BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARSHA J. BROOKS, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)	**IC 2004-510731** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed: August 27, 2010

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 Idaho Falls on August 6, 2009. Claimant, Marsha J. Brooks, was present in person and represented by Michael McBride, of Idaho Falls. The Defendant, State of Idaho, Industrial Special Indemnity Fund (ISIF), was represented by Paul Rippel, of Idaho Falls. Employer, Idaho Home Health & Hospice, Inc., and its surety, Idaho State Insurance Fund, reached a settlement in this matter with Claimant before the hearing and thus did not participate in the hearing. The parties presented oral and documentary evidence. A post-hearing deposition was taken and briefs were later submitted. The matter came under advisement on April 30, 2010.

ISSUES

The issues to be decided by the Commission were narrowed at hearing and in the parties' briefs and are as follows:

1. Whether the Industrial Special Indemnity Fund is liable pursuant to Idaho Code § 72-332.

2. Apportionment under the formula set forth in Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984).

CONTENTIONS OF THE PARTIES

Claimant argues that she is totally and permanently disabled due to the combined effects of her 2004 motor vehicle accident at work and a number of pre-existing conditions. Claimant asserts she suffers 25% impairment of the whole person due to her 2004 industrial accident plus pre-existing whole person permanent impairments of 7% due to a neck condition, 5% due to asthma, 6% due to diabetes, 1% due to a right elbow condition, and 5% due to a lumbar condition. Claimant asserts that her preexisting physical impairments were manifest, hindered her in obtaining employment, and combined with her 2004 industrial injury to render her totally and permanently disabled.

ISIF acknowledges in its briefing that Claimant is totally and permanently disabled, but argues that it bears no liability because Claimant's 2004 accident alone resulted in total and permanent disability.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file, including Exhibits 1-5 supplied to ISIF with Claimant's Notice of Intent to File a Complaint Against ISIF;
2. The pre-hearing deposition testimony of Claimant, taken March 18, 2009;
3. The testimony of Claimant, taken at the August 6, 2009 hearing;
4. Claimant's Exhibits 1A through 1N; 2; 3A through 3E; and 4, admitted at the hearing; and
5. The post-hearing deposition of Richard G. Taylor, Ph.D., taken January 19, 2010.

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.

OBJECTIONS

The objections by Mr. Rippel recorded at page 101 of the Hearing Transcript, page 65 of Claimant's Deposition and page 9 of Dr. Taylor's Deposition, as well as Mr. McBride's objection recorded at page 38 of Dr. Taylor's Deposition, are overruled.

FINDINGS OF FACT

Employment history

1. Claimant was 57 years of age and resided in Pocatello, Idaho at the time of the hearing. She graduated from high school in Pocatello in 1970 and, later that year, learned to make ceramics from molds. In 1976, Claimant earned a certificate from a medical secretary receptionist correspondence course.

2. In 1982, Claimant completed coursework at Idaho State University to earn her licensed practical nurse (LPN) certificate. As an LPN, Claimant was required, among other things, to lift up to 100 pounds, perform CPR, maintain a working knowledge of medications, administer injections, start intravenous lines and assess patients.

3. Claimant was hired as an LPN for Bannock Hospital in 1982. She worked full-time, at first with oncology patients on the night shift and, later, in the intensive care unit watching heart monitors.

4. From 1990 until 2004, Claimant worked as a home visiting nurse for Employer. Claimant was paid a flat fee for each visit to travel to patients' homes to complete assessments, administer medications and draw blood. She also regularly assisted patients into and out of bathtubs and chairs, and up off the floor. Claimant completed seven or eight visits each day, working more than 40 hours per week. Her travel route took her from Pocatello to Downey, American Falls, Aberdeen and Blackfoot, then back to Downey and American Falls, each day.

5. In addition to her work for Employer, Claimant occasionally took on temporary jobs for other employers. In 2001, Claimant opened her own ceramics business. She used her

retirement funds as seed money, planning to operate the shop through and after her retirement. She made ceramics from molds and taught customers how to paint them.

6. After her industrial accident in May 2004, Claimant worked four hours per day in Employer's office. However, she ceased working even part-time for Employer in late April 2006 because, although she had undergone cervical fusion surgery, her neck pain prevented her from transitioning to a full-time position, as Employer required.

7. Claimant sold her ceramics business in 2007 because she could not lift the heavy molds, which could weigh up to 80 pounds, and it was not financially feasible to pay an employee to help her with the heavy lifting.

Preexisting injuries and conditions

8. Asthma. Claimant was diagnosed with asthma in 1970. Since then she has taken medications and used an inhaler from time to time to control her asthma. She testified that she ceased taking asthma medication in 2003 due to cost issues and, as a result, had to give up home visits in potato farming areas during harvest season. At the time of hearing Claimant used an inhaler several times per week, when she was short of breath. She asserts a 5% whole person permanent impairment rating for her asthma.

9. Diabetes. Claimant was diagnosed with diabetes in 1993 and has, at times, had difficulty controlling her diabetes. Her work was affected by her diabetes and resulting blurry vision, which by 2004, made it difficult for her to assess patients' wounds, draw blood, and administer injections. Eventually, Claimant ceased drawing blood because she could no longer locate the vein. Claimant asserts a 6% whole person permanent impairment rating to her diabetes condition.

10. Cervical spine condition. In 1997, Claimant sought medical treatment for neck pain arising off and on while driving. She was diagnosed with a calcified nuchal ligament. On June 1, 2006, Mary Himmler, M.D., Claimant's treating physiatrist, assigned a 7% whole person permanent impairment rating to this neck condition.

11. Right elbow fracture. In 1998, Claimant fell down several steps and fractured her right elbow. She was treated by Richard A. Wathne, M.D., who later rated her impairment at 2% of the right upper extremity. Claimant lost strength in her right arm and compensated by reducing the weight in her nursing bag. Claimant had to quit doing personal patient care because she could not lift patients into and out of a bathtub due to her right elbow injury. She seeks a 1% whole person permanent impairment rating in consideration of her right elbow condition.

12. Back injury. In 2000, Claimant injured her back while transferring a patient. She received medical treatment, including a number of steroid injections, however she has continued to have back pain and associated symptoms when lifting, standing or walking, and can no longer lift a patient from the floor. Claimant asserts a whole person permanent impairment rating of 5% for her lumbar spine injury.

13. Congestive heart failure. In 2001, Claimant was diagnosed with congestive heart failure. She noted dyspnea on exertion, fluid retention, fatigue, nocturia and occasional paroxysmal nocturnal dyspnea. She had to sit down to examine her patients because she had so much trouble breathing. She asserts no permanent impairment rating for this condition.

Industrial accident and treatment

14. While in the course of her employment on May 18, 2004, Claimant was involved in a chain reaction motor vehicle accident, in which another vehicle rear-ended her vehicle, which in turn collided with the vehicle ahead of her. She was treated by R. Scott Malm, P.A., for injuries to her neck and back. Claimant reported left-sided pain along her neck, shoulder and thoracic spine.

15. On September 15, 2004, Claimant was evaluated by Dr. Himmler. She presented with insomnia, headaches, left-sided neck and shoulder pain, tingling in her left hand, occasional numbness in the right thumb, and right leg pain. Dr. Himmler diagnosed cervicalgia due to whiplash-type injury associated with headaches and myofascial pain in Claimant's girdle

musculatures at her left shoulder and right hip. She prescribed medications and administered a trigger point injection into Claimant's left shoulder. Dr. Himmler also administered acupuncture and recommended stretching exercises for Claimant's neck pain.

16. Claimant followed up with Dr. Himmler on September 23 and October 7, 2004 for headaches and neck and shoulder pain. Dr. Himmler reaffirmed her previous diagnosis and prescribed trials of Norflex and transcutaneous electrical nerve stimulation (TENS).

17. On October 21, 2004, Dr. Himmler noted on examination that Claimant demonstrated significant spasm and tenderness across the bilateral trapezius and cervical paraspinal musculatures, and tenderness to palpation at C5-7. Dr. Himmler added left upper extremity paresthesias and right sacral iliac joint dysfunction to Claimant's diagnoses, continued Claimant's medications and ordered a cervical spine MRI.

18. Claimant underwent a cervical spine MRI on October 28, 2004. The MRI identified an intervertebral disc protrusion at C5-6 that contacted and flattened a portion of the ventral cord and mildly narrowed the neuroforamina. Also, at C6-7, a central intervertebral disc bulge, along with uncovertebral hypertrophy, mildly narrowed the central canal and mildly to moderately narrowed the bilateral neuroforamina. Dr. Himmler referred Claimant for a surgery consultation.

19. On November 30, 2004, Claimant was examined by Scott Huneycutt, M.D., an orthopedic surgeon. Claimant reported pain radiating down the back of her neck, over her left shoulder blade, down her arm and into the second, third and fourth fingers of her left hand. She also reported left hand weakness and clumsiness, along with some right-handed symptoms while driving. Dr. Huneycutt assessed a herniated cervical disc with neck pain and radiation into Claimant's left upper extremity. He discussed surgical intervention with Claimant but recommended conservative care, and referred her to Anesthesia Associates for epidural steroid injection for pain relief. On January 5 and 18, 2005, Claimant underwent epidural steroid injections by Patrick E. Farrell, M.D., an anesthesiologist.

20. Dr. Huneycutt examined Claimant again on March 8, 2005. His objective findings on exam were unchanged; however, Claimant reported that her arm pain symptoms had expanded from her left arm, primarily, to both arms, notwithstanding the epidural steroid injections. He discussed with Claimant her options of continued conservative care versus surgery and its attendant risks.

21. On or about April 13, 2005, Claimant was again examined by Dr. Huneycutt, who again found no changes on exam. Claimant advised that she wished to proceed with surgery because she was miserable. Dr. Huneycutt agreed to perform a cervical spine decompression and stabilization (fusion) upon authorization from Surety. Dr. Huneycutt responded to an inquiry from Surety and opined that Claimant's cervical symptoms resulted from the 2004 accident, alone, while acknowledging that Claimant's diabetes and other health conditions could affect the outcome of her surgery.

22. On September 22, 2005, D. Peter Reedy, M.D., a neurosurgeon, responded to Surety's request for a second opinion. He concurred that surgery was a reasonable option. He also strongly concurred that Claimant's need for surgery arose out of the 2004 accident, alone:

> I do think Dr. Honeycutt is correct that the accident is directly related to her symptoms since she had never had any symptoms like this prior to the accident and they have been persistent ever since…despite any previous spondylitic disease she may have had, she was asymptomatic and the entire need for surgery is based on the accident.

IIC Exhibit 1.

23. On November 4, 2005, Dr. Huneycutt performed a bilevel anterior cervical discectomy and fusion with right hip bone graft at C5-6 and C6-7. Dr. Huneycutt advised Surety that Claimant was disabled from work from November 3, 2005 until January 1, 2006. He restricted Claimant from bending, lifting, twisting or neck jarring, and required her to wear a cervical collar continuously.

24. Dr. Huneycutt again examined Claimant on December 20, 2005. She reported

some improvement in her pre-operative symptoms, but she still experienced pain radiating from her right elbow to her right fourth and fifth fingers. He referred Claimant to M. Elizabeth Gerard, M.D., a neurologist, for an electromyogram study (EMG) to rule out a double crush syndrome of C6 and the ulnar nerve at the elbow. Dr. Huneycutt opined that Claimant's condition was work related.

25. On December 29, 2005, Dr. Gerard conducted an EMG and nerve conduction study (NCS) of Claimant's right arm. She found severe, demyelinating Carpal Tunnel Syndrome (carpal tunnel syndrome) at the right wrist with axonal involvement and both acute and chronic denervation. There was no evidence of ulnar neuropathy at the wrist or elbow, or C5-T1 radiculopathy or plexopathy. Claimant followed up with Dr. Huneycutt on January 3, 2006 to discuss the EMG/NCS findings.

26. On January 3, 2006, Dr. Huneycutt reported that Claimant could begin modified duty work on January 9, 2006, with restrictions including no kneeling, crouching or overhead activities; occasional lifting up to 15 pounds, stooping and repetitive hand and arm activity; frequent reaching; and limited pulling and pushing. He also recommended that Claimant begin with only four hours per day for two weeks, increasing work intervals as tolerated.

27. On March 13, 2006, Dr. Himmler reviewed a job site evaluation and confirmed that Claimant could work four hours per day and permanently restricted Claimant to no more than occasional bending or stooping. She estimated Claimant would require two or three months more medical treatment. On March 15, 2006, Dr. Himmler examined Claimant who reported feeling "wonderful" after surgery; however, after a bad cold in which she coughed a lot, Claimant's residual occasional stabbing pain in her right arm worsened and, although she had tried to increase her workday from four hours to five, she was unable to do so due to pain and fatigue. Dr. Himmler found a mildly positive Tinel's sign at each wrist, some loss in upper extremity muscle bulk and bilateral trapezius spasm, worse on the left. Dr. Himmler diagnosed

persistent radicular symptoms and paresthesia, "apparent" right carpal tunnel syndrome and myofascial pain in her bilateral shoulder girdle muscles, worse on the left than on the right. She prescribed physical therapy and medications and restricted Claimant from lifting more than 15 pounds. She also restricted Claimant from bending, stooping or reaching overhead more than occasionally. Dr. Himmler opined that Claimant was not ready for an impairment rating.

28. On April 6, 2006, Dr. Huneycutt reported that Claimant had reached maximum surgical improvement. Therefore, he deferred to Dr. Himmler to determine whether Claimant had reached maximum medical improvement and, if so, to assess any applicable permanent impairment ratings or restrictions.

29. On April 26, 2006, Claimant reported to Dr. Himmler that she was only able to work four hours per day due to her neck pain. Her attempts to work five hours had failed, and her last day of work was approaching at the end of the week because Employer required that she work eight hours or more after this date, which she could not do. Dr. Himmler opined that Claimant had reached maximum medical improvement and rated her permanent impairment at 25% of the whole person due to Claimant's neck condition. Dr. Himmler also assessed permanent restrictions limiting Claimant to light-duty work, with no overhead work.

30. On June 1, 2006, after reviewing Claimant's cervical spine x-ray from 1997 revealing evidence of nuchal ligament calcification, Dr. Himmler allocated 7% of her total whole person impairment rating to Claimant's preexisting neck condition. Dr. Himmler explained that she believed it was "only fair" to apportion her impairment rating, since Claimant had a history of neck pain in February 1997. IIC Exhibit 3.

31. Dr. Himmler next evaluated Claimant for neck pain on February 5, 2007, and ordered a new cervical spine MRI. There were no significant findings other than evidence of the cervical fusion and mild cervical canal narrowing. She administered xylocaine injections into

Claimant's trigger points to reduce her muscle spasms, noting that the previous TENS trial had failed.

32. On February 6, 2007, Henry G. West, Jr., D.C., N.M.D., a chiropractic orthopedist and doctor of naturopathic medicine, provided a second opinion and impairment rating. Based upon her past medical history of neck pain and radiculitis dating back to 1997, her October 29, 2004 MRI results, and objective findings on examination, including a Computerized Spinal Range of Motion Exam, Dr. West determined that Claimant's complaints were consistent with the clinical findings, the motor vehicle accident and her preexisting neck condition. He opined that Claimant had reached maximum medical improvement and assigned an impairment rating of 29% of the whole person based on her range of motion, with 25% apportioned to her preexisting neck condition (7.25%) and 75% to the 2004 accident (21.75%).

33. Dr. West explained:

> I have apportioned the impairment rating as 25% preexisting and 75% pathological aggravation relating to the motor vehicle accident. She had the interval between 1997-2004 without any other medical treatment and therefore her condition was asymptomatic at the time of the accident and the accident is fully responsible for the medical necessity and medical care as a result of the motor vehicle accident.

Claimant's Exhibit 1K, p. 124-126.

34. On March 19, 2007, Claimant returned to Dr. Himmler, reporting some improvement in her left shoulder pain, but no improvement on the right. Claimant was working three hours per week and transitioning her ceramics business to her daughter because she was unable to do the lifting work there. Dr. Himmler opined that Claimant would not be able to return to full-time work, and referred her to Patrick E. Farrell, M.D., an anesthesiologist, for evaluation for a right C5 epidural steroid injection.

35. On April 16, 2007, Dr. Farrell examined Claimant and scheduled her for a

cervical epidural steroid injection. On May 30, 2007, Claimant reported to Dr. Himmler that she gained pain relief for three days from the injection. However, she was hesitant to undergo a repeat procedure.

36. Also on May 30, 2007, Dr. Himmler completed a Work Restriction Form indicating that Claimant could stand or walk no more than two hours per day; could not use her hands for simple grasping, fine manipulation or repetitive pushing and pulling of more than five pounds; could not ever use her "upper extremity" for pushing, pulling or reaching above shoulder level; could not use her feet for repetitive raising and lowering and pushing to operate foot controls; could not ever squat, kneel, climb or reach; and could occasionally bend. Claimant's Exhibit 1F, p. 91. She also indicated Claimant must avoid heat and take pain medications that could affect her ability to work.

37. On June 27, 2007, Dr. Himmler referred Claimant to a pain specialist colleague in her own practice for evaluation of her candidacy for a spinal cord stimulator for pain relief. No further information on this subject is evident from the record.

Independent medical examination

38. On September 7, 2007, physiatrist David C. Simon, M.D., examined Claimant at Surety's request. He interviewed and examined Claimant, and administered a pain inventory and questionnaire. Claimant denied having any symptoms prior to the 2004 accident that are similar to those she experienced afterward. During the interview, Claimant reported continued pain up both sides of her neck and across the top of her shoulders, more severe on the right. She also reported pain into her right shoulder blade and down the right sides of both arms to the last three fingers, again, more severe on the right. On a scale of 1-10, Claimant rated her pain at a "7". She also reported daily headaches initiated by pain in her neck, made worse with arm movement, bending, turning her head or lifting with her right arm. She explained that her headache pain was alleviated by holding her head completely straight, and that injections had helped ease her

headaches, as well as pain in her neck and shoulder areas. Finally, Claimant reported that her right hand goes numb when using a keyboard, and that her hands go to sleep when she holds a book. Claimant believed these symptoms were the result of her 2004 neck injury, and not because of her carpal tunnel syndrome.

39. Dr. Simon confirmed Claimant's bilevel cervical disc herniations with resultant radiculopathy as a result of the 2004 accident, and her subsequent discectomy and fusion in 2005. He diagnosed cervical spondylosis with prior history of neck and arm pain, carpal tunnel syndrome as the most likely cause of her current hand symptoms, and lumbar spondylosis with a history of low back pain and leg pain/numbness. Dr. Simon opined that Claimant had reached maximum medical improvement. He stated Claimant should permanently avoid all repetitive or prolonged overhead work as a result of her 2004 accident and injury and concurred in Dr. Himmler's whole person permanent impairment rating of 25%, allocating 7% to Claimant's preexisting cervical spine condition.

40. Dr. Simon opined that Claimant's 2004 neck injury would not prevent her from working an eight hour day, so long as she avoided prolonged or repetitive overhead work. He believed Claimant's carpal tunnel syndrome was her biggest impediment to work, but unequivocally stated that the 2004 accident did not cause either this condition or Claimant's low back problems. He did not elaborate and did not assign permanent impairment ratings for these conditions.

Vocational rehabilitation experts

41. Nancy Collins, Ph.D. On July 19, 2006, Nancy Collins, Ph.D., a vocational rehabilitation consultant retained by Claimant, prepared a report assessing Claimant's "…current employability and future vocational disability based upon residual deficits associated with injuries sustained in an industrial accident." IIC Exhibit 5. Specifically, Dr. Collins assessed Claimant's employability as a result of the injuries she sustained in the 2004 accident. Dr.

Collins relied upon information derived from Claimant's medical records compiled by Dr. Huneycutt and Dr. Himmler and an interview with Claimant, as well as vocational records[1], in forming her opinions.

42. Dr. Collins identified prior medical conditions including insulin-resistant diabetes, congestive heart failure and carpal tunnel syndrome[2], noting that no restrictions had been issued on account of any of these conditions. She identified post-accident restrictions imposed by Dr. Himmler (light-duty work four to six hours per day, maximum lifting of 15 pounds, no overhead work) and Dr. Huneycutt (occasional lifting up to 15 pounds, bending, stooping and repetitive hand/arm activity; no kneeling, crouching or overhead activity; and limited pushing and pulling). She also recorded Claimant's subjective complaints including chronic neck and shoulder pain, daily headaches, arm numbness after 20 minutes of exertion requiring her to stop and shake them, aching pain in her arms that limits her ability to use them, dizziness when looking up or down, pain when sitting more than 30 minutes and pain when walking or standing for long periods, and insomnia, among other things.

43. Dr. Collins went on to opine that Claimant's lifting restriction limits her to sedentary work and a few light duty jobs within her lifting restriction. Utilizing the *LifeStep* software, Dr. Collins concluded that, given Claimant's education, skills and physical restrictions, including both her lifting restriction and her limitation to no more than occasional stooping and handling activities, Claimant was not employable at any job listed in the *Dictionary of Occupational Titles*. Then, she further concluded, without explanation, that she believes there are some reception jobs, which would require only occasional arm and hand use, that Claimant could perform.

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[1] Dr. Collins relied upon the following vocational records and information in reaching her opinions: *LifeStep Jobware Program, Dictionary of Occupational Titles, Idaho Occupational Wage and Employment Survey,* Department of Labor job listings, O*NET and notes from the Idaho Industrial Commission Rehabilitation Division.

[2] No evidence of a preexisting carpal tunnel syndrome diagnosis is evident from the record. Dr. Gerard conducted an EMG on December 29, 2005 and, thereafter, diagnosed carpal tunnel syndrome.

44. Dr. Collins ultimately opined that Claimant suffered 75%-90% loss of access to the labor market and a 75% loss of earning capacity, for a total reduction in employability of 75%-82.5%, due to the 2004 accident.

45. Richard Taylor, Ph.D. On May 19, 2009, Richard Taylor, Ph.D., a vocational rehabilitation consultant also retained by Claimant, provided an opinion as to Claimant's post-accident employability. Defendant concurs in the opinions set forth in Dr. Taylor's report.

46. Dr. Taylor interviewed Claimant, reviewed some of her medical and related records[3], and administered standardized achievement tests[4]. He relied on Dr. D'Sousa's functional capacity evaluation to establish that Claimant could do sedentary and light work with restrictions.[5] Like Dr. Collins, Dr. Taylor assumed that all of Claimant's limitations were due to the 2004 accident.

47. Dr. Taylor performed a computer analysis to determine specific sedentary and light jobs available in the workplace and narrowed that list to positions for which someone with Claimant's age, education, previous work experience and other relevant personal factors, would qualify. Dr. Taylor also established assumptions regarding Claimant's pre-accident employability:

> Prior to the injury, Ms. Brooks had the capacity to do a full range of work from Sedentary to Heavy in terms of physical demand. Sedentary work requires exerting up to 10 pounds of force occasionally, standing and walking occasionally, and sitting most of the day. Light work requires exerting 20 pounds of force occasionally or up to 10 pounds of force frequently. Medium work requires exerting 20 to 50 pounds of force occasionally or 10 to 25 pounds of force frequently. Heavy work requires exerting 50 to 100 pounds of force occasionally or 25 to 50 pounds of force frequently.

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[3] Dr. Taylor reviewed case notes prepared by Kevin Hill, M.D., on October 20, 2008; documents prepared by Dr. Huneycutt from November 30, 2004 until April 6, 2006; a report prepared by Dr. Wathne on September 17, 1998; a functional capacity report prepared by Sherwin D'Sousa on February 28, 2009; and Social Security Administration records dated May 5, 2006 through December 28, 2008.

[4] Dr. Taylor administered the Slosson Intelligence Test, 3rd Revision, and the Wide Range Achievement Test, 3rd Revision.

[5] According to Dr. Taylor, Dr. D'Sousa assessed restrictions including: no pushing or pulling with either hand, no bending, no squatting, no kneeling, occasional climbing and occasional reaching.

Claimant's Exhibit 2, p. 182.

48. Dr. Taylor concluded Claimant's disability resulted in 100% loss of access to the labor market in nursing; 91%-100% loss of the labor market in sedentary and light category jobs; and 99% of the labor market for unskilled work. In addition, Dr. Taylor surmised that, as people become disabled and age, their ability to find and keep work diminishes, and that as a job decreases in skill level, it usually increases in physical exertion level. Accordingly, given Claimant's age, education and disabilities, Claimant became 100% disabled due to medical and non-medical factors, alone, as a result of the 2004 accident.

DISCUSSION AND FURTHER FINDINGS

49. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). 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).

ISIF liability.

50. Claimant asserts that ISIF is liable pursuant to Idaho Code § 72-332 which provides 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 her 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 her income benefits out of the ISIF account. In Dumaw v.

J. L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court summarized the four inquiries a claimant must satisfy to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was 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.

51. In the present case, Claimant has suffered a number of health problems over the years including asthma and diabetes as well as lumbar, cervical, and right elbow pain. In spite of these challenges, after medical treatment, she continued to work. ISIF has acknowledged that Claimant is now totally and permanently disabled. However, ISIF asserts that the requisite combining is absent because Claimant is totally permanently disabled due to the effects alone of her 2004 industrial accident. ISIF is not liable where the last injury, itself, renders a worker totally and permanently disabled. Selzler v. State of Idaho, Industrial Special Indemnity Fund, 124 Idaho 144, 857 P.2d 623 (1993).

52. It is undisputed that Claimant cannot return to nursing because she is restricted to lifting 15 pound occasionally which, among other things, renders her incapable of administering CPR, a function required for nursing certification. In addition, Claimant testified at hearing that she became fatigued and felt pain while working her desk job for Employer because it hurt her neck to look down. She also testified at her deposition that, although she had experienced neck pain in 1997, she had full mobility of her neck until after her cervical fusion surgery. Further, she reported to Dr. Simon in 2007 that none of her present difficulties were similar to any difficulties she had previously experienced.

53. Claimant's lifting restriction, neck pain while looking down and loss of mobility in her neck are all attributable to the 2004 accident. Although Claimant had to reduce her lifting after her right elbow and lumbar back conditions were identified, no restrictions in excess of

Claimant's 15-pound restriction were ever imposed. Further, Claimant did not experience neck pain while looking down until after her cervical fusion surgery.

54. Claimant retained two vocational rehabilitation experts, Dr. Collins and Dr. Taylor. Neither one opined that any portion of Claimant's disability arose from any preexisting condition. On the contrary, each one attributed her or his respective disability findings solely to the injuries Claimant incurred in the 2004 accident. Dr. Collins relied on Dr. Huneycutt's and Dr. Himmler's records, and Dr. Taylor relied on a report prepared by Sherwin D'Sousa, M.D., an internist, in connection with Claimant's application for Social Security Disability Insurance benefits. Dr. D'Sousa's report is not in evidence.

55. No physician has opined that any of Claimant's current restrictions or physical limitations are due to any preexisting condition. In fact, Dr. Huneycutt opined on June 7, 2005, that Claimant's cervical symptoms were due to the 2004 accident alone, and Dr. Reedy strongly concurred.

56. Dr. Simon opined that Claimant's hand problems were most likely due to her carpal tunnel syndrome, which he strongly stated was not caused by the 2004 accident. He further opined that Claimant's hand problems are probably her greatest impediment to returning to work. Dr. Simon's conclusions contradict the opinions of Dr. Huneycutt and Dr. Himmler. Both of these physicians opined that Claimant's restrictions and inability to return to work stem from her 2004 cervical spine injury. As Claimant's treating physicians, Dr. Huneycutt and Dr. Himmler are more familiar with Claimant's condition than Dr. Simon, who reviewed her records and some test results and met with her for 59 minutes. Thus, their testimony regarding the extent and etiology of Claimant's symptomatology is more credible.

57. Claimant's carpal tunnel syndrome was initially diagnosed by Dr. Gerard, following referral by Dr. Huneycutt, on December 29, 2005, more than a year and a half after Claimant's accident in May 2004. There is inadequate evidence from which to determine that

Claimant's carpal tunnel syndrome preexisted her 2004 accident. There is likewise inadequate evidence from which to determine that Claimant's hand problems attributable to her carpal tunnel syndrome combine with her 2004 neck injury to render her totally and permanently disabled.

58. Dr. Himmler, a physician, and Dr. West, a chiropractor, have both opined that the 1997 evidence of nuchal ligament calcification in Claimant's medical records warrants an impairment rating for preexisting cervical spine disease. However, the record is silent as to if or how this condition compounded or interacted with Claimant's cervical disc injuries from the 2004 accident to increase her disability. In fact, none of Claimant's post-accident medical records even confirms the pertinent 1997 x-ray findings. Further, Claimant reported to Dr. Simon that her difficulties after her 2004 accident were different than any difficulties she had previously experienced. It is tempting to presume that Claimant's preexisting cervical spine condition must have caused or in some way contributed to her post-accident symptomatology. No such presumption exists in the law, however, to alleviate Claimant's burden of proving such a connection.

59. The evidence establishes that Claimant's permanent impairments rendering her unemployable all stem from the 2004 accident. Further, to the extent Claimant had preexisting permanent impairments that similarly limited her, they were superseded by the injury she sustained in the 2004 accident. As a result, Claimant has failed to establish that any of her preexisting impairments combined with her subsequent industrial injury such as to trigger ISIF liability. The Referee concludes that Claimant's 2004 industrial accident alone rendered Claimant totally and permanently disabled. Claimant has not proven ISIF's liability pursuant to Idaho Code § 72-332.

Carey apportionment.

60. The issue of apportionment pursuant to Carey v. Clearwater County Road

Department, 107 Idaho 109, 686 P.2d 54, (1984), is moot.

CONCLUSIONS OF LAW

1. Claimant has not proven ISIF is liable pursuant to Idaho Code § 72-332.

2. Apportionment under the formula set forth in Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is moot.

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 20th day of August, 2010.

INDUSTRIAL COMMISSION

_/s/_____
Alan Reed Taylor, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of August, 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:

MICHAEL R MCBRIDE
1495 EAST 17TH STREET
IDAHO FALLS ID 83404-6236

PAUL B RIPPEL
PO BOX 51219
IDAHO FALLS ID 83405-1219

sc _/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARSHA J. BROOKS, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)	**IC 2004-510731** **ORDER** Filed: August 27, 2010

Pursuant to Idaho Code § 72-717, Referee Alan Taylor 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 has not proven ISIF is liable pursuant to Idaho Code 72-332.

2. Apportionment under the formula set forth in Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is moot.

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

DATED this 27th day of August, 2010.

INDUSTRIAL COMMISSION

_/s/_____
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 27th day of August, 2010, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

MICHAEL R McBRIDE
1495 E 17TH ST
IDAHO FALLS ID 83404

PAUL B RIPPEL
P O BOX 51219
IDAHO FALLS ID 83405-1219

sc _/s/_____