BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHAEL J. BOYER, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2005-005463** **IC 2006-003106** **FINDINGS OF FACT, CONCULSIONS OF LAW, AND RECOMMENDATION** **FILED 03/23/2012**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Twin Falls, Idaho on June 30, 2011. Claimant, Michael J. Boyer, was present in person and represented by Kevin E. Donohoe, of Bellevue, Idaho. Defendant, State of Idaho, Industrial Special Indemnity Fund (ISIF), was represented by Anthony M. Valdez, of Twin Falls, Idaho. Claimant settled with his former employer, Kiefer Built, LLC (Kiefer Built), prior to hearing. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on December 12, 2011.

ISSUES

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

1. Whether, and to what extent, Claimant is entitled to disability in excess of impairment, including whether Claimant is permanently and totally disabled pursuant to the odd-lot doctrine or otherwise.

2. Whether the ISIF is liable pursuant to Idaho Code § 72-332.

3. Apportionment under the Carey formula.

CONTENTIONS OF THE PARTIES

Claimant alleges that he is totally and permanently disabled pursuant to the odd-lot doctrine as a result of his pre-existing bilateral carpal tunnel syndrome, his neck, back, and left shoulder conditions, and his 2005 and 2006 industrial accidents at Kiefer Built. He asserts that ISIF is liable for a portion of his total permanent disability benefits pursuant to Idaho Code § 72-332.

ISIF contends that Claimant is employable and not totally and permanently disabled. In the alternative, ISIF contends that Claimant's pre-existing carpal tunnel syndrome did not constitute a hindrance or obstacle to employment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. Claimant and Defendant's Joint Exhibits 1-30, admitted at the hearing;

3. The testimony of Claimant, Claimant's wife Shannon Todd, and David Duhaime, taken at the June 30, 2011 hearing; and

4. The post-hearing deposition of Nancy J. Collins, Ph.D, taken by Defendant on August 10, 2011.

The objection posed during Claimant's pre-hearing deposition is overruled.

After having considered the above evidence and the arguments 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 born in Mountain Home in 1955. He is left-handed. He was 57 years old and had resided in Gooding for approximately seven years at the time of the hearing. He graduated from high school in 1974 and thereafter worked pulling green chain in a sawmill, loading 100-pound sacks of beans in warehouses, and driving local truck routes. He later became a long-haul truck driver.

2. In 1982, while driving long-haul in California, Claimant was involved in a head-on collision in which two individuals were killed. Claimant suffered relatively minor physical injuries. However, he was off work for approximately one year and developed post-traumatic stress disorder (PTSD) due to the collision. He ceased long-haul driving. He was treated with prescription medications for chronic PTSD symptoms.

3. In 1986, Claimant attended the College of Southern Idaho (CSI) where he studied industrial and structural welding. After 11 months, he received his structural welding certificate and then worked as a structural welder, which required repetitively lifting up to 70 pounds. He was laid off after a brief period.

4. Commencing in 1988, Claimant attended apprenticeship electrician classes at CSI. He later began working with the union as an electrical apprentice. His duties included digging trenches, installing conduit and lights, and pulling heavy wire from spools weighing 40 pounds in residential applications. He worked as an apprentice from 1988 through 1992 for various electrical companies in Jerome, Ketchum, and Idaho Falls.

5. In approximately 1990, Claimant developed bilateral carpal tunnel syndrome. In 1991, Timothy Floyd, M.D., performed bilateral carpal tunnel release surgeries and thereafter restricted Claimant from repetitive forceful gripping and turning of his wrists. Dr. Floyd rated

Claimant's permanent impairment due to his bilateral carpal tunnel condition at 26% of the whole person. In 1992, Richard Knoebel, M.D., rated Claimant's permanent impairment due to his bilateral carpal tunnel condition at 19% of the upper extremity or 11% of the whole person.

6. In July 1993, Claimant was diagnosed with ADHD by James Cooper, M.D., who also noted that Claimant had a number of developmental learning disabilities. In September 1993, Dale Schmaljohn, Ed.D., opined that Claimant experienced developmental arithmetic, expressive writing, and reading disorders. Claimant mastered the "hands on" skills of a journeyman electrician and took the journeyman electrician's written test three times, but did not pass.

7. Claimant resumed working as an electrical apprentice and eventually worked on dams and other large projects both in and out of state through approximately 1998. He became a plant electrician.

8. In February 2000, Claimant was riding in a work van in Nevada when the van went off a 30-foot embankment and rolled. Claimant temporarily lost consciousness and injured his neck, left shoulder, and low back. He underwent extensive diagnostic testing and was diagnosed with strain and contusion of the cervical and lumbar spine. Cervical and lumbar MRIs revealed C6-7 and L5-S1 broad based disc protrusions. He was treated with prescription medications, physical therapy, and chiropractic manipulation. As a result of the 2000 accident, Michael Chung, M.D., opined Claimant suffered from persistent neck and low back sprain/strain. Dr. Chung permanently restricted Claimant from lifting more than 30 pounds occasionally and 20 pounds frequently. He rated Claimant's permanent impairment due to his neck and back sprain at 6% of the whole person, according to 1997 Utah Industrial Commission Guidelines. On September 15, 2000, Michael Glick, D.O., examined Claimant and diagnosed head trauma,

cervical strain/contusion, thoracolumbar strain/contusion, and left shoulder strain/contusion. He rated Claimant's permanent impairment to his left shoulder and to his cervical, thoracic, and lumbar spine at 16% of the whole person pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition.

9. Claimant recovered sufficiently to resume working and later became a millwright. However, he was unable to manipulate heavy conduit or pull large cables, due to his 2000 injuries. As a millwright he performed layouts, set electric motors for electricians, and assisted journeyman millwrights. Claimant felt compelled to exceed his lifting restrictions in order to keep his job. He experienced ongoing difficulty with lifting and bending.

10. Claimant subsequently transferred to a fertilizer plant where he worked as a safety inspector. He had no prior training or experience as a safety inspector, but filled the position for approximately three months. The position required him to complete various forms; however, he was not able to do so. To compensate, he tape recorded his observations and notes at work and then took the tape and forms home to his wife where she filled out the paperwork for him.

11. Claimant next sought heavy equipment operator training in Washington, and obtained a crane operator certificate. He pursued this training because it was a job that did not require heavy lifting or extensive paperwork. He worked as a crane operator in Pocatello and Idaho Falls. However, operating a crane required prolonged sitting, which aggravated Claimant's back pain. Furthermore, his PTSD persisted and he developed increasing anxiety when hoisting loads over co-workers' heads. Claimant ceased crane operation and returned to work as a millwright until he could no longer tolerate the lifting required.

12. In 2005, Claimant commenced employment with Kiefer Built, a horse trailer manufacturer in Gooding, as the sole plant maintenance technician. His duties included general maintenance and repair of air and hydraulic tools. He was able to perform his job duties.

13. On May 9, 2005, Claimant stepped off a cement pad while working for Kiefer Built and injured his left ankle. He received medical treatment from Ronald Kristensen, M.D., was placed in a walking cast, and returned to work. Although Claimant was supposed to limit time on his feet, he felt compelled to spend considerable time on his feet to maintain and repair the equipment for which he was responsible.

14. On February 20, 2006, while still wearing a brace for his left ankle condition, Claimant slipped on ice while working for Kiefer Built and twisted his right knee. His right knee symptoms persisted and on June 30, 2006, he underwent right knee arthroscopy with subtotal medial meniscectomy and chondral debridement by William May, M.D.

15. Claimant's left ankle symptoms persisted and on April 3, 2007, Dr. Kristensen performed a left Chrisman-Snook surgical procedure to improve Claimant's left ankle stability.

16. Claimant was later released by Dr Christensen and Dr. May, to light-duty work. His additional restrictions included no climbing and no prolonged standing or sitting. Claimant returned to work at Kiefer Built; however, he continued to spend too much time on his feet and ultimately left Kiefer Built for other employment.

17. Claimant received job search assistance from Industrial Commission rehabilitation consultant David Duhaime.

18. In July 2007, Claimant commenced working for Idaho Sand & Gravel as a gravel truck driver. On January 10, 2008, during the seasonal lay-off from Idaho Sand & Gravel, Dr. Kristensen performed a left ankle arthroscopic debridement and left talar osteochondritis

dissecans fusion. Later in 2008, Claimant returned to work at Idaho Sand & Gravel. He noted difficulty depressing the clutch pedal of his gravel truck because of his left foot and ankle pain, and consequently ran stop signs and stop lights while driving. He backed into the paver because he could not engage the clutch of his gravel truck to stop.

19. On June 25 and 26, 2008, Claimant underwent a functional capacity evaluation by Tracy Becerra, P.T., pursuant to Dr. Kristensen's direction.

20. In November 2008, Idaho Sand & Gravel terminated Claimant's employment when a supervisor saw him limping across the work yard. Claimant was then limping due to a left knee injury he had suffered at home a few days earlier.

21. After his dismissal by Idaho Sand & Gravel, Claimant began applying for work elsewhere. He consulted again with David Duhaime, who provided him job leads with potential employers. Claimant submitted over 75 job applications and followed up on all of Duhaime's suggestions, but obtained no interviews and found no employment. Among many others, he applied at Burger King, McDonalds, Wendy's, and Sonic.

22. At the time of hearing, Claimant was receiving Social Security Disability benefits. He continued to suffer chronic PTSD symptoms. He avoided repetitive turning of his wrists when working on his old pickup truck. His activities included working on his old pickup, maintaining his lawn sprinklers, and mowing his lawn. He used a riding mower for 30 minutes at a time, and then had to stop and rest his back. Claimant was still looking for any type of work.

23. Having observed Claimant, his wife, and David Duhaime at hearing, and compared their testimony with other evidence in the record, the Referee finds that all are credible witnesses.

DISCUSSION AND FURTHER FINDINGS

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

25. **Permanent disability.** The first issue is the extent of Claimant's permanent disability, including whether he is totally and permanently disabled pursuant to the odd-lot doctrine. "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. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease,

consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. 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).

26. Claimant asserts that his 2005 and 2006 industrial accidents at Kiefer Built, in combination with his pre-existing conditions and non-medical factors, render him totally and permanently disabled. His permanent disability must be evaluated based upon his medical factors, including his permanent impairments, the physical restrictions arising from his permanent impairments, and his non-medical factors, including his capacity for gainful activity and potential employment opportunities.

27. Impairments. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989). Claimant herein alleges permanent impairments to his bilateral wrists, lower back, neck, and left shoulder, left ankle, and right knee.

28. Claimant developed bilateral carpal tunnel syndrome in 1990. Dr. Floyd performed bilateral carpal tunnel release surgery and in 1991 rated Claimant's permanent impairment from his bilateral carpal tunnel syndrome at 26% of the whole person pursuant to the

AMA Guides to the Evaluation of Permanent Impairment, Third Edition. Dr. Knoebel reviewed Dr. Floyd's rating and noted that it mistakenly utilized strength index measurement tables. Dr. Knoebel examined Claimant and in 1992 rated his permanent impairment due to his bilateral carpal tunnel syndrome at 11% of the whole person pursuant to the AMA Guides. The Referee finds that Claimant suffers a permanent impairment of 11% of the whole person due to his bilateral carpal tunnel syndrome.

29. In 2000, Claimant injured his low back, neck and left shoulder in a roll-over van accident. Later that same year Dr. Glick rated Claimant's permanent impairment to his back, neck, and left shoulder resulting from his 2000 accident at 16% of the whole person. No party contests this impairment rating.

30. In 2005, Claimant injured his left ankle at Kiefer Built and subsequently underwent two surgeries by Dr. Kristensen. In June 2008, Dr. Kristensen rated Claimant's permanent impairment to his left ankle at 3% of the whole person. No party contests this rating. The Referee finds that Claimant suffers a permanent impairment of 3% of the whole person due to his left ankle condition.

31. In 2006, Claimant slipped on ice and twisted his right knee at Kiefer Built. Dr. May performed right knee surgery and on July 27, 2006, rated Claimant's permanent impairment to his right knee at 1% of the whole person. No party contests this rating. The Referee finds that Claimant suffers a permanent impairment of 1% of the whole person due to his right knee condition.

32. Claimant has proven that he suffers permanent physical impairments of 11% of the whole person due to his bilateral carpal tunnel syndrome, 16% of the whole person due to his neck, back and left shoulder condition, 3% of the whole person due to his left ankle condition,

and 1% of the whole person due to his right knee condition, thus totaling 31% of the whole person.

33. Physical restrictions. Dr. Knoebel permanently restricted Claimant from repetitive forceful gripping due to his bilateral carpal tunnel syndrome. Dr. Chung permanently restricted Claimant to lifting no more than 30 pounds occasionally and 20 pounds frequently due to his neck, back, and shoulder condition. Dr. Kristensen permanently restricted Claimant from lifting more than 30 pounds occasionally and 20 pounds frequently, and from climbing and prolonged standing or sitting due to his left ankle condition. Dr. May restricted Claimant from stair or ladder climbing, and from squatting or kneeling due to his right knee condition. Physical therapist Tracy Becerra, who conducted Claimant's functional capacity evaluation on June 25 and 26, 2008, concluded that Claimant was capable of light-duty work and recommended only occasional standing or kneeling, frequent left lower extremity position change, and the avoidance of uneven terrain or operating a clutch pedal. She reported that Claimant should not operate foot controls requiring more than 25 pounds of pressure.

34. Competitiveness in open labor market. Nancy Collins, Ph.D., testified on behalf of ISIF. She interviewed Claimant and reviewed his work history, medical records, and physical restrictions. Dr. Collins considered Claimant employable. She opined:

> Mr. Boyer has taken advantage of vocational rehabilitation in the past to retrain for a new occupation. He could certainly do this again. ….
>
> With the restrictions outlined by his physicians and his Functional Capacity Evaluation, there should be work consistent with his limitations and his work experience. Employers in the past were willing to provide some accommodation for his light work restrictions and they might again. ….
>
> I do not think Mr. Boyer is totally disabled. His work restrictions and subjective complaints are similar to those he had back in 2000. He was able to find work. The labor market is quite poor, but I do think with the right approach Mr. Boyer is employable.

Exhibit 29, p. 314 (emphasis supplied).

35. Dr. Collins noted that as a millwright, Claimant's work had exceeded his lifting restrictions and his repetitive forceful gripping restrictions. She observed that Claimant's duties at Kiefer Built and Idaho Sand & Gravel also exceeded the restrictions resulting from his 2000 injuries. Although Claimant's present restrictions are similar to those imposed after his 2000 injuries, Claimant exceeded his restrictions following his 2000 injuries in order to obtain and retain employment.

36. Dr. Collins testified that retraining to position Claimant for a light-duty career in drafting technology, for example, would require approximately one year of remedial classes followed by at least one additional year of college level training. She acknowledged that Claimant is not altogether computer literate. She noted that although Claimant repeatedly failed the journeyman electrician test, he worked as an electrician for many years. She observed that although Claimant did not have a strong academic record, he was successful in learning highly skilled work on the job as an electrician and as a millwright. Dr. Collins acknowledged that if Claimant pursued retraining, he would be 58 or 59 years old before completing the retraining and prepared to seek employment in a new field. She conceded that some employers may not consider him the best candidate for a new draftsman position.

37. Dr. Collins opined that Claimant could be an electrical foreman, although she conceded that he was unable to pass the journeyman electrician's test on three separate attempts. Claimant reported that he misread blueprints on one occasion and installed several motors backwards in a New Mexico project. Furthermore, Claimant is unable to complete the written reports and similar documentation generally required of one supervising other employees. When

Claimant was a safety inspector, he relied upon his wife to complete the necessary paperwork required of his position.

38. Dr. Collins opined that Claimant could drive a delivery vehicle or a bus with an automatic transmission, perform security work, or be a dispatcher. However, she readily acknowledged that Claimant now has reduced labor market access and a fairly restricted job market and that shuttle and escort driver positions are limited. She further acknowledged that only five to ten percent of her professional time was involved in the Magic Valley labor market.

39. Douglas Crum, CDMS, interviewed Claimant in September 2010 and examined his medical records and prior work history. He noted that Claimant achieved poor grades throughout high school, reads and spells poorly, never reads books or magazines, has never even powered on a computer and knows nothing about them, tried unsuccessfully three times to pass the journeyman electrician's written test even with additional time accommodations, and has been formally diagnosed with developmental reading, expressive writing, and arithmetic disorders. Mr. Crum observed that Compass academic skill testing at CSI revealed Claimant would require considerable remediation in reading, vocabulary, English, and mathematics before he could even begin any college-level retraining. Mr. Crum considered the permanent physical restrictions placed by Claimant's examining physicians and the two-day functional capacity evaluation concluded June 26, 2008, by physical therapist Tracy Becerra. Mr. Crum then opined:

> Based on that analysis which includes Mr. Boyer's age, education, academic skill deficits, learning disabilities, complete absence of computer skills, a narrow range of prior employment, pre-existing problems with heavy truck driving, a somewhat unsophisticated presentation and the nature and composition of his labor market including a relatively high rate of unemployment at this time, combined with the physical capacities noted in the functional capacity evaluation, I can think of no occupation that Mr. Boyer could perform on a full-time basis that is a regularly occurring job in his labor market.

> In my opinion, Mr. Boyer is not a viable candidate for any sort of formal academic retraining. Given his age, currently 55 years old, and academic deficits/learning disabilities I do not believe that any formal vocational retraining would be cost effective or likely to succeed either.

Exhibit 28, p. 300. Mr. Crum concluded that Claimant is totally and permanently disabled and that further efforts to find employment would be futile.

40. Claimant called David Duhaime to testify at hearing. Mr. Duhaime has served as a vocational rehabilitation consultant for the Industrial Commission for 21 years, including 19 years in the Magic Valley. He is intimately familiar with the labor markets in Twin Falls, Gooding, Jerome, Cassia, Minidoka, Camas, Blaine, Custer, and Elmore counties. Duhaime familiarized himself with Claimant's medical records, work history, educational background, prior injuries and resulting work limitations. He actually assisted Claimant at various times with his job search and was aware of Claimant's employment with Idaho Sand & Gravel. Duhaime contacted Kiefer Built and met with Claimant's former supervisor to review Claimant's job duties and prepare a job site evaluation for Claimant's position at Kiefer Built. Duhaime noted that Claimant had standing and walking limitations, however, his duties at Kiefer Built required continuous standing and walking. Kiefer Built did not accommodate Claimant's standing and walking restrictions. Duhaime classified Claimant's work at Kiefer Built as medium-duty, requiring lifting 10 pounds continuously, 20 pound frequently, and 50 pounds occasionally.

41. Mr. Duhaime observed that, pursuant to the functional capacity evaluation, Claimant was restricted to using foot controls that required no more than 25 pounds of pressure. Duhaime testified that most larger trucks he had measured required 70 to 100 pounds of pressure to depress the clutch pedal. Duhaime was aware that Dr. Kristensen restricted Claimant to lifting no more than 20 pounds and not driving a vehicle with a clutch, and that Claimant expressly asked that these restrictions be removed so he could work at Idaho Sand & Gravel.

42. Duhaime considered Claimant's bilateral carpal tunnel syndrome, PTSD, ADHD, standing and walking restrictions, and inability to use the standard clutch of most trucks. He testified that he was not aware of any employment within Claimant's restrictions that is regularly and continuously available, that there are not jobs regularly and continuously available in the local labor market that Claimant could perform, and that further work search would be futile.

43. Claimant has unsuccessfully looked for work from Twin Falls to Mountain Home on his own, through the unemployment office, and with the assistance of Mr. Duhaime. The conclusions reached by Dr. Collins are noticeably hesitant as to Claimant's probability of obtaining employment. The conclusions of Mr. Crum and Mr. Duhaime are well explained, supported by the record, consistent with Claimant's actual job search experience, and thus more persuasive than those of Dr. Collins.

44. Based on Claimant's permanent impairments totaling 31% of the whole person, his permanent physical restrictions, and considering all of his medical and non-medical factors, including his PTSD, ADHD, age at the time of his final industrial accident, limited formal education, computer illiteracy, academic deficits, developmental arithmetic, reading, and expressive writing disorders, below average literacy, inability to return to previous positions, and lack of transferable skills, Claimant's ability to engage in regular gainful activity after his 2006 industrial accident has been greatly reduced. The Referee concludes that Claimant has established a permanent disability of 90%, inclusive of his 31% whole person impairment.

45. Odd-lot**.** A claimant who is not 100% permanently disabled may prove total permanent disability by establishing he is 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 establishing odd-lot status rests upon the claimant. Dumaw v. J. L. Norton Logging, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). A claimant may satisfy his burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways: (1) by showing that he has attempted other types of employment without success; (2) by showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or (3) 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).

46. In the present case, Defendant asserts that Claimant is not an odd-lot worker, observing that he obtained employment with Idaho Sand & Gravel after his 2006 industrial accident. While Defendant's observation is accurate, Claimant has presented significant direct evidence of an unsuccessful work search and that he worked beyond his restrictions at Idaho Sand & Gravel. It is undisputed that following the termination of his employment by Idaho Sand & Gravel, Claimant filed over 75 job applications without receiving a single interview. There is indication that Commission rehabilitation consultant David Duhaime unsuccessfully searched for suitable employment for Claimant. Finally, Claimant has presented the expert opinions of Mr. Duhaime and Mr. Crum that it would be futile for Claimant to seek employment. As noted above, these opinions are persuasive. Claimant has established a prima facie case that he is an odd-lot worker, totally and permanently disabled, under the Lethrud test.

47. Once a claimant establishes a prima facie odd-lot case, the burden shifts to ISIF "to show that some kind of suitable work is regularly and continuously available to the claimant." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The ISIF must prove 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 Fund 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).

48. In the present case, ISIF has not shown that there is an actual job regularly and continuously available which Claimant can perform and at which he has a reasonable opportunity to be employed. Claimant has proven that he is totally and permanently disabled pursuant to the odd-lot doctrine.

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

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

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

51. In Dumaw v. J. L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court identified four requirements a claimant must meet to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was indeed a pre-existing impairment; (2) whether that impairment was manifest; (3) whether the impairment was a subjective hindrance to employment; and (4) whether the impairment in any way combined with the subsequent injury to cause total disability. Dumaw, 118 Idaho at 155, 795 P.2d at 317.

52. Pre-existing, manifest impairments. The pre-existing physical impairments at issue herein are those to Claimant's bilateral wrists, left shoulder, back, and neck prior to his 2006 industrial accident. There is no dispute that his bilateral wrist impairment existed and was manifest prior to 1991, and his neck, back, and left shoulder condition existed and was manifest in 2000. Pursuant to Smith v. J.B. Parson Company, 127 Idaho 937, 908 P.2d 1244 (1995), Claimant's 2005 left ankle injury is not considered a pre-existing condition for purposes of Idaho Code § 72-332 because the claim arising therefrom was still open at the time of his 2006 accident, that is, Claimant's 2005 ankle injury was not medically stable nor rated prior to his 2006 accident.[1]

[1] Further treatment of the disability attributable to Claimant's 2005 left ankle injury that would be required by Smith v. J.B. Parson Company, is unnecessary here because of Claimant's pre-hearing settlement with Employer.

53. Claimant's bilateral wrist condition, left shoulder, neck, and back condition all constitute pre-existing conditions for purposes of Idaho Code § 72-332. Each preexisted and was manifest prior to his 2006 industrial accident. The first and second prongs of the Dumaw test have been met.

54. Hindrance or obstacle. The third prong of the Dumaw test considers "whether or not the pre-existing condition constituted a hindrance or obstacle to employment for the particular claimant." Archer v. Bonners Ferry Datsun, 117 Idaho 166, 172, 786 P.2d 557, 563 (1990). ISIF asserts that Claimant's pre-existing bilateral wrist condition was not a subjective hindrance to employment. Claimant testified that his bilateral wrist condition did not prevent him from performing his work. He testified that it did affect his repairs on his own pickup truck, but otherwise did not hinder his work for any employer. Claimant concedes in his briefing regarding apportionment, that his wrists have not been a serious impediment to his work. The Referee finds that Claimant's bilateral wrist condition was not a hindrance or obstacle to his employability.

55. Claimant's pre-existing left shoulder, neck, and back conditions compelled him to avoid heavy work. His back condition also limited his sitting and standing tolerances. The Referee finds that Claimant's pre-existing left shoulder, neck, and back impairments constituted a hindrance to his employment. The third prong of the Dumaw test is met as to these impairments.

56. Combination. Finally, to satisfy the "combines" element, the test is whether, but for the last industrial injury, the worker would have been totally and permanently disabled immediately following the occurrence of that injury. This test "encompasses both the combination scenario where each element contributes to the total disability, and the case where

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

57. The record contains persuasive evidence that Claimant's left shoulder, neck, and back condition combined with his 2006 industrial injuries to render him totally and permanently disabled. As noted, Claimant's 2006 injuries restricted his stair and ladder climbing, and his squatting and kneeling. With low back-induced sitting and lifting limitations, Claimant's low back condition further compromises his work capacity.

58. ISIF does not argue, and the Referee is not persuaded, that Claimant's 2006 industrial accident alone rendered him totally and permanently disabled. Rather, the weight of the evidence establishes that Claimant's 2006 industrial accident combined with his pre-existing neck, back and left shoulder impairment to render him totally and permanently disabled. The final prong of the Dumaw test has been satisfied as to Claimant's pre-existing neck, back and left shoulder impairment. Pursuant to Idaho Code § 72-332, ISIF is liable for Claimant's pre-existing neck, back, and left shoulder impairment.

59. **Carey apportionment.** In Carey v. Clearwater County Road Department, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984), the Idaho Supreme Court adopted a formula apportioning liability between ISIF and the employer/surety at the time of the final industrial accident. The formula prorates the non-medical portion of disability between the employer/surety and the ISIF in proportion to their respective percentages of responsibility for the physical impairment. Conditions arising after the injury, but prior to a disability determination, which are not work-related, are not the obligation of ISIF. Horton v. Garrett Freightlines, Inc., 115 Idaho 912, 915, 772 P.2d 119, 122 (1989).

60. Before applying the Carey formula, the portion of Claimant's impairment pre-

existing his 2006 industrial accident at Kiefer Built, and the portion caused by his 2006 industrial accident must be quantified. Claimant's qualifying pre-existing impairments total 16% of the whole person for his neck, back, and left shoulder. Claimant's left ankle impairment due to his 2005 industrial accident is 3% of the whole person. However, pursuant to Smith v. J.B. Parson Company, 127 Idaho 937, 908 P.2d 1244 (1995), it is not included in the Carey apportionment. Claimant's right knee impairment due to his 2006 accident is 1% of the whole person. Thus, Claimant's impairments for Carey apportionment total 17% (1% due to his 2006 accident and 16% qualifying pre-existing). Claimant's 2006 impairment constitutes 5.88% (1/17), and his qualifying pre-existing impairments constitute 94.12% (16/17) of his total impairment.

61. By application of the Carey formula, ISIF is responsible for the pre-existing medical portion of 16% impairment and for 94.12% of the nonmedical portion of Claimant's permanent disability. Thus, ISIF is responsible for payment of full statutory benefits commencing 29.4 weeks following the date of medical stability.

62. The date of medical stability, constituting the starting date for ISIF's responsibility for payment of benefits, merits further discussion. As noted above, Claimant's last industrial injury occurred in February 2006, and became medically stable on July 27, 2006. However, Claimant would not have been totally permanently disabled on that date because his 2005 industrial injury contributed to his permanent disability. His 2005 injury did not become medically stable until June 27, 2008. Although Smith v. J.B. Parson Company, precludes consideration of the 2005 accident in calculating Carey apportionment, the permanent restrictions attributable to the 2005 accident are relevant to ultimately finding Claimant totally and permanently disabled. Those restrictions were unknown until he became medically stable on June 27, 2008. The Referee concludes that ISIF is responsible for payment of full statutory

benefits commencing 29.4 weeks following June 27, 2008.

CONCLUSIONS OF LAW

1. Claimant suffers permanent disability of 90%, and has proven in the aftermath of his 2006 industrial accident that he is an odd-lot worker, totally and permanently disabled under the Lethrud test.

2. ISIF is liable pursuant to Idaho Code § 72-332 only for Claimant's pre-existing neck, back, and left shoulder impairments and the proportion of disability attributable thereto.

3. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: ISIF is responsible for payment of full statutory benefits commencing 29.4 weeks following June 27, 2008.

RECOMMENDATION

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

DATED this 22nd day of March, 2012.

INDUSTRIAL COMMISSION

_____/s/_____
Alan Reed Taylor, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of March, 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:

KEVIN E DONOHOE
112 SOUTH MAIN STREET #C
BELLEVUE ID 83313-5050

ANTHONY M VALDEZ
2217 ADDISON AVE E
TWIN FALLS ID 83301-6744

srb _____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHAEL J. BOYER, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2005-005463** **IC 2006-003106** **ORDER** **FILED 03/23/2012**

Pursuant to Idaho Code § 72-717, Referee 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 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 suffers permanent disability of 90%, and has proven in the aftermath of his 2006 industrial accident that he is an odd-lot worker, totally and permanently disabled under the Lethrud test.

2. ISIF is liable pursuant to Idaho Code § 72-332 only for Claimant's pre-existing neck, back, and left shoulder impairments and the proportion of disability attributable thereto.

3. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: ISIF is responsible for payment of full statutory benefits commencing 29.4 weeks following June 27, 2008.

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

DATED this 23rd day of March, 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 23rd day of March, 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

KEVIN E DONOHOE
112 SOUTH MAIN STREET #C
BELLEVUE ID 83313-5050

ANTHONY M VALDEZ
2217 ADDISON AVE E
TWIN FALLS ID 83301-6744

sb _____/s/_____