BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SIDNEY SMITH, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2012-005833** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed July 14, 2017

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Pocatello on September 6, 2016. Claimant, Sidney Smith, was present in person and represented by Fred J. Lewis, of Pocatello. Defendant, State of Idaho, Industrial Special Indemnity Fund (ISIF), was represented by Bren E. Mollerup, of Twin Falls. Claimant settled with his former employer, Jackson Express, LLC (Jackson) and its surety, State Insurance Fund, prior to hearing. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted.[1] The matter came under advisement on April 12, 2017.

ISSUES

The issues to be decided are:

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

[1] Page 28 of Claimant's Post-Hearing Brief is entirely blank.

2. Whether ISIF is liable pursuant to Idaho Code § 72-332.[2]

3. Apportionment under the Carey formula.

CONTENTIONS OF THE PARTIES

Claimant alleges that he is totally and permanently disabled pursuant to the odd-lot doctrine as a result of pre-existing impairments to his back, left knee, hearing, and pulmonary function, and his 2012 right shoulder injury at Jackson. He asserts that ISIF is liable for a portion of his total permanent disability benefits pursuant to Idaho Code § 72-332.

ISIF denies all liability contending that Claimant is employable and not totally and permanently disabled. In the alternative, ISIF contends that Claimant's pre-existing conditions did not constitute a hindrance or obstacle to employment and/or did not combine with his 2012 industrial accident to render him totally and permanently disabled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. The pre-hearing deposition of Claimant taken October 22, 2014;

3. The parties' joint exhibits 1 through 23, admitted at the hearing;

4. The testimony of Claimant and his wife Loraine Smith taken at the hearing;

5. The post-hearing deposition of Brian D. Wright, PT, DPT, taken by Claimant on September 28, 2016;

6. The post-hearing deposition of Kenneth E. Newhouse, M.D. taken by Claimant on October 11, 2016;

[2] The noticed issue of whether Claimant's condition is due, in whole or in part, to a pre-existing and/or subsequent injury or condition is effectively subsumed and addressed in discussion of the Idaho Code § 72-332 question.

7. The post-hearing deposition of Nancy J. Collins, Ph.D., taken by Claimant on November 2, 2016; and

8. The post-hearing deposition of Douglas N. Crum, CDMS, taken by Defendant on November 2, 2016.

All outstanding motions to strike are denied and all outstanding objections are overruled, except for Defendant's objections contained on pages 37-38 of Dr. Newhouse's deposition, which are hereby sustained.

After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was born in Nampa in 1944. He is right-handed. At the time of hearing he was 72 years old, six feet four inches tall, weighed more than 350 pounds, and had resided in Pocatello for several decades.

2. Claimant graduated from Pocatello High School in 1963 and joined the Navy. In the Navy he trained with 50 caliber machine guns, which subjected him to significant noise exposure. Claimant was also tasked with throwing 55 gallon drums partially filled with gasoline from the ship deck into the ocean for live fire target practice. On one occasion he lifted a gasoline-filled 55 gallon drum and felt immediate intense low back and right leg pain. Claimant underwent two weeks of conservative medical treatment and was thereafter restricted to lifting 30 pounds. Over time, Claimant learned to manage his back pain and increased his lifting to 50 pounds. He experienced excruciating back and leg pain if he lifted more than 50 pounds.

3. In 1963, Claimant married and dedicated himself to being the sole wage earner for his wife and children. From 1965 until 1968, Claimant worked for Simplot as a laborer and an

operator. His duties included shoveling, which aggravated his back pain. From 1968 until 1972, Claimant worked for Intelco Aluminum in Washington where he operated an overhead bridge crane. This position was tolerable for his back as it required no lifting. In 1972, Claimant joined the National Guard and remained active in the Guard for the next 20 years as a mechanic. His service subjected him to significant noise exposure as he repaired tanks at the firing line.

4. In 1974, Claimant graduated from Idaho State University with an Associates Degree in diesel mechanics. Thereafter he worked for IEX as a mechanic rebuilding engines. He sought help when lifting more than 40 pounds because heavier lifting caused back and leg pain. Claimant next worked briefly for Caterpillar in Pocatello as a general mechanic.

5. Starting in 1974, Claimant worked for Bucyrus Erie manufacturing large mining equipment. His duties included building draglines and blast hole drills, installing bearings, and testing large equipment. He developed left knee grinding when his duties required him to crawl. He also began noticing hearing loss. He left Bucyrus Erie in 1983, when it shut down, and went to work for Jerry's Four-Wheeler driving a wrecker.

6. In 1984, Claimant moved to Salt Lake City and worked for approximately one year driving long haul for Uintah Truck Lines. The prolonged sitting aggravated his back pain and prompted him to seek other employment. He found work as a dump truck driver for Four Way Construction. From approximately 1987 until 1992, Claimant worked as a diesel mechanic for Black Hills Trucking.

7. In 1992, Claimant returned to Pocatello and worked briefly for H&H Diesel, diagnosing and repairing diesel engines. He continued to limit his lifting due to back pain. In 1993, Claimant commenced working for the Union Pacific Railroad. He worked on a rail gang for several years and then was assigned to the locomotive shop where he repaired diesel

locomotives. He used a crane or forklift to lift heavy items and limited his own lifting to 35 pounds. His hearing worsened. In 1999, Claimant left the Union Pacific when it closed the locomotive shop. He then weighed 350 pounds.

8. In 2000, Claimant and his wife went to Martin's Cove, Wyoming for six months as volunteers for their church where Claimant worked as an equipment mechanic. He noted ongoing back issues and limited himself to lifting no more than 30 pounds. His left knee continued to worsen and limit his walking. His weight continued to exceed 300 pounds.

9. On September 27, 2000, Kenneth Newhouse, M.D., performed left knee arthroscopy, lateral release, and chondroplasty debridement. Claimant developed a septic left knee and over the next few weeks required repeated left knee surgery, irrigation, and debridement. When the infection resolved, his left knee had deteriorated and Dr. Newhouse concluded he could not return to his prior job.

10. In 2001, Claimant was awarded Social Security Disability benefits. His disabilities included hearing loss and left knee, back, and right leg pain. Claimant then weighed approximately 325 pounds and his weight limited his mobility.

11. For 18 months from approximately 2001 and 2002, Claimant served as a volunteer for his church dispensing food at a storehouse in Pocatello.

12. In 2002, Claimant commenced working part-time as a local driver for McNabb Trucking. Thereafter, Claimant worked as a seasonal driver for Holiday Motor Coach for 11 years. His duties included stowing passengers' luggage and prolonged sitting while driving, both of which caused back and hip pain.

13. In 2004, Claimant applied for VA disability benefits. He was awarded 20% disability for his service-related back condition and 10% disability for his service-related hearing loss.

14. Claimant's left knee continued to worsen and on September 6, 2006, Dr. Newhouse performed total left knee replacement. Claimant then weighed 360 pounds. Dr. Newhouse restricted Claimant's lifting and walking, and forbade kneeling or crawling. On October 17, 2006, at Claimant's request, Dr. Newhouse released Claimant to return to work. Claimant continued driving tour buses seasonally for Holiday Motor Coach. In 2007, he worked as a part-time school bus and city bus driver. In approximately 2009, when Claimant turned 65, he transitioned from Social Security Disability to Social Security Retirement benefits.

15. In approximately 2010, Claimant left his part-time bus driving job and began working as a seasonal truck driver for Wada Farms. Wada Farms' trucks were equipped with push button tarps and no lifting was required. Claimant typically drove 40-minute runs, which were easier given his back and left knee conditions. He used grab bars on the side of the truck cab to the right of the driver's door to pull himself into the cab of the truck. In 2012, when work was slow at Wada Farms, Claimant began working for Jackson.

16. **Final industrial accident and treatment.** On January 18, 2012, Claimant was working for Jackson walking around his truck when he slipped on the ice. He landed on his right elbow and shoulder as he fell to the ground. He sought medical treatment for right shoulder pain. A right shoulder MRI revealed right rotator cuff tear and on May 21, 2012, Dr. Newhouse performed right rotator cuff repair. Claimant thereafter attended physical therapy.

17. On January 8, 2013, Dr. Newhouse found Claimant had reached maximum medical improvement and rated his right shoulder permanent impairment at 8% of the whole

person. Dr. Newhouse permanently restricted Claimant from loading and unloading trucks, and directed him to avoid lifting, pushing, pulling, climbing, any repetitive throwing motions, use of his arms overhead, and chaining or unchaining trucks. Claimant did not return to work at Wada Farms because with his right shoulder condition he could not pull himself up into the cab of a truck.

18. **Vocational efforts.** Commencing in February 2013, and continuing through July 2016, Claimant sought employment at trucking companies, parts stores, retail stores, warehouses, auto dealers, delivery companies, cement businesses, car rental agencies, wholesale sales dealers, cleaning companies, paving companies, fast food businesses, convenience stores, towing companies, tire stores, and several city and federal agencies in his area.[3] A number of these

[3] Claimant sought work at Idaho Transportation, Estes Trucking, Western Equipment, Kenworth, Motion Industries, Cate Equipment, Wesco Distribution, Plat, Modern Machine, Carquest, NAPA, Subway, All American Cleaning, Verizon, Advanced Industrial Supply, Staples, Western Electric, AutoZone, Costco, Jack Parson, Home Depot, Lowe's, Shopko, Harbor Freight, WinCo, Alsco-American Linen Division, Great Rift, Lithia Motors, Heritage Home Builders, Micklesen Construction, Western Wholesale, FedEx, UPS, Bannock Road & Bridge, Prime Time Auction, Liddell Paving, Klinger Asphalt, Cole Chevrolet, Courtesy Ford, Hirning GMC, Phil Meador Subaru, Phil Meador Toyota, Avis Car Rental, Enterprise Car Rental, Navajo Trucking, C.R. England, Swift Trucking, ABF Trucking, Cargo Express, Idaho Wholesale Hardware, D&S Electrical Supply, Waste Connections, Paramount Supply, Mid-Pacific Irrigation, Dyke's Electric, CFP Trucking, Doug Andrus Trucking, WDS, BTI, Idaho Correctional, All American Cleaning, Advanced Industrial Supply, A&I Distribution, Blaze Sign, Brady's Home Store, Budget Truck Rental, Central Equipment, City of Pocatello, Knight Trucking, USA Trucking, Central Trucking, Fortune 100, ON Semiconductor, U-Haul, Get Trucking, NTSJ Trucking, Sears, US Forest Service, Leavitt Freight, Gordon Trucking, Batteries Plus, NTDJ Paving, Stevens Trucking, Omega Trucking, Schneider Trucking, Melton Trucking, Con-way Trucking, Road Master Driving School, Sage Driving School, KLLM Trucking, Wendy's, Power's Candy, Burger King, McDonald's, John's Paint & Glass, Industrial Tool & Supply, Grease Monkey, K&B Quick Stop, Maverick Stores, Barrie's Ski & Sport, Common Cents, Lamb Weston/ConAgra Foods, Commercial Tire, Idaho Rock & Sand, Key Line Auto Supply, Kaman Industrial, K&B Shipping & Receiving, Les Schwab, Brian's Tire Factory, Rhino Lining, Sun Power, Accu Tech Repair, Salt Lake Express, Jackson Food Stores, T-Box, Marigold Dairy/Dean Foods, R&R Driving School, A1 Crane, CCI Crane, Teton Delivery, Kroger Excavation, Karl's Machine, McKee's, Precision Machine, Doc's Gun Barn, Morgan Pavement, All Things Pipe, Industrial Pipe Products, Robertson Supply, Idaho Rail Shop, E&G Contractors, Conrad Bischoff, Trinity Trailer, Eagle Bridge Trailers, Custom Towing, Utility Equipment Sales, D&S Diesel, Walmart, Arctic Circle, Mid-Pacific Irrigation, SI Waste Company, Road Master Truck Driving, Convergys Corporation, U-Save Auto Rental, Master Mechanics, Sun Power Auto, Pocatello Regional Transportation, Cash Store, Express Cash, Kellerstrass Oil Company, Westwood Mall, Jungle Retreat, CAL Ranch Stores, Wada Farms, McKee's Pet Center, Sam's Gun Shop, Gem State Paper, Butterfield Express, Denny's Wrecker, Dell's Home Appliance, Pocatello Electric, Triple L Towing, Custom Towing, Dapco Hobbies, Big Foot Pizza, Papa John's, Papa Kelsey's, Pizza Hut, Carpet One, Wilks Funeral, Colonial Funeral, Popeyes, Chipotle, Panera Bread, Red Robin, Black Bear Diner, Freddy's Steakburger, Tuck Utilities, McCormick Auto Exchange, Diamond Quality Trailers, Medalist Cleaning & Restoration, Huskey Electric, Quality Overhead Doors & Glass, Worth Steel, P&R Auto Sales, Wholesale Auto &

potential employers he contacted more than once. Some potential employers had current job openings, most did not. However, all had positions Claimant believed his skills and prior experience qualified him to perform. Some potential employers he merely telephoned or completed an on-line application with his wife's help; however most potential employers he physically visited and spoke with a representative. Claimant made approximately 300 job contacts over the space of three years without a single job offer.

19. Commencing in approximately 2014 or perhaps earlier, Claimant and his wife began performing as Santa and Mrs. Claus at family gatherings, in friends' homes, at church socials, and in at least two restaurants during the Christmas season. Claimant was comfortable with and enjoyed these events which became more frequent as demand increased over the years.

20. On March 24, 2015, Nancy Collins, Ph.D., authored a report evaluating Claimant's employability. She noted that Claimant is a skilled mechanic and an experienced commercial truck driver but at the age of 70, he is not likely to find an employer willing to train him. Considering Claimant's training, work experience, and medical restrictions, Dr. Collins opined Claimant suffered a 47% loss of earning capacity and a loss of labor market access exceeding 85%. She concluded Claimant suffered a permanent disability of 70%, inclusive of impairment and was an odd-lot worker.

21. On July 9, 2015, Nancy Greenwald, M.D., rated Claimant's permanent impairments from his pre-existing total left knee replacement, morbid obesity resulting in sleep apnea, hypertension, nonspecific recurrent low back and right hip pain, esophagitis post fundoplication, and hiatal hernia.

Repair, Tractor Supply, Meineke Car Care, Thomas Fuel, Lube & Chemicals, Prestige Auto Body, City Creek Glass, and Air Exchange Technologies.

22. On March 3, 2016, Claimant underwent a functional capacity evaluation by Bryan Wright, PT, DPT. Mr. Wright concluded that Claimant could not safely lift from floor to waist. He concluded Claimant could only safely lift five pounds from waist to crown with a preferred grip and that Claimant could only safely front carry five pounds. Mr. Wright further concluded that Claimant could not safely perform elevated work above his head and opined that Claimant would not be able to reach above his head to grasp the overhead bar on a truck cab and pull himself up into the cab. As a result of the FCE testing, Mr. Wright restricted Claimant to never crouching or kneeling, rarely standing, walking no more than five minutes at a time, and sitting occasionally for no more than 15 minutes at a time up to a total of two and one-half hours per day. He limited Claimant's pushing and pulling to 51 and 70 pounds rarely, respectively.

23. On April 7, 2016, Dr. Newhouse opined Claimant's 2012 accident resulted in 7% whole person impairment of his right shoulder.[4] Dr. Newhouse also concurred in Dr. Greenwald's 10% whole person permanent impairment rating for Claimant's left total knee replacement. Dr. Newhouse endorsed Mr. Wright's FCE results and restrictions.

24. At the time of hearing, Claimant was receiving Social Security Retirement benefits which were insufficient to meet his financial obligations. He continued to suffer low back, right leg, and left knee pain, hearing loss, and sleep apnea due to obesity. At hearing Claimant presented as approachable and personable. Claimant's wife credibly testified that Claimant is well known in the Pocatello area and everyone enjoys talking with him. Claimant's

[4] In January 2013, Dr. Newhouse initially rated Claimant's permanent impairment due to his right shoulder condition at 8% of the whole person. In April 2016, Dr. Newhouse rated Claimant's right shoulder impairment at 7% of the whole person. The difference was apparently due to Dr. Newhouse's initial use of the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment, and his subsequent use of the Sixth Edition of the Guides.

wife, at 68 years old, worked starting most days at 4:00 am driving truck for Wada Farms in the potato harvest because Claimant, in spite of extensive efforts, was unable to find employment.

25. **Credibility.** Having observed Claimant and his wife at hearing, and compared their testimony with other evidence in the record, the Referee finds that both are credible witnesses.

DISCUSSION AND FURTHER FINDINGS

26. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

27. **Permanent disability.** The first issue is the extent of Claimant's permanent disability, including whether he is totally and permanently disabled pursuant to the odd-lot doctrine. "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. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation.

Idaho Code § 72-422. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. The focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

28. In the present case, Claimant asserts that his 2012 industrial accident at Jackson, in combination with his pre-existing conditions and non-medical factors, render him totally and permanently disabled. His permanent disability must be evaluated based upon his medical factors, including his permanent impairments, the physical restrictions arising from his permanent impairments, and his non-medical factors, including his capacity for gainful activity and potential employment opportunities.

29. Impairments. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989). Claimant herein alleges

permanent impairments due to his recurrent lower back pain, total left knee replacement, hearing loss, pulmonary dysfunction, and right shoulder condition.

30. Dr. Greenwald rated Claimant's permanent impairment to his low back at 2% of the whole person. Dr. Newhouse and Dr. Greenwald rated Claimant's permanent impairment from his total left knee replacement at 10% of the whole person. Dr. Greenwald rated Claimant's impairments for pulmonary dysfunction—specifically sleep apnea due to morbid obesity—at 6% of the whole person, hypertension at 17% of the whole person, esophagitis post fundoplication at 5% of the whole person, and hiatal hernia at 3% of the whole person.[5] On April 12, 2016, Barry J. Peterson, D.O, evaluated Claimant's hearing, found significant bilateral sensorineural hearing loss consistent with history of noise exposure, and rated Claimant's permanent impairment due to hearing loss at 5% of the whole person. Dr. Greenwald and ultimately Dr. Newhouse both rated Claimant's permanent impairment due to his right shoulder condition at 7% of the whole person.

31. The Referee finds that Claimant has proven that he suffers the following whole person permanent physical impairments: 2% due to his low back condition, 10% due to his total left knee replacement, 6% due to pulmonary dysfunction from sleep apnea related to morbid obesity, 5% due to his hearing loss, and 7% due to his right shoulder condition, thus totaling 30% of the whole person.

32. Physical restrictions. Dr. Greenwald restricted Claimant due to his left knee to no lifting more than 50 pounds, no prolonged standing/walking, no ladders, no kneeling or squatting, no repetitive stooping or twisting. Comprehensively considering Claimant's physical

[5] Claimant does not assert that his hypertension, esophagitis post fundoplication, or hiatal hernia constitute relevant conditions. Nor is there persuasive evidence that any of these conditions were a hindrance or obstacle to his employment prior to the 2012 industrial accident, or combined with his 2012 accident to render him totally and permanently disabled.

conditions, physical therapist Brad Wright following functional capacity testing restricted Claimant to five pounds carrying and lifting from waist to crown. He found that Claimant could not safely lift from floor to waist. Mr. Wright concluded Claimant could not perform work above his head or reach above his head with his right arm to grasp the overhead bar on a truck cab and pull himself up into the cab. He further restricted Claimant from all crouching or kneeling and limited him to rarely standing, walking no more than five minutes at a time, and sitting occasionally for no more than 15 minutes at a time up to a total of two and one-half hours per day. Dr. Newhouse concurred in these restrictions and deemed them permanent.

33. Competitiveness in open labor market. The parties emphasize the opinions of two vocational experts who have evaluated Claimant's employability. Each is addressed below.

34. *Nancy Collins.* Claimant presented the expert testimony of Nancy Collins, Ph.D., who interviewed Claimant and reviewed his work history, medical records, and physical restrictions. Dr. Collins produced a written report in March 2015 and a supplemental report in April 2016. She opined that Claimant's shoulder condition and resulting medical restrictions of lifting 35 pounds occasionally, 20 pounds frequently and avoiding pushing and pulling greater than 15 pounds were "significant for him because he weighs nearly 400 pounds, and he had to pull himself up into the trucks to drive." Collins' Deposition, p. 16, l. 25 through p. 17, l. 2. Dr. Collins testified that she was not aware of any employment within Claimant's restrictions that is regularly and continuously available in the local labor market that Claimant could perform. She opined that Claimant is an odd-lot worker and it has been and would be futile for him to search for work. She summarized her opinion regarding Claimant: "I think without a doubt he is permanently and totally disabled, to his chagrin." Collins' Deposition, p. 17, ll. 15-16.

35. *Douglas Crum.* ISIF presented the expert testimony of Douglas Crum, CDMS, who interviewed Claimant and examined his medical records and prior work history. He considered Claimant's shoulder condition and resulting medical restrictions of lifting 35 pounds occasionally, 20 pounds frequently and avoiding pushing and pulling greater than 15 pounds. Mr. Crum concluded that Claimant was totally and permanently disabled.

36. Claimant has unsuccessfully looked for work in the Pocatello and Idaho Falls areas on his own making approximately 300 employer contacts. The conclusions reached by Dr. Collins regarding Claimant's permanent disability are persuasive in that they are supported by the record and consistent with Claimant's actual extensive but unsuccessful job search experience.

37. Based on Claimant's permanent impairments totaling 30% of the whole person, his permanent physical restrictions, and considering all of his medical and non-medical factors, including his age at the time of his final industrial accident, limited formal education, very marginal computer literacy, inability to return to previous positions, and lack of transferable skills, Claimant's ability to engage in regular gainful activity after his 2012 industrial accident has been greatly reduced. The Referee concludes that Claimant has established a permanent disability of 70%, inclusive of his 30% whole person impairment.

38. Odd-lot**.** A claimant who is not 100% permanently disabled may prove total permanent disability by establishing he is an odd-lot worker. An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market - absent a

business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). 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 his burden of proof 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).

39. In the present case, Defendant questions Claimant's work search, maintains he worked only part-time for several years before his 2012 accident, and asserts that he is employable. Claimant has presented significant direct evidence of an unsuccessful work search as well as the expert testimony of Dr. Collins and Mr. Crum that he is an odd-lot worker. Dr. Collins opined that Claimant's employment search was "one of the most significant job searches I've seen." She observed that Claimant is largely computer illiterate and that "he started out just going directly to potential employers, which he'd always done, seeing if they had a job, filling out an application. Then his wife helped him, so he was then doing online job searches and making applications that way." Collins' Deposition, p. 19, ll. 3-4, 8-12. As noted above, Dr. Collins' conclusion is persuasive. Claimant has shown he has unsuccessfully searched for work and that further searching would be futile. He has established a prima facie case that he is an odd-lot worker, totally and permanently disabled, under the Lethrud test.

40. Once a claimant establishes a prima facie odd-lot case, the burden shifts to ISIF "to show that some kind of suitable work is regularly and continuously available to the claimant." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The ISIF must prove there is:

> An actual job within a reasonable distance from [claimant's] home which [claimant] is able to perform or for which [claimant] can be trained. In addition, the Fund must show that [claimant] has a reasonable opportunity to be employed at that job. It is of no significance that there is a job [claimant] is capable of performing if he would in fact not be considered for the job due to his injuries, lack of education, lack of training, or other reasons.

Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 407, 565 P.2d 1360, 1364 (1977).

41. In the present case, ISIF has not established that there is an actual job regularly and continuously available which Claimant can perform and at which he has a reasonable opportunity to be employed. Claimant has proven that he is totally and permanently disabled pursuant to the odd-lot doctrine.

42. **ISIF liability**. The next issue is whether ISIF bears any liability pursuant to Idaho Code § 72-332. Idaho Code § 72-332(1) provides in pertinent part that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his income benefits out of the ISIF account.

43. Idaho Code § 72-332(2) further provides that "permanent physical impairment" is as defined in Idaho Code § 72-422, 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 physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

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

45. Pre-existing, manifest impairments. The pre-existing physical impairments at issue herein are Claimant's recurrent low back pain, total left knee replacement, hearing loss, and pulmonary dysfunction—specifically sleep apnea related to obesity, prior to his 2012 industrial accident.

46. Claimant's recurrent low back pain originated with his service in the Navy and was recognized in 2004 with a 20% service related disability award. It was rated at 2% whole person impairment by Dr. Greenwald. Claimant's total left knee replacement was performed by Dr. Newhouse in 2006. His left knee impairment was rated at 10% of the whole person by Drs. Greenwald and Newhouse. Claimant's hearing loss originated with his service in the Navy and was recognized in 2004 with a 10% service related disability award. It was rated at 5% whole person impairment by Dr. Peterson. Claimant's back, left knee, and hearing conditions all

constitute pre-existing conditions for purposes of Idaho Code § 72-332. Each preexisted and was manifest prior to his 2012 industrial accident. The first and second prongs of the Dumaw test have been met as to these conditions.

47. Claimant's pulmonary dysfunction, specifically sleep apnea related to obesity, was rated by Dr. Greenwald at 6% whole person impairment. Dr. Greenwald opined that this impairment pre-existed Claimant's 2012 industrial accident. However, Claimant gained approximately 50 pounds after his industrial accident and it appears unclear whether this pulmonary dysfunction was actually manifest prior to his accident.

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

49. The instant record provides no persuasive indication that Claimant's pulmonary dysfunction was a hindrance or obstacle to obtaining employment prior to his industrial accident. Claimant expressly testified that his hearing loss did not prevent him from performing his work and testified that it did not hinder his work for any employer before his 2012 industrial accident. The Referee finds that Claimant's pulmonary dysfunction and hearing loss were not a hindrance or obstacle to employment prior to his industrial accident.

50. In contrast, Claimant's pre-existing left knee and back conditions compelled him to avoid heavy work before his 2012 accident. His back condition also limited his sitting and standing tolerances and prompted him to cease long haul truck driving and change employments. His left knee condition hindered his walking, ladder climbing, kneeling, and squatting abilities. The Referee finds that Claimant's pre-existing left knee and back impairments constituted a

hindrance to his employment prior to his 2012 industrial accident. The third prong of the Dumaw test is met as to these impairments.

51. Combination. Finally, to establish ISIF liability, the preexisting impairment must combine with the subsequent industrial injury to cause total permanent disability. "[T]he 'but for' standard … is the controlling test for the 'combining effects' requirement. …. The 'but for' test requires a showing by the party invoking liability that the claimant would not have been totally and permanently disabled but for the preexisting impairment." Corgatelli v. Steel West, Inc., 157 Idaho 287, 293, 335 P.3d 1150, 1156 (2014), rehearing denied (Oct. 29, 2014). This test "encompasses both the combination scenario where each element contributes to the total disability, and the case where the subsequent injury accelerates and aggravates the pre-existing impairment." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

52. The record in the instant case contains persuasive evidence that Claimant's left knee and back conditions combined with his 2012 industrial injury to render him totally and permanently disabled.

53. Physical therapist Brad Wright restricted Claimant to lifting and carrying no more than five pounds from waist to crown due to his knee and back conditions. He found that Claimant could not safely lift from floor to waist due to his low back. Mr. Wright concluded Claimant could not perform work above his head or reach above his head to grasp the overhead bar on a truck cab and pull himself up into the cab due to his shoulder condition. He further restricted Claimant from all crouching or kneeling due to his knee condition and limited him to rarely standing, walking no more than five minutes at a time, due to his knee and low back condition; and sitting occasionally for no more than 15 minutes at a time up to a total of two and

one-half hours per day due to his back condition. Mr. Wright concluded: "Due to the complex interchange of his various impairments in the shoulder, knee, back, hip, and elbow, his functional limitations are of a severe nature and render him impervious to function in a vocational setting." Exhibit 21, p. 557. Dr. Newhouse opined that Claimant's knee, back, and right shoulder injuries "are all reasons for his permanent restrictions in combination set forth in Brian Wright's functional capacity evaluation. Furthermore, it is also my opinion that Mr. Smith should adopt the restrictions set forth in Mr. Wright's functional capacity evaluation and that these are permanent." Exhibit 2, pp. 88-89.

54. Mr. Crum opined that Claimant "is totally and permanently disabled based exclusively on the restrictions for the right-shoulder injury." Crum Deposition, p. 12, ll. 12-14. Mr. Crum believed that Claimant had "never done any sort of customer service …." Crum Deposition, p. 13, ll. 5-6. Mr. Crum did not specifically opine regarding whether Claimant would be competitive for employment as a service writer, security guard, or crossing guard if he had only the restrictions arising from his right shoulder injury. Mr. Crum did not consider Claimant's years of performing as Santa Claus at family and church gatherings and in restaurants to reflect any customer service ability.

55. Dr. Collins expressly disagreed with Doug Crum's conclusion that Claimant's 2012 accident alone rendered him totally and permanently disabled. Dr. Collins opined that assuming Claimant had only his right shoulder limitations; he would still have access to approximately 1,000 retail sales jobs in the Pocatello area, and could also work as a service writer, security guard, crossing guard, auto parts clerk, or fast food worker. She noted that such positions require standing and walking beyond his restrictions. Thus Dr. Collins concluded that Claimant is totally and permanently disabled due to the combination of his pre-existing

conditions and the restrictions arising therefrom and his 2012 industrial shoulder injury. Collins' Deposition, p. 18.

56. As noted, Claimant's 2012 injuries restricted his reaching, lifting, and carrying ability with his dominant right arm and shoulder. Claimant credibly testified at hearing that he would be able to perform retail and other jobs if he was only constrained by shoulder restrictions from his 2012 accident. With low back-induced sitting and lifting limitations, and left knee-induced walking, squatting, kneeling, ladder and stair climbing limitations, Claimant's low back and left knee conditions further compromise his work capacity. The evidence establishes that but for Claimant's preexisting conditions he would not have been totally and permanently disabled by his industrial accident.

57. The weight of the evidence establishes that Claimant's 2012 industrial accident combined with his pre-existing low back and left knee conditions to render him totally and permanently disabled. The final prong of the Dumaw test has been satisfied as to Claimant's pre-existing low back and left knee impairments. Pursuant to Idaho Code § 72-332, ISIF is liable for Claimant's pre-existing back and left knee impairments.

58. **Carey apportionment.** In Carey v. Clearwater County Road Department, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984), the Idaho Supreme Court adopted a formula apportioning liability between ISIF and the employer/surety at the time of the final industrial accident. The formula prorates the non-medical portion of disability between the employer/surety and the ISIF in proportion to their respective percentages of responsibility for the physical impairment. Conditions arising after the injury, but prior to a disability determination, which are not work-related, are not the obligation of ISIF. Horton v. Garrett Freightlines, Inc., 115 Idaho 912, 915, 772 P.2d 119, 122 (1989).

59. Before applying the Carey formula, the portion of Claimant's impairment pre-existing his 2012 industrial accident at Jackson, and the portion caused by his 2012 industrial accident must be quantified. Claimant's qualifying pre-existing impairments total 12% of the whole person for his back and left knee. Claimant's right shoulder impairment due to his 2012 accident is 7% of the whole person. Thus, Claimant's impairments for Carey apportionment total 19% (7% due to his 2012 accident and 12% qualifying pre-existing). Claimant's impairment from his 2012 industrial accident constitutes 36.84% (7/19), and his qualifying pre-existing impairments constitute 63.16% (12/19) of his total impairment.

60. By application of the Carey formula, absent settlement, Employer/Surety would have been responsible for the medical portion of 7% impairment caused by Claimant's 2012 accident and for 36.84% of the nonmedical portion of Claimant's permanent disability. ISIF is responsible for the pre-existing medical portion of 12% impairment and for 63.16% of the nonmedical portion of Claimant's permanent disability. Thus, absent settlement Employer/Surety would have been liable for 184.2 weeks of statutory benefits commencing on January 8, 2013, the date Dr. Newhouse found Claimant had reached maximum medical improvement from his 2012 industrial injury.

61. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: for the 184.2 week period subsequent to January 8, 2013, ISIF is responsible to pay to Claimant the difference between the applicable permanent partial disability rate and the applicable total and permanent disability rate. Thereafter, ISIF is wholly responsible for the payment of total and permanent disability benefits at the applicable statutory rate.

CONCLUSIONS OF LAW

1. Claimant suffers permanent disability of 70%, and has proven in the aftermath of his 2012 industrial accident that he is an odd-lot worker, totally and permanently disabled under the Lethrud test.

2. ISIF is liable pursuant to Idaho Code § 72-332 only for Claimant's pre-existing low back and left knee impairments and the proportion of disability attributable thereto.

3. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: for the 184.2 week period subsequent to January 8, 2013, ISIF is responsible to pay to Claimant the difference between the applicable permanent partial disability rate and the applicable total and permanent disability rate. Thereafter, ISIF is wholly responsible for the payment of total and permanent disability benefits at the applicable statutory rate.

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 7th day of July, 2017.

INDUSTRIAL COMMISSION

___/s/_____
Alan Reed Taylor, Referee

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 14th 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:

FRED J LEWIS
PO BOX 1391
POCATELLO ID 83204

BREN MOLLERUP
PO BOX 366
TWIN FALLS ID 83303-0366

___/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SIDNEY SMITH, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2012-005833** **ORDER** Filed July 14, 2017

Pursuant to Idaho Code § 72-717, Referee Alan Taylor 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 suffers permanent disability of 70%, and has proven in the aftermath of his 2012 industrial accident that he is an odd-lot worker, totally and permanently disabled under the Lethrud test.

2. ISIF is liable pursuant to Idaho Code § 72-332 only for Claimant's pre-existing low back and left knee impairments and the proportion of disability attributable thereto.

3. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: for the 184.2 week period subsequent to January 8, 2013, ISIF is responsible to pay to Claimant the difference between the applicable permanent partial disability rate and the applicable total and permanent disability rate.

Thereafter, ISIF is wholly responsible for the payment of total and permanent disability benefits at the applicable statutory rate.

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

DATED this 14th day of July, 2017.

INDUSTRIAL COMMISSION

___/s/_____
Thomas E. Limbaugh, Chairman

___/s/_____
Thomas P. Baskin, Commissioner

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

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 14th 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:

FRED J LEWIS
PO BOX 1391
POCATELLO ID 83204

BREN MOLLERUP
PO BOX 366
TWIN FALLS ID 83303-0366

___/s/_____