BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RICHARD PURCELL, Claimant, v. IDAHO ASPHALT SUPPLY, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	)	**IC 2005-509328** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED JAN -7 2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Idaho Falls on November 12, 2009. Dennis R. Petersen represented Claimant. E. Scott Harmon represented Employer and Surety. Anthony M. Valdez represented Industrial Special Indemnity Fund ("ISIF"). The parties presented oral and documentary evidence, took post hearing depositions, and submitted briefs. Upon motion and acquiescence of the parties, the briefing schedule was suspended for several months relating to difficulty scheduling depositions. The case came under advisement on November 15, 2010. It is now ready for decision.

ISSUES

The issues to be resolved according to the Amended Notice of Hearing and by agreement of the parties at hearing are:

1. Whether the condition for which Claimant is seeking benefits was caused by the alleged industrial accident;
2. Whether and to what extent Claimant is entitled to disability in excess of impairment (including total disability);

3. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate;

4. Whether Claimant is entitled to permanent total disability under the odd-lot doctrine;

5. Whether ISIF is liable under Idaho Code § 72-332; and

6. Apportionment under the Carey formula.

CONTENTIONS OF THE PARTIES

Claimant contends he injured his face and neck in a semi-trailer roll-over on April 23, 2005. These injuries required surgery. Combined with Claimant's preexisting low back and other impairments they render him totally and permanently disabled, or so nearly totally and permanently disabled that an odd-lot analysis would deem him so. A Carey apportionment should make Employer responsible for 62% of disability and ISIF responsible for the remainder.

Employer and Surety contend the accident did not cause the chronic dizziness and related symptoms upon which Claimant bases his claim for PPI. Dr. Brent Greenwald released Claimant upon finding him MMI with no restrictions on January 26, 2006. Claimant has accepted and quit jobs since. His separations from these jobs had nothing to do with the 2005 accident. At age 70, Claimant suffers from dementia and/or Alzheimer's disease, unrelated to the 2005 accident and arising or worsening after it. He suffered no permanent disability in excess of the PPI related to neck surgery following the 2005 accident. He is not totally and permanently disabled.

ISIF contends the components of Idaho Code § 72-332 have not been established here. Claimant is not totally and permanently disabled, nor may he be deemed so by odd-lot.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant and his wife;

2. Joint Exhibits A through X; and

3. Post hearing depositions of treating neurosurgeon Brent Greenwald, M.D., of physiatrist David Simon, M.D., and of vocational experts Kent Granat and Mary Barros-Bailey, Ph.D.

Having examined the evidence, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

FINDINGS OF FACT

1. Claimant drove truck for Employer. On April 23, 2005, he swerved his semi-tractor trailer rig to avoid a deer. The rig rolled ("accident"). Claimant injured his face and neck. He was "life flighted" and hospitalized for two days. He had broken his cheekbone and a few fractures were found in his neck vertebrae.

2. An April 23 CT scan described a fracture at C2 and one at C6, with other traumatic and degenerative changes. A CT angiogram of Claimant's neck was essentially negative. A CT angiogram of his head showed a cephalohematoma with other findings of ambiguous cause, chronic versus traumatic. Other diagnostic imaging was negative for traumatic findings except as noted above.

3. The hospital discharge summary noted his past medical history included a stroke and "increased short-term memory loss."

4. On April 27 a CT scan of Claimant's head showed a fracture of the right zygomatic arch, the right orbit, the left lateral C2, and scalp swelling and fluid in a sinus. Of apparently less significance were changes at the C3 facet joint and the C5 lamina.

5. After additional follow-up care and imaging, surgery was performed on May 10, 2005. Claimant's fractured zygomatic arch was repaired.

6. On May 24, 2005, Lynn J. Stromberg, M.D., examined Claimant at Surety's request. The examination was limited because Claimant was wearing a cervical collar. Dr. Stromberg noted the MRI scan showed a C4-5 disc protrusion "which does efface the

cord on the left side." Nevertheless, he reported Claimant had no "neurologic findings with are of concern."

7. On June 8, 2005, Brent H. Greenwald, M.D., recommended surgery, including a C4-5 fusion. This surgery was performed July 26, 2005. Claimant's C4- and C5 vertebrae were found and removed pieces of a herniated disk. He suspected that this disk may have been causing symptoms of cervical myelopathy of which Claimant had complained.

8. On September 9, 2005, Dr. Greenwald released Claimant to light duty with restrictions.

9. On October 25, 2005, Dr. Greenwald imposed a 30-pound lifting restriction as Claimant healed from surgery. In deposition, Dr. Greenwald explained that he does not impose permanent lifting restrictions unless expressly asked to do so. He was not asked in this case.

10. On January 26, 2006, Dr. Greenwald opined Claimant was medically stable. He released Claimant to return to work. No restrictions were mentioned. Dr. Greenwald declined to provide an opinion regarding PPI. In deposition, he testified he would have given a 75-pound lifting restriction and an "if-it-hurts-don't-do-it" caution if he had been asked at the time of MMI. He deferred imposing restrictions, feeling it would be more appropriately handled by a non-treating physiatrist. Dr. Greenwald's next note is dated September 3, 2009.

11. On March 8, 2006, David C. Simon, M.D., evaluated Claimant at Surety's request. He opined Claimant's neck problems were causally related to the accident; low back and dizziness problems were not. He opined Claimant's PPI at 25% of the whole person entirely attributable to the truck rollover. He advised restrictions of no repetitive overhead work and that Claimant's neck injury would not prevent him from returning to work as a driver. In deposition, he opined: a 75-pound lifting restriction was reasonable; problems unrelated to

the accident would prevent Claimant from returning to truck driving; and Claimant's dizziness was more likely related to his prior stroke, an inner ear problem, or some other factor than to the accident.

12. On March 13, 2006, William Domarad, D.O., examined Claimant relating to Claimant's memory loss. Claimant reported symptoms of memory loss of three years' duration, worsening since the first of the year. Dr. Domarad diagnosed early dementia. He noted by history the occurrence of the subject accident, but did not link the memory loss to it.

13. On September 29, 2009, Dr. Greenwald performed a lumbar laminectomy and discectomy at L2-3.

Prior Medical History

14. In February 1990 Claimant underwent a partial medial menisectomy of his left knee.

15. In April 1993 Claimant's broken right ulna was repaired.

16. A November 1998 MRI showed degenerative conditions throughout Claimant's lumbar spine with residual effects from a prior surgery. The prior surgery is referenced elsewhere as occurring in 1965.

17. In August 1999, Claimant was examined by David C. Simon, M.D., on referral from Dr. Greenwald for low back complaints. Dr. Simon opined that conservative measures were appropriate, that Claimant's symptoms were not sufficiently severe for surgery. Dr. Simon suggested a trial of epidural steroid injections.

18. In October 1999, Claimant was admitted with symptoms of chest pain. The cause was ultimately undetermined.

19. In February 2003, Claimant was admitted with symptoms of dizziness. This was ultimately determined to be a stroke.

Social Security Disability

20. Claimant receives retirement benefits from the Social Security Administration. He has not applied for disability benefits.

Non-Medical Factors

21. Claimant was terminated by Employer. Employer cited two accidents and some speeding violations as its basis for termination.

22. After the accident, Claimant worked for two other employers. In February 2006, he worked about four days for Rocky Storer driving truck. In July 2006, he worked one week for American Paving. In 2007, he worked four months for TMC Contractors. Claimant left each of these jobs for reasons unrelated to the subject accident.

23. Claimant was born November 6, 1939, and was 65 years of age at the time of the accident.

24. Claimant has driven truck professionally for essentially all of his adult life. He has also worked briefly as a gas station attendant and farm hand.

25. Claimant graduated from high school and attended one semester of college.

Vocational Experts

26. Vocational consultant Kent Granat evaluated Claimant's potential disability. His report is dated March 12, 2009. He opined Claimant is 100% totally and permanently disabled. He opined that Claimant would qualify as totally and permanently disabled as an odd-lot worker under the "futility" test. He opined that if Claimant were not totally and permanently disabled, he was 71% disabled. In deposition, he opined that Claimant, based upon his physical condition, should not have been driving truck before the subject accident.

27. Vocational consultant Mary Barros-Bailey, Ph.D., evaluated Claimant's potential disability. Her report is dated November 3, 2009. She opined Claimant suffered

a 63% permanent disability, inclusive of PPI, based upon Dr. Greenwald's 30-pound lifting restriction and other factors. She opined that under Dr. Simon's evaluation, ignoring preexisting physical problems, Claimant suffered no disability in excess of impairment. In deposition, she opined that if all medical and nonmedical factors were considered as they existed when she evaluated him in 2009, he was totally and permanently disabled. She could not opine how all factors would have combined at the time of medical stability in 2006.

DISCUSSION AND FURTHER FINDINGS OF FACT

Credibility

28. Claimant was entirely credible in demeanor and consistency of testimony. His long history of continuous employment speaks well of his lifelong motivation to work. Because of his memory difficulties he sometimes relies upon his wife for confirmation of historical detail or is otherwise unable to provide a historical account. Where his memory deficits arise, contemporaneously made medical and other records are given greater weight.

General Considerations

29. It is well settled in Idaho that the Workers' Compensation Law is to be liberally construed in favor of the claimant in order to effect the object of the law and to promote justice. 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, 910 P.2d 759 (1966). Although the worker's compensation law is to be liberally construed in favor of a claimant, conflicting evidence need not be. Aldrich v. Lamb-Weston, Inc., 122 Idaho 316, 834 P.2d 878 (1992).

Causation

30. A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special

Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). Magic words are not required. Jensen v. City of Pocatello, 135 Idaho 406, 18 P.3d 211 (2000). "Probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

31. The persuasive evidence of record shows Claimant suffered injuries to his face and neck as a result of the industrial accident. The conditions underlying his symptoms of dizziness and memory loss existed before the accident and were not caused, accelerated, nor exacerbated by the accident.

Permanent Impairment

32. Permanent impairment is defined and evaluated by statute. Idaho Code § 72-422 and 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, 115 Idaho 750, 769 P.2d 1122 (1989); Thom v. Callahan, 97 Idaho 151, 540 P.2d 1330 (1975).

33. Dr. Simon's rating of 25% whole person PPI related to the accident is persuasive.

Permanent Disability and Apportionment

34. Permanent disability is defined and evaluated by statute. Idaho Code § 72-423 and 72-425 *et. seq*. Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See*, Eacret v, Clearwater Forest Indus., 136 Idaho 733, 40 P.3d 91 (2002); Boley v. State, Industrial Special Indem. Fund, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. Seese v. Idaho of Idaho, Inc., 110 Idaho 32, 714 P.2d 1 (1986).

35. The 75-pound lifting restriction suggested by Dr. Greenwald and approved by Dr. Simon, together with Dr. Simon's restriction from overhead work would exclude

Claimant from some truck driving jobs. While neither Mr. Granat nor Dr. Barros-Bailey had the opportunity of addressing the 75-pound lifting restrictions, their analyses show Claimant did suffer permanent disability in excess of PPI.

36. There are two methods by which a claimant can demonstrate he is totally and permanently disabled. First, a claimant may prove a total and permanent disability if his medical impairment together with the pertinent nonmedical factors totals 100%. If a claimant has met this burden, then total and permanent disability has been established. Alternatively, a claimant may establish himself as an odd-lot worker. Boley, *supra*. "[Odd-lot] workers need not be physically unable to perform any work at all. They are simply 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." Gooby v. Lake Shore Management Co., 136 Idaho 79, 83, 29 P.3d 390, 394 (2001) (citations omitted).

37. Claimant worked for at least two other employers after he became medically stable. He quit one job because he did not want to drive to California. He quit another because he was insufficiently familiar with Idaho Falls street addresses to make the required deliveries quickly. Neither of these reasons reflects permanent disability arising from the accident or from any preexisting condition or nonmedical factor to be considered under disability analysis. Claimant's ability to obtain and work these jobs shows he is not 100% totally and permanently disabled.

38. Under an odd-lot analysis, Claimant fails to qualify as totally and permanently disabled. *See*, Dehlbom v. ISIF, 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997). If a claimant is able to perform only services so limited in quality, quantity, or dependability that no reasonably stable market for those services exists, he is to be considered totally and permanently

disabled. Arnold v. Splendid Bakery, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). Such is the definition of an odd-lot worker. Reifsteck v. Lantern Motel & Cafe, 101 Idaho 699, 700, 619 P.2d 1152, 1153 (1980). *Taken from*, Fowble v. Snowline Express, 146 Idaho 70, 190 P.3d 889 (2008). A three-pronged analysis is used to determine a claimant's odd-lot status. A claimant may satisfy his burden of proof and establish odd-lot disability (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. Boley, *supra*.

39. Claimant sought work and was hired. He was able to perform the work and quit for reasons unrelated to his impairments from the accident. Thus under the first and third parts of the odd-lot analysis, Claimant is not an odd-lot worker. The record does not support a finding that Claimant made an extensive job search. Moreover, Claimant's age and decision to accept Social Security retirement benefits show it unlikely that he met the job search requirements involved in the first and second parts of the analysis. Claimant did not provide *prima facie* evidence to establish the second part of the analysis. Thus, Claimant failed to show he is an odd-lot worker.

40. The task remains to establish the extent of Claimant's permanent disability, less than total, related to the accident. The analysis of both vocational experts is useful. But because of uncertainties about the appropriate restrictions, the opinion of neither can be unqualifiedly accepted.

41. Claimant does have preexisting conditions, most significantly, an old low back injury which required surgery and is accompanied by degenerative changes in his spine. Other relevant preexisting conditions were not shown to have caused impairment or disability.

The record does not show whether an impairment rating was established at the time of medical stability for the low back injury nor does it show whether permanent physical restrictions were imposed or recommended then. The Idaho Supreme Court recently clarified that apportionment under Idaho Code § 72-406 requires, in some circumstances, a two-step approach "when making an apportionment: (1) evaluating the claimant's permanent disability in light of all of his physical impairments, resulting from the industrial accident and any preexisting conditions, existing at the time of the evaluation; and (2) apportioning the amount of the permanent disability attributable to the industrial accident." Page v. McCain Foods, Inc., 145 Idaho 302, 179 P.3d 265 (2008).

42. The evaluation of Claimant's preexisting disability for purposes of apportionment is problematic. No impairment was assigned then, but certainly he retained some permanent impairment from the surgery. One evaluator suggested in speculative hindsight that Claimant should have been restricted from driving truck immediately after he recovered from the old low back surgery. That suggestion is nonsense, given Claimant's roughly 40 subsequent years as a productive truck driver. Considering Claimant's preexisting conditions, and considering all appropriate medical and nonmedical factors, including but not limited to Claimant's age, education, the local labor market, expert opinions which argued for 71% and 63% disability under incorrectly assumed restrictions, and Claimant's actual medical restrictions as found above, Claimant is permanently disabled, rated at 50% of the whole person, inclusive of PPI. This figure should be apportioned to reflect Claimant's *de minimus* preexisting permanent disability of 5%. Claimant suffers permanent disability rated 45% from the 2005 accident.

ISIF Liability

43. 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 his or her 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 or her income benefits out of the ISIF account.

44. Claimant is not totally and permanently disabled. Therefore, ISIF bears no liability in this matter.

Carey Formula

45. Determination of the amount of ISIF liability is a matter of calculation set forth by the Idaho Supreme Court. Carey v. Clearwater County Road Dept., 107 Idaho 109, 686 P.2d 54 (1984). Having found Claimant is not totally and permanently disabled and that he did not meet the requirements of Idaho Code 72-332, this issue is moot.

CONCLUSIONS OF LAW

1. Claimant suffered permanent partial impairment (PPI) rated at 25% of the whole person caused by a compensable industrial accident;

2. Claimant suffered permanent disability rated at 45%, inclusive of PPI as a result of the accident;

3. Claimant failed to show he is totally and permanently disabled by any analysis, including odd-lot analysis;

4. Pursuant to Idaho Code § 72-332, ISIF bears no liability regarding this claim; and

5. The issue of Carey apportionment is moot.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED this 16TH day of December, 2010.

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:

/S/_____
Assistant Commission Secretary

db

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RICHARD PURCELL, Claimant, v. IDAHO ASPHALT SUPPLY, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	)	**IC 2005-509328** **ORDER** FILED JAN -7 2011

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

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

1. Claimant suffered permanent partial impairment (PPI) rated at 25% of the whole person caused by a compensable industrial accident.

2. Claimant suffered permanent disability rated at 45%, inclusive of PPI as a result of the accident.

3. Claimant failed to show he is totally and permanently disabled by any analysis, including odd-lot analysis.

4. Pursuant to Idaho Code § 72-332, ISIF bears no liability regarding this claim; and

5. The issue of Carey apportionment is moot.

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

DATED this 7TH day of JANUARY, 2011.

INDUSTRIAL COMMISSION

/S/_____
R. D. Maynard, Chairman

/S/_____
Thomas E. Limbaugh, Commissioner

/S/_____
Thomas P. Baskin, Commissioner

ATTEST:

/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7TH day of JANUARY, 2011, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

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