BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID HOGMIRE, Claimant, v. STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2013-033304** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed June 1, 2017

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-referenced matter to Referee Michael E. Powers, who conducted a hearing in Boise on May 17, 2016. Claimant was present and represented by David M. Farney of Nampa. Paul J. Augustine of Boise represented Idaho Special Indemnity Fund (ISIF). Employer/Surety settled prior to hearing. Oral and documentary evidence was presented and the record remained open for the taking of four post-hearing depositions. The parties submitted post-hearing briefs and this matter is now ready for decision. Because the Commissioners disagree with the Referee's analysis on ISIF liability, specifically the "combines with" section, 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 as the result of the hearing are:

1. Whether Claimant is totally and permanently disabled, and if so,
2. Whether ISIF bears any responsibility for that disability, and, if so,

3. Whether apportionment pursuant to the *Carey*[1] formula is appropriate.

CONTENTIONS OF THE PARTIES

Claimant contends that he is totally and permanently disabled pursuant to the odd lot doctrine. He further contends that ISIF is liable for a portion of that total disability in that his pre-existing impairments combine with his last industrial injury to create total disability.

ISIF responds that there was no combination here and that if Claimant is totally and permanently disabled, he was such prior to his last industrial accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the hearing.

2. Claimant's Exhibits (CE) A-X admitted at the hearing.

3. ISIF Exhibits 1-5 admitted at the hearing.

4. The post-hearing depositions of: Matthew DiVietro, D.O., taken by Claimant on June 6, 2016; Kevin R. Krafft M.D., taken by Claimant on June 10, 2016; Douglas Crum, CDMS, taken by Claimant on July 20, 2016; and Barbara Nelson, M.S., CRC, taken by ISIF on August 2, 2016.

FINDINGS OF FACT

Claimant's Hearing Testimony:

Background

1. Claimant was 58 years of age and residing in Middleton at the time of the hearing. He was raised in the Treasure Valley. Claimant attended Caldwell High School

[1] Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984).

through the 11th grade and then Job Corps in Curlew, Washington to learn heavy equipment operation. He did not graduate and has not obtained his G.E.D.

2. Claimant then returned to the Treasure Valley and worked generally as a laborer including hand-stacking 60- to 100-pound bags of sugar at Amalgamated Sugar and rebuilding automobile engines for Key West Engine Rebuilding.

3. Claimant then attended BSU's truck driving school and graduated after completing 600 hours. He obtained his CDL with hazardous materials, double and triples, and air brakes endorsements. In the early 1990s, he obtained employment hauling triples with various loads throughout the Pacific Northwest as well as other local truck driving jobs. He then commenced employment with Employer hauling cement-related product beginning in 2004.

Pre-existing injuries/conditions

4. Claimant broke his **left ankle** in the early 1990s resulting in three surgeries but not significantly interfering with his truck driving duties.

5. Claimant broke his **right wrist** while working for Employer in 2005. He was assigned a 4% whole person PPI rating and was released to return to truck driving work without restrictions.

6. Claimant underwent **bilateral carpal tunnel releases** on the same date with no residuals.

7. Claimant underwent **gall bladder** surgery without residuals.

8. Claimant developed double pneumonia that resulted in **Stevens-Johnson syndrome**[2] in the late 1970s. He had the lower lobe of his left lung surgically removed

[2] While Claimant and some of the medical records refer to Stevens-Johnson syndrome,

in the early 1980s. He was off work for a year-and-a-half post-surgery. Claimant then went to work emptying septic tanks without any problems. Claimant eventually worked for Amalgamated Sugar where he stacked bags of sugar. He could do the job but was not as fast as other workers. Claimant attributed his "huffing and puffing" to his being overweight, rather than his lung condition.

9. Claimant testified that his lung condition posed no problem regarding his work at rebuilding motors or truck driving. However, in 2009, Claimant presented to the emergency room in McCall during an elk hunting trip due to his not taking his hypertension medication for five days. His oxygen level was low and he was released without being admitted and was given an oxygen cannula. Claimant then returned to his regular work with Employer consisting of 12-14 hour days without difficulty.

10. In December 2009, Claimant saw a pulmonologist, Dr. Crowley, who performed pulmonary function testing. Dr. Crowley did not impose any restrictions on Claimant and Claimant does not remember whether or not Dr. Crowley prescribed any medications. Claimant testified that he did not experience any problems climbing in and out of his truck cab or in doing pre-trip inspections. He did, however, need to "slow down" when chaining due to his lung condition. Also, Claimant always carried an oxygen tank with him in his truck in case he experienced dusty conditions or other situations where he needed to work at a faster than usual pace.

Dr. Matthew DiVietro, a pulmonologist, testified that the correct name for Claimant's condition is Swyer-James syndrome. That syndrome occurs when an underlying pulmonary infection causes permanent, irreversible damage to a lung or lungs resulting in a residual poor functioning lung condition.

The accident

11. On December 4, 2013, Claimant was putting away a hose on his truck when his right shoulder "snapped." He came under the care of Howard Shoemaker, M.D., who diagnosed a torn right rotator cuff and a split bicep. After physical therapy and a cortisone injection, Dr. Shoemaker referred Claimant to Andrew Curran, M.D., an orthopedic surgeon, who recommended surgery. Based on Claimant's poor oxygen readings pre-surgery, the anesthesiologist would not approve the surgery and referred Claimant to pulmonologist Dr. Matthew DiVietro.

12. Claimant first saw Dr. DiVietro on April 15, 2014 at which time he informed Claimant, "He come in there and he says, son, you're going to die."[3]

> Q. Did he explain further?
>
> A. I'm all choked up over that. He says my oxygen level is really low in my blood system and so he explained that and said if you don't do something now you're going to die. So, he prescribed Fariba (phonetic), which is a pill you can crush and get the powder out - -

HT p. 72.

13. Claimant continued treating with Dr. DiVietro; however, Dr. DiVietro has never approved Claimant for right shoulder surgery due to the weakness of his lungs, particularly on the left. Dr. Curran will not perform the shoulder surgery without Dr. DiVietro's approval.

14. After his shoulder injury, Employer provided Claimant with light duty work involving fork lift driving and customer service at its Meridian terminal. However, it was dusty with sand and cement inside the warehouse causing Claimant to "bark and cough" so he quit; not because of his shoulder injury but because of his lung condition. "I never

[3] While Dr. DiVietro's office note of April 15 describes Claimant's pulmonary condition as severe, the Commission can find no reference therein to Claimant's imminent demise.

- - but when I couldn't handle the dust anymore and start [sic] and started hacking up the phlegm and the - - whatever you would cough up, you know, I just couldn't do it no more." HT p. 76.

15. Employer eventually terminated Claimant's employment but was told to re-apply once his medical condition stabilized. He was found to be eligible for Social Security Disability benefits and receives $1,427 a month. Claimant does not believe he can return to truck driving due to his right shoulder injury in that it would be difficult climbing into a truck's cab by pulling himself up and in. He would also have problems handling the hoses needed to transport cement products as well as chaining, steering, and shifting to higher gears.[4]

16. As a result of his right shoulder injury, Claimant can no longer participate in archery and sold all of his archery equipment. There are some aspects of engine rebuilding Claimant could do but could not return to washing truck trailers.

17. Regarding Claimant's lungs, Claimant testified that Dr. DiVietro told him to only use his oxygen cannula as needed, especially when doing strenuous activities.

18. In spite of being diagnosed with obstructive sleep apnea, Claimant disagrees with that diagnosis. However, there were times when Claimant was driving for Employer when he would pull over to take a short "power nap" when feeling sleepy.

19. Regarding some jobs that have been identified as suitable for Claimant, he testified that a job at a sporting goods store might be difficult based on his lack of skill in sales. He could drive a passenger vehicle without problems if he could keep his right elbow close to his body.

[4] Claimant testified that if his right shoulder was "fixed," he could return to truck driving with his lung condition.

Cross examination

20. Claimant testified that it has only been a month that he started using his nose cannula when needed. He admitted using the cannula during his November 16, 2015 deposition. Claimant denied that he was told that on the last date he saw Dr. DiVietro (February 2016), he was to be on supplemental oxygen even at rest. Claimant also denied that Dr. DiVietro told him that he had severe obstructive sleep apnea. Claimant denied being tired during the day in 2009 that prompted Dr. Crowley to order a sleep study which was never accomplished. Claimant testified that he told Dr. Crowley that he only experienced shortness of breath with exercise even though his records indicate that Claimant told him he experienced shortness of breath at rest.

21. Claimant testified that he told Dr. Crowley that he did not have any difficulties with sleep in spite of Dr. Crowley's records to the contrary. He also never told Dr. Bressler about any sleep problems. Claimant began taking Nuvigil, a stimulant, in May 2013, not because he was sleepy, but because it helped him stay "alert." Claimant was unaware that Dr. Bressler, in preparing Claimant's DOT medical paperwork in May 2013, described him as a young, robust male appearing his stated age. Claimant does not recall that he saw Dr. Bressler in September 2013 (before Claimant's right shoulder injury) for severe asthma, hypertension, metabolic syndrome with diabetes, poorly controlled obstructive sleep apnea, and morbid obesity. Claimant was not aware that his pulmonary function tests between 2009 and 2014 worsened.

22. Claimant admitted that he used his supplemental oxygen while driving for Employer in 2009, but did not remember telling Dr. Crowley that using it made him more aware and alert.

23. Claimant recalled going to the ER at West Valley Medical Center in January 2013 complaining of breathing problems. He denied using more supplemental oxygen in early 2013 than before, contrary to the ER records. Claimant was given an EKG, a chest x-ray, and supplemental oxygen. ER staff wanted to provide more treatment; however, Claimant left the ER against medical advice.

24. In February 2014, Dr. Bressler, per his records, informed Claimant that because he required continuous supplemental oxygen, he probably should not be working. Claimant does not remember Dr. Bressler telling him that he should not be working.

25. Dr. DiVietro referred Claimant for a sleep study in May 2014. Claimant does not remember telling Dr. DiVietro that he had a snoring problem (although his records so indicate) but Dr. DiVietro also believed a need for the study was Claimant's pulmonary hypertension and severe underlying obstructive lung disease.

26. Claimant completed a questionnaire associated with his sleep study and testified that he did so honestly. He answered that he occasionally wakes up tired. Even though he was not allowed to, Claimant took power naps. He agreed that 81% oxygen saturation when sleeping without supplemental oxygen was below what his doctor wanted and is unchanged from the study to the present.

27. Claimant does not remember telling defense counsel at his deposition that Dr. DiVietro told him that he could return to "minimal work. If I was to go back to work it would be really, really, really light work. Sedentary work." HT p. 124.

28. Claimant testified that he uses supplemental oxygen at night: "I don't have to, but I use it." *Id.* He acknowledged that he used his supplemental oxygen cannula at

his deposition, during the interviews with Barbara Nelson and Doug Crum, and, in fact, has used his cannula constantly since November 2014.[5]

29. Claimant testified in his deposition that he was not aware of DOT regulations regarding driving and lung function, but, nonetheless, testified that his lung function would not disqualify him from driving jobs. He admitted that, because rescue inhalers do not always work while driving, in such instances he would either take a power nap or breathe supplemental oxygen.

30. Claimant applied for Social Security Disability in June 2014. Claimant and his wife filled out a questionnaire. One question concerned how his illnesses, injuries, or conditions limited his ability to work. Although Claimant testified that he did not remember, Claimant answered that he could not breathe. He stated he was unable to climb on trucks and trailers, his oxygen saturation level was low and he was not safe to drive a truck.

31. Claimant testified that it was his pulmonary hypertension combined with his right shoulder injury that created his Social Security Disability. However, he also testified that the only disabling condition mentioned in his SSD application was his pulmonary hypertension. He "doesn't recollect" or "doesn't know the rules" as reasons why he did not mention his shoulder injury in his application.

[5] Defense counsel intimated that Claimant did not wear his cannula to the hearing because, by that time, Claimant was aware that he needed to downplay his pulmonary condition to satisfy the "combined with" prong of establishing odd lot status. While possible, the Referee was reluctant to make a specific finding in that regard. The Commission will not disturb the Referee's observational credibility assessment; Defendants' intimation of gamesmanship is not persuasive.

Medical Testimony:

Matthew DiVietro, D.O:

Direct examination

32. Claimant took the deposition of Dr. DiVietro on June 6, 2016. Dr. DiVietro is board certified in internal, pulmonary, and critical care medicine and is employed by Pulmonary and Critical Care at St. Luke's in Boise. He is qualified to testify as an expert witness in this matter.

33. Dr. DiVietro first saw Claimant in April 2014 as a referral from Dr. Curran regarding Claimant's "…pulmonary risk stratification prior to rotator cuff repair surgery." Dr. DiVietro Depo., p. 7. Upon examination and evaluation of Claimant, Dr. DiVietro reached the following diagnoses:

> So I thought that he had numerous chronic pulmonary conditions. When he presented, he was severely hypoxemic, meaning on room air, his oxygen saturations were very low, and he needed supplemental oxygen, And I think that that was his baseline pulmonary condition.
>
> And so I thought that was the most important thing for his initial visit, was to evaluate and start figuring out and treating underlying causes for his chronic lung disease.
>
> I thought he has severe obstructive lung disease. Clinically, he appeared to have obstructive sleep apnea, which is another formal diagnosis we can discuss. And then I thought he had underlying pulmonary hypertension, which is secondary to those two previous mentioned conditions.

Id., p. 8.

34. Dr. DiVietro compared pulmonary function tests done in 2009 with tests done in 2014 and found Claimant to be suffering from very severe, end stage, COPD.

Dr. DiVietro also diagnosed Claimant with Swyer-James Syndrome[6] which he described this way:

> It is - - generally, it is a clinical diagnosis where somebody has an underlying pulmonary infection, usually early in life. But that infection infects the lungs, causes permanent damage of the airways and remodeling of the lungs, and then they have kind of permanent, irreversible damage to a lung from that infection.
>
> His history fit with that. He had a pulmonary infection in the 1970s. He had a subsequent surgical procedure, which is what you'd often do to try and resect some of the non-viable lung, and then your left over residual poor functioning lung condition.

Dr. DiVietro Depo., p. 10.

35. Dr. DiVietro was concerned that because Claimant was severely hypoxemic and oxygen dependant, he may be unfit for commercial truck driving. He was aware that Claimant drove a fork lift in a dusty environment while on light duty after his shoulder injury and that such an environment likely exacerbated his lung condition.

36. Dr. DiVietro also diagnosed Claimant as having severe obstructive sleep apnea probably more associated with Claimant's obesity than anything else. Severe obstructive sleep apnea can also lead to chronic hypoxemia.

37. Dr. DiVietro also diagnosed Claimant with pulmonary hypertension which he explained as follows:

> My impression - - and we can talk about this - - is one of the other things I mentioned is, I think he has a component of something called pulmonary hypertension. And so pulmonary hypertension is a remodeling of the right side of the heart and the pulmonary vasculature in the lungs.
>
> And when you get chronic lung conditions, notably severe obstructive lung disease and severe obstructive sleep apnea, you get remodeling and you get elevated blood pressure in the pulmonary

[6] Dr. DiVietro's notes initially refer to Steven Johnson Syndrome; however, in his deposition he testified that Steven Johnson Syndrome was a typo and the correct name is Swyer-James Syndrome and his later notes reflect the correct name of Claimant's condition.

> vascular bed. That leads to dysfunction of the right side of the heart, which is what feeds the pulmonary vascular bed. And so any low oxygen level puts stress on the heart.
>
> So based on my assessment, I thought he had underlying pulmonary hypertension. I thought that any episodes of hypoxia or physical exertion was putting stress on his heart. So he may have felt like he could do the work, but my concern was that he was sicker than he realized.

Id., p. 24.

38. When only considering Claimant's pulmonary situation and not his right shoulder injury, Dr. Divietro opined that Claimant could perform a "desk job," get in and out of the cab of a truck (assuming he was on supplemental oxygen), could steer a truck, and perform other light duty work if such is considered to consist of lifting 20 pounds up to a third of the workday, 10 pounds up to two-thirds of the workday, and 5 pounds more than two-thirds of the workday with supplemental oxygen. It would also be reasonable for Claimant to stand/walk two-thirds of the workday two hours at a time. Claimant could also work as a security guard (so long as not actively involved in capturing and/or detaining) and in light production work. He can walk up to two hours at a time, four times per shift with standard breaks. Dr. DiVietro testified that Claimant "… did not have insight into how advanced his lung disease was." Dr. DiVietro Depo., p. 35. That lack of insight impacts Claimant's subjective assessment of what he can and cannot do on a physical level.

Cross examination

39. Dr. DiVietro testified that Claimant's taking Nuvigil, a stimulant to help him stay awake during the day due to his sleep apnea, coupled with his need for supplemental oxygen, would have led him to not sign off on Claimant's DOT medical examination allowing him to drive commercial vehicles.

40. Dr. DiVietro explained that a pulmonary function test consists of various measurements tied to percentages of normal lung function:

> Yeah. So it's normal lung function. So everybody has - - there's a standardization scale of somebody's expected, you know, lung capacity should be or airflow ability should be. And so for COPD, we base it off of their spirometry, which is their airflow. So if they take a large breath in, what is the volume of air that they can breathe in, what is the volume of air that they can exhale in one second, and then continuously.
>
> So it's, you know, airflow over time is how we graph it. And so you have severe obstruction - - obstructive lung disease, his being asthma or COPD from different reasons - -
>
> * * *
>
> - - the longer it takes you to blow your air out. So the longer time for your airflow to exhale shows your degree of obstruction.
>
> * * *
>
> Yes, so to speak. We also look at - - so there's two things that you factor in. You look at the forced vital capacity, which is the FTV, and then the most - - the other point number is the FEV1. So that's the forced expiratory volume in one second. So how much can you get out in the first second of exhalation.

Dr. DiVietro Depo., pp. 41-42.

41. If the percentages discussed above decrease over time, that means Claimant's overall pulmonary condition is worsening. Even though Claimant either downplays or is not aware of the seriousness of his pulmonary condition, Dr. DiVietro, nonetheless, prescribed continuous supplemental oxygen as of February 2016 for <u>any</u> exertion level. If compliant, Claimant would have to wear a backpack with an oxygen canister or put the canister in an out-of-the-way place while working. He would need to wear a <u>nose cannula at all times</u>.

Kevin R. Krafft, M.D.

Direct examination

42. Dr. Krafft is a local physiatrist who is board certified in physical medicine and rehabilitation, electrodiagnostic medicine, and sports medicine. He has given testimony before the Commission on a number of occasions and is qualified to testify as an expert in this matter.

43. Dr. Krafft first examined Claimant, at his attorney's request, on January 20, 2015. He was asked to evaluate Claimant's pulmonary condition as well as his right shoulder condition. Dr. Krafft obtained the following history regarding Claimant's pulmonary condition:

> It dated back to 1978. And he had a history of double pneumonia. Which resulted in some scarring in his lung. He indicated that he thought it was from working in a freezer at the time. He had had shortness of breath since that time and had significant symptoms. He also was spitting up mucus and phlegm. And had difficulties with functional activities like hiking and swimming. He couldn't walk very far. He said he required a fair amount of rest after a block of walking. He also said that the weather increased his symptoms. And he had to use oxygen at night and most of the day to sustain his 02 saturation.

Dr. Krafft Depo., p. 6.

44. Dr. Krafft reviewed Claimant's prior medical records (pulmonary function tests being the most important) to arrive at a 45% whole person PPI rating for Claimant's lung condition prior to December 4, 2013. Dr. Krafft generally agrees with Dr. DiVietro's assessment of Claimant's physical capabilities stemming from his pulmonary functioning.

45. Claimant gave Dr. Krafft the following history regarding his right shoulder injury:

> "He said he was working at Handy Truck Lines and was putting everything away. And as he was putting away his hot line hose, as he termed it, he lifted it up and felt immediate pain in the top of his shoulder. So that is when he reported it to his boss."

Dr. Krafft Depo., p. 12.

46. Dr. Krafft diagnosed Claimant with having a full-thickness right rotator cuff tear and a split bicep tendon. He assigned a 7% upper extremity PPI that equates to a 4% whole person PPI rating.

Cross examination

47. Dr. Krafft acknowledged that after he calculated Claimant's pulmonary PPI in 2015 he had limited Claimant to sedentary work (lifting 10 pounds occasionally and seated at least two-thirds of the workday) as a result of that condition which pre-existed his 2013 shoulder injury. By the time of his deposition, Dr. Krafft had "modified" the 10 pounds to 20 pounds lifting. While pulmonary function testing will show lung functioning, such tests will not show a capacity for work. For that, one would need a functional capacity evaluation as well as knowledge regarding the work that was actually being performed.

48. Claimant informed Dr. Krafft that he used his oxygen canister at home at night and most of the day which would be consistent with Claimant's pulmonary issues.

49. Dr. Krafft conceded that he based his pulmonary PPI rating solely on Claimant's 2009 pulmonary function test and his examination of Claimant. He was unaware that Claimant went to an ER in 2013 complaining of dyspnea, worse with exertion. Dr. Krafft was also unaware that Claimant's pulmonary function tests between 2009 and 2014 actually worsened.

50. Dr. Krafft performs DOT medical examinations on occasion and was asked:

> Q. If a driver has severe obstructive sleep apnea, they have sleeplessness during the day, requires a prescribed stimulant such as Nuvigil, and they have very severe COPD as reflected in the 2009 PFT's [sic], would you sign off on a DOT physical for that person?
>
> A. I would refer to a pulmonologist.
>
> Q. And he said he wouldn't. Would you agree with that?
>
> A. Yes. If that is what he said.

Dr. Krafft Depo., p. 37.

51. Dr. Krafft acknowledged that whatever work Claimant may perform, he would need constant supplemental oxygen through a nose cannula.

Vocational testimony:

Douglas N. Crum, CDMS:

Direct examination

52. Mr. Crum's credentials are well known to the Commission and need not be repeated here. He is qualified to testify as an expert witness in this matter.

53. In March 2015, Claimant retained Mr. Crum to prepare a vocational assessment. Mr. Crum prepared two reports (CE T, February 9, 2016 and CE U, April 26, 2016) based on Claimant's history as well as vocationally pertinent records listed in his reports. He also reviewed the deposition transcripts of Drs. DiVietro and Krafft as well as the hearing transcript.

54. Mr. Crum identified the following medical conditions that preceded Claimant's December 4, 2013 right shoulder injury:

> The record indicates that he had some - - let's see, he had some bilateral carpal tunnel syndrome and some bilateral surgeries. I think he has testified that didn't result in any restrictions. He had a couple of eye injuries. He had a wrist - - another wrist injury, I believe. He had hypertension, he was morbidly obese. He may have had obstructive

sleep apnea. It had been kind of tentatively diagnosed, but he never had a sleep study before the injury.

* * *

He had a left ankle fracture and surgery without restrictions or impairment. He had a right wrist fracture without restrictions or impairment.

Mr. Crum Depo., p. 7.

55. Mr. Crum testified as follows regarding Claimant's educational background:

> Mr. Hogmire completed the 11th grade, but did not graduate from high school. He left school and went into a Job Corps program for, I think, several months, but didn't complete that either. He's never completed a GED. I don't know that he's ever attempted one. In 1992 he attended Boise State University's truck driving program and completed it and then later became a commercial truck driver after getting a CDL. Mr. Hogmire has basic literacy skills. He's able to read in a functional manner. He's able to perform basic mathematics and is proud that he knows how to run a calculator, I think. And he has no computer skills to - - that are vocationally relevant. He essentially doesn't type. I think he testified that he has an email account, but he doesn't know how to get into it. He's never taken a computer class, so . . .

Mr. Crum Depo., pp. 8-9.

56. Mr. Crum recorded the following employment history:

> In the mid to late 1970s he worked at an engine rebuilding business in Caldwell called Key West Engine Builders, basically, tearing down engines and later on, I think, he operated an engine cylinder head resurfacing machine.
>
> From 1976 to '77 he worked as a warehouseman at a company called Flavor Freeze in Caldwell.
>
> In 1989 he worked at Clearwater Trucking in Boise as a truck driver.
>
> In the early 1990s he worked at Amalgamated Sugar as a laborer. And he testified that that involved quite a lot of repetitive and fairly heavy lifting.
>
> In 1990 to '93 he worked at Charlie Miller Trucking out of Caldwell as a truck driver.

> 1993 he worked for a relatively short time, I believe, at JR Simplot Corporation as a truck driver.
>
> In about '93 he worked as a laborer in a portable truck wash outfit, washing trucks and trailers - -semi trucks and trailers.
>
> '94 to 2004 he worked for Empire Transport in Meridian as a heavy truck driver pulling dry bulk loads full-time until the business closed.
>
> And then in 2004 until 2013 he worked at Handy Truck Lines as a heavy truck driver, again pulling dry bulk trailers, mostly in the, kind of, Intermountain Northwest.

Id., pp. 10-11.

57. Mr. Crum was not aware of any physical restrictions placed upon Claimant by any physician prior to his 2013 industrial accident and right shoulder injury. While able to perform the "major" aspects of his job at Employer's, Claimant did inform Mr. Crum that he had some difficulties such as shortness of breath when performing tasks rapidly, the need to take short naps to "recharge" after becoming tired during the day, and "sometimes" used bottled oxygen, all due to his pulmonary condition. Claimant self-modified some of his job duties, but Employer did not.

58. Based on an ICRD job description of Claimant's time-of-injury job and other factors such as Claimant's capacity for medium work, Mr. Crum opined that Claimant had access to 9.1% of the jobs in his labor market (Ada and Canyon counties) pre-accident.

59. Regarding Claimant's right shoulder injury, Mr. Crum understood the restrictions assigned by Dr. Krafft to be:

> Okay. Basically after the posthearing [sic] deposition testimony it actually became clear that Dr. Krafft feels that Mr. Hogmire has about a 20–pound unilateral - - no, bilateral lifting capacity, the ability to lift - - or to push and pull up to about 40 pounds using both arms. He recommends no overhead work with the right upper extremity. He recommended that Mr. Hogmire not use his right arm to pull himself up

> into a truck cab. He indicated that tasks such as steering a heavy truck which required reaching forward away from the core of his body was a bad idea for him. He indicated that, in general, when using his right upper extremity he should keep his right arm tucked in close to his body. I think that's about it, unless you want to remind me of some others,

Mr. Crum Depo., pp. 16-17.

60. Mr. Crum testified that there were a number of jobs within Claimant's labor market that he could perform when considering his pulmonary condition, solely:

> Okay. I think he could do some heavy truck driving jobs. I think he could probably do some bus driving type jobs. I think that he could - - I was thinking of forklift driver, but I think Dr. DiVietro indicated he didn't recommend that he be in an environment where there was a lot of dust and that sort of thing, so probably not that one. He could probably do some hand labor, hand-assembly type jobs, hand packing. He could probably do food processing jobs. He could probably do fast food cook work within those recommendations. He could do some food prep jobs, and he probably could do some dishwashing jobs within the recommendations.

Id., pp. 23-24.

61. Mr. Crum understood that Dr. Krafft severely limited Claimant's reaching with his right upper extremity and grasping and manipulating objects. When factoring in Claimant's right shoulder injury, he would be precluded from performing the jobs Mr. Crum identified in finding number 59 above.

62. Mr. Crum testified as follows regarding Claimant's employability when factoring in both his pre-existing pulmonary condition and his right shoulder injury:

> It's [his opinion] is sort of twofold. First of all, again, as an individual that had a preexisting pulmonary condition that was symptomatic and, you know, it was manifest, and then he had a shoulder injury, because of the preexisting condition he was unable to undergo a surgery that the doctors think would likely to have improved his function. And as a result he's given some very significant restrictions now, and based on those restrictions I believe that he's totally disabled.

> And then also you have the issue of the combination of the limitations for the shoulder combined especially with the limitations that have been given more recently mostly in sworn depositions. But again, those don't necessarily represent how he was at the time of injury.

Mr. Crum Depo., pp. 28-29.

63. Mr. Crum also opined that it would be futile for Claimant to engage in a job search.

Cross examination

64. Mr. Crum made the assumption in his first report that, based on Dr. Krafft's opinion as well as the ICRD time-of-injury job site evaluation (JSE) and Claimant's testimony, he was performing medium duty work immediately prior to his shoulder injury. However, Mr. Crum agreed that based on the 2009 pulmonary function tests, Dr. Krafft indicated that Claimant could only perform sedentary level work pre-accident.

65. Mr. Crum acknowledged that the ICRD JSE differed from Claimant's application for Social Security wherein he stated that the most he lifted at Employer's pre-accident was 20 pounds, yet the JSE indicated 100 pounds.

66. Mr. Crum did not review the Federal Motor Carrier Safety regulations as they related to pulmonary functionality. He relied upon the certification of a DOT approved medical examiner who had cleared Claimant to drive with his pulmonary condition and has no independent knowledge of what may or may not disqualify a driver with pulmonary issues. Mr. Crum has no reason to disagree with Dr. DiVietro's opinion that based on Claimant's pulmonary function tests, he would be disqualified from driving a commercial motor vehicle. Mr. Crum testified that as of the time of Claimant's industrial accident, based on Dr. Krafft's recommendations and the JSE, Claimant was

capable of driving a "heavy" truck; however, he does not believe Claimant is presently so capable. Further, Mr. Crum opined that Claimant's body habitus and unsophisticated demeanor does not create a favorable first impression making his job search much more difficult.[7]

67. Finally, Mr. Crum responded to the following question this way:

> Q. (By Mr. Augustine): Now, if we were to - - if Mr. Hogmire went into an employer and was as honest with them as an injured worker as he was with the Social Security Administration I want to ask you if you think he would be hired in any capacity based upon the following: That his condition - - his pulmonary condition limits his ability to work because he can't breathe, unable to climb on trucks, can't walk up stairs, and his oxygen level is chronically low so he's not safe to drive a truck. Would that preclude him from most employers obtaining employment if he went in and told the employer, "Hey, I can't breathe, I can't climb up stairs, I'm not safe to drive a vehicle, a truck."
>
> A. If that was all the information the employer had, it would probably be - - he probably would not be hired.

Mr. Crum Depo., pp. 66-67.

68. Mr. Crum was aware that Claimant did not list his right shoulder as a disabling condition in his application for Social Security Disability benefits.

Barbara Nelson, M.S., C.R.C.:

Direct examination

69. Ms. Nelson was retained by ISIF to assess Claimant's employability and disability status. Her credentials are well-known to the Commission and need not be repeated here. She is qualified to testify as an expert in this matter.

[7] Claimant's continuous use of a nose cannula would also have an impact on Claimant's first impression on prospective employers. Mr. Crum did not mention the continuous use of a nose cannula in either of his two reports because he was not aware that such usage was a medical requirement at the time he authored his reports.

70. Ms. Nelson reviewed relevant medical and vocational records, interviewed Claimant, and prepared a report dated April 8, 2016 (ISIF Ex. 3). A list of the documents reviewed by Ms. Nelson may be found at page 2 of her report. Materials reviewed after she prepared her report include Claimant's hearing testimony, his Social Security Disability application, the deposition testimony and report of Mr. Crum, as well as the deposition testimony of Drs. DiVietro and Krafft.

71. Upon interviewing Claimant, Ms. Nelson found him to be a nice man who does not present well due to his weight and hygiene, but, "…he's kind of a standup sort of guy." Ms. Nelson Depo., p. 9. Regarding Claimant's understanding of his medical condition, Ms. Nelson opined:

> It was fairly remarkable. He basically has the belief system that if you don't believe in something then you can't have it. So he doesn't really believe in sleep apnea or believe in diabetes or believe in asthma. So he doesn't believe he has it.
>
> And when you ask him about - - that the medical seem to contradict that opinion, he then tells you that he had a bad opinion about doctors and that they are quacks and he doesn't really believe them.

Ms. Nelson Depo., pp. 9-10.

72. Regarding Claimant's subjective complaints, Ms. Nelson observed:

> You know, he said it [his right shoulder] really isn't too bad on his day-to-day life. He told me he was able to fish and he was able to do a little bit of hunting and that he was able to do housework, some housework and some yard work. But he said that he did need to give up bow hunting and that he - - the times that he gets pain in the shoulder mostly is when he reaches overhead. And that he gets what he calls a zinger, which is a sharp pain.
>
> Q. Now what did he tell you about his pulmonary condition, his lung condition?
>
> A. He said he really can't do much physically because of that condition.

Id., p. 10.

73. Ms. Nelson was aware that Claimant suffered from preexisting chronic bronchitis, asthma, obstructive sleep apnea,[8] obesity, Type II diabetes,[9] hypoventilation syndrome, hypertension and right wrist limited range of motion issues.

74. Ms. Nelson testified that since Claimant's industrial accident, in January 2014, DOT changed its rules regarding DOT physicals required to obtain a CDL. Previously, there was no requirement that physicians performing such examinations be certified and specially trained in rules and regulations involving truck driving. Ms. Nelson was critical of Dr. Bresser, Claimant's family physician who approved his DOT physical in May 2013, for painting a different picture of Claimant's physical capabilities than matched reality and that Dr. Bressler was trying to help Claimant keep his job. Ms. Nelson opined, based on Dr. DiVietro's testimony and his 2009 pulmonary functions testing, that Claimant's pulmonary function alone would have prevented him from obtaining a DOT medical card in 2013.

75. Ms. Nelson also opined that Claimant's uncontrolled sleep apnea alone would have disqualified him from commercial truck driving.

76. Ms. Nelson expressed some concern regarding Claimant's application for Social Security Disability benefits in that he never even mentioned his right shoulder injury; he only mentioned his pulmonary difficulties as preventing him from working.

[8] The Referee noted Claimant's view of his conditions differed from his medical notes. For example, even though a sleep study confirmed that Claimant has obstructive sleep apnea, he is adamant that he does not have that condition or that he has sleepiness during the day, in spite of complaining of such and being prescribed medications to keep him awake during the day.

[9] Again, Claimant denies that he has Type II diabetes and asserts that medication generally prescribed for that condition was merely to help him lose weight and not to treat diabetes. While arguably lacking self-awareness of his limitations, the Commission notes that the Referee did not find Claimant testified in an effort to deceive.

77. Ms. Nelson discussed Claimant's nonmedical factors she found to be vocationally relevant to include his 11th grade eduction which testing showed to be about a 7th grade level that is not highly functional and a 4th grade math level meaning he would need a low-level job or a sedentary job not involving clerical or bookkeeping functions. His lack of computer skills will have a negative impact on employment opportunities. Claimant's work history demonstrates that even with a lack of education and skills, and his health problems; he has always found work and has supported his family.

78. Regarding Claimant's use of a nose cannula, Ms. Nelson testified, "You know, I don't think I can think of anything that is more significant to a prospective employer or anyone that meets someone that's on oxygen, anything that signifies illness more than, you know, he can't breathe without that. It's very much a red flag to a prospective employer. Ms. Nelson Depo, p. 31.

79. Ms. Nelson opined that Claimant was unemployable when considering his nonmedical factors and his pulmonary restrictions alone:

> Because of the fact that doesn't bring much to the table to start out with. He doesn't have a lot of skills. He doesn't have good grammar. His education is not of a high school graduate or a GED. And then he appears ill. He does not look good. And it comes with the oxygen.
>
> And I just believe that any reasonable employer would conclude this is a person that probably is not going to be able to do this job for very long. He's not going to be able to show up every day. I don't think he's going to be dependable. He just doesn't look well.

Id., pp. 31-32.

Cross examination

80. Ms. Nelson testified that she understood that, pre-right shoulder injury, he was driving truck (with power naps and medication to keep him awake) but did not meet

the criteria for being medically qualified to do so due to his pulmonary function. Claimant was impaired by exertion that caused him to experience shortness of breath. He also had difficulty with prolonged standing. Ms. Nelson did not provide a loss of labor market analysis because she assumed Claimant was permanently disabled at the time of his accident meaning that he had no access to any labor market.

81. In reviewing the jobs or job categories that Mr. Crum indicated might be appropriate for Claimant, Ms. Nelson could find none for which Claimant was qualified or for which he would be hired, or for which he was physically able to perform due to his pulmonary condition alone.

DISCUSSION AND FURTHER FINDINGS

There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment together with the relevant nonmedical factors totals 100%. If a claimant has met this burden, then total and permanent disability has been established. The second method is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. Boley v. State Industrial Special Indemnity Fund, 130 Idaho 278, 281, 939P.2d 854, 857 (1997). An odd-lot worker is one "so injured the he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." Bybee v. State of Idaho, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), *citing* Arnold v. Splendid Bakery, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). 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), *citing* Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

82. The Commission finds that Claimant has proven that his combined medical impairments of 45% pulmonary, 4% right wrist and 4% right shoulder as well as the nonmedical factors equal 100% as of the time of the hearing.

Idaho Code § 72-332 provides:

> **Payment for second injuries from industrial special indemnity account, --** (1) 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 [or her] 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.
>
> (2) "Permanent physical impairment" is as defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or occupational disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become unemployed. This shall be interpreted subjectively as to the particular employee involved, however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

There are four elements that must be proven in order to establish liability of ISIF:

1. A pre-existing impairment;

2. The impairment was manifest;

3. The impairment was a subjective hindrance to employment; and,

4. The impairment combines with the industrial accident in causing total disability. Dumaw v. J.L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990). Regarding the "combines with" element, the Idaho Supreme Court has held that the "but for" standard is the appropriate test to determine whether the total disability is the result of the combined effects of the pre-existing condition and the work related injury. Garcia v. J.R. Simplot Co., 115 Idaho 966, 970, 772 P. 2d 173,177 (1989).

83. The Commission finds that Claimant has satisfied the first three prongs of *Dumaw*, supra. Claimant had pre-existing impairments of Swyer-James syndrome as well as from a right wrist injury resulting in impairment but no restrictions. Claimant's lung condition was manifest and constituted a subjective hindrance to employment as evidenced by his need for supplemental oxygen and stimulants and power naps to stay awake during the day.

84. The determinative question presented here is whether or not Claimant's pre-existing lung condition combined with his right shoulder injury to render him totally and permanently disabled. In order to evaluate the "combines with" prong, it is necessary to determine the extent of Claimant's pre-existing physical impairment at a time immediately prior to the industrial accident. *See* Colpaert v. Larson's Inc., 115 Idaho 825, 829, 771 P.2d 46, 50 (1989). Colpaert lends no support to the proposition that in evaluating ISIF liability for a pre-existing but progressive condition, that condition should be assessed as of the date of hearing, i.e. at a time when Claimant's condition is much worse. Thus, notwithstanding the progression of Claimant's pulmonary condition, the Commission is concerned with the pulmonary condition as of the time immediately preceding the work injury.

85. There is conflicting evidence on the severity of Claimant's pre-existing pulmonary condition, and whether that alone would take him out of any relevant labor market before his industrial accident causing injury to Claimant's right shoulder. In reasoning that Claimant's pre-existing pulmonary condition alone rendered Claimant totally and permanently disabled without combination with the subject accident, Ms. Nelson and Dr. DiVietro were highly critical of Claimant's awareness about his pre-industrial accident pulmonary condition, and that Claimant should not have been driving truck prior to his industrial accident. Ms. Nelson sharply criticized Dr. Bressler's issuance of a DOT driver's license for Claimant prior to the industrial accident, suggesting that the same was done inappropriately. Both opinions suggest that Dr. Bressler unwisely rubber-stamped Claimant's DOT request, and that Dr. Bressler reversed his 2013 DOT endorsement only after the industrial accident to maximize Claimant's pursuit of benefits. While the Commission is familiar with instances of inappropriate meandering into legal advocacy from providing appropriate medical treatment and judgment, the Commission cannot find such evidence of bias or self-serving motivation in Dr. Bressler's opinions after reviewing the medical records for the following reasons.

86. First, this case is distinct from Hanson v. United Parcel Service, Inc., and ISIF, 2014 WL 2750033 (May 14, 2014). Like Claimant, Ms. Hanson's job responsibilities included driving trucks. Ms. Hanson testified that notwithstanding her vision problems, she "begged" her treating physician for a release because she was adamant about going back to work. Ms. Hanson insisted that she was "safe enough to [drive]." Ms. Hanson's assessment of her physical ability to drive safely was,

unfortunately, false, and in November 2005, Hanson was involved in a car accident while at work deemed avoidable by her employer, and related to worsening double vision (diplopia). It is not clear that this accident was ever communicated to Dr. Iwasa, the physician responsible for endorsing Hanson's IDOT release, but Dr. Iwasa testified that he would have restricted her from driving if he had known that Hanson believed her diplopia had interfered with her vision such that she got into a car accident. Unfortunately, Ms. Hanson was not entirely forthcoming about her limitations or the interference her vision condition (diplopia) had on her driving, and did not relay this information to her treating physician. The Commission concluded that the ISIF was not liabile for Ms. Hanson's disability, because her vision condition alone rendered her totally and permanently disabled. Here, Dr. Bressler's record is not contradicted by Claimant's *actual* job performance prior to the industrial accident. Claimant did not have any truck driving accidents during the period in question. If Claimant was so inappropriately suited for truck driving in the years prior to 2013 then one might have expected an accident to have occurred over the years of Claimant driving absent exceptional luck. While it is possible that Claimant's accident-free status is due to luck, the facts give the Commission pause to accept the opinion of Dr. DiVietro over Dr. Bressler, where the situation predicted by Dr. DiVietro's assessment did not occur.

87. Second, there is no testimony that Claimant secured the DOT endorsement by concealing his medical condition from Dr. Bressler, and Dr. Bressler did not denigrate his previous issuance of a DOT license based on newly discovered information about Claimant's medical condition as the treating physician in Hanson did. For reasons unknown to the Commission, Dr. Bressler was not deposed. While Dr. DiVietro's

testimony was competent, his assessment of Claimant was made in hindsight, and is less persuasive that the contemporaneous assessment of Claimant's treating physician. Dr. Bressler has treated Claimant since 2005. (C. Exh. C., p. 37). Claimant may be less self-aware of his limitations than what Ms. Nelson or Dr. DiVietro would like, and Claimant is not a particularly detailed historian, but there is simply no evidence that he had to "beg" his treating physician to issue the endorsement, or that Claimant benefitted by *intentionally* omitting crucial details about his condition, such as a car accident caused by declines in a pre-existing condition, like Ms. Hanson did.

88. Third, Dr. Bressler sought additional medical expert input, and his issuance of a DOT license was not contradicted by Dr. Crowley's 2009 pulmonary assessment. Prior to the industrial accident, Dr. Bressler referred Claimant to a pulmonologist, Dr. Crowley, who happened to work at the same clinic (Idaho Pulmonary Associates) as Dr. DiVietro currently does. On December 7, 2009, Dr. Crowley had occasion to assess Claimant's pulmonary function. Dr. Crowley was aware that Claimant "drives truck and occasionally needs a micronap" and that Claimant was taking "Provigil". However, Dr. Crowley *did not restrict* Claimant from truck driving, or recommend that Dr. Bressler rescind or alter the DOT license. Even though this evaluation occurred in 2009, it is an independent opinion from a second physician that strongly refutes that Dr. Bressler was engaged in inappropriate patient advocacy. Further, the Commission cannot accept that both doctors would have constructed such a medical opinion to aid Claimant's case against the ISIF years later.

89. Finally, while Claimant's pulmonary condition was concerning prior to his industrial accident, it was not static. There is the argument that Claimant's February

2014 evaluation by Dr. Bressler more accurately captures his pre-injury pulmonary condition than Dr. Bressler's May 2013 DOT evaluation, because the latter was performed closer to the industrial accident. As stated above, in February 2014, Dr. Bressler, per his records, informed Claimant that because he required continuous supplemental oxygen, he should not be driving. However, under Colpaert, the Commission's focus for ISIF liability involving progressive pre-existing conditions is the time immediately preceding the industrial accident, and the Commission will not retroactively apply the February 2014 evaluation to define Claimant's pre-existing pulmonary condition over the May 2013 assessment where Claimant received his DOT clearance.

90. Of course, it cannot be known to what extent the recommended shoulder surgery will improve Claimant's condition or what his eventual functionality will be with the treatment, because such treatment cannot occur due to Claimant's pulmonary condition. Hence, Claimant is between the proverbial "rock and a hard place" where his post-shoulder surgery condition is unknown, and his pulmonary condition is not expected to improve to allow him medical treatment that could rehabilitate his employment opportunities. Ms. Nelson's reliance on Claimant's recent medical evaluations to define Claimant's medical needs prior to the industrial accident make her testimony less persuasive on the "combines with" analysis. Mr. Crum was forthright about the obstacles Claimant would face in obtaining employment, noting Claimant's unsophisticated demeanor, body habitus and lack of previous aptitude for or interest in sales, cashiering, or any other indoor type of work. However, Mr. Crum ultimately opined that Claimant's pre-existing pulmonary condition combines with his industrial right shoulder injury to

render Claimant totally and permanently disabled. C. Exh. T, p. 238. While acknowledging that this is a close case, the Commission finds Mr. Crum's vocational opinion persuasive. Claimant has satisfied the "combines with" element of ISIF liability.

Carey Apportionment

91. The Idaho Supreme Court has adopted a formula dividing liability between the ISIF and the Employer/Surety at the time of the industrial accident in question. The formula provides for the apportionment of nonmedical disability factors by prorating the nonmedical portion of disability between the ISIF and the Employer/Surety in proportion to their respective percentages of responsibility for the physical impairment. Carey v. Clearwater County Road Department, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984). Based on Mr. Crum's evaluation, the Commission finds that Claimant's right shoulder and his pre-existing pulmonary condition combine to render him totally and permanently disabled. Therefore, impairment ratings for these conditions are relevant to application of the Carey formula. Dr. Krafft proposed a 4% rating referable to Claimant's right shoulder, and a 45% rating referable to his pre-existing pulmonary condition. Thus, Claimant's impairments for Carey apportionment total 49%, leaving 51% residual disability to apportion between the parties. Claimant's last industrial accident is responsible for 4% of Claimant's residual disability (4/49 x 51%). Therefore, Employer's total responsibility for accident-produced disability is 4% PPI plus 4% disability, or 8% disability.

92. Claimant was clearly totally and permanently disabled as of the date of hearing of May 17, 2016. Defendant has not brought facts to our attention suggesting that Claimant was also not totally and permanently disabled as of the date of his medical

stability, and so we find. Claimant reached maximum medical improvement following his shoulder injury on September 23, 2014.[10] He is entitled to total and permanent disability effective that date. Past precedent endorses the start of total and permanent disability benefits as of, or close to, the date of maximum medical stability, rather than delay payment of total and permanent disability benefits until the date of hearing. (*See* Dohl v. PSF Industries, Inc. v. State of Idaho, Industrial Special Indemnity Fund, 127 Idaho 232 (1995); Quincy v. Quincy, 136 Idaho 1 (2001) (The Referee found Claimant permanently disabled as of the day *after* the date of medical stability from the last accident.)) Under Carey, had Employer not settled its obligation via LSSA, it would be responsible for the payment of forty (40) weeks (500 x 8%) of Claimant's permanent disability benefits at 55% of the average state wage (ASW) for the year of injury, as anticipated by Idaho Code §§ 72-428 and 72-429. For this 40 week period, ISIF is liable for the payment of the difference between the payment of partial permanent disability and total and permanent disability calculated pursuant to Idaho Code § 72-408. Thereafter, ISIF shall pay all total and permanent disability benefits owed to Claimant pursuant to Idaho Code § 72-408, for the rest of Claimant's life.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven that he is totally and permanently disabled.

2. Claimant has shown the ISIF is liable because his preexisting impairment was manifest, constituted a subjective hindrance, and combined with his right shoulder injury to result in his total and permanent disability.

[10] This is the date Dr. Krafft rated Claimant's PPI for his shoulder injury.

3. For the 40 week period of September 23, 2014 through June 30, 2015, ISIF is liable for the payment of the difference between the payment of partial permanent disability and total and permanent disability calculated pursuant to Idaho Code § 72-408. Thereafter, ISIF shall pay all total and permanent disability benefits owed to Claimant pursuant to Idaho Code § 72-408, for the rest of Claimant's life.

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

DATED this 1st day of June, 2017.

INDUSTRIAL COMMISSION

___/s/_____
Thomas E. Limbaugh, Chairman

Participated but did not sign
_____
Thomas P. Baskin, Commissioner

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

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of June, 2017, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

RICHARD S OWEN
PO BOX 278
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PAUL J AUGUSTINE
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BOISE ID 83701

___/s/_____