BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

WAYNE E. SEVERSON, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)	**IC 2006-000784** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** Filed January 18, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on March 2, 2011. Andrew E. Schepp represented Claimant and Paul J. Augustine represented the State of Idaho, Industrial Special Indemnity Fund (ISIF). Employer and its Surety settled with Claimant prior to the hearing. Oral and documentary evidence was presented and 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 July 5, 2011.

ISSUES

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

1. Whether Claimant is totally and permanently disabled as an odd-lot worker, or otherwise; and, if so

2. Whether ISIF is liable pursuant to Idaho Code § 72-332, and, if so

3. Apportionment under the *Carey* formula.[1]

[1] See *Carey v. Clearwater Cty. Road Department,* 107 Idaho 109, 686 P.2d 54 (1984).

CONTENTION OF THE PARTIES

Claimant contends that he is totally and permanently disabled either by the 100% method or by virtue of the odd-lot doctrine. Such disability arose as the result of a combination of his rather significant pre-existing physical conditions and his last industrial accident causing bilateral quadriceps tendon tears. Claimant further contends that he has presented evidence establishing ISIF's statutory liability and should receive benefits accordingly.

ISIF contends that while Claimant may presently be totally and permanently disabled, such disability arose due to the natural progression of Claimant's underlying physical maladies such as his morbid obesity, COPD, and bilateral osteoarthritis in his knees. Claimant was never given any PPI ratings or restrictions for his preexisting conditions, his bilateral knee injuries have healed without restrictions, and his current knee problems are, according to Claimant's treating physician, the result of his obesity and the natural progression of his underlying osteoarthritis. Thus, there is no industrial injury to combine with Claimant's preexisting conditions to make him totally and permanently disabled, and ISIF liability has not been established.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, taken at the hearing.

2. Joint Exhibits 1-38, admitted at the hearing.

3. The post-hearing deposition of Nancy Collins, Ph.D., taken by Claimant on April 19, 2011, and that of William C. Jordan, M.A., C.R.C., C.C.M.S., taken by ISIF on April 22, 2011.

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

FINDINGS OF FACT

1. Claimant was 58 years of age at the time of the subject accident and 63 at the time of the hearing. He resides rent-free in exchange for caretaker duties in a mobile home at the site of a horse riding club near the airport in Boise.

2. Claimant worked for the City of Boise at the airport in maintenance since August 1981. At the time of the subject accident, he was lead maintenance mechanic and had about 17 workers that he supervised. Claimant was a working foreman, although there were certain duties he had difficulty performing both before and after his industrial accident; he self-accommodated.

3. On January 9, 2006, Claimant was descending some stairs when he slipped and ruptured his left knee quadriceps tendon. On January 16, 2006, while convalescing at home, Claimant ruptured his right quadriceps tendon while rising from a chair.

4. On January 18, 2006, Erik Heggland, M.D., an orthopedic surgeon, performed bilateral quadriceps tendon repairs. Because both knees were involved, Claimant could not ambulate, so he was released to a complete-care rehabilitation facility for the next six weeks or so.

5. Claimant remained under the care of Dr. Heggland post-surgery. He eventually released Claimant to graduated light-duty work. On June 2, 2006, Dr. Heggland released Claimant to return to his time-of-injury job.

6. Claimant returned to work for over two-and-half years, but had various health issues that caused him to miss work under the FMLA, as well as sick and vacation leave. In any

event, Claimant physically worked until November 15, 2008, and retired effective March 2, 2009.

7. On July 7, 2006, Dr. Heggland noted that Claimant demonstrated full extension and flexion in both knees, walked with a normal gait, had well-healed wounds and was at the end of healing for his quadriceps tendon tears. Dr. Heggland indicated that 100% of Claimant's left knee was industrially related while 50% of his right knee was so related. He assigned a 5% PPI rating for both knees then backed out 2.5% for Claimant's left knee due to preexisting osteoarthritis, leaving a total PPI rating of 7.5% for both knees. Dr. Heggland released Claimant to return to work without restrictions.[2]

8. On May 19, 2008, Richard Radnovich, D.O., a physiatrist, saw Claimant one time at his attorney's request for an IME and the assignment of PPI ratings. Regarding causation, Dr. Radnovich noted that Claimant's industrial accident caused Claimant's left quadriceps tear and was the "significant precipitating factor" in his right quadriceps tear. Ex. 13, p. 232. Dr. Radnovich assigned a 10% whole person PPI with a 2.5% reduction for preexisting condition in Claimant's right knee, for a total of 7.5% whole person PPI. Dr. Radnovich's assigned permanent restrictions as follows for Claimant's safety and ". . . to prevent disease aggravation or exacerbation." Ex. 13, p. 233. No kneeling. No squatting. No repetitive climbing (as in stairs or ladders). Avoid uneven surfaces. No unprotected heights.

[2] This release contradicts Dr. Heggland's June 2, 2006 permanent 50-pound lifting restriction he assigned in a response to a letter sent by an ICRD consultant. A reasonable inference may be made that Dr. Heggland intended to retract that lifting restriction in that he indicated in an October 18, 2006 follow-up note that he would not limit Claimant in any way at work. Dr. Heggland did not change that release even though Claimant returned complaining of bilateral knee pain on March 13, 2007. Other than in the letter, Dr. Heggland never mentions any lifting restriction in any subsequent documents.

9. While ISIF concedes that "the Claimant is *now* totally and permanently disabled, it is solely due to the advancement and progression of his pre-existing conditions rather than any sequelae of his industrial injury to his bilateral quadriceps tendon." ISIF's Post-Hearing Brief, p. 2. (Emphasis in original).

DISCUSSION AND FURTHER FINDINGS

10. Under Idaho Code § 72-423, permanent disability is measured on the claimant's actual or presumed ability to engage in gainful activity because of permanent impairment, with no fundamental or marked change in the future. It follows that permanent disability cannot be evaluated until maximal medical rehabilitation has been achieved and any remaining abnormality or loss is stable. Reynolds v. Browning Ferris Industries, 113 Idaho 965, 968, 751 P.2d 113, 116 (1988). It is impossible to correctly predict prior to maximal medical rehabilitation whether, and to what extent, a loss will be permanent or only temporary. *See*, Colpaert v. Larson's Inc., 115 Idaho 825, 771 P.2d 46 (1989). The appropriate date for a disability analysis is the date on which maximum medical improvement has been reached. Stoddard v. Hagadone Corp., 147 Idaho 186, 207 P.3d 162 (2009).

11. As discussed above, Dr. Heggland released Claimant to return to his time-of-injury job on June 2, 2006. On July 7, 2006, Dr. Heggland assigned a 5% PPI rating for both knees then backed out 2.5% for Claimant's left knee due to preexisting osteoarthritis, leaving a total PPI rating of 7.5% for both knees. Dr. Heggland released Claimant to return to work without restrictions.

12. Claimant's disability for ISIF liability must be evaluated on July 7, 2006, the date he reached MMI and received his PPI rating from Dr. Heggland. Unless Claimant is deemed totally and permanently disabled as of July 7, 2006, further analysis of ISIF liability is moot.

13. A claimant may establish that he or she is totally and permanently disabled by using either of the two methodologies available to establish total permanent disability:

> First, a claimant may prove a total and permanent disability if his or her medical impairment together with the nonmedical factors total 100%. If the Commission finds that a claimant has met his or her burden of proving 100% disability via the claimant's medical impairment and pertinent nonmedical factors, there is no need for the Commission to continue. The total and permanent disability has been established at that stage. *See*, Hegel v. Kuhlman Bros., Inc., 115 Idaho 855, 857, 771 P.2d 519, 521 (1989) (Bakes, J., specially concurring) ("Once 100% disability is found by the Commission on the merits of a claimant's case, claimant has proved his entitlement to 100% disability benefits, and there is no need to employ the burden-shifting odd-lot doctrine").
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> Boley v. State, Indus. Special Indem. Fund, 130 Idaho, at 281, 939 P.2d at 857 (emphasis added).

When a claimant cannot make the showing required for 100% disability, then a second methodology is available: the odd-lot category is for those workers who are so injured that they can perform no services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. Jarvis v. Rexburg Nursing Center, 136 Idaho 579, 584 38 P.3d 617, 622 (2001), *citing* Lyons v. Industrial Special Indem. Fund, 98 Idaho 403, 565 P.2d 1360 (1977). The worker need not be physically unable to perform any work; 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. Id., 136 Idaho at 584, 38 P.3d at 622.

14. An employee may prove total disability under the odd-lot doctrine in 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 her behalf have searched for other work and other work is not available; or,
>
> (3) by showing that any efforts to find suitable employment would be futile.

Hamilton, 127 Idaho at 224, 899 P.2d at 437 (Citations omitted).

15. Claimant's total combined permanent physical impairment is well under 100%. In order to be totally and permanently disabled as a matter of law, all other factors affecting Claimant's employability must make up the remaining disability. On the record before us, the Claimant was not 100% disabled as a matter of law on July 7, 2006.

Odd-lot Disability

16. For reasons discussed above, ISIF liability for total and permanent disability is evaluated on the date of medical stability from the last industrial accident. Claimant returned to work for over two-and-half years after his release from his industrial accident. While Claimant's health issues caused him to miss work under the FMLA, Claimant physically worked until November 15, 2008, and retired effective March 2, 2009. Because Claimant returned to work for his time-of-injury Employer for over two years, Claimant's argument is that Employer was a sympathetic employer.

Vocational evidence

Nancy Collins, Ph.D.

17. Claimant retained Dr. Collins to assess his disability. Dr. Collins is well-known to the Commission and her qualifications will not be repeated here.[3] Dr. Collins reviewed vocationally pertinent medical[4] and vocational records, met with Claimant, prepared a report (Exhibit 34) and was deposed. Dr. Collins indentified Claimant's preexisting health conditions as follows:

> Q. (By Mr. Schepp): What is your general understanding of those pre-existing health conditions that Mr. Severson had prior to the accident?

[3] Dr. Collins' CV is attached as Exhibit 1 to her deposition.

[4] Dr. Collins acknowledged that she did not review any of Dr. Heggland's records after Dr. Radnovich's IME.

> A. Well, he was a non-insulin-dependent diabetic, so he managed that with medication and diet. He had had weight problems all of his life, a lot of weight gain, weight loss over many years. He had chronic obstructive pulmonary disease, COPD, a lack of oxygenation. He had sleep apnea, which caused considerable fatigue. He had hypertension, he had high cholesterol; he had a significant history of depression. He had knee surgery prior, finger injuries, some back pain, but none of these had any specific restrictions associated with them.
>
> At the time of the accident, he did have limitations[5] from the respiratory, the COPD, had struggled with sleep issues for a lot of years. He actually changed his job at one point, switched to the day shift so that he could regulate his sleep better. And he had some knee pain before the injury.

Dr. Collins Deposition, pp. 8-9.

18. Dr. Collins found Claimant to be an odd-lot worker in that he is so limited that a reasonably stable labor market for his services does not exist. Dr. Collins testified that another employer would not have kept Claimant employed with what he was actually able to perform, and Claimant used FMLA, sick time, and vacation hours throughout the two years he returned to work. Dr. Collins did not limit her evaluation of Claimant's employability to Dr. Heggland's MMI date.

19. Mr. Jordan was retained by ISIF to assist them with vocational issues. Mr. Jordan's qualifications are well-known to the Commission and will not be repeated here.[6] Mr. Jordan reviewed pertinent medical and vocational records, sat through Claimant's deposition and attended the hearing. He wrote a report (Exhibit 33) and was deposed. Mr. Jordan was aware of Claimant's preexisting conditions discussed above. Mr. Jordan was also aware that Claimant self-accommodated by delegating work and in other ways. Mr. Jordan noted that Claimant worked 2.8 years after his return to work after his industrial accident and before his retirement with the same accommodations as before. Mr. Jordan considered Dr. Radnovich's IME report

[5] These were not from a physician, but were self-imposed.
[6] Mr. Jordan's CV is attached as Exhibit 1 to his deposition.

and was also aware of the treatment given and opinions expressed by Dr. Heggland after that IME.

20. Mr. Jordan did not believe Claimant was unable to perform his job duties after his industrial accident, because he worked over two years after being released to full duty by Dr. Heggland. Mr. Jordan was aware that Dr. Heggland continued treating Claimant after Dr. Radnovich's IME. Because Claimant had problems from underlying preexisting conditions before his industrial accident, and continued to have those problems after his accident, and because his quadriceps tears did not cause or accelerate his osteoarthritis or affect his ability to work, Mr. Jordan reasoned that Claimant lost no access to his pre-injury labor market because it was the same before as after. Even so, Mr. Jordan conceded that Claimant "might" be totally and permanently disabled due to non-industrially related underlying health conditions, not his bilateral quadriceps tears.

21. At hearing, Claimant testified that Employer accommodated his physical abilities after his return to work. Employer even assisted Claimant's claim for disability coverage by allowing Claimant to remain officially employed up to March 2, 2009, when Claimant could not physically work after November 15, 2008. Yet, Dr. Heggland fully released Claimant to work without formal restrictions. Following his 2006 release, Claimant had access to a golf cart and avoided heavy lifting. Claimant considered his post-accident responsibilities to be lighter duty work and he felt he "didn't have to do anything." Hr. 41. However, Mr. Jordan considered Claimant's accommodations and work activities post-accident to be very similar to his pre-accident accommodations and activities.

22. The Referee is persuaded that Claimant's post-accident work assignments were legitimate. Claimant was a valued employee performing a real job. The evidence fails to

support a conclusion that Claimant's job was a "make work" job, or that he enjoyed continued employment following the industrial accident only because of the sympathy of his employer. As a supervisor, Claimant had the authority to delegate tasks and responsibilities. Claimant sought assistance from his fellow employees lifting heavy items before and after the last industrial accident. While Claimant's physical condition in 2008 prompted his 2009 retirement, the Referee is constrained to consider Claimant's physical condition and work abilities at the point of MMI and not at a point in time two-and-a-half years later.

23. The Referee finds Mr. Jordan's opinions on Claimant's disability as of the date of Claimant's MMI more persuasive. Exposure for ISIF liability is not indefinite. Unfortunately, in Claimant's situation, his non-industrially related degenerative changes deteriorated after he reached MMI. Based on the foregoing, Claimant has not established that he was totally and permanently disabled under the odd-lot doctrine as of the date of stability from his last industrial accident.

24. Even if Claimant had established he was totally and permanently disabled as of the date of medical stability, Claimant must still show that the ISIF is liable for a portion of that total disability. The primary issue is whether Claimant satisfies the "combined" requirement of ISIF liability.

Idaho Code § 72-332 provides:

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

be compensated for the remainder of his income benefits out of the industrial special indemnity account.

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

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

1. A pre-existing impairment;

2. The impairment was manifest;

3. The impairment was a subjective hindrance to employment; and

4. **The impairment combines with the industrial accident in causing total disability**.

Dumaw v. J.L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990). (Emphases added).

25. The evidence established that Claimant had the following manifest conditions[7] that preexisted his January 2006 industrial accident:

* 1979 motor vehicle accident – left quadriceps tendon repair.
* 1981 chainsaw accident – right quadriceps tendon repair.
* ? Bilateral knee osteoarthritis.
* 1987 hypertension.
* 1994 Chronic Obstructive Pulmonary Disease (COPD).
* 2001 severe sleep apnea.
* ? Diabetes mellitus type II.

[7] None of Claimant's preexisting conditions were ever rated for PPI so "conditions" are referenced rather than impairments.

* ? Morbid obesity.

No physician has assigned PPI ratings or physical restrictions for the above conditions. However, Employer allowed Claimant to self-accommodate for his knees and COPD, for example, by allowing Claimant to delegate certain duties and allowing him to use a motorized cart to travel longer distances rather than walking, due to fatigue and shortness of breath.[8]

26. In November 2008, Claimant applied for leave under the FMLA due to his severe sleep apnea, morbid obesity, COPD, diabetes, and hypertension. In January 2009, Claimant applied for group disability insurance and listed the medical conditions that kept him from working as his COPD that he acknowledged was not work-related. Claimant also applied for PERSI and Social Security Disability (SSD), both of which were approved. Regarding PERSI, the Disability Benefit Specialist concluded, "Member stopped working 11/21/08 due to bronchitis that exacerbated his COPD. Records indicate member's oxygen saturations drop with exertion. Also noted sleep apnea, hypertension, diabetes mellitus, osteoarthritis in both knees, and morbid obesity." Ex. 36, p. 704. Regarding SSD, a Dr. Dickey noted, "Clmt is most limited by his obesity. He is credible in his assertions that he cannot sustain activity though most likely d/t deconditioning. Clmt's allegations of limitations caused by knee problems are not consistent with Dr. Heggland's assessment." Ex. 32, p. 526.

Vocational evidence

27. Dr. Collins opined that Claimant's bilateral knee pain combined with his preexisting conditions render him totally and permanently disabled. Dr. Collins agreed that if, as

[8] Claimant never formally requested any special accommodations (except during his light-duty return to work) and there was no written acknowledgment by Employer of any accommodations afforded Claimant. It is apparent that Claimant was a valued long-time employee with much institutional knowledge, and could do what he needed to do to get the job done.

Dr. Heggland has indicated, the symptoms identified by Dr. Radnovich and treated by Dr. Heggland were caused by Claimant's morbid obesity and his underlying osteoarthritis, and not his industrial accident/injury, then no combination can occur. She testified that she had no medical basis to dispute Dr. Heggland's opinion in that regard.

28. Mr. Jordan did not believe a combination of Claimant's industrial injury and his preexisting conditions made it less likely for him to access employment in his labor market because such labor market was the same before his accident as after.

29. Mr. Jordan understood that Claimant retired due to problems regarding his COPD and morbid obesity; not due to his bilateral quadriceps tears. Also, Claimant's applications for PERSI, group health, and SSD, as well as the reasons he was awarded such benefits had nothing to do with his bilateral quadriceps tears. Mr. Jordan was aware that Dr. Heggland continued treating Claimant after Dr. Radnovich's IME. He was also aware that Dr. Heggland had reported that Claimant's ongoing knee pain was caused by his underlying, progressive preexisting osteoarthritis and morbid obesity. Therefore, Mr. Jordan concluded that the restrictions imposed by Dr. Radnovich were not related to Claimant's industrial accident and resultant injuries. Because Claimant had problems from underlying preexisting conditions before his industrial accident, and continued to have those problems after his accident, and because his quadriceps tears did not cause or accelerate his osteoarthritis or affect his ability to work, Mr. Jordan reasoned that Claimant lost no access to his pre-injury labor market because it was the same before as after. Even so, Mr. Jordan conceded that Claimant "might" be totally and permanently disabled due to non-industrially related underlying health conditions, not his bilateral quadriceps tears.

30. The only medical evidence presented in this matter, that of Dr. Heggland, leads to the inevitable conclusion that Claimant's preexisting conditions, be they "impairments" or not, did not combine with Claimant's industrial injury to render him totally and permanently disabled. Once Claimant reached MMI, Dr. Heggland rated him for PPI and concluded that Claimant's ongoing bilateral knee complaints were due to his underlying bilateral knee osteoarthritis and morbid obesity, and not his bilateral quadriceps tears. No physician has contradicted that opinion. Dr. Radnovich assigned restrictions, but did not indicate what created the need for those restrictions. The fact that he mentioned that the restrictions were given to ". . . prevent disease aggravation or exacerbation" is evidence that he was assigning restrictions due to Claimant's underlying osteoarthritis, rather than his bilateral quadriceps tear that had healed by the time Dr. Radnovich saw him. Claimant returned to work for over two years after his knee injuries with basically the same accommodations as before. If Claimant needed accommodations after he was declared at MMI, it was due to his morbid obesity, COPD, etc., not his bilateral quadriceps tears.

31. Claimant has failed to prove his preexisting physical "impairments" combined with his industrially related bilateral quadriceps tears to render him totally and permanently disabled, and ISIF bears no responsibility for Claimant's disability.

CONCLUSION OF LAW

Claimant has failed to prove ISIF liability.

RECOMMENDATION

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

DATED this 20th day of December, 2011.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __18th__ day of __January__, 2012, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

BRADY LAW
2537 W STATE ST STE 200
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PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701

ge ___/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

WAYNE E. SEVERSON, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)	**IC 2006-000784** **ORDER** Filed January 18, 2012

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 conclusion 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 these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusion of law as its own.

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

1. Claimant has failed to prove ISIF liability.

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

DATED this __18th___ day of __January__, 2012.

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 _12th_ day of __January__ 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

BRADY LAW
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BOISE ID 83702

PAUL J AUGUSTINE
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ge __/s/_____