BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

THOMAS SCHAPER, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2014-000243** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED SEP 15 2023 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Boise, Idaho, on November 15, 2022. Darin Monroe represented Claimant. Paul Augustine represented Defendant State of Idaho, Industrial Indemnity Fund (ISIF). The parties submitted oral and documentary evidence at hearing and prepared post-hearing briefs. One post-hearing deposition was taken. The matter came under advisement on August 3, 2023.

ISSUES

The issues listed as ripe for decision at hearing were:

1. Whether Claimant is totally and permanently disabled;
2. Whether ISIF is liable under Idaho Code § 72-332; and if so, and
3. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant asserts he is totally and permanently disabled as the result of his industrial injuries incurred on December 20, 2013, involving bilateral shoulders and wrists, cervical spine, and low back, in combination with pre-existing medical issues including left shoulder (which Claimant

argues was aggravated in the subject accident), Achilles tendon, and cervical spine injuries. Defendant ISIF is liable for its share of Claimant's total and permanent disability.

Defendant argues Claimant is not totally and permanently disabled. Furthermore, all of Claimant's preexisting conditions other than his left shoulder do not meet the criteria for ISIF liability. However, Claimant's left shoulder was not aggravated in the subject accident; it suffered a new injury. Finally, Claimant's permanent disability, even if total, is the result of the subject accident, and Claimant's preexisting medical conditions did not combine with his industrial injuries incurred in December 2013.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;

2. Joint exhibits A through AAA, admitted at hearing;[1] and

3. The post-hearing deposition transcript of Cali Eby, MPA., taken on May 1, 2023;

The objection made during Ms. Eby's deposition at page 30 is overruled as the statement of a party opponent is not hearsay.

FINDINGS OF FACT

1. Claimant was sixty-seven years of age on the date of hearing.

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[1] The parties' joint exhibits utilized a bizarre and confusing lettering system, where exhibit AA follows exhibit A chronologically, but in the exhibits notebooks, it is in a separate volume, located after exhibit Z. This unwieldy pattern repeats through all 2400 plus pages of exhibits, the end result being a jumble of documents difficult to properly track, which in turn makes reviewing them much more difficult. The next time parties submit joint exhibits with more than 26 listed exhibits, it would be wise to simply number the exhibits, instead of using letters beyond Z.

2. Claimant graduated high school and attended junior college for two years. He attained no degrees.

EMPLOYMENT OVERVIEW

3. For most of his adult work life, Claimant has taken jobs in the moving and storage field. He has been a local furniture mover, a moving truck driver, both local and long distance, a warehouse supervisor, where goods were inventoried and stored, (in that job he supervised up to 100 workers), and a dispatcher who arranged assignments for laborers. Claimant also has experience working with a restoration company where he sorted personal property in fire or water damaged homes and made sure it was sent to the proper department for restoration. He has also worked as a packer, packing customers' belongings in boxes preparatory to moving.

3. After a shoulder injury in 2000, Claimant needed assistance with lifting heavy objects, and tried to stay away from jobs requiring such lifting. However, over time Claimant returned to driving and loading/unloading (with help) moving trucks.

4. In 2006, pursuing better wages than he was making as a mover, Claimant went to work for Swift Transportation, (Swift) his time-of-injury employer. At Swift, Claimant was just a truck driver. He had no loading or unloading responsibilities. His heavy lifting was primarily limited to chaining up his truck and knocking ice from the brakes with a sledgehammer when needed. Claimant worked for Swift for ten years, he quit in November 2014. He has not worked since.

PRIOR MEDICAL OVERVIEW

5. In 1984, Claimant injured his knee, resulting in surgery. That injury does not figure in the current analysis, Claimant testified he has had no problems with his knees since healing from that surgery.

6. Claimant ruptured his right Achilles tendon in 1995, which was surgically repaired. He was given a 5% lower extremity impairment rating. The injury impacted Claimant's ability to run and jump, but did not impact his ability to work, according to his testimony. At the same time as the Achilles repair surgery, Claimant had a hernia surgically repaired. Although the result was not good (the mesh did not hold), Claimant testified the hernia likewise has had no detrimental effect on his ability to work, including heavy lifting.

7. Claimant had a laminectomy, foraminotomy, and discectomy surgery in 1998 for a herniated C6-7 disc. After recovering from that surgery Claimant returned to his profession as an owner-operator furniture mover. He testified the surgery did not hinder his work, but he "had to hire more guys because of the injury and I didn't want to reinjure it." Tr. p. 31.

8. In 2000, Claimant injured his left shoulder. A subsequent MRI showed a full thickness tear to the rotator cuff and a torn bicep tendon. In 2001, Claimant underwent a left shoulder arthroscopy, labral debridement, and open acromioplasty/bicep tenodesis surgery. During the procedure it was discovered Claimant had an irreparable supraspinatus cuff tear. Claimant testified that his recovery was protracted, he did not work for two years after his surgery. For this injury Claimant received a 13% whole person impairment rating and the following restrictions with his left arm; no lifting over 25 pounds to waist height, 15 pounds to shoulder height, and 10 pounds over the shoulder height. Claimant also was restricted to occasional pushing or pulling with his left arm below shoulder height, and no pushing, pulling or reaching activities above shoulder height. Claimant returned to work thereafter but no longer lifted heavy furniture.

INDUSTRIAL ACCIDENT AND TREATMENT (INCLUDING IMEs)

9. On December 20, 2013, Claimant slipped and fell on ice while in Canada picking up a load for Swift. He injured both shoulders, his low back, cervical spine, and both wrists.

10. Claimant's injuries resulted in surgeries to his low back, right and left shoulders, right wrist, and his cervical spine.

11. On December 4, 2014, Claimant underwent an L1-L2 decompression and fusion surgery. Claimant testified that recovery was difficult, and he is left with daily activity limitations such as his inability to bend to put on socks and tie his shoes. He can no longer golf. Standing is limited to about an hour, and sitting for more than two and a half hours requires him to stand and stretch, or his low back will tighten up and become painful.

12. Regarding his low back, Claimant was declared MMI as of June 2015 by his surgeon, Thomas Manning, M.D., who also assigned Claimant a 6% whole person impairment rating and work restrictions for his low back of frequent lifting of 40 pounds, 50 pounds occasionally, and no repetitive lifting tasks.[2]

13. After completing a work hardening program in late 2016, Robert Friedman, M.D., assigned Claimant permanent low back lifting restrictions of no more than 25 pounds frequently, 50 pounds occasionally, and no twisting or torquing with his low back. Also, Claimant should avoid exposure to prolonged low-frequency vibration, such as long-haul truck driving.

14. Claimant's bilateral shoulder injuries were addressed by Jeffrey Hessing, M.D., in May 2014. Dr. Hessing felt Claimant suffered from preexisting bilateral rotator cuff deficient shoulders with likely bilateral unrepairable chronic rotator cuff tears. After conservative treatment, Dr. Hessing sought authorization for an arthroscopic debridement of Claimant's right shoulder in March 2015. Swift's surety scheduled an IME.

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[2] Claimant underwent a surgery in November 2019 which extended his lumbar fusion, but Dr. Manning opined that the second surgery did not change Claimant's impairment or restrictions.

15. Claimant was seen by Roman Schwartzman for the IME on April 7, 2015. Dr. Schwartzman felt Claimant had advanced degenerative changes in both shoulders sufficiently severe to predispose him to total shoulder arthroplasties independent of any acute injury, coupled with acute biceps labral injury to both shoulders. Dr. Schwartzman recommended first a right shoulder arthroscopy with bicep tenodesis, debridement and decompression. Once recovered from right shoulder surgery, Claimant could undergo debridement and biceps tenodesis of his left shoulder.

16. Dr. Schwartzman stressed the suggested surgeries, if successful, would still leave Claimant with advanced preexisting degenerative changes and tears of both right and left cuffs, which conditions were unrelated to his work-related slip and fall in 2013. As he put it, the objective for the surgeries "would be to give him limited useful function over the next few years...." JE K, pp. 348, 349.

17. On May 1 and September 16, 2015, Dr. Schwartzman performed the contemplated surgeries on Claimant's right and left shoulders respectively.[3] In December 2015, Dr. Schwartzman rated Claimant's left biceps tenotomy at 3% upper extremity related to his 2013 industrial accident. Claimant's other shoulder issues were not rated as Dr. Schwartzman felt they were nonindustrial.

18. Dr. Friedman rated Claimant's right shoulder at 10% upper extremity, with 50% of that rating due to nonindustrial preexisting conditions. Dr. Friedman rated Claimant's left shoulder at 3% for his industrial accident. (He rated Claimant at 15% UE for all conditions combined.) Finally, Dr. Friedman imposed work restrictions of no repetitive lifting over the shoulder greater

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[3] Although a tenodesis was suggested, the actual biceps procedure performed was a tenotomy.

than 20 pounds. He opined this restriction should have been in place since Claimant's cervical laminectomy in 1998.

19. Claimant testified that he can only lift his right arm to chest height and is very limited in the weight he can lift with it. He does not use his right arm while driving. He claimed he cannot lift at all using just his right arm but can lift up to 20 pounds using both arms. He also feels he can lift 20 pounds using just his left arm and can lift his left arm somewhat higher than shoulder level. He cannot hold either hand in front of him for extended time periods. Claimant's pain in his left shoulder was unchanged after the 2013 work accident compared to before the accident but his ability to lift using his left shoulder is diminished since the 2013 accident and subsequent surgery.

20. As a result of the 2013 accident, Claimant underwent right carpal tunnel surgery in July 2015. After the surgery Claimant was released without restrictions related to his bilateral carpal tunnel syndrome. He still feels his right hand is weak.

21. Dr. Manning performed a discectomy and fusion at C6-7 in April 2016 to treat a disc protrusion at that level. By August of that year Dr. Manning declared Claimant medically stable and released him to work without restrictions for his cervical spine. Claimant's only residual complaint from his cervical surgery is difficulty in looking up and fully rotating his head.

22. Dr. Friedman assigned Claimant a 6% whole person permanent impairment rating for his cervical spine, and apportioned half of that impairment to Claimant's preexisting condition and surgery. His restrictions for Claimant's cervical spine consist of no repetitive overhead lifting greater than 20 pounds, which restriction should have been in place since his prior neck surgery in 1994. The subject accident did not, in Dr. Friedman's opinion, result in any increase in restrictions.

23. Dr. Friedman opined that Claimant was medically stable as of late 2016, and his various restrictions limited him to medium duty work moving forward.

24. In early 2021, Claimant was seen by Richard Radnovich, M.D., at Claimant's request, for an independent medical examination. Dr. Radnovich reviewed medical records, took a history, and performed an examination of Claimant. He listed Claimant's lumbar injuries and subsequent surgeries, bilateral shoulder injuries and surgeries, right carpal tunnel syndrome and surgery, and cervical disc disease with surgery as all being related in whole to Claimant's 2013 industrial accident in question, with no apportionment for preexisting conditions.

25. In his report dated January 5, 2021, Dr. Radnovich assigned impairment ratings for Claimant's combined shoulders at 21% whole person, lumbar spine at 17%, and cervical spine at 6%, but also, in that same report, summarized Claimant's impairments as "final whole person impairment ratings of 13% for his lumbar spine, 16% for his cervical spine and 21% for his shoulders." Regardless of which ratings are used, Dr. Radnovich was clear that Claimant's impairments were caused by his 2013 work accident, with no apportionment.

26. Dr. Radnovich imposed the following restrictions on Claimant;

- No overhead work,
- No lifting from waist to chest repetitively greater than 10 pounds,
- No repetitive lifting, squatting, twisting, bending, stooping, crawling, or climbing stairs or ladders,
- No lifting or carry greater than 20 pounds,
- No exposure to low frequency vibration,
- No repetitive terminal, cervical or lumbar range of motion, no repetitive pushing or pulling.

Dr. Radnovich also noted prolonged sitting or standing could increase Claimant's pain. JE WW, p. 2110.

VOCATIONAL EXPERTS

27. Claimant hired Douglas Crum to evaluate the "factors that might lead to a finding of permanent partial disability in excess of permanent partial impairment." JE TT, p. 2011. Mr. Crum reviewed relevant medical records and other documentation of interest, including Claimant's deposition testimony, and he interviewed Claimant telephonically. After summarizing Claimant's medical (including IME reports), education, and work history, and considering Claimant's labor market access, Mr. Crum reached two conclusions based on which medical opinion is afforded the greater weight. Because Dr. Friedman opined that Claimant's current restrictions were identical to preexisting restrictions, if Dr. Friedman's opinions were used, Claimant would have no permanent disability greater than impairment. If Dr. Radnovich's opinions carried the day, Claimant would be 100% disabled because he suffered a 100% reduction in labor market access due to a combination of Claimant's age, lack of education and computer skills, work history, and imposed permanent restrictions.

28. Mr. Crum concluded his report by noting that "given the restrictions recommended by Dr. Radnovich, [Claimant] is totally and permanently disabled. The total and permanent disablement does not require the combination of any pre-existing conditions." JE TT p. 2020.

29. While still a party to this litigation, Swift hired Barbara Nelson to prepare a disability evaluation. In March 2021, she prepared a very thorough summary of Claimant's medical history, both pre-and-post 2013 accident. She then proposed three scenarios for disability. The first scenario focused on Dr. Friedman's opinions. She noted Dr. Friedman's restrictions for the 2013 accident did not exceed restrictions Claimant had, or should have had, in place for his prior left shoulder and cervical injuries. If Dr. Friedman's opinions are used, Claimant would have no disability greater than his impairment if not considering Claimant's chronic pain condition.

30. Under a second scenario, Ms. Nelson considered Claimant's chronic pain in conjunction with Dr. Friedman's opinions. Ms. Nelson noted Claimant's chronic pain requires regular meetings with a pain management physician, daily medications, including narcotics, and curtailment of many activities Claimant used to enjoy. Ms. Nelson acknowledged Claimant had received no permanent restrictions stemming from his pain condition but felt Claimant's chronic pain reduced his ability to work. Ms. Nelson felt it was a mistake not to account for Claimant's pain when calculating his permanent disability.

31. Even with his chronic pain condition, Ms. Nelson felt jobs existed for Claimant. Most notably, local driving jobs, such as light delivery with companies such as Lyft and Uber would be worth looking into if Claimant had a newer four-door automobile required by such companies. Without a new vehicle, Claimant could likely find work with companies such as Erandz, which was looking for drivers to hire out as errand runners or light delivery such as dry cleaning, groceries, prescriptions, etc. She also found available jobs through Walmart, Panera Bread, Bogus Basin, and Quest, all of which were looking for light delivery or personnel hauling.

32. Ms. Nelson also pointed out that Claimant told her he was interested in sales, and "appointment sales" jobs, calling prospective clients for various products. Similarly, Claimant could pursue call center jobs, many of which have moved to in-home jobs in recent times.

33. While Ms. Nelson believed Claimant had lost a majority of his job market access - 85% - he was not totally and permanently disabled. It would not be futile for him to look for work. She opined that 60% of Claimant's disability rating stemmed from his preexisting conditions and 25% of his disability rating was due to his 2013 work accident.

34. In her third scenario, Ms. Nelson volunteered that if the Commission did find it would be futile for Claimant to look for work, Claimant's odd-lot status would be due to

the combined effects of his preexisting conditions and his permanent disability stemming from his 2013 work accident. She concluded the 2013 aggravated and accelerated Claimant's preexisting left and right shoulder and cervical spine conditions but did not specifically point to any particular medical records as authority for her opinion.

35. Ms. Nelson did not initially review Dr. Radnovich's report, and thus his opinions were not included in her first report.

36. In June 2021, after reviewing his report, and the reports of Mr. Crum and Cali Eby (ISIF's vocational expert), Ms. Nelson authored a supplemental report. She did not change her mind on Claimant's 85% disability rating, although she did acknowledge the job market in June 2021 was much better than when she wrote her initial report. She listed several new delivery jobs which would fit within Dr. Radnovich's restrictions. In conclusion, she agreed with Ms. Eby that jobs existed for Claimant in his labor market (several of which she listed in her supplemental report), and disagreed with Mr. Crum that Claimant was totally and permanently disabled such that it would be futile to even attempt to land one of those available jobs.

37. As alluded to above, ISIF hired Cali Eby to prepare a vocational assessment, which she completed on April 27, 2021. She also reviewed records and testimony, which she summarized, and interviewed Claimant via Zoom. After evaluating all relevant medical, educational, employment and personal history, Ms. Eby calculated Claimant's loss of job market access at 19% based on restrictions, placing Claimant in a medium-duty work category. She calculated his loss of earning capacity at 38%. She then calculated Claimant's permanent partial disability at 28% inclusive of PPI. She felt Claimant was employable and could work in dispatching, sales, local driving, driving instruction, but not long-haul driving. It would not be futile for Claimant to look for work in Ms. Eby's opinion.

38. Subsequent to preparing her initial report, Ms. Eby was provided Dr. Radnovich's report. She recalculated her PPD rating based on his restrictions at 38.7% inclusive of PPI.

DISCUSSION AND FURTHER FINDINGS

PERMANENT DISABILITY

39. Permanent disability results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. Evaluation (rating) of permanent disability is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425.

40. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988).

41. The extent and causes of permanent disability are factual questions committed to the particular expertise of the Commission, which considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Indus.,* 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund,* 130 Idaho 278, 939 P.2d 854 (1997); *Thom v. Callahan,* 97 Idaho 151, 155, 157, 540 P.2d 1330, 1334, 1336 (1975). The burden of establishing permanent disability is upon Claimant. *Seese v. Idaho of Idaho, Inc.,* 110 Idaho 32, 714 P.2d 1 (1986).

42. The initial issue for consideration herein is whether Claimant is totally and permanently disabled. Total and permanent disability may be proven either by showing that Claimant's permanent impairment together with nonmedical factors totals 100% or by showing that he fits within the definition of an odd-lot worker. *Christensen v. S.L. Start & Assoc., Inc.,* 147 Idaho 289, 292, 207 P.3d 1020, 1023 (2009). 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, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). 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).

43. Claimant may satisfy his burden of proof and establish total permanent disability under the odd-lot doctrine in any 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 his behalf have searched for other work and other work is not available; or (3) by showing that any efforts to find suitable work would be futile. *Lethrud v. Industrial*

Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995). The burden of establishing odd-lot status rests with Claimant. *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990).

44. Claimant, utilizing the opinion of Mr. Crum, argues he is 100% disabled. He also argues it would be futile for him to even attempt to find employment under the odd-lot doctrine.

45. Three vocational experts opined on the extent of Claimant's permanent disability. As noted above, Mr. Crum found Claimant to be 100% disabled. He did so by relying on restrictions imposed by Dr. Radnovich, who imposed the most limiting restrictions of any physician. On the other hand, Mr. Crum acknowledged that if Dr. Friedman's opinions were utilized, Claimant suffered no additional permanent disability from his subject work accident in 2013.

46. Mr. Crum's opinions put Claimant in a tough spot. If Dr. Radnovich is believed, *all* of Claimant's permanent restrictions are the result of his 2013 accident and none of his prior conditions contribute to Claimant's current disability. Conversely, if Dr. Friedman's opinion carries the greater weight, Claimant suffered *no* additional permanent disability from the 2013 work accident. Mr. Crum concluded that Claimant was totally and permanently disabled from the 2013 accident alone, and such finding did not require the combination of any preexisting condition.

47. Ms. Nelson found Claimant suffered a high degree of disability but was not totally and permanently disabled. He did not fit the description of an odd-lot worker, as he did not prove he had looked for work or had someone look for work for him, and it was not futile for him to attempt to find employment. In fact, she listed several jobs in Claimant's labor market which fit within his restrictions and skill sets. Ms. Nelson placed an emphasis on Claimant's chronic pain as limiting his chances for success in the workplace. However, even using Dr. Radnovich's

restrictions, Ms. Nelson was able to identify available employment positions in Claimant's labor market for which he appeared qualified.

48. Ms. Eby also found Claimant was not totally disabled. She too found jobs available to Claimant in his labor market. The difference between Ms. Eby's and Ms. Nelson's reports centered on the extent to which Claimant lost job opportunities due to his chronic pain, and an improved job market between the time of Ms. Nelson's first report and Ms. Eby's report. Ms. Eby also opined that because Dr. Radnovich's restrictions, which he attributed in whole to the 2013 accident, were more limiting than those imposed by Dr. Friedman for Claimant's preexisting conditions, there could be no "combining" element for ISIF liability. The 2013 injuries and resultant work restrictions and limitations eclipsed any previous restrictions applicable to Claimant.

49. No expert other than Mr. Crum felt it would be futile for Claimant to seek employment.

50. Ms. Nelson's opinions on the issue of the extent of Claimant's permanent disability carry the most weight. She accounted for Claimant's physical limitations, not just suggested restrictions, when calculating his chances for finding employment. Claimant testified to significant limitations in his daily activities of a type which would negatively affect his employability. Ms. Nelson acknowledged that there were not a significant number of jobs available to Claimant due to his real-life limitations coupled with medically imposed restrictions designed to prevent further injury. She initially found that although Claimant had lost up to 85% of his labor market, there were still some jobs which he could do, even when all his injuries, limitations, and restrictions were considered. By the time of her supplemental report in June 2021, she recognized that the job market was improved from when she initially found Claimant had lost

85% of his labor market. She was able to find even more jobs for which Claimant would qualify. There is nothing in the record which would hint at the notion that Claimant's job market at the time of hearing in November 2022 had deteriorated since June 2021.

51. When the totality of the evidence is considered, Claimant has failed to prove by a preponderance of the evidence that he is totally and permanently disabled.

52. Claimant argues that he has worked his entire life, even exceeding work restrictions in order to maintain employment. If he could return to work, he would have. His limited transferable skills, advanced age, and chronic pain and physical limitations render him unemployable, and thus totally and permanently disabled. Although that argument did not carry the day in light of the totality of the evidence, including a fairly significant number of open jobs in Claimant's job market for which he would qualify, nevertheless, even if Claimant was determined to be totally and permanently disabled, he still would have to establish all elements of liability, set out below, against ISIF in order to recover benefits from the fund.

ISIF LIABILITY

53. Idaho Code § 72-332 states in relevant part;

> (1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury … arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury … suffers total and permanent disability, the employer and its surety shall be liable for payment of compensation benefits only for the disability caused by the injury … and the injured employee shall be compensated for the remainder of his income benefits out of the ISIF account.

54. To establish ISIF liability, Claimant must prove his preexisting permanent physical impairment(s) combined with the subsequent industrial injury to cause total permanent disability.

55. In *Aguilar v. Industrial Special Indemnity Fund*, 164 Idaho 893, 901, 436 P.3d 1242, 1250 (2019), the Idaho Supreme Court summarized the four inquiries that must all be satisfied to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was a preexisting impairment; (2) whether that impairment was manifest; (3) whether the impairment was a subjective hindrance to employment; and (4) whether the impairment in any way combined with the subsequent injury or was aggravated and accelerated by the subsequent injury to cause total disability.

56. Defendant contends not only that Claimant is not totally and permanently disabled but also that Claimant failed to prove all elements of liability against the fund. Specifically, Defendant argues Claimant failed to prove the "subjective hindrance" and "combining" elements.

57. Claimant's preexisting left shoulder condition was a subjective hindrance to employment. He received work restrictions and a 13% impairment rating. He was advised to seek a different profession than furniture mover. While he returned to the moving profession, he either limited his jobs to lighter duty work or had help with the heavier tasks. His time-of-injury job with Swift involved limited heavy lifting (chains in the winter). While Claimant was able to find work after his left shoulder injury in 2000, certain heavy lifting jobs were no longer available to him, which is by definition a hinderance to employment. The same argument could be made for Claimant's low back. While the low back did not directly hinder Claimant's employment, it did require him to rely on extra help when doing the heavier lifting.

58. Claimant met the "subjective hindrance" element of ISIF liability.

59. Claimant's injuries from his 2013 accident did not combine with his preexisting conditions to render him totally and permanently disabled. No evidence in the record exists which establishes the fact that "but for" Claimant's prior conditions his injuries sustained in 2013 would

not have been sufficient to render him totally and permanently disabled, but because of those prior conditions *and* his 2013 injuries, Claimant has been taken out of the workforce. To the contrary, Dr. Radnovich clearly places the blame for all of Claimant's imposed restrictions and physical limitations on Claimant's industrial accident in 2013 while working for Swift. Dr. Radnovich's restrictions are more onerous than those imposed in 2001 for Claimant's left shoulder, and more restrictive than those imposed by Dr. Friedman for all of Claimant's various preexisting conditions, including his cervical spine, bilateral shoulders and wrists, low back, and Achillies' tendon.

60. Claimant's permanent restrictions, either severe or total, were the result of injuries he sustained in his industrial accident on December 20, 2013. Any restrictions in place prior to then were eclipsed by the injuries of that date. Claimant testified he was not limited in his activities prior to 2013. Claimant's chronic pain syndrome which affects his ability to perform many tasks was not present prior to the 2013 accident. Prior to that accident Claimant was able to perform his employment duties for Swift without accommodation. Dr. Radnovich, the last physician in time to address Claimant's permanent restrictions, placed the cause of all of Claimant's restrictions on the 2013 work accident. This opinion is in line with Claimant's testimony and the weight of the evidence of record. Dr. Radnovich's opinion on causation is persuasive.

61. No physician has opined that Claimant's restrictions were the combined effect of his preexisting conditions coupled with permanent disability resultant from his 2013 accident. Further, Claimant undertook no "but for" analysis in briefing. It is certainly not self-evident when considering the record that there was a combining effect which led to Claimant's current disability. In fact, the record does not support the argument that but for Claimant's preexisting conditions, or any of them, the limitations and restrictions from which Claimant currently suffers would be less, and Claimant would be capable of work which he is currently incapable of performing.

Instead, Claimant's preexisting conditions did not limit him in his job duties, but his injuries from the 2013, looked at in isolation, precluded Claimant from most jobs he could previously accomplish. Even without considering his preexisting conditions, as Mr. Crum observed, Claimant's 2013 injuries took him either out of the job market or severely limited his job prospects. Claimant's preexisting conditions add nothing to his current disability profile.

62. When the totality of the evidence is considered, Claimant has failed to prove that his preexisting impairments in any way combined with his injuries sustained in his 2013 work accident or that any of Claimant's preexisting conditions were aggravated and accelerated by the subsequent injury so as to cause total disability.

CONCLUSIONS OF LAW

1. When all the evidence is considered, Claimant has failed to prove he is totally and permanently disabled;

2. Even assuming Claimant is totally and permanently disabled, when all the evidence is considered, Claimant has failed to prove the elements of ISIF liability have been satisfied.

RECOMMENDATION

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

DATED this 21st day of August, 2023.

INDUSTRIAL COMMISSION

Brian Harper

Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September 2023, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by email transmission and regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

THOMAS SCHAPER, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2014-000243** **ORDER** FILED SEP 15 2023 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Brian Harper 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, IT IS HEREBY ORDERED that:

1. When all the evidence is considered, Claimant has failed to prove he is totally and permanently disabled.

2. Even assuming Claimant is totally and permanently disabled, when all the evidence is considered, Claimant has failed to prove the elements of ISIF liability have been satisfied.

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

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IT IS SO ORDERED.

DATED this the 15th day of September, 2023.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Aaron White, Commissioner

ATTEST:

Christina Nelson
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 2023, a true and correct copy of the foregoing **ORDER** was served by email transmission and regular United States Mail upon each of the following:

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