BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRENT GERDES, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2012-030594** **IC 2012-030598** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed September 4, 2020**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael Powers. Thereafter, Referee Powers retired, and the Commission re-assigned the matter to Referee Alan Taylor, who conducted a hearing in Idaho Falls on June 26, 2019. Claimant, Brent Gerdes, was present in person and represented by James Arnold of Idaho Falls. 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. The matter came under advisement on February 14, 2020 and is ready for decision.

ISSUES

The issues to be decided were clarified at hearing[1] and are:

1. Whether ISIF is liable pursuant to Idaho Code § 72-332; and,
2. Apportionment under the Carey formula.

[1] At hearing, ISIF conceded that Claimant is totally and permanently disabled.

CONTENTIONS OF THE PARTIES

All parties acknowledge Claimant's December 3, 2012 industrial accidents to his left knee and left shoulder.[2] Claimant argues ISIF is liable for total and permanent disability benefits because his pre-existing impairments to his left knee and low back were manifest and combine with his December 3, 2012 industrial injuries to render him totally and permanently disabled.

ISIF responds that Claimant's total and permanent disability was caused by the industrial accident alone, that there is no evidence Claimant's left knee condition was aggravated or accelerated by the industrial accidents and no evidence that his low back condition was stable and ratable prior to the industrial accident. Further, ISIF asserts Claimant's low back restrictions are less onerous than the restrictions resulting from his left knee and left shoulder conditions. As such, neither can combine with Claimant's industrial injuries to result in ISIF liability.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Joint Exhibits A-P, admitted at hearing;
3. The testimony of Claimant, Brent Gerdes, taken at hearing;
4. The post-hearing deposition of Delyn Porter taken by Claimant on November 13, 2019; and
5. The post-hearing deposition of Douglas Crum taken by Defendant on November 13, 2019.

[2] Claimant filed IC 2012-030598 for his left knee injury and IC 2012-030598 for his left shoulder injury. Throughout these proceedings the Parties have agreed to treat the "knee and the shoulder as, essentially ... both the same as to the last accident." Porter Deposition, p. 9, ll. 7-14.

All outstanding objections are overruled. After having considered the above evidence and the arguments of the parties, the undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. Claimant was 59 years old and resided in Blackfoot, Idaho at the time of hearing. Claimant was six feet four inches tall and weighed between 350 and 400 pounds at all times relevant to this proceeding.

2. **Background.** Claimant was born in 1960 in Idaho Falls and grew up on his family farm in Wapello. He graduated from Blackfoot High School in 1978 and studied farm mechanics at Eastern Idaho Vocational Technical College but did not complete the program due to lack of funds. He worked odd jobs in construction, auto supplies, and bucking hay, until 1983 when he trained as a glazier in Dallas, Texas. Claimant worked solely in commercial, residential, and automobile glass repair and fabrication thereafter. He returned to Blackfoot in 1990 to start a family.

3. **Prior conditions.** Claimant was diagnosed with hypertension some time prior to 2000 but the record does not disclose precisely when. Exhibit A, p. 1. Claimant weighed 400 pounds at the time of this February 2000 appointment. His chronic low back pain began around this time.

4. On March 21, 2003, Claimant was diagnosed with insulin resistance and prescribed Avandamet.

5. At a February 16, 2004 medical appointment, Claimant complained of low back pain, which was better with movement, but worse at nighttime.

6. On November 24, 2008, Doug Gilbert, FNP-C, ordered a lumbar MRI which was completed on December 2, 2008. Gilbert identified "2 areas of concern" and recommended Claimant make an appointment with his orthopedist. Exhibit A, p. 40.

7. On May 30, 2009, Claimant again reported back pain with numbness bilaterally into his feet, left greater than right. He did not report any significant prior back injuries; however, he had "a prior history of disc herniation." Exhibit A, p. 44. Claimant was prescribed Neurontin for his back. He was also diagnosed with hyperthyroidism and prescribed Synthroid around this time.

8. On July 28, 2009, Claimant underwent a nerve conduction study. The study was "mildly abnormal" and showed: "1. Mild, sensory-motor, peripheral neuropathy. 2. NO ,[sic] bilateral, L2-S2 radiculopathies or plexopathies." Exhibit B, p. 9. On August 6, 2009, Michael Garbarini, M.D., performed an L4-5 epidural steroid injection that provided Claimant relief from his back pain for approximately six months before wearing off.

9. In October 2009, Claimant was diagnosed with gout and prescribed Colchicine and Allopurinol.

10. On January 14, 2011, Claimant injured his low back at work while lifting a 200-pound frame. He presented to Courtland Carbol, M.D., that same day and was prescribed physical therapy, Flexeril, an anti-inflammatory, and given a temporary 20-pound lifting restriction. By Claimant's follow-up appointment on January 21, 2011, he reported having no pain and was released back to full duty work. On February 10, 2011, he was discharged from physical therapy with a home exercise program.

11. On July 30, 2011, Claimant presented to Blackfoot Medical Center after injuring his left knee. Claimant testified he had been fishing with his wife and son, and he was "walking

down the bank, and… when I turned, [the left knee] popped." Claimant 2014 Deposition, p. 95, ll. 20-22. An MRI showed a tear of the posterior horn of the left medial meniscus, joint effusion, degenerative joint disease, and edema. Claimant was referred to Casey Huntsman, M.D.

12. On August 11, 2011, Claimant presented to Dr. Huntsman who recommended an arthroscopy with partial medial meniscectomy, affirming that the surgery would not get rid of Claimant's arthritis but would "certainly get rid of the meniscus pain." Exhibit E, p. 3. On August 12, 2011, Claimant underwent a left knee arthroscopy, 70% posterior medial meniscectomy, rim 20% lateral meniscectomy, and grade three and four patellar and trochlear chondroplasty. On September 20, 2011, Claimant reported he still had occasional knee pain but that his knee was doing a lot better. Dr. Huntsman released Claimant without restrictions. There was no discussion of a total knee replacement at any of Claimant's appointments for this knee injury.

13. On September 13, 2012, Claimant injured his left knee at work when he tripped over "a bunch of cement and rebar" and went down on his left knee. Claimant 2014 Deposition, p. 98, ll. 15-20. He did not seek medical treatment for this injury.

14. On November 11, 2012, Claimant sought treatment for his low back at Blackfoot Medical Center. He described getting up from the couch and experiencing a "shooting pain that shot from his back all the way down to his right ankle." Exhibit A, p. 58. Claimant also stated that his symptoms were improving at the time of the evaluation. He was prescribed Flexeril. Claimant followed-up the next day because he was already scheduled for his annual wellness screening. He reported low back pain and the "need to go to the ER recently for inability to walk due to pain radiating down his leg. He does report of decreased weakness [sic] in his right lower extremity." Exhibit A, p. 60.

15. On November 15, 2012, Claimant presented to Mark Weight, M.D., reporting a history of low back pain for years, which had recently worsened. Dr. Weight noted Claimant had paresthesia down his left thigh and foot and into his right foot; he also noted Claimant had weakness with dorsiflexion on the left side as well as at the EHL. Dr. Weight reviewed lumbar X-rays which showed:

> On the AP view, there are five lumbar type vertebrae with multilevel degenerative spondylosis noted with loss of disc space height of the upper and lower lumbar segments, lateral disc osteophyte complexes noted. The lateral views reveal five lumbar type vertebrae, slight loss of the lumbar lordosis through the upper segments, loss of disc space height through the lower lumbar segments at L4-L5 and L5-S1 with anterior and posterior disc osteophyte complexes and endplate sclerosis.

Exhibit C, p. 2. Dr. Weight assessed lumbosacral radiculopathy, lumbar spondylosis, left lower extremity weakness, lumbar degenerative disc disease. He ordered an MRI.

16. On November 20, 2012, Claimant returned to Dr. Weight for review of his MRI. Dr. Weight recorded that Claimant's MRI showed a herniation at L4-L5, degenerative changes, and severe neuroforaminal stenosis. Dr. Weight recommended conservative measures, epidural steroid injections, and recorded:

> [H]e continues with significant symptoms, chronic symptoms, with pain and weakness in the left side and that he [sic] may ultimately necessitate surgical intervention but this may be prohibitive due to his size. He weighs 390 pounds and is very large and even had difficulty obtaining an MRI due to his size. Again, his size presents significant limitations and risks and can be prohibitive to surgical intervention.

Exhibit C, p. 3.

17. On November 30, 2012, Dr. Weight performed a left L4-5 transforaminal epidural steroid injection.

18. **Industrial accidents and treatment**. On December 3, 2012, Claimant suffered an industrial accident to his left knee and another accident to his left shoulder. Claimant injured his

left knee while pulling himself up onto a platform. He was kneeling with his left side on the platform and as he went to pull his right side up, he "heard a nice loud pop in [his] left knee." Claimant 2014 Deposition p. 107, l. 19. Claimant reported the injury but finished the job he was on and returned to the glass shop. At the shop, he tripped, but caught himself with his left hand before falling, and injured his left shoulder. He felt "a really sharp pain about clear down through [his] elbow." Claimant 2014 Deposition, p. 115, ll. 14-16. He reported the injury and by the next day, could not lift his left arm.

19. On December 4, 2012, Claimant presented to Dr. Carbol who assessed left knee and left shoulder strain and instructed Claimant not to lift with his left arm for seven days. At follow-up on December 10, MRIs of Claimant's knee and shoulder were ordered, and he was referred to Dr. Huntsman.

20. On December 17, 2012, Claimant presented to Dr. Huntsman who diagnosed a probable left rotator cuff tear and possible left medial meniscus tear. For the left knee, Dr. Huntsman performed an injection, and for the left shoulder, he ordered an MR arthrogram.

21. On December 20, 2012, Claimant underwent an MR arthrogram which revealed a full-thickness tear of the supraspinatus tendon, fraying along the inferior labrum, a partial tear of the subscapularis tendon, and AC joint degenerative disease. Dr. Huntsman discussed treatment options and Claimant elected surgery.

22. On February 8, 2013, Dr. Huntsman performed left shoulder arthroscopy, labral tear debridement and repair, subacromial decompression, and rotator cuff repair. Claimant followed up with Dr. Huntsman on February 21, 2013, reporting his shoulder felt good during the day but was very painful at night and muscle cramps woke him up. At his appointment on March 21, Claimant was prescribed physical therapy.

23. On April 18, 2013, Claimant reported he was progressing well, and Dr. Huntsman released Claimant to return to work full time with no overhead lifting or lifting greater than 10 pounds. At his next visit, Claimant reported his employer had no light duty work available, and Dr. Huntsman updated Claimant's work restrictions to include lifting up to 20 pounds and occasional overhead work.

24. On June 24, 2013, Claimant presented to Dr. Huntsman and requested he reevaluate Claimant's left knee because it had recently worsened since the December injection. Dr. Huntsman ordered an MRI, which showed a medial meniscus tear, osteoarthritis, and chronic partial tear of the ACL and medial collateral ligament. On July 16, 2013, Dr. Huntsman recorded that Claimant's knee hadn't bothered him prior to his industrial injury, that Claimant had pre-existing arthritis, but the medial meniscus tear was "probably new." Exhibit E, p. 54. Claimant wished to pursue surgery, and Dr. Huntsman offered an arthroscopy with partial medial meniscectomy and chondroplasty. On July 23, 2013, Dr. Huntsman updated Claimant's work restrictions to no lifting above 30 pounds specifically due to Claimant's knee injury and released Claimant to normal activities regarding his left shoulder injury.

25. On August 9, 2013, Dr. Huntsman performed surgery on Claimant's left knee. On August 20, 2013, Dr. Huntsman issued post-surgical restrictions of no lifting over 20 pounds.

26. On September 17, 2013, Claimant presented to Dr. Huntsman reporting he had resumed his work duties but only with significant difficulty:

> The patient reports that [his left knee] keeps swelling up and is "killing" him at work. He reports that he has problems with stairs because he can't bend his knee far enough...He reports his left shoulder is hurting him now that he has started at work again. His pain will range from mild to moderate. He reports that when he works overhead at work his thumb and 2nd and 3rd fingers have numbness, tingling and burning that he has to "shake out" afterwards.

Exhibit E, p. 62. Dr. Huntsman performed an injection of Claimant's left knee and restricted him

to lifting no more than 20 pounds and only occasional overhead work.

27. At Claimant's next appointment he reported no improvement in his left knee pain from the injection and wished to pursue Euflexxa injections, which Dr. Huntsman agreed were indicated at that time. Dr. Huntsman wrote: "the only thing we haven't done beyond [injections] is a knee replacement and he is not yet ready to go to that step." Exhibit E, p. 65. Dr. Huntsman issued updated work restrictions to include no bending, squatting, kneeling, climbing ladders, occasional stairs, occasional overhead use, and no lifting over 20 pounds.

28. In November 2013, Dr. Huntsman performed three Euflexxa injections. On January 6, 2014, Claimant followed up and reported the injections made his left knee worse. Claimant also explained he had been unable to rest his knee because he had been working 60-hour weeks up until Christmas. Dr. Huntsman prescribed Voltaren and updated Claimant's restrictions to no squatting, kneeling, and no lifting over 20 pounds, but allowed overhead work.

29. **Work restrictions and impairment ratings.** Several practitioners have assigned Claimant work restrictions and impairment ratings.

30. Dr. Huntsman. On February 4, 2014, Claimant reported his left knee was hurting even worse than his last appointment and that his left shoulder had also begun to hurt since Dr. Huntsman had changed his restrictions to allow overhead work. Dr. Huntsman recorded "We discussed his difficulty doing his present job. I do not think that labor is in his future. I think it would be best to retrain him to do something that is more sedentary." Exhibit E, p. 83. Dr. Huntsman re-imposed a restriction for no overhead work and continued his restrictions of no squatting, kneeling, and no lifting over 20 pounds.

31. Dr. Stromberg. Also, on February 4, 2014, Claimant underwent an independent medical exam (IME) with Lynn Stromberg, M.D., at Employer/Surety's request. Dr. Stromberg

reviewed records and examined Claimant. He found Claimant was at maximum medical improvement and opined further medical intervention was not indicated. Dr. Stromberg rated Claimant's permanent impairment at 3% whole person for his left shoulder rotator cuff tear, with 1% attributable to Claimant's "risk factors," namely his age and weight, pursuant to the AMA Guides to the Evaluation of Injury and Disease Causation, 2nd Edition, and 2% attributable to his industrial shoulder injury. Dr. Stromberg rated Claimant's left knee impairment at 3% of the whole person, with 20% work-related and 80% related to his pre-existing degenerative disease and "risk factors," again his age and weight, resulting in 1% impairment related to the industrial accident. Dr. Stromberg concluded Claimant's left knee and shoulder injuries collectively resulted in 3% permanent impairment attributable to his work accidents. Dr. Stromberg issued restrictions relating to the left shoulder to avoid repetitive overhead lifting or prolonged overhead work. Dr. Stromberg issued no restrictions pertaining to Claimant's left knee; however, he opined a total knee arthroplasty may be in his future, but that such surgery would be related to Claimant's pre-existing degenerative disease and not to the work accident. Dr. Stromberg did not address Claimant's low back condition.

32. Dr. Bates. On May 20, 2014, Claimant underwent an IME with James Bates, M.D., at his request. Dr. Bates reviewed records and examined Claimant. Dr. Bates concurred with Dr. Stromberg that Claimant did not require further medical treatment, but, regarding impairment, noted that the AMA Guides for the Evaluation of Permanent Impairment do not mention "risk factors" in rating impairment. Dr. Bates rated Claimant's left shoulder impairment at 4% of the whole person due solely to the industrial injury because there were no reports of pain or lack of function prior to the injury. Dr. Bates rated Claimant's left knee impairment prior to the December 2012 industrial accident at 7% of the whole person since he had a good outcome from his 2011

meniscal surgery and at 8% after his industrial accident, resulting in 1% impairment related to the industrial accident. Regarding Claimant's low back, Dr. Bates rated Claimant at 7% whole person impairment and documented that it was an entirely pre-existing condition. Dr. Bates assigned restrictions for the left shoulder as follows: minimal work at or above shoulder level less than 3% of the time, max lifting at or above shoulder level of 5 pounds, occasional reaching, pushing, and pulling from chest to waist height, and no limitations on handling as long as his arms were held close to the body. For the left knee, Dr. Bates assigned: no kneeling or crawling, occasional squatting, rare ladder climbing, occasional walking on uneven surfaces, max lifting of 35 pounds "to decrease the use of knees and squatting." Exhibit G, p. 9. Regarding the low back, Dr. Bates assigned restrictions of no repetitive bending, twisting, stooping, and max lifting 35 pounds waist to chest and 25 pounds floor to waist. Dr. Bates further specified that his restrictions were for each individual body part and that the sum of restrictions may limit Claimant's functioning.

33. **Vocational opinions.** Delyn Porter, M.A., C.R.C., and Douglas Crum, C.D.M.S., both assessed Claimant's disability, wrote reports, and were deposed as discussed hereafter.

34. Delyn Porter. On April 7, 2014, Delyn Porter interviewed Claimant in his home and later reviewed his medical records. Mr. Porter wrote three different reports assessing Claimant's disability. Mr. Porter's first report on April 17, 2014, concluded that prior to the work accident Claimant had access to 35% of all jobs in the Blackfoot area. Mr. Porter found that Dr. Stromberg's restrictions resulted in an 11% reduction in labor market access and wage loss of 35%, resulting in permanent partial disability of 23%. Mr. Porter also calculated Claimant's wage loss and labor market access loss utilizing Dr. Huntsman's restrictions, however, he did not have Dr. Huntsman's February 4, 2014 chart note wherein Dr. Huntsman re-imposed Claimant's overhead lifting restriction, and therefore only calculated Claimant's disability based on the

restrictions for his left knee (51% labor market access loss and 40% wage loss and therefore 45.5% permanent partial disability). Mr. Porter opined that the restrictions against squatting, kneeling, and lifting over 20 pounds put Claimant in the "limited light" category. Mr. Porter listed several jobs he felt Claimant could perform with Dr. Huntsman's left knee restrictions. However, all the occupations he opined Claimant could perform came with the caveat "only those individual occupations within each of these SOC codes that are compatible with all the work restrictions identified by Dr. Huntsman would be appropriate for Mr. Gerdes," and, again, did not consider Claimant's overhead work restriction. Exhibit H, p. 24.

35. Mr. Porter was aware Claimant had a prior work-related low back strain and had previously treated for his low back; however, he opined that Claimant "was fully capable of performing all of the essential functions of his past jobs." Exhibit H, p. 18. In his disability analysis, Mr. Porter noted Claimant had numerous[3] medical issues that were unrelated to the accident that impacted his overall level of functioning, that he walked with a pronounced limp, and was 52 at the time of injury. Mr. Porter observed:

> There are numerous additional factors to consider in Mr. Gerdes' current employment challenges including his age; his significant non-industrial medical factors and limitations / restrictions, his limited work history and transferable skills to less physically demanding employment; the geographic location of his residence and available employment within his assigned labor market area; his limited educational background; and an influx of additional job seekers that are pursuing the same positions that the claimant is eligible to pursue.

Exhibit H, p. 27.

36. On August 7, 2014, Mr. Porter wrote an addendum and on August 11, 2014, a second report to incorporate Dr. Bates' restrictions. Utilizing Dr. Bates' low back, left knee, and

[3] "Type II diabetes/Insulin resistance, prior left knee injury and surgical repair; diabetic neuropathy, hypertension, gout, obesity, deviated septum, severe osteoarthritis, elevated BMI, shoulder/rib contusion; and hyperactive airway disease." Exhibit H, p. 25.

left shoulder restrictions, Mr. Porter opined that Claimant lost access to 69% of his labor market, suffered wage loss of 43%, and was restricted to the limited-light physical demand work capacity. Mr. Porter performed an additional analysis incorporating Claimant's self-reported residual functional capacity and Dr. Bates' restrictions which resulted in labor market access loss of 86% and restricted Claimant to the sedentary-limited light work capacity. Mr. Porter again opined that "Although Mr. Gerdes possessed some significant non-industrial medical history, he remained competitive in his work activity prior to the industrial accident and was fully capable of performing all of the essential functions of his past work." Exhibit I, p. 32. Further, Mr. Porter opined Claimant was "fully capable of working in occupations in the sedentary, light, medium, heavy, and very heavy work categories" prior to his industrial accident. Exhibit I, p. 25. Mr. Porter ultimately concluded that it would be futile for Claimant to look for work based on Dr. Bates' restrictions and that Claimant was totally and permanently disabled. However, if Claimant was judged less than totally and permanently disabled, his disability was 64.5% utilizing Dr. Bates' restrictions and Claimant's self-reported residual functional capacity.

37. In his second report, Mr. Porter again did not have Dr. Huntsman's February 4, 2014 chart note wherein he restricted Claimant from overhead work.

38. Douglas Crum. On May 20, 2019, Douglas Crum interviewed Claimant and later reviewed his medical records and Claimant's 2014 and 2018 depositions. On May 24, 2019, Mr. Crum issued a report on behalf of ISIF. He concluded that Claimant had access to approximately 11% of the jobs in his labor market prior to his December 2012 industrial injuries, assuming no restrictions. Utilizing only Dr. Bates' low back restrictions, Mr. Crum concluded that Claimant lost 50% of his labor market access, suffered wage loss of 31%, and would not be capable of his time-of-injury employment. However, he would have been capable of working some

welding, warehouse, service/food prep, delivery, assembly, and janitorial jobs within his low back restrictions.

39. Utilizing only Dr. Bates' left knee and left shoulder restrictions, Mr. Crum opined that Claimant lost 100% of his labor market access:

> The restrictions recommended by Dr. Bates for the 2012 industrial injury are more extensive and limiting than those he recommended for Mr. Gerdes' preexisting lumbar spine condition. The restrictions recommended by Dr. Bates for the 2012 industrial injury would, by themselves, result in a 100% loss of labor market access, *whether or not Mr. Gerdes was under the pre-existing restrictions for the lumbar spine*.

Exhibit K, p. 13 (emphasis in original).

40. Mr. Crum then analyzed Claimant's employability utilizing Dr. Huntsman's restrictions and reached the same conclusion: that Dr. Huntsman's restrictions, standing alone, resulted in 100% labor market loss. Mr. Crum reviewed Dr. Huntsman's February 4, 2014 chart note, but misstated Dr. Huntsman's overhead restrictions as "only occasional" use of the left upper extremity instead of the more limiting restriction Dr. Huntsman actually gave which was no overhead work.

41. Mr. Crum acknowledged that Claimant had documented low back issues since 2000 and that he worked with "self created modifications." Exhibit K, p. 14. However, Claimant never had permanent restrictions assigned despite seeking medical care and Claimant still had access to the labor market prior to his December 2012 industrial injuries. Mr. Crum reiterated Claimant was permanently disabled by his industrial injury alone applying either Dr. Bates' or Dr. Huntsman's restrictions.

42. On June 11, 2019, Mr. Porter issued an addendum to his report in response to Mr. Crum's report. Mr. Porter concurred with Mr. Crum that Claimant would not be disabled based on Dr. Bates' low back restrictions alone. Mr. Porter cited Claimant's testimony, that he avoided

heavy lifting when he could, to conclude that Claimant's low back and left knee conditions constituted subjective hinderances. Mr. Porter concluded with a review of Mr. Crum's report and his opinion that Claimant's pre-existing conditions combined with his industrially related conditions to result in total and permanent disability.

43. **Condition at the time of hearing.** At hearing, Claimant reported his shoulders hurt if he did "too much" or moved the wrong way, his back hurts "all the time," and that both his knees hurt with walking, but the left knee "hurts so bad behind it that it's just hard to deal with it." Transcript, p. 28, l. 18, p. 29, l. 8.

44. ISIF acknowledges that Claimant is totally and permanently disabled.

45. **Credibility.** Having observed Claimant at hearing and compared his testimony with other evidence in the record, the Referee found that Claimant is a credible witness. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

DISCUSSION AND FURTHER FINDINGS

46. 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).

47. **ISIF liability**. The first issue is whether ISIF has any liability in the present case. Idaho Code § 72-332 provides that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of his

employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his income benefits out of the ISIF account.

48. 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) 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.

49. In the instant case, although ISIF concedes that Claimant is totally and permanently disabled, it denies liability pursuant to Idaho Code § 72-332. Each element identified in Aguilar must be examined.

50. Pre-existing, manifest impairments. Claimant alleges two pre-existing impairments: his prior knee injury rated at 7% by Dr. Bates and his low back pain/herniated disc also rated at 7%. There is no dispute that Claimant's left knee and low back were both pre-existing impairments and manifest; Claimant had undergone a prior left knee surgery and at least two ESI injections for his low back condition. The first and second prongs of Aguilar are met as to both conditions.

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

argues that Claimant's left knee condition was not a subjective hinderance because Dr. Huntsman released Claimant back to full duty work without restrictions after his left knee surgery in 2011 and because Claimant was not limited in performing his job duties because of his knee condition.

52. On January 25, 2013, Claimant reported to Dr. Huntsman that his left knee "was doing very well" prior to the most recent industrial injury. Exhibit E, p. 28. At Claimant's 2014 deposition, he testified that he had good results from his 2011 left knee surgery, that he had not been given any restrictions other than the instruction to be careful with it, and that he did not have to alter the way he did his job after surgery. Claimant 2014 Deposition pp. 98-103. At his 2018 deposition and at hearing, Claimant re-affirmed that his left knee did not affect his ability to do his job. Claimant 2018 Deposition, pp. 72-73, Transcript, p. 43, ll. 5-16. Claimant's left knee condition was not a subjective hinderance to employment. The third prong of Aguilar is not satisfied as to Claimant's preexisting left knee condition.

53. Regarding Claimant's low back, ISIF does not argue that his low back condition was not a subjective hindrance. Claimant testified in 2014, 2018, and at hearing that he had difficulty with the heavy lifting requirements of being a glazier, avoiding it and asking for help when he could. Claimant also sought medical treatment multiple times for his low back, as recently as just one month prior to the industrial accident. Claimant's low back condition was a subjective hinderance to employment. The third prong of Aguilar is met as to Claimant's preexisting low back condition.

54. Combination or Aggravation and Acceleration. The fourth and final element required for ISIF liability is that the pre-existing impairments must either "combine with" the impairment from the industrial accident and injury or be "aggravated and accelerated" by the industrial accident and injury to render a person totally and permanently disabled. To satisfy the

fourth requirement in Idaho Code § 72–332(1), the "but for" standard is the appropriate test to determine whether the total permanent disability is the result of the combined effects of the pre-existing condition and the work-related injury. The "but for" test requires a showing by the party invoking liability that the claimant would not have been totally and permanently disabled but for the preexisting impairment. Green v. Green, 160 Idaho 275, 284, 371 P.3d 329, 338 (2016). This test "encompasses both the combination scenario where each element contributes to the total disability, and the case where the subsequent injury accelerates and aggravates the pre-existing impairment." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

55. ISIF argues first that Claimant's low back condition cannot combine with his industrial injuries to result in ISIF liability because he was still receiving treatment for his low back condition just prior to the industrial injury and therefore it was not stable.

56. In Ritchie v. ISIF, 2016 WL 6884645 (Idaho Ind. Com. 2016), the Commission considered how a progressive pre-existing condition should be treated for purposes of evaluating ISIF liability. Relying on Colpaert v. Larsen's, Inc., 115 Idaho 825, 771 P.2d 46 (1989), the Commission concluded that for a progressive pre-existing condition, elements of ISIF liability must be assessed as of the date immediately preceding the work accident.

57. Colpaert and Smith v. J.B. Parsons Co, 127 Idaho 937, 908 P.2d 1244 (1996), discuss ISIF liability regarding pre-existing conditions and medical stability. In Colpaert, the claimant had ataxia, a progressive condition, and injured her shoulder at work. The Court found that Idaho Code § 72-322 contemplates pre-existing impairments from "any cause or origin" and makes no distinction between progressive and non-progressive conditions. The Court held that for purposes of ISIF liability, if claimant's ataxia was assessed at a "specific point in time" just prior

to the industrial accident, it was acceptable to consider it a pre-existing condition which could contribute to total and permanent disability. Colpaert 115 Idaho 825, 829, 771 P.2d 46, 50. In Smith, claimant had two industrial injuries, a finger injury while working for Parsons in 1988, and a low back injury while working for a different employer in 1990. His finger was ultimately amputated, and he was deemed stable in 1992. The Court affirmed the Commission's finding that Smith's finger injury was not a pre-existing condition. The Commission did not consider Smith's finger amputation a pre-existing condition because, at the time of his second injury, he had a "separate, viable, and open claim" for his finger injury: "The Commission's conclusion is supported by the fact that Smith's disability and Parson's liability due to the finger injury had never been determined prior to Smith's 1990 back injury." Smith 127 Idaho 937, 942, 908 P.2d 1244, 1249. In other words, the claimant Smith was still undergoing treatment and had yet to reach maximum medical improvement such that his impairment could be calculated for purposes of apportioning ISIF liability.

58. In the instant case, the Friday before his Monday injuries, Claimant herein received the first of what was supposed to be a series of epidural steroid injections to "get [Claimant] back to more of a baseline functioning." Exhibit C, pp. 3-4. Dr. Weight recorded that Claimant's condition "may ultimately necessitate surgical intervention," but that his large size could make surgery impossible. Exhibit C, p. 3. Claimant testified at hearing that he has not sought treatment for his low back since this appointment because of "Money. My situation. My insurance isn't that great." Transcript, p. 27, ll. 4-5.

59. However, Claimant was not treating with Dr. Weight for an acute injury, but a chronic, degenerative condition. Claimant had experienced low back pain since 2000 and had sought treatment for it on and off for years. In May 2014, Dr. Bates reviewed Claimant's low back

treatment, performed a physical exam, and did not then recommend further treatment for Claimant's low back.

60. Claimant's low back condition is progressive and degenerative, more like the ataxia in Colpaert than the finger amputation in Smith. Unlike Smith, Claimant herein had no open viable workers' compensation claim pending for his low back and he did not receive further medical care for his pre-existing condition after his last disabling injury. Medical stability is critical because if a claimant's condition can improve with further medical intervention, then a claimant's disability may be reduced by further medical intervention. That consideration is not implicated here; Claimant's low back condition is a degenerative, chronic condition, Claimant is not a candidate for surgery due to his size[4], and Dr. Bates did not recommend further treatment for Claimant's low back. As long as Claimant's low back condition was assessed at the specific point in time just prior to his industrial injury, it can be considered a pre-existing condition for purposes of ISIF liability.

61. ISIF's next argument is that Dr. Bates' May 2014 restrictions are not an accurate representation of Claimant's functional impairment just prior to the industrial accident, as required by Ritchie. ISIF cites to Claimant's hearing testimony that his low back condition has progressively worsened since the industrial accident and that Dr. Bates evaluated Claimant's impairment a year and a half post-accident. Claimant responds that Dr. Bates considered Claimant's pre-injury medical records in developing his low back restrictions and that his low back symptoms in May 2014 are nearly identical to his complaints to Dr. Weight in November 2012.

62. Dr. Bates does not specifically note that his restrictions are as of December 2, 2012, just prior to the industrial accident. However, Dr. Bates clearly identifies the condition he is evaluating is a pre-existing condition. Further, Claimant's complaints to Dr. Weight in November

[4] Claimant has unsuccessfully tried to lose weight since approximately 2000.

2012 were as follows: "back pain and pain extending with numbness and tingling down the lower extremities." Exhibit C, p. 1. Claimant's complaints to Dr. Bates in May 2014 were as follows: "pain in the low lumbar/gluteal region, more left-sided and it will radiate down the posterior aspect of his leg." Exhibit G, p. 2. By the June 2019 hearing, Claimant described: "the back, it hurts all the time. It's constant," Claimant described sitting for any length of time as difficult due to pressure from his back. Transcript. p. 28, ll. 23-24; p. 25, ll. 17-24. A comparison of these complaints shows ISIF is correct that Claimant's condition had progressed since the May 2014 examination to the June 2019 hearing, but there is no evidence that Claimant's condition had progressed significantly from November 2012 to May 2014 such that Dr. Bates' restrictions should be rejected.

63. ISIF next argues that under either Dr. Huntsman's restrictions or Dr. Bates' restrictions, Claimant is totally and permanently disabled as a result of the industrial accident alone. To show combination, Claimant must show that "but for" the pre-existing condition, he would not have been totally and permanently disabled. Green v. Green, 160 Idaho 275, 284, 371 P.3d 329, 338 (2016).

64. Dr. Huntsman assigned restrictions for Claimant's left knee and left shoulder of no squatting or kneeling, no overhead use, and no lifting over 20 pounds. Dr. Bates opined Claimant's restrictions were as follows:

> Restrictions for the left shoulder include minimal work at or above shoulder level. Limited to a rare basis, less than 3% of the time. Max lifting at or above shoulder level 5 pounds, occasional reaching, pushing and pulling from chest to waist height. There are no limitations of handling objects as long as the arms are held close to the body. No limitations of side carry for the left shoulder.
>
> Restrictions for the left knee include no kneeling, or crawling. Occasional squatting. Rare climbing of ladders. Occasional walking on uneven surfaces. Max lifting 35 pounds to decrease use of knees and squatting.
>
> Restrictions for the low back include max 35 pounds. No repetitive bending, twisting, stooping. Thirty-five pounds waist to chest, 25 pounds floor to waist.

Exhibit G, p. 9.

65. In comparing the accident-related restrictions assigned by Dr. Huntsman and Dr. Bates, it appears that Dr. Bates' restrictions are more detailed and he had the benefit of reviewing all of Claimant's medical records. However, Dr. Huntsman was Claimant's treating surgeon for his first knee injury in 2011, his industrially related second knee injury and shoulder injury from December 2012 until February 2014. Furthermore, Dr. Huntsman updated Claimant's restrictions at almost every appointment based on Claimant's reports of symptoms and his physical exam. Dr. Bates issued restrictions for Claimant's low back and his restrictions are the product of reviewing treatment records from 2009 onward and his physical exam. Dr. Bates' restrictions regarding Claimant's low back are detailed and well-reasoned. Dr. Huntsman's accident related restrictions, while less detailed, are the product of his familiarity with Claimant over time and as his surgeon and are a more persuasive measure of Claimant's safe functional capacity.

66. Here, the decisive question is whether Claimant's accident produced restrictions combine with his pre-existing low back restrictions or whether Claimant is totally and permanently disabled because of his December 3, 2012 industrial accidents alone. Claimant's accidents produced restrictions are more limiting than his low back restrictions (20-pound max vs. 35/25-pound max) except for Claimant's restriction against bending, twisting, and stooping.

67. Both Mr. Crum and Mr. Porter were deposed regarding what the additional twisting, bending, stooping restriction meant for Claimant's employability. Mr. Porter testified:

> Q: (by Mr. Arnold) Are there jobs or types of jobs that you have identified that Mr. Gerdes would have been able to do if he had--if we just looked at his knee and shoulder restrictions and taking out the back?
>
> A: And I think based upon his vocational profile, the jobs that I would identify for him would be a hyster driver or tractor or a farm equipment operator, that, essentially is sitting in the tractor and driving. He would still be able to do those

jobs.

Q: And then what is about the back that then, adding the back in, how would that take him out of those jobs?

A: So because of the back problems, he can't sit for extended periods of time either. And that's what would take him out of those jobs as well.
….

Q: How would that restriction that Dr. Bates gave relative to repetitive bending and twisting affect those jobs, his ability to do those jobs?

A: It would impact his ability to be able to do those jobs. But I think that he still could sit in a tractor or could sit on a forklift and operate that.

Porter Deposition, p. 13, ll. 11-25; p. 14, ll. 18-23. Mr. Porter agreed on cross-examination that the only additional restriction that was added by the low back was the prohibition against repetitive bending, twisting, and stooping. Mr. Porter agreed that Claimant was under no medically imposed restriction against sitting or standing. Porter Deposition, pp. 30, 32. Mr. Porter was further cross-examined regarding the hyster job as follows:

Q: [Mr. Augustine] Okay. Hyster drivers, are they - - these jobs, did that require reaching or some overhead work?

A: Depends on the job itself. I just did a job-site evaluation last week for the grain mill in Blackfoot and he literally sits on a hyster all day long, eight hours a day, running controls with his hands, but he does not have to get off. Somebody else pelletizes it for him.

Q: Do they have to reach in order to use the hand controls?

A: Just as far as - - the steering wheel and the hand controls are all right here.

Q: [Mr. Arnold] Next to the body?

A: Yes.

Porter Deposition, p. 32, ll. 11-24. On re-direct, Mr. Porter emphasized that repetitive twisting is what made the hyster driving job inappropriate for Claimant.

68. Mr. Crum was deposed on November 13, 2019 and testified:

Q: [Mr. Augustine] Okay. When you compared - - if we were to layer Dr. Bates' restrictions on the restrictions that he imposed for the work-related injury, do we come up any - - does the low back add anything, are there any additional restrictions for his low back that aren't already included in the restrictions he imposed for the left shoulder and left knee?

A: In my opinion, from a practical standpoint, in terms of employability, it doesn't. The back injury restrictions from Dr. Bates did result in restrictions for no repetitive bending, twisting, or stooping. But in my opinion, the addition of that doesn't change the fact that from the industrial injury, the Claimant is totally disabled - - is totally disabled from the industrial injury, apart from, without needing to combine with the preexisting conditions.

…

Q: Okay. You're not aware of any hyster-driving jobs that are in the light capacity that Mr. Gerdes would qualify for in light of his restrictions from Dr. Huntsman and/or Dr. Bates for the shoulder and knee?

A: I am not. Forklift operator jobs are more physical than most people think it would be, you know. I don't know of any forklift jobs where the person stays in the saddle the entire time and doesn't do anything else. You know, if you're working in a spud warehouse, a manufacturing plant, you'll be on and off that machine, you're going to be pushing and pulling bins and pallets, pallet jacks, those kinds of things are all going to be pretty heavy.

Q: Is that why it's a medium-classification job generally?

A: It generally is, yes, sir.

…

Q: All right. Can you think of any job that would have been available in 2019, in June of 2019 when we had the hearing, that Mr. Gerdes could perform with his restrictions for his left shoulder and left knee that he could not perform because of his repetitive stooping and bending and twisting restriction?

A: No.

Crum Deposition, p. 12, l. 12 through p. 13, l. 3; p. 17, l. 19 through p. 18, l. 9; p. 18, ll. 16-22.

69. Mr. Porter's analysis is troubling as conceptually inconsistent with Green v. Green, 160 Idaho 275, 371 P.3d 329 (2016). In Mr. Porter's June 11, 2019 addendum, there is no discussion of a hyster job; Mr. Porter concludes, after recounting Mr. Crum's opinion, that "Based

upon this information, I have concluded that the pre-existing impairment 'combines with' the last injury to cause total and permanent disability in this case." Exhibit J, p. 4. At deposition, Mr. Porter expanded on this opinion by explaining that because Claimant could still perform some jobs with his low back restrictions, and the addition of his accident related restrictions takes him out of competitive employment completely, therefore the pre-existing condition "combines with" the accident produced restrictions to create total and permanent disability. This rationale is not the "but for" standard of Green and does not refute the possibility that Claimant was totally and permanently disabled by his industrial accident alone.

70. Mr. Porter opined that there were still some jobs Claimant could do within Dr. Huntsman's "limited light" restrictions. However, Mr. Porter never updated his analysis with Dr. Huntsman's restriction against overhead work; although he was aware Claimant had difficulty with overhead work because of the residual functional capacity questionnaire, but specifically acknowledged that his conclusions regarding labor market access were based on Dr. Huntsman's January 6, 2014 chart note. Porter Deposition, p. 22, l. 18 through p. 23, l. 1. Further, Mr. Porter acknowledged at deposition and in his report that Claimant would be limited in competing for "limited light" jobs due to his lack of prior customer service, his limp, and his age.

71. Mr. Porter opined there was one job type that Claimant could perform "but for" his low back restrictions, driving a hyster, tractor, or other farm equipment. Mr. Porter's conclusion appears to be based on one job site evaluation at one plant where one employee did not have to leave the cab of the hyster; there is no other evidence supporting his opinion.

72. Mr. Crum's opinion was that given Dr. Huntsman's restrictions related to Claimant's work accidents alone he was totally and permanently disabled:

> Now there might be a few individual instances of jobs that he might be able to acquire with Dr. Huntsman's restrictions alone in the labor market, but it would be very, very few and

> probably not dependably. .... So if there are jobs, I still believe he would be totally and permanently disabled based on Huntsman's restrictions, essentially on an odd lot basis.

Crum Deposition, p. 16, l. 18 through p. 17, l. 2.

73. Mr. Crum's opinion is more persuasive than Mr. Porter's. Mr. Crum's conclusion that Claimant was totally and permanently disabled by his December 3, 2012 industrial accidents alone is supported by the record and well-reasoned. Thus, Claimant's pre-existing low back condition did not "combine with" the industrial injuries to render Claimant totally and permanently disabled.

74. As the Supreme Court has recently articulated, the fourth and final element of ISIF liability may be satisfied not only via the "combined effects" test, but also through the "aggravates and accelerates" test. Aguilar, 164 Idaho at 902, 436 P.3d at 1251; Idaho Code § 72-332(1). In other words, a claimant may prove the fourth element of ISIF liability if the work injury "aggravated and accelerated the pre-existing impairment to cause total and permanent disability." Aguilar, 164 Idaho at 902, 436 P.3d at 1251. As stated earlier, the "but for" test is the appropriate standard to determine whether the total and permanent disability is the result of the pre-existing impairment being aggravated and accelerated by the work injury. Bybee, 129 Idaho at 81, 921 P.2d at 1205.

75. Although Claimant's counsel primarily argues that the work injury aggravated and accelerated the pre-existing left knee impairment, we must also address the argument that Claimant's pre-existing low back impairment was aggravated and accelerated by the work injury to cause total and permanent disability.[5]

[5] Counsel's brief states the following: "Claimant argues that he has proven that he is totally and permanently disabled either due to the combined effects of Claimant's low back pre-existing impairment and the left knee and left shoulder injuries, or is due to the injury to the left knee which aggravated and accelerated the pre-existing left knee impairment or both." Claimant's Closing Post Hearing Brief, p. 4.

76. In an attempt to establish that Claimant's low back pre-existing impairment was aggravated and accelerated by the work injury, counsel merely points to the fact that Dr. Bates rated Claimant at 7% whole person impairment due to conditions of the lumbar spine. *See* Claimant's Post Hearing Brief, p. 4; Exhibit G, p. 8. Although Dr. Bates did rate the impairment of the lumbar spine, there is nothing in his IME that would suggest that Claimant's low back impairment was aggravated and accelerated by the work injury of December 3, 2012. Accordingly, we find that Claimant has not met its burden to show that the work injury aggravated and accelerated his pre-existing low back impairment for the purpose of ISIF liability.

77. Claimant has not proven that ISIF is liable pursuant to Idaho Code § 72-332, for any of his pre-existing impairments.

78. **Carey apportionment.** Inasmuch as ISIF is not liable for Claimant's pre-existing impairments, apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is moot.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has not proven that ISIF is liable pursuant to Idaho Code § 72-332, for any of his pre-existing impairments.

2. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is moot.

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

DATED this 4th day of September, 2020.

INDUSTRIAL COMMISSION

Thomas P. Baskin, Chairman

Aaron White, Commissioner

Thomas E. Limbaugh, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of September, 2020, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular e-mail upon each of the following:

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