BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GLENN KIMBALL, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2006-524775** **FINDINGS OF FACT, CONCULSIONS OF LAW, AND RECOMMENDATION** FILED 08/28/2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Coeur d'Alene, Idaho on March 15, 2012. Claimant, Glenn Kimball, was present in person and represented by Richard Whitehead, of Coeur d'Alene, Idaho. Defendant, State of Idaho, Industrial Special Indemnity Fund (ISIF), was represented by Thomas Callery, of Lewiston, Idaho. Claimant settled with his former employer, Richard Jordan (Jordan Construction), prior to hearing. The parties presented oral and documentary evidence. No post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on May 24, 2012.

ISSUES

The issues to be decided are:

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

2. Whether the ISIF is liable pursuant to Idaho Code § 72-332.

3. Apportionment under the Carey formula.

CONTENTIONS OF THE PARTIES

Claimant alleges that he is totally and permanently disabled pursuant to the odd-lot doctrine as a result of his pre-existing lumbar and cervical conditions, and his 2006 industrial accident at Jordan Construction. He asserts that ISIF is liable for a portion of his total permanent disability benefits pursuant to Idaho Code § 72-332. ISIF contends that Claimant is employable and not totally and permanently disabled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant and Defendant's Joint Exhibits 1-27, admitted at the hearing; and
3. The testimony of Claimant, Claimant's wife Laura Kimball, Daniel Brownell, and Nancy Collins, taken at the March 15, 2012 hearing.

All objections posed during Claimant's pre-hearing deposition are overruled.

After having considered the above evidence and the arguments 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 born in 1962. He is right-handed. He was 49 years old and resided in Coeur d'Alene at the time of the hearing. He graduated from Coeur d'Alene High School in 1981 with below average grades. He has received no other formal education.

2. After high school, Claimant worked in a sawmill, then as a dishwasher at a restaurant, and later as a furniture deliveryman. In approximately 1982, he worked building

grandstand seats in California. Claimant then returned to Idaho and worked as a sawyer and logging equipment operator for three or four years.

3. Commencing in approximately 1986, Claimant began working as a drywall hanger. In 1993, Claimant sustained a lumbar injury when a gust of wind caught a sheet of drywall he was lifting and strained his back. He received prescription muscle relaxers for a time and resumed his regular duties but continued to notice low back discomfort with heavy lifting and bending. Thereafter he worked as a cabinet maker. In approximately 1996, Claimant commenced working as a construction framer. He became widely recognized as an excellent framer and became a working framing foreman, leading and supervising framing crews.

4. In 1998, Claimant noted significant back pain accompanied by leg pain and numbness. Lumbar spine films revealed L5-S1 instability. On December 15, 1998, Bret Dirks, M.D., performed L5-S1 diskectomy and fusion with instrumentation. Claimant progressed and returned to light duty work and then to his supervisory duties; however, he noted ongoing back pain and difficulty with bending and heavy lifting.

5. On April 22, 1999, Claimant was at work helping hold a beam overhead when a coworker dropped the other end and Claimant felt neck pain and left arm numbness. He received medical treatment and was diagnosed with C6-7 disc herniation. On May 18, 1999, Dr. Dirks performed anterior C6-7 diskectomy and fusion. Claimant returned to light-duty work and then to his regular duties. On November 19, 1999, Herbert Gamber, M.D., rated Claimant's cervical impairment at 5% of the whole person. On May 6, 2000, Dr. Dirks recorded that Claimant's cervical impairment was closer to 10% of the whole person. Dr. Dirks restricted Claimant from performing the heavy lifting and hard labor he was doing before the accident. Thereafter, Claimant was no longer able to handle sheets of plywood and perform the roof work usually

expected of a leading edge framer. Claimant experienced ongoing difficulty sleeping due to chronic neck pain. He was not able to look up as readily and consequently hit his head occasionally on beams while working.

6. From approximately 2002 until 2004, Claimant owned and operated his own framing business. At the height of his business, he ran three crews and employed 15 people. However, Claimant did not fully understand the bidding process and many of his crew members proved to be unreliable. His wife did all of the computer work necessary for the business. The first year he made approximately $26,000.00, the second year only $3,000.00. The final year he nearly went bankrupt, losing approximately $50,000.00 and was forced to close down his business even though construction in Coeur d'Alene was then booming. At the time of the hearing, Claimant still owed debts and taxes from the years he operated his own business.

7. In May 2004, Claimant sustained a "boxer's fracture" in which he fractured the knuckles of the ring and little fingers of his right hand. These fractures healed.

8. In approximately 2005, Claimant began working for another company as a construction supervisor. However his actual job duties were more physically demanding than had been represented at the time of his hiring. He left the job after one year.

9. On October 9, 2006, Claimant began working as a framer for Jordan Construction. On October 12, 2006, pursuant to Richard Jordan's express urging, Claimant was helping lift a stack of sheet metal, three feet wide and approximately 16 feet long, when Claimant noted immediate severe pain and weakness in his right shoulder, right arm, and neck. Claimant was earning $30.00 per hour at the time of his accident. Claimant presented at the emergency room of a local hospital and was initially diagnosed with shoulder and trapezius strain, however his symptoms worsened. Diagnostic testing revealed cervical pathology.

10. On December 14, 2006, Dr. Dirks performed C3-4 anterior diskectomy and fusion with instrumentation. Claimant continued to report right shoulder pain and arm pain. An MRI revealed right shoulder pathology.

11. On June 14, 2007, Roger Dunteman, M.D., performed right rotator cuff repair. Dr. Dunteman then restricted Claimant from lifting above shoulder level and from lifting more than 20 pounds.

12. In approximately February 2008, Claimant was examined by Stephen Sears, M.D, at Defendant's request. Dr. Sears pronounced Claimant medically stable and approved his return to his pre-injury work as a framer with restrictions of no overhead lifting and only occasional use of his right hand. Dr. Dunteman disagreed with Dr. Sears' conclusions.

13. Claimant worked with Industrial Commission rehabilitation consultants from October 2006 through April 2008. No academic testing was ever offered or performed. Claimant testified that one of the consultants treated him rudely. One of the consultants recommended that Claimant pursue Social Security Disability. Claimant followed her recommendation. The consultant closed Claimant's case because he had reached maximum medical improvement, per Dr. Sears, and did not desire further vocational assistance. None of the consultants who assisted Claimant were still employed by the Commission at the time of the hearing.

14. Claimant continued to have debilitating right shoulder and arm pain. An MRI revealed a torn right biceps tendon. On December 16, 2008, Dr. Dunteman performed right biceps tenodesis and tenotomy, and right rotator cuff debridement. Claimant continued to experience arm and neck symptoms. Diagnostic studies revealed C3-4 pseudoarthrosis.

15. On April 1, 2009, Dr. Dirks performed a diskectomy and anterior and posterior fusion at C3-C5.

16. On November 24, 2009, Dr. Dirks opined that Claimant was medically stable. On November 28, 2009, Dr. Dirks opined that Claimant suffered a cervical impairment of 30% of the whole person, including 10% for his pre-existing C6-7 cervical condition. Dr. Dirks asked Claimant to consider filing for Social Security Disability due to his loss of strength, limited range of motion, and inability to return to his prior positions.

17. On February 26, 2010, Dr. Dunteman found Claimant medically stable and rated his right shoulder impairment at 9% of the upper extremity. Dr. Dunteman restricted Claimant from repetitive activity at or above shoulder level and from lifting more than 10 pounds.

18. On March 19, 2010, David Bauer, M.D., and David Rutberg, M.D., examined Claimant at Defendant's request and concluded that his shoulder and C3-5 conditions were related to his 2006 accident. Drs. Bauer and Rutberg rated his right shoulder impairment at 17% of the upper extremity and his cervical impairment at 15% of the whole person. They restricted Claimant to lifting no more than 10 pounds with his right arm and to sitting or standing no more than 30 minutes.

19. Claimant's application for Social Security Disability benefits was denied in October 2010.

20. In 2011, Claimant began applying for work. Claimant, with his wife's assistance, checked Job Service postings. Claimant visited several prospective employers and telephoned over 150 additional prospective employers in Coeur d'Alene but found no employment.

21. Claimant has had persisting swallowing difficulties since his first cervical surgery. These difficulties have been increased by his subsequent cervical surgeries.

22. Claimant has substantial ongoing neck, right shoulder and low back pain. He has treated with Sorin Ispirescu, M.D., of Pain Management of Northwest Idaho, who prescribed various medications and performed nerve block injections. None of these measures were particularly helpful. Claimant also treated with Scott Magnuson, M.D., who prescribed a TENS unit, which is only partially effective in managing Claimant's pain. Claimant has difficulty sleeping due to his shoulder, neck, and back pain. He arises four or five times each night due to pain. He is able to sit for only 15 to 30 minutes consecutively, and stand for only 15 to 20 minutes. He is able to drive for only 30 minutes.

23. Claimant has had lifelong difficulty reading. He described it as a learning disability. He does not read the newspaper or subscribe to any magazine. During his construction work he relied on others to read directions and explain them to him. He does not read letters from his attorney, but relies upon his wife to read and explain them to him. He is not computer literate. His activities now include mowing his small lawn. At the time of hearing, Claimant was seeking Social Security Disability benefits.

24. Having observed Claimant and his wife at hearing, and compared their testimony with other evidence in the record, the Referee finds that both are credible witnesses.

DISCUSSION AND FURTHER FINDINGS

25. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

26. **Permanent disability.** The first issue is whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. "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 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 disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. 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). Pursuant to Idaho Code § 72-422, the proper date for disability analysis of a claimant's labor market access is the date of hearing, and not the date that maximum medical improvement has been reached. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012).

27. Claimant asserts that his 2006 industrial accident at Jordan Construction, in combination with his pre-existing lumbar and cervical conditions and non-medical factors, render him totally and permanently disabled. His permanent disability must be evaluated based upon his medical factors, including his permanent impairments, the physical restrictions arising from his permanent impairments, and his non-medical factors, including his capacity for gainful activity and his ability to compete in the open labor market within his geographical area.

28. Impairments. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, 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).

29. Claimant herein alleges permanent impairments to his lower back, neck, and right shoulder. Claimant underwent L5-S1 diskectomy and fusion in 1998. The record contains no permanent impairment rating for his lumbar condition; however, Claimant asserts that 20% of the whole person is appropriate pursuant to the AMA, Guides to the Evaluation of Permanent Impairment, 5th Edition, p. 384, Table 15-3. Defendant does not contest this assertion. The record abundantly establishes Claimant's L5-S1 fusion and persisting chronic back pain. As already noted, the Commission is the ultimate evaluator of impairment. The Referee finds that Claimant suffers a permanent impairment of 20% of the whole person due to his pre-existing lumbar condition.

30. In 1999, Claimant underwent C6-7 diskectomy and fusion. Dr. Gamber rated

Claimant's C6-7 cervical impairment at 5% of the whole person. In 2000, Dr. Dirks, Claimant's treating cervical surgeon, rated Claimant's C6-7 cervical impairment at 10% of the whole person. Claimant's 2006 industrial accident caused C3-4 and C4-5 injuries necessitating surgery. In November 2009, Dr. Dirks rated Claimant's collective cervical impairment at 30% of the whole person, including 10% for his pre-existing C6-7 diskectomy and fusion. In March 2010, Drs. Bauer and Rutberg rated Claimant's permanent impairment of his cervical spine at 15% of the whole person. They assigned no impairment to his pre-existing C6-7 diskectomy and fusion. The Referee finds the failure to assign any impairment to Claimant's pre-existing C6-7 diskectomy and fusion unusual, unexplained, and unpersuasive. As Claimant's treating surgeon, Dr. Dirk's rating of Claimant's cervical impairment is more persuasive. The Referee finds that Claimant suffers a permanent cervical impairment of 30% of the whole person, including 10% of the whole person due to his pre-existing C6-7 condition.

31. In February 2010, Dr. Dunteman, Claimant's treating shoulder surgeon, rated Claimant's right shoulder impairment at 9% of the upper extremity which equates to 5% of the whole person. In March 2010, Drs. Bauer and Rutberg rated Claimant's right shoulder impairment at 17% of the upper extremity which equates to 10% of the whole person. Dr. Dunteman subsequently agreed with the rating assigned by Drs. Bauer and Rutberg. The Referee finds that Claimant suffers a permanent impairment of 10% of the whole person due to his right shoulder condition.

32. Claimant has proven that he suffers permanent physical impairments of 20% of the whole person due to his lumbar condition, 30% of the whole person due to his cervical condition and 10% of the whole person due to his right shoulder condition, thus totaling 60% of the whole person.

33. Physical restrictions. On February 26, 2010, following Claimant's final shoulder surgery, Dr. Dunteman restricted Claimant from repetitive activity at or above shoulder level and from lifting more than 10 pounds. On March 19, 2010, Drs. Bauer and Rutberg restricted Claimant from lifting more than 10 pounds with his right arm and from sitting or standing for more than 30 minutes.

34. Ability to compete in the open labor market. Nancy Collins, Ph.D., testified on behalf of ISIF. She interviewed Claimant and reviewed his work history, medical records, and physical restrictions. Dr. Collins considered Claimant capable of sedentary to light employment. She noted that 60% of all jobs in the Coeur d'Alene and Spokane areas are light or sedentary jobs. Dr. Collins acknowledged that Claimant was not successful in managing his own framing business. However she testified that he had transferable skills and good knowledge of construction, customer service, and supervising employees.

35. Dr. Collins reviewed available jobs in Spokane and Coeur d'Alene on three different days, each one week apart, in the fall of 2011. She found many jobs that she opined Claimant could perform, including construction sales representative, construction supervisor foreman, construction field superintendent, and construction project foreman. Many of these required dealing with customers, completing regular written job reports, and/or conducting regular safety meetings. In addition to construction-related positions, Dr. Collins opined that Claimant might work as a small parts inspector, front desk clerk, dispatcher, front desk sales person for a fitness center, toner refill technician, night desk auditor, security officer, guest support relations person, security guard, and sporting goods sales person. She acknowledged that some of these positions may not be the best fit for Claimant.

36. Dr. Collins acknowledged that Claimant would not be competitive for call center positions and that customer service representative positions would require sitting beyond Claimant's 30-minute restriction. Dr. Collins concluded that Claimant is employable in light and sedentary work within the Coeur d'Alene/Spokane labor market. She believed it would not have been futile for him to look for work and believed that Claimant should have taken advantage of the job preparation resources available to him. Dr. Collins readily acknowledged that it would take Claimant a while to find a job, and that he might have to take a computer class to prepare for any available job.

37. Dr. Collins did not contact any prospective employer about the actual requirements of any job and did not discuss Claimant's abilities with any potential employer. She noted that most jobs now require on-line applications. Dr. Collins acknowledged that she has not placed anyone in the Coeur d'Alene/Spokane labor market in the last year, and probably not within the last three years.

38. Claimant called Daniel Brownell to testify at hearing. Mr. Brownell served as a vocational rehabilitation consultant for the Industrial Commission for 29 years in Coeur d'Alene, retiring in 2010. He is intimately familiar with the labor markets in the Coeur d'Alene and Spokane areas and has placed numerous individuals in jobs within those areas. Mr. Brownell testified that Kootenai County has lost more than 5,500 jobs from 2008 to 2011—approximantely one-half of them in construction-related businesses. He noted that although the Kootenai County unemployment rate has improved from 10.8% in December 2010, to 9.8% in December 2011, the county has lost nearly 1,000 jobs during that year alone.

39. Mr. Brownell met with Claimant and familiarized himself with Claimant's medical records, work history, educational background, injuries and resulting work limitations.

He noted that Claimant achieved poor grades throughout high school, reads poorly, rarely reads books or magazines, and knows virtually nothing about computers. Mr. Brownell considered the results of Claimant's TABE testing which measured his functional educational level. Mr. Brownell testified that the TABE testing documented that Claimant functions academically between a fourth and fifth grade level overall, with language skills at a 2.7 grade level, reading at a 3.6 grade level, and math at an eighth grade level. Mr. Brownell considered the permanent physical restrictions placed by the physicians. He opined that Claimant's most significant physical limitations were his right upper extremity limitation of lifting 10 pounds, his bilateral hand numbness, and his 30-minute sitting restriction, which limited his driving ability and largely precluded access to the Spokane labor market. Mr. Brownell observed that Claimant has not worked since his industrial accident in 2006 and testified that long periods of unemployment are negative flags to prospective employers.

40. Mr. Brownell reviewed the notes of the Industrial Commission rehabilitation consultants who assisted Claimant from 2006 until 2008 and testified that Claimant was in a period of medical recovery during the entire time that he associated with Commission rehabilitation consultants. No testing was then done to determine whether Claimant might have been a viable candidate for retraining. One of the Commission rehabilitation consultants encouraged Claimant to apply for Social Security Disability and recommended Claimant retain an advocate to assist in his application process. Claimant followed the consultant's recommendation.

41. Over the course of four months, Mr. Brownell sought employment for Claimant. Dr. Collins had recommended Claimant seek foreman or construction supervisor positions, so part of Mr. Brownell's contacts were to investigate construction supervisor positions. He also

considered security guard, assembly work, and other sedentary work positions. He considered Home Depot, Lowes, Cabela's, and various building and lumber suppliers. He reviewed Job Service listings on Claimant's behalf. Mr. Brownell testified that Claimant is not competitive for call center or casino positions because of his computer illiteracy, sitting limitations, and lack of public relations skills. Mr. Brownell affirmed that Claimant was not competitive for cashier positions because of his computer illiteracy, lack of interpersonal skills, and lifting restriction, given the stocking usually required of cashiers. Mr. Brownell personally approached 25 prospective employers, tapping his most relevant longstanding professional contacts, and together with Claimant, made over 200 inquiries regarding employment for Claimant in the four months prior to hearing. Mr. Brownell was not able to obtain even one interview for Claimant.

42. Mr. Brownell reviewed Dr. Collins' report and specifically reviewed all of the jobs listed in her report to determine whether the jobs were within Claimant's restrictions and whether Claimant would actually be competitive for them. Mr. Brownell testified that there are approximately 7,000 people presently looking for work in North Idaho. He affirmed that there are usually 100 to 200 applicants for each job announced. He noted that construction supervisor positions are so sought after that individuals with four-year construction engineer college degrees are competing for them. Mr. Brownell testified that Claimant would not be a viable candidate for any of the positions that Dr. Collins identified. Mr. Brownell testified that Claimant is totally and permanently disabled and that further efforts to find employment would be futile.

43. Defendant argues that Claimant is young and thus more likely employable. While he was 44 at the time of the accident, he was 49 at the time of the hearing and turned 50 before the parties briefed and submitted this case for decision. Defendant criticizes Claimant's job search conducted within approximately four months of hearing. However, the evaluation of

Claimant's disability near the time of hearing is mandated by Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012).

44. The record establishes that Claimant has difficulty reading. TABE testing demonstrates his language skills are less than the third grade level and his reading skills are less than the fourth grade level. He does not read the newspaper or subscribe to any magazine. During his years of construction work he relied on others to read directions and explain them to him. His wife reads his attorney's letters and explains them to him. Claimant can perform a simple Google search but is otherwise not computer literate. He does not use email. Claimant has not enrolled for any classes at North Idaho College because of his literacy deficits. He was advised that he would need two years of remedial classes before he would be able to attempt college level courses.

45. Dr. Collins opined there is work available that Claimant could perform. However the conclusion reached by Dr. Collins—that Claimant is a viable candidate for such work—without actually consulting any potential employer about Claimant's competitiveness for an actual job in the open labor market, is speculative. Claimant has unsuccessfully looked for work in the Coeur d'Alene area on his own, through the unemployment office, and with the assistance of Mr. Brownell. Regardless of the alleged deficiencies of Claimant's own job search, Mr. Brownell performed an additional but unsuccessful job search. The conclusion of Mr. Brownell—that Claimant is not competitive in the open labor market—is well explained, well supported in the record by Mr. Brownell's actual job search in Claimant's behalf and by Claimant's own actual job search, and more persuasive than Dr. Collins' conclusion.

46. Based on Claimant's permanent impairments totaling 60% of the whole person, his permanent physical restrictions, and considering all of his medical and non-medical factors,

including his age at the time of his 2006 industrial accident, limited formal education, computer illiteracy, academic deficits, below average literacy, inability to return to previous positions, and limited transferable skills, Claimant's ability to compete in the open labor market and engage in regular gainful activity after his 2006 industrial accident has been greatly reduced. The Referee concludes that Claimant has established a permanent disability of 95%, inclusive of his 60% whole person impairment.

47. Odd-lot**.** A claimant who is not 100% permanently disabled may prove total permanent disability by establishing he is 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 establishing odd-lot status rests upon the claimant. Dumaw v. J. L. Norton Logging, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). A claimant may satisfy his burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways: (1) by showing that he has attempted other types of employment without success; (2) by showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or (3) 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).

48. In the present case, Defendant asserts that Claimant is employable and not an odd-lot worker. As noted above, Claimant has presented significant direct evidence of an unsuccessful work search in that Claimant contacted over 150 prospective employers without success. Moreover, former Commission rehabilitation consultant Daniel Brownell approached his extensive network of contacts unsuccessfully seeking suitable employment for Claimant. Mr. Brownell has opined that it would be futile for Claimant to seek employment. As concluded above, Brownell's opinion is persuasive. Claimant has established a prima facie case that he is an odd-lot worker, totally and permanently disabled, under the Lethrud test.

49. Once a claimant establishes a prima facie odd-lot case, the burden shifts to ISIF "to show that some kind of suitable work is regularly and continuously available to the claimant." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The ISIF must prove there is:

> An actual job within a reasonable distance from [claimant's] home which [claimant] is able to perform or for which [claimant] can be trained. In addition, the Fund must show that [claimant] has a reasonable opportunity to be employed at that job. It is of no significance that there is a job [claimant] is capable of performing if he would in fact not be considered for the job due to his injuries, lack of education, lack of training, or other reasons.

Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 407, 565 P.2d 1360, 1364 (1977).

50. In the present case, although Dr. Collins reported on a number of available jobs in the area, she made no specific inquiry into the suitability of any of these jobs for Claimant given his physical restrictions or whether Claimant would be a competitive viable candidate for any of these jobs. Mr. Brownell testified convincingly that he had reviewed all of the potential positions identified by Dr. Collins and that Claimant is not a viable candidate for any of them.

51. ISIF has not shown that there is an actual job regularly and continuously available which Claimant can perform and at which he has a reasonable opportunity to be employed.

Claimant has proven that he is totally and permanently disabled pursuant to the odd-lot doctrine commencing March 19, 2010, the date Drs. Bauer and Rutberg found Claimant medically stable and rated Claimant's right shoulder impairment.

52. **ISIF liability**. The next issue is whether ISIF bears any liability pursuant to Idaho Code § 72-332. Idaho Code § 72-332(1) provides in pertinent part that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his income benefits out of the ISIF account.

53. Idaho Code § 72-332(2) further provides that "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. 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 pre-existing physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

54. In Dumaw v. J. L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court identified four requirements a claimant must meet to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was indeed a pre-existing

impairment; (2) whether that impairment was manifest; (3) whether the impairment was a subjective hindrance to employment; and (4) whether the impairment in any way combined with the subsequent injury to cause total disability. Dumaw, 118 Idaho at 155, 795 P.2d at 317.

55. Pre-existing, manifest impairments. The pre-existing physical impairments at issue herein are those to Claimant's low back and neck prior to his 2006 industrial accident. There is no dispute that his low back and neck conditions existed and were manifest in 1998 and 1999 respectively, documented by his L5-S1 and C6-7 surgeries. Claimant's low back and neck conditions constitute pre-existing conditions for purposes of Idaho Code § 72-332 because each preexisted and was manifest prior to his 2006 industrial accident. The first and second prongs of the Dumaw test have been met.

56. Hindrance or obstacle. The third prong of the Dumaw test considers "whether or not the pre-existing condition constituted a hindrance or obstacle to employment for the particular claimant." Archer v. Bonners Ferry Datsun, 117 Idaho 166, 172, 786 P.2d 557, 563 (1990).

57. Claimant underwent L5-S1 laminectomy and fusion in 1998. He later returned to work; however, he had ongoing pain and difficulty with bending and heavy lifting. He stopped carrying sheets of plywood and resorted to the lighter work of supervising framing. Claimant underwent C6-7 diskectomy and fusion in 1999. Thereafter he returned to work with a 30-pound lifting restriction which precluded him from the very heavy labor he had previously performed. Claimant's pre-existing low back and neck conditions compelled him to avoid heavy work. The Referee finds that Claimant's pre-existing low back and neck impairments constituted a hindrance to his employment. The third prong of the Dumaw test is met as to these impairments.

58. Combination. Finally, to satisfy the "combines" element, the test is whether, but

for the industrial injury, the worker would have been totally and permanently disabled immediately following the occurrence of that injury. This test "encompasses both the combination scenario where each element contributes to the total disability, and the case where the subsequent injury accelerates and aggravates the pre-existing impairment." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

59. The record contains persuasive evidence that Claimant's low back and neck condition combined with his 2006 industrial injuries to render him totally and permanently disabled. As noted above, Claimant's 2006 injuries limited his lifting and overhead working abilities. His pre-existing low back condition limited his standing and sitting tolerances. His pre-existing neck condition further compromises his work capacity by reducing his neck range of motion and accelerating the wear on his C5-6 cervical disk. Mr. Brownell testified that Claimant's 1998 and 1999 injuries combine with his 2006 accident to produce his total permanent disability.

60. ISIF does not argue, and the Referee is not persuaded, that Claimant's 2006 industrial accident alone rendered him totally and permanently disabled. Rather, the weight of the evidence establishes that Claimant's 2006 industrial accident combined with his pre-existing low back and neck impairments to render him totally and permanently disabled. The final prong of the Dumaw test has been satisfied as to Claimant's pre-existing low back and neck impairment. Pursuant to Idaho Code § 72-332, ISIF is liable for Claimant's pre-existing low back and neck impairment.

61. **Carey apportionment.** In Carey v. Clearwater County Road Department, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984), the Idaho Supreme Court adopted a formula apportioning liability between ISIF and the employer/surety at the time of the final industrial

accident. The formula prorates the non-medical portion of disability between the employer/surety and the ISIF in proportion to their respective percentages of responsibility for the physical impairment. Conditions arising after the injury, but prior to a disability determination, which are not work-related, are not the obligation of ISIF. Horton v. Garrett Freightlines, Inc., 115 Idaho 912, 915, 772 P.2d 119, 122 (1989).

62. Before applying the Carey formula, the portion of Claimant's impairment pre-existing his 2006 industrial accident at Jordan Construction, and the portion caused by his 2006 industrial accident must be quantified. Claimant's qualifying pre-existing impairments total 30% of the whole person for his low back (20%) and neck (10%). Claimant's impairments due to his 2006 industrial accident total 30% of the whole person for his neck (20%) and right shoulder (10%). Thus, Claimant's impairments for Carey apportionment total 60% (30% due to his 2006 accident, and 30% qualifying pre-existing). Claimant's 2006 impairments constitute 50% (30/60), and his qualifying pre-existing impairments constitute 50% (30/60) of his total impairment.

63. By application of the Carey formula, ISIF is responsible for the pre-existing medical portion of 30% impairment and for 50% of the nonmedical portion of Claimant's permanent disability. Thus, ISIF is responsible for payment of full statutory benefits commencing at the conclusion of 250 weeks after March 19, 2010, the date Claimant became medically stable after his industrial accident.

CONCLUSIONS OF LAW

1. Claimant suffers permanent disability of 95%, and has proven in the aftermath of his 2006 industrial accident that he is an odd-lot worker, totally and permanently disabled under the Lethrud test.

2. ISIF is liable pursuant to Idaho Code § 72-332 for Claimant's pre-existing low back and neck impairments and the proportion of disability attributable thereto.

3. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: ISIF is responsible for payment of full statutory benefits commencing at the conclusion of 250 weeks after March 19, 2010, the date Claimant became medically stable.

RECOMMENDATION

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

DATED this 20th day of August, 2012.

INDUSTRIAL COMMISSION

_____/s/_____
Alan Reed Taylor, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of August, 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:

RICHARD WHITEHEAD
PO BOX 1319
COEUR D'ALENE ID 83816-1319

THOMAS W CALLERY
PO BOX 854
LEWISTON ID 83501-0854

srb _____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GLENN KIMBALL, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2006-524775** **ORDER** FILED 08/28/2012

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his 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 suffers permanent disability of 95%, and has proven in the aftermath of his 2006 industrial accident that he is an odd-lot worker, totally and permanently disabled under the Lethrud test.

2. ISIF is liable pursuant to Idaho Code § 72-332 for Claimant's pre-existing low back and neck impairments and the proportion of disability attributable thereto.

3. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: ISIF is responsible for payment of full statutory benefits commencing at the conclusion of 250 weeks after March 19, 2010, the date

Claimant became medically stable.

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

DATED this 28th day of August, 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 28th day of August, 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

RICHARD WHITEHEAD
PO BOX 1319
COEUR D'ALENE ID 83816-1319

THOMAS W CALLERY
PO BOX 854
LEWISTON ID 83501-0854

srb _____/s/_____