BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JAMES L. SLIGER, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)	**IC 2002-013109** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** Filed March 11, 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 Boise on August 5, 2009. Claimant was present and represented by Bruce D. Skaug of Nampa. Employer/ Surety settled with Claimant prior to the hearing. Anthony M. Valdez of Twin Falls represented Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF). Oral and documentary evidence was presented. No post-hearing depositions were taken. The parties submitted post-hearing briefs and this matter came under advisement on December 18, 2009.

ISSUES

By agreement of the parties, the issues to be decided are:

1. Whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine and, if so,

2. Whether ISIF is liable for a portion of such disability, and

3. Apportionment pursuant to the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant contends that, as the result of the combining effects of two low back injuries and nonmedical factors, he is totally and permanently disabled pursuant to the odd-lot doctrine. While he concedes that he has not meaningfully attempted work or searched for the same, to have done so would have been futile. ISIF has failed to rebut Claimant's *prima facie* odd-lot showing by demonstrating that there are jobs within his labor market that are regularly and continuously available to him. Therefore, Claimant is entitled to benefits from ISIF as determined by the *Carey* formula.

ISIF contends that Claimant is not totally and permanently disabled. He has not looked for work in the six or so years before the hearing, and to have done so would not have been futile. Claimant's vocational expert's opinion should be given no weight because he did not meet Claimant until the morning of the hearing, and was not familiar with Claimant's Oregon labor market. Finally, because Claimant's accident with Employer was nothing more than a temporary aggravation of his long-standing back condition with no additional PPI, there was no combining effect.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and vocational rehabilitation consultant Terry Montague taken at the hearing.

2. Joint Exhibits A-Y admitted at the hearing.

After having considered all the above evidence and the 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 43 years of age and resided in Falls City, Oregon, at the time of the hearing.

2. Claimant has a high school equivalency diploma and spent a year-and-a-half in a saddle-making school. He then enlisted in the Air National Guard, where he served for three-and-a-half years. Claimant spent six months of his duty in Saudi Arabia, where he installed and maintained communication systems. He was medically discharged in 1993 as a senior airman.

3. In 1992, Claimant injured his back in Saudi Arabia when he twisted while lifting a cable spool. This incident led to a medical discharge and a service-connected disability. Claimant testified that he never completely healed from that injury. His symptomatology when he left the military was chronic sharp pain in his low back, shooting spasms that would cause him to fall, and severe low back and leg pain.

4. After a two-year period of recuperation upon completion of his Air National Guard service, Claimant has primarily worked in cabinetry and mechanics. On July 10, 2002, while installing cabinets at Kuna High School, Claimant again injured his back as he twisted while lifting a heavy cabinet. Claimant immediately reported to the Boise Veteran's Administration Hospital (VA), where he was prescribed pain medication and sent home. Eventually, two local neurosurgeons recommended surgery, but Claimant declined for personal reasons. Claimant later changed his mind and contacted two neurosurgeons at the VA in Oregon in that regard. Claimant testified that neither of the two surgeons would perform the surgery, because he could end up worse off than he was. His treating physician in Boise, Michael O'Brien, M.D., a neurologist, prescribed physical therapy that "helped."

5. At hearing, Claimant described his current symptoms as follows:

> Besides the chronic low-back pain, I still have the shooting spasms. I'm always falling. I try not to walk very far because I'm 280 pounds. My wife, she's a little lady. She's not going to be able to pick me up and carry me anywhere. My activity is very low.

Hearing Transcript, p. 55.

6. Claimant described his overall health as:

> Well, because of my back, the pain that I've been going through, I suffer from depression.[1] Oftentimes I'm very cranky. I'm not able to do a whole lot. It seems like the only time I get to get out of the house is when my wife drags me shopping. And it's only when I can hang on to the cart. Going from a person being physically active and having the attitude that there's nothing you can't accomplish, having that worth and that value to going to nothing, not doing anything, it's a real blow to a man's ego.

Id., p. 61.

Restrictions/impairments:

7. **Michael O'Brien, M.D.** Claimant first saw Dr. O'Brien, a neurologist, on September 3, 2002, for evaluation and treatment. An MRI ordered by Dr. O'Brien showed no significant changes from an MRI taken after his accident in Saudi Arabia. Because Claimant's MRI did not match up with Claimant's complaints, Dr. O'Brien recommended a neurosurgical consultation. In that regard, Claimant saw **Ronald Jutzy, M.D.,** a neurosurgeon, on December 17, 2002. Dr. Jutzy did not believe Claimant was a surgical candidate, and recommended physical therapy and retraining or vocational reassessment. Dr. Jutzy did not relate Claimant's pain syndrome to his industrial accident. He issued the following restrictions: limit bending and twisting of low back for approximately six months – no lifting over 30 pounds. Dr. Jutzy indicated that it was "not determined" if the foregoing restrictions would be permanent. He did

[1] At the time of the hearing, Claimant was not being treated for depression, but was "trying to do it" himself.

not recommend any further treatment for Claimant. Upon re-evaluating Claimant, Dr. Jutzy referred Claimant to **Paul Montalbano, M.D.,** another neurosurgeon, regarding surgical intervention. Dr. Montalbano recommended a decompression and fusion; Claimant refused. Dr. Montalbano did not assign any permanent restrictions.

8. Claimant saw **Michael Weiss, M.D.**, a physiatrist, at Surety's request on June 17, 2003. Dr. Weiss concluded that Claimant was medically stable and would not benefit from surgery. He rated Claimant's back condition as 13% whole person PPI. Dr. Weiss then apportioned all of the 13% to Claimant's pre-existing back condition, characterizing Claimant's 2002 injury as a temporary aggravation. Regarding functional limitations, Dr. Weiss indicated that, at the time of Claimant's discharge from the military, he could perform light-to-medium work with 25-50 pounds maximum and 10-15 pounds frequently, should avoid torquing maneuvers of the lumbar spine (combined bend/twist/lift), should allow for ad lib position change, and should avoid prolonged exposure to low-frequency vibrations. As the result of a non-validated isometric lifting task, Claimant could perform light work, which is 25 pounds maximum and 10 pounds frequently. Dr. Weiss further indicated that these restrictions pre-dated his 2002 accident. Dr. Montalbano has indicated his agreement with Dr. Weiss's IME.

9. In a November 5, 2007, letter to Claimant's counsel, Dr. O'Brien increased his prior PPI rating of 1% to 5% whole person that he relates to Claimant's 2002 accident. It is unclear from the letter how he got there. In a November 20, 2003, letter to Claimant's counsel, Dr. O'Brien states:

> In this patient's case, his chief medical problem is going to involve the restrictions that he has in going back to work and doing his job. He presently has been ruled unemployable, so the fact is that he is no longer in a work situation. This factor needs to be taken into serious consideration when rendering him a disability rating

> based upon his medical impairment. The patient simply cannot stand or walk or sit long enough to hold a regular job. His lifting restrictions would probably run somewhere in the vicinity of 5 lbs. on any basis. This could be on rare occasions moved up to 10 pounds. The fact is that he could do no competitive [sic] lifting, climbing, bending, walking, or moving around in an aggressive manner.

Exhibit H.

DISCUSION AND FURTHER FINDINGS

There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment together with the relevant nonmedical factors totals 100%. If a claimant has met this burden, then total and permanent disability has been established. The second method is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939P.2d 854, 857 (1997). 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 of Idaho*, *Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), *citing Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). Such workers are not regularly employable "in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984), *citing Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

100% method:

10. Claimant does not argue that his medical impairment and relevant nonmedical factors total 100%, and the Referee so finds.

Odd-lot:

Although Claimant has failed to establish that he is totally and permanently disabled by the 100% method, he may still be able to establish such disability via the odd-lot doctrine. An injured worker may prove that he or she is an odd-lot worker in one of three ways: (1) by showing he or she has attempted other types of employment without success; (2) by showing that he or she or vocational counselors or employment agencies on his or her behalf have searched for other suitable work and such work is not available; or, (3) by showing that any effort to find suitable employment would be futile. *Hamilton v. Ted Beamis Logging and Construction,* 127 Idaho 221, 224, 899 P.2d 434, 437 (1995).

11. The only work Claimant has attempted after his 2002 injury was at a seed company in 2003. Claimant was on a three-person crew loading beans into bags, stitching them closed, and throwing them on a pallet. At some point, Claimant had a spasm and fell. After informing his foreman about his back condition, on his second day Claimant was told he could no longer work there. The Referee finds that this work attempt is insufficient to establish odd-lot status.

12. The Referee finds that Claimant has not presented evidence that he, or someone on his behalf, has searched for suitable work and such work is not available. Claimant was involved with ICRD from August 9, 2002 until they closed their file on September 18, 2003, when Claimant informed them that he was receiving VA benefits and no longer needed their

services. Further, Claimant testified that he never followed up with VA-offered vocational assistance.

13. Claimant's primary argument regarding his entitlement to odd-lot status is that it would have been futile for him to have searched for employment and relies on the opinions of his vocational expert, **Terry Montague**, in support of that position. Mr. Montague is a vocational consultant in private practice and testified at hearing. Mr. Montague reviewed medical records and interviewed Claimant by phone. He did not personally meet with Claimant until the morning of the hearing. Although aware of the opinions expressed by Drs. Weiss, Montalbano, and Jutzy, Mr. Montague bases his disability opinion on Dr. O'Brien's 2003 restrictions:

> Well, Dr. O'Brien's opinion came after Dr. Weiss's opinion with regard to work restrictions and limitations.[2] And Dr. O'Brien spent more time treating and following Mr. Sliger's case and care. And it's been my experience that we follow, whenever possible, the physician that knows the patient best. In this case, it would be Dr. O'Brien.
>
> Hearing Transcript, p. 27.

14. Mr. Montague opined that Claimant has lost 100% access to his labor market.[3] He offered the following rationale for that opinion at hearing:

> Well, vocationally, we look to the medical community to give us guidance in terms of what a person can or cannot do physically. We're attempting to identify alternative employment after an industrial injury. We have to work within the parameters of the medical community. In this case, the treating physician, Dr. O'Brien, determined that Mr. Sliger was restricted to no lifting of greater than five pounds[4] and only on rare occasions up to ten pounds. That's actually below what the classification for sedentary work would be. In addition to that, it was Dr.

[2] Dr. Weiss assigned his restrictions about five months earlier than Dr. O'Brien.

[3] It is interesting to note that Mr. Montague admitted that he had no familiarity with Claimant's labor market in the Salem, Oregon, area where Claimant resides. He testified that he saw no reason to research Claimant's labor market.

[4] Claimant testified in his June 24, 2009, deposition that he could lift ten pounds continuously. *See* pp. 43-44.

> O'Brien's opinion that Mr. Sliger had such limitations with regard to sitting, standing, walking that he was essentially unemployable.
>
> Since he offered that opinion, I've also reviewed a number of opinions from medical doctors from the VA, which highlight that Mr. Sliger is unemployable. They refer to him as unemployable.

Hearing Transcript, pp. 18-19.

15. The Referee is not persuaded that it would be futile for Claimant to look for work. Dr. O'Brien's restrictions are much more severe than the other physicians weighing in on the matter, and are given without explanation. Mr. Montague's sole reliance on those restrictions is misplaced and diminishes the weight to be given to his opinions. Further, there is a genuine disagreement among the physicians regarding whether the need to place any restrictions on Claimant at all is due to his 2002 accident or his 1992 accident. Mr. Montague made no attempts to provide any alternatives for his conclusions by considering the less restrictive limitations assigned by Drs. Weiss and Jutzy. Of additional concern is Mr. Montague's lack of familiarity with Claimant's labor market.

16. Claimant insists he cannot work due to his debilitating back and leg pain, his spasms, his memory problems, and his falling. However, he had those conditions since 1992 and was able to work, recreate, and be productive. The Referee is not convinced that Claimant is serious about returning to the work force. He terminated the services of ICRD once he began receiving VA benefits and failed to follow-through with any retraining options. At one point, Claimant expressed an interest in drafting. When asked if he had the educational capacity to pursue that occupation, he responded, "I don't know if I do or not. I won't find out until I try." Hearing Transcript, p. 68. That is exactly the point. Mr. Montague admitted that there was no reason why Claimant could not learn and that his disability would be less with retraining.

17. Claimant is worried that his spasms which, at times cause him to fall, will interfere with any potential employment opportunities. However, there is nothing in Dr. O'Brien's records regarding spasms or falling as being problematic. When he saw Dr. Weiss about a year later, Claimant did mention that, at times, he would "lose sensation" in his legs and fall; no mention of spasms. Based on the lack of complaints and treatment in the relevant medical records regarding spasms/falls, the Referee is unable to place much weight on this concern of Claimant's.

18. The fact that Dr. O'Brien and "medical doctors at the VA" may refer to Claimant as "unemployable" is of no consequence to this Referee, as it is the Commission's charge to make that determination. The fact is, Claimant is employable when considering the restrictions imposed by Drs. Weiss and Jutzy (a scenario not even considered by Mr. Montague). While Claimant may subjectively believe he cannot work, that belief does not make him an odd-lot worker.

19. The Referee finds that Claimant has failed to prove that he is an odd-lot worker.

20. Based on the above finding, the Referee further finds that Claimant has failed to prove ISIF liability.

CONCLUSION OF LAW

Claimant has failed to prove that ISIF is liable and the Complaint against it should be dismissed with prejudice.

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 __25th__ day of February, 2010.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___11th___ day of ___March ___, 2010, 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:

BRUCE D SKAUG
1226 E KARCHER RD
NAMPA ID 83687

ANTHONY M VALDEZ
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TWIN FALLS ID 83301

ge Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JAMES L. SLIGER, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)	**IC 2002-013109** **ORDER** Filed March 11, 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 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 this recommendation. 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 that ISIF is liable and the Complaint against it is dismissed with prejudice.

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

DATED this __11th___ day of ___March ___, 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 __11th___ day of ___March ___ 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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