

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

ELMER A. HELSLEY,

Claimant,

v.

STATE OF IDAHO, INDUSTRIAL  
SPECIAL INDEMNITY FUND,

Defendant.

**IC 2014-014196**

**IC 2015-022847**

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

November 18, 2019

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John C. Hummel, who conducted a hearing in Twin Falls on February 6, 2019. Dennis R. Petersen represented Claimant, Elmer A. Helsley, who was present in person. Anthony M. Valdez represented Defendant, State of Idaho, Industrial Special Indemnity Fund (ISIF). The parties presented oral and documentary evidence, took post-hearing depositions, and submitted briefs. The matter came under advisement on October 18, 2019.

**ISSUES**

The issues to be decided by the Commission as the result of the hearing are:

1. Whether Claimant is totally and permanently disabled, pursuant to the *Odd-Lot* Doctrine, or otherwise;
2. Whether ISIF is liable pursuant to Idaho Code § 72-332; and
3. If ISIF is liable, what is the correct determination of the *Carey* formula?<sup>1</sup>

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<sup>1</sup> Claimant waived the issue of attorney fees pursuant to Idaho Code § 72-804 at hearing.

## **CONTENTIONS OF THE PARTIES**

Employer, The Kroger Company, aka Smith's Food & Drug Centers (Smith's), and Surety, Ace American Insurance Company, entered into a lump sum settlement agreement with Claimant approved on January 19, 2018, and thus did not take part in the hearing.

Claimant contends that he is totally and permanently disabled as a result of a combination of two injuries he sustained in the employ of Smith's, one in 2014 and the other in 2015. Claimant argues that ISIF is liable under Idaho Code § 72-332 for 19% of Claimant's disability, inclusive of impairment.

ISIF argues that Claimant is not permanently and totally disabled, thus there is no ISIF liability. Nevertheless, if the Commission finds that Claimant is so disabled, ISIF contends that Claimant's 2014 left shoulder injury did not present a subjective hindrance to his employment. ISIF further argues that the 2014 and 2015 injuries did not combine with each other to result in Claimant's disability, thus there is no liability for ISIF under Idaho Code § 72-332.

## **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;
2. Joint Exhibits A through DD, admitted at the hearing;
3. The post-hearing deposition testimony of the following experts:
  - a. James. H. Bates, M.D.;
  - b. Delyn Porter, M.A., CRC, CIWCS; and
  - c. Barbara K. Nelson, M.S., CRC.

All unresolved objections from the hearing and/or post-hearing depositions are overruled.

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

### **FINDINGS OF FACT**

1. **Claimant's Background and Education.** Claimant was born on October 10, 1953 and was 65 years old at the time of hearing. Tr., 17:21-24. He resided in Burley, Idaho. *Id.* at 25-18:1.

2. Claimant grew up on a farm in Shoshone, Idaho and attended high school there. *Id.* at 18:17-21. In or about 1970, he left school after the tenth grade. He did not subsequently obtain a GED or engage in any post-secondary education. *Id.* at 19:1-7. The only additional training he received was in a two-week course on manufacturing of sausage that Falls Brand arranged for him. *Id.*

3. As a youth, Claimant had his first work experience laboring on his father's 1,000 acre farm. He performed typical farm hand chores, including herding cattle, feeding cattle, and picking rocks in fields, among other tasks. *Id.* at 19:12-20:1.

4. **Work History.** Claimant's first job after high school was working for a dairy located in Richfield, Idaho. He fed the milk cows and milked them, as well as performed other various chores. *Id.* at 20:2-11. He kept this job for a couple of years. *Id.* at 12-13.

5. Claimant next worked for a meat packing house, Allen's Packing, located in Gooding, Idaho, in 1972. In this job he slaughtered cattle, or in Claimant's words, "knocked cattle." *Id.* at 20:24-21:7. He kept this job for approximately a year. *Id.* at 21:8-10.

6. Claimant next worked for Vanderway Dairy in Caldwell, Idaho. He fed and milked cows, helped treat them, pulled calves, as well as performed various other chores related to the dairy. *Id.* at 21:17-22:2.

7. Claimant next went to work for Idaho Meat Packers located in Caldwell, Idaho. It was at this job that he first performed butchering cattle. He “headed” cattle (skinned the cattle head), worked in the “blood pit,” and performed other tasks related to the slaughtering and butchering of cattle. He worked at this job for four to five years. Tr., 22:3-24:16.

8. Claimant and his wife then moved briefly to Indianapolis, Indiana, where his wife’s father was retired. He worked at a beef packing house in Henderson, a suburb of Indianapolis. They stayed less than a year. *Id.* at 24:24-25:12.

9. Claimant returned to Idaho and worked for Independent Meat Company (Falls Brand) in Twin Falls in 1977. At Falls Brand, he headed cattle and hogs, worked on the pork line, and also worked as the foreman in the kitchen. Between different stints he worked at Falls Brand for approximately 16 years altogether. In-between the two stints he worked at a meat packing plant in Caldwell. *Id.* at 25:13-28:20.

10. In or about March 1990, Claimant left Falls Brand and began farming near Shoshone, which lasted 10 years. His farm work included raising cattle, hay, oats, and corn. He then bought a custom meat plant in 2000 in Wendell and operated it until approximately August 2008, when he sold it. *Id.* at 28:22-30:1.

11. Claimant and his family then moved to Burley. He had several jobs, including work at Simplot’s palletizing product in the freezer, a job at Idaho Milk driving, and then a job at the meat department at Stokes Market cutting meat. *Id.* at 33:1-12. Claimant also worked for Glambia Food and Lowry Dairy. *Id.* at 33:21-34:1. Claimant and his wife worked several of these jobs in the winter while during the rest of the year they farmed. *Id.* 34:4-7.

12. **Prior Medical History.** Prior to working for the subject employment, Smith's, beginning in 2011, Claimant had never had any major injuries to his body at work, nor did he have any major surgeries. Tr., 37:13-19.

13. Claimant sustained a minor injury in 2000. He cut his chest with the tip of his knife while cutting a sirloin steak. According to Claimant, the cut "just barely tapped me." He received a couple of stitches for a flesh wound and recovered fully. *Id.* at 37:20-39:7.

14. Claimant sustained a finger injury while working for Smith's in 2013. Claimant mistakenly grabbed his knife and injured his middle finger on his right hand, requiring several stitches. The wound healed fully. *Id.* at 39:8-24.

15. When Claimant was growing up, approximately age 10 or 12, he was hit with an axe behind his ear. Claimant received stitches and recovered fully with the exception of some nerve damage. *Id.* at 40:5-8.

16. Claimant received a gun wound to his left foot in a hunting accident when he was 14 years old. The injury took a toe. He fully recovered from the accident. *Id.* at 40:10-41:4.

17. In or about 2012, Claimant had surgery on his neck to remove a benign tumor on his cervical spine. He recovered fully from the surgery and the condition. *Id.* at 41:5-43:18.

18. **Subject Employment.** Claimant first went to work for the meat department at Smith's in Burley on June 18, 2011. *Id.* at 37:7-12; 44:4.

19. When Claimant began working in the Smith's meat department, management had him perform work alongside the two journeymen meat cutters cutting meat. He eventually gained enough experience to qualify as a journeyman meat cutter himself after three years. *Id.* at 44:5-46:21.

20. **Industrial Accidents and Medical Care.** *May 26, 2014 Accident.* On May 26, 2014, Claimant was on the late shift; all of his coworkers had already left for the day. Tr., 47:7-10. Claimant was running a little behind. He went out to the loading dock where a six wheeler cart was waiting with four or five plastic crates stacked up. Claimant needed the six wheeler cart to complete his work for the evening shift, which included preparing the freezer for the next day's work. Claimant explained as follows: "All I did was grab them to slide them off and when I slid them it [his shoulder] twisted. That's what tore my left shoulder." *Id.* at 48:10-17. The pain dropped Claimant to his knees. *Id.* at 49:8-10. He reported the injury to the night manager and then again in the morning to the store manager. *Id.* at 49:15-25. Ex. B:1 (First Report of Injury).

21. Claimant first sought treatment at Cassia Regional Medical Center on May 27, 2014. Lanny F. Campbell, M.D., evaluated him. Ex. M:1. Dr. Campbell's history provided more detail for the mechanism of injury, as follows: Claimant "was lifting some freight that was about waist height. It started to twist and move down. He went to catch it, weighing about 60 pounds. It tugged on his left shoulder causing significant pain since then to the left lateral and posterior shoulder. No prior problems with the shoulder in the past ... Subsequently, he was told to come in for evaluation." *Id.* Dr. Campbell observed that Claimant "may have had an underlying issue with the shoulder, but they [sic] tore it while at work ..." *Id.* at 2. The plan was to have the WorkMed Industrial Clinic follow up with him in three days and then have an orthopedic specialist from that point. *Id.*

22. The WorkMed Industrial Clinic of Cassia Regional Medical Center scheduled Claimant for an examination on May 30, 2014. Ex. N:1. Anna Makovec-Fuller, CFNP, evaluated Claimant. Claimant reported lifting plastic crates with nonfood items when the injury occurred to his left shoulder. He also reported "about 30 years ago having a left shoulder injury though it

resolved and he has not had any problems since.”<sup>2</sup> Ex. N:1. CFNP Makovec-Fuller requested authorization for an MRI. *Id.* at 2. Meanwhile Claimant was to report to work with no use of the left arm. *Id.*

23. Claimant received a referral to Bryce W. Millar, M.D., an orthopedic surgeon with Intermountain Cassia Orthopedic Clinic and Cassia Regional Medical Center. Ex. O:1. Dr. Millar evaluated Claimant for the first time on June 18, 2014. He noted that Claimant had been “pulling some crates from a cart when he noticed a pop and associated pain. Since the time of that injury he has had a hard time doing overhead work and activity.” Ex. O:1. An MRI of June 14, 2014 demonstrated “a sizeable tear.” *Id.* at 2. Dr. Millar diagnosed a large rotator cuff tear as the source of Claimant’s symptoms. *Id.* He opined that the rotator cuff tear was work-related based upon history and lack of symptoms prior to the accident. Dr. Millar discussed treatment options with Claimant and recommended conservative treatment to start with physical therapy (PT) and medication. *Id.* He asked Claimant to return for evaluation in three to four weeks, and if he were not progressing, surgery would be the next step. *Id.*

24. On July 16, 2014, Claimant reported little to no benefit from PT. He was still having pain and difficulty in reaching, particularly overhead, with his left arm. Dr. Millar recommended surgery to repair the rotator cuff tear, which was scheduled for August 12, 2014. Claimant was restricted to no overhead lifting in excess of 20 pounds on his left side, and no work above the shoulder level. *Id.* at 4-6.

25. Dr. Millar performed left rotator cuff repair and subacromial decompression surgery on Claimant on August 12, 2014. The operative report indicated that Claimant’s rotator cuff repair “demonstrated good integrity.” *Id.* at 10-11.

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<sup>2</sup> This is somewhat inconsistent with Claimant’s testimony at hearing in which he did not report that he previously experienced any “major” medical problems with any parts of his body. Tr., 37:13-19.

26. Dr. Millar's clinic saw Claimant for follow-up post-surgery on August 27, 2014. Claimant reported doing well. He received a referral for further PT. Ex. O:14.

27. On September 17, 2014, Claimant reported to Dr. Millar five weeks post-surgery from his rotator cuff surgery. Claimant felt that his PT was going well, that his level of pain had significantly improved compared to his pre-operative status, and that he was off all pain medications. Dr. Millar noted that Claimant was "doing reasonably well for repair of a massive tear." Claimant was to discontinue use of his immobilizer prescribed after surgery and continue with PT. *Id.* at 15.

28. At the October 27, 2014 follow-up, Claimant was ten weeks from surgery. He had no complaints or particular concerns; he felt that his shoulder was now "much better" than it was prior to the operation. He was having only rare discomfort. The report from his PT therapist was equally encouraging. Claimant wished to return to work and Dr. Millar approved. He released Claimant to return to work with restrictions of no overhead work, no lifting over 10 pounds, and no work above the shoulder level, with "counter-top level work only." *Id.* at 18-21.

29. On November 24, 2014, Claimant followed up with Dr. Millar concerning his left shoulder rotator cuff repair. He was 15 weeks from surgery and felt "better all the time." He had finished PT. Claimant also stated that his arm felt "better now than it has for years." He had been back to work cutting meat and had been able to do this without too much difficulty. Dr. Millar released Claimant from his care and released him to return to work without restrictions at regular duty. *Id.* at 22-23.

30. Claimant observed that he "did good for awhile" after surgery. Tr., 52:13. He did not notice weakness "right off the bat" after being released by Dr. Millar, "but it [his left arm] just kept getting weaker," especially if he had to extend his arm. *Id.* at 52:23-53:1.



31. Claimant recalled that when he returned to work, he didn't have enough strength to lift the tote container where the meat cutters placed their meat scraps, so he required help from his coworkers to lift those to dump them. Tr., 53:13-21. Claimant compensated with his right arm. *Id.* at 54:8. If he had to do any work that required shoulder-high work, that was problematic. *Id.* at 10-12. He had to use his right arm for dumping more as a result. *Id.* at 18.

32. Claimant recalled that he also had difficulty lifting boxes of meat that weighed as much as 60 to 90 pounds, so he required help from his coworkers with that task. Claimant called the task "throwing the load." He claimed that his strength "just wasn't there." *Id.* at 57:4-22.<sup>3</sup>

33. Claimant couldn't think of anything else besides dumping the totes or overhead "throwing the load" for which he needed help. Otherwise, he worked as he did before. *Id.* at 58:6-9.

34. Claimant returned to Dr. Millar for assignment of an impairment rating on his left shoulder on August 24, 2015. Dr. Millar noted in pertinent part as follows:

At the time of surgery, he was noted to have a fairly sizeable tear. He was felt to have done well in the postoperative period. He reports today that his pain has improved to a marked degree. He has only very little discomfort at present. He does describe difficulty washing his back and some difficulty with internal rotation maneuvers; however, for most of his day to day activities he feels that his shoulder is perfectly functional. He has returned to his employment as a meat cutter at Smith's.

Ex. O:32.

35. Dr. Millar assigned Claimant a 4% upper extremity impairment, which corresponded to a 2% whole person impairment (WPI). He declared Claimant's condition "fixed and stable." He assigned no work restrictions to Claimant's left upper extremity. *Id.*

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<sup>3</sup> As will be explained in further detail below, Claimant's testimony at hearing about the limitations of his left extremity and his corresponding need for help from his coworkers was not mirrored in earlier deposition testimony, medical records, or PT records. See below in the section concerning Claimant's credibility for a discussion of contradictory evidence to Claimant's account of having difficulties at work with performing with his left shoulder.

36. *August 22, 2015 Accident.* On August 22, 2015, Claimant's right shoulder was hurting but it was not something Claimant "felt alarmed about" and neither did his coworkers. Tr., 60:17-61:8. Claimant and his coworker were trimming London Broils at the bottom round. They weighed approximately 30 to 40 pounds. Claimant was running them through the boneless meat saw when his right shoulder "popped." *Id.* at 61:15-19. Claimant's right hand then flopped "just like a wet rag. There was no controlling it, no nothing, and that's when my hand went into the saw blade." *Id.* at 62:6-9. The wound on his hand bled profusely. *Id.* at 63:11-12.

37. Claimant received transport to the emergency department of Cassia Regional Medical Center where Dr. Millar evaluated and treated him. *Id.* at 13-19; Ex. O:24. Dr. Millar performed a skin graft to repair the wound to Claimant's right hand. Tr., 63:20-64; Ex. O:24-31.

38. Dr. Millar noted in his history of Claimant's condition in pertinent part as follows: Claimant "is a 61 year old male who is a patient of mine who presents now to the emergency room with a new injury to his dominant right index finger. This injury occurred in a work-related accident while he was using a meat saw. The saw ran across the radial aspect of his index finger, and he presents with a large soft tissue defect and complaints of bleeding." Ex. O:24. The critical structure of the index finger was intact but Dr. Millar explained there was a large soft tissue defect that could be repaired with a skin graft obtained from the "medial brachium," underneath Claimant's arm. *Id.* at 25. Dr. Millar took Claimant the same day to the operating room to perform the surgery, which included an irrigation and debridement of Claimant's right index finger laceration with a full-thickness skin graft and harvest of full thickness skin graft from the medial brachium. There were no operative complications. *Id.* at 26. Dr. Millar released Claimant from the hospital with pain medications. *Id.* at 30.

39. Claimant recalled that he told Dr. Millar that something “popped” in his right shoulder that caused him to “lose control,” thus resulting in the index finger laceration, but that Dr. Millar was not concerned with the right shoulder at that point but rather repairing his index finger. Tr., 64:8-15. He further recalls that ten days later an X-ray was performed that disclosed a serious problem with his right shoulder. *Id.* at 15-24.

40. Claimant’s recollection is not consistent with the medical records. On the day of the injury, August 22, 2015, Claimant denied “any other pain or discomfort, and denies any wrist, elbow or shoulder pain.” Ex. O:24. He did not mention his right shoulder pain until the post-surgical follow-up appointment on August 31, 2015. *Id.* at 35. Dr. Millar noted that the right shoulder would be addressed in a separate appointment. *Id.*

41. At a September 9, 2015 follow-up appointment, Dr. Millar noted that Claimant “also today is complaining of right shoulder pain. He states today that the reason his right index finger injury occurred was that when he was working something snapped in his shoulder, and he felt his hand slip out of position, and at that point that is when his finger got caught in the blade. He states that at present his shoulder is actually more painful than his finger.” *Id.* at 44. Upon examination, Claimant’s right shoulder demonstrated “profound weakness.” *Id.* Dr. Millar ordered an X-ray which imaging showed “significant superior migration of the humeral head, suggestive of a large rotator cuff tear.” Dr. Millar ordered an MRI. *Id.*

42. Meanwhile Claimant’s right index finger continued to heal well and he recovered use of it. At an October 7, 2015 follow-up appointment, Dr. Millar observed that the injury was “improving.” *Id.* at 49. On November 23, 2015, Dr. Millar declared that Claimant was “fully recovered” from his right index finger injury. *Id.* at 52.

43. At an October 7, 2015 office consultation, Dr. Millar reviewed the results of Claimant's right shoulder MRI with him. Ex. O:49. He noted that "unfortunately" the MRI demonstrated a "rather severe rotator cuff pathology with complete supraspinatus and infraspinatus tears. These have retracted to the level of the glenoid and are associated with almost complete muscle atrophy. There is a partial tear of the subscapularis, again associated with some atrophy. The humeral head is noted to be high-riding. Biceps tendon is partially torn. Some early degenerative changes at the glenohumeral joint are also noted." *Id.* Dr. Millar explained to Claimant that the pathology in his right shoulder was significantly worse than encountered in his left shoulder, and that a simple rotator cuff repair was insufficient to address the problem. *Id.* He recommended a reverse total shoulder arthroplasty as a plan of treatment with a referral to Dr. May in Twin Falls to perform the procedure. *Id.*

44. Claimant received a referral to William F. May, M.D., an orthopedic surgeon with the St. Luke's Clinic – Orthopedic and Plastic Surgery, located in Twin Falls. Tr., 65:20-21; Ex. R:1. Dr. May noted that Dr. Millar referred Claimant "for evaluation of his right shoulder problems. Apparently on 8/22/15 he was working as a butcher, cutting some meat with a saw when he felt a pop in his right arm and the arm gave way and he hit his finger against the band saw... This was treated by Dr. Millar. Since that time he has had severe pain in the shoulder and cannot raise his arm. He is quite miserable and was evaluated by Dr. Millar and felt to have a significant shoulder problem and sent to my office for evaluation." *Id.*

45. After reviewing the MRI and conducting a physical examination, Dr. May discussed treatment options with Claimant. Claimant chose to proceed with a reverse total shoulder arthroplasty, which Dr. May would schedule pending workers' compensation approval. *Id.* at 3. Meanwhile Dr. May restricted Claimant from lifting with his right arm in excess of 10

pounds and no overhead lifting, and ordered that Claimant may need frequent rests and to sit periodically. Ex. R:5.

46. Dr. May performed the rotator cuff reverse total shoulder arthroplasty on Claimant's right shoulder on January 6, 2016 at St. Luke's Magic Valley Regional Medical Center. *Id.* at 9-14. Claimant tolerated the procedure well and there were no complications. *Id.* After follow-up care, Dr. May discharged Claimant from the hospital on January 7, 2016. *Id.* at 15.

47. Dr. May examined Claimant on January 19, 2016 for his first postoperative visit. *Id.* at 17. Claimant was doing "reasonably well." He was healing well from the surgery with no evidence of infection. Dr. May could induce a passive range of motion. Claimant still had a little bit of pain in actively flexing and abducting his right arm. Dr. May prescribed PT and continued to keep Claimant off work. *Id.* at 19.

48. At the February 16, 2016 follow-up, Dr. May noted that Claimant continued to do well in his recovery from the surgery. Claimant did not need to wear a sling anymore. Claimant asked about returning to work; Dr. May noted in pertinent part as follows: "The problem is that he is not going to be able to lift greater than 20 pounds on the right shoulder. He states that he cannot do this ... and states that he has to lift greater than 50 pounds on a constant basis, so I am not convinced that he will be able to do that type of activity." *Id.* at 21.

49. At the March 22, 2016 follow-up, Dr. May noted that Claimant was 2-3/4 months post surgery and was "actually doing reasonably well. He is not having much pain." *Id.* at 22. Dr. May further observed that he thought Claimant was improving and that it was OK for Claimant to continue to use his right arm, albeit not for strenuous activities. Dr. May released Claimant to light duty effective April 1, 2016, with a restriction not to lift in excess of 10 pounds

with his right arm. R:23. Claimant did not feel he could return to his job as a meat cutter because it required him to lift in excess of 50 pounds. Claimant was applying for Social Security Disability due to his inability to return to his previous occupation. *Id.*

50. Smith's provided Claimant with alternate duty in the form of a position as a front door greeter. Claimant did not like the job, calling it a "make believe" job and "degrading." Tr., 68:6-69:12. He worked this job, in which Claimant would "stand up front and say hi and bye to customers," for two to three months and then requested from the store manager to be allowed to work in a facing position with merchandise. *Id.* Facing involved straightening the merchandise on shelves to make the displays look good. Claimant was allowed to perform the facing position using his left hand, however he could not reach the top or bottom shelves due to his limitations with his left arm. *Id.* at 69:15-23. He also had difficulty kneeling and getting back up due to his age. *Id.* at 69:22-70:4. Claimant "finally felt just degraded enough that I was going to move on," so he quit his employment with Smith's effective June 18, 2016. *Id.* at 70:12-22.

51. Dr. May determined that Claimant was at MMI effective September 15, 2016. Ex. R: 31. Dr. May permanently limited Claimant from lifting weight with his right arm in excess of 20 pounds "per our routine protocols for total shoulder arthroplasty." Claimant expressed his belief that he could no longer perform his job as a meat cutter due to this limitation; Dr. May agreed. According to the *AMA Guides*, Dr. May assessed that Claimant had a 20% impairment of the upper extremity due to having had a total shoulder arthroplasty. *Id.* at 28.

52. At another office follow-up on September 15, 2016, Dr. May noted that Claimant complained of weakness in his right upper extremity. *Id.* at 29. Dr. May noted that he had previously released Claimant from further care with a 20% upper extremity impairment and that at "this point there is really nothing else that I can offer him." *Id.* at 30.

53. **Claimant's Activities Since Being Released by Dr. May and Condition at Hearing.** Claimant has not worked since he quit Smith's on June 18, 2016. Tr., 71:12-13.

54. Claimant applied for Social Security Disability benefits. On September 16, 2016, the Social Security Administration approved his application and he began receiving monthly SSD benefits in the amount of \$1,523.00. Ex. BB; Tr., 71:16-72:2. Claimant was still receiving SSD benefits as of the date of hearing. Tr., 72:3-5.

55. When asked to explain what he can do with his right arm and hand, Claimant stated in pertinent part as follows:

I don't do much of anything with it, guys. I mean it – it's a helper. I mean, you know, like when I have my little one [great granddaughter] around, you know, I have to hold her in my left, but you have to get her positioned so I don't drop her.

*Id.* at 77:22-78:1.

56. Claimant stated that if he moves his right arm frequently, he would develop pain in the form of cramps/muscle spasms in the extremity. *Id.* at 79:2-16.

57. Claimant believed that he cannot return to being a butcher/meat cutter, given the condition of his right arm. "It's impossible. You don't have the strength. You don't have the weight limit." *Id.* at 80:2-8.

58. Claimant's right index finger bled if he over used it or bumped it. He explained in pertinent part as follows:

Oh, it [right index finger] – it healed good. It – it's real tender and the skin that he [Dr. Millar] grafted it tears really easy. If you bump it just right you get a light layer of skin pulled – it will tear off of it and, then, you bleed for a while or sometimes right here in the joint where you bend your – what it is it will crack and bleed if you use it too much.

*Id.* at 80:13-19.

59. Counsel for Claimant asked him whether if he had full use of his left arm and hand, there were any jobs at Smith's he could do. He replied as follows: "I'm sure maybe something – if they – I don't know for a one handed person, you know what I mean? I don't know." Tr., 86:8-10. When asked again if there were any such jobs, Claimant replied as follows: "None that had any job titles. Just make-up jobs." *Id.* at 86:19. He further speculated that perhaps he could perform a salesperson job if he did not have to load, unload or stock shelves. *Id.* at 87:1-3.

60. Claimant conducted a job search after leaving Smith's. His records of that search are contained in Exhibit Y. Claimant listed 21 employers to whom he applied in 2017 and 2018, either by going in and personally talking to them or making applications. Ex. Y:1. Claimant listed 15 employers he sought work from in January 2019. *Id.* at 2. He also listed 11 other employers without a date. *Id.* at 3. Claimant applied to fast food restaurants, Walmart, Family Dollar, Sears, gas stations, Ridley's, Maverick Store, among others. *Id.* at 1-3. Claimant did not obtain any job offers from any of these employers that he was able to fill the position. Tr., 95:2-3. Claimant had one conditional offer from Minidoka School District for a position as a bus driver, but when he explained the impairment of his arms to the hiring official, the offer was withdrawn. *Id.* at 92:1-19.

61. Claimant has no restrictions on standing, sitting, or going up and down stairs. *Id.* at 96:10-14.

62. Claimant did not register with the Idaho Department of Labor to assist him in his job search. He also did not register or work with any other employment agencies. *Id.* at 98:10-17.

63. Claimant was able to drive, but his vehicle has an automatic transmission, which Claimant considered important to accommodating his impaired right arm. He has driven from



Burley to Boise for a medical appointment, but does not generally drive longer distances. Tr., 100-19.

64. Claimant had difficulty grasping items with his right hand, and further had difficulty in holding any type of tool in his right hand. *Id.* at 101:5-10.

65. Throughout his career as a meat cutter, Claimant did not use his left hand to cut meat; he was right-hand dominant and not ambidextrous. *Id.* at 101:16-25.

66. Claimant admitted that he used a step ladder to reach higher shelves when he performed facing. *Id.* at 103:19-21.

67. Claimant admitted that even though he believed he was performing a “made up” job, Smith’s was willing to keep him employed as long as he were willing. *Id.* at 103:25-104:3.

68. Claimant began the SSD application process shortly before he quit his employment with Smith’s. *Id.* at 117:21-23.

69. **Independent Medical Examinations (IMEs).** *Rodde D. Cox, M.D.* Defendant Smith’s referred Claimant for an IME with Rodde D. Cox, M.D., of Boise, Idaho, on December 7, 2016. Ex. U:1. Dr. Cox is a psychiatrist. *Id.* Dr. Cox reviewed relevant medical records, including those of Dr. Millar and Dr. May, for the IME. *Id.*

70. Dr. Cox took Claimant’s medical history. Claimant denied any previous on-the-job injuries or any previous liability injuries.<sup>4</sup> *Id.* at 2.

71. Claimant’s chief complaint to Dr. Cox was pain in the right shoulder and biceps. His left shoulder was “not too bad.” *Id.* at 10. The pain in the right shoulder was a spasm, constant soreness, worsened when reaching out lifting and improved if he rubbed it. On a scale

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<sup>4</sup> This is inconsistent with the record. At hearing, Claimant testified to two minor work knife cut injuries, one in Smith’s employment. Claimant also denied to Dr. Cox that he had ever had any right shoulder problems before the work injury in 2015. Ex. U:4.

from 0 to 10, Claimant reported the pain as averaging 7. Ex. U:10-11. Claimant reported difficulties with tasks of daily living due to his right shoulder as follows: bathing, daily chores, sweeping floors and driving. *Id.* at 11.

72. Dr. Cox diagnosed Claimant with the following:

- Left shoulder rotator cuff/status post subacromial decompression and rotator cuff repair;
- Right shoulder rotator cuff tear/status post reverse total shoulder arthroplasty;
- Symptom magnification; and
- Finger laceration/status post skin grafting.

*Id.* at 14.

73. Dr. Cox found that Claimant's subjective complaints were not entirely consistent with objective findings. "Symptom magnification was evident." *Id.* at 14.

74. Dr. Cox opined that Claimant's symptom magnification was not representative of intentional misrepresentation of pain and disability, "but more likely represents a learned pattern of illness behavior." *Id.* at 15.

75. Dr. Cox found that on a more probable than not basis, Claimant's left shoulder condition was related to the work injury. *Id.* at 15. He found causation less clear for the right shoulder condition, so he was unable to say on a more probable than not basis the right shoulder rotator cuff tear was related to the injury of record. *Id.*

76. Per Dr. Cox, Claimant was at MMI. *Id.* at 16.

77. Dr. Cox was in agreement with Dr. Millar regarding a 2% WPI for Claimant's left shoulder. *Id.* For Claimant's right shoulder, Dr. Cox awarded an overall 14% upper extremity impairment, which would equal an 8% WPI. For this rating, he would apportion 4% to pre-existing factors. *Id.*

78. Dr. Cox felt that Claimant should avoid repetitive work above the shoulder level with the right extremity. Claimant could lift up to 20 pounds on an occasional basis with the right upper extremity. He found that there was no objective basis that would support any physical restrictions to the upper left extremity. Ex. U:16.

79. Dr. Cox did not believe that any further medical treatment was indicated *Id.*

80. Dr. Cox did not find that Claimant was totally and permanently disabled. *Id.* at 18. He further did not find that a combination of Claimant's left and right shoulder injuries rendered Claimant permanently and totally disabled. *Id.*

81. *James H. Bates, M.D.* Claimant's attorney referred Claimant to James. H. Bates, M.D., of Boise, Idaho, for an IME on November 1, 2016. Ex. V.1.

82. Claimant reported the current status of his right shoulder as follows:

He reports he still has significant difficulty with the right shoulder. He has pain in the biceps area. He cannot lift the shoulder very much. Significant limitations in the range of motion. He reports that although he was right-handed initially, his right hand and arm is now used pretty much as a helper arm for the left hand. For the most part, he cannot utilize the right arm to assist with shaving or facial grooming.

With these conditions, Mr. Helsley reports that he is independent in his ADLs but has difficulties. He is independent in driving. He is independent in light housework and light meal preparations.

He has difficulty using both arms, but has much greater function with the left arm than the right arm.

*Id.* at 1-2.

83. Dr. Bates found that Claimant was restricted in shoulder strength, more significant on the right than on the left. Claimant had significant limitations in abduction, flexion and external rotation on the right, with only mild limitation on the left. *Id.* at 3.

84. Dr. Bates diagnosed a rotator cuff tear left shoulder. Claimant had reached MMI from this industrial accident and no further treatment was necessary. Dr. Bates found the 2% WPI assessed by Dr. Millar to be appropriate. Ex. V: 9.

85. Dr. Bates determined that the following physical restrictions were appropriate to Claimant's left extremity: "Would recommend limited activity on an occasional basis for any activity at or above chest level with the left arm, maximum lifting at or above chest level five pounds. Pushing, pulling or lifting maximum of 30 pounds with the left hand."<sup>5</sup> *Id.*

86. Dr. Bates found that the treatment Claimant received as a result of his left extremity injury was reasonable and necessary. *Id.* at 11.

87. Dr. Bates diagnosed an extensive rotator cuff tearing of the right shoulder and now status post reverse total shoulder arthroplasty. *Id.* at 10.

88. Dr. Bates assessed that Claimant was at MMI regarding his right shoulder condition and the industrial accident. *Id.* No further treatment was required. *Id.*

89. Dr. Bates assigned a default impairment of 24% upper extremity impairment, based upon a total shoulder arthroplasty, to Claimant's right shoulder.<sup>6</sup> *Id.*

90. Dr. Bates agreed with the permanent physical restrictions assigned by Dr. May to Claimant's right shoulder. *Id.* at 11.

91. Dr. Bates found that Claimant's treatment for the right shoulder had been reasonable, appropriate and necessary as a result of the industrial accident. *Id.*

92. Dr. Bates diagnosed a laceration of the right index finger requiring skin graft related to the industrial accident. *Id.*

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<sup>5</sup> The restrictions that Dr. Bates assigned to Claimant's left extremity are contrasted with the finding of Dr. Cox, who determined that there were no physical restrictions assignable to Claimant's left extremity. *See*, Ex. U:16.

<sup>6</sup> Dr. Bates did not convert the 24% upper extremity impairment to that of a whole person. A 24% upper extremity impairment converts to a 14.4% WPI.

93. Claimant was at MMI following his right finger injury, according to Dr. Bates. No further medical treatment was necessary. Ex. V:11.

94. Dr. Bates assigned Claimant a 1% upper extremity impairment for his right index finger condition.<sup>7</sup> *Id.*

95. As for permanent physical restrictions for Claimant's right index finger, Dr. Bates stated as follows:

For permanent restrictions would recommend no repetitive and forceful gripping with the right hand. Mr. Helsely would have limitation for the use of his right hand and general dexterity and would not be able to pursue repetitive fine motor movements with the right hand. Would limit use of the hand on an occasional basis.

*Id.* at 12.

96. Dr. Bates opined that the medical treatment Claimant received for his right index finger was reasonable, appropriate and necessary as a result of the industrial accident. *Id.*

97. **Vocational Assessments.** *Delyn D. Porter, M.A., CRC, CIWCS.* Claimant's attorney engaged Delyn D. Porter, M.A., CRC, CIWCS, to prepare a vocational evaluation and disability assessment report concerning Claimant. Ex. Z:1. Mr. Porter delivered his written report on March 24, 2017. *Id.*

98. To prepare the report, Mr. Porter interviewed Claimant on September 19, 2016. *Id.* Mr. Porter stated that the report was based upon injuries sustained on May 27, 2014, the left shoulder injury, and August 22, 2015, the right shoulder injury and right index finger injury. *Id.*

99. Mr. Porter reviewed relevant medical records, including the IME of Dr. Bates but not that of Dr. Cox. *Id.* at 2. He also reviewed the following materials to prepare his report: Social Security Administration Itemized Statement of Earnings for Claimant; *AMA Guides to the*

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<sup>7</sup> A 1% upper extremity impairment converts to a 1% WPI.

*Evaluation of Permanent Impairment*, 6<sup>th</sup> Ed.; Idaho Department of Labor; Dictionary of Occupational Titles, O\*NET; Idaho Career Information Systems (eCIS); Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles; New Guide for Occupational Exploration; The Revised Handbook for Analyzing Jobs; Rehabilitation Consultant’s Handbook, 4<sup>th</sup> Ed.; The Henry J. Kaiser Family Foundation; Occupational Outlook Handbook; SkillTRAN; and U.S. Department of Labor Bureau of Labor Statistics. Ex Z:2.

100. Mr. Porter noted that Claimant reported a “prior rotator cuff injury in 2013,” left or right unspecified. He was apparently treated and released without any impairment assigned or permanent work restrictions. *Id.* at 1.<sup>8</sup>

101. Claimant could not return to his occupation as a meat cutter, nor was he able to return to any of his past occupations, as a result of the permanent work restrictions assigned by Dr. Bates, according to Mr. Porter. *Id.* at 12.

102. Mr. Porter found that Claimant had worked in occupations ranging from unskilled to skilled, with most of his work history as a skilled meat cutter. He also worked as a farmer for approximately 10 years. *Id.* at 16. His highest level of Specific Vocational Preparation was Level 7, skilled work requiring two to four years of preparation to perform. *Id.*

103. Mr. Porter discussed the impairments and work restrictions assigned variously to Claimant by Dr. Millar, Dr. May, and Dr. Bates (but not Dr. Cox, whose report Mr. Porter did not have). *Id.* at 17. He then addressed Claimant’s formal educational level. He placed Claimant’s formal educational attainment at Level 2, completion of elementary school and some high school. *Id.* at 18. For “general education development,” Mr. Porter noted that Claimant had extensive work experience as a meat cutter, farmer, palletizer, and hand packager, therefore his

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<sup>8</sup> This report of such an injury in 2013 is inconsistent with Claimant’s testimony at hearing. Furthermore, there are no medical records that correlate to this injury that are in the record.

overall general education development was Level 4, successful work experience in an organized technology. Ex. Z:18.

104. Mr. Porter analyzed Claimant's past jobs in terms of their strength categories and compared them to permanent work restrictions assigned by Dr. May and Dr. Bates. He classified Claimant's employment as a meat cutter with Smith's as heavy physical demand work. He also classified Claimant's other past positions as heavy. Based upon this conclusion, Mr. Porter determined that Claimant would be unable to return to either his time of injury employment at Smith's or any of his other past positions as a butcher, farmer, palletizer, and hand packager. Ex. Z:19. Dr. May's restrictions placed Claimant in the light physical demand category and the restrictions of Dr. Bates placed him in the limited light category. *Id.*

105. For purposes of Claimant's available labor market, Mr. Porter considered a 50-mile radius from Claimant's residence in Burley, Idaho. *Id.* at 19.

106. Mr. Porter concluded that Claimant's "vocational profile is based upon his limited work history and transferable skills, his limited educational background and lack of a high school diploma or GED, and his assigned permanent work restrictions." *Id.* at 20. Claimant spent the majority of his adult working life as a meat cutter/butcher and farmer, thus his transferable skills were limited to those occupations. *Id.* Since his past work occupations were all classified as heavy physical demand, and the physical restrictions assigned by Dr. May and Dr. Bates limited him to light or limited light physical demand jobs, *Id.* Claimant was extremely limited in his job market. His lack of a high school diploma or GED ruled him out for any occupations that require such. *Id.* Finally, Claimant's profile as an older worker limited his job opportunities even further. *Id.*

107. Based upon this vocational profile, Mr. Porter determined that pre-injury, Claimant had reasonable access to, and was competitive for, approximately 13.5% of the total jobs in his labor market. Ex. Z:20. When applying the same analysis, but with Dr. May's work restrictions included, which placed Claimant in the light physical demand category, Mr. Porter determined that Claimant would continue still have access to 4.25% of the total jobs in his labor market, a 68.5% reduction in labor market access. *Id.* at 21.

108. Applying the combined physical restrictions assigned by Dr. Bates to the labor market analysis, which placed Claimant in the limited light physical demand category for work, Mr. Porter determined that post-injury Claimant would have access to less than 1.0% of the total jobs in his labor market area, resulting in a loss of 92.6% of labor market access post-injury. *Id.* at 21.

109. Mr. Porter conducted a wage loss analysis based upon Claimant's 2015 highest earning wage at Smith's, \$15.51/hour. He compared it to post-injury median wages collected from the following occupations: food preparation and serving related occupations; combined food preparation and serving workers, including fast food; cashiers; retail salespersons; couriers and messengers. Combined, these occupations in Claimant's labor market had an average hourly wage of \$9.75. Accordingly, Mr. Porter determined that Claimant had sustained a 37.1% wage loss, based upon the difference between his pre-injury wage (\$15.51) and the calculated post-injury median wage earning capacity (\$9.75). *Id.* at 22-23.

110. Mr. Porter found that Claimant qualified as an Odd-Lot worker. He reasoned in pertinent part as follows:

In my opinion, when you consider all of the industrial and non-industrial factors in this case, Mr. Helsely's actual opportunities to return to competitive employment within the assigned restrictions from Dr. Bates are minimal at best.



In my opinion, his actual labor market is so small that a viable competitive labor market no longer exists for Mr. Helsely.

In my professional opinion, it would likely take a sympathetic employer for Mr. Helsley to become competitively employed within his skill set, educational background (no high school diploma or GED) and assigned permanent work restrictions from Dr. Bates. In my opinion, it would be futile for him to attempt to secure competitive employment within the assigned restrictions.

In my opinion, based upon the assigned permanent restrictions from Dr. Bates, Mr. Helsley meets the criteria for odd-lot and permanent disability under Idaho's workers' compensation law.

Ex. Z:24.

111. Pursuant to the 100% method, Mr. Porter determined that Claimant had suffered a permanent partial disability (based upon his labor market access and wage loss) of 52.25% inclusive of the 20% upper extremity impairment assigned by Dr. May. *Id.* at 28.

112. On April 6, 2017, Mr. Porter delivered an addendum to his vocational report in light of the IME of Dr. Cox that was issued on December 7, 2016. *Id.* at 29. Mr. Porter noted the restrictions assigned by Dr. Cox to Claimant's right extremity and that Dr. Cox opined that "there was no objective basis for any restrictions regarding the left upper extremity." *Id.* at 30.

113. Dr. Cox's IME revealed medical records in 2013 prior to the industrial injuries in which Claimant complained of right arm pain that he had not disclosed to Mr. Porter. *Id.* at 31. Mr. Porter nevertheless concluded that prior to the industrial accidents, Claimant was working at full capacity in performing all the essential functions of his heavy physically demanding job. *Id.*

114. Mr. Porter calculated, based upon Dr. Cox's assigned restrictions, that Claimant had suffered a 68.5% loss of labor market access post-injury. He also suffered a 37.1% wage earning capacity loss post-injury. *Id.* at 32. This results in a permanent partial disability (PPD) of 52.25% inclusive of Claimant's 20% upper extremity impairment found by Dr. Cox. *Id.*

115. On January 24, 2019, Mr. Porter issued a second addendum to his vocational report. In this report he addressed the vocational report of Barbara K. Nelson dated August 28,

2018,<sup>9</sup> job search records from Claimant, and whether Claimant meets the definition of an Odd Lot worker and ISIF liability/*Carey* formula. Ex. Z:33-38.

116. Claimant reported job search activities that Mr. Porter reviewed from 2017 and 2018. *Id.* at 36-37. Mr. Porter noted that Claimant had been unsuccessful in securing and maintaining employment. *Id.* at 37. He further noted that Claimant continued to seek employment. *Id.* At that time Claimant was contacting two employers per day to seek employment. *Id.*

117. In Mr. Porter's opinion, Claimant further qualified for the criteria of Odd Lot and permanent disability based upon his unsuccessful attempts to seek employment within his assigned restrictions. *Id.*

118. With regard to ISIF liability, Mr. Porter opined as follows:

In my professional opinion, the preexisting impairments and permanent work restrictions assigned by Dr. Cox combines with the industrially related impairments and work restrictions from Dr. Bates to render Mr. Helsely totally and permanently disabled under the odd-lot doctrine.

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Using the *Carey* formula, the time of injury employer would be responsible for 64% disability ( $17/21 \times 71/1 = 64\%$ ) plus the 17% new impairment for a total of 81% disability inclusive of impairment.

The ISIF would be responsible for 15% disability ( $4/21 \times 79/1 = 15\%$ ) plus the 4% preexisting impairment for a total of 19% disability inclusive of impairment.

*Id.* at 37-38.

119. *Barbara K. Nelson, M.S., CRC.* At the request of counsel for ISIF, Barbara K. Nelson, M.S., CRC, conducted a vocational evaluation of Claimant and delivered a report dated August 28, 2018. Ex. DD.

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<sup>9</sup> Mr. Porter's response to Ms. Nelson in this report will not be detailed here but rather in his deposition testimony, detailed below.

120. With regard to the left upper extremity industrial injury of May 26, 2014, Ms. Nelson highlighted the fact that Dr. Millar returned Claimant to work following his recovery from his left shoulder injury and surgery without restrictions. Ex. DD:6.

121. With regard to the right upper extremity industrial injury of August 22, 2015, Ms. Nelson stressed the fact that Dr. Millar “felt Mr. Helsely had fully recovered from his right finger injury. He did not anticipate any significant permanent disability from this injury.” *Id.*

122. As for Claimant’s right shoulder injury, Ms. Nelson noted the fact that Dr. May released Claimant with a 20 pound lifting restriction on a repetitive basis, thus Claimant would have to use his left arm for most lifting. *Id.* at 7.

123. Ms. Nelson emphasized that for left shoulder restrictions, Dr. Bates recommended significant restrictions including limiting any activity at or above chest level with the left arm to an occasional basis, and limiting weight to five pounds at or above chest level. Pushing, pulling, or lifting with the left hand should be limited to 30 pounds. She further highlighted that Dr. Bates concurred with Dr. May’s restrictions for Claimant’s right arm. Ms. Nelson noted that unlike Dr. Millar, Dr. Bates assigned permanent restrictions to Claimant’s right index finger laceration, that Claimant should do no repetitive or forceful gripping with his right hand and would not be able to pursue fine motor movements with his right hand, limiting the use of Claimant’s right hand to an occasional basis. *Id.* at 8.

124. Ms. Nelson described Dr. Cox’s work restrictions for Claimant as follows: Dr. Cox found no objective basis to support any restrictions for Claimant’s upper left extremity. *Id.* at 9. Dr. Cox could not say on a more probable than not basis that the right shoulder rotator cuff tear was indeed related to the industrial injury. *Id.* For the right shoulder restrictions, Dr. Cox prescribed that Claimant should avoid repetitive work above the shoulder level with the

right upper extremity and could lift up to 20 pounds with the right arm on an occasional basis. *Id.*  
Dr. Cox did not believe that Claimant was totally and permanently disabled. Ex. DD:9.

125. Ms. Nelson noted with regard to Claimant's left shoulder injury in pertinent part as follows:

The relevant prior medical condition in Mr. Helsely's case is his industrial left shoulder condition. Dr. Bates is the only physician who places restrictions on it, and they are imposed after Mr. Helsely had received a full release from his treating surgeon and had demonstrated the ability to successfully work in a heavy production job for nine months with no indication that he was not meeting his work demands ... Mr. Helsely's current subjective complaints regarding his left shoulder are not well substantiated in his earlier medical records ... Prior to returning to full duty work after his left shoulder surgery, Mr. Helsely had been released from physical therapy with glowing remarks about his absence of pain and increasing functional capacities. Mr. Helsely had felt rehabilitated enough that he requested a release to return to work from his treating physician, who released him without restrictions.

*Id.* at 13-14.

126. With regard to Claimant's right shoulder, Ms. Nelson observed in pertinent part as follows:

Mr. Helsely's right shoulder condition is by far the most limiting. Drs. Cox, Bates, and May agree on his permanent restrictions which are limiting, but a far cry from describing a useless limb. Mr. Helsely's subjective description (to me) is far grimmer than his medical records suggest. He states that basically his arm just hangs there and that he cannot even use it as a helper hand ... Even Dr. Bates says he uses it as a helper hand. Dr. Cox did detect symptom magnification in his exam.

*Id.* at 14.

127. Ms. Nelson noted that Dr. Bates was the only physician to place any restrictions on Claimant's right index finger. *Id.*

128. Ms. Nelson opined that Claimant was not totally and permanently disabled pursuant to Idaho Workers' Compensation Law. *Id.* at 15-17. She first noted that there were jobs available within his restrictions and skill set, including greeter, gas station attendant, cashier,

part-time shopper, school bus driver, and bus person. Ex. DD:15-16. She then observed that Claimant's job search was very limited and that he "had only contacted three prospective employers" since leaving Smith's employment.<sup>10</sup> As for the third prong of the *Lethrud* test for Odd Lot status, Ms. Nelson opined that "no physician imposed restrictions are of such magnitude that it would be futile for Mr. Helsely to even attempt to find work. In view of current labor market conditions, and the ready discovery of specific available jobs within his restrictions, futility is not suggested." *Id.* at 16-17. Ms. Nelson concluded her report by stating as follows: "In good conscience I cannot say that he [Claimant] is totally and permanently disabled pursuant to any of the three prongs necessary to invoke the odd lot doctrine." *Id.*

129. **Expert Opinion Testimony.** *James H. Bates, M.D.* Claimant's counsel took the deposition of Dr. Bates on March 26, 2019. Bates Dep., 2:4-5. Dr. Bates is board certified in physical medicine and rehabilitation. *Id.* at 5:10-11. He attended medical school at Creighton University in Omaha, Nebraska, and then completed a residency in physical medicine and rehabilitation at the University of Missouri in Columbia, Missouri. Bates *Id.* at 5:3-9. He is licensed to practice medicine in Idaho and practices in Meridian, Idaho. *Id.* at 4:19-20; 5:15-16. His credentials are known to the Commission, he has testified in Commission cases before, and he is qualified to testify in this matter as an expert medical witness. Dr. Bates conducted an IME of Claimant at his attorney's request on November 1, 2016. *Id.* at 5:18-24.

130. To the extent that the report of Dr. Bates has already been summarized above, those findings will not be repeated here. Rather, the highlights of his testimony and cross examination will be summarized.

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<sup>10</sup> This assessment is contrary to Claimant's testimony and the job search records contained in Ex. Y.

131. Counsel for Claimant asked Dr. Bates whether Claimant would have any further restrictions by virtue of the fact that he had two injured upper extremities with impairments and limitations. Dr. Bates replied in pertinent part as follows:

[W]hen both shoulders don't work well, it becomes – it becomes more difficult. The more – the more – the greater impairment people have, then the greater difficulty they generally have in doing activities, more body parts involved, the less they can compensate and perform activities.

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In Mr. Helsely's case he would probably be making a lot of adjustments or modifications; the upper shelves of cupboards probably are not utilized. Things that are – that are – tasks that usually require a hand to go up to the top of the head would be reduced. Things that – tasks that require reaching at the – with the arm extended in any position would be more difficult to do when – neither arm can support much activity extended away from the body.

So those are the tasks that are performed from chest level and above, particularly with the arm extended, would be much more difficult to compensate for when it cannot be – pretty much cannot be done with either extremity.

Bates Dep., 31:11-17; 33:17-34:5.

132. Dr. Bates had no concern that Claimant drives himself. *Id.* at 36:2-9.

133. Dr. Bates did not assign any restrictions to Claimant's lower extremities, or the activities of the lower extremities, such as walking, standing, and sitting. *Id.* at 36:10-37:3.

134. Dr. Bates admitted that by the "timeframe between the injury of that [left] shoulder to the time of evaluation, there may have been some effects on that shoulder for having to compensate for the right shoulder." *Id.* at 45:11-14.

135. *Delyn D. Porter, M.A., CRC, CIWCS*. Claimant's attorney took the deposition of Mr. Porter on April 25, 2019. Porter Dep., 2:1-5.

136. Mr. Porter is a self-employed vocational expert with offices for practice in Blackfoot, Idaho. He has practiced as Porter Vocational Services since December 2010. He holds a master's degree in rehabilitation counseling from Western Washington University and is a certified rehabilitation counselor (CRC). He has also been certified through the Idaho Industrial

Commission's Workers' Compensation certification course. He is a past field consultant for both the Idaho Division of Vocational Rehabilitation and the Idaho Industrial Commission. Porter Dep., 4:17- 9:1

137. Mr. Porter has appeared as a vocational expert in past Industrial Commission cases. His qualifications are well known to the Commission and he is qualified to render a vocational opinion in this case.

138. Mr. Porter prepared a vocational report concerning Claimant dated March 24, 2017, and two addendum reports dated April 6, 2017 and January 24, 2019. *Id.* at 12:6-9. The findings and conclusions of those reports covered in the deposition will not be re-summarized here. Rather, key findings elicited in examination and cross examination will be summarized.

139. In commenting on the fact that Claimant left school in the 10<sup>th</sup> grade without receiving a high school diploma or obtaining his GED, Mr. Porter noted that it was important to his employability in pertinent part as follows:

Q. Is that important in looking for work these days?

A. More so today than it was in 1975.

Q. Why is that?

A. Because most of the jobs require now require a minimum of a high school diploma or a GED.

...

If you don't have a high school diploma or GED, you're automatically excluded from 80 out of 100 jobs that are out there.

*Id.* at 17:22-18:1; 18:7-9.

140. Mr. Porter recalled that when he asked Claimant whether he had any computer skills, his reply was "none." *Id.* at 21:9-11.

141. Mr. Porter reported that, based upon his interview of Claimant, Claimant had hearing loss and wore hearing aids. *Id.* at 24:17-20.

142. Because of Claimant's past experience as a farmer, under Mr. Porter's analysis he qualified for jobs with a specific vocational preparation level of one through seven, level seven being up to two years and including up to four years of preparation to perform at a skilled level. Porter Dep., 34:7-12.

143. Commenting on Claimant's ability to return to his job as a meat cutter with Smith's, Mr. Porter concluded that "whether you use Dr. May's restrictions or Dr. Bates', neither one of those are compatible with the physical demands of the work. In other words, he can't do the job." *Id.* at 40:14-17.

144. Mr. Porter opined that Claimant fell "into a sedentary or limited light" physical demand category for performing work. *Id.* at 41:7-20.

145. In addition to being unable to return to his work as meat cutter, Claimant also could not return to any of his previous occupations, including farmer and palletizer, according to Mr. Porter. *Id.* at 42:1-4.

146. Claimant's status as an older worker was another factor that Mr. Porter considered in his analysis, commenting in pertinent part as follows: "Basically, we all know that age discrimination is illegal, yet it happens all the time. As you get older, it becomes more difficult to find new work." *Id.* at 43:23-44:1.

147. With regard to Claimant's educational background, Mr. Porter observed as follows: "One of the things to consider for individuals with limited educational background is most of the jobs that they qualify for are typically more physically demanding, as well." *Id.* at 48:12-15.



148. Mr. Porter opined that Claimant suffered a “total loss” of job market access. Porter Dep., 50:5-6. He observed that Claimant “qualifies, at least under an odd-lot determination for total and permanent disability.” *Id.* at 50:15-16.

149. Mr. Porter could not identify a job in Claimant’s geographical job market (south central Idaho) that Claimant could perform. *Id.* at 51:2.

150. Commenting on Claimant’s past work experience in driving trucks for a dairy, Mr. Porter opined that Claimant would be unable to perform a truck driving job, as follows: “Limited use of the right hand, in my opinion, takes him out of commercial driving.” *Id.* at 53:15-16.

151. When asked whether Claimant would be able to perform the job of greeter at Walmart in Burley, he admitted as follows: “That is the one job that he possibly could do, but how many Greeters are there at Walmart in Burley, Idaho? ... Maybe a half a dozen.” *Id.* at 54:9-12.

152. With regard to the gas station attendant job, Mr. Porter commented that Claimant “would require some additional training to be able to do that – especially with processing credit and debit payments and learning how to run the cash register and the gas pumps and everything else.” *Id.* at 56:2-7. Because of the other typical responsibilities of a gas station attendant that requires the use of one’s upper extremities, Mr. Porter opined that Claimant “would have difficulty doing that job ... Because of the restrictions that he has – specifically with the upper extremities there.” *Id.* at 56:21-25.

153. In Mr. Porter’s opinion, the job of “part-time shopper,” identified by Ms. Nelson, was not one that Claimant was capable of performing due to his restrictions. First, some of the shelves he would retrieve items from would be above head level. Second, he was restricted to

occasional uses of the right upper extremity, which then limited him to one-handed work, and he had restrictions on his left extremity (from Dr. Bates) as well. Finally, pushing the cart may be problematic for him. Porter Dep., 60:1-11.

154. Ms. Nelson, in her report, stated that to perform the job of part-time shopper, Claimant would need to be able lift 30 to 40 pounds, which she believed were within his capabilities. Mr. Porter disagreed that Claimant could do so. *Id.* at 61:1-6.

155. When asked whether Claimant could perform the job of school bus driver identified by Ms. Nelson as appropriate for Claimant to perform, Mr. Porter pointed out that Claimant would be repeatedly be required to open and close the door as students exit and enter the vehicle. *Id.* at 61:19-21. Furthermore, he would require a Passenger Endorsement on his CDL to perform that job. *Id.* at 61:16-18. The driving itself could be problematic with both of Claimant's arms impaired; "You've got kids' safety that you'd be concerned with as well." *Id.* at 61:24-62:3. Bus drivers are also required to enforce discipline among students. *Id.* at 62:8-17. Based upon all of these factors, Mr. Porter opined that Claimant was not capable of performing a school bus driver job. *Id.* at 63:2-7.

156. With regard to the position of a restaurant bus person, also identified by Ms. Nelson, Mr. Porter doubted he could perform that job, in pertinent part as follows: "Just the physical demands of that job itself – carrying loads of plates, cleaning tables off with food and everything else. Could he [Claimant] do that? I don't think so." *Id.* at 63:17-19.

157. For the position of cashier, Mr. Porter discounted Claimant's ability to perform that position as follows: "Cashiers are constantly pulling items, scanning them across, using their arms. He would have to learn to use the computer in order to be a cashier, as well. He doesn't

have any computer skills or experience.” Porter Dep., 66:8-12. Based upon Dr. Bates’ restrictions, “it takes him out of all feasible employment competition.” *Id.* at 66:15-16.

158. Mr. Porter ruled out any retail sales job for the same factors as cashier positions. *Id.* at 66:19. “The constant using [of arms] – stocking shelves, putting items on racks – with Dr. Bates’ restrictions, no, I don’t think so.” *Id.* at 66:20-22.

159. For courier and messenger positions, Mr. Porter doubted whether such jobs were widely available, as follows: “There are very, very few of those jobs in existence in today’s labor market.” *Id.* at 67:4-5. Mr. Porter doubted whether Claimant could meet the physical demands of such positions with the amount of driving involved. *Id.* at 67:19-21.

160. In Mr. Porter’s opinion, and using the restrictions imposed by Dr. Bates, Claimant met the definition of permanently disabled Odd-Lot worker. *Id.* at 68:18-20.

161. Incorporating the additional restrictions that Dr. Bates identified in his deposition, Mr. Porter opined that one gets “much closer to 100 percent labor market loss” for Claimant. *Id.* at 70:7-9.

162. In Mr. Porter’s opinion, if Claimant had not sustained a left shoulder injury, and only had the right shoulder injury and right index finger injury, he would still be capable of working – jobs like the ones Ms. Nelson identified, cashier, stocking, customer service. *Id.* at 76:2-10. “You’re talking having one good arm to use versus two bad arms.” *Id.* at 77:10-11.

163. On cross-examination, Mr. Porter admitted that his opinions regarding Claimant’s left shoulder were all based upon Dr. Bates’ restrictions because Dr. Millar, Dr. May and Dr. Cox did not prescribe any restrictions for Claimant’s left shoulder. *Id.* at 84:3-20. Using Dr. Bates’ restrictions on both shoulders, Mr. Porter found that none of the jobs identified by Ms. Nelson as potential employment for Claimant were suitable. *Id.* at 87:16-20.

## **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 35**

164. Mr. Porter admitted that references in his report to a 2013 right shoulder injury for Claimant may have been a misstatement, because the medical records for such an injury could not be located. Porter Dep., 90:3-13.

165. Mr. Porter admitted that when workers are returning to work after an injury, they would be well advised to “take it easy” so as to not become reinjured; “you wouldn’t want to tear it out again.” *Id.* at 91:3-8. He also agreed that coworkers may “help out a little bit more – knowing you just had surgery.” *Id.* at 91:9-12. This was consistent with Claimant’s testimony at hearing “that his co-workers helped with some of the heavier tubs of meat and taking stuff off the truck when he came back.” *Id.* at 91:13-17.

166. Mr. Porter admitted that Claimant had some limited experience with computer skills due to his experience in the meat department at Smith’s where he would have had to use digital scales to weigh meat products and produce bar codes for customer service. *Id.* at 98:25-99:9. Nevertheless, he denied that such experience was comparable to using computers in a call center, for example. *Id.*

167. Mr. Porter admitted that the loss of job market identified in his report was due to solely to the impairment of Claimant’s right arm, as follows:

Q. Okay. It’s those same – if I understand your testimony correctly, you know, the answers that you have given me – that 4.25 percent of available jobs or suitable jobs would be the same whether or Mr. Helsely had a fully-functioning left shoulder or not?

A. I think he would have a larger percentage with a fully functioning left hand, but the restrictions themselves are just for the right arm.

Q. Okay—and that’s what I’m getting at. So the reduction from 13.5 percent of the jobs in the area to 4.25 percent of the jobs in the area, that’s solely related to the lack of function in his right arm?

A. Yes.

*Id.* at 101:8-21.

168. Mr. Porter agreed that Claimant engaged in a “limited job search,” not a fully productive job search. Porter Dep., 107:4-14.

169. When asked to comment on the situation where Claimant received a job offer as a school bus driver from Minidoka County and told the hiring officer that he could not do the job because of his right arm, Mr. Porter stated as follows: “Certainly, not the way to find a job when you walk in and tell them what you can’t do.” *Id.* at 109:5-6. Mr. Porter admitted that he was aware that this school district had buses with automatic push-button door openers and automatic transmissions. *Id.* at 109:16-22. Mr. Porter was also aware that Dr. Bates did not have any concerns about Claimant driving. *Id.* at 110:1-2.

170. *Barbara K. Nelson, M.S., CRC.* ISIF took the deposition of Ms. Nelson on April 25, 2019. Nelson Dep., 1:1-9. Ms. Nelson is a Forensic Vocational Consultant. *Id.* at 4:16-17. She practices under the trade name “Injury Management and Rehabilitation Consulting.” *Id.* at 4:19-20. She holds a master of science degree in vocational rehabilitation received from Drake University in 1987. Ex. 1:1, Nelson Dep. She worked as staff to the Idaho Industrial Commission Rehabilitation Division from 1983 to 1994. Thereafter, she opened up her own private practice as a rehabilitation consultant beginning in 1994 through the present. *Id.* at 2. Ms. Nelson has testified in numerous Industrial Commission cases; her qualifications are well known to the Commission.

171. As described above, Ms. Nelson prepared a vocational report concerning Claimant dated August 28, 2018. Ex. DD. That report will not be re-summarized here but rather the key points elicited in Ms. Nelson’s testimony will be summarized.

172. When Ms. Nelson interviewed Claimant she was surprised by his physical appearance and demeanor. “After having read his medical records, I was shocked to see the way

that he carried his arm – you would almost think it was paralyzed – the way he carried it.” Nelson Dep., 10:11-14.<sup>11</sup> This was a “detractor” for Claimant’s ability to present as a job seeker if he presented in that manner. *Id.* at 10:10. When Ms. Nelson greeted Claimant and offered to shake hands, Claimant left his right arm dangling and shook her left hand using his left hand. *Id.* at 11:1-3.

173. Ms. Nelson commented on Claimant’s recovery from his left shoulder surgery in pertinent part as follows:

I saw that very quickly his physical therapy notes reflected that he had no complaints of pain.

Within two-and-a-half months he was having a follow-up appointment with his surgeon and asking to be returned to work.

\*\*\*

I didn’t see any references to him ever asking for any modifications or any changes in the way that he did his work.

Q. What is your review of Mr. Helsely’s testimony regarding his return to work after his left shoulder injury?

A. Well, in a hearing – it changed several years later when he’s in a hearing and he’s saying that he had some fairly significant difficulties doing that job because of his left shoulder, and that he had to get help from his co-workers.

Q. Previous testimony didn’t reveal that?

A. No.

Q. Medical records didn’t reveal that?

A. No.

*Id.* at 15:22-16:1; 16:6-20.<sup>12</sup>

174. Ms. Nelson noted that after Claimant’s recovery from his left shoulder surgery, he “went back to work, and he did well for ten months. Even at the end of ten months, there wasn’t anything problematic with his left shoulder that made him stop work; it was the new injury to the right shoulder.” *Id.* at 21:7-12.

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<sup>11</sup> Claimant carried his right arm similarly during the hearing. Throughout the hearing, he barely moved his right arm, which rested on his stomach, and Claimant used his left hand to hold the right arm. This gave the appearance of an almost-paralyzed arm.

<sup>12</sup> A review of Claimant’s relevant testimony from his August 30, 2016 deposition shows that Claimant complained of left arm weakness post-recovery from his rotator cuff surgery, but does not reveal any of the details of his coworkers being required to assist him at work that his hearing testimony detailed. *See.* Ex. W:19-21.

175. Ms. Nelson concluded that Claimant did not conduct a thorough or rigorous search. “Very quickly after his right shoulder injury, he applied for Social Security Disability and did not do much of a job search. So he effectively took himself out.” Nelson Dep., 27:3-5. Ms. Nelson expressed her doubts with Claimant’s job search in pertinent part as follows: “I just think it’s woefully inadequate ... Just contacting 15 employers in a two-year period and coming to the conclusion that none of them were hiring is not adequate.” *Id.* at 34:4; 13-15. Ms. Nelson also noted that Claimant did not take advantage of any job seeking services such as the Idaho Industrial Commission Rehabilitation Division, Idaho Division of Rehabilitation, and/or Job Service. Nelson Dep., 34:6-12.

176. Regarding the “facing” job function that Smith’s provided to Claimant after he first worked as a greeter, Ms. Nelson commented in pertinent part as follows:

- Q. So it’s not a made up job like described in the hearing, is it?  
A. It’s not a made-up duty, no. It’s a real duty.  
Q. He just didn’t want to do it, right?  
A. He didn’t.  
Q. There was nothing about his functions and limitations that prohibited him – or prevented him from doing that job?  
A. That’s correct.  
Q. And Smith’s is certainly not the only retail store in the Burley area that could use someone that could face shelves?  
A. Right.

*Id.* at 28:2-14.

177. Noting that the unemployment rate in Claimant’s job market is at an historical low, Ms. Nelson commented as follows: “For job seekers, it’s not competitive. Employers have lowered their standards because they can’t get employees, and so they’re very interested in a worker who is going to show up everyday – and maybe not work for the next ten years, but maybe work for the next year.” *Id.* at 34:23-35:3.

178. Ms. Nelson opined that the current job market conditions are more favorable for older workers, given the lack of qualified applicants. Nelson Dep., 36:1-2.

179. When asked whether Claimant is disabled, Ms. Nelson replied as follows: “I really do think it is a close call – I really do. He’s got a pretty bad right arm, and he has some pretty strong nonmedical factors that are going to affect his employability. So I mean, I think reasonable people can have somewhat of a difference of an opinion on this.” *Id.* at 37:14-19.

180. Ms. Nelson observed that it’s not a close case when only considering the restrictions of Dr. Millar, Dr. May, and Dr. Cox; it is only when the restrictions of Dr. Bates are taken into account that it becomes a closer case whether Claimant is totally and permanently disabled. *Id.* at 38:1-8.

181. Regardless, whether it is a close case on disability, in Ms. Nelson’s opinion it does not hinge on Claimant’s left extremity but rather his right extremity, “his dominant arm or the function of his dominant arm.” *Id.* at 39:6-12.

182. Ms. Nelson admitted that she would not want her own grandchildren to be driven in a bus operated by Claimant, in light of his impairments. *Id.* at 42:4-13. She would also have her doubts about Claimant performing a truck driving job (with automatic transmission and no loading/unloading responsibilities), “based just on the way he looks and acts.” Nelson Dep., 43:3-15.

183. Ms. Nelson admitted in pertinent part as follows:

Q. Okay. All right.

A bus person. Do you think – assuming what you saw with Mr. Helsely’s right arm, that he could carry little tubs of dishes?

A. Not with what I saw. It is compatible with the restrictions, but not with what I saw.

*Id.* at 45:16-21.



184. Counsel for Claimant asked Ms. Nelson to respond to a general question about the jobs Claimant could perform, based upon his appearance, as follows:

Q. Okay. Assuming what you observed of Mr. Helsely and his right arm, assuming that's what he can do now and that's his function with his right arm, other than possibly a Greeter at Wal-Mart, are there any of those jobs that you think he can do that you have listed?

A. Just by looking at him –

Q. Yes, that's right.

A. -- but not considering the restrictions?

Q. Yes.

A. -- I think he could do the gas station attendant job.

Nelson Dep., 47:21-48:6.

185. **Claimant's Credibility.** Claimant generally testified credibly at hearing, however there are significant discrepancies between his hearing testimony and the accounts of some events contained in medical records and his prior deposition testimony.

186. During and after his recovery from his first industrial accident on May 26, 2014 in which he injured his left shoulder, Claimant did not report any difficulties with his left shoulder to Dr. Millar and in fact reported that it felt "better now than it has in years" on November 24, 2014. Ex. O:22-23. When he returned to work, he did not mention any job difficulties to Dr. Millar or other medical providers. At hearing, however, Claimant recalled difficulties with lifting the meat scrap bucket and "throwing the load," i.e., lifting and moving heavy boxes of meat, requiring the help of his coworkers and also requiring him to rely more on his right arm. Tr., 53:13-21; 57:4-22.

187. A similar account of Claimant's alleged hindrances at work after returning from the left shoulder surgery did not appear in his second deposition, dated November 9, 2017, in which Claimant responded as follows to questioning about the functioning of his left shoulder at work after his return to work:

Q. Were you still working the same number of hours?  
A. Yes.  
Q. Were you still performing all the job duties that you had prior to hurting your left shoulder?  
A. Yes.  
Q. You just may have had to do them a little bit differently?  
A. Yes.  
Q. *Did you have to enlist the help of some of your co-employees at times, or no?*  
A. *Not with my left shoulder, no.*

Ex. X:6 (126:20-127:6) (emphasis added). In his first deposition dated August 30, 2016, Claimant responded as follows to a question about his employability with only his left shoulder injury:

Q. Could you still be working had you not had your right-shoulder injury?  
A. Yes.  
Q. In meats?  
A. Yes.

Ex. W:21 (78:15-19).

188. After Claimant injured his right upper extremity in the August 22, 2015 accident, he claimed at hearing that he told Dr. Millar, who first examined him, that he had hurt his shoulder in addition to his right index finger. Tr., 64:8-15. Nevertheless, Claimant's recollection that he immediately informed providers of the right shoulder injury is not consistent with contemporaneous medical records, which show that he first mentioned a right shoulder problem nine days later on August 31, 2015. Ex. O:35.

189. In light of these inconsistencies between Claimant's recollections in testimony and medical records, wherever they diverge, more weight is given to the medical history recounted in medical records and the surrounding circumstances than Claimant's testimony.

## DISCUSSION AND FURTHER FINDINGS

190. 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).

191. **Disability.** Claimant contends that he is totally and permanently disabled. This is one of the elements of proof he must satisfy before ISIF can be held responsible for some portion of Claimant's disability. Nevertheless, Claimant must also satisfy certain other elements of proof vis-à-vis his pre-existing impairments before the ISIF can be held liable. As explained below, Claimant's case against the ISIF fails because he cannot demonstrate that his left shoulder condition constituted a subjective hindrance to his employability. Accordingly, it is not necessary to determine whether Claimant is totally and permanently disabled.

192. **ISIF Liability.** Idaho Code § 72-332(1) provides as follows:

If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease 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 or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account.

193. In *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court specified the following four-part test for determining liability under Idaho Code

§ 72-332(1): 1.) Whether there was a pre-existing impairment; 2.) Whether the impairment was manifest; 3.) Whether the impairment was a subjective hindrance to employment; and 4.) Whether the impairment in any way combines in causing total permanent disability. *Id.*, 118 Idaho 155, 795 P.2d at 317. The party asserting ISIF liability (in this case, Claimant) bears the burden of proving all four elements. *Eckhart v. State Industrial Special Indemnity Fund*, 133 Idaho 260, 263, 985 P.2d 685, 688 (1999). *See also, Andrews v. State Industrial Special Indemnity Fund*, 162 Idaho 156, 158, 395 P.3d 375, 377 (2017).

194. There is no dispute, and ISIF concedes, that Claimant had a pre-existing impairment stemming from his 2014 accident and injury to his left arm. Dr. Millar, Claimant's treating surgeon, assessed a 2% WPI applicable to Claimant's left shoulder injury, which required surgical repair of the rotator cuff.

195. There is also no dispute, and ISIF concedes, that Claimant's left shoulder impairment was manifest prior to his 2015 accident and injury to his right upper extremity.

196. There is, however, insufficient evidence to show that Claimant's left shoulder impairment was a subjective hindrance to employment. In *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990), the Idaho Supreme Court held that "whether the claimant considered the condition to be a hindrance should not be determinative." *Id.*, 102 Idaho at 171, 786 P.2d at 562. Rather, the Court held that the criteria for determining whether an impairment constitutes a subjective hindrance to employment rests upon "evidence of the claimant's attitude towards the pre-existing condition, the claimant's medical condition before and after the injury or disease for which compensation is sought, nonmedical factors concerning the claimant, as well as expert opinions and other evidence concerning the effect of the pre-existing condition on the claimant's employability." *Id.*, 102 Idaho at 172, 786 P.2d at 563.

197. In *Archer*, the Court held that there was substantial and competent evidence of a subjective hindrance to employment from the preexisting impairment where there was “evidence not only of the medical condition of this knee before the injury to the right knee, but also evidence that the condition of the left knee required Archer to wear a brace and had impeded his employability from time to time after 1976.” *Id.*, 102 Idaho at 172, 786 P.2d at 563.

198. Unlike *Archer, Id.*, there is insufficient evidence of a subjective hindrance to employment. While the claimant in *Archer* had to wear a brace on his knee and there was evidence that his employability was impeded after the first injury and before the second injury, here Dr. Millar authorized Claimant to discontinue use of his immobilizer and released him to return to work without restrictions on November 24, 2014. Claimant then returned to work full-time with no accommodations and worked for approximately another nine months until August 22, 2015, when he had his second accident. In deposition, Claimant admitted that he worked the same number of hours as before the accident, was performing all of the same job duties as before, and did not have to enlist the help of co-employees to perform his work. Ex. X:6. Furthermore, Claimant admitted if he had not injured his right shoulder, he could still be working in the same job at Smith’s cutting meat. Ex. Y:21.

199. Although Claimant testified at hearing that he required the help of co-employees to complete heavier tasks, *see. e.g.* Tr., 53:13-21, that evidence conflicts with his prior deposition testimony and the medical records in which Claimant reported to Dr. Millar that his left shoulder felt better than it had “in years.” Ex. O:22. Nevertheless, even if one accepts Claimant’s hearing testimony on this issue, that is not determinative per *Archer*, because “whether the claimant considered the condition to be a hindrance should not be determinative.” *Id.*, 102 Idaho at 171, 786 P.2d at 562. The medical evidence and actual evidence concerning the

effect of the left shoulder injury on Claimant's employability, together with other circumstantial evidence, weigh in favor of a finding that Claimant's left shoulder injury was not a subjective hindrance to his employment.

200. Because the evidence shows that Claimant's burden of proof fails on the third element of the four-part test from *Dumaw*, 118 Idaho 150, 795 P.2d 312, it is unnecessary to analyze the fourth element, whether the prior impairment combined with the industrial accident in causing total permanent disability. Under these circumstances, ISIF is not liable for a portion of Claimant's disability.

201. **Carey Formula.** It is also unnecessary to analyze the *Carey* formula to determine a proportion of ISIF's liability for disability, because ISIF is not liable pursuant to *Dumaw, Id.*, and Idaho Code § 72-332.

#### CONCLUSION OF LAW

1. Because Claimant's prior impairment did not constitute a subjective hindrance to employment, ISIF is not liable for any portion of Claimant's disability pursuant to Idaho Code § 72-332.

#### RECOMMENDATION

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

DATED this \_\_23<sup>rd</sup>\_\_\_\_ day of October, 2019.

INDUSTRIAL COMMISSION

/s/  
\_\_\_\_\_  
John C. Hummel, Referee

ATTEST:

/s/  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 18<sup>th</sup> day of November, 2019, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

DENNIS R PETERSEN  
PETERSEN PARKINSON & ARNOLD  
P O BOX 1645  
IDAHO FALLS ID 83403-1645

ANTHONY M VALDEZ  
VALDEZ LAW OFFICE  
2217 ADDISON AVE E  
TWIN FALLS ID 83301

sjw

/s/

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

ELMER A. HELSLEY,

Claimant,

v.

STATE OF IDAHO, INDUSTRIAL  
SPECIAL INDEMNITY FUND,

Defendant.

**IC 2014-014196**

**IC 2015-022847**

**ORDER**

November 18, 2019

Pursuant to Idaho Code § 72-717, Referee John C. Hummel 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. Because Claimant's prior impairment did not constitute a subjective hindrance to employment, ISIF is not liable for any portion of Claimant's disability pursuant to Idaho Code § 72-332.

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

DATED this 18<sup>th</sup> day of November, 2019.

INDUSTRIAL COMMISSION

/s/  
Thomas P. Baskin, Chairman



/s/  
Aaron White, Commissioner

/s/  
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 18<sup>th</sup> day of November, 2019, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

DENNIS R PETERSEN  
PETERSEN PARKINSON & ARNOLD  
P O BOX 1645  
IDAHO FALLS ID 83403-1645

ANTHONY M VALDEZ  
VALDEZ LAW OFFICE  
2217 ADDISON AVE E  
TWIN FALLS ID 83301

sjw

/s/