BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CODY BACCUS, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)	**IC 2004-000425** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed: April 20, 2010

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Idaho Falls, Idaho, on October 16, 2009. Michael R. McBride of Idaho Falls represented Claimant. Thomas B. High of Twin Falls represented Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF). Employer, Bechtel Bettis, Inc., and Surety, Insurance Company of the State of Pennsylvania, entered into a settlement with Claimant prior to hearing and did not participate. The parties presented testimonial and documentary evidence and filed post-hearing briefs. The matter came under advisement on February 23, 2010 and is now ready for decision.

ISSUES

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

1. Whether Claimant is totally and permanently disabled, either as an odd-lot worker, or because his impairment, together with non-medical factors, totals 100%;

2. Whether ISIF is liable under Idaho Code § 72-332; and

3. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant asserts that he is totally and permanently disabled. Claimant seeks to hold ISIF liable for up to 36 % of his permanent total disability pursuant to Idaho Code § 72-332 by virtue of meeting all statutory requirements for ISIF liability.

Although a noticed issue at the time of hearing, in its briefing ISIF implicitly accepted Claimant's assertion that he is totally and permanently disabled. ISIF's defense focuses on Claimant's failure to meet the "combined with" requirement set out in Idaho Code § 72-332(1) for establishing ISIF liability. More particularly, ISIF asserts that either: 1) Claimant's total disability is the result of the last accident alone; or 2) that Claimant's total disability resulted from an event subsequent to the last accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and his father, Thomas Baccus, taken at hearing;

2. Joint Exhibits 1A through 1R, admitted at hearing, and including additional medical records of Carolyn Baker, M.D., dating from February 26, 2009 through January 12, 2010, filed February 16, 2010, by stipulation of the parties;

3. The depositions of Omatola Hope, M.D., taken April 23, 2009; Carolyn Baker, M.D., taken March 11, 2009; Thomas Baccus, taken March 11, 2009; and Cody Baccus, taken March 11, 2009.

Subsequent to the hearing, on December 4, 2009, ISIF filed a Motion to Augment the Hearing Record. ISIF had become aware of expert reports prepared by Craig Beaver, Ph.D., and Richard Wilson, M.D., as part of Claimant's negligence claim against a third party related to his industrial injury. Claimant's counsel objected to the Motion for the reasons that ISIF had not

disclosed the reports or the existence of the experts before the hearing and in response to discovery. ISIF filed a response to the Objection noting that Claimant (not Claimant's counsel) was the only person who had knowledge that there were additional medical records that might be relevant to the industrial case, and Claimant had failed to disclose this information. ISIF offered to permit such time as Claimant needed to review the new information, depose witnesses, and conduct additional depositions of previously deposed experts.

After a careful review of the pleadings, the Referee denied the motion to augment the record. The Referee did not explicate the reasons for denying ISIF's motion at that time, but does so in this decision to provide a record in the event of an appeal.

The Referee is cognizant of the value of having all available information on the table when making a decision in workers' compensation cases. In fact, in almost any other circumstance, the Referee's first inclination would have been to permit augmentation of the record. Because of the singular factual background in this proceeding, and for the following reasons, the Referee denied the request to augment:

- The records at issue were generated in a third-party action;
- Claimant testified in his March 2009 deposition that he had filed a third-party suit against the company that delivered entryway rugs to Employer's facility, and testified that Richard Meyers was representing him in that case (Exhibit 4, p. 41);
- Claimant's deposition was taken *seven months prior* to the hearing, allowing both parties ample time to contact Mr. Meyers and investigate whether evidence was being developed in the third-party action that might be relevant to the workers' compensation case;

- ISIF made no showing that the information contained in the two new medical reports was new information that could not have been obtained in any other way;
- An *in-camera* review of the reports of Craig Beaver and Dr. Wilson present no new evidence, just opinions that differ from those in the record;
- ISIF could have sent Claimant for additional psychiatric, psychological, or neuropsychological testing to obtain causation opinions, but did not do so;
- The records of Craig Beaver and Dr. Wilson *did not exist* at the time of hearing, as neither individual saw Claimant until *after* the workers' compensation hearing;
- Claimant was the only *party* at the workers' compensation hearing in a position to know that he was scheduled to see Craig Beaver and Dr. Wilson;
- In light of Claimant's memory dysfunction, the Referee could not find with any degree of certainty that Claimant *actively or intentionally* withheld information about the upcoming appointments from his workers' compensation attorney and, subsequently, ISIF;
- The Referee did have concerns that Claimant's father may have intentionally withheld the information regarding the involvement of Craig Beaver and Dr. Wilson. However, Claimant's father had no legal obligation to disclose such information;
- In this case, the parties deposed Claimant's treating physicians *prior* to the workers' compensation hearing. The Judicial Rules of Practice and Procedure recognize the importance of closure and certainty by ensuring that even when experts are deposed post-hearing, no new evidence can be considered without good cause *and* a Commission order (Rule 10(E)(4)).

- Excluding the new information did not put either party at a disadvantage, whereas admitting the new information would result in substantial delays and additional costs to the party least able to afford it. Denying ISIF's Motion left both parties in the same position as they were in at the conclusion of the hearing.

In its brief, ISIF once again asserts that it does not believe that the matter is ripe for decision and requests an order augmenting the record and permitting additional discovery before submitting the matter for decision. Therefore, ISIF submitted its brief only for purposes of complying with the briefing schedule ordered by the Referee. For the reasons outlined above, the Referee denies ISIF's renewed request to augment the record.

Claimant's objection at page 19 of the deposition of Dr. Baker is overruled. After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. At the time of hearing, Claimant was forty-four years of age and resided in Baton Rouge, Louisiana. Claimant was twice divorced and the adoptive father of three adult children.

2. Claimant did not finish high school, but obtained a GED and later earned a certificate in merchandising and mid-management from a technical college in Idaho Falls.

PRE-ACCIDENT WORK HISTORY

3. As a teenager, Claimant worked as a stock boy for Kings variety store. After receiving his certificate from Eastern Idaho Technical College, he worked in the sporting goods department of a ShopKo store. In 1986, he received a security clearance from the Department of Energy and the Department of Defense that allowed him to work at "the Site," a nuclear testing

facility west of Idaho Falls.[1]

4. Claimant's first job at the Site was working for the contractor that provided food service for Site workers. Claimant worked as a cashier. Claimant left the food service job to work for a contractor doing asbestos remediation at the Site and in other locations in the Pacific Northwest. Claimant left that job after about eighteen months when he had a seizure that resulted in short-term disability. Claimant could not return to construction work because of his seizure disorder.

5. In 1990, Claimant went to work as a custodian for Westinghouse, a predecessor in interest of Bechtel Bettis, the general contractor managing the Site for the federal government. Claimant remained in the same custodial position until 2003, although his employer changed several times during that period. In 2003, Claimant changed jobs, moving from custodial work to a position in information technology with Bechtel Bettis.

PRE-EXISTING MEDICAL CONDITIONS

6. In its brief, ISIF concedes that "Claimant has a variety of pre-existing problems, a shoulder injury, loss of vision in one eye, carpal tunnel release, and most significantly, epilepsy." ISIF Brief at p. 3. ISIF contends that "most" of Claimant's pre-existing impairments were not rated, nor were they rated for this proceeding. *Id.* In fact, the record reflects that Claimant was awarded 4% whole person impairment for two shoulder surgeries necessitated by an industrial

[1] The federally-owned facility has gone by a number of monikers and acronyms over the years, and is currently officially denominated as the Idaho Nuclear Laboratory or INL. Regardless of the official name, local residents have always called the various facilities that comprise the INL as "the Site."

accident, and 7% to 10% whole person impairment for his seizure disorder.[2] Gregory M. Hoffpauir, M.D., rated Claimant's permanent impairment for loss of vision in the right eye as 18% whole person. Dr. Hoffpauir based his rating on the *AMA Guides to the Evaluation of Permanent Impairment,* 5th Ed. (*AMA Guides)*. However, under Idaho's workers' compensation statutes, some impairments, including loss of vision, are statutory. Idaho Code § 72-428(3) values the functional loss of vision in one eye at 30% whole person (150 weeks). Where an impairment is statutory, the Referee defers to the statute over the *AMA Guides.* See, *Cox v. State of Idaho Industrial Special Indemnity Fund,* 2007 IIC 0382 (June 1, 2007).

7. Claimant suffered his first *grand mal* seizure when he was nine or ten years old. Doctors diagnosed a seizure disorder and prescribed anti-epileptic drugs (AED) to control Claimant's seizures. The medications substantially controlled, but did not cure, Claimant's seizure disorder. When properly medicated, Claimant experienced occasional *petit mal* seizures, which he described as:

> I would just have like a weird sensation, and I would have, what the doctors call, an event. It would last 30, 45 seconds. Most of the time, I would stay alert but wasn't able to communicate as I normally would. Then I'd come out and be perfectly fine.

Tr., pp. 44-45. The medical records do record that, in the years before his 2003 industrial accident, there were also occasions when Claimant experienced more severe seizures with attendant confusion and loss of memory. These events generally occurred in concert with a change in medication or some other contributing cause. At some point, Claimant began suffering from anxiety attacks, and these attacks seemed to exacerbate the seizure disorder.

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[2] Both Drs. Hope and Baker rated Claimant as "Class 1" on Table 13-3, p. 312 of the *AMA Guides.* Within the range of impairment in Class 1 (0% to 14%), Dr. Hope placed him at 10% whole person impairment, while Dr. Baker placed him at 7% whole person impairment.

ACCIDENT

8. On December 22, 2003, Claimant was leaving the administration building on his way to set up a computer for a new user in another building. When Claimant stepped into the vestibule exiting the building, he slipped and fell, hitting his head. Claimant was unable to get up and crawled back into the building, by which time he received assistance from other workers in the area. Claimant testified that he lost consciousness, but the medical records are silent on the subject.

POST-ACCIDENT MEDICAL CARE

9. Claimant received treatment in the ER at Eastern Idaho Regional Medical Center (EIRMC) the same day. He was complaining of head, neck, low back, and left shoulder pain. The chart note describes him as "extremely anxious," requiring morphine to control his agitation. Exhibit 1E, p. 087. CT scans of Claimant's head and neck were unremarkable; x-rays of Claimant's left shoulder and lumbar spine were negative for fracture. The ER doctor released Claimant with a prescription for Lortab, advised a follow up with his regular physician, and told him to return to the ER if his condition became worse.

10. Claimant saw Stephen Vincent, M.D., his treating neurologist, on January 5, 2004. He was complaining of trouble with his vision, word-finding ability, and concentration. Dr. Vincent suspected post-concussion syndrome and ordered an MRI of Claimant's brain. The MRI was normal but for an equivocal finding in the right frontal area, which was consistent with an artifact seen on the earlier CT scan. An ophthalmology exam showed no change in his vision from an earlier test.

11. Claimant returned to work without restrictions in mid-January 2004.

12. Claimant continued to complain about left shoulder pain, which Casey Huntsman, M.D., diagnosed as a partial tear of the left rotator cuff and arthritis in the AC joint. In mid-May 2004, Dr. Huntsman performed an arthroscopic decompression and debridement of Claimant's left shoulder. Claimant ultimately underwent a number of additional shoulder procedures in Louisiana before his shoulder injury was declared stable.[3]

13. It is undisputed that following his December 2003 injury, the nature and frequency of Claimant's seizures increased. Claimant went from having occasional *petit mal* seizures to daily *grand mal* seizures. Employer terminated Claimant's employment in the summer of 2004 as a result of his seizures. Claimant did find employment following his termination, but was not able to keep any of the jobs for long because of his seizure disorder.

14. Dr. Vincent continued to treat Claimant for his seizure disorder and sought consultation from Mark D. Corgiat, Ph.D., a neuropsychologist, and Robert A. New, M.D., a psychiatrist. Dr. New and Dr. Vincent continued to monitor Claimant's condition, adjusting medications and providing psychiatric care. Claimant's condition deteriorated until June 2005 when he was hospitalized for a week after threatening suicide.

15. In May 2006, Dr. Vincent referred Claimant to Robert T. Wechsler, M.D., Ph.D., for evaluation by the Comprehensive Epilepsy Center at St. Luke's Regional Medical Center. Dr. Vincent believed that the source of Claimant's seizures had been located in the right temporal region of Claimant's brain, and believed Claimant might be a candidate for epilepsy surgery. Dr. Wechsler confirmed the diagnosis of intractable symptomatic localization related epilepsy and confirmed that the source of the problem was in the right temporal lobe, consistent

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[3] Claimant was not rated for additional impairment of his left shoulder resulting from the subject industrial accident.

with a right mesial temporal sclerosis visible on MRI imaging. Based on these findings, Dr. Wechsler believed Claimant was a surgical candidate.

16. In July 2006, Claimant saw a neurologist in Provo, Utah, for pre-surgical neuropsychological testing. The testing indicated that Claimant's memory was severely impaired secondary to his epilepsy, and that the memory impairment was evident in both the left and right temporal lobes.

17. In May 2007, Dr. Wechsler conducted a pre-surgical test intended to identify if surgical removal of Claimant's right temporal lobe would affect his ability to process new memories. The testing suggested that a right temporal lobectomy would involve a considerable risk of losing memory function, so Dr. Wechsler determined that Claimant was not a surgical candidate. Claimant was no longer able to live on his own, and his father moved him to Baton Rouge in the spring of 2007.

18. Once in Baton Rouge, Claimant began treating with Joseph Acosta, M.D., and Dr. Baker at the NeuroMedical Center Clinic in Baton Rouge. Drs. Acosta and Baker did a complete neurological work-up, including a neuropsychological consult by Paul M. Dammers, Ph.D., a neuropsychologist at the Clinic.

19. In late fall 2007, Dr. Baker referred Claimant to the neurology department at the University of Texas Medical School, home to a clinic specializing in tertiary care for complex epilepsy cases. Claimant underwent several months of intensive medical and neuropsychological testing at the University of Texas facility. The testing confirmed that Claimant's seizures originated in the right temporal lobe. Other test results were consistent with Dr. Wechsler's findings and suggested that Claimant had intact memory functioning in the right hemisphere of his brain and deficit memory functioning in the left hemisphere. If Claimant's doctors were to

remove the part of his brain where the seizures originated, they would also be removing the part of his brain where memory function was intact. These results left Claimant with a Hobson's choice: Surgical resection of Claimant's right anterior temporal and medial temporal lobe would likely provide significant, if not total relief from his debilitating seizures, but also carried a significant risk of post-surgical amnesia or deterioration in memory function.

20. Claimant opted to undergo the surgical procedure. As he explained at hearing:

> I would continue to have these multiple problems which will continue to eat my memory away or I could have the surgery, get rid of the seizures, or at least get rid of most of them, and be able to retain what I have left of my memory. But I would not be able to learn and probably not live on my own.

Tr., p. 64. Claimant had the surgery on March 6, 2008. He recovered well; his memory function was unchanged from its pre-surgical condition. For nearly two months post-surgery, Claimant reported no seizures. He was less anxious because he did not fear having a seizure, and his memory was no worse than it had been before the surgery. By the end of March, Dr. Baker described his condition as dramatically improved, though it was too early to state definitively that the surgery was a success.

21. On the evening of April 29, Claimant's father found Claimant on the floor having an atypical seizure or seizures. Paramedics responded and transported Claimant to the ER at the NeuroMedical Clinic. In the ER, Claimant had blood tests and a brain CT. All results were normal and Claimant was discharged.

22. Dr. Baker saw Claimant for an emergency appointment the following day. Claimant's father described Claimant's behavior during and following the seizures—he was confused and panicked when he awoke at the hospital and kept asking the same questions over and over. When Dr. Baker asked Claimant what happened, he described events that had happened three days previously, on Sunday. Claimant believed it was Monday. He repeatedly

asked Dr. Baker if he had a black eye as he touched the area around his right eye—again asking the same questions repeatedly. Dr. Baker performed an EEG which showed no sign of epileptic brain activity. Dr. Baker increased one of his AEDs, but remained puzzled that Claimant's memory was functioning following the surgery, but not functioning following the seizures. She speculated that Claimant had been having small seizures that had adversely affected his memory.

23. By the time Claimant returned to Dr. Baker for routine follow up in late May, 2008, the likely cause of Claimant's breakthrough seizures was pinpointed. Claimant had become confused about his medication regime and had only been taking a half dosage of one of his AEDs. Once Claimant began taking the prescribed dose, he had no further seizures. Dr. Baker continued to supervise Claimant's seizure treatment and medications, and Claimant continued to see Dr. Dammers for psychological counseling.

24. Almost a year after his surgery, Claimant returned to see Dr. Baker for a routine follow up. Claimant's father accompanied him because he was concerned about the nature and extent of Claimant's short-term memory impairment, and wanted to be sure Dr. Baker was aware of the problem. Mr. Baccus provided a number of examples of Claimant's short-term memory impairment. Otherwise, Claimant was doing well, had had no seizures, and his mood was improved overall following the surgery. Dr. Baker advised Claimant and his father that it was not likely that Claimant's memory would improve, but that he should be able to accommodate better. Dr. Baker made a number of suggestions and also referred Claimant to the Speech and Hearing Clinic at Louisiana State University because both she and Claimant's neurosurgeon believed that speech therapy could help with memory accommodation.

25. Claimant did not follow up with the referral to speech therapy, and the last documented visit to Dr. Baker was in January of 2010, at which time he was seeking treatment

for an incapacitating headache. Claimant had a history of cluster headaches, and after ruling out an aneurysm, Dr. Baker gave him an oral medication and a shot of phenergan.

EVERY DAY A NEW DAY

26. As of the date of the hearing, Claimant was living on his own in an apartment within two blocks of shopping, a gym, a movie theater, and his doctors at NeuroMedical Center. His father lives not far away and provides close supervision and support. Claimant lives a rigidly-structured life in order to accommodate his short-term memory impairment. He always carries a PDA. The PDA reminds him when to take his medications and when he has appointments, and contains other information he needs on a daily basis. He is confident walking within a two-block radius of his apartment, which is sufficient to provide him access to necessary services. Once he steps outside these boundaries, he becomes lost and disoriented and has to call his father to come get him. He does not drive. His father puts together his medications for the week, broken down by day and dose (morning, noon, night.) Claimant pays his rent a year in advance. His father monitors his bank account and bills, as Claimant frequently will pay the same bill several times. Claimant has a credit card, but his father had to take it away because Claimant could not keep track of its use or his payments. Claimant has a list of simple tasks that he must accomplish each day: Feed the cats, clean the litter box, do the laundry, go to gym, etc. If Claimant does not cross off each item as he does it, he is likely to repeat the task, unaware that he has already completed it. Often when he does laundry he forgets to start the machine or he cannot remember if he used detergent. If he does not smell detergent, he has to do the load over again. Claimant relates that he has gone to the gym and worked out for three hours, come home, taken a shower, seen that "work out" was not crossed off his list, and gone back to the gym and done another three-hour workout.

27. Claimant remained seizure-free at the time of hearing. His short-term memory has neither improved nor deteriorated further. Neither of his treating neurologists, Drs. Hope and Baker, believe that Claimant will ever be able to return to any kind of work.

DISCUSSION AND FURTHER FINDINGS

DISABILITY

28. Under the Idaho worker's compensation law "disability" is "a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors." Idaho Code § 72-102(11). A claimant's permanent disability rating is determined by appraising the combined effect of those medical and nonmedical factors on the "injured employee's present and probable future ability to engage in gainful activity." Idaho Code § 72-425.

29. When a claimant's medical impairment together with the nonmedical factors total 100%, then a claimant is totally and permanently disabled as a matter of law. Claimant asserts that he is totally and permanently disabled as a matter of law. ISIF does not dispute Claimant's assertion, but for the record, Claimant's pre-existing impairments included the following:

Right Shoulder	4.0%
Epilepsy	8.5%
Loss of vision (one eye)	30.0%

This results in a combined impairment of 42.5%.

30. Dr. Hope testified in her deposition that, following his lobectomy, Claimant's impairment was 60% to 65%. ISIF did not dispute Dr. Hope's opinion. Using an average of Dr. Hope's ratings (62.5%), Claimant's medical impairments alone exceed 100%.

ISIF LIABILITY

31. The determination that Claimant is totally and permanently disabled necessarily leads to the real issue of this proceeding—whether ISIF is liable for a portion of Claimant's total disability income benefits. Under Idaho Code § 72-332, ISIF pays a portion of income benefits for workers who, while partially disabled from a previous accident, become totally disabled in a subsequent accident. This provision encourages the employment of individuals with pre-existing impairments by relieving their current employer from liability for possible aggravations of the worker's previous condition by a subsequent accident.

32. There are four requirements that must be proven by a claimant to establish ISIF liability under Idaho Code § 72-332:

1. Whether there was a preexisting impairment;
2. Whether the impairment was manifest;
3. Whether the impairment was a subjective hindrance; and
4. Whether the impairment in any way combines in causing total permanent disability.

Dumaw v. J. L. Norton Logging, 118 Idaho 150, 155, 795 P.2d 312, 317 (1990). Here, only the fourth element is at issue.

33. To satisfy the 'combined effects' requirement in I.C. § 72-332(1), a claimant must show that *but for* the pre-existing impairments, he would not have been totally and permanently disabled. *Garcia v. J.R. Simplot Co.,* 115 Idaho 966, 772 P. 2d 1973 (1989). (Emphasis added). ISIF attacks the "combined with" requirement on two grounds. First, ISIF argues, Claimant's disability is a result of his last industrial accident alone, not a combination of the last accident and his pre-existing impairments. Second, ISIF asserts that Claimant's disability was a result of a subsequent intervening cause—the multiple *grand mal* seizures Claimant experienced about six weeks following his lobectomy.

34. The "combined with" requirement of Idaho Code § 72-332 has generated a number of appellate decisions, most involving one of two common scenarios. Either, 1) the claimant was already totally and permanently disabled as an odd-lot worker prior to the most recent industrial injury; or 2) as ISIF asserts in this case, the Claimant became totally and permanently disabled solely as a result of the last industrial injury. The Court has carefully laid out a framework for analyzing these two common situations and determined that neither meets the "combined with" requirement.

Last Accident

35. ISIF's brief correctly sets out the existing state of the case law regarding the "combined with" requirement as it relates to disability from the last accident alone; what is missing is any discussion of why the "but for" test is not met on the facts of this case. ISIF's entire argument consists of two statements without any analysis or support. To assert that there is no "but for" relationship and that it was Claimant's loss of memory alone that caused his disability does not make it so, and does not convince this Referee that it is so.

36. ISIF does not dispute Claimant's nearly thirty-year history of epilepsy prior to his 2003 work injury. ISIF does not dispute that Claimant's epilepsy became worse after his work injury. ISIF does not dispute that, after the fall, when Claimant's seizures became intractable, he also began to exhibit increasing memory dysfunction. In fact, Claimant's life became so difficult that he chose to have a part of his brain removed, even though he knew it could mean a total loss of his memory. Immediately following his lobectomy, his father described Claimant's memory as the same as it was before the surgery—bad. Claimant himself said that the surgery did not improve or worsen his memory difficulties, it merely controlled the seizures. When Claimant became confused about his medication and had a series of *grand mal* seizures, his memory

worsened again. But all of these events are just the sequelae of Claimant's pre-existing epilepsy combined with his industrial injury. But for the pre-existing epilepsy, the fall would not have worsened the epilepsy leading to memory loss, surgery, medication errors, more seizures, and further deterioration of Claimant's memory.

Subsequent Intervening Cause

37. ISIF asserts that Claimant's post-surgical seizures were a discrete event, unrelated to his industrial accident; this separate and distinct event caused further deterioration in Claimant's memory and is, therefore, solely responsible for his total permanent disability. In support of their argument, they point to Dr. Hope's deposition testimony wherein she estimates that Claimant's PPI attributable to the accident was a Class 3 with a maximum of 49% PPI following the lobectomy but before the seizures. It was only after the seizures that his accident-related PPI jumped to Class 4 with a 60% to 65% PPI. ISIF's argument fails, for the same reasons discussed in the previous paragraphs. First, even if Claimant's PPI rating following the surgery but before the seizures was 49%, his medical impairments at *that* time would total something in excess of 88% (39% pre-existing + 49% for the accident related epilepsy + additional impairment for the left shoulder). If the hearing had been held during this interval, Claimant could easily have met his burden of proving 100% disability once non-medical factors were considered. If Claimant was totally and permanently disabled immediately following his surgery, then the subsequent *grand mal* seizures could have no affect on his disability status.

38. More importantly, as discussed previously, Claimant's post-surgical *grand mal* seizures were the sequelae of his pre-existing impairments together with his work injury. To suggest that the debilitating series of seizures that Claimant experienced following his lobectomy is a discrete event unconnected to either his pre-existing epilepsy, or the industrial injury, is

unpersuasive.

39. The Referee finds that Claimant has proven with substantial evidence that his pre-existing epilepsy combined with his work injury to render him totally and permanently disabled. As ISIF does not dispute the other three requirements for establishing ISIF liability, ISIF is liable for a portion of Claimant's total permanent disability benefits.

CAREY APPORTIONMENT

40. The *Carey* formula only applies when a preexisting impairment combines with the current injury to create total and permanent disability. *Hamilton v. Ted Beamis Logging & Constr*., 127 Idaho 221, 899 P.2d 434 (1995). Its purpose is to apportion the nonmedical disability factors between the employer and the ISIF. The formula comes from *Carey v. Clearwater County Road Department*, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984), in which the Idaho Supreme Court held:

> [T]he appropriate solution to the problem of apportioning the nonmedical disability factors, in an odd-lot[4] case where the fund is involved, is to prorate the nonmedical portion of disability between the employer and the fund, in proportion to their respective percentages of responsibility for the physical impairment.

Henderson v. McCain Foods, Inc., 142 Idaho 559, 567, 130 P.3d 1097, 1105 (2006). On the facts in this case, Claimant is totally and permanently disabled based on medical impairments alone, so there is no reason to apportion non-medical factors. Employer would be liable for the first 312.5 weeks of disability (62.5%) with ISIF liable thereafter.

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[4] In *Carey*, the Claimant was deemed totally and permanently disabled as an odd-lot worker. Application of *Carey* is not limited to cases in which the claimant's total disability is a result of the application of the odd-lot doctrine. At bottom, *Carey* is a method of allocating liability for non-medical factors in total perm cases. Whether a claimant is found totally disabled because of the application of the odd-lot doctrine, or because his or her impairments together with non-medical factors total 100%, has no bearing on the application of the *Carey* formula, so long as the statutory requirements of Idaho Code § 72-332 for ISIF liability are met.

CONCLUSIONS OF LAW

1. Claimant is totally and permanently disabled as a result of medical factors alone.

2. ISIF is liable pursuant to Idaho Code § 72-332 because all statutory conditions for ISIF liability have been established.

3. Because Claimant's total permanent disability is the result of medical factors alone, there is no reason to apply *Carey* to apportion non-medical factors, and ISIF is liable for all but the first 312.5 weeks of disability benefits.

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 7 day of April, 2010.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CODY BACCUS, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)	**IC 2004-000425** **ORDER** Filed: April 20, 2010

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed 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 is totally and permanently disabled as a result of medical factors alone.

2. ISIF is liable pursuant to Idaho Code § 72-332 because all statutory conditions for ISIF liability have been established.

3. Because Claimant's total permanent disability is the result of medical factors alone, there is no reason to apply *Carey* to apportion non-medical factors, and ISIF is liable for all but the first 312.5 weeks of disability benefits.

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

matters adjudicated.

DATED this 20 day of April, 2010.

INDUSTRIAL COMMISSION

Chairman Maynard recused himself___
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 20 day of April, 2010, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS,** and **ORDER** were served by regular United States Mail upon each of the following persons:

MICHAEL R MCBRIDE
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IDAHO FALLS ID 83404

THOMAS B HIGH
PO BOX 366
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djb /s/_____