BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KEVIN R. SMITH Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2007-002698** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed July 7, 2017

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Coeur d'Alene, Idaho, on May 17, 2016.[1] Claimant was represented by Starr Kelso, of Coeur d'Alene. Thomas Callery, of Lewiston, represented State of Idaho, Industrial Indemnity Fund ("ISIF"), Defendant. Oral and documentary evidence was admitted. Post-hearing depositions were taken and the parties thereafter submitted briefs. The matter came under advisement on June 6, 2016.

ISSUES

At hearing, the parties acknowledged the issues to be decided are:

1. Whether Claimant is totally and permanently disabled;

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

[1] This is the second hearing in this matter. The first was held by Referee Taylor on October 27, 2008, and dealt with the limited issue of whether Claimant was entitled to Idaho Code § 72-451 benefits for psychological injuries stemming from his admitted industrial accident. The findings from that hearing, published in April 2009, are discussed in greater detail herein.

3. Apportionment under the *Carey* Formula, if applicable; and

4. Whether Claimant's claim is barred by Idaho Code § 72-706.[2]

CONTENTIONS OF THE PARTIES

Claimant argues he is totally and permanently disabled due to the effects of his pre-existing impairment of his ankles, his left wrist injury sustained in January 2007, and an overarching mental condition. Defendant is responsible for apportioned benefits equal to Claimant's pre-existing impairments as they relate to Claimant's total disability. Claimant's complaint was timely filed.

Defendant argues Claimant failed to establish the requisite criteria for recovery under Idaho Code § 72-332 and related case law, and as such is not liable to Claimant for any benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's hearing testimony;

2. Claimant's Exhibits (CE) A through Z, and AA through DD, admitted at hearing;

3. Defendant's Exhibits (DE) 1 through 5, and 7 through 16, admitted at hearing[3];

4. The post-hearing deposition transcript of Edward Tapper, M.D., taken on July 12, 2016;

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[2] Although Defendant reiterated at hearing its desire to include the statute of limitation issue under Idaho Code § 72-706, it presented no argument to contradict Claimant's evidence establishing the timely filing of his complaint, and inapplicability of the statute. The issue is deemed waived by Defendant.

[3] Defendant's proposed Exhibit 6 was renumbered as 16 at hearing, and proposed Exhibit 17 was excluded as being untimely submitted.

5. The post-hearing deposition transcripts of William Jordan and Dan Brownell, taken on November 1, 2016; and

6. The Industrial Commission file and record in this matter, including the exhibits admitted at the first hearing.

All objections, including motions to strike, preserved during the depositions are overruled, with the exception of Claimant's objection to allowing deponent William Jordan to "read and sign" his deposition, which objection is moot and therefore not ruled on, since Mr. Jordan made no corrections.

Having considered the evidence and briefing of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

BACKGROUND, INCLUDING RELEVANT PREVIOUSLY PUBLISHED FINDINGS

As footnoted above, Referee Taylor conducted a previous hearing in this matter, and Findings of Fact and Conclusions of Law flowed therefrom. Those facts and legal conclusions are binding, and serve as a framework herein. While all such facts and legal conclusions are incorporated herein by reference, certain facts and conclusions are reiterated, summarized, and/or paraphrased herein to provide clarity. Additional facts from the 2016 proceedings are also included as required to support the conclusions.

1. Claimant was born in 1972 and is left hand dominant.

2. In July 1997, while living in Lake Tahoe, California with his then-pregnant wife, Claimant fell approximately 20 feet from his apartment balcony when a railing he was leaning on gave way. He landed on his feet and shattered both heels. He received extensive medical treatment, including surgery, from Edward Tapper, M.D., and was confined to

a wheelchair for approximately one year. Claimant was unable to work for well over a year. His wife became the family's sole breadwinner.

3. Due to the family's reduced income, Claimant and his wife were evicted from their apartment several months later and lived in their car with their two-month old daughter for a few days before moving into an inexpensive motel. During Claimant's recovery from his fall, Dr. Tapper refused to prescribe narcotics for pain relief, explaining that narcotics may aggravate depression and that Claimant was "emotionally decompensated." Dr. Tapper repeatedly told Claimant that his left ankle was probably destroyed beyond repair.

4. For approximately eighteen months after the fall Claimant was largely unable to ambulate. After his fractures healed, Claimant was left with residual heel pain and reduced standing tolerance.

5. Prior to this accident, Claimant had a history of changing employment repeatedly, remaining at most jobs a relatively short time; however he typically had no trouble finding work. Claimant demonstrated impulsivity, (he was fired from two jobs for badmouthing his employer's wife), but also demonstrated ambition and a strong work ethic. He was rarely without employment for significant periods. At the time of his fall, Claimant was employed in the construction field.

6. When he was able to reenter the workforce, Claimant determined that he could no longer perform general construction work, which required him to be on his feet continually. Claimant sought and obtained employment and on-the-job training in plumbing. This was less demanding on his feet. Over the next several years, Claimant lived in Lake Tahoe and later in Reno where he worked as a plumber and supported his wife and their two children comfortably.

7. In 2006, Claimant and his family relocated to Coeur d'Alene. He thereafter commenced working as a plumber for Garland.

8. On January 15, 2007, Claimant fell and injured his left wrist when he slipped on ice while loading his work truck. He was initially treated for left wrist sprain and possible radius fracture and assigned light-duty work. Further diagnostic testing suggested a dorsolunate fracture fragment and a scapholunate ligament tear. In July 2007, Peter Jones, M.D., performed left wrist surgery and removed the fracture fragment. Dr. Jones found the scapholunate ligament intact but noted post traumatic degenerative changes. Garland terminated Claimant's employment a few days after surgery. Claimant's attitude and emotional stability began to deteriorate.

9. After a period of recuperating from surgery, Claimant attempted a minor plumbing repair in his own home and discovered that his left wrist continued to be too painful to effectively use a screwdriver. He concluded he could no longer work as a plumber and became very concerned about how to provide for his family given his residual foot limitations and the new limitations of his dominant left hand. Claimant's concern grew into anxiety; he experienced difficulty sleeping and began withdrawing from usual interactions with his family. His anxiety increased further as he was unable to identify any viable employment options to support his family and began to consider his situation hopeless.

10. By September 2007, Dr. Jones noted that Claimant was borderline suicidal. Dr. Jones referred Claimant for psychological evaluation for depression. Ruth Milbee, a nurse case manager provided by his employer/surety (employer), helped arrange for Claimant to be seen for psychological issues by psychiatrist David Wait, M.D.

11. At employer's request, James Brinkman, M.D., performed an

independent medical examination on September 20, 2007. He was concerned by Claimant's apparent depression and encouraged referral to a psychiatrist for evaluation or treatment of anxiety and depression.

12. On October 10, 2007, Claimant presented to Dr. Wait, who diagnosed a single episode of severe major depression. Dr. Wait prescribed Celexa and encouraged hospitalization, or at least weekly counseling. Claimant declined hospitalization but agreed to counseling. Dr. Wait noted that Claimant had a longstanding pattern of being a self-starter, that he suffered fairly significant wrist pain limiting his ability to lift or carry, and that Claimant's depression stemmed from his inability to return to work. Claimant falsely denied any history of substance abuse, including marijuana.[4]

13. On October 29, 2007, Defendants authorized five psychiatric visits. Claimant treated with Dr. Wait who recommended that he continue counseling with Emily Hart, M.Ed., LCPC. Claimant counseled with Hart on three occasions in December 2007. Claimant told Hart a number of falsehoods, including that he had lived in Holland, had changed his name, and had committed past crimes in retaliation against others who had wronged his friends. Claimant falsely denied being the victim of physical abuse as a child. In his deposition, when confronted with his fabrication, Claimant explained that he considered Hart attractive and desired to impress her.

14. On December 12, 2007, Joseph Welch, M.D., found Claimant's left wrist condition medically stable and rated his permanent impairment at 9% of the upper extremity.

15. By early 2008, Claimant was receiving counseling and medications from

[4] The record, including the 2009 Findings of Fact, illustrate Claimant's significant marijuana use, as well as Claimant's continual denial or minimization of the same.

Idaho Department of Health and Welfare Region 1 Mental Health Services (MHS).

16. On May 26, 2008, Claimant and his wife were arguing at home when he became violently angry. He broke kitchen chairs, threw ash trays and pancake batter everywhere, overturned tables, broke an interior door, threw clothes from a closet, and broke window blinds. His wife fled their home with their children and called Claimant's psychological counselor who called police. Claimant left his home briefly and smoked marijuana. Upon returning to his home, Claimant was taken into temporary custody by police and evaluated for involuntary commitment at Kootenai Medical Center Behavioral Health by Eric Heidenreich, M.D. Dr. Heidenreich diagnosed major depression, recurrent, severe. Claimant reported to Dr. Heidenreich that he lived in Holland in his early twenties, where he used marijuana regularly and also tried LSD. Claimant has apparently never lived in Holland. Claimant did not meet the criteria for involuntary commitment and was released.

17. On June 23, 2008, Claimant was seen at MHS by Jill Megow, LCSW, who assessed frustration and severe depression with accompanying anger. She noted that Claimant had tested positive for marijuana twice since representing that he last used it over four weeks earlier on May 26. On June 24, 2008, Claimant and his wife both attended a counseling session and adamantly denied Claimant was using marijuana, expressing extreme anger over their perception that MHS had failed to assist Claimant. In subsequent visits over the next few weeks, Claimant was seen by Megow, psychiatrist Jennifer Rhodes, M.D., and Marie Parkman, Psy.D. Dr. Rhodes prescribed various medications, some of which Claimant tried, disliked, and discontinued and others which Claimant refused.

18. Claimant was subsequently stopped for speeding in Oregon and also charged with possession of marijuana. On July 18, 2008, Claimant attended a counseling session at MHS

with Robert Bishop, LSW, where Claimant was "very stressed out due to charges against him in Oregon for child endangerment and possession of marijuana."

19. MHS assisted Claimant in applying for Social Security Disability benefits. On August 4, 2008, he underwent a Disability Determination Evaluation by Dr. Parkman, Jill Megow, and Dr. Rhodes. After pointed inquiry, Claimant acknowledged that he was struggling with quitting marijuana.

20. By the time of the 2008 hearing, Claimant was still undergoing counseling at MHS but testified that he felt worse after each session. Claimant has been prescribed various medications, all of which Claimant ultimately discontinued or refused.

21. Having observed Claimant at hearing, and carefully examined the record, Referee Taylor determined that Claimant is not a credible witness.[5] Claimant's two positive marijuana tests at MHS, his charge for possession of marijuana in Oregon, and finally his admission on August 4, 2008, that he was struggling with quitting marijuana indicate that Claimant has not been truthful about the extent of his marijuana abuse. Claimant has also been intentionally untruthful with several of his counselors on multiple occasions, including Emily Hart, Dr. Waite, Dr. Parkman, and also to a lesser extent Drs. Rehnberg and Klein, regarding his past residences, past and current drug abuse, and exposure to past physical abuse. Taken collectively, these instances of dishonesty, and several others, indicate that Claimant fabricates, at least occasionally, when he perceives it is to his advantage to mislead. The frequency of this behavior cannot be ascertained with certainty.

22. The independent medical evidence does support the fact that Claimant's psychological conditions, including depression, are real and genuine, although his 2007

[5] The undersigned completely agrees with such assessment based upon the record, even if not bound by precedent.

industrial accident is not the predominant cause of his psychological condition when weighed against all other causes combined, as found by the Commission in 2009, when it denied Claimant Idaho Code § 72-451 benefits, for the reasons set out below.

Dr. Klein

23. Employer at the 2008 hearing offered, and the Commission found more persuasive, the testimony of psychologist Ronald Klein, Ph.D. Dr. Klein evaluated Claimant on July 17, 2008, and reviewed his medical and psychological treatment records. He opined that Claimant suffers an Adjustment Disorder with anxious and depressed features, a Mixed Personality Disorder with emotionally dependent and narcissistic features, and significant financial and family stresses. He characterized Claimant's functioning like that of a maladjusted child. Dr. Klein testified that Claimant's psychological condition and depression are the product of many causes and that his work injury is not the predominant cause, as compared to all other causes combined. He opined that Claimant's psychological functioning was essentially the same before and after his industrial accident, and that the wrist injury had no impact on Claimant's psychological condition.

24. In arriving at his conclusion, Dr. Klein testified that Claimant's psychological disorders go back to his childhood. He noted that Claimant as a youth was subject to a series of horribly abusive, neglectful, and emotionally demoralizing relationships and that he was subject to such severe physical abuse that he was placed in temporary foster care. Dr. Klein testified that Claimant demonstrated impulsivity in beating up his stepfather, changing jobs frequently, and bad-mouthing the wives of two prior bosses (for which he was fired)—all prior to the wrist injury. Dr. Klein interpreted Claimant's work history, starting with his service in the Army and continuing until his industrial accident, as a series of

jobs interrupted by Claimant's behavioral outbursts which got him into trouble in the workplace. Dr. Klein noted that prior to Claimant's industrial accident he was repeatedly fired from jobs he had the knowledge and physical ability to perform, but was psychologically so maladjusted that he could not retain. He noted that Claimant repeatedly demeaned himself during his evaluative interview.

25. Dr. Klein opined Claimant's heel fractures were more physically disabling than his industrial wrist injury. He noted that Claimant's chief limitation presently is his own report of continuing left wrist pain in spite of medical treatment. Dr. Klein testified that the veracity of Claimant's reported wrist pain is undermined by multiple lies which Claimant has told to his medical providers. Dr. Klein opined that Claimant's repeated lies to his providers reveal his psychological functioning, emotional immaturity, and impulsivity. He observed that Claimant lied repeatedly to his providers to avoid responsibility for his actions or to attempt to impress one therapist whom he considered attractive. Dr. Klein noted that by lying to his providers, Claimant was misleading them and effectively sabotaging his own treatment.

26. The record substantiates Dr. Klein's opinion of Claimant's pre-accident impulsivity and adjustment disorder. However, Claimant demonstrated energy and ambition in finding work after his 1997 heel fractures. If Claimant's wrist injury had no impact on his psychological condition, it is difficult to explain why he rebounded from his heel fractures but not after his wrist injury.

Dr. Rehnberg

27. Psychologist Tim Rehnberg, Ph.D., testified for Claimant. While the Commission placed less weight on his testimony, in large part due to the fact his opinions were based upon inadequate and incomplete information, his expert observations are worth considering,

even if his conclusions are not afforded as much weight as Dr. Klein's.

28. Dr. Rehnberg evaluated Claimant on August 26 and September 12, 2008. He diagnosed Claimant with Major Depressive Disorder, Adjustment Disorder with Mixed Anxiety and Depressed features, Mixed Personality Disorder, and Pain Disorder. Dr. Rehnberg noted Claimant's history of major depression as outlined by Dr. Wait and Dr. Rhodes. He concluded that Claimant was psychologically impaired and emotionally volatile, with mood swings from depression to anger.

29. Dr. Rehnberg performed extensive psychological testing. Based upon his testing, Dr. Rehnberg opined that Claimant's intelligence was in the top 20% nationally and that Claimant is capable of college level training, after addressing his present psychological condition.

2016 HEARING TESTIMONY

30. At his May 17, 2016 hearing, Claimant updated his current status. He was currently living in Apple Valley, California. He moved to California in 2012 seeking help from his mother and siblings who lived there.[6]

31. At the time of hearing, Claimant was unemployed. He testified that his typical day entails helping his children get ready for school, taking them to various activities. He claims he does not feel safe driving, due to his lack of wrist strength in his left hand, so his daughter drives whenever possible. Claimant's hobbies include people watching and going to the library, where he reads. He also finds that "in coordination with" medical marijuana "going out in the middle of the woods or out where there's not many people and enjoy[ing] the five senses;

[6] There is a notation in the file that Claimant, when 20 years old, beat up his abusive step father, and has been estranged from his family since. The record is not clear if this is another example of Claimant making up stories to make him sound more impressive, or if it is true and his family later reconciled with him.

looking out as far as I can see, taking the smells in, taking something with me to eat" to be therapeutic. Tr. p. 89.

32. Shortly prior to the 2016 hearing, Claimant settled with his employer in this case. He then contacted the California Division of Vocational Rehabilitation, and sought a referral from his local doctor to get back into mental health therapy. During this same time frame, he registered with Job Services, Employment Development Division. By the time of hearing, he had yet to hear back from Voc Rehab, and had not yet attended any mental health programs. Claimant also checked into returning to college, (he is 13 credits short of an AA degree), but would have to pay back a PELL grant from when he was enrolled prior and failed or withdrew from two classes before he would qualify for further grants.

33. Claimant testified that he is "open and willing" to try whatever suggestions his vocational rehabilitation specialist makes, including returning to school now that he has the money to do so post-settlement, or participate in job training. He is "very hopeful" he can return to work with the help of the specialist. Tr. p. 86.

DISCUSSION AND FURTHER FINDINGS

34. Claimant asserts ISIF liability pursuant to Idaho Code § 72-332, which states in relevant part;

> (1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury … arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury … suffers total and permanent disability, the employer and its surety shall be liable for payment of compensation benefits only for the disability caused by the injury … and the injured employee shall be compensated for the remainder of his income benefits out of the ISIF account.
>
> (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 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.

35. Idaho Code § 72-422 defines a permanent impairment as "any anatomical or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation."

36. To establish ISIF liability, Claimant must prove his preexisting permanent physical impairment(s) combined with the subsequent industrial injury to cause total permanent disability.

PERMANENT DISABILITY

37. **"**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.

38. 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). In sum, 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).

39. Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Indus.,* 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund,* 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

TOTAL PERMANENT DISABILITY

40. The first prerequisite to ISIF liability is that the Claimant is totally and permanently disabled. *See e.g. Hope v. Indus. Special Indemn. Fund*, 157 Idaho 567, 571, 338 P.3d 546, 550 (2014); (*After* the Commission determines a worker is totally and permanently disabled, the worker must establish four elements to apportion liability to the ISIF….) (Emphasis added.) A finding of disability less than total, after taking into account all of Claimant's medical and non-medical factors which negatively impact his ability to engage in gainful activity, now and in the future, precludes the possibility of ISIF liability. The parties disagree on whether Claimant is totally and permanently disabled.

41. Total permanent disability may be established using either the 100% method or the odd-lot doctrine. Under the 100% method, Claimant must prove his medical impairment and non-medical factors combine to equal a 100% disability. Under the odd-lot doctrine, Claimant must show he was 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, absent business boom, the sympathy of the employer, temporary good luck, or a superhuman effort on Claimant's part. *See, e.g. Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984).

Total Disability under 100% Method

42. Claimant argues he is totally and permanently disabled under the 100% method due to his prior crushing injuries to his bilateral heels and attendant limitations, combined with his "minimal" use of his left hand and wrist after the subject industrial accident, and his psychological condition, which was impacted, but not predominately caused by Claimant's left wrist injury.

43. Claimant's heels and wrist are medically stable. On December 12, 2007, Dr. Welch found Claimant's left wrist medically stable and rated his permanent impairment at 9% upper extremity. In May 2015, Claimant requested an impairment rating for his lower extremities injuries from John McNulty, M.D. Dr. McNulty rated Claimant's calcaneus fractures at 22% left lower extremity and 10% right lower extremity impairment.

44. No physician has opined Claimant is permanently incapable of employment. Claimant has been given various restrictions for his physical injuries. While the record contains more than one expert opinion that Claimant will have a difficult time finding employment unless and until his psychological issues are treated, no expert has opined that Claimant's psychological condition is not treatable, and therefore a stable, permanent barrier to employment.

45. Claimant testified that with professional job-seeking assistance he is "very hopeful" he can return to employment. Alternatively, he feels he may be able to finish his college education, which in turn would assist him in finding work. Lack of funds

held Claimant back from seeking to finish his education started at North Idaho College. Settlement with the surety in this matter has provided Claimant funds, and he is open to the idea of continuing his education if so advised by his counselor.

46. Claimant's heels have not stopped him from obtaining employment. While he subjectively claims his left wrist injury makes it impossible for him to continue as a plumber, he has transferable skills. Also, the true extent of Claimant's current left wrist impairment is not clear from the medical record. At this time, Claimant's greatest impediment to employment is not physical, but psychological. With proper psychological treatment, it is more likely than not that Claimant would or should be able to find employment in the Apple Valley, California labor market, as discussed in greater detail below.

47. Claimant has failed to prove his is totally and permanently disabled under the 100% method.

Total Disability under the Odd-Lot Method

48. The burden of establishing odd-lot status rests upon the claimant. *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). A claimant may satisfy this burden and establish total permanent disability under the odd-lot doctrine in any one of three ways: (1) by showing that he has attempted other types of employment without success; (2) by showing that he 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).

Dan Brownell

49. Claimant hired rehabilitation consultant Dan Brownell, who is well known to the Commission and qualified to render opinions within his field of expertise, to evaluate Claimant's vocational prospects in light of his various injuries and psychological condition. Mr. Brownell had some prior experience with Claimant before this assignment as he had met with Claimant through the Idaho Division of Vocational Rehabilitation and assisted Claimant in receiving speech-to-text software to assist Claimant as he attended North Idaho College.

50. As part of his current assignment, Mr. Brownell reviewed Claimant's medical, mental health, and vocational records, as well as legal documents. On May 13, 2016, Mr. Brownell prepared a Vocational Evaluation Report for Claimant.

51. After detailing Claimant's past history relevant to the matter, Mr. Brownell reached the conclusion that it is futile for Claimant to attempt to obtain employment. He reached his conclusion by considering medical reports concerning Claimant's physical limitations and psychological condition, Claimant's testimony, employment history, transferable skills, and the labor markets in Coeur d'Alene and Apple Valley, California. Mr. Brownell stated that when he finds conflicting evidence in the record, he chooses to rely on the evidence he would use if he was attempting to help an injured worker find employment. He discounts the evidence he finds less credible.

52. Specifically, Mr. Brownell opined that Claimant's physical limitations caused by his industrial wrist injury, when combined with "his pre-existing physical limitations due to [Claimant's] heel injuries and his pre-existing psychological condition as impacted by his industrial injury" were so disabling that Claimant has

"no reliable access to jobs in either the Coeur d'Alene or the Apple Valley labor markets." Furthermore, Claimant's "attempts to find employment were, and will continue to be (barring the occurrence of some unforeseen resolution of his psychological condition) futile in the absence of sheer luck in discovering an extraordinarily sympathetic employer." He also opined that "but for the combined effect on [Claimant] of his pre-existing physical limitations caused by his injuries to his heels and his pre-existing psychological condition, as impacted by his industrial injury, with his physical limitations caused by his industrial injury, he would have been employable after his left wrist injury in some reasonably reliable job." Mr. Brownell lastly opined that if Claimant "had not been suffering from a significant pre-existing psychological condition that was negatively impacted by his industrial injury and if he had not suffered from the physical limitations caused by his pre-existing heel injuries, he would have been employable subsequent to his January 15, 2007 industrial injury." CE DD, p. 680.

53. Mr. Brownell was deposed post hearing. Therein, he discussed that Claimant would be vying for jobs with individuals who have less physical and psychological issues than Claimant, which will make it more difficult for Claimant to be hired. Also, Claimant has been unemployed for nine years and counting. He will have to explain that to potential employers, which could expose his physical and mental history.

54. Mr. Brownell also critiqued the report prepared by ISIF's vocational rehabilitation expert, William Jordan. Mr. Brownell noted that the Idaho Occupational Employment and Wage Survey of 2015 lists only types of jobs that people are employed in, but does not list specific job openings. It also does not list the volume of jobs within any job type listing, nor does it list the physical job requirements

for any given job. While Mr. Brownell at first attempted to imply Mr. Jordan used a too-large job market area for consideration when evaluating Claimant's labor market, he ultimately conceded the California job market population of 333,000 people used by Mr. Jordan was approximately the same size as the Coeur d'Alene/Spokane job market, as used by Mr. Brownell. Mr. Brownell's main criticism of Mr. Jordan's report was that the latter did not identify specific, open jobs available to Claimant within his work restrictions.

55. On cross examination, Mr. Brownell conceded that if Claimant attained his AA degree he would be more competitive in the job market. He also agreed that Claimant was intelligent. Mr. Brownell agreed that Claimant historically (prior to his 2007 accident) showed an ability to learn a skilled occupation with on-the-job training. Mr. Brownell agreed that Claimant presents as a pleasant person. He further admitted he did not have knowledge of Claimant's current psychological condition. Finally, Mr. Brownell agreed that if the findings of a functional capacity evaluation (FCE) done in 2014 at Claimant's request were accurate, Claimant could do medium duty work, and it would not be futile for him to look for work. However, Mr. Brownell disputed and disregarded the FCE findings, except for the test that showed decreased grip strength in Claimant's left hand, which he endorsed when preparing his report. The FCE is discussed in greater detail below.

William Jordan

56. As noted above, ISIF hired vocational rehabilitation expert William Jordan, who is also well known to the Commission and qualified to render opinions within his field of expertise, to evaluate Claimant's employability. On May 12, 2016, Mr. Jordan authored an Employability Report regarding Claimant.

57. Mr. Jordan reviewed Claimant's medical and vocational history, and completed a telephonic interview with Claimant. (Mr. Brownell was likewise present during this interview.) In formulating his opinions, Mr. Jordan relied on one or more of the following; the US Dep't of Labor *Dictionary of Occupational Titles, Occupational Outlook Handbook,* Idaho Dep't of Labor *Occupational Employment and Wage Survey 2015,* Career Code, Idaho Dep't of Labor Job Seeker Services, Job Browsers Pro, Skill TRAN, OASYS, and job search engines, such as Indeed.

58. Mr. Jordan acknowledged Claimant's two injuries of consequence, and detailed the history of Claimant's medical treatment and recovery therefrom. He also documented Claimant's psychiatric issues. Mr. Jordan's report cited extensively to medical and mental health records by date, thus providing a timeline history for Claimant's various conditions, with selected quotes pulled from the records highlighting facts relied upon by Mr. Jordan in formulating his opinions.

59. During Claimant's interview with Mr. Jordan, Claimant stated that while he was not keen on a wrist fusion, he would consider it if there were no other options to improve his condition. He was doing minimal exercise, and most of his activities centered around raising his children and domestic chores. He was asked to give his subjective perception of abilities to do specific tasks. The following table, DE 16, p. 0209, is based upon Claimant's self-perception.

Standing	Good and bad days – depending on surface – currently about an hour.
Walking	2 blocks before starts feeling feet on hard surface. On grass, can go 1 to 1.5 hours.
Lifting/Carrying	Very limited- does not carry using both hands. If carrying anything, usually done w/ right hand. Will pick up a 12 pack of soda with both hands. Cannot carry water jug weighing 24 pounds using left hand (drops).

Pushing/pulling	If shopping cart gets full, "left hand goes dead, and can't grip cart or push it."
Bending/stooping	No trouble.
Squatting/Crouching	OK
Kneeling/crawling	Yes-has not done since plumbing-thinks could do.
Twisting/turning	OK (with empty hands)
Reaching forward	When reaching for door or car door, keeps away from using left hand-uses right hand almost exclusively. Assumes with empty hands.
Reaching overhead	Can with both arms (empty hands), but uses right hand to grab items.
Throwing	Can, but uses right arm now because cannot use left hand.
Gripping	Left-"grasping is effected big time". Weak grip; Right grasping OK.
Handling	Left: dropped 24 pound water jug 1-2 years ago. Right: OK
Fingering	Trouble with left middle finger. Trouble with small things. Right OK.
Use of controls	Left-trouble with door locks, windows. Right OK.
Climbing	Can climb stairs. Can climb ladders, but not for too long.
Senses (feel, hear, vision, taste/smell)	Feeling: loss of feeling in the left "dead"-numbness in ring finger and middle finger goes dead/feels weak. Hearing OK. Vision: needs to see eye doctor for glasses. Taste/smell OK.
Sleep	Varies-sometimes as little as four hours, sometimes as much as 7. Average 6 or 5 hours/night.
Driving	Has not driven in a couple of years per concern that will lose grip strength in left hand and inability to grip steering wheel.

60. Claimant also reported periodic panic attacks, and a desire to get back into behavioral health treatment. Sometimes thinking about his five senses or what he wants to eat,

or listening to music helps calm panic attacks, but does not always work. He claimed to have had a panic attack just prior to the phone interview with Mr. Jordan.

61. Claimant lives in Apple Valley, which is 9 miles east of Victorville, and 43 miles north of San Bernardino, California. He intends to remain at his current address, as it is across the street from the high school his son attends. (In other records, he claimed it was a couple of blocks away.) Claimant divorced in 2014. Prior to the divorce, his ex-wife had an affair and accused Claimant of being a drug addict. His children were 15 (son) and 18 (daughter) at the time of interview. The daughter attends Victorville Community College. Claimant has custody of his children due to an agreement he made with his ex-wife.

62. Claimant stated he was making about $25 per hour pre-industrial accident. In 2009 and 2010 he drew unemployment benefits. Claimant has been receiving Social Security Disability benefits since 2008. Claimant is also on Medicare, and receives some benefits from the State of California. His son and daughter receive, or until quite recently received Medicaid. Claimant says creditors are pursuing him for approximately $15,000 for consumer items like DirecTV, Sprint, and credit cards. He also claims to have student loans from Idaho in the sum of $14,000 he cannot repay. He reportedly received $50,000 in settlement of his heel injuries, and netted about $21,000. The amount Claimant received in settlement with surety in this case was not disclosed.

63. Claimant again denied he had served in the military during the interview. This is a recurring falsehood. He does have training related to materials handling and safety, some sheet metal work, and can use measuring devices, benders, and scribing, as well as basic hand tools. He can use a torch and pipe cutter, and can solder. He claims limited experience with a backhoe, Bobcat, and scissor lift. On his SSDI application, he stated

he was a "journeyman" plumber whose responsibilities included bidding, invoicing, collection, blueprint reading, and training apprentices in plumbing. Claimant also claimed experience with heating systems (but not A/C) including installation, service and repair. Claimant also indicated he took two on-line courses for computer operation, but has difficulty keyboarding due to his left wrist and fingers.

64. After reviewing the types of jobs available in the Apple Valley and Coeur d'Alene markets, and weighing Claimant's pros and cons, Mr. Jordan concluded jobs existed within the job markets in question for which Claimant was suited, and he was not totally and permanently disabled. In reaching this conclusion, Mr. Jordan relied on a number of factors, including a disputed FCE (discussed below), no physician opinion that Claimant is incapable of working, Claimant's skills and past work history, even after his lower extremity injuries, and progress made in Claimant's psychological condition.

65. Mr. Jordan acknowledged that if one were to rely on Claimant's subjective perception of his work capacity and his psychological status, he would more likely than not be totally and permanently disabled. However, Claimant's lack of truthfulness clouds the analysis. As such, looking at the record is a better barometer of Claimant's status than listening to him. Mr. Jordan points out that while Claimant had a pre-existing manifest impairment with his bi-lateral ankles, which injury was a hindrance to employment, Claimant was nevertheless able to engage in meaningful employment. Likewise, Claimant's pre-existing personality disorder did not prevent him from working prior to the industrial accident. Mr. Jordan also noted Claimant's most recent psychiatric evaluation[7] shows that

[7] The report referenced was prepared by Thaworn Rathana-Nakintara, M.D., on April 22, 2014. ISIF inadvertently failed to include this report with its exhibits, and discovered the mistake shortly before hearing. Claimant objected to the report's inclusion as part of ISIF's exhibits, since it was not disclosed as an exhibit in a timely fashion. The objection was sustained and the document was not admitted as a stand-alone exhibit. However, Mr. Jordan,

from a psychological standpoint Claimant is able to work without limitations in performing either simple, repetitive tasks or detailed and complex tasks, and could complete a normal work day and work week. He is capable of accepting instructions from supervisors and interacting with coworkers and the public.

The Disputed FCE

66. Both parties reference an FCE done on March 3, 2014 at Claimant's request. Certain irregularities in the report cause Claimant to repudiate the findings, while ISIF relies on it to support their claim.

67. The issues raised by Claimant in an attempt to discredit the document, its findings and conclusions include;

- A statement therein that the lifting testing was "invalid" due to inconsistent results, even though the lift testing raw data showed consistent lifting results of 149 pounds for each of three attempts at the two-arm over shoulder lift, and 63 pounds at each of three two-arm floor lifts. Other places in the report list a valid effort for lifting.

- Grip strength conclusion in the report lists a valid effort in that the grip measurements produced a "bell shaped curve" indicating maximal effort. Claimant's efforts with the right hand were "49, 47, 41, 39, and 35". Left hand efforts were recorded as "25, 29, 22, 25, and 29". Claimant is (incorrectly) critical of the fact the numbers in the sequence presented do not represent a bell curve, and by his interpretation of the data, only 2 of 5 recordings with the right hand were in the normal range, while none of the readings were in the normal range for the left hand.[8]

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as a qualified expert, is entitled to rely upon the report, and the undersigned is entitled to rely on Mr. Jordan's findings, even with regard to the report in question. Experts may rely on inadmissible materials if they are of a type typically relied upon by experts in their field of expertise. IRE 703. This report so qualifies and the undersigned finds the probative value of the report in the context of Mr. Jordan's analysis substantially outweighs its prejudicial effect. The report is not considered or relied upon by the undersigned independently of Mr. Jordan's analysis, but Mr. Jordan's analysis will be considered in its entirety.

[8] It should be noted that the report did not call the findings "normal" but only stated it appeared Claimant made a valid maximum effort during the grip testing. This is based upon a "bell curve" grip progression measured on the dynamometer as the person grips. It is not a bell curve based on the five position grip strength findings. Claimant's argument that his five grip strength "numbers" are not arranged in a bell curve is completely irrelevant. *See* DE 14, p. 0183. Also, Claimant misinterprets the "normal range" data. The "normal range" finding was for position 2 of 5 gripping positions, and in fact, Claimant's grip in position 2 was in the normal range. *See* DE 14, p. 0168. (Normal range POS 2.) The "normal range" indicator does not appear to be for all 5 positions, as argued by Claimant.

- The report lists the wrong home address for Claimant, does not list a city, (just a street address and "CA"), and lists the incorrect date of injury.

- Claimant believes it inconceivable that he could stand, walk, and climb without restriction for 6 to 8 hours per day, as concluded by the report. Also a notation that Claimant cannot lift or carry "at a height of 3' – 6' more than N/A lbs. for more then 1 hours per day" is either wrong if it implies Claimant could lift heavy weight with his left wrist, or at best makes no sense as written.

68. Claimant is also critical of a Return-to-Work Voucher Report which accompanied the FCE performance findings. He notes the document is unsigned, although there is a line for a physician's signature. Claimant also disputes the findings on the voucher which list him being able to stand, walk, sit, climb, bend forward, kneel, crawl, twist, and keyboard for six to eight hours per workday. The only limitation on the voucher is for left grasping, which is limited to four to six hours daily.

69. Mr. Brownell had his own concerns with the FCE report and voucher. First he was critical of, or confused by, the form of the document, which was different than he was used to seeing. He also felt the findings were inconsistent with Claimant's subjective statements of physical limitations, and different than Claimant's previous medical records.[9] Mr. Brownell likewise noted the voucher was unsigned by a physician. Finally, he was concerned that Claimant had indicated the entire testing took about an hour, and did not involve him climbing or walking as part of the testing.

70. Conversely, ISIF and its expert, Mr. Jordan, relied on the findings of the FCE in support of their conclusion that Claimant is not totally and permanently disabled. His limited restrictions would put Claimant in a medium-duty level job. ISIF notes that even Mr. Brownell

[9] The records referred to by Mr. Brownell were generated over six years previous to the FCE, and at a time during or just after Claimant's period of recovery.

acknowledged that if the FCE testing was valid, it would not be a futile gesture for Claimant to pursue employment.

FCE Analysis

71. To begin with, Claimant's subjective testimony on what the testing entailed, how long it took, and even Claimant's subjective statements on his perceived limitations are given little weight. The record is replete with his falsehoods, and the law of this case is that Claimant's testimony is not trustworthy. Even without that prior pronouncement, the Referee does not place weight on Claimant's statements based upon an examination of the record. As such, arguments based on Claimant's memory of the FCE, or comparisons of the FCE to Claimant's uncorroborated statements of limitation are not persuasive. While Claimant cites to psychologist records in an attempt to explain why he fabricates, the "why" is not relevant, as no excuse will turn a falsehood into the truth.

72. The FCE appears to be internally inconsistent, or if it is not inconsistent, its unfamiliar form makes it difficult to accurately interpret. Since no one familiar with the report was deposed, the Referee is left to interpret it to the best of his ability. It does appear the document is inconsistent to the extent that the conclusions are not entirely supported by the raw data. Most notably, the lifting invalidity conclusion appears to conflict substantially with the testing data. The data itself appears legitimate, but when the data is incorporated into conclusions inconsistencies emerge. For example, the "validity testing" data in the report shows a zero percent coefficient of variation, and thus a valid effort designation, DE 14, p. 0164, but the conclusion somehow morphs the lifting test results into being "invalid." Other notations in the raw data section of the report are detailed and support the proposition that the testing

was actually performed. Claimant's suggestion that perhaps the report was based on someone other than him is summarily rejected.

73. The unsigned voucher will not be considered, nor will the conclusions in the report which show Claimant's predicted abilities over a six to eight hour workday. The raw data, including grip strength, lifting ability, shoulder and back movement ranges, and ankle range of movements, will be considered as that data carries more weight than Claimant's subjective comments to the contrary.

Odd-Lot Analysis

74. Claimant bears the burden of proving that he is totally and permanently disabled under the odd-lot doctrine. He has chosen to attempt to meet his burden by utilizing the third prong under the *Lethrud* test, by showing that any efforts to find suitable work would be futile. For years, Claimant has not attempted to find work to any significant degree. No physician imposed restrictions of such magnitude that it would be futile for Claimant to even *attempt* to find work. More than one doctor felt that it would be difficult for Claimant to find work *until his psychological issues were treated*.

75. For example, in December 2007, after Dr. Welch examined Claimant for the third time he diagnosed Claimant's physical injury as a left wrist sprain and an aggravation of a pre-existing lunate fracture, for which he assigned Claimant a 9% impairment of the left upper extremity due to loss of wrist mobility. However, Dr. Welch agreed with other doctors that Claimant was suffering from severe, incapacitating depression. Dr. Welch felt Claimant's wrist complaints were a physical manifestation of his depression. Claimant's left wrist was fixed and stable, but Dr. Welch believed Claimant would not be able to return to work "until [Claimant's] psychiatric issues are addressed." DE 13 p. 0155.

76. Dr. Rehnberg, a psychologist hired by Claimant, testified at his deposition that Claimant's pain disorder was affected by his depression. Dr. Rehnberg felt that Claimant needed counseling or therapy, along with medication and a vocational rehabilitation program, to get him back to work. He felt Claimant could regain his psychological health with "appropriate vocational rehabilitation." CE I p. 203. *Without treatment*, Dr. Rehnberg felt it would be difficult for Claimant to do any full-time work which required thinking.

77. Dr. Klein, a psychologist hired by the surety, felt that Claimant needed to return to work in order to overcome his anxiety symptoms, as work would give Claimant something outside of himself on which to focus. Dr. Klein opined that the longer Claimant was out of work, the more he would obsess about his pain, and feel sorry for himself. Dr. Klein did not believe Claimant was unemployable as of the time of his 2008 report.

78. In August 2008, Marie Parkman, Psy.D., in conjunction with Regional I Mental Health Services clinical director Jennifer Rhodes, M.D., and case manager Jill Megow, LCSW, prepared a report concerning Claimant's treatment at that agency. There was discussion therein about how the litigation (along with Claimant's marijuana use) was complicating Claimant's recovery. It was their experience that it is difficult for some individuals to move on with their lives until their litigated cases are resolved. This theory seemed to be borne out to a degree at the hearing in this matter. Claimant, who had just settled his case with his employer and its surety, expressed hope for employment, and was willing to return to school, or job training, or whatever path to employment was suggested by his vocational rehabilitation counselor. His mood and affect at hearing did not appear flat and despondent, but rather positive and responsive.

79. Even Mr. Brownell concedes in a round-a-bout way that if or when Claimant's psychological condition improves he could look for work. Mr. Brownell noted that unless Claimant found some "unforeseen" resolution of his psychological issues it would be futile for him to look for work. CE DD p. 680. While Mr. Brownell described Claimant's path out of depression and back to productivity as if it was a mystery, no medical expert in this case has expressed an opinion that given the current state of medical and psychological care, there is no available treatment for Claimant to return him to his pre-accident mental status.

80. The overwhelming consensus is that Claimant's most significant barrier to employability is not physical in nature. No expert has opined that Claimant cannot work solely due to the physical injuries of his wrist and ankles. But for Claimant's psychological overlay, there is no evidence by anyone herein that Claimant would be unable to work. The Referee finds that Claimant is not totally disabled by any method as a result of his wrist and ankle injuries alone.

81. Claimant cites to the case of *Ford v. Concrete Placing Co., Inc.,* IC 2005-518336 (November 6, 2014) to support his contention that his psychological issues must be considered when evaluating whether he is totally and permanently disabled. In *Ford*, the Commission found that regardless of whether the claimant's psychological condition was a ratable impairment under Idaho Code §72-451, or merely part of his non-medical factors, it must be considered when determining the issue of permanent disability. In that case, the Commission ruled that the claimant was totally and permanently disabled due to physical limitations and his psychological condition, which included his inability to interact positively with members of the public. His physical features were also a factor in the determination.

82. The difficulty in applying *Ford* to the present case is that in *Ford* there was no discussion as to whether the claimant's "psychological condition" was or was not permanent. It may well be the matter did not need to be discussed in detail, given the nature of the claimant's psychological condition. It may have just been "who the claimant was." In other words, his psychological status may not have resulted from a temporary, treatable condition. Or, maybe the issue was simply overlooked. In either case, the Commission *did not* pronounce that temporary psychological conditions, capable of treatment, may be considered in determining permanent disability.

83. Claimant's debilitating depression is not just "who Claimant is." He had little history of pre-accident depression, mood swings, or excessive emotional outbursts. He weathered his non-industrial lower extremity injuries without spiraling into severe, chronic depression and feelings of worthlessness. By all accounts, his significant psychological problems worsened after his industrial accident, were aggravated by marital issues, and have remained until now inadequately treated. However, should Claimant elect to treat his psychological issues, there is nothing in the record suggesting he could not overcome his current psychological state and return to the workforce. He is hopeful that now that he has the money to return to mental health and vocational counseling he can get back on his feet emotionally and psychologically, and seek employment.

84. Claimant's permanent physical impairments of ankles and wrist do not render him totally and permanently disabled. Claimant's psychological overlay is a significant disability, which if not treated would make it difficult for Claimant to pursue employment. However, it does not appear from the record to be a permanent disability, but rather a treatable,

temporary condition. As such, it cannot be one of the combining factors when determining the "combined with" requirement under Idaho Code §73-332 for ISIF liability.

85. Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Indus.,* 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund,* 130 Idaho 278, 939 P.2d 854 (1997).

86. While often the issue of disability rests with the weight assigned to one vocational expert over another, in this case the advisory vocational reports provide some guidance, but are not dispositive of the issue. Claimant's expert Mr. Brownell does not unequivocally state that Claimant will never be in a position to even seek employment. He notes that unless and until Claimant's psychological condition is ameliorated it would be futile for Claimant to look for work. Mr. Jordan concedes that subjectively Claimant paints a grim picture for his chances at future employment. Mr. Jordan notes that physically Claimant has the ability to work, as borne out by the medical, psychological, and FCE raw data records. Claimant's major impediment is his mental condition, a temporary condition.

87. When considering the totality of the evidence, both medical and vocational, and Claimant's permanent non-medical factors, Claimant has not met his burden of establishing that it would be futile for him to seek employment, and that he is totally and permanently disabled under the odd-lot doctrine.

88. Since Claimant has not shown he is totally and permanently disabled as a result of permanent physical impairments combined with permanent non-medical factors, the remaining noticed issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove he is totally and permanently disabled, either by the 100% method or as an odd-lot worker;

2. All other issues are moot.

RECOMMENDATION

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

DATED this 29th day of June, 2017.

INDUSTRIAL COMMISSION

___/s/_____
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of July, 2017, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

STARR KELSO
PO BOX 1312
COEUR D ALENE ID 83816

THOMAS CALLERY
PO BOX 854
LEWISTON ID 83501

___/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KEVIN R. SMITH Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2007-002698** **ORDER** Filed July 7, 2017

Pursuant to Idaho Code § 72-717, Referee Brian Harper submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has failed to prove he is totally and permanently disabled, either by the 100% method or as an odd-lot worker.

2. All other issues are moot.

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

DATED this 7th day of July, 2017.

INDUSTRIAL COMMISSION

___/s/_____
Thomas E. Limbaugh, Chairman

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

___/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of July, 2017, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

STARR KELSO
PO BOX 1312
COEUR D ALENE ID 83816

THOMAS CALLERY
PO BOX 854
LEWISTON ID 83501

___/s/_____