BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ARTURO AGUILAR, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2011-024699** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON REMAND** **File June 5, 2020**

This matter came before the Commission on remand from a decision of the Idaho Supreme Court issued March 14, 2019. At a status conference held July 30, 2019, the parties stipulated that no additional evidence need be adduced and that the matter could be resubmitted to the Commission for decision consistent with the Supreme Court's Order on Remand. A briefing schedule was established. The matter is now ready for decision. The Commission hereby issues the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. This matter originally came before the Commission for hearing on July 22, 2015. Subsequent to hearing, Claimant and Employer/Surety reached a settlement. Claimant's remaining claims against Defendant State of Idaho, Industrial Special Indemnity Fund ("ISIF") came under advisement on or about July 20, 2017. The Commission entered its decision on or about October 13, 2017. In connection with the issue of ISIF's liability, the Commission made several specific findings which were not challenged on appeal, but which are relevant to the issues before the Commission on remand. By virtue of his low back condition alone, the Commission found that Claimant was totally and permanently disabled as of the date of hearing. The Commission found that Claimant's physician-imposed low back restrictions were the same at the time of hearing as

they were following his 2007 low back surgery. The parties acknowledge that Claimant is currently totally and permanently disabled as well.

2. In its original decision, the Commission found that while Claimant is totally and permanently disabled by reason of his low back condition alone, Claimant failed to prove that his pre-existing low back condition from his 2006 accident combined with his low back injury flowing from the 2011 accident to cause total and permanent disability. The Commission found the evidence insufficient to prove that Claimant would not now be totally and permanently disabled but for the pre-existing low back impairment.

3. On appeal, the Court noted the Commission's finding that Claimant's medical restrictions were the same both before and after the subject accident. The Court also noted the Commission's conclusion that Claimant was totally and permanently disabled as of the date of hearing. From those findings, the Court concluded that the Commission implicitly found that Claimant was totally and permanently disabled at the time of the subject accident. The Court further concluded that this implicit finding was inconsistent with the fact that Claimant was working regularly at two physically demanding jobs at the time of the subject accident. Since the evidence was uncontradicted that Claimant was so employed at the time of the second accident, this fact was sufficient to meet Claimant's burden of proving that he was not an odd-lot worker immediately prior to the subject accident. *Bybee v. State Industrial Special Indemnity Fund*, 129 Idaho 76, 921 P.2d 1200 (1996). Having made this threshold showing, the Court ruled that the burden of proof shifted to ISIF to show that Claimant was an odd-lot worker, even though he was working. ISIF could do this by showing that Claimant was only employed at the time of injury due to superhuman effort, the sympathy of his employer, a business boom or good luck. *Aguilar v. Industrial Special Indemnity Fund*, 164 Idaho 893, 901, 436 P.3d 1242, 1250 (2019). Because the

Commission did not address whether ISIF had met its burden of proving futility, the case was remanded for further findings by the Commission on this issue. However, the Court further ruled that in the event ISIF cannot carry its burden under *Bybee*, Claimant still retains the burden of proving all the elements of ISIF's liability as set forth in I.C. § 72-332.

4. Next, the Court addressed the Commission's conclusion that Claimant failed to adduce proof sufficient to demonstrate that the subject accident "combined with" his pre-existing low back condition to cause total and permanent disability. The Court observed that under I.C. § 72-332 the final element of ISIF's liability, i.e., the "combining with" element, is stated in the disjunctive. The final element of ISIF's liability requires the injured worker to demonstrate that he would not have become totally and permanently disabled, "but for" the pre-existing impairment. I.C. § 72-332. This element of the case can be proven in two ways: first, the injured worker may demonstrate that the pre-existing condition and the subject accident combined to cause total and permanent disability. Second, the "but for" test may be satisfied by demonstrating that the subject accident aggravated or accelerated the pre-existing condition to cause total and permanent disability. *See Aguilar*, 164 Idaho at 901-02, 436 P.3d at 1250-51 (outlining the disjunctive test of the fourth and final element of I.C. § 72-332). It was the second element of the disjunctive test that the Commission failed to apply. On remand, the Court directed the Commission to evaluate this means of satisfying the "but for" test, in addition to the "combining with" method that was previously considered.

5. The evidence considered by the Commission is the same evidence outlined in the original decision; neither party desired to adduce additional evidence on remand. ISIF concedes that Claimant is totally and permanently disabled as of the date of hearing. Additionally, ISIF concedes that it cannot prove that it would have been futile for Claimant to search for other

employment had Claimant lost the jobs he was performing at the time of the subject accident. Said differently, ISIF concedes that, at the time of the subject accident, Claimant was not employed only by reason of a business boom, sympathetic employer, temporary good luck or superhuman effort. ISIF's Post-remand Brief 15. Indeed, ISIF acknowledges that Claimant's testimony concerning his subjective abilities and symptoms make meeting this burden of proof impossible. Therefore, per *Bybee*, we conclude that Claimant was not an odd-lot worker at the time of the subject accident, but do not disturb our conclusion that as of the date of hearing he was totally and permanently disabled. Further, nothing disturbs our previous findings that Claimant's total and permanent disability is due to his low back condition alone, and that his medical restrictions for his low back condition, before and after the subject accident, are the same. From this, does it follow that the subject accident combines with the pre-existing low back condition to cause total and permanent disability? The Court did not think so, and gave direction to the Commission that if ISIF was unable to rebut Claimant's successful showing that he was not an odd-lot worker at the time of the subject accident, Claimant nevertheless retains the burden of proving all elements of ISIF's liability.

6. Next, we consider whether Claimant would not now be totally and permanently disabled but for the aggravation or acceleration of his pre-existing condition by the 2011 accident.

7. In connection with its discussion of the evidence, the Court offered the following observation after reviewing the records of Dr. Verst and Dr. Jorgenson: "In spite of their initial disagreement, both doctors ultimately agreed that an underlying condition had been aggravated by the second injury and that compensable surgery was appropriate." *Aguilar*, 164 Idaho at 897, 436 P.3d at 1246 (2019).

8. Per the Court's direction, the Commission now examines the medical evidence on the issue of whether the subject accident aggravated or accelerated Claimant's pre-existing physical impairment to cause total and permanent disability. Attention is directed to Claimant's L3-L4 level, the level immediately above the L4-5 level that was injured and surgically fused as a result of the 2006 accident. It is worth reiterating the findings from the radiological imaging of Claimant's low back conducted between 2006 and 2011. Of these studies, we said in the original decision:

> 13. While Claimant had several low back injuries prior to 2006, it was the 2006 accident that first led to surgical treatment. On December 27, 2006, Claimant underwent MRI evaluation of the lumbar spine which was read by David Giles, M.D., as follows:
>
> > L2-3 disc space: There is reduced T2 signal intensity from the nucleus but no other abnormality.
> > L3-4 disc space: Normal.
> > L4-5 disc space: There is focal small central disc extrusion probably secondary to an underlying radial annular fissure since there is a fluid collection in the anterior part of the disc protrusion. The disc protrusion minimally deforms the anterior surface of the thecal sac and contacts but does not deform in either of the fifth rootlets. Space available for thecal sac is minimally reduced, there is a generous CSF in the interstices between nerve rootlets.
> > L5-S1 disc space: Normal.
> > Soft tissues: The conus medullaris is posterior to L1 and normal. There is no evidence of an intraspinal mass. Nerve root the duct are normal positions with an CSF throughout the levels examined. The facet joints are normal. No soft tissue abnormality is identified.
> > Impression:
> > 1. There is a focal moderate central L4-L5 disc protrusion, probably secondary to an underlying radial annular fissure, that is in contact with and minimally deforms the anterior surface if the thecal sac, and is in contact with but does not deform or displace both of the L5 rootlets.
>
> ISIF's Exhibit 11, p. 4.
>
> 14. Claimant was treated conservatively, but failed to improve. About April 26, 2007, Dr. Johnson recommended an L4-5 fusion for treatment of Claimant's low back pain and radiculopathy. Repeat MRI evaluation of Claimants lumbar spine was performed on May 10, 2007, and was read as follows:
>
> LUMBAR DISK LEVELS:

L1-2: Normal for age.
L2-3: Normal for age.
L3-4: There is very mild intraforaminal annulus bulge of the left. There appears to be ample room for the nerve root to escape.
L4-5: There is moderate broad-based intraannular disc protrusion present. Disc material extends across entire anterior aspect of the spine canal and produces moderate sac compression. There is resultant bilateral recess stenosis.
L5-S1: normal for age.
ADDT'S COMMENTS: None
IMPRESSION: There is a moderate broad-based L4-5 intra annular disc protrusion present, There is a moderate anterior sac compression and there is a bilateral lateral recess stenosis.
There is a small focal intraforaminal disc bulge in the left at L3-4 without exiting the L3 root compression.

Employer's Exhibit 1, p. 172. (Emphasis in original).

15. Claimant was evaluated by Kenneth Little, M.D., on May 24, 2007 in connection with Dr. Johnson's recommendation for L4-5 diskectomy and fusion. Dr. Little noted the most recent MRI evaluation of Claimant's lumbar spine demonstrating an L4-5 disk protrusion, but also a small disk bulge on the left at L3-4, but without compression of the L3 nerve root. Dr. Little recommended a minimally invasive bilateral L4-5 hemilaminectomy and microdiskectomy. He felt that this would offer Claimant the best chance for pain relief. On June 11, 2007, Dr. Johnson performed an L4-5 diskectomy with instrumented fusion. Claimant did poorly following surgery, presenting with continuing complaints of low back pain and left lower extremity radiculopathy. Repeat MRI evaluation of Claimant's lumbar spine was performed on or about March 5, 2008. That study was read as follows:

COMPARISON: Examination of the lumbar spine, 12/27/2006.
FINDINGS: Since the previous exam, bilateral pedicle screws have been placed at L4 and L5. A spacer has been placed in the posterior aspect of the intervertebral disk space at L4-5. Posterior decompression has been performed. The bone marrow is within normal limits. There is loss of intervertebral disk signal at the L2-3 and L4-5 levels.
L5-S1: No abnormality is noted.
L4-5: Postsurgical changes are present, with pedicle screws at L4 and L5 bilaterally and posterior fusion bars and a spacer in the intervertebral disk space. No recurrent or retained disk is identified. Post surgical soft tissue enhancement seen posteriorly.
L3-4: A minor broad-based bulge is present abutting the anterior aspect of the thecal sac. There is mild facet arthropathy.
L2-3: There is a slight loss of intervertebral disk signal, but no disk bulge, protrusion, or herniation is identified. The central canal and neural foramina are widely patent.
L1-2: Normal.

> IMPRESSION: Postsurgical changes with lumbar spinal fusion, without MRI evidence of recurrent or retained disk.

Employer's Exhibit 1, p. 304. (Emphasis in original).

16. To evaluate possible pseudarthrosis at the level of the fusion, Dr. Little ordered a CT myelogram of the lumbar spine, which demonstrated a solid fusion. Dr. Little did not believe that Claimant's complaints were amenable to further surgical revision, and pronounced Claimant medically stable with a 25% whole person rating. (*See* ISIF's Exhibit 14, p. 6). Dr. Little also expressed his belief that Claimant would not be able to return to his time-of-injury work.

17. By letter dated July 29, 2008, Dr. Johnson pronounced Claimant medically stable and entitled to impairment at 18% of the whole person. Further, Dr. Johnson limited Claimant to light duty activities with occasional lifting to 17 pounds, frequent lifting to 7 pounds, and constant lifting of up to 3 pounds. These limitations/restrictions are quite likely derived from the July 10, 2008 Functional Capacity Evaluation ordered by Dr. Johnson. (*See* ISIF's Exhibit 15). Claimant continued to follow with Dr. Johnson through July 7, 2009, and during that time, Dr. Johnson periodically amended his activity restrictions for Claimant. On October 14, 2008, Dr. Johnson offered the following comments on Claimant's limitations/restrictions:

> He should not lift more than 15 pounds on an occasional basis. He should avoid repetitive lifting. He could probably lift 5 pounds without much difficulty.

ISIF's Exhibit 12, p. 24.

By letter dated November 6, 2008, Dr. Johnson offered the following comments on Claimant's limitations/restrictions:

> At this point Arturo should not lift more than about 15 pounds on an occasional basis. He should avoid jobs that involve repetitive lifting activities. He could probably lift up to 5 pounds at a time without much difficulty. In time he may get to where he can lift 20 to 30 pounds. Given his present level of function, I do not feel that he can do this at this time.

ISIF's Exhibit 12, p. 25.

18. In a response dated January 6, 2009 to a request to the Idaho Division of Vocational Rehabilitation, Dr. Johnson restricted Claimant to limited bending/twisting/stooping, limited pushing/pulling of 25 pounds and limited prolonged sitting/standing. He felt that Claimant could lift up to 25 pounds occasionally, 15 pounds frequently, and 5 pounds continuously. In notes dated April 7, 2009, Dr. Johnson limited Claimant as follows:

> He could not lift more than 20 pounds on occasional basis. He should avoid repetitive lifting he could probably lift 5 pounds without much difficulty.

ISIF's Exhibit 12, p. 27.

In his final note of July 7, 2009, Dr. Johnson limited Claimant as follows:

> Continue with current work restrictions no lifting over 20 pounds avoid, twisting, and excessive bending.

ISIF's Exhibit 12, p. 29.

As noted above, notwithstanding these recommendations from Dr. Johnson, Claimant returned to his customary work following the Commission's August 5, 2009 approval of the July 22, 2009 lump sum settlement, which resolved all claims associated with the 1999 and 2006 accidents. (*See* ISIF's Exhibit 2, p. 1).

19. Following the accident of October 3, 2011, Claimant experienced the onset of severe low back pain and bilateral lower extremity radiculopathy. Repeat MRI evaluation of Claimant's lumbar spine was accomplished on November 22, 2011. That study was read by Cameron Evans, M.D., as follows:

> There is multilevel degenerative disk disease throughout the lumbar spine, worst at the L3-L4 level, above the fused segment. This results in the spinal cord and neuroforaminal narrowing. This is described in detail by the level below.
> T12/L1: Normal disk height and signal without central canal or foraminal stenosis.
> L1/L2: Normal disk height and signal without canal or foraminal stenosis.
> L2/L3: There is a mild disk space narrowing and the disk desiccation there is a small Schmorl's node in the inferior endplate of L2. There is a small broad-based posterior disk bulge that does not cause significant spinal canal or neural foraminal narrowing.
> L3/L4: There is a disk space narrowing and a disk desiccation at this level. There is a large broad-based posterior disk bulge with central annular fissure and superimposed left paracentral caudally directed disk extrusion. Disk bulge combined with facet hypertrophy and ligamentum flavum laxity results in moderate spinal canal narrowing. There is also moderate bilateral neuroforaminal narrowing at this level. Extruded left paracentral disk severely narrows at the left lateral recess and impinges upon the transiting left L4 nerve root.
> L4/L5: There is mechanical fusion at this level. Hardware artifact somewhat limits evaluation of neural foramina. No significant spinal canal narrowing.
> L5/S1: Intervertebral disk space height is well preserved. No significant spinal canal narrowing. There is mild bilateral neuroforaminal narrowing at this level. Visualized sacrum is intact. Sacroiliac joints are preserved.

> Paraspinous musculature is within normal limits. Visualized retroperitoneal and pelvic structures are unremarkable.
> IMPRESSION:
> 1. ADVANCE DEGENERATIVE DISK DISEASE AT L3-L4 WHERE THERE IS A BROAD-BASED POSTERIOR DISK BULGE WITH SUPERIMPOSED LEFT PARACENTRAL CAUSALLY DISK EXTRUSION. EXTRUDED DISK SEVERLY NARROWS THE LEFT LATERAL RECESS AND IMPINGES UPON THE TRANSITING LEFT L4 NERVE ROOT. THERE IS ALSO MODERATE SPINAL CANAL NARROWING AT THIS LEVEL.
> 2. STATUS POST LUMBAR FUSION AT L4-L5 WITH LAMINECTOM AT L4. HARDWARE ARTIFACT SOMEWHAT LIMITS EVALUATION OF INTERVERTEBRAL DISK SPACE AND THE NEURAL FORAMINA AT THIS LEVEL.

Employer's Exhibit 3, pp. 622-623. (Emphasis in the original).

Findings of Fact, Conclusions of Law, and Order pp. 7-11, Oct. 13, 2017.

9. These studies were considered by treating/evaluating physicians in rendering their opinions on the extent, if any, to which the subject accident contributed to Claimant's low back injury. It is interesting that these objective studies were given different treatment by several of Claimant's treating/evaluating physicians. For example, after reviewing the March 5, 2008 and November 22, 2011 MRI studies, Dr. Greenwald observed:

> The second injury of 10/3/2011 demonstrated a herniated disc at L3-4, with extrusion which is new from his last imaging study dated 2008. Therefore, it is my medical opinion that this was caused (sic) related to his work-related injury of 10/3/2011 and he hence underwent an L3-4 decompressive surgery and the revision of his prior surgery. …

ISIF's Exhibit 22, p. 14.

10. In contrast, Dr. Verst's review of the same studies led him to observe that the 2008 and 2011 studies demonstrated "similar" to "very similar" findings at the L3-4 level. *See* ISIF's Exhibit 21. Suffice it to say that even objective MRI studies admit subjective interpretations. Dr. Evans, who read the 2011 MRI, did not have the opportunity to compare that study against the 2008 MRI. To the layperson's eye, the L3-4 deficits reported by Dr. Evans in 2011 appear to be

more consequential than the deficits noted at the same level by the radiologist who read the 2008 study. As stated above, the 2008 study references only a "minor" L3-4 disc bulge "abutting" the anterior thecal sac. Mild facet arthropathy was noted. By 2011, the posterior disc bulge was described as "large" with the additional finding of a central annular tear with a left paracentral caudally directed disc extrusion. By 2011, the disc bulge was observed to cause moderate spinal canal narrowing, and the left-sided disc extrusion was noted to "severely" narrow the space for the exiting L4 nerve root. Both Dr. Greenwald and Dr. Verst had the opportunity to review and compare the 2008 and 2011 studies. On balance, we find very little support in the aforementioned radiologist's interpretations for Dr. Verst's conclusion that the 2008 and 2011 studies are "very similar." However, it is clear that Dr. Verst's assessment of these studies helped inform his ultimate conclusion that the 2011 accident is not responsible for contributing to Claimant's L3-4 injury. ISIF's Exhibit 21, pp. 3-4. The other thing that is notable about Dr. Verst's report is that he appears to have assumed that Claimant had a "long extensive history of low back pain," (*Id.* at p. 2) notwithstanding Claimant's unchallenged testimony that he had returned to normal symptom-free function at some point after the Industrial Commission's August 5, 2009 approval of the Lump Sum Settlement negotiated to close his 2006 claim. At least, Dr. Verst's report does not reflect that he was aware of Claimant's relatively lengthy period of being symptom free vis-à-vis his low back prior to the 2011 accident. *See id.*

11. Dr. Verst attributed Claimant's new symptoms to the findings at L3-4 and he did recommend decompression and stabilization surgery at that level. ISIF's Exhibit 21, p. 3. On the issue of causation, he observed:

> Regarding causation and what is responsible for the L3-4 disc degeneration, disc collapse, disc protrusion/herniation, and lateral recess stenosis; I feel that this is the global cascade pathophysiology that corresponds to progressive disc degenerative disease. Therefore, on a more-probably-than-not basis, the jackhammer incident

> was not the insult or causation to his current need for surgical intervention. This statement is justified by having reviewed all of his previous MRI scans as well as an extensive review of all of his medical records. Again, there is evidence of disc herniation protrusion at the L3-4 level on his 2008 MRI scan.

ISIF's Exhibit 21, p. 3.

12. Dr. Verst's medical opinion supports a conclusion that the 2011 accident did nothing to aggravate or accelerate Claimant's pre-existing deficits at L3-4. Dr. Verst's responses to questions posed by counsel for Employer further reinforce his position that Claimant's L3-4 lesion is not causally related to the subject accident:

> 2. Is his current condition causally related to the industrial injury of 10/03/11? As previously mentioned in the discussion, I do not feel that his current need for surgery or further treatment is related to his industrial injury of 10/03/11.
>
> …
>
> 4. Is the need for surgery causally related to the industrial surgery of 10/03/11? A: I do not feel the current need for surgery is related to the industrial injury of 10/03/11. As mentioned in the discussion, MRI from 2008 demonstrates very similar findings with herniated disc favoring the left side with associated lateral recess and foraminal stenoses. Overall, this is natural progression of underlying degenerative disc disease.

ISIF's Exhibit 21, p. 4.

13. Notwithstanding Dr. Verst's apparently firm commitment to the proposition that the subject accident is not implicated in aggravating/accelerating Claimant's L3-4 condition, the Court observed that both Dr. Verst and Dr. Jorgenson "ultimately agreed that an underlying condition had been aggravated by the second injury." *Aguilar*, 164 Idaho at 897, 436 P.3d at 1246. Indeed, in response to one of counsel's questions, Dr. Verst did say something that may be at odds with the statements quoted above:

> A: I feel that the injury that occurred on 10/3/2011 aggravated an underlying advanced degenerative condition.

ISIF's Exhibit 21, p. 4.

However, the statement must be viewed in the context of the question it answers. The question posed was as follows:

> 5. Did Mr. Aguilar sustain temporary aggravation from the incident of 10/3/2011 regarding his back?

ISIF's Exhibit 21, p. 4. (Emphasis added).

14. In answering this question, it is not clear what Dr. Verst believes; does he believe the subject accident caused a temporary aggravation of Claimant's pre-existing condition, or does he believe that the subject accident permanently aggravated the pre-existing condition? His answer is ambiguous and is not proof that he is in agreement with Dr. Jorgenson. Additionally, even more uncertainty is interjected by Question #6, and Dr. Verst's response:

> 6. Is Mr. Aguilar's current condition stable as a result of the aggravation of 10/03/11?
>
> A: He has not reached maximal improvement. Again, I would recommend surgical intervention that will include fusing and decompressing the L3-4 level.

ISIF's Exhibit 21, p. 4.

15. The answer does not really address the call of the question. Read in conjunction with Question #5, ISIF seems to want to know whether Claimant was still suffering from the "temporary" aggravation that it hopefully hypothesized. Although Dr. Verst's answer makes it clear that Claimant was not yet stable, it leaves unanswered the question of whether the instability was caused by the aggravating effects of the subject accident. These uncertainties leave the Commission unable to conclude that Dr. Verst "ultimately agreed" with Dr. Jorgenson that Claimant has an underlying condition which was permanently aggravated/accelerated by the 2011 accident. However, if it is accurate to say that Dr. Verst holds an opinion that Claimant's L3-4 deficits were not accelerated/aggravated by the 2011 accident, his opinion may be challenged by

what we perceive to be Dr. Verst's mischaracterization of the 2008 and 2011 studies, and his apparent ignorance of Claimant's lack of preinjury symptoms.

16. Unlike Dr. Verst, Dr. Jorgenson did take a history from Claimant that he (Claimant) had not suffered from any low back complaints in the months preceding October 3, 2011, but did suffer immediate onset of low back pain while breaking up concrete on that date. *See* ISIF's Exhibit 20, p. 1. Following a trial of conservative therapy, Dr. Jorgenson eventually made some surgical recommendations for Claimant. In a February 13, 2012 note, Dr. Jorgenson stated:

> Mr. Aguilar has not responded to conservative care and has radiographic evidence of disk pathology above an existing fusion. We have recommended surgical intervention in terms of an L3-L4 laminectomy, discectomy, and fusion. The fusion is required since it is adjacent to an existing fusion and as a consequence of the expected increase stress at the L3-L4 level. …

ISIF's Exhibit 20, p. 5.

17. Dr. Jorgenson gave three surgical recommendations for Claimant at L3-4; a laminectomy, discectomy and fusion at that level. ISIF's Exhibit 20, p. 5. However, he stated that the fusion part of the procedure was required simply because Claimant had undergone previous fusion at L4-5 and this caused "expected increase stress" at the L3-4 level. *Id.* Therefore, absent the pre-existing fusion at L4-5, Dr. Jorgenson's notes suggest that Claimant would be a candidate for only a laminectomy and discectomy at L3-4.

18. Subsequent to Dr. Jorgenson's surgical recommendation of February 13, 2012, Dr. Verst offered his opinions, as discussed above, to the effect that Claimant's L3-4 level problems arose independent of the accident of October 3, 2011. Dr. Jorgenson responded to Dr. Verst in his letter of April 24, 2012. ISIF's Exhibit 20, p. 6. In that letter, Dr. Jorgenson reiterated his opinion that Claimant required surgery at L3-4, explaining that Claimant suffers from "adjacent segment disease" at that level. *Id.* This is obviously a reference to the additional stresses placed on the L3-

4 level by virtue of the previous L4-5 fusion, as discussed in Dr. Jorgenson's February 13, 2012 note. Next, in the April 24, 2012 letter, Dr. Jorgenson addressed Dr. Verst's assessment that the need for treatment at L3-4 was not causally related to the October 3, 2011 accident. Because Claimant had returned to heavy work following the 2007 surgery, and was symptom-free prior to October 3, 2011, the accident aggravated Claimant's pre-existing pathology at L3-4. ISIF's Exhibit 20, p. 6. After offering this opinion, Dr. Jorgenson then said something which might, at first blush, appear to denigrate his opinion that Claimant's pre-existing pathology at L3-4 was aggravated by the accident of October 3, 2011:

> However, since the patient was asymptomatic prior and had a specific injury and has had symptoms since, it is my opinion on a medically more-probable-than-not basis that his current symptoms and need for treatment are directly related to the industrial injury of 10/3/2011.

ISIF's Exhibit 20, p. 6.

19. It might be argued that, by this statement, Dr. Jorgenson believes that the accident of October 3, 2011, and that accident alone, is responsible for Claimant's symptoms and need for medical treatment. However, a more considered view is that the existence of a "direct relationship" (to paraphrase Dr. Jorgenson) between the accident of October 3, 2011, and Claimant's symptoms and need for treatment, is not inconsistent with the proposition that the subject accident aggravated Claimant's pre-existing condition to cause Claimant's symptoms and need for treatment. This view is reinforced by the penultimate paragraph of Dr. Jorgenson's April 24, 2012 letter:

> While Dr. Verst opines that the patient's symptoms are an aggravation of the preexisting injury, I do not agree with his assessment that his current symptoms are more related to the preexisting natural degenerative cascade for the reasons as stated above. Most notably, the patient had a specific event which directly resulted in his symptoms and he was entirely asymptomatic for several years prior to this incident.

ISIF's Exhibit 20, p. 6.

From the foregoing, we conclude that Dr. Jorgenson views the subject accident as accelerating/aggravating the pre-existing adjacent segment disease at L3-4; causally related to the L4-5 fusion performed in 2007.

20. Having considered the testimony of Dr. Jorgenson and Dr. Verst, we cannot conclude that the two physicians ultimately agreed that Claimant's underlying condition was aggravated by the accident of October 3, 2011. However, we do find Dr. Jorgenson's writings persuasive on the question of whether or not the accident of October 3, 2011 aggravated or accelerated Claimant's pre-existing deficits at L3-4, deficits which were the natural and probable consequence of the decision to fuse Claimant at L4-5 in 2007. As a result, we conclude that Claimant has established that his pre-existing L3-4 lesion was permanently aggravated by the accident of October 3, 2011.

21. However, to conclude that Claimant's pre-existing L3-4 lesion was permanently aggravated by the effects of the October 3, 2011 accident is not our stopping point. Claimant must still prove that he would not have become totally and permanently disabled but for the pre-existing impairment. To recap, we have found that Claimant suffered from a pre-existing condition at L3-4 which was a natural and anticipated consequence of the decision to fuse Claimant at L4-5 in 2007. As Dr. Jorgenson explained, the L4-L5 fusion places greater stresses on the adjacent L3-L4 motion segment. The accident of October 3, 2011 aggravated and accelerated Claimant's L3-4 adjacent segment disease but not, as far as we can tell, his fusion at L4-5. As revealed in his operative report of May 5, 2012, Dr. Jorgenson found Claimant's previous L4-5 fusion to be intact. However, because the fusion was to be extended to include the L3-4 level, the pedicle screw instrumentation implanted in 2007 was removed and replaced with new instrumentation which would span L3 to L5. As noted by Dr. Jorgenson, it was the pre-existing fusion at L4-5 which

made it necessary to fuse Claimant at L3-4. Absent the pre-existing L4-5 fusion, a discectomy and laminectomy at L3-4 might have sufficed to address Claimant's L3-4 deficits.

22. We have previously concluded that Claimant's medical restrictions for his low back condition are the same now as they were prior to the October 3, 2011 accident. It might be argued that this finding is the best defense to Claimant's assertion that the subject accident aggravated the pre-existing condition to cause total and permanent disability. How could it be said that Claimant would not now be totally and permanently disabled but for the pre-existing impairment, when his medical restrictions are unchanged? However, we are also constrained in this decision to conclude that Claimant was not totally and permanently disabled immediately prior to the subject accident, but, by virtue of his low back condition alone, is totally and permanently disabled as of the date of hearing. The answer to this conundrum lies in recognizing that pre- and post-injury restrictions given to Claimant for his low back condition are medical recommendations made by his providers in an effort to protect him against further injury. As pointed out in the original decision, such medical restrictions are not intended to define Claimant's functional ability. They are imposed to protect compromised individuals from further injury by restricting the types of vocational activities in which they should engage. The fact that Claimant was working at two jobs which exceeded these restrictions at the time of injury does not disprove the validity of the restriction, although it does give credence to Claimant's testimony that he was symptom free vis-à-vis his low back, and had been for some months, at the time of the subject accident. Since then, he has suffered from unrelenting low back discomfort, notwithstanding the surgery performed by Dr. Jorgenson. He has been unable to tolerate attempts to return to gainful activity. Therefore, notwithstanding that he now carries the same recommendations to protect his back from further injury as he did following the 2007 surgery, he is subjectively much worse, and the medical evidence we find persuasive

leads us to conclude that the worsening of Claimant's subjective complaints results from the aggravation of his pre-existing L3-L4 lesion by the October 3, 2011 accident. Therefore, we conclude that Claimant has satisfied his burden of demonstrating that he would not now be totally and permanently disabled but for the pre-existing L3-L4 lesion, which, in turn, resulted from the decision to fuse Claimant at L4-L5 in 2007.

23. We have previously determined that Claimant's pre-existing low back condition constituted a subjective hindrance to Claimant prior to the subject accident. *See* Findings of Fact, Conclusions of Law, and Order pp. 33-34, Oct. 13, 2017. We reached this conclusion based on the restrictions imposed by Dr. Johnson in 2009 to protect Claimant's back against further injury. Had Claimant observed these restrictions he might not have caused progressive injury to the L3-L4 level. Therefore, we believe that on a pre-injury basis Claimant reasonably had restrictions which constituted a subjective hindrance.

24. There remains for consideration, the question of whether Claimant has carried his burden of demonstrating that the pre-existing L3-L5 lesion in fact qualifies as a pre-existing physical impairment for purposes of the test for ISIF liability. One of the elements of that test is that Claimant demonstrate that his pre-existing L3-L5 lesion constituted a ratable permanent physical impairment as of the date of injury. *See Colpaert v. Larson's, Inc.*, 115 Idaho 852, 771 P.2d 46 (1989).

25. As noted in the original decision there are competing opinions on Claimant's accident-produced and pre-existing low back impairment. There, we found Dr. Greenwald's opinion to be the most persuasive. Findings of Fact, Conclusions of Law, and Order p. 23, Oct. 13, 2017. Employing the protocols recommended by the *Guides to the Evaluation of Permanent Impairment, (Sixth Edition)* she calculated an impairment rating for all of Claimant's low back

impairments before subtracting-out the impairment rating referable to Claimant's 2011 accident. ISIF's Exhibit 22. Dr. Greenwald assigned a 25% whole person rating for Claimant's multi-level low back condition. *Id.* She determined that Claimant suffered a significant injury in 2006, in fact a multi-level injury, since he had two levels of radiculopathy as a result of the accident. Therefore, his impairment rating for his pre-existing low back impairment is deemed to be 19% of the whole person, of which 6% is referable to the 2011 accident. *Id.* Dr. Greenwald did not make any effort to apply separate ratings to Claimant's pre-existing L4-5 and L3-4 conditions, although she reviewed the radiological studies which showed that Claimant's L3-4 condition did progress following the 2007 fusion surgery. *Id.* We assume, however, that whatever pre-existing impairment Claimant might be entitled to for the pre-existing L3-4 lesion is captured in the 19% impairment rating. Further, since we have found that the pre-existing L3-4 lesion is the natural and probable consequence of the decision to fuse Claimant at L4-5, it seems unnecessary to separate the pre-existing impairments referable to each level. Claimant's L4-5 fusion led to his pre-existing L3-L4 deficits by placing additional stresses on the L3-4 level, as reflected in Dr. Jorgenson's records and discussed above. Both L4-5 and L3-4 are therefore implicated in contributing to Claimant's total and permanent disability. Thus, we conclude that Dr. Greenwald's opinion is adequate to demonstrate the pre-existing impairment which is implicated in combining with the work accident to cause total and permanent disability.

26. Dr. Little proposed that absent the December 27, 2012 motor vehicle accident, Claimant would have reached medical stability as of six months following his May 15, 2012 surgery, i.e., November 15, 2012. Claimant's Exhibit F, p. 238. The December 27, 2012 accident was eventually determined to be non-contributory to Claimant's permanent low back condition.

Claimant's Exhibit I, pp. 341-42. Therefore, the Commission concludes that Claimant became medically stable as of November 15, 2012.

CONCLUSIONS OF LAW AND ORDER

Based on the foregoing, and following the Court's Order on remand, the Commission makes the following additional findings:

1. Claimant has proven that he was not an odd-lot worker at the time of the subject accident.

2. ISIF has failed to rebut Claimant's showing that he was not an odd-lot worker.

3. Claimant has demonstrated that the subject accident aggravated/accelerated his pre-existing low back condition. Further, Claimant has proved that he would not now be totally and permanently disabled, but for the pre-existing condition. The elements of ISIF's liability have been met.

4. Claimant's relevant impairments total 25% of the whole person, leaving 75% disability to be apportioned between Employer and ISIF. Employer bears responsibility for disability as follows: 6/25 x 75 = 18 + 6 = 24% of the whole person. ISIF's responsibility is calculated as follows: 19/25 x 75 = 57 + 19 = 76% of the whole person. *Carey v. Clearwater County Road Dep't*, 107 Idaho 109, 686 P.2d 54 (1984). Had Employer not settled the claim, it would be responsible for the payment of 120 weeks of disability benefits (24% of 500 weeks) calculated at 55% of the average weekly state wage beginning November 15, 2012. ISIF is responsible for paying the difference between what Employer would have been obligated to pay, and the total and permanent disability rate calculated pursuant to I.C. § 72-408 and I.C. § 72-409. Thereafter, ISIF is responsible for the payment of the entirety of Claimant's entitlement to total and permanent disability benefits.

5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated. **IT IS SO ORDERED.**

DATED this 5th day of June, 2020.

INDUSTRIAL COMMISSION

Thomas P. Baskin, Chairman

Aaron White, Commissioner

Thomas E. Limbaugh, Commissioner

ATTEST:

Kamerron Monroe
Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of June, 2020, a true and correct copy of the foregoing **FINDINGS OF FACT, CONLUSIONS OF LAW, AND ORDER ON REMAND** was served by email upon each of the following:

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el Emma O. Landers