BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY R. CORGATELLI, Claimant, v. STEEL WEST, INC., Employer, and STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2005-501771** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed July 26, 2012**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Pocatello on November 23, 2011. Claimant, Gary Corgatelli, was present in person and represented by Fred Lewis, of Pocatello. Defendants, Steel West, Inc., and State Insurance Fund (Employer/Surety), were represented by Jay Meyers of Pocatello. Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF), was represented by Paul Rippel of Idaho Falls. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on February 29, 2012. The case is now ready for decision.

The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

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

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 or otherwise;
2. Apportionment pursuant to Idaho Code § 72-406(1);
3. Whether the ISIF is liable under Idaho Code § 72-332;
4. Apportionment under the formula set forth in Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984); and
5. Whether, pursuant to Idaho Code § 72-406(2), upon a subsequent injury to the same body part for which income benefits were previously paid and now culminating in total permanent disability, there is a deduction for the previously paid income benefits received for the previous injury to the same body part, and if so, whether that deduction inures to the benefit of the Employer/Surety or to the ISIF.

CONTENTIONS OF THE PARTIES

Claimant argues he is totally and permanently disabled due to both the combined effects of his January 3, 2005, industrial accident and his pre-existing 1994 lumbar injury, or due to his 2005 industrial accident alone. He maintains that no deduction pursuant to Idaho Code § 72-406(2) is warranted.

Employer/Surety assert that Claimant has failed to prove he is totally and permanently disabled due to his 1994 lumbar condition and/or his 2005 industrial injury. Employer/Surety also assert that if Claimant is found to be totally and permanently disabled, they are entitled to a deduction for permanent disability benefits previously paid for Claimant's 1994 injury, pursuant to Idaho Code § 72-406(2).

ISIF maintains that Claimant is totally and permanently disabled due to the effects alone of his 2005 industrial accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony of Claimant, Leta Corgatelli, and Dennis Meusborn taken at the November 23, 2011 hearing;
3. Exhibits A through Y admitted at the hearing;
4. The post-hearing deposition of David Simon, M.D., taken by Employer/Surety on December 7, 2011;
5. The post-hearing deposition of Nancy Collins, Ph.D., taken by Claimant on December 9, 2011; and
6. The post-hearing deposition of Mary Barros-Bailey, Ph.D., CRC, CDMS, taken by Employer/Surety on December 9, 2011.

All objections posed during the depositions are overruled.

FINDINGS OF FACT

1. **Claimant's background**. Claimant was born in 1947. He was 63 years old and resided in Chubbuck at the time of the hearing. Claimant was raised on a cattle ranch near Mackay where he helped farm and ranch until graduating from Mackay High School in 1966. His academic performance in high school was below average. He then attended Ricks College where he took general courses and welding classes. He required frequent tutoring in his English classes. Thereafter he attended one term at Idaho State University where he obtained his welding certification.

2. From approximately 1968 through 1971, Claimant served in the U.S. Navy. Thereafter he served in the National Guard. After returning from the Navy, Claimant worked as a welder and truck driver for various potato warehouses.

3. In 1973, Claimant commenced working for Steel West as a fitter and welder. He helped build large tanks, furnaces, and commercial buildings for FMC, Monsanto, and others. In the early 1980's he was promoted to lead man and helped the foreman run construction jobs. Claimant was later promoted to shipping and receiving and paint foreman. He oversaw the receiving, unloading, sandblasting, and painting of all steel. He also drove delivery trucks.

4. **1994 accident.** On October 4, 1994, Claimant injured his back while pushing a load of steel off of a delivery truck for Steel West. He was earning $12.06 per hour at the time of the accident. On October 20, 1994, Claimant was examined by a Gail Fields, D.O. He presented with complaints of low back and left buttock pain. Following his exam of Claimant, Dr. Fields' working diagnosis was bilateral sciaticneuralgia, worse on the left. He recommended MRI evaluation of the lumbar spine, which was performed on October 25, 1994, and read by radiologist Allen Eng, M.D. Per Dr. Eng, Claimant had a "normal MRI." (*See* C. Ex. B, p. 6).

On October 31, 1994, Dr. Fields released Claimant to return to restricted duty work effective November 2, 1994, with restrictions against repeated bending, stooping, twisting or turning and lifting more than thirty pounds for one month. Claimant was seen again by Dr. Fields on December 12, 1994 with increasing complaints for six weeks. Dr. Fields took Claimant off work and ordered a bone scan, which was performed on December 20, 1994. That study was read as follows:

> There is markedly increased radiotracer uptake involving the left facet, pedicle, and adjacent left disc margin at L3-4. Radiographic and MRI correlation demonstrates mild impaction of the superior vertebral endplate of L4 laterally to the left either due to a longstanding Schmorl's node or a recent mild impaction. There is inflammatory change in the adjacent trabecular bone due to healing response. No evidence of spondylolysis. No evidence of metastatic disease.

D. EX. B, p. 11.

5. By February 14, 1995, Dr. Fields felt that Claimant was approaching medical stability. However, he expressed concern that Claimant would have on-going difficulty if he continued to perform his time-of-injury job. On February 14, 1995, Dr. Fields placed Claimant on permanent restrictions against lifting more than thirty-five pounds. He recommended against bending and stooping on a frequent basis. (*See* D. Ex. B, p. 12)

6. On or about March 3, 1995, Claimant was seen for a second opinion, at his request, by Pocatello Neurosurgeon Peter Schossberger, M.D. Dr. Schossberger had the opportunity to review the original films from the October 25, 1994 MRI, as well as Claimant's bone scan of December 20, 1994. Dr. Schossberger was in significant disagreement with Dr. Eng's reading of the MRI. Dr. Schossberger read the study as follows:

7. MRI lumbar scan from BRMC 10/25/94 shows
   a. nuclear dehydration at L1-2, L2-3, L3-4, and L4-5 (sagittal T2 #10 of 22);
   b. evident left posterior superior L4 body Schmorl's node or end plate fracture (sagittal T2 #6 of 22) with increased water signal in the

bone marrow of the surrounding L4 body (sagittal T2 #4, 6, 8, and 10 of 22) and also some increased water signal in the posterior inferior L3 body (sagittal T2 #s 6, 8, 10 and 12 of 22) adjacent to the interspace;

c. there may be a focal tiny left L3-4 disc herniation (sagittal T2 #8 of 22 and sagittal T intermediate #7 of 22; but question if present on transverse T2 #12 of 22 or transverse T1 #8 of 15);

d. slight diffuse central L4-5 annulus convexity without definite disc herniation (transverse T2 #7 of 22 and transverse T1 #5 of 15);

e. normal L5-S1 nuclear hydration, annulus, and canal (sagittal and transverse T2 #3 of 22, transverse T1 #2 of 15);

f. considerably different reading from the official reading of normal with normal vertebral body signal for pulse sequences used, normal nuclear signal, etc.

D. Ex. N, pp. 7-8.

8. As of March 3, 1995, Claimant's presenting complaints on exam were of low back pain and bilateral lower extremity pain extending down the legs to Claimant's heels. Dr. Schossberger did not think that Claimant was a surgical candidate, and recommended that he follow-up with Kevin Hill, M.D. for work hardening. Dr. Schossberger concluded his evaluation of Claimant with the following comments:

> In my estimation, nuclear dehydration at four lumbar levels, multilevel osteophytes, and superior L4 end plate and surrounding bone changes including focally positive bone scan at about left L3-4 are more likely than not of degenerative cause and/or are a result of cumulative life work lifting activities.

D. Ex. N, p. 11.

9. Claimant was seen by Kevin Hill, M.D. on August 17, 1995. Following his review of medical records and examination of Claimant, he stated his impression of Claimant's condition as follows:

1. Chronic mechanical low back pain sub acute secondary to musculoligamentous injury.
2. Degenerative disc and joint disease L1-5. Left facet arthritis L3-4.

D. Ex. O, p. 8. He also considered whether Claimant was entitled to an impairment rating and whether he should have permanent limitations/restrictions:

> IMPAIRMENT: Impairment comes from the Guides to permanent Impairment DRE lumbosacral category complaints and symptoms. The whole person impairment is zero. The patient does have significate [sic] degenerative disc and lumbar spine disease. However this was pre-existing. Recommendation for his further treatment would include nonsteroidal anti-inflammatory medication as needed. He is to continue with his low grade exercise program. He is to use excellence biomechanical technique. Recommendation would be that he be limited to a medium physical demand classification worker, 50 pounds occasionally, 20 pounds frequently and 10 constantly. That he limit his climbing, sitting, kneeling, squatting, crawling on all fours to an occasional basis and that he avoid bending and stooping at all times. He has reached maximum medical improvement at this time and may need to limit his activities as needed for pain relief.

D. Ex. O, pp. 8-9. It seems likely that by these comments, Dr. Hill did not intend to state that Claimant was not entitled to an impairment rating, only that he was not entitled to an impairment rating for the effects of the 1994 accident.

10. On October 11, 1995, Claimant returned to Dr. Fields' office for the purpose of obtaining Dr. Fields' assessment of his permanent physical impairment. Dr. Fields awarded Claimant a 5% whole person rating, without any reference to whether he would revise the permanent limitations/restrictions he gave Claimant on February 14, 1995.

11. In March 1996, Claimant and Employer/Surety executed a lump sum settlement agreement wherein Employer/Surety paid Claimant $27,500.00 to resolve the 1994 claim. This settlement specified the amount of $27,348.75 for disputed permanent impairment and permanent disability.

12. Claimant attempted to return to his position as a foreman at Steel West, but could not tolerate the bending, stooping and lifting required. He then accepted a $3.00 per hour pay cut and a new position as safety director at Steel West. In his new position, Claimant largely did paperwork, inventory, and limited computer work. He did not use, and was never familiar with, Excel, WordPerfect, or Microsoft Word. As the safety director, Claimant had a part-time

employee type out safety meeting agendas. Claimant maintained, correlated, and filed material data safety sheets. He filled out workers' compensation accident reports and helped keep inventory. Claimant still drove delivery trucks and delivered steel within his 35-pound lifting restriction.

13. **2005 accident and later recurrent symptoms.** On January 3, 2005, Claimant was at work for Steel West when he stepped down off of a semi truck and landed on a large snow-covered piece of sheet metal. One foot slipped off the sheet metal and the other foot caught on the bottom step of the truck, which was about three feet above the ground. Claimant did the splits and fell onto his buttocks and back, experiencing immediate back and leg pain. Claimant received some initial chiropractic care before returning to Dr. Fields, who saw Claimant on January 25, 2005. After examining Claimant, Dr. Fields proposed that Claimant was suffering from degenerative disc disease with lumbar sacral strain or sprain with left sciatica neuralgia symptoms or radiculopathy. Claimant continued to be symptomatic, leading Dr. Fields to order an MRI of Claimant's lumbar spine, which was performed on February 15, 2005 and read by D.J. Marc Cardinal, M.D. as follows:

> FINDINGS: The canal and foramina are below average in size developmentally. The conus medullaris is normal in appearance and terminates at a normal level at L1. There is a mild dextroconcave scoliosis. T10-11, T11-12, and T12-L1 are unremarkable.
>
> At L1-2, there is mild disc narrowing and disc bulging mildly narrowing the canal and the foramina.
>
> At L2-3 there is advanced disc narrowing with mild to moderate disc bulging causing mild narrowing of the thecal sac and the left intervertebral foramen and moderate narrowing of the right intervertebral foramen.
>
> At L3-4 there is advanced down with mild disc bulging and facet degenerative change and hypertrophy mildly narrowing the thecal

sac and moderately narrowing the intervertebral foramina bilaterally.

At L4-5 there is mild disc narrowing and mild disc bulging. There is a small disc extrusion laterally on the right measuring about 10 x 8 mm. located at the lateral margin of the intervertebral foramen severely narrowing the lateral portio (sic) of the left intervertebral foramen and displacing the left L4 nerve root. There is mild narrowing of the thecal sac and moderate narrowing of the right intervertebral foramen.

L5-S1 demonstrates minor disc bulging causing slight narrowing of the intervertebral foramina and no impingement on the thecal sac.

OPINION:

1. The canal and foramina are developmentally below average in size.
2. L4-5 demonstrates a small disc extrusion laterally at the lateral margin of the left intervertebral foramen severely narrowing the left intervertebral foramen and displacing the left L4 nerve root. Degenerative changes are present mildly narrowing the thecal sac and moderately narrowing the right intervertebral foramen.
3. At L3-4 degenerative changes are present moderately narrowing the foramina and mildly narrowing the thecal sac.
4. At L2-3 degenerative changes are present moderately narrowing the right intervertebral foramen and causing mild narrowing of the thecal sac and left intervertebral foramen.
5. At L1-2 degenerative changes are present mildly narrowing the canal and foramina.

D. Ex. B, pp. 33-34.

14. Reviewing the report, Dr. Fields commented that it demonstrated the presence of degenerative disc disease at all of the lumbar levels along with "something new," i.e. a disc herniation at L4-5. In view of the results of the study, Dr. Fields referred Claimant to Clark Allen, M.D. for neurosurgical consultation.

15. Dr. Allen first saw Claimant on March 1, 2005. From Dr. Allen's note of that date, it does not appear that Dr. Allen was given a history of the low back complaints from which

Claimant had suffered prior to the January 3, 2005 accident. Dr. Allen recommended conservative modalities to treat Claimant's complaints. However, Claimant's complaints proved recalcitrant and Dr. Allen performed a decompressive laminotomy, facetotomy, and excision of herniated disc and L4-5.

16. Dr. Allen advised Claimant that he would see him in three or four years because he anticipated that Claimant's back condition would deteriorate. Claimant returned to his work at Steel West. He continued to handle paper work and make deliveries.

17. Claimant noted mild bladder incontinence and partial sexual dysfunction for which he consulted Mary Himler, M.D., in December 2005. Both conditions arose or worsened after Claimant's 2005 accident. Urologist Douglas Norman, M.D., examined Claimant in 2006 and found no indication of neurogenic bladder.

18. From 2005 until August 2008, Claimant's back and leg discomfort gradually worsened until he was taking 10-12 over-the-counter ibuprofen daily. In August 2008, Claimant noted increased back and leg pain after making a delivery in Wyoming. Steroid injections and physical therapy provided no relief. A lumbar spine MRI in October 2008 revealed previous changes at L4-5, disc bulging and central spinal canal stenosis at L2-3, L3-4, and L4-5, severe neuroforaminal narrowing on the left at L4-5, and near complete effacement of the fat surrounding the exiting L4 nerve root.

19. Claimant was first seen by Scott Huneycutt, M.D., on October 14, 2008. The record does not reflect that Dr. Huneycutt took any history from Claimant concerning the low back difficulties from which he had suffered prior to the date of the January 3, 2005 accident. Dr. Huneycutt examined Claimant and reviewed the most recent MRI ordered by Dr. Allen. He noted that the study revealed tight foraminal stenosis at L4-5 on the left, along with degenerative

changes noted throughout the lumbar spine. By letter dated October 22, 2008, Paula Adams of the SIF, made the following inquiries of Dr. Huneycutt:

> Do you feel Mr. Corgetelli's [sic] current symptoms and need for treatment are related to his original injury of January 3, 2005? Or do you feel Mr. Corgetelli [sic] suffered a new injury? Do you feel Mr. Corgetelli [sic] is experiencing pain due to a natural progression of his underlying disc disease? Please explain.

D. Ex. D, p. 42.

20. In his letter of October 29, 2008, Dr. Huneycutt offered the following reply to Ms. Adams' questions:

> 1.) Activity is unknown. This was taken from subjective portion of encounter.
> 2.) Yes, I believe the patient's current symptoms are related to his original injury.
> 3.) No, there is no evidence of a new injury.
> 4.) Yes, the patient is suffering from progression of his original injury. This is evidenced by his report of return of previous symptoms and his imaging studies that by comparison reveal a continued decline and failure of his injured disk.

D. Ex. D, p. 43. Therefore, in the absence of a history of an intervening event, Dr. Huneycutt was of the view that Claimant's continuing problems at L4-5 represented a natural progression from the original injury. Notably, Dr. Huneycutt did not comment on the genesis or cause of Claimant's degenerative disc disease at levels other than L4-5. Nor does Dr. Huneycutt appear to have been aware that Claimant had findings of disease at L4-5 going back as early as 1994.

21. Surety desired to test Dr. Huneycutt's conclusions, and arranged for an independent evaluation by David Simon, M.D. Concerning the 1994 accident, Dr. Simon noted that the October 25, 1994 MRI was "normal." Though Dr. Simon was evidently aware of the fact that Dr. Schossberger performed a second opinion evaluation at Claimant's request, Dr. Simon did not note Dr. Schossberger' rather emphatic disagreement with the original MRI reading performed by Dr. Eng. Dr. Simon erroneously noted that Dr. Fields assigned Claimant a

12% PPI rating for the 1994 accident. Dr. Simon reached the following diagnoses concerning Claimant's condition:

> Diagnosis
> 1. Left L4 radiculopathy secondary to foraminal stenosis. This radiculopathy has occurred primarily as a result of his previous low back injury and the subsequent surgery.
> 2. Status-post L4-5 discectomy on 5/4/05 following a work injury on 1/3/05.

D. Ex. K, p 5. As did Huneycutt, Dr. Simon concluded that in the absence of a history of intervening injury or MRI changes consistent with an acute disc herniation, Claimant's L4-5 problems were likely a progression of the problems first noted following the 2005 work injury. Accordingly, Dr. Simon felt that the treatment recommended by Dr. Huneycutt, i.e. injection therapy, was appropriate and related to the 2005 accident.

22. Epidural steroid injections performed at Dr. Huneycutt's instance were not successful in ameliorating Claimant's symptomatology. Claimant met with Dr. Allen on February 18, 2009, for the purpose of discussing surgical options. Noting that Claimant's most recent lumbar MRI showed severe disc collapse at L2-3, L3-4, and L4-5 with accompanying severe neuroforaminal stenosis at all levels, Dr. Allen recommended posterior lumbar interbody fusion from L2 to L5. This procedure was performed on April 6, 2009. The operative report reflects that among the indications for this procedure were the fact that Claimant has severe disc collapse with herniated discs at L2-3, L3-4, and L4-5.

23. Claimant obtained some benefit from surgery; however, his back and leg pain largely persisted. Dr. Allen later diagnosed Claimant with "failed back syndrome."

24. On August 25 and 26, 2009, Claimant underwent a functional capacity evaluation by Corey Rasmussen, PT, DPT, which showed Claimant functioned at a sedentary level, was only able to tolerate 10 minutes of sustained sitting, could carry up to 20 pounds occasionally,

and occasionally lift 10 pounds from floor to waist and from waist to shoulder. Claimant was unable to demonstrate efficiency with hand coordinated tasks.

25. In October 2009, Claimant began receiving Social Security Disability benefits.

26. On August 4, 2010, Dr. Simon found Claimant had reached maximum medical improvement and his condition was medically stationary. All parties agree that Claimant achieved maximum medical improvement no later than August 4, 2010. Dr. Simon diagnosed failed back syndrome and rated Claimant's permanent impairment due to his back condition attributable to his industrial injury at 15% of the whole person. Dr. Simon did not express an opinion on the question of whether Claimant's impairment should be apportioned between the effects of the 2005 accident and Claimant's preexisting condition. Although Dr. Simon stated that a causal relationship existed between Claimant's complaints and the 2005 work injury, he did not state that the 2005 work injury was the exclusive cause of Claimant's failed back syndrome. Indeed, in his subsequent deposition, Dr. Simon proposed that the need for the L2-5 fusion surgery was, in part, causally related to Claimant's multilevel degenerative disc disease, a condition which predated the 2005 accident:

> (By Mr. Meyers)
> Q On April 6th, 2009, I'm looking at page three of your report just for my reference, April 6th, 2009, Dr. Allen performed a lumbar decompression and fusion from L2 to L5.
> You reviewed that operative report?
>
> A Yes, I did.
>
> Q To what extent would that fusion address anatomic findings that pre-existed the 2005 accident?
>
> A Well, the 2005 accident injury affected the L4-5 level and the previous stuff that we talked about back in 1995. The worse level was the L3-4 level.

> I'm not a surgeon. I'm not sure why he went up to the L2, but that being closer to the L3-4 level. I mean, that level would also be – you know, that would more likely be related to the pre-existing problems and the problems at the L3-4 level than the work-related L4-5 level.

Simon Depo., 14/12-15/5.

27. Finally, Dr. Simon proposed that Claimant's permanent limitations/restrictions are as set forth in the functional capacity evaluation. He stated that these restrictions are related to the industrial injury. (*See* C. Ex. K., p. 14).

28. After the 2009 surgery, Claimant and Steel West mutually agreed there were no jobs he could perform at Steel West. Claimant began searching for other employment. His son typed out Claimant's resume and helped him search job listings on the computer system at the unemployment office. Claimant applied for numerous positions by hand-delivering resumes. He maintained a job search log. From February 2010 through November 2011, Claimant inquired and/or applied for work at well over 125 businesses in his geographic area. He obtained fewer than 10 interviews and not a single job offer.

29. Claimant had anticipated working for Steel West until he retired and then working with horses—a life-long interest. However, Claimant has been unable to ride horses since his 2005 accident and reluctantly sold all of his horses when it became apparent that he could no longer ride or care for them.

30. **Credibility.** The Referee found that Claimant, his wife Leta Corgatelli, and his Steel West supervisor Dennis Meusborn, are all highly credible witnesses. The Commission finds no reason to disturb the Referee's findings on credibility.

DISCUSSION AND FURTHER FINDINGS

31. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187,

188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

32. **Permanent disability**. The first issue is the extent of Claimant's permanent disability, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise. "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). The proper date for disability analysis is the date of the hearing, not the date

that maximum medical improvement has been reached. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012).

33. To evaluate Claimant's permanent disability several items merit examination including his permanent impairment, the physical restrictions resulting from his permanent impairment, and his potential employment opportunities—particularly as identified by vocational rehabilitation experts.

34. Permanent impairment. Dr. Simon's August 2010 report rated Claimant's permanent impairment at 15% of the whole person due to his 2005 accident. Dr. Simon testified in his deposition that Claimant suffered a permanent impairment of 15% of the whole person for his lumbar spine, including 5% whole person impairment attributable to his 1994 accident and the balance attributable to his 2005 accident. The Commission finds that Claimant suffers permanent impairment of his lumbar spine of 15% of the whole person, 5% attributable to his 1994 injury and the balance attributable to his 2005 industrial accident.

35. The records of Dr. Himler, who examined Claimant in 2005 and 2006, suggest a 5% permanent partial impairment for mild bladder incontinence and partial sexual dysfunction. Both conditions apparently arose or worsened after Claimant's 2005 accident. Michael Weiss, M.D., reviewed Dr. Himler's records and questioned the propriety of an impairment rating for either condition and whether either condition was related to the 2005 accident. Urologist Douglas Norman, M.D., found no indication of neurogenic bladder in 2006, offered no impairment rating, and did not opine that either condition was caused by the 2005 accident. The record does not indicate that any physician has evaluated either condition since Claimant underwent his 2009 three-level fusion and reached medical stability in 2010. Neither condition

previously limited or currently limits Claimant's capacity to work. No impairment rating is given for either condition.

36. Work restrictions. Claimant's activities are restricted due to his back condition. Dr. Simon concurred in the findings of the functional capacity evaluation that Claimant is restricted to carrying no more than 25 pounds occasionally, lifting no more than 10 pounds occasionally from floor to waist and waist to shoulder, and sitting for only approximately 10 minutes consecutively.

37. Opportunities for gainful activity. Nancy Collins, Ph.D., a vocational rehabilitation expert retained by Claimant, prepared a report assessing Claimant's employability. Dr. Collins noted that Claimant graduated from high school, but is a poor reader and speller and reads the newspaper only with difficulty. He is not computer literate. Dr. Collins noted that Claimant was hindered somewhat by hand tremors of unknown etiology, but that he did not even know how to type. She opined that Claimant now lacks the physical capacity to perform any of his prior occupations, that his office skills are minimal, and that he would not be competitive even for entry level office jobs. Dr. Collins wrote:

> In my opinion, at age 63, with poor reading, spelling and no real office skills, Mr. Corgatelli will not find work using his skills. He can no longer drive and with the significant sitting restrictions and need to rest after standing and walking, I can't think of a job that is regularly available in his or any labor market.

Exhibit M, p. 6. In her post-hearing deposition, Dr. Collins re-emphasized that Claimant's extremely limited sitting tolerance precluded virtually all employment opportunities. She concluded that Claimant is totally disabled and not regularly employable in any well-known branch of the labor market.

38. Mary Barros-Bailey, Ph.D., a vocational rehabilitation expert retained by Employer/Surety, prepared a report evaluating Claimant's disability. She noted the increased

limitations in all aspects of Claimant's functioning due to the 2005 accident. Dr. Barros-Bailey opined that based on the limitations from the 2005 injury, Claimant retained no residual transferable skills. She observed that although Claimant's 2009 functional capacity evaluation classified his functional limitations as sedentary, Claimant would not qualify for sedentary work because, by definition, sedentary work requires both lifting up to 10 pounds and prolonged sitting. Dr. Barros-Bailey concluded that Claimant would likely not be employable. In her post-hearing deposition, Dr. Barros-Bailey testified that Claimant has lost access to 100% of the labor market and is 100% disabled. She noted Claimant's extensive and unsuccessful job search, and opined that it would be futile for Claimant to look for work.

39. Employer/Surety asserts that Claimant's hand coordination limitation is the factor most limiting his employability. Dr. Collins noted that Claimant was hindered somewhat by hand tremors of unknown etiology, but that he is not computer literate and did not even know how to type. Dr. Barros-Bailey opined that Claimant's hand coordination limits his employability in sedentary and light work. She testified that light work might require less sitting than sedentary work, but acknowledged that light work would also require lifting up to 20 pounds and that Claimant is limited to lifting no more than 10 pounds. The actual effect of Claimant's limited hand coordination on his employability is immaterial because it is superseded by the effects of his permanent lifting and sitting restrictions.

40. The conclusions reached by Dr. Collins and Dr. Barros-Bailey are thorough, well-reasoned, strikingly similar, and highly persuasive. Based on Claimant's impairment rating of 15% of the whole person, his extensive permanent physical restrictions including his sitting and lifting limitations, and considering his non-medical factors including his age of 57 at the time of the accident, limited formal education, reading and writing deficiency, functional computer

literacy, absence of transferable skills, and inability to return to any of his previous positions, Claimant's ability to engage in regular gainful activity in the open labor market in his geographic area has been eliminated. The Commission concludes that Claimant has suffered a permanent disability of 100%, inclusive of his 15% whole person impairment. Claimant has proven that he is totally and permanently disabled.

41. **Idaho Code § 72-406(1) apportionment.** Inasmuch as Claimant is totally and permanently disabled, the issue of apportionment pursuant to Idaho Code § 72-406(1) is moot.

42. **ISIF liability**. Employer/Surety assert that ISIF is liable pursuant to Idaho Code § 72-332 which provides that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his income benefits out of the ISIF account. In Dumaw v. J. L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court summarized the four inquiries that must be satisfied to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was a pre-existing impairment; (2) whether that impairment was manifest; (3) whether the impairment was a subjective hindrance to employment; and (4) whether the impairment in any way combined with the subsequent injury to cause total disability. Dumaw, 118 Idaho at 155, 795 P.2d at 317.

43. In the present case, the first three elements of ISIF liability are clearly established. Claimant was given a 5% impairment for the 1994 accident. It is clear that the impairment was manifest, and it is clear that the impairment constituted a subjective hindrance to Claimant. The

limitations imposed on Claimant were of sufficient magnitude to cause him to abandon his time of injury position in favor of a less demanding job. As is not infrequently the case, the real dispute in the instant matter vis-à-vis ISIF liability lies in determining whether or not the preexisting impairment from the 1994 accident in some way "combines with" the effects of the subject accident to cause Claimant's total and permanent disability. For the reasons set forth below, we believe it is clear that it is only as a result of the combined effects of the work accident and the preexisting impairment that Claimant is totally and permanently disabled.

44. We recognize that Dr. Simon has stated that the limitations/restrictions defined in the FCE are related to the January 3, 2005 accident. At first blush, this appears to support a conclusion that it is the 2005 accident, standing alone, and without contribution from the preexisting impairment, that renders Claimant totally and permanently disabled. If true, then there can be no "combining with" and the claim against the ISIF would fail on this element of the prima facie case. However, Dr. Simon was not examined about this statement at the time of his deposition, and it is not entirely clear that his intentions in making this statement are as described by the ISIF.

45. What we do know is that Claimant is totally and permanently disabled as a consequence of the fact that the L2-5 fusion surgery he endured was less than successful, such that Claimant carries the diagnosis of "failed back syndrome." It is equally clear that Claimant's L2-5 fusion was undertaken because of the L4-5 lesion thought to be related to the January 3, 2005 accident and the multilevel degenerative changes in Claimant's lumbar spine first noted in 1994, and progressing thereafter. In this regard, it is notable that the only injury identified with the January 3, 2005 accident is the L4-5 disc herniation. However, the February 15, 2005 MRI demonstrates severe degenerative changes at levels above and below the L4-5 level. The

findings at these levels demonstrate significant progression of the degenerative process in the years since the prior 1994 study, a progression that has not been related by any medical expert to the January 3, 2005 accident.

46. Dr. Allen proposed the L2-5 fusion to address not only the L4-5 level, but also the Claimant's severe degenerative disease at levels above and below L4-5. His operative report clearly reflects that the indications for surgery are multifactoral, and not solely related to the need to address L4-5 level. Indeed, it is the experience of the Commission that in the absence of multilevel problems, surgeons typically prefer to limit fusion procedures to levels where it is absolutely necessary in order to preserve lumbar spine motion.

47. Because Claimant's surgery was necessitated by both the subject accident and Claimant's preexisting condition, and because Claimant had a poor surgical outcome, such that he is currently totally and permanently disabled, it is clear that the combining with element of the prima facie case has been met.

48. **Carey Apportionment**. Having determined that the prima facie elements of ISIF liability have been satisfied, it is next necessary to consider how responsibility for Claimant's permanent and total disability should be apportioned between the ISIF and Employer per the formula adopted in Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984). Claimant has been found to have total impairment of 15% of the whole person, 5% attributable to the preexisting condition, and 10% attributable to the subject accident. This leaves disability of 85% to be apportioned between the ISIF and Employer. Per Carey, supra, Employer's liability is calculated as follows: 10/15 x 85 = 56.7 + 10 = 66.7% disability. 66.7% disability equates to 333.5 weeks of benefits or $99,599.78 at 2005 rates. With a date of medical stability of August 4, 2010, ISIF responsibility for the payment of total and permanent disability

commences 333.5 weeks subsequent to August 4, 2010.

49. **Idaho Code § 72-406(2) apportionment.** Defendants urge the Commission to apply the provisions of Idaho Code § 72-406(2) to the facts of this case. That subsection provides:

> Any income benefits previously paid an injured workman for permanent disability to any member or part of his body shall be deducted from the amount of income benefits provided for the permanent disability to the same member or part of his body caused by a change in his physical condition or by a subsequent injury or occupational disease.

50. Here, Employer/Surety paid Claimant the sum of $27,348.75 for impairment/disability for his 1994 low back injury. Employer/Surety asserts that in order to avoid a double recovery, they are entitled to have their responsibility for the payment of disability benefits in the instant matter reduced by the amount of the previous payment. In making this argument, they contend that the 1994 accident involved an injury to the same body part as that injured in the January 3, 2005 accident.

51. Idaho Code § 72-406(2) has received only limited treatment by the Industrial Commission. *See* Ellsberry v. Idaho State School & Hospital, 1987 IIC 0732.1 (1987); Randell v. Nestle Brands Foodservice Company, 2002 IIC 0418.1 (2002). In Randell, claimant was diagnosed with bilateral carpal tunnel syndrome in 1992. She underwent surgical treatment for this condition in 1997. She was subsequently awarded a PPI rating based on her mild entrapment neuropathy at the right wrist for which she was paid the sum of $5,940.00 by employer/surety. In 1998, claimant suffered a new injury to her right wrist and elbow. She was diagnosed as having suffered a traumatic tear of the scapholunate and lunotriquetral ligaments when her wrist was forcibly dorsiflexed at the time of the accident. Claimant underwent surgery for this injury, and was eventually given a 15% upper extremity rating based on decreased range of motion of the right wrist.

Employer/surety paid this award, valued at $10,964.25. Claimant was given significant limitations/restrictions following her recovery from the 1998 accident. These restrictions, considered in light of claimant's relevant non-medical factors, eventually led the Commission to make a disability award to claimant of 55% of the whole person, inclusive of impairment. Employer/surety argued that under Idaho Code § 72-406(2) its responsibility to pay the award should be reduced by the amount of impairment previously paid to claimant for her 1997 carpal tunnel impairment. Employer/surety argued that the impairment paid to claimant in 1997 was for injury to the same body part involved in the 1998 claim. The Commission declined to accept this argument, noting that the 1997 impairment rating was given for the residual effects of an entrapment neuropathy, whereas the subsequent impairment rating was given for wrist loss of motion. The Commission reasoned that the 1998 accident did not actually injure the same body part as that injured in connection with the earlier claim. The 1997 claim involved an injury to the median nerve, whereas the 1998 claim involved to the scapholunate ligament and the lunotriquetral ligament. Therefore, the prerequisite to application of the provisions of Idaho Code § 72-406(2) had not been met. However, the Commission noted that had the evidence established that the same body part had been injured in both claims, Defendants would have been entitled to reduce its obligation to pay the 55% disability award by the amount it had previously paid claimant in connection with the carpal tunnel claim.

52. It is notable that the 55% disability award given by the Commission represented claimant's disability from all causes, inclusive of the impairment she received for both the 1997 and 1998 claims. In other words, the disability award did not represent claimant's entitlement to disability solely as a result of the 1998 accident. Where Defendants can meet their threshold responsibility of demonstrating multiple injuries to the same body part, the application of Idaho

Code § 72-406(2) to an award of disability from all causes will prevent Claimant from obtaining a double recovery.

53. To illustrate, consider the application of the statute in connection with a petition for change of condition. Idaho Code § 72-719 provides a mechanism by which an injured worker to whom an award of disability has previously been made may claim additional disability benefits due to a change or deterioration in his condition. If Claimant is successful in persuading the Industrial Commission that his condition has deteriorated, the Claimant will receive additional disability benefits. For example, if the original award of disability was 30% following Claimant's recovery from an L4-5 discectomy, Claimant's disability might be increased to 50% on his petition for change of condition, and following proof that his low back condition had deteriorated such that he had required fusion surgery and the imposition of additional limitations/restrictions. Application of Idaho Code § 72-406(2) to the facts of such a case will allow Defendants to offset their responsibility for the payment of a 50% disability by the 30% rating previously paid in connection with the original claim. In this example, the upward revision of Claimant's disability due to a change of condition to 50% of the whole man represents the entirety of Claimant's disability as a result of both the original accident and the subsequent change in his condition. The award does <u>not</u> represent only the 20% increase in Claimant's impairment as a result of his deteriorated condition. Had the order on Claimant's petition for change of condition been couched in such terms, i.e. had it made an award to Claimant only of an additional 20% disability, it seems clear that the purpose against preventing a double recovery would not be served by allowing Employer/Surety to avoid payment of the award by invoking the provisions of Idaho Code § 72-406(2).

54. The nature of the award in the instant matter should prevent the application of Idaho Code § 72-406(2) to the facts of this case. Assuming, for the sake of argument, that the same body

part was involved in both the 1994 and 2005 accidents, we know that Claimant received a 5% PPI rating following the 1994 accident. He was given a 15% impairment rating following the 2005 accident, with 5% attributable to the 1994 accident and 10% attributable to the 2005 accident. Although Employer/Surety has previously paid $27,348.75 in connection with the 1994 claim, Employer's current obligation to pay the sum of $99,599.78 is derived solely from consideration of the additional permanent physical impairment referable to the 2005 accident. In short, the apportionment Employer/Surety seeks has already taken place in the connection with the *Carey* apportionment. Claimant's total and permanent disability has been apportioned between Employer/Surety and the ISIF. Applying the Carey formula, Employer/Surety is obligated to pay a sum certain based on its responsibility for the 10% impairment rating given for the 2005 accident. ISIF liability is based on its responsibility for the 5% rating referable to the 1994 accident. To give Employer/Surety a credit in the amount of $27,348.75 against their obligation to pay disability entirely referable to a subsequent accident would be a windfall to Employer/Surety, is contrary to the policies underlying Idaho's workers' compensation laws, and is clearly not intended by the provisions of Idaho Code 72-406(2).

CONCLUSIONS OF LAW AND ORDER

Based on the foregoing, it is HEREBY ORDERED that:

1. Claimant has proven that he is totally and permanently disabled;

2. ISIF liability is established;

3. Claimant has permanent physical impairment totaling 15%, with 5% referable to the 1994 accident and 10% referable to the 2005 accident;

4. Per Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), Employer's liability is calculated as follows: 10/15 x 85 = 56.7 + 10 = 66.7%, or $99,599.78;

5. ISIF is liable for the payment of statutory benefits commencing 333.5 weeks subsequent to Claimant's August 4, 2010 date of medical stability;

6. Employer/Surety is not entitled to offset its obligation to pay the award by the provisions of Idaho Code 72-406(2).

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

DATED this __26th_____ day of July, 2012.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

_/s/_____
R. D. Maynard, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _26th_____ day of ____July_____, 2012, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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__/s/_____