

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

JOSEPH MORRILL,

Claimant,

v.

STATE OF IDAHO, INDUSTRIAL  
SPECIAL INDEMNITY FUND,

Employer,

Defendant.

**IC 2006-518118  
2007-032332**

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER**

**Filed May 24, 2012**

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Lewiston on September 8, 2011. Claimant was present and represented by Christopher Caldwell of Lewiston. Thomas W. Callery, also of Lewiston, represented State of Idaho, Industrial Special Indemnity Fund (ISIF). Employer/Surety settled with Claimant prior to hearing. Oral and documentary evidence was presented and one post-hearing deposition was taken. The parties submitted briefs and this matter came under advisement on January 13, 2012. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

**ISSUES**

The issues to be decided as the result of the hearing are:

1. Whether Claimant is totally and permanently disabled and, if so,

2. Whether ISIF is liable under Idaho Code § 72-332 and, if so,
3. Apportionment under the *Carey*<sup>1</sup> formula.

### **CONTENTIONS OF THE PARTIES**

Claimant contends that he is totally and permanently disabled pursuant to the odd-lot doctrine. While he has searched for work without success, according to his retained vocational expert, to continue searching would be futile. He had manifest pre-existing permanent impairments that combined with his last industrial accidents<sup>2</sup> to trigger ISIF liability and *Carey* apportionment.

ISIF contends that if Claimant is totally and permanently disabled, it is not due to a combination of manifest pre-existing conditions, which are serious in and of themselves, and Claimant's last accidents, but rather, it is due to the natural progression of Claimant's underlying degenerative disc disease in his spine. In other words, there was no "last accident" with which to combine Claimant's pre-existing impairments to render Claimant totally disabled and, thus, ISIF cannot be liable.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant, adduced at the hearing.
2. Claimant's Exhibits A and B, admitted at the hearing.
3. Joint Exhibits 1-18, admitted at the hearing.
4. The post-hearing deposition of Dan Brownell, C.E.A.C., taken by Claimant on

October 7, 2011.

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<sup>1</sup> See *Carey v. Clearwater County Road Department*, 107 Idaho 109, 686 P. 2d 54 (1984).

<sup>2</sup> Claimant contends that a back injury in June of 2006 and an aggravation thereof in August of 2007 constitute the last "accident."

## **FINDINGS OF FACT**

1. Claimant was 58 years of age and resided between Kamiah and Kooskia in North Central Idaho in a rented mobile home. Grangeville is 27 miles away on a “country road.” Orofino is 22 miles away. Lewiston is about two-and-one-half hours away. He is divorced with two adult children.

2. Claimant was raised in the Vermont/New Hampshire area. He is not sure if he completed the 11<sup>th</sup> grade; he does not have a GED or any vocational training. Before moving to Idaho in 1979 at 25 years of age, Claimant worked as a truck loader, furniture sander, automobile mechanic, paper mill worker, forklift driver, cabinet maker, and woolen mill worker.

3. Claimant’s first job after moving to Idaho was at Stites Shake Mill in Kooskia. He “ran the deck,” meaning he cut up logs, split them with a jackhammer, and sorted them for either the flat saw or the shake saw. He performed this work for about five years.

4. In 1984, in order to make more money, Claimant began working at Employer herein, Star Cedar in Kamiah. When Claimant started at Employer’s, there were between 50 and 60 employees. That work force had dwindled to about 10 to 12 employees by the time Claimant left in November of 2007. Claimant ran the deck for Employer for about a year-and-a-half before he transferred to making 8-10 foot rails that are inserted into fence posts. Claimant was put on the saws in 1988, but could not do that job, as the cedar dust was harming his lungs, and he had to go back to rail making after about a year.

### **Prior medical history**

5. Claimant underwent three right shoulder surgeries, one in 1987 causing Claimant to miss eight or nine months of work, and another to remove a loose screw in 1989. He missed about a month of work for the 1989 surgery, but the mill was closed for clean-up in any event.

Claimant's third right shoulder surgery occurred in 2003, and was performed to repair a torn rotator cuff.

- \* Claimant underwent bilateral carpal tunnel releases in 2000.
- \* Claimant underwent hernia surgeries in 2001.
- \* In early 2003, Claimant suffered a traumatic amputation of his right hand ring finger.
- \* In March 2004, Claimant underwent a cervical fusion at C5-C7.

6. Claimant also has a history of prior injuries to his low back. Records of the Idaho Industrial Commission reflect that on or about August 14, 1991, Claimant suffered an injury involving his lumbar spine. Industrial Commission records reflect that this was a medical only claim.

7. Industrial Commission records reflect that on or about June 19, 2000, Claimant suffered another lumbar spine injury while employed by Star Cedar Sales. Per Dr. Stevens, Claimant was treated by Nurse Practitioner Brenda McCoy, at the Kamiah Clinic following the June 19, 2000 accident. Interestingly, the Kamiah Clinic records contained at Joint Exhibit 3 do not include copies of any of Ms. McCoy's records. At any rate, Dr. Stevens evidently did have access to these records, and his report reflects that Claimant was initially seen on June 19, 2000, with complaints of low back pain radiating from the right side of the low back into the right leg. Claimant was seen in follow-up by Ms. McCoy on June 26, 2000, and was discharged with a full work release on or about July 5, 2000. Per Dr. Stevens' report, Claimant gave Dr. Stevens a history that he (Claimant) did not require any further medical treatment for care of his low back between the dates of his release by Ms. McCoy and the subject 2006 accident. (See J. Ex. 13, p. 1504). However, the record reflects that Claimant was seen on one occasion between July 2000

and the 2006 accident. On or about February 6, 2004, Claimant was seen by neurologist Donald Soloniuk, M.D., primarily for evaluation of neck, shoulder and right arm complaints. However, Dr. Soloniuk made an incidental observation that Claimant also presented with complaints of “significant pain in the low back extending down the left leg.” Dr. Soloniuk suspected that these complaints represented claudication symptoms with progressive weakness in the legs with ambulation. On exam, straight leg raising did reveal some back and hip pain on the left side. (See J. Ex. 2, p. 202). Claimant did not deny the accuracy of Dr. Soloniuk’s recitation of Claimant’s low back and left leg complaints in 2004; he merely stated he did not remember giving this history to Dr. Soloniuk. (Tr. 109/6-9). With the exception of Dr. Soloniuk’s February 2004 note, the record does not denigrate Claimant’s testimony that he had no significant low back complaints between July 2000 and the date of the 2006 accident. In this regard, it should be noted that the record also establishes that Claimant received extensive medical treatment for other conditions between July 2000 and the date of the subject 2006 accident. With the exception of Dr. Soloniuk’s February 2004 report, none of these records reflect that Claimant presented with complaints of low back pain until following the occurrence of the 2006 accident. Claimant denied having any low back or lower extremity complaints between approximately July 2000 and the date of the 2006 accident. (Tr. 78/17-79/15).

#### **Accident of June 1, 2006**

8. On June 1, 2006, Claimant injured his low back while trying to pull a stuck “cant” from the waste hog. Finally, with the assistance of a co-worker, he was able to retrieve the cant. As a result of his efforts in this regard, he experienced the immediate onset of low back pain with numbness extending all the way down the right leg into the right foot. This accident was witnessed by Claimant’s immediate supervisor, Albert Hendren. Claimant testified that he was

scheduled to work one more day before a scheduled two-week layoff. However, Mr. Hendren instructed Claimant to stay home, and not return to work until after the scheduled layoff. Claimant returned to work following the scheduled two-week layoff, and did not miss any additional time from work until the occurrence of the second accident of August 27, 2007.

Claimant did not seek medical treatment for his low back until July 6, 2006, when he evidently had a telephone conversation with a provider at the Kamiah Clinic, resulting in an order of prescription medication for care of Claimant's "back muscle pain." Claimant was not seen at the Kamiah Clinic until July 11, 2006, when he was evaluated by Dr. Sigler. In his note of that date, Dr. Sigler stated that Claimant dated his low back problem to a lifting incident of June 1, 2006. Dr. Sigler also noted Claimant's subjective complaints of low back pain with radiation down the right hip and the right leg. Dr. Sigler noted that x-rays revealed a narrowing at L4-5. He suspected that Claimant was suffering from an L4-5 radiculopathy. Additional medications were prescribed for Claimant, including Mobic and Diazepam. Claimant was also given some recommendations for stretching exercises.

9. Claimant was next seen on July 18, 2006, at which time Claimant reported that the Mobic had been helpful in controlling his discomfort. Kamiah Clinic records also reflect that Claimant refilled prescriptions for Diazepam on August 9, 2006 and August 29, 2006. He refilled prescriptions for Mobic on July 18, 2006, August 9, 2006 and August 29, 2006. Further refills for both Diazepam and Mobic were reauthorized on or about September 14, 2006.

10. Claimant was next seen at the Kamiah Clinic on November 7, 2006 reporting that he had suffered some side-effect from Mobic. Dr. Sigler replaced Mobic with another medication, Lodine.

11. As noted, Claimant testified that until the June 1, 2006 accident, he had had no low back complaints that he could remember following his recovery from the 2000 accident. However, although Claimant missed only one day from work following the June 1, 2006 accident, he testified that he had on-going low back and right lower extremity problems between June 1, 2006 and the date of the second accident of August 27, 2007.

By Mr. Caldwell

Q. Between 2006 and 2007, how was your back and leg doing during that time?

A. The leg and back were both – they hurt all the time anyway, they kept just – I think it’s getting worse if you want my opinion. Because I was having more and more trouble picking up heavy – heavy stuff, lot more trouble walking too – as a matter of fact I started to see Dr. Sigler because I was having trouble – well, for some reason, I go walk and all of a sudden the legs lock up.

...

Q. Okay. Now, in – did then in 2007 you sort of – what happens to you then, you kind of re-injury [sic] your back in 2007?

A. I don’t know. I didn’t know what happened to it. I just know it went back out again. That’s why I filed for another – you know, another claim.

Q. You have used the term –

A. It was getting worse all the time because I was telling Albert I got to stop packing those saws and stuff for him. He says nobody else do it he says.

...

Q. Ok, during 2006 you were still carrying these saws to the saw shop man?

A. I don’t recall how long I done that. I don’t recall when I even started doing that. I didn’t do it – didn’t do it for years, I know that.

Q. Do you think you were still doing it in 2006?

A. I think I started doing it somewhere around the end of 2006.

Tr. 80/9-18; 110/20 - 111/5; 111/17-25.

Claimant also testified that following the June 1, 2006 accident, his low back and right lower extremity problems, along with his other pre-existing impairments, impacted his ability to function in his time of injury job such that he suffered a reduction in his hourly wage. (Tr. 80/21-81/17).

12. On or about August 9, 2007, Dr. Sigler authored a brief report primarily focused on Claimant's cervical spine and right shoulder injuries. He noted that even after the cervical spine and right shoulder surgeries, Claimant had gone back to a job requiring him to lift up to 100 pounds on a fairly routine basis. Next, possibly intending to illustrate that Claimant should not be engaged in such physically demanding work, Dr. Sigler noted that Claimant had suffered an injury to his low back on June 1, 2006. He noted that since the low back injury, Claimant required three Hydrocodone tablets to control his pain on a daily basis. Dr. Sigler suggested that Claimant should not take these medications while working around hazardous equipment. He also suggested that if Claimant continued in his heavy work, he would likely suffer additional injuries to his neck, shoulders and low back. He concluded his brief report by emphasizing that as Claimant compensated for previous surgeries to his neck and shoulder, his low back would begin to give him more problems than it already does. (See J. Ex. 3, p. 328).

13. Robert Colburn, M.D. saw Claimant on August 23, 2007 for the purposes of an independent medical evaluation, the principal focus of which appear, again, to have been evaluation of Claimant's shoulder and neck injuries. However, like Dr. Sigler, Dr. Colburn noted the accident of June 1, 2006. On August 23, 2007, Dr. Colburn took a history from Claimant that he (Claimant) was still experiencing low back and right lower extremity symptomatology as of August 23, 2007. (J. Ex. 12, p. 1403). Consistent with Claimant's



hearing testimony, Dr. Colburn recorded the following concerning Claimant's subjective complaints on August 23, 2007, mere days before the August 27, 2007 accident:

He continues to have symptoms of lower back pain radiating to both sides and into his hips and buttocks, and also radiating into the right thigh. These symptoms are aggravated by heavy lifting. He does notice some ache when he is not working and also notes increased symptoms on stooping. He does have some concerns about the leg swelling . . . aching is noted in the right thoracal lumbar area and the left lumbar area with stabbing pains in the lumbosacral level midline with aching and stabbing radiating toward both hips and some stabbing in both buttocks with aching in the right anthrolateral proximal thigh. Also noted are indications of numbness in the right lateral toes and heal area.

Dr. Colburn performed a physical exam of Claimant on August 23, 2007. His findings relevant to the Claimant's lumbar spine are as follows:

He stands with a mild thoracal lumbar scoliosis. He is able to flex forward with finger tips reaching his toes. Extension movement is 20 degrees, tilting is 30 degrees in either direction associated with some pulling sensation on the left tilt. Twisting is 30 degrees in either direction. There is some tenderness to palpation in the midline at the L4 to S1 level and over the left SI joint area. There is no tenderness on palpation in the sciatic notch area, although this is where he locates his painful complaints.

He is able to stand on his heels and toes easily. Hip motion was within normal limits without discomfort. The knees presented with no fixed deformities or limited motion. There was no effusion present. Both knees were stable to examination. Straight leg raise was accomplished to 70 degrees on either side limited by back pain without radiation. Legs are of equal length. The right thigh measures 49 cm in circumference and the left 47. The right calf measures 39 cm in circumference and the left 38. The deep tendon reflexes are equal and active at the knee and ankle. Superficial sensation was intact in the lower extremities. Pulses were full in both ankles. No edema was noted. There were prominent varicosities in the left calf and a mild cavus deformity of both feet.

J Ex. 12, p. 1045.

14. Dr. Colburn diagnosed Claimant as having suffered a sprain injury to the lumbar spine with low back and right radicular pain. He did not believe that Claimant had reached a point of medical stability, vis-à-vis his lumbar spine as of August 23, 2007.

15. Based on his manifold physical injuries, including the low back, Dr. Colburn concluded that it was unlikely that Claimant would be able to continue in his customary work.

**Accident of August 27, 2007**

16. On or about August 27, 2007, Claimant suffered the second of the subject accidents. He described the accident, and its immediate aftermath, as follows:

By Mr. Caldwell

Q. So we started talking about this '07, August 27 of '07 injury, what happened then?

A. I was – that was on the head splitter. I ran a knife down through the – down through the log, it's about a four foot knife went down through the log, and it got stuck in there. And so I just grabbed the log to help pull it apart to get it apart when it gave – something in my back gave. I think it was probably the same thing as 2006. Whole leg went numb and it just lit me up. But the only difference between that one and the other one is I have never been able to keep it in since. Since it went out that time, it just won't stay in.

Tr. 86/5-17.

17. Following the accident of August 27, 2007, Claimant returned to Dr. Sigler for care, who eventually referred him to a Lewiston neurologist, T. William Hill, M.D. In his report of December 10, 2007, Dr. Hill noted the results of Claimant's MRI scan demonstrating multilevel degenerative changes throughout the lumbar spine, most prominent at L3-4 and L4-5. Also, Claimant was noted to have a narrowing of the neuroforamina bilaterally at L3-4 and L5-S1, and more prominently on the left at L4-5. A disk bulge was noted at the L4-5 level.

18. Although Dr. Hill considered surgical treatment of Claimant's low back condition, he was skeptical that surgical treatment would resolve Claimant's complaints such that he could return to his customary profession. Dr. Hill evidently felt that a better choice for Claimant, in view of his low back condition and other medical issues, would be to return to a much lighter duty job. (See J. Ex. 2, p. 219).

19. Following the accident of August 27, 2007, Claimant testified that he never returned to work for Employer in his time of injury position. He did attempt to return to forklift driving for Employer, but his low back and right lower extremity complaints made it impossible for him to perform this work. (Tr. 87/24-88/20).

20. Claimant was seen by J. Craig Stevens, M.D., for the purposes of an independent medical evaluation on or about September 9, 2008. Dr. Stevens was aware that Claimant treated with Dr. Sigler following the June 1, 2006 accident, but does not appear to have been aware of the history of Claimant's prescription medication usage through the summer and fall of 2006, as demonstrated by Dr. Sigler's records. (See J. Ex. 13, p. 1502). As noted above, Dr. Stevens was also aware that Claimant had suffered a low back injury in 2000, for which he had received treatment by Ms. McCoy, for low back and right lower extremity pain. Dr. Stevens does not appear to have been aware of the February 2004 report prepared by Dr. Soloniuk referencing Claimant's low back and left-sided lower extremity discomfort. Concerning the accidents of June 1, 2006 and August 27, 2007, Dr. Stevens offered the following comments on the nature of the injuries caused by those events:

On his date of injury of June 1, 2006, Mr. Morrill sustained an exacerbation of his condition of lumbar degenerative disk disease, specifically a lumbar strain with preexisting and coexisting lumbar degenerative disk disease. While he describes radiating pain into the right leg has [sic] having occurred at that time, there is not much objective correlate for that, in particular he exhibits no specific neurologic deficits within the right leg. Furthermore his MRI revealed features of lumbar degenerative disk disease with moderate disk protrusion to the right; however he also exhibited somewhat similar features previously. Indeed we have a previous injury in 2000 where he was describing a similar symptom pattern. While he describes a further worsening as having occurred on August 27, 2007, I strongly suspect that a portion of this progression represents a continuation of the same degenerative process that was already in place.

J. Ex. 13, p. 1505.

21. Dr. Stevens felt that Claimant was entitled to a 1% PPI rating for the effects of the June 1, 2006 accident. He felt that although Claimant had no specific objective findings on exam, this rating was nevertheless appropriate based on Claimant's MRI findings. While he felt that some portion of Claimant's multilevel lumbar spine findings related to pre-existing disease, it was nevertheless appropriate to ascribe the whole of 1% impairment rating to the accident of June 1, 2006.

22. Dr. Stevens did not feel it appropriate to award Claimant an impairment rating for the effects of the August 27, 2007 accident, reasoning as follows:

While he describes a further worsening has [sic] having occurred on August 27, 2007, I strongly suspect that a portion of this progression represents a continuation of the same degenerative process that was already in place.

J. Ex. 13, p. 1505.

...

ADDITIONAL IMPAIRMENT AS A RESULT OF EVENT OF AUGUST 27, 2007: In regard to the injury of August 27, 2007, I would state that any worsening of his condition in that time frame would represent a continuation of the previous condition of June 1, 2006; and in any case no further upward increment in his impairment occurred as a result of the 2<sup>nd</sup> described event of August 27, 2007. Mr. Morrill has no additional PPI that arose from his August 27, 2007, injury.

J. Ex. 13, p. 1506. Therefore, even though Dr. Stevens did not denigrate Claimant's history of the occurrence of a specific event of August 27, 2007, he nevertheless felt that any worsening of Claimant's condition caused by that event should be treated a part of the chain of events initiated by the accident of June 1, 2006. In other words, he appears to have concluded that the accident of August 27, 2007 was simply a natural and probable consequence of the accident of June 1, 2006. Further, Dr. Stevens seems to have concluded that there was no evidence that Claimant suffered additional injury as a consequence of the August 27, 2007 accident.

23. Drs. Sigler, Hill and Colburn all reached independent conclusions that Claimant should restrict his activities in order to protect his back from further injury. None of these physicians, however, appear to have offered an opinion on the extent to which Claimant's limitations/restrictions were referable to one or both of the subject accidents versus his well documented pre-existing condition. Dr. Stevens, however, did offer an opinion on this issue, and because of the relevance of accident caused limitations/restrictions to the determination of the "combining with" component to ISIF liability, it is worth quoting Dr. Stevens' views on the genesis of Claimant's low back limitations/restrictions:

PHYSICAL RESTRICTIONS: I disagree with the necessity for permanent restrictions as outlined in Dr. Hill's May 19, 2008, note. At the least I would state that no restrictions are indicated pertinent to the specific event of June 1, 2006, or the specific event of August 27, 2007. As to whether this gentleman should be on restrictions pertinent to his condition of lumbar degenerative disk disease, it is not appropriate for me to comment as I am asked only to address injury-caused factors. Again I would state that while restrictions may be indicated pertinent to lumbar degenerative disk disease, I mention again that there are significant inconsistencies in his current physical examination causing me some concern as to what his true-pain level and functional level actually is.

J. Ex. 13, p. 1506. Therefore, Dr. Stevens' starting point is that he does not even believe that Claimant requires limitations/restrictions for his low back condition. He specifically disagrees with Dr. Hill's recommendations in this regard, and must, as well, be presumed to disagree with the recommendations of Drs. Sigler and Colburn. Next, Dr. Stevens posits that if it be assumed that Claimant requires limitations/restrictions for his low back condition, the need for such limitations/restrictions cannot fairly be referred to either the accident to of June 1, 2006 or August 27, 2007. Ultimately, his conclusions that none of the Claimant's limitations/restrictions should be assigned to the subject accidents, or either of them, rests upon his conclusion that there were significant inconsistencies on Claimant's exam which caused him to be doubtful as to the real nature of Claimant's pain and functional ability.

## **DISCUSSION AND FURTHER FINDINGS**

### **PPI**

24. The only evidence of record concerning whether Claimant is entitled to PPI ratings for the accidents of June 1, 2006 and August 27, 2007 is found in the report of Dr. Stevens. As developed above, he proposed that Claimant is entitled to a 1% PPI rating for the accident of June 1, 2006. However, because he concluded that any worsening Claimant suffered following the accident of August 27, 2007 must be assigned to the June 1, 2006 accident as a “continuation” of the effects of that accident, no impairment rating is assignable to the accident of August 27, 2007. He also evidently felt that there was no objective basis upon which to award additional impairment for the second accident. The record before the Commission is altogether uncontaminated by other medical evidence addressing the extent and degree of Claimant’s physical impairment referable to the subject accidents, and each of them. Dr. Stevens clearly felt that Claimant was entitled to a 1% PPI rating for the June 1, 2006 accident. His reason for declining to assign an impairment rating to the August 27, 2007 accident is less clear. He seems to have offered two explanations: (1) there is no objective evidence of additional injury related to that accident, and (2) even if there were some additional injury, it is simply the natural and expected consequence of the June 1, 2006 accident. In the absence of medical evidence to the contrary, Dr. Steven’s opinion on impairment is adopted.

### **Permanent and Total Disability**

There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment together with the relevant nonmedical factors total 100%. If a claimant has met this burden, then total and permanent disability has been established.

## **100% Disability**

25. Claimant does not contend that his medical impairments together with relevant non-medical factors total 100%, and the Commission agrees.

## **Odd-Lot**

The second method is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997). An odd-lot worker is one “so injured the 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 of Idaho, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), citing *Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). 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), citing *Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

An injured worker may prove that he or she is an odd-lot worker in one of three ways: (1) by showing he or she has attempted other types of employment without success; (2) by showing that he or she or vocational counselors or employment agencies on his or her behalf have searched for other suitable work and such work is not available; or, (3) by showing that any effort to find suitable employment would be futile. *Hamilton v. Ted Beamis Logging and Construction*, 127 Idaho 221, 224, 899 P.2d 434, 437 (1995).

26. Claimant retained Dan Brownell to assist with vocational matters. Mr. Brownell's credentials are well known to the Commission and will not be repeated here. His curriculum vitae may be found at Exhibit B to his deposition. Mr. Brownell met with Claimant, reviewed vocationally-relevant vocational resources and medical records, prepared a Summary Report of Employability dated August 25, 2011, and was deposed.

27. Based on Claimant's prior work history as well as the cedar mill jobs he had performed, Mr. Brownell classified Claimant as a general laborer with transferrable skills consistent with ". . . just pure physical labor." Brownell Deposition, p. 12. Mr. Brownell considers Claimant's labor market to be within 45 miles of the Kamiah/Kooskia area. The unemployment rate there was 13.6% as of October 6, 2011. Mr. Brownell testified that he is not as familiar with Claimant's labor market as he is with the Coeur d'Alene/Post Falls area, but relies on information from a labor analyst with whom he staffs. Because the population for that labor market is only 1,500 people<sup>3</sup> and it is estimated that the labor force is about half that number, ". . . the labor force down there is really, really limited, meaning the jobs are limited." *Id.*, p. 15. Mr. Brownell believes Claimant to be totally and permanently disabled.

28. Claimant has not worked since November 29, 2007. He attempted to return to work after his August 2007 accident driving a forklift. Claimant had difficulty climbing up and down and was uncomfortable standing on the forks, fearing his right leg would give out. After his back "went out" at home, Claimant was not called back to work. He testified that he has not looked for work because he does not feel physically capable of working. The Commission finds that Claimant has failed to prove odd-lot status by the first two methods.

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<sup>3</sup> Mr. Brownell conceded on cross-examination that Orofino and Grangeville are within 45 miles of Kooskia/Kamiah, but apparently did not consider them in his labor market analysis. However, he testified that even if Orofino and Grangeville were considered, Claimant would still be totally and permanently disabled.



29. Mr. Brownell testified that it would be futile for Claimant to look for work in his labor market. Based on the totality of Claimant's medical condition and Mr. Brownell's report and testimony, the Commission agrees. The Commission finds that Claimant has met his burden of proving Claimant's odd-lot status by the third method, futility of a work search.

## ISIF

Idaho Code § 72-332 provides:

**Payment for second injuries from industrial special indemnity account, --** (1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of his [or her] employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account.

(2) "Permanent physical impairment" is as defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or occupational 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 permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

There are four elements that must be proven in order to establish liability of ISIF:

1. A pre-existing impairment;
2. The impairment was manifest;
3. The impairment was a subjective hindrance to employment; and,
4. The impairment combines with the industrial accident in causing total disability. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990).

## Pre-existing impairments

30. Claimant has incurred the following pre-existing impairments:
- \* 10% UE or 6% WP (See Table 16-3, *AMA Guides*, 5<sup>th</sup> Ed.) for a right shoulder injury.
  - \* Neck and right shoulder (after third right shoulder surgery):
  - \* IME physicians Drs. Phillips and Colburn;  
Dr. Phillips: 10% UE or 6% WP for right shoulder.  
16% WP for neck.  
Dr. Colburn: 4% WP for right shoulder.  
19% WP for neck.

The Commission deems it appropriate to average the ratings of Drs. Phillips and Colburn for the neck and right shoulder injuries. Accordingly, the Commission concludes that Claimant's pre-existing impairment for his right shoulder following the third right shoulder surgery is 5% of the whole person, while his impairment rating for this cervical spine, following surgery is 17.5% of the whole person.

- \* 8% WP for amputated ring finger.

### **Manifest**

31. All of Claimant's pre-existing impairments were manifest. "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. See *Royce v. Southwest Pipe of Idaho*, 103 Idaho 290, 294, 647 P.2d 746, 750 (1982). Here, all impairments originated from injuries received while Claimant was employed by Employer, resulted in surgeries, and, in some cases, restrictions. Both Employer and Claimant knew of the injuries resulting in impairments.

### **Hindrances**

32. Pre-existing conditions can satisfy this statutory requirement depending upon whether the impairments were subjective hindrances or obstacles to employment for the particular claimant. See *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990). The Commission finds that, based upon the testimony of Claimant and Mr. Brownell, that each of Claimant's rated impairments was serious enough to constitute subjective hindrances to retaining or obtaining employment.

### **Combines with**

33. In *Garcia v. J.R. Simplot Co.*, 115 Idaho 966, 970, 722 P.2d 173, 177 (1989), the Court stated, "We acknowledge the "but for" standard is the appropriate test to determine whether the total permanent disability is the result of the combined effects of the pre-existing condition and the work related injury.

34. There remains for consideration the question of whether or not the 1% impairment rating assigned to the accident of June 1, 2006, has combined with Claimant's pre-existing impairments to cause total and permanent disability. For the reasons set forth below, we conclude that Claimant has met his burden of demonstrating the "combining with" component of the prima facie case against the ISIF.

35. As a result of his previous cervical spine, bilateral shoulder, bilateral wrist, and finger amputation injuries, Claimant suffered significant limitations on his ability to perform physical activities with his upper extremities. Claimant's testimony, and the records of his physicians, establishes that the pre-existing impairments all impacted his ability to work.<sup>4</sup>

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<sup>4</sup> The testimony establishes that as Claimant's physical abilities diminished, his Employer found it necessary to reduce Claimant's hourly wage as the result of his diminishing output. The testimony is in conflict, however, as to when this wage reduction took place. Claimant appears to have testified in his deposition that the wage reduction took place prior to the June 1, 2006 accident. However, as developed above, Claimant's hearing testimony was to the effect that the

36. Just as with his testimony concerning whether Claimant is entitled to impairment ratings for the accidents of June 1, 2006 and August 27, 2007, Dr. Stevens is the only physician who has spoken to the question of whether the limitation/restrictions assignable to Claimant's low back condition are, in fact, referable to the subject accidents. Although Dr. Stevens found it appropriate to assign an impairment rating to the June 1, 2006 accident, he declined to assign any limitations/restrictions to that accident because Claimant's subjective complaints evidently failed to correlate well with findings on exam. In this regard, it is notable that only Dr. Stevens appears to have entertained these doubts about Claimant. All of the other physicians who have treated/evaluated Claimant appear to have found him to be a credible historian, one who has not been noted to maximize his subjective complaints. It is also worth noting that Dr. Stevens only challenged the conclusions of Dr. Hill, apparently unaware that both Dr. Sigler and Dr. Colburn had joined Dr. Hill in giving Claimant limitations/restrictions for his low back condition.

37. The evidence establishes that Claimant does have a history of low back injury which predates June 1, 2006. Records of the Industrial Commission establish that Claimant suffered a medical only claim for a lumbar spine injury in 1991, as well as a medical only claim for a lumbar spine injury in 2000. Although it is true that his 2000 complaints bear some similarity to the complaints with which he first presented following the June 1, 2006 accident, what is important to note that between July 2000 and June 1, 2006, Claimant does not appear to have been significantly troubled by complaints of low back pain/discomfort. While it must be

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wage reduction took place subsequent to the June 1, 2006 accident. If the wage reduction took place prior to the June 1, 2006 accident, this would substantiate the Commission's finding that Claimant's pre-existing impairments were a subjective hindrance to Claimant in his employment. If the wage reduction took place subsequent to the June 1, 2006 accident, this fact would arguably support a conclusion that Claimant's low back condition contributed to his decreased production. Because the Commission is unable to ascertain when the wage reduction took place, the Commission is unable to attach much, if any, significance to the fact that a wage reduction occurred.

conceded that Claimant was seen in 2004 for complaints of low back and left lower extremity pain, this singular record, in the midst of many, many medical records generated during the 2000-2006 time frame, does not persuade the Commission that Claimant suffered from significant and progressive complaints between 2000 and 2006. Rather, the Commission is persuaded that in the years immediately preceding the accident of June 1, 2006, Claimant had minimal low back symptoms.

38. Following his June 1, 2006 accident, Claimant's low back complaints were more significant, although he continued to work, and missed no time from work referable to his low back after returning from his two-week layoff in mid-June of 2006. As noted, however, Claimant did require medication during the summer and fall of 2006, and did have trouble lifting heavy objects associated with his work. Claimant testified that his back got worse and worse between the time of the June 1, 2006 accident, and the accident of August 27, 2007. The record makes it clear that following the June 1, 2006 accident, Claimant's low back condition, which had been quiescent for a number of years, again became symptomatic, and never really calmed down. Defendants argue that the absence of medical visits subsequent to the June 1, 2006 accident suggest that it was minor, and did not significantly contribute to Claimant's underlying pre-existing condition. However, the medical and prescription records of Dr. Sigler, the August 2007 report of Dr. Colburn, along with Claimant's corroborating testimony, establish that the June 1, 2006 accident was a significant event which permanently aggravated Claimant's underlying low back condition and increased his physical limitations/restrictions.

39. In all, the Commission concludes that the accident/injury of June 1, 2006 did result in additional limitations/restrictions that are sufficient to invite examination of the question

of whether the June 1, 2006 accident combined with the Claimant's documented pre-existing condition to cause total and permanent disability.

40. In addressing this question, we are guided by the report of the only vocational expert who was called to testify in this matter. After concluding that Claimant is, indeed, totally and permanently disabled by reason of the futility of any attempt by Claimant to look for work, Mr. Brownell concluded that Claimant's total and permanent disability is the result of his cervical spine and upper extremity impairments in combination with the effects of the low back injury. Although Mr. Brownell concluded that the upper extremity/cervical spine limitation/restrictions are potentially more vocationally significant since they would interfere with Claimant's ability to perform sedentary work, it is also clear that the added limitations/restrictions stemming from the accident of June 1, 2006, make it even more unlikely that a sedentary job could be identified for him. Relevant to this determination, as well, is Claimant's subjective sense of how the low back injury interferes with his ability to engage in physical activity. Claimant cannot operate a motor vehicle for long distances without having difficulty controlling the foot controls, and also because of low back pain/discomfort. He cannot sit for very long and has been advised by his treating physician to always try and keep moving. His low back pain and lower extremity discomfort has significantly reduced his stamina; things that he used to be able to do, such as cutting firewood, filling his wood box, changing his oil, now take much longer, if they can be performed at all. We find Mr. Brownell's testimony to be credible, and his conclusions concerning the cause of Claimant's total and permanent disability is well corroborated by Claimant's testimony, as well as the medical records of Drs. Sigler and Hill. In summary, we find that the accident of June 1, 2006 did combine with the Claimant's pre-existing impairments to cause total and permanent disability.

### **Carey Apportionment**

41. Claimant's pre-existing impairments total 36.5% (6% + 5% + 17.5% + 8%). Claimant's impairment from the last industrial accident equals 1%. Claimant's total impairments equal 37.5% (36.5% + 1%). The remaining disability to apportion between the Employer and the ISIF equals 62.5% (100% - 37.5%). Employer's liability for Claimant's total and permanent disability is calculated as follows per *Carey v. Clearwater County Road Department*, 107 Idaho 109, 686 P.2d 54 (1984):  $1\% \div 37.5\% \times 62.5\% = 1.688\% + 1\% = 2.7\%$ . The ISIF's responsibility for Claimant's total and permanent disability is calculated as follows:  $36.5\% \div 37.5\% \times 62.5\% = 60.813\% + 36.5\% = 97.3\%$ .

42. The Commission concludes that Claimant's date of medical stability following the accident of June 1, 2006 is May 14, 2008, per the August 4, 2008 report of Dr. Hill. A 2.7% disability equals 13.5 weeks. The ISIF is responsible for the payment total and permanent disability benefits starting 13.5 weeks subsequent to May 14, 2008.

### **CONCLUSIONS OF LAW**

1. Claimant has a 1% impairment referable to the subject accident of June 1, 2006;
2. Claimant has suffered no impairment referable to the subject accident of August 27, 2007;
3. Claimant was not medically stable from the effects of the accident of June 1, 2006 until May 14, 2008;
4. Claimant is totally and permanently disabled under the odd-lot doctrine;
5. Claimant has pre-existing physical impairments totaling 36.5% of the whole person;

6. Claimant's pre-existing physical impairments are manifest, constitute a subject hindrance and combine with the effects of the accident of June 1, 2006 to cause total and permanent disability;

7. Under *Carey v. Clearwater County Road Department, supra*, the ISIF is responsible for the payment of total and permanent disability benefits commencing 13.5 weeks subsequent to May 14, 2008.

### **ORDER**

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

1. Claimant has a 1% impairment referable to the subject accident of June 1, 2006;
2. Claimant has suffered no impairment referable to the subject accident of August 27, 2007;
3. Claimant was not medically stable from the effects of the accident of June 1, 2006 until May 14, 2008;
4. Claimant is totally and permanently disabled under the odd-lot doctrine;
5. Claimant has pre-existing physical impairments totaling 36.5% of the whole person;
6. Claimant's pre-existing physical impairments are manifest, constitute a subject hindrance and combine with the effects of the accident of June 1, 2006 to cause total and permanent disability;
7. Under *Carey v. Clearwater County Road Department, supra*, the ISIF is responsible for the payment of total and permanent disability benefits commencing 13.5 weeks subsequent to May 14, 2008.



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

DATED this 24th day of May, 2012.

INDUSTRIAL COMMISSION

participated but did not sign  
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 24th day of May, 2012, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

CHRISTOPHER CALDWELL  
PO BOX 607  
LEWISTON ID 83501

THOMAS W CALLERY  
PO BOX 854  
LEWISTON ID 83501

cs-m/mw

/s/