BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DONALD BIERDERSTEDT, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2014-018842** **IC 2015-023678** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **Filed October 22, 2020**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a video hearing (via Zoom) from Boise, Idaho, on May 27, 2020.[1] Michael McBride represented Claimant. Paul Augustine represented Defendant. The parties produced oral and documentary evidence at the hearing. No post-hearing depositions were taken. The parties submitted briefs. The case came under advisement on September 10, 2020.

ISSUES

The issues listed at hearing are:

1. Whether Claimant suffered an injury from an accident arising out of and in the course of employment;

2. Whether the condition for which Claimant seeks benefits was caused by an industrial accident;

[1] While the Referee conducted the video hearing from his office in Boise, Claimant, his witness, and his attorney presented their case from the attorney's office in Idaho Falls. Defendant's attorney participated in the hearing from his office in Boise.

3. Whether Claimant is totally and permanently disabled;

4. Whether ISIF is liable under Idaho Code § 72-332;

5. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant argues he is totally and permanently disabled due to the combined effects of his pre-existing impairments and conditions coupled with an injury sustained in a work accident on or about December 10, 2014. Defendant is responsible for apportioned benefits equal to Claimant's pre-existing impairments as they relate to Claimant's total disability.

Defendant argues Claimant did not have a work accident on or around December 10, 2014. While admittedly Claimant had pre-existing impairments, Claimant's last work-related injury occurred in June 2014, after which he returned to work without restrictions. Claimant was not totally and permanently disabled due to this final industrial accident. The injury Claimant belatedly attempts to relate to a December 10, 2014 work accident in fact happened in the spring of 2015 when Claimant was performing yard work for his neighbors.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and witness Dorothy Bierderstedt, taken at hearing;

2. Joint Exhibits (JE) A through R, admitted at hearing;[2]

FINDINGS OF FACT

1. At the time of hearing Claimant was 73 years old, living with his wife Dorothy in Shelley, Idaho. Claimant worked in the meat processing industry for most of his career.

[2] The parties stipulated after the hearing to include page 648a to JE Q (which page is attached to the Claimant's opening brief) and this stipulation was approved. The page was considered when the exhibits were reviewed.

2. In approximately 1994 Claimant injured his back while working in a meat processing facility in Baker, Oregon. Records from this injury no longer exist, but the injury is not disputed. Claimant applied for and received Social Security disability (SSDI) benefits after this injury.

3. While on SSDI Claimant obtained part-time work with Employer in September 2008. His typical duties were limited to assisting with wild game butchering from approximately September or October through about the end of the year, three to four hours per day, three days per week.

4. In June 2014 Claimant was assisting Employer with butchering at a bison ranch when he injured his right arm/shoulder lifting water jugs. His injury was treated by Gregory Biddulph, M.D., in Idaho Falls.

5. Dr. Biddulph diagnosed a full thickness rotator cuff tear with labral tearing and complete rupture of the biceps tendon with retraction into the arm. Dr. Biddulph believed Claimant's repetitive activities away from his body and history of smoking led to Claimant's condition. He recommended surgery to fix the rotator cuff tendon and the labrum. Dr. Biddulph expected Claimant to be able to return to work without restrictions three months postop.

6. Surgery took place on August 7, 2014. Thereafter, Claimant underwent physical therapy. Claimant had slow but steady improvement and by November 24, 2014, indicated that he would like to return to work. Dr. Biddulph released Claimant to work without restrictions on that date. Claimant received a 3% whole person impairment rating for his right shoulder.

7. Claimant returned to work for Employer.

8. Claimant asserts that on December 10, 2014, he reinjured his right shoulder and biceps while boning game for Employer. He points to an undated notice of injury signed by him

as supporting this assertion.[3] Claimant argues it was this injury, when coupled with his preexisting conditions, which rendered him totally and permanently disabled. Defendant disputes the occurrence of this accident.

DISCUSSION AND FURTHER FINDINGS

9. In order to prevail, Claimant must establish by a preponderance of the evidence that all elements of his claim against the ISIF have been met. In *Aguilar v. Industrial Special Indemnity Fund*, 164 Idaho 893, 901, 436 P.3d 1242, 1250 (2019), the Idaho Supreme Court summarized the four inquiries which must all be satisfied to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was one or more preexisting impairments; (2) whether the impairment was manifest; (3) whether the impairment was a subjective hindrance to employment; and (4) whether the impairment in any way combined with the subsequent injury or was aggravated and accelerated by the subsequent injury to cause total disability.

10. Regardless of the nature and extent of Claimant's preexisting impairments, there must be a subsequent industrial injury which combines with the preexisting impairment(s) to cause total and permanent disability. If Claimant becomes totally and permanently disabled due to a non-industrial accident or condition, or simply as the natural progression of a prior industrial injury, ISIF is not liable under Idaho Code § 72-332, as detailed in cases such as *Aguilar*. In short, there must be an industrial accident which combines with a pre-existing condition/impairment (from any cause or origin) to cause total and permanent disability.

11. Prior to his June 2014 industrial accident, Claimant suffered from a prior impairment, most notably his low back condition from his accident in 1994 which left him with

[3] The first report of injury indicates Claimant's last day of work for Employer was December 10, 2014, and that he notified Employer of his injury on such date. There is a date stamp of September 4, 2015 on the document of unknown origin.

residual work limitations.[4] Claimant's 1994 low back injury was manifest, and a subjective hindrance to Claimant's employment. Claimant's June 2014 accident resulted in an impairment rating but did not combine with the 1994 accident to render Claimant totally and permanently disabled; after all, Claimant returned to his regular employment without any restrictions after he reached MMI. Claimant acknowledges the same. Instead, Claimant argues the 1994 impairment combined with both the June 2014 accident *and* the December 10, 2014 accident (as well as several personal circumstances, including Claimant's illiteracy and auditory mental defect) to leave Claimant totally disabled as an odd-lot worker. Put another way, the December 10, 2014 accident was the proverbial "straw that broke the camel's back" in that after (but admittedly not before) such accident Claimant became totally disabled due to a combination of his prior conditions and the December 2014 work accident. This argument presupposes that the December 10, 2014 accident as alleged by Claimant actually occurred.

12. Defendant contends Claimant did not suffer a work accident on or about December 10, 2014.

Defendant's Points of Inconsistencies

13. Defendant points to various inconsistencies and conflicts in the record to support its position that Claimant has not proven by a preponderance of the evidence that an accident took place at work on or around December 10, 2014. Notable inconsistencies are discussed below.

14. In his August 13, 2019 deposition, Claimant testified that immediately after the December 10, 2014 work accident he did not go back to work for the remainder of the season, or at any time since. However, payroll records from Employer show Claimant worked into January 2015. Those records show that Claimant worked over 20 hours between December 8 and

[4] Claimant also points to a prior left index finger injury in 2012, but how this injury was a subjective hindrance to employment was not developed at hearing or in Claimant's briefing.

December 21, 2014. If his accident happened on December 10 as alleged, and he did not work after that date, he would have had to work approximately 7 hours per day on December 8, 9, and 10, which is contrary to his own testimony that he worked 3 to 4 hours per day. However, if he worked 6 days (3 days per week for each of the two weeks in the pay period, as he testified to), he would have averaged 3.3 hours per day, which is in line with his sworn testimony of working between 3 and 4 hours per work day. Furthermore, he was paid for nearly 10 hours of work between December 22, 2014 and January 4, 2015, a time frame which included two holidays. Finally, he was paid for an additional 20 hours (approximate) of work he performed during January 2015.

15. In addition to payroll evidence, Defendant points to ICRD records to support its position. In an entry dated January 9, 2015, consultant Dan Wolford noted that he had called Claimant's wife Dorothy, who confirmed that Claimant returned to work when he was released without restrictions from his June accident, and was still working for Employer as of the current date, although he was "on call" since Christmas, as was the Employer's traditional practice. She further told consultant Wolford that Claimant was doing "OK" overall, but still had some pain and discomfort in his arm since the surgery.

16. Additional notes from that entry indicate Mr. Wolford contacted Employer as well. Employer affirmed the fact that Claimant had returned to work through the hunting season, but was on call for periodic work recently, as had been Employer's practice for several years. Employer noted Claimant was working in his exact same status as he had prior to his June accident.

17. Defendant next points to Claimant's medical records from late 2014 and early 2015 which show a lack of complaints of a new injury. Most notable is a record from January 2, 2015 by a Lee Gardner, PA-C, Dr. Biddulph's assistant. This was the first medical record since December 10, 2014. Mr. Gardner's notes indicate Claimant reported that his shoulder was doing

well overall but does get sore and feels weak at times. Claimant noted he would not be returning to work until next fall. Claimant felt his shoulder was slowly improving. On examination, Mr. Gardner found Claimant's shoulder was stable in all directions. There was no mention of a new injury. Other records from early 2015 were consistent with Mr. Gardner's notes. In a letter from February 2015, Dr. Biddulph indicated Claimant's shoulder was still stable and he reiterated that Claimant had no physical restrictions at that time.

18. On May 6, 2015, Claimant presented to Lance Wehrle, an internal medicine physician, with complaints of increased right shoulder pain. At that time Claimant indicated he had been doing odd jobs which increased his pain. Those odd jobs included mowing lawns and pulling weeds for extra income.

19. On June 3, 2015, Mr. Gardner's notes state that Claimant had been doing very well until the prior week, when Claimant had been mowing lawns and weeding for four hours, which led to increased shoulder pain. Examination at that time produced pain in all areas of Claimant's range of motion. An MRI was scheduled.

20. On June 17, 2015, Dr. Biddulph noted Claimant's right shoulder pain began "at work 6 weeks ago" and Claimant had a lot of pain if he used his right arm. Dr. Biddulph reiterated that he had been very happy with Claimant's surgical outcome until the "new injury" from six weeks ago where Claimant reinjured his arm at work. After viewing the MRI scans, Dr. Biddulph diagnosed a new subscapularis tear in Claimant's right shoulder. Dr. Biddulph recommended surgery. Claimant was taken off work pending surgery.

21. Defendant points out that in the June 17, 2015 office notes from Dr. Biddulph there is no mention of a December accident involving Employer. Secondly, Defendant notes that exactly six weeks prior to June 17, 2015, Claimant was in Dr. Wehrle's office complaining of increased pain from lawn work.

22. On July 15, 2015, Claimant again saw Dr. Biddulph. Claimant acknowledged increased pain with lawn mowing, but Claimant felt that such increased pain was not a new injury. Claimant was having difficulty getting Surety to pay for the proposed surgery. Claimant could not recall exactly when an injury or event causing his new shoulder symptoms occurred, but Dr. Biddulph noted Claimant was a poor historian. Dr. Biddulph encouraged Claimant to "go home and evaluate" dates in order to make an addendum to Claimant's chart, perhaps in an effort to obtain coverage for surgery. Defendant points out that even as of mid-July 2015, Claimant was not claiming a December work accident as the cause of his right shoulder complaints.

23. In his operative report, Dr. Biddulph noted Claimant had recovered from his June 2014 injury but subsequently had suffered a new tendon tear, which he repaired.

Claimant's Position

24. Claimant testified that on December 10, 2014, he felt a tear or ripping similar to what he previously felt in June of that year. He argues that when Dr. Biddulph noted Claimant suffered an injury "at work" six weeks ago, the "at work" was accurate, but the doctor should have said "six months" not "six weeks." Further, the "at work" meant "at work with Employer," not doing yard work for neighbors to make ends meet. Claimant further argues Dr. Biddulph's notes establish that the aggravation felt by Claimant doing yard work was not a new injury. Instead, the July 2015 MRI documented a new injury of a type similar to Claimant's June 2014 injury.

25. Claimant argues that "it stands to reason" that Claimant's work butchering on December 10, 2014 caused the same pathology as when he injured his arm in June 2014 lifting heavy water jugs. Claimant's theory is that the injury from December 2014 caused pain at first, which lessened with lack of use and came back when Claimant began mowing lawns and pulling weeds in May 2015.

December 10, 2014 Accident Analysis

26. Defendant's points are well taken and supported by the record. Other than Claimant's belated recollection that he injured his arm on December 10, 2014, there is no evidence of such an occurrence. His undated FROI does not establish the accident. His wife's testimony and that of his Employer in January 2015 strongly cuts against Claimant's assertion of a December accident which left him disabled. Medical records do not help Claimant's case; even their silence on the subject speaks loudly. Claimant's argument that the Commission should assume a mistake in the medical records in order to make Claimant's story fit better is unpersuasive. There is nothing in the record other than the fact Claimant is a poor historian to support the concept that either Claimant or Dr. Biddulph made a mistake in stating "weeks" when he should have said "months."

27. Contrary to Claimant's assertion, when a physician records a patient's subjective opinion, such recordation does not serve as the physician's opinion. When Dr. Biddulph noted that Claimant felt mowing lawns and picking weeds did not cause a new injury, such recordation carries no medical weight as it is not a medical opinion. *See, e.g., Caudel* v. *Boulder Mountain Village*, 91 IWCD 52, p. 4198, at p. 4201 (1991).

Findings on Issues

28. When the record as a whole is examined, Claimant has failed to establish by a preponderance of the evidence that he suffered an injury from an accident arising out of and in the course of employment on or about December 10, 2014, or at any time after he returned to work after his industrial accident of June 16, 2014 for the reasons set forth immediately above.

29. When the record as a whole is examined, Claimant has failed to establish by a preponderance of the evidence that the condition for which he seeks benefits - total and permanent disability with apportionment against ISIF as per the *Carey* Formula - was caused by

an industrial accident occurring in December 2014, coupled with Claimant's prior impairments. Claimant's argument that the alleged December 10, 2014 accident, when added to Claimant's prior impairments, rendered Claimant "severely restricted from activities" or in the language of workers' compensation, totally and permanently disabled, hinges upon an actual industrial accident occurring in such time frame. Claimant has failed to establish such an accident actually happened as alleged.

30. The final three issues - whether Claimant is totally and permanently disabled; whether ISIF is liable under Idaho Code § 72-332; and apportionment under the *Carey* formula can be analyzed simultaneously and summarily. Because Claimant has failed to establish the requisite requirements to hold ISIF liable for apportioned benefits, most notably the requirement that there occurred an industrial accident which combined with an existing condition/impairment to cause total and permanent disability, Claimant has failed to establish liability in ISIF for apportioned benefits.[5] Accordingly, the issues of *Carey* formula apportionment and whether Claimant is totally and permanently disabled are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove by a preponderance of the evidence that he suffered an injury from an accident arising out of and in the course of employment on or about

[5] While one might be tempted to consider whether, even without the occurrence of an industrial accident in December 2014, Claimant's current condition might simply be the progressive end result of his June 2014 industrial accident, which, when coupled with his prior low back injury resulted in Claimant becoming totally and permanently disabled, thus potentially implicating ISIF. However, such consideration is not supported, and in fact is specifically refuted, by both Claimant's treating physician and Claimant's own written arguments, *i.e.* Claimant's Opening Brief, p. 7. Dr. Biddulph's operative narration of his second shoulder surgery on Claimant note a "new subsequent tendon tear" superimposed over a well healed older tear from Claimant's first surgery. JE F, p. 479. Without a medical opinion that Claimant's current shoulder condition is the natural end result of the June 2014 industrial accident such theory cannot survive.

December 10, 2014, or at any time after he returned to work after his industrial accident of June 16, 2014.

2. Claimant has failed to prove by a preponderance of the evidence that the condition for which he seeks benefits - total and permanent disability with apportionment against ISIF as per the *Carey* formula - was caused by an industrial accident occurring in December 2014, coupled with Claimant's prior impairments.

3. All remaining issues are moot.

RECOMMENDATION

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

DATED this 1st day of October, 2020.

INDUSTRIAL COMMISSION

Brian Harper

Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2020, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by email transmission and regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DONALD BIEDERSTEDT, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2014-018842** **IC 2015-023678** **ORDER** **Filed October 22, 2020**

Pursuant to Idaho Code § 72-717, Referee Brian Harper submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusion of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation.

Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusion of law as its own.

Based upon the foregoing, IT IS HEREBY ORDERED that:

1. Claimant has failed to prove by a preponderance of the evidence that he suffered an injury from an accident arising out of and in the course of employment on or about December 10, 2014, or at any time after he returned to work after his industrial accident of June 16, 2014.

2. Claimant has failed to prove by a preponderance of the evidence that the condition for which he seeks benefits - total and permanent disability with apportionment against ISIF

as per the *Carey* formula - was caused by an industrial accident occurring in December 2014, coupled with Claimant's prior impairments.

3. All remaining issues are moot.

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

DATED this the 22nd day of October, 2020.

INDUSTRIAL COMMISSION

Thomas P. Baskin, Chairman

Aaron White, Commissioner

Thomas E. Limbaugh, Commissioner

ATTEST:
Assistant Commission Secretary

INDUSTRIAL COMMISSION STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2020, true and correct copy of the foregoing **ORDER** was served by email transmission and regular United States Mail upon each of the following:

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