been established.

100% method:

7. Two hand specialists have rated Claimant's left elbow injury at between 13-14% whole-person PPI. Claimant had pre-existing PPI for his low back spondylolisthesis of approximately 20% of the whole person immediately before his 2002 industrial injury and 23% at the time he was rated on January 5, 2006. Thus, Claimant's total PPI is between 33-37%, which leaves between 63-67% for non-medical factors. William Jordan, Defendants' vocational expert, testified that when considering Claimant's low back condition coupled with Claimant's elbow condition, Claimant has suffered whole person PPD of 88%. The Referee finds that when considering Claimant's total PPI as well as pertinent non-medical factors, Claimant has incurred whole person PPD of 88%.

Odd-Lot:

The second method is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939P.2d 854, 857 (1997). An odd-lot worker is one "so injured the 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 of Idaho*, *Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), *citing Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). 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), *citing Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

Medical Factors and Restrictions:

8. Claimant testified regarding three conditions that have affected his ability to work: his knees, his low back, and his left elbow, arm, and hand.

9. Knees:

Although he has not been given restrictions as such, Claimant testified that as a result of bilateral pre-existing knee injuries, he had to modify the way he knelt performing his pipe-fitting duties. He would place a rag or other cushioning device on any unlevel, gravel, or grating surface to lessen the pain associated with kneeling on either or both of his knees.

10. Low back:

Claimant injured his low back in November 1991 that was treated non-surgically. Claimant's physician imposed a permanent 50-pound lifting restriction. Claimant's back situation was re-examined by an orthopedic surgeon, Benjamin Blair, M.D., in January 2006. Dr. Blair noted that Claimant "remains markedly symptomatic" and believes his back problem had worsened over the past decade. Dr. Blair opined that Claimant's symptoms were secondary to spondylolisthesis, associated spondylosis, and secondary stenosis. Dr. Blair would have imposed a 35-pound lifting restriction, rather than the 50-pounds assigned by Claimant's treating physician. Dr. Blair testified as follows in his deposition regarding Claimant's permanent restrictions:

> Q. (By Mr. Cooper): Would you just go through that for us and describe what restrictions are applicable because of the low back - - he also had a left arm problem, so I want to restrict this to the lumbar.
>
> A. That would be mainly the lifting as well as the standing, sitting; the hand coordination, all of that activity would be mainly the hand. So lifting, basically no more than 5 pounds on a continuous basis, only 15 pounds occasional basis, actually carrying no more than five pounds occasionally, none constantly. Only occasional sitting, walking or forward reaching, and only occasional stair climbing or frequent stair climbing.

Dr. Blair Deposition, p. 10.

11. Left Elbow, Arm, and Hand:

With the exception of a hand specialist at the University of Utah, Claimant has primarily been treated for his left elbow problem by Vermon Esplin, M.D., a board-certified orthopedic surgeon and hand specialist.

He testified as follows regarding Claimant's left upper extremity restrictions:

> Q. (By Mr. Cooper): And I'd like to know what the restrictions were and why you gave those restrictions?
>
> A. Okay. The reason they were done, obviously, is because as I talked to him it was difficult for him to even lift a gallon of milk with that left upper extremity and do simple daily activities. So I put a limitation of about 10 pounds of lifting with that left upper extremity. And I certainly did not want him climbing ladders where a lot of his weight would be hanging on that extremity. And certainly his health or well-being being at risk from not being able to support his weight with that left upper extremity. And his grip and other things were not equal to working outside. So I felt doing any heavy work with twisting and a weak grip would be difficult as well.
>
> * * *
>
> Q. So basically no lifting above 10 pounds, no use of pushing and pulling and those kinds of activities with 10 pounds?
>
> A. Right.
>
> Q. More than 10 pounds?
>
> A. More than 10 pounds. Occasionally, if it's once a day he had to move a 15 or 20 pound thing using both hands, that's possible. But repetitive using more than 10 pounds would be painful and difficult.[2]

Dr. Esplin Deposition, pp. 14-15, 25-26.

12. Claimant was also seen by Dr. William Lenzi, M.D., a hand specialist, at Defendants' request. On July 15, 2009, Dr. Lenzi declared Claimant at MMI regarding his left elbow and assigned a 14% whole person PPI rating. He restricted Claimant to lifting no more

[2] On cross-examination, Dr. Esplin indicated that Claimant could lift up to 10 pounds repetitively, with occasionally lifting up to 30 pounds two to three times a day with help from his right hand.

than 30-35 pounds with his left arm; no repeated contact with medial aspect of the left elbow (ulnar nerve); and no repetitious left elbow motions.

13. Claimant participated in two separate Functional Capacity Evaluations (FCEs) conducted personally by physical therapist Sharik Peck; the first on December 15 and 16, 2005, and the second on June 23, 2009. Mr. Peck testified at hearing that the purpose of the two-day test is because there is a 20% error rate in just one day of testing and, "Their, their actual functioning level is much more representative of that second day of testing." Hearing Transcript, p. 223. Mr. Peck did not test Claimant for a second day in June 2009 because of the consistencies between the 2005 testing and the first day of the 2009 testing, and Mr. Peck was able to arrive at a "good understanding" of Claimant's functional abilities. Mr. Peck considered the total of the testing to be reliable and valid.

14. Mr. Peck testified that he did not just focus on Claimant's left elbow injury regarding the FCE:

> A, a functional capacity evaluation is designed to be a full-body test. If we have a job specific test, that's, that's - - that may focus in a little bit more on just a specific body part, but a function [sic] capacity evaluation in general is a whole body test. And since most work-related activities require whole body positions and movement, we test it all; and, and then let you folks hash it out as far as what it all means.
>
> Hearing Transcript, p. 226.

15. As the result of his testing, Mr. Peck concluded that Claimant was incapable of performing even sedentary work based on a five-day, 40-hour week. Mr. Peck explained why:

> Just the, the, definitely the, the left upper extremity first. If you have an inability to lift and carry and, and handle materials, that's a significant limiting factor in my opinion.
>
> Secondary to that is [sic] the limitations walking [sic], climbing, balancing, and, the ability to sustain postures or positions.

But I look at the combination of all of those physical limitations doing two-handed work.

Hearing Transcript, p. 231.

16. Mr. Peck identified restrictions related to Claimant's left upper extremity: all handling of weight; lifting, carrying, and pulling; limited pinching and gripping; limited ability to reach out away from the body; and limited elevated and/or overhead work.

17. Regarding Claimant's low back, Mr. Peck testified:

Q. (By Mr. Cooper): And then in Mr. Avila's case, were you able to identify specific limitations that he had that were associated with his low back?

A. Yes. Certainly - - I believe his sitting limitations, or, or inability to function while sitting is, in large part due to his, to his back, partly due to the weakness and inability to manipulate very well, but a significant impact from the back.

Standing and walking, standing in one spot is mostly a function of the trunk and lower extremities. Bending and reaching certainly.

Low-level activity is more a, a limitation of the lower extremities and, and trunk than his arm; although once he gets down into that position, he has a difficult time using his arm to perform any work activity.

Hearing Transcript, p. 232-233.

Vocational Experts

William Jordan:

18. Defendants retained William Jordan, M.A., C.R.C., C.D.M.S., to assist them with vocational issues. Mr. Jordan is well-known to the Commission and his credentials and experience will not be repeated here. Mr. Jordan authored an Employability Report and was deposed. In his 54-page Employability Report dated July 17, 2009, Mr. Jordan opined that Claimant has suffered whole person PPD of 56-60% inclusive of PPI. He further opined:

However, if the Industrial Commission were to accept the opinion of Benjamin Blair, M.D. (that Claimant is not able to work in his prior occupations as a result of the combined effects of his back, elbow, and knees), as well as the outcome of the FCE (which suggests that Claimant would not even be able to

> perform sedentary work) Claimant would have extremely limited or no access to the labor market. In this scenario, I would suggest that if the Industrial Commission determines that Claimant is totally and permanently disabled, then it would be my opinion that it is the result of the combined effects of Claimant's conditions.
>
> Defendants' Exhibit 24, p. 18.

19. In his deposition, Mr. Jordan testified that if Claimant's back and left arm were both considered, Claimant would be totally and permanently disabled.

Dr. John Janzen:

20. Claimant retained John Janzen, Ed. D., C.R.C., to assist him with vocational issues. Dr. Janzen is well-known to the Commission and his credentials and experience will not be repeated here. Dr. Janzen authored two reports and testified at the hearing. Dr. Janzen has opined that Claimant is totally and permanently disabled due to the combined effects of his left arm and back conditions, absent a sympathetic employer. Dr. Janzen has attempted to find work for Claimant without success, and it would be futile for Claimant to look for work in the Pocatello area labor market.

Discussion

21. Claimant was 49 years of age at the time of the injury to his left elbow and 56 years of age at the time of the hearing. He is a high school graduate and attended ISU for two semesters in general studies, then attended Portland Community College for one semester. Claimant then returned to Pocatello where he began working in a plumbing/pipefitting supply store, eventually becoming its warehouse foreman. After about five years, Claimant left the supply company to begin his five-year pipefitter apprenticeship, which he successfully completed in 1983. Claimant worked as a pipefitter until his third elbow operation in December of 2003. At the time of the subject accident, Claimant was earning $23.10 an hour, received

overtime, vacation and sick leave, as well as employer-provided medical, dental, and vision benefits.

22. Claimant has been given some serious physical restrictions for his elbow and back by Drs. Esplin, Lenzi, and Blair, as well as by the results of his two FCEs that indicate that Claimant cannot even work in a sedentary capacity for a full work-week. Mr. Jordan criticizes the FCEs as being merely "snapshots in time" and not indicative of what Claimant can actually do, because he was in a deconditioned state at the time and his abilities could improve with exercise, etc. However, physicians, including Dr. Blair, routinely rely on such evaluations to set physical restrictions. Further, the same could be said for a deconditioned patient who is given physical restrictions by his physician; his or her restrictions could lessen with subsequent conditioning. Here, Mr. Peck determined the tests to be valid and reliable and there is no evidence to the contrary.

23. Dr. Janzen testified that he tried to find work for Claimant without success. Claimant has not applied for any jobs since December 2003, and for Claimant to have done so would have been futile in Dr. Janzen's opinion. ICRD worked with Claimant for a period of time, but closed its file after determining they could do no more for Claimant. Mr. Jordan identified a number of potential jobs for Claimant including two offered by Employer. However, the two jobs offered by Employer were neither readily available in Claimant's labor market nor permanent positions. The remainder of the potential jobs were beyond either Claimant's physical capabilities[3] or his intellectual level. Defendants' assertion that Claimant is not motivated to return to the workforce because he is receiving approximately $4,700 in SSD and union pension benefits that he may risk losing all or a portion of if he becomes employed is not persuasive. The Referee was impressed at hearing with the pride Claimant expressed in his occupation as a pipe-fitter and his desire to return to work if an appropriate position could be

[3] Mr. Jordan did not consider Claimant's back condition when identifying potential jobs.

located. The fact that Claimant had the wherewithal to at least partially provide for himself and his family in the case of his disability should not now be used against him by inferring that such in some way diminishes his motivation to return to work.

24. When considering Claimant's age, 30-year history of heavy physical labor, significant physical restrictions, loss of access to virtually all of his labor market, loss of earning capacity, lack of computer skills, the vocational opinions of Mr. Jordan and Mr. Janzen, lack of appreciable transferrable skills to lighter work, physical impediments regarding driving, and the futility of retraining regarding actually assisting him in returning to gainful employment anywhere near his pre-injury earning capacity, the Referee finds that Claimant is totally and permanently disabled pursuant to the odd-lot doctrine.

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

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

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

25. The Referee finds that Defendants have failed to prove that there is an actual job within Claimant's labor market that he has a reasonable opportunity to be employed at and for which a reasonable chance of being hired exists considering his restrictions, education, training, and transferrable skills. As previously found (s*ee,* finding number 24 above) the potential jobs identified by Mr. Jordan for Claimant either are not within his restrictions or require skills Claimant does not possess. The two "jobs" offered by Employer to Claimant were "make-work"

positions and were not of the type regularly and continuously found within his labor market. Defendants have failed to rebut Claimant's *prima facie* case of odd-lot status.

ISIF liability:

Idaho Code § 72-332 provides:

> **Payment for second injuries from industrial special indemnity account, --** (1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of his [or her] employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account.
>
> (2) "Permanent physical impairment" is as defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or occupational disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become unemployed. This shall be interpreted subjectively as to the particular employee involved, however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

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

1. A pre-existing impairment;

2. The impairment was manifest;

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

4. The impairment combines with the industrial accident in causing total disability. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990)

ISIF argues it has no liability because, even if Claimant is found to be totally and permanently disabled, such total disability was brought about by Claimant's last accident, not a

combination of any pre-existing physical impairments (knees and back) with Claimant's elbow injury. Claimant had no difficulties performing his full work duties as a pipefitter before October 16, 2002.[4]

Pre-existing physical impairments:

Knees:

26. No PPI rating has been assigned for Claimant's bilateral knee problems.

Back:

27. Dr. Blair assigned a 23% whole person PPI for Claimant's back condition (spondylolisthesis). He testified that Claimant's PPI for his back was at least 20% whole person before his October 2002 accident.

Manifest:

"Manifest" means that either the employer of employee is aware of the condition so that the condition can be established as existing prior to the injury. *Royce v. Southwest Pipe of Idaho*, 103 Idaho 290, 294, 647 P.2d 746, 750 (1982).

Knees:

28. Claimant testified that as the result of his bilateral knee injuries (1988 – right knee surgery; 1998 – MCL strain without surgery) he has had to alter the way he kneels on his knees and climbs stairs. The Referee finds that Claimant's bilateral knee condition was manifest under *Dumaw* even though no PPI rating was ever assigned for that condition.

[4] Idaho Code § 72-333(2) states that the fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing physical impairment was not of such seriousness as to constitute a hindrance or obstacle to obtaining employment.

Back:

29. Dr. Blair has assigned permanent restrictions of lifting no more than 35 pounds and other restrictions described in finding number 10 above. Claimant was aware of his back condition and modified the way he worked because of it. The Referee finds that Claimant's back condition was manifest under *Dumaw*.

Subjective hindrance:

30. The Referee finds that Claimant's pre-existing back condition was a subjective hindrance to employment. Claimant was aware of the restrictions regarding his back and modified his work accordingly. Dr. Janzen testified that claimant's low back condition constituted a hindrance regarding employment in that the, at that time, 50-pound lifting restriction alone removed Claimant from about 10% of the heavy to very heavy classification of jobs within his labor market. Mr. Jordan testified similarly.

Combining with:

31. The Referee finds that Claimant's pre-existing low back condition combined with his elbow injury has left Claimant totally and permanently disabled. Both vocational experts have testified that if the Commission finds Claimant to be totally and permanently disabled, it is the result of the combination of his low back condition and his left upper extremity condition. Claimant's bilateral knee condition is not considered to be a combining impairment.

Carey apportionment:

In *Carey v. Clearwater County. Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984), the Idaho Supreme Court stated, "that 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.

32. Claimant's pre-existing whole person PPI for his back is between 20% (just prior to the subject accident) and 23% (as of January 5, 2006). For *Carey* purposes, the Referee finds that the 20% figure is reasonable and unrebutted and is the share of PPI attributable to ISIF. Claimant's left elbow condition has been rated as 13% whole person PPI by Dr. Esplin and 14% by Dr. Lenzi. For *Carey* purposes, the Referee finds that the 13% figure assigned by Claimant's treating physician is reasonable. Therefore, Employer/Surety is responsible for 39% or 195 weeks (13% PPI /33% total PPI = 39% x 500 weeks = 195 weeks).

Date of stability:

33. Dr. Esplin rated Claimant at 13% whole person PPI on August 19, 2004, and even though he would still undergo three more surgeries, Dr. Esplin did not increase his PPI rating. The Referee finds that August 19, 2004, is the appropriate date for the commencement of Claimant's total disability.

TTDs/Attorney fees:

34. Claimant alleges he is entitled to TTD benefits following his sixth surgery on August 18, 2008, until he was declared at MMI from that surgery on December 18, 2008. However, in the event Claimant is found to be totally and permanently disabled effective before that date, Claimant indicates that he will not seek TTD benefits for that time period or attorney fees for failing to pay TTD benefits. Therefore, based on the foregoing, the issues of TTD benefits and attorney fees are moot.

CONCLUSIONS OF LAW

1. Claimant has incurred whole person PPI of 13% as the result of his October 16, 2002, industrial accident and injury.

2. Claimant is totally and permanently disabled pursuant to the odd-lot doctrine effective August 19, 2004.

3. Employer/Surety is liable for 195 weeks of total permanent disability benefits at the appropriate rate commencing August 19, 2004, subject to a credit for any PPI benefits previously paid.

4. ISIF is liable for the remaining total permanent disability benefits commencing once Employer/Surety's responsibility ceases.

5. The remaining issues of TTD and attorney fees are moot.

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 __6th__ day of January, 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 January, 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:

GARY L COOPER
PO BOX 4229
POCATELLO ID 83205-4229

GARDNER W SKINNER
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PAUL B. RIPPEL
PO BOX 51219
IDAHO FALLS ID 83405-1219

Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARIO AVILA, Claimant, v. ATLAS MECHANICAL, Employer, and HARTFORD INSURANCE COMPANY OF THE MIDWEST, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2002-016620** **ORDER** Filed January 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 incurred whole person permanent partial impairment of 13% as the result of his October 16, 2002, industrial accident and injury.

2. Claimant is totally and permanently disabled pursuant to the odd-lot doctrine effective August 19, 2004.

3. Employer/Surety is liable for 195 weeks of total permanent disability benefits at the appropriate rate commencing August 19, 2004, subject to a credit for any permanent partial impairment benefits previously paid.

4. ISIF is liable for the remaining total permanent disability benefits commencing once Employer/Surety's responsibility ceases.

5. The remaining issues of total temporary disability and attorney fees are moot.

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

DATED this 21st day of ____January___, 2010.

INDUSTRIAL COMMISSION

___Unavailable for signature _
R.D. Maynard, Chairman

__/s/_____
Thomas E. Limbaugh, Commissioner

__/s/_____
Thomas P. Baskin, Commissioner

ATTEST:
__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __21st____ day of ___January___ 2010, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

GARY L COOPER
PO BOX 4229
POCATELLO ID 83205-4229

GARDNER W SKINNER
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