BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KEITH E. GODFREY, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2005-012945** **2009-028453** **2007-020643** **2008-012881** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed March 20, 2013**

This matter came before the Commission for hearing on August 7, 2012 in Idaho Falls, Idaho.[1] Robert Beck, of Idaho Falls, represented Claimant. Jay Meyers, of Pocatello, represented the Industrial Special Indemnity Fund ("ISIF"). The Church of Jesus Christ of Latter Day Saints, self-insured employer and Defendant ("Employer"), entered into a lump sum agreement settling Claimant's claims following the first hearing and, thus, did not participate in the second hearing. The parties presented oral and documentary evidence at the hearing, and subsequently submitted post-hearing briefs. The case came under advisement on January 21, 2013. It is ready for decision.

ISSUES

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

1. Whether the Claimant is totally and permanently disabled under either the 100% method or the odd lot doctrine;
2. Whether ISIF is liable pursuant to Idaho Code § 72-332;
3. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804; and

[1] A first hearing was conducted on October 13, 2010 on certain threshold issues. A decision in that matter was issued on April 20, 2011.

4. Whether, pursuant to Idaho Code § 72-406(2), 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 ISIF.

CONTENTIONS OF THE PARTIES

Claimant incurred an industrial injury to his back on April 2, 2008 which required surgical repair. As a result of the injury and subsequent surgery, Claimant asserts he is totally and permanently disabled under the 100% method and as an odd lot worker because, even though he is currently employed as a substitute teacher/teacher's aide, he would not likely be employable if he were to lose this job. Claimant contends that ISIF is liable for a portion of his total disability benefits because he had preexisting impairments, including to his back and left knee, which constituted hindrances to employment and which combined with his April 2, 2008 injury to cause his total and permanent disability.

ISIF counters that Claimant is not totally and permanently disabled because he is well-educated and employable, as evidenced by the fact that he has worked as a part-time, on-call substitute school teacher since fall 2009, and is qualified for some sedentary jobs. Even if Claimant is totally and permanently disabled, ISIF asserts that it is not liable for any of Claimant's benefits because his disability is fully attributable to his industrial accident, and further, because his preexisting impairments did not constitute subjective hindrances to employment. Along these lines, ISIF argues that Claimant's PPI and disability attributable to his February 2008 injury may not be considered as preexisting when determining its liability because that condition was not medically stable at the time of his relevant industrial injury. In the event ISIF is found liable, it seeks a deduction in the amount it owes Claimant, pursuant to

Idaho Code § 72-406(2), for previously paid income benefits Claimant received related to his previous back injury.

EVIDENCE CONSIDERED

The record in this case consists of the following evidence admitted at the October 13, 2010 and August 7, 2012 hearings.

October 13, 2010 hearing:

1. Testimony from Jeffrey Jardin, Claimant and Linda Godfrey;
2. Claimant's Exhibits A through K;
3. Defendant's Exhibits 1 through 5, and 8;
4. The pre-hearing depositions of Lene O'Dell and Heather Foster taken April 19, 2010, admitted by stipulation filed October 28, 2010; and
5. The Commission's legal file.

August 7, 2012 hearing:

6. Testimony from Claimant and Linda Godfrey;
7. Claimant's Exhibits A and B; and
8. Joint Exhibits 1 through 10;

Also at the hearing, on Defendant's motion, the Commissioners took judicial notice of information provided on the Idaho State Department of Education, Region 6, website. No specific web address was provided at the hearing; however, the Commission located the site at http://www.sde.idaho.gov/site/charter_schools/regions.htm.

All deposition objections are overruled. After having fully considered the above evidence and arguments of the parties, the Commission hereby issues its decision in this matter.

FINDINGS OF FACTS

CLAIMANT'S EDUCATION AND WORK EXPERIENCE

1. Claimant was 58 years of age at the time of the hearing and resided in Ammon, Idaho. He is a part-time teacher's aide/substitute teacher. Teaching represents an employment change since Claimant's relevant industrial back injury of April 2, 2008, when he bent over to fix a sink.[2] At the time of this injury, Claimant had been working for Employer as an assistant building engineer for approximately 11 years.

2. Claimant has a bachelor's degree in small business management from Alameda College.[3] In addition, Claimant previously obtained education, certificates and/or licensing in: commercial vehicle operation, auto mechanics, hydraulics, small engine repair, welding, HVAC/air conditioning, refrigeration coolant recovery, electronics/electrical studies, and basic computer repairs. Claimant also has basic computer word processing and Excel spreadsheet skills, as well as touch-type ability (though he does not know how fast).

3. Claimant has worked as a machine operator, equipment mechanic and rental store manager (including basic bookkeeping and/or commercial delivery truck driving), assistant building engineer (including various mechanical repair and other building maintenance duties, lifting greater than 50 pounds, working overhead, supervision of custodial crew and building engineers, but no hiring or firing duties), and substitute teacher.

[2] We previously determined that this injury, referred to in the April 20, 2011 decision as the "Sink Injury," was the result of a compensable permanent aggravation of a preexisting L3-4 disc protrusion and an L2-3 disc bulge.
[3] Claimant graduated in 2007 with a 3.2 grade point average. He participated primarily through the Internet, but also did some class work.

PREEXISTING CONDITIONS AND RESTRICTIONS

Back

4. We previously found:

> Claimant has had four prior back surgeries, including fusions at L4-5 and L5-S1. Claimant continued to work after each of these surgeries without significant problems. Claimant did not recall any restrictions given by his previous doctors.

2011 Decision, p. 3.

5. Claimant's prior back surgeries took place in 1989, 1995, 2001 and 2002. Claimant left his prior job at Action Rental because, even with accommodations, he could no longer do heavy work. "I was doing a lot of starting of engines, lifting, heavy work, and I realized that I couldn't keep doing this because I was falling apart." 2012 Tr., p. 25. "So I looked for a job that would require lighter duty, one that wouldn't require so much stress on my back, and I applied at the Idaho Falls temple and they hired me on." *Id.* This testimony, though more detailed, is consistent with Claimant's testimony at the first hearing regarding why he left Action Rental.

6. Following Claimant's 2001 back surgery, Claimant returned to work at Employer in three or four weeks, with no significant problems. "I had to be careful in not doing any lifting, but it was just light-duty work that I was doing." 2012 Tr., p. 26. "I was able to do my job…No significant problems that way, no." 2012 Tr., p. 26. Similarly, Claimant confirmed at the 2012 hearing what he conveyed to Robert Ward, M.D., an internist who performed an independent medical evaluation ("IME"), in January 2010; that is, that prior to February 2008, he had no trouble with walking, standing, bending, twisting, stooping, or any other activities, except that he experienced mild back pain when lifting heavy objects.[4] For example, he went waterskiing as

[4] On January 12, 2010, Dr. Ward administered two Back Pain Indexes. One sought Claimant's impressions of his pain and functionality prior to February 2008, and one sought Claimant's impressions related to the period following

recently as 2007. Mr. Jardine, Claimant's supervisor, confirmed that Claimant was an excellent worker and that he was unaware of any problems Claimant had in performing his job duties prior to 2008.

7. Contrary to his testimony at the first hearing, however, Claimant testified at the second hearing that he had been assessed a 50-pound permanent lifting restriction by Dr. McCowin before February 2008. In support of that testimony, Claimant described how he had informed Action Rental of his lifting restriction and, in response, that employer provided significant accommodations, such as constructing a loading dock (so that heavy items could be rolled in and out) and installing an overhead hoist for lifting.

8. Claimant was given the opportunity to reconcile his inconsistent testimony from the 2011 hearing (that he had no work restrictions) with his 2012 hearing testimony (that he had significant work restrictions):

> COMMISSIONER BASKIN: Mr. Godfrey, on direct-examination by Mr. Beck, you had indicated that the reason you left Action Collection [*sic*] was because you were in fear of falling apart, and that it was for that reason that you went to work for the temple because it was a less physically demanding job. Do you recall that testimony?
>
> THE WITNESS: Yes.
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> COMMISSIONER BASKIN: Can you help me understand, then, why it is that you responded to Dr. Ward's questions the way that you did? Mr. Meyers went over those with you, how you described your preinjury condition; that is, your

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his 2008 surgery. He indicated the following "pre" and "*post*" responses: "The pain comes and goes and is very mild/*The pain comes and goes and is very severe,*" "I do not have to change my way of washing or dressing in order to avoid pain/*Washing and dressing increases the pain but I manage not to change my way of doing it*," "I can lift heavy weights but it causes extra pain/*Pain prevents me from lifting heavy weights off the floor, but I can manage light to medium weights if they are conveniently positioned*," "I can stand as long as I want without pain/*I cannot stand for longer than 10 minutes without increasing pain*," "I get no pain in bed/*Because of pain my normal sleep is reduced by less than 50%*," "My pain is neither getting better nor getting worse/*My pain is gradually worsening*," "I have no pain while walking/*I cannot walk more than 1 mile without increasing pain*," "I can sit in any chair as long as I like/*Pain prevents me from sitting for more than 1 hour*," " My social life is normal and gives me no extra pain/*Pain has no significant effect on my social life apart from limiting my more energetic interests (e.g. dancing, etc.)*," and "I get no pain while traveling/*I get extra pain while traveling but it does not cause me to seek alternate forms of travel.*" 2011 DE-l1, pp. 270-302.

condition prior to February 2008 as essentially being problem free. Can you help reconcile those two different sort of positions?

THE WITNESS: I was pretty well problem free in the fact that I could do my walking, sleeping, doing the activities that I needed to do. I didn't really have any limitations in the fact that I was hurting all the time. I could still do things.

Work-wise, I did have to limit in what I lifted and what I did while I was at Action Rental. It required a lot of physical lifting or equipment in and out of vehicles. I had to pull start tillers, power rakes, lawn mowers, and things like that, which was twisting and bending that way. And at the end of the day, I did hurt doing that.

COMMISSIONER BASKIN: Okay. After you left Action Rental, did those problems disappear?

THE WITNESS: I would say for the most part, yes.

COMMISSIONER BASKIN: And were you responding accurately to the questions that Dr. Ward asked of you in his questionnaires?

THE WITNESS: At the time, I was feeling pretty good, yes. Again, bad days, good days. But for the most part, pretty good.

2012 Tr., pp. 85-86.

9. Claimant's debilitating back pain related to his industrial injury began when he was repairing the boiler at work in February 2008.[5] He was diagnosed with a large left lateralized disc protrusion at L3-4, identified by MRI on March 28, 2008. Claimant was still receiving medical treatment for this condition when his relevant industrial accident, determined in the prior decision to have permanently aggravated this condition, occurred.

10. Claimant did not lose any time from work between February 4 and April 2, 2008, but: "I did have to limit myself in what I was doing [at work] because I was having back problems at that time." 2012 Tr., pp. 28-29. Defendants do not dispute that Claimant continued to work, with limitations, during this period.

[5] Claimant attributes this injury to what was referred to in the April 20, 2011 Decision as the "Boiler Accident." We previously found this accident was not a compensable industrial accident because it was time-barred pursuant to Idaho Code § 72-701.

11. Claimant recalled his symptoms on April 1, the day before his industrial accident. He was feeling a little bit better following his February injury and he believes he would still be working for Employer, if not for his April 2, 2008 industrial injury. The medical records do not indicate a clear prognosis for Claimant's February 2008 back injury before April 2.

12. According to Dr. Knoebel's unrebutted opinion, the February 2008 injury was not medically stable as of April 2, 2008:

> The Claimant was having symptoms of back pain noted in February of '08 for which he sought medical attention and went on to have the MRI scan of March of '08. He was then referred to Dr. Marano as well for treatment of this. This is all done up to a point of just four days before the industrial incident. He was being actively treated for that symptomatic condition. And he was not medically stable. He was not as good as he was going to get. He had not used all operative and nonoperative treatment in regards to his preexisting and ongoing back problems before the 4/2 of '08 incident.

Knoebel Dep., p. 12.

13. Dr. Knoebel opined that Claimant also had impairment, restrictions and disability related to his low back that preexisted his April 2, 2008 industrial accident:

> Absent the patient's reported 4/2/08 incident he was having significant low back pain and left leg pain consistent with a left L4 radiculopathy and the L3/4 disc herniation as already noted on MRI scan of 3/28/08. The patient's symptoms were noted to be significant already in 2/08, with the patient reporting functional disability already at that time including difficulty with lifting even grocery bags, difficulty climbing stairs and difficulty bending, kneeling and stooping.
>
> The patient was also status post 5 prior lumbar surgeries including both L4/5 and L5/S1 fusions. By the current AMA Guides, lumbar spine Table 17-4, the patient would have a pre-existing 19% whole person impairment of the low back…

JE 9, pp. 83-84.

Bilateral wrists and left knee

14. Dr. Knoebel opined that Claimant had preexisting medical impairment and functional disability involving his bilateral wrists and left knee. He assessed 18% whole person

permanent partial impairment ("PPI") to Claimant's bilateral wrist arthrodeses, with functional disability and restrictions including no repetitive forceful gripping or torque-like activities; and at least 1% PPI to Claimant's post-meniscectomy left knee (he did not know the details of this condition), with functional disability related to kneeling, as well as associated restrictions. Dr. Andary, Claimant's orthopedic knee surgeon, assessed 4% PPI in relation to his left knee condition.

15. Along these lines, Dr. Ward, in approximately January 2010, confirmed that Claimant "did have some restrictions and some limitations" prior to 2008. 2011 DE-11, p. 262. However, he did not quantify or describe the nature of these restrictions and limitations.

INDUSTRIAL INJURY AND DISABILITY

16. Following his April 2, 2008 industrial injury, Claimant continued to work at light-duty tasks until May 14, 2008, when he underwent spine surgery. Following surgery, Claimant was left with back and left leg nerve pain that waxes and wanes. To control his pain, Claimant takes 1200 milligrams of Gabapentin nightly and relies on Aleve during the day. He sits in his hot tub and takes a 30-minute nap after work to refresh himself. He regularly walks, rides his stationary bike to strengthen his left leg, and exercises with his Wii Fit to improve his balance. Claimant also takes medication for diabetes, with which he was diagnosed in about June 2009. No party has alleged that Claimant's diabetes is work-related.

17. Four physicians have opined as to Claimant's functional abilities and/or applicable medical restrictions following his last surgery.

Stephen Marano, M.D.

18. Dr. Marano, a neurosurgeon, performed Claimant's 2008 back surgery. His chart notes confirm he discussed potential post-surgical restrictions with Claimant before surgery, but

they do not specifically identify any. At a six-month follow-up on November 21, 2008, Claimant still had left leg pain and weakness with atrophy in his left quadriceps. He reported, among other things, trouble with standing, walking and sitting. Claimant reported he had undergone an EMG, which identified nerve damage as the cause of his left leg problems. Dr. Marano diagnosed L3 or L2 lumbar radiculopathy. He did not opine as to permanent restrictions, but advised Claimant should "continue working that leg as much as he can to make sure the muscle does not get any weaker. He needs to make sure he is doing some walking everyday outside of therapy." 2011 DE 11, p. 247.

Lynn J. Stromberg, M.D.

19. Dr. Stromberg, an orthopedic surgeon, evaluated Claimant for persistent left leg pain and weakness on December 16, 2008. Based on a 2008 EMG study, x-rays, clinical observations and examinations of Claimant, Dr. Stromberg diagnosed a left-side L4 nerve root injury, even though MRI imaging did not clearly identify any impingement. Dr. Stromberg opined that Claimant's leg function probably would not improve. He administered a diagnostic epidural injection on February 5, 2009, which returned equivocal results. Dr. Stromberg noted atrophy of Claimant's left quadriceps on exam, with associated weakness and, therefore, "it is mandatory that the patient avoid any height or ladders. He will likely have great difficulty with using stairs. Standing for long periods will also not work because his leg is at significant risk of giving out. I have recommended that he use a cane to try to add to his stability." 2011 DE 11, p. 202. Surety's claim file notes also indicate that Dr. Stromberg limited Claimant's lifting to 20 pounds.

Shane Mangrum, M.D.

20. Dr. Mangrum, a physiatriat, treated Claimant from April 2009 through June 2009 for back and left leg pain, weakness and numbness and trouble walking, standing and sitting, among other things. He ultimately attributed Claimant's pain to an L2 or L3 nerve root injury. On April 7, 2009, Dr. Mangrum opined[6] after reviewing Claimant's time-of-injury job site evaluation ("JSE") that Claimant would not be able to return to that job unless accommodations could be made so that he could avoid climbing ladders altogether and limit his stair-climbing. Otherwise, Dr. Mangrum opined that Claimant could return to his regular schedule. Dr. Mangrum anticipated that these restrictions would be permanent. Dr. Mangrum also prescribed a knee brace to assist with Claimant's left leg stability and suggested a repeat EMG study, which Claimant declined due to the discomfort associated with his prior experience. Mr. Wolford's notes indicate that Claimant disagreed with Dr. Mangrum's restrictions. Claimant believed additional restrictions were appropriate because if he did any significant physical work or was on his feet for long, he would be down for days.

Richard T. Knoebel, M.D.

21. Dr. Knoebel, an orthopedic surgeon, conducted an independent medical evaluation ("IME") of Claimant, then detailed his findings and opinions in a June 18, 2009 report and a September 30, 2009 supplemental report. In addition, he provided post-hearing deposition testimony on September 27, 2012. Prior to authoring his reports, Dr. Knoebel examined and interviewed Claimant and reviewed his prior medical records, identified in an addendum.

22. He assessed 19% whole person PPI to Claimant's preexisting L4-5 and L5-S1 conditions, and 14% PPI to weakness at the L3-4 interspace, which followed his industrial accident.

[6] This opinion was elicited and recorded by Dan Wolford, ICRD consultant.

23. Dr. Knoebel understood from Claimant that he first began having difficulties with his activities of daily living ("ADLs") after his February 2008 injury. After reviewing his time-of-injury JSE, Dr. Knoebel opined that Claimant could not return to that job because it exceeded his permanent medical restrictions, which he identified as light work with a 20-pound lifting limit occasionally and 10 pounds frequently, and very occasional squatting, bending, kneeling, climbing, pushing, pulling, with similar limits on other activities involving comparable physical effort. JE-83. Along these lines, he noted on exam in June 2009 that Claimant was unable to fully extend his knee when weight-bearing. "When ambulating in the exam, without aids, the patient has significant antalgia of the left leg with decreased weight bearing, flexed knee and poor ankle push off." JE-73. Also, Dr. Knoebel identified only a trace left knee reflex compared to a normal right knee reflex.

Robert Ward, CIME

24. Dr. Ward, an internist, conducted an IME, at Claimant's request, then provided his findings and opinions in an undated report (apparently prepared in or around January 2010) and a follow-up addendum dated July 23, 2012. Dr. Ward conducted an interview, reviewed Claimant's medical records, performed an examination, and administered questionnaires.[7] Dr. Ward assessed 6% PPI of the whole person to Claimant's industrial back injury, opining specifically that Claimant's work options are limited to light-duty or sedentary jobs. He also summed up his opinion of Claimant's work motivation and ability:

> …His main goal was to be able to try and get back to as normal a condition as he could, to be able to work at what he could. One of his biggest fears was that he would not be able to go on a mission for his church, which he and his wife have been planning to do for a number of year [*sic*]. He feels very strongly he would like to do that. Therefore, I have no reservations at all in assigning the above-noted impairment.

[7] At the time, Claimant took the position that his February 4, 2008 back injury was industrially-related, so his responses regarding his "pre" condition assumed a time period prior to that date.

> As far as his work ability goes, he is able to basically use his mind and use the abilities of that area as a teacher. However, as far as any kind of physical labor, he is totally and permanently disabled from that type of activity. Given his age, it is doubtful that vocational rehabilitation would be made available to him, though I am sure he would take advantage of it and that it would be very helpful putting him back to work on some type of full-time basis.

DE 11, pp. 262-263.

Claimant

25. Claimant testified at the hearing about his abilities to sit, stand, walk, and perform other functions:

a. *Sitting.* Claimant began to feel uncomfortable sitting at the hearing after about an hour, but he explained that he can drive for two to three hours before needing to stop and walk around. He does not think he could take classes (or, apparently, work in a sedentary job) for eight hours per day because of the sitting involved. Dr. Ward reported in 2009 that Claimant told him he had been medically restricted from sitting for long periods. However, no medical evidence establishes that any physician has restricted Claimant from sitting. Dr. Knoebel and Dr. Ward have each opined that Claimant can do sedentary and light-duty work.

b. *Walking, standing, lifting, bending.* "Walking I can do, which helps a lot. I cannot just stand absolutely still in one spot. That only takes two or three minutes. And so I've either got to be walking or sitting." Tr., p. 51. Claimant walks one to two miles either every day, or three days per week, on flat ground. (Compare Tr., p. 53 with Tr., p. 69). It takes him approximately an hour to walk two miles on a good day. He also has bad days, when he cannot walk as far:

> If I do any long walking, like in the mall or something, I take a cane. When I go grocery shopping, I use the cart as a walker. Stairs, I have to use the handrail and two step it, put one – my right leg up to use the main power for lifting because my left leg won't do it. And if I bend it too much, I'll literally fall down.

Tr., p. 51. "…I can't even hardly walk up stairs, I can't climb on a ladder, I can't bend over, I can't do any lifting. Just walking down the hallways I have a bad time that way." Tr., p. 34.

26. Without qualification, Claimant pegged his left leg limitations and his inability to return to his time-of-injury job (or any full-time job) to his May 2008 surgery.

VOCATIONAL EVIDENCE

Post-Industrial Injury Vocational History

27. Claimant did not return to work for Employer. In a February 2009 meeting, Robert Nield, Idaho Falls Temple Recorder, advised Claimant he could not return to work because he was unable, physically, to perform all of the duties required of his job description. Notes by Dan Wolford, Industrial Commission Rehabilitation Division ("ICRD") consultant, and a memorandum from Bruce Sevy, Idaho Falls Assistant Temple Recorder, to Mr. Nield, confirm that Employer was unwilling to modify Claimant's time-of-injury position so that he could return. In addition, the memorandum confirms that Claimant was encouraged to seek employment placement assistance, and that Claimant was advised his long-term disability benefits would be jeopardized if Claimant were to go back to work:

> Brother Godfrey was again encouraged to work with Vocational Rehabilitation and LDS Employment to seek other opportunities for employment. However, until such time that he make equal to or more than 75% of his current pay level he will remain on long term disability. If such work is secured his long term disability will be lifted.

DE-26. Along these lines, Claimant testified at his deposition on April 18, 2012 that his Social Security Disability Insurance ("SSDI") benefits will be reduced if he earns more than $700 per month.

28. Claimant began substitute teaching for the Idaho Falls School District in fall 2009. He tried teaching for several consecutive weeks at one point, but he stopped because he could not take the long periods of standing. "I did that for about a month, and…it was just too hard. I'd come home at night just absolutely hammered…so…I took my name off the full-time substituting list and went to just doing it part time…" 2012 Tr., p. 38. His job at first sometimes lasted only a couple of hours, and sometimes all day; sometimes one day a week, and sometimes five days a week. In addition, Claimant had the flexibility to refuse assignments. At the second hearing, Claimant explained that he was working three hours per day, five days per week, teaching students in the resource room. He taught in half-hour blocks and was able to get up and take five-minute walks regularly. Claimant will return for the 2012-13 school year in the same position, if it is offered to him; however, the school district is under no duty to extend this offer.

29. Once before, and once shortly after Claimant began substitute teaching, he applied (unsuccessfully) to the school district for a computer technician position. After obtaining a fuller understanding of the requirements of that job, which include lifting computer components, Claimant now believes that he could not physically do it. Claimant has not looked for other work or obtained additional training. He does not believe he can work more than part-time, at any job, or attend classes for eight hours per day. He does not believe he could work six hours per day, five days per week, in the resource room because he knows "from past experience" that it would be too much for him. Tr., p. 45. Note, however, that Claimant did not

work in the resource room, and apparently did not seek any accommodations, when he previously tried working full-time.

Post-Industrial Injury Earnings

30. Claimant's earnings for 2010 included $22,753 (SSDI) plus $6,187.36 (W-2 earnings). In 2011, Claimant received $22,758 (SSDI) plus $5,068.09 (W-2 earnings). In 2012, Claimant's earnings from the school district, through April, amounted to $2,665.42.

Dan Wolford, ICRD Consultant

31. Mr. Wolford, a consultant with ICRD, assisted Claimant in developing his strategy for reentering the workplace from January 21, 2009 through November 30, 2009. Mr. Wolford confirmed that, although Claimant was hopeful he could return to work for his Employer as a mentor, Employer declined to put him back to work, in any capacity. Employer recommended that Claimant work with LDS Employment Services (as well as ICRD) to find a new job, but Claimant did not pursue this option. Claimant did discuss retraining with Mr. Wolford, however, and went as far as to achieve admission into an IT Technical Support-Help Desk program. As of July 9, 2009, Claimant was still very interested in attending this program. He had also obtained legal representation, so Mr. Wolford contacted Claimant's attorney and set up a meeting.

32. Mr. Wolford met with Claimant and his attorney on August 13, 2009. They discussed that Claimant would likely not be able to recapture his time-of-injury wage ($26.13 per hour, or approximately $50,000 annually) without some additional training and, even then, it would take time to reestablish himself and rebuild his earnings. They also discussed that the IT program was relatively new, so related job placement statistics were unavailable, as well as options available to him through workers' compensation benefits. Claimant decided that he was

unwilling to commit to the IT program at that time, so Mr. Wolford did not complete a retraining plan.

33. Mr. Wolford followed up with Claimant in September 2009. He was still undecided about the IT program but, in any event, he did not need Mr. Wolford to complete a retraining plan because he expected his retraining costs to be covered by his workers' compensation settlement.

34. On October 19, 2009, Claimant advised that he had been approved for SSDI benefits and that he had begun working as a part-time substitute elementary school teacher. Claimant thought the job was going well, but he did not believe he could do it on a full-time basis because he felt so sore after a day of work. He thought he might obtain a teaching certificate to enhance his employability. Also, Claimant noted that he can only earn so much before losing SSDI benefits. He "indicated that at this time he will be deferring that issue to his attorney and expects it will be addressed in case settlement negotiations." JE-11.

35. On November 30, 2009, Mr. Wolford closed Claimant's ICRD file because Claimant appeared to be employed at a job compatible with his physical abilities. Mr. Wolford opined that:

a. The school district in which Claimant was employed pays between $10.05 and $10.56 per hour for teacher's aides. Substitute teachers with bachelor's degrees were paid $61.82 per day in 2009 and, had Claimant possessed a teaching certificate, he would have earned $68.68 per day;

b. "Mr. Godfrey does have significant computer experience and is familiar with Excel. During his work career, he has demonstrated a high degree of mechanical aptitude. He is a well spoken individual and appears to have a very good "people skills." He

has worked with the public and has experience in the area of customer service. Although he has a bachelor's degree in business management, he has no prior work experience in that field," DE-14;

c. Without additional training or enhanced work skills, occupations within Claimant's skills and physical abilities include telemarketer (local hourly wage range $10.03-$11.44), hotel desk clerk ($6.84-$9.62), van driver ($7.36-$12.83), bill/account collector ($12.49-$16.00), potato sorter (N/A-$7.33), eligibility reviewer, government ($15.61-$19.22), and bank teller ($8.62-$11.15);

d. With nine months of formal training, Claimant could become a computer support specialist, and with six to ten months of formal training, Claimant could obtain his teaching certificate, which would qualify him to make $35,980-$45,968 as a full-time elementary school teacher, a job Mr. Wolford acknowledged may be outside Claimant's restrictions issued by Dr. Stromberg;

e. Claimant will likely not be able to replace his time-of-injury earnings, even with formal training; and

f. Claimant should continue his current substitute teaching work and, if his stamina improves, perhaps obtaining a teaching certificate and obtaining a full-time teaching job will become an option in the future.

Douglas N. Crum, CDMS

36. Mr. Crum, a qualified vocational disability consultant, authored a report on March 5, 2012 outlining Claimant's ability to obtain gainful employment. His opinions are based upon his review of Claimant's relevant medical and vocational records and an interview with Claimant.

37. Mr. Crum noted Claimant's education, described above, as well as his work experience. He opined that Claimant has transferrable skills related to retail management, customer service, cashiering, record-keeping, basic computer software utilization (including word processing), building maintenance (including related tools, materials and processes), reading, business management degrees, and substitute teaching.

38. Mr. Crum's ultimate opinion regarding Claimant's employability differs depending upon whether Dr. Knoebel's or Dr. Ward's medical restrictions are imposed. Under Dr. Knoebel's restrictions, which Mr. Crum interpreted as light work with a 20-pound maximum lifting limit and very occasional squatting, bending, kneeling, etc., Claimant is not totally and permanently disabled because he is not limited in his standing, walking or sitting. Under Dr. Ward's "assumed" restrictions of light to sedentary work with the ability to change positions on an ad lib basis and flexible hours, and *further* "assuming that Mr. Godfrey has very little tolerance for any sort of prolonged sitting, standing or walking," Mr. Crum opined Claimant, "would likely have no realistic access to jobs in his competitive labor market and would reasonably be found to be totally and permanently disabled as a result of this combination." CE 303. It is important to note that the critical assumption made by Mr. Crum concerning Claimant's tolerance to sitting is not supported by any of the medical opinions of record. Mr. Crum's ultimate opinion on Claimant's disability is therefore suspect.

CLAIMANT'S CREDIBILITY

39. The Commission found Claimant to be a credible witness at the first hearing, without qualification. Likewise, Dr. Knoebel attested to Claimant's credibility in his post-second-hearing deposition, reiterating the high opinion he formed of Claimant's character during

his IME examination, when he caught Claimant trying to *hide* his pain on the straight-leg raise test. ("Absolutely, yeah, I did, I found him credible." Knoebel Dep., p. 19.)

40. Claimant's testimony at the second hearing, however, exposed the context-specific nature of some of his responses related to his functional capabilities, such as where he recanted his testimony at the first hearing that he had no permanent medical restrictions. A similar problem can be found in Claimant's response to a pain questionnaire administered by Dr. Ward in December 2009. Claimant indicated that he was unable to work at all; however, he was, at that time, substitute teaching on an on-call basis. Claimant apparently did not believe his substitute teaching was substantial enough to mention; however, Claimant's opinion in this regard is insufficient to overcome the facts in the record that he actually was working when he filled out the questionnaire. We must conclude that if Claimant misunderstands the context of a query, his testimony may prove inaccurate.

41. Claimant's testimony regarding his medical restrictions and functional abilities is afforded no weight where it is not supported by other credible evidence in the record.

DISCUSSION AND FURTHER FINDINGS

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).

DISABILITY

42. Since a finding of total permanent disability is a prerequisite to any ISIF liability,

Claimant must first prove he is totally and permanently disabled.

TOTAL PERMANENT DISABILITY

43. "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. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 766 P.2d 763 (1988).

44. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation. Idaho Code § 72-422. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the nature of any disfigurement, the cumulative effect of multiple injuries, the occupation of the employee, and the employee's age at the time of the relevant accident or occupational disease manifestation. In addition, consideration should be given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area in light of all of the personal and economic circumstances of the employee, and other factors as the Commission may deem

relevant. The focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

45. There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment together with the relevant nonmedical factors total 100%. If a claimant has met this burden, then total and permanent disability has been established.

Time of Disability Determination

46. The Idaho Supreme Court in *Brown v. The Home Depot,* WL 718795 (March 7, 2012) reiterated that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing. Under Idaho Code § 72-425, a permanent disability rating is a measure of the injured worker's "present and probable future ability to engage in gainful activity." Therefore, the Court reasoned, in order to assess the injured worker's "present" ability to engage in gainful activity, it necessarily follows that the labor market, as it exists at the time of hearing, is the labor market which must be considered. Although the Commission is afforded latitude in making alternate determinations based upon the particular facts of a given case, the parties have not argued that Claimant's disability should be determined as of any other point in time. In addition, there is no reason apparent from the record why any alternate timeframe should be considered. Therefore, Claimant's disability will be determined as of the hearing date.

100% Disability

47. A claimant may establish total and permanent disability by proving that he or she is unable to engage in any gainful activity due to his or her medical and nonmedical factors, alone. It is undisputed that Claimant has worked on a mostly on-call, part-time basis as a substitute teacher since fall 2009. We find that this evidence is sufficient to establish that

Claimant is not totally disabled by the 100% method. In addition, notwithstanding his post-industrial injury employment, Claimant's medical and nonmedical factors are insufficient to establish he is totally and permanently disabled.

48. **Nonmedical factors.** Based upon the vocational and other evidence of record, Claimant's relevant nonmedical factors contributing to his disability at the time of the hearing include his:

a. Age (58);

b. Advanced education, including a bachelor's degree in small business management, touch-typing ability, and certificates or licenses (though lapsed) in a number of areas including electric/electronic fields, welding, commercial driving and others;

c. Work experience concentrated in medium and heavy labor positions with supervisorial duties, including some office work where he used a computer and did some bookkeeping, and, of course, elementary school teaching;

d. Transferrable skills which qualify him for some light and sedentary jobs; and

e. **Disabled-looking appearance attributable to his ambulatory difficulties observed at the hearing.**

49. **Medical factors.** Circumstances impacting Claimant's ability to perform job duties, as established by his medical restrictions and functional limitations, comprise his medical factors. Medical restrictions are assessed by physicians to protect patients from further injuring themselves. A claimant may be able to perform work outside of his reasonable medical restrictions, but such activity would pose an undue risk of injury. Therefore, the Commission will assume that a claimant is only eligible for work within his medical restrictions. Beyond medical restrictions, a claimant may also establish that he is additionally limited by pain. This

inquiry turns largely on the reliability of the claimant's subjective reports, since an individual's pain experience is not readily measureable by objective testing.

50. The record establishes that Claimant's ability to work at the time of hearing was reduced by the following reasonable permanent medical restrictions relegating him to light or sedentary work: no lifting in excess of 20 pounds occasionally (Stromberg and Knoebel) and 10 pounds frequently (Knoebel); no working at heights or climbing ladders (Stromberg); no standing for long periods (Stromberg); ability to change positions frequently (Ward); and only occasional squatting, bending, kneeling, climbing, pushing, pulling, with similar limits on other activities involving comparable physical effort (Knoebel). In addition, Claimant is restricted from any repetitive forceful gripping or torque-like activities related to his bilateral wrist arthrodeses (Knoebel), and no kneeling/squatting related to his post-meniscectomy left knee (Knoebel).

51. Claimant's medical records do not clearly restrict his walking; however, Claimant has testified that he tries to walk often and is sometimes limited from walking for long periods. Claimant's testimony is supported by medical records and physician opinions that his left knee condition and physician-diagnosed radiculopathy causing left leg pain and weakness are responsible for his walking difficulties. Claimant's testimony is adequately supported by the record. Therefore, we find that Claimant would be unable to perform work in which he is required to regularly walk for long periods.

52. Sitting poses a more difficult question. Claimant does not believe he can sit for eight hours a day, either to work or take classes. However, there is no medical evidence establishing that any of Claimant's evaluating/treating physicians would limit him in this regard. For example, Dr. Ward expressly opined that Claimant could work full-time in a sedentary

position, so long as he can change positions frequently, and the record does not establish that Claimant's condition has deteriorated since then. Further, Claimant demonstrated and explained at the hearing that he can generally sit for an hour or more without becoming uncomfortable.

53. The record lacks evidence of any attempt by Claimant to obtain or do sedentary work. For that matter, the record lacks evidence of the type of pain Claimant incurs by sitting and what, if anything, relieves it. Such details are important to rule out sedentary work, since such jobs do not all require workers to sit for eight hours straight, which he has testified he cannot do. We do not doubt that Claimant does not believe he can do sedentary work. However, the record establishes that no physician agrees with Claimant's assessment, and Claimant has provided an inadequate basis for refuting (or augmenting) these opinions to support his claims. We find that Claimant has failed to prove by a preponderance that either reasonable medical restrictions, or pain, preclude him from sedentary work.

54. Mr. Wolford and Mr. Crum both identified sedentary jobs that Claimant is qualified to do. We find these opinions persuasive. Claimant is not totally and permanently disabled by the 100% method.

Odd lot doctrine

The second method of establishing total and permanent disability is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd lot worker. *Boley v. State Industrial Special Indemnity Fund,* 130 Idaho 278, 281, 939 P.2d 854, 857 (1997). An odd lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist*." Bybee v. State, Industrial Special Indemnity Fund,* 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), citing *Arnold v. Splendid Bakery,* 88 Idaho 455,

463, 401 P.2d 271, 276 (1965). Such workers are not regularly employable "in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department,* 107 Idaho 109, 112, 686 P.2d 54, 57 (1984) citing *Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

The burden of establishing odd lot status rests upon the claimant. *Dumaw v. J. L. Norton Logging*, 118 Idaho at 153, 795 P.2d at 315 (1990). An injured worker may establish total permanent disability under the odd lot doctrine in any one of three ways:

a. By showing that the claimant has attempted other types of employment without success;

b. By showing that the claimant or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or

c. By showing that any efforts to find suitable work would be futile.

Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

55. Claimant asserts that, if he loses his current job, he will not be employable elsewhere. However, he does not assert his current employment is the result of a superhuman effort on his part, a business boom, or a sympathetic employer. Likewise, the record does not establish a basis for any of these grounds. Claimant obtained his position through a competitive process, and he had retained it for more than two school years at the time of the second hearing. His employer accommodated his need for a five-minute walk every half hour, but there is no evidence from which to conclude that such accommodations were not made when necessary for any employee. Claimant has good days and bad days, but his testimony and his history at this job establish that he is able to maintain this level of employment on a continuing basis.

56. There is no question that Claimant's current employment represents a significant reduction in earning potential from his time-of-injury employment. However, Claimant's employment is sufficient to establish that he is competitive in his local labor market for at least some jobs. Thus, we find he is not totally and permanently disabled as an odd lot worker.

57. Claimant has likewise failed to establish total and permanent disability under the three *Lethrud* methods.

58. First *Lethrud* method. Claimant has not applied for any sedentary jobs because he does not believe he can sit for eight hours per day. As determined, above, Claimant's subjective concern in this regard is unsupported by other credible evidence in the record and, thus, is insufficient to establish he cannot do sedentary work. Therefore, Claimant's failure to look for such work, particularly in light of the fact that he is currently performing work that is more physically demanding than sedentary work, is dispositive of this prong. Claimant has failed to adduce sufficient evidence to prove he is an odd lot worker under the first *Lethrud* test.

59. Second *Lethrud* method. Claimant worked with ICRD to find suitable retraining and/or employment, but ICRD closed Claimant's file when he began working for the school district. Neither ICRD, nor any other entity, searched for work on Claimant's behalf and found it unavailable. There is insufficient evidence in the record from which to find Claimant was an odd lot worker under the second method.

60. Third *Lethrud* method. The record does not establish that it would be futile for Claimant to attempt to find work in his labor market. Again, Claimant's education and experience avail him to sedentary work, and Claimant has failed to establish that he cannot do such work.

61. We find that Claimant has failed to establish that he is totally and permanently disabled. As a result, all other issues are moot.

CONCLUSION OF LAW

Claimant has failed to prove he is totally and permanently disabled. All other issues are moot.

ORDER

1. Claimant has failed to prove he is totally and permanently disabled. All other issues are moot.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this __20th____ day of ___March_____, 2013.

INDUSTRIAL COMMISSION

/s/_____
Thomas P. Baskin, Chairman

/s/_____
R.D. Maynard, Commissioner

/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _20th_____ day of __March_____, 2013, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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