BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DARYL PATTERSON, Claimant, v. BLUE LAKES COUNTRY CLUB, INC., Employer, and STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2006-505350** **IC 2009-004209** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed November 10, 2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Twin Falls on March 18, 2011. Claimant, Daryl Patterson, was present in person and represented by L. Clyel Berry, of Twin Falls. Defendant Employer, Blue Lakes Country Club, Inc. (Blue Lakes), and Defendant Surety, Idaho State Insurance Fund, were represented by Neil D. McFeeley, of Boise. Defendant Industrial Special Indemnity Fund (ISIF) was represented by Thomas B. High, of Twin Falls. The parties presented oral and documentary evidence. One post-hearing deposition was taken and briefs were later submitted. The matter came under advisement on July 7, 2011. 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 are:

1. The extent of Claimant's permanent disability, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine;

2. Whether the Industrial Special Indemnity Fund bears any liability pursuant to Idaho Code § 72-332;

3. Apportionment under the Carey formula;

4. Apportionment pursuant to Idaho Code § 72-406;[1]

5. Claimant's entitlement to temporary disability benefits; and

6. Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant alleges that he is totally and permanently disabled pursuant to the odd-lot doctrine. Employer and Surety do not contest Claimant's assertion of total permanent disability. They argue his disability is the product of his 2008 work accident and his pre-existing lumbar, cardiac, right shoulder, and left index finger impairments, for which ISIF bears responsibility. ISIF contests Claimant's assertion of total permanent disability and further maintains that Claimant's disability is entirely due to his 2006 and 2008 industrial accidents. Claimant also alleges entitlement to temporary total disability benefits for the period of December 31, 2008, through January 13, 2009, and to attorney fees for Employer and Surety's failure to pay such benefits and delay in commencing payment of benefits following his 2008 accident.

[1] The parties have addressed apportionment pursuant to Idaho Code § 72-406(1).

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. The pre-hearing deposition of Claimant taken August 4, 2010;

3. The testimony of Claimant taken at the March 18, 2011 hearing;

4. Claimant's Exhibits 1 through 24, admitted at hearing; and

5. The post-hearing deposition of Douglas Crum, CDMS, taken April 5, 2011.

All objections posed during Douglas Crum's deposition are overruled.

FINDINGS OF FACT

1. Claimant was born in 1959 and is right hand dominant. He was 51 years old at the time of the hearing and had resided in Twin Falls at all relevant times. As a youth he struggled academically in public school, particularly with reading and mathematics. He was placed in special education classes from the fourth grade onward and received occasional C grades, but mostly Ds and Fs. He attended Twin Falls High School, but dropped out after the tenth grade to work and help his grandmother support the family. He never obtained a GED and has no other formal educational training.

2. Claimant is largely illiterate. He does not read the newspaper or any magazines. He has adequate command of addition and subtraction, but otherwise is not proficient in math. His wife handles all aspects of the family finances. He does not own or use a computer.

3. Claimant began working while attending the ninth grade. He worked part-time after school at Colonial Concrete, where he set and removed concrete forms. Claimant's grandfather and uncle taught him about lawnmower and automotive mechanics. He also

worked with his cousin building fences and assisting with automotive repair projects. Claimant worked at Colonial Concrete for approximately seven years.

4. In approximately 1978, Claimant began working part-time as a cashier at Buy Rite, a gas station and convenience store. He was eventually given the title of assistant manager, but had no authority to hire, fire, or handle banking transactions. He used an old-style cash register. Buy Rite was a neighborhood store and he knew the customers. They alerted him when he made the wrong change. He left Buy Rite after approximately two years because of his concern about management's honesty.

5. Commencing in approximately 1980, Claimant began living with and caring for his grandmother, who had raised him, while she battled cancer.

6. In approximately 1984 and 1985, Claimant worked for D Bus Company. He drove a standard transmission school bus for approximately three hours each school day. He performed no bus maintenance.

7. From approximately 1985 through 1989, Claimant did not work outside of his home. He lived with and cared for his grandmother until she succumbed to cancer in 1989.

8. Prior to 1990, Claimant accidentally struck his left index finger while working on a transmission and tore a tendon. He sought no medical attention. Thereafter, he did not have full flexion of the distal interphalangeal (DIP) joint of his left index finger.

9. On March 4, 1990, Claimant began working at Blue Lakes Country Club. He applied fertilizers, raked fairways and sand traps, mowed lawns and greens, and maintained lawnmowers, trucks, backhoes, scooters, and other equipment. He asked others to read fertilizer bags and other written instructions to him because he could not read. Claimant took pamphlets home from work for his wife to read to him.

10. On November 16, 1994, Claimant was at work helping his supervisor dig out a large rock on a hillside, when the rock came loose and rolled over Claimant's back. He was treated by orthopedic surgeon Fred Surbaugh, M.D., who diagnosed an L4-5 disc herniation and eventually performed an L4-5 laminectomy. Dr. Surbaugh rated the permanent impairment of Claimant's low back at 10% of the whole person. Claimant accepted the permanent impairment benefits and declined to seek any additional compensation for permanent disability. Dr. Surbaugh imposed a 50-pound lifting restriction and directed Claimant to limit twisting and avoid raking sand traps. Blue Lakes accommodated Claimant's restrictions and he was able to return to work.

11. Following Claimant's back injury and surgery, he experienced ongoing back pain while performing some of his work duties at Blue Lakes. He required assistance to lift heavier items and had to stop periodically while riding lawn mowers to walk and rest his back.

12. In February 2004, Claimant suffered a heart attack. He was at work at Blue Lakes shoveling ice off the greens when he noted acute chest pain. He drove himself home, collapsing in his driveway. His wife took him immediately to the hospital where he underwent angioplasty and stent placement. He returned to work within a few days and filed no workers' compensation claim. Thereafter, Claimant's medical providers advised him to avoid exertion. His supervisor at Blue Lakes agreed that he would work at his own pace. This slowed him down somewhat, but did not prevent him from performing his duties.

13. Following his heart attack, Claimant was diagnosed with Type II diabetes mellitus and hypertension and began taking oral medication. He occasionally got the shakes due to fluctuations in his blood sugar level; however, he was able to complete his work.

14. On February 22, 2006, Claimant injured his right shoulder while helping his supervisor at Blue Lakes. He was riding in a cart, steadying metal shelves with his right arm, when the shelves caught on a tree and both Claimant and the shelves were abruptly yanked from the cart. From this accident arose claim number IC 2006-505350. At the time of the injury, Claimant was earning $12.38 per hour. He was diagnosed with a large right rotator cuff tear with retraction, minor labral lesion, and partial biceps tendon rupture. He received medical treatment from Dr. Surbaugh, who ultimately performed three right shoulder surgeries. Surety then recommended treatment by Roman Schwartzman, M.D., who subsequently performed a complex revision rotator cuff repair of Claimant's right shoulder.

15. On August 5, 2008, Dr. Schwartzman found Claimant medically stable from his 2006 industrial injury and released him to work with restrictions of no lifting more than 30 pounds with his right arm, and no lifting more than five pounds above shoulder height with his right arm. Dr. Schwartzman rated Claimant's right shoulder permanent impairment at 8% of the whole person due to his 2006 accident. Blue Lakes again accommodated Claimant's restrictions and he returned to work.

16. On December 30, 2008, Claimant was at Blue Lakes performing routine maintenance on a lawnmower. He raised his right arm to steady a drain pan and felt a pop and immediate pain in his right shoulder. He notified his supervisor of the accident that same day. From this accident arose claim number IC 2009-004209. Subsequent testing revealed an extensive re-tear of the right rotator cuff with retraction.

17. On or about February 17, 2009, Surety accepted the 2008 claim.

18. Claimant received medical treatment from various physicians, including Scott Humphrey, M.D. On September 21, 2009, Dr. Humphrey performed a right reverse total shoulder arthroplasty. Dr. Humphrey noted this was a salvage procedure.

19. On July 6, 2010, Dr. Humphrey found Claimant's right shoulder had reached maximum medical improvement. He indicated that Claimant should seek a desk job and refrain from frequent lifting. Dr. Humphrey noted that although Claimant had a 25-pound lifting restriction, he really should not frequently lift items no matter what the weight.

20. On August 12, 2010, Stanley Waters, M.D., rated Claimant's right shoulder impairment at 17% of the whole person, attributing 9% impairment to his 2008 accident and 8% impairment to his 2006 accident.

21. On September 10, 2010, Claimant's math and reading abilities were formally evaluated by Community Partnerships of Idaho. The evaluator reported that the instructions had to be read slowly in order for Claimant to understand them. Testing revealed that Claimant had only fifth grade reading and math skills, third grade spelling skills, and, at best, eighth grade comprehension skills.

22. On September 22 and 23, 2010, Claimant underwent a functional capacity evaluation by Leslie Ruby, P.T. Patterns of movement and physiologic responses indicated that Claimant put forth maximum effort. Ruby concluded that Claimant functioned at the sedentary physical level. She determined that Claimant could tolerate 30 minutes of sitting with positional changes. She opined that due to his left index finger condition, he should not participate in repetitive fine motor activities without frequent breaks. She also concluded that given his low back pain, he would be a poor candidate for exposure to low frequency vibration.

23. Claimant worked with Industrial Commission rehabilitation consultant Pamela

Burkett in searching for employment. Burkett concluded that Claimant was not employable in the local labor market.

24. On December 12, 2010, Douglas Crum, C.D.M.S., interviewed Claimant and subsequently opined that he was totally and permanently disabled.

25. At hearing, Claimant noticeably guarded his right arm. He gestured exclusively with his left arm, even when describing activities he formerly accomplished with his right arm.

26. Having observed Claimant at hearing, and compared his testimony to the other evidence in the record, the Referee found Claimant to be a credible witness. The Commission finds no reason to disturb the Referee's finding on credibility.

DISCUSSION AND FURTHER FINDINGS

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

28. The first issue is the extent of Claimant's permanent disability, including whether he is totally and permanently disabled pursuant to the odd-lot doctrine. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent

impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. The focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

29. Inasmuch as the instant proceeding is a consolidation of two open claims against the same employer, the decision of Quincy v. Quincy, 136 Idaho 1, 27 P.3d 410 (2001), is highly instructive. In Quincy, the claimant suffered a non-industrial right lower extremity injury in 1976 which was ultimately rated at 25.5% permanent impairment. He suffered an industrial accident in 1991 causing a 2% permanent impairment to his right ankle. This injury became medically stable and was rated later in 1991. While working for the same employer in 1992, he suffered an industrial accident causing a 2% permanent impairment to his back. The parties stipulated that Quincy was totally and permanently disabled after the 1992 injury. The Commission consolidated Quincy's claims for hearing. After hearing, the Commission

determined that Quincy was entitled to permanent partial disability benefits of 15% from his employer for the 1991 right ankle injury as well as to permanent total disability benefits apportioned between his employer and the ISIF for the 1992 accident. On appeal, the Idaho Supreme Court noted:

> The Commission took the approach that claims need to be resolved individually to a certain extent before liability as a whole can be apportioned. The employer's liability for the 1991 ankle injury needed to be measured based on the effect of the injury back in 1991. At that time the claimant had not reached total permanent disability. The decision of the Commission is affirmed.

Quincy v. Quincy, 136 Idaho 1, 7, 27 P.3d 410, 416 (2001).

30. Thus, Quincy directs that Claimant's permanent disability herein should be addressed in two parts: first, his disability due to his 2006 right shoulder injury, when it became medically stable in August 2008; and second, his disability in the aftermath of his December 2008 right shoulder injury, when it became medically stable in July 2010.

31. **Permanent disability due to 2006 industrial accident.** Under the circumstances of this case, a two step process is utilized to ascertain the extent and degree of Claimant's disability referable to the 2006 accident. Here, Claimant's disability as of his date of medical stability following the 2006 accident is a product not only of the limitations/restrictions referable to the 2006 accident, but also of physical injuries which predate the 2006 accident. Page v. McCain Foods, Inc., 145 Idaho 302, 179 P.3d 265 (2008), makes it clear that when considering apportionment of disability under I.C. § 72-406, a two step analysis must be employed. First, Claimant's disability must evaluated in light of all his physical impairments resulting from the industrial accident, and any preexisting conditions existing as of the date of Claimant's medical stability following the industrial accident. Thereafter, the Commission must apportion the amount of permanent disability attributable to the industrial

accident. In this case, it is clear that Claimant suffered from permanent physical impairment which predated the 2006 accident, thus meeting the threshold requirement of I.C. § 72-406(1). However, the facts of this case make it more difficult to ascertain the extent and degree of Claimant's disability from all causes as of his 2008 date of medical stability. There is a paucity of expert opinion on this question. Mr. Crum has testified that as a result of the limitations/restrictions flowing from the 1994 low back injury, Claimant had residual access to only 5.3% of the total labor market. Next, he testified that as a result of the additional limitations/restrictions imposed on Claimant following the 2006 accident, he had access to only 3.8% of the total labor market. As a result of the 1994 low back injury, Claimant went from having no restrictions (as far as the record discloses) to having restrictions against engaging in anything more onerous than medium duty work. His ability to work was further circumscribed as a consequence of the limitations flowing from the 2006 accident which left him able to perform nothing more onerous than light duty work. Although Mr. Crum's opinion does quantify the extent to which the 2006 accident decreased Claimant's access to the labor market, his testimony sheds little to no light on the size of Claimant's labor market prior to the 1994 low back injury. An understanding of the size and extent of Claimant's labor market prior to both the 1994 and 2006 injuries is necessary to understand the extent and degree of his disability from all causes. As will become apparent, it is not sufficient to simply conclude, as Claimant's counsel has suggested, that because 3.8% represents a 28% reduction from 5.3%, Claimant has suffered a 28% loss of access to the labor market as a consequence of the 2006 injury.

32. The record provides ample support for the proposition that even before the 1994 low back injury, Claimant enjoyed only limited access to his local labor market. Claimant has no significant transferable job skills. Although he was employed briefly as a cashier, it is

readily conceded that his skills were below average, and that he relied upon the honesty of customers to help him make correct change. Parenthetically, although Claimant testified that he left this job because he had doubts about the integrity of management, it seems just as likely that he was let go because of his inability to balance his till. (See C. Brf. p. 3). Claimant has poor reading, writing and math skills. Although Claimant can perform basic addition and subtraction, he is functionally illiterate. Even without any physical limitations/restrictions, it is immediately evident that Claimant is best suited to unskilled physical labor. The Industrial Commission is familiar with the Magic Valley labor market. The Commission is familiar with that portion of the labor market available to unskilled and uneducated workers. Based on this experience, the Commission concludes that even without any physical limitations/restrictions, Claimant had access to 15% of the labor market, at most, prior to the 1994 low back injury.

33. With this conclusion in place, it is clear that the impact of the 2006 accident is less than has been suggested by Claimant's counsel. If Claimant had access to 15% of his labor market prior to the 1994 low back injury, it is clear that as of the date of medical stability following the 2006 accident, Claimant suffered a significant loss of labor market access. Mr. Crum has proposed, and the Commission finds reasonable, that as of the 2008 date of medical stability, Claimant had access to only 3.8% of his labor market. This equates to a 75% loss of the labor market access, as compared to his ability to access the labor market prior to the 1994 low back injury.

34. Accordingly, the first step of the process contemplated by Page yields labor market loss from all causes of 75% as of the 2008 date of medical stability. Step two requires of the Commission that it parse this figure to extract that portion of Claimant's loss of access that is referable to the industrial injury, in this case, the accident of 2006. Again, Mr. Crum has

persuasively testified that following the 1994 low back injury, Claimant had access to 5.3% of his labor market. Assuming base line market access of 15%, this yields loss of access referable to Claimant's preexisting impairment of 65%. This calculation allows the Commission to ultimately conclude that the loss of labor market access referable to the 2006 accident is in the range of 10% (75% - 65%).

35. In addition to labor market access loss, wage loss is also frequently, but not always, considered by the Commission in connection with evaluating disability. In this case, it seems likely that Claimant has not suffered significant wage loss either as a consequence of the 1994 low back injury, or the 2006 accident. Indeed, Mr. Crum testified that as a result of the 2006 accident, Claimant had access to the same types of jobs he could have performed prior to the 2006 accident, just fewer of them. Even before Claimant injured in low back in 1994, it seems likely that based on his relevant nonmedical factors, he had access only to those jobs paying a very low wage. The wage that he might be expected to enjoy following the 2006 accident, is probably not significantly lower than the wage for which he could have competed prior to the 1994 low back injury. Accordingly, the Commission concludes that Claimant has not suffered significant wage loss as a consequence of the 2006 accident.

36. Under the peculiar facts of this case, the Commission finds Claimant's loss of access to the labor market is a more significant factor in measuring his disability than any potential wage loss he may have suffered. However, the fact that Claimant has probably not suffered significant wage loss as a consequence of the 2006 cannot be wholly disregarded. Based on these considerations, the Commission concludes that the disability referable to the subject accident is in the range of 8% of the whole person, inclusive of the 8% PPI rating awarded to Claimant for the effects of the 2006 accident.

37. **Permanent disability after 2008 industrial accident.** Claimant asserts that his December 2008 industrial accident in combination with his pre-existing conditions and non-medical factors rendered him totally and permanently disabled. Again, his permanent disability must be evaluated based upon his permanent impairments, the physical restrictions arising from his permanent impairments, and his non-medical factors, including his capacity for gainful activity and potential employment opportunities.

38. Impairments. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989). Claimant herein alleges permanent impairments to his left index finger, low back, heart, and right shoulder.

39. Claimant injured his left index finger before commencing his employment at Blue Lakes. The admitted evidence contains no permanent impairment rating for his left index finger, however, his left index finger limitations were demonstrated at hearing. The functional capacity evaluation also documents loss of effective flexion in the DIP joint of the left index finger, due to a prior flexor digitorum profundus injury. Claimant and Employer/Surety urge a finding of 7% permanent impairment for this condition. However, Idaho Code § 72-428(1) prescribes a permanent impairment equating to only 6% of the whole person for amputation of the index finger at the DIP joint. The Commission finds that Claimant suffers an impairment of 3% of the whole person due to his left index finger condition.

40. Dr. Surbaugh rated Claimant's low back impairment at 10% of the whole person. No party contests this impairment rating.

41. The record clearly documents Claimant's 2004 myocardial infarction and stent placement, but contains no impairment rating therefore. Claimant and Employer/Surety urge an impairment rating of 11% to 23% of the whole person for Claimant's cardiac condition, specifically his coronary artery disease, based upon Class 2 from Table 4-6 of the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition (Guides), and Claimant's history of documented myocardial infarction and continued medication.

42. Claimant indeed has a history of coronary artery disease and myocardial infarction. At the time of his deposition he was taking medication for his cardiac condition; however, by the time of hearing he was apparently no longer taking medication. Transcript, p. 77. Earlier medical records indicate he was placed on a beta blocker and used sublingual Nitroglycerin rarely. Claimant also has a clear history of percutaneous coronary intervention—specifically stent placement—consistent with Class 2 of Table 4-6. However, Dr. Surbaugh noted on May 3, 2006, that Claimant had undergone cardiac stent placement and was a functional cardiac Class 1, such that his rotator cuff surgery could be done as an out-patient. Exhibit 5, p. 10. Table 4-6 of the Guides indicates that New York Heart Association functional Class 1 cardiac patients are those that have no limitation of activities and suffer no symptoms from ordinary activities. They are rated in Class 1 of Table 4-6 with impairment between 2 and 10% of the whole person. Considering all of the above, the Commission finds that Claimant suffers a permanent impairment of 11% of the whole person due to his cardiac condition.

43. As previously noted, Dr. Schwartzman rated Claimant's right shoulder impairment at 8% of the whole person due to his 2006 injury. Dr. Waters later rated Claimant's

right shoulder impairment at 17% of the whole person, attributing 8% to the 2006 injury and 9% to the 2008 accident. No party contests these impairment ratings.

44. Claimant has proven that he suffers permanent physical impairments of 3% of the whole person due to his left index finger condition, 10% of the whole person due to his lumbar condition, 11% of the whole person due to his cardiac condition, 8% of the whole person due to his 2006 right shoulder injury, and 9% of the whole person due to his 2008 right shoulder injury, thus totaling 41% of the whole person.

45. Physical restrictions. Dr. Humphrey restricted Claimant to sedentary work only and to lifting 25 pounds occasionally with the right upper extremity. However, he indicated that Claimant should not lift anything frequently, no matter what the weight. Following a functional capacity evaluation, physical therapist Leslie Ruby concluded that Claimant was limited to sedentary work and to lifting no more than 15 pounds. Ruby also found that because of low back pain, Claimant was limited to sitting no more than 30 minutes and standing no more than 30 minutes. She also noted that, because of his back pain, he would be a poor candidate for exposure to low frequency vibration. She reported that Claimant lacked the shoulder strength and range of motion to pull himself into a large truck.

46. Employment opportunities. Douglas Crum, Claimant's vocational rehabilitation expert, testified that Claimant would not be able to find work in his labor market. Crum expressly considered Claimant's age, physical restrictions, near illiteracy, very limited transferable skills, very limited ability to use his dominant upper extremity, and the available labor market. Crum opined that Claimant is not employable and it would be futile for him to seek employment. Industrial Commission rehabilitation consultant Pamela Burkett worked with Claimant after his 2008 accident. She also concluded that Claimant was not employable in the

local labor market. The conclusions reached by Crum and Burkett are well explained, amply supported by the record, and persuasive. The record contains no other vocational expert evidence on this issue.

47. Based on Claimant's permanent impairments totaling 41% of the whole person, his permanent physical restrictions, and considering his non-medical factors including his age at the time of the 2008 accident, limited education, third grade spelling skills, fifth grade reading and math skills, inability to return to any of his previous positions, and lack of transferable skills, Claimant's ability to engage in regular gainful activity after his 2008 industrial accident has been greatly reduced. The Commission concludes that Claimant has established a permanent disability of 85%, inclusive of his 41% whole person impairment.

48. Odd-lot. A claimant who is not 100% permanently disabled may prove total permanent disability by establishing he is an odd-lot worker. An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market - absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status rests upon the claimant. Dumaw v. J. L. Norton Logging, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). A claimant may satisfy his burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways: (1) by showing that he has attempted other types of employment without success; (2) by showing that he or vocational counselors or employment

agencies on his behalf have searched for other work and other work is not available; or (3) by showing that any efforts to find suitable work would be futile. Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

49. In the present case, Claimant has not presented direct evidence of an unsuccessful work search or of multiple failed attempts at other types of employment. However, there is indication that Commission rehabilitation consultant Pamela Burkett unsuccessfully searched for suitable employment on his behalf. Moreover, Claimant has presented Douglas Crum's expert opinion that it would be futile for Claimant to seek employment. As noted above, Crum's opinion in this regard is persuasive. Claimant has established a prima facie case that he is an odd-lot worker, totally and permanently disabled, under the Lethrud test.

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

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

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

51. In the present case, Blue Lakes does not assert, and none of the Defendants have shown, that there is work regularly and continuously available which Claimant can perform and at which he has a reasonable opportunity to be employed. Claimant has proven that he is totally and permanently disabled pursuant to the odd-lot doctrine commencing July 6, 2010, the date Dr. Humphrey concluded Claimant reached maximum medical improvement from his 2008

shoulder injury. See Stoddard v. Hagadone Corp., 147 Idaho 186, 192, 207 P.3d 162, 168 (2009).

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

53. Idaho Code § 72-332(2) further provides that "permanent physical impairment" is as defined in Idaho Code § 72-422; provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become unemployed. This shall be interpreted subjectively as to the particular employee involved; however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

54. In Dumaw v. J. L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court identified four requirements a claimant must meet to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was indeed a pre-existing impairment; (2) whether that impairment was manifest; (3) whether the impairment was

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

55. Pre-existing, manifest impairments. The pre-existing physical impairments at issue herein are those to Claimant's left index finger, low back, heart, and right shoulder prior to his 2008 industrial accident. There is no serious dispute that his left index finger impairment existed and was manifest prior to 1990, his low back condition existed and was manifest in 1994, and his cardiac condition existed and was manifest in 2004. ISIF cites Smith v. J.B. Parson Company, 127 Idaho 937, 908 P.2d 1244 (1995), and argues that Claimant's 2006 shoulder injury should not be considered a pre-existing condition for purposes of Idaho Code § 72-332 because the claim arising therefrom was still open at the time of his 2008 accident. Blue Lakes cites Quincy v. Quincy, 136 Idaho 1, 27 P.3d 410 (2001), and asserts that Claimant's 2006 shoulder injury was a pre-existing impairment for purposes of Idaho Code § 72-332 because it was medically stable and rated prior to the 2008 accident.

56. In Smith, the worker suffered a 1988 finger injury and a 1990 back injury which, in combination with other medical and non-medical factors, rendered him totally and permanently disabled. The finger injury ultimately became medically stable in 1992. Because the finger injury was not medically stable, but was an open, unresolved, and viable claim at the time of the 1990 back injury, it did not constitute a pre-existing condition for purposes of assessing ISIF liability.

57. In Quincy, the worker suffered a 1991 ankle injury which became medically stable and was rated later in 1991, and a 1992 back injury which, in combination with other medical and non-medical factors, rendered him totally and permanently disabled. Even though the 1991 ankle injury was an open claim, the Commission found the 1991 ankle injury was

medically stable before the 1992 back injury occurred and thus it constituted a pre-existing condition for purposes of assessing ISIF liability. On appeal, the Supreme Court addressed the Commission's characterization of Quincy's 1991 ankle injury as a pre-existing condition, noting:

> [U]nlike the claimant in Smith, Claimant's injury in this case was medically stable before the subsequent injury was incurred. Therefore, in this case the Commission was able to make a determination that the injury was ultimately pre-existing where the Commission could not make that determination in Smith.
>
> Stability is a key factor to consider when determining if a pre-existing impairment exists. In considering the date of stability of Claimant's ankle condition and his disability attributable to the 1991 injury, the referee found, "Claimant became medically stable as to his first industrial injury on May 10, 1991, after his cast was removed and Dr. Pike returned him to work to see how he would do." It is important to note that this date is prior to January 2, 1992, the date Claimant suffered the next industrial accident. The date of stability distinguishes Claimant's ankle injury in this case from the finger injury suffered in Smith. Because Claimant's ankle injury became medically stable before he suffered the next injury, the Industrial Commission correctly concluded that the injury was a pre-existing impairment and the decision of the Commission is affirmed.

Quincy, 136 Idaho at 6, 27 P.3d at 416.

58. In the present case, Claimant's right shoulder condition resulting from his 2006 accident actually existed and was manifest in 2006 and became medically stable in August 2008—prior to his December 2008 accident. It constitutes a pre-existing condition for purposes of Idaho Code § 72-332. Claimant's left index finger, low back, cardiac, and 2006 right shoulder conditions each preexisted, and were manifest, prior to his December 2008 industrial accident. The first and second prongs of the Dumaw test have been met.

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

(1990). ISIF contests, and Blue Lakes and Claimant assert, that his pre-existing conditions were a hindrance to his employability.

60. Claimant testified that his left index finger condition did not prevent him from doing his work at Blue Lakes; however, because he was unable to oppose his left index finger and thumb, he had to modify the way he performed his work. He used his left middle finger and thumb for fine grasping when necessary. Douglas Crum recognized this created fine dexterity issues, but testified that he did not consider Claimant's left index finger a factor in his employability. The Commission finds that Claimant's left finger condition was not a hindrance or obstacle to his employability.

61. Claimant's pre-existing low back condition compelled him to seek help with heavy lifting and forced him to take breaks periodically from riding lawnmowers. His back condition also hindered his walking on uneven ground. Claimant was fortunate that Blue Lakes was willing to accommodate this condition. Douglas Crum did not focus particularly on Claimant's back condition, but did not consider it significant to his employability because his lifting ability was more restricted due to his shoulder condition. However, Leslie Ruby, P.T., expressly noted that Claimant's back condition limited his sitting and standing tolerances and made him a poor candidate for work requiring exposure to low frequency vibration. The Commission finds that Claimant's low back condition was a hindrance to employment.

62. Claimant's cardiac condition did not prevent him from performing his duties at Blue Lakes, but compelled him to slow his work pace and avoid exertion. Again, Claimant was fortunate that Blue Lakes accommodated this condition so he could continue his employment. Claimant used sublingual Nitroglycerin rarely for his cardiac condition. The Commission finds that Claimant's heart condition constituted a hindrance or obstacle to employment or

reemployment if Claimant had become unemployed.

63. Claimant's 2006 right shoulder injury resulted in four surgeries and significantly impacted his employability. After becoming medically stable from his 2006 right shoulder injury, he was restricted from lifting more than 30 pounds with his right arm and restricted from lifting more than five pounds above shoulder level. Douglas Crum testified that Claimant's limitations from his 2006 shoulder injury negatively impacted his employability. The Commission concludes that Claimant's right shoulder condition after recovering from his 2006 accident was a hindrance or obstacle to employment or reemployment if Claimant had become unemployed.

64. The Commission finds that Claimant's pre-existing low back, cardiac, and right shoulder impairments constituted hindrances to his employment. The third prong of the Dumaw test is met as to these impairments.

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

66. The record contains no persuasive evidence that Claimant's heart condition combined with his 2008 industrial injury to render him totally and permanently disabled. It appears the impact of the 2008 injury, which effectively limited him to sedentary work, also removed him from any significant exertional activities, thus rendering the effects of his cardiac condition immaterial. However, there is persuasive evidence that the 2008 accident combined

with Claimant's pre-existing low back and right shoulder conditions to result in total permanent disability.

67. As noted, Claimant's 2008 injury has restricted him to sedentary employment. With low back-induced sitting and standing limitations, Claimant's low back condition compromises his capacity for sedentary work which, by definition, requires sitting most of the time. These limitations render Claimant uncompetitive for a number of sedentary positions. As to his right shoulder, Dr. Humphrey persuasively opined that Claimant's 2008 accident caused significantly greater injury because of the compromised condition of his shoulder due to his 2006 injury. Claimant's pre-existing low back and right shoulder conditions combine with his 2008 right shoulder injury to produce the extensive physical limitations quantified by Dr. Humphrey, Dr. Waters, and Leslie Ruby.

68. The Commission is not persuaded that Claimant's 2008 industrial accident alone rendered him totally and permanently disabled. Rather, the weight of the evidence establishes that Claimant's 2008 industrial accident combined with his pre-existing low back and right shoulder impairments to render him totally and permanently disabled. The final prong of the Dumaw test has been satisfied as to Claimant's pre-existing low back and right shoulder impairments. Pursuant to Idaho Code § 72-332, ISIF is liable for Claimant's pre-existing low back and right shoulder impairments.

69. **Carey apportionment.** In Carey v. Clearwater County Road Department, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984), the Idaho Supreme Court adopted a formula apportioning liability between ISIF and the employer/surety at the time of the final industrial accident. The formula prorates the non-medical portion of disability between the employer/surety and the ISIF in proportion to their respective percentages of responsibility for

the physical impairment. Conditions arising after the injury, but prior to a disability determination, which are not work-related, are not the obligation of ISIF. Horton v. Garrett Freightlines, Inc., 115 Idaho 912, 915, 772 P.2d 119, 122 (1989).

70. Before applying the Carey formula, the portion of Claimant's impairment pre-existing his 2008 industrial accident, and the portion caused by his 2008 accident must be quantified. Claimant's qualifying pre-existing impairments total 18% of the whole person (10% low back plus 8% right shoulder). Claimant's right shoulder impairment due to his 2008 accident is 9% of the whole person. Thus, Claimant's impairments for Carey apportionment total 27% (9% due to his 2008 accident, plus 18% qualifying pre-existing). Claimant's 2008 impairment constitutes 33.33% (9/27), and his qualifying pre-existing impairments constitute 66.67% (18/27) of his total impairment.

71. By application of the Carey formula, Employer and Surety are responsible for the medical portion of 9% impairment caused by Claimant's 2008 accident and for 33.33% of the nonmedical portion of Claimant's permanent disability. ISIF is responsible for the pre-existing medical portion of 18% impairment and for 66.67% of the nonmedical portion of Claimant's permanent disability. Thus, Employer and Surety are collectively liable for 166.67 weeks of statutory benefits, and ISIF is responsible for payment of full statutory benefits commencing 166.67 weeks after July 6, 2010, the date Dr. Humphrey found Claimant medically stable after his final industrial accident.

72. **Idaho Code § 72-406**. The issue of apportionment for a pre-existing condition pursuant to Idaho Code § 72-406(1) is moot.

73. **Temporary disability**. The next issue is whether Claimant is entitled to additional temporary disability benefits. Idaho Code § 72-408 provides that income benefits for

total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980). Once a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to temporary disability benefits unless and until such evidence is presented that he has been released for light duty work and that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout the period of recovery, or that (2) there is employment available in the general labor market which he has a reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release. Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219 (1986).

74. In the present case, Claimant's second right shoulder injury occurred at Blue Lakes on December 30, 2008. Exhibit 11(b) shows payment of temporary disability benefits for the period of January 14 through August 17, 2009; however, there is no indication such benefits were paid for this injury prior to January 14, 2009. Claimant requests total temporary disability benefits from December 31, 2008, through January 13, 2009. Defendants assert that Dr. Surbaugh did not take Claimant off of work until after January 13, 2009, thus Claimant has not proven his entitlement to total temporary disability benefits prior to that time.

75. The record establishes that Dr. Surbaugh examined Claimant's right shoulder on Friday, January 9, 2009, and recorded that: "He re-injured it just lifting his arm over his head a week ago and felt a snap. Since then, he has had increased pain and weakness in adduction

overhead function. His employer had been allowing him modified work activity." Exhibit 5, p. 81. After examining Claimant's shoulder, Dr. Surbaugh requested a right shoulder MRI indicating: "He can continue to do restricted work activity, not utilizing the right upper extremity. I will see him back once the rotator cuff MRI has been completed." Exhibit 5, p. 81. On Monday, January 12, 2009, Dr. Surbaugh's office provided a "Return to Work Assessment Form" diagnosing right shoulder pain and indicating Claimant should limit his work to modified duty, perform no overhead lifting, and perform no strenuous lifting until his next appointment. On Tuesday, January 13, 2009, Claimant underwent a right shoulder MRI. On the following Monday, January 19, 2009, Dr. Surbaugh wrote that the MRI demonstrated an extensive re-tear of the right rotator cuff which would require surgery, effectively taking Claimant off of work.

76. In a recorded interview on March 2, 2009, and with his attorney present, Claimant told the Surety's investigator that, following his accident on December 30, 2008, he worked most of the time until he saw Dr. Surbaugh, and that he worked until January 17, 2009. Claimant specifically told the Surety's investigator that he "missed a couple of days" but "worked probably 12 days" in January 2009. Exhibit 14, p. 9. Surety paid Claimant total temporary disability benefits for the period commencing January 14, 2009.

77. Claimant has not proven his entitlement to additional temporary disability benefits.

78. **Attorney fees**. The final issue is Claimant's entitlement to an award of attorney fees. Attorneys fees are not granted as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804, which provides:

> If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by

> an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding a claimant attorney fees is a factual determination which rests with the Commission. Troutner v. Traffic Control Company, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

79. In the present case, Claimant requests attorney fees for Surety's failure to pay temporary disability benefits for the period of December 31, 2008, through January 13, 2009. As noted above, Claimant has not proven his entitlement to temporary disability benefits for this period. Claimant also requests attorney fees for Surety's delay in commencing payment of temporary disability benefits until February 17, 2009.

80. The record confirms that Claimant injured his right shoulder at work on December 30, 2008. On January 9, 2009, Claimant first incurred medical bills for his 2008 shoulder injury. On January 19, 2009, Dr. Surbaugh issued his report that Claimant had suffered a rotator cuff re-tear from his December 30, 2008 accident, and would require surgery. On January 22, 2009, Surety paid Claimant permanent partial impairment benefits of $1,350.28 for the period of January 1 through 31, 2009, for his 2006 right shoulder injury. On January 25, 2009, Surety commenced paying medical bills for Claimant's 2008 shoulder injury. On January 27, 2009, Surety requested Dr. Surbaugh's opinion of whether Claimant's December 30, 2008, right shoulder injury was a continuation of his 2006 injury or a new and distinct injury. On January 28, 2009, Dr. Surbaugh opined that Claimant had suffered both a new injury and a reinjury of his right shoulder. Dr. Surbaugh's note was faxed to the Surety on January 29, 2009.

On February 17, 2009, Surety paid Claimant total temporary disability benefits of $1,494.96 for the period of January 14 through February 17, 2009. Thus, Surety paid Claimant temporary disability benefits commencing four weeks and one day after Dr. Surbaugh's report of January 19, 2009, indicating the MRI showed a large re-tear requiring surgery and effectively taking Claimant off work.

81. Claimant cites Idaho Code § 72-402(1) which provides:

> An injured employee shall not be allowed income benefits for the first five (5) days of disability for work; provided, if the injury results in disability for work exceeding two (2) weeks, income benefits shall be allowed from the date of disability and be paid no later than four (4) weeks from date of disability. Provided, further, that the waiting period shall not apply if the injured employee is hospitalized as an in-patient.

82. The Commission takes judicial notice that four weeks after January 19, 2009, was Monday, February 16, 2009, which was Presidents' Day, a state and national holiday. Payment of temporary disability benefits the very next day does not constitute an unreasonable delay.

83. Claimant has not proven his entitlement to an award of attorney fees.

CONCLUSIONS OF LAW

1. Claimant has proven that he suffered permanent partial disability of 8%, inclusive of his 8% whole person impairment, due to his 2006 right shoulder injury at Blue Lakes. Employer and Surety are entitled to credit for amounts previously paid for permanent impairment and/or disability for the 2006 accident.

2. Claimant has not proven that he is 100% disabled, however Claimant has proven in the aftermath of his 2008 industrial accident, that he is an odd-lot worker, totally and permanently disabled under the Lethrud test.

3. ISIF is liable pursuant to Idaho Code § 72-332 for Claimant's pre-existing back and right shoulder impairments.

4. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: Employer and Surety are liable for payment of 166.67 weeks of statutory benefits to Claimant, and ISIF is responsible for payment of full statutory benefits commencing 166.67 weeks after July 6, 2010, the date Claimant became medically stable. Employer and Surety are entitled to credit for amounts previously paid for permanent impairment and/or disability from the 2008 accident.

5. Apportionment pursuant to Idaho Code § 72-406(1) is moot, except as related to the 2006 accident.

6. Claimant has not proven he is entitled to payment of total temporary disability benefits for the period of December 31, 2008, through January 13, 2009.

7. Claimant has not proven he is entitled to an award of attorney fees.

ORDER

Based upon the foregoing, IT IS ORDERED that:

1. Claimant has proven that he suffered permanent partial disability of 8%, inclusive of his 8% whole person impairment, due to his 2006 right shoulder injury at Blue Lakes. Employer and Surety are entitled to credit for amounts previously paid for permanent impairment and/or disability for the 2006 accident.

2. Claimant has not proven that he is 100% disabled, however Claimant has proven in the aftermath of his 2008 industrial accident, that he is an odd-lot worker, totally and permanently disabled under the Lethrud test.

3. ISIF is liable pursuant to Idaho Code § 72-332 for Claimant's pre-existing back and right shoulder impairments.

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5. Apportionment pursuant to Idaho Code § 72-406(1) is moot, except as related to the 2006 accident.

6. Claimant has not proven he is entitled to payment of total temporary disability benefits for the period of December 31, 2008, through January 13, 2009.

7. Claimant has not proven he is entitled to an award of attorney fees.

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

DATED this __10th____ day of November, 2011.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

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

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __10th____ day of November, 2011, 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:

L CLYEL BERRY
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NEIL D MCFEELEY
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__/s/_____