BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY BROWN, Claimant, v. THE HOME DEPOT, Employer, and AMERICAN HOME ASSURANCE COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2004-001660** **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 Boise on November 18, 2009. Claimant, Gary Brown, was present in person and represented by Daniel A. Miller of Boise. Defendant Employer, The Home Depot (Home Depot), and Defendant Surety, American Home Assurance Company, were represented by W. Scott Wigle of Boise. Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF) was represented by Lawrence E. Kirkendall of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on April 23, 2010.

ISSUES

The issues to be decided by the Commission were simplified at hearing and include the following:

1. The extent of Claimant's permanent disability in excess of impairment, including whether Claimant is permanently and totally disabled pursuant to the odd-lot doctrine.
2. Whether the ISIF is liable under Idaho Code § 72-332.
3. Apportionment under the formula set forth in Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984).
4. Claimant's entitlement to additional medical benefits.

CONTENTIONS OF THE PARTIES

Claimant argues that he is totally and permanently disabled due to the combined effects of his January 31, 2004 industrial accident and his pre-existing lumbar condition. He requests additional medical benefits for treatment by two physicians at the University of Washington and for prescription medications.

Employer and Surety assert that Claimant is capable of regular gainful employment and not totally and permanently disabled. In the alternative, Employer and Surety assert that if Claimant is totally and permanently disabled, such is due to his pre-existing lumbar and pulmonary condition in combination with his industrial injury. They also maintain that he is entitled to no further medical care.

The ISIF maintains that Claimant is employable and not totally and permanently disabled. The ISIF further argues that even if he is totally and permanently disabled, Claimant's pre-existing lumbar and pulmonary impairments were not a hindrance to his employability.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition of Claimant, taken by Defendants Employer and Surety on September 25, 2007, and on October 2, 2007, and admitted into evidence as Employer/Surety Exhibits OO and PP and ISIF Exhibits 41 and 42;
3. The pre-hearing deposition of Claimant, taken by Defendant ISIF on October 16, 2009, and admitted into evidence as ISIF Exhibit 40;
4. The testimony of Claimant, Claimant's wife Lenora Brown, and Nancy J. Collins, Ph.D., taken at the November 18, 2009 hearing;
5. Claimant's Exhibits 1 and 4 through 27, Employer/Surety's Exhibits A through PP and RR, and ISIF's Exhibits 1 through 38 and 40 through 45, admitted at hearing;
6. The post-hearing deposition of Richard Wilson, M.D., taken by Employer/Surety on December 7, 2009;
7. The post-hearing deposition of William C. Jordan, taken by the ISIF on December 15, 2009; and
8. The post-hearing deposition of Douglas N. Crum, taken by Employer/Surety on January 29, 2010.

Claimant's Exhibits 2 and 3 were not admitted into evidence in order to avoid duplication of documents admitted into evidence by other parties. Employer/Surety's Exhibit QQ was never offered into evidence, nor was the ISIF's Exhibit 39.

The objections posed during William Jordan's and Douglas Crum's depositions are sustained. After considering 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 1947. He was 62 years old and had lived in Boise since 1977 at the time of the hearing. At age 13, he began milking at a dairy farm for $3.00 per day, plus

room and board. Claimant graduated from high school and in 1965 entered the U.S. Marines, where he served three tours of duty in Vietnam. He suffered back pain in approximately 1967 during his duties as a paratrooper. He was honorably discharged in 1968 and then worked in Missouri unloading boxcars. He noted back pain from time to time. Thereafter he worked as a reinsurance clerk in Sydney, Australia. He later worked for a painting and remodeling company and eventually operated his own residential painting company in Australia.

2. In approximately 1972, Claimant returned to the U.S. and entered college. In 1974, he married. In 1976, he graduated with a bachelor's degree in architectural engineering from Kansas State University. He ultimately obtained a license in civil and structural engineering. In 1977, he began working for Morrison Knudson in Boise as an engineer in training. In approximately 1978, Claimant went to work for the U.S. Forest Service, where he was classified as a civil engineer and tasked with designing water systems and lookouts. He worked for the Forest Service for approximately one year, then returned to Morrison Knudson. At Morrison Knudson, Claimant completed four years as an engineer in training and thereafter received increasingly responsible assignments. He designed roads and/or structures in Idaho, Nevada, Kentucky, Colombia, and Saudi Arabia. He designed the heaviest coal mine hoist in the world. He excelled in his engineering career and eventually became a supervisor of approximately 50 engineers.

3. In 1979, Claimant began to notice pulmonary problems. He developed shortness of breath and began coughing up large amounts of blood. He was ultimately treated at the Mayo Clinic where, in 1982, Paul Connete, M.D., surgically removed Claimant's left lung. Since that time, Claimant has noted shortness of breath when climbing stairs or inclines and paces himself when walking on level ground.

4. By 1991,Claimant was earning about $62,000.00 per year at Morrison Knudson. He maxed out his 401K contributions while at Morrison Knudsen. Claimant's wife worked as a registered nurse for the Central District Health Department.

5. By 1991, Claimant and his wife were financially secure and decided to take time off from work. Both quit their jobs and traveled extensively throughout the southern United States for several years. In 1995, Claimant and his wife returned to Boise and built their own home. They performed nearly all of the designing, framing, roofing, plumbing, and electrical work themselves. They also enjoyed golfing, woodworking, and traveling.

6. In 2000, Claimant noted increasing back problems and leg pain. He was diagnosed with an L4-5 disc herniation. Joseph Verska, M.D., performed an L4-5 laminectomy and diskectomy. A few weeks later, Dr. Verska performed repeat lumbar surgery for recurrent L4-5 disc herniation. After the surgeries, he advised Claimant to be careful with lifting. Thereafter, Claimant limited his lifting to a maximum of 50 or 60 pounds. He was still able to play golf regularly and twist and bend.

7. In 2000, the dotcom bubble burst. Claimant and his wife were heavily invested in technology stocks and lost about 80% of their holdings. They determined to supplement their retirement savings by returning to work part-time.

8. In November 2001, Claimant applied for a job at and commenced working for Home Depot. He told Home Depot at the time of hiring that he did not lift heavy things. He was able to obtain help from co-workers when heavy lifting was required. At his preference, Claimant was assigned only part-time work. He was an exemplary employee and enjoyed his work at Home Depot. Claimant's wife also returned to work.

9. On January 31, 2004, Claimant was helping deliver a cabinet to a Home Depot customer when he fell on snow-covered steps while carrying the cabinet, landed on his left hip, and hurt his back. At the time of the accident, Claimant was earning $12.16 per hour and working approximately 30 hours per week. He earned an average of approximately $19,000.00 per year at Home Depot.

10. Claimant received conservative medical treatment for his industrial injury and was assigned to light-duty work. However, his back condition worsened. A July 2004 lumbar MRI revealed a recurrent L4-5 disc herniation and an L5-S1 annular tear. Claimant resigned from his employment at Home Depot on November 15, 2004, citing back pain. He has not worked since that time.

11. On March 23, 2005, Timothy Doerr, M.D., performed a laminotomy, foraminotomy, partial diskectomy, and anterior and posterior L4-5 fusion with allograft and instrumentation. The first allograft fractured upon impaction during surgery, necessitating placement of a second allograft and resulting in a prolonged surgery. Claimant was under anesthesia for approximately seven and one-half hours. The discharge summary documents essentially full strength in his legs and intact perineal sensation.

12. On April 26, 2005, Claimant established care with Sheila Giffen, M.D., as his family physician. Dr. Giffen examined Claimant and noted that he had persistent lower extremity numbness bilaterally, but no weakness and no incontinence. On May 18, 2005, Dr. Giffen performed Claimant's annual physical exam and noted slightly diminished rectal tone, but recorded no complaints of incontinence or sexual dysfunction. On May 25, 2005, Dr. Giffen noted that Claimant suffered mild situational depression. On July 19, 2005, Claimant presented to Dr. Giffen for follow-up of his depression. She noted under review of systems: "positive for… depression…and sexual problems." Claimant's Exhibit 22, p. 14. Claimant was not driving, but was excited about golfing the next day. On August 23, 2005, Claimant complained of numbness almost into his groin, difficulty voiding, some urinary incontinence, decreased sensation throughout his groin area, and partial sexual dysfunction. Dr. Giffen recorded: "He is able to become aroused, but cannot sustain this arousal. This has been prominent since the surgery and initial inciting accident." Claimant's Exhibit 22, p. 16.

13. In August 2005, Dr. Doerr reported that Claimant was unable to drive due to lack of feeling in his feet. On September 15, 2005, Claimant reported to Dr. Doerr bilateral lower extremity dysesthesia, forgetfulness, and urinary incontinence with dribbling, which began shortly after his visit in August. Dr. Doerr reported that Claimant had intact sphincter tone with positive active contraction and intact perianal sensation. A subsequent MRI showed no evidence of neurologic impingement and provided no explanation for Claimant's complaints of incontinence. Dr. Doerr recommended a neurologic consult.

14. In September and October, 2005, neurologist George Lyons, M.D., examined Claimant and his prior diagnostic studies and recommended further testing. Dr. Lyons subsequently performed nerve conduction and EMG tests, which suggested a very mild peripheral neuropathy and an old L4-5 radiculopathy but did not explain Claimant's complaints of incontinence. Dr. Lyons noted that some aspects of the examination appeared over-determined, with marked giveaway weakness in the lower extremities.

15. On December 8, 2005, Dr. Doerr found Claimant medically stable and rated his impairment at 12% of the whole person due to his industrial accident. He recorded that Claimant's perianal sensation was intact. On January 12, 2006, Dr. Doerr opined that Claimant could return to his pre-accident position at Home Depot with a permanent 30-pound lifting restriction and no other permanent restrictions. Claimant did not return to work.

16. On March 28, 2006, Claimant was examined at Defendants' request by a panel of physicians including orthopedist Michael Phillips, M.D., neurologist Richard Wilson, M.D., and psychiatrist Eric Holt, M.D. Claimant complained of a bilateral stocking hypesthesia in his lower extremities to the mid-calf area and some sensory alteration in his thighs bilaterally. He reported diminished sensation in the perineum and that he was able to obtain an erection normally, but not orgasm, since his 2005 surgery. He also reported memory and cognitive difficulties, which he attributed to his prescription medications. The panel reported that Claimant had adequate anal

sphincter tone and voluntary sphincter control. Dr. Holt noted that Claimant's sexual dysfunction could be a consequence of his prescription medications. The panel noted that Claimant had no alteration in bowel control and only a little bit of post-micturition dribbling. Neurocognitive testing revealed that Claimant performed above average for memory, naming, digit span, construction abilities, abstraction, similarities, judgment, and simple calculations. The panel opined that Claimant's condition was medically stable, with a 25% permanent impairment of the whole person due to his lumbar condition—12% attributable to his 2004 industrial accident and 13% attributable to his pre-existing lumbar condition. They recommended a 15-pound lifting restriction and concluded that Claimant could perform sedentary work with no prolonged standing or walking and no ladder climbing. The panel concluded that no further medical treatment was indicated. Dr. Lyons and Dr. Wilson subsequently opined that Claimant could return to work lifting 30 pounds occasionally and 15 pounds frequently.

17. Industrial Commission rehabilitation consultant Cindy Lijewski offered Claimant vocational assistance from December 2005 through May 2006. She identified several positions in which she believed Claimant was employable, but closed his file in June 2006 because he did not believe he was capable of working and was not seeking work.

18. In approximately September 2006, Claimant reported minor fecal incontinence. The Surety denied further medical treatment and Dr. Giffen referred Claimant to neurologist Patricia Oakes, M.D., at the University of Washington Medical Center.

19. On October 30, 2006, Claimant presented to Dr. Oakes and reported the onset of groin and inner thigh numbness following his 2005 surgery and the subsequent onset of progressive leg weakness. Claimant told Dr. Oakes that within the prior six weeks, he was surprised to discover a small amount of fecal material on his underwear on five or six occasions after taking a walk. He reported that his urinary incontinence had largely resolved. Dr. Oakes examined Claimant, noted that he had normal anal sphincter tone, and (after ordering and

reviewing a lumbar MRI) concluded that there was no evidence of exiting nerve root compression. Dr. Oakes reported that Claimant's various complaints displayed an "odd distribution" of pain perception. She did not find any neurological explanation for his symptoms, which she considered very difficult to connect with the history of Claimant's surgery. Dr. Oakes referred Claimant to neurourologist Claire Yang, M.D., at the University of Washington Medical Center.

20. On January 30, 2007, Claimant presented to Dr. Yang with complaints of partial sexual dysfunction and occasional mild fecal incontinence. Dr. Yang examined Claimant and performed testing, which revealed some abnormalities. Dr. Yang found lower extremity sensory loss and weakness and patchy genital sensory loss and motor loss. She was unable to elicit a bulbocavernosus reflex and found lax anal sphincter tone with weak and unsustained voluntary contraction strength. She reported a "patchy cauda equina picture...not out of the range of possible," and recorded her impression as: "lumbosacral neurologic deficits consistent with history of back pain and multiple back operations." Claimant's Exhibit 26, p. 22. Dr. Yang acknowledged that prolonged anesthesia may result in permanent mental status changes, but concluded that there was no way to prove Claimant suffered memory loss due to his seven and one-half hours under anesthesia during his 2005 lumbar fusion surgery.

21. On March 6, 2007, Claimant reported mild occasional fecal incontinence to Dr. Doerr, who opined that Claimant's incontinence complaints had not shown any obvious spinal source.

22. In November 2007, Claimant underwent a comprehensive neuropsychological evaluation by psychologist Craig Beaver, Ph.D. Dr. Beaver found that Claimant had reached maximum medical improvement and needed no neurocognitive care.

23. On June 24, 2008, Claimant was examined at Defendants' request by neurosurgeon R. Tyler Frizzell, M.D., neurologist Richard Wilson, M.D., and pulmonologist

George Pfoertner, M.D. Repeat EMG studies confirmed the prior diagnosis of an old L5 radiculopathy, most likely pre-dating the 2004 accident. Dr. Wilson found that Claimant's presentation and complaints did not display usual neurologic patterns. The panel physicians did not expressly report Claimant's anal sphincter tone, genital sensory status, or bulbocavernosus reflex. Dr. Pfoertner rated Claimant's pulmonary condition at 55% permanent impairment of the whole person. Drs. Frizzell and Wilson restricted Claimant to lifting 25 pounds occasionally and 10 pounds frequently.

24. On April 14, 2009, Claimant was examined by Kathleen Miller, M.D., who reported normal rectal tone.

25. During his deposition in October 2009, Claimant testified that he did not believe he was competitive for employment, but that within approximately two years he could brush up his engineering skills and be competitive again. Claimant's Exhibit 3, p. 40.

26. At the time of the hearing, Claimant reported bilateral foot pain, occasional acute low back pain, reduced proprioception of his lower extremities, infrequent minor urinary incontinence, and frequent minor fecal incontinence. Claimant suffers mild depression because he cannot be as active as he once was. He loves golfing, but now golfs rarely. However, he played Falcon Crest Golf Course approximately six times in 2008 and walked each time. Most days he walks approximately two to three miles on a sidewalk and uses a cane as a precaution to avoid falling. No physician has prescribed a cane.

27. Having observed Claimant at hearing and compared his testimony to the other evidence of record the Referee finds that Claimant is intellectually gifted, articulate, and a credible witness.

DISCUSSION AND FURTHER FINDINGS

28. 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).

29. **Permanent disability**. The first issue is the extent of Claimant's permanent disability in excess of impairment, including whether Claimant 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. 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. In sum, 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). Pursuant to Idaho Code § 72-422, "The proper date for disability analysis is the date that maximum medical improvement has been reached." Stoddard v. Hagadone Corp., 147 Idaho 186, 192, 207 P.3d 162, 168 (2009).

30. All parties herein agree that Claimant achieved maximum medical improvement on December 8, 2005, as found by Dr. Doerr and confirmed by the 2006 panel. To evaluate Claimant's permanent disability, several items merit examination including his permanent impairments, the physical restrictions resulting from his permanent impairments, and his potential employment opportunities—particularly as identified by vocational rehabilitation experts.

31. Permanent impairments. The parties do not dispute the extend of Claimant's permanent impairment. All parties agree that Claimant suffers a permanent impairment of 25% of the whole person for his lumbar spine, including 12% whole person impairment attributable to his 2004 industrial accident and 13% whole person impairment attributable to his pre-existing L4-5 condition. Claimant also suffers a permanent impairment of 55% of the whole person arising from the surgical removal of his left lung in 1982 and chronic obstructive pulmonary disease of his right lung. Thus Claimant's permanent impairments total 80% of the whole person as rated by Defendants' panel.

32. Pulmonary condition. Dr. Pfoertner confirmed the prior surgical removal of Claimant's left lung and also diagnosed chronic obstructive pulmonary disease of his right lung. Claimant has a history of twice yearly bronchitis and notes shortness of breath when ascending an incline or stairs. He was cautioned by his prior physician about supervising an engineering project near Challis at an elevation of 7,500 feet. Dr. Pfoertner noted that Claimant was fortunate to have had few respiratory infections and recommended close follow-up by a pulmonologist, frequent evaluations, and timely respiratory inoculations as indicated. He recorded that Claimant's wife had to walk slower in order for him to keep up.

33. Incontinence. There is no assertion or evidence of incontinence prior to the industrial accident. Claimant asserts that he suffers occasional urinary and fecal incontinence due to his industrial injury and resulting surgery. Defendants argue that the medical evidence does not support this alleged causal connection.

34. Claimant first reported to Dr. Doerr minor urinary incontinence, which began shortly after August 2, 2005. In his deposition, Claimant describes urinary incontinence of dribbling approximately twice per week. Dr. Wilson testified that the urinary incontinence that Claimant described amounted to minor post-micturition dribbling—not an abnormal occurrence for a man of Claimant's age.

35. In his October 2009 deposition, Claimant described bowel habits of a daily voluntary bowel movement followed two or three times each week by an episode of involuntary voiding a small volume of fecal matter, constituting the contents of the rectal vault, while walking. Claimant did not report fecal incontinence to the 2006 panel physicians, but reported it to Dr. Oakes in 2006, to Dr. Yang in 2007, and to the panel physicians in 2008. Dr. Wilson examined Claimant in both 2006 and 2008. He opined that the delayed reporting of fecal incontinence established that Claimant did not suffer cauda equina syndrome from his industrial accident or his 2005 surgery. Dr. Oakes reported that Claimant's complaints reflected an "odd distribution." Dr. Wilson agreed with Dr. Oakes' report that Claimant's complaints were "difficult to localize with one lesion as regions supplied included L1, L2, L4, L5, S3 and S4 bilaterally, and S1 on the right." Wilson Deposition, p. 34, ll. 13-15. He concluded this would not occur as a result of lumbar disease or surgery at L4-5. Dr. Wilson testified that the usual sequence is loss of sexual function, bladder control, and finally bowel control. He noted that the fact that Claimant has at least partial sexual function and adequate bladder control, but not bowel control, is decidedly unusual. Wilson Deposition, p. 37.

36. Surprisingly, the 2008 panel physicians did not specifically evaluate, or at least did not expressly report, Claimant's anal sphincter tone, genital sensory status, or bulbocavernosus reflex. In 2007, Dr. Yang performed the most thorough investigation and examination of Claimant's incontinence of any physician. She opined that it is "not out of the range of possibility" that Claimant's fecal incontinence is related to his fusion surgery.

Claimant's Exhibit 26, p. 22. Defendants argue that Dr. Yang did not opine that it was related to the required reasonable degree of medical probability.

37. Certainly a claimant must prove not only that he was injured, but also that the injury was the result of an accident arising out of and in the course of employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). However, magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. Jensen v. City of Pocatello, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001).

38. Dr. Yang's note of January 30, 2007, recounts Claimant's history of two microdiscectomies at L4-5 in 2000, after which he was relatively symptom-free until he fell while working at Home Depot in 2004, resulting in significant back pain and L4-5 fusion surgery in 2005 for L4-5 disc protrusion. Dr. Yang recorded that the 2005 surgery resolved Claimant's debilitating back pain, but Claimant had numbness in his groin, genitals, and anterior aspect of both thighs following surgery. She noted his report of various episodes of fecal incontinence since surgery, occasional urinary dribbling, and partial sexual dysfunction. After extensively recounting Claimant's history and symptoms, Dr. Yang assessed: "lumbosacral neurologic deficits consistent with history of back pain and multiple back operations." Claimant's Exhibit 26, p. 22. She further opined that Claimant's fecal incontinence occurs with increased intestinal motility in combination with his back condition and increased back fatigue due to walking.

39. Dr. Yang's findings, particularly that a bulbocavernosus reflex could not be elicited, objectively corroborate and explain Claimant's report of partial sexual dysfunction and

fecal incontinence. Her opinion persuasively and adequately relates Claimant's fecal incontinence and partial sexual dysfunction to his history of back pain and multiple back operations, including his 2005 lumbar surgery necessitated by his industrial accident. Dr. Yang provided no permanent impairment rating for these conditions. Nevertheless, Claimant's fecal incontinence is a factor in evaluating his permanent disability. His fecal incontinence is more than occasional minimal involuntary voiding. He minimizes incontinent episodes through an intentionally constipating diet and a daily bowel management program. His morning routine is constrained by his risk of fecal incontinence. He remains at home each morning until after his daily voluntary bowel movement to reduce the risk of embarrassment from a large incontinent episode. Thus Claimant is often not able to leave his home until 10:00 or 11:00 a.m. Even given these precautions, he still experiences two or three minor episodes of involuntary voiding each week. Claimant does not assert, and the record does not contain, any impairment rating for his fecal incontinence or partial sexual dysfunction.

40. Work restrictions. Claimant denied that his lung condition had any impact on his activities or employment. Nevertheless, Dr. Collins testified that Claimant's color did not look good after he ascended the flight of stairs to her office. Dr. Pfoertner opined that Claimant was restricted to no more than sedentary work due to his pulmonary condition. Defendants' Exhibit MM, p. 35. However, Claimant routinely lifted up to 50 pounds in his job at Home Depot before his industrial accident.

41. Several physicians have restricted Claimant's activities due to his back condition. Dr. Doerr released Claimant to return to his time-of-injury position at Home Depot with a lifting restriction of 30 pounds due to his back. Drs. Wilson and Frizzell restricted Claimant to lifting no more than 25 pounds occasionally and 10 pounds frequently and opined that Claimant could work eight hours per day with appropriate breaks. They opined that Claimant should avoid repetitive bending, stooping, and twisting. Dr. Lyons restricted Claimant to lifting no more than

30 pounds occasionally and 15 pounds frequently. Dr. Lyons opined that Claimant could work eight hours per day and should avoid bending, stooping, kneeling, and crouching. Thus, the physicians who have assessed Claimant's back condition essentially agree, and the Referee finds, that Claimant is restricted to lifting no more than approximately 25 pounds occasionally and 10 pounds frequently and that he should avoid bending, stooping, kneeling, and crouching.

42. Driving. Claimant asserts that his work-related injuries preclude him from driving because he cannot adequately feel his feet to modulate the pressure he applies to control foot pedals. Dr. Doerr opined that Claimant may have a peripheral neuropathy not related to his industrial accident or treatment therefor. Dr. Lyons opined that Claimant showed evidence of a very mild peripheral neuropathy and a possible old L4-5 radiculopathy. Dr. Wilson also found evidence of an old radiculopathy, but no neurological explanation for Claimant's complaints that he could not drive. Dr. Doerr instructed him in May and August 2006 not to drive. Dr. Doerr also issued a note in December 2007 stating that Claimant could not attend jury duty, as he had not been able to sit or drive due to his back fusion. However, it appears that no physician has permanently restricted Claimant from driving.

43. Defendants legitimately note that it is puzzling that Claimant, who walks two or three miles daily and played Falcon Crest Golf Course approximately six times the prior year, cannot operate the foot pedals of an automobile. However, even assuming that he is unable to operate a vehicle via customary foot controls, there is no indication that he could not use hand controls to operate a vehicle. Bill Jordan testified that hand controls are available starting at $379.00. All of the vocational experts acknowledged that such were readily available. Claimant acknowledged that he was aware hand controls are available and he is willing to use them, but has not done so because no one has offered them. The Referee finds that Claimant is not precluded from driving.

44. Employment opportunities. Nancy Collins, Ph.D., testified at hearing, as Claimant's vocational rehabilitation expert, that he is totally and permanently disabled from gainful employment. She noted that his lifting restrictions limit him to the sedentary to light range of employments. Dr. Collins testified that Claimant's fecal incontinence figured prominently in her conclusions. She opined that incontinence would be a difficult issue for a potential employer to accommodate and would preclude Claimant from working customary full-time hours. She also referenced Claimant's inability to drive, but later acknowledged that hand controls are a viable option for driving his own vehicle. She opined that even assuming Claimant were capable of driving, he would still not be competitive in the labor market existing at the time of the hearing. Dr. Collins noted that after his industrial accident, Claimant successfully passed the real estate licensing test and discussed working for several real estate firms, but ultimately did not pursue these leads due to his incontinence and inability to drive. She noted that he had been out of the engineering field for nearly 20 years and opined that he was not employable as an engineer, realtor, or stock trader or in any other regularly available position. She acknowledged that she did not consider unskilled positions in her analysis, but testified that she could not identify any unskilled sedentary job for which Claimant would be competitive. She considered his employability and the labor market as of the time of hearing, November 18, 2009, rather than the date Claimant reached maximum medical improvement, December 8, 2005. Dr. Collins acknowledged that Claimant has excellent communication skills and there are jobs available that he could perform, including part-time jobs, but testified that Claimant would not be competitive for them in the job market existing at the time of the hearing. She testified that if Claimant wanted to reenter the workforce, he would have been better off doing so two or three years prior to hearing.

45. Employer/Surety's vocational expert, Douglas Crum, concluded that Claimant is not totally and permanently disabled, but rather capable of gainful employment. Crum testified

that his interview with Claimant and Claimant's work history with Morrison Knudson demonstrate that Claimant is very bright, very articulate, very good with people, quick to learn, has excellent math and computer skills, and commands a wide range of knowledge. Crum testified of several engineering openings in the Boise area. He testified that hand controls are regularly used to operate a vehicle by those with lower extremity sensory or strength problems. He noted that Claimant had probably been limited to medium-duty work following his 2000 lumbar surgeries by Dr. Verska.

46. Crum testified that, applying the restrictions imposed by Dr. Lyons, Claimant would have a permanent disability of 40%, including his permanent impairment, and that applying the restrictions imposed by Drs. Wilson, Doerr, Frizzell, and Pfoertner, Claimant would have a permanent disability of 26%, inclusive of his impairment. Crum Deposition, p. 19. Crum opined that Claimant's incontinence was a moderate issue that, based on the rate of occurrence and the fact that it seemed to be related to long walks, was of limited vocational significance. Crum testified that the current economic climate was the worst he had seen and that in 2005, construction was strong and the rate of unemployment was much lower.

47. ISIF's vocational expert, William Jordan, concluded that Claimant is capable of gainful employment and is not totally and permanently disabled. Jordan testified that Claimant's pre-existing back and lung conditions were not an obstacle to his employability prior to his industrial accident. Jordan noted that no physician had restricted Claimant from driving and that hand controls for driving were available starting at about $379.00. Jordan noted that Claimant was receiving nontaxable Social Security retirement benefits of $1,053.00 per month, which was nearly comparable to his after-tax earnings at Home Depot. Jordan concluded that this provided a disincentive for Claimant to seek other employment. Jordan testified that Dr. Doerr approved Claimant's return to work at Home Depot at his time-of-injury job, modified by a 30-pound lifting restriction. He testified that Claimant was a highly skilled professional and capable of

learning skilled, semi-skilled, and unskilled jobs. He opined that Claimant could work as a professional golfer, parking lot attendant, telephone operator, collector, telemarketer, computer operator, drafter, cost estimator, construction manager, home improvement sales associate, and account sales representative. Jordan testified there were telemarketer positions available in the area. Jordan also testified that Claimant's employment opportunities would have been much better in late 2005 and early 2006 than at the time of the hearing and that Claimant would certainly have been able to locate suitable employment at that time.

48. The opinions of Crum and Jordan treat lightly the impact of Claimant's fecal incontinence on his vocational opportunities—seeming to conclude that the use of Depends would nullify the effects of any incontinent episodes. Nevertheless, Crum and Jordan both opined persuasively that Claimant is employable and not totally and permanently disabled. Both indicated that a variety of positions would largely restore Claimant's earnings from his part-time time-of-injury job at Home Depot. As noted, Crum opined that Claimant sustained permanent disability of 26 to 40%, inclusive of his impairment. Crum apparently referred to Claimant's lumbar impairment of 25% of the whole person and did not include in his calculations Claimant's 55% whole person impairment due to his pulmonary condition. Considering Claimant's back and pulmonary condition, and applying Crum's conclusions, Claimant would sustain disability beyond his impairment of from 1 to 15%, which equates to 81 to 95% permanent disability inclusive of his 80% whole person impairment.

49. Claimant has a valid engineer's license, but has been out of the engineering field for approximately 18 years. The record establishes that Claimant planned to return to engineering, but needed time to familiarize himself with major changes in structural engineering codes and practices. For this reason he elected part-time employment at Home Depot in 2001. He is not competitive for engineering positions without extensive review and perhaps as much as two years of formal university classes.

50. Significantly, Claimant's disability must be evaluated at the time he reached maximum medical improvement—which all parties agree was December 8, 2005—and not at the time of the hearing in November 2009. See Stoddard v. Hagadone Corp., 147, Idaho 186, 207 P.3d 162 (2009). All of the vocational experts agree that the economy and labor market at the time of the hearing were the worst they had seen, far worse than in late 2005 and early 2006. All of the vocational experts—Jordan, Crum, and even Dr. Collins—agree that Claimant would have had a better chance of reentering the work force in 2005 or 2006, when he reached maximum medical improvement, rather than at the time of the hearing. Jordan and Crum testified of jobs within Claimant's restrictions that Claimant could have obtained in 2005 or 2006. The records of Industrial Commission rehabilitation consultant Cindy Lijewski identify several positions in which she believed Claimant was employable between December 2005 and June 2006. Even Claimant's vocational expert, Dr. Collins, conceded that there were jobs for which Claimant might have been considered before the current economic downturn. When cross-examined by Employer/Surety's counsel, Dr. Collins testified as follows:

> Q. I wanted to explore one area with you that's come up two or three times at least and that is the current status of the labor market, which, as I understand it, is about as bad as it's been in recent memory; correct?
>
> A. Well, I have been doing this for 25 years and I have never seen it.
>
> Q. Okay. To what extent does the current economic downturn contribute to your opinion that Mr. Brown is not employable?
>
> A. Well, I think that – that what it does is it – employers are not – they are not hungry for employees. You know, there are – typically, there are occupations where there is really high turnover and it's hard to find people to fill those jobs. I think if the economy were in a better position, those were the kind of things that he might be considered for, are those, you know, jobs like a greeter at Wal-Mart or, you know, fast food kinds of things or those jobs that are hard to fill, I think he would – you know, they would be more willing to accommodate him.

Transcript, p. 189, l. 20–p. 190, l. 15. Dr. Collins' conclusion that Claimant was not competitive for employment at the time of the hearing is thus not altogether persuasive.

51. Based on Claimant's impairment ratings totaling 80% of the whole person, his permanent physical restrictions and fecal incontinence, and considering his non-medical factors including his age of 56 at the time of the accident, demonstrated intellectual capacity, extensive education, work and managerial experience, many years away from the engineering profession, part-time earnings at Home Depot at the time of the accident, and compromised ability to return to his previous position at Home Depot, Claimant's ability to engage in regular gainful activity has been reduced. The Referee concludes Claimant has established a permanent disability of 95%, inclusive of his 80% whole person impairment. The clear weight of the evidence establishes that all of Claimant's disability in excess of impairment is attributable to his industrial accident.

52. Odd-lot**.** A claimant who is not 100% permanently disabled may still 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).

53. 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).

54. In the present case, Claimant has testified of one failed work attempt at Home Depot since his 2004 industrial injury. This lone attempt does not sufficiently prove that he attempted other types of employment without success. Claimant has not presented evidence of a serious but unsuccessful work search. He has presented Dr. Collins' expert opinion that he is totally disabled, thus inferring that it would be futile for Claimant to look for work. However, as noted above, Dr. Collins' opinion in this regard is not persuasive as it evaluates Claimant's employability at the time of hearing, nearly four years after the time he reached maximum medical improvement. Dr. Collins herself conceded that Claimant might have been competitive for employment prior to the economic downturn. Even assuming that Claimant had established a prima facie odd-lot case, Jordan and Crum have persuasively testified that there were jobs available in the 2005-2006 labor market which Claimant could have performed and for which he was competitive. Claimant has not proven that he is totally and permanently disabled pursuant to the odd-lot doctrine.

55. **ISIF liability**. Idaho Code § 72-332(1) requires a finding that Claimant suffers total and permanent disability before the ISIF may be potentially liable. Claimant has not proven total and permanent disability, thus the ISIF has no liability in the present case.

56. **Carey apportionment.** The issue of apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984), is moot.

57. **Additional medical benefits.** The final issue is whether Claimant is entitled to additional medical benefits pursuant to Idaho Code § 72-432, including payment for various prescription medications after September 2006 and for examinations by Drs. Oakes and Yang.

58. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989). For the purposes of Idaho Code § 72-432(1), medical treatment is reasonable if the employee's physician requires the treatment and it is for the physician to decide whether the treatment is required. Mulder v. Liberty Northwest Insurance Company, 135 Idaho 52, 58, 14 P.3d 372, 402, 408 (2000). Of course, the employer is only obligated to provide medical treatment necessitated by the industrial accident. The employer is not responsible for medical treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997).

59. The Surety denied Claimant further medical treatment by mid-2006; however, his intermittent incontinence and partial sexual dysfunction persisted. Thereafter, Claimant's family physician, Dr. Giffen, referred Claimant to Dr. Oakes, who referred him to Dr. Yang for these concerns. Defendants argue that Claimant has not shown that these medical expenses are related to his industrial accident. However, as noted above, Dr. Yang's opinion persuasively relates the complaints which prompted Claimant to seek further medical care from Dr. Oakes and Dr. Yang to his back pain and multiple back surgeries, necessarily including his 2005 lumbar fusion surgery in consequence of his industrial accident. Claimant is entitled to additional medical benefits for medical expenses associated with his visits to Drs. Oakes and Yang.

60. Claimant also seeks reimbursement for medications including Neurontin, Lyrica and Cymbalta prescribed by Dr. Lyons and by his family physicians, Drs. Giffen and Miller. Defendants acknowledge that Dr. Lyons was Claimant's treating neurologist for a time. However, Defendants contend that Claimant is not entitled to reimbursement for medications prescribed after he reached medical stability and that the medications for which Claimant seeks reimbursement were prescribed for peripheral neuropathy, a condition not shown to be related to his industrial accident. Claimant's mild peripheral neuropathy has been documented by several physicians. However, none persuasively relate this condition to his industrial accident. Claimant has not shown his entitlement to additional medical benefits for prescriptions for treatment of his peripheral neuropathy.

CONCLUSIONS OF LAW

1. Claimant has proven that he suffers permanent disability of 95%, inclusive of his 80% permanent impairment. All of Claimant's disability in excess of impairment is attributable to his industrial accident. He has not proven that he is totally and permanently disabled pursuant to the odd-lot doctrine.

2. The ISIF is not liable pursuant to Idaho Code § 72-332.

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

4. Claimant has proven his entitlement to additional medical benefits for medical expenses associated with his visits to Drs. Oakes and Yang. He has not proven his entitlement to any other medical benefits currently.

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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:

DANIEL A MILLER
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sc _/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY BROWN, Claimant, v. THE HOME DEPOT, Employer, and AMERICAN HOME ASSURANCE COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2004-001660** **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 proven that he suffers permanent disability of 95%, inclusive of his 80% permanent impairment. All of Claimant's disability in excess of impairment is attributable

to his industrial accident. He has not proven that he is totally and permanently disabled pursuant to the odd-lot doctrine.

2. The ISIF is not liable pursuant to Idaho Code § 72-332.

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

4. Claimant has proven his entitlement to additional medical benefits for medical expenses associated with his visits to Drs. Oakes and Yang. He has not proven his entitlement to any other medical benefits currently.

5. 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

__Com. Baskin recused himself_____
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:

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sc _/s/_____