BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DENNIS GRAWCOCK, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)	**IC 2007-007328** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed: April 22, 2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Coeur d'Alene, Idaho, on August 4, 2010. Stephen J. Nemec of Coeur d'Alene represented Claimant. Thomas W. Callery of Lewiston represented Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF). The parties submitted oral and documentary evidence. The parties took three post-hearing depositions and submitted post-hearing briefs. The matter came under advisement on December 14, 2010 and is now ready for decision.

ISSUES

As set out at hearing, the issues to be decided were:

1. Whether and to what extent Claimant is entitled to permanent disability in excess of impairment, including total permanent disability pursuant to the odd lot doctrine;

2. Whether Claimant is totally and permanently disabled;

3. Whether ISIF is liable pursuant to Idaho Code 72-332; and if so,

4. Apportionment under the *Carey* formula.

Claimant settled with Employer and Surety prior to the hearing, and did not pursue the issue of 100% disability. Therefore, the issue of Claimant's odd-lot status remains relevant only insofar as it is one element necessary to establish ISIF liability pursuant to Idaho Code § 72-332. Therefore, the Referee restates the issues to be determined as follows:

1. Whether ISIF is liable pursuant to Idaho Code § 72-332 on Claimant's claim; and, if so,

2. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant asserts that he is totally and permanent disabled as an odd-lot worker as the result of four work-related accidents which occurred during his tenure as a paramedic and firefighter for Employer, Northern Lakes Fire District. Claimant asserts that ISIF is liable for a portion of his disability benefits, because he had pre-existing impairments that were manifest, a subjective hindrance to employment and, combined with his last injury, rendered him totally and permanently disabled.

ISIF argues that it is not liable for any portion of Claimant's disability claim, because Claimant failed to establish two of the four requirements for ISIF liability. ISIF contends that Claimant had no pre-existing impairment, as defined by Idaho Code § 72-332, prior to his last accident. Furthermore, Defendant asserts that Claimant is not totally and permanently disabled under any legal theory, a necessary prerequisite for ISIF liability.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Christy Grawcock, and Nancy Collins, Ph.D., taken at hearing;

2. Joint exhibits 1 through 19, admitted at hearing;

3. ISIF exhibits 1 through 12, admitted at hearing; and

4. Post-hearing depositions of John McNulty, M.D., taken September 7, 2010; Scott Magnuson, M.D., taken August 18, 2010; and Tom L. Moreland, taken September 7, 2010.

All objections proffered during the course of the post-hearing depositions are overruled. After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was fifty-nine years of age at the time of hearing. He was living with his wife of twenty years and their two children at their home in Rathdrum, Idaho.

RELEVANT WORK HISTORY

2. Claimant served for more than twenty years as a firefighter, EMT, and paramedic in Alaska. He started his career as an emergency responder in Sitka. He later moved to Juneau, and retired from the Capital City Fire Department, City and Borough of Juneau, in 2003.

3. Claimant was a valued and respected employee of the Capital City Fire Department, as numerous commendations and evaluations document. In addition, the Department granted Claimant a lengthy sabbatical so that he could relocate to Palo Alto, California, and complete a paramedic certification program at Stanford.

4. Upon his retirement, Claimant moved his family from Juneau to north Idaho in search of more sun and less rain.

5. Claimant was ill-suited to retirement, and shortly after moving to Rathdrum, he began working for Employer as a volunteer. It was not long before Employer hired Claimant as a temporary employee for the purpose of evaluating his performance, as it considered making

him an offer of a permanent position. Employer did hire Claimant as a permanent full-time employee, effective February 8, 2005.

RELEVANT MEDICAL HISTORY

6. As might be expected of a first-responder, especially one who lived, worked, and played in Alaska, Claimant suffered a number of relatively minor injuries over the course of his years in Alaska. Attorneys for the parties agreed that Claimant's tale of injury by a porpoise that jumped into his boat set a new standard for discussion of unusual causal events. However, nothing in Claimant's medical or industrial injury history prior to August 2004 is relevant to the issues before the Commission at this time.

August 2004

7. In early August 2004, while Claimant was working for Employer as a full-time temporary employee, he developed a lower left inguinal hernia. There is some uncertainty whether the hernia was industrial or non-industrial: Claimant testified at hearing that he suffered an immediate onset of pain while carrying an obese patient down a flight of stairs and around tight corners. Elsewhere in the record there is mention that Claimant was performing some work around his home when the herniation occurred. Whatever the cause, Claimant was diagnosed with a left inguinal hernia requiring surgical repair. Claimant did not wish to jeopardize his opportunity for permanent employment with Employer, so he chose to rely on his personal health insurance for treatment, and did not report a work injury.

8. Antoine Sarkis, M.D., performed a surgical repair on Claimant's left lower inguinal hernia on September 27, 2004. There were no complications, and Claimant made a remarkable recovery. Claimant saw Dr. Sarkis for one follow-up visit a week after the surgery, and Dr. Sarkis released him to full-duty work on October 17, 2004. Claimant testified

consistently that he never had any problem with the hernia repair once he recovered from the surgery. When asked if he ever had *any* pain in his left groin after his first surgery, he replied, "No. It was like it never happened." ISIF Ex. 1, p. 122 (deposition p. 86).

9. Dr. Sarkis imposed no restrictions on Claimant related to his 2004 hernia repair, and no physician who saw or treated him, either contemporaneously or subsequently, awarded any impairment related to the 2004 hernia.

April 14, 2006

10. Claimant continued working full-time as a paramedic and firefighter, considered to be "very heavy" work, without incident until April 14, 2006. In the course of transporting an obese patient on that day, Claimant experienced left lower groin pain, which he described as coming on like a light switch. Claimant did not seek treatment for the pain until he saw Thomas Martin, M.D., on June 2, 2006. Dr. Martin diagnosed a left groin strain and prescribed physical therapy. Claimant attended an initial physical therapy session on June 5, but did not return for further therapy. Claimant followed up with Dr. Martin on June 9, and advised that he wanted to return to work. Dr. Martin advised Claimant to finish his course of physical therapy and released him to return to work without restrictions, effective June 14.

11. Claimant did return to full-duty work following his release, but was back at the clinic on June 21 complaining of left lower groin pain. He advised Dr. Martin that he could not safely perform all of his duties as a paramedic because of the pain. Dr. Martin placed Claimant on modified duty until June 26.[1] Ultimately, Claimant remained off duty until July 20, 2006, at

[1] The records include multiple instances where Claimant was on modified or restricted duty. It is undisputed, however, that there is no modified or restricted duty available for persons in Claimant's job. Either he can perform all the duties of his position, or he cannot. Claimant is effectively off work during any period when his activities are restricted.

which time Kirk Hjeltness, M.D., determined that Claimant's groin pain was resolving. Dr. Hjeltness released Claimant to a trial of full-duty work on July 22.

12. Claimant did return to full-duty work, but his groin pain never completely resolved. Claimant's symptoms were exacerbated by strenuous activity, improved with rest, then would flare again with increased activity.

October 27, 2006

13. On October 27, 2006, Claimant was transporting a patient when he suffered an immediate onset of left lower groin pain he described as being like a door slamming shut. At the conclusion of the emergency run, Claimant asked Anthony Russo, M.D., one of the ER doctors, to check him out. Dr. Russo observed marked tenderness in the left inguinal area, particularly along the spermatic cord, but found no evidence of a new hernia. Dr. Russo diagnosed epididymitis, a low-grade infection. He took Claimant off work for two days, and prescribed antibiotics, anti-inflammatories, and analgesics. Claimant returned to the ER for scheduled follow up on October 30. Douglas Dero, M.D., saw Claimant on this return visit. Claimant continued to report left lower groin pain, which had not resolved with the antibiotics or pain relievers. During his initial exam, Dr. Dero found no evidence of a left inguinal herniation, but when he asked Claimant to distend his abdomen, the doctor appreciated a large "typical left inguinal hernia." Joint Ex. 16, p. 9. Dr. Dero referred Claimant to Dr. Sarkis for surgical repair.

14. On November 14, 2006, Dr. Sarkis performed a surgical repair of Claimant's recurring left inguinal hernia. The operative report included several findings pertinent to this proceeding:

- There was a significant defect in the internal inguinal ring through which the hernia and spermatic cord protruded;
- "Extensive scarring was noted within the inguinal canal." Joint Ex. 3, p. 14; and

- Dr. Sarkis repaired the new defect using a plug and mesh overlay because of the previous hernia repair.

The surgical note concluded that the repair appeared adequate and the patient had tolerated the procedure well.

15. Claimant's post-operative course was long, painful, and included a number of complications. Claimant's first complication was a post-operative hematoma with swelling in his groin and scrotum, and bruising across his abdomen and around to his back. The chart notes describe the swelling and bruising as "extensive" (Joint Ex. 3, p. 31) and "significant" (*Id.*, at p. 32). The descriptions provided by Claimant and his wife are far more graphic, and convey a more accurate assessment of the severity of Claimant's post-operative condition as it is depicted in Joint Exhibit 19. The chart note for December 20, 2006, more than a month after the surgery, still noted *moderate* swelling and *resolving* ecchymosis. By January 3, 2007, the swelling and ecchymosis had resolved. Claimant wanted to return to work, but was unable to do so because it was too painful for him to wear some of the firefighting equipment, especially harnesses and belts that included a strap or belt across his abdomen. Dr. Sarkis determined that Claimant should be ready for a full release and return to work on January 15, 2007, and released Claimant from care.

16. On January 15, 2007, Dr. Sarkis extended Claimant's work release until January 29, 2007. There is no chart note of record explaining the delay in Claimant's return to work. Although he continued to experience some lower left inguinal discomfort, Claimant did return to work on January 29, 2007. According to Employer's timesheets, Claimant worked the last two

days of one shift and two full shifts between January 29 and February 17, 2007.[2]

17. Claimant testified that he never returned to his pre-injury status following the November 2006 hernia surgery. When he returned to work at the end of January, he knew something was not right. At hearing, he stated, "And I don't know how many days I actually did work, but I tried to tough her out thinking it's going to get better, it's going to get better . . ." Tr., p. 47.

February 16, 2007

18. On February 16, 2007, Claimant experienced an acute onset of pain in his left inguinal area while lifting a patient. The pain was followed by bruising in the same area. Claimant saw Dr. Sarkis on February 19. Claimant was tender on exam, but showed no signs of a recurrent hernia. Dr. Sarkis diagnosed a ligamentous strain. On this same visit, Claimant expressed a concern to Dr. Sarkis that he believed that his left testicle was getting smaller. Dr. Sarkis confirmed that the left testicle was atrophic. Dr. Sarkis took Claimant off work, and prescribed analgesics and anti-inflammatories.[3]

On-Going Care

19. Claimant's return to Dr. Sarkis following the February 16, 2007 incident marked the beginning of a medical odyssey that would take him as far as Southeast Asia in search of treatment that would alleviate his pain. An extensive hearing record documents Claimant's efforts to improve his condition and regain his functions. It is not necessary for the purposes of this recommendation to discuss Claimant's extensive on-going medical care in detail. The

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[2] Claimant's shift schedule was six days on, three days off. He worked the last two days of a six-day shift on January 29 and 30, followed by one full six-day shift, three days off, and another full six-day shift.

[3] Claimant never returned to work after the February 16, 2007 incident.

following points are illustrative, but certainly not inclusive of Claimant's medical sojourn:

- Saw Edward D. Ellison, M.D., a urologist, and Thomas K. Thilo, M.D., a general surgeon, upon referral by Dr. Sarkis. Doppler testing ordered by Dr. Ellison showed reduced blood flow to left testes, and fluid collection at site of hernia repair. Dr. Thilo confirmed prior findings and opined that Claimant's spermatic cord was injured during the second hernia surgery or as the result of the "impressive" post-surgical hematoma. He discouraged further surgery, suggested nerve block trial, orchiectomy (removal of the atrophic testicle) and pain management;

- Began taking OxyContin, prescribed by Dr. Sarkis, to control his pain. Trials of Neurontin, Lidoderm patch, and Lyrica for pain control were unsuccessful;

- Self-referred to Hugh M. Foy, M.D., a surgeon at Harborview Hospital in Seattle. Dr. Foy diagnosed ilioinguinal nerve entrapment syndrome caused by the second hernia surgery. Dr. Foy performed a diagnostic/therapeutic nerve block and discussed a surgical neurectomy if nerve block provided temporary relief;

- Returned to Harborview Medical Center for left inguinal exploration and trineurectomy of ilio-inguinal, ilio-hypogastric, and genitofemoral nerves. Surgery confirms diagnosis of ilioinguinal nerve entrapment. Procedure provided little or no relief of Claimant's pain;

- Exhibits signs of depression and attention-deficit hyper-activity disorder (ADHD). Began weekly counseling with Patricia Olsen, Ph.D., Psychologist. Effexor prescribed for depression, and Ritalin prescribed for ADHD;

- Evaluated by Patty Bullick, MSW, who diagnoses psychological/medical pain disorder, neuralgia, neuritis, and difficulty with activities of daily living. She recommends ten sessions of cognitive and behavioral therapy;

- Participated in three independent medical evaluations (IMEs) including one requested by ISIF with Craig Beaver, Ph.D., and Robert H. Friedman, M.D.; one requested by Employer/Surety with J. Craig Stevens, M.D.; and his own by Dr. McNulty;

- Tried a Marcaine block of left spermatic cord with no improvement;

- Participated in a pain management program with Dr. Magnuson. In an attempt to find acceptable long-term substitute for OxyContin, Dr. Magnuson tried Cymbalta, Methadone, Embeda (long-acting morphine designed to prevent dosage tampering). Either Claimant cannot tolerate or they do not control his pain. At time of hearing, Claimant was taking Opana, which provided *some* relief with manageable side effects.

- Completed a functional capacities evaluation (FCE) with good effort and valid result.

VOCATIONAL EVIDENCE

20. All of the parties to this proceeding retained vocational experts. ISIF retained Dr. Collins. She prepared written reports and testified at the hearing. Claimant retained Thomas Moreland, who prepared reports and was deposed post-hearing. Employer/Surety retained William C. Jordan, who prepared a report prior to Employer/Surety entering into a lump sum settlement with Claimant. Mr. Jordan's report is included in the record as ISIF Ex. 7. To the extent that the vocational opinions bear on these findings, conclusions, and recommendation, they are addressed in subsequent sections of this recommendation.

DISCUSSION AND FURTHER FINDINGS

ISIF LIABILITY

21. As discussed at the outset of this recommendation, the matter in dispute is fundamentally a question of ISIF's liability for a portion of Claimant's disability claim. ISIF liability is governed by the provisions of Idaho Code § 72-332. That section sets out four elements that a Claimant must prove in order to establish ISIF liability:

1. That there was a preexisting impairment;

2. That the impairment was manifest;

3. That the impairment was a subjective hindrance; and

4. That the pre-existing impairment combined with the last accident to cause total permanent disability.

Dumaw v. J. L. Norton Logging, 118 Idaho 150, 155, 795 P.2d 312, 317 (1990). A claimant's failure to prove any of the required elements relieves ISIF of all liability on the claim. ISIF argues that Claimant has failed to establish its liability for two reasons: First, that Claimant did not have a pre-existing permanent impairment as defined by Idaho Code § 72-422, and explicated in *Smith v. J.B. Parson Company,* 127 Idaho 937, 943, 908 P.2d 1244, 1250 (1996);

and, second, that Claimant is not totally and permanently disabled.

Pre-existing Impairment

22. "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 non-progressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

23. The definition of permanent impairment as set out in Idaho Code and explicated in the case law includes concepts crucial to the question of whether a permanent impairment is pre-existing in the context of a claim against ISIF. In order to be a "permanent impairment," a functional loss or abnormality must be medically stable and ratable. As stated in *Quincy v. Quincy*, 136 Idaho 1, 27 P. 3d 410 (2001), "stability is the key factor to consider when determining if a pre-existing impairment exists." In *Quincy*, Claimant suffered from a non-industrial ankle condition, conceded by the parties to constitute a pre-existing impairment. Thereafter he suffered work-related accidents in 1991 and 1992, while employed by the same employer. For his non-work related condition, he was found to be entitled to a 25.5% PPI rating. For his 1991 injury, he was found to be entitled to a 2% PPI rating, and for his 1992 injury, a 2% PPI rating. At issue was whether the 1991 rating was for a pre-existing impairment for which the

ISIF bore responsibility. The Court ruled that the Commission did not err in answering this question in the affirmative, since the evidence of record established that Claimant had reached a point of medical stability *vis à vis* the 1991 accident by the time the 1992 accident occurred. As applied to the instant matter, *Quincy* establishes that unless the evidence demonstrates that Claimant had reached a point of medical stability for the 2006 accidents prior to the 2007 accident, his pre-existing hernia difficulties do not constitute "pre-existing impairments" assignable to the ISIF.

24. Claimant takes the position that he suffered four separate left lower inguinal injuries: August 2004, April 2006, October 2006, and February 2007. Claimant argues that he sustained permanent impairment as a result of the August 2004, and/or April 2006, and/or October 2006 injuries and, therefore, had a permanent impairment prior to his last industrial accident in February 2007.

25. ISIF takes the position that Claimant suffered two discrete left lower inguinal injuries prior to February 16, 2007: August 2004 and April 2006. The August 2004 hernia resulted in no impairment. The April 2006 incident resulted in a small, difficult-to-detect recurrent hernia or weakness, which did not resolve. It became worse as Claimant continued to work, leading to Dr. Dero's diagnosis in late October 2006 when the hernia became patent. In essence, the April 2006 herniation progressed to necessitate the November 2006 surgery. Claimant did not reach medical stability from the November 2006 surgery until long after the February 2007 event took him off work permanently. Because there was no permanent impairment associated with the August 2004 hernia, and because Claimant was not medically stable from the April 2006 injury and subsequent surgery on February 16, 2007, he had no pre-existing impairment at the time he had his last accident.

26. The Referee finds ISIF's analysis of Claimant's medical history both persuasive and well-supported by the medical records, Claimant testimony, and the medical experts.

2004 Hernia

27. There is no evidence in the record to support a claim that Claimant sustained any permanent impairment as a result of his 2004 injury. Claimant testified that he recovered quickly and completely from the hernia repair surgery. Just six weeks after surgery, Claimant passed a demanding physical agility test—a prerequisite to his hiring by Employer. None of Claimant's treating physicians imposed any restrictions or awarded any impairment related to the 2004 injury. None of the IME physicians who subsequently examined Claimant and reviewed his medical records opined that he sustained any permanent impairment as a result of the 2004 accident. Dr. Stevens observed that if Dr. Sarkis had imposed permanent restrictions following the 2004 injury, Claimant would have been less likely to have had the recurrence of the hernia in 2006.[4] Dr. Stevens was careful to note that this observation occurred in hindsight and in no way suggested that Dr. Sarkis should have given restrictions following the 2004 surgery, especially where a good mesh repair was evident.

28. The Referee finds that Claimant sustained no permanent impairment as a result of his 2004 hernia and subsequent surgical repair.

April 2006/October 2006 Hernia

29. The next injury of consequence in this proceeding occurred on April 14, 2006. Claimant was transporting an obese patient when he felt left lower groin pain that "came on like a light switch." Claimant continued to work his regular shifts until June 2, when he saw Dr. Martin, his primary care physician. Dr. Martin diagnosed a groin strain and took Claimant

[4] And Claimant would not have been able to return to his work as a paramedic.

off work and referred him to physical therapy. On June 9, Claimant told Dr. Martin that he wanted to return to work. Dr. Martin gave Claimant a full release, effective June 14. Claimant returned to work, but the groin pain interfered with his ability to perform his duties and, on June 21, just one week following his initial release, he returned to Dr. Martin. Dr. Martin took him off work again. When Dr. Hjeltness released Claimant to return to work effective July 20, he noted that Claimant was still complaining of a twinge in his left groin with certain strides or movements, and that the release to return to work was "a trial of full duty at this stage." Claimant's Ex. 15, p. 47.

30. When discussing the period between late July 2006 and late October 2006, Claimant was consistent in his assertions that, although he continued working, the pain he first experienced in April never went away. Some days it was better, some days it was worse. The location and type of pain varied a bit depending upon Claimant's particular activity. Claimant asserts that the July 20 release was, and remains, determinative Claimant was medically stable. In fact, the most that can be said of the release is that Dr. Hjeltness *believed* that Claimant should have been medically stable by July 20, 2006. Subsequent events support the conclusion that Claimant was not at maximum medical improvement (MMI) on July 20, 2006.

31. On October 27, 2006, while transporting a patient, Claimant experienced a sudden onset of left lower groin pain. The onset of symptoms was so acute that Claimant asked one of the emergency room doctors to check him out. Dr. Russo did not find a hernia. He suspected that Claimant had a low-grade infection in his spermatic cord. When Claimant returned to the emergency room for a recheck on October 30, Dr. Dero did not initially find a herniation either, but when Dr. Dero asked Claimant to change position, a large hernia became evident.

32. Both Drs. Stevens and McNulty agreed with ISIF's analysis of the April and

October 2006 events:

- The April 2006 injury caused a small hernia or weakening of the previous hernia repair;
- As Claimant continued to perform his very heavy work, the initial weakness or small hernia progressed until the October 27 event caused the obvious rupture that Dr. Dero observed on October 30.

Dr. Russo's inability to locate the hernia on October 27 supports the view that Claimant's April 2006 injury started a progression of symptoms that was not easily detectible, even once the hernia had become quite large.

33. The opinions of Drs. Stevens and McNulty as to the etiology of Claimant's October 2006 hernia are unrefuted by any of the medical evidence of record, and are entirely consistent with Claimant's testimony and the documented complaints that he reported beginning in June 2006 and continuing until he was definitively diagnosed on October 30. Claimant could never have been medically stable during the period that he had an undetected hernia that was progressively getting worse. Drs. Martin and Hjeltness may have believed that Claimant was medically stable at times during those months, but subsequent developments proved them wrong.

Second Hernia Surgery

34. Once Dr. Dero definitively diagnosed Claimant's recurrent hernia on October 30, 2006, he referred Claimant to Dr. Sarkis for a second surgical repair. Dr. Sarkis performed the surgery on November 14, 2006. As discussed in the initial findings, Claimant experienced serious post-operative complications that turned his life upside down. There is no real dispute that, as a result of the second surgery, Claimant suffers from ilio-inguinal, ilio-hypogastric, and

genitofemoral nerve entrapment.[5] This condition causes severe pain anytime Claimant's abdominal muscles move. The underlying condition is untreatable except symptomatically. There is also no real dispute that the surgery resulted in injury of Claimant's left spermatic cord, resulting in ischemic orchitis of the left testicle with associated pain.

35. Claimant argues that he was at maximum medical improvement from the second hernia surgery by January 29, 2007, when Dr. Sarkis released him to return to work. In fact, the record, including Claimant's own statements, amply demonstrates that he was not at MMI on January 30. Claimant only worked a few shifts following his release, and he reported that he was in pain and had difficulty performing his paramedic duties. We now know that Claimant's post-surgical groin pain was not part of a normal surgical recovery, but instead arose from the nerve entrapment and spermatic cord damage caused by the November 2006 surgery. While Claimant's nerve entrapment syndrome may not have been progressive, his spermatic cord injury most certainly was. The first medical documentation of Claimant's ischemic orchitis occurred February 19, 2007, just days *after* Claimant asserts he suffered his last accident.

February 16, 2007

36. On February 16, 2007, Claimant was at work when he experienced an acute onset of left inguinal pain followed by the appearance of bruising. He sought care from Dr. Sarkis on February 19, 2007. Dr. Sarkis noted that Claimant was tender, but showed no sign of a recurrent hernia. Claimant pointed out to Dr. Sarkis that his left testicle seemed to be shrinking, and

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[5] Dr. McNulty expressed some doubt as to whether it was the second hernia surgery or the February 2007 incident that caused Claimant's entrapment syndrome. As discussed in the initial findings, Dr. Sarkis noted significant scar tissue present when he performed the second hernia repair. Dr. Thilo attributed the spermatic cord damage to the second surgery or the hematoma that followed. Neither Dr. Friedman nor Dr. Foy questioned that the second hernia surgery caused the ilioinguinal entrapment syndrome and the compromise of the spermatic cord.

Dr. Sarkis confirmed that it was smaller than the right testicle.

37. It is unclear whether the incident on February 16, 2007 constituted a new injury, or was a temporary exacerbation related to his post-surgical complications. For purposes of this recommendation, such a determination is not necessary. The undisputed evidence leaves little doubt that Claimant was not medically stable from the November 2006 surgery on February 16, 2007. In fact, Claimant was just beginning to discover the myriad of medical problems that were the result of the second hernia surgery. As it turns out, Claimant did not become medically stable from the April 16, 2006 injury until long after the February 16, 2007 incident.[6]

38. Whether Claimant's last injury occurred April 16, 2006, October 27, 2006, or February 26, 2007, he has failed to establish a pre-existing impairment as defined by Idaho Code § 72-224, as required by Idaho Code § 72-332, and as applied by the Idaho Supreme Court in *Smith v. J.B. Parson Company.*

DISABILITY

39. As a second prong in its defense, ISIF asserts that it was not liable on Claimant's claim, because he was not totally and permanently disabled. Because Employer and Surety are no longer a part of this proceeding, and because the issue of ISIF liability is decided on other grounds, whether or not Claimant is totally and permanently disabled is moot.

CONCLUSIONS OF LAW

1. Claimant has failed to establish that he had a pre-existing impairment, a necessary element of establishing ISIF liability.

2. All other issues are moot.

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[6] The date that Claimant ultimately reached MMI from the November 2006 surgery remained an issue in dispute until Employer/Surety and Claimant compromised their claims. At that point, determining the actual MMI date was unnecessary.

RECOMMENDATION

Based upon 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 14 day of April, 2011.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DENNIS GRAWCOCK, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)	**IC 2007-007328** **ORDER** Filed: April 22, 2011

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed 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 recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

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

1. Claimant has failed to establish that he had a pre-existing impairment, a necessary element of establishing ISIF liability.

2. All other issues are moot.

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

DATED this 22 day of April, 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 22 day of April, 2011, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS,** and **ORDER** were served by regular United States Mail upon each of the following persons:

STEPHEN NEMEC
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djb /s/_____