BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ARTHUR ALLEN, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2009-021803** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed November 24, 2020**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael Powers, who conducted a hearing on February 20, 2013. Claimant, Arthur Allen, was present in person and represented by Justin Alysworth of Boise. Defendant Industrial Special Indemnity Fund (ISIF) was represented by Paul Augustine of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken. Thereafter, Referee Powers retired. By letters dated October 22 and October 29, 2019, the parties wrote they were willing to have the matter reassigned and there was no need for another Referee to re-hear the case. The matter was reassigned to Referee Sonnet Robinson. The matter came under advisement on June 19, 2020, and is ready for decision.

ISSUES

The issues to be decided and clarified at hearing are:

1. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine, or otherwise;
2. Whether ISIF is liable under Idaho Code § 72-332;
3. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant contends that he is totally and permanently disabled under both the 100% and odd-lot theories of disability. Claimant had numerous pre-existing conditions, which were manifest and a subjective hinderance, and which combine with his July 16, 2009 industrial accident to cause total and permanent disability.

Defendants argue that Claimant was totally and permanently disabled prior to the industrial accident and that Claimant's pain medication usage disqualified him from the job he was performing at the time of the accident. In the alternative, ISIF argues Claimant is not totally and permanently disabled.

Claimant responds that Defendants have shown neither a sympathetic employer, nor superhuman effort as required by *Aguilar v. ISIF*, 164 Idaho 893, 436 P.3d 1242 (2019). Further, Defendants are prohibited from taking such inconsistent positions by *Vawter v. UPS*, 155 Idaho 903, 318 P.3d 893 (2014).

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition of Claimant, taken July 19, 2011;
3. The testimony of Claimant and Nichole Gerard, taken at hearing;
4. Claimant's Exhibits, A-X;
5. ISIF's Exhibits 1-9;
6. The post-hearing depositions of Tyler Frizzell, MD, Nancy Collins, PhD, and Nancy Greendwald, MD.

Claimant's objection to ISIF's post-hearing brief attachments/appendices is SUSTAINED. The regulations and website print-out are dated after the accident in question and are therefore irrelevant.

The Commission has reviewed the proposed decision authored by the Referee and prefers to give different treatment to the issue of apportionment of disability between Employer/Surety and ISIF. Accordingly, the Commission issues this decision in lieu of the proposed decision.

FINDINGS OF FACT

1. Claimant was born in Leavenworth, Washington on October 12, 1951. Clt. Depo. 7:12-15. Claimant was a poor student and enrolled in the Navy shortly after graduating from high school. *Id*. at 9:1-9. Claimant served from 1970 to 1974 and was a river boat mechanic in Vietnam for 22 months; Claimant was honorably discharged. *Id*. at 10:6-9; CE L:423, 438. Thereafter, Claimant worked hauling logs in Washington. Clt. Depo. 10:12-13; 27:4-5.

2. Claimant moved to Idaho in 1993 and continued to haul logs. Clt. Depo. 27:4-28:15. Claimant's VA medical records indicate that Claimant underwent bilateral knee arthroscopies in 1993 and 1995. CE L:502. There are no records for these procedures and Claimant did not recall ever having surgery on his left knee. Clt. Depo. 91:20-23.

3. During the mid-1990s, Claimant recalled that he had right shoulder surgery for a rotator cuff issue at St. Luke's in Boise. Clt. Depo. 31:25-32:3. There are no records for this procedure, but later imaging confirms Claimant underwent right shoulder surgery (see ¶ 14).

4. Around 1996, Claimant was hired for a seasonal position with the Idaho Department of Transportation in the sign crew. *Id.* at 33:25-34:9. In 1998, while pushing a 200-pound cart at work, Claimant experienced shortness of breath; he was diagnosed with coronary

artery disease and underwent a 5-vessel bypass. CE G:212; Clt. Depo. 51:8-52:8. No records were admitted for this procedure.

5. On April 12, 1999, Claimant started driving a dump truck for Owyhee Construction. CE Q:824

6. On July 22, 2003, Claimant was diagnosed with "mild to moderate high frequency sensorineural hearing loss bilaterally" and tinnitus. CE L:508-509.

7. On May 24, 2004, Claimant presented to Clinton Mallari, M.D., with complaints of neck pain, headaches, bilateral shoulder pain, lower back pain, and wrist pain. CE D:122. After a physical exam, Dr. Mallari diagnosed cervicalgia, cephalgia, deQuervaines, and lumbar facet arthropathy. *Id.* at 123. Dr. Mallari recommended intramuscular stimulation and steroid injections and gave Claimant Provigil samples for his narcolepsy symptoms. *Id.* Between May 2004 and July 2005, Claimant's right wrist was injected five times to treat his deQuervaines. *Id.* at 124, 128, 132, 133, 134.

8. On August 18, 2004, Claimant followed-up with Dr. Mallari and reported hip pain; Dr. Mallari diagnosed bilateral SI joint dysfunction and lumbar facet arthropathy and prescribed hydrocodone. *Id.* at 125. Dr. Mallari also recommended SI joint injections, but it does not appear Claimant ever received this treatment. See CE D:126.

9. On November 8, 2004, Claimant began to treat with the VA Medical Center in Boise for his primary care with PA Joshua Lawrence. CE L:501. Claimant reported the following medical conditions: coronary artery disease, hypertension, hyperlipidemia, left wrist and hip pain, previous MRSA infection, depression, GERD, sleep apnea, and hearing loss. *Id.* Claimant's prescribed medications were propranolol for hypertension, Crestor for hyperlipidemia, hydrocodone for pain, Celexa for depression, and omeprazole for GERD; Claimant had a CPAP

for his sleep apnea. *Id.* at 502. Regarding Claimant's sleep apnea, Claimant reported he had started to develop "a problem with his legs being restless, feels he needs to kick all the time which is inhibiting his sleep." CE D:502. This is the first mention of 'restless legs' in the medical record.

10. On May 31, 2005, Dr. Mallari started Claimant on Zanaflex for his restless legs. *Id*. at 131.

11. On September 1, 2005, Claimant reported he was very sleepy during the day and had fallen asleep at a stop light. CE L:483. PA Lawrence associated this daytime sleepiness with Claimant's sleep apnea and recommended Claimant get fitted for a new CPAP mask. *Id.* at 485.

12. On September 26, 2005, Claimant reported to his supervisor at Owyhee Construction that he had fallen asleep at two stoplights while driving. Clt. Depo. 45:10-15. Owyhee Construction offered to put Claimant on an unpaid medical leave of absence because he was "unable to stay awake during his shift." CE Q:839. Claimant was eventually let go from this position. DE 2:44.

13. That same day, Claimant presented to the Mental Health Clinic at the VA Medical Center in Boise. CE L:481. Claimant was seen by Mukesh Mittal, MD. *Id.* Dr. Mittal recorded: "[h]e presents today in a state of despair, helplessness, and hopelessness for the past many years with gradual worsening of symptoms. He further claims that he cannot sleep and he is having nightmares, feeling overwhelmed…" *Id.* Dr. Mittal diagnosed depression, with underlying posttraumatic stress disorder and generalized anxiety; Dr. Mittal prescribed Effexor and trialed Claimant on prazosin to help with nightmares. *Id.* at 481-482. Claimant was also prescribed clonazepam for his restless legs. *Id.* at 480.

14. On December 27, 2005, Claimant presented to the Boise VA Medical Center with complaints of aching in his right shoulder, left elbow, and right wrist. CE L:470. Claimant's right shoulder and right wrist X-ray revealed mild arthritis in both joints and the following findings:

> the patient has probably undergone prior acromioplasty with relatively foreshortened acromion. Portions of the AC joint at least on the acromion side probably have been resected as well with moderate AC arthrosis changes noted. The glenohumeral joint is within normal limits but does display faint calcification about greater tubercle which may be a postoperative phenomenon."

CE L:469, 544.

15. In 2006, Claimant moved to Washington from Idaho to be closer to family. *Id.* at 463. On May 19, 2006, Claimant presented to Daniel Garcia, M.D., for a Department of Transportation physical. CE C:95. Claimant was cleared to drive truck on May 23, 2006. *Id.* at 98. Dr. Garcia took over Claimant's pain management. *Id.* at 102.

16. Around this time, Claimant started a new position with Dellinger Construction, a company owned by Claimant's nephew. Clt. Depo. 48:11-20. Claimant only worked there a short time before he was let go: "Well, I wasn't getting the sleep I needed, as usual. I was moving a backhoe one morning. I loaded the backhoe up. I left the bucket up on the trailer, when it was on the trailer. I drove off, and I hooked some wires and tore down a pole. I screwed up." *Id.* at 49:11-15. Claimant was terminated for this mistake. *Id*.

17. On July 27, 2006, Claimant reported "considerable lower back pain" to Dr. Garcia. CE C:103. Claimant reported a history of restless leg syndrome (RLS), narcolepsy, sleep apnea, and use of a CPAP machine. *Id.* Dr. Garcia recorded "[i]t is difficult to get a history from him, as

he has he has not had any workup for his back, interestingly enough." Dr. Garcia prescribed Mirapex and ordered a bone scan.[1] *Id.*

18. On July 31, 2006, Claimant returned to the Boise VA for follow-up. PA Lawrence recorded Claimant was still struggling with restless leg syndrome, and that he had trialed levodopa, clonazepam, and most recently Mirapex, all without relief of his symptoms; Claimant reported the only medication that had helped was Vicodin (hydrocodone). CE L:458.

19. On August 7, 2006, Claimant was admitted at the Boise VA for depression, PTSD, and restless leg syndrome. CE L:454. Dr. Mittal recorded Claimant was in a state of despair and distress: "he feels his symptoms are so extreme that it would be a relief to step in front of a truck… the crawling under his skin was so extreme that he was uncomfortable in any position that he was in." *Id.* Claimant was particularly distraught he couldn't work:

> Approximately a month ago, veteran and his wife moved from their home in Boise to their hometown, Concrete, Washington. Initially veteran had a job there but only had it for two days and states he was unable to work because he was unable to sleep due to his restless legs and that he would fall asleep at streetlights… States he is unable to work. No money coming in. No money for gas. The rent will be due August 15. Concerned about having trouble feeding his grandkids. Does not have insurance.

CE L:438. Dr. Mittal changed Claimant's depression medication from Effexor to mirtazapine, again prescribed prazosin for nightmares, Benadryl for restless legs and anxiety, and Vicodin for restless legs; Claimant also participated in therapy. *Id.* at 435-436. Claimant was discharged on August 11, 2006. *Id.* at 392. Claimant regularly attended therapy at both the Puget Sound VA and Boise VA thereafter for his depression and PTSD. See CE:L.

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[1] Claimant never received the bone scan; he missed the first appointment and lost his insurance before the second scheduled appointment. See CE:C.

20. Claimant started seeing a Dr. Aldridge in Washington around this time who started Claimant on methadone to treat him for his RLS. *Id.* at 374; CE M:591-592. No records were admitted related to this medical care.

21. Claimant applied for Social Security Disability (SSD) in August of 2006. CE M:578. Claimant underwent a physical exam on November 2, 2006 by Jerry Rusher, MD, for his application. *Id.* at 590. At the time of examination, Dr. Rusher noted Claimant's primary medical issues were his restless leg syndrome, coronary artery disease, arthritis, and right shoulder pain. Claimant's medications included Zocor, Atenolol, aspirin, Lexapro, Protonix, Methadone, prazosin, clonazepam, diphenhydramine, Mirapex, Norco, and Gabitril. CE M:591-592. On December 2, 2006, Claimant underwent a mental exam by Russell Bennett, MD. Dr. Bennett noted Claimant's primary mental health issues were nightmares, depression, and PTSD. *Id.* at 596.

22. RB Rohwedder, the social security medical consultant, rejected the opinions and restrictions issued by Dr. Rusher and by Dr. Bennett. *Id.* at 609, 630. On December 18, 2006, Rohwedder issued a residual functional capacity (RFC) report which found Claimant capable of the following: occasional lift/carry 20 pounds, frequent lift/carry 10 pounds, stand/walk about six hours in an eight hour day, sit about six hours in an eight hour day, occasional climbing, frequent balancing, stooping, kneeling, crouching, crawling, and to avoid concentrated exposure to hazards (such as machinery and heights). *Id.* at 603-606. Rohwedder did not indicate which physical restriction was associated with what condition, although the physical residual functional capacity assessment identifies primary diagnoses of RLS and status/post coronary artery bypass graft (s/p CABG), and other alleged impairments of hand, wrist stiffness, and right shoulder pain. *Id.* at 606. Regarding Claimant's depression and PTSD, Rohwedder found Claimant was mildly limited in activities of daily living, mildly limited in maintaining social function, and moderately limited in

maintaining concentration, persistence, or pace. *Id.* at 620. Regarding specific activities, Rohwedder issued a mental residual functional capacity assessment on December 18, 2006 and found Claimant was moderately limited in his ability to understand and remember detailed instructions, moderately limited in his ability to carry out detailed instructions, and moderately limited in his "ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods." *Id.* at 624-625. Rohwedder ultimately concluded that Claimant was incapable of performing his past work, did not have transferable skills, and was not capable of performing other work. *Id.* at 632.

23. Rohwedder's conclusions were reviewed by three other doctors.[2] On January 6, 2007, David Q. Wilson, MD, provided an orthopedic review and agreed with Rohwedder's conclusions and Rohwedder's rejection of Dr. Rusher's proposed restrictions; he observed that Claimant's restless leg syndrome was neurologic in origin and would not be a basis to limit his "musculoskeletal day (work) time activities." CE M:752. On January 13, 2007, Richard S. Winslow, MD, provided a mental health review and disagreed with Rohwedder in relevant part as follows:

> This MRFC is a brief summary of [Claimant's] strengths and weaknesses. [Claimant] obviously carry out simple tasks with no problem, but his social interaction with people outside the home is more limited than described here. Thus, for paragraph C, Social, I would describe him as able to sustain function in a setting with only brief and superficial contact with general public and with coworkers, such as the minimal contact required when he was at previous job driving a dump truck. For paragraph D, Adaptation, he has a pattern of falling asleep, whether from restless legs, narcolepsy, excess opiate use, or sleep apnea (all of which are in the MER at one time or another). Though this pattern is not necessarily a psychiatric condition (unless it is from excess opiate use), he may not recognize ordinary job

[2] It is not clear what impact their opinions had on Claimant's SSD issued restrictions; there were no further restrictions listed in exhibit M after Rohwedder's. All the vocational experts considered Rohwedder's restrictions as Claimant's SSD restrictions, as does this decision.

> hazards and, in fact, may BE a job hazard; thus he needs to be in a workplace where aside from the minimal risks from sitting, standing and walking, there are essentially no risks.

(emphasis in original). *Id.* at 754. On January 16, 2007, Jacqueline Farwell, MD, provided a neurologic review and agreed with Rohwedder's conclusions except for the limitation against more than occasional climbing stairs, ramps, ropes, ladders, and scaffolds. *Id*. at 635. Claimant was approved for SSD retroactive to November 2006. *Id.* at 567.

24. Claimant had two stents placed in January 2007 to treat his coronary artery disease. CE G:212; CE L:518. No records were admitted for this procedure.

25. On April 30, 2008, Claimant presented to the Puget Sound Health Care System for primary care and reported methadone really helped his restless leg syndrome. CE L:518. Claimant's methadone prescription had increased from two 10mg daily, at the time of his SSD application, to three 10mg daily at the time of this appointment. CE L:519; CE M:591.

26. Claimant moved back to Idaho in the spring of 2008. Clt. Depo. 69:3-8. On May 23, 2008, Claimant re-established care at the Boise VA Medical Center. CE L:374. Claimant had recently fallen on his left shoulder; PA Lawrence ordered an X-ray, which showed arthritis in the joint, but also ordered a follow-up MRI as he suspected a rotator cuff tear. *Id.* at 370, 377. PA Lawrence took over Claimant's pain management at this appointment and required Claimant to sign a pain management contract. *Id.* at 377. Regarding Claimant's RLS, PA Lawrence recorded:

> [Claimant] noted gabitril, norco, and clonazepam had all been trialed (although not sure where gabitril was trialed). Clonazepam did seem to help. Trial of carbidopa/levodopa with that visit. 07/31/2006 we followed-up. He had moved to WA by that time and was being seen by Dr. Alderidge [sic], private practice family physician. Mirapex was tried with him to no benefit, and the only thing that did benefit was vicodin… Since that time, he was started on Methadone by Dr. Aldridge, apparently for his RLS. His medication was being obtained through Puget sound VA, and he was receiving Methadone 10 mg Q8HRS. He was also given

> vicodin 1 tab Q4hrs to relieve pain. He reports he was taking up to 8 vicodin a day before methadone was started for this pain/discomfort. Unfortunately, we have no records for Dr. Alderidge [sic] here with us today. Pt reports his legs are currently "driving him crazy." … He has been out of methadone and vicodin for 2-3 weeks now. His wife is here with him today, and reports that he has been doing very poorly since not having any methadone.

Id. at 374. PA Lawrence prescribed a one-week supply of methadone 5mg, because he was uncomfortable starting Claimant at his previous dosage when he had not been taking it for three weeks, and scheduled Claimant for a follow-up appointment. *Id.* at 377. PA Lawrence requested a neurologist's opinion on Claimant's severe refractory RLS. *Id.* at 376. A follow-up note dated May 27, 2008 indicates that Claimant forgot his "DOT form" and would like to be notified when it was complete. *Id*. at 369.

27. Claimant applied to Cattleman's Meat Co. for a part-time truck driver position through Craigslist and was hired in May of 2008; Claimant wrote he was receiving SSD benefits in his application. CE R:848; Clt. Depo. 70:6-7. Claimant explained he was looking for part-time work to supplement his income. Clt. Depo. 70:1-4. Cattleman's held a contract to deliver mobile kitchens, usually to firefighters, across the United States; Claimant drove the frozen foods semi-trailer. *Id.* at 72:1-12.

28. On August 4, 2008, Claimant's left shoulder MRI was interpreted as showing a "small anterior marginal tear of supraspinatus tendon." CE L:361, 543. On August 11, 2008, David Hinson, MD, performed a neurology consult, although Claimant did not show up for the appointment. *Id.* at 360. Dr. Hinson reviewed records, but noted he had no records of previous evaluation or prescriptions; he wrote: "Methadone is accepted rx for refractory RLS. There is no "diagnostic test", and the dx is essentially based on clinical hx and exclusion of other dxs." *Id.*

29. On August 13, 2008, Claimant presented to PA Lawrence for follow-up. Claimant wanted to discontinue taking methadone because he thought that Vicodin was what was actually

helping his RLS; Claimant explained he had been taking methadone only once a day despite it being prescribed three times a day. *Id.* at 357-359. However, on August 14, Claimant called and relayed he had been up all night with restless legs until he took a methadone at 7AM and then went right to sleep. *Id.*

30. Claimant was terminated from Cattleman's on August 28, 2008 due to "seasonal employee – lack of work." CE R:853.

31. Claimant returned to the Boise VA Medical Center on October 17, 2008 for follow-up. Claimant reported his RLS was "worsening" and PA Lawrence increased his methadone to 10 mg twice a day from 5 mg three times a day, as that was his dosage in Washington which he "seemed to do well" on.[3] CE L:342-344.

32. On Feb 23, 2009, Claimant underwent a random drug test for Cattleman's. *Id.* at 861. On his drug screen, he self-reported that he was taking methadone and hydrocodone. *Id.* at 862. Claimant tested positive for opiates and PA Lawrence wrote the following letter to Cattleman's:

> To Whom It May Concern:
>
> Mr. Arthur Allen is followed at the Boise VA Medical Center for his healthcare needs. Unfortunately, he suffers from a condition that has been refractory to first, second, and third line treatments. Therefore, he must use narcotics to treat this condition and he must take these daily.
>
> Please take this into consideration in the evaluation of Mr. Allen. Thank you for your time.

Id. at 865. Cattleman's re-hired Claimant, and he began work on April 26, 2009. *Id.* at 867.

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[3] Puget Sound Health Care Services records reflect Claimant was on methadone 10mg three times a day. CE L:517-519.

33. **Industrial Accident.** On July 16, 2009, Claimant was in Pocatello on his way back from a trip to Georgia for Cattleman's. Claimant described the accident as follows:

> We got in from driving, and the roommate and I went up to our room. I got in the shower, and I was washing my legs. I put my foot up on the edge of the tub to wash my leg and foot. My foot slipped off the edge of the tub, and I was - - I was facing the end of the tub where there's no faucets. It slipped off. When I went to grab with my hands, they were soapy. It just slipped off, and I just done a header down - - I done a complete flip. Actually, the back of my head hit the end of the tub and just flipped me over.

Clt. Depo. 95:21-96:6. Claimant reported the accident on August 3, 2009. CE A:1.

34. Claimant presented to Todd Cramer, DC, on August 4, 2009. Claimant reported it was a worker's compensation injury and reported neck pain, shooting pains down his legs, and low back pain. CE E:139. Dr. Cramer diagnosed cervical and lumbar subluxation. CE A:145. Dr. Cramer treated Claimant with adjustments, traction, kinetic activity, and therapeutic exercise from August 4 until January 4, 2010. *Id.* at 135, 145.

35. On September 21, 2009, Claimant presented to Nancy Greenwald, MD. CE F:148. Claimant reported left shoulder pain and low back pain, with pain radiating down his legs, left worse than right. *Id*. Dr. Greenwald reviewed records[4], conducted a physical exam, and ordered physical therapy and a left shoulder MRI. *Id*. at 150.

36. Claimant presented to his cardiologist Mark Parent, MD, on October 2, 2009 because he was experiencing shortness of breath. CE G:212. On October 8, 2009, Claimant had a stent placed in his posterolateral branch to treat his coronary artery disease. *Id*. at 234.

37. Claimant followed-up with Dr. Greenwald on October 22, 2009. CE F:156. The left shoulder MRI was "on hold" due to Claimant's cardiac issues. *Id*. Claimant reported his back pain

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[4] Dr. Greenwald mistakenly attributed a VA record to Claimant wherein a patient reported bilateral shoulder pain with "no known injury" on July 28, 2009, however, the record was retracted because it had been "entered on the wrong [patient]." CE L:329.

had increased since he had last seen Dr. Greenwald; Dr. Greenwald ordered a left S1 transforaminal epidural. *Id*. On November 2, 2009, Claimant underwent bilateral S1 ESI injections. *Id*. at 160.

38. Claimant returned to Dr. Greenwald on December 1, 2009. *Id*. at 162. Claimant reported his pain was worsening and that the ESI shot had made his back pain worse. *Id*. On exam, Claimant's SI joints were tender, and Claimant had pain when bending. *Id*. Dr. Greenwald noted Claimant was cleared for an MRI and referred Claimant for an MRI of both his left shoulder and his lumbar spine. *Id*.

39. On December 8, 2009, Claimant's lumbar spine MRI was read as follows: "probable L5 spondylolyses [sic] with grade 1 spondylolisthesis. Associated moderate to high-grade bilateral L5-S1 neural foraminal narrowing. Mild spondylotic changes at L3-4 and L4-5. No significant spinal canal compromise." CE F:165. Claimant's left shoulder MRI was compared to his previous May 2008 MRI, and the radiologist opined it showed no significant interval change. *Id*. at 166.

40. Dr. Greenwald referred Claimant to Roman Schwartzman, M.D., for evaluation and treatment of Claimant's left shoulder. Dr. Schwartzman saw Claimant on December 22, 2009. CE H:237. Dr. Schwartzman's notes of that date reflect that he had the opportunity to review the May 28, 2008 left shoulder MRI performed at the VA. Dr. Schwartzman interpreted that study as demonstrating a full thickness tear of the distal supraspinatus tendon, along with extensive fraying of the labrum, but no frank detachment or undermining. Dr. Schwartzman also noted that Claimant had arthritic changes to the AC joint.

41. Dr. Schwartzman also had the opportunity to review and comment on the left shoulder MRI performed on December 8, 2009. Dr. Schwartzman interpreted that study as

demonstrating the previously-noted supraspinatus tendon tear, along with a new finding: the December 8, 2009 MRI showed evidence of superior labral detachment underlying the biceps anchor along with posterior labrum detachment. He concluded that the December 8, 2009 study revealed a progression of the pre-existing degenerative changes of the labrum to an acute tear. CE H:237.

42. Dr. Schwartzman recommended surgical treatment of Claimant's left shoulder to include a biceps tenodesis versus repair of the labrum and a repair of the torn supraspinatus tendon. Dr. Schwartzman opined that the need for the supraspinatus tendon repair was unrelated to the subject accident, but that the need for the tenodesis/labral repair was related to the accident in view of the radiological evidence of an acute worsening of this condition. Finally, Dr. Schwartzman recommended subacromial decompression, but felt that this was connected to the need to perform the rotator cuff repair and was therefore non-industrial. CE H:238. Claimant eventually elected not to undergo the proposed surgery. In his note of April 13, 2010, Dr. Schwartzman stated that Claimant was "relatively asymptomatic," vis-à-vis the left shoulder. He was noted to have pain at extremes of motion, otherwise doing well. Dr. Schwartzman authorized Claimant to "continue with his preinjury work status." CE H:243. In view of Claimant's decision to decline surgery, Dr. Schwartzman found Claimant to be at MMI. Concerning impairment, Dr. Schwartzman offered the following:

> For the slap tear the impairment is a Class 1 Grade C, which is 3% upper extremity. Since impairment is only being assigned for the industrial condition, no apportionment is indicated.

CE H:243.

43. Therefore, Dr. Schwartzman only provided a rating for the shoulder condition he deemed to be work related, and did not provide a rating for the supraspinatus tendon injury, the

condition he deemed to be non-work related, and pre-existing. Dr. Schwartzman's last note of May 1, 2012, reflects that Claimant presented on that date as being satisfied with his level of functioning. Dr. Schwartzman noted that Claimant reported he was able to pursue all of his recreational activities and activities of daily living without undue discomfort. On exam, Claimant did have discomfort with overhead motion and motion behind his back, but otherwise was happy with his level of function. Dr. Schwartzman released Claimant to return to work as tolerated, noting that "patient has no restrictions from my standpoint," and noting that no further treatment was indicated. CE H:246.

44. Dr. Greenwald read Claimant's low back and left shoulder MRI on December 15, 2009. CE F:170. She referred Claimant to Rehab Authority for degenerative joint disease in his low back. *Id.* at 173. On January 6, 2010, Dr. Greenwald noted Claimant's leg pain had worsened in his right leg, whereas at his last visit his pain was predominately in his left leg. CE F:174. She also re-reviewed Claimant's VA medical records and noted there was no indication of chronic low back pain. *Id.*

45. On February 10, 2010, Claimant reported to Dr. Greenwald that physical therapy had been helping, but he continued to have pain in his right buttock and down his leg; sitting was the worst for his pain. CE F:182. Dr. Greenwald prescribed cyclobenzaprine. *Id.* On March 10, Claimant reported his left shoulder was better with therapy; Dr. Greenwald anticipated a good recovery for Claimant's low back. *Id.* at 185.

46. Dr. Greenwald found that Claimant reached maximum medical improvement on or about April 15, 2010. She rated his low back condition at that time as follows:

> So I went through the Sixth Edition to the Guides to the Evaluation of Permanent Impairment, and I used the spine lumbar nonspecific class one, because again he has a stuttering presentation, and I used the modifiers, and he came out to be, let me see, whole person is one percent. And then I did apportionment for preexisting

> condition in 2008. I thought he had some preexisting pain down his right leg. And so I gave him 0.5 percent. But according to the Sixth Edition you round it up, so I gave him a one percent whole person for his low back.

Greenwald Depo. 31:14-25. Therefore, Dr. Greenwald found that Claimant was entitled to 1% whole person rating for his low back condition, with half of this rating referable to Claimant's pre-existing low back condition. The *Sixth Edition to the Guides for the Evaluation of Permanent Impairment* anticipates that fractional impairment ratings be rounded-up. Therefore, Claimant is entitled to a 1% whole person rating for his work-related low back condition and a 1% whole person rating for his pre-existing low back condition. *See* CE F:194-196. Dr. Greenwald did not independently rate Claimant's left shoulder condition, but simply adopted Dr. Schwartzman's rating. Greenwald Depo. 32:1-7. For Claimant's low back, Dr. Greenwald issued restrictions for ad lib position changes, but pronounced Claimant capable of driving. CE F:196.

47. On August 31, 2010, Richard Radnovich, DO, examined Claimant, reviewed records, and issued a written report at Claimant's request. CE I:248. Dr. Radnovich diagnosed a left shoulder labral tear, lumbar spondylosis with persistent pain, and persistent right posterior thigh pain. *Id*. at 250. Dr. Radnovich rated Claimant's left shoulder at 2% whole person impairment and his low back at 7% whole person impairment; the combined rating was 9% whole person impairment. Regarding apportionment, Dr. Radnovich opined that while Claimant had degenerative low back findings, he did not have restrictions or persistent low back issues prior to the injury. CE I:251. Dr. Radnovich issued restrictions related to these conditions as follows: no repetitive (greater than 30% of the workday) bending, twisting. No repetitive lifting above the chest greater than 40 pounds. No overhead lifting greater than 20 pounds. No repetitive overhead work. *Id*.

48. Defendant/Employer covertly surveilled Claimant on September 27, 2011. See DE 6. Claimant is seen walking a small dog for approximately 20 minutes. Claimant then mows his front yard, using mostly his right upper extremity to pivot the lawnmower different directions; Claimant then dumps out the grass catcher into a large plastic bag. Later, Claimant grooms a small dog for approximately 20 minutes. It is very difficult to observe his movements due to how far the camera is away from Claimant, however, Claimant appears to stand in one place using his upper extremities to groom the entire time. Claimant then mows his back yard and is observed again bagging grass clippings in a similar manner. *Id*.

49. On December 27, 2011, Dr. Radnovich issued impairment ratings for Claimant's pre-existing conditions. CE I:253. Dr. Radnovich was provided with additional records, surveillance to review, and he examined Claimant on October 27, 2011, November 2, 2011, November 16, 2011, and December 14, 2011. *Id*. Dr. Radnovich rated Claimant's PTSD/depression at 10% of the whole person, his heart disease at 17% of the whole person, his right shoulder at 1% of the whole person, and his bilateral knees at 1% of the whole person. *Id.* at 254. Regarding Claimant's restless leg syndrome, Dr. Radnovich rated it as a sleep disorder and combined it with Claimant's sleep apnea and narcolepsy for a 5% whole person impairment. *Id*. Dr. Radnovich also updated his rating for Claimant's low back and left shoulder. *Id.* at 255. Dr. Radnovich rated Claimant's low back at 10% whole person impairment and his left shoulder at 3% of the upper extremity, with 1% of the upper extremity apportioned for his pre-existing symptoms and complaints, leaving 2% upper extremity, or 1% of the whole person related to the industrial injury. *Id*. Claimant's pre-existing impairments totaled 34%. Dr. Radnovich did not issues restrictions for Claimant's pre-existing impairments.

50. On August 7, 2012, Dr. Frizzell reviewed records, examined Claimant, and issued a report at Claimant's request. Dr. Frizzell agreed with Dr. Greenwald's low back diagnosis of "traumatic aggravation of a pre-existing condition" and her impairment rating of 1% for Claimant's low back. CE J:262. Dr. Frizzell ordered a functional capacity evaluation (FCE) to determine Claimant's permanent work restrictions. *Id*.

51. Claimant underwent an FCE on September 7, 2012; it was conducted by Suzanne Kelly, PT CEAS. CE P:813. PT Kelly found that Claimant's FCE was valid, that Claimant demonstrated full effort over the five-hour assessment, and that he was capable of functioning at a medium work level. *Id*. Claimant was found capable of an eight hour work day, four hours of sitting at 30 minute increments, three to four hours of standing at 40 minute increments, five to six hours of walking/frequent long distances, and seven to eight hours of upper extremity use at 60 minute increments. *Id.* at 814.

52. On September 13, 2012, Dr. Frizzell responded to a letter from Claimant's attorney as follows:

> Question 1. Is Mr. Allen capable of long haul truck driving due to the pain he continues to experience in his back and in his legs?
>
> No. I have reviewed Mr. Allen's key functional capacity assessment performed by Suzanne Kelly physical therapist and assessment specialist on September 7, 2012. This was a valid representation of the present physical capabilities for Mr. Allen. On page two it notes that Mr. Allen is capable of working an eight hour work day but should only sit for a total of four hours a day. He is able to sit for a 30 minute duration then make ad lib positional changes. This restriction in his ability to sit would prohibit him from returning to long haul truck driving.

CE J:264.

53. Dr. Frizzell was deposed on April 28, 2014. Dr. Frizzell reiterated his opinion that Claimant suffered a traumatic aggravation of a pre-existing condition, specifically his sciatica. Frizzell Depo. 11:20-25. Dr. Frizzell confirmed he had reviewed records that showed Claimant

had prior treatment for his low back, including his treatment with Dr. Mallari; he explained this was why he agreed with Dr. Greenwald's low back impairment rating vs. Dr. Radnovich's rating because Dr. Greenwald appropriately apportioned the rating. *Id*. at 20:24-21:20.

54. Dr. Greenwald was deposed on December 21, 2018. Dr. Greenwald opined that Claimant's low back MRI did not show an acute injury but showed arthritis. Greenwald Depo. 20:4-22:12. However, Dr. Greenwald did opine that a portion of Claimant's symptoms and presentation was attributable to the accident, which is why she "gave him an impairment rating." *Id*. 32:19-33:11. Regarding his restrictions, Dr. Greenwald explained the ad-lib position change was because "if he sits for a period of time or stands in one position, then he does get some discomfort in his back." *Id*. at 32:15-18.

55. Regarding Claimant's FCE results, Dr. Greenwald explained that she does not use FCEs for restrictions, but does use them for their validity scale, and that Claimant's showed he gave a good effort. *Id*. at 34:2-35:8. Dr. Greenwald felt Claimant could return to long-haul trucking if he was allowed to get out of the truck at certain times to stretch his legs. *Id*. at 35:12-20. Dr. Greenwald agreed it was reasonable for Claimant to not want to use his left shoulder to "hoist" himself up into the cab of a truck after his industrial injury. *Id*. at 77:4-13. Dr. Greenwald concluded with her opinion that 50% of Claimant's low back condition was pre-existing and 50% was due to the accident; she did not endorse Claimant's 30-minute sitting restriction: "I go back to the hurt versus harm. You know, the 30 minutes and he has to get out, you know, I know it hurts him. That's a subjective. It does not harm him." Greenwald Depo. at 82:18-83:4.

56. **Vocational Evidence.** On May 9, 2011, Barbara Nelson, MS, CRC, issued a disability assessment at Claimant's request; she interviewed Claimant, tested Claimant, and reviewed records. *See* CE:U. Ms. Nelson found that Claimant's academic levels were

"considerably below" a typical high school graduate and that he possessed only rudimentary computer skills. *Id*. at 951. Ms. Nelson recorded that Claimant's RLS was under control just prior to Claimant's job with Cattleman's due to a combination of methadone and Klonopin (clonazepam). *Id.* at 943. Ms. Nelson opined that Cattlemen's was not a sympathetic employer because Claimant was qualified for the position and did not receive any accommodations. *Id*. at 953. Ms. Nelson found that Claimant was not totally and permanently disabled prior to his accident and that he still would have had access to jobs such as light delivery, driving a school bus, or shuttling cars prior to the accident; she did not calculate his pre-injury labor market or post-injury labor market loss. Regarding Claimant's post-accident restrictions, Ms. Nelson opined:

> The most significant restriction is the fact that he must be allowed to make position changes on an ad lib basis. This is due to the fact that he is now intolerant to prolonged standing and sitting. He needs to change from these positions on a frequent basis…
>
> While Dr. Greenwald does not restrict Claimant from driving, the reality is than an individual who makes his living driving needs to be able to accomplish his tasks in a time efficient manner. Having to stop the vehicle every 45 minutes or so, and spend time standing, stretching and walking about, would not be tolerated by the vast majority of employers of professional drivers. To make matters worse, Mr. Allen now has chronic pain from his low back and left shoulder injuries that make it difficult for him to sleep. He has resumed the pattern of interrupted sleep all night long, resulting in excessive daytime sleepiness. He does not believe that he would be safe to drive professionally with this problem, and it would be hard to argue with him on that.

Id. at 954. Ms. Nelson further opined that Claimant had a limited vocational profile as he had only been a driver and heavy equipment operator and that his chances of being hired in even a "good" or "normal" labor market would be "extremely slim" post-accident. *Id*. Ms. Nelson did not have impairment ratings for Claimant's pre-existing conditions but found the following conditions vocationally limiting: bilateral knee surgeries, right shoulder surgery, coronary artery disease with five vessel bypass and three subsequent stent placements, and arthritis in his hands and wrists. *Id*.

at 955, 952. Ms. Nelson concluded with her opinion that Claimant's pre-existing conditions combined with his accident produced conditions to result in total and permanent disability.

57. On February 2, 2012, Douglas Crum, CDMS, issued a disability assessment for Defendant/Employer Cattleman's; he interviewed Claimant, reviewed records and surveillance, and discussed Claimant's restrictions with Dr. Greenwald. CE T:919. Mr. Crum opined that Claimant's work for Cattleman's "did not demonstrate his ability (or inability) to be a full time truck driver in competitive employment." *Id*. at 927. Mr. Crum concluded that Claimant only earned significant wages in two, two-week pay periods out of the 10 pay periods Claimant was on payroll in 2009. *Id*. at 924. Mr. Crum could not calculate precisely how many hours a week Claimant worked during those two pay periods:

> Assuming that when Mr. Allen worked, he worked an equal part amount of time driving the truck ($21.00 per hour)[5] and performing other paid duties ($12.00 per hour), assuming an average wage of $16.50 per hour, he worked a total of 193.8 hours in a 4-week period, or 48 hours per week. If he worked more than 50% of the time driving, he weekly wage for the two pay periods would be less than 48 hours.

Mr. Crum corresponded with Dr. Greenwald regarding Claimant's restrictions; she indicated that her restrictions did not prevent Claimant from driving heavy truck, sitting continuously for up to 4 hours, or driving 8 to 10 hours a day with breaks every 4 hours. *Id*. at 928. Mr. Crum found that Claimant suffered no disability in excess of impairment because his pre-existing restrictions, issued by the Social Security Administration, were more limiting than the restrictions given by Drs. Greenwald and Radnovich. CE T:928. Mr. Crum did not calculate Claimant's pre-injury labor market or post-injury labor market loss.

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[5] Claimant's wages at Cattleman's were variable: $12.00 an hour for non-driving time, $18.00 an hour overtime, $21.00 an hour CLD driving time, and $31.50 an hour for CDL driving overtime. *Id*. at 924.

58. On September 24, 2012, Ms. Nelson issued a supplemental memorandum. CE U:957. Ms. Nelson opined that Claimant's FCE demonstrated that Claimant could no longer work as even a seasonal truck driver due to his 30-minute sitting limitation. *Id*.

59. On February 7, 2013, Nancy Collins, PhD, prepared a vocational report at ISIF's request; she reviewed records and interviewed Claimant. DE 8:1. Dr. Collins recorded the then current impact of Claimant's pre-existing impairments including "sleep," bilateral knees, left hip/low back, arthritis in Claimant's hands, wrists, and big toe, bilateral shoulders, cardiac issues, restless leg syndrome, PTSD and depression, and hearing loss. *Id*. at 3, 4. Dr. Collins found Claimant's work history included heavy and medium level occupations and that his pre-existing impairments precluded him from working in those occupations due to his sleep disorder, his lifting limitations, his postural limitations, and his inability to recognize hazards. *Id*. at 6. Dr. Collins opined that if Claimant was restricted by only his FCE restrictions, without accounting for his pre-existing conditions, he would still be qualified for some light driving positions; if only Dr. Greenwald's restrictions were adopted, he would still be qualified to drive a dump truck or operate heavy equipment. *Id*. at 7. Dr. Collins found that Claimant's pre-existing conditions, specifically his pre-existing restless leg syndrome and sleep disorder, were what disqualified him from these positions, not his accident produced restrictions. *Id*.

60. Regarding Claimant's job at Cattleman's, Dr. Collins observed "[h]e was able to work in a seasonal job but had the employer known of his restrictions he would not have been able to perform the essential functions of the job." *Id*. Dr. Collins concluded that Claimant was totally and permanently disabled prior to the industrial accident and that Claimant's low back and left shoulder restrictions did not meaningfully "add anything to his loss of access to the labor market." DE 8:7.

61. On February 11, 2013, Mr. Crum issued an additional report, this time for Claimant.[6] CE T:929. Mr. Crum reviewed records from Dr. Frizzell and PT Kelly, and Dr. Collin's report. *Id*. Mr. Crum emphasized that the FCE restrictions for sitting were more onerous than Claimant's pre-existing limitations as identified by Social Security; Claimant had been restricted to sitting six hours in an eight hour day by SSD, at Cattleman's Claimant worked in excess of this restriction, sitting continuously for four hours at a time up to 10 hours a day, and Claimant was now restricted by the FCE to sitting 30 minutes at a time up to four hours a day. *Id*. at 936. Mr. Crum concluded that this meant Claimant, pre-accident, was capable of "some, limited, types of truck driving." *Id*. Mr. Crum did not calculate Claimant's pre-injury labor market access or his post-injury labor market loss. Mr. Crum opined that the sitting restriction, in conjunction with the fact that Claimant could no longer favor his left extremity in entering his truck, meant that Claimant was now totally and permanently disabled due to a combination of his pre-existing and accident produced restrictions. *Id*. at 937.

62. Dr. Collins was deposed on December 6, 2018. Since authoring her original report, Dr. Collins had reviewed the hearing transcript and Mr. Crum's second report, but not Dr. Frizzell's deposition. Collins Depo. 11:1-15; 45:13-24. Dr. Collins no longer had her original notes but affirmed she would have recorded anything important in her report. *Id*. at 12:3-10. Dr. Collins reiterated her opinion that Claimant was totally and permanently disabled prior to the industrial accident due to Claimant's SSD restrictions and because of Claimant's use of narcotics, which would affect his ability to drive. *Id*. at 27:5-22. Dr. Collins stated it was very common for SSD recipients to work a part-time job to supplement their income. Collins Depo. at 28:1-3. Dr. Collins explained that the only difference between Claimant's SSD restrictions and Dr. Frizzell's

[6] Defendant/Employer agreed to allow Claimant to retain Mr. Crum by letter dated July 3, 2012. CE W:997.

restrictions were the positional limitations regarding sitting and standing; specifically he was now limited to 30 minutes of sitting for four hours in a day and 40 minutes of standing at a time for three to four hours in a day. *Id*. at 33:2-14. Dr. Collins recounted that Claimant thought his sitting restriction was due to his hip pain. *Id*. at 33:15-21. Dr. Collins testified "so I felt with those, the FCE functional limitations, that there was still work he could do" such as light delivery jobs and bus driving. *Id*. at 34:21-35:9. Dr. Collins clarified that while she felt Claimant was employable with only the FCE restrictions, he was totally and permanently disabled due solely to his pre-existing conditions:

> Q: [Mr. Augustine] So if we consider his FCE results and the - - some other nonmedical factors, is it your opinion that Mr. Allen is not totally and permanently disabled?
>
> A: Well. He's not totally and permanently disabled if he's not falling asleep - -
>
> Q: Right.
>
> A: - - If we're just looking at the FCE restrictions. The social security disability restrictions are still fairly significant for him.
>
> Q: Right. So if we just take the - - and my understanding is that you indicate that Mr. Allen was totally disabled as a result of his preexisting medical conditions. Is it your opinion that if he is totally and permanently disabled, it's the result solely of his preexisting medical conditions?
>
> A: The shoulder and the low back restrictions don't add anything. They don't - - there's no "combined with" in this case. Realistically, had he told the employer of his specific restrictions, he would not have been hired. He wouldn't have been able to work.

Id. at 37:3-38:1.

63. On cross-examination, Dr. Collins was shown Dr. Frizzell's addendum report and deposition wherein Dr. Frizzell opined Claimant's 30-minute sitting restriction was due to Claimant's work-related injury, not to his hip, and Dr. Collins admitted it was Claimant's subjective experience and lay opinion that it was his hip. Collins Depo. at 45:16-46:8. Dr. Collins

testified she had no evidence that Claimant performed anything other than a "real" job for Cattleman's, which he secured through a competitive hiring process, and performed satisfactorily such that he was re-hired in 2009. *See id*. at 48-53. Dr. Collins confirmed that it was her assumption that Claimant did not tell Cattleman's about his drug use and that if he had, it would have been disqualifying. *Id*. at 57:10-58:2. However, she was shown Claimant's employment records wherein he disclosed his use of methadone and hydrocodone to Cattleman's and PA Lawrence's letter, and admitted her assumption was incorrect. *Id*. at 60:1-63:2. Claimant's counsel proposed a hypothetical: if Claimant had come to Dr. Collins as a client in 2008 with his SSD restrictions and a job offer that would have allowed him to take breaks from driving as needed, would she advised him not to bother because he was already totally and permanently disabled. Dr. Collins responded that she would have told him to pay attention to his restrictions, but if the employer was willing to make accommodations, that a job like that "might have been appropriate." *Id*. at 64:13-67:2.

64. **Credibility.** The Referee did not have the benefit of observing Claimant during hearing. However, it is clear from the record and Claimant's testimony that Claimant's memory is poor; Claimant did not recall meeting Barbara Nelson, Claimant did not recall how long he worked for Owyhee Construction, Claimant did not recall his stent placement in 2009, amongst many other examples. Clt. Depo. 51:21-24; 36:3-10; 54:8-10. Drs. Greenwald, Frizzell, Collins, and Ms. Nelson, all recorded or commented on Claimant's poor memory, attributing it his multiple coronary procedures, his depression/PTSD, or his narcotic use. Where the medical records contradict Claimant's recollection, the medical records will be relied upon.

DISCUSSION AND FURTHER FINDINGS

65. The provisions of the 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). A worker's compensation claimant has the burden of proving, by a preponderance of the evidence, all the facts essential to recovery. *Evans v. Hara's, Inc.*, 123 Idaho 473, 479, 849 P.2d 934 (1993). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447−48, 74 P.2d 171, 175 (1937).

66. **Total Permanent Disability.** Permanent disability results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. Evaluation of permanent disability is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the cumulative effect of multiple injuries, the age and occupation of the employee at the time of the accident causing the injury, consideration being given to the diminished ability of the employee to compete in an open labor market within a reasonable geographical area considering all the personal and

economic circumstances of the employee, and other factors as the Commission may deem relevant.

67. There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment together with the relevant nonmedical factors totals 100%. If a claimant has met this burden, then total and permanent disability has been established. The second method is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. *Boley v. State of Idaho, Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939P.2d 854, 857 (1997). An odd-lot worker is one "so injured the he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State of Idaho, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

68. The first step to determining Claimant's disability is weighing and deciding between the competing impairment ratings. Idaho Code § 72-422 defines permanent physical impairment as "any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation." Pain itself can produce functional loss and thus is a medical factor to be considered in determining permanent impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 754-55, 769 P.2d 1122, 1126-27 (1989).

69. Dr. Radnovich was the only physician to rate Claimant's pre-existing impairments:

PTSD/depression – 10%
Heart disease – 17%
Right shoulder – 1%
Restless leg syndrome – 5%
Bilateral knee surgeries – 1%

Left shoulder – 1%[7]

Dr. Radnovich's opinion is unchallenged and well-reasoned. His ratings of Claimant's pre-existing impairments are adopted for purposes of this decision, with the addition of a 1% whole person rating for Claimant's pre-existing low back condition, as proposed by Dr. Greenwald.

70. Drs. Radnovich and Schwartzman both rated Claimant's left shoulder injury.[8] Dr. Schwartzman rated Claimant's shoulder at 3% upper extremity for his acute work related SLAP tear, or 2% whole person, but did not rate Claimant's pre-existing supraspinatus tendon tear. Dr. Radnovich initially rated Claimant at 2% whole person, but then updated his rating to 3% of the upper extremity, with 1% apportioned for his pre-existing symptoms and complaints, for a final whole person impairment of 1% related to the industrial injury. Both Drs. Radnovich and Schwartzman provided careful, well-reasoned impairment ratings for Claimant's shoulder, however, Dr. Schwartzman's rating is more persuasive because he was Claimant's treating physician. Claimant has proven a 2% whole person impairment related to his work related left shoulder injury. However, because Dr. Schwartzman did not address the rating applicable to Claimant's pre-existing left shoulder condition, we adopt Dr. Radnovich's opinion that Claimant's pre-existing left shoulder condition warrants a 1% whole person rating.

71. Drs. Greenwald and Radnovich rated Claimant's low back. Dr. Radnovich's final rating for Claimant's low back was 10% whole person impairment, without apportionment to a pre-existing condition. His report indicates he had Claimant's prior medical records, but Dr. Radnovich's report does not mention Claimant's prior low back complaints to Drs. Mallari or

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[7] Dr. Radnovich gave Claimant a 1% upper extremity rating for his pre-existing left shoulder condition. CE I:255. He did not convert this to a whole person rating. However, per Table 15-11 of the *Guides*, a 1% upper extremity rating converts to a 1% whole rating.

[8] Dr. Greenwald mis-transcribed Dr. Schwartzman's rating as 1.5% upper extremity and did not independently rate Claimant's shoulder. CE F:195-196.

Garcia. Dr. Greenwald's rating was 1% whole person impairment, with half of this apportioned to pre-existing conditions. Dr. Greenwald rounded up Claimant's accident produced impairment to 1%, and presumably did the same for Claimant's pre-existing 0.5% impairment. Dr. Greenwald was Claimant's treating physician for his low back, Dr. Frizzell, an expert for Claimant, agreed with her rating specifically because it was appropriately apportioned. Dr. Greenwald's low back rating is more persuasive.

72. Claimant's medical impairment is 36% whole person impairment for his pre-existing conditions, 2% whole person impairment for his accident produced acute left shoulder injury, and 1% whole person impairment for permanent aggravation of Claimant's pre-existing low back condition.

73. Regarding Claimant's accident produced restrictions, Dr. Greenwald's initial restrictions, and her later clarification, merits a closer look. Dr. Greenwald explained that she assigned the ad lib[9] change of position restriction because Claimant became uncomfortable after sitting or standing in one position for too long; however, she also explained that a restriction should reflect objective medical evidence and not a claimant's subjective complaints. *See* Greenwald Depo. 32-34, 59. Dr. Greenwald's later clarification that Claimant can sit continuously for up to four hours arguably contradicts her restriction that Claimant should "change position as needed;" if Claimant is in pain after 30 minutes and needs to change position that is in line with Dr. Greenwald's ad lib restriction, and her reasoning for the restriction, but not her clarification. CE F:197.

74. Dr. Greenwald's seemingly contradictory opinion illustrates the difference between

[9] "Ad lib" is defined as "1: in accordance with one's wishes; 2: without restraint or limit." "Ad-lib." *Merriam-Webster.com* Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/ad-lib. Accessed 17 Aug. 2020.

"functional limitations" and "permanent restrictions;" Dr. Collins explained that permanent restrictions are assigned to prevent further harm, whereas functional limitations reflect limits due to pain or range of motion issues. Collins Depo. 9:1-13. Dr. Greenwald was consistent in her opinion that sitting/standing for longer than 30 minutes would not harm Claimant, but she still understood that Claimant would be in pain.

75. Dr. Greenwald's ad lib restriction is congruent with the FCE finding that Claimant can only sit for 30 minutes up to four hours a day and stand for 40 minutes. Dr. Frizzell's endorsement of the FCE restrictions and adoption of "ad lib positional change" in his letter to Claimant's attorney is more evidence that this is an appropriate restriction for Claimant due to his low back injury. The FCE finding that Claimant can only sit for up to 30 minutes at a time and stand for 40 before making an ad lib positional change is accepted for purposes of determining Claimant's disability. This restriction appropriately considers that pain can produce functional loss, it is a more accurate representation of Claimant's actual function, and it incorporates Dr. Greenwald's initial restriction and her reasoning for it.

76. The FCE results are also similar to Dr. Radnovich's restrictions. Dr. Radnovich issued restrictions of no repetitive (greater than 30% of the workday) bending, twisting. No repetitive lifting above the chest greater than 40 pounds. No overhead lifting greater than 20 pounds. No repetitive overhead work. The FCE demonstrated Claimant could occasionally bend/stoop and occasionally lift 34 pounds above his shoulders bilaterally, 20 pounds with his left shoulder. Dr. Radnovich's restrictions for Claimant's left shoulder and low back are accepted.

77. In sum, Claimant's accident produced restrictions include the following: four hours of sitting at 30 minute increments (ad lib positional change), three to four hours of standing at 40 minute increments, no repetitive (greater than 30% of the workday) bending, twisting, no repetitive

lifting above the chest greater than 40 pounds, no overhead lifting greater than 20 pounds, and no repetitive overhead work.

78. Regarding restrictions resulting from his pre-existing impairment, the SSD restrictions are accepted, with the exception of Claimant's lifting[10] restrictions, as Claimant's pre-injury physical and mental restrictions. Claimant's pre-injury restrictions are found to be as follows: stand/walk six hours in an eight hour day, sit six hours in an eight hour day, occasional climbing, frequent balancing, stooping, kneeling, crouching, and crawling, and to avoid concentrated exposure to hazards (such as machinery and heights), moderately limited in his ability to understand and remember detailed instructions, moderately limited in his ability to carry out detailed instructions, and moderately limited in his "ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods." CE M:629.

79. It is also necessary to understand whether, and to what extent, Claimant had restrictions in the use of his left shoulder following his May 2008 left shoulder injury. It will be recalled that an August 4, 2008 left shoulder MRI demonstrated a supraspinatus tendon tear. Claimant did not quarrel with the suggestion that following the May 2008 left shoulder injury, he was unable to lift his left arm over his head. He was unable to explain how he got into his vehicle between May of 2008 and the date of the subject accident, i.e., whether he used his left or right upper extremity to access the cab of his tractor. He believes that he used his left upper extremity because it was "evidently" more functional than his right upper extremity. Tr. 72-76. From the foregoing, the Commission is unable to reach any conclusion about which upper extremity

[10] Claimant's FCE showed he was capable of safely lifting more weight than the SSD's 20-pound occasional/10-pound frequent lifting limitation.

Claimant used immediately prior to the subject accident to pull himself into the cab of his vehicle. Nor is the Commission able to reach any conclusion about the extent and degree to which Claimant's pre-existing left supraspinatus tendon injury restricted Claimant in his use of his left upper extremity immediately prior to the subject accident.

80. Claimant's non-medical factors include his considerably below average academic testing, his rudimentary computer skills, his limited employment history of almost exclusively truck driving, and his age of 61 at the time of hearing.

81. Barb Nelson, Doug Crum, and Dr. Collins all agreed that Claimant's only transferable skills were in driving and heavy equipment operation, all three agreed that Claimant had significant pre-existing conditions and vocational factors which limited his employability, and all three agreed that Claimant was totally and permanently disabled at the time of their respective evaluations.

82. None of the vocational experts calculated pre-injury average wage/labor market access or post-injury wage loss/labor market loss resulting from Claimant's restrictions and non-medical factors. Ms. Nelson opined that Claimant was now totally and permanently disabled due to his limited vocational profile, his daytime somnambulance, and his need to change position frequently.[11] Dr. Collins opined Claimant was totally and permanently disabled prior to the industrial accident, specifically because of his restless leg syndrome and sleep disorder, which disqualified him from any job he would be otherwise qualified to perform. Mr. Crum also concluded that Claimant was totally and permanently disabled because of Dr. Frizzell's sitting restriction and Claimant's education, skills, and work history. No vocational expert opined

[11] Although Ms. Nelson was utilizing Dr. Greenwald's restrictions to reach this conclusion, her assumptions about the need for ad lib position changes closely tracks with FCE findings/Dr. Frizzell's restrictions of changing position every 30 minutes.

Claimant could work post-accident, even in a limited capacity. No vocational expert opined that Claimant was an odd lot worker.

83. Claimant's non-medical factors, together with his medical factors, add up to 100% disability. Claimant's very limited vocational profile, the restrictions from his depression/PTSD/anxiety, his orthopedic restrictions, his need to change position every 30 minutes, and his age of 61 at the time of hearing all support a finding that Claimant is 100% totally and permanently disabled. ISIF's alternative argument that Claimant is not totally and permanently disabled finds no support in the record or in expert testimony and is rejected.[12]

84. **ISIF Liability.** Idaho Code § 72-332 provides that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his income benefits out of the ISIF account. In *Aguilar v. Industrial Special Indemnity Fund*, 164 Idaho 893, 436 P.3d 1242 (2019), the Idaho Supreme Court summarized the four inquiries that must all be satisfied to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was a pre-existing impairment; (2) whether that impairment was manifest; (3)

[12] Claimant's argument that ISIF is prohibited from taking such "inconsistent positions" by *Vawter v. UPS*, 155 Idaho 903, 318 P.3d 893 (2014) is also rejected. In *Vatwer*, defendant/employer had previously denied that claimant suffered any impairment from a 1990 injury and did not pay any impairment for that injury; however, when defendant/employer was part of a subsequent suit alleging total and permanent disability, defendant/employer argued that claimant did suffer impairment from the 1990 injury such as to implicate ISIF liability and apportion some part of that disability as ISIF's responsibility. The Commission found, and the Supreme Court affirmed, that defendants were prohibited from taking such inconsistent positions by the theory of quasi-estoppel because they had "benefitted twice" from denying that claimant had any impairment, and not paying it, and then in subsequent litigation arguing he did have impairment from that same accident. ISIF has not "benefitted" from arguing both sides such as the defendants in *Vawter* and are entitled to argue defenses in the alternative.

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. *Aguilar*, 164 Idaho at 901, 436 P.3d at 1250. The timing of making the assessments of these elements of the prima facie case against the ISIF was addressed in *Mitchell v. State, Industrial Special Indemnity Fund*, 062017 IDWC, IC 2005-528356 (Idaho Ind. Com. 2017). Citing to *Colpaert v. Larson's Inc.*, 115 Idaho 852, 771 P.2d 46 (1989), the Commission stated:

> From *Colpaert*, it is clear that in determining whether the elements of ISIF liability are satisfied, a preexisting condition must be assessed as of the date immediately preceding the work injury. A snapshot of Claimant's preexisting condition must be taken as of that date, and from that snapshot Claimant's impairment must be determined, as well as whether Claimant's condition was manifest and constituted a subjective hindrance to Claimant. Finally, it must be determined whether Claimant's preexisting condition, as it existed immediately before the work accident, combines with the effects of the work accident to cause total and permanent disability. *Colpaert* lends no support to the proposition that in evaluating ISIF liability for a preexisting but progressive condition, that condition should be assessed as of the date of hearing, i.e., at a time when Claimant's condition is much worse.

Mitchell, at ¶ 58.

85. **Pre-existing Impairments.** As developed herein, the Commission concludes that Claimant has the following pre-existing impairments:

- PTSD/Depression 10%
- Heart Disease 17%
- Right Shoulder 1%
- Left Shoulder 1%
- Restless Leg Syndrome 5%
- Bilateral Knees 1%
- Low Back 1%

86. **Manifest.** For a pre-existing impairment to be "manifest" it must be shown that Claimant and/or others were aware of the condition prior to the subject accident. *Horton v. Garrett Freightlines, Inc.*, 115 Idaho 912, 772 P.2d 119 (1989). The Commission finds that all of the pre-

existing impairments identified in the preceding paragraph were manifest.

87. **Subjective Hinderance.** The Idaho Supreme Court set out the definitive explanation of the "subjective hindrance" requirement in *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 686 P.2d 557 (1990). Under this test, evidence of the claimant's attitude toward the preexisting condition, the claimant's medical condition before and after the injury or disease for which compensation is sought, nonmedical factors concerning the claimant, as well as expert opinions and other evidence concerning the effect of the preexisting condition on the claimant's employability are considered in determining whether a particular condition was a subjective hinderance to that particular claimant. *Id*.

88. *PTSD/Depression/Generalized Anxiety.* Claimant suffers from PTSD, depression, and generalized anxiety caused by his service in Vietnam. Claimant suffers nightmares, flashbacks, and avoids contact with people because of his diagnosis. Tr. 21:8-10; 24:17-25:14. Claimant has sought out isolated employment to accommodate his symptoms. *Id.* Dr. Winslow felt that Claimant was best able to function in a setting where he had limited contact with members of the general public or co-workers. SSD concluded that Claimant is moderately limited in following, understanding, and carrying out detailed instructions and completing a normal workday or workweek without interruptions from his symptoms due to these conditions. Claimant's PTSD, depression, and anxiety were subjective hinderances to employment.

89. *Restless Leg Syndrome/Narcolepsy/Sleep Apnea.* Claimant suffers from multiple sleep disorders; Claimant's chronic pain and nightmares interact and overlap with these conditions making sleep difficult for Claimant. Claimant lost his job with Owyhee Construction because he self-reported he had fallen asleep at the wheel. Tr. 31:10-32:11. SSD considered Claimant's RLS a disabling condition when awarding him benefits. While Dr. Wilson, who provided an orthopedic

review, observed that Claimant's RLS was neurologic in origin and would not be a basis to limit his "musculoskeletal day (work) time activities," Dr. Winslow, who provided a psychiatric review, observed that Claimant's "pattern of falling asleep, whether from restless legs, narcolepsy, excess opiate use, or sleep apnea" was extremely hazardous and that Claimant himself might not recognize hazards. CE M:752, 754. At times, Claimant's RLS has obviously been a subjective hinderance.

90. However, at the time of Claimant's SSD application, Claimant was on methadone twice a day at 10mg. At some point after, the VA increased Claimant's methadone to three times a day at 10mg. In April 2008, Claimant reported to the Puget Sound VA that he was "doing much better" on methadone. CE L:518. Claimant testified that at the time he applied to Cattleman's his RLS symptoms had improved with a combination of methadone and hydrocodone and he no longer thought he would fall asleep at the wheel. Clt. Depo. 70:11-71:11.

91. ISIF argues Claimant's methadone was reduced to 5mg by the VA just prior to obtaining his position with Cattleman's, but ignores that this was because Claimant had been off methadone for three weeks due to his move from Washington to Idaho, and that his provider was unwilling to start him at such a high dosage when he had been off methadone for so long. ISIF repeatedly argues that Claimant's methadone use was "medically disqualifying," if not an outright bar to driving commercially. However, ISIF's assertion is without citation to any applicable 2009 CFR (see ISIF's Brief, p. 22) and is contrary to its own vocational expert's testimony: Dr. Collins testified that an employee can drive on narcotics with a waiver from a physician. Collins Depo. 56:24-57:9. There is evidence that Claimant's DOT certification was completed by VA medical providers who were the most familiar with Claimant's RLS and medications in 2008. CE L:369. Further, the VA medical providers were aware Claimant was a long-haul trucker, Claimant's

provider wrote a letter explaining why Claimant needed to be on narcotics, and Cattleman's retained Claimant as an employee with the knowledge he was on such medication. *See* CE L and R.

92. ISIF's also argues that Claimant's RLS was not well controlled prior to the accident because in October 2008 Claimant reported that his RLS was "worsening." CE L:342. In that same record, PA Lawrence records that Claimant is "much better" on methadone than he ever was without it and he adjusted Claimant's methadone to 10mg from 5mg to better control his symptoms. *Id*. The only other evidence is a report in April 2009 to Dr. Mittal, Claimant's VA psychiatrist, that Claimant was "sleeping not too well" but it appears this is due to nightmares; restless leg syndrome is not mentioned. *Id*. at 333. ISIF's further arguments revolve around the post-accident worsening of Claimant's RLS symptoms and, as such, are irrelevant.

93. The record reflects that just prior to the accident, Claimant had returned to a regime of 10mg of methadone, and that his RLS was well controlled at this dosage; further, that his RLS was better controlled with methadone than any other medication. The subjective hinderance test weighs the impact of a particular condition on a particular claimant, just prior to the industrial accident; Claimant's RLS, although previously a subjective hinderance, was not a subjective hinderance to his employment at the time of the accident because it was well controlled. Further, even if, as proposed during Dr. Collins deposition, Claimant experienced the recurrence of RLS subsequent to the subject accident, this would not negate the conclusion that as of the date of the subject accident RLS was not a subjective hindrance to Claimant.

94. *Coronary Artery Disease.* Claimant has had multiple surgeries to treat his coronary artery disease. Claimant recalled that he was given restrictions against lifting, although he could not say against how much, against "stress," and against being in excessive heat or cold. Clt. Depo.

53:15-56:21. Drs. Greenwald and Frizzell both opined that Claimant's difficulty with memory was due to his multiple surgeries to treat his coronary artery disease. Greenwald Depo. 40:23-41:24; Frizzell Depo. 13:23-14:7. Claimant's coronary artery disease was one of the bases for which Claimant was awarded SSD benefits. CE M:587, 610. Claimant's coronary artery disease was a subjective hinderance.

95. *Right Knee.*[13] Claimant described that after his right knee surgery "[t]here was things I couldn't do. I couldn't kneel down, you know, for very long. It just didn't work no more as good as it did," however, Claimant also testified that his right knee surgery did not prevent him from performing any work activities. Clt. Depo. 26:1-9. Claimant stated at hearing that he left driving logging trucks because his "knees and body" couldn't take it anymore, specifically jumping down from the logging truck. Tr. 24:2-13; 26:25-27:6. However, Claimant explained at deposition that he was still able to exit the same size truck at Owyhee Construction, just in a different manner: "I slowed way down. Instead of jumping, I would step down." Clt. Depo. 39:1-4. When asked directly, Claimant testified that his doctor did restrict him from kneeling, crawling, and crouching and summarized his doctor's restrictions as "just watch your kneeling positions" and "don't squat down… be careful." Tr. 26:16-24; Clt. Depo. 26:10-16. Claimant did not report issues with kneeling or squatting to SSD and it does not appear that SSD was informed of Claimant's prior knee surgery. CE M:587, 592, 609. Although Claimant's SSD restrictions included only occasional climbing and frequent kneeling, crouching, crawling, it appears these restrictions were due to Claimant's other conditions. *Id.* at 604. Claimant's right knee condition was not a subjective hinderance; Claimant was still able to descend and ascend into the cab of his

[13] Claimant did not recall any left knee surgery and there are no records for this procedure; it is referenced in Claimant's VA medical records, but as Claimant did not testify to any pre-existing hinderance regarding his left knee, this decision only considers Claimant's right knee.

truck, albeit carefully, Claimant did not report issues with kneeling or squatting prior to the industrial accident, and Claimant testified it did not prevent him from performing any work activities. Claimant's testimony that he left driving trucks due to his knees is belied by his other testimony and subsequent job history.

96. *Left Shoulder.* VA records establish that between May of 2008 and the date of the subject accident Claimant was suffering from symptoms related to his left supraspinatus tendon tear, a condition that is yet unrepaired. VA records do not reflect that Claimant was given any restrictions vis-à-vis the left shoulder prior to the subject accident. The VA records only reflect that Claimant presented with limited range of motion of the left shoulder and that it was painful for him to raise his left arm above shoulder height. CE L:374. However, it is unknown whether these symptoms continued unabated until the subject accident. Claimant's testimony is of little help in resolving this question. We are unable to conclude that the evidence establishes that Claimant's pre-existing left shoulder impairment constituted a subjective hindrance to Claimant as of the date of the subject accident.

97. *Right Shoulder.* Claimant drove logging trucks from 1974 to 1993, until he "couldn't lift my arm no more" above shoulder level and had right rotator cuff surgery. Clt. Depo. 30:21-25. Claimant did not recall whether his physician issued restrictions related to his right shoulder. *Id*. at 33:1-8. Claimant testified he had a "poor" result from the surgery. Tr. 28:21-24. Claimant is right hand dominant and explained that after his right shoulder surgery he would no longer use his right shoulder to pull himself up into the cab of his truck and used his left arm to steer. *Id*. at 28:25-30:2. Claimant reported his right shoulder pain and surgery to SSD, his physical exam at that time showed deficits in forward elevation, abduction, and internal rotation as compared to his left, and it was one of the conditions for which he was awarded benefits. CE

M:590-594. On the other hand, Claimant evidently reported to Doug Crum that his (Claimant's) right shoulder is "pretty good" with good range of motion and strength. Claimant had no recollection of making this comment to Mr. Crum. Tr. 73:23 – 74:5. Although there is some evidence to the contrary, the Commission concludes that on balance, Claimant's right shoulder was a subjective hindrance to him prior to the subject accident.

98. *Low Back.* Neither Dr. Greenwald nor Dr. Frizzell commented on whether Claimant reasonably had restrictions for his pre-existing low back impairment. While the Social Security Disability assessment reflects that Claimant was given lifting restrictions in connection with his application for Social Security Disability, that report does not reflect these restrictions were given specifically for Claimant's low back. The primary diagnoses considered by the Social Security Administration were Claimant's restless leg syndrome and his coronary issues, while other alleged impairments considered related to Claimant's hands, wrist and right shoulder. The Commission is unable to conclude that Claimant's pre-existing low back impairment constituted a subjective hindrance to Claimant at the time of the subject accident.

99. **Combination.** The fourth and final element required for ISIF liability is that the pre-existing impairments must "combine with" the impairment from the industrial accident and injury to render a person totally and permanently disabled, or the work accident must aggravate the pre-existing condition to cause total and permanent disability. *Aguilar*, 164 Idaho at 901, 436 P.3d at 1250.

100. ISIF argues that Claimant was totally and permanently disabled prior to his industrial accident and supports this argument with testimony from its expert, Dr. Collins. Claimant responds that Claimant was working regularly at a job at the time of injury and that Defendants did not meet their reversed burden of proof as required by *Bybee v. ISIF*, 129 Idaho

76, 82, 921 P.2d 1200 (1996) to show that Claimant was employed by good luck, a sympathetic employer, made a superhuman effort, or as a result of a business boom.

101. ISIF put on no evidence that Cattleman's was a sympathetic employer. Cattleman's did accommodate Claimant's narcotic use after a note from his provider, but there's no evidence this was due to sympathy or a special accommodation reserved for only Claimant. Similarly, ISIF put on no evidence of superhuman effort by Claimant, that he got his job by good luck or that a business boom was responsible for his employment. ISIF has failed to meet the reversed burden of proof as required by *Bybee*.

102. Even so, Claimant must still prove that his pre-existing PTSD, cardiac and right shoulder impairments combined with the work accident to cause total and permanent disability, or that the work accident aggravated these pre-existing impairments to cause total and permanent disability.

103. As noted, proof of gainful employment at the time of the subject accident, along with ISIF's failure to meet its reverse burden under *Bybee* is sufficient to show that Claimant was not totally and permanently disabled immediately prior to the subject accident. Further supporting this conclusion is Dr. Collins's flawed testimony that even though Claimant was working at the time of the subject accident, he should not have been. Dr. Collins's testimony in this regard is based on her belief that had Employer known the facts surrounding Claimant's use of narcotic medication, it would never have employed him. However, as developed on cross-examination of Dr. Collins, Employer was aware of Claimant's narcotic medication use and retained him as an employee notwithstanding this issue.

104. Claimant is now totally and permanently disabled, and all that remains is to tease-out which of the pre-existing impairments combined with the work accident to cause total and

permanent disability. In this regard, it is worth reiterating the restrictions stemming from the subject accident: four hours of sitting at 30 minute increments (ad lib positional change), 3 to 4 hours of standing at 40 minute increments, no repetitive (greater than 30% of the workday) bending, twisting, no repetitive lifting above chest height greater than 40 pounds, no overhead lifting greater than 20 pounds, and no repetitive overhead work.

105. First, with respect to Claimant's cardiac condition, we cannot say that this condition in any way combines with the subject accident to cause total and permanent disability. Claimant's cardiac condition, though a subjective hindrance to Claimant, is eclipsed by the orthopedic restrictions referable to the subject accident, and cannot be said to combine with the accident to cause total and permanent disability. Further, while both Dr. Greenwald and Dr. Frizzell commented on Claimant's memory problems, thought to arise from cerebral vascular damage due to his past cardiac procedures, the vocational impact of those problems was not quantified in a way that would allow us to conclude that these memory problems combine with the work accident to cause total and permanent disability. However, we come to a different conclusion concerning Claimant's right shoulder and PTSD/depression.

106. Claimant is shown to have had significant right shoulder restrictions stemming from a remote injury and surgical repair which left him within an inability to use his right upper extremity in connection with his preferred work as a truck driver. He used his left upper extremity, instead, to perform tasks such as hoisting himself into his tractor cab and grasping the steering wheel. Claimant's inability to use his left upper extremity to now perform these tasks significantly decreases his ability to perform the narrow slice of jobs for which he was best suited prior to the subject accident. Claimant might, conceivably, be able to perform other types of driving work in smaller vehicles with power controls, where no loading or unloading is required. However,

Claimant is now also prevented from doing any type of work, including driving work which requires him to sit for more than 30 minutes at a time. This further constrains Claimant in his access to driving and other sedentary-type jobs. Finally, due to his PTSD/depression, Claimant has always sought-out employment in which he was able to work more-or-less by himself, without interaction with members of the public or other co-workers. Indeed, this is a restriction endorsed by the Social Security Administration in its evaluation of Claimant. Whatever sedentary work Claimant might be able to perform with his orthopedic restrictions is further narrowed by his psychological restrictions. For example, it is possible to imagine that Claimant is physically capable of competing for certain parts delivery jobs, light manufacturing work, call center work, etc. However, these jobs are not psychologically suitable for Claimant.

107. In conclusion, we find that Claimant's PTSD and right shoulder condition combine with the subject accident to cause Claimant's total and permanent disability.

108. ***Carey* Apportionment**. Next, the apportionment of Claimant's total disability between Employer/Surety and ISIF must be addressed. The Idaho Supreme Court in *Carey v. Clearwater County Road Department*, 107 Idaho 109, 686 P.2d 54 (1984) held that "the appropriate solution of the problem of apportioning the non-medical factors in an odd-lot case where [ISIF] is involved, is to prorate the non-medical portion of disability between the employer and [ISIF] in proportion to their respective percentages of responsibility for the physical impairment." *Id*. at 107 Idaho 118, 686 P.2d at 63. *See also*, *Garcia v. J.R. Simplot Company*, 115 Idaho at 971, 772 P.2d at 178.

109. The first step is to define the respective percentages of the applicable pre-existing impairments and accident produced impairments. As noted above, the pre-existing impairments attributable to Claimant's right knee and RLS do not apply, because, although both were manifest

prior to the industrial accident, they were not subjective hindrances. Further, while Claimant's coronary artery disease was a pre-existing subjective hinderance, it did not "combine with" Claimant's accident produced restrictions to result in total and permanent disability.

110. Claimant's pre-existing impairments total 11% (10% PTSD/depression and 1% right shoulder). Claimant's accident-produced impairments total 3% (2% left shoulder and 1% low back). Claimant's impairments total 14% (11% pre-existing plus 3% accident related). This leaves 86% disability (100% - 14%) to apportion between Employer and ISIF. Employer's responsibility is calculated as follows: 3/14 x 86 = 18.4 + 3 = 21.4% disability. Therefore, Employer is responsible for the payment of 107 weeks of disability (500 weeks x 21.4%) from April 15, 2010, Claimant's date of medical stability. Employer, of course, has previously reached settlement with Claimant. The 21.4% disability rating is payable at 55% of the average weekly state wage. Total and permanent disability benefits are payable at a different rate under Idaho Code § 72-408. Thus, for the first 107 weeks following Claimant's date of medical stability ISIF is responsible to make-up any difference between Employer's obligation to pay permanent disability and Claimant's entitlement to benefits as calculated pursuant to Idaho Code § 72-408. Thereafter, ISIF is responsible for the payment of total and permanent disability benefits for the remainder of Claimant's life.

CONCLUSION OF LAW AND ORDER

1. Claimant is 100% disabled.
2. Claimant's pre-existing impairments for PTSD/depression and right shoulder injury, combine with the subject accident to cause total and permanent disability.
3. Commencing April 15, 2010, ISIF shall pay the difference between periodic payments that would have been owed by Employer/Surety, had they not settled, and the amounts payable

pursuant to Idaho Code § 72-408. Thereafter, ISIF shall pay benefits to Claimant pursuant to Idaho Code § 72-408 for the life of the Claimant.

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

DATED this 23rd day of November, 2020.

INDUSTRIAL COMMISSION

Thomas P. Baskin, Chairman

Aaron White, Commissioner

Thomas E. Limbaugh, Chairman

ATTEST:

Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of November, 2020, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular email upon each of the following:

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