

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

ROBERT WADE FULFER,

Claimant,

v.

RUAN LOGISTICS CORPORATION,  
Employer, INDEMNITY INSURANCE CO. OF  
NORTH AMERICA, Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL  
INDEMNITY FUND,

Defendant.

**IC 2018-010978**

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

**FILED  
JULY 26, 2024  
IDAHO INDUSTRIAL COMMISSION**

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Alan Taylor. Upon his retirement this matter was reassigned to Referee Douglas A. Donohue who conducted a hearing in Boise on March 17, 2023. D. Samuel Johnson represented Claimant. Matt Pappas represented Employer and Surety. Paul Augustine represented ISIF. All parties presented oral and documentary evidence. All parties submitted a Joint Stipulation of Facts on July 11, 2023. All parties took post-hearing depositions and submitted briefs. The case came under advisement on December 11, 2023, but was informally stayed upon representations from the parties that a settlement was imminent. Employer and Surety settled with Claimant. This settlement was approved February 6, 2024. On May 22, 2024, ISIF represented that issues remained between Claimant and ISIF and filed a Motion for Final Decision. This matter is now ready for decision.

**ISSUES**

The issues to be decided as revised by the settlement are:

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 1**

1. Whether Claimant is entitled to total and permanent disability;
2. Whether Claimant is entitled to permanent total disability under the odd-lot doctrine;
3. Whether ISIF is liable under Idaho Code § 72-332; and
4. Apportionment to establish ISIF's share of liability under *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984).

All other issues were resolved by the settlement between Claimant and Employer and Surety.

### **CONTENTIONS OF THE PARTIES**

Claimant contends he is totally and permanently disabled as an odd-lot worker. Claimant injured his right shoulder and arm trying to catch himself from a fall as he exited his semi-truck. He landed on his buttocks and injured his low back. Employer and Surety were active Defendants at the time of briefing. Claimant's briefs did not allege facts or argument for ISIF liability.

ISIF contends that Claimant cannot establish he is totally and permanently disabled under the 100% analysis. Claimant does not qualify as an odd-lot worker. Moreover, Claimant alleged in briefing that his disability was caused solely by the subject accident. Claimant has not established the existence of any preexisting impairment rating or physician-imposed restrictions. Claimant's ability to work many long hours at medium and heavy duty before the accident show an absence of a manifest condition which constituted a hindrance to employment. Also, even if reduced ability were present, Claimant failed to allege or show that it combined with his work-related restrictions. Claimant failed to establish that he can pass the "but for" test.

### **EVIDENCE CONSIDERED**

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant;

2. Joint exhibits 1-54 and 56 and 57 admitted at hearing; Exhibit 55, a surveillance report, was reserved pending testimonial authentication and opportunity for cross-examination. No witness testified on record to support this document. Exhibit 55 is NOT admitted;
3. Joint Stipulation of Facts submitted post-hearing (appended to this decision as Attachment "A"); and
4. Post-hearing depositions of physiatrist Christian Gussner, M.D., and of vocational experts Barbara Nelson and Kourtney Layton.

All objections raised in pre- and post-hearing depositions are OVERRULED. Claimant's Motions to Strike in Dr. Gussner's deposition are denied, but these do identify bases upon which such testimonial details may be given less weight.

The Referee submits the following findings of fact and conclusions of law for the approval of the Commission and recommends it approve and adopt the same.

#### **FINDINGS OF FACT**

##### **Joint Stipulation of Facts**

1. The Parties' Joint Stipulation of Facts (Attachment A) is approved, adopted, and incorporated into these Findings and Conclusions, except as modified immediately below by the Referee. Modifications identified immediately below reflect events occurring and evidence received after the submission of Attachment A. Pages of Exhibits identified as the source of particular paragraphs of Attachment A were not independently reviewed by the Referee. The signatures of attorneys for the Parties is deemed sufficient attestation of the accuracy of the content of the pages attributable to each the respective stipulated facts. All other pages of Joint exhibits 1 through 54 and 56 and 57 were reviewed by the Referee.

2. Findings of fact recited in Attachment A are modified in these two findings of fact immediately below. These modify Attachment A only insofar as paragraphs 3 and 4 of the section designated "Introduction" have become outdated by subsequent events.

3. All post-hearing depositions have been taken.

4. The settlement which released Employer and Surety has limited the issues under consideration to those identified above.

#### **Referee's Findings Additional to Attachment A**

5. Claimant's injury occurred on or about April 18, 2018, and certainly no later than April 21, 2018. For purposes of compensability, April 18, 2018, is deemed the date of injury.

6. In deposition Claimant attributed injuries to his shoulder, low back, and left hand as arising from his work with Employer.

#### **Post-Accident Medical Care**

7. On February 21, 2019, spine surgeon Shane Andrew, D.O., opined that Claimant's synovial cyst in his low back was not likely related to the industrial accident.

8. On October 7, 2019, Karl Zarse, M.D., at Idaho Spine & Pain, examined Claimant to initiate pain management. He suspected "post laminectomy syndrome from scarring in the epidural space." He anticipated a medial branch block to indicate whether nerve ablation would likely help. He noted an absence of pre-injury back pain as a factor in determining whether Claimant's condition was or was not industrially related. However, he did not expressly opine about causation. Moreover, Dr. Zarse stated, "I don't know if he will be permanently worsened or temporarily."

9. On November 20, 2019, Dr. Zarse noted that both oxycodone and oxymorphone were detected despite a six-month interval since Claimant's "last oxycodone fill." Neither cannabinoids nor cocaine metabolites were detected. Elsewhere in the record Claimant has alternately admitted and denied to physicians whether he used these substances. In subsequent visits Dr. Zarse performed epidural steroid injections. Other "visits" were conducted remotely due

to pandemic.

10. On September 14, 2020, Craig Beaver, Ph.D., opined that Claimant's noncompliance and follow through with recommended care and treatment "is impeding his recovery."

11. On January 29, 2021, Claimant visited St. Luke's emergency department at its Nampa facility. In the presence of a registered nurse he claimed a "spell" was coming. Despite voluntary tensing of upper extremity musculature, the nurse noted "no vital sign changes; remain NSR at a rate of 73," along with "no color change, no postictal type behavior." Claimant claimed that he had "passed out 4 times" that day. Although Claimant associated these blackouts with severe epigastric pain, a CT of abdomen and pelvis was "unremarkable."

12. Except as otherwise referenced, St. Luke's ER Nampa records of visits in 2020 through 2022 (Exhibit 29) do not provide significant assistance in determining potential ISIF liability.

#### **Prior Conditions: Medical Records and Testimony**

13. About May 1991 Claimant injured his low back and right shoulder in an industrial fall. He healed over a few months. His physician released him to return to work without restrictions.

14. About November 1992 Claimant fell from the roof of a mobile home while working. Injuries included a head injury with significant loss of consciousness.

15. About February 2000 Claimant sought medical attention for an unrecalled problem.

16. About November 2010 Claimant was injured at home. He fell on ice and struck his head.

17. After years of misdiagnosed cardiac and/or GERD symptoms, a gallbladder surgery

about 2014 left Claimant with no residual limitations or problems.

18. Claimant suffered urinary incontinence for a time after his prostate surgery. It cleared up, and he did not have that problem until it recurred after the subject industrial accident.

### **Forensic Medical Evaluations**

19. In post-hearing deposition Dr. Gussner opined that Claimant's shoulder and low back injuries were causally related to the industrial accident. Dr. Gussner opined that Claimant had been asymptomatic for low back and/or leg pain for "over a decade." He found no basis for apportionment of any restrictions to any preexisting condition. Dr. Gussner opined that Claimant did not need to use a cane, and he would not recommend one. He did not find in the records that any physician had prescribed one. He opined that Claimant exhibited undue somatic exaggerations and complaints. He noted that Claimant's reports of conversations with physicians and an adjuster were inconsistent with notes of these physicians and adjuster. He noted Claimant's imperfect compliance with recommendations by physicians. Dr. Gussner well explained his bases for opinions set forth in his IME report. He corrected a "typo" to say L2-S1 rather than L2-3 as it relates to right leg radiculopathy along specific dermatomes.

### **Prior Conditions**

20. After Claimant's November 29, 1992, industrial accident, Michael Phillips, M.D., on March 24, 1993, found Claimant stable and without PPI despite Claimant's complaints of pain. Upon examination he noted Waddell's signs, indicia of "embellishment" and other inconsistencies. He approved Claimant's return to mobile home transport and set-up.

21. Thomas Henson, M.D., on March 30, 1993, completed a jobsite evaluation ("JSE"). He also approved Claimant's return to mobile home transport and set-up.

22. About December 13, 1993, Claimant was admitted to Intermountain Hospital after

a suicide attempt. His brother found Claimant pointing a gun at his head. Claimant reported to physicians that he had tried to shoot himself “numerous times” in the past year.

### **Vocational Factors**

23. Born January 5, 1963, Claimant was 60 years old on the date of hearing.

24. Claimant testified that he graduated high school. Vocational reports record that he received a G.E.D. His earliest employments involved being a restaurant cook and night janitor.

25. Claimant is a military veteran. He served in the Army from 1982 to 1989.

26. He performed farmhand work for a few years. He worked as a self-employed woodcutter for residential customers. He used his military medic experience to work as an EMT tech in Riggins. He built and repaired log cabins.

27. Claimant completed an eight-week truck driving course and obtained a license as a professional truck driver. Claimant has worked as a truck driver for most of his adult life. He testified about driving 10-wheel farm trucks since he was 13 years old. He also operated farm equipment. He owned his own semi-tractor for a few years on two separate occasions and leased them to C.R. England.

28. For about five years in the mid-2000s Claimant performed handyman duties and some managerial work at a storage facility. Work included some construction, remodeling and structural maintenance on buildings made of wood, sheetrock, and/or metal.

29. For about one year Claimant operated a loader for his cousin’s construction company building subdivisions.

### **Vocational Experts**

30. ICRD provided services following this accident from May 2020 into December 2021. (ICRD notes from 1993 services are of record also.) Claimant’s intention to earn no more

than \$200 per week to avoid a reduction in his Social Security benefit caused consultant Sara Feldner to recommend he obtain part-time employment. She noted that but for Social Security considerations he could seek full-time employment. She identified specific types of jobs available to him within his restrictions.

31. On November 1, 2021, Kourtney Layton issued a report. She reviewed records and interviewed Claimant telephonically. She analyzed restrictions imposed by Dr. Bates for Claimant's shoulder and by Dr. Andrew for his low back. She analyzed restrictions anticipated by Dr. Gussner. She opined that Claimant was unable to return to truck driving but was not totally and permanently disabled. She opined a loss of local labor market access from his pre-injury access to be 21% to 66% depending upon physicians' varied restrictions with no loss of earning capacity. Using averaging, she opined that Claimant's permanent partial disability, inclusive of PPI, was no greater than 33%. She identified specific types and numbers of jobs which are regularly available within Claimant's restrictions. She opined that over 4,000 jobs are regularly available.

32. Ms. Layton was deposed for the first time on January 24, 2022. She well explained her assumptions and methods of analysis. She explained the difficulties in comparing Social Security Disability definitions and opinions with the opinions of Idaho workers' compensation physicians in Claimant's case.

33. In her second deposition dated September 12, 2023, Ms. Layton reiterated her earlier opinions. Information she had received between these dates did not change her mind.

34. On August 1, 2022, Barbara Nelson issued a report. She reviewed records and interviewed Claimant. She evaluated in detail the specific differences between physicians' varying restrictions. She considered Claimant's subjective reports of his functional capacity. She critiqued



Ms. Layton's report. Ms. Nelson opined that Claimant was totally and permanently disabled as an odd-lot worker under the futility prong of the test. She opined that no preexisting injury or condition constituted a hindrance to Claimant's disability, thereby excluding ISIF from potential liability. In post-hearing deposition she maintained that opinion and well explained why.

#### **Claimant's Depositions and Hearing Testimony**

35. Claimant gave a deposition on October 19 and 20, 2020, and another on April 12, 2022. ISIF was not yet a party and not represented at the 2020 deposition. He admitted to marijuana use but denied any other illegal substance. He testified that medical records asserting positive tests for cocaine were erroneous.

36. At Claimant's 2022 deposition he denied having any chronic limitations or permanent restrictions before the subject industrial accident occurred.

#### **DISCUSSION AND FURTHER FINDINGS OF FACT**

37. The provisions of the Idaho 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).

38. Facts, however, need not be construed 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). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447-48, 74 P.2d 171, 175 (1937). *See also Dimmeen v. Finch*, 100 Idaho 620, 626-27, 603 P.2d 575, 581-82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

#### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 9**

39. Claimant's demeanor did not show indicia which might undermine his credibility.

40. Exhibit 38, page 3848 contains an ICRD note of an unfavorable comment by a former employer of Claimant. This note constitutes multi-level hearsay and is given no weight.

41. Claimant showed a tendency for exaggeration. For example, the record at various times shows Claimant reported frequent recurring blackouts which he alternately attributed to "rage" or "pain" or some other cause. However, when observed by a medical professional there was no true "blackout" and no objective changes in any vital signs. Observable symptoms were all within a person's voluntary control. At least one physician has attributed these alleged blackouts to syncope related to possible postural hypotension. Similarly, another example is Claimant's reporting which shows he does not distinguish suicide "attempts" from suicidal ideation or gestures. A third example is evident from the nurse case managers' notes in which Claimant reported, in several instances, exaggerated symptoms—for example, pain at "15" on a scale of 0-10. Other examples exist in the record. Where medical records are inconsistent or less dramatic than Claimant's representations and memory, the medical records carry greater weight.

### **Permanent Disability**

42. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423 and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

43. "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

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 10**

(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 permanent impairment and by pertinent nonmedical factors as provided by Idaho Code § 72-430.

44. 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, 766 P.2d 763 (1988). In sum, the focus of a determination of permanent disability is on a claimant’s ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995). A claimant’s local labor market access in the area around his home is the general geographical scope for assessing permanent disability. *Combs v. Kelly Logging*, 115 Idaho 695, 769 P.2d 572 (1989).

45. The record shows minor differences of opinion among physicians who rated Claimant’s PPI. Dr. Bates rated only Claimant’s right shoulder and assigned a 7% whole-person impairment. Dr. Andrew appears to have limited his restrictions to those arising from Claimant’s low back and radiculopathy. Dr. Gussner rated all conditions, assigned an 18% whole-person impairment, and recommended restrictions. Dr. Arnold, the Social Security physician, provided opinions based upon Social Security Administration definitions and rules.

46. Other entities use different definitions for disability than does Idaho Workers’ Compensation Law. Social Security Administration records and records of Principal Life Insurance Company (Claimant’s long-term disability policy) are given less weight than physicians and vocational experts of record who address Claimant’s conditions from a workers’ compensation standpoint.

47. Dr. Gussner’s PPI rating and restrictions are deemed to be the most thorough as

applicable to Idaho Workers' Compensation Law and therefore are assigned the greater weight. However, the issue of permanent impairment is not at issue. Finding that PPI is present from this industrial accident is sufficient to open the door for analyzing whether Claimant is totally and permanently disabled.

48. Ms. Nelson did not opine that Claimant was 100% totally and permanently disabled. Rather, as analyzed below, she opined in favor of odd-lot disability.

49. Ms. Layton provided a range of permanent disability after considering restrictions from each of the physicians familiar with Idaho Workers' Compensation processes. She did not opine that Claimant was 100% totally and permanently disabled. To the contrary, she identified many suitable jobs in several categories which are regularly available in Claimant's local labor market.

50. ICRD consultant Sara Feldner found Claimant able to return to the workforce, but recommended only part-time work to prevent a reduction of Claimant's Social Security benefits. Her report supports a finding that Claimant is not 100% totally and permanently disabled. Her recommendation does not suggest that Claimant is unable to perform or restricted from full-time work.

51. No unambiguous evidence of record shows it likely that Claimant is 100% totally and permanently disabled. Ms. Layton's opinions about the range of disability carry greater weight, but no finding is necessary to establish actual permanent partial disability below 100%.

#### **Odd-Lot Disability**

52. If a claimant is able to perform only services so limited in quality, quantity, or dependability that no reasonably stable market for those services exists, she is to be considered totally and permanently disabled. *Id.* Such is the definition of an odd-lot worker. *Reifsteck v.*

#### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 12**

*Lantern Motel & Cafe*, 101 Idaho 699, 700, 619 P.2d 1152, 1153 (1980); *also see, Fowble v. Snowline Express*, 146 Idaho 70, 190 P.3d 889 (2008). Odd-lot presumption arises upon showing that a claimant has attempted other types of employment without success, by showing that she or vocational counselors or employment agencies on her behalf have searched for other work and other work is not available, or by showing that any efforts to find suitable work would be futile. *Boley, supra.; Dehlbom v. ISIF*, 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997).

53. Upon establishing the presumption, the burden shifts to a defendant to show suitable work is regularly and continuously available. *Rodriguez v Consolidated Farms, LLC.*, 161 Idaho 735, 390 P.3d 856 (2017).

54. Ms. Nelson relied largely upon Dr. Arnold's opinions to reach her opinion that Claimant should be deemed an odd-lot worker using the "futile" prong of the three tests. Ms. Nelson's opinion about odd-lot disability is conclusory without ample supporting evidence to establish its likelihood. Regardless, Ms. Nelson opined that she found no substantial basis for prior impairment, restrictions, or examples of Claimant's conduct which might show any of the prerequisites for ISIF liability.

55. Claimant failed to show it likely that he qualifies as an odd-lot worker.

56. Ms. Layton found many jobs in Claimant's local labor market which were within his restrictions. Even if Ms. Nelson's opinion were found to prevail in establishing a presumption for odd-lot disability, the number and quality of suitable jobs regularly and continuously available to Claimant show Defendants have met their burden under *Rodriguez*.

57. Claimant failed to make a *prima facie* showing that he is an odd-lot worker.

#### **ISIF ISSUES**

58. The fact that briefing occurred before Employer/Surety settled out of this case is

unfortunate for Claimant. His entire briefing focused upon establishing total and permanent disability and not on potential ISIF liability.

59. Despite Employer's insistence that Claimant was not totally and permanently disabled, ISIF was joined by Employer as a precaution.

60. Dr. Gussner opined that Claimant had been asymptomatic for low back and/or leg pain for "over a decade." He found no basis for apportionment of any restrictions to any preexisting condition. He found no basis to assign preexisting PPI.

61. Claimant, being neither 100% disabled nor an odd-lot worker, cannot establish the liability of ISIF. Moreover, Claimant failed to show or actually denied the presence of facts to establish the prerequisite elements of ISIF liability.

#### **CONCLUSIONS**

1. Claimant failed to make a prima facie showing that he likely is totally and permanently disabled, by either the 100% or the odd-lot methods; and
2. ISIF bears no liability as a result.

#### **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 11<sup>th</sup> day of July, 2024.

INDUSTRIAL COMMISSION  
  
Douglas A. Donohue, Referee

**CERTIFICATE OF SERVICE**

I hereby certify that on the 26<sup>th</sup> day of July, 2024, a true and correct copy of the foregoing **ORDER** was served by regular United States mail and Electronic Mail upon each of the following:

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dc

*Debra Cupp*

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

ROBERT WADE FULFER,

Claimant,

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RUAN LOGISTICS CORPORATION,  
Employer, INDEMNITY INSURANCE CO. OF  
NORTH AMERICA, Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL  
INDEMNITY FUND,

Defendant.

**IC 2018-010978**

**ORDER**

**FILED  
JULY 26, 2024  
IDAHO INDUSTRIAL COMMISSION**

Pursuant to Idaho Code § 72-717, Referee Douglas Donohue 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 recommendations of the Referee. The Commission concurs with these recommendations. 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:

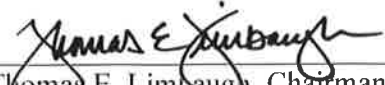
1. Claimant failed to make a prima facie showing that he likely is totally and permanently disabled, by either the 100% or the odd-lot methods; and
2. ISIF bears no liability as a result.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.



DATED this 26th day of July, 2024.



INDUSTRIAL COMMISSION

  
\_\_\_\_\_  
Thomas E. Limbaugh, Chairman

  
\_\_\_\_\_  
Claire Sharp, Commissioner

  
\_\_\_\_\_  
Aaron White, Commissioner

ATTEST:

  
\_\_\_\_\_  
Kamerron Slay  
Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 26<sup>th</sup> day of July, 2024, a true and correct copy of the foregoing **ORDER** was served by regular United States mail and Electronic Mail upon each of the following:

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dc

*Debra Cupp*