BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STEVEN RAY BRUSSEAU, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)	**IC 2007-029200** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed December 15, 2011

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Rinda Just. On May 20, 2011, the matter was re-assigned to the Commissioners. The Commissioners conducted the June 8, 2011, hearing in Coeur D'Alene, Idaho. Joseph Jarzabek represented Claimant. Thomas W. Callery represented the Industrial Special Indemnity Fund (ISIF). The parties presented oral and documentary evidence at the hearing, and subsequently submitted post-hearing briefs. The case came under advisement on November 1, 2011. It is now ready for decision.

ISSUES

After due notice and by agreement of the parties at hearing the issues are:

1. Whether Claimant suffered an injury from an accident arising out of and in the course of employment;

2. Whether Claimant is totally and permanently disabled;

3. Whether the Industrial Special Indemnity Fund is liable under Idaho Code § 72-332; and,

4. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

The parties agree that Claimant sustained an injury to his lower back on August 16, 2007, which necessitated a left L5-S1 laminotomy and microdiskectomy. Claimant argues he is totally and permanently disabled due to the combined effects of the August 16, 2007 low back injury and his pre-existing back and knee conditions. Following his release in 2008, Claimant could neither obtain employment nor return to his time-of-injury employer. Claimant's knee deteriorated, necessitating a total knee replacement in 2009. The expert testimony of Dr. Christina M. Rust-Hefley and Dr. Mary Barros-Bailey satisfies the elements of ISIF liability.

Defendant argues that February 2008 is the operative date for the Commission's evaluation of Claimant's disability. In 2008, Claimant was released with a 30-pound lifting restriction and could have returned to employment. However, Claimant failed to seek employment following his release, or cooperate with the Industrial Commission Rehabilitation Division. The Commission must not reward Claimant's inaction. While Defendant concedes that Claimant is now totally disabled according to Dr. Rust's 2010 functional capacity evaluation and Dr. McNulty's 2011 IME, Claimant's disability claim must relate back to his date of medical stability from the 2007 accident. In the event that the Commission finds Claimant totally and permanently disabled, Defendant argues that Claimant has not satisfied the "combined" requirement of ISIF liability.

EVIDENCE CONSIDERED

The record in this instant case consists of the following:

1. Oral Testimony at hearing by Claimant, Dr. Mary Barros-Bailey, Tori Cook and Dr. Nancy Collins;
2. Claimant's Exhibits 1 through 47 admitted at hearing;

3. Defendant's Exhibits A through F; and,

4. The Commission's legal file.

After having fully considered the above evidence and arguments of the parties, the Industrial Commission hereby issues its decision in this matter.

FINDINGS OF FACTS

1. Claimant was 59 years old at the time of hearing and 55 years old at the time of his August 16, 2007 industrial accident. Claimant resided in the small community of Santa, Idaho at the time of industrial accident. Two months before the hearing, Claimant's wife died, and Claimant moved to Fernwood, Idaho, to live at his mother's residence.

2. Claimant is a high-school dropout, who obtained his GED when he was 30. Claimant's early work history is dominated by heavy duty work in the logging industry. Following a 1992 industrial accident, Claimant left the logging industry and transitioned into less strenuous work. Before his last job, Claimant dabbled in restaurant management and food service, but primarily worked in the truck driving industry. A 1996 industrial accident prompted his exit from the trucking industry.

3. Claimant obtained his time-of-injury position as a highway technician with the Idaho Transportation Department in 1998 and worked until 2008. Claimant was based out of St. Maries, Idaho, with an 18-mile commute. Claimant then transferred to Santa, Idaho, with a two-mile commute. Claimant's responsibilities as a highway technician included maintaining trucks and highways, filling potholes, cutting brush along the road, removing carcasses, paving, and running equipment, including graders, front-end loaders, brooms and sweepers.

4. On August 16, 2007, Claimant injured his low back while lifting ramps on an equipment trailer. Claimant notified his employer of the accident, and received medical

treatment once his symptoms progressed. Claimant's resultant injury was a herniated disk at L5-S1. Dr. Dirks performed a diskectomy on September 24, 2007. C. Exh. 8, p. 63. There is no controversy over the occurrence of this low back accident or Claimant's medical treatment.

5. J. Craig Stevens, M.D., found Claimant at MMI from his low back injury on February 27, 2008. Dr. Stevens proposed a 4% PPI rating after apportionment for preexisting conditions under the ROM method of the *AMA Guides to the Evaluation of Permanent Impairment*, Fifth Edition, and imposed a 30-pound lifting restriction to reduce the risk of future injury. Dr. Stevens attributed the lifting restriction completely to Claimant's lumbar degenerative disk disease rather than the industrial accident. Dr. Stevens suspected symptom magnification by Claimant, but the record is void of any other relevant evidence of malingering.

6. Claimant received follow-up care with Bret Dirks, M.D., who released Claimant to work on March 6, 2008, with a permanent 30-pound lifting restriction. Dr. Dirks suggested that Claimant would be a great candidate for retraining. Thereafter, Claimant continued in a physical therapy program under the direction of Dr. Dirks.

7. The Commission finds that Claimant's date of medical stability from his accident is February 27, 2008, the date of Dr. Stevens' IME. There was no event of significance between February 27, 2008 and March 6, 2008, which would alter the finding of Claimant's date of medical stability. As early as February 13, 2008, Dr. Dirks was supportive of releasing Claimant back to light duty work, but recommended a 20-pound restriction until Claimant completed his work hardening program.

8. On October 30, 2008, Dr. John McNulty performed an IME. Dr. McNulty's findings echo those from Drs. Dirks and Stevens—that Claimant was stable from the August 16, 2007 accident, and should abide by a 30-pound lifting restriction. Dr. McNulty gave a 13% PPI

rating under the DRE method using the Fifth Edition of the *AMA Guides to the Evaluation of Permanent Impairment*. Dr. McNulty made his PPI rating based on the representations that Claimant's 1992 impairment rating did not include the lower back and that Claimant had not had any previous medical treatment for his lower back. In the alternative, Dr. McNulty supported the usage of the ROM method that Dr. Stevens employed, without any apportionment, to find a 7% PPI rating.

9. Claimant's restrictions precluded his return to his time-of-injury employer. Feeling unsuited to perform any jobs available, Claimant did not seek other employment, and retired from state employment.

10. Following his August 2007 accident, the State Insurance Fund referred Claimant to the Industrial Commission's Rehabilitation Division. Consultant Teresa Reed was assigned the case on October 25, 2007. Ms. Reed contacted Employer and Claimant early in November, and conducted a job site evaluation. Ms. Reed stayed apprised of Claimant's medical treatment and condition. On February 21, 2008, Ms. Reed learned from employer that it was considering a medical layoff, because Claimant had exceeded the six-month time limit for off-duty status. On March 19, 2008, Ms. Reed learned that Claimant had taken a medical retirement. On April 3, 2008, Ms. Reed spoke with Claimant by phone, and noted that he was not interested in pursuing employment at that time, and was considering retirement. On June 10, 2008, Ms. Reed officially closed Claimant's file, because Claimant was not interested in pursuing employment.

11. Claimant denies telling Ms. Reed that he was not interested in seeking employment. While Claimant vaguely recalls a work-site visit, Claimant cannot recall most of the events from Ms. Reed's notes.

12. Claimant and Employer entered into a lump sum settlement agreement (LSSA) on December 16, 2008. The LSSA purports to pay Claimant a 4% PPI rating, and additional consideration ($40,150.00) for "unapportioned disputed impairment and additional disability benefits at 25% whole person at 125 weeks at $321.20 per week." C. Ex. 33 (noted as C. Ex. 32 on Index).

Previous accidents and pre-existing impairments

13. Claimant has multiple previous industrial accidents and injuries: a 1989 bilateral carpal tunnel injury, a 1992 neck and low back injury, a 1995 neck and low back injury, a 1996 slip and fall injury to his neck, back and shoulders, a 1996 motor vehicle accident, a neck injury in 2005, and two separate left knee injuries in 2004 and 2006. The relevant previous industrial accidents Claimant argued to meet the "combination" requirement of ISIF liability are Claimant's 1992 (back), 2004 and 2006 (left knee) accidents/injuries.

14. Claimant injured his wrists in 1989, and received the diagnosis of bilateral carpal tunnel syndrome. Claimant underwent a prolonged course of rehabilitation and treatment before having carpal tunnel release surgery. Claimant received a 11% PPI rating, and returned to work in February 1990. (D. Ex. D. p., 455).

15. On August 7, 1992, Claimant was hit in the back by a tree snag (dead tree) while logging. Claimant injured his neck, low back and left lower extremity, and aggravated his degenerative disk disease at L5-S1, L4-5, and C5-6. Drs. Harvey DeWitt and Frank Emmons gave Claimant a 13% PPI rating with 50% apportioned to pre-existing conditions.

16. Claimant's initial restrictions from the 1992 accident were no repetitive bending and lifting over 30 pounds, occasional bending, stooping, crouching, kneeling and lifting, pushing 59 pounds, pulling 104 pounds, frequent squatting, crawling, stairs and balance, sitting

three-four hours a day, and standing for five to six hours a day. Claimant did not abide by these restrictions. The parties settled the 1992 claim, approved on October 13, 1992.

17. Claimant filed an industrial claim on January 19, 1995, after he felt pain in his low back when taking tire chains off a truck. On June 5, 1995, Claimant's skidder truck struck a tree, causing a rotation injury to his cervical and dorsal spine. Dr. Richard T. Knoebel performed an independent medical exam on October 27, 1995. Dr. Knoebel felt that Claimant's subjective complaints outweighed the objective findings, and that such amplification of symptoms was on a conscious or unconscious basis. Claimant did not receive any impairment for these incidents. Dr. Knoebel concluded that Claimant should be restricted from lifting a maximum of 30-pound lifting, and pushing/pulling 60 pounds.

18. On March 5, 1996, Claimant slipped while shoveling, and fell on his neck, back and shoulders. Claimant was released without any restrictions or impairment connected to this accident.

19. On September 27, 1996, Claimant was involved in a motor vehicle accident that resulted in a fatality. Claimant watched his logging truck crush the other party to the accident, and suffered post-traumatic stress disorder, in addition to back sprain (cervical and lumbar), and musculoskeletal pain. Claimant received medical and psychological treatment. The psychological panel IME confirmed post-traumatic stress disorder, but found Claimant difficult to assess due to exaggerated psychological complaints. After reviewing Claimant's MRI and CT reports, Dr. Stephen R. Sears found surgery inappropriate for his condition. On April 30, 1997, Claimant was stable, and released without formal restrictions and 0% impairment. Claimant chose not to return to the trucking industry.

20. Claimant suffered his first left knee injury on December 8, 2004, when he slipped on ice and twisted his knee. On February 15, 2005, Claimant had a left knee arthroscopic partial medial and lateral meniscectomy, as well as debridement. Dr. McNulty found Claimant's left knee fixed and stable as of April 26, 2005, and issued a 4% PPI rating.

21. Claimant injured his neck while picking up a deer carcass off the road. Claimant's diagnosis was neck strain on July 27, 2005. By December 1, 2005, Claimant was doing well, and reported little to no neck pain. Claimant did not receive an impairment rating, and returned to work.

22. On April 28, 2006, Claimant stumbled and injured his left knee. Again, surgery on Claimant's left knee was warranted to alleviate Claimant's symptoms. Dr. McNulty performed a left knee arthroscopic partial medial and lateral meniscectomy on August 29, 2006. Dr. McNulty issued a 4% PPI rating, but later attributed the entire rating to preexisting conditions. Claimant returned to work with a full release on November 6, 2006. Despite the full release, Claimant testified that his knee hindered the performance of his job responsibilities, and required pain management with cortisone shots.

23. Claimant's other non-industrial medical issues include diabetes, heart fluttering, and carpal tunnel, which have not impacted his employability.

Credibility

24. After observing Claimant at hearing, the Commission finds his presentation believable. The Commission finds the contemporaneously recorded ICRD notes more persuasive than Claimant's recollection.

Claimant's Condition Post-MMI

25. Following his February 27, 2008 date of medical stability, Claimant's left knee continued to deteriorate. On September 30, 2008, Claimant complained to Dr. McNulty that he had been experiencing left knee pain for several months. Dr. McNulty assessed osteoarthritis, and recommended knee injections for the pain. Claimant's left knee x-rays, reviewed October 14, 2008, demonstrated moderate degenerative changes.

26. Claimant's left knee complaints increased in intensity and frequency. By March 31, 2009, Dr. McNulty recommended a left total knee replacement, which Dr. McNulty performed on May 5, 2009. Following this surgery, Claimant had multiple physical therapy sessions.

27. Deborah Moore, RPC, Benewah Community Hospital, submitted a Functional Capacity Evaluation on July 20, 2009 (2009 FCE), shortly after Claimant's total knee replacement surgery.

- **Climbing**: Patient able to do 18 steps up and down stairs. Complained of low back pain and some pain in left knee.
- **Activity Tolerance**: Pain pre-test was 2/10. Post-test was 6/10. Patient needs frequent rests during all activities, with complaint of increasing pain during each activity.
- **Balance**: Sitting and Standing are normal. Patient is able to balance on one leg for 5 seconds on (left) and 20 seconds on (right).
- **Stooping/Crouching**: Patient is able to stoop down 27 times with pain level at 4/10 to start, 6/10 at the end of the test. Test was for 1 minutes [sic] and 15 seconds, patient requested to stop. Patient was using parallel bar for assist during this part of test.
- **Kneeling**: Patient unable to kneel currently, secondary to knee surgery.
- **Sitting**: Patient is able to tolerate about ½ hour before he has to get up and change positions. Complains of pain in neck and back. He states level at 5/10 when he has to sit longer.
- **Standing**: Patient tolerated 2 minutes before needing to sit and rest legs.
- **Walking**: Patient has slight limp on left side during ambulation, uses straight cane. He is able to walk nonstop for 3 minutes before needing to rest left lower extremity. Complains of back pain and knee pain.
- **Driving**: Patient states "I am able to drive. Occasionally, I need to stop and get out and walk around."

D. Ex. D., p. 595.

28. Claimant filed for Social Security Disability on March 11, 2010, and qualified for back-due benefits starting March 2009.

29. Claimant returned to Dr. Dirks in 2010, with increased complaints of left knee and low back problems. Dr. Dirks recommended injections to treat Claimant's pain.

Functional Capacity Evaluation

30. On October 1, 2010, Claimant underwent an FCE with Christina Rust-Hefley, Doctor of Physical Therapy. Dr. Rust's FCE findings show Claimant was significantly limited, and unable to access light, medium of heavy duty categories, as defined by the Social Security Administration. Claimant scored poorly under every testing modality. Claimant could not lift any weight from the floor to his waist, could only lift a maximum of 30 pounds six inches from his waist, and 15 pounds from his waist to overhead. Claimant had difficulty sitting for 11 minutes, standing in one place for 6 minutes and 20 seconds, and showed obvious discomfort. Claimant was unable to walk continuously for longer than 2 minutes and 23 seconds at a pace of 1.4 mph. Further, Claimant was unable to climb a ladder, crouch, kneel, and was very limited in turning/twisting, stooping, bending, balancing, and walking up stairs or steps. Claimant's flexibility testing and back fitness testing ranked very poorly. The total combined time Claimant spent on his feet during the FCE was 2 hours and 47 minutes. Dr. Rust found that Claimant's presentation was consistent and reliable with his reports of pain, and that Claimant exhibited maximum effort during the FCE.

2011 Independent Medical Exam

31. Dr. McNulty performed an IME in 2011. Dr. McNulty opined that Claimant's left knee condition was consistent with progressively worsening osteoarthritis. Dr. McNulty

concurred with the 2010 FCE findings, discussed above. Dr. McNulty supported a 20-pound lifting restriction on Claimant due to left lower extremity weakness and low back pain. Claimant was unable to crawl or kneel. Dr. McNulty found that continuous sitting and standing should be limited to 15 minutes at a time, with frequent stretching and position changes to alleviate low back pain. Based on Claimant's restrictions, Dr. McNulty opined it would be difficult for Claimant to find gainful employment.

Vocational Rehabilitation Experts

32. Dr. Mary Barros-Bailey testified in support of Claimant, and Dr. Collins testified in support of Defendant. Both experts' qualifications are well known to the Commission, and will not be repeated here. There is little disagreement that Claimant's restrictions and abilities, as defined by the 2010 FCE and Dr. McNulty's 2011 IME, render Claimant totally and permanently disabled. However, the experts diverge on what the Commission should consider as the appropriate restrictions and labor market to evaluate Claimant's disability. Dr. Barros-Bailey has included the 2010 FCE restrictions and the 2011 IME restrictions, while Dr. Collins excluded restrictions given after Claimant's 2008 release to medical stability. Within the parameters of Claimant's 1992 and 1995 restrictions, Dr. Barros-Bailey found the Claimant's 1995 IME failed to capture the details of Claimant's 1992 lifting restrictions and overstated Claimant's capabilities, while Dr. Collins found Claimant's restrictions consistent from 1992 until 2008, i.e., that Claimant should avoid lifting over 30 pounds. Both experts reviewed Claimant's relevant past medical records and testified at hearing.

Dr. Barros-Bailey

33. Dr. Barros-Bailey found Claimant totally disabled, and that Claimant's preexisting low back and knees combined with his last industrial accident to render him totally

disabled. As a foundation, Dr. Barros-Bailey reviewed the 1992 restrictions from the tree snag accident, the 1995 cervical injury restrictions, and the 2008 restrictions from the last accident, the 2010 FCE report, and the 2011 IME from Dr. McNulty.

Claimant's Restrictions from 1992-2008

34. Following his 2008 release, all physicians evaluating Claimant agreed on the restriction of "no lifting over 30 pounds" to prevent further injury to Claimant's back. There is some controversy over Claimant's 1992 restrictions. Dr. Barros-Bailey argued that Claimant's restrictions from the 1992 accident were no repetitive bending and lifting over 30 pounds, occasional bending, stooping, crouching, kneeling and lifting, pushing 59 pounds, pulling 104 pounds, frequent squatting, crawling, stairs and balance, sitting three-four hours a day, and standing for five to six hours a day. Hr. Tr., p. 32. Dr. Collins took the approach that Claimant's restrictions have been consistent from 1992 to 2008—no lifting over 30 pounds.

35. Dr. Barros-Bailey criticizes Dr. Knoebel's 1995 review of Claimant's restrictions for omitting Claimant's additional 1992 restrictions.

> A. So we go from there [1992 restrictions] to cervical injury in the mid 90s. June 5 of '95. Dr. Knoebel then looks back to the record, and his opinion is on 10-27-95. Looks back to the record, and assumes that 30 pounds is a maximum instead of repetitive and carries that forward saying that the pre-existing limitations were 30 pounds maximum. 60 pounds pushing and pulling. Sitting and standing were three of four hours a day, with occasionally bending, stooping, kneeling, crawling and overhead. There was frequent or repetitive hand and arm and then constant grasping.
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> And then we go from there to the next set of limitations would be, you know, the most recent, the L5-S1, '07 injury. And we have Dr. Stevens at 30 pounds, we have Dr. Dirks at 30 pounds, we have Benewah Community Hospital at 30 pounds.
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> Hr. Tr. p. 32/19-33/9.

36. Dr. Knoebel performed an IME of Claimant on October 27, 1995. Dr. Knoebel also reviewed Claimant's medical records and surveillance footage. At that time, Claimant's job

site evaluation required Claimant to lift 50 pounds rarely, 35 pounds occasionally, stand and walk 2 to 4 hours per day, occasional squats, kneels, climbs and bends, continuously grasps and pushes and pulls up to 100 pounds. Based on Claimant's exam, Dr. Knoebel concluded that Claimant should be restricted from lifting a maximum of 30-pound lifting and pushing and pulling 60 pounds. C. Ex. 15.

37. Dr. Knoebel's restriction of no lifting over 30 pounds is more stringent than no repetitive bending and lifting over 30 pounds, but does omit the positional restrictions listed above. As to the balance of these 1992 restrictions, Dr. Barros-Bailey did not explain how her view of the 1992 restrictions changes Claimant's employability at his date of medical stability in 2008. When pressed on cross-examination about Claimant's employability in 2008, Dr. Barros-Bailey acknowledged that her study did not apply the 2008 restrictions to the labor market. The Commission finds parsing of the 1992 restrictions unhelpful because Dr. Barros-Bailey's final conclusions are predicated on the 2010 FCE and 2011 IME restrictions, and Claimant exceeded all of the 1992 restrictions Dr. Barros-Bailey identified until his 2007 accident.

38. The 2010 FCE and 2011 IME restrictions depict Claimant as unable to walk or sit for brief periods of time, much less return to medium-duty employment. Under those restrictions, Claimant could access "light" category jobs from the United States Department of Labor Dictionary of Occupational Titles.

39. Dr. Barros-Bailey defined Claimant's reasonable labor market as Santa; Clarkia, Fernwood, St. Maries, Harvard and Bovill. Dr. Barros-Bailey showed a thorough understanding of the distance and travel time to these communities. Communities with a drive-time exceeding 45 minutes, such as Worley, were outside Claimant's labor market. Dr. Barros-Bailey then conducted a census of the jobs in those communities, and found Claimant unable to access any

positions due to his restrictions, and the combined interactions of Claimant's preexisting back and knee issues with his current condition.

40. Thus, according to Dr. Barros-Bailey, Claimant's isolated geographic community and restrictions eliminated his employment opportunities and satisfied the elements of ISIF liability.

41. Tori Cook, Claimant's friend and resident of St. Maries, Idaho, provided lay testimony that there are no jobs available for Claimant in the labor market.

Dr. Nancy J. Collins

42. Dr. Nancy J. Collins, Defendant's expert, premised her evaluation on Claimant's restrictions on Claimant's date of medical stability in 2008. Dr. Collins reviewed Claimant's employment history and medical records, and met with Claimant in 2010. Per Dr. Collins, Claimant presented extremely well and did not display any pain behaviors—a striking difference from Claimant's presentation during his 2010 FCE. Dr. Collins conceded that the 2010 FCE and 2011 IME present Claimant as unable to find employment, even in the larger geographic area she identified for his job market.

43. Claimant's 30-pound lifting restriction leaves Claimant access to light, sedentary, and even some medium-level jobs. For example, Claimant could have access to work as a cook, a food preparation worker, a cashier, a retail clerk, a bus driver, a shuttle driver, and customer service jobs. Dr. Collins found these retail, cashiering and customer service jobs consistently available in Claimant's labor market.

44. Dr. Collins defined a larger reasonable labor market than Dr. Barros-Bailey, and included the community of Worley. Residents of small communities are accustomed to longer commutes, and Claimant briefly worked in Worley before his time of injury job with the State of

Idaho. While Dr. Collins omitted drive-time from her analysis, Claimant did not have the sitting/standing difficulties or restrictions in 2008. Likewise, Claimant's restrictions have not substantially changed since 1992, and Claimant has always secured employment in his limited labor market.

45. Thus, Dr. Collins concluded that Claimant was not totally and permanently disabled on February 27, 2008, the date of stability from his 2007 low back accident.

DISCUSSION

46. Claimant argues that his preexisting knee and low back injuries combine with his 2007 low back injury to render him totally and permanently disabled. In this case, Claimant has three relevant preexisting conditions—his 1992 back injury, and his 2004 and 2006 left knee injuries. Claimant was released with restrictions from his 1992 accident, and given an impairment rating of 6.5%. Claimant was found stable from his first left knee injury on April 26, 2005, with a 4% PPI rating, and stable from his second left knee injury on November 6, 2006, with all impairment related to preexisting conditions. Claimant returned to work and performed his job duties satisfactorily. Following Claimant's last accident in 2007, three physicians found Claimant stable in 2008, released Claimant to work, and agreed on a 30-pound lifting restriction.

47. Idaho Code § 72-332(2) provides that ISIF is liable for the remainder of an employee's income benefits, over and above the benefits to which an employee is entitled solely attributable to an industrial injury, when the industrial injury combines with a preexisting permanent physical impairment to result in total and permanent disablement of the employee. In Dumaw v. J. L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court listed four requirements a claimant must meet to establish ISIF liability under Idaho Code § 72-332:

(1) Whether there was indeed a preexisting impairment;

(2) Whether that impairment was manifest;

(3) Whether the alleged impairment was a subjective hindrance to employment; and

(4) Whether the alleged impairment in any way combines with the subsequent injury to cause total disability.

48. Claimant must establish that he is totally and permanently disabled, *and* that he satisfies the four requirements from the Court in Dumaw v. J.L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990). Assuming that the Commission finds Claimant totally and permanently disabled, the parties only dispute the "combined with" factor of ISIF liability.

49. The matter turns on the appropriate point to evaluate Claimant's disability. Claimant argues that the progressive nature of his knee problem should prompt the Commission to look beyond his date of medical stability in 2008.

50. Under Idaho Code § 72-423, permanent disability is measured on the claimant's actual or presumed ability to engage in gainful activity because of permanent impairment, with no fundamental or marked change in the future. It follows that permanent disability cannot be evaluated until maximal medical rehabilitation has been achieved and any remaining abnormality or loss is stable. Reynolds v. Browning Ferris Industries, 113 Idaho 965, 968, 751 P.2d 113, 116 (1988). It is impossible to correctly predict prior to maximal medical rehabilitation whether, and to what extent, a loss will be permanent or only temporary. *See*, Colpaert v. Larson's Inc., 115 Idaho 825, 771 P.2d 46 (1989). The appropriate date for a disability analysis is the date on which maximum medical improvement has been reached. Stoddard v. Hagadone Corp., 147 Idaho 186, 207 P.3d 162 (2009).

51. In Colpaert, *supra*, the Court considered how physically progressive conditions, which by definition are unstable and changing, should be evaluated for impairment ratings in an ISIF case. ISIF argued that the claimant's progressive condition could not satisfy the definition of a permanent physical impairment under Idaho Code § 72-332, and therefore, the progressive condition could not be a preexisting condition for ISIF liability. The Court rejected ISIF's argument. The Court held that progressive conditions could be the basis for an impairment rating, and ISIF liability, but noted that the impairment rating needed to be made at a specific point in time.

> The rating of the permanent physical impairment is made at a point in time just prior to a claimant's industrial accident or injury. In other words, the rating is made, based on expert testimony, **at a specific point in time**. Thus, whether the condition is progressive or not does not impact this rating and the income benefits which flow from it.
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> Colpaert v. Larson's Inc., 115 Idaho 825, 771 P.2d 46 (1989). (Emphasis in original)

The Court reiterated its acceptance of Colpaert v. Larson's Inc., *supra*, in Smith v. J.B. Parson Co., 127 Idaho 937, 908 P.2d 1244 (1996). Accordingly, disability is to be assessed as of the date of medical stability following the work accident. Preexisting impairment for a progressive disease or condition is to be assessed as of the date of the subject industrial injury.

52. Claimant's request to have the condition of his knee in 2010 and 2011 considered in his disability analysis is stifled by two hurdles: (1) Claimant's industrially related knee problems were found stable by November 6, 2006; and (2) Claimant's date of medical stability from his last accident was February 27, 2008. Per Colpaert, Claimant's preexisting impairments are evaluated as of the date of the August 16, 2007 industrial accident. However, unless Claimant is deemed totally and permanently disabled as of February 27, 2008, further analysis of ISIF liability is moot.

53. A claimant may establish that he or she is totally and permanently disabled by using either of the two methodologies available to establish total permanent disability:

First, a claimant may prove a total and permanent disability if his or her medical impairment together with the nonmedical factors total 100%. If the Commission finds that a claimant has met his or her burden of proving 100% disability via the claimant's medical impairment and pertinent nonmedical factors, there is no need for the Commission to continue. The total and permanent disability has been established at that stage. *See*, Hegel v. Kuhlman Bros., Inc., 115 Idaho 855, 857, 771 P.2d 519, 521 (1989) (Bakes, J., specially concurring) ("Once 100% disability is found by the Commission on the merits of a claimant's case, claimant has proved his entitlement to 100% disability benefits, and there is no need to employ the burden-shifting odd-lot doctrine"). Boley v. State, Indus. Special Indem. Fund, 130 Idaho, at 281, 939 P.2d at 857 (emphasis added).

When a claimant cannot make the showing required for 100% disability, then a second methodology is available: the odd-lot category is for those workers who are so injured that they can perform no services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. Jarvis v. Rexburg Nursing Center, 136 Idaho 579, 584 38 P.3d 617, 622 (2001), *citing* Lyons v. Industrial Special Indem. Fund, 98 Idaho 403, 565 P.2d 1360 (1977). The worker need not be physically unable to perform any work; they are simply 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. Id., 136 Idaho at 584, 38 P.3d at 622.

54. An employee may prove total disability under the odd-lot worker doctrine in 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 her behalf have searched for other work and other work is not available; or,

(3) by showing that any efforts to find suitable employment would be futile.

Hamilton, 127 Idaho at 224, 899 P.2d at 437 (Citations omitted).

Claimant's Non-medical Factors

55. Claimant is an older, pleasant individual with limited educational and vocational training. Claimant lives in a geographically isolated area. Claimant's other non-industrial medical issues include diabetes, heart fluttering, and carpal tunnel, which have not impacted his employability.

100% disability

56. From his previous industrial accidents, Claimant has received the following impairment ratings:

a. Bilateral carpal tunnel injury: 11% PPI rating

b. 1992 accident: 13%, with 50% attributed to preexisting conditions, resulting in a 6.5% impairment rating

c. Left knee accident: 4% impairment rating

d. Second left knee accident: 4% impairment rating, with 100% attributed to preexisting conditions, resulting in a 0% impairment rating

e. 2007 accident: 4% PPI from Dr. Stevens

57. Claimant's total combined permanent physical impairment is well under 100%. In order to be totally and permanently disabled as a matter of law, all other factors affecting

Claimant's employability must make up the remaining disability. On the record before us, the Commission cannot find Claimant 100% disabled as a matter of law.

Odd-lot Doctrine

58. Claimant acknowledges that he did not attempt to secure employment after his last accident because he felt unsuited to perform any jobs available in his labor market. Further, Claimant's IRCD file was closed due to Claimant's retirement. Therefore, Claimant must show that any attempts at employment following his February 27, 2008 release would have been futile.

59. Both vocational experts testified at hearing. The experts agree that Claimant's geographic area and educational background limit his employment prospects. The foundational problem with Dr. Barros-Bailey's conclusions is her reliance on the 2010 FCE and 2011 IME restrictions. While there is no disagreement that the 2010 FCE and 2011 IME restrictions would make Claimant totally and permanently disabled, the restrictions in those reports arose years after the relevant point of analysis for ISIF liability. For reasons discussed above, ISIF liability for total and permanent disability is evaluated on the date of medical stability from the last industrial accident, with preexisting progressive impairment being assessed as of the date of the last industrial accident. Dr. Barros-Bailey's analysis does not provide the Commission with a clear picture of Claimant's employability or restrictions as of February 27, 2008.

> Q. (by Jarzabek) If you had worked with Mr. Brusseau back in 2008, April of 2008, and he was having problems with his back and he was having these complaints and you had the same medical reports, the same panels, going back to '92, and he was telling you that he had this ongoing problem with the knee, the left knee, based on—and I know that your market survey came this year, so I know that's two to three years after that period of time. But assuming, as you testified to, that the patterns don't really change there from year to year, what jobs—if you were working with him clinically, what jobs would have been available to him back them?
>
> A. (Dr. Barros-Bailey) You're saying 2008?

Q. Yes.

A. That's hard to say, because what we're looking at and what you just indicated is that we are dealing with a trajectory. And so his knee, he went through the total knee in 2009. And so what you would have been looking at in 2008 might not have been—if he could have gotten into something, he might not have been able to sustain it given the kinds of limitations that we're dealing with now. So that's hard to say at this point.

Hr. Tr., pp. 69/7-70/4.

60. ISIF liability is not premised on whether the trajectory of the aging process will eventually render a claimant totally and permanently disabled. Unfortunately, in Claimant's situation, his non-industrially related degenerative changes have hastened such a trajectory shortly after his retirement. In any case, Claimant's knee problems in 2007 are very different from his knee problems in 2010 and 2011, considering Claimant's knee replacement in 2009, and the absence of restrictions or limitations for Claimant's knee in 2007.

Q. (by Commissioner Baskin). Let me ask you this. Did you make any assumptions concerning whether Mr. Brusseau had limitations or restrictions referable to the knee as of the date of the 2007 accident?

A. (Barros-Bailey). I didn't see any in the record as based on the 2007. I think the record prior shows he had injury [sic] 2004, 2006, and it was a progressive kind of thing. So if we were to slice it for 2007, I didn't see any limitations.

Q. Well, and I want to make sure we're comparing apples to oranges here, or apples to apples. Do I understand you to be saying that, as of the date of the 2007 accident, your review of the records does not reveal to you that he had any physician-imposed limitations or restrictions as of that date for the knees?

A. Correct. When he and I talked about what he was dealing with on the job in terms of pain and function, he was telling me that he was having progressive problems doing the job because of the knee, but in terms of the medical record, there was nothing in the record that I saw.

Q. Okay. So quite apart from what a physician may or may not have said, never the less, as of the date of the 2007 accident, you had had some understanding that he had at least self-limited himself due to the pain and discomfort?

A. Correct. And I don't want to speak for him, but that was my understanding in speaking with him.

Q. Now, the limitations and restrictions that were of a physician-imposed variety, for the knee at least, don't arise until 2010 or 2011. Is that correct?

A. That's when my understanding is that that was really addressed, because of the progressive nature of the knee.

Q. And did any of those figures say with any specificity when they thought those limitations had arisen?

A. No. The first record of that is actually the functional capacity evaluation. And then Dr. McNulty does his report last month, and I spoke with him on that. But we didn't specifically talk about that aspect of it, so no, I don't have that.

Hr. Tr., pp. 73/12-75/4

61. Claimant's restrictions from his August 16, 2007 accident have consistently been no lifting over 30-pounds. The three physicians who evaluated Claimant in 2008, Drs. Stevens, Dirks, and McNulty, independently agreed on Claimant's stability and restrictions. A restriction against lifting 30-pounds has been the most consistent restriction on Claimant since his 1992 industrial accident. While Claimant's written restrictions shortly after his 1992 accident were more onerous than no lifting over 30 pounds, the Commission is not persuaded that Claimant abided by such restrictions, and by 1995, only the 30-pound lifting restriction was still relevant.

Q. (by Callery) Now, when Mr. Brusseau was working for the State of Idaho, he was exceeding his 30-pound lifting restriction, wasn't he?

A. (Barros-Bailey) From speaking with Ralph, his supervisor, they might go a couple days where they don't lift any more than a piece of paper and then have a day where they have to go lift road kill and it can be heavy. So there would be occasions where he would lift over 30 pounds, yes.

Hr. Tr. p. 62/1-9.

62. There is evidence that Claimant had some knee pain before his 2007 industrial accident, and managed his knee pain with cortisone shots or activity modifications. Claimant felt

he needed to "cowboy up" to complete his job task. Claimant's testimony aside, Claimant's physicians did not give him any knee restrictions after his two industrial accidents, and only a minimal amount of impairment. Claimant did not have any standing or sitting restrictions until his 2010 FCE.

63. Here, Dr. Collins' report squarely addresses Claimant's employability using Claimant's 2008 restrictions. Dr. Collins identified several medium and light-duty positions which Claimant could perform, and were available in his labor market.

> Q. (by Callery) Let's get to it. Using the restrictions that were available in 2008, were there jobs in Mr. Brusseau's labor market, in your opinion, that he could perform?
>
> A. (Collins) I think that there were. Considering a 30-pound lifting restriction, that's about 70 percent of the jobs that are out there are considered light and sedentary, and he even had access to some medium-level work. So considering a 30-pound lifting restriction, he would have had access to work as a cook, as a food prep worker, as a cashier, as a retail clerk, as a bus driver, as a shuttle driver, customer service jobs. And those are the most common jobs that are available on a regular basis. The two most common retail clerk and cashier. Significantly.
>
> Q. Is a 30-pound restriction—does that include some what's considered medium-level work?
>
> A. Yes.
>
> Q. It's certainly not the full scope of medium-level work, though?
>
> A. Correct.
>
> Hr. Tr., pp. 154/17-155/12.

64. Dr. Collins defined a larger labor market area than Dr. Barros-Bailey. While Dr. Barros-Bailey's drive time analysis is very thorough and her census of employers commendable, Dr. Barros-Bailey's labor market and analysis are shaped by restrictions Claimant did not have in

2008. On balance, the Commission finds Dr. Collins' analysis more persuasive on Claimant's condition in 2008.

65. Claimant has not established that he was totally and permanently disabled under the odd-lot doctrine, as of the date of stability from his last industrial accident. Though Claimant is now odd-lot, that status is mainly the result of the progression of his underlying knee condition, a condition unrelated to the 2007 accident.

66. The Commission does not reach the question of "combination" for ISIF liability, given the conclusion that Claimant was not totally and permanently disabled as of February 27, 2008.

CONCLUSIONS OF LAW

1. Claimant has not established he was totally and permanently disabled on the date of stability from his last industrial accident;

2. Claimant has not established Industrial Special Indemnity Fund liability; and,

3. Apportionment under the *Carey* formula is moot.

ORDER

Based on the foregoing analysis, IT IS HEREBY ORDERED That:

1. Claimant has not established he was totally and permanently disabled on the date of stability from his last industrial accident;

2. Claimant has not established Industrial Special Indemnity Fund liability; and,

3. Apportionment under the *Carey* formula is moot; and

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

DATED this __15th_____ day of December, 2011.

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 _15th__ day of December, 2011 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon:

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cs-m _/s/_____