BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CLARENCE "FRED" GOLDMAN, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)	**IC 2007-011742** **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION** November 18, 2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee LaDawn Marsters, who conducted a hearing in Idaho Falls on December 7, 2010. Claimant was present and represented by Delwin W. Roberts. Paul B. Rippel represented the Industrial Special Indemnity Fund ("ISIF"). The parties presented oral and documentary evidence, took two post-hearing depositions and filed briefs. This matter came under advisement on July 12, 2011.

ISSUES

By agreement of the parties, the issues to be decided are:

1. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition;

2. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine or otherwise;

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

4. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

There is no dispute that Claimant was injured when he rolled the semi truck he was driving to avoid colliding with a passenger vehicle on April 3, 2007. There is also no dispute that, prior to the accident on that day, Claimant was not disabled, but was working as a truck driver while managing permanent partial impairments to his neck, back, knees, upper extremities and hips. Further, the parties agree that, as of the Functional Capacity Evaluation (FCE) prepared on November 4, 2010, Claimant was totally and permanently disabled.

Claimant contends that ISIF is liable for a portion of his benefits because he is totally and permanently disabled due to a combination of his pre-existing permanent impairments, permanent impairments to his left knee and lower back that he sustained in the industrial accident, and non-medical factors affecting his ability to maintain gainful employment. Claimant seeks findings that his pre-existing impairments were manifest, constituted subjective hindrances to employment, and "combined" with injuries sustained in Claimant's last accident such as to trigger ISIF liability. He relies upon the opinions of Brent Greenwald, M.D., his treating orthopedic surgeon with respect to his back injury; Mary Himmler, M.D., his treating physiatrist; Sid J. Garber, M.D., an orthopedic surgeon and independent medical evaluation (IME) panelist; and Richard G. Taylor, Ph.D., a vocational consultant.

ISIF does not dispute that Claimant is totally and permanently disabled *now*, but it maintains that Claimant was not thusly disabled when he reached maximum medical improvement (MMI) following his April 2007 accident, from which he suffered no disability at all. Relying upon Drs. Himmler and Taylor, John Andary, M.D. (Claimant's treating orthopedic surgeon for his left knee injury) and a panel of IME physicians including Dr. Garber, Richard W.

Wilson, M.D. (a neurologist) and Eric Holt, Ph.D. (a psychiatrist), ISIF posits that Claimant's current condition is due to advancement of his pre-existing pathology alone. It seeks a holding that it is not liable for any of Claimant's benefits.

OBJECTIONS

All pending objections are overruled. Commencing at page 20 of Dr. Garber's deposition, Counsel for Claimant inquired of Dr. Garber whether he had an opinion concerning the extent and degree of Claimant's preexisting physical impairment for left knee degenerative arthritis. This elicited an objection from Defendant, who asserted that any such opinion held by Dr. Garber would constitute a "new opinion" based on information that was unavailable to Dr. Garber prior to the date of hearing. Presumably, Defendant raised this objection pursuant to JRP 10(E)(4), which specifies:

> Unless the Commission, for good cause shown, shall otherwise order at or before the hearing, the evidence presented by post-hearing deposition shall be evidence known by or available to the party at the time of the hearing and shall not include evidence developed, manufactured, or discovered following the hearing. Experts testifying post-hearing may base an opinion on exhibits and evidence admitted at hearing but not on evidence developed following hearing, except on a showing of good cause and order of the Commission. Lay witness rebuttal evidence is only admissible post-hearing in the event new matters have been presented and the Commission so orders.

Defendant intimates that the opinions rendered by Dr. Garber concerning the extent and degree of Claimant's permanent physical impairment relating to preexisting degenerative knee arthritis are of a variety derived from consideration of evidence developed subsequent to the hearing. However, a review of Dr. Garber's testimony reveals that his opinions were based solely on evidence known and disclosed to the parties prior to the date of hearing. Accordingly, the Referee overrules the objection made by Defendant at page 20 of Dr. Garber's deposition.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Claimant's son-in-law, Donald T. Jones, who is also a social worker, taken at the hearing;

2. Claimant's Exhibits A-C admitted at the hearing;

3. The post-hearing deposition of Sid Garber, M.D., an orthopedic surgeon, taken via telephone on April 6, 2011; and

4. The post-hearing deposition of Richard G. Taylor, Ph.D., a vocational rehabilitation consultant, taken on April 7, 2011.

5. In addition, as addressed below, judicial notice is taken of the Lump Sum Settlement Agreement executed by Employer/Surety and Claimant on May 22, 2009.

After having considered all the above evidence and briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

BACKGROUND

1. Claimant was 71 years of age and resided in Idaho Falls at the time of the hearing. He was 69 years of age on April 3, 2007, the date of his semi truck rollover accident.

2. Claimant finished high school as an average student, then enlisted in the military. Subsequently, in 1975, he took one university course in supervision techniques in conjunction with one of his jobs. He is a "hunt-and-peck" typist with no computer or keyboarding experience.

3. Claimant's lifetime work experience is predominantly comprised of employment requiring heavy duty labor. Beginning in the mid-1970's, he worked for a number of employers in the masonry trade for whom he laid foundations, erected metal buildings and prepared and finished concrete.

4. In light of his deteriorating physical condition, Claimant retired from full-time masonry work in 2000. He and his wife planned to open and operate a daycare business; however, they were unable to do so because first his mother-in-law, then his wife, died of cancer. Seeking a new start, Claimant moved to Idaho and, with the assistance of the Idaho Department of Vocational Rehabilitation, he trained to become a truck driver and obtained his CDL. Between November 2003 and April 2007, Claimant drove semi trucks for several different employers.

APRIL 3, 2007 INDUSTRIAL ACCIDENT

5. Employer hired Claimant as a truck driver in March 2007. On April 3, 2007, he swerved to avoid a car in the middle of the road, overturning his truck. He described how he was injured in that accident at the hearing:

> …And at that point I had to either dodge him or run over him and I won't hit a four-wheeler, so I actually missed him. The trailer I was pulling off-tracked to the right about 16 inches and the tandems on the trailer hooked a – it put me in a culvert and that jerked the trailer around and ultimately wound up throwing the cab over into – off of a – I don't know how to explain it. It was a – probably a drop off the edge of the road three foot.
>
> And when the trailer went off, the truck was sort of jackknifed and it just sort of flipped the cab over and slammed it down on the –
>
> Before it flipped over, there was – it went down through a fence. There was a lot of stuff coming through the windshield. It knocked the windshield back inside the truck and something came though the front and stabbed me in the leg and I was hanging upside down in the cab by my left knee.
>
> My left boot was under the clutch pedal, I guess. Whatever it was that stuck me in the leg was holding me up. So I was hanging upside down for a period of time.

> And then when I fell, I didn't fall far, but I fell on my head and rolled around.
>
> And then the first thing you think about is fire. So I was able to stand up and move the windshield out of the way and then go out through the front of the truck and that would then –
>
> I don't know what transpired after that. The EMTs came and that couldn't have been more than five minutes and they told me I needed to go to the hospital.

Tr., pp. 46-48.

6. Claimant's left knee hurt worse than anything else when he emerged from the truck, and he also knew something had happened to his low back. He received emergent care in Carthage, Missouri; however, there are no medical records in evidence documenting the care Claimant received. Other records (for example, those prepared by Dan Wolford, consultant for the Industrial Commission Rehabilitation Division) indicate that x-rays of Claimant's cervical and lumbar spine, as well as both knees, demonstrated mild arthritic changes throughout and mild to moderate osteoarthritis in his left knee, but no acute pathology. On release, Claimant was told to see his primary care physician.

7. Claimant did not receive follow-up care until he returned to Idaho, two weeks later. His return was delayed because Employer did not provide transportation, so Claimant had to find his own way back. He arrived on a weekend, so he went to the emergency room at Eastern Idaho Regional Medical Center. Claimant recalled that x-rays were taken, but no records of this visit are in evidence. Again, Claimant was instructed to follow up with his primary care physician.

8. Claimant followed up with a physician assistant at the Pain Management Clinic on April 25, 2007 and for several subsequent visits. He was referred to Nathan Hunsaker, M.S.P.T., a physical therapist, who he first saw on April 26. Claimant was also seen at Idaho

Urgent Care. Significantly, Claimant attributed left knee, neck and low back symptoms to the industrial accident at his initial visits. Records from these medical care providers document Claimant's ongoing left knee, low back and other symptoms as follows:

a. (April 25, 2007): Left knee contusions, numbness in his right foot, and cervical and lumbar tenderness without deformity, swelling or instability.

b. (April 26, 2007): Pain down his left leg, stiff neck and low back pain due to April 2007 accident. "At this time patient demonstrates symptoms consistent with acute lumbar and minor cervical strain with soft tissue damage." CE, p. 141. It was also noted that Claimant had a history of multiple broken bones, including a broken pelvis.

c. (April 27, 2007): Symptoms not worse; pain more in buttock than down leg.

d. (April 30, 2007): Back pain improvement but increased neck pain.

e. (May 2, 2007): Back pain improvement but very painful left elbow.

f. (May 4, 2007): Improvement in elbow and low back.

g. (May 7, 2007): Increased cervical spine pain; improvement in elbow.

h. (May 9, 2007): Improvement in neck and low back, but burning on soles of feet keeping him up at night. Chronic neck, back and left knee pain with onset at rollover accident. Muscle spasms. Knee tenderness without deformity, swelling or instability. History of long-term use of steroids, gout and elevated lipid levels noted.

i. (May 11, 2007): Some improvement in back pain; no change in foot pain.

j. (May 14, 2007): Backs of his hands going numb and/or burning when he lies down at night.

k. (May 16 and 18, 2007): Overall improvement but lingering neck problems.

l. (May 21, 2007): Overall improvement.

m. (May 23, 2007): Improvement in neck pain but increased elbow pain.

n. (May 25, 2007): Overall feeling good.

o. (May 29, 2007): Constant back pain that temporarily increases following "popping". No change in knee pain; neck pain unchanged.

p. (May 30, 2007): Hip pain, continued back popping and pain.

q. (May 31, 2007): "Back pain since 1958. Pain is diff since MVA in April '07. Back "snap, crackles and pops"…very painful…Feels back will "cave in"… Pain is constant, sharp and at times shoots down legs. PT has helped pt function but has not helped [with] pain." CE, p. 91.

"Complains of low back pain of chronic origin, muscle spasms at night 20 min, upper back and low neck pain following truck rollover mva without seatbelt, low back pain following truck rollover mva without seatbelt, and Previous [sic] back injuries (lumbar) from a lifetime of wt lifting…". CE, p. 99.

r. (June 1, 2007): Increased pain in both knees and hips, as well as increased popping and pain in his back.

s. (June 4, 2007): Increased pain and stiffness over the weekend; increased pain on the medial side of both knees.

t. (June 6, 2007): Increased back pain radiating down his left leg; cannot do PT exercises due to pain; lying on right side at night reduces pain.

u. (June 8, 2007): Increased pain in back, hip, knees, elbow and some stomach upset. Pain radiating down left leg. PT exercises no longer relieving his pain, but he gets some relief from lying on his right side.

v. (June 14, 2007): Chronic low back pain in addition to low and mid back pain from accident. Pain radiating down left side.

w. (June 21, 2007): Low back pain, worse with ADLs, not improved with injections. Neck and back pain improved with PT.

x. (July 16, 2007) (Post left knee surgery): Knee pain from arthroscopic surgery.

y. (July 18, 2007): Knee pain improved since surgery.

z. (July 19, 2007): Back pain with radiculopathy; pain in hips, shoulder and knee; depression; inability to perform ADLs.

aa. (July 20, 2007): Sore left knee.

bb. (July 23, 2007): Improvement in knee but debilitating back pain.

cc. (July 25, 2007): Bruising and increased pain in left knee. Significant worsening right hip pain.

dd. (July 27, 2007): Unchanged pain in knee, but less stiff.

ee. (July 30, 2007): Pain with weightbearing in the medial aspect of the knee at the joint line.

ff. (August 1, 2007): Left knee painful and tender to palpation along joint line of medial side.

gg. (August 2, 2007): Unchanged knee symptoms; back pain.

hh. (August 6, 2007): Sore knee; improvement in right hip; very sore back.

ii. (August 7, 2007): Inability to perform ADLs, depression over health status, severe insulin resistance, numbness and vascular insufficiency in feet, chronic back pain. Claimant was referred to Mary Himmler, M.D., for treatment of his back pain.

jj. (August 16, 2007) (Post double hernia repair): Pain due to hernia repair surgery and increasing pain in left knee with slight reduction in range of motion as compared to pre-surgery but no visible bruising or swelling.

kk. (August 20, 2007): Increased knee pain following abdominal surgery; Claimant suspicious something may have happened during that procedure to exacerbate his knee condition. Still unable to drive truck.

ll. (August 24, 2007): Increased pain in knee and back.

mm. (August 27, 2007): Knee worsening.

nn. (August 29, 2007): Knee improving.

oo. (August 31, 2007): Back pain, not well-controlled.

pp. (September 5, 2007): Great day on Sunday, not feeling too bad this day.

qq. (September 7, 2007): Claimant just doesn't feel good in a general sense.

rr. (September 10, 2007): Still generally under the weather. Claimant discharged from PT to a home regimen.

ss. (September 12, 2007): Claimant obtained a medical excuse from jury duty because he could not sit for prolonged periods and must attend medical appointments. Reported right hip pain like something was digging into him,

depression, constipation from narcotics and related stomach discomfort, and chronic pain and attendant stress.

9. Claimant's back pain was also managed by David P. Bowman, D.O. at Idaho Urgent Care. Dr. Bowman administered pain injections into Claimant's spine to treat muscle spasms on May 3, 2007, and June 13, 2007. Claimant's knee condition was treated by Dr. Andary.

LEFT KNEE INJURY

10. On May 21, 2007, Dr. Andary opined that conservative treatment had failed and that Claimant had a potentially symptomatic meniscus tear as well as underlying arthritis.

11. On June 6, 2007, after reviewing Claimant's left knee MRI of June 1, 2007, Dr. Andary formally assessed a left knee meniscus tear and chondromalacia and recommended surgical repair. In preparation for that procedure, Claimant underwent an extensive examination and subsequent diagnostic tests to obtain cardiac clearance. These evaluations identified coronary artery disease with stent placement in the right circumflex artery, systemic hypertension, dyslipidemia, osteoarthritis, gout, past cholecystectomy, borderline diabetes and morbid obesity.

12. Claimant's knee surgery, performed on July 12, 2007, was extensive. Dr. Andary performed a partial medial meniscectomy, a meniscectomy of the posterior horn and inner edge of the lateral meniscus, and chondroplasty of the medial femoral condyle, medial tibial plateau, lateral facet and medial eminence of the patella, and lateral femoral condyle.

13. Following surgery, Dr. Andary took Claimant off work for a total of eight weeks. Claimant was referred for a home health evaluation because he could not care for himself.

14. On August 9, 2007, Claimant underwent surgical repair of a double hernia. Following surgery, Claimant's knee pain increased. He wondered if something had occurred

during surgery to aggravate his three-week post-operative knee. There is inadequate evidence in the record to establish Claimant's supposition.

15. On November 12, 2007, nine months after he performed Claimant's left knee surgery, Dr. Andary again saw Claimant in follow-up. Claimant reported pain with walking and Dr. Andary administered a pain injection into the knee. Notwithstanding Claimant's continuing pain symptoms, Dr. Andary opined, "Fred has done very well, he has got some significant underlying arthritis which is [sic] probably been re-aggravated…". CE, p. 26. He apparently found Claimant had reached maximum medical improvement because he assessed 4% permanent partial impairment on account of Claimant's left knee surgery based upon the *AMA Guides, 5th Edition* and released him without restrictions.

16. Claimant reported to Mr. Wolford on May 13, 2008, that he was healing from his back surgery (addressed below), but he was still having problems with his right hip and his left knee. His left knee pain was limiting the amount of walking he could do, which was of particular concern to Claimant because Dr. Greenwald encouraged walking to assist in his recovery from his spine surgery.

17. By July 8, 2008, Claimant was still having problems walking very far due to left knee pain, and he was using a left knee brace. His walking difficulties were continuing to hamper his spine surgery recovery. Claimant was also having significant problems in his legs and feet that he attributed to an L-5 nerve root issue. He advised Mr. Wolford that a total knee replacement had been recommended, but he felt he needed to recover from his current injuries before considering that option. Mr. Wolford closed Claimant's file because he was no longer receiving worker's compensation benefits and, further, Claimant did not believe he could return to work in any capacity.

18. Claimant's left knee continued to deteriorate. On September 18, 2008, he reported to the IME panel (see below) that his pain was worse than pre-surgically and that it "collapses". The panel confirmed Dr. Andary's PPI assessment, attributing all degeneration to preexisting conditions.

19. Since sometime before May 20, 2010, Claimant has required bilateral canes to ambulate. On November 4, 2010, Mr. Hunsaker described Claimant's gait pattern as "…quite dysfunctional with shortened, shuffled steps." CE, p. 129.

LUMBAR SPINE INJURY

20. On December 12, 2006, about four months prior to his industrial accident, Claimant obtained an MRI of his lumbar spine. No physician records are in evidence to describe Claimant's symptoms prompting this study; however, the MRI report states Claimant was having low back pain and difficulty walking. The MRI identified a number of conditions throughout Claimant's lumbar spine that could account for his symptoms.

21. On June 1, 2007, Claimant underwent an MRI of his lumbar spine identifying a number of subluxations throughout his lower back not specifically identified on the report of his December 2006 study. The radiologist noted, however, the absence of any significant internal change when comparing the June 1, 2007, study to the earlier study of December 12, 2006. (*See*, Claimant's Exhibit A-1 at p. 16).

22. On September 6, 2007, Claimant was evaluated by Dr. Himmler for treatment of his persistent low back pain, which she attributed to the April 2007 rollover accident. Dr. Himmler was concerned about Claimant's "catching" sensation and his difficulty with standing upright after forward flexion. Lumbar spine flexion and extension x-rays did not identify any spondylolisthesis; however, visualization was difficult due to hardware placed to repair

Claimant's previously shattered right hip. Claimant's June 1, 2007, lumbar spine MRI report identifies a number of subluxations; apparently, Dr. Himmler did not have access to this study when she recorded her chart note.

23. On September 15, 2007, Dr. Himmler informed Claimant that she was moving to Pennsylvania and, therefore, could not continue treating him. Nevertheless, she saw Claimant in follow-up on September 26, 2007, and to assess a PPI rating on July 2, 2008.

24. On September 26, 2007, Dr. Himmler diagnosed lumbar spinal stenosis and degenerative disc disease. She referred Claimant for another opinion to Brent Greenwald, M.D., an orthopedic surgeon, and took him off work for eight weeks.

25. Dr. Greenwald evaluated Claimant's lumbar spine on November 14, 2007. By history, Dr. Greenwald noted Claimant's former low back problems associated with working with concrete since the 1950's, his January 2005 pelvis fracture and his April 2007 industrial accident. He noted that, following the April 2007 accident, Claimant had immediate new pain radiating into both legs, worse on the left than the right, and burning in the balls of his feet. These symptoms prevented Claimant from walking long distances and standing for long periods of time; he had claudication at 20 yards and could not stand pain-free for more than 2-3 minutes. Claimant reported that he had always done what he needed to do in order to keep working, but after the rollover accident, his pain became so severe that he could no longer function day-to-day.

26. Dr. Greenwald diagnosed long-standing degenerative changes of Claimant's lumbar spine acutely exacerbated by the April 2007 accident. He opined that Claimant's most serious problems were at the L2-3 and L3-4 levels. He ordered diagnostic tests to assess the potential benefits of operative intervention. None of these records are in evidence.

27. On March 18, 2008, Dr. Greenwald performed an L2-L4 decompression fusion and fixation to reduce lateral movement in Claimant's low back. No medical records of this procedure are in evidence.

28. On July 2, 2008, Dr. Himmler found Claimant had achieved MMI with respect to his back surgery and assessed a PPI rating in consideration of his lumbar spine impairment. Relying upon the *AMA Guides, Fifth Edition*, Dr. Himmler assessed PPI of 23% of the whole person based upon DRE lumbar category IV, at page 384, for complete or near loss of motion or a motion segment as a result of surgery. Opining, "The patient has long-standing degenerative changes in the lumbar spine with an acute exacerbation secondary to this work-related accident that occurred in April…," Dr. Himmler apportioned 50% of the permanent impairment to preexisting conditions and 50% to the April 2007 accident. CE, p. 177. Dr. Himmler also assessed permanent restrictions including no lifting of greater than 40 pounds, no bending, twisting, stooping, crouching, kneeling, balancing or walking on uneven ground. She anticipated that Claimant may require physical therapy, oral medication, spinal injection or further surgery to manage his back symptoms in the future.

29. When Dr. Himmler assessed her PPI rating, Claimant was back in physical therapy with Mr. Hunsaker, still trying to recover. He was still dealing with a bad left knee and was wearing a knee brace. As discussed above, Claimant's left knee pain made it difficult for him to walk, hampering his recovery from his back surgery.

INDEPENDENT MEDICAL EVALUATION PANEL OPINION

30. On September 18, 2008, Claimant underwent an independent medical evaluation by a panel of three physicians at the request of Surety. Dr. Wilson was the panel chair, with Dr. Garber and Dr. Holt participating as panel members. The panel reviewed Claimant's medical

records related to his April 2007 accident injuries, as well as some that were compiled previously.

31. The panel reported that Dr. Griffiths, in April 2005, opined that Claimant was probably a candidate for lumbar spine surgery and was a future candidate for total knee replacement, but Claimant wished to delay operative intervention. In addition, there are references to an April 7, 2008 revision in Dr. Andary's PPI rating and an April 8, 2008, independent medical evaluation by David C. Simon, M.D. The panel identified the following preexisting medical conditions from Claimant's medical records: exogenous obesity, hypertension, diabetes, gout, osteoarthritis, degenerative arthritis of the spine, both knees and both hips (more prominent on the right), right rotator cuff tear, GERD and bladder dysfunction.

32. The panel also interviewed Claimant, who reported that his left knee was worse than before surgery. He still had pain and it felt unstable. Regardless of these symptoms, the panel determined Claimant had likely reached MMI for his left knee condition three months post-surgically (approximately October 18, 2007). It assessed 4% whole person permanent partial impairment attributable to the April 2007 accident on account of Claimant's partial meniscectomies, which it opined successfully repaired Claimant's accident-related meniscus tears. The panel did not take Claimant's osteoarthritis into account at all because it opined that this condition was not caused by the industrial accident because it preexisted that event.

33. With respect to disability, the panel agreed that Claimant was limited to sedentary activities due to his left knee condition. However, based upon Dr. Griffiths' prior opinion that Claimant would someday require total knee replacement surgery due to his significant preexisting degenerative arthritis, the panel opined that all of Claimant's current limitations, including those related to his left knee, are due to preexisting degeneration. Thus, the panel

report concluded, Claimant incurred no disability as a result of the injuries arising from his industrial accident.

34. However, the panel report contradicts itself in the paragraph following its above-stated conclusion by opining that Claimant's limitation to sedentary activities is partly due to his industrial injury:

> Mr. Goldman's current physical condition would restrict him to a work environment in which he is engaged in sedentary activities. This relates only partially to his left knee injury for which he underwent medical and lateral meniscectomies. He is far more limited based upon on [sic] his preexisting, progressive, symptomatic degenerative arthritis of both knees and hips, right greater than left.

CE, p. 198. At his deposition, on cross-examination, Dr. Garber reinforced the opinion that Claimant's meniscectomies combined with his preexisting condition, resulting in his limitation to sedentary activities and worsening symptoms:

> Q. …did the meniscectomies along with the preexisting condition combine to result in his limitation to sedentary activity?
>
> A. Yes. That would be an affirmative. The combination of the multiple degenerative problems and the meniscectomies would combine to present what we felt at that time was sedentary activities.
>
> Q. …when you do those repairs and clean up those tears or disruptions in the knee, that does have an impact on those surfaces, correct?
>
> A. Well, yes. You do remove the shock absorber or the cushion between the two bones when you take a piece out, so you don't come out of that scot-free. There will be some degenerative changes resultant from that.
>
> Q. Is that kind of change consistent with maybe an increase in what Mr. Goldman described as kind of a feeling of instability in the knee? He described a kind of a give-and-go type of weakness after that surgery. Any explanation for that?
>
> A. Well, not only did Dr. Andary do the partial meniscectomies, he also tried to clean some of the osteoarthritic debris out of there. He smoothed down the patella, and he smoothed down the femoral condyles and the tibial plateau. So there was an effort to give him a better knee. And certainly a giving away of the

knee wouldn't be that uncommon subsequent to that procedure. And physical therapy to help strengthen the knee is usually a part of it to help avert and correct that give-away.

CE, pp. 21-22.

35. Dr. Garber also opined that Claimant's knee surgery accelerated the worsening of his symptoms:

> Q. …after this accident of 4-3-07 and the surgery, he had what he described as a significant increase in pain and, you know, it just didn't seem like it was – he just didn't get around walking the way he used to. Why is that? What's the explanation for that?
>
> A. Well, I think I alluded to it in my previous statement that, you know, more than just a meniscectomy there was an effort to shave off all of the debris. And his inactivity did produce increased weight. I remember asking him that, and he said he had gained some weight because he couldn't do much of anything. And, of course, that's not good when you have a bad joint to start with and you put more load on it.
>
> And physical therapy is a very important part. I know he had 38 visits with the physical therapist. Part of it was after the surgery. But, you know, it's just a 69-year-old osteoarthritic knee that's been operated on and changed, and it's just not uncommon to go downhill thereafter.

CE, p. 23.

36. On October 9, 2008, after reviewing Dr. Himmler's report regarding Claimant's permanent partial impairment due to his lumbar spine condition, Dr. Wilson wrote an addendum to the panel report which confirmed the panel's opinion that none of Claimant's limitations were attributable to the April 2007 industrial accident. He also expressed some skepticism for Dr. Himmler's 40-pound lifting restriction, opining that this would only be appropriate at such time that Claimant's left knee condition improves to allow him to engage in activities above a sedentary level.

FUNCTIONAL CAPACITY EVALUATION

37. Meanwhile, Claimant was still working to recover. By May 20, 2010, Claimant had again been participating in physical therapy with Mr. Hunsaker for a period that cannot be determined from the record. Mr. Hunsaker wrote to Dr. Greenwald, describing how Claimant's comorbidities were complicating his recovery from his lumbar spine surgery:

> Fred has had a difficult recovery from his surgery thus far. He continues to improve in strength and stability but his progress is slow and complicated by comorbidities such as bilateral severe knee osteoarthritis and GI problems. He began his rehabilitation process requiring 2 canes for ambulation and several sitting rest breaks during a therapy session. He is currently able to ambulate all distances using a SPC and is tolerating a therapy session with 4-5 rest breaks during a therapy session. His back strength is improving and his posture is improving along with it. He continues to have some complaints of pain lateral to the mid lumbar spine which we have been working on utilizing ultrasound and soft tissue mobilization. He reports that this is helping.
>
> Fred's rehab process is going to be longer than a typical post-lumbar fusion due to his extended hospital and SNF stay as well as his numerous comorbidities. We are slowly transitioning him to a home program but it will take time.

CE, p. 130.

38. On November 4, 2010, Mr. Hunsaker prepared his FCE. He opined that Claimant could lift no more than ten pounds, on an occasional basis, relegating him to sedentary activities. He further opined that Claimant should never climb, stoop, kneel, crouch, crawl, or perform tasks involving vibration or working in high, exposed places, and he should only occasionally stand/walk, balance, reach or finger. Claimant could handle, feel and perform near or far acuity tasks frequently, and Mr. Hunsaker placed no restrictions on Claimant's abilities to talk, hear, smell, taste, see colors, see with a full field of vision or perform tasks involving depth perception or accomodation.

VOCATIONAL REHABILITATION CONSULTANT OPINION

39. On November 12, 2010, Claimant's ability to return to work was evaluated by Richard G. Taylor, Ph.D., a vocational consultant. Dr. Taylor reviewed Claimant's medical records and evaluations and interviewed Claimant prior to reaching his opinions in this case. Then, he prepared a report in which he repeatedly misstated the date of Claimant's injury. At his deposition, Dr. Taylor testified that all of these misstatements should be corrected to state April 3, 2007.

40. Unfortunately, Dr. Taylor not only misstated the date of Claimant's injury, but he also relied upon an inaccurate operative industrial injury date of April 5, 2009. This reliance contributes to a material misunderstanding on Dr. Taylor's part of evidence dispositive of this case. As a result of his mistake, Dr. Taylor believed that Dr. Himmler's July 2, 2008, opinion was prepared *prior* to Claimant's industrial injury when, in fact, it was prepared *after* both of the surgeries Claimant attributes to his industrial accident-related injuries.

41. In addition, Dr. Taylor treated Dr. Himmler's restrictions as comprehensive, when there is no evidence from her report that she intended to address any restrictions other than those arising from Claimant's lumbar spine impairment.

42. As a result of his misunderstanding, Dr. Taylor opined that Claimant incurred *additional limitations from the industrial accident,* in reaching, fingering and working in environments with vibration, which rendered him totally and permanently disabled. However, since the "pre-accident" information he relied upon actually evaluates only a portion of Claimant's *post-accident* condition, Dr. Taylor's opinion lacks foundation, is not credible and is afforded no weight inasfar as it relies upon Dr. Himmler's conclusions to establish Claimant's pre-rollover condition or any condition unrelated to his lumbar spine.

43. Based upon Claimant's proven ability to maintain employment as a truck driver so long as he did not need to handle the loads in any way, Dr. Taylor explained at his deposition that he assumed Claimant was able to perform this type of work prior to his industrial accident. After the accident, however, Dr. Taylor opined Claimant became unable to return to truck driving. These opinions are consistent with the bulk of the evidence in the record and are credible.

44. Dr. Taylor determined that Claimant is totally and permanently disabled as a result of medical and non-medical factors impacting his ability to obtain gainful employment. Neither party disputes this conclusion as of November 4, 2010, the date of Mr. Hunsaker's report upon which Dr. Taylor relied in reaching this opinion.

CLAIMANT'S CREDIBILITY

45. At the hearing, Claimant appeared significantly disabled. He ambulated with two canes and appeared to be in genuine discomfort while sitting and when required to turn his head. His testimony and demeanor persuaded the Referee that he was a highly credible witness, that he would return to work if he could and that, after the industrial accident, he could no longer function day-to-day due to his worsening limitations.

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). However, the Commission is not required to construe facts 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).

46. The ISIF acknowledges that Claimant is totally and permanently disabled as of the date of hearing. However, ISIF contends that it has no liability because Claimant's left knee condition (the only condition which ISIF concedes is related to the work accident) did not combine with the Claimant's preexisting impairments to cause total and permanent disability. The problem, of course, is that immediately prior to the accident of April 3, 2007, Claimant was employable, even though partially disabled. The ISIF's answer to this is that the change in Claimant's status from partially disabled to totally and permanently disabled is due to the natural progression of a number of underlying degenerative processes, and not the result of the accident of April 3, 2007. In order to analyze this argument, it is first important to understand the nature of the injuries causally related to the subject accident.

INJURIES CLAIMANT SUFFERED DUE TO THE INDUSTRIAL ACCIDENT

47. There is no dispute that Claimant suffered an industrial injury to the lateral and medial menisci of his left knee. However, ISIF rejects Claimant's contentions that he also suffered acute exacerbations of his preexisting degenerative conditions in his left knee and lumbar spine.

48. Drs. Himmler and Greenwald each opined that Claimant's lumbar spine condition was permanently exacerbated by the 2007 rollover accident; whereas, the IME panel headed by Dr. Wilson opined that Claimant's lumbar spine condition was wholly due to advancement of his preexisting degenerative arthritis.

49. None of these physicians witnessed Claimant immediately after the accident, but all of them reviewed his medical records. In addition, Dr. Himmler evaluated Claimant's lumbar spine on two separate occasions. Dr. Greenwald evaluated him on several occasions and performed his lumbar spine fusion surgery. Dr. Greenwald and, to a lesser extent, Dr. Himmler,

were in better positions to render opinions concerning Claimant's lumbar spine pathology than were the panel physicians, and they both opined that Claimant suffered an acute lumbar spine injury due to the industrial accident. These opinions are consistent with Claimant's description of the accident, which left him hanging upside-down, suspended by something sticking in his left knee, before he was dropped onto his head and rolled around before he could pull his way through the windshield to escape from the cab. They are also consistent with Claimant's medical records in evidence.

50. As to the role Claimant's industrial injury and subsequent arthroscopic surgery played in his worsening left knee condition, Dr. Garber, in his deposition and through the IME panel report, set forth facts which establish that Claimant suffered not only meniscus tears, but also permanent exacerbation of his preexisting left knee arthritis. Explaining that meniscectomies alone contribute to accelerated degenerative processes, Dr. Garber testified, "…you don't come out of that scot-free. There will be some degenerative changes resultant from that." CE, p. 21. Even the IME panel report did not dispute that the industrial accident and subsequent arthroscopic surgery were partly responsible for Claimant's relegation to sedentary activities.

51. Dr. Andary, Claimant's treating orthopedic surgeon, was aware of Claimant's post-surgical knee pain; however, like the panel, Dr. Andary allocated 100% of Claimant's residual symptoms to preexisting degeneration. Although Dr. Andary directly viewed Claimant's knee during surgery and was the physician most closely aware of Claimant's left knee condition, he did not testify and did not provide a rationale for his opinion that neither the industrial accident nor the subsequent extensive surgical procedures hastened the wearing out of that joint.

52. The Referee finds the opinions of Drs. Greenwald and Himmler more persuasive than the IME panel's opinion with respect to whether the 2007 accident permanently exacerbated Claimant's preexisting low back condition. The Referee further finds the opinions of Dr. Garber and the IME panel, to the extent the panel's opinions are consistent with Dr. Garber's, most persuasive concerning the etiology of Claimant's left knee condition.

53. The weight of evidence in the record establishes Claimant suffered left knee meniscus tears, as well as permanent exacerbations of his preexisting lumbar spine and left knee degenerative conditions, as a result of the 2007 rollover accident. As such, ISIF's argument that it is not liable for any of Claimant's benefits because the industrial accident did not contribute to Claimant's degenerative lower back and left knee conditions is moot. It is next necessary to determine whether Claimant was totally and permanently disabled as of his date of medical stability following the 2007 accident. If so, then the potential for ISIF liability exists.

MAXIMUM MEDICAL IMPROVEMENT (MMI)

54. Because of the progressive nature of Claimant's manifold injuries, it is critical to an assessment of Claimant's disability to clearly identify the date as of which that assessment should be performed. The proper date for disability analysis is the date that maximum medical improvement has been reached following the industrial injury. See *Stoddard v. Hagadone Corp.*, 147 Idaho 186, 207 P.3d 162 (2009). By reference to I.C. § 72-422, which defines "permanent impairment," it is possible to extract a rule for identifying the date of maximum medical improvement. That Section provides:

> "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. Permanent impairment is a basic consideration in the evaluation of permanent disability, and is a contributing factor to, but not necessarily an indication of, the entire extent of permanent disability.

55. Therefore, in order to define the date on which Claimant's permanent disability should be assessed, it is important to understand when the injuries suffered by Claimant as a consequence of the subject accident became stable and nonprogressive. Specifically, in order to identify the date on which Claimant's disability must be assessed, the date on which he finally became stable vis-à-vis his left knee and lumbar spine injuries must be identified..

56. Left Knee. ISIF posits that Claimant reached MMI following his left knee injury on either October 19, 2007, (as per the IME panel) or November 12, 2007 (as per Dr. Andary). Neither of these opinions takes the industrial injury's role in permanently exacerbating Claimant's left knee arthritis into account. Instead, they each focus only upon the repairs to Claimant's menisci, opining that these should have healed by the indicated timeframes with no further problems. Given that Claimant's post-accident left knee degeneration was found herein to be due in part to the industrial accident, however, these opinions lack foundation and are not credible.

57. The medical evidence in the record establishes that Claimant's left knee pain continued to worsen following surgery. Within a couple of weeks, he reported increasing pain. In November 2007, he required a pain injection into the knee; in May 2008 he was concerned because his left knee pain was still limiting his walking, which he needed to increase to assist in his lumbar spine surgery recovery; by July 2008 he was wearing a brace and by May 2010 he required bilateral canes to ambulate.

58. Claimant told Mr. Wolford on July 8, 2008, that a total knee replacement had been recommended but he declined, wishing to recover from his other injuries before considering another surgery. Also, his worker's compensation benefits had been terminated by this time and

he was living off of his savings. No other procedures to improve his knee condition have been proposed.

59. Occasionally, the Commission has found an injured worker to be at medical stability, notwithstanding that there exists a contemporaneous medical opinion suggesting that the worker would benefit from additional treatment. In these cases, it is usually demonstrated that the injured worker has rejected recommendations for further medical/surgical care and is satisfied with his/her condition the way it is. Typically, in these cases, a treating/evaluating physician will acknowledge that if Claimant declines further treatment, then he or she could be declared "medically stable" for all intents and purposes.

60. In the instant matter, the evidence suggests Claimant has not altogether ruled out the possibility of future medical care to treat his left knee condition. The ICRD records from 2008 suggest that Claimant may be waiting for his back condition to settle down before he entertains the prospect of a total knee replacement surgery. Also, judicial notice is taken of the fact that the April 2009 lump sum settlement between Employer and Claimant specifically left future medical care open vis-à-vis Claimant's left knee condition.[1] The lump sum settlement does not guarantee Claimant a total knee arthroplasty; all it does is specify that future medicals for the left knee are open. Even so, the record fails to disclose that Claimant has ever made further request to Surety for additional medical care for his left knee condition. Therefore, the record differs from those cases in which the Commission has relied upon the injured worker's refusal to consider additional care to support a finding of medical stability as of the date of refusal. Nevertheless, the ultimate fact remains that Claimant has declined to pursue the further medical treatment that has been recommended for care of his left knee, to include, per Claimant,

[1] The Commission may take judicial notice of its own files pertaining to a case. Anderson vs. Potlatch Forests, 77 Idaho 263, 291 P.2d 859 (1955).

left total knee arthroplasty. Under these circumstances, it is appropriate to find Claimant reached MMI on the date all reasonable medical treatment was offered, as opposed to delaying the conclusion of this case until such time that Claimant obtains and recovers from the surgery.

61. The Referee finds that, by July 8, 2008, all reasonable medical treatment expected to improve Claimant's left knee condition had been offered. Therefore, the Referee concludes Claimant reached MMI following his left knee injury on July 8, 2008.

62. Lumbar spine. With respect to his low back condition, Dr. Himmler opined that Claimant reached MMI as of July 2, 2008, approximately three and one-half months following his dual-level lumbar spine fusion surgery. The record also establishes that, as of May 2010, Claimant was still participating in physical therapy with Mr. Hunsaker, who opined that his recovery was taking longer because of his multiple preexisting pathologies. Mr. Hunsaker summarized Claimant's extensive limitations:

> Summary: Mr. Goldman presents for evaluation today with notable deficits in both UE and LE AROM---He is able to sit up to 10 minutes before requiring a sitting rest. He is able to ambulate 50" with bilateral single point canes but requires a sitting rest at that point. He reports constant 7/10 pain mainly in his hips, knees and back which increases to 10/10 at its worst. His gait pattern is quite dysfunctional with shortened, shuffled steps.

CE, p. 129.

63. Given Claimant's age and condition, his preexisting impairments impeding his recovery, and Mr. Hunsaker's opinion in May 2010 that Claimant was still in a period of recovery, Dr. Himmler's opinion that Claimant reached MMI by July 2, 2008, may appear overly optimistic. However, the fact that Claimant's condition was arguably worse in 2010 does not rule out the possibility that it was medically stable on July 2, 2008.

64. Dr. Himmler's opinion as to Claimant's lumbar spine condition is credible, and there is insufficient medical evidence in the record to refute it. No other physician opined on this

point. The Referee finds Claimant reached MMI following his lumbar spine surgery on July 2, 2008.

65. Having determined, above, that Claimant reached MMI from his left knee condition on July 8, 2008, and from his lumbar spine surgery on July 2, 2008, the Referee finds Claimant reached MMI following his industrial accident on the later of those dates, or July 8, 2008. This is the operative date upon which to determine whether Claimant was totally and permanently disabled.

TOTAL PERMANENT DISABILITY

66. Claimant must prove that he was totally and permanently disabled as of July 8, 2008. ISIF relies upon Dr. Taylor's opinion that Claimant was able to do a full range of light-duty work and some medium-duty work during this period and, thus, he was not totally and permanently disabled. Claimant argues that he has been unable to perform any work since his industrial accident, so he was totally and permanently disabled as of the relevant date. Claimant can prove he was totally and permanently disabled, as of July 8, 2008, by establishing that he was unable to perform any gainful employment due to his medical and non-medical factors alone.

67. Medical Factors/Permanent Restrictions as of July 8, 2008. As determined above, Claimant had permanent medical restrictions preventing him from lifting more than 10 pounds; from bending, twisting, stooping, crouching, kneeling, and balancing; and from walking on uneven ground. These restrictions are all attributable to both preexisting and industrial causes, because they resulted from his spine and left knee injuries which were both found to be due to permanent exacerbation of preexisting osteoarthritis. As determined below, Claimant also had

preexisting impairments that impeded full functionality of his shoulders, elbows, wrists, hips and cervical spine.

68. Non-Medical Factors as of July 8, 2008. The nonmedical factors under scrutiny include Claimant's age, education, transferrable skills and disabled-looking appearance, as they affect his employability.

a. ***Age:*** At the age of 69 on July 8, 2008, Claimant is an older worker. Without elaboration, Dr. Taylor stated this is a relevant factor in evaluating Claimant's employability.

b. ***Education:*** Claimant possesses a formal education through the 12th grade, with specialized on-the-job training through the years in construction work and truck driving training and certification. He has no keyboarding or computer skills. He is unable to utilize his construction skills because he is relegated to sedentary work. Likewise, he cannot return to truck driving, even in his former limited capacity, because he cannot cannot reliably climb into the cab of a semi, among other limitations. At his age, with his physical limitations, retraining is not a viable option.

c. ***Transferrable skills:*** Claimant has no transferrable skills. He could feasibly perform some telephone customer support jobs but for the fact that these positions typically require keyboarding skills.

d. ***Disabled-Looking Appearance:*** Although Claimant presents as someone who would work if given the chance, his dysfunctional gait requiring a knee brace on July 8, 2008 and his inability to turn his head without moving his shoulders

due to his prior neck fusion would likely discourage potential employers in a competitive job market.

69. Dr. Taylor opined that Claimant's condition as of Mr. Hunsaker's November 2010 functional capacity report rendered him totally and permanently disabled because he is only capable of performing .22% of the jobs in Idaho, which Dr. Taylor opined amounts to no real access, at all, in Claimant's local labor market. On its face, this opinion is not helpful because the parties do not dispute that Claimant was totally and permanently disabled at that point and, further, November 2010 is too remote from July 8, 2008 to provide meaningful guidance. Looking more closely at Dr. Taylor's report and his deposition transcript, however, the Referee finds that it does support Claimant's position that he was totally and permanently disabled as of July 8, 2008.

70. As Defendants point out, Dr. Taylor opined that Claimant was not totally and permanently disabled as of July 8, 2008, because, although his impairments relegated him to sedentary work, there was some sedentary work available to him at that time. Dr. Taylor's *ultimate* opinion lacks credibility and is unpersuasive, in part because the foundation upon which it is based includes only a partial picture of Claimant's many impairments from which he suffered on that date. This is because Dr. Taylor relied upon Dr. Himmler's post-accident impairment assessments *alone* in developing his opinion as to Claimant's capabilities. As a result, even though this portion of Dr. Taylor's opinion addresses the proper timeframe, it fails to account for any of Claimant's preexisting disabilities, and also improperly excludes Claimant's post-accident disability related to his left knee. Nevertheless, Dr. Taylor's opinion as to Claimant's disability as of early July 2008 provides a starting point from which to determine if, taking his other impairments into consideration, there was any work he could do.

71. As of that point in time, Dr. Taylor opined that, even with Claimant's spine-related restrictions and limitations relegating him to sedentary work, there were some call center jobs that Claimant could perform. He opined that, subsequently, Claimant became totally and permanently disabled when he "became" unable to perform the keyboarding functions necessary for call center work.

72. There are two significant problems with Dr. Taylor's opinion that Claimant could perform keyboarding work on July 8, 2008. First, Claimant's fingering dysfunction, identified by Mr. Hunsaker in November 2010, is attributable to his upper extremity injuries that he sustained prior to his industrial accident, and there is no evidence to establish that Claimant was not similarly disabled in July 2008. Moreover, Claimant has no keyboarding or computer skills, anyway, and it would be unrealistic to expect an employer to teach a 69-year-old to type when this skill is relatively common among younger applicants. Therefore, these positions should never have been included in the list of jobs Claimant could perform on July 8, 2008. When these jobs are excluded, the evidence establishes that Claimant had virtually no access to any job on the operative date.

73. Claimant's credible testimony also supports a finding that Claimant was totally and permanently disabled as of July 8, 2008. He testified that, during this period, he tried to think of a job he could do, but ruled them all out. He could not work as a greeter at, for example, Walmart or Home Depot, or as a security guard, because he could not stand for long periods; he could not work as a taxicab driver because he cannot repetitively get in and out of a vehicle or lift baggage. He also testified that he took a correspondence course toward qualifications for a job in the physical therapy field, but ceased pursuing that goal because individuals employed in

that field told him he is not a candidate because of his back problems and inability to lift or catch patients who fall.

74. The Referee finds Claimant was 100% disabled as a result of his medical and non-medical factors on July 8, 2008. In addition, he was totally and permanently disabled as an odd-lot worker because he has proven that any attempt to obtain gainful employment would be futile.

ISIF LIABILITY

Idaho Code § 72-332 (2) provides that ISIF is liable for the remainder of an employee's income benefits, over and above the benefits to which an employee is entitled solely attributable to an industrial injury, when the industrial injury combines with a preexisting permanent physical impairment to result in total and permanent disablement of the employee. "Permanent physical impairment" is as defined in Idaho Code § 72-422, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become unemployed. *Id.* This shall be interpreted subjectively as to the particular employee involved; however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the preexisting physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

In *Dumaw v. J. L. Norton Logging,* 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court listed four requirements a claimant must meet to establish ISIF liability under Idaho Code § 72-332:

(1) Whether there was indeed a preexisting impairment;

(2) Whether that impairment was manifest;

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

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

Dumaw, 118 Idaho at 155, 795 P.2d at 317.

PREEXISTING PERMANENT PHYSICAL IMPAIRMENT

Idaho law makes it clear that when evaluating the extent and degree of preexisting permanent physical impairment for purposes of ISIF liability, that impairment must be assessed and evaluated as of the date of injury. This rule applies regardless of whether the preexisting impairment is stable or progressive in nature. *See*, *Colpaert v. Larsons*, 115 Idaho 825, 771 P.2d 46 (1989).

In *Colpaert*, claimant suffered a trip and fall at work on December 10, 1982, causing injuries to her right shoulder. Claimant also suffered from a condition known as Ataxia, a neurological condition which attacked the nerves and muscles throughout her body and was progressive in nature. Following the work injury, claimant received treatment for her shoulder condition and eventually returned to work. However, by February 1984, claimant's Ataxia had progressed, and she was forced to cease work altogether.

ISIF argued that claimant's Ataxia did not constitute a preexisting permanent physical impairment because the condition was progressive in nature. Therefore, it could not, by definition, constitute a permanent physical impairment capable of triggering ISIF liability. The Supreme Court rejected this strained interpretation, ruling that Idaho law provides that, for progressive conditions, preexisting permanent physical impairment must be rated at a point in time immediately prior to the subject industrial accident.

Although no one had performed an impairment evaluation of claimant's Ataxia immediately prior to the work accident, there was persuasive testimony from one of claimant's

evaluating physicians that, had claimant undergone impairment evaluation immediately prior to the subject accident, her impairment rating for Ataxia would have been in the range of 30%. This evidence was deemed sufficient to establish that, immediately preceding the work accident, claimant's preexisting permanent physical impairment for Ataxia was 30% of the whole person.

In addition, testimony established the *Dumaw* requirements that the claimant's preexisting condition was manifest as of the date of the work accident and that it constituted a subjective hindrance to claimant as of the date of the work accident. (Both claimant and her immediate supervisor testified that, as of the date of the work accident, claimant required certain job modifications because her Ataxia made it difficult for her to stand and climb ladders.)

75. The evidence in this case establishes that in the years *prior to* the accident of April 3, 2007, Claimant was given an impairment rating for neck, left shoulder and left upper extremity injuries. See CE, pp. 233-234. Claimant's permanent impairment related to preexisting injuries was also assessed at various times *following* his April 3, 2007, accident. Nearly all of these impairment ratings are for conditions which the ISIF contends are progressive in nature; thus, the accuracy of such assessments is questionable because they are based upon a condition which may not reflect Claimant's permanent impairments as of the date of the industrial accident. Therefore, the next issue that must be resolved is whether, as was the case in *Colpaert,* there is substantial and competent evidence establishing values for preexisting permanent physical impairments as of April 3, 2007.

76. The March 31, 1995, letter from Dr. Cole is not particularly instructive. Even though he referenced a 22% PPI rating for Claimant's cervical spine, left shoulder and left upper extremity injuries, he was also quick to note that the rated conditions are progressive.

77. Arguably, Dr. Cole's observation that Claimant's conditions rated in 1995 are progressive is borne out by the next evaluation performed by Craig V. Lords, D.C. on or about August 19, 2009. Whereas Dr. Cole's 1995 report reflects that Claimant's cervical spine condition warranted a 15% PPI rating at that time, Dr. Lords concluded that, as of August 2009, Claimant's cervical spine condition warranted a 19% PPI rating. However, it is also worth noting that it is unlikely that Dr. Cole and Dr. Lords used the same rating criteria; the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition* (Fifth Edition), upon which Dr. Lords' relied, was not published until 2000.

78. Dr. Lords ultimately concluded that Claimant was entitled to a 45%[2] whole person rating for his preexisting permanent physical impairments. However, as previous decisions of the Commission make clear, when considering ISIF liability, and in particular, when calculating apportionment under *Carey v. Clearwater County Road Department*, 107 Idaho 109, 686 P.2d 54 (1984), the Industrial Commission does not utilize the combined values table, and instead, applies a simple additive approach to combining impairment ratings. *See Corson v. P.R. Corporation*, 022603-2008 IIC 0363.

79. Per Dr. Lords, Claimant is entitled to impairment ratings for a variety of preexisting conditions. His report reduces some of these impairment ratings to upper extremity ratings, while other impairments are expressed as percentages of the whole person. Under Idaho Code § 72-428, it is possible to express the upper extremity impairments awarded by Dr. Lords as percentage impairments of the whole person. Therefore, per Dr. Lords' report of August 19, 2009, Claimant has the following preexisting permanent physical impairments expressed as percentages of the whole person:

[2] Dr. Lords utilized the combined values table contained in the *Fifth Edition* in reaching his conclusion.

Right Shoulder	3%
Right Elbow	4.8%
Right Wrist	5.4%
Right Hip	6%
Left Shoulder	3.6%
Left Elbow	4.8%
Left Wrist	3%
Left Hip	6%
Cervical Spine	19%

80. Dr. Lords' report concerning Claimant's preexisting permanent physical impairments was authored following his evaluation of Claimant in August 2009. Unlike the evaluation that took place in *Colpaert*, nothing in Dr. Lords' report suggests that he attempted to place a value on Claimant's preexisting permanent physical impairments as those impairments existed on April 3, 2007. Because the evidence establishes some of Claimant's preexisting conditions are progressive, Dr. Lords' evaluation, conducted over two years following the subject accident, may not accurately reflect Claimant's time of injury impairment. Therefore, some effort must be made to extrapolate back to Claimant's impairment as of the date of injury.

81. Claimant has well-documented injuries involving his neck, upper extremities, low back and knees, which pre-date the April 3, 2007, accident by many years. The injuries were significant enough to cause him to give up concrete work in favor of a less demanding profession. It would do a disservice to the principles underlying the creation of the ISIF to ignore this plain evidence of preexisting permanent physical impairment with its undeniable impact on Claimant's employability prior to the April 3, 2007, accident.

82. Given the competing interests in this case, it is appropriate to acknowledge the preexisting permanent physical impairments identified by Dr. Lords, and to reduce the values he assigned in order to account for the deterioration in Claimant's condition during the two-year delay between the date of his industrial accident and the date on which he was assessed by Dr.

Lords. In the Referee's judgment, a 10% reduction, across the board, is appropriate since Dr. Lords recognizes that all of Claimant's conditions that he rated are progressive degenerative conditions. In accordance with the foregoing, the Referee concludes that Dr. Lords' ratings should be reduced to the following whole person values:

Right Shoulder	2.7%
Right Elbow	4.32%
Right Wrist	4.8%
Right Hip	5.4%
Left Shoulder	3.24%
Left Elbow	4.32%
Left Wrist	2.7%
Left Hip	5.4%
Cervical Spine	17.10%

83. Dr. Lords also noted that Claimant suffers from degenerative arthritis involving both knees that impacts his ability to engage in activities of daily living. See, CE, p. 203. He stated that "other physicians" would address the impairment referable to Claimant's low back and left knee, and did not provide any such assessments, himself. The panel report of Drs. Wilson, Holt and Garber reflects that Claimant has a long-standing history of bilateral knee problems and arthritis. Claimant's hearing testimony confirms this history. Per the panel report, Dr. Griffiths suggested that Claimant was a candidate for a future left knee arthroplasty as of April 5, 2005.

84. At his deposition, Dr. Garber acknowledged that Claimant was probably entitled to an impairment rating for his preexisting degenerative disease of his knees, bilaterally. He speculated that Claimant's preexisting permanent physical impairment for each knee could be as high as 15% per knee, since a 15% rating is typically awarded for a total knee arthroplasty with a good result. Dr. Garber's statements in this regard are evidently based on his recognition that Dr. Griffiths had previously recommended that Claimant was a candidate for future total knee

replacement as early as 2005. On redirect, Dr. Garber offered additional comments on the extent and degree of Claimant's preexisting permanent physical impairment for degenerative arthritis of the knees in the absence of total knee arthroplasty having been performed:

> FURTHER EXAMINATION
>
> By Mr. Rippel:
>
> Q. Mr. Roberts inquired concerning rating of Mr. Goldman's knees prior to this accident in April of '07 with regard to the degenerative conditions that he had. I noticed that the discussion in your report with regard to Dr. Griffiths from 2005 indicated that at that time Mr. Goldman was already a candidate for replacement of both knees.
>
> Was the 15 percent that you discussed, 15 percent whole person for a replacement, is that just for one knee? When you looked at the book and gave us a rating of – a guesstimate about ratings for degeneration being where between 4 percent and 15 percent because 15 was a total replacement, is that just pr knee?
>
> A. That is correct.
>
> Q. So if we wanted to know what his impairment in those knees was prior to this automobile accident, we would have to take that kind of guesstimate and use a combined values chart and figure out what that percentage is?
>
> A. That is correct. Again, range of motion would figure in there in regards to that. So the answer is yes.
>
> Q. So using that criteria, it could have been as high as 15 percent for each knee?
>
> A. That's after a replacement, you know.
>
> Q. How high does it go if I've just got a degenerative condition that's not – and I haven't had it replaced yet? Can I still have a 15 percent rating?
>
> A. Well, that's a good question. I can't answer that. I don't have access to that particular table in this book. But that makes sense to me. It could go as high as 15 if you're totally incapacitated, the joint is shot, and, you know, I suppose it could go as high as 15.

Garber Dep., pp. 26-28.

86. Dr. Garber's testimony is well-supported by the testimony of Claimant, who credibly established that one of the reasons he left concrete work in 2000 was because of unrelenting knee discomfort.

86. When determining impairment, the opinions of medical experts are not binding on the Commission, but are advisory only. Moreover, the Commission is empowered to consider pain as a measure of functional loss in determining impairment. See *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1126 (1989). The Referee finds the opinions expressed by Dr. Garber concerning the ratability of Claimant's preexisting knee arthritis to be credible and instructive. The medical evidence reflects that Claimant has long-standing degenerative arthritis of the knees, bilaterally. His complaints have been significant enough in this regard to cause him to give up concrete work for a less demanding profession. Indeed, so significant were Claimant's pre-injury complaints that he was considered to be a candidate for future knee replacement surgery in the years immediately preceding the subject accident. These facts, coupled with Dr. Garber's testimony, lead the Referee to conclude that, as of the April 3, 2007, accident, Claimant was entitled to a 10% whole person rating per knee for preexisting permanent physical impairment for each knee.

87. Claimant's preexisting low back impairment has been addressed by Dr. Himmler, who followed Claimant before and after his lumbar spine surgery. Dr. Himmler opined that Claimant suffered whole person PPI in the amount of 23% following his low back surgery, one-half of which (11.5%) is referable to preexisting degenerative conditions involving Claimant's low back at multiple levels. The Referee finds this opinion to be persuasive and, therefore,

concludes that as of April 3, 2007, Claimant was entitled to an 11.5% PPI rating representing preexisting permanent physical impairment for his low back.

MANIFESTATION

88. Next, Claimant must demonstrate, for each of the preexisting permanent physical impairments referenced above, that such impairment was "manifest," i.e. that either the employer or the employee was aware of the condition so that the condition can be established as having existed prior to the injury. See *Royce v. Southwest Pipe of Idaho*, 103 Idaho 290, 647 P.2d 746 (1982).

89. It is clear from Claimant's testimony at hearing that each of the preexisting impairments referenced above was manifest as of the date of injury. See, generally, Tr., pp. 16-79. Claimant's testimony establishes that, on a pre-injury basis, he was aware of each of the conditions leading to the assignment of a preexisting permanent physical impairment by Dr. Lords, Dr. Himmler, or the panel. Therefore, each of the aforementioned impairments was "manifest" within the meaning of the statute.

SUBJECTIVE HINDRANCE

The "subjective hindrance" prong of the test for ISIF liability finds its genesis in the statutory definition of permanent impairment together with additional language enacted by the legislature in 1981:

> "Permanent physical impairment" is defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become employed. **This shall be interpreted subjectively as to the particular employee involved, however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the preexisting permanent physical impairment was**

> **not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.**

Idaho Code § 72-332(2), Idaho Sess. Laws, ch. 261, Sec. 2, pp. 552, 554 (emphasis added).

The Idaho Supreme Court set out the definitive explanation of the "subjective hindrance" language in *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 172, 686 P.2d 557, 563 (1990):

> Under this test, evidence of the claimant's attitude toward the preexisting condition, the claimant's medical condition before and after the injury or disease or which compensation is sought, nonmedical factors concerning the claimant, as well as expert opinions and other evidence concerning the effect of the preexisting condition on the claimant's employability will all be admissible. No longer will the result turn merely on the claimant's attitude toward the condition and expert opinion concerning whether a reasonable employer would consider the claimant's condition to make it more likely that any subsequent injury would make the claimant totally and permanently disabled. The result now will be determined by the Commission's weighing of the evidence presented on the question of whether or not the preexisting condition constituted a hindrance or obstacle to employment for the particular claimant.

90. With respect to Claimant's preexisting knee and low back impairments, the record is replete with evidence establishing that these conditions did constitute a subjective hindrance to Claimant prior to the accident of April 3, 2007. As well, the evidence establishes that Claimant's cervical spine condition amounted to a subjective hindrance on a pre-industrial injury basis. Claimant testified that sometime in the 1970s, he suffered a spontaneous fusion injury to his cervical spine when he fell into a basement excavation. As a result of this accident, he now has severely restricted range of motion in his cervical spine, which is evident to observers and potentially off-putting to employers.

91. At some point in time after 1978, Claimant shattered his right elbow while operating a loader. Ever since then, Claimant has been weaker in the right arm, as the result of a detachment of the long head of the tricep's tendon. His right arm simply "collapses" at a certain

point while performing pushing activities. Tr. 22-24. The evidence in the record establishes that Claimant's right elbow impairment constitutes a subjective hindrance to his employability.

92. While employed in the Denver area, Claimant suffered a work-related fall that caused severe injuries to his left shoulder. Claimant evidently suffered a traumatic dislocation of the left shoulder, which also "destroyed" the rotator cuff. He testified that after reaching a maximum medical improvement, he has continued to have difficulties with the left shoulder. He has limited range of motion, and has an inability to use the left upper extremity in tasks requiring work over shoulder level. Tr. 26-28. Claimant has proven that his left shoulder impairment constitutes a subjective hindrance.

93. While employed by Western Transport, Claimant suffered a motor vehicle accident in January 2005. As a result of this accident, he suffered injuries to his pelvis, right shoulder and right arm. As a result of his pelvis/acetabulum injury, Claimant has permanent hip pain and a leg length discrepancy, which he has proven were subjective hindrances to his employability prior to his April 2007 industrial accident. Tr., pp. 41-42. Claimant testified that his right shoulder and arm injuries consisted of a rotator cuff tear and a fracture. The functional capacities evaluation performed at Claimant's instance by Nathan Hunsaker, MSPT, on November 4, 2010, reflects that Claimant has limitations on range of motion and weakness in the right shoulder; however, the record does not establish that the limitations found on that date were extant as of the April 3, 2007, accident. Therefore, Claimant has failed to prove that his right shoulder impairment constitutes a subjective hindrance.

94. Concerning his wrists, Claimant testified that he developed bilateral Carpal Tunnel Syndrome sometime in the mid-nineties due to the repetitive demands of his job as a cement finisher and concrete worker, and that, since then, he has had limited range of motion in

both wrists. (See Tr., pp. 78-79). Claimant's testimony does not reflect that his bilateral wrist impairments limited him in his ability to engage in gainful activity prior to April 3, 2007. Nor does the functional capacities evaluation performed by Mr. Hunsaker lend any particular support to the proposition that Claimant has permanent limitations/restrictions because of his bilateral wrist impairment that might impact his ability to perform remunerative activities. Although it is true that Claimant does, per Mr. Hunsaker, have current limitations/restrictions against certain types of reaching, handling and fingering activities, it is not clear that these limitations are related to the wrist impairments. Moreover, as noted above, Mr. Hunsaker's opinions are not particularly instructive when it comes to defining the impact of Claimant's preexisting permanent physical impairment, since the Hunsaker evaluation was conducted over three and a half years after the subject accident.

95. Finally, with respect to Dr. Lords' impairment assessment regarding his left elbow, Claimant did not testify concerning the impact of a left elbow condition on his ability to engage in physical activities prior to the April 3, 2007, accident. Although Mr. Hunsaker defines some limitations/restrictions referable to Claimant's left shoulder, his report does not contain specific reference to limitations/restrictions related to the left elbow. Therefore, Claimant has failed to establish that his left elbow impairment constitutes a subjective hindrance.

96. From the foregoing, the Referee concludes that Claimant has failed to establish, by substantial and competent evidence, that his preexisting impairments for the right shoulder (2.7%), right wrist (4.8%), left elbow (4.32%), and left wrist (2.7%), amounted to a subjective hindrance to Claimant as of the date of April 3, 2007, accident. The Commission finds, however, that the balance of Claimant's preexisting permanent physical impairments did

constitute a subjective hindrance to Claimant within the meaning of the statue as of the date of April 3, 2007, accident, in the following increments:

Right Hip	5.4%
Right Elbow	4.32%
Left Shoulder	3.24%
Left Hip	5.4%
Cervical Spine	17.1%
Lumbar Spine	11.5%
Right Knee	10%
Left Knee	10%

COMBINING WITH

Finally, as part of his prima facie case, Claimant bears the burden of establishing that his preexisting permanent physical impairments "combined with" his impairments related to his industrial accident so as to result in total and permanent disablement. Claimant bears the burden of demonstrating that, but for the preexisting impairments, he would not have been totally disabled. See *Garcia v. J.R. Simplot Company*, 115 Idaho 966, 772 P.2d 1973 (1989); *Bybee v. State Industrial Special Indemnity Fund*, 129 Idaho 76, 921 P.2d 1200 (1996).

97. The Referee concludes that Claimant's permanent impairments rendering him totally and permanently disabled include his preexisting permanent impairments to his hips (bilaterally), cervical and lumbar spine, knees (bilaterally), right elbow and left shoulder; and his accident-related permanent impairments to his spine and left knee. Claimant's relevant pre-accident impairments all contributed to his need to retire from heavy concrete and construction work, which is the only work he had performed in his lifetime. Claimant testified persuasively that the additive effects of these injuries, over time, prevented him from engaging in that type of work prior to his April 2007 industrial accident. He could, however, still work in a subsection of truck driver positions and, presumably, in some other light or medium-duty positions. It was

only after his industrial injuries that he was no longer able to perform this type of work that he became totally and permanently disabled.

98. Similarly, in the absence of his preexisting impairments, there would be some work that Claimant could perform. As a result of the accident, Claimant could no longer sit or walk for long periods, or climb into the cab of a truck. (His sitting intolerance is attributable to his lumbar spine condition, and his difficulty climbing is attributable, in part, to both his lumbar spine and left knee conditions. Claimant's walking difficulty is primarily due to his left knee condition.) If not for Claimant's preexisting permanent impairments, Claimant's spine and left knee conditions would likely have healed following the accident to the point where he could return to a truck driving position like the one he held at the time of his accident. The panel physicians opined that, without his preexisting left knee osteoarthritis, Claimant's tears to his menisci would have healed within three months. Further, the record establishes that Claimant had no trouble sitting for long periods before the accident, and that, in the absence of his preexisting arthritis in his spine, his lumbar injury likely would not have progressed to the point where he became unable to sit for prolonged periods by the time he reached MMI from his industrial injuries.

99. The Referee finds Claimant would not be totally and permanently disabled, but for his permanent impairments related to both his preexisting conditions (involving his hips, cervical and lumbar spine, knees, right elbow and left shoulder) and his accident-induced conditions (lumbar spine and left knee injuries).

CAREY APPORTIONMENT

100. As developed above, Claimant's relevant preexisting permanent physical impairments total 66.96%. His relevant accident produced impairments are determined, below.

101. As discussed above, Dr. Himmler's PPI assessment is persuasive; therefore, the Referee finds Claimant suffered 11.5% whole person PPI as a result of back injury due to the industrial accident. As to Claimant's left knee, the Referee finds he suffered an additional 4% whole person PPI due to the industrial accident which tore his meniscus and exacerbated his preexisting osteoarthritis.

102. Therefore, Claimant's total impairment from all sources is 82.46%, leaving 17.54% disability to be apportioned under the *Carey* formula.

Employer's responsibility is as follows: 15.50/82.46 x 17.54 = 3.33 + 15.5 = 18.83%

ISIF's responsibility is described as follows: 66.96/82.46 x 17.54 = 14.21 + 66.96 = 81.17%

103. An 18.83% impairment rating equates to approximately 94 weeks of benefits owed by Employer following the date of medical stability. The Referee has determined that Claimant reached a point of medical stability on July 8, 2008. Therefore, ISIF liability for the payment of permanent and total disability benefits commenced April 26, 2010.

CONCLUSIONS OF LAW

1. Claimant's current disablement is due in part to preexisting conditions.
2. Claimant has proven that he is totally and permanently disabled due to medical and non-medical factors, as well as under the Odd Lot Doctrine.
3. ISIF is liable for Claimant's benefits commencing April 26, 2010.

RECOMMENDATION

Based on the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __23rd____ day of August, 2011.

INDUSTRIAL COMMISSION

/s/_____
LaDawn Marsters, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _18th____ day of November, 2011, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

DELWIN W ROBERTS
1495 E 17TH ST
IDAHO FALLS ID 83404-6236

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

srn /s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CLARENCE "FRED" GOLDMAN, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)	**IC 2007-011742** **ORDER** November 18, 2011

Pursuant to Idaho Code § 72-717, Referee submitted the record in the above-entitled matter, together with her recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant's current disablement is due in part to preexisting conditions.

2. Claimant has proven that he is totally and permanently disabled due to medical and non-medical factors, as well as under the Odd Lot Doctrine.

3. ISIF is liable for Claimant's benefits commencing April 26, 2010.

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

DATED this 18th day of November, 2011.

INDUSTRIAL COMMISSION

/s/_____
Thomas E. Limbaugh, Chairman

/s/_____
Thomas P. Baskin, Commissioner

/s/_____
R.D. Maynard, Commissioner

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __18th____ day of November, 2011, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

DELWIN W ROBERTS
1495 E 17TH ST
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srn /s/_____