BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID TARBET, Claimant, v. J. R. SIMPLOT COMPANY, Self-Insured Employer, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	)	**IC 2007-012004** **2007-038938** **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION** Filed June 14, 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 Pocatello on December 10, 2009. Claimant was present and represented by Fred J. Lewis of Pocatello. Wes L. Scrivner of Boise represented Employer, and Lawrence E. Kirkendall of Boise represented the Industrial Special Indemnity Fund ("ISIF"). The parties presented oral and documentary evidence and two post-hearing depositions were taken. In lieu of post-hearing briefs, the parties presented oral closing arguments in Boise on February 5, 2010. This matter came under advisement on February 17, 2010.

ISSUES

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

1. Whether Claimant is entitled to benefits for permanent partial disability in excess of impairment, and the extent thereof;

2. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine or otherwise;

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

4. Whether ISIF is liable under Idaho Code § 72-332; and, if so,

5. Apportionment under the *Carey* formula.

REMAINING ISSUES AND CONTENTIONS OF THE PARTIES

Employee and ISIF both retained vocational rehabilitation consultants to investigate the extent of Claimant's disability as it pertains to employability. After interviewing Claimant, reviewing his medical records and conducting vocational assessments, they each concluded that Claimant is totally and permanently disabled. In addition, at the hearing and in their closing arguments, the parties agreed or, in the case of Employer, did not dispute, these opinions. Therefore, the Referee finds sufficient evidence to conclude, at the outset, that Claimant is totally and permanently disabled. As a result, the only remaining question to be decided is whether and to what extent ISIF is liable for a portion of Claimant's benefits.

Employer contends that ISIF is liable because Claimant's total and permanent disablement is due to a combination of his pre-existing permanent impairments to his eardrum and lower back, together with the cervical spine injury he sustained in his last industrial accident

in April 2007.[1] Employer seeks findings that Claimant's pre-existing impairments were manifest, constituted subjective hindrances to employment, and "combined" with injuries sustained in Claimant's last accident such as to trigger ISIF liability.

ISIF maintains that Claimant's permanent and total disability is due to his final industrial accident alone. ISIF seeks a finding that Claimant became totally and permanently disabled solely as a result of his April 2007 industrial accident and resulting cervical injury so that it cannot be held liable for any portion of Claimant's benefits.

OBJECTIONS

ISIF's objection on page 21 of the transcript of the deposition of Gary C. Walker, M.D., is overruled; to the extent not mooted by follow-up inquiry, Employer's objection on page 49 and Claimant's objection on page 59 of the transcript of the deposition of Nancy Collins, Ph.D., are also overruled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The pre-hearing deposition of Claimant dated January 25, 2008;

2. The pre-hearing deposition of Claimant dated October 7, 2009;

3. The testimony of Claimant, Claimant's wife Sandra Tarbet, and Claimant's former supervisor Gary Norman, taken at the hearing;

4. Claimant's Exhibits A-C admitted at the hearing;

5. Employer's Exhibits 1-21 admitted at the hearing;

[1] Claimant also suffered an industrial accident on or about May 13, 2007. However, none of the injuries from that accident are relevant to this decision so the April 2007 accident is referred to herein as the "last accident."

6. ISIF's Exhibits 1-31 admitted at the hearing;

7. The post-hearing deposition of William C. Jordan, M.A., vocational rehabilitation consultant, taken by ISIF on January 5, 2010;

8. The post-hearing deposition of Nancy J. Collins, Ph.D., vocational rehabilitation consultant, taken by Employer on January 5, 2010; and

9. The post-hearing deposition of Gary C. Walker, M.D., taken by Employer on January 7, 2010.

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 62 years of age and resided in Soda Springs, a small, somewhat isolated community of approximately 3,500 residents, at the time of the hearing. Claimant finished 10th grade, served in the armed forces in Vietnam, then worked for Employer for 36 years.

2. Claimant developed specialized skills working for Employer. Over the years, he performed a number of jobs at the Smoky Mountain Mine and, later, at the Conda Pump Station ("Conda") in Soda Springs. At Conda, Claimant was part of a 24-7 operation maintaining giant pumps that pull phosphorous ore slurry through a pipeline, 30 miles west from Smoky Mountain, then push it 58 miles over a mountain pass, to Employer's plant in Pocatello.

3. At times Claimant was a maintenance worker, performing continuous heavy work such as loosening and torquing down oversized bolts that were often located overhead or in other difficult to reach areas. At other times he was employed in operations, where heavy work was

only required during emergencies. Claimant was well-suited to working at Conda because he was inordinately strong, standing 6'4" and weighing in the mid-to-high 200-pound range. In addition, he applied an exemplary work ethic.

4. It is undisputed that Claimant greatly enjoyed working for Employer and that he was a valued employee. However, he did not always function well with others. In 2001, Claimant was written up after coworkers complained about his intimidating behavior. Claimant attributed these incidents to temper flares, which he later believed were due to post-traumatic stress disorder ("PTSD"), addressed below, and his hearing problem because it made him speak loudly. The only other write-up Claimant ever received was in 2006, after he failed to report he had strained his back in a timely manner, as required under Employer's safety policy.

5. Claimant managed the following relevant physical and psychological conditions while working for Employer:

a. Rheumatoid Arthritis ("RA"): Claimant has been afflicted with RA in his wrists, hips, shoulders and elbows for over 30 years. He accommodated his RA at work by taking medication, duct-taping towels around his wrists to keep them warm and just working through the pain. Claimant testified that he never missed a day of work due to this condition. Further, Claimant has not suffered any excess degeneration of his affected joints as a result of his RA. The Referee finds that Claimant's RA is not a factor contributing to his total and permanent disablement.

b. Post-Traumatic Stress Disorder ("PTSD"): Claimant's PTSD is a result of his experiences in Vietnam. Claimant was unaware of his PTSD until 2008, when he was diagnosed by Thomas R. Mullin, Ph.D., a psychologist. Claimant's PTSD causes

occasional temper flares and short-term memory loss, discomfort in social situations, and difficulty sleeping, but does not produce physical symptoms. Claimant attended an extended inpatient PTSD treatment program in 2009, and he continues to participate in on-going group therapy sessions and has made progress with his condition. The Referee finds that Claimant's PTSD is not a factor contributing to his total and permanent disability.

c. Depression: Claimant has experienced bouts of depression for several years. He treats his depression symptoms with medication. The Referee finds that Claimant's depression is not a contributing factor to his total and permanent disability.

d. No impairment ratings: Claimant has never received an impairment rating for any of these conditions; however, he is receiving benefits for a 70% service-connected disability related to his PTSD.

6. Claimant also experienced a string of industrial accidents requiring surgery while working for Employer.

a. Eardrum: In 1990, Claimant punctured his right eardrum, for which he underwent tympanoplasty surgery by John H. Thomas, M.D., an otolaryngologist. Claimant returned to work after his eardrum injury, accommodating his associated hearing problem by asking coworkers to repeat themselves and training his "good ear" toward people when he knew they were speaking to him. Still, he could not hear in the presence of background noise, so he would sometimes miss information directed to him. Likewise, Claimant accommodated his balance problems by making sure he had a grip on something stable whenever he had to work at heights, or by enlisting someone else to do

those jobs. Claimant's eardrum injury precipitated total deafness in his right ear by sometime in 2005 or 2006, as well as vestibular (balance) problems that increased as his hearing declined. Kraig C. McGee, M.D., an otolaryngologist, assessed whole person permanent partial impairment ratings of 8% to Claimant's hearing impairment and 10% to his vestibular impairment. The Referee finds that Claimant's ear problem is not a contributing factor in his total and permanent disability.

b. Knee: In 1999, Claimant twisted his right knee at work, for which he underwent partial meniscectomy in March 2000 by Steven L. Coker, M.D., an orthopedic surgeon. Claimant recovered fully from his knee injury, and returned to work with no significant residual symptoms. The Referee finds that Claimant's knee problem is not a contributing factor in his total and permanent disability.

c. Lower back: By 2001, Claimant had suffered two lower back injuries, for which he underwent a laminectomy and partial diskectomy surgery in July 2001 by Scott Huneycutt, M.D., a neurosurgeon. Claimant also returned to work after his lumbar spine surgery, although his recovery was slow and difficult. When it appeared that he may never again be able to return to work at Employer's because of a permanent lifting restriction, Claimant worked out hard to strengthen his muscles, then convinced Eric Roberts, M.D., his treating physiatrist, to release him without restrictions. Employer also played a role by allowing Claimant to return as an operator (as opposed to a maintenance worker) to reduce the strain on his back. At work, Claimant further accommodated his low back problems by letting others do the heavy tasks when he could. Otherwise, Claimant performed the duties required of his operator job, from April 2002 until his last

industrial accident, in April 2007. Gary C. Walker, M.D., a physiatrist, assessed a 10% whole person permanent partial impairment rating to Claimant's lower back condition. The Referee finds that Claimant's back condition was not a contributing factor in his total and permanent disability.

7. Claimant's final industrial accident occurred in April 2007, when he injured his cervical spine while pressure washing a pump. Claimant underwent a bi-level anterior cervical diskectomy and decompression surgery in July 2007 and a bi-level anterior cervical fusion surgery in December 2007, both by Benjamin Blair, M.D., an orthopedic surgeon.

8. Claimant attempted to return to full-time work after his first cervical spine surgery. However, after 10 days or so, he reinjured his neck. As a result, he was required to undergo a revision surgery in December 2007. Afterward, Dr. Blair permanently restricted Claimant from lifting more than 5 pounds above waist level on a continuous basis, or 10 pounds occasionally. He also restricted Claimant from repetitive squatting, crawling, kneeling, stairs, step ladder or ladder climbing, and further restricted him from more than occasional rotational positions with sitting, rotational standing or bending forward.

9. Claimant's permanent lifting and mobility restrictions relegate him to jobs classified as "sedentary" in addition to a few that could be considered "light duty." As a result, Claimant is physically disqualified from returning to work for Employer, in any position, at the Conda Pump Station.

10. Dr. Blair assessed a whole person permanent partial impairment rating of 18% to Claimant's cervical spine condition. Dr. Blair initially stated Claimant's permanent restrictions in a letter dated November 19, 2008 to a claims examiner for Employer's third party

administrator. In that letter, Dr. Blair opined, "I would apportion 100% to the [cervical spine] injury and 0% to preexisting conditions." Ex. 14, p. 156. On August 17, 2009, however, Dr. Blair authored a follow-up letter in which he attributed the lifting restrictions only, to Claimant's cervical spine injury, and the mobility restrictions to his preexisting lower back condition. The Referee finds that Claimant's 5-pound lifting restriction is due to his cervical spine injury and is a material factor contributing to his total and permanent disablement.

11. After the December 2007 surgery, Dr. Blair advised Claimant that the first surgery had damaged his vocal cords. Claimant explained this is why the more he talks, the hoarser he gets, as he demonstrated at the hearing. The Referee finds Claimant's inability to talk reliably without going hoarse is a significant factor mitigating against his ability to perform customer service jobs.

12. Also after Claimant's last industrial injury, he was assessed a 1% whole person permanent impairment rating for carpal tunnel syndrome ("CTS"). Dr. Walker imposed this impairment rating following his August 26, 2009 independent medical examination ("IME") based upon clinical evidence of a borderline abnormal Tinel's response and a 2007 electromyogram confirming mild CTS. Dr. Walker noted that Claimant had significant intermittent symptoms, in that his hands go numb when he drives, but no atrophy or weakness as a result of his CTS. Further, Dr. Walker did not issue any restrictions. The Referee finds that Claimant's CTS is not a contributing factor in his total and permanent disability.

13. Nancy Collins, Ph.D., the vocational rehabilitation consultant retained by Employer, opined that it would take a sympathetic employer to hire Claimant. She explained that Claimant's lifting and mobility restrictions limit him to cashiering and customer service

positions, but Claimant is not a good candidate for these jobs because of his hearing impairment and, potentially, his personality characteristics. "The combination of Mr. Tarbet's hearing loss and balance issues and his physical limitations for his low back and neck, makes returning to work very difficult…He is realistically, totally disabled from traditional, full-time work in his labor market." Ex. 6, p. 8.

14. Bill Jordan, M.A., the vocational rehabilitation consultant retained by ISIF, opined that Claimant is totally and permanently disabled as a result of his lifting restrictions due to the cervical spine injury, alone. "He wouldn't have a relevant labor market available to him after the restrictions Dr. Blair placed on him." Ex. 28, p. 27.

15. Claimant presented well at the hearing, appeared younger than his age, is not "disabled-looking," and knows many potential employers in the community. He is motivated to work and has transferrable skills in heavy equipment operation, mechanical work, truck driving, materials ordering, inventory, welding, diagnostics/repair and trouble-shooting, and basic computer operation. Nevertheless, Claimant was unable to obtain a job offer, even after a 14-month search in which he submitted approximately 20 applications to local businesses.

DISCUSSION AND FURTHER FINDINGS

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

ISIF liability.

Idaho Code § 72-332 (2) provides that ISIF is liable for the remainder of an employee's income benefits, over and above the benefits to which an employee is entitled solely attributable to an industrial injury, when the industrial injury combines with a preexisting permanent physical impairment to result in total and permanent disablement of the employee. "Permanent physical impairment" is as defined in Idaho Code § 72-422, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become unemployed. *Id.* 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 preexisting physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

In *Dumaw v. J. L. Norton Logging,* 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court listed four requirements a claimant must meet to establish ISIF liability under Idaho Code § 72-332:

(1) Whether there was indeed a preexisting impairment;

(2) Whether that impairment was manifest;

(3) Whether the alleged impairment was a subjective hindrance to employment; and

(4) Whether the alleged impairment in any way combines with the subsequent injury to cause total disability.

Dumaw, 118 Idaho at 155, 795 P.2d at 317.

16. The Idaho Supreme Court has identified two theories under which ISIF can escape liability by establishing the absence of the requisite "combination" under the fourth prong of *Dumaw*. First, if Claimant was totally and permanently disabled (an "odd-lot" worker) immediately prior to the relevant industrial injury, the combination requirement cannot be satisfied. *Bybee v. State, Indus. Special Indem. Fund,* 129 Idaho 76, 921 P.2d 1200 (1996). Second, there is no combination if the disability would have been total regardless of preexisting conditions. *Selzler v. State of Idaho, Industrial Special Indemnity Fund,* 124 Idaho 144, 857 P.2d 623 (1993). Here, ISIF has elected to argue the latter proposition.

17. Employer relies heavily upon the opinion of Dr. Collins to support its position that Claimant would still be employable, if not for his preexisting impairments. She concluded that, after a short training period, Claimant would be able to work as a cashier or in a customer service job, if not for Claimant's deafness in his right ear.

18. Employer also relies upon Dr. Blair's *second* opinion concerning apportionment, revised to assign 100% of Claimant's mobility restrictions to his preexisting lumbar spine injury, but leaving intact his apportionment of 100% of Claimant's 5-pound lifting restriction to his cervical spine injury. Although Dr. Blair's unexplained change of opinion from 2008 to 2009 is problematic, it is unnecessary to nitpick this point because the Referee finds Claimant is totally and permanently disabled solely as a result of his 5-pound lifting restriction, plus his nonmedical factors. The Referee also finds sufficient evidence to establish that the lifting restriction is due to Claimant's last industrial injury.

19. Although the parties stipulated to, or did not dispute, Claimant's total permanent disability status, they disagree as to how Claimant's various physical impairments and

nonmedical factors add up to get him there. As a result, some discussion and findings pertaining to Claimant's odd-lot status are necessary.

20. 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).

21. Claimant has failed to prove odd-lot status by the first method because he never attempted employment without success. However, the Referee finds Claimant has established odd-lot status by the second and third methods for the following reasons. First, the evidence in the record establishes that Claimant's, Dr. Collins' and Mr. Jordan's employment searches on Claimant's behalf all met with failure. Along those lines, Claimant submitted approximately 20 applications over a 14-month period without ever even being given an interview. Second, the Referee finds that Claimant was sincere in his job search and, no doubt, would be working if given a reasonable opportunity. Third, the Referee finds that due to Claimant's 5-pound lifting restriction due to his cervical injury and his nonmedical factors, as described more fully below, it would be futile for him to continue looking for work.

22. The nonmedical factors under scrutiny include Claimant's age, education, transferrable skills, and the Soda Springs labor market, as they affect his employability.

a. Age: Claimant is an older worker. Surmising that age is not a significant factor in Claimant's case because he looks young and knows everyone, Dr. Collins nevertheless

opined that, although he could learn on the job, "…at his age of 62, many employers will not be willing to train him." Ex. 6, p. 5. Along those lines, Claimant testified that because he knows many potential employers in the community, they are aware of his disabilities.

b. Education: Claimant possesses a formal education through the 10th grade, with specialized on-the-job training through the years. Dr. Collins explained that Claimant's education level makes it more difficult for him to find a sedentary job. However, neither she nor Mr. Jordan believed Claimant's education was a prime factor in preventing him from working because he had transferrable skills, was bright and motivated, and also possessed a great deal of experience.

c. Transferrable skills: Dr. Collins identified Claimant's transferrable skills as: heavy equipment operation, mechanical aptitude and skill, truck driving, materials ordering, inventory, welding skills, diagnostics/repair and trouble shooting, and basic computer operation. Then she ruled out jobs where he could apply these skills because they "require too much sitting or standing." Ex. 6, p. 6. Dr. Collins' opinion does not recognize that Claimant is also precluded from these jobs for other reasons. Claimant's 5-pound lifting restriction prevents him from driving truck, operating heavy equipment and doing most welding tasks. Dr. Collins suggested that Claimant could perform jobs requiring basic computer skills, such as cashiering, customer service or sales, if not for his hearing problem. However, she clearly states in her opinion that Claimant would need good hearing *and* "a personality to work in customer service roles" in order to do these jobs, given his physical restrictions. Ex. 6, p. 7. She also states, "…his hearing and

lack of customer service skill will preclude most of this work." *Id.* Reading Dr. Collins' opinion as a whole, rather than relying on just her concluding statement, the Referee is persuaded that Claimant would need more acute hearing, as well as some customer service aptitude, to be a viable candidate for employment in light of his lifting restriction and other non-medical factors.

d. Customer service: The Referee finds that Claimant's preference for working alone, lack of customer service experience and inability to talk for long periods without going hoarse would preclude Claimant from jobs requiring customer service, even in the absence of his hearing impairment. As a result, Employer's argument that Claimant could work in customer service jobs but for his hearing impairment, is rejected.

e. Local labor market: The Soda Springs local labor market boasts a lower-than-average unemployment rate but, nevertheless, further compounds Claimant's job search difficulties. Given the state of the national economy, more outside-area applicants are vying for fewer jobs because there is less voluntary turnover. Mr. Jordan reported that the types of jobs available in Soda Springs in November 2009 were: Autobody Repairer, Sheepherder, Food Safety Maintenance Supervisor, Electrician, Human Resource Administrator, Cashier, Food Service Manager and Janitor, in addition to some other part-time positions, and that Claimant was either unqualified or unable to perform any of them. Dr. Collins reported some vague details about a job listing for a position involving "setting up a store" that Claimant may have been able to do. However, Dr. Collins was unable to discern much information from the ad, like the physical requirements for the job and whether it was full-time and permanent. Therefore, this evidence is insufficient

to establish that the position in question was a realistic employment opportunity for Claimant. Further, even though Claimant was highly motivated to find work, he eventually gave up seriously looking due to the lack of positive response he received from the approximately 20 applications that he submitted.

23. The Referee finds that Claimant would be totally and permanently disabled, even in the absence of his preexisting permanent physical impairments. His nonmedical factors, combined with his 5-pound lifting restriction stemming from his cervical injury, render him totally and permanently disabled. As a result, ISIF is not liable for any portion of Claimant's benefits.

CONCLUSIONS OF LAW

1. Claimant has proven that he is totally and permanently disabled.

2. ISIF is not liable for Claimant's benefits and the Complaint against it should be dismissed with prejudice.

3. All other issues are moot.

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 __10th____ day of June, 2010.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __14th___ day of __June_____, 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:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID TARBET, Claimant, v. J. R. SIMPLOT COMPANY, Self-Insured Employer, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	)	**IC 2007-012004** **2007-038938** **ORDER** Filed June 14, 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 has proven that he is totally and permanently disabled.

2. ISIF is not liable for Claimant's benefits and the Complaint against it is dismissed with prejudice.

3. All other issues are moot.

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

DATED this __14th___ day of ___June_____, 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 __14th__ day of __June____ 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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