BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DALE SADORUS, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)	**IC 2006-005531** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed October 15, 2010

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 Idaho Falls on October 21, 2009. Claimant was present and was represented by G. Lance Nalder of Idaho Falls. Paul B. Rippel, also of Idaho Falls, represented the State of Idaho, Industrial Special Indemnity Fund ("ISIF"). Employer, J.R. Simplot Company ("Simplot") and Claimant reached a lump sum settlement prior to the hearing. Oral and documentary evidence was presented. The record remained open for the taking of two post-hearing depositions. The parties then submitted post-hearing briefs and this matter came under advisement on June 29, 2010.

ISSUES

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

1. Whether Claimant is totally and permanently disabled.
2. Whether ISIF is liable.
3. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant contends that he is totally and permanently disabled as a result of previous injuries and conditions combining with injuries sustained in his last industrial accident at Simplot. His multiple and severe physical restrictions constituted obstacles and hindrances to his employment while working, and restrictions associated with his last injury prevent him from obtaining employment in his eastern Idaho labor market.

ISIF concedes that Claimant is totally and permanently disabled; however, he was disabled before his last accident at Simplot. Thus, there is no combination in place so as to trigger ISIF liability. While ISIF does not consider Simplot to be a sympathetic employer, nonetheless, Claimant was "lucky" to have even obtained his job there and Simplot would not have hired him had they known of his restrictions, which he routinely exceeded. In other words, the Simplot job (or others like it) was not continuously and regularly available in Claimant's labor market, and being hired by Simplot was the result of temporary good luck on Claimant's part and not a true test of his ability to compete for jobs in his labor market.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant presented at the hearing.

2. Claimant's Exhibits 1-32 admitted at the hearing.

3. The post-hearing depositions of Douglas N. Crum, CDMS, taken by Claimant on December 8, 2009, and Nancy J. Collins, Ph.D., taken by ISIF on February 12, 2010.

The objections made during the taking of the above depositions are overruled with the exception of Claimant's objection on page 12 of Dr. Collins' deposition, which is sustained.

After having considered all the above evidence and briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 53 years of age and resided in St. Anthony at the time of the hearing. Claimant completed the 11th grade and obtained his GED online through a program offered at Boise State University in 2004 or 2005. His grades in high school consisted of Ds and Fs and he had particular difficulty with writing, spelling, reading, and grammar. Claimant can do "basic math" and has limited computer skills.

2. Claimant has suffered bilateral knee problems requiring surgeries since 1979. His last operation was on his right knee in 1997 or 1998. He has been informed that he will eventually require bilateral knee replacements. Claimant's knees have bothered him throughout the years by locking up or giving out.

3. In 2003, while working for the Idaho Transportation Department in road maintenance at Lolo Pass, Claimant was changing road signs when the ladder upon which he was standing slipped out from under him causing him to fall 12 to 14 feet to the ground. Claimant injured his neck, back, right wrist, right hip and right shoulder, resulting in surgery for a torn rotator cuff. After a lengthy period of recovery in Boise, Claimant was unable to return to his road maintenance job.

4. Claimant attempted to find work in Boise, without success, during his convalescence. Financial concerns persuaded Claimant to return to his hometown of St. Anthony where he could live with his father rent-free. Although not actively seeking work in St. Anthony, Claimant ran into an old acquaintance in a restaurant who inquired whether Claimant

might be interested in a seasonal fertilizer truck driving job at Simplot. Claimant submitted an application and was invited to participate in a driver's test. Claimant was hired.

5. In spite of Claimant's pre-existing physical impairments and associated problems, he was able to satisfactorily perform his truck driving duties for Simplot. While Claimant self-accommodated in some instances like getting in and out of his cab, Simplot made no accommodations. Simplot never complained that Claimant was not satisfactorily performing his duties. Claimant had worked for Simplot for approximately two months when, on May 5, 2006, he injured his left shoulder while attempting to open a stuck chute door; he felt a "snap" in his left shoulder. Two left shoulder surgeries later, Claimant is still having problems that prevent him from working.

DISCUSSION AND FURTHER FINDINGS

The parties do not dispute that Claimant is presently totally and permanently disabled. The real issue here is ISIF's liability, if any.

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 Idaho Code § 72-332disease, 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)

ISIF acknowledges the first three prongs of the *Dumaw* test. Their argument is that Claimant's pre-existing physical impairments did not combine with his 2006 accident at Simplot; he was totally and permanently disabled before that accident.

Pre-existing permanent physical impairments/ratings

6. Gary Walker, M.D., a physiatrist, performed an IME on Claimant on April 3, 2008, and supplied an addendum to his initial report on July 17, 2008. Dr. Walker was asked to assign impairment ratings for all of his ratable conditions. Dr. Walker assigned the following whole person PPI ratings:

Right upper extremity:	13%
Left upper extremity:	10% (for Claimant's 2006 left shoulder injury).
Cervical spine:	15%
Lumbar spine:	2%
Right knee:	6%

Left knee: 10%

Dr. Walker combined the impairments for a total of 45%.

Effect of pre-existing physical impairments on Simplot job

7. Claimant described his job duties at Simplot generally as:

> When you show up, obviously the first thing you do is go out and start your truck, check the oil, check the tires, sometimes we'd actually have to crawl under the truck and grease it, and then we would go in and have - - a supervisor would set us up with where we were to go for the first load, and then at that point in time you would go out and pull your truck under whatever bin was to be loaded, the fertilizer was to be loaded.

Hearing Transcript, pp. 16-17.

8. Claimant's duties were generally performed within a 20-25 mile radius from his home base at St. Anthony. He was required to tarp his loads, but this took minimal physical effort as he only needed to grab a rope that was attached to the tarp and pull the tarp over the load. Claimant would then secure the tarp with two bungee cords. Once at the point of delivery, Claimant would usually drive into the field, climb out of his truck, unhook the bungee cords, pull back the tarp, and then pull open the chute door to allow the fertilizer to reach an auger that would transfer it to the spreader truck. He would then climb into the truck's bin to sweep out any remaining fertilizer and climb back out of the bin using an attached ladder. Claimant would repeat this procedure on average six to seven times a day, six days a week. Prior to his accident on May 5, 2006, Claimant had repeated the above procedure hundreds of times. Claimant testified that his low back, right wrist and shoulder, neck, and bilateral knees bothered him at his Simplot job. While Claimant described the performance of his jobs duties as "difficult," he was nonetheless able to perform them during his approximately two months of employment.

The vocational experts

Douglas N. Crum, CDMS:

9. Claimant retained Mr. Crum to prepare a vocational assessment. Mr. Crum's qualifications are well known to the Commission and will not be repeated here. Mr. Crum interviewed Claimant on January 29, 2008, and March 24, 2009. Mr. Crum reviewed *inter alia*, vocationally relevant medical records, Claimant's two depositions and his hearing testimony, and ICRD records including a job site evaluation for the Simplot job. Mr. Crum noted that Claimant had an 11th grade education with poor grades and a subsequent GED. Claimant's work history consisted primarily of working on farms, driving tractors, carpentry, cooking, and laboring on construction or maintenance jobs. Mr. Crum referenced a job site evaluation submitted by ICRD consultant Shannon Purvis to Simplot that indicated the job was to last for a period of eight to nine weeks; however, Claimant understood the duration of the job would be eight to nine months.

10. In Mr. Crum's March 16, 2009 report, he discussed his understanding of Claimant's pre-Simplot accident physical restrictions per Dr. Walker's analyses as follows:

- No lifting more than 15# with the right upper extremity (7/8/04 Dr. Heggland).
- No climbing.
- No kneeling.
- No squatting.
- No work that would require him to look up or do any kind of rotation or looking down.
- No repetitive (hand) work (related to carpal tunnel syndrome),

- No reaching or lifting above chest level with the right arm.

Exhibit 31, p. 485.

11. Mr. Crum lists Claimant's restrictions imposed by his treating physician for his left shoulder injury as follows:

- Occasional lifting to 20 pounds (combined weights, apparently) "but the bulk of his lifting should be below 10 pounds."
- No overhead work.
- No manual labor with left shoulder.

Id.

12. Mr. Crum testified as follows regarding how Claimant's pre-existing physical impairments impacted his pre-Simplot access to his labor market:

> Q. (By Mr. Nalder): Did Dale Sadorus' preexisting limitations have an effect on Dale Sadorus' access to the labor market?
>
> A. Prior to May 5, 2006?
>
> Q. Yes.
>
> A. It did.
>
> Q. Would you explain that, please?
>
> A. Sure. Mr. Sadorus, prior to May 5, 2006, had a number of medical conditions that affected his physical capacities and abilities. The most important ones, in terms of his capacities, would be a 2003 right shoulder injury, a 2003 right radius fracture of the wrist, cervical spine problems that include severe degenerative joint disease, and bilateral knee pain, and bilateral knee surgeries preexisting 5/5/06.
>
> He also has preexisting complaints of low back problems. Dr. Walker's first report notes that he has thoracic spine compression fractures in his history. He also noted that Mr. Sadorus has upper extremity paresthesias, and weak grip on the right side, that he, apparently, relates to the cervical spine degenerative disk disease.

Crum Deposition, pp. 22-23.

13. Mr. Crum summarized his opinion regarding Claimant's total disability and the combination of Claimant's pre-existing physical impairments and his accident at Simplot this way:

> Q. (By Mr. Nalder): Would you just summarize what your opinions are?
>
> A. Sure. It's my opinion after reviewing all these records, and interviewing Mr. Sadorus, talking to him again earlier this year, that the combination of the preexisting restrictions, and the 2006 left shoulder injury, render him totally and permanently disabled.
>
> Prior to May 5, 2006, Mr. Sadorus had significant physical challenges that affected his employability. He was off work for, I think, I think two or three years after the 2003 injury, and I think, sort of was worried that he wouldn't be able to work any more after that injury. However, he did manage to find the job at Simplot. He did manage to perform it until the 5/5/06 left shoulder injury.
>
> Once that injury occurred, in my opinion, his physical capacities were reduced to such an extent, when combined with the other preexisting conditions, that he's unemployable.

Id., pp. 23-24.

Nancy J. Collins, Ph.D.:

14. ISIF retained Dr. Collins to assist it with vocational issues.[1] The Commission is well-aware of Dr. Collins' qualifications and they will not be repeated here. If Dr. Collins prepared a report, it is not in evidence; however, she was deposed. She testified that she could not say whether she reviewed Claimant's hearing exhibits (the only exhibits of record), but she had reviewed vocationally relevant medical records as well as the ICRD records and Mr. Crum's deposition testimony. It is Dr. Collins' opinion that Claimant was totally and permanently disabled before his Simplot job and, given his physical restrictions, should not have been

[1] Interestingly, Claimant had originally retained Dr. Collins to explore employability issues following his 2003 accident when represented by different counsel. Neither Dr. Collins nor Claimant's then-counsel could locate a copy of the report she prepared regarding that assignment, and Dr. Collins testified that she could not remember the conclusions she reached at that time.

performing that job in the first place. Claimant would not have been able to perform the Simplot job on a regular full-time basis, and in any event, that job was temporary in nature. Further, the other truck driving jobs in the St. Anthony area identified by Mr. Crum would all exceed Claimant's restrictions, both before and after his Simplot job injury.

15. On cross-examination, Dr. Collins conceded that Claimant was out of work from his 2003 accident for only 29 months rather than 42 months as she originally believed. Further, Claimant had not reached MMI from that accident until after he moved from Boise to St. Anthony. Therefore, his job search in the Boise area was hampered by Claimant's lack of knowledge regarding what his permanent physical restrictions would be. Dr. Collins acknowledged that an ICRD consultant did not believe Claimant was totally and permanently disabled after his 2003 accident and injuries and before his Simplot job.

Combining with

16. The Referee finds that Claimant's total and permanent disability is the result of the combination of Claimant's pre-existing physical impairments, discussed above, and the left shoulder injury he sustained in the Simplot accident. The Referee is not persuaded that Claimant was an odd-lot worker immediately prior to his Simplot accident. As discussed by the Idaho Supreme Court in *Fowble v. Snowline Express Inc.*, 146 Idaho 70, 190 P.3d 889 (2008), the standard for proving odd-lot disability is as follows:

> Regarding the "combined" requirement, 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." *Id.* In order to be characterized as "totally disabled," a worker does not have to be literally totally disabled or unable to engage in any activity worthy of compensation. *Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). *If he can perform only services so limited in quality, quantity, or dependability that no reasonably stable market for those services exists, the worker is totally disabled. Id.* Such is the definition of an

> "odd-lot" worker. *Reifsteck v. Lantern Motel & Cafe*, 101 Idaho 699, 700, 619 P.2d 1152, 1153 (1980).
>
> There are three methods of proving odd-lot status. The proponent of the existence of odd-lot status must demonstrate: (1) the other types of employment that the worker attempted; (2) that the worker, vocational counselors, employment agencies, or job services have unsuccessfully searched for work for the worker; or (3) that any efforts of the employee to find suitable employment would be futile. *Dehlbom v. State, Indus. Special Indem. Fund*, 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997). If the Commission finds that a worker falls within the odd-lot category, it has made a factual determination; therefore, the factual finding will not be set aside if supported by substantial and competent evidence. *Reifsteck* at 701, 619 P.2d at 1154. If the Commission finds that ISIF proved that the worker was an odd-lot worker prior to the subsequent injury, ISIF has successfully established a defense, as ISIF has disproved the "combined" requirement of I.C. § 72-332(1). *Bybee* at 81-82, 921 P.2d at 1205-06.
>
> *A claimant must presumptively establish that he was not an odd-lot worker prior to the last injury, a task that may be accomplished by "showing that [he] was working regularly at a job at the time of injury." Id.* at 82, 921 P.2d at 1206. *ISIF may overcome the presumption by demonstrating that the claimant's actual employment was due to a business boom, an employer's sympathy, temporary good luck, or a superhuman effort. Id.* Additionally, since odd-lot status requires that *no* suitable occupation be available to the worker, ISIF must show that the search for other suitable employment would have been futile. *Id.* at 82-83, 921 P.2d at 1206-07.
>
> Footnotes omitted. (Emphasis supplied).

The ISIF argues that Claimant's employment was due to luck since he was not actively looking for work after his 2003 industrial accident, and he obtained employment only because an acquaintance told him about a job. Contrary to ISIF's assertions, it is the Referee's experience that employment is frequently obtained through a network of friends and family as opposed to a more traditional job search. Despite the fact that an acquaintance alerted Claimant to the Simplot job opening, there is no indication that Simplot provided Claimant with any preferential treatment for this position in securing the position or performing his work tasks. Hearing Transcript, p. 40. Claimant obtained his position at Simplot through a competitive application process that included testing, even though he was not actively seeking a job when he heard about

the Simplot position. Hearing Transcript, pp. 23-24. Thus, it cannot be said that Claimant's job at Simplot was due to "temporary good luck" or Employer's sympathy, as Employer did not provide accommodations to Claimant. Claimant had the required license to drive Simplot's truck, the requisite pre-injury academic levels, and the physical capacities to perform the job functions. There is confusion over how long the Simplot job was to last. The ISIF argues that the short duration of the job suggests that there was "no reasonably stable market" for these services. Claimant believed it to be from six to eight months in duration while the ICRD consultant, in preparing a job site evaluation, listed the length of duration at six to eight weeks. In any event, Claimant was able to perform all essential functions of the job for six days a week and at least eight hours a day for approximately eight weeks before his injury. Mr. Crum testified that there are jobs similar to Claimant's position at Simplot readily available in the labor market, and there is no evidence of an unusual business boom in this field prior to Claimant's employment. Crum Deposition, p. 25. Claimant did not receive any accommodations from Employer, and Claimant's modifications of his activities to perform his job functions do not rise to the level of "superhuman efforts." The absence of corrective or disciplinary action by Simplot in the record suggests that Claimant was capable of adequately performing in his Simplot position prior to the industrial accident. Hearing Transcript, p. 40. Further, it is important to note that the injury Claimant suffered to his left shoulder in the Simplot accident was to a body part that had never been injured before; i.e., this is not a case where a preexisting condition was aggravated or where Claimant suffered a new injury to a previously injured body part.

17. Dr. Collins argues that Claimant may not have been totally and permanently disabled in the Boise area labor market, but was so after he moved to St. Anthony. However,

that theory was never successfully tested because Claimant obtained employment in St. Anthony. Whether he could have obtained employment with Simplot had he informed them of all of his preexisting conditions is speculative because the record does not reflect what, if anything, Claimant told Simplot in that regard. It is also speculation as to whether Claimant could have otherwise obtained employment in the St. Anthony area labor market.

18. The Referee finds that ISIF is liable for a portion of Claimant's total permanent disability benefits pursuant to Idaho Code § 72-332.

***Carey* apportionment**

In *Carey v.Clearwater County. Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984), the Idaho Supreme Court stated, ". . . the appropriate solution to the problem of apportioning the non-medical factors in an odd-lot case where [ISIF] is involved, is to prorate the non-medical portion of disability between the employer and [ISIF], in proportion to their respective percentages of responsibility for the physical impairment." *Id.*, at 118.

19. Utilizing Dr Walker's records, for purposes of the *Carey* formula, Claimant's total PPI equals 46% of the whole person using the summation method. Dr. Walker rated Claimant's left shoulder at 10% of the whole person for a total of 56% whole person PPI. Therefore, ISIF is responsible for 82.14% (46/56) of Claimant's PTD benefits and Employer is responsible for the remaining 17.86% (10/56).

20. Claimant's treating physician for his left shoulder injury found Claimant medically stable from that condition on January 7, 2008, and that is the date from which Claimant's permanent and total disability commences. *See,* Exhibit 20, p. 375.

CONCLUSIONS OF LAW

1. Claimant is totally and permanently disabled.

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

3. Employer is liable for 17.86% of Claimant's permanent total disability (PTD) benefits and ISIF is responsible for the remainder of Claimant's permanent total disability (PTD) benefits.

4. The date of Claimant's maximum medical improvement is January 7, 2008.

RECOMMENDATION

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

DATED this __1st___ day of October, 2010.

INDUSTRIAL COMMISSION

___/s/_____
Michael E. Powers, Referee

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __15th___ day of ___October___, 2010, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

G LANCE NALDER
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Ge/cjh Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DALE SADORUS, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Employer, Defendants.	)	**IC 2006-005531** **ORDER** Filed October 15, 2010

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers 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 recommendation of the Referee. The Commission concurs with this recommendation. 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 is totally and permanently disabled.

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

3. Employer is liable for 17.86% of Claimant's permanent total disability (PTD) benefits and ISIF is responsible for the remainder of Claimant's permanent total disability (PTD) benefits.

4. The date of Claimant's maximum medical improvement is January 7, 2008.

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

DATED this __15th___ day of ___October____, 2010.

INDUSTRIAL COMMISSION

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

__/s/_____
Thomas E. Limbaugh, Commissioner

_/s/_____
Thomas P. Baskin, Commissioner

ATTEST:
__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __15th____ day of __October__ 2010, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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