BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KEVIN HOPE, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2002-516298** **IC 2004-001924** **IC 2004-500701** **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION** Filed: October 26, 2012

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 April 5, 2012. Prior to the hearing, Claimant settled his claims against Empro Professional Services, LLC ("Empro/Blaser"), his employer at the time of his August 2002 back injury claim (Claim No. 2002-516298) and his December 2003 right shoulder injury claims (Claim Nos. 2004-001924 and 2004-500701).

Claimant was present and represented by Robert K. Beck. Anthony M. Valdez represented the State of Idaho, 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 September 5, 2012.

ISSUES

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

1. Whether Claimant is entitled to permanent total disability pursuant to the odd lot doctrine and, if so:

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

3. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant contends that he is totally and permanently disabled due to preexisting impairments to his right shoulder and low back, combined with his 2003 industrial right shoulder injury, such as to render ISIF liable for his workers' compensation benefits. ISIF counters that it is not liable because Claimant is not totally and permanently disabled. Even if the Commission finds he is thusly disabled, ISIF disclaims liability on the basis that Claimant would be unemployable as a result of his nonmedical factors and his last industrial injury, alone.

OBJECTIONS

All pending objections are overruled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Exhibits admitted at the hearing:
    a. Claimant's Exhibits A-N; and
    b. ISIF's Exhibits 1-5 (including Claimant's prehearing depositions taken May 11, 2006 and January 21, 2011);
2. Testimony taken at the hearing from:
    a. Claimant; and
    b. Gloria Hope, Claimant's wife;
3. The post-hearing deposition testimony of:
    a. Kent Granat, M.S., taken on April 25, 2012; and
    b. Nancy Collins, Ph.D., a vocational disability consultant, taken on May 3, 2012.

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 AND PRE-INDUSTRIAL INJURY VOCATIONAL HISTORY

1. Claimant, who is right-handed, was eight days away from his 55th birthday at the time of the hearing and residing in Teton City, Idaho. The Referee observed that Claimant is small in stature, consistent with medical records indicating he is approximately 5'6", 170 pounds. He ambulated slowly and stiffly in a bent-over posture. He also appeared uncomfortable at times while seated and providing testimony.

2. Claimant left high school during the 11th grade to learn to be a carpenter. He ultimately completed a trade school carpentry program, but he never obtained a GED.

3. Over his lifetime, Claimant has worked primarily in general construction labor jobs. He has experience with both residential and commercial framing and concrete work. However, he has never been a contractor or subcontractor and, while he can operate off of blueprints, he has never measured them to bid jobs. Claimant has worked side-by-side with coworkers as a field supervisor, but he has never had any hiring or firing authority. He knows some Spanish words, but he does not speak Spanish. He has no keyboarding, computer or cash register skills or experience. Prior to 1991, he worked in non-construction jobs as a laborer and forklift operator at a food warehouse, tree trimmer, potato sorter, paper stocker and boxer for a printing company, machine operator at a bookbindery, and laborer at a sawmill.

4. Claimant's medical history before he worked for Empro/Blaser was notable for treatment for pain in his low back and right shoulder, including a right shoulder surgery in 2000. In August 2002 and fall 2003, Claimant suffered industrial back injuries while working for

Empro/Blaser, one of which is the subject of one of the consolidated claims in this case, yet he continued to work.[1] In December 2003, Claimant suffered an industrial right shoulder injury while working for Empro/Blaser, which is also a subject of the consolidated claims in this case.[2] Claimant persuasively testified that, by this time, his time-of-injury supervisor, Marty Blaser, had been assigning the heavy lifting to Claimant's younger co-workers because Claimant could no longer do it.

5. Claimant has not been gainfully employed since December 22, 2003, when he left work following his last industrial injury.

MEDICAL CARE PRECEDING DECEMBER 2003 INDUSTRIAL INJURY

6. In 1987, Claimant was involved in a car accident, after which he suffered low back and neck pain. No medical records from that accident are in evidence. Claimant testified that he was out of work for a year recovering from his injuries and that he had to modify the way he worked when he returned. He did not receive a concurrent PPI rating related to those injuries, but he described his post-accident functional limitations at his May 2006 deposition:

> There was no more -- bending over was more of a challenge, to bend over right at the waist. It got to where I had to bend over with my knees bent, which is the proper way to bend anyway is with your legs. But when you're doing construction, you don't take time to bend your legs when you've got a house to be built and there's deadlines.

DE-3, p. 38. Claimant has experienced neck and back problems since this accident:

[1] ISIF does not dispute the date on which Claimant suffered his first industrial back injury, so references in the record to other possible onset dates are not relevant. His second back injury does not appear to be specifically referenced in those records.

[2] Claimant filed two claims in December 2003, but he explained in his May 11, 2006 deposition that he suffered only one injury, on December 10, 2003. He reported the injury to Marty Blaser, but continued to work light-duty in order to receive a paycheck. On December 22, 2003, while lifting flooring up to the second floor, the pain from the prior injury became unbearable and he told Mr. Blaser he had to go to the doctor.

> I've had problems ever since then, different things happening just – it doesn't take much to -- it didn't take much at the time to cause me discomfort in my back. So that's why I wanted to say, you know, in a way it did limit me, but I still - - I still went out and built houses.

DE-3, p. 39.

7. Claimant suffered a right shoulder rotator cuff tear in May 1995, while he worked for Bateman Hall, for which there are no medical records in evidence. He was apparently treated by Rheim Jones, M.D., an orthopedist. He was placed on light-duty work for a period, then returned to full-duty. Claimant does not believe he ever regained full strength in his right arm following this accident. After that event, he had coworkers help him with heavy lifting:

> Q. …What were people helping you do? What was it that they were having to help you do after you returned to full duty from your May '95 injury?
>
> A. Lifting any heavy rebar. I didn't pick it up because - - rebar comes [*sic*] 30-foot lengths, 20-foot lengths. And you have to have another guy on one end of that rebar. But [*sic*] used to grab it and just throw it right up on your shoulder. Well, I wasn't doing that anymore. And so it reduced it - - my ability to do the things that I did before, but I just figured that it was the strain, the stress, the strain on my shoulder and that it just hasn't - - just hasn't healed yet.
>
> Q. Okay. Did it ever heal?
>
> A. It quit hurting, yeah.

DE 3, p. 55.

8. On September 7, 1995, Claimant sought treatment from Steve Mellor, D.C., for worsening low back pain that felt like a pinched nerve. Claimant reported a history of low back pain ("have had back pain for years") and his right rotator cuff injury. CE-157. He also reported headaches, neck pain and stiffness, sleeping problems, irritability, dizziness, pins and needles in his arms, numbness in his fingers and an upset stomach.

9. On January 30, 2000, Claimant was evaluated by Gary C. Walker, M.D., a physiatrist, in referral by Dr. Barton Brower, whose medical records are not in evidence.

Claimant reported right arm pain since January 15, 2000, when he fell on ice carrying a nail gun while he was working for Pacific West Construction. Dr. Walker diagnosed traumatic right lateral epicondylitis, probable right ulnar neuropathy at the elbow, right myofascial syndrome involving the right scapula and shoulder area, improving right impingement symptoms, and a preexisting olecranon spur outside the area of his other then-current complaints.

10. Over the next two months, Dr. Walker trialed conservative treatments including physical therapy, medications, and two subacromial injections, none of which fully alleviated Claimant's symptoms. Also during this period, Dr. Walker administered EMG testing and opined that it revealed no evidence of ulnar neuropathy or an active denervating process. On March 17, 2000, Dr. Walker ordered an MRI of Claimant's right shoulder because he was still having pain. Dr. Walker opined that the MRI, performed March 22, 2000, revealed evidence of a complete tear of the supraspinatus and infraspinatus rotator cuff tendons. He referred Claimant for an orthopedic surgical consultation.

11. On May 30, 2000, Dr. Biddulph performed an arthroscopic acromioplasty and bursectomy surgery, in which he debrided the tear and released and resected the coracoacromial ligament. At surgery, Dr. Biddulph observed only a 50% tear, but "a lot of bursitis" in the subacromial space.

12. Claimant's recovery from his right shoulder surgery, as of July 26, 2000, was going very well:

> Kevin is now two months out from right shoulder arthroscopic surgery for his rotator cuff pathology and subacromial decompression. He is remarkably improved compared to prior to surgery. He has a full active range of motion of the shoulder. He still has some minimal pain which would be expected but significantly improved compared to prior to surgery.

CE-182. Dr. Biddulph recommended a strengthening program and therapy, and released Claimant to work with no overhead activities, no reaching and no lifting over 25 pounds.

13. As of October 4, 2000, however, Claimant's condition had declined and he was having increased shoulder pain. "He was doing satisfactorily but states that he is having a lot of stressful events in his life presently including a lot of legal matters and he has been under a lot of stress and feels his shoulder is more bothersome to him at this point." CE-183. Within the previous week, Claimant's workers' compensation attorney had been in touch with Dr. Biddulph's office. Dr. Biddulph noted that the shoulder pain Claimant described was different than his pre-surgery pain. "He describes pain over the posterior aspect of the shoulder girdle in the infraspinatus region. This is well posterior and inferior to the portal sites and seems to be different from the pain that he had prior to surgery." *Id.* On exam, Claimant's shoulder showed no signs of internal derangement or any recurrent problems that would require surgery. Dr. Biddulph recommended continuing physical therapy and prescribed Vioxx.

14. On November 10, 2000, David C. Simon, M.D., performed an independent medical evaluation at the request of Claimant's employer's surety. Dr. Simon assessed 1% PPI of the whole person, without apportionment, because he found no evidence of any relevant preexisting condition. Dr. Simon also opined that no medical restrictions were indicated and that Claimant could return to his prior occupation.

15. By November 29, 2000, Claimant's right shoulder was again doing well, with decreasing pain, increasing strength and full range of motion. Dr. Biddulph again released Claimant to work, with restrictions of no lifting more than 50 pounds, no repetitive activities, and no overhead activities or reaching.

16. On May 30, 2001, Claimant followed up with Dr. Biddulph regarding his right shoulder, now reporting bilateral shoulder pain. He had full active and passive range of motion in his right shoulder. He thought he was using his left shoulder more to compensate for his painful right shoulder. Claimant had not returned to work "because they wanted him to work out of state and his wife is in the hospital with problems of ovarian cysts and he is very discouraged about his overall situation. He feels like he was doing very well before his injury and now because of this and other problems in his life, he is not doing well." CE-188. "I do think Kevin can do his job but he does not want to go out of state for other reasons and I understand this as well." *Id.* On exam, Claimant had mild pain to palpation, but no signs of instability or crepitation and a negative apprehension test. Dr. Biddulph considered, but rejected, the idea of arthroscopically assessing Claimant's healing process because of his good functionality. Dr. Biddulph recommended continued strengthening and assessed 1% PPI of the whole person.

17. On January 11, 2002, Claimant reported worsening right shoulder pain to Dr. Biddulph. He was back at work, apparently with Empro/Blaser, and had pain with repetitive overhead reaching activities and, occasionally, when he slept. Claimant recalled that, by the time he went to work at Empro/Blaser, his right arm strength was only about half of what it was prior to his shoulder injuries. Dr. Biddulph ordered an MRI arthrogram, which Claimant apparently did not obtain until August. On August 30, 2002, Dr. Biddulph opined the imaging showed no evidence of any labral or rotator cuff tear, and Claimant had no pain to palpation over the AC joint. Dr. Biddulph diagnosed chronic right shoulder pain and recommended either a cortisone injection or physical therapy. Claimant initially elected neither, but underwent a cortisone injection after about two weeks.

18. On August 5, 2002, Claimant sought treatment from David Booth, D.C., for "serious back pain" which Claimant attributed at the hearing to a back injury at Empro/Blaser. Dr. Booth examined Claimant and referred him to Dr. Walker. Claimant continued to work, with back pain and assistance from coworkers.

19. On June 24, 2003, Lynn J. Stromberg, M.D., an orthopedist, prepared a chart note addressing Claimant's spine x-ray films of unidentified date. "It appears he has some fairly advanced degenerative changes, most notable at L3-4 and L4-5. He also has a large osteophyte anteriorly at L2-3. He certainly has more degenerative disease than one would expect to see at this age." CE-171. Ten days later, Dr. Stromberg noted that Claimant was "doing really poorly" with left radicular pain, difficulty walking and an antalgic gait. CE-172. He also noted that MRI imaging (taken July 1, 2003) showed subluxation of L3 on L4, and L4 on L5, with a herniation at L4-5 that was probably causing Claimant's radicular pain. Dr. Stromberg recommended an epidural injection for pain control. "If that doesn't work out, we may consider discectomy procedure to decompress the nerve and try to keep him working for a while [*sic*]. It's pretty clear that he's headed for having a big back surgery some day to fuse L3 to L5." *Id.*

20. In addition, Claimant injured his right pinky finger such that he has no movement in the distal interphalangeal joint. Claimant received care, at times, for other conditions not described, above. However, they are not relevant to the issues presented herein because there is no dispute that Claimant completely recovered from those conditions prior to December 2003.

EVIDENCE FOLLOWING DECEMBER 2003 INDUSTRIAL INJURY

21. **Right shoulder symptom treatment.** On January 12, 2004, after reinjuring his right shoulder at work in December 2003, Claimant returned to Dr. Biddulph:

> It has been about a year and a half since I have seen Kevin. He has been able to work and function in his job building houses. In this particular injury, he was

> lifting plywood up to the second floor and he felt a pop occur in the shoulder…He also states that on a separate, workman's compensation injury, that he did hurt his back and is currently being treated by Dr. Stromberg for that problem.

CE-189. Dr. Biddulph performed examination and testing, and ordered an MRI, from which he concluded that Claimant had new tears to the labrum and supraspinatus tendon of his right shoulder.

22. Dr. Biddulph performed a second arthroscopic right shoulder surgery on February 24, 2004. Claimant began physical therapy in March 2004.

23. On April 19, 2004, Claimant's recovery was going well, and Dr. Biddulph released him to light-duty work with no repetitive reaching or overhead activities and lifting limited to 20 pounds. He believed Claimant would be able to return to full-duty by late May 2004. Claimant reported that there was no light-duty work available and that he was considering changing occupations so he could do more sedentary work. "[B]ased on the number of shoulder problems he has had, I could certainly understand why he would want to consider changing occupations and I would support this." CE-200.

24. On April 26, 2004, Dr. Biddulph referred Claimant to Dr. Stromberg for treatment of sciatica symptoms and examined Claimant's right shoulder, which had become more painful over the previous five or six days.

25. On May 3, 2004, Dr. Biddulph again evaluated Claimant's shoulder. It was still painful, but improving. He believed Claimant would be able to return to construction work in about a month, and that he was then capable of light-duty work:

> There is absolutely no pain over the glenohumeral joint but he does have it in the subacromial space consistent with tendinosis. In regard to returning as a laborer, I would estimate this to be 06/01/04. He may have persistent pain when he does that, that is the first I would like him to try that. I would still hold him to the same restrictions of no lifting over 20 lb, avoiding repetitive reaching and overhead type activities. There is

> absolutely no reason why he cannot return to market research interviewer at this point.

CE-200. Although Dr. Biddulph implies that Claimant had been working as a market research interviewer, the record reveals no evidence that would establish this supposition as fact.

26. On May 26, 2004, Dr. Biddulph opined that Claimant had full range of motion in his shoulder with no crepitation, locking, instability or mechanical symptoms. Claimant reported improvement of 50%-75%, depending on the day. Dr. Biddulph's chart note states Claimant agreed he was ready to return to light-duty construction work. He did not wish to do telemarketing work because the occupation itself was distasteful to him. Dr. Biddulph released Claimant with restrictions including no lifting more than 30 pounds and no overhead, repetitive or reaching activities. In July 2004, Claimant reported continuing pain, and Dr. Biddulph recommended physical therapy and anti-inflammatory medication.

27. On December 22, 2004, Dr. Biddulph diagnosed bursitis in Claimant's right shoulder and administered a pain injection which, Claimant reported a month later, did not help.

28. Following additional examination on January 24, 2005, Dr. Biddulph suspected a pinched nerve in Claimant's neck and recommended cervical x-rays and an MRI, unrelated to Claimant's shoulder injury. Claimant did not follow up on these recommendations.

29. **Back symptom treatment.** On March 14, 2009, Claimant sought emergent care for sharp, recurrent pain in his lumbar spine, right buttock, groin and testicle. The accompanying chart note indicates he was taking Norco, among other medications. Lumbar radiculopathy was diagnosed, medications were prescribed, and Claimant was advised to follow up with his physician.

30. On September 22, 2010, Claimant sought emergent care for abdominal pain, chronic back pain and hyperventilation syndrome. He was provided with a prescription for 15 Vicodin pills, no refills.

31. On January 12, 2011, Claimant again provided deposition testimony. He had been taking narcotic pain medications for several years and admitted that his memory had declined. These assertions are generally supported by the most recent medical records in evidence, identified as CE-375 through CE-409; however, the frequency with which he used narcotic pain medications cannot be accurately discerned from Claimant's medical records. Claimant had not been involved in any new accidents since his 2006 deposition, and had not worked or applied for work. He still had constant mid and low back pain, worse than in 2006 in that his tolerance for sitting and standing was further reduced. He still had occasional left leg numbness, unchanged from 2006, except perhaps stronger, with some episodes of right leg numbness. He could not sleep on his right shoulder, had pain on moving it, and reported further reduction in strength since 2006. He also had increased trouble with his left shoulder, but not as much as with his right, and he had onset of occasional migraine headaches within the last year-and-a-half or so that he attributed to just getting older. At about the same time, he developed a nerve twitch through his right arm that sometimes interfered with activities such as drinking. No physician opined as to the causal connection, if any, between these new symptoms and Claimant's industrial injuries, and Claimant was unaware of what, if any, treatment was available. Claimant was diagnosed with hepatitis C in 2010, and he does not assert any connection with his industrial injuries. Dr. Hansen and Dr. Daniels had prescribed pain and sleep medication, and he also took Tylenol and Excedrin Migraine. The rate of Claimant's

narcotic pain medication use over the years could not be specifically ascertained from Claimant's medical records in evidence.

32. **PPI (Back) - Dr. West.** On August 30, 2004, Claimant underwent a self-referred evaluation of his back condition by Henry West, D.C. Dr. West reviewed Claimant's medical records, including available imaging, and interviewed and examined him. Claimant reported persistent low back pain above the waist without radiculopathy. Dr. West diagnosed chronic low back pain secondary to a sudden hyperflexion injury, consistent with Claimant's description of injuring his back at work in August 2002.

33. Dr. West opined that Claimant's injuries consisted of an anterior intervertebral compression of L1 superimposed on a preexisting disc bulge at L4-5 and preexisting degenerative joint disease. He noted that Claimant could not walk at all without pain, could only lift very light weights and could not sit for more than a half-hour at a time, among other things. Dr. West recommended trialing an anti-gravity lumbar trunk cast, and did not believe Claimant was a surgical candidate. He reiterated his opinions in follow-up letters to Claimant's attorney on September 15 and October 12, 2004.

34. Dr. West also took measurements of Claimant's various functional capabilities which he entered into grid forms that appear at CE-330 through CE-338 in the record. One form concludes that Claimant's PPI is 12% of the whole person and one concludes 23%. Nowhere in the record does Dr. West (or any physician) opine as to the foundation for either of Dr. West's PPI ratings. As a result, these conclusions lack credibility and carry no weight in determining the amount of PPI Claimant sustained, from any cause. Dr. West's opinion is sufficient, however, to support Claimant's claim that he suffered significant preexisting low back pathology and symptomatology before December 2003.

35. **PPI (Shoulder and Back) – Dr. Ward.** On March 9, 2005, Robert E. Ward, D.C., rendered a PPI assessment, pursuant to the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition ("Fifth Edition")*, at Claimant's request. With respect to Claimant's right shoulder, on which he underwent surgery prior to his December 2003 industrial injuries, Dr. Ward assessed 8% whole person PPI with 3% apportioned to his preexisting condition and, regarding Claimant's lumbar spine, Dr. Ward assessed 12% based upon the MRI evidence of disc herniation.

36. **Claimant's Subjective Symptoms.** On May 11, 2006, at his first deposition, Claimant described his shoulder and back conditions. He rated them equally in terms of the problems they posed for him. His back pain was constant, located at the "right middle" and low back areas. DE-3, p. 66. He did not specifically describe his right shoulder pain, but he did complain of left shoulder pain for which he had not seen a physician. He also described intermittent left leg numbness, which limited his sitting, standing and walking, that he believed was related to his spinal pathology. Claimant attributed his back and shoulder conditions to his August 2002 and December 2003 industrial injuries. He was not then taking narcotic pain medications, since he was no longer treating with Dr. Biddulph, but he was taking over-the-counter pain and sleep medications.

37. Claimant also described his lifting capabilities and job search efforts. He could lift a gallon of milk and other light items, but not a 40-pound bag of dog food. He had a hard time doing gardening, but could do dishes. He no longer hunted big game, fly-fished, bowled or water skied, activities he formerly enjoyed. Marty Blaser had recently offered Claimant an opportunity to return to his time-of-injury job, but Claimant declined because he did not believe he was capable of doing the work. Wearing a 25-pound tool belt, lifting, bending, carrying

materials and carrying a nail gun continuously throughout the day, he believed, exceeded his abilities. Claimant also explained that he had turned down a phone solicitation job because he lacked the skills and the physical ability to sit all day and, apparently, because it did not pay well enough. Although he regularly looked in the classifieds and had at some point gone to the employment office to see about job openings, he never filled out any applications.

38. At the hearing, Claimant explained that, overall, his symptoms had worsened, and he was still taking narcotic pain medications. The medical records in evidence are insufficient to accurately describe the frequency and dosage of Claimant's narcotics use over time, and no physician has opined as to the effect of such use on Claimant's ability to work, or whether his need to take this medication is likely permanent. Therefore, the evidence in the record is insufficient to support a finding that Claimant's narcotic pain medication use constitutes a either a permanent impairment or a bar to employment.

VOCATIONAL DISABILITY REHABILITATION CONSULTANT OPINIONS

39. **Kent Granat, M.S.**[3] On August 24, 2011, Mr. Granat prepared a vocational disability report at Claimant's request. He opined that Claimant is totally and permanently disabled as an odd lot worker because it would be futile for him to attempt to find work, or that Claimant is 64.7%-73.6% disabled based upon his loss of access and loss of wage earning capacity analyses. He based his opinions on his interpretations of Claimant's functional capabilities at the time of the evaluation; Claimant's nonmedical factors including age, education, work experience, disabled-looking appearance, and his rural labor market as a resident of Teton City; and his transferrable skills analysis which concluded that "Mr. Hope has no transferrable skills he can utilize because of his RFC restriction of no right hand reaching, and

[3] Mr. Granat's resume' indicates he possesses a master's degree in human resources. It is presumed here that this is a master of science and not a master of arts degree.

occasional right hand fingering and grasping." CE-357. ISIF does not object to the foundation for Mr. Granat's RFC (residual functional capacity) restrictions and they appear to be reasonably derived from Dr. Biddulph's medical restrictions.

40. Utilizing national occupational statistics obtained from SkillTRAN software, Mr. Granat concluded that Claimant has loss of access to his time-of-injury labor market of 100% based on his past eleven jobs (all medium-duty or heavy-duty); 91.2% loss of access based solely on his right-hand restriction on fingering and grasping (repetitive use); and 99.1% loss of access based solely on his restriction on right-hand reaching, for a combined loss of access of 96.8% based upon Claimant's functional abilities, education, skills and experience, alone. He apparently averaged Claimant's loss of access with his loss of wage earning capacity (32.6% to 50.3%) to arrive at his overall disability opinion based upon medical and nonmedical factors alone. Although Mr. Granat noted Claimant's age, rural labor market and disabled-looking appearance as relevant nonmedical factors, they were not factored into either his loss of access or loss of wage earning capacity analyses.

41. **Nancy Collins, Ph.D.** On March 19, 2012, Dr. Collins prepared a vocational disability report at ISIF's request. Based upon Claimant's medical restrictions when he was declared medically stable in 2005, including no lifting over 20-30 pounds and no repetitive or overhead work with the right arm, Dr. Collins opined that Claimant was no longer employable in any of his former occupations. However, she further opined that he had good access to customer service, front desk clerk and security jobs, and partial access to retail sales and cashier jobs. Dr. Collins did not perform a transferrable skills analysis because she could not adjust for restrictions on repetitive or overhead work with the right arm only, so such an analysis, she opined, would overestimate Claimant's one-armed disability.

42. As of 2012, however, Dr. Collins opined that Claimant's condition had deteriorated:

> It is now 2012, and Mr. Hope has much more significant limitation. He has been very sedentary over the past five years. I did not find any new restrictions from medical providers but he does now complain of headaches, hand numbness, bi-lateral shoulder pain and weakness, low back and lower extremity pain and numbness, and he is taking narcotic pain medication. If the commission [*sic*] considers Mr. Hope's current condition, rather than his condition when he was found to be medically stationary, and they consider his subjective complaints as restrictions, it would be difficult for Mr. Hope to work.

DE-5, p. 9.

CLAIMANT'S CREDIBILITY

43. Claimant was a credible witness. He persuasively testified that Marty Blaser was the best boss he had ever had, and that he would return to work for him if he could. His descriptions of his physical symptoms and capabilities were also persuasive. The Referee believes that after many years doing heavy labor work and multiple shoulder and back injuries, Claimant no longer believes he is physically capable of returning to medium or heavy-duty work. Claimant was not an accurate historian, however, when it comes to the dates on which he received medical care or the dates on which he suffered certain injuries. Where the record contains other substantial, competent evidence of relevant dates, that evidence will be afforded more weight than Claimant's testimony. Where Claimant's testimony relates relevant events to other operative facts, such as where he was employed during such events or which physician treated him, for example, that testimony will be given full weight.

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).

PREEXISTING PPI AND PREEXISTING RESTRICTIONS

44. **Lumbar spine.** On March 9, 2005, Dr. Ward assessed 12% whole person PPI due to Claimant's lumbar spine condition following his 2002 injury. The evidence in the record is insufficient to establish what, if any, medical restrictions were appropriate at that time. Claimant testified that he was able to work, but bending at the waist and lifting from low heights was more difficult due to pain following this injury, and that younger crew members at work did the heavy lifting because he was unable to do it.

45. **Right shoulder.** On November 10, 2000, Dr. Simon opined (based on his IME) that Claimant could work without restrictions. On November 29, 2000, Dr. Biddulph, Claimant's sole treating shoulder physician, released Claimant to work with right upper extremity medical restrictions of no lifting greater than 50 pounds and no repetitive activities, overhead activities or reaching. On May 30, 2001, without further addressing restrictions, Dr. Biddulph assessed 1% whole person PPI due to Claimant's post-surgical right shoulder condition, given his full active and passive ranges of motion. Thereafter, Claimant continued to have pain, which Dr. Biddulph diagnosed as chronic right shoulder pain. Dr. Biddulph recommended physical therapy or a cortisone injection, the latter of which Claimant eventually underwent, achieving some temporary improvement. On March 9, 2005, Dr. Ward assessed 3% whole person PPI in regard to Claimant's preexisting right shoulder condition.

46. Dr. Simon's assessment is less credible than Dr. Biddulph's because Dr. Biddulph, as Claimant's treating and operating physician, had more direct knowledge and experience with Claimant's condition. In addition, Dr. Biddulph rendered his opinion upon evaluating Claimant's shoulder after Dr. Simon evaluated it. Dr. Ward's opinion is yet more credible because it takes Dr. Biddulph's opinion into consideration, plus Claimant's persistent pain following Dr. Biddulph's assessment, and the *Fifth Edition's* guidance on assessing pain-related impairment (see *Fifth Edition*, p. 574). Based upon Dr. Ward's PPI assessment, the Referee finds Claimant suffered 3% PPI related to his right shoulder condition prior to December 2003.

47. As for restrictions, unfortunately, the most recent opinion is Dr. Biddulph's from November 2000, in which he assessed no lifting greater than 50 pounds and no repetitive activities, overhead activities or reaching. These restrictions are better founded than Dr. Simon's opinion from a couple of weeks prior, that no restrictions were indicated, for the same reasons that Dr. Biddulph's PPI opinion is more persuasive than Dr. Simon's. There is no evidence that these restrictions were ever superseded. The Referee finds Claimant had permanent right upper extremity restrictions consistent with those assessed by Dr. Biddulph in November 2000, in December 2003.

48. **Right pinky finger.** Claimant has unspecified functional limitations, unrated, due to a fused last joint in his right pinky finger.

49. **Neck.** Claimant has a history of neck pain; however, the evidence in the record is insufficient to establish any PPI, at any time, as a result of any neck pain condition.

50. **Left shoulder.** Claimant testified that he injured his left shoulder prior to December 2003 and he believes that it probably requires surgery. However, he has never sought

medical treatment for this condition, so he has failed to prove he has any permanent impairment related to his left shoulder.

INDUSTRIAL INJURY, PPI AND MEDICAL RESTRICTIONS

51. **Right shoulder.** In December 2003, Claimant suffered new tears in his right shoulder labrum and supraspinatus tendon as a result of his industrial injury, requiring a second surgical repair on February 24, 2004. On May 26, 2004, Dr. Biddulph released Claimant to work with right upper extremity restrictions of no lifting more than 50 pounds, and no overhead, repetitive or reaching activities. Claimant continued to have pain. Dr. Biddulph recommended physical therapy in July 2004 and diagnosed bursitis in December 2004. Claimant underwent a cortisone injection for the bursitis, which did not provide long-term pain improvement. On March 9, 2005, Dr. Biddulph assessed 5% whole person PPI in consideration of Claimant's right shoulder surgery. This assessment is credible and persuasive. The Referee finds Claimant suffered 5% whole person PPI as a result of his industrial right shoulder injury, for a total of 8% whole person PPI when including his 3% preexisting whole person PPI.

PERMANENT DISABILITY

52. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical

impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 766 P.2d 763 (1988).

53. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation. Idaho Code § 72-422. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the nature of any disfigurement, the cumulative effect of multiple injuries, the occupation of the employee, and the employee's age at the time of the relevant accident or occupational disease manifestation. In addition, consideration should be given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area in light of all of the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. The focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

54. **Time of disability determination.** The Idaho Supreme Court in *Brown v. The Home Depot,* WL 718795 (March 7, 2012) this year reiterated that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing. Under Idaho Code § 72-425, a permanent disability rating is a measure of the injured worker's "present and probable future ability to engage in gainful activity." Therefore, the Court reasoned, in order to assess the injured worker's "present" ability to engage in gainful activity, it necessarily follows that the labor market, as it exists at the time of hearing, is the labor market which must be considered. Although the Commission is afforded latitude in making alternate determinations based upon the particular facts of a given case, the parties have not argued that Claimant's disability

should be determined as of any other point in time. In addition, although Claimant's condition has deteriorated since he reached medical stability, no party has alleged that this deterioration is due to anything but the natural progression of Claimant's industrial and preexisting conditions. Therefore, Claimant's disability will be determined as of the hearing date.

55. **Nonmedical factors.** Based upon the vocational and other evidence of record, Claimant's relevant nonmedical factors contributing to his disability at the time of the hearing include his somewhat advanced age (55), his lack of a high school diploma, his work experience concentrated in medium and heavy labor positions, his limited rural labor market, his lack of any skills transferrable to sedentary work and his disabled-looking appearance.

56. **Permanent disability/odd lot status.** As a threshold matter, Claimant must establish he was totally and permanently disabled as of the hearing date to prove ISIF is liable for his benefits. The facts in the record established by the documentation and testimony of the vocational consultants, as well as Drs. West, Ward, Biddulph and Stromberg, in addition to Claimant's testimony, are sufficient to prove that Claimant was, at the time of the hearing, unable to return to his time-of-injury job duties, and relegated to sedentary and light jobs that do not exceed his upper right extremity restrictions.

57. Dr. Collins opined that, within the sedentary and light categories, Claimant could do customer service, security or front desk work and, to a lesser extent, retail sales and cashier work. However, given Claimant's nonmedical factors, as well as the testimony of Claimant and Mr. Granat, the Referee disagrees. Employers would be deterred from hiring Claimant for even unskilled light and sedentary work within his restrictions because he has no experience, no high school diploma, is disabled-looking, and is an older worker. Further, Dr. Collins did not buttress

her opinion with any evidence of an actual job Claimant could do at or around the time of the hearing.

58. Mr. Granat's opinion, too, underestimates Claimant's disability, first by failing to factor in Claimant's nonmedical factors of age and disabled-looking appearance and then, by averaging his loss of access and loss of wage earning capacity results. When faced with a 96.8% loss of access based upon functional abilities, education[4], skills, experience and labor market, alone, the addition of the omitted factors, in Claimant's case, is sufficient to establish 100% loss of access. Although the average of the access and wage analyses often represents a fair appraisal of a Claimant's disability, that is not the case here, where the evidence establishes Claimant likely has no access at all to his local labor market.

59. ISIF argues that Claimant could obviously work, at least in 2004, because he turned down a telephone marketing job actually offered to him through the efforts of an ICRD consultant. Claimant turned the job down because he hoped to get a better job in construction work, he did not approve of telephone solicitations and he did not have experience in that type of work. By the time of the hearing, however, Claimant no longer believed he could get a construction job, and the evidence in the record from both vocational consultants supports his belief. Also, after observing Claimant at hearing and reading the transcripts of his depositions, the Referee is not convinced that he would adapt well to telephone marketing work. Claimant was friendly and personable, but he regularly had trouble focusing on the question at hand, so his responses were often lengthy and unfocused. It is difficult to conceive of someone with this conversation style succeeding at telephone marketing or solicitations. In addition, Claimant does not type. Even if he did, his right pinky joint fusion would likely negatively impact his

[4] Mr. Granat also failed to consider the likelihood of a negative impact from Claimant's lack of a high school diploma on his ability to obtain even unskilled light and sedentary work.

efficiency at recording information related to his calls, which is ordinarily required in such jobs. Finally, a claimant's distaste for a certain job will not ordinarily suffice to remove that job from the population of occupations he could perform for purposes of determining his disability. However, in this case, where Claimant's ability to perform the job is already in question, and the distaste for the job stems from a personal difficulty with a foundational aspect of the job (such as cold-calling people, a challenging task for many under any circumstances), it is apparent that his distaste would impact his ability to succeed in the position. For all of these reasons, the Referee finds the evidence of the 2004 telemarketing job offer insufficient to overcome a finding that Claimant was totally and permanently disabled at the time of the hearing.

60. As of the date of the hearing, Claimant was ineligible for any jobs available in his labor market based upon his medical and nonmedical factors, alone. The Referee finds Claimant is totally and permanently disabled.

61. Even if Claimant were not totally and permanently disabled based upon his medical and nonmedical factors, alone, he would be thusly disabled as an odd lot worker. An odd lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist*." Bybee v. State, Industrial Special Indemnity Fund,* 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part*." Carey v. Clearwater County Road Department,* 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of proof to establish total permanent disability under the odd lot doctrine may be established in any one of three ways:

a. By showing that the claimant has attempted other types of employment

without success;

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

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

Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995). In this case, ISIF is asserting the doctrine as an affirmative defense, so it carries the burden of proof. *Bybee.*

62. First *Lethrud* method. Claimant has looked at ads, but he has not applied for any jobs because he does not believe he can do any work for which he is qualified. Claimant has failed to adduce sufficient evidence to prove he is an odd lot worker under the first *Lethrud* test.

63. Second *Lethrud* method. Notwithstanding ICRD assistance, the only job secured for Claimant following his industrial accidents was the telemarketing job which, for reasons stated above, was an unlikely fit. Nevertheless, there is no evidence that anyone assisted Claimant in obtaining work at or around the hearing date, so there is insufficient evidence in the record from which to find Claimant was an odd lot worker under the second method.

64. Third *Lethrud* method. Given the factors considered, above, in concluding that Claimant is totally and permanently disabled by his medical and nonmedical factors, alone, the Referee further finds that Claimant is also totally and permanently disabled as an odd lot worker under the third *Lethrud* method because it would be futile for him to attempt to find work in his labor market.

ISIF LIABILITY

65. 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.

66. 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.

67. **Preexisting impairment:** Claimant has whole person PPI ratings for preexisting conditions, as established above, of 3% for his right shoulder condition and 12% for his lumbar spine condition.[5]

68. **Manifest:** ISIF does not dispute that Claimant's right shoulder impairment was manifest, but it does not concede that his lumbar spine condition satisfies this factor. "Manifest" means that either the employer or employee was aware of the condition so that the condition can be established as existing prior to the injury. See *Royce v. Southwest Pipe of Idaho*, 103 Idaho 290, 294, 647 P.2d 746, 750 (1982). Here, Claimant sustained an industrial lumbar spine injury in August 2002, while working for Empro/Blaser, and Claimant persuasively testified that Mr. Blaser was aware of his preexisting right shoulder condition. Claimant has proven that both he and Mr. Blaser knew of his preexisting back and right shoulder conditions prior to December 2003.

69. **Subjective hindrance:** ISIF disputes that either Claimant's preexisting right shoulder or lumbar spine conditions constituted a subjective hindrance prior to his final industrial right shoulder injury. The "subjective hindrance" prong of the test for ISIF liability is defined by statute, 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**

[5] Only preexisting injuries that are medically stable as of the date of the last industrial accident may be considered as preexisting impairments when determining ISIF liability. Q*uincy v. Quincy*, 136 Idaho 1, 27 P.3d 410 (2001). No finding in this regard is here made because the point is ultimately mooted by the findings of facts and conclusions of law recommended by the Referee in this case.

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

Idaho Code § 72-332(2) (emphasis added).

70. 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.

71. There is conflicting evidence in the record as to whether Claimant's shoulder and back conditions constituted a subjective hindrance to obtaining employment in December 2003. Claimant persuasively testified that he had to modify the way he worked following his 1987 low back injury. However, his work history for approximately 15 years following that event fails to establish this injury alone was a subjective hindrance to employment. Then, in August 2002, Claimant again injured his low back, further reducing his functionality and increasing his pain on bending at the waist and lifting. Yet, he continued to work. At some point, Mr. Blaser began assigning the heavy lifting to younger crew members because Claimant could no longer do it. Claimant persuasively testified that such lifting, common in a construction job, included activities like lifting materials from the floor and carrying them on a shoulder and lifting heavy objects overhead. These activities require a strong low back.

72. Mr. Blaser accommodated Claimant's lifting limitations due to his low back condition. Some other employers, no doubt, would be willing to offer similar accommodations for an individual with Claimant's skills and experience. However, many would not, given that younger, stronger applicants with good skills and experience would likely be competing for the same jobs. Claimant's low back condition constituted a subjective hindrance prior to his December 2003 industrial injury.

73. Mr. Granat's deposition testimony to the contrary is unpersuasive because he fails to address material facts, including Claimant's August 2002 injury and Mr. Blaser's concessions, which is necessary to establish adequate foundation for his opinion on whether Claimant's low back condition was a subjective hindrance.

74. Claimant's right shoulder also constituted a subjective hindrance. Following 2000, Claimant had permanent right upper extremity restrictions of no lifting over 50 pounds with no overhead reaching and no repetitive use of the right arm. Such activities are required of workers in Claimant's time-of-injury job. Employers would be less likely to hire Claimant, due to his right upper extremity restrictions, than an able-bodied competitor. Claimant has proven his right shoulder condition constituted a subjective hindrance prior to his December 2003 industrial injury.

75. The Referee finds Claimant's preexisting low back and right shoulder impairments constituted a subjective hindrance to employment.

76. **"Combining with":** 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 he would not have been totally disabled in the

absence of his preexisting impairments. 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).

77. The Referee concluded, above, that Claimant has preexisting permanent impairments to his low back and right shoulder, which are manifest and constitute a subjective hindrance to employment, as well as an industrially-related permanent impairment to his right shoulder. ISIF argues that Claimant's December 2003 industrial right shoulder injury, alone, rendered him totally and permanently disabled and, therefore, Claimant's claims must be dismissed because there is no requisite combination.

78. Claimant has a variety of functional deficits that prevent him from working. His inability to carry and operate a 20-pound nail gun (or similar equipment) for long periods, to reach, or to engage in repetitive or overhead activities or lift more than 30 pounds with his right upper extremity, among other things, are related to his right (dominant) shoulder impairment and accompanying medical restrictions following his last industrial injury. If Claimant's right shoulder condition as of the hearing is the result of the cumulative effects of his preexisting and industrial conditions, then he has carried his burden of proving a combination such as to trigger ISIF liability. (*See, for example, Corgatelli v. Steel West, Inc.*, 2012 IIC 0062, in which the Commission that claimant satisfied his burden on the "combining with" prong by proving the surgical repair, from which he sustained a poor result rendering him totally and permanently disabled, was necessitated by both the subject accident and qualifying preexisting condition.)

79. Unfortunately, no physician has opined on this ultimate question, and the medical records provide insufficient basis from which to draw this conclusion. Claimant clearly had preexisting shoulder pathology. However, it cannot be determined to a reasonable medical

probability, based upon the evidence of record, that Claimant's resultant loss of function would have differed in any way had his shoulder been completely healthy before his last industrial accident. Therefore, Claimant must establish that his industrial right shoulder impairment combined with his low back impairment to render him totally and permanently disabled.

80. Claimant's inability to lift up to forty pounds with both upper extremities, or wear a tool belt or stand all day, are most likely attributable to his low back condition. Although no physician specifically opined on these points, the medical evidence is sufficient to establish Claimant's low back pathology, and insufficient to establish any other medical cause for Claimant's loss of function in these areas. Further, Claimant's testimony about his reduced functionality, as well as his physical appearance at the hearing, were persuasive.

81. Claimant's low back condition contributes significantly to his overall functional deficit. However, the weight of the evidence favors a finding that Claimant would be totally and permanently occupationally disabled as a result of his December 2003 right shoulder injury, alone. As Dr. Ward reported:

> It must be noted with this last injury and surgery Mr. Hope has significant disability. To put it bluntly his shoulder is pretty well trashed! I doubt further surgery would help and I would be very surprised if any of the orthopedic surgeons would be inclined to use surgical intervention. He will have permanent lifting, reaching [*sic*] pushing, pulling and carrying restrictions.

CE-342.

82. Similarly, Claimant testified that he doubted he could continue doing construction work, even in the absence of his back injuries:[6]

[6] Claimant also testified that he did not believe he could continue working for Empro/Blaser in the absence of his right shoulder condition, due to his back condition. Given that there is significant evidence in the record from which it could be determined that Mr. Blaser was a sympathetic employer, and that ISIF could establish no liability for Claimant's benefits by proving that Claimant was totally and permanently disabled before his last industrial accident, it bears noting that the reason this argument is not addressed herein is that ISIF did not raise it.

Q. Let's say you didn't have a back problem. You just had the shoulder problems you have today, as you sit here today. Do you think you could still work for Marty if you, if you just had your shoulder problems?

A. Not and do the job I used to do, no.

Q. Okay. Let's ask you this way: If you just had your shoulder problems, but not back problems, do you think you could maybe work in a marketing office, telemarketing office?

A. Boy, that's, that's not me.

Q. But you could do the job?

A. I, I don't know.

Q. Okay.

A. I don't know. I doubt it.

Tr., p. 70.

83. Claimant's wife contradicted Claimant, opining that Claimant probably *could* continue to work for Empro/Blaser, had he not reinjured his right shoulder in December 2003. However, she agreed with his assessment that Claimant would not have been able to work, even with a healthy back, after his December 2003 injury. Claimant's wife's testimony is afforded little weight, given that she has no specialized vocational, construction or medical training. Nevertheless, her concerns as a devoted spouse are noted.

84. Even if Claimant could stand, bend at the waist, and lift unlimited weight with his left upper extremity all day, he could not use either power or manual tools effectively in the line of work because these tasks depend, in Claimant's case, on right arm use in excess of his restrictions on reaching, repetitive activities and, in some cases, overhead work and lifting over 30 pounds. Further, as determined above, other lighter-duty work that Claimant could physically do was factored out because he lacked education, skills and experience to qualify for these

positions and further because of his age, disabled-looking appearance and rural labor market. As such, Claimant's industrial right shoulder impairment, alone, would have rendered him totally and permanently disabled.

85. Claimant has failed to prove his total and permanent disablement is the result of a combination of preexisting and subsequent industrial injuries. As a result, ISIF is not liable for Claimant's benefits.

86. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has proven that he is totally and permanently disabled due to medical and nonmedical factors, as well as under the odd lot doctrine.

2. Claimant has failed to prove that ISIF is liable for any of Claimant's benefits.

3. All other issues are moot.

DATED this 28th day of September, 2012.

INDUSTRIAL COMMISSION

/s/
LaDawn Marsters, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of October, 2012, 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:

ROBERT K BECK
ROBERT K BECK & ASSOCIATES PC
3456 E 17TH ST STE 215
IDAHO FALLS ID 83406

ANTHONY M VALDEZ
VALDEZ LAW OFFICE PLLC
2217 ADDISON AVE E
TWIN FALLS ID 83301

sjw

/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KEVIN HOPE, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2002-516298** **IC 2004-001924** **IC 2004-500701** **ORDER** Filed: October 26, 2012

Pursuant to Idaho Code § 72-717, Referee LaDawn Marsters 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 has proven that he is totally and permanently disabled due to medical and nonmedical factors, as well as under the odd lot doctrine.

2. Claimant has failed to prove that ISIF is liable for any of Claimant's benefits.

3. All other issues are moot.

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

DATED this __26th____ day of ___October_____, 2012.

INDUSTRIAL COMMISSION

/s/_____
Thomas E. Limbaugh, Chairman

/s/_____
Thomas P. Baskin, Commissioner

/s/_____
R.D. Maynard, Commissioner

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _26th_____ day of _October_____, 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

ROBERT K BECK
ROBERT K BECK & ASSOCIATES PC
3456 E 17TH ST STE 215
IDAHO FALLS ID 83406

ANTHONY M VALDEZ
VALDEZ LAW OFFICE PLLC
2217 ADDISON AVE E
TWIN FALLS ID 83301

sjw

/s/_____