BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DONALD AICHER, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2008-033006** **IC 2009-015796** **IC 2011-000934** **IC 2011-015260** **IC 2011-017191** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed January 27, 2017

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Alan Taylor, who conducted a hearing in the above referenced consolidated cases in Idaho Falls on January 5, 2016. Dennis R. Petersen represented Claimant, Donald Aicher. Paul B. Rippel represented the State of Idaho, Industrial Special Indemnity Fund ("ISIF"). Employer, First Street Welding, Inc. ("First Street"), and Surety, Idaho State Insurance Fund, settled with Claimant pre-hearing and did not appear. The parties presented oral and documentary evidence. After post-hearing depositions, the parties submitted briefs. The matter came under advisement on September 30, 2016. 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.

ISSUES

The issues to be decided according to the Notice of Hearing are as follows:

1. Whether and to what extent Claimant is entitled to disability in excess of impairment;

2. Whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise;

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

4. What the correct apportionment of ISIF liability is pursuant to *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984).

CONTENTIONS OF THE PARTIES

Claimant contends that he is totally and permanently disabled as result of a combination of preexisting impairments together with his last injury to his lower back that occurred on July 6, 2011, which combination renders ISIF liable for a portion of his disability income benefits.

ISIF contends that it is not liable for any of Claimant's disability because his last injury does not combine with his preexisting impairments to render him totally and permanently disabled.

EVIDENCE CONSIDERED

The record in the instant case includes the following:

1. The Industrial Commission legal file;

2. The testimony of Claimant taken at the hearing;

3. Joint Exhibits A through Z and AA through RR admitted at the hearing;

and

4. The following post-hearing expert witness depositions: James H. Bates, M.D., taken by Claimant on March 15, 2016; Gary C. Walker, M.D., taken by Defendant on May 2, 2016; and Delyn Porter, M.A., CRC, CWICS, taken by Claimant on June 8, 2016.

OBJECTIONS

Any objections preserved in the depositions are overruled.

Since 2008, Claimant has suffered a number of work-related injuries while in the employ of First Street Welding, Inc. On September 5, 2008, Claimant suffered a low back injury. (I.C. 2008-033006). On June 17, 2009, Claimant suffered an injury to his left hand. (I.C. 2009-

015796). On December 17, 2010, Claimant suffered an injury to his low back. (I.C. 2011-000934). On June 1, 2011, Claimant suffered an injury to his low back. (I.C. 2011-015260). Finally, on July 6, 2011, Claimant suffered an injury to his low back. (I.C. 2011-017191). Complaints were filed for all of the aforementioned accidents/injuries. By Order dated September 27, 2011, these claims were consolidated for purposes of hearing. For each of the aforementioned injuries Claimant sought workers' compensation benefits, to include medical and indemnity benefits. Following consolidation of the complaints for hearing, Claimant filed a complaint against the Industrial Special Indemnity Fund (ISIF) in which he alleged that he suffered from various "pre-existing conditions" which combined with his last injury of July 6, 2011, to render Claimant totally and permanently disabled. As noted, prior to hearing Claimant reached settlement with Employer on all claims.

FINDINGS OF FACT

1. **Claimant.** Claimant was born on July 15, 1956. He grew up in eastern Idaho and attended high school in Idaho Falls through the eleventh grade. After leaving high school in 1973, he completed requirements for a GED. He completed no further formal education. Claimant is married and has three adult children. At the time of hearing he was 59 years old and resided in Iona, Idaho. Tr., 26:1-27:20; Ex. II:432 (4:8-16) (Claimant Dep. 5/21/14).

2. **Employer.** At all relevant times, First Street operated a welding and metal fabrication business located in Idaho Falls. Norman Geib, Claimant's uncle, started the business. Marvin Geib, Claimant's cousin, later succeeded his uncle as the managing owner of First Street. Tr., 29:18-30:9.

3. **Claimant's Vocational History.** During high school, Claimant worked for Hayes Construction performing general construction labor. This employment lasted for a year and a

half. He next worked as a truck driver for Midstate Transport, again for a year and a half. Sometime during this same time period, he worked for Pillsbury as a grain worker for a single harvest season. *Id.*, 27:21-29-13.

4. Claimant began working as a welder for First Street in 1976. Marvin Geib hired him. The position was a full-time, heavy, skilled labor job that required significant amounts of bending, stretching, lifting, and crawling to complete tasks. Claimant frequently lifted metal materials from supply trucks that could weigh as much as 100 pounds. Having performed chores at First Street while he was in high school, Claimant came to the position with some initial familiarity with welding techniques. After his formal employment began in 1976, he acquired welding training on the job and also at an eastern Idaho vocational school for carburetor, heliarc and aluminum/stainless steel welding techniques. Typical work that Claimant performed for First Street was welding and metal fabrication on tractor/trailers, tankers, garbage trucks, irrigation equipment, and farm equipment. Tr., 29:14-36:9.

5. First Street had overhead hoists in the shop that employees used to move heavy pieces of metal into place for welding or fabrication work. Ex. II:435 (13:1-5). The use of these lifting aids, however, did not insulate employees from heavy lifting. Claimant testified in his first deposition in pertinent part as follows: "You are always lifting. If you've got – you know, you take a couple of pieces of flat bar that might weigh 15 pounds, but you get six of them stuck together and you've got to roll it, you're still lifting a combination of everything put together." Ex. II:435 (16:5-10).

6. In the late 1980s or early 1990s, Norman Geib retired and Marvin Geib succeeded him as the managing owner of First Street. As part of this transition, Claimant succeeded Marvin Geib as the shop foreman. Claimant continued to perform all of his prior welding and metal

fabrication duties, but also had the added responsibilities of bidding jobs, performing office work, supervising welders, and training employees. Tr., 36:10-38:16.

7. Claimant's career with First Street lasted approximately 36 years. He continued to work full-time in the position of shop foreman until Marvin Geib laid him off in or about late July 2011. *Id*., 66:12-23.

8. **Industrial Accidents/Injuries; Treatment.** Between 1982 and 2011, Claimant sustained 23 injuries from workplace accidents at First Street, for which he filed worker's compensation claims. Following is a chronological list of those accidents and injuries:

No.	Accident Date	Body Part Injured
1.	July 6, 1982	eye(s)
2.	January 4, 1983	eye(s)
3.	April 27, 1984	eye(s)
4.	September 12, 1984	eye(s)
5.	January 1, 1987	eye(s)
6.	June 17, 1987	eye(s)
7.	June 13, 1988	hand
8.	September 7, 1988	eye(s)
9.	May 2, 1991	knee
10.	June 4, 1996	hand
11.	October 8, 1997	multiple lower extremities
12.	October 7, 1999	hand
13.	February 7, 2000	eye(s)
14.	March 29, 2000	thumb
15.	December 28, 2000	lower back (lumbar/lumbrosacral)
16.	December 2, 2005	lower back (lumbar/lumbrosacral)
17.	April 10, 2006	lower arm
18.	September 5, 2008	lower back (lumbar/lumbrosacral)
19.	June 17, 2009	wrist
20.	October 15, 2009	eye(s)
21.	December 7, 2010	lower back (lumbar/lumbrosacral)
22.	June 1, 2011	lower back (lumbar/lumbrosacral)
23.	July 6, 2011	lower back (lumbar/lumbrosacral)

Ex. GG; Ex. HH.

9. Claimant's most frequent work-related injuries were to his eyes, for which he filed nine separate claims between 1982 and 2009. These occurred when grinding metal or using

a jet arc welder that caused metal dust to lodge in one or both of his eyes. Claimant recovered after treatment without permanent impairments or assigned restrictions as a result of these eye injuries. Tr. 38:17-39:40:25; Ex. GG; Ex. HH.

10. Prior to 2000, the most consequential workplace injury that Claimant sustained was a left knee injury on May 2, 1991. On May 17, 1991, David Hume, M.D., performed a left lateral menisesctomy to repair the injury. On September 3, 1991, Dr. Hume found that Claimant had sustained a 5% whole person partial impairment of his lower left extremity as a result of the injury. After a brief period of recovery, Claimant returned to work at First Street with no permanent work restrictions. He recalled that he "went back and got right back into doing what I was doing before." Tr., 39:16-40:19; EE:389; Ex. GG; Ex. HH; Ex. NN:535-536.

11. Beginning with his December 28, 2000 first injury to his back, Claimant began to experience more serious physical consequences from workplace injuries, including surgeries, impairment ratings, and permanent work restrictions. Claimant sustained six separate workplace injuries to his lower back, up to and including his last industrial injury on July 6, 2011. Ex. GG; HH.

12. Following his first back injury and continuing through the date of the hearing, Claimant received continuous treatment for his back, including surgeries, palliative care and physical therapy. These findings will not attempt to detail all of Claimant's back treatments and treating physicians in detail but rather will summarize only the most relevant highlights.[1]

13. On December 28, 2000, Claimant was lifting an axle on a horse trailer off the ground to place it in the garbage can. The axle weighed approximately 100 pounds. In the course

[1] Gary C. Walker, M.D., provided a comprehensive medical history chronology of Claimant's medical care and treatment for his back between 1980 and 2011 in his independent medical examination dated February 23, 2011. Ex. EE:388-396.

of lifting it he immediately felt pain in his lower back and right leg, so he dropped the axle. Thereafter, Claimant sought treatment with Robert Cach, M.D., of the Idaho Neurosurgical Center in Idaho Falls. Tr., 40:24-42:1; Ex. PP.

14. Dr. Cach initially treated Claimant's back injury conservatively. He diagnosed right L4-5 and L5-S1 disc herniations and lateral recess stenosis. An MRI showed degenerative disk disease and bulges at L3-4 and L4-5. On May 25, 2001, Dr. Cach performed the following surgical procedures on Claimant to repair the back injury: right L-5 laminectomy, partial L-4 laminectomy, right L4-5, L5-S1 medial facetectomies, and L4-5, L5-S1 disectomies. Ex. PP:592-593.

15. In a letter to Surety dated January 25, 2002, Dr. Cach stated that Claimant had reached maximum medical improvement (MMI). His diagnosis was post-laminectomy syndrome, also known as failed back syndrome, which Dr. Cach described as "chronic." He related Claimant's current complaints to his industrial injury of December 28, 2000. Although he did not perform impairment ratings, Dr. Cach stated that it would be appropriate for Claimant to receive an impairment rating. He recommended a permanent 30 pound lifting restriction with "very infrequent" bending or stooping, stated that further neurosurgical intervention was unwarranted, and opined that Claimant should receive treatment for chronic pain. Pain medications prescribed for Claimant at this time included the following: MS Contin, Amitryptline, Neurontin, Oxycontin, and Lortab. Ex. PP:610-612.

16. Claimant returned to work at First Street, first part-time and later full-time, approximately two months after his surgery by Dr. Cach. He continued to perform all of his previous duties, except that he no longer unloaded trucks. He did his "best" to try to limit his work within the 30 pound weight restriction that Dr. Cach had prescribed. Wherever possible, he

would obtain assistance from other employees in lifting heavy objects. Nevertheless, Claimant continued to perform all of the welding tasks that he had previously performed. While acknowledging that Dr. Cach had ordered infrequent bending and stooping, Claimant continued to engage in those activities because he could not "reach for a welding rod without bending or twisting or something like that." He told Marvin Geib that he could not perform his work in the same manner as before. He recalled that Geib replied, "Do the best you can." Tr., 43:8-45:19.

17. On February 21, 2002, Gary C. Walker, M.D.,[2] a physiatrist, evaluated Claimant for a permanent impairment rating regarding his back injury of December 28, 2000. Dr. Walker assessed the rating based upon the two-level disectomies/laminectomies that Dr. Cach had performed. He gave Claimant a DRE Category 3 permanent partial impairment rating of 13% of the whole person. He agreed with Dr. Cach's maximum 30 pound permanent lifting restriction, but opined that Claimant would continue to have pain complaints associated with lifting. Ex. EE:396-A-396-C.

18. In a letter to Surety dated April 17, 2002, Dr. Cach agreed with Dr. Walker's opinion regarding the impairment rating and restriction. Ex. PP:617.

19. Robert Friedman, M.D., and Craig Beaver, PhD, conducted an independent panel evaluation regarding Claimant's condition at Surety's request on October 14, 2002. The panel found that Claimant had reached maximum medical improvement with regard to his back injury of December 28, 2000, and that he did not require further medical treatment. The panel opined that Claimant's continuing back pain complaints were related to his industrial injury but that his lower extremity complaints were more likely than not related to a preexisting peripheral

[2] In his post-hearing deposition, the parties stipulated to Dr. Walker's medical qualifications to render an expert opinion in this case. Walker Dep., 4:13-20. His medical office stationery states that he is board certified in physical medicine and rehabilitation. Ex. EE:388.

neuropathy. Using the *Guides to the Evaluation of Permanent Impairment*, Fifth Edition, the panel concluded that Claimant would be best rated under DRE category III of the lumbrosacral spine for a 13% whole person impairment, of which 50% was attributable to preexisting degenerative arthritis, resulting in a 7% whole person impairment attributable to the industrial injury. The panel opined that Claimant could return to work at First Street with a maximum lifting restriction of 50 pounds, a 25 pound repetitive lifting restriction, and no twisting or torquing maneuvers to his lower back. All of these restrictions were permanent. Ex. QQ.

20. Dr. Walker reviewed the panel's report and disagreed with their apportionment of the impairment rating. He conceded that Claimant had sustained a 3% permanent partial impairment of the whole person as a result of preexisting conditions but opined that 10% was attributable to the December 28, 2000 lower back injury. Ex. NN:538-539.

21. Claimant injured his lower back a second time in the workplace on December 2, 2005, when a ladder slipped out from under him. He received evaluation at Community Care for a possible L4 compression fracture, however X-rays of his lumbar spine showed no acute fracture; rather, the study showed a progression of Claimant's multilevel degenerative disk disease. Claimant continued his pain management, including radiofrequency lesion treatments and epidural steroid injections. He did not lose any time from work due to this injury, nor is there any evidence in the record that it resulted in any surgeries, impairment ratings, or additional work restrictions. Ex. DD:379; Ex. EE:391; Ex. GG:413; Ex. HH:414.

22. Claimant sustained a third workplace injury to his lower back on September 5, 2008.[3] He was in the back of an aluminum trailer at First Street grinding out metal cracks with a grinder and welding the cracks. He was seated with one leg underneath the other one when he

[3] IC # 2008-033006.

twisted around to pick up a grinder and his back popped. This maneuver caused pain to his lower back and down his right leg so that Claimant could no longer sit. Although he took it easy for a few days, Claimant's pain worsened. He returned for a repeat radiofrequency lesion treatment. An October 10, 2008 MRI demonstrated marked progression of degenerative disk disease throughout the spine. Also present was a large extruded disk herniation involving L4-5 on the right extending superiorly behind the L4 vertebral body. Claimant received a recommendation for surgery, which Stephen Marano, M.D., performed on November 13, 2008. The surgical procedures included a redo microsurgical disk excision L3-4 with decompression of L3-4 and a redo excision of L4-5 and decompression of L4-5. Tr., 48:23-50:1; Ex. S:63-71; Ex. EE:391.

23. Claimant responded well to his second back surgery. He believed that the surgery was "Great. It worked good." He remained off work for two to three months, whereupon he gradually returned to full-time work at First Street in 2009. He continued to try his "best" to work within his previously-prescribed work restrictions. He continued to weld as before but sought help lifting heavy items. He still continued to "crawl around" in trailers and on machinery to perform welding and other fabrication tasks, despite concerns that he might re-injure his back. He remained in his position as shop foreman. Tr., 50:2-52:5.

24. On April 20, 2009, Dr. David C. Simon, M.D. conducted an independent medical examination ("IME") concerning Claimant's September 5, 2008 injury, at Surety's request. Dr. Simon reviewed Claimant's extensive medical history and treatment related to his back injuries and surgeries. Dr. Simon opined that Claimant's "preexisting problem [pain resulting from the December 28, 2000 injury] is going to continue. Any future problems will be more likely related to this injury and his chronic degenerative changes." Dr. Simon performed a permanent impairment evaluation according to the *Guides to the Evaluation of Permanent*

Impairment, Sixth Edition. He opined that the current impairment following the injury of September 5, 2008 was a 10% whole person impairment. He noted in pertinent part as follows: "In summary, his current impairment would be the same as his previous impairment. Clinically, this makes sense since it appears that he is now in the same condition as he was prior to the 9/5/08 injury." Dr. Simon assigned no work restrictions attributable to the September 5, 2008 industrial injury. Ex. DD.

25. On June 17, 2009, Claimant sustained a work injury to his left wrist when he fell off a ladder and braced his fall with his wrists hyper-extended.[4] He received a referral to William P.D. Wilson, M.D., a plastic surgeon. After reviewing an MRI, Dr. Wilson diagnosed Claimant with profuse acute synovitis of the extensions and dorsal left wrist. On October 28, 2009, Dr. Wilson performed a synovectomy of Claimant's left fourth extensor compartment. Dr. Wilson advised Surety on May 28, 2010 that Claimant would reach maximum medical improvement from his wrist injury on October 10, 2010; he did not assign any permanent restrictions or impairment rating based upon the injury. Ex. U, V, and W.

26. On December 7, 2010, Claimant injured his lower back a fourth time while working at First Street.[5] The shop had a new brake used to bend sheets of iron. Generally when the brake would come down it would hesitate and the sheet of iron would pause before tipping. On this date the brake came down without hesitating and Claimant and his coworker were not ready for it. The sheet, weighing 120 pounds, dropped on them. Claimant had acute back pain and left work for the day. Over the weekend his pain did not improve and he sought medical treatment at Idaho Urgent Care. X-rays were negative for significant findings. He returned to work after a couple of days but his pain continued. An MRI of the lumbar spine on December 30,

[4] IC # 2009-105796.

[5] IC # 2011-000934.

2010 showed significant degenerative changes at multiple levels but no new acute pathology. Dr. Marano opined that further surgery at that time was contraindicated. He ordered physical therapy. Claimant remained off work for several months. Thereafter, Claimant continued to have constant pain between a 5-10/10 in the low back. Left leg pain was not constant but waxed and waned. After he returned to work, while he continued to weld as before, he began protecting his back more by obtaining assistance with lifting tasks. Tr., 52:8-54:14; Ex. S:86; Ex. EE:393.

27. Dr. Walker performed an IME of the Claimant at Surety's request on February 23, 2011. Noting Claimant's "longstanding history of low back problems," Dr. Walker opined that Claimant's December 7, 2010 injury was that of a low-back strain, an exacerbation of Claimant's preexisting back condition. He found nothing new on the MRI that would suggest an aggravation or a permanent worsening of a preexisting condition. Dr. Walker opined that as "far as this recent injury is concerned, given the absence of any new disc pathology, this would be considered that of a strain and likely exacerbation of his underlying severe degenerative changes." He recommended physical therapy, anti-inflammatory medication, and a trial of an epidural steroid injection if the first two treatments were not successful in resolving Claimant's pain. He found Claimant to be at maximum medical improvement and that surgery was not required as a result of the most recent injury. While he prescribed temporary lifting restriction of 35 pounds, Dr. Walker did not believe that permanent work restrictions were necessary as a result of the December 7, 2010 injury. Ex. EE:388-396.

28. Dr. Walker testified that the work restrictions he recommended for Claimant's December 7, 2010 work injury were temporary because of the lack of objective findings of new damage or injury. He noted that Claimant had "a very, very worn out, arthritic back that nothing at all to do with his work injuries." Walker Dep.16:20-17:2.

29. Claimant received emergency room care at Eastern Idaho Regional Medical Center on May 10, 2011 following an incident in which he was in his garage and developed severe low back pain. Claimant's back "locked up," his left leg "gave out" and he fell to the floor. "When asked what he means by 'give out' he states that the pain was so bad it caused him to collapse … The quality is noted to be 'pain' and similar to prior episodes." An MRI showed evidence of multilevel degenerative disk and facet disease within the lumbar spine with evidence of prior surgical procedures, however these results were essentially unchanged from Claimant's previous MRI in December 2010. Ex. X:200-211.

30. In a letter to Surety dated June 6, 2011, Dr. Walker reviewed the emergency room notes and updated MRI of May 10, 2011. Dr. Walker observed that the MRI showed ongoing severe degenerative changes at multiple levels of Claimant's lumbar spine, but there was nothing new that suggested any new acute disk pathology from the home incident on May 10, 2011. He observed in pertinent part as follows: "Unfortunately, Mr. Aicher does have severe degenerative arthritic changes in his lumbar spine and I think predisposed to having chronic low back pain and possible recurrent episodic pain associated with movement and activity simply on the grounds of his degenerative changes." Ex. EE:396D3.

31. On June 1, 2011, Claimant sustained a fifth injury to his lower back in the workplace.[6] He was in the rear of the shop drilling a hole into an inch and a half metal plate. He was bending over the plate when the drill went through the plate. The resulting jarring motion caused him to immediately feel pain in his lower back and down his left leg. Tr., 54:23-55:19. Claimant recalls being off work for a "short time." *Id.*, 59:15-16. The record does not contain any medical records pertaining to the June 1, 2011 incident, however Claimant received the

[6] IC # 2011-015260.

physical therapy previously ordered by Dr. Walker at RehabAuthority in Idaho Falls from June 13 to 27, 2011. Ex. Y:242-249.

32. When Claimant returned to work after June 1, 2011, he attempted to limit himself further to prevent re-injury to his back as follows:

> Q. What did you do to limit yourself?
> A. I made somebody else do all the – most of the lifting if I couldn't. And I used the crane a lot. I just tried to keep what I had left there.
> Q. What do you mean? I don't understand what you just said.
> A. It was about gone. It just got to the point where, if you caught yourself doing something, it was usually painful when you would find out what it was.
> Like, just reaching over grabbing something like that, I'd try to walk over to it. Just trying to be more careful with what I did.

Tr., 60:1-12.

33. On July 6, 2011, Claimant sustained his sixth and final lower back injury while working at First Street.[7] The injury occurred when Claimant and Marvin Geib were retrieving a front-end loader from the parking lot to bring it into the shop. Claimant was climbing the steps to the cab of the loader. When he reached the third step, he leaned back to open the door to the cab, his back "locked up" or spasmed, and he fell backwards onto the gravel of the lot. He could not get up. Tr., 60:13-65:18.

34. Claimant testified regarding his back "locking up" as follows:

> Q. Had your back, prior to July 6, 2011, locked up like you just described to me right now?
> A. It started locking up after the – the brake incident is when it started locking up on me.
> Q. The December 2010?
> A. Yes.
> Q. What do you mean by "locking up on you"?
> A. The only thing I can compare it to is like if somebody walked up and hit you with an ice pick in the back. I mean, you just freeze. You can't –
> When Marv saw me go off on it, he said: Why didn't you try to protect you? You can't. I mean, you freeze. You don't do anything.

[7] IC # 2011-017191.

…
Q. How many times had that happened prior to that?
A. It happened a couple of times over at work and once when I was at home.

Tr., 61:11-23; 62:10-13.

35. Following his accident on July 6, 2011, Claimant received evaluation and treatment in the emergency room of the Eastern Idaho Regional Medical Center by Troy Weston, P.A. X-rays of Claimant's lower back were taken. As read by Radiologist Peter Vance, M.D., the X-rays showed degenerative changes throughout the lumbar spine, no spondylolisthesis, and no fractures. There were no new acute findings. Ex. CC:375. The clinical impressions of Mr. Weston were as follows: contusion to back, acute left sided sciatica, fall, and acute pain in lower back. Ex. X:212-214.

36. **Employment Termination and Subsequent Events.** Claimant returned to work at First Street shortly after the accident of July 6, 2011. He continued to perform the same welding and other duties as before, while he continued to seek help from other employees with heavy lifting wherever possible. Several weeks later, in or about late July 2011, Marvin Geib terminated Claimant's employment. Claimant began work in the morning by putting on his shop coat. Geib then motioned for him to come into the office. Geib told Claimant, "I'm going to do you a favor. I'm going to lay you off. Keep your back as best as you can." Geib told Claimant that if he could stop taking pain medication, he could return to work at First Street. Claimant understood this to mean the Valium and Morphine prescriptions he was taking at the time and had been taking consistently, off and on, since his first back injury in 2000. After the termination of his employment at First Street, Claimant did not work again through the date of the hearing. Tr., 66:6-68:15.

37. **Job Search**. Claimant sought work after his job termination but was unsuccessful in obtaining alternative employment. While receiving unemployment insurance benefits, he sought various employment positions in construction, roofing, welding, lawn maintenance, gun manufacturing, and parking lot maintenance/snow plowing, among other occupations and industries. Claimant continued to seek work until December 3, 2012. He made in excess of 100 contacts with prospective employers between July 2011 and December 2012. Most of these contacts were by telephone rather than in-person applications for employment. He explains his reason for stopping his job search as follows: "I got tired – like I say, if they [prospective employers] got interested and asked me anything about my past, it was just like shutting the door on you. I just kind of got tired of it." Tr., 68:13-80:14; Ex. MM.

38. **Social Security Disability.** Claimant began receiving Social Security Disability ("SSD") benefits on January 1, 2012. Although he was receiving SSD benefits, Claimant continued to look for work until December 2012. He stated his reason for doing so as follows: "Because I cannot just sit. I've got to be doing something … I wanted to be doing something." Tr., 80:17-82:18; Ex. LL.

39. **ICRD Rehabilitation Efforts**. Rehabilitation Consultant Dan Wolford of the Industrial Commission Rehabilitation Division worked with Claimant upon referral from Surety from July 25, 2011 until February 29, 2012. Ex. HH:420-430. Wolford reviewed Claimant's medical records, interviewed Claimant, and conducted a job site evaluation. On February 29, 2012, Wolford closed Claimant's file. He determined that:

> a return to work opportunity [at First Street] has been available to the claimant since the case was open … However, that offer of employment is contingent on the claimant being off narcotic pain medication. However, the claimant does not feel capable of existing without the assistance of narcotic pain medication. In addition to this, no significant medical treatment is occurring which would change the claimant's physical condition.

Accordingly, Wolford determined that "ICRD work activities are not appropriate at this time." Ex. HH:429.

40. **August 6, 2013 IME**. On August 6, 2013, James H. Bates, M.D.,[8] examined Claimant and prepared a report of an IME at his attorney's request. Dr. Bates reviewed Claimant's past medical records relating to his industrial injuries. At the time of examination, Claimant reported that he had pain in the low portion of his back and radiating across the back at times, and frequently radiating into his lower left extremity. He also reported episodes of sharp, severe pain that would cause him to freeze or lock up. Claimant was taking MS Contin and Valium for pain at the time of examination. Dr. Bates diagnosed Claimant with chronic back pain and failed back syndrome with residuals of radiculopathy. For Claimant's impairment due to his December 28, 2000 injury, Dr. Bates adopted the previous permanent partial impairment of 13%. He opined that the 30 pound lifting restriction given to Claimant following the December 28, 2000 injury was appropriate. Using the *Guides for the Evaluation of Permanent Impairment*, Sixth Edition, Dr. Bates opined that Claimant should be rated for additional impairment for his September 5, 2008 back injury, for a total 17% whole person impairment (13% attributable to his December 28, 2000 injury, and 4% attributable to the September 5, 2008 injury)[9]. He concluded that Claimant had no further restrictions due to the September 5, 2008 injury. With regard to Claimant's June 17, 2009 left wrist injury, Dr. Bates assigned a 1% whole

[8] Dr. Bates graduated from Creighton Medical School, served an internship at Sacred Heart Hospital in Spokane, and served a residency at the University of Missouri in Columbia. He is licensed to practice medicine in Idaho and is board certified in physical medicine and rehabilitation. Bates Dep., 4:19-5:6.

[9] While it was somewhat ambiguous in his report, at his deposition Dr. Bates clarified that the impairment rating he assigned was apportioned between the December 28, 2000 and September 5, 2008 injuries, as follows:

Q. Okay. And as I read your report, it appears that you gave him [Claimant] an additional 4 percent?

A. Yes, or a total of 17 percent, yeah.

Bates Dep., 13:23-25.

person impairment with the following restrictions: avoid heavy lifting and pulling; avoid use of the wrist with frequent flexion and extension; and "rotation from a continual basis, the limit would be up to a frequent basis." Dr. Bates assigned no additional impairment or restrictions attributable to Claimant's December 7, 2010 lower back injury. He assigned no additional impairments attributable to Claimant's June 1 and July 6, 2011 lower back injuries, however for "current restrictions," Dr. Bates opined that Claimant should be limited to lifting 25 pounds on rare occasions with proper support, proper body patterns; lifting up to 15 pounds on occasional basis; bending, twisting, stooping, squatting on a rare basis only; and changing positions (sitting, standing, or standing/walking) frequently (every 15 to 30 minutes as needed) for comfort. He noted further in pertinent part as follows: "The fourth injury or flare up in June and July 2011 and the history of multiple injuries, surgeries, numerous exacerbations would lead to the restrictions noted above." Ex. FF:397-412.

41. Because of his June and July 2011 back injuries, Dr. Bates opined that restrictions were appropriate for Claimant based upon a review of medical records and the physical examination that he performed on August 6, 2013. He further testified that the restrictions were indicated due to an inability to work. Bates Dep., 14:16-15:21; 17:11-17.

42. Dr. Bates explained his rationale for assigning work restrictions based upon the June and July 2011 back injuries, but no additional permanent impairment, as follows: "The impairments are based more on objective findings, and with those accidents there was no additional objective findings or things that would raise the class or grade of the impairment that he [Claimant] was given before." *Id*. at 16:19-23.

43. Dr. Bates acknowledged that he first examined Claimant two years after the incidents in June and July of 2011. *Id*. at 19:15-20. Counsel for ISIF questioned Dr. Bates further as follows:

> Q. Okay. So let's just talk about your examination of him. In your examination, did you see things that you thought would indicate this was – I mean, as we said, this is two years later. Did you see things that made you say, "Oh, this guy has had permanent aggravation from these mid-2011 incidents."
>
> Could you really say that, or would it be speculation?
>
> A. When it came into the conclusion and putting it together, yes. In the medical records there – the complaints that he was voicing to me, the restrictions that were seen on physical exam were consistent with the medical record that I reviewed that he had continued to have complaints of pain.
>
> So this did appear this was a new and different level of function than where he was prior to the incident.

Bates Dep., 22:3-19.

44. Asked how he could separate "falling onto his back in the yard at the welding shop" from the fact that Claimant has "degenerative disk disease indicia or spondylitic and etc., degenerative facets; how are you separating that from the effects of those diseases?" *Id*. at 24:18-24. Dr. Bates responded as follows:

> The degenerative changes are there. The symptoms that are coordinated with degenerative changes or the symptoms that are coordinated with MRI or any image findings are not – do not always relate.
>
> There is a difference between clinical findings and objective image findings, and there may or may not be a connection. The degenerative findings or imaging are not ratable impairments, and sometimes they are always – you cannot tell how much pain a person will be in by looking at an MRI or an X-ray.
>
> You should put the clinical findings with the objective findings and correlate them, but there is no functional meter on pain on an MRI.

Id. at 24:25-25:12.

45. Counsel for ISIF asked Dr. Bates to distinguish his diagnosis and the basis of his restrictions as required by the injuries of June and July 2011 from Claimant's preexisting diagnosis of chronic back pain and failed back syndrome: "So how is what you've said anything

different than what's been said by the other physicians back in 2011-2012, or is it different?" Bates Dep., 26:12-14. Dr. Bates replied as follows:

> I gave the assessment and diagnosis of chronic back pain and failed back syndrome; so I am in agreeance [sic] with the diagnosis that was presented in this note you referenced. I'm also in agreeance what he [Dr. Marano] put here: Noting multiple work injuries, the last being May 2011, close to that area.

Id. at 26:25-27:5.

46. Counsel persisted by asking Dr. Bates whether Claimant's chronic back pain was simply the result of the natural progression of a chronic degenerative process of the lumbar spine. Bates Dep., 38:23-39:4. Dr. Bates replied as follows:

> I think it has more factors than that. He's had two surgeries. Back in those two – at least those two prominent injuries resulting in surgery would have a component of his pain. The subsequent injuries after his last surgery would be a component of his pain. The degenerative components in there, the age and mileage, that can definitely be a component of pain.
>
> But I would list some of the other ones just as I have. There's been significant – he has a significant history to his back, of what's gone on with his back.

Id. at 39:5-15. Dr. Bates confirmed his opinion by testifying that the factors that he had described "all contribute or can contribute" to Claimant's present condition. *Id*. at 40:3.

47. **January 30, 2015 IME.** On January 30, 2015, Dennis Chong, M.D., examined Claimant and prepared a report of an IME, at Employer and Surety's request. Ex. OO. Dr. Chong reviewed Claimant's past medical records related to his industrial injuries through 2014, conducted a physical examination of Claimant, and took a medical history. He determined that Claimant was at maximum medical improvement. Ex. OO:580.

48. Dr. Chong noted that Claimant had "longstanding chronic low back pain" that was well documented in his medical records review. He diagnosed Claimant as follows:

1. Preexisting multilevel lumbar spine degenerative disease and spondylosis. This is not related to, caused by or aggravated by the industrial event of December 7, 2010.
2. Status post lumbar spine decompression surgery in 2001 and 2008.
3. Lumbar sprain/strain, related to the industrial event of December 7, 2010.
4. Chronic mechanical low back pain as a result of the natural progression of chronic degenerative process of the lumbar spine.

Ex. OO:584-585.

49. **Vocational Assessment**. On February 12, 2014, Delyn D. Porter, M.A., CRC, CIWCS,[10] delivered a vocational evaluation report concerning the Claimant, at his attorney's request. Ex. KK. To prepare his report, Mr. Porter interviewed Claimant on November 25, 2013. He reviewed Claimant's extensive medical records and IME reports. He also reviewed the following: ICRD records; Social Security Administration Notice of Award dated November 11, 2011; Social Security Administration Itemized Statement of Earnings – January 1995 to December 2010; First Street Welding Pay Stubs 01/2008 – 06/2011; *Guide to the Evaluation of Permanent Impairment*, 6th Edition; Idaho Department of Labor; *Dictionary of Occupational Titles*; O*NET; Idaho Career Information Systems (eCIS); *Selected Characteristics Defined in the Revised Dictionary of Occupational Titles* (SCODRDOT); *New Guide for Occupational Exploration*; *The Revised Handbook for Analyzing Jobs*; and *Rehabilitation Consultant's Handbook, Revised*. Ex. KK:476-478. Prior to being deposed, Mr. Porter also reviewed the hearing transcript and the depositions of Dr. Bates and Dr. Walker. Porter Dep., 15:22-16.

[10] Mr. Porter is a Certified Rehabilitation Counselor (CRC) and a Certified Worker's Compensation Specialist – Advanced Level (CIWCS). He holds a Master of Arts, Rehabilitation Counseling, from Western Washington University, and a Bachelor of Arts, Sociology, from Idaho State University. From 1991 to 2006, he served as Vocational Rehabilitation Counselor for the Idaho Division of Vocational Rehabilitation. From 2006 to 2010, he served as a Rehabilitation Consultant for the Idaho Industrial Commission. He has served as a private vocational rehabilitation counselor/consultant since January 2011. Porter Dep., Ex. 1.

50. Mr. Porter noted that Claimant had dropped out of high school in 1974 during his senior year, obtained his GED in 1980, and had completed welding certification courses in 1978-1979. This was the full extent of Claimant's education. Ex. KK:484.

51. Mr. Porter observed that Claimant had worked for First Street for a total of 36 years, had suffered numerous industrial injuries over the years, and had also been diagnosed and treated for a variety of non-industrial medical conditions. He further noted that a modified duty job site evaluation was reviewed and approved, however an offer of employment by First Street was contingent on Claimant being able to function without narcotic pain medications, which he had not been able to achieve. Ex. KK:485.

52. Mr. Porter noted that Claimant's permanent work restrictions imposed by Dr. Bates placed Claimant in the limited sedentary – very limited light work categories. He further noted that a residual functional capacity profile completed as part of Claimant's vocational assessment placed Claimant in the limited sedentary – limited light work capacity on a post-injury basis. *Id*. at 500.

53. Mr. Porter cited numerous factors constituting employment challenges for Claimant including "his preexisting impairments and work restrictions, his non-industrial medical issues, his age, his limited work history outside welding/fabrication, his limited educational background, and influx of additional job seekers that are pursuing the same positions that the claimant is eligible to pursue." *Id*. at 502. Based upon his age of 57 years at the time of his report, Mr. Porter observed that Claimant was an older worker and that in "the labor market, as you get older you become less marketable." Porter Dep., 14:1-7.

54. For the available labor market area, Mr. Porter considered a 50 mile radius from Claimant's address in Iona, Idaho. He noted that Claimant had worked as a metal

fabricator/welder for First Street for 36 years, and between 2002 and 2011 he worked under permanent work restrictions that limited him to a light – limited medium work capacity. First Street accommodated those restrictions, thus Mr. Porter considered First Street to be a sympathetic employer towards Claimant. He found it unlikely that any other employer in the job market would have been willing to employ Claimant in the welding/fabrication industry with such restrictions. Furthermore, he determined that Claimant would be unable to return to any of his past jobs without accommodations. Ex. KK:503-504.

55. Mr. Porter testified regarding the ability of Claimant to return to work as a welder or welding supervisor, as follows:

> Q. And he was a shop supervisor or something they called it out there. Seems to me that there would be a big call for a supervisor with all this experience.
> A. Except in eastern Idaho, most of your shop foremen or shop supervisors are working foremen or supervisors. They don't have somebody that just sits at a desk all day long and pushes papers and tells others what to do. Instead, they're out there helping them do the work and showing them what needs to be done as well.
> Q. That's based upon your experience in eastern Idaho?
> A. Yes.
> …
> A. Basically, looking at everything that I've looked at and considering my experience in the last twenty-five plus years of doing this, it's my opinion that he [Claimant] can't be a welder anymore.
> Q. That's based upon a reasonable degree of vocational probability?
> A. Yes.
> Q. Why can't he be a welder anymore?
> A. Because of the physical demands and positional requirements typically required of welding positions.
> Q. What restrictions are you using for that?
> A. Dr. Bates when he assigned the maximum fifteen pound occasional restrictions, the position restrictions requiring him to be able to move every fifteen to thirty minutes, those are Dr. Bates's restrictions is what I'm using to base that opinion on.

Porter Dep., 39:22-40:10; 40:15-41:8.

56. Based upon his labor market analysis, Mr. Porter found that Claimant had, on a pre-injury basis, reasonable access to and was competitive for approximately 22% of the total jobs in his labor market area. Using the permanent work restrictions and residual functional capacity profile identified for Claimant, Mr. Porter determined that Claimant would continue to have access to approximately only 2% of the total jobs in his labor market area, representing a 91% reduction in post-injury labor market access. Ex. KK:505.

57. For wage earning capacity, Mr. Porter determined Claimant's loss of wage earning capacity to be 39%, the difference between the reported pre-injury wage ($20.77 per hour) and Claimant's estimated post-injury median wage earning capacity of $12.70 per hour. Ex. KK:506.

58. Mr. Porter concluded his report by opining that Claimant was unable to return to any of his prior work settings. The jobs Claimant continued to qualify for were typically entry level, low wage jobs. Nevertheless, given his significant work restrictions, Claimant had a very limited ability to seek, pursue and maintain employment. Mr. Porter noted that even if Claimant were successful in securing employment, there were serious concerns about his physical capacity to work on a day to day basis up to 40 hours per week. Thus, Claimant's opportunities to return to work were so limited in quality, dependability, or quantity that a reasonably stable job market for him did not exist. It would be futile for Claimant to seek employment under such circumstances, which rendered Claimant permanently and total disabled as an odd-lot worker, in Mr. Porter's opinion. *Id*. at 507-508.

59. Mr. Porter reviewed Claimant's job search conducted in 2012 and also reviewed his hearing testimony concerning his job search. Based upon that review, Mr. Porter considered Claimant's job search to be "a more thorough search than most individuals go through," Porter

Dep., 49:9-10, because Claimant was "actually going out and contacting employers. He's not just sitting home feeling sorry for himself. He's actually speaking to people face-to-face. As you notice on there [job search list] he's got the names of individuals that he's spoken to. He's going – putting forth the effort to try to identify the work." Id. at 49:12-18.

60. **Claimant's Condition at Time of Hearing.** Claimant was unemployed and still receiving SSD at the time of hearing. Claimant continued to experience low back pain and radicular pain in both legs. During the hearing Claimant stood for a significant portion of his testimony due to his apparent back discomfort involved with sitting. His back condition required that he get up and walk or stand after brief periods of sitting during the hearing. Although he formerly walked in the desert for recreation and exercise as recently as 2014, at the time of hearing Claimant no longer did so because of his concern that his back might "lock up" and no one would find him if he fell down. He also quit hunting for the same reason. Claimant still walked for exercise but found that he could no longer walk long distances. He no longer engaged in dirt biking or snowmobiling because the vibrations would aggravate his back pain. Merely walking up a set of stairs was enough to aggravate Claimant's back pain so that he either had to sit down or lay down. Within the three months preceding the hearing, Claimant experienced an episode of his back "locking up" on him at home; he fell down and stayed on the floor overnight until he could get up. The "locking up" of his back occurred at least once every couple of months. While Claimant could successfully complete most activities of daily living, he occasionally had trouble bending over and tying his shoelaces. Any activities that involve bending or twisting (such as vacuuming) were generally ones that he avoided due to the concern of increasing his back pain. Claimant took Amitriptyline for back pain and still received periodic radiofrequency ablations to control his back pain. Although Claimant believed he could still

work in an office, he had limited computer skills and thus considered office work problematic. Claimant believed he could no longer engage in the bending and twisting that would be required to engage in welding. Tr., 82:19-107:4.

61. **Claimant's Credibility**. Having observed Claimant's testimony and demeanor at the hearing and having compared the same to 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 OF FACT

62. The provisions of the Workers' Compensation Law should 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 of the law leave no room for a narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Nevertheless, the Commission is not required to construe facts liberally in favor of the worker where the evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

63. **Medical Stability; Permanent Impairment.** As a prerequisite to determining whether Claimant has a disability in excess of impairment, the evidence must demonstrate that he is medically stable and that he has a permanent physical impairment. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422.

64. The evidence shows that Claimant was medically stable. The last physician who examined Claimant in an IME, Dr. Chong, found on January 30, 2015 that Claimant had reached

maximum medical improvement from his back injuries and that further treatment would be palliative only. Ex. OO:580. Further, there is no dispute regarding Claimant's medical stability.

65. Claimant has the following permanent physical impairments, as determined by his treating physicians and/or forensic examiners: a 5% whole person partial impairment due to his May 2, 1991 left knee injury, as found by Dr. Hume, Ex. NN:536; a 13% whole person impairment due to his back injury of December 28, 2000, of which 3% was apportioned to preexisting degenerative arthritis, resulting in 10% whole person impairment, as found by Dr. Walker, Ex. EE:396-B; a 13% whole person impairment due to his back injury of December 28, 2000, of which 50% was attributable to preexisting degenerative arthritis, resulting in a 7% whole person impairment due to his industrial injury, as found by Dr. Friedman, Ex. QQ:624;[11] a 10% whole person impairment due to his back injury of September 5, 2008, as found by Dr. Simon. Ex. DD:383; a 1% whole person impairment due to his left wrist injury of June 17, 2009, as found by Dr. Bates, Ex. FF:411; and a 17% whole person impairment, of which 13% was apportioned to preexisting degenerative conditions and previous injuries, resulting in a 4% whole person impairment due to his back injury of September 5, 2008, as found by Dr. Bates. *Id*. at 410.

66. Totaling the impairments assigned to Claimant results in the following computation:

Injury	Date of Injury	WPI
Left Knee	May 2, 1991	5%
Lumbar Back	December 28, 2000	13%[12]

[11] Dr. Walker disagreed with the apportionment of the impairment rating but conceded that 3% of the 13% whole person impairment he assigned to Claimant's December 28, 2000 industrial injury was due to preexisting degenerative arthritis, resulting in 10% whole person impairment attributable to his industrial condition. Ex. NN:538-539.

[12] Following the December 28, 2000 accident Dr. Walker proposed that Claimant suffered a 13% whole person rating referable to his low back, 3% of which is apportioned to pre-existing arthritis and 10% of which is

Lumbar Back	September 5, 2008		7%[13]
Left Wrist	June 17, 2009		1%
		Total Impairment	26%

67. In summary, Claimant sustained a whole person impairment in the total amount of 26% from all industrial injuries for which he received impairment ratings.

68. **Permanent Disability.** "Permanent disability" or "under a 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 (rating) 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 permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425.

69. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). 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 disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or

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referable to the 2000 accident. For this same injury Dr. Friedman too found that Claimant was entitled to a 13% PPI rating, but with 6.5% referable to a pre-existing condition and 6.5% referable to the subject accident. We do not deem it necessary to parse these opinions in order to come to a conclusion about how Claimant's 13% impairment rating should be apportioned between the 2000 accident and a pre-existing condition. Suffice it to say that the entire 13% impairment rating, on which there is agreement between Dr. Friedman and Dr. Walker, constitutes a pre-existing impairment for purposes of evaluating ISIF liability vis-à-vis the July 6, 2011 accident.

[13] Again, calculating the impairment ratings from two physicians for the same injury, Claimant's September 5, 2008 back injury, Dr. Simon's 10% WPI is averaged with Dr. Bates's 4% (after apportionment), yielding 7% WPI.

manifestation of the occupational disease, consideration being given to the diminished ability of the affected 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. The focus of a determination of permanent disability is on the Claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

70. The proper labor market to consider in evaluating Claimant's disability is the labor market in which Claimant resided at the time of hearing. *Brown v. Home Depot*, 152 Idaho 605, 609, 272 P.3d 577, 581 (2012). Whether Claimant has a permanent disability is a question of fact. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 280, 989 P.2d. 854, 856 (1997). Claimant bears the burden of proving that he has suffered a disability in excess of impairment. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 34, 714 P2d 1, 3 (1985).

71. In light of the factors outlined in Idaho Code § 72-430(1), the following facts are relevant to determine Claimant's permanent disability:

- Nature of the physical disablement: Claimant was significantly physically impaired by his various industrial back injuries, resulting in the loss of his 36 year employment with First Street. As a result of his cumulative back injuries and chronic degenerative lumbar spine, Dr. Bates limited Claimant to lifting 25 pounds on rare occasions; lifting 15 pounds on an occasional basis; bending, twisting, stooping and squatting on a rare basis only; and changing positions (sitting, standing, or standing/walking) frequently. Ex. FF:397-412.
- Cumulative effect of multiple injuries: From 2000 until 2011, Claimant sustained six successive injuries to his lower back. Two of those back injuries resulted in surgeries (2000 and 2008), impairment ratings, and work restrictions. Claimant also had degenerative changes to his lumbar spine that progressed during this period.
- Disfigurement: There is no evidence that Claimant has an observable disfigurement related to his industrial injuries.
- Claimant's age: Claimant was 59 years of age at the date of hearing. As an older worker, Claimant's opportunities for reemployment are significantly

disadvantaged in relation to younger workers who do not have physical impairments.

- Diminished ability of Claimant to compete in an open labor market within a reasonable geographical area: The evidence of Claimant's vocational expert, Mr. Porter, is un-rebutted and credible. He performed a vocational analysis in which he determined that as a result of his back condition, Claimant had sustained both a significant loss of labor market access and a significant loss of earnings capacity. Mr. Porter found that Claimant had suffered 91% reduction in post-injury labor market access and a 39% reduction in earning capacity. Ex. KK:505-506.
- Other Factors: Other significant factors to be taken into consideration and which demonstrate Claimant's disability in excess of impairment include the following: Claimant's working career was spent almost entirely with one employer, First Street, which significantly handicaps him in obtaining alternative employment as an older worker; Claimant continued to experience significant pain in his lower back and radicular pain in both legs for which he is required to take pain medication; Claimant had a high school education with only limited vocational education following high school in welding techniques which are not transferrable to other occupations; Claimant could not return to his career as a welder; Claimant's only other work prior to his welding career involved construction, trucking, and agriculture, occupations to which he could not return based upon his limitations; and Claimant had limited office and computer skills.

72. An injured worker's permanent disability is often determined by averaging his loss of labor market access with his reduction in earnings capacity. Mr. Porter's conclusion of Claimant's disability might be calculated at 65% (91% + 39% = 130% / 2 = 65%.). The Commission, however, has previously observed:

> Rating an injured worker's permanent disability by averaging her estimated loss of labor market access and expected wage loss, as Drs. Collins and Barros-Bailey have done in the instant case, can provide a useful point of reference. However, the averaging method itself is not without conceptual and actual limitations. As the loss of labor market access becomes substantial, and the expected wage loss negligible, the results of the averaging method become less reliable in predicting actual disability. For illustration, as judged by the averaging method, a hypothetical minimum wage earner injured sufficiently to lose access to 99% of the labor market may theoretically suffer no expected wage loss if she can still perform any minimum wage job. Calculation of such a worker's disability according to the averaging method would produce a permanent disability rating of only 49.5% ([99% + 0%] ÷ 2) even though her actual probability of obtaining employment in the remaining 1% of an intensely competitive labor market may be as remote as winning the lottery. The averaging method fails to fully account for the reality that the two factors are not fully independent.

> As the residual labor market becomes increasingly small, the disability rating obtained by the averaging method becomes increasingly skewed ….

Deon v. H&J, Inc., 2013 IIC 0034 at 14, 2013 WL 3133646 at 11–12 (Idaho Ind. Com. May 3, 2013).

73. In *Deon*, two vocational experts rated a loss of labor market access at 90%. In the present case, Mr. Porter opined Claimant's loss of labor market access is 91%. Under these circumstances, reliance on the averaging method alone underestimates Claimant's disability. Considering the record as a whole and given all of the factors enumerated above, Claimant herein has proven permanent disability inclusive of impairment of 80%.

74. **Total and Permanent Disability.** Claimant may prove total and permanent disability under either the 100% method or the odd-lot doctrine. Under the 100% method, Claimant must show that his medical impairment and nonmedical factors combine to equal a 100% disability. *Boley*, 130 Idaho at 281, 939 P.2d at 857.

75. 100% Method. Claimant's permanent disability equal 80%. Thus, Claimant has not proven total and permanent disability under the 100% method.

76. Odd-Lot. Claimant may also prove his total and permanent disability as an odd-lot worker. An odd-lot worker is one who is "so injured that 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, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984).

77. Establishing total and permanent disability under the odd-lot doctrine may be proved in any one of the three following ways: (1) by showing that Claimant has attempted other types of employment without success; (2) by showing that the Claimant or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or (3) by showing that any efforts to find suitable work would be futile. *Lethrud v. Industrial Special Indemnity Fund,* 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

78. Claimant has not attempted other types of employment. He has not worked since his employment with First Street ended in or about late July 2011.

79. Claimant began a search for work in 2011 that continued through 2012. While Claimant contacted many prospective employers, his job search was not successful. Thus, Claimant sought other work, however it was not available to him.

80. Based upon the totality of the circumstances, it would be futile for Claimant to attempt to find suitable employment. After 36 years in a single job at First Street, the prospects for Claimant gaining reemployment, given his significant impairments, work restrictions, limited transferable skills, high school education, and status as an older worker, are so minimal as to be virtually nonexistent.

81. Claimant has thus shown that he has met the second and third criteria of the *Lethrud* standard, 126 Idaho at 563, 887 P.2d at 1070, for demonstrating total and permanent disability through odd-lot status. Once Claimant establishes a *prima facie* odd-lot case, the burden shifts to ISIF "to show that some kind of suitable work is regularly and continuously available to the claimant." *Carey*, 107 Idaho at 112, 686 P.2d at 57. ISIF must prove that there is "an actual job within a reasonable distance" from Claimant's home which he is able to perform

or for which he can be trained, and that he has a reasonable opportunity to be employed in that job. *Lyons v. Industrial Special Indemnity Fund,* 98 Idaho 403, 407, 565 P.2d 1360, 1364 (1977).

82. ISIF has not made any such showing of an actual job within a reasonable distance from Claimant's home in Iona that he is able to perform or for which he can be trained and for which he has a reasonable opportunity to be employed. Therefore, Claimant has proven that he is totally and permanently disabled pursuant to the odd-lot doctrine.

83. **ISIF Liability**. Idaho Code § 72-332(2) provides that ISIF is liable for the remainder of an employee's disability income benefits, over and above the benefits to which an employee is entitled solely attributable to an industrial injury, when the industrial injury combines with a preexisting permanent physical impairment to result in total and permanent disablement of the employee.

84. In *Dumaw v. J. L. Norton Logging,* 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court held that there are four requirements a claimant must meet to establish ISIF liability under Idaho Code § 72-332: (1) whether there was indeed a preexisting impairment; (2) whether that impairment was manifest; (3) whether the alleged impairment was a subjective hindrance to employment; and (4) whether the alleged impairment in any way combines with the subsequent injury to cause total disability. *Dumaw,* 118 Idaho at 155, 795 P.2d at 317.

85. To determine ISIF liability under Idaho Code § 72-332, the nature of Claimant's preexisting permanent physical impairments on his disability status must be assessed as of the point in time immediately prior to the final industrial accident. *Colpaert v. Larson's, Inc.,* 115 Idaho 825, 829, 771 P2d 46, 50 (1989); *Ritchie v. Industrial Special Indemnity Fund,* IC 2008-014338, 2008-020389 (August 15, 2016) at 28 ("[F]or the purpose

of assessing ISIF liability, a snapshot of the extent and degree of claimant's permanent physical impairment is taken immediately prior to the industrial accident.")

86. Preexisting Impairment. It is Claimant's contention that he suffers from a number of "pre-existing impairments" which combine with the effects of the July 6, 2011 accident/injury to cause total and permanent disability. (*See* Claimant's Brief at 19, 20; Claimant's ISIF Complaint). As noted, a number of these impairments are the product of accidents which are included in this consolidated proceeding. In order to determine which of these impairments are "pre-existing" vis-à-vis his last industrial injury of July 6, 2011, it must be determined whether Claimant had reached medical stability for those injuries prior to July 6, 2011. If so, then those impairments can be treated as "pre-existing" for purposes of ISIF liability. On the other hand, if, for any of Claimant's prior injuries, he did not become medically stable until after the accident of July 6, 2011, impairment for those injuries would not be implicated for purposes of establishing ISIF liability. *See Quincy v. Quincy*, 136 Idaho 1, 27 P.3d 410 (2001). Here, the record establishes that prior to July 6, 2011, Claimant had been pronounced stable for his 2008 low back injury, his 2009 hand injury, and his 2010 low back injury. Concerning the low back injury of June 1, 2011, the record does not establish any objective evidence of injury resulting from that accident. Claimant does not appear to have received medical care referable to that accident. Claimant has not received an impairment rating referable to that accident, and the record does not reflect that Claimant was ever deemed to be in a period of recovery following that accident, and if so, whether he was ever deemed medically stable at some point following that accident. Assuming, arguendo, that Claimant suffered injury from the June 1, 2011, accident, but reached stability prior to July 6, 2001, there is no evidence of impairment related to the June 1, 2011 accident which would allow it to be considered in

connection with ISIF liability. If it be assumed that Claimant reached medical stability following the June 1, 2011 accident after July 6, 2011, an independent assessment of Claimant's entitlement to benefits for this injury would not yield any entitlement to disability benefits, since the evidence fails to establish that Claimant suffered impairment as a consequence of the accident of June 1, 2011. Absent evidence of permanent physical impairment, the issue of disability is not reached.

87. Manifest. Knowledge of an impairment by an employer is unnecessary for a condition to be manifest; rather, a condition is manifest when either the employer or the employee was aware of it so that the condition was established as having existed **prior to the work** injury. *Royce v. Southwest Pipe of Idaho, 103 Idaho 290, 294 647* P2d 746, 750 (1982). There is no dispute that Claimant's previous impairments, including his left knee injury, lumbar back injuries, and left wrist injury, were manifest at the time of his final lumbar back injury on July 6, 2011.

88. Subjective Hindrance. Claimant's May 2, 1991 left knee injury, although it resulted in a 5% whole person impairment, did not constitute a subjective hindrance to his employment. Dr. Hume, who surgically repaired the knee, did not assign any work restrictions as a result of the injury, nor did any subsequent forensic medical examiner or treating physician assign work restrictions attributable to this injury. Ex. NN:536. Furthermore, Claimant returned to work following surgery for the knee injury and continued to perform the same job as before, without any problems. Tr., 40:14-19.

89. Similarly, Dr. Wilson, who repaired Claimant's left wrist injury of June 17, 2009, did not assign any work restrictions to it. Ex. W. Although Dr. Bates assigned a 1% whole person impairment to Claimant's left wrist injury, and also certain work restrictions because of it,

nevertheless this occurred in 2013, long after Claimant stopped working. Ex. FF:411. There is also no other evidence that either Claimant or First Street considered the left wrist injury a hindrance to his employment. Thus, this injury did not constitute a hindrance to his employment.

90. Claimant's December 28, 2000 injury to his lumbar back presented a subjective hindrance to his employment. Following surgery due to the injury, Claimant received a diagnosis of failed back syndrome, and further received a permanent 30 pound lifting restriction with "very infrequent" bending or stooping as an additional permanent restriction. Ex. PP:610-612. Claimant's persistent use of narcotic pain medications began at this time, which eventually led, in part, to the termination of his employment at First Street. *Id.;* Tr.; 66-68:15. Furthermore, Claimant testified that upon returning to work, he did his "best" to stay within his assigned restrictions; wherever possible he obtained assistance from other employees in lifting heavy objects. Lifting requirements in First Street's shop included the occasional lifting of heavy metal objects weighing as much as 100 pounds, which Claimant was restricted from performing. Claimant also told Marvin Geib that he could not perform his work in the same manner as before Tr., 43:8-45:19.

91. Claimant's September 5, 2008 injury to his lumbar back did not constitute a subjective hindrance to his employment. The surgery following this injury was more successful than the previous surgery, and Dr. Simon assigned no additional work restrictions. He further opined that Claimant would have the same restrictions assigned by Dr. Cach after his December 28, 2000 back injury and surgery. Ex. DD:385. Furthermore, Claimant did not testify as to any further limitations after this injury or recovery from surgery, but rather indicated that he continued to do his best to work within his previously-prescribed limitations. Tr. 50:2-52:5.

92. The evidence thus shows that Claimant had a subjective hindrance to employment from at least one of his preexisting impairments, based upon his December 28, 2000 back injury.

93. Combination. To satisfy this element, the standard is whether, but for the last industrial injury, Claimant would have been totally and permanently disabled immediately following the occurrence of that injury. 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 preexisting impairment." *Bybee v. State, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

94. If Claimant were to be considered permanently disabled as a result of a combination of his preexisting impairments and his final industrial injury, such a finding must necessarily rely upon the evidence of Dr. Bates. No other physician opined that Claimant had additional functional limitations after his final injury.

95. Dr. Bates assigned no permanent physical impairment as a result of Claimant's July 6, 2011 industrial injury, because "there were no additional objective findings or things that would raise the class or grade of the impairment that he [Claimant] was given before." Bates Dep., 16:19-23. It is difficult to comprehend how Claimant's final industrial injury contributed to his disability or accelerated the deterioration of his lumbar spine if it did not merit an impairment rating.

96. While it is perhaps a fine point, it is troubling that Dr. Bates conflated Claimant's final industrial injury of July 6, 2011 with the one that preceded it on June 1, 2011. Dr. Bates apparently considered them to be a single incident when he referred to the "fourth injury or flare up in June and July of 2011." Ex. FF:411. As noted above, ISIF liability depends upon finding that a preexisting impairment combines with a "subsequent injury," meaning the last injury, or

that the "subsequent injury accelerates and aggravates the preexisting impairment." *Bybee*, 129 Idaho at 81, 921 P.2d at 1205. By failing to accurately identify the last workplace injury, Dr. Bates engenders doubt whether the combination necessary for ISIF liability results from Claimant's preexisting impairment together with the injury of July 6, 2011.

97. Counsel for ISIF queried Dr. Bates whether, upon examining Claimant two years later in 2013, he could really say that Claimant "has had permanent aggravation from these mid-2011 incidents." Dr. Bates replied in pertinent part that "the restrictions that were seen on physical exam were consistent with the medical records that I reviewed that he had continued to have complaints of pain. So this did appear that this was a new and different level of function than where he was at prior to that incident." Bates Dep., 22:7-19.

98. Dr. Bates' testimony presents an interesting conundrum. On the one hand, he believes that one or both of the 2011 accidents are sufficient to have permanently increased Claimant's previous limitations/restrictions. On the other hand, he is unable to say that Claimant's 2011 injuries caused objective worsening of Claimant's low back sufficient to warrant the award of a permanent physical impairment rating. Without evidence of an impairment rating for the last accident of July 6, 2011, can it be said that Claimant's pre-existing impairments combine with the injury of July 6, 2011 to cause total and permanent disability? In other words, must the last industrial accident result in a quantifiable permanent physical impairment before the "combining with" element of ISIF liability can be satisfied? The statute is not explicit about this. Idaho Code § 72-332(1) specifies:

> If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall

> be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account.

Therefore, in order to establish ISIF liability there must be a pre-existing "permanent physical impairment" which combines with a "subsequent disability by an injury or occupational disease" to cause total and permanent disability. While Idaho Code § 72-332(1) does not explicitly require the subsequent injury or occupational disease to result in a permanent impairment, it does require the subsequent injury or occupational disease to produce a "disability". Disability, as used in Idaho Code § 72-332(1) must, of necessity, refer to a permanent disability, or it would be pointless to consider the accident produced disability in the evaluation of the ISIF's responsibility for the payment of total and permanent disability benefits. Idaho Code §§ 72-422 through -425 make it clear that in order for the Commission to reach the issue of whether an injured worker has suffered a disability as a consequence of an accident/injury the existence of a permanent physical impairment is a necessary prerequisite. *LaBleu v. Challenger Companies*, IC 2013-01366 (November 2016); *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989). We believe this is further illustrated by the Commission's reliance on the *Carey* formula to apportion responsibility between employer and the ISIF. Absent the assignment of some type of impairment rating to employer for the July 6, 2011 accident/injury, application of the *Carey* formula would leave ISIF responsible for <u>all</u> of Claimant's residual 74% disability. This would be entirely inconsistent with the fact that ISIF liability cannot be predicated on anything less than a demonstration that Claimant's pre-existing impairments <u>combined</u> <u>with</u> the effects of the July 6, 2011 accident to cause total and permanent disability. In other words, if the Commission finds Dr. Bates' testimony persuasive that the July 6, 2011 work accident increased Claimant's limitations/restrictions such that Claimant is now totally and

permanently disabled as a result of the combined effects of the pre-existing impairment and the July 6, 2011 work accident, then apportionment of responsibility between the employer and the ISIF is frustrated by lack of an impairment rating referable to the July 6, 2011 work accident. Counsel for Claimant is cognizant of this difficulty. Citing to *Urry v. Walker & Fox Masonry Contractors*, *supra*, Claimant urges the Commission to award a 1% impairment to Claimant for the effects of the July 6, 2011 accident. In this fashion a *Carey* calculation can be performed, which assigns most, but not all, of the responsibility for Claimant's total and permanent disability to the ISIF.

99. Here, no physician felt that the objective evidence warranted the award of an impairment rating for the accident of July 6, 2011. Even Dr. Bates, who felt that Claimant's subjective presentation warranted the imposition of more onerous limitations/restrictions, did not deem it appropriate to award Claimant an impairment rating for the effects of the 2011 accidents.[14] While *Urry* instructs us that a physician's opinion is advisory only to the Industrial Commission, and that it is the Industrial Commission that is the ultimate evaluator of impairment, we are disinclined to make an award of impairment in this case, where Dr. Bates, the physician most sympathetic to Claimant's subjective sense of what he could and could not do, found that an impairment award for the 2011 accidents could not be justified. Impairment is a necessary prerequisite to a finding that Claimant has suffered permanent disability as a consequence of the July 6, 2011 accident, and absent a finding that Claimant is entitled to impairment for the effects of that accident, Claimant cannot satisfy the combining with component of the case against the ISIF.

[14] Moreover, it is not entirely clear that Dr. Bates related the increase in Claimant's limitations to the singular event of July 6, 2011. Dr. Bates appears to conflate the events of July 6, 2011 and June 1, 2011.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has permanent disability inclusive of impairment of 80%.

2. Claimant is totally and permanently disabled as an odd-lot worker.

3. ISIF is not liable for a portion of Claimant's permanent disability benefits pursuant to Idaho Code § 72-332(2).

4. Apportionment of ISIF liability under the *Carey* formula is moot.

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

DATED this 27th day of January, 2017.

INDUSTRIAL COMMISSION

____/s/_____
Thomas E. Limbaugh, Chairman

____/s/_____
Thomas P. Baskin, Commissioner

____/s/_____
R.D. Maynard, Commissioner

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of January, 2017, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** were served by regular United States Mail upon each of the following:

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