BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DOJIE LANGLEY, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)	**IC 2004-507709** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** filed September 8, 2010

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Idaho Falls on December 2, 2009. Jonathan W. Harris of Blackfoot represented Claimant. Paul B. Rippel of Idaho Falls represented the State of Idaho, Industrial Special Indemnity Fund ("ISIF"). Employer and Surety did not appear, having previously reached a lump sum settlement with Claimant. The parties presented oral and documentary evidence and took two post-hearing depositions. The parties filed post-hearing briefs and Claimant filed a reply brief. This matter came under advisement on May 5, 2010. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact and conclusions of law.

ISSUES

By agreement of the parties at hearing, the noticed issues to be decided were:

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

2. Whether Claimant is totally and permanently disabled;

3. Whether the Industrial Special Indemnity Fund is liable under Idaho Code § 71-332; and

4. Apportionment under the *Carey* formula.

At hearing, the parties agreed that Claimant was totally and permanently disabled, leaving ISIF liability and *Carey* apportionment as the only issues to be decided.

CONTENTIONS OF THE PARTIES

Claimant asserts that, prior to her April 2004 industrial injury, she had permanent impairments that were manifest, were a subjective hindrance to employment, and combined with the industrial accident of April 2004 to render her totally and permanently disabled.

ISIF agrees that Claimant is totally and permanently disabled, but denies any liability for Claimant's disability benefits. ISIF asserts that Claimant's disability did not result from the combination of her pre-existing impairments and the industrial accident, but is solely due to brain trauma sustained in the industrial accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Bill Langley, Shana Langley, and Kathy Gammon, taken at the hearing;

2. Claimant's Exhibits A-T, admitted at the hearing;

3. ISIF's Exhibits 1-8, admitted at the hearing;

4. The pre-hearing deposition of Claimant, taken on June 25, 2007;

5. The pre-hearing deposition of Claimant, taken on April 2, 2009;

6. The post-hearing depositions of Nancy J. Collins, Ph.D., taken on February 11, 2010, and Brenda Empey, taken on December 11, 2009; and

7. The Idaho Industrial Commission legal file.

After having considered all the above evidence and briefs of the parties, the Commission issues the following findings of fact and conclusions of law.

FINDINGS OF FACT

BACKGROUND

1. Claimant was seventy-one years of age at the time of the hearing and residing in Blackfoot. She was born in Montana, where she grew up and worked on a cattle ranch. She graduated from high school as valedictorian of her class. After graduation, Claimant attended college from 1957 until 1958, studying elementary education. Claimant has no further formal education.

2. Since 1963, Claimant and her husband Bill have owned and operated the Spinning Diamond Ranch, where Claimant eventually took charge of the breeding and foaling operations. Claimant's husband, a former horse trainer and bronc rider, has been unable to assist with the heavier jobs since at least 1995, because injuries to his left hip greatly reduced his stability and mobility.

3. In 1983, Claimant went to work for Employer as a librarian. After a few years, she became a teacher's aide, serving as a "one-on-one" tutor for students with disabilities. By 1998, knee pain made it difficult for Claimant to work directly with the students, so she became a school bus driver transporting students with disabilities. Claimant received on-the-job training and held a driver's license with a CDL endorsement.

4. Claimant worked as a school bus driver for Employer until April 8, 2004. On that day, Claimant was driving the bus when a vehicle pulled out in front of her, causing a collision. The impact launched Claimant out of her seatbelt and down the steps of the bus, where her head shattered the glass in the vehicle's door. Claimant lost consciousness and sustained various injuries, including a concussion, a serious laceration to her forehead and right eyelid, and bruises to her knees.

INITIAL POST-ACCIDENT TREATMENT AND RECOVERY

5. Immediately following the industrial accident, Claimant was airlifted to Eastern Idaho Regional Medical Center, where she was diagnosed with cerebral contusion, complex facial laceration and possible right globe (eyeball) rupture. She reported she was taking medications including Vioxx, Atenolol, Diovan and Elavil.

6. During transport, Claimant asked to lie on her side because of her arthritis, but the EMT told Claimant she must lie flat on her back. The EMT placed pillows under her knees for comfort. At the emergency room, Claimant complained that her chronic knee pain had been made worse.

7. Ophthalmologist Catherine E. Durboraw, M.D., performed emergency surgery to repair Claimant's facial lacerations, including the laceration to her right eyelid. Claimant lapsed into renal failure post-surgically and received treatment in the intensive care unit.

8. A CT scan of Claimant's cervical spine showed soft tissue ossification surrounding the dens, possibly due to chondrocalcinosis, and severe degenerative disc disease and bilateral neuroforaminal narrowing at C5-6. A CT scan of Claimant's thoracic and lumbar spine also showed degenerative and hypertrophic changes, likely chronic in nature. A head CT

indicated a small amount of intraparenchymal and/or subarachnoid hemorrhage bilaterally, fluid within the paranasal sinuses most likely related to the hemorrhage, and fractures of the nasal bone and right orbit.

9. On April 9, 2004, Alan G. Avondet, M.D., an internist, evaluated Claimant's general medical status, as well as her chronic renal dysfunction. Claimant had no documented internal injuries, but exhibited persistent moderate hypotension even though she had a history of hypertension. An abdominal CT scan indicated small, atrophic kidneys. Claimant confirmed some mild kidney problems in the past, but denied that any treatment was prescribed.

10. Dr. Avondet noted that Claimant was on multiple blood pressure medications, as well as Vioxx for joint pain.

> She has had a great deal of difficulty with joint discomfort including virtually all of her joints for many, many years, and…has tried many different arthritis medicines…she has variously been told at some points that she has lupus and at other points that she does not. She has also been told that she has fibromyalgia.

Claimant's Exh. D, p. 384. Dr. Avondet recommended ceasing all NSAIDS due to their renotoxicity. He withheld Claimant's Vioxx and ibuprofen and questioned whether a change in her heart medication could eliminate the use of diuretics.

11. Knee x-rays taken April 9 showed bilateral end-stage degenerative changes. Right hand and wrist x-rays taken April 11 revealed severe degenerative joint disease (DJD) consistent with osteoarthritis. Flexion and extension x-ray views of Claimant's cervical spine corroborated the CT finding of DJD at C5-6.

12. Upon release from the hospital, Claimant was wheelchair-bound due to decreased central balance and bilateral knee pain. Claimant's home would not accommodate a wheelchair, so the hospital released her to an assisted living facility to recuperate. During her stay at the

assisted living facility, Claimant developed bilateral knee flexion contractures. Upon completion of a wheelchair-accessible addition to Claimant's house, she was released to go home.

PHYSICAL THERAPY

13. From May 13 until June 16, 2004, Claimant underwent a course of twelve physical therapy sessions at Rocky Mountain Physical Therapy. At her final session, Claimant reported that she felt great and demonstrated that she could stand and walk for short distances with the aid of a wheeled walker. However, she remained largely dependent upon a wheelchair for mobility. From September 7, 2004 until August 9, 2005, Claimant attended physical therapy sessions at Pocatello Physical Therapy. Although she was making improvements in her gait and knee extension, she was still dependent on assistive devices to ambulate.

14. Under the direction of Gene Griffiths, M.D., an orthopedic surgeon, Claimant began a work-hardening program ("aggressive physical therapy") at Pocatello Physical Therapy on August 11, 2005. She attended six hours per day for three days per week. By her final session on September 16, 2005, Claimant's gait had deteriorated and her knee and hip pain had markedly increased. According to Dan Desfossess, P.T.:

> Overall [Claimant] is still having a great deal of pain. She is not anywhere near as good as she was when she started therapy a few weeks ago. The aggressive therapy has caused the decline in her ability to walk.

Claimant's Exh. J, p. 505.

15. Claimant, her husband, her daughter, and Dr. Griffiths all agreed that Claimant's physical condition declined after her aggressive physical therapy sessions. Claimant's husband and daughter both testified that Claimant's mental state noticeably declined at this point, as well.

EYE INJURY FOLLOW-UP

16. Claimant followed up with Dr. Durboraw concerning her right eye injury three times between June 2004 and July 2005. Dr. Durboraw noted Claimant's right eye was droopy, but did not recommend surgical repair due to the high risk that Claimant may not be able to completely close her right eye post-surgery.

17. In June 2004, Dr. Durboraw referred Claimant to Scott Simpson, M.D., another ophthalmologist, for further evaluation of her right eye. Dr. Simpson diagnosed an increased possibility that Claimant would develop traumatic glaucoma in her right eye and recommended yearly eye examinations to monitor for this condition. Claimant's right eye vision was 20/70, corrected to 20/40 with pinhole vision.

18. No physician has assessed a permanent impairment rating for Claimant's right eye condition.

KNEE PAIN HISTORY AND FOLLOW-UP

19. Prior to her industrial accident, Claimant had a significant history of joint pain and pathology, including but not limited to her left knee, hip, and upper extremities. X-rays from January 10, 1991 revealed moderate to severe left knee degenerative changes with space narrowing, a moderate amount of chondrocalcinosis, milder changes at the left hip, and moderate to severe degenerative changes in the lumbar spine. Claimant began treating her osteoarthritis with Voltaren in August 1993, and continued from that point on to treat her arthritis pain with prescription medications. Claimant complained of knee pain to her physician twice in 1997. Also in 1997, Claimant's physician told her that she would someday require total knee

replacement. Claimant was diagnosed with symptomatic upper extremity osteoarthritis in 1999, and was again evaluated for intermittent left knee pain in 2003.

20. The day after the industrial accident, bilateral knee x-rays showed severe tricompartmental degenerative change with specific findings consistent with bilateral end-stage degenerative change.

21. On August 18, 2004, Gary Walker, M.D., a physiatrist, saw Claimant concerning her constant knee pain. She reported experiencing left knee arthritis pain before the industrial accident, and debilitating bilateral knee pain since. Claimant was using a wheelchair for mobility outside, and a walker inside. She had difficulty climbing stairs unless she could hold onto two rails. Acupuncture, massage and physical therapy brought only minimal temporary benefits.

22. Dr. Walker diagnosed severe degenerative arthritis that pre-existed her industrial injury. Although he reported that Claimant had a history of pre-existing left knee pain, he inconsistently concluded at the end of his report that she had stated she was asymptomatic. He also opined, based upon Claimant's x-rays, that her pain could feasibly be so severe as to be the sole factor limiting her mobility. Dr. Walker discussed knee replacement surgery with Claimant and administered bilateral Hyalgan injections.

23. Claimant followed up with Dr. Walker on August 26, 2004. Although her knee pain had improved, Claimant now complained of back pain with onset since the industrial accident. Dr. Walker administered another course of Hyalgan injections into Claimant's knees and ordered spinal x-rays. The x-rays showed severe degenerative disc disease at L5-S1 with vacuum phenomena, and spondylolisthesis at L4-L5 and L5-S1.

24. Dr. Walker opined that some of Claimant's spine pathology could be due to the industrial accident. He noted that an MRI could determine whether spinal stenosis is present, but delayed ordering that procedure. On September 2, 2004, Claimant again followed up with Dr. Walker for her third (and final) course of Hyalgan injections into her knees.

25. On September 20, 2004, Dr. Walker authored a letter to a representative of the State Insurance Fund. He concluded that Claimant has lived with severe degenerative arthritis in both knees for many years. Claimant's right knee arthritis was apparently asymptomatic, but her left knee had been intermittently symptomatic for more than thirteen years at the time of the industrial accident. The industrial accident caused Claimant's left knee pain to increase and triggered pain in her right knee. He did not believe Claimant could drive a bus because her knee pain associated with negotiating stairs, as on a school bus, was so severe. Dr. Walker based his opinion, in part, on Claimant's relevant history of left knee, left hip, back, and other joint pain as reported in her medical records.

INDEPENDENT MEDICAL EXAMINATION/MMI DATE

26. On March 16, 2005, Claimant saw Dr. Griffiths, who Surety retained to conduct an independent medical examination. Dr. Griffiths noted Claimant's history of knee pain documented in her medical records since 1991, along with her report that, in spite of the pain, she was functional before the industrial accident. Dr. Griffiths also noted Claimant's injuries to her knees, head and face from the industrial accident, as well as her general course of recovery thereafter.

27. On examination, Dr. Griffiths noted that Claimant used a wheelchair for mobility and that she exhibited asymmetric eye folds, bilateral knee flexion contractures, and diffuse

tenderness about the knees. He ordered x-rays of her knees that identified severe end-stage tricompartmental osteoarthrosis with large osteophytosis, symptomatology consistent with chondrocalcinosis, and bone loss around the medial tibial plateau.

28. Dr. Griffiths reported that Claimant suffered contusions to both knees, as well as lacerations to her face (her right eye in particular), as a result of the industrial accident. He did not believe Claimant had reached maximum medical improvement (MMI) or was yet capable of returning to work. He recommended aggressive physical therapy to restore Claimant to at least light-duty work. It was this course of physical therapy that led to Claimant's physical decline, discussed previously.

29. On October 12, 2005, Dr. Griffiths calculated an impairment rating for Claimant's bilateral knee conditions. He opined that Claimant's pre-existing bilateral knee arthritis, her flexion contractures due to the 2004 accident, and her resulting gait derangement should *each* be measured at 20% whole person impairment rating at *each* knee. However, he elected to assess 20% of the whole person at each knee due to her gait derangement, alone.

30. Dr. Griffiths explains his rating by noting that Claimant's gait derangement is probably her most significant impairment. He did not combine his impairment ratings for Claimant's pre-existing arthritis or knee contractures with his impairment rating for Claimant's gait derangement because:

> . . . [b]ased on Section 17.2C, gait derangements from the American Medical Association Guides to Evaluation of Permanent Impairment, the gait derangement percentile stands alone and it is not combined with any other findings.

Claimant's Exh. L, p. 707.

31. Dr. Griffiths allocated half of his permanent impairment rating to Claimant's pre-existing bilateral knee arthritis. Dr. Griffiths explained:

> I would have to assume that with pre-existing arthritis, her gait derangement would not be as severe as it is, but without the accident would assume that she would not have deteriorated so rapidly and resulted in such a severe and acute gait impairment.

Claimant's Exh. L, p. 708.

32. Dr. Griffiths went on to recommend bilateral total knee replacements and to confirm that Claimant was unable to return to her occupation as a school bus driver. He permanently restricted Claimant from climbing stairs or ladders and recommended only minimal standing and walking, limited to 10-15 minutes per hour.

33. On December 6, 2005, Dr. Griffiths authored a letter to Surety in which he opined that Claimant had reached MMI as of September 26, 2005. He opined that further physical therapy after that date would be futile, due to Claimant's severe arthritis in both knees, and recommended a self-directed exercise regimen at a health club or gym. He acknowledged that Claimant's condition declined after she participated in the in-patient physical therapy program, due to her severe bone-on-bone arthritis, and again surmised she would require bilateral total knee replacement surgery to obtain any relief. Dr. Griffiths did not take Claimant's hand injury (discussed at paragraphs 36 through 42) into consideration, even though it occurred before the MMI date he assessed.

34. Curtis L. Galke, D.O., a family doctor who treated Claimant prior to the 2004 accident, and participated in her post-accident care, signed a form on November 28, 2005, indicating he concurred with the statements contained in Dr. Griffiths' IME report.

35. Ken Blanchard, rehabilitation consultant with the Idaho Industrial Commission, indicated in his notes regarding closure of Claimant's file that, as of January 10, 2007, Claimant still had not reached MMI.

HAND INJURY AND POST-PHYSICAL THERAPY CARE

36. In 2002, Dr. Galke treated Claimant for symptoms including pain and numbness in her wrists and hands, worse at night. He assessed carpal tunnel syndrome (CTS). Dr. Galke did not report how he arrived at his diagnosis or record any testing or treatment follow-up. He did note that Claimant was already taking Vicoprofen for fibromyalgia pain.

37. As discussed *infra* at Paragraph 11, right hand and wrist x-rays taken days after the industrial accident revealed severe DJD within multiple joint spaces. The radiologist posited the opinion that Claimant's right wrist and hand DJD was asymmetrical and, therefore, consistent with degenerative osteoarthritis.

38. On September 30, 2005, Claimant reported to Dr. Galke that her overall condition had deteriorated as a result of her participation in the work-hardening program that ended September 16, 2005. Specifically, Claimant complained of pain and numbness in her hands from gripping the equipment used in the therapy program. Dr. Galke prescribed Darvocet for pain and recommended reducing Claimant's physical therapy. Claimant followed up with Dr. Galke concerning her hand pain at least twice more in 2005. In late 2005, Dr. Galke referred Claimant to Stephen G. Vincent, M.D., a neurologist, for a consultation regarding her neurological complaints.

39. Claimant first saw Dr. Vincent in early January 2006. On March 23, 2006, Dr. Vincent reported findings from upper extremity nerve conduction testing consistent with

severe bilateral CTS, worse on the right. Dr. Vincent prescribed a trial of carpal tunnel splints. He surmised that cervical stenosis may play a part in Claimant's bilateral hand symptomatology and elected to take a wait-and-see approach.

40. On June 6, 2006, Dr. Galke again evaluated Claimant. She complained of balance problems, expressive aphasia, lower extremity edema since completing the work-hardening program, and insomnia. Dr. Galke prescribed TED hose for Claimant's lower extremity swelling, and two Darvocet at night to help her pain subside so she could sleep.

41. On August 15, 2006, Paul L. Beckett, D.O., a family doctor, evaluated Claimant for hand pain that had persisted since the industrial accident and increased during her intensive physical therapy. Dr. Beckett provided Mobic samples and ordered bilateral hand x-rays. The films revealed bilateral polyarticular arthropathy involving all three finger joints. The imaging was suspicious for hemochromatosis and calcium pyrophosphate deposition disease—CPDD, or chondrocalcinosis—findings consistent with images taken shortly after the industrial accident.

42. On September 7, 2006, Claimant saw Dr. Beckett again for hand pain. He noted her x-rays were suspicious for CTS, prescribed Mobic, and recommended night splints. He did not mention Dr. Vincent's electrodiagnostic testing from March 2006 that also indicated CTS.

43. Claimant returned to Dr. Beckett on June 27, 2008, complaining of hand pain that persisted despite continued use of Mobic and Darvocet. Dr. Beckett increased Claimant's Neurontin dose, started her on prednisone and ordered lab tests. Upon review of her test results, Dr. Beckett discontinued Claimant's Mobic, because her kidney function tests were elevated.

NEUROLOGICAL ASSESSMENT

44. As discussed previously, Claimant saw Dr. Durboraw on July 6, 2005 regarding her eye injury. In addition to her right eye injury, Claimant complained of memory loss and poor balance. Dr. Durboraw recommended consultation with a neurologist at the University of Utah, but Claimant declined, agreeing to call if her symptoms worsened.

45. On September 8, 2005, Claimant presented to Dr. Galke with complaints of insomnia, decreased memory, and pain in the right part of her head, all worse since the accident. Dr. Galke indicated he would order a head MRI; however, there is no corresponding MRI report in the record and he does not mention it again in subsequent reports. He prescribed hydrochlorthiazide for edema and increased Claimant's antidepressant dosage.

46. As discussed in Paragraphs 39-40, *infra,* Claimant saw Dr. Vincent on January 10, 2006 upon referral from Dr. Galke. At the time, and in addition to her hand pain, she reported having one type of headache three times per week, a second type of headache associated with her right eye injury intermittently, chronic watery right eye, and word-finding difficulty. Claimant denied any history of headaches prior to the 2004 accident; however, her medical records indicate she received treatment for headaches at least once previously, in July 2002. Claimant's husband expressed his concern that Claimant's personality had changed since the industrial accident.

47. Following his examination, Dr. Vincent concluded that Claimant suffered obstructive sleep apnea unrelated to the industrial accident. He ordered a sleep study. He also ordered an "updated" brain MRI to better assess Claimant's memory and personality changes, though he did not indicate when, if ever, Claimant had previously undergone a brain MRI.

Dr. Vincent also ordered a cervical spine MRI to investigate Claimant's hand and leg symptoms, and increased her amitriptyline to alleviate her headaches. He confirmed that all procedures other than the sleep study were to investigate injuries Claimant sustained in the industrial accident. Results of the MRIs ordered by Dr. Vincent are not evident in the record.

48. On April 13, 2006, Dr. Vincent prescribed headache medication and C-PAP for Claimant's sleep apnea, and noted that a neuropsychiatric evaluation may be necessary to "look for evidence of cognitive dysfunction related to the head injury." Claimant's Exh. D, p. 894-895.

PSYCHOLOGICAL ASSESSMENT

49. In the spring of 2006, Claimant's neurocognitive functioning was evaluated by psychologist Howard K. Harper, Ph.D. Claimant was cooperative and friendly, and expressed frustration that it was difficult to find words for thoughts and emotions, though Dr. Harper observed that she was able to communicate her ideas freely. Claimant also described balance and leg weakness difficulties, reporting that she had fallen on several occasions.

50. Dr. Harper administered a number of tests[1] and determined Claimant's responses were valid. Claimant's test results indicated average overall intellectual skills and abilities. However, there were areas in which Claimant demonstrated lower-than-average functioning levels.

51. Claimant had a Verbal IQ score of 87 (low average), indicating weakness with verbal comprehension, verbal reasoning, and problem solving, and had significant difficulty with the language portion of her ability to spontaneously name objects. She also scored in the low

[1] Dr. Harper administered the Minnesota Multiphasic Personality Inventory, Wechsler Adult Intelligence Scale, Wechsler Memory Scale, Wide Range Achievement Test, Grooved Pegboard Test, Trail Making Test Forms A & B, Wisconsin Card Sort Test, Boston Naming Test and controlled Oral Word Association Test.

average range in attention/concentration and learning/memory abilities. Her motor function also tested significantly below the norm, indicating profound fine and gross motor impairment bilaterally, somewhat worse on the right. Claimant's scores on executive functioning measures were "significantly below what might have been predicted based on estimation of her pre-morbid function." Claimant's Exh. N, p. 756. She demonstrated difficulty with applying feedback in problem solving, shifting between problem solving strategies, simultaneously sequencing strings of numbers and letters, and engaging in abstract reasoning to identify similarities among items.

52. Areas in which Claimant demonstrated higher than average functioning levels include language, specifically her ability to communicate clearly in interpersonal interactions and to verbalize fluidly. Claimant also scored relatively strongly (upper average) on visual spatial ability tests, which evaluated her visual reasoning and problem solving abilities, visual motor integration, and ability to recognize visual symbols and process visual information.

53. From Claimant's personality/mood testing, Dr. Harper determined that Claimant was experiencing significant symptoms of depression from losing her independence, along with her strong but realistic concerns about the changes in her life occasioned by her deteriorated health and physical functioning. She expressed that she is more introverted since the industrial accident, and is self-conscious about her appearance, her right eye in particular. Dr. Harper also noted that Claimant is more likely to take a stoic attitude to her condition, as opposed to malingering or exaggerating her symptoms.

54. Dr. Harper concluded that:

> [Claimant] has experienced significant neuro cognitive [sic] impairment caused by injuries incurred in her motor vehicle accident and resulting in traumatic brain injury.

Claimant's Exh. N, p. 759. He recommended speech therapy, cognitive rehabilitation therapy, consultation with a physician to reevaluate her regimen of psychotropic medication and individual counseling to assist in coping with her stressors.

55. On September 4, 2009, Dr. Harper authored a letter to Claimant's attorney in which he opined that Claimant's acquired memory deficits, combined with her stoic personality, may predispose her to underestimating the extent of her health concerns prior to the industrial accident. He based his opinion on findings from his 2006 testing of Claimant, as well as an interview with her on July 5, 2009.

VOCATIONAL REHABILITATION CONSULTANTS

Kathy Gammon

56. Kathy Gammon, a physical therapist and vocational consultant retained by Claimant, provided three separate reports after interviewing Claimant and her husband, examining Claimant, and reviewing Claimant's relevant medical and other records.

57. Ms. Gammon's first report, dated December 8, 2006, was evidently prepared in anticipation of third-party litigation arising out of the 2004 motor vehicle accident, because it included extraneous details and analysis, most notably, a life-care plan. In this report, Ms. Gammon concluded that Claimant was totally and permanently disabled as a result of injuries she sustained in the 2004 industrial accident. The report is ambiguous, at best, regarding whether Claimant had any pre-existing impairments that contributed to her disability status.

58. Ms. Gammon's second report, dated August 11, 2009, was prepared after a fifty-minute telephone conversation with Claimant. Ms. Gammon attempted to clarify her ultimate opinion, apparently anticipating the present proceedings:

> Doije [sic] continues to be precluded from all of her previous work positions by her physical injuries resulting from a motor vehicle accident in April 2004…
>
> Additionally, Dojie's pre-existing arthritic pain and dysfunction at her bilateral knees, right hand/wrist and lumbar spine, effectively reduced her ability to perform in her previous work positions, not only as a school bus driver but particularly as a special education aide.
>
> However, due to Dojie's determination and long term use of anti-inflammatory medication, she managed to continue working in her job position as handicapped bus driver [sic] until her injuries of April 2004, [sic] ultimately prevented her from returning to any type of gainful employment.

Claimant's Exh. R, p. 1013.

59. In her third report, prepared in the form of a letter to Claimant's attorney and dated November 19, 2009, Ms. Gammon opined that, if not for Claimant's pre-existing arthritis in her knees and right hand, she would have been able to ambulate and use her hands after the industrial accident. As a result, Ms. Gammon posited, Claimant would still qualify cognitively as a school crossing guard, dog bather, library shelving clerk, door greeter, parking lot attendant, sewing machine operator, produce sorter or fast food worker. Ms. Gammon stated that the positions listed above are unskilled and would not require much training, but would require Claimant to be able to stand and walk. Thus, it is not Claimant's cognitive condition alone which causes her total and permanent disability.

60. Ms. Gammon's reports are not helpful in determining whether Claimant had any pre-existing impairments. However, her observations and opinions on specific points may be credible with respect to whether Claimant's pre-existing physical impairments, established by credible evidence, were manifest subjective hindrances.

Nancy Collins

61. Nancy Collins, Ph.D., a vocational rehabilitation consultant retained by ISIF, concurred with Ms. Gammon's findings and opinions set forth in her first report. Dr. Collins read the report to mean that Claimant's total and permanent disability was the result of the industrial accident alone because, among other things, Ms. Gammon pointed out that Claimant was able to complete all of her job requirements prior to the accident and Ms. Gammon did not apportion any of Claimant's permanent impairments to a pre-existing condition.

62. Dr. Collins did not dispute that Claimant may have had pre-existing permanent impairments. She argued, however, that "but for" Claimant's brain injury and sequelae, caused by the 2004 accident alone, she would not be totally and permanently disabled. Dr. Collins based her opinions upon the conclusions drawn by Dr. Harper.

63. Dr. Collins testified that Ms. Gammon's ultimate opinions, stated in her second report, remained consistent with a determination that the industrial accident, alone, caused Claimant's total and permanent disability.

CLAIMANT'S CHARACTER

64. By all accounts, Claimant is an extraordinarily hard worker with a "git 'er done" attitude. She loved working with the students and was dedicated to her horse ranching operation. She worked through her pain from bone-on-bone arthritis in both her knees, arthritis in her hand, and fibromyalgia, among other conditions evident in her medical records.

65. Claimant was also cognizant of her health and obtained treatment for her various conditions when she needed to. This is apparent from Claimant's medical records, even though her testimony, and that of her husband, in particular, could lead to the conclusion that Claimant

did not obtain medical treatment for her ailments. The Commission finds Claimant to be a generally credible witness. However, to the extent that conclusions drawn by any witness about Claimant's medical conditions conflict with credible information reported in her medical records, the Commission finds the medical records the more credible source.

DISCUSSION AND FURTHER FINDINGS

ISIF LIABILITY

66. Pursuant to Idaho Code § 72-332, ISIF's liability is limited to claims wherein the injured worker can establish total permanent disability and meet a number of other statutory requirements. Often, both total permanent disability and ISIF liability are in dispute, and the two issues are litigated in the same proceeding. In this matter, the parties agree that Claimant is totally and permanently disabled, so the dispute is limited to whether Claimant can prove the remaining elements of Idaho Code §72-332 in order to obtain benefits from ISIF. In *Dumaw v. J. L. Norton Logging,* 118 Idaho 150, 155, 795 P.2d 312, 317 (1990), the Idaho Supreme Court reiterated the four requirements a claimant must meet to establish ISIF liability under Idaho Code § 72-332:

(1) Whether there was, indeed, a pre-existing physical 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.

Each of these elements is addressed in turn in the following pages.

Pre-Existing Impairment

67. Prior to the industrial accident, Claimant had never received a permanent impairment rating. Following the accident, Dr. Griffiths assessed a permanent impairment rating for Claimant's pre-existing bilateral arthritis of the knee. In addition, Claimant seeks an impairment rating for her pre-existing hand conditions and her head injury. Neither party asserts that an impairment rating for any other medical condition would be appropriate.

Bilateral Knee

68. The *AMA Guides to the Evaluation of Permanent Impairment,* 5th ed. (*AMA Guides,* 5th), advises that gait derangement impairment ratings stand alone and should not be combined. However, it also admonishes: "*Whenever possible, the evaluator should use a more specific method.*" *AMA Guides,* 5th, p. 529 (emphasis in original).

69. In his report, Dr. Griffiths thoroughly analyzes Claimant's lower extremity conditions. He considers her pre-existing bone-on-bone left knee arthritis pain as well as the debilitating effects of her injuries from the industrial accident, including flexion contractures and knee contusions. Dr. Griffiths measured a 20% permanent impairment rating at each knee for arthritis pain, and another 20% at each knee for knee contusions caused by the accident. Ultimately, however, he concluded that 20% at each knee for gait derangement was a more appropriate rating for Claimant's condition.

70. Dr. Griffiths correctly perceived that the *AMA Guides,* 5th, requires him to choose *either* gait derangement or a combination of Claimant's other related impairments when assessing a permanent impairment rating. When Dr. Griffiths elected to assess the gait impairment rating alone, he implicitly rejected a combined impairment rating of 59% for

Claimant's bilateral knee arthritis and bilateral knee flexion contractures under the *AMA Guides,* 5th. The Commission finds that the 59% rating more fully accounts for all of Claimant's lower extremity permanent impairments, as opposed to just her gait derangement.

71. The Commission assigns a 59% whole person permanent impairment rating attributable to Claimant's bilateral knee conditions. Further, the Commission adopts Dr. Griffiths' assessments that 50% of Claimant's bilateral knee condition is due to her pre-existing arthritis, and 50% is due to injuries she sustained in the 2004 accident. As a result, the Commission apportions Claimant's combined impairment rating related to her knees at 29.5% to her pre-existing knee arthritis and 29.5% to the industrial accident.

Bilateral Hand

72. Claimant argues that the Commission should assign a permanent impairment rating to her pre-existing hand condition(s). Provided there is adequate evidence from which to make a determination, the Commission is empowered to assess permanent impairment ratings. *Soto v. J.R. Simplot,* 126 Idaho 536, 887 P.2d 1043 (1994).

73. In December 2002, Claimant sought treatment for her nighttime hand pain and numbness from Dr. Galke. He diagnosed CTS, but did not do any testing or prescribe any treatment. Three days after Claimant's industrial accident, the x-rays of her right hand and wrist showed severe DJD consistent with osteoarthritis. On March 23, 2006, electrodiagnostic testing by Dr. Vincent confirmed a diagnosis of severe CTS. On August 14, 2006, bilateral hand x-rays confirmed bilateral polyarticular arthropathy and raised suspicions of chondrocalcinosis and CTS. No other relevant test results are evidenced in the record.

74. Carpal tunnel syndrome is an entrapment/compression neuropathy impairment. The *AMA Guides*, 5th, require evaluation of *objective findings from electrodiagnostic testing* to assess an impairment rating for CTS. Here, no such testing was done prior to the industrial accident. As a result, there is inadequate evidence from which to assign a permanent impairment rating to Claimant for *pre-existing* CTS. Further, there is inadequate evidence in the record to establish that the industrial accident caused the CTS that Dr. Vincent conclusively diagnosed post-accident. Therefore, the Commission declines to assess a permanent impairment rating for CTS resulting from the accident.

75. Claimant's right hand and wrist x-rays taken April 11, 2004, combined with her prior complaints of pain in her right hand when operating the handle to open and close the bus door, are sufficient evidence that Claimant suffered DJD consistent with osteoarthritis prior to the industrial accident. Further, the injury that she sustained to her hands from gripping exercise equipment in her work-hardening sessions is well-documented and undisputed. As the contusions from the industrial accident accelerated onset of Claimant's severe knee pain from DJD, the physical therapy due to the industrial accident accelerated Claimant's hand and wrist pain.

76. As was the case with assessing an impairment rating for her CTS, there is inadequate evidence in the record—such as flexion or extension measurements—from which to derive an impairment rating for Claimant's *pre-existing* hand and wrist DJD. The Commission cannot assess an impairment rating for Claimant's increased hand pain, because there is no measurement of Claimant's hand pain pre- and post-injury. A pain rating on a 1/10 scale has some inherent reliability issues, but here, even that is lacking. Therefore, the Commission

declines to assess an impairment rating for Claimant's pre-existing or post-accident hand conditions.

Manifest

77. According to the Idaho Supreme Court, ""Manifest" means that either the employer or employee is aware of the condition so that the condition can be established as existing prior to the injury." *Royce v. Southwest Pipe of Idaho,* 103 Idaho 290, 647 P.2d 746 (1982).

78. The Commission finds ample evidence in the record that Claimant was aware of her left knee problems prior to the industrial accident; therefore, it was manifest.

79. MRI images taken immediately following the industrial accident show that Claimant's right knee pathology matched that of her left knee. Her bilateral bone-on-bone arthritis clearly pre-existed the accident; however, Claimant's medical records do not clearly indicate she had previously complained of right knee pain. Wherever a specific painful knee is identified, it is the left knee.

80. On the other hand, Claimant's deposition testimony is that she had pre-existing arthritis pain in both of her knees. Medical records dated several years prior to the accident corroborate widespread degenerative joint disease, without limiting the diagnosis to any particular joint.

81. The absence of specific mention of her right knee in medical records dated prior to the industrial accident is not dispositive of the issue. This is especially true given Claimant's propensity to underreport her pain and the lack of any incentive to report her right knee pain because she was already receiving pain medication to treat her left knee. Finally, Dr. Griffiths

did not assign a lesser impairment rating for the right knee, even after reviewing Claimant's medical records.

82. The Commission finds Claimant was aware of her pre-existing right knee arthritis and, accordingly, that Claimant has established that her bilateral knee arthritis was manifest prior to the industrial accident.

Subjective Hindrance

83. The Commission also finds that Claimant's pre-existing bilateral bone-on-bone knee arthritis constituted a subjective hindrance to her employment.

84. At the time of the 2004 accident, Claimant was, by all accounts, functioning well in her job. The fact that Claimant was working does not preclude a finding that her impairment is a subjective hindrance. I.C. § 72-332(2). In *Garcia v. J. R. Simplot Co.*, 115 Idaho 966, 772 P.2d 173 (1989), the Court reiterated that the subjective hindrance requirement "is to eliminate those claimants who have had an earlier injury, but have not suffered any loss of *potential* earning capacity." (Emphasis in original).

85. Claimant testified that she had accommodated her knee condition by taking the bus driver job in 1993 so she did not have to move around and bend at the knee so much. Further, Claimant and Ms. Empey, a teacher's aide, both testified that Claimant had trouble bending to strap the wheelchairs securely in place in her "new" job. Claimant's husband and daughter also observed she had difficulty climbing the bus steps, and observed Claimant rubbing liniment on her knees to ease the pain.

86. ISIF emphasizes that Ms. Empey could only remember Claimant asking for help on one occasion. Given Claimant's tendency to play down her pain and work independently,

Ms. Empey's confirmation that Claimant asked for help at all, even just once, provides credible support for Claimant's position.

87. The record establishes that Claimant's bilateral knee arthritis hindered her in performing her job such that a future employer may reasonably be reluctant to hire her. Claimant's potential earning capacity was decreased by her pre-existing knee impairments. Claimant has proven her arthritis pain in her bilateral knees was a subjective hindrance to employment pursuant to Idaho Code § 72-332.

Combines With

88. We next address ISIF's primary argument: That Claimant has failed to establish the fourth prong of her *prima facie* case. Specifically, ISIF argues that it is not liable for Claimant's benefits, because the injuries from the 2004 accident did not combine with her pre-existing conditions to render her totally and permanently disabled. Instead, Defendant asserts that Claimant's total and permanent disability resulted from her brain injury alone.

89. Defendant cites *Selzler v. State of Idaho, Industrial Special Indemnity Fund,* 124 Idaho 144, 857 P.2d 623 (1993), in which the claimant suffered a back injury requiring several surgeries, after which he continued to experience severe physical problems. There, the Idaho Supreme Court wrote, "ISIF is not liable unless the disability would not have been total but for a preexisting condition." *Id., citing Garcia v. J.R. Simplot Co.,* 115 Idaho 966, 772 P.2d 173 (1989). The Court went on to hold that ISIF was not liable for the claimant's benefits, affirming the Commission's findings that his learning disabilities did not "combine" with his last injury because the last injury, itself, rendered Selzler totally and permanently disabled. The *Garcia* Court previously applied the same rule, holding ISIF liable in that case, because the claimant's

pre-existing back and left thumb conditions did combine with her right arm amputation and right knee injury to leave her totally and permanently disabled. *Id.*

90. The Commission agrees that the "but for" standard is the appropriate test to determine whether total permanent disability is the result of the combined effects of the pre-existing condition and the work-related injury, but rejects the argument that Claimant did not meet this standard.

91. ISIF relies upon the opinion of Dr. Collins to support its position. In turn, Dr. Collins relies upon Dr. Harper's assessments of Claimant's neuropsychological functioning to conclude that Claimant's brain injury sequelae from the 2004 accident, alone, rendered her totally and permanently disabled. Dr. Harper's tests indicated Claimant has average overall intellectual skills and abilities, though some areas showed lower-than-average functioning. Claimant demonstrated a weakness in verbal comprehension, verbal reasoning, and difficulty in her ability to spontaneously name objects. Claimant also had difficulty with applying feedback in problem solving and shifting between problems solving strategies. Dr. Harper also noted that Claimant was friendly in her demeanor, cooperative with the evaluation, her speech was clear and coherent, and she was able to communicate ideas clearly.

92. Based largely on Dr. Harper's report, Dr. Collins opined that Claimant's total and permanent disability is solely attributable to a brain injury resulting from the industrial accident. Dr. Collins' assessment that Claimant's neurological deficits alone preclude her from the job market are not persuasive. In a difficult case such as this, it is important for the vocational expert to have personally met Claimant. Dr. Collins review of Dr. Harper's report is a good starting point, but without any detailed work restrictions given by Dr. Harper, the Commission finds Dr.

Collins' assumptions of Claimant's cognitive condition less persuasive than Ms. Gammon's conclusions.

93. Ms. Gammon first interviewed Claimant in her home for six hours. The interview included brief vocational and physical therapy testing. Ms. Gammon administered an oral direction test to Claimant, the results of which placed Claimant between the 3rd and 20th percentile of the norm groups. Ms. Gammon explained that Claimant demonstrated enough working memory to understand the direction and hold onto it long enough to do simple tasks. Ms. Gammon opined that, if Claimant could still walk and stand, she would qualify cognitively for short training unskilled jobs such as, school crossing guard, dog bather, library shelving clerk, door greeter, parking lot attendant, sewing machine operator, produce sorter, and fast food worker.

94. Ms. Gammon demonstrated a better understanding of Claimant's abilities and applicable skills. The Commission is persuaded, as concluded by Ms. Gammon, that Claimant is totally and permanently disabled because of the combined effects of her preexisting impairment and her industrial injury. Thus, the Commission finds that Claimant's brain injury alone did not cause her total and permanent disability.

95. Claimant's neurocognitive condition is debilitating, but only when combined with the significant restrictions from her knee problems does Claimant become totally and permanently disabled. Claimant's knee related restrictions include standing or walking limited to 5 minutes at a time followed by 2-3 minutes of rest, never carrying an item while walking, never bending, never kneeling, and never climbing stairs. While Claimant would qualify cognitively for short training unskilled jobs such as, school crossing guard, dog bather, library

shelving clerk, door greeter, parking lot attendant, her knee related restrictions would not allow her to perform those jobs.

96. The Commission acknowledges that Claimant has been treated for hand conditions which include carpal tunnel syndrome, osteoarthritis, and hand pain. Dr. Harper observed that Claimant's performance on tasks requiring fine motor skill was impaired. While the evidence demonstrates that Claimant's hand conditions caused difficultly with her fine motor skills, the Commission finds that Claimant's neurocognitive condition coupled with her knee conditions are enough to cause her total and permanent disability. The positions available to Claimant considering her neurocognitive condition, as opined by Ms. Gammon, include short training unskilled jobs such as, school crossing guard, dog bather, library shelving clerk, door greeter, parking lot attendant, sewing machine operator, produce sorter, and fast food worker. Claimant's neurocoginitive condition severely limits her employment market. As stated above, an overview of Claimant's knee related restrictions include standing or walking limited to 5 minutes at a time followed by 2-3 minutes of rest, never carrying an item while walking, never bending, never kneeling, and never climbing stairs. When the positions above are reviewed with a focus on Claimant's restrictions due to her knee conditions nothing viable remains. Additionally, as discussed in the preexisting impairment section, the evidence does not support a finding that Claimant's preexisting hand condition qualifies as a preexisting impairment.

97. For the foregoing reasons, the Commission finds that Claimant's total permanent disability was not solely the result of her industrial accident, but was due to a combination of her pre-existing knee arthritis combined with the flexion contractures she incurred in the 2004 accident and the brain injury.

CAREY APPORTIONMENT

98. The *Carey* formula only applies when a pre-existing impairment combines with the current injury to create total and permanent disability. *Hamilton v. Ted Beamis Logging & Constr*., 127 Idaho 221, 899 P.2d 434 (1995). Its purpose is to apportion the non-medical disability factors between the employer and the ISIF. The formula comes from *Carey v. Clearwater County Road Department*, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984), in which the *Idaho Supreme Court held:*

> [T]he appropriate solution to the problem of apportioning the nonmedical disability factors, in an odd-lot[2] case where the fund is involved, is to prorate the nonmedical portion of disability between the employer and the fund, in proportion to their respective percentages of responsibility for the physical impairment.

Henderson v. McCain Foods, Inc., 142 Idaho 559, 567, 130 P.3d 1097, 1105 (2006).

99. To establish the amount of ISIF liability, the extent, in percentage of the whole person, of qualifying permanent physical impairments is required. The Commission has determined that Claimant's whole person permanent impairment due to her knee injuries is 59%, with half apportioned to her pre-existing condition. But no party provided sufficient evidence to find, without speculation or arbitrary assignment, the extent of the remaining impairments. Therefore, under the Commission's investigatory authority, Idaho Code § 72-714(3), this matter is retained for purposes of determining the PPI rating due for Claimant's neurocognitive

[2] In *Carey*, the claimant was deemed totally and permanently disabled as an odd-lot worker. Application of *Carey* is not limited to cases in which the claimant's total disability is a result of the application of the odd lot doctrine. At bottom, *Carey* is a method of allocating liability for non-medical factors in total perm cases. Whether a claimant is found totally disabled because of the application of the odd-lot doctrine, or because his or her impairments together with non-total 100%, has no bearing on the application of the *Carey* formula, so long as the statutory requirements of Idaho Code § 72-332 for ISIF liability are met.

condition. *Hartman v. Double L Manufacturing*, 141 Idaho 456, 111 P.3d 141 (2005). The parties will be given 90 days to file the relevant rating with the Commission.

MMI DATE

100. Claimant is entitled to disability benefits dating from the date that she was no longer in the period of recovery (at maximum medical improvement or MMI). Idaho Code § 72-408. Dr. Griffith's opinion, rendered October 12, 2005, asserts that Claimant's bilateral knee conditions were stable as of September 26, 2005, shortly after she completed the work-hardening program. He opined that any further physical therapy after that date would only worsen her knee condition. He recommended bilateral knee arthroplasty, which Claimant opted not to pursue.

101. Claimant continued to receive treatment for her neurocognitive complaints after September 2005. Claimant's neurocognitive condition was evaluated by Dr. Harper on June 1, 2006. While Dr. Harper does not expressly state that Claimant is stable, June 1, 2006 is the only date in evidence which the Commission can utilize for neurocognitive MMI date. Additionally, Claimant did not seek the therapy recommended by Dr. Harper. The Commission finds sufficient evidence to support a finding that Claimant had reached MMI for her knee injuries and neurocognitive condition by June 1, 2006.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has carried her burden of establishing the statutory elements for ISIF liability pursuant to Idaho Code § 72-332.

2. This matter should be retained for the parties to produce evidence to determine a PPI rating for Claimant's neurocognitive condition related to the industrial accident. The parties will be given 90 days to submit evidence for the purpose of determining the PPI rating due for

Claimant's neurocognitive condition. At that time the Commission will issue an order with the appropriate *Carey* formula application.

3. Until the Commission issues an additional order determining the appropriate *Carey* formula application, this decision is not final and conclusive as to all matters adjudicated.

DATED this __8th__ day of __September_____, 2010.

INDUSTRIAL COMMISSION

_/s/_____
R.D. Maynard, Chairman

_/s/_____
Thomas E. Limbaugh, Commissioner

_/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _8th_ day of _September_____, 2010, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS,** and **ORDER** were served by regular United States Mail upon each of the following persons:

JONATHAN W HARRIS
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djb __/s/_____