BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MELVIN "DUKE" BUSH, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2020-016680** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed April 24, 2026 Idaho 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 Pocatello, Idaho, on June 10, 2025. Andrew Adams 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. Post-hearing depositions were taken. The matter came under advisement on February 3, 2026.

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;
3. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant asserts he is totally and permanently disabled as the result of his subject industrial left bicep injury in combination with pre-existing medical issues, including his chronic early

morning bouts of nausea, diabetes, peripheral vascular disease, coronary artery disease, and a host of items identified by Dr. Friedman. Defendant ISIF is liable for its share of Claimant's total and permanent disability.

While Defendant acknowledges Claimant was totally and permanently disabled at the time of hearing in 2025 due to progressive diabetes affecting his lower extremities, (he had recently lost his leg and was in a wheelchair at the time of hearing), and a post-accident stroke, Defendant argues that at the time of his industrial accident in 2020, Claimant was not rendered totally and permanently disabled by such accident. Furthermore, Claimant's industrial bicep injury did not combine with his pre-accident conditions to render Claimant totally and permanently disabled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;
2. Joint exhibits 1 through 32, admitted at hearing;
3. The post-hearing deposition transcript of Delyn Porter, taken on September 18, 2025;
4. The post-hearing deposition transcript of James Bates, M.D., taken on October 1, 2025; and
5. The post-hearing deposition transcript of Terry Parsons, taken on October 6, 2025.

FINDINGS OF FACT

Summary Medical Overview

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

2. Claimant has a long history of various arterial diseases, such as coronary artery disease, peripheral artery disease, aortic aneurysms, and atherosclerosis. He suffers from multiple arterial aneurysms. His degraded arteries led to claudication (loss of oxygenated blood flow) into Claimant's lower extremities, resulting in his legs cramping with extended walking. He also has type 2 diabetes and hypercholesterolemia. He suffered a heart attack in 2004, which led to Claimant having stents placed in his heart.

3. In May 2017, Claimant underwent peripheral artery surgery on his legs. He suffered complications from the surgery and testified he was placed in an extended induced coma as a result. Thereafter, he had extensive rehabilitation and was unable to work for approximately two years. His intubation while in a coma led to chronic nausea which he testified leaves him with dry heaves which come on in the early morning hours and can last for several hours.

4. Claimant returned to work in 2019, and tore his left distal bicep tendon on July 14, 2020. He has not worked since. In 2023, he suffered a stroke. The progression of his arterial diseases and/or diabetes resulted in the amputation of his left leg by the time of hearing.

Relevant Work History

5. For decades Claimant made a living as a truck driver and before that he operated heavy equipment. Since 2004, he has worked for his time-of-injury employer (hereinafter "Stinker"), delivering fuel to various locations, including mine sites and more recently gas stations. His job required lifting up to 100 pounds occasionally, and it was common for him to work 70 hours per week.

6. While Claimant suffered a heart attack soon after beginning work for Stinker, he soon returned to work without restrictions. Likewise, after his 2017 lower extremity bypass

surgery and complications therefrom which required a two-year rehabilitation effort, Claimant returned to work for Stinker in 2019, at first on light duty status, and eventually to his previous job of delivering fuel. His hours fell from 70 hours per week to approximately 60 hours per week.

Subject Accident and Treatment

7. On July 14, 2020, Claimant suffered an injury to his left distal bicep tendon while in the course and scope of his duties for Stinker. Imaging was read to show a "full-thickness complete width tear of the distal biceps tendon from its radial tuberosity attachment without significant retraction." JE 19, p. 1179. The retraction was only several millimeters.

8. Based on Claimant's "history of problems with anesthesia," his diabetes, and history of smoking, the plan was to have Claimant evaluated by a presurgical team to determine if he was a good surgical candidate, with the goal of proceeding with a distal bicep tendon repair. The presurgical study, completed on August 4, 2020, concluded with a determination that Claimant's "risk benefits ratio … is in favor of moving forward with surgery without further cardiac workup." JE 7, p. 351.

9. However, after examining Claimant that same day, his treater, Richard Wathne, M.D., recommended conservative management due to Claimant's "uncontrolled diabetes" coupled with the MRI findings which showed what appeared to be "a few remaining fibers of the bicep tendon at its insertion to the radial tuberosity." *Id* at 1180. Claimant was given a hinged brace and prescribed physical therapy.[1]

[1] Claimant testified to a conversation he had with Dr. Wathe, where supposedly the doctor thought Claimant's risk was not worth the potential reward of surgical vs. conservative treatment due to the location of an artery adjacent to the location of the bicep tear. However, that reasoning is not in the doctor's office notes. Rather, Claimant's diabetes was the factor (along with the fact there was still some tendon fibers connecting the bicep to bone) which led Dr. Wathne to recommend therapy instead of surgery. Also, Defendant's assertion that Dr. Wathne's rationale for not conducting the surgery was because the tendon was intact and did not need surgical repair ignores the complete record.

10. By his August 25, 2020 visit with Dr. Wathne, Claimant was progressing with physical therapy and home exercises to the point the doctor contemplated returning Claimant to work three weeks hence.

11. At his September 15 doctor visit, Claimant expressed doubt he would be able to handle the four-inch fuel hoses, which can weigh several hundred pounds when full. Dr. Wathne noted it could take up to three months to recover from an injury such as Claimant's and was hopeful Claimant would continue to progress toward recovery. The doctor felt Claimant could, as of mid-September, return to light duty work if any such jobs were available. Claimant was restricted to no greater than five pounds lifting with his left arm and limited pushing/pulling.

12. By mid-October Claimant was still complaining of discomfort but making progress with physical therapy. He wanted to return to work and Dr. Wathne released him to do so as of October 19, 2020. The plan was for Claimant to use 3-inch fuel hoses, instead of the 4-inch hoses typically used to unload fuel from the trucks to the gas station fuel tanks. Doing so would reduce the weight required to be lifted when draining the hoses.

13. Claimant testified he had worked out this arrangement to use 3-inch hoses with his employer and was set to return to work that Monday, October 19, 2020. Claimant testified that the night before he was scheduled to return to work, he received a call from his employer who indicated Claimant would need to have a telephone conference with human resources before returning to work. That phone conference took place on the morning of October 19, 2020, at which time he was terminated.

14. While Claimant did not testify to the specifics of the phone conversation with HR, he did imply that COVID was at least ostensibly listed as a reason for his termination. As he put it, while he had dodged previous layoffs due to COVID, once he injured his elbow things changed.

His testimony included his observation that he "worked until I blew my elbow out and then COVID ran its course." He continued with his explanation of his firing, "that, I'm afraid, is how Stinker got rid of me is because of the restrictions that COVID had put on everybody." Tr. p. 47.

15. Claimant continued with physical therapy under the direction of Dr. Wathne. On Claimant's October 29 visit, Dr. Wathne suggested Claimant undergo an ultrasound evaluation with his partner, Anthony Joseph, M.D. That ultrasound procedure occurred on December 2, 2020.

16. Dr. Joseph's reading of the ultrasound showed no healing in the area of Claimant's bicipital radial bursa and a thickened appearance to his distal biceps tendon. Dr. Joseph felt that corticosteroid injections into the area would not be in Claimant's best interest. Instead, Dr. Joseph felt it was in Claimant's best interest to pursue surgical treatment or other options.

17. One week later Claimant saw Dr. Wathne, still complaining of discomfort in his elbow. Dr. Wathne noted the tendon was intact but tender. He again advised against surgery. He did not elaborate on his thinking, beyond noting the tendon was intact. Dr. Wathne was not deposed.

18. Claimant's symptoms in December 2020 predominately involved his anterolateral forearm and possible capsular disruption at the radiocapitellar joint. Dr. Wathne performed a corticosteroid injection in Claimant's lateral epicondylar region and his proximal forearm extensor muscles.

19. On January 21, 2021, Claimant saw Dr. Wathne for an impairment rating. Claimant still expressed ongoing tenderness in the front of his left elbow. After examining Claimant and consulting the *AMA Guides, 6th Ed.*, Dr. Wathne gave Claimant a 4% left upper extremity impairment for his industrial condition. Claimant was released to full job duties without restrictions, although he was advised to continue his home exercises for his left forearm and elbow.

Hired Expert Witnesses

20. Claimant relies on opinions from Drs. Bates and Friedman, and vocational rehabilitation witness Delyn Porter to construct his case. Defendant relies on Terry Porter to support its position. Their opinions and analysis are explored below.

James Bates, M.D.

21. Claimant hired James Bates, M.D., to conduct an IME. The examination took place on March 22, 2021, about two months after Claimant was declared at MMI and given an impairment rating by Dr. Wathne for his elbow injury.

22. At the time of this examination, Claimant related his limitations with his left elbow, which included his inability to hold items away from his body with his left arm. He discussed his coronary and peripheral artery diseases and how those conditions limited his treatment options for his left elbow to physical therapy, as surgery was contraindicated. He reported no limitations on sitting or standing. He had no reported difficulty with his activities of daily living or driving his personal vehicle.

23. Claimant's gait was within normal limits, and he was able to walk heel to toe. His right upper extremity was normal in all testing, but his left elbow showed some limitation, and atrophy of the corresponding muscles was noted.

24. After examining Claimant, Dr. Bates responded to a series of questions from Claimant's counsel. His diagnosis of Claimant's left elbow was near complete tear of the distal biceps tendon. Claimant was at MMI and his elbow condition was stable. Dr. Bates gave Claimant a 4% whole person permanent impairment rating for his elbow. Also, Claimant should not lift more than 10 pounds on rare occasion with his left arm, with no lifting with an outstretched

left arm. Claimant had no restrictions handling objects or fine manipulation with his left hand held close to his body.

25. Dr. Bates felt Claimant should consider surgery by seeking a second opinion from a reconstruction surgeon. He noted Claimant was cleared for surgery previously but not taken to surgery by Dr. Wathne due to Claimant's comorbidities. Dr. Bates was unsure if Claimant would still be a surgical candidate due to the passage of time since the injury (8 months), but a surgeon could weigh in on the issue if Claimant wanted to explore surgery.

26. Dr. Bates was deposed post hearing. His testimony was limited and consistent with his IME report as noted above.

Delyn Porter

27. Delyn Porter was hired by Claimant to perform a vocational assessment and disability assessment. As part of that process, he completed a report dated May 5, 2021.

28. Mr. Porter is well known to the Commission. His report followed a fairly standard track, with an interview of Claimant (via Zoom due to COVID), record review, analysis of physical restrictions and personal limitations, education and work history, transferable skills, wage capacity, and findings in light of Claimant's labor market.

29. Mr. Porter acknowledged Claimant had "significant non-industrial medical issues" but in spite of that, he was able to "perform all of the essential functions of his time-of-injury job up until the 07/15/2020 industrial accident." Mr. Porter also noted he had been working for Stinker since 2003, full-time, albeit with flexibility of scheduling. JE 24, p. 1385. (Claimant testified his job was less about arriving to work at a set time and more about production. As such, his start and stop time varied, but his production, i.e. fuel delivery, was consistent.)

30. Given Claimant's left arm limitations following the industrial accident, and restrictions given by Dr. Bates, Mr. Porter opined that Claimant would not be able to perform any of his previous jobs, such as delivering fuel, operating heavy equipment, or fire fighting for the forest service. All those jobs required medium to heavy physical demands. Mr. Porter opined Claimant was limited to "one-handed" work "as a result of his industrial injury." As a result, Mr. Porter felt Claimant's "opportunities to return to competitive employment within his vocational profile and assigned restrictions would be minimal to non-existent." *Id.* at 1387.

31. Mr. Porter felt it would be futile for Claimant to even attempt to "secure **competitive employment** within his current vocational profile and the assigned restrictions." *Id.* (Emphasis in original.)

32. Mr. Porter noted there were no assigned restrictions or limitations due to Claimant's preexisting medical conditions, but if such restrictions were identified subsequently, apportionment would be appropriate.

33. In June of 2025, after Defendant obtained a vocational report from their expert, Terry Parsons, Claimant had been deposed, and Claimant had undergone an IME with Dr. Friedman, discussed below, Mr. Porter was asked to prepare an "addendum" report.

34. In large part, Mr. Porter's addendum report was devoted to critiquing Ms. Parson's report. Mr. Porter concluded his report by asserting his opinion that Claimant was totally and permanently disabled as a result of the 2020 industrial accident combined with his preexisting medical history and impairments.

35. Mr. Porter was deposed post hearing. Therein, he was asked if he considered Claimant's transferable skills. While he acknowledged Claimant had skills in the area of commercial driving, he felt that based upon Dr. Bates' restrictions, Claimant was totally and

permanently disabled. His answer tacitly acknowledged he did not consider other driving jobs before determining Claimant was totally and permanently disabled. This testimony was consistent with his written report, wherein he did not attempt to address transferable skills beyond those Claimant historically had undertaken, such as heavy equipment operator, or commercial truck driver.

36. When asked to critique Ms. Parson's report, where she had determined there existed a number of light-duty driving jobs, such as food delivery, crew transport, etc., Mr. Porter noted Claimant's nausea made consistent early morning start times difficult, but all of the jobs listed would otherwise be within Claimant's imposed restrictions.

Robert Friedman, M.D.

37. Dr. Friedman's involvement in this case began when he was hired by the surety to conduct an IME on Claimant. The examination took place on or around December 5, 2022, nearly two years after being declared at MMI from his elbow injury and given an impairment rating by Dr. Wathne.

38. After examining Claimant and taking his history, Dr. Friedman answered a number of questions posed to him by the surety. Included therein, he assigned Claimant a 4% whole person impairment rating for his left elbow injury. He also opined that Claimant was not precluded from returning to employment "with accommodations" due to his left elbow injury. Dr. Friedman concluded Claimant was not a surgical candidate for his left elbow, in part "because of his numerous additional medical conditions including but not limited to his known cardiovascular and peripheral vascular disease and diabetes." However, the doctor also felt that at the time of his examination in late 2022, surgical intervention was "not indicated or necessary." JE 25, pp. 1403, 1404.

39. Surety also asked Dr. Friedman to list Claimant's non-industrial medical conditions, which he did. In addition to those discussed at the hearing and in briefing by the parties, (cardiovascular disease, hypertension, diabetes, vascular diseases, chronic nausea, and elevated cholesterol), Dr. Friedman listed neuropathy, (a result of his vascular disease), bilateral knee osteoarthritis, low back pain, and pulmonary disease from his longtime tobacco use.

40. Next, Dr. Friedman was asked to provide a permanent impairment rating for all of Claimant's non-industrial conditions. His ratings for various conditions, listed as a whole person percentage were:

- Peripheral vascular disease 10%
- Coronary artery disease and myocardial infarction 14%
- Hypertension 17%
- Diabetes 8%
- "Gait disturbance" due to neuropathy 15%
- Chronic low back pain 2%
- Bilateral knee osteoarthritis 2% (1% for each knee)
- COPD 6%
- Chronic nausea 5%.

41. Dr. Friedman did not combine the impairments (as per the *AMA Guides)*, and not all the listed impairments were subjective hinderances to Claimant's employment. Claimant testified to hinderances from his peripheral vascular disease, which caused claudication, thus limiting his ability to walk long distances, his diabetes, which impacted his meal choices, but not his ability to work, (so long as he stayed off insulin, which he was not on at the time of his industrial accident), and his nausea, which caused him difficulty with early morning start times. He did not testify to

employment hindrance issues involving his knees, gait, low back, high blood pressure/hypertension, COPD, or heart issues.

42. If Dr. Friedman's "gait disturbance" was his way of addressing Claimant's inability to walk significant distances due to claudication, that would be a subjective hindrance, but it is not clear, since Dr. Friedman did not use the term claudication, but instead linked the gait disturbance to Claimant's neuropathy. (Dr. Friedman did note Claimant had an atypical gait when walking. Claimant did not testify that his way of walking was a hindrance to his employment.)

43. Finally, Dr. Friedman was asked to specify appropriate permanent physical restrictions which could have reasonably existed at the time of Claimant's industrial accident. He listed lifting restrictions due to Claimant's knees and low back, which he put at 50 pounds occasional and no twisting or torquing of his low back. Also, due to Claimant's knee condition he should limit his kneeling, squatting, or crawling to occasional.

44. Due to his cardiovascular and peripheral arterial diseases, Claimant would have had, in Dr. Friedman's opinion, limitations on how far he could walk. Dr. Friedman estimated 200 yards; Claimant, on his intake sheet, indicated he could walk no more than a quarter mile or approximately 440 yards before stopped by pain.[2] JE 25, p. 1412. Dr. Friedman opined Claimant should limit how vigorously he engaged in physical activities, measured in metabolic equivalent, or MET, which the doctor capped at 10.[3] (In October 2023, Claimant suffered a stroke. He lost his left leg in 2024. Therefore, many of his restrictions are no longer applicable.)

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[2] This statement could be misleading, as the check the box options went from "I can only walk using a cane or crutches" to "Pain prevents me from walking more than ¼ mile." There was no option for walking only "x" yards less than ¼ mile.

[3] MET was not further defined by Dr. Friedman, but a MET of 10 would be the equivalent of jumping rope, or as noted by Ms. Parsons, running at 6 miles per hour.

Terry Parsons

45. In 2025, Defendant hired vocational rehabilitation expert Terry Parsons to perform a vocational evaluation for Claimant. Her report, dated May 15, 2025, outlined her evaluation methodology, analysis, and conclusions. She did not interview Claimant but instead relied on the cumulative information from various sources available to her at the time of her report, including Claimant's deposition testimony, medical records, ICRD records, and Mr. Porter's first report.

46. Ms. Parsons prepared a detailed outline of Claimant's medical history, his work history, and independent medical examination findings from Drs. Bates and Friedman. She then prepared a disability analysis. She noted Pocatello, the hub of Claimant's labor market, was at full employment and conditions were "very favorable for job seekers who are otherwise able to work." JE 27, p. 1477. She looked at Claimant's transferable skills, coupled with the restrictions imposed by Drs. Blair and Friedman. She did not consider Claimant's more recent health decline, including his stroke, which occurred after he was declared at MMI in early 2021 and after he was seen by Dr. Friedman in late 2022.

47. Ms. Parsons first concluded that as of March 22, 2021, when evaluated by Dr. Blair, the first physician to impose restrictions on Claimant, even with those restrictions there were light to light-medium driving jobs in the Pocatello labor market Claimant would be qualified to perform.

48. Similarly, utilizing the restrictions imposed by Dr. Friedman on December 5, 2022, the same jobs would be available to Claimant as were available to him utilizing Dr. Blair's restrictions. Those jobs included a number of truck driving jobs listed in the medium and heavy

strength category.[4] More importantly, they also contain jobs such as railroad crew transport driver, fire crew driver, (seasonal), city transit van driver, lab courier, title document carrier, and pizza or sub sandwich delivery driver, which are light or light-medium duty jobs.

49. Ms. Parsons reached the conclusion that Claimant was not totally and permanently disabled at the time he was declared at MMI by Dr. Blair, or at the time he was seen by Dr. Friedman, although his subsequent non-industrial stroke and leg amputation rendered him so.

50. Ms. Parsons also opined that if Claimant was totally and permanently disabled after his elbow injury, it is that injury alone which rendered him totally disabled, and not a combination of his preexisting conditions coupled with his biceps injury.

51. Ms. Parsons was deposed post hearing. She supported her position that Claimant was not totally disabled under the odd lot category by noting he had not established odd lot status under any of the three ways of legally proving odd lot. He had not unsuccessfully attempted other work, or looked for work to no avail. Likewise, he had no vocational counselors or employment agencies attempt to find him work. In fact, he told ICRD he was not in a position to seek employment due to his non-industrial issues. See, JE 31, p. 1590 et seq. Finally, it was not futile for Claimant to look for work, as jobs he could have performed, such as delivery driver, were available to him.

52. In response to Mr. Porter's criticism that Ms. Parsons did not speak to the potential employers to determine whether they would hire someone in Claimant's position, she did in fact

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[4] Jobs listed as heavy strength, and medium strength but with tasks such as unloading freight or working a forklift, do not appear, even at first blush, to fit into Claimant's work ability profile and are ignored when analyzing the merits of Ms. Parson's report. Other jobs, which do appear at first blush to fit his profile, will be examined further in the analysis of Claimant's claim.

talk with a pizza parlor seeking drivers, the City of Pocatello, and a title company. She was unable to speak with the railroad crew driver employer.

53. The City of Pocatello position required drivers to be at work at 8:30 am on weekdays and 9 am on Saturdays. There was no lifting as all passengers were mobile.

54. The fire crew transport job employer indicated drivers were given advance notice when they would be needed. Hours were not discussed. The position was seasonal employment.

55. Speaking with a title company with a job opening, Ms. Parsons learned that particular job was part-time, from noon to 5 pm. When not making deliveries, the driver might be asked to greet customers or put away inventory weighing up to 20 pounds. Drivers could sit or stand as needed while waiting for deliveries and the company was willing to make accommodation for individuals with disabilities so long as the employee could perform the essential job duties with the accommodation.

56. Ms. Parsons testified Claimant's nausea was not the source of medical restrictions, so although it would cause discomfort, it would not prevent Claimant from working. Even if Claimant's nausea caused him to show up later in the morning on occasion, the pizza delivery position would most likely not be affected in her opinion.

57. Ms. Parsons believed courier jobs were readily available in Pocatello. Claimant had a great work ethic and was a pleasant person. He could track information using an iPad, and from the record appeared to her to be intelligent and ethical. Ms. Parsons felt Claimant would have been able to find work in Pocatello in 2021 if he had looked.

58. In cross examination, Ms. Parsons was confronted with the possibility the lab, title document, and/or pizza or sandwich delivery positions might require Claimant to walk more

than 200 yards. She was doubtful it would but could not testify under oath that none of those positions would require such walking distances.

DISCUSSION AND FURTHER FINDINGS

59. This case involves three issues; was the Claimant totally and permanently disabled when he reached MMI after his industrial biceps injury, did any of his preexisting physical impairments constitute a subjective hindrance to employment, and if so, was his total and permanent disability due to a combination of preexisting physical impairments and his industrial injury, such that ISIF is responsible for a portion of Claimant's total disability benefits.

ISIF Liability

60. 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.

61. 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, *once total and permanent disability is established*, to create 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.

Total and Permanent Disability

62. 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. 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).

63. In this case Claimant argues for odd lot status. The odd-lot category is for those workers who are so injured that they can perform no services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. *Jarvis v. Rexburg Nursing Center,* 136 Idaho 579, 584, 38 P.3d 617, 622 (2001). Odd-lot presumption arises upon showing that a claimant has attempted other types of employment without success, 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 by showing that any efforts to find suitable work would be futile. Odd lot 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." *Gooby v. Lake Shore Management Co.*, 136 Idaho 79, 83, 29 P.3d 390, 394 (2001). Whether a claimant is an odd-lot worker is a factual determination. *Bybee v. State, Industrial Special Indemnity Fund*, 129 Idaho 76, 82, 921 P.2d 1200, 1206 (1996). The burden of establishing odd-lot status rests upon Claimant. *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990).

64. Claimant argues he was rendered totally and permanently disabled as an odd lot worker by his 2020 elbow injury when coupled with his preexisting conditions, the most notable of which include his arterial diseases and his chronic nausea.

65. Claimant, upon reaching MMI from his industrial accident, was not allowed to return to his time-of-injury employment, despite his willingness to try to do that job. Other truck driving jobs were not an option for Claimant. While it is true Dr. Wathne released Claimant to full duty work without restrictions, such a release carries no weight when analyzed in light of Claimant's obvious limitations.[5] Both Drs. Friedman and Bates imposed restrictions, and the facts of this case support the reality that Claimant had significant limitations with his left arm after his industrial accident, and restrictions were appropriate.

66. Given Claimant's limited education (no high school diploma), work experience (driving semi-trucks and operating heavy equipment), age, and transferable skill set, and Mr. Porter's testimony, Claimant has made a *prima facie* showing of total disability through the futility branch of the odd-lot worker criteria.

67. Once Claimant makes a *prima facie* case of odd-lot disability, the burden shifts to Defendant to show that some kind of suitable work is regularly and continuously available to the claimant. *See, e.g. Rodriguez v. Consolidated Farms, LLC,* 161 Idaho 735, 390 P. 3d 856 (2017).

68. While Defendant must establish that there exists an actual job within a reasonable distance from Claimant's home which he is able to perform, that showing is not the end of the inquiry. Defendant must also provide evidence "that a kind of suitable work exists that is

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[5] For a discussion of hindrance to employment without physician-imposed restrictions, see *Talbot, infra.*

regularly and continuously available in a well-known branch of the job market." *Id.* at 743, 865. Expanding on Defendant's obligation, the *Rodriguez* Court stated,

> an employer has a dual evidentiary burden once a claimant has made a *prima facie* showing of odd-lot status. First, an employer must show that there is a type of job that is both suitable for a claimant and that occurs regularly and continuously in a well-known branch of the job market. Second, an employer must show that an actual job of that type exists within a reasonable distance from a claimant's home as of either the time of injury or the time of the hearing.

Id.

69. The *Rodriguez* Court found it was not enough that the defendant found an actual job the claimant was offered by his time-of-injury employer. It pointed out the defendant needed to show that a *kind of job*, not merely a single, unique job, existed in the labor market. The rationale is that businesses' needs change, and they sometimes go out of business. A single employer willing to hire a claimant is insufficient for a defendant to meet its burden of proof. If a single employer ceases to exist, a claimant must have a legitimate chance of finding another job of the same type and with the same opportunities to work around a claimant's physical limitations. *Rodriguez* at 744, 866.

70. Defendant argues it has overcome Claimant's *prima facie* showing of total disability, because there existed readily available work for which Claimant was qualified at the time he reached MMI from his biceps injury in 2021 and/or at the time of hearing. The availability of these jobs overcomes Claimant's *prima facie* case for odd lot status. Defendant lists various driving jobs which were within the limits of Claimant's physician-imposed restrictions, which were set out by Ms. Parsons and discussed herein.

71. Claimant argues his walking restriction or personal limit for distances greater than about 200 yards will affect his ability to find employment. While many of the courier listings identified by Ms. Parsons might not require round trips of greater than 200 yards, certainly some

of them could. For example, delivering pizza or sandwiches to a third-floor apartment from a distant parking lot (apartment complexes are notorious for having inadequate parking, thus requiring visitors to park some distance from the apartment they are visiting) could tax or exceed Claimant's walking ability. Claudication causing leg cramps when walking distances or climbing stairs would be a very real hinderance to Claimant's job performance.

72. Another issue with food delivery is the fact that large orders could be difficult for Claimant. An order of several large pizzas, with multiple one-liter soft drink bottles, and breadsticks or other side dishes, delivered to a third-story apartment would be difficult for him to manage. Perhaps Jimmy Johns sandwiches might be easier to handle one handed, but large orders could be taxing. While there might be a way for Claimant to decline such large orders and let some other courier take them, it would be speculative to assume that is the case, since that question was not fleshed out.

73. Defendant points out that up to and through the moment of injury to Claimant's biceps, no physician had imposed work restrictions on him. Only after the fact did Dr. Friedman impose such restrictions. Claimant had abilities and tolerances which exceeded Dr. Friedman's 2022 restrictions at the time of his industrial accident. Dr. Friedman's retrospective restrictions were "unreasonably and artificially restrictive." Def. Brief, p. 19. For example, while Dr. Friedman suggested Claimant should not walk more than 200 yards, Claimant, in 2020, was able to walk over 800 yards before his legs became painful. JE 22, p. 1312. Dr. Friedman listed no reason why walking more than 200 yards would be detrimental to Claimant's health, and it was not the limits of Claimant's abilities. If walking 200 yards became walking 800 yards, it would open up jobs for Claimant.

74. The problems with Defendant's argument include a lack of development on what climbing stairs, or carrying weight, or carrying weight up flights of stairs had on Claimant's ability to walk beyond a short distance. It is one thing to walk at a leisurely pace on even and level ground, but another to walk while carrying weight up sets of stairs, or on uneven ground. Without knowing Claimant's limitations such as might be developed in a functional capacity evaluation, it is speculative to assume Claimant could carry weight up stairs or inclines more than suggested by Dr. Friedman.

75. The other unknown, and perhaps more significant variable is the cumulative effect of multiple trips. While Claimant apparently told his physician in 2020 that he could walk up to ½ mile, the record is silent on how many times in a day Claimant could do so. The recouperation period of muscles must be accounted for, and in delivery jobs it would be rare to have just one delivery, or even just two or three, in a work shift. So, while Claimant might be able to initially walk further than Dr. Friedman's suggestion, if he had to walk a distance a dozen times over a workday the record does not speak to his ability to do so on a daily basis.

76. Chronic nausea with dry heaves on a regular basis in the early morning understandably has the real potential to interfere with a set early morning, *e.g.* 8 or 9 am start time. If punctuality was required, such as when picking up fire fighters or railroad workers, Claimant would have a difficult time performing such job task consistently.[6] The beauty of his job with Stinker was that set hours were not required so long as the product was delivered timely. So, if Claimant had a bad morning with his nausea he could still get the product delivered,

[6] For a discussion on how periodic medical issues can lead to permanent disability when the issue affects employment consistency or dependability, see *Knapp v. Gem State Staffing, LLC.,* IIC 2014-007755 (Dec 2, 2022).

albeit a few hours later than he would have otherwise. On the other hand, delivering fire crews hours late could be a real problem.

77. While Mr. Porter only identifies nausea as a barrier to Claimant's employment, cross examination of Ms. Parsons highlighted the walking element to several of the jobs proposed by her.

78. While food delivery was not a practical employment option for Claimant, other driving jobs require closer inspection. Defendant listed medical lab courier jobs, where Claimant would pick up lab samples from various medical locations and deliver them to the lab or the hospital.

79. From a walking standpoint, these types of jobs seem well suited to Claimant's abilities. It is highly unlikely taking lab work from a doctor's office to the lab, be it at the hospital or other facility, would entail long distance walking. Medical facilities are keenly aware of the walking constraints of some patients, so handicap parking is routinely and abundantly provided. Elevators are available when needed. Loading or unloading zones are common.

80. The issue with such jobs is not the walking, but the schedule. Defendant did not establish the fact that lab courier positions allow for late morning starts, and it seems counterintuitive to suggest. Lab work is often time sensitive, and getting specimens to the lab so the results can get to the treaters in a timely manner is expected. Lab work that requires overnight fasting is typically done early in the morning. Without more information, Defendant has failed to establish lab courier as suitable employment for Claimant.

81. Defendant lists Uber® or Lyft® jobs, where Claimant sets his own hours and only takes the jobs when he is available. However, those jobs have prerequisites, such as the age and condition of the driver's vehicle and its configuration (must have 4 doors), and use of

a smartphone. Likewise, failure to accept jobs on a regular basis is discouraged and drivers who decline work often find no work coming their way. Finally, depending on the circumstances, the driver typically will help load and unload suitcases, or baggage, or groceries, for the passengers. The uncertainty of these variables, and the lack of factual development needed to make an informed decision on the suitability of this line of work precludes Uber® or Lyft® jobs from consideration.

82. Defendant did find one job which appears custom made for Claimant. It was delivering documents for a title company in Pocatello. It does not require early morning hours (the job's hours are from noon to 5 pm), involves no heavy lifting, no long distance walking, (for the same reason as lab courier jobs – businesses typically do not locate more than one hundred yards from the nearest available parking or loading zone, nor on upper floors of buildings without elevators), and the company was willing to work with an employee on their personal physical limitations.

83. Whether the listed job with a single employer is representative of the class of employment with title companies remains a mystery. The record is not clear that other title companies have the same or similar hours or would allow for flexibility in work schedule to account for those days when Claimant's bouts of nausea required him to start his workday at 10 or 11 am. Also, it would have been insightful to know how many title companies service the Pocatello area, and how many routinely are looking for couriers to hire. If title company courier is a routinely available position and title companies routinely start their workdays at 11 am or later, such employment would have been suitable for Claimant, and Defendant would have met its burden of overcoming Claimant's *prima facie* showing of odd-lot permanent total disability. Without that information, Defendant has failed to meet its burden of proof.

84. When the totality of the evidence is considered, Claimant has proven he is totally and permanently disabled under the odd-lot doctrine.

Subjective Hinderance Impairments

85. The Idaho Supreme Court set forth a detailed explanation of the "subjective hindrance" in *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 686 P.2d 557 (1990):

> Under this test, evidence of the claimant's attitude toward the preexisting condition, the claimant's medical condition before and after the injury or disease for which compensation is sought, nonmedical factors concerning the claimant, as well as expert opinions and other evidence concerning the effect of the preexisting condition on the claimant's employability will all be admissible. No longer will the result turn merely on the claimant's attitude toward the condition and expert opinion concerning whether a reasonable employer would consider the claimant's condition to make it more likely that any subsequent injury would make the claimant totally and permanently disabled. The result now will be determined by the Commission's weighing of the evidence presented on the question of whether or not the preexisting condition constituted a hindrance or obstacle to employment for the particular claimant.

Id. at 172, 563.

86. While Dr. Friedman lists a host of preexisting conditions he determined constituted ratable conditions, only two find support in the record as being a subjective hinderance to Claimant's employment at the time of his industrial accident – his peripheral artery disease and related claudication, (10% or 25% WP impairment, depending on what is included in calculating Claimant's walking limitations), and his chronic nausea (5% WP impairment).

87. If an impairment lessens Claimant's ability to find work, that constitutes a hinderance. *See generally Talbot v. Summit Wall Systems,* IIC 2012-004039 (Nov. 14, 2017) (Claimant's impairments made him less competitive and slower functioning in his job, which constituted a subjective hinderance.) For the reasons discussed above, Claimant has established

his peripheral artery disease and his chronic nausea created a barrier to him finding suitable employment after his industrial accident.

88. When the totality of the evidence is considered, Claimant has proven he had preexisting physical impairments which constituted subjective hindrances to his employment.

Combined Effects

89. Defendants argue that Mr. Porter's initial disability report strongly suggests his opinion that Claimant's permanent total disability was due to his biceps injury alone. Mr. Porter accentuated the fact that the injury left Claimant as functionally a "one-armed worker" when considering Dr. Bates' restrictions. No reference was made to Claimant's preexisting impairments when declaring Claimant an odd-lot worker. It was only in the addendum, after Claimant settled with his employer, that the "combination" language took root.

90. Defendant further argues Claimant cannot establish the fact that "but for" his prior conditions he would not be totally and permanently disabled. [7] Defendant's argument focuses on whether Claimant's preexisting conditions were a hindrance to his employment at the moment immediately preceding his industrial accident, as required by *Colpaert v. Larson's Inc*., 115 Idaho 825, 829, 771 P.2d 46, 50 (1989).

91. Defendant points out that just after his industrial accident Claimant was not as limited in his walking as suggested by Dr. Friedman's IME done in 2022. This argument was dealt with above under the *Subjective Hindrance* heading.

[7] Claimant argued the failure to get his biceps surgically repaired was due to his preexisting medical conditions, and without surgery his left arm was left nearly useless, so that his prior medical conditions led to his left arm's permanent disability, thus satisfying the "combined with" or "but for" requirements. However, as noted below, one does not need to go to such lengths to establish the "combined with" criteria.

92. Notwithstanding the arguments of the parties, the record is clear that Claimant's preexisting physical impairments of morning nausea and walking limitations, present at the time of Claimant's industrial accident, combined with his biceps injury to create his total and permanent disability.

93. But for his early morning nausea Claimant would have jobs available as a lab courier, a fire crew transportation driver, a city of Pocatello driver, or a transportation driver of railroad crews. But for his claudication issues, Claimant could deliver pizzas or sandwiches, or other delivery services to residential locations. Claimant's elbow injury alone would limit Claimant to light duty driving jobs, but those are not uncommon in his labor market. It is only when the biceps injury combines with either Claimant's nausea or his claudication that he finds himself an odd-lot worker.

94. When the totality of the evidence is considered, Claimant has proven he is totally and permanently disabled under the odd-lot doctrine as a result of a combination of his industrial biceps injury and his preexisting nausea and/or walking limitation due to his peripheral artery disease.

Carey Apportionment

95. Because Claimant has met his obligation under Idaho Code § 72-332, Claimant's employer and its surety is liable for payment of compensation benefits 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. To calculate the respective compensation allocations, a formula known as the *Carey* formula is used. This formula derives from the case of *Carey v. Clearwater County Road Department*, 107 Idaho 109, 686 P.2d 54, (1984).

96. The *Carey* formula prorates the non-medical portion of disability between the employer/surety and ISIF in proportion to their respective percentages of responsibility for the physical impairment. Distilled down, the formula works by adding the impairment ratings from a claimant's past ratable impairments[8] and the claimant's impairment ratings from the subject accident, and then subtracting that number from 100 (total disability) to determine the claimant's non-medical disability. Then, the ratio between past and subject impairments is used to determine respective percentages of responsibility between employer and ISIF. As such, it is imperative that the claimant's past impairments be quantified. Without such quantification, one cannot apply the *Carey* formula to determine ISIF liability.

97. In order to quantify Claimant's preexisting physical impairments, the first issue is to consider the ratings for those impairments which constituted a subjective hindrance to Claimant's employment. As noted hereinabove, those are limited to Claimant's chronic nausea and his walking limitations due to his peripheral artery disease.

98. Dr. Friedman assigned Claimant a 5% whole person impairment rating for his chronic nausea. His assignment for Claimant's peripheral vascular disease was 10% whole person.[9] What is not clear is what the doctor meant by "gait disturbance" due to neuropathy, to which he assigned a 15% whole person rating. It is unclear if the gait disturbance manifests as a distance walking limitation or something different.

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[8] For the sake of simplicity, the example described ignores the "combined value" of multiple past impairments and the "combined value" of subject accident impairments, if any, when describing how the formula operates. However, when allocating real percentages the combined value is used.

[9] Throughout this document, the term peripheral artery disease, and peripheral vascular disease have been used interchangeably even though technically peripheral artery disease is a specific condition, and a subset of peripheral vascular disease, the latter of which is used in broad sense to include any disease of the cardiovascular system. However, both terms implicate medical deficits in Claimant's cardiovascular system, as do the aneurisms in his arteries and other related issues with his circulatory system.

99. Since Claimant bears the burden of proof on ratings for his preexisting conditions and "gait disturbance" was not something he testified to, it would be speculative to conclude "gait disturbance" due to neuropathy is the same condition as inability to walk long distances due to claudication as the result of peripheral vascular disease. As such, Dr. Friedman's "gait disturbance" is not a condition on which there is testimony sufficient to conclude it was a subjective hindrance to Claimant's employment. Therefore, the rated preexisting physical impairments which constituted a subjective hindrance to Claimant's employment are limited to his early morning nausea (5%), and his inability to walk for distance as a result of his peripheral vascular disease (10%).

100. Claimant's qualifying preexisting physical impairments when combined, equal 15%, whether utilizing the combining table from the *AMA Guides to the Evaluation of Permanent Impairment, 6th Ed*., or simply adding them together. His impairment rating for his industrial accident was rated at 4% by both Dr. Bates and Dr. Friedman. That rating carries the most weight.

101. Claimant's impairments for *Carey* apportionment total 19% (15% + 4%) of the whole person, leaving an additional 81% disability to be apportioned between the ISIF and Employer per the *Carey* Formula. Claimant's industrial impairment constitutes 21% (4/19) and his qualifying preexisting impairments constitute 79% of his total impairment. (Derived by either subtracting 21 from 100 or dividing 15 – his preexisting impairments –by 19 – his total impairments.)

102. Employer is responsible for payment of 105 weeks of disability (500 weeks, the limit of partial disability x 21% industrial partial impairment) from January 21, 2021, the date of Claimant's medical stability. The 21% disability rating is payable at 55% of the average state

weekly wage for the year of Claimant's injury. Of course, the employer has previously settled with Claimant, so its obligation is accounted for in the settlement.

103. Total and permanent disability benefits are payable at a different rate under Idaho Code § 72-408. Thus, for the first 105 weeks following Claimant's date of medical stability, ISIF is responsible for making up any difference between the employer's obligation to pay permanent disability benefits and Claimant's entitlement to benefits as calculated pursuant to Idaho Code § 72-408. Thereafter, ISIF is responsible for the payment of total and permanent disability benefits for the remainder of Claimant's life.

CONCLUSIONS OF LAW

1. When the totality of the evidence is considered, Claimant has proven he is totally and permanently disabled under the odd-lot doctrine as a result of a combination of his industrial biceps injury and his preexisting nausea and/or walking limitation due to his peripheral artery disease.

2. When the totality of the evidence is considered, Claimant has proven Defendant State of Idaho, Industrial Special Indemnity Fund is liable under Idaho Code § 72-332 for a share of Claimant's total and permanent disability benefits pursuant to the *Carey* formula.

3. Commencing January 21, 2021, for a period of 105 weeks, Defendant State of Idaho, Industrial Special Indemnity Fund shall pay the difference between the periodic payments that would have been owed by the employer/surety, had they not settled, and the amounts payable pursuant to Idaho Code § 72-408. Thereafter, Defendant State of Idaho, Industrial Special Indemnity Fund shall pay benefits to Claimant pursuant to Idaho Code § 72-408 for the remainder of Claimant's life.

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 26th day of March, 2026.

INDUSTRIAL COMMISSION

Brian Harper

Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, 2026, 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

MELVIN "DUKE" BUSH, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2020-016680** **ORDER** Filed April 24, 2026 Idaho 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 the totality of the evidence is considered, Claimant has proven he is totally and permanently disabled under the odd-lot doctrine as a result of a combination of his industrial biceps injury and his preexisting nausea and/or walking limitation due to his peripheral artery disease.

2. When the totality of the evidence is considered, Claimant has proven Defendant State of Idaho, Industrial Special Indemnity Fund is liable under Idaho Code § 72-332 for a share of Claimant's total and permanent disability benefits pursuant to the *Carey* formula.

3. Commencing January 21, 2021, for a period of 105 weeks, Defendant State of Idaho, Industrial Special Indemnity Fund shall pay the difference between the periodic payments that would have been owed by the employer/surety, had they not settled, and the amounts payable pursuant to Idaho Code § 72-408. Thereafter, Defendant State of Idaho, Industrial Special Indemnity Fund shall pay benefits to Claimant pursuant to Idaho Code § 72-408 for the remainder of Claimant's life.

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

IT IS SO ORDERED.

DATED this the 24th day of April, 2026.

INDUSTRIAL COMMISSION

Claire Sharp

Claire Sharp, Chair

Aaron White, Commissioner

ATTEST:

Mary McMenomey

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, 2026, 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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