

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBIN STANGER,

Claimant,

v.

IDAHO STATE UNIVERSITY, Employer, and
STATE INSURANCE FUND, Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND,

Defendants.

IC 2013-015556

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

**FILED
NOVEMBER 5, 2018**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Pocatello on October 17, 2017. Claimant, Robin Stanger, was present in person and represented by James C. Arnold, of Idaho Falls and Kent A. Higgins, of Pocatello. Defendant Employer, Idaho State University (ISU), and Defendant Surety, State Insurance Fund, were represented by Steven R. Fuller, of Preston. Defendant, State of Idaho, Industrial Special Indemnity Fund (ISIF), was represented by Anthony M. Valdez, of Twin Falls. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on August 28, 2018.

ISSUES

The issues to be decided were narrowed in briefing and are:¹

¹ In post-hearing briefing, Claimant asserted the issue of retention of jurisdiction. Retention of jurisdiction was not mentioned in Claimant's Request for Calendaring or any parties' response thereto. Consequently, it was not listed as an issue in the Commission's Notice of Hearing. Pursuant to Idaho Code § 72-713, it cannot be addressed in the present decision.

1. The extent of Claimant's permanent impairment and the portion thereof attributable to her industrial accident.

2. Whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise.

3. Whether the Industrial Special Indemnity Fund is liable under Idaho Code § 72-332.

4. Apportionment under the Carey Formula.

Employer/Surety have briefed the issue of whether Claimant's claim for permanent disability is precluded by Idaho Code § 72-435 because Claimant engaged in the allegedly unreasonable practice of declining surgery, specifically, bilateral reverse total shoulder arthroplasty. This issue was not mentioned in Claimant's Request for Calendaring filed October 3, 2016 after joinder of ISIF, Claimant's Amended Request for Calendaring filed October 7, 2016, or her Second Amended Request for Calendaring filed October 27, 2016. This issue was not listed in ISIF's Response to Claimant's Request for Calendaring filed October 20, 2016. The document entitled "Response to Amended Request for Calendaring," dated October 21, 2016, and attached to Employer/Surety's Objection to Claimant's Reply Brief filed August 31, 2018, is not contained in the Commission's legal file and was apparently not received by the Commission.² Consequently, whether Claimant is precluded from claiming permanent disability for failure to follow prescribed medical treatment was not listed as an issue in the Commission's November 2, 2016 Notice of Hearing, May 9, 2017 Order Vacating and Resetting Hearing,

² Whether Claimant is precluded from claiming permanent disability for failure to follow prescribed medical treatment was listed as an issue in the Commission's September 23, 2015 Notice of Hearing, pursuant to the statement of that issue in Employer/Surety's Response to Request for Calendaring filed September 14, 2015. However said hearing was subsequently vacated and reset and was ultimately vacated by order of the Commission on June 7, 2016, pursuant to stipulation of Claimant and Employer/Surety due to the imminent joinder of ISIF.

June 15, 2017 Amended Order Vacating and Resetting Hearing, or August 7, 2017 Second Amended Order Vacating and Resetting Hearing. Pursuant to Idaho Code § 72-713, it cannot be addressed herein.³

CONTENTIONS OF THE PARTIES

Claimant asserts she is 100% totally and permanently disabled or is an odd-lot worker. Employer/Surety assert that Claimant has failed to prove she is totally and permanently disabled due to her 2013 industrial injury and also assert that if Claimant is found to be totally and permanently disabled, it is due to the combined effects of her industrial accident and pre-existing permanent impairment for which ISIF bears responsibility. ISIF maintains that Claimant's pre-existing condition was not a hindrance or obstacle to her employment and that her 2013 accident does not combine with her preexisting condition to render her totally and permanently disabled asserting that prior to her accident Claimant worked without restrictions and was fully able to function.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The parties' joint exhibits A through R;

³ Although not noticed per Idaho Code § 72-713 as an issue to be presently addressed, the assertion that Claimant unreasonably failed to submit to bilateral reverse total shoulder arthroplasty finds little support in the record. Reverse total shoulder arthroplasty requires major surgery. Dr. Wathne described the surgical alteration of the shoulder—the ball of the proximal humerus and the socket of the glenoid—in lay terms: “what we do is we reverse the configuration and we put the ball where the socket is and socket where the ball is.” Wathne Deposition, p. 17, ll. 7-9. At the time such was suggested to Claimant, she was advised the surgery would likely improve her pain but not her range of motion. Additionally, as further set forth hereafter, at the time reverse total shoulder arthroplasty was originally offered, a preoperative examination revealed Claimant's blood platelet count was too low to permit such major surgery. Further diagnostic testing confirmed idiopathic thrombocytopenia ostensibly unrelated to her industrial accident. To resolve her thrombocytopenia, a splenectomy was advised as a prerequisite for shoulder surgery. However, Claimant had no means to pay for a splenectomy and Surety declined to do so. Given the present record, Claimant's failure to undergo bilateral reverse total shoulder arthroplasty does not appear to constitute an unreasonable practice.

3. The post-hearing deposition testimony of Richard Wathne, M.D., taken by Claimant on December 19, 2017;

4. The post-hearing deposition testimony of Kathy Gammon, CRC, MSPT, taken by Claimant on January 30, 2018; and

5. The post-hearing deposition testimony of Sara Statz, CRC, taken by Employer/Surety on March 2, 2018.

All outstanding objections are overruled and motions to strike are denied except as noted below. Employer/Surety's objection to Claimant's Reply Brief is overruled pursuant to Idaho Code § 72-713 for the reasons set forth above. Employer/Surety's Motion to Strike Claimant's Response to Objection to Claimant's Reply Brief, filed September 12, 2018, in which ISIF subsequently joined on September 21, 2018, is hereby granted only as to pages 3 through the paragraph entitled "CONCLUSION" at page 17 of Claimant's response.

After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. **Background.** Claimant was born in 1952 in Pocatello. She was 65 years old and resided in Pocatello at the time of the hearing. She is right-handed.

2. Claimant graduated from Pocatello High School in 1970. In high school she participated in gymnastics and Taekwondo. She eventually tested for and advanced to black belt proficiency. She completed a year of college but obtained no college degrees. Claimant has been actively involved in caring for, training, and riding horses most of her life. Between approximately 1970 and 2001, Claimant worked as a fast food server, stable attendant, hotel housekeeper, cake decorator, construction flagger, convenience store cashier, baker, animal

control officer, security guard, bartender, dry cleaning attendant, and assisted living center administrator.

3. In approximately 2001, Claimant commenced working for Idaho State University as an office specialist and later as an archives record manager. She inventoried archived records, retrieved, organized, and re-shelved boxes of records and made a computer data base of the materials. She re-boxed materials into appropriate containers for long term storage. Claimant regularly transported boxes in her own vehicle for several miles and moved boxes alone and with assistance from others. Boxes often weighed from 40 to 50 pounds or more. She used ladders frequently to access higher shelves.

4. **Prior conditions.** On June 22, 2011, Claimant sought medical treatment for pain in her left shoulder, left knee, and right hip. Michael Doyle, PA-C, recorded her left shoulder symptoms included pain “which keeps her awake” and limited range of motion with abduction to “80-85 degrees, but she groans and moans while doing so.” Exhibit C, p. 9. Left shoulder x-rays showed significant calcification and she was diagnosed with likely calcific left rotator cuff tendonitis and given prednisone and Naprosyn. Thereafter she continued to seek medical treatment periodically for shoulder, knee, and hip symptoms.

5. On August 1, 2011, Claimant presented to Jami Price, PA-C, reporting pain in her shoulders. Exhibit C, p. 4.

6. In approximately October 2011, Claimant began treating with Ananda Walaliyadda, M.D., who diagnosed Claimant with rheumatoid arthritis, systemic lupus erythematosus, and chronic pain.

7. On October 3, 2011, David Brizee, D.O., recorded Claimant’s complaints of bilateral knee pain, right hip pain, and left shoulder pain. He noted calcification of her left

shoulder tendons and considered referring her to a pain management specialist. Claimant was then taking a number of medications, including: Buprenorphine patch for shoulder pain; Ibuprofen 800 milligrams for knee, hip and shoulder pain; Meloxicam for arthritis, pain, swelling, and stiffness in her knee, hip, and shoulder; Baclofen for spasms and leg cramps; Simvastatin; and Hydroxychloroquine for arthritis and lupus. Exhibit A, p. 4. She was referred to Kevin Hill, M.D., for pain management.

8. On October 20, 2011, Dr. Hill examined Claimant and recorded her report of a six-month history of severe joint pain. He further recorded: “Crepitus noted in the right shoulder. Right shoulder shows forward flexion to approximately 90 degrees, shoulder abduction to 85 degrees, shoulder internal and external rotation decreased by 25% bilaterally.” Exhibit B, p. 2. He prescribed methadone, Celebrex, and Wellbutrin.

9. On August 23, 2012, Dr. Hill examined Claimant noted her pain was 7/10, and recorded: “Her pain is aching in bilateral shoulders, left greater than right.” Exhibit B, p. 56. He assessed joint arthralgias, rheumatoid arthritis, lupus, and chronic pain syndrome. Dr. Hill renewed her medication prescriptions including Butrans opiate extended release patch, Mobic, Hydroxychloroquine, and Omeprazole.

10. On December 20, 2012, Dr. Walaliyadda offered to perform a left shoulder tenotomy for pain management; however Claimant declined. Exhibit B, p. 63.

11. At hearing Claimant readily admitted she had “aches and pains” in both shoulders prior to 2013, but asserted it was nothing serious and that prior to June 2013, she was saddling and riding her horse, roping cows, and throwing hay over the fence to feed her horses.

12. **Industrial accident and treatment.** On June 13, 2013, Claimant was at work rearranging boxes on shelves to make room for more boxes. She was on a ladder with a missing wheel when the ladder tilted and she fell while holding a box and struck her right shoulder against adjacent shelving. Claimant noted immediate right shoulder pain and burning, and told a co-worker she had fallen. She finished her shift. Upon returning to work the next day, Claimant reported her fall to a supervisor and was encouraged to seek medical attention.

13. On June 14, 2013, Claimant presented to Jacob Forke, M.D., who suspected right shoulder strain but could not rule out rotator cuff injury. He prescribed medications and later physical therapy. Claimant returned to work and also participated in physical therapy. However, by June 19, 2013, her worsening shoulder pain prompted a half-day work schedule. By July 25, 2013, Claimant requested a leave from work to seek further medical treatment for her shoulder. A July 10, 2013 right shoulder MRI revealed rupture of the infraspinatus tendon, nearly full thickness tearing of the supraspinatus tendon, and complex labrum tearing. She was referred to Richard Wathne, M.D., for treatment.

14. On August 1, 2013, Claimant presented to Dr. Wathne who confirmed right rotator cuff tear. She reported to Dr. Wathne that she had injured both her right and left shoulders in the industrial accident. He performed injections which provided only temporary benefit. Dr. Wathne recommended that Claimant undergo surgery on her right shoulder and ultimately recommended reverse total shoulder arthroplasty for both shoulders. He indicated such surgery would improve her pain but likely not increase her range of motion. Dr. Wathne later affirmed that a successful reverse total shoulder arthroplasty would allow Claimant to lift to her waist and allow her to lift up to 20 pounds to her shoulder, but “no more than a couple

of pounds above shoulder level, and certainly not on a repetitive basis.” Wathne Deposition, p. 41, ll. 14-16. Dr. Wathne cautioned Claimant to not lift anything given the condition of her shoulders, thus she never returned to her work at ISU.

15. On November 8, 2013, Claimant was examined by Stanley Waters, M.D., Ph.D., at Surety’s request. He assessed right rotator cuff tear and recommended arthroscopic right acromioplasty with distal clavicle resection and attempted right rotator cuff repair. Dr. Wathne did not oppose the recommendation, but opined that this more conservative surgery had at most only a 50% probability of resulting in significant functional improvement. He continued to recommend reverse total shoulder arthroplasty.

16. On February 13, 2014, Dr. Waters concluded Claimant’s industrial accident had “clearly exacerbated or worsened her shoulder pain and weakness with overhead activities; and probably contributed to expanding the left shoulder rotator cuff tear.” Exhibit F, p. 8.

17. On March 13, 2014, Claimant applied for Social Security disability benefits.

18. On March 21, 2014, ISU terminated Claimant’s employment because she had not returned to work.

19. Claimant was scheduled for reverse total right shoulder arthroplasty on June 16, 2014; however, pre-operative consultation revealed unacceptably low blood platelet levels resulting in cancellation of her shoulder surgery.

20. On August 2, 2014, Claimant was found eligible for Social Security Disability Benefits effective as of June 13, 2013.

21. On September 8, 2014, Claimant was examined by Michael Francisco, M.D. He diagnosed idiopathic thrombocytopenia and recommended splenectomy to treat her thrombocytopenia. Claimant was not financially able to pursue such treatment.

22. In response to Surety's inquiry, on November 4, 2014, Dr. Wathne affirmed Claimant had reached "maximum medical improvement until such time she is able to proceed with the recommended reverse total shoulder" surgery. Exhibit E, p. 34. He indicated rating Claimant's permanent impairment should be deferred until after shoulder surgery.

23. On December 23, 2014, Claimant was examined by David Simon, M.D., at Surety's request. He rated Claimant's right shoulder impairment at 11% of the whole person and apportioned 45% to pre-existing causes. Dr. Simon rated Claimant's right shoulder impairment due to her industrial accident at 6% of the whole person.

24. On September 29 and 30, 2015, Sharik Peck, PT, CRC, administered a functional capacity evaluation to Claimant and concluded she was extremely limited in all aspects of physical function. He opined she could lift and carry no more than five pounds, reach and handle only occasionally, and lacked the ability to perform productive work at any level according to the Dictionary of Occupational Titles.

25. On March 30, 2016, Dr. Wathne concurred with Mr. Peck's FCE findings, conclusions, and resulting restrictions, noting they were consistent with his observations from previous orthopedic examinations. Dr. Wathne affirmed that Claimant's bilateral shoulder dysfunction and restrictions were directly related to her industrial accident.

26. On August 24, 2017, Dr. Wathne examined Claimant and rated her permanent impairment at 23% of the whole person with 55% (equating to 13% of the whole person) attributable to her industrial accident and the balance of 10% to preexisting conditions.

Dr. Wathne opined Claimant was restricted from returning to employment due to a combination of her preexisting conditions and her 2013 industrial injury.

27. Claimant applied for employment with the City of Chubbuck, Maverick, Common Cents, Fred Meyer and several other businesses. She received no job offers.

28. **Condition at the time of hearing.** At the time of hearing, Claimant testified her shoulders were painful. Claimant understood that Dr. Wathne continued to recommend she undergo bilateral reverse total shoulder arthroplasties. She was not on pain medication and had not been on prescription pain medications for her shoulders for more than a year. She acknowledged the possibility of reverse total shoulder arthroplasty still exists, but she does not desire such surgery presently. She reported receiving PERSI retirement and Social Security Disability benefits.

29. **Credibility.** Having observed Claimant at hearing and compared her testimony with other evidence in the record, the Referee finds that Claimant is not an entirely reliable witness. Dr. Wathne, Kathy Gammon, and Sara Statz all observed that Claimant was not an accurate historian. The Referee does not find that Claimant is or has been deliberately false in any account. However, her memory is demonstrably imperfect and not reliable. Furthermore, Claimant is stoic to the point of consistently understating her bilateral shoulder condition, her need for medical treatment thereof, and the limitations therefrom. As is more fully set forth hereafter, Dr. Wathne testified that Claimant avoided acknowledging the full extent of her physical limitations. Wathne Deposition, pp. 50-51. To the extent Claimant's declarations are inconsistent with other evidence in the record; her statements will not be relied upon.

DISCUSSION AND FURTHER FINDINGS

30. 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). 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).

31. **Permanent impairment.** The first issue is the extent of Claimant's permanent impairment and the portion thereof attributable to her industrial accident. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. A determination of physical impairment is a question of fact and the Commission is the ultimate evaluator of impairment. Soto v. J.R. Simplot, 126 Idaho 536, 887 P.2d 1043 (1994).

32. In the present case, Dr. Simon examined Claimant on December 23, 2014, and rated her right shoulder impairment at 11% of the whole person with 6% due to her industrial accident and the balance preexisting. Dr. Wathne examined Claimant on August 24, 2017, and rated the permanent impairment of her shoulders at 23% of the whole person with 55%

attributable to her industrial accident. This equates to 13% of the whole person. He opined that Claimant had a preexisting chronic right rotator cuff tear.

33. On September 12, 2017, Dr. Simon examined Claimant again at Surety's request and concurred in Dr. Wathne's rating as to Claimant's right shoulder only. He apportioned 45% of Claimant's right shoulder impairment to pre-existing causes, concluding "She likely had pre-existing arthritis and a chronic rotator cuff tear that was aggravated by the 6/13/13 industrial injury." Exhibit G, p. 9. Dr. Simon rated Claimant's right shoulder impairment due to her industrial accident at 7% of the whole person.

34. Claimant indicated both shoulders were impacted in her June 13, 2013 fall:

A. The box I had ahold [sic] of hit this shoulder (indicating). And this shoulder and arm (indicating) hit the other row of shelving.

Q. (by Mr. Fuller) You are demonstrating to a shoulder. Which shoulder are you demonstrating?

A. I had the box on my left shoulder. And my right shoulder hit the row of shelving across.

Q. Which shoulder was injured then?

A. Both.

Q. Both shoulders?

A. Yes.

Exhibit O, p. 10 (Claimant's Deposition, p. 34, l. 21 through p. 35, l. 4).

35. Dr. Simon considered Claimant's left shoulder condition unrelated to her industrial accident and offered no opinion as to any left shoulder impairment. Dr. Simon's conclusion that Claimant's left shoulder symptoms are preexisting and entirely unrelated to her industrial accident does not explain the rapid increase in her symptoms and rapid loss of

left shoulder function following her accident. In contrast, regarding the relation of the 2013 industrial accident to Claimant's left shoulder pathology, Dr. Wathne testified:

Q. (by Mr. Fuller) Could Ms. Stanger's left shoulder problems simply be due to the progressive nature of her disease and not necessarily to the industrial injury?

A. Certainly can contribute to it. But I must admit that she claimed that she was lifting all these boxes and that in the few month period of time between June and December when she came in there, she basically developed a pseudoparalytic shoulder on the left. It's almost too much of a coincidence not to have some link to her injury or overusing it as a result of it.

Wathne Deposition, p. 51, l. 25 through p. 52, l. 11.

36. Dr. Wathne is Claimant's treating physician and observed her on multiple occasions over time. His opinion that both of Claimant's shoulders were injured in the 2013 accident or as a result thereof is supported by the record and persuasive. Dr. Wathne's impairment rating and apportionment are also supported by the record and persuasive.

37. Claimant has proven she suffers permanent impairment of her shoulders of 23% of the whole person, of which 55% is attributable to her industrial accident, and 45% is attributable to preexisting conditions. Claimant has proven she suffers permanent impairment of 23% of the whole person with 13% attributable to her 2013 industrial accident and 10% attributable to her preexisting condition.

38. **Permanent disability.** The next issue is the extent of Claimant's permanent disability, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise. "Permanent disability" or "under a 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 permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. 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 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. In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995). The proper date for disability analysis is the date of the hearing, not the date that maximum medical improvement has been reached. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012).

39. To evaluate Claimant's permanent disability several items merit examination including the physical restrictions resulting from her permanent impairment and her potential employment opportunities—particularly as identified by vocational rehabilitation experts.

40. Work restrictions. Claimant's activities are restricted due to her shoulder condition. After an FCE on September 29 and 30, 2015, Sharik Peck concluded Claimant could lift and carry no more than five pounds, reach and handle only occasionally, and lacked the ability to perform productive work at any level according to the Dictionary of Occupational Titles. Dr. Wathne concurred with Mr. Peck's conclusions and restrictions. The Referee finds that Claimant is restricted to lifting and carrying no more than five pounds,

reaching and handling only occasionally, and lacks the ability to perform productive work at any level according to the Dictionary of Occupational Titles.

41. Opportunities for gainful activity. Kathy Gammon, MS, CRC, CIWCS, LVRC, MSPT, a vocational rehabilitation expert retained by Claimant is also a licensed physical therapist who actively practiced physical therapy for many years. Her training brings a clearer and more thorough understanding and appreciation for Claimant's medical history. She interviewed Claimant on April 14, 2016, reviewed her medical and employment records, and prepared a report on May 6, 2016, assessing her employability. Ms. Gammon concluded that Claimant was precluded from the competitive labor market because of her reduced lifting, carrying, reaching and handling abilities resulting from her June 13, 2013 industrial accident. Ms. Gammon summarized: "She has suffered a 100% loss of access to employment and is totally and permanently disabled from future employment due to her industrial injury." Exhibit K, p. 26.

42. On October 4, 2017, Ms. Gammon issued an addendum to her employability report in response to new medical information from Dr. Wathne's August 24, 2017 examination of Claimant, permanent impairment rating, and conclusion that she was prevented from returning to gainful employment due to a combination of her preexisting conditions and the conditions related to her June 13, 2013 industrial injury. Ms. Gammon then opined:

According to this newly received medical information, Mrs. Stanger currently continues to experience a 100% loss of access to the local labor market due to a combination of her pre-existing shoulder conditions and her industrial injury of June 13, 2013.

On a more probable than not basis, she remains totally and permanently disabled from gainful employment within the local labor market due to a combination of

her preexisting left shoulder limitations, which were exacerbated by the industrial injury, and her right shoulder limitations resulting from her industrial injury.

Exhibit K, p. 28.

43. Sara Statz, MS, CRC, CIWCS, a vocational rehabilitation expert retained by Employer/Surety, interviewed Claimant on April 20, 2016, reviewed her medical and employment records, and prepared a report on May 13, 2016, assessing her employability. Ms. Statz noted that Dr. Wathne found Claimant reached maximum medical improvement by November 4, 2014. Ms. Statz noted that Claimant had not been released to any kind of work “and as such would be deemed totally disabled at this time.” Exhibit L, p. 17. In her post-hearing deposition, Ms. Statz concluded that Claimant was totally and permanently disabled based upon the limitations recorded by Mr. Peck and endorsed by Dr. Wathne.

44. The conclusions reached by Ms. Gammon and Ms. Statz are similar, thorough, well-reasoned, and persuasive. Based on Claimant’s bilateral shoulder impairment rating of 23% of the whole person, her extensive permanent physical limitations including her restrictions of lifting and carrying no more than five pounds, and reaching and handling only occasionally, and considering her non-medical factors including her age of 60 at the time of the accident and 65 at the time of hearing, absence of transferable skills, and inability to return to any of her previous positions, Claimant’s ability to engage in regular gainful activity in the open labor market in her geographic area has been eliminated. The Referee concludes that Claimant has suffered a permanent disability of 100%, inclusive of her 23% whole person permanent impairment. Claimant has proven that she is totally and permanently disabled.

45. **ISIF liability.** The next issue is whether ISIF bears any liability in the present case. Idaho Code § 72-332 provides that 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 will 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. In Dumaw v. J. L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court summarized the four inquiries that must be satisfied to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was a pre-existing 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 to cause total disability. Dumaw, 118 Idaho at 155, 795 P.2d at 317.

46. Pre-existing, manifest impairment. The preexisting physical impairment at issue herein is Claimant's bilateral shoulder condition prior to her 2013 industrial accident.

47. Claimant's preexisting shoulder condition compelled her to seek medical treatment on multiple occasions before her 2013 accident. In 2011, Michael Doyle, PA-C, noted Claimant's left shoulder symptoms of pain and limited range of motion. Left shoulder x-rays showed calcific left rotator cuff tendonitis. Also in 2011, Dr. Walaliyadda diagnosed Claimant with rheumatoid arthritis producing pain in both of her shoulders. Dr. Brizee noted calcification of her left shoulder tendons and referred her to Dr. Hill for pain management. Dr. Hill found crepitus in Claimant's right shoulder and limited range of motion bilaterally. In spite of multiple medications for prolonged periods, Dr. Hill noted in 2012 that Claimant continued to have bilateral shoulder symptoms. Her symptoms were sufficient to prompt her to seek further medical care. Dr. Wathne testified that from the right shoulder MRI it was

apparent that Claimant had a substantial right rotator cuff tear before her 2013 accident. Dr. Simon opined similarly. Dr. Wathne also opined that Claimant likely had a left rotator cuff tear prior to her 2013 accident. Claimant's bilateral shoulder impairment was rated at 10% of the whole person by Dr. Wathne. Exhibit E, p. 46.

48. Claimant's bilateral shoulder condition constitutes a pre-existing condition for purposes of Idaho Code § 72-332. It pre-existed and was manifest prior to the 2013 industrial accident. The first and second prongs of the Dumaw test have been met as to this condition.

49. Hindrance or obstacle. The third prong of the Dumaw test considers "whether or not the pre-existing condition constituted a hindrance or obstacle to employment for the particular claimant." Archer v. Bonners Ferry Datsun, 117 Idaho 166, 172, 786 P.2d 557, 563 (1990).

50. Claimant asserted that her shoulder condition did not prevent her from performing her work and testified that it did not hinder her work for any employer before the 2013 industrial accident. However, she admitted experiencing shoulder pain at work: "I lifted a lot of weight. And I thought most of the pain was from too much lifting." Exhibit O, p. 11 (Claimant's Deposition, p. 38, l. 25 through p. 39, l. 1). Claimant testified that she had "aches and pains" prior to her industrial accident "but they weren't stopping me from doing anything." Transcript, p. 70, l. 7. Claimant testified that with the help of an assistant she threw 500 boxes of records in a dumpster the week before her 2013 accident. However, Claimant had repeatedly sought medical treatment for her "aches and pains," including her bilateral shoulder pains, and functioned with the aid of periodic medical treatment and multiple prescription medications.

51. Dr. Wathne testified:

You know, obviously she claims she didn't have, you know, left shoulder problems before, although subsequent I learned that, you know, she had had a prior injection and was treated on the left side. So she obviously had been having some dysfunction but at the time of her injury was functioning at a normal level.

Wathne Deposition, p. 21, ll. 18-24. Dr. Wathne noted that Claimant had had considerable prior treatment including a Butrans opiate shoulder patch and multiple medications for shoulder pain control before her industrial accident. She treated extensively with Dr. Hill, a pain management specialist.

52. ISIF emphasizes Claimant's testimony that she was able to saddle and ride horses, and load and lift boxes at the library in her job at ISU before her 2013 accident as evidence that her preexisting shoulder condition was not a hindrance. However, regarding the accuracy of Claimant's assertions that she had no shoulder problems before her 2013 accident,

Dr. Wathne testified:

Q. (by Mr. Fuller) Didn't she deny to you that she had any shoulder problems prior to the industrial injury?

A. Yes, she did.

Q. Both shoulders?

A. She just said right—occasionally right she had some pain.

Q. But she never mentioned anything prior to the injury or said that she had any problems with her shoulder, left shoulder prior to the injury?

A. That's correct. She did say that.

Q. But she did have, didn't she, according to the records?

A. According to the records she did.

Wathne Deposition, p. 52, ll. 12-24. Considering Claimant's denial of prior shoulder limitations,

Dr. Wathne agreed Claimant was not an accurate historian:

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Q. (by Mr. Arnold) Based on what you have learned overall about the condition of her—particularly her left shoulder prior to the June 13th, 2013, accident, would you agree that Ms. Stanger is not a correct historian?

A. She is probably not the most accurate historian I've encountered. She seems to be in somewhat of a denial as to her condition. You know, as I mentioned before, even when I saw her this past August, she was like: Yeah, I'm doing fine. I'm functioning fine. I'm like: Well, let me see you lift your arm up. Is that fine? And she's like: No. I go: Are you in pain? Yes. They hurt me all the time.

Q. So it—

A. She's a tough cookie. Yes, I would concur that she's not a great historian.

Wathne Deposition, p. 50, l. 14 through p. 51, l. 5.

53. Claimant's testimony denying shoulder problems and limitations prior to her 2013 accident is unpersuasive. The medical records establish that prior to her 2013 accident, Claimant suffered significant pain and physical limitations that reduced her function and compelled her to seek medical attention repeatedly for her bilateral shoulder condition. Dr. Hill's records establish that Claimant's pre-existing condition was sufficient to restrict her horseback riding—a priority in her non-work activities—that prompted her to seek medical attention. Only with the aid of periodic medical attention from a pain management specialist and multiple prescription medications to control her bilateral shoulder pain was Claimant able to function in her work and non-work activities. Ms. Gammon noted the types and quantities of medications Claimant was taking prior to her industrial accident and testified: “she was taking a significant amount of pain medication and anti-inflammatory medication, and that seems probably to be the case that had she not been on that medication, she likely could not have done the work.” Gammon Deposition, p. 33, ll. 12-16.

54. Furthermore, as clearly explained by Ms. Gammon, even with the aid of multiple prescription medications Claimant's pre-existing bilateral shoulder condition caused

her to adopt less than optimal compensatory procedures for performing her assigned work at ISU which ultimately contributed to her June 13, 2013 accident. Having extensively reviewed Claimant's records, Ms. Gammon testified that Claimant's pre-existing left shoulder condition was a hindrance to her work performance. Ms. Gammon noted that Dr. Hill's August 23, 2012 records document significant left shoulder range of motion deficits. She testified that Claimant's left shoulder abduction was then below shoulder level and that:

Normal for that range of motion is ... clear over your head. So she was significantly limited in that she couldn't bring that left hand up to shoulder level because of her dysfunction in her left shoulder.

Flexion was zero to one twenty. So that was a little bit above shoulder level; but normal, again, is clear over your head.

So, again, she was significantly limited in the function of her hand out in front of her, not only to the side, but out in front of her, that she couldn't get it up over her head.

Gammon Deposition, p. 21, l. 13 through p. 22, l. 1.

55. Ms. Gammon observed that Dr. Hill encouraged home exercises which modestly improved Claimant's left shoulder range of motion; however, she still could not lift her arm above her head and reported left shoulder pain from four to seven out of ten. By March 2013, her left shoulder pain had improved to where she was riding her horses again.

56. Ms. Gammon summarized: "in answering your questions how was her activity affected prior to her injury, according to the medical records, I could see many instances where it affected not only her daily activities but also would impinge upon her vocational activities." Gammon Deposition, p. 25, ll. 18-22. Ms. Gammon then carefully analyzed Claimant's description of the June 13, 2013 industrial accident and testified that the very manner in which Claimant was performing her work when she was injured illustrated how her preexisting shoulder condition hindered her ability to work. She noted Claimant's testimony

that she was repositioning two heavy boxes on the top shelf and was at least four steps up on the ladder when she fell. Claimant testified at hearing regarding her accident as follows:

Q. (by Mr. Valdez) You have a box of books on one of your shoulders, and you're climbing up to place it on one of the shelves—

A. No. That's not what happened. The boxes were already on the shelf.

Q. Okay.

A. And I was just going to shift it from one part of the shelf to the other part, because I was trying to make some room.

Q. And you were doing that by—you have one box on one of your shoulders; right?

A. Yeah. It was too heavy to lift, so I was going to kind of swing it over.

Transcript, p. 87, ll. 4-16 (emphasis supplied). Claimant estimated the box she was positioning when she fell weighed 50 pounds. Exhibit M, p. 7.

57. After citing the above portion of Claimant's hearing testimony, Ms. Gammon explained:

So let's picture this. So we have her up four steps on the ladder where she's—her shoulder is level to the top shelf. She reaches over and puts the left box on her shoulder with probably her right hand. She puts it on her left shoulder, and she's going to move the other box and then put the box back from her left shoulder back on the shelf.

But as she shifts her weight to move the box, the ladder tips and she falls. Okay. If you and I were going to move a box, would we go up four steps where we're shoulder level to the shelf? No. I'd probably go up two steps, put my hands up, grab the box, move it over, pick it up with my arms over my head, pick it up, move it over, and put it where it needs to be on the shelf. I wouldn't go up four steps, transfer the box to my shoulder, push the other box over and then push it back up.

So what she's doing is she's accommodating her inability to lift her hands over her head with any kind of weight.

Gammon Deposition, p. 30, l. 15 though p. 31, l. 10 (emphasis supplied).

58. Ms. Gammon testified that given Dr. Hill's August 23, 2012 records: "There's no way she could have lifted over her head with that active range of motion." Gammon Deposition, p. 43, ll. 3-5.

59. Common experience teaches that the higher one ascends a ladder, the less stable one becomes. Thus, Claimant's pre-existing shoulder condition actually constrained her to move the box on June 13, 2013, in a hazardous manner—swinging it—resulting in the shifting of her weight on the ladder, and the ladder tipping due to the missing wheel.

60. Responding specifically to counsel's assertions that Claimant's pre-existing shoulder condition was inconsequential because she could apparently lift above shoulder level to saddle and ride her horse, Ms. Gammon testified:

I grew up on a ranch. I saddled many horses in my life, and you don't necessarily always lift. You can swing, and with swinging, you use momentum. And when you use momentum, it requires less muscle force and less range of motion because momentum is carrying the object up.

So I believe she could swing the saddle up. And she talks about how she was going to swing the box.

Gammon Deposition, p. 44, ll. 18.

61. Sara Statz largely agreed with Ms. Gammon's assessment:

Q. (by Mr. Fuller) Do you believe that any of those conditions could have acted as a hindrance to her employment, those preexisting conditions?

A. It depends on which document you look at. Because in Ms. Stanger's interview with me, like I said, she appeared to be the picture of health. And I believe that she presented herself as being quite healthy prior to the industrial injury. But then when you look at medical notes and you look at everything in totality, it appears that she was struggling.

And I think Kathy Gammon did a really great job, she was talking about how she had modified these activities because she wanted to. And it was just a slow progression that caused these things to build up to the point where she couldn't overcome them any longer; that is was insurmountable.

Statz Deposition, p. 25, l. 17 through p. 26, l. 7.

62. The Referee finds that Claimant's pre-existing shoulder impairment constituted a hindrance to her employment prior to her 2013 industrial accident. The third prong of the Dumaw test is met as to this impairment.

63. Combination. Finally, to establish ISIF liability, the pre-existing impairment must combine with the subsequent industrial injury to cause total permanent disability. "[T]he 'but for' standard ... is the controlling test for the 'combining effects' requirement. The 'but for' test requires a showing by the party invoking liability that the claimant would not have been totally and permanently disabled but for the preexisting impairment." Corgatelli v. Steel West, Inc., 157 Idaho 287, 293, 335 P.3d 1150, 1156 (2014), rehearing denied (Oct. 29, 2014). This test "encompasses both the combination scenario where each element contributes to the total disability, and the case where the subsequent injury accelerates and aggravates the pre-existing impairment." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

64. The record in the instant case contains persuasive evidence that Claimant's pre-existing shoulder condition combined with the 2013 industrial injury to render her totally and permanently disabled.

65. Dr. Wathne opined that "the restrictions that prevent her from returning back to gainful employment are due to a combination of the pre-existing conditions and the conditions related to her industrial injury of June 13, 2013 on a more probable than not basis." Exhibit E, p. 46. Ms. Gammon persuasively testified that Claimant is "totally and permanently disabled from gainful employment within the local labor market due to a combination of her

pre-existing left shoulder limitations, which were exacerbated by the industrial injury, and her right shoulder limitations resulting from her industrial injury.” Exhibit K, p. 28.

66. Dr. Wathne described how Claimant’s pre-existing condition combined with the injuries from her 2013 industrial accident to produce her loss of shoulder function. He testified that Claimant likely had pre-existing chronic rotator cuff tearing happening over a period of years resulting in muscle atrophy; however, Claimant “was able to use other muscles to compensate for that.” Wathne Deposition, p. 10, ll. 3-4. He considered her 2013 accident and observed: “there’s just kind of a tipping point where you have an injury And she was kind of teeter-tottering and it just took an injury to throw her over the hump essentially where she wasn’t going to have that function now.” Wathne Deposition, p. 11, ll. 3-10.

67. The record, particularly Dr. Wathne’s testimony, establishes that but for Claimant’s pre-existing condition she would not have been totally and permanently disabled by the industrial accident. Claimant’s 2013 industrial accident combined with her pre-existing left shoulder condition to render her totally and permanently disabled. The final prong of the Dumaw test has been satisfied as to Claimant’s pre-existing shoulder impairment.

68. Pursuant to Idaho Code § 72-332, ISIF is liable for Claimant’s pre-existing shoulder impairment and the proportion of disability attributable thereto.

69. **Carey apportionment.** The final issue is apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54, (1984).

70. In Carey, the Idaho Supreme Court adopted a formula apportioning liability between ISIF and the employer/surety at the time of the final industrial accident. The formula prorates the non-medical portion of disability between the employer/surety and the ISIF in proportion to their respective percentages of responsibility for the physical impairment.

Conditions arising after the injury, but prior to a disability determination, which are not work-related, are not the obligation of ISIF. Horton v. Garrett Freightlines, Inc., 115 Idaho 912, 915, 772 P.2d 119, 122 (1989).

71. Before applying the Carey formula, the portion of Claimant's impairment pre-existing her 2013 industrial accident at ISU, and the portion caused by her 2013 industrial accident must be quantified. Claimant's qualifying pre-existing impairment is 10% of the whole person for her shoulder condition. Claimant's shoulder impairment due to her 2013 accident is 13% of the whole person. Thus, Claimant's impairments for Carey apportionment total 23%. Claimant's impairment from her 2013 industrial accident constitutes 56.5% (13/23), and her qualifying pre-existing impairment constitutes 43.5% (10/23) of her total impairment.

72. By application of the Carey formula, Employer/Surety are responsible for the medical portion of 13% impairment caused by Claimant's 2013 accident and for 56.5% of the nonmedical portion of Claimant's permanent disability. ISIF is responsible for the pre-existing medical portion of 10% impairment and for 43.5% of the nonmedical portion of Claimant's permanent disability. Thus, Employer/Surety are liable for 282.5 weeks of statutory benefits commencing on November 4, 2014, the date Dr. Wathne found Claimant had reached maximum medical improvement from her 2013 industrial injury.

73. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: for the 282.5 week period subsequent to November 4, 2014, Employer/Surety are responsible to pay to Claimant total and permanent disability benefits at the applicable statutory rate. During this same period ISIF is responsible to pay to Claimant the difference between the applicable permanent partial disability rate and the applicable total and permanent disability rate. Thereafter, ISIF is wholly

responsible for the payment of total and permanent disability benefits at the applicable statutory rate.

CONCLUSIONS OF LAW

1. Claimant has proven she suffers permanent impairment of 23% of the whole person with 13% attributable to her 2013 industrial accident and 10% attributable to her pre-existing condition.

2. Claimant has proven she is totally and permanently disabled.

3. ISIF is liable pursuant to Idaho Code § 72-332 for Claimant's pre-existing shoulder impairment and the proportion of disability attributable thereto.

4. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: for the 282.5 week period subsequent to November 4, 2014, Employer/Surety are responsible to pay to Claimant total and permanent disability benefits at the applicable statutory rate. During this same period ISIF is responsible to pay to Claimant the difference between the applicable permanent partial disability rate and the applicable total and permanent disability rate. Thereafter, ISIF is wholly responsible for the payment of total and permanent disability benefits at the applicable statutory rate.

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 __29th_ day of October, 2018.

INDUSTRIAL COMMISSION

/s/ Alan Reed Taylor, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of November, 2018, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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2217 ADDISON AVENUE EAST
TWIN FALLS ID 83301

/s/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBIN STANGER,

Claimant,

v.

IDAHO STATE UNIVERSITY, Employer, and
STATE INSURANCE FUND, Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND,

Defendants.

IC 2013-015556

ORDER

**FILED
NOVEMBER 5, 2018**

Pursuant to Idaho Code § 72-717, Referee Alan Taylor 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 has proven she suffers permanent impairment of 23% of the whole person with 13% attributable to her 2013 industrial accident and 10% attributable to her pre-existing condition.
2. Claimant has proven she is totally and permanently disabled.
3. ISIF is liable pursuant to Idaho Code § 72-332 for Claimant's pre-existing shoulder impairment and the proportion of disability attributable thereto.

4. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: for the 282.5 week period subsequent to November 4, 2014, Employer/Surety are responsible to pay to Claimant total and permanent disability benefits at the applicable statutory rate. During this same period ISIF is responsible to pay to Claimant the difference between the applicable permanent partial disability rate and the applicable total and permanent disability rate. Thereafter, ISIF is wholly responsible for the payment of total and permanent disability benefits at the applicable statutory rate.
5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 5TH day of November, 2018.

INDUSTRIAL COMMISSION

/s/ _____
Thomas E. Limbaugh, Chairman

/s/ _____
Thomas P. Baskin, Commissioner

/s/ _____
Aaron White, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of November , 2018, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

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sc

 /s/ _____