BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ARTURO AGUILAR, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2011-024699** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed 10/13/17**

This matter came to hearing before the Industrial Commission on July 22, 2015. Appearing for Claimant was Justin Aylsworth, Esq. Appearing for Defendants Lowry Excavating/Concrete (Employer) and State Insurance Fund was Jon Bauman, Esq. Appearing for Defendant Industrial Special Indemnity Fund (ISIF) was Daniel Miller, Esq. The following matters are at issue pursuant to the Commission's December 5, 2014 Order Vacating and Resetting this matter for hearing:

1. Whether the conditions for which Claimant seeks benefits were caused by the industrial accident, or by the pre-existing or subsequent injury or condition;

2. Whether and to what extent Claimant is entitled to the following benefits:

    a. Medical care;

    b. Temporary total disability (TTD);

    c. Permanent partial impairment (PPI);

    d. Permanent partial disability (PPD);

3. Whether apportionment pursuant to Idaho Code § 72-406 is appropriate;

4. Whether Claimant is totally and permanently disabled, either under the 100% method or according to the odd-lot doctrine;

5. Whether ISIF is liable pursuant to Idaho Code § 72-332, and, if so, how disability should be apportioned according to the formula set forth in *Carey v. Clearwater County Road Department*, 107 Idaho 109, 686 P.2d 54 (1984).

6. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804;

7. Whether Claimant's alienage bars him from recovering permanent disability benefits;

8. Whether *Sanchez v. Galey*, 112 Idaho 609, 733 P.2d 1234 (1986), and *Patino v. Gregg & Anderson Farms*, 97 Idaho 251, 542 P.2d 1170 (1975), supersede the Commission's decision in *Diaz v. Franklin Building Supply*, 2009 IIC 0652 (November 20, 2009);

9. If disability recovery is barred, whether Claimant may seek a legal remedy for his injury outside of Title 72, Idaho Code.

10. Whether Defendants are precluded from asserting Claimant's alienage as a defense to avoid liability for benefits;

11. Whether Claimant engaged in an injurious practice and should therefore have his benefits reduced pursuant to Idaho Code § 72-435;

12. Whether Claimant is precluded from seeking compensation on this claim due to a prior lump sum settlement agreement.

With respect to issue 10, Claimant conceded at hearing that he is an illegal alien. (Transcript, p. 9/12-11/3). Issue 12 was not addressed in briefing and is considered withdrawn. Claimant was the only witness to testify at hearing. Although a number of post-hearing

depositions were noticed, the only two that were eventually taken were those of vocational rehabilitation expert Delyn Porter and John Janzen.

Subsequent to hearing, Claimant and Employer/Surety reached a settlement of Claimant's claim against Employer/Surety. That settlement was approved by the Industrial Commission on or about October 19, 2015 pursuant to Idaho Code § 72-404. Therefore, issues 1-3, 6 are now moot. Claimant notified the Commission of his intention to continue to pursue his claim against the ISIF. The aforementioned post-hearing depositions were completed and briefings submitted by the parties. The matter came under advisement on or about July 20, 2017, and is now ripe for decision.

FINDINGS OF FACT

1. Claimant was born on September 5, 1974. He is a Mexican National and has resided illegally in the United States since approximately 1986. He is married, and has two daughters, both of whom are U.S. Citizens. The oldest, Alondra, is profoundly disabled, and suffers from cerebral palsy.

2. Claimant completed the 5th grade in Mexico, and at hearing testified through an interpreter. He has had no schooling in the United States. He has the ability to read Spanish (Transcript, p. 64/6-7), but not English (Transcript, p. 38/12-13). Records of the Industrial Commission Rehabilitation Division generated following Claimant's 2006 low back injury reflect that Claimant does speak English, and is able to comprehend explanations and instructions conveyed in English. However, he prefers to speak Spanish. (ISIF's Exhibit 7, p. 29).

3. Since moving to the United States, Claimant has generally been employed in physically demanding work. (Claimant's Exhibit DD; ISIF's Exhibit 7; ISIF's Exhibit 9). He has

performed agricultural labor, but for 16 years prior to the date of hearing worked primarily in the concrete pouring/finishing industry. Some of this work is highly skilled, particularly his work as a concrete finisher, but all of it has been physically demanding.

4. Claimant has a history of a number of work-related injuries to his low back which predate the subject claim. On or about October 26, 1999, while employed by B & T Construction, Inc., Claimant suffered an injury to his low back after the vehicle in which he was riding was struck from behind by a third party.

5. On or about September 17, 2002, while employed by West Regional Contractors, Inc., Claimant suffered an injury to his low back while attempting to free a stuck jackhammer.

6. On or about December 11, 2006, while employed by Paul Snyder, Claimant suffered an injury to his low back while screeding concrete. As developed *infra*, Claimant's injury was at the L4-5 level. On June 11, 2007, he underwent an L4-5 diskectomy and fusion performed by Miers Johnson, M.D. Claimant was unemployed from the date of the accident through the date of closure of his ICRD file on or about April 6, 2009. His 1999 and 2006 claims were resolved via a lump sum settlement approved by the Industrial Commission on or about August 5, 2009 pursuant to Idaho Code § 72-404. At some point, but no later than June 2010, Claimant returned to his customary work. He testified that his back felt good by the time he started work for Lowry Excavation/Concrete. He gave a similar history to Dr. Jorgenson when seen following the 2011 accident. In this regard, Dr. Jorgenson reported:

> Mr. Aguilar had surgery in 2007 and had an excellent result from this by history. He states he had no back pain and no leg pain and is fully functional performing a heavy job description requiring repetitive bending and lifting activities.

(Claimant's Exhibit I, p. 295). Claimant started work for Lowry on June 3, 2010. For a period, he was contemporaneously employed by Gail Ansley. On or about December 9, 2010, Claimant

suffered another injury to his lumbar spine when moving a 55 gallon barrel while employed by Ansley.

7. Claimant was employed on a full-time basis by Lowry. His job required a great deal of repetitive bending, lifting and twisting. He testified that his job required lifting of up to 100 pounds. (Transcript, p. 42/2-15). The October 3, 2011 accident occurred when Claimant was employing a jackhammer[1] to break concrete. While so engaged, he felt the immediate onset of low back pain. (Claimant's Exhibit 1, p. 1).

8. Claimant also suffers from a number of non-work related medical conditions which predate the subject accident of October 3, 2011.

9. Medical records reflect that Claimant suffers from vision loss in the right eye caused by diabetic retinopathy and/or cataracts. At hearing, Claimant testified that he had lost vision in his right eye prior to his June 3, 2010 hire date by Employer. (Transcript, p. 44/23-45/9). He testified that his vision loss presented difficulties when he was required to cut expansion joints in concrete slabs, level wet concrete and read plans. (Transcript, p. 45/10-21). However, on cross examination, Claimant confirmed that at the time of his August 21, 2014 deposition, he gave the following testimony concerning the onset of his loss of vision in the right eye:

> Q. Your inability to see with your right eye, did that occur before or after your accident at Lowry?
> A. After.

Claimant's Deposition, p. 51/6-9.

[1] Claimant testified at pre-hearing deposition that he injured himself while using a jackhammer and the first report of injury similarly reports use of a jackhammer. (Claimant's Deposition, p. 31/1-3; Claimant's Exhibit 1, p. 1). Claimant testified at hearing he was lifting a sledgehammer when he injured himself. However, Claimant also explained at hearing that he uses "jackhammer" and "sledgehammer" interchangeably. (Transcript, p. 36/1-3). He testified both weigh approximately 80-90 pounds. (Transcript, p. 42/13-14).

10. At hearing, Claimant also testified to suffering from diabetes for approximately ten years. Prior to the subject injury, his diabetes would sometimes make him feel dizzy when his blood sugar got too low, and he would have to stop work to eat something. He also required breaks to take insulin (Transcript, p. 46/13-21). However, on cross examination, Claimant conceded that at the time of his 2014 deposition, he testified that his diabetes diagnosis did not affect his ability to work in any way:

> Q. (BY MR. MILLER) Mr. Aguilar, you have diabetes. How long have you known you've had diabetes?
> A. About ten years.
> Q. And has your diabetes affected your ability to work in any way that you know of?
> A. No. I worked fine. I worked normal.
> Q. Has your diabetes gotten worse since this accident at Lowry?
> A. No. I think it's stable.
> Q. If you take your medicine for diabetes, do you feel ok then?
> A. Yes.
> Q. Have you been taking your medicine for diabetes?
> A. I have been injecting my insulin.

Claimant's Deposition, p. 48/19-49/10.

11. As noted above, Claimant testified both at prehearing deposition, and at hearing that he is essentially blind in the right eye. As of the date of his prehearing deposition, if he covered his left eye, he could see nothing. (Claimant's Deposition, p. 79). At hearing, Claimant revealed, for the first time, that he also suffers from severe left eye impairment. His vision in both eyes is now so bad that he no longer drives. (Transcript, p. 64/10-65/16). Claimant believes that his left eye impairment is related to his diabetes. (Transcript, p. 76/7-10).

12. Claimant suffered from hypertension prior to the subject accident, but testified that to the best of his knowledge his hypertension has not impacted his ability to work. (Claimant's Deposition, p. 49/11-20).

Low Back Treatment

13. While Claimant had several low back injuries prior to 2006, it was the 2006 accident that first led to surgical treatment. On December 27, 2006, Claimant underwent MRI evaluation of the lumbar spine which was read by David Giles, M.D., as follows:

> L2-3 disc space: There is reduced T2 signal intensity from the nucleus but no other abnormality.
> L3-4 disc space: Normal.
> L4-5 disc space: There is a focal small central disc extrusion probably secondary to an underlying radial annular fissure since there us a fluid collection in the anterior part of the disc protrusion. The disc protrusion minimally deforms the anterior surface of the thecal sac and contacts but does not deform in either of the fifth rootlets. Space available for thecal sac is minimally reduced, there is a generous CSF in the interstices between nerve rootlets.
> L5-S1 disc space: Normal.
> Soft tissues: The conus medullaris is posterior to L1 and normal. There is no evidence of an intraspinal mass. Nerve root the duct are normal positions with an CSF throughout the levels examined. The facet joints are normal. No soft tissue abnormality is identified.
> Impression:
> 1. There is a focal moderate central L4-L5 disc protrusion, probably secondary to an underlying radial annular fissure, that is in contact with and minimally deforms the anterior surface if the thecal sac, and is in contact with but does not deform or displace both of the L5 rootlets.

ISIF's Exhibit 11, p. 4.

14. Claimant was treated conservatively, but failed to improve. About April 26, 2007, Dr. Johnson recommended an L4-5 fusion for treatment of Claimant's low back pain and radiculopathy. Repeat MRI evaluation of Claimants lumbar spine was performed on May 10, 2007, and was read as follows:

> LUMBAR DISK LEVELS:
> L1-2: Normal for age.
> L2-3: Normal for age.
> L3-4: There is very mild intraforaminal annulus bulge of the left. There appears to be amble room for the nerve root to escape.
> L4-5: There is moderate broad-based intraannular disc protrusion present. Disc material extends across entire anterior aspect of the spine canal and produces moderate sac compression. There is resultant bilateral recess stenosis.

L5-S1: normal for age.
ADDT'S COMMENTS: None
IMPRESSION: There is a moderate broad-based L4-5 intra annular disc protrusion present, There is a moderate anterior sac compression and there is a bilateral lateral recess stenosis.
There is a small focal intraforaminal disc bulge in the left at L3-4 without exiting the L3 root compression.

Employer's Exhibit 1, p. 172. (Emphasis in original).

15. Claimant was evaluated by Kenneth Little, M.D., on May 24, 2007 in connection with Dr. Johnson's recommendation for L4-5 diskectomy and fusion. Dr. Little noted the most recent MRI evaluation of Claimant's lumbar spine demonstrating an L4-5 disk protrusion, but also a small disk bulge on the left at L3-4, but without compression of the L3 nerve root. Dr. Little recommended a minimally invasive bilateral L4-5 hemilaminectomy and microdiskectomy. He felt that this would offer Claimant the best chance for pain relief. On June 11, 2007, Dr. Johnson performed an L4-5 diskectomy with instrumented fusion. Claimant did poorly following surgery, presenting with continuing complaints of low back pain and left lower extremity radiculopathy. Repeat MRI evaluation of Claimant's lumbar spine was preformed on or about March 5, 2008. That study was read as follows:

COMPARISON: Examination of the lumbar spine, 12/27/2006.
FINDINGS: Since the previous exam, bilateral pedicle screws have been placed at L4 and L5. A spacer has been placed in the posterior aspect of the intervertebral disk space at L4-5. Posterior decompression has been performed. The bone marrow is within normal limits. There is loss of intervertebral disk signal at the L2-3 and L4-5 levels.
L5-S1: No abnormality is noted.
L4-5: Postsurgical changes are present, with pedicle screws at L4 and L5 bilaterally and posterior fusion bars and a spacer in the intervertebral disk space. No recurrent or retained disk is identified. Post surgical soft tissue enhancement seen posteriorly.
L3-4: A minor broad-based bulge is present abutting the anterior aspect of the thecal sac. There is mild acet arthropathy.
L2-3: There is a slight loss of intervertebral disk signal, but no disk bulge, protrusion, or herniation is identified. The central canal and neural foramina are widely patent.

> L1-2: Normal.
> IMPRESSION: Postsurgical changes with lumbar spinal fusion, without MRI evidence of recurrent or retained disk.

Employer's Exhibit 1, p. 304. (Emphasis in original).

16. To evaluate possible pseudarthrosis at the level of the fusion, Dr. Little ordered a CT myelogram of the lumbar spine, which demonstrated a solid fusion. Dr. Little did not believe that Claimant's complaints were amenable to further surgical revision, and pronounced Claimant medically stable with a 25% whole person rating. (*See* ISIF's Exhibit 14, p. 6). Dr. Little also expressed his belief that Claimant would not be able to return to his time-of-injury work.

17. By letter dated July 29, 2008, Dr. Johnson pronounced Claimant medically stable and entitled to impairment at 18% of the whole person. Further, Dr. Johnson limited Claimant to light duty activities with occasional lifting to 17 pounds, frequent lifting to 7 pounds, and constant lifting of up to 3 pounds. These limitations/restrictions are quite likely derived from the July 10, 2008 Functional Capacity Evaluation ordered by Dr. Johnson. (*See* ISIF's Exhibit 15). Claimant continued to follow with Dr. Johnson through July 7, 2009, and during that time, Dr. Johnson periodically amended his activity restrictions for Claimant. On October 14, 2008, Dr. Johnson offered the following comments on Claimant's limitations/restrictions:

> He should not lift more than 15 pounds on an occasional basis. He should avoid repetitive lifting. He could probably lift 5 pounds without much difficulty.

ISIF's Exhibit 12, p. 24.

By letter dated November 6, 2008, Dr. Johnson offered the following comments on Claimant's limitations/restrictions:

> At this point Arturo should not lift more than about 15 pounds on an occasional basis. He should avoid jobs that involve repetitive lifting activities. He could probably lift up to 5 pounds at a time without much difficulty. In time he may get to where he can lift 20 to 30 pounds. Given his present level of function, I do not feel that he can do this at this time.

ISIF's Exhibit 12, p. 25.

18. In a response dated January 6, 2009 to a request to the Idaho Division of Vocational Rehabilitation, Dr. Johnson restricted Claimant to limited bending/twisting/stooping, limited pushing/pulling of 25 pounds and limited prolonged sitting/standing. He felt that Claimant could lift up to 25 pounds occasionally, 15 pounds frequently, and 5 pounds continuously. In notes dated April 7, 2009, Dr. Johnson limited Claimant as follows:

> He should not lift more than 20 pounds on occasional basis. He should avoid repetitive lifting he could probably lift 5 pounds without much difficulty.

ISIF's Exhibit 12, p. 27.

In his final note of July 7, 2009, Dr. Johnson limited Claimant as follows:

> Continue with current work restrictions no lifting over 20 pounds avoid, twisting, and excessive bending.

ISIF's Exhibit 12, p. 29.

As noted above, notwithstanding these recommendations from Dr. Johnson, Claimant returned to his customary work following the Commission's August 5, 2009 approval of the July 22, 2009 lump sum settlement, which resolved all claims associated with the 1999 and 2006 accidents. (*See* ISIF's Exhibit 2, p. 1).

19. Following the accident of October 3, 2011, Claimant experienced the onset of severe low back pain and bilateral lower extremity radiculopathy. Repeat MRI evaluation of Claimant's lumbar spine was accomplished on November 22, 2011. That study was read by Cameron Evans, M.D., as follows:

> There is multilevel degenerative disk disease throughout the lumbar spine, worst at the L3-L4 level, above the fused segment. This results in the spinal cord and neuroforaminal narrowing. This is described in detail by the level below.
> T12/L1: Normal disk height and signal without central canal or foraminal stenosis.

L1/L2: Normal disk height and signal without central canal or foraminal stenosis.
L2/L3: There is a mild disk space narrowing and the disk desiccation there is a small Schmorl's node in the inferior endplate of L2. There is a small broad-based posterior disk bulge that does not cause significant spinal canal or neural foraminal narrowing.
L3/L4: There is a disk space narrowing and a disk desiccation at this level. There is a large broad-based posterior disk bulge with central annular fissure and superimposed left paracentral caudally directed disk extrusion. Disk bulge combined with facet hypertrophy and ligamentum flavum laxity results in moderate spinal canal narrowing. There is also moderate bilateral neuroforaminal narrowing at this level. Extruded left paracentral disk severely narrows at the left lateral recess and impinges upon the transiting left L4 nerve root.
L4/L5: There is mechanical fusion at this level. Hardware artifact somewhat limits evaluation of neural foramina. No significant spinal canal narrowing.
L5/S1: Intervertebral disk space height is well preserved. No significant spinal canal narrowing. There is mild bilateral neuroforaminal narrowing at this level.
Visualized sacrum is intact. Sacroiliac joints are preserved. Paraspinous musculature is within normal limits. Visualized retroperitoneal and pelvic structures are unremarkable.
IMPRESSION:
1. ADVANCE DEGENERATIVE DISK DISEASE AT L3-L4 WHERE THERE IS A BROAD-BASED POSTERIOR DISK BULGE WITH SUPERIMPOSED LEFT PARACENTRAL CAUSALLY DISK EXTRUSION. EXTRUDED DISK SEVERELY NARROWS THE LEFT LATERAL RECESS AND IMPINGES UPON THE TRANSITING LEFT L4 NERVE ROOT. THERE IS ALSO MODERATE SPINAL CANAL NARROWING AT THIS LEVEL.
2. STATUS POST LUMBAR FUSION AT L4-L5 WITH LAMINECTOM AT L4. HARDWARE ARTIFACT SOMEHWAT LIMITS EVALUATION OF INTERVERTEBRAL DISK SPACE AND THE NEURAL FORAMINA AT THIS LEVEL.

Employer's Exhibit 3, pp. 622-623. (Emphasis in original).

20. Claimant underwent epidural steroid injections without relief. By February 8, 2012, he had progression of his complaints into the calves with numbness and tingling into the left foot. Claimant's complaints were thought to be mediated by his demonstrated advanced degenerative disk disease at L3-4 with associated broad based posterior disk bulge narrowing the left lateral recess and impinging on the left L4 nerve root.

21. By letter dated February 13, 2012, Samuel Jorgenson, M.D., recommended surgery, to include an L3-4 laminectomy, diskectomy and fusion. He stated: "Fusion is required

since it is adjacent to an existing fusion and as a consequence of the expected increase stress at the L3-4 level." (Claimant's Exhibit I, p. 288). Employer/Surety asked David Verst, M.D., to review Dr. Jorgenson's surgical recommendation and to respond, in particular, to the question of the extent to which the accident of October 3, 2011 caused further injury to Claimant's lumbar spine. Dr. Verst evaluated Claimant and prepared a report dated March 12, 2012. Dr. Verst had the opportunity to review all of Claimant's previous MRI scans. He offered the following comments concerning the evolution of Claimant's problems, particularly those at L3-4:

> MRI scan findings most recent MRI on November 2011, demonstration fusion at the L4-5 level. L3-4 demonstrates advance disc degeneration with left lateral disc protrusion and lateral recess as well as foraminal narrowing.
>
> Previous MRI scans were reviewed that included MRI from 2008, 2007 and 2006. Interestingly, there are similar findings at L3-4 level from the 2008 MRI scan. The 2008 lumbar MRI demonstrates left lateral disc herniation at the L3-4 level with mild-to-moderate lateral recess narrowing as well a foraminal narrowing. There is also disc degeneration at this level.

Employer's Exhibit 3, p. 664. Dr. Verst concluded that Claimant's pain complaints were, indeed, associated with the structural deficits noted at L3-4. However, he declined to relate Claimant's problems at this level to the subject accident:

> Regarding causation and what is responsible for the L3-4 disc degeneration, disc collapse, disc protrusion/herniation, and lateral recess stenosis; I feel that this is the global cascade pathophysiology that corresponds to progressive disc degenerative disease. Therefore, on a more-probable-than-not basis, the jackhammer incident was not the insult or causation to his current need for surgical intervention. This statement is justified by having reviewed all of his previous MRI scans as well as an extensive review of all his medical records. Again, there is evidence of disc herniation protrusion at the l3-4 level on his 2008 MRI scan.

Employer's Exhibit 3, p. 665. While he agreed with Dr. Jorgenson's surgical recommendation, he did not believe that the need for surgery could be related to the accident of October 3, 2011:

> 4. Is the need for surgery casually related to the industrial surgery of 10/03/11?

> A: I do not feel the current need for surgery is related to the industrial injury of 10/03/11. As mentioned in the discussion, MRI from 2008 demonstrates very similar findings with herniated disc favoring the left side with associated lateral recess and foraminal stenosis. Overall, this is a natural progression of underlying degenerative disc disease.

Employer's Exhibit 3, p. 666.

22. In a letter dated April 24, 2012, Dr. Jorgenson responded to Dr. Verst's observations. Expressing his disagreement with Dr. Verst's opinion on causation, Dr. Jorgenson stated:

> Dr. Verst also opines that he does not see that the need for the treatment is based on the industrial injury of 10/03/11. I do not agree with Dr. Verst's assessment of this. The reason for my assessment is that Mr. Aguilar had surgery in 2007 and had an excellent result from this by history. He states he had no back pain and no leg pain and is fully functional performing a heavy job description requiring repetitive bending and lifting activities. Following this, he has specific event lifting a jackhammer which caused severe pain to his back and leg, which has persisted since this time. His symptoms are best categorized as aggravation of an existing pathology at the L3-L4 level.
>
> However, since the patient was asymptomatic prior and had a specific injury and has had symptoms since, it is my opinion on a medically more probable than not basis that his current symptoms and need for treatment are directly related to the industrial injury of 10/03/11.
>
> While Dr. Verst opines that the patient's symptoms are an aggravation of the pre-existing injury, I do not agree with his assessment that his current symptoms are an aggravation of the preexisting natural degenerative cascade for the reasons stated above. Most notably, the patient had a specific event which directly resulted in his symptoms and he was entirely asymptomatic for several years prior to this incident.

Claimant's Exhibit I, p. 295.

23. Surety authorized the surgery recommended by Dr. Jorgenson. On May 15, 2012, Dr. Jorgenson performed a revision fusion at L4-5, with diskectomy at L3-4 and extension of the fusion to include the L3-4 level. Claimant did poorly following surgery, continuing to complain of low back pain as well as bilateral leg pain with the left leg being worse than the right. A repeat

MRI of the lumbar spine performed on July 16, 2012 failed to document any areas of central canal stenosis or neuroforaminal narrowing.

24. A CT myelogram of the lumbar spine was preformed on November 19, 2012, and was thought to show mild to moderate degenerative changes at L2-3 with annular bulging of the disk, facet arthrosis and ligamentum flavum hypotrophy. This was thought to cause a mild degree of central canal stenosis. (Claimant's Exhibit I, p. 325).

25. On December 27, 2012, Claimant was involved in a motor vehicle accident in which the vehicle he was driving was struck from behind by another vehicle. He complained of increased low back pain following this incident, but no change in his lower extremity symptoms. A CT scan performed following the accident did not demonstrate any "worrisome pathology" according to Dr. Jorgenson. (*See* Claimant's Exhibit I, p. 330). Claimant underwent repeat MRI evaluation of the lumbar spine on February 20, 2013 at Dr. Jorgenson's instance. That study was compared against the previous MRI of July 16, 2012 and the lumbar spine CT myelogram of November 19, 2012. The February 20, 2013 study demonstrated mild central canal stenosis at L2-3 related to a mild disk bulge, but without significant change from the earlier above referenced exams. (*See* Claimant's Exhibit I, p. 336). Dr. Jorgenson did not believe that Claimant would benefit from further surgical intervention and recommended that Claimant by referred for ongoing pain management. He also felt that Claimant might be a candidate for a dorsal column stimulator. (*See* Claimant's Exhibit I, p. 339).

26. In a report dated March 21, 2013, Dr. Little responded to a number of questions posed by Employer/Surety. He stated that absent the motor vehicle accident of December 27, 2012, he would have expected continued improvement in Claimant's low back condition following Dr. Jorgenson's surgery. Absent the December 27, 2012 motor vehicle accident, Dr.

Little felt that Claimant should have been able to get to the point where he could lift up to 50 pounds. Dr. Little also stated that following the L4-5 fusion necessitated as a result of the 2006 accident, Claimant reasonably had permanent lifting restrictions of no more than 50 pounds. Therefore, per Dr. Little, Claimant's restrictions both before and after the accident of October 3, 2011 were in the range of no lifting greater than 50 pounds. In a follow-up report dated May 23, 2013, Dr. Little addressed Claimant's impairment. He rated Claimant's overall impairment at 17% of the whole person under the 6th Edition to the AMA *Guides to the Evaluation of Permanent Impairment*. A 13% PPI rating was assigned to the 2006 accident/injury, with a 4% rating assigned to the October 3, 2011 injury.

27. In a July 12, 2013 letter, Dr. Jorgenson opined that the December 27, 2012 motor vehicle accident did not cause any further injury to Claimant's lumbosacral spine. Dr. Jorgenson opined that Claimant is limited to light duty capacity only, with alternation between standing and sitting with no significant bending, lifting, or twisting. (*See* Claimant's Exhibit I, p. 341-342). Claimant underwent three medical evaluations following the conclusion of his treatment by Dr. Jorgenson.

28. Claimant was seen by Tyler Frizzell, M.D., on October 16, 2013 at the instance of Claimant's Counsel. Dr. Frizzell took a history from Claimant that Claimant made a "full recovery" following the 2007 L4-5 fusion. Dr. Frizzell recorded that prior to the October 3, 2011 accident Claimant was "able to do everything," and had not had any back issues for "a long time." (*See* Claimant's Exhibit M, p. 385). Following electrodiagnostic studies performed on December 11, 2013, and a functional capacity evaluation also performed on December 11, 2013, Dr. Frizzell agreed with Dr. Little's assessment that as a consequence of the 2006 accident Claimant suffered a 13% whole person impairment rating. However, he disagreed with Dr.

Little's assessment of Claimant's impairment as a result of the 2011 accident. Dr. Frizzell proposed that Claimant is entitled to a 14% whole person rating for the effects of the 2011 accident, for a total low back impairment of 27% of the whole person. By letter dated March 20, 2015, Dr. Frizzell responded to Counsel's inquiry as to whether or not the accident of 2006 and the accident of 2011 "combined" to render Claimant totally and permanently disabled. In response, Dr. Frizzell stated: "I have had the opportunity to perform an independent medical evaluation of Mr. Aguilar on October 14, 2013. I have also had the opportunity to review the other medical records provided to me. On a more probable than not basis, Mr. Aguilar is totally and permanently disabled." (Claimant's Exhibit K, p. 393).

29. On October 29, 2014, Claimant was seen by Nancy Greenwald, M.D., at the instance of Employer/Surety. Dr. Greenwald concluded that Claimant suffered an L4-5 injury as a consequence of the December 11, 2006 accident and an L3-4 injury as a consequence of the October 3, 2011 accident. However, she did not relate Claimant's lower extremity radicular complaints to either of these events. Rather, she concluded that Claimant suffers from a diabetic neuroradiculopathy referable to his frequently uncontrolled diabetes. She also felt that Claimant suffers from peripheral neuropathy referable to his diabetes, moderate depression, loss of vision in the right eye, decreased hearing, kidney disease, and hypertension.

30. Referring to the 6th Edition of the AMA *Guide to the Evaluation of Permanent Impairment,* Dr. Greenwald rated Claimant's lumbar spine impairment at 25% of the whole person, with 19% referable to the 2006 accident and 6% referable to the 2011 accident. She gave Claimant a higher rating for the 2006 accident than did Drs. Little and Frizzell because of her belief that while Claimant had a single level injury at L4-5, he had multilevel radiculopathy as a

result of that lesion. Therefore, a 19% impairment rating for the 2006 accident better fit Claimant's clinical presentation.

31. Dr. Greenwald gave Claimant the following limitations/restrictions referable to his 2006 and 2011 accidents, and for his non work-related conditions:

> Yes. From his prior 2006, he should have with the one level fusion a 50 pounds occasional lifting restriction and avoid frequent torquing maneuvers. For the 2011 work injury, now a two level injury, no lifting greater than 40 pounds. Avoid frequent torquing maneuvers, and change position ad-lib. For his nonindustrial injuries, he should have the following restrictions: No driving with blindness in his right eye, no heights secondary to his significant peripheral neuropathy and decrease in proprioception, avoid any jobs that place him at risk for injury to his legs and arms such as welding or dangerous equipment that could cause any wounds to his arms and legs since his decrease sensation is quite prominent.

ISIF's Exhibit 22, p. 16.

Dr. Greenwald also rated Claimant's various other conditions based on her review of the medical records and her exam of Claimant. It does not appear from Dr. Greenwald's report that she made an attempt to rate these conditions as they existed immediately prior to the October 3, 2011 accident. In her follow up letter of November 21, 2014, Dr. Greenwald gave Claimant the following impairment for these conditions: diabetes, 22%; polyneuropathy, 5%; vision loss in the right eye, 20%; depression, 5%; hypertension, 32%.

32. On or about November 4, 2014, Claimant was evaluated by Robert Friedman, M.D., at the instance of Claimant's Counsel. Dr. Friedman was asked to evaluate Claimant's various pre-existing impairments as they existed immediately prior to the October 3, 2011 accident. His recommendations for these ratings as of that date are as follows: diabetes, 10%; depression, 5%; hypertension, 17%; right eye vision loss, 15%.

33. For Claimant's pre-existing diabetes, Dr. Friedman recommended that Claimant should have access to bathroom facilities on a four times per day basis in order to allow him to

check his blood sugar and administer insulin. He also believed that Claimant should have scheduled breaks, allowing him to adjust his caloric intake as needed. Although Dr. Friedman believed that Claimant had a 5% impairment rating for pre-existing depression, he did not note any limitations or restrictions relating to this condition. For his pre-existing hypertension, Dr. Friedman limited Claimant to maximum lifting of 50 pounds occasionally, 25 pounds repetitively, and to avoid vigorous lifting, bending and other activities that would cause increased blood pressure. For his right eye vision loss, Claimant had precautions against approaching and/or presenting information from the right due to his right side visual impairment. (*See* Claimant's Exhibit O).

Vocational Testimony

34. The ISIF retained John M. Janzen to perform a forensic vocational evaluation of Claimant, with a particular view towards assessing whether or not Claimant's current disability is a result of the combined effects of the 2006 and 2011 industrial accidents. Dr. Janzen did not actually offer an opinion on the question of whether or not Claimant is totally and permanently disabled as alleged. In his report dated November 10, 2014, he argued that the medical and other records in evidence demonstrate that Claimant's limitations/restrictions following the 2011 industrial accident are no greater than the limitations/restrictions assignable to Claimant following the 2006 industrial accident. Therefore, Claimant's employability following the 2011 industrial accident is comparable to his employability following the 2006 industrial accident.

35. In reaching this conclusion, Dr. Janzen relied on the limitations/restrictions imposed by Claimant's treating physician, Dr. Johnson, following the 2006 industrial accident, along with the results of a 2008 functional capacities evaluation. These records support the conclusion that following the 2007 L4-5 diskectomy and fusion Claimant was capable of light

duty employment, at best. The recommendation of Dr. Jorgenson and the results of the 2013 functional capacities evaluation similarly restrict Claimant to performing light duty work, at best. (*See* ISIF's Exhibit 9, p. 1-6). Dr. Janzen's deposition was taken on April 6, 2017. Elaborating on the conclusions reached in his report, he testified that even Dr. Little's assessment of Claimant's limitations/restrictions supports the conclusion that Claimant's disability was not made any worse as a result of the 2011 accident. It will be recalled that Dr. Little proposed that Claimant ended up with a 50 pound lifting restriction following the 2006 accident, and has similar lifting restrictions following the 2011 accident. Dr. Janzen did not believe that the limitation imposed by Dr. Friedman for Claimant's hypertension, diabetes and right eye impairment constituted significant vocational impediments to Claimant. (Janzen's Deposition, p. 13/25-16/11).

36. Delyn Porter performed a forensic vocational evaluation of Claimant at the request Claimant's Counsel. His report appears in the record as Claimant's Exhibit DD. Mr. Porter unequivocally concluded that Claimant is totally and permanently disabled based on medical and non-medical factors. Like Dr. Janzen, Mr. Porter recognized that Claimant's work history is in heavy and manual labor, and that he has neither the skills nor education to exploit employment opportunities in the work he is capable of performing with his current restrictions. On the issue of the extent to which the 2006 and 2011 industrial accidents contributed to Claimant's total and permanent disability, Mr. Porter noted that Dr. Little established a 50 pound lifting restriction for Claimant as a consequence of the 2006 accident. Following the 2011 accident, Claimant's restrictions were significantly increased such that he is now only capable of light duty employment. Mr. Porter did <u>not</u> explain why the pre-existing low back condition and the 2011 accident, when combined, cause total impairment and disability. Specifically, he did not explain how, but for the preexisting condition, Claimant's disability following the 2011 accident

would not have been total and permanent. The only testimony offered by Mr. Porter on the issue of combination is as follows:

> Q. What, if any, opinions did you arrive at with respect to combing Arturo's impairments and disabilities?
> A. I came to the conclusion that if you combine the pre-injury and post injury together, Mr. Aguilar ends up at 100 percent between medical and nonmedical factors there, which basically indicates he's totally and permanently disabled.
> Q. As part of your vocational disability evaluation, did you set forth your opinions and conclusions as to Arturo's permanent disability considering permanent medical factors combined with pertinent non-medical factors?
> A. Yes.
> Q. And are those opinions and conclusions set forth under the "Conclusions" heading on page 26 of your 2013 vocational disability report?
> A. Yes.
> Q. Could you tell us what your conclusions were?
> A. That Mr. Aguilar is totally and permanently disabled.
>
> ….
>
> Q. Could you please go over your opinions for us?
> A. When you look at the combined industrial and non-industrial factors, Mr. Aguilar comes up with a 74 percent whole person permanent partial impairment in this case. The FCE places him in a sedentary to limited light work capacity there. And if you compare or contrast all of that together, he's really restricted to sedentary work when you look at the positional restrictions that he has there as well. And, again, I conclude that he's totally and permanently disabled.

Porter's Deposition, pp. 29/3-24; 34/1-12.

Claimant's Credibility

37. As developed *infra*, Claimant's testimony at hearing concerning the impact of his right eye deficit and diabetes differs from the testimony he gave at his August 2014 deposition. The Commission is also troubled by Claimant's evolving work capacity following the 2006 accident. After that accident, Claimant was unable to work for over 30 months due to the severity of his low back complaints. Claimant also claimed that he was totally and permanently disabled. (*See* ISIF's Exhibit 5). However, not long following the August 5, 2009 settlement of his 2006 claim, he returned to his customary profession, later relating that he had made a full recovery

from his 2006 accident, and was able to perform heavy physical labor without symptomatology. Then, Claimant suffered low back injuries in 2010 and 2011 while engaged in activities that exceeded the limitations given by Dr. Johnson. It may be entirely coincidental that Claimant's symptomatic complaints resolved after he settled the 2006 claim. We give Claimant the benefit of the doubt in this regard, but as explained *infra*, the fact that Claimant returned to his customary job does not necessarily denigrate the limitations/restrictions given by Dr. Johnson during his treatment of Claimant.

38. Claimant is a poor historian, and to many of the questions he was asked regarding his medical history or past symptomatology, he stated that he did not remember. Accordingly, the Commission prefers to rely on contemporaneous medical records in connection with Claimant's medical history and the course of his symptomatology.

DISCUSSION AND FURTHER FINDINGS

39. Among the issues noticed for hearing are the extent and degree of Claimant's disability, whether Claimant is totally and permanently disabled, and if so, whether some part of Claimant's total and permanent disability is the responsibility of the ISIF. Following hearing, Claimant and Employer/Surety reached a settlement, which was approved by the Industrial Commission. Following the October 2015 settlement between Employer/Surety and Claimant, the only remaining issues in this case relate to the liability of the ISIF. For the purpose of evaluating whether Claimant is totally and permanently disabled, and if so, whether the ISIF shares responsibility for some portion of Claimant's total and permanent disability, it is first helpful to come to some conclusion regarding the impairment assignable to the subject accident and Claimant's pre-existing conditions, as well as the limitations/restrictions assignable to the subject accident and Claimant's various pre-existing conditions.

Impairments

40. Per Idaho Code § 72-422, "permanent impairment" is any anatomical or functional abnormality or loss after maximum medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Pursuant to Idaho Code § 72-424, "evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employees personal efficiency and the activities of daily living. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment when medical evidence is conflicting. *Urry v. Walker Fox Masonry Contractors,* 115 Idaho 750, 769 P.2d 1122 (1989).

41. Claimant has been given various impairment ratings for his accident-caused and pre-existing conditions. For the effects of the 2006 accident, Dr. Little gave Claimant a 13% rating, Dr. Frizzell a 13% rating, Dr. Greenwald a 19% rating, and Dr. Johnson, Claimant's treating physician, an 18% rating. Having reviewed the explanations given by the treating/evaluating physicians in support of these ratings, the Commission concludes that Dr. Greenwald's is the most persuasive. She recognized that while Claimant's surgery involved only one level, L4-5, he had radiculopathy at multiple levels, which implicates a higher rating under the applicable provisions of the *Guides*. We find, therefore, that Claimant has suffered 19% whole person impairment as a consequence of the 2006 accident/injury.

42. Both Dr. Greenwald and Dr. Friedman gave ratings for Claimant's other pre-existing conditions. As explained *infra,* for purposes of ISIF liability, Claimant's pre-existing conditions must be evaluated as the date immediately preceding the October 3, 2011 accident. Dr. Greenwald gave Claimant ratings for his diagnoses of polyneuropathy, hypertension, right

eye deficit, depression, and diabetes. However, the report from her 2014 evaluation does not reflect that she made an effort to assess Claimant's impairments for these conditions as of a date immediately preceding the October 3, 2011 accident. Dr. Friedman, on the other hand, did state that the ratings he gave for Claimant's hypertension, right eye impairment, depression, and diabetes were given as of a date immediately preceding the October 3, 2011 accident. He gave Claimant the following ratings: hypertension, 17%; right eye deficit, 15%; depression, 5%; and diabetes, 10%. Because Dr. Friedman is the only physician who made an effort to assess Claimant's impairments as they existed immediately prior to the subject accident, we adopt his opinion as the most persuasive.

43. As respects the subject accident, Dr. Little gave Claimant a 4% PPI rating, Dr. Frizzell, a 14% PPI rating and Dr. Greenwald, a 6% PPI rating. We find Dr. Greenwald's explanation for how Claimant's low back impairment should be apportioned between the 2011 and 2006 accident more persuasive than the testimony of the other physicians who have weighed in on this issue. Therefore, we conclude that Claimant has a 6% PPI rating for the effects of the subject October 3, 2011 accident. To synopsize, Claimant has pre-existing impairments as follows: low back, 19%; hypertension, 17%; right eye, 15%; depression, 5%; and diabetes, 10%. His accident produced impairment equates to 6% of the whole person.

44. The opinions of the vocational experts who have evaluated Claimant's disability, and the contribution of his various conditions to that disability, depend on assumptions they made concerning the limitations/restrictions referable to his pre-existing and accident caused conditions. The weight to be given to these opinions depends, in part, on correctly assessing the limitations/restrictions that should be assigned to Claimant's various conditions based on the medical opinions in evidence.

45. Concerning the pre-existing low back condition, we reject Dr. Little's opinion that Claimant was entitled to limitations against lifting more than 50 pounds as a consequence to the 2006 low back injury. Dr. Johnson, Claimant's treating physician, has consistently expressed the view that Claimant should be restricted to light duty as a consequence of the 2006 low back injury. The 2008 FCE is consistent with Dr. Johnson's recommendations. As Claimant's treating physician following the 2006 low back injury, we believe that Dr. Johnson had better insight into Claimant's limitations/restrictions than did Dr. Little. Accordingly, we conclude that prior to the October 3, 2011, Claimant was already restricted to light duty because of his pre-existing low back condition. We reach this conclusion notwithstanding the fact that by June of 2010 Claimant had returned to physically demanding concrete work.

46. As noted above, the Commission concludes that Dr. Friedman's opinions concerning impairment ratings to be given to other pre-existing conditions are the most persuasive because he made an effort to evaluate Claimant's pre-existing impairments as of a date immediately preceding the October 3, 2011 accident. For similar reasons, we adopt Dr. Friedman's opinions concerning limitations/restrictions to be given for these conditions. Therefore, for his diabetes, Dr. Friedman recommended that Claimant have access to bathroom facilities on a four times per day basis in order to allow him to check blood sugar and administer insulin. He also believed that Claimant should be allowed scheduled breaks in order to adjust his caloric intake. Dr. Friedman did not recommend any limitations/restrictions for Claimant's diagnosis of depression. He did recommend that Claimant had activity preclusions for his hypertension, but these activity preclusions are not as onerous as those given for Claimant's pre-existing low back condition. For Claimant's right eye vision loss, Dr. Friedman recommended against relying on that eye to process visual information.

47. For the subject accident of October 3, 2011, the Commission concludes that the medical evidence establishes that Claimant's limitations/restrictions are not significantly more onerous than they were prior to the subject accident. Essentially, Claimant still has restriction against engaging in anything more onerous than light duty, vis-a-vis his low back. We reject Dr. Little's belief that Claimant can lift up to 50 pounds at present. Dr. Little's opinion in this regard is speculative in nature, and is based on what he thought Claimant's trajectory of healing would have been absent the motor vehicle accident of December 27, 2012. (However, even Dr. Little acknowledges that Claimant's low back limitations/restrictions are unchanged following the October 3, 2011 accident). In summary, the Commission concludes that Claimant's low back limitations/restrictions were not measurably increased as a consequence of the subject accident.

Disability

48. "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. The evaluation of a permanent disability is an "appraisal of the injured employees present and probable future ability to engage in gainful activity . . ." Idaho Code § 72-425. In determining whether a claimant is permanently disabled, both medical and non-medical factors must be considered, as set forth in Idaho Code § 72-430.

49. A claimant alleging total and permanent disability may prove the same in one of two ways. First, a claimant may prove total and permanent disability if his or her medical impairment, together with non-medical factors, totals 100%. *Boley v. State of Idaho Industrial Special Indemnity Fund*, 130 Idaho 278, 939 P.2d 854 (1977). The second method by which a claimant may prove total and permanent disability is for the claimant to demonstrate that he fits

within the definition of an "odd lot" worker. The odd lot category is for those workers who are so injured that they can perform no services other than those that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist. *See*, *Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 565 P.2d 1360 (1977). Odd lot workers are simply not regularly employable in a well-known branch of the labor market absent a business boom, the sympathy of the particular employer or friends, temporary good luck, or a super human effort on their part. An injured worker may prove total disability under the odd lot doctrine in 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 on his behalf have searched for other work and other work is not available; or, (3) by showing that any efforts to find suitable employment would be futile. *Boley v. State of Idaho, Industrial Special Indemnity Fund, supra; Lethrud v. Industrial Special Indemnity Fund*; 126 Idaho 560, 887 P.2d 1067 (1995). Odd lot status is a question of fact for the Commission to decide.

50. Claimant argues that he is either 100% disabled or disabled as an "odd lot" worker. The testimony of Delyn Porter and Dr. Frizzell is offered in support of these assertions. For their part, ISIF makes only a half-hearted effort to dispute the assertion of total and permanent disability, stating that whether or not Claimant is totally and permanently disabled depends on which of the various sets of limitations/restrictions best describe Claimant's physical capacity as of the date of hearing. ISIF offered no expert testimony specifically contradicting Mr. Porter's conclusion that Claimant is totally and permanently disabled. Rather, the thrust of Dr. Janzen's report and testimony is that Claimant cannot meet the "combining with" element of ISIF liability. Of course, a threshold element of ISIF liability is the Commission's determination that Claimant is totally and permanently disabled. Therefore, even though Claimant's assertion

of total impairment and disability was not hotly contested, we believe it necessary to address this aspect of the claim in more detail.

51. First, Claimant relies on the medical testimony of Dr. Frizzell in support of the claim of total and permanent disability. Dr. Frizzell was asked to comment on the "combining with" element of Claimant's claim against the ISIF, but in response only acknowledged that Claimant is totally and permanently disabled. The Commission attaches little evidentiary value to Dr. Frizzell's pronouncement. Dr. Frizzell expressed a naked conclusion unsupported by any explanation of the analysis he employed to reach this conclusion. There is no evidence in the record that Dr. Frizzell actually knows the elements of the *prima facie* case of total and permanent disability either by the 100% method or the odd lot method. Except in cases where a claimant's medical impairment equals 100%, it is unclear that a physician is even competent to comment on how medical and non-medical factors conspire to cause total and permanent disability. Without more, Dr. Frizzell's conclusion is not persuasive.

52. Mr. Porter has testified that Claimant's medical and non-medical factors exceed 100%. He supports this conclusion by first observing that Claimant has impairment/disability of 76% as a consequence of the 2006 industrial accident. In this regard he reasoned that Claimant was given a 25% impairment rating by Dr. Little and that the August 5, 2009 Lump Sum Settlement Agreement acknowledged the payment to Claimant of another 51% in unapportioned disputed impairment and additional disability. He next argued that Dr. Little has assigned to Claimant an additional 10% impairment referable to the October 11 industrial accident, bringing Claimant's combined PPI/PPD to 86% before the additional disability caused by the 2011 industrial accident is considered. Per Mr. Porter, as consequence of the additional restrictions imposed by the 2011 industrial accident, Claimant has suffered a 78% reduction in his post

injury labor market and a 31% wage loss. Averaging these figures, he calculated the additional disability caused by the 2011 accident at 54.5%. Therefore, to the 86% combined PPI/PPD previously calculated, Mr. Porter would add the additional 54.5% disability, to yield a numerical disability well in excess of 100%. (*See* Claimant's Exhibit DD, p. 1323). The Commission rejects Mr. Porter's analysis for the following reasons: first, while Dr. Little did initially assign to Claimant a 25% PPI rating for the 2006 injury, he later withdrew this, and his last word is that Claimant suffered only a 13% PPI rating as a consequence of the 2006 industrial accident. More problematic is Mr. Porter's reliance on the 2009 lump sum to support his conclusion that Claimant has disability referable to the 2006 accident in the amount of 51% of whole person. The 2009 lump sum settlement is just that, a settlement of a disputed claim. From this settlement one can extract no conclusion that Claimant suffered a disability of 51% over and above his impairment rating. Next, Mr. Porter asserts that as a consequence of the 2011 accident Dr. Little assigned Claimant an additional 10% impairment. In fact, Dr. Little ultimately assigned only a 4% impairment rating to the 2011 accident.

53. With respect to Mr. Porter's conclusion the Claimant has a disability in excess of physical impairment referable to the 2011 accident of 54.5%, the Commission notes that this conclusion is based on Mr. Porter's assumption that the 2006 industrial accident left Claimant with medium-duty restrictions and that the 2011 industrial accident resulted in more onerous restrictions preventing Claimant from engaging in anything more than sedentary in light-duty employment. As noted above, we find the opinion of Claimant's treating physician, Dr. Johnson, more persuasive in describing Claimant's limitations/restrictions following the 2006 industrial accident. It might be argued that Dr. Johnson's conclusions, as well as the result of the 2008 FCE are called into question by the fact that following the 2009 lump sum settlement Claimant

returned to his customary physically demanding employment after being unemployed for 30 months following the 2006 accident. Giving Claimant the benefit of the doubt, we acknowledge that Claimant's symptoms may have finally resolved to the point that he felt able to return to his time-of-injury profession. However, this does nothing to denigrate the recommendations by his treating physician that he needed to modify his activities to protect against further injury. Indeed, Claimant suffered just as such further injury after returning to physically demanding labor. At any rate, for the aforementioned reasons, we are unable to accept Mr. Porter's conclusion that Claimant is totally and permanently disabled under the 100% method.

54. We do, however, agree with Mr. Porter that Claimant has met his burden of proving total and permanent disability under the odd lot doctrine as of the date of hearing. Claimant attempted other employment following the 2011 accident, but was unable to tolerate the demands of the two or three jobs he attempted. Claimant has also demonstrated that it would be futile for him to attempt employment as of the date of hearing. Claimant has, at best, limited English language skills. He has no education past the 5th grade in Mexico. He has profound limitations relating to his low back condition. He has no training or transferable job skills that reasonably allow him to access sedentary and light duty employment. While Claimant's diabetes, hypertension, and depression may not significantly impede his ability to work, it is clear that his current right, and now left, eye impairments are significant impediments to employment. At hearing, Claimant testified that from a distance of 6-7 feet he could not read an analog wall clock with a diameter of approximately one foot. Without assigning a specific numerical value to Claimant's disability, the facts of the case lead us to conclude that Claimant is indeed totally and permanently disabled under the odd lot doctrine as of the date of hearing. We reach this conclusion without consideration of Claimant's status as an illegal alien, as recently mandated in

Marquez v. Pierce Painting Docket No. 2010-012699 IIC (2017).[2] *Marquez* resolves issues 7, 8, 9, and 10.

ISIF Liability

55. Idaho Code § 72-332 specifies that the total and permanent disability of an injured worker may be apportioned between an employer and the ISIF if the injured worker's total and permanent disability is caused by a combination of the permanent effects of the primary work accident, in this case the October 3, 2011 accident, and a pre-existing impairment. In order to hold the ISIF responsible for some percentage of an injured workers total and permanent disability, Claimant bears the burden of demonstrating the existence (1) a pre-existing impairment which was (2) manifest, (3) constituted a subjective hindrance to Claimant's employment and (4) combined with the impairment referable to the industrial accident to render Claimant totally and permanently disabled. *Dumaw v. J.L. Norton Loggin*g, 118 Idaho 150, 795 P.2d 312 (1990). To satisfy the "combined with," Claimant must demonstrate that he would not have been totally and permanently disabled "but for" the pre-existing impairment. *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014); *Garcia v. JR Simplot Company*, 115 Idaho 966, 772 P.2d 173 (1989).

56. The case of *Colpaert v. Larson's, Inc.*, 115 Idaho 852, 771 P.2d 46 (1989) makes it clear that in the case of a progressive pre-existing impairment, such pre-existing condition must be assessed as of a date immediately preceding the work injury. A snapshot of Claimant's pre-existing condition must be taken as of that date, and from that snapshot Claimant's impairment must be determined, as well as whether Claimant's condition was manifest and constituted a subjective hindrance to Claimant. Finally, it must be determined whether

[2] *Marquez* is currently under expedited appeal pursuant to Idaho Appellate Rule 12.4.

Claimant's pre-existing condition, as it existed immediately prior to subject work accident, combines with the effects of the work accident to cause total and permanent disability. *Ritchie v. State of Idaho Industrial Special Indemnity Fund*, 2016 IIC 0038 (2016).

Permanent Impairment

57. As developed above, the Commission concludes that Claimant has pre-existing impairments as follows: low back, 19%; hypertension, 17%; right eye deficit, 15%; depression, 5%; diabetes, 10%.

Manifest

58. "Manifest" means that either the employer or the employee was aware of the condition so that the condition can be established as existing prior to the injury. *See Royce v. Southwest Pipe of Idaho*, 103 Idaho 290, 647 P.2d 746 (1982). From the testimony and medical records, it is clear all of the aforementioned pre-existing conditions were manifest prior to October 3, 2011.

Subjective Hindrance

59. The "subjective hindrance" prong of test for ISIF liability is defined by statute:

> (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 employed. 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.

Idaho Code § 72-332 (2). In *Green v. Joe Salvage*, 2014 IIC 0009, the Commission explained further:

The Idaho Supreme Court set out the definitive explanation of the "subjective hindrance" language in *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 172, 686 P.2d 557, 563 (1990):

> Under this test, evidence of the claimant's attitude toward the preexisting condition, the claimant's medical condition before and after the injury or disease for which compensation is sought, nonmedical factors concerning the claimant, as well as expert opinions and other evidence concerning the effect of the preexisting condition on the claimant's employability will all be admissible. No longer will the result turn merely on the claimant's attitude toward the condition and expert opinion concerning whether a reasonable employer would consider the claimant's condition to make it more likely that any subsequent injury would make the claimant totally and permanently disabled. The result now will be determined by the Commission's weighing of the evidence presented on the question of whether or not the preexisting condition constituted a hindrance or obstacle to employment for the particular claimant. *Id.*

Archer makes it clear that an injured worker's attitude towards a preexisting condition is but one factor to be considered by the Commission in determining whether or not the preexisting physical impairment constituted a subjective hindrance to Claimant. After Archer, the Commission is required to weigh a wide variety of medical and nonmedical factors, as well as expert and lay testimony, in making the determination as to whether or not a preexisting condition constituted a hindrance or obstacle to employment for the particular claimant." *Id.*

60. Neither Claimant nor Dr. Friedman has indicated that Claimant's diagnosis of depression constitutes a hindrance or obstacle to Claimant's employment. Claimant has testified that his hypertension did not interfere with his ability to work, while Dr. Friedman has opined that Claimant's diagnosis of hypertension as of the date of the October 3, 2011 accident does carry with it the admonition against lifting more than 50 pounds and engaging in vigorous pushing, pulling, or straining activities. Therefore, we conclude that, standing alone, Claimant's hypertension does constitute a subjective hindrance as of October 3, 2011.

61. Claimant has given possibly conflicting testimony on the impact of his right eye vision deficit. At hearing, Claimant testified that he lost vision in his right eye prior to his June 3,

2010 hire date by Employer. He further testified that his right eye condition caused him difficulties in his performance of his work as a concrete finisher. However, at the time of his August 21, 2014 deposition, Claimant testified that his inability to see with his right eye occurred after his accident of October 3, 2011. That Claimant gave deposition testimony that his inability to see with his right eye did not arise until after the subject accident is not inconsistent with the proposition that he had less severe problems with his right eye prior to October 3, 2011. Dr. Friedman has confirmed that Claimant's right eye deficit predated the subject accident. From this testimony and medical evidence we conclude that Claimant's right eye impairment did constitute a subjective hindrance to Claimant prior to October 3, 2011.

62. Claimant testified that he suffered from diabetes for approximately 10 years. Prior to the subject injury his diabetes would sometimes make him feel dizzy when his blood sugar got too low and he would have to stop work to eat something. He also required breaks to take insulin. However, at the time of his August 2014 deposition, Claimant testified that his diabetes has not affected his ability to work. For his part, Dr. Friedman opined that prior to the October 3, 2011 accident Claimant would have needed scheduled break to check his blood sugar, administer insulin, and have a snack, if necessary. We conclude that while Claimant may have had to take breaks to manage his diabetes prior to October 3, 2011, his condition did not constitute a subject hindrance to employment.

63. Finally, we conclude that Claimant's pre-existing low back condition constituted a subjective hindrance prior to October 3, 2011. The Commission appreciates that Claimant returned to his time of injury employment following the 2009 settlement. However, as explained above, this fact does not invalidate the limitations/restrictions imposed by Dr. Johnson and recommended by the 2008 FCE. The Commission further recognizes that Claimant has testified

and given a history to Dr. Jorgensen that he had no low back symptoms prior to the subject accident and was able to perform his job without difficulty until the October 3, 2011 accident. Again, this testimony, if true, is not inconsistent with the recommendation that Claimant should avoid anything more onerous than light duty work in order to protect his lumbar spine from further injury. We conclude that Claimant's pre-existing low back condition did constitute a subjective hindrance to Claimant as of the date of the October 3, 2011 accident.

Combining With

64. As developed above, in order to implicate ISIF liability Claimant must demonstrate that he would not have become totally and permanently disabled but for the pre-existing impairments. *See Garcia v. J.R. Simplot Company*, *supra.* As explained below, the Commission concludes that on the evidence before it, Claimant has failed to produce proof sufficient to satisfy this element of the *prima facie* case.

65. Claimant's hypertension and right eye vision deficit all carry limitations/restrictions which, standing alone, may have impacted Claimant's labor market access on a pre-injury basis. However, these conditions are not vocationally relevant in light of Claimant's low back condition. In other words, Claimant is totally and permanently disabled by virtue of his low back condition alone, and without contribution of the limitations stemming from his hypertension and right eye deficit, as those conditions existed as of October 3, 2011. The lifting limitations for Claimant's hypertension are eclipsed by the more onerous limitations given for Claimant's low back condition. Likewise, Claimant's visual deficit, as it existed on October 3, 2011, is vocationally irrelevant in view of our conclusion that Claimant's low back limitations restrict him from all the jobs for which he is otherwise suited. The remaining question

is whether Claimant's pre-exiting low back condition combined with the October 3, 2011 accident to cause total and permanent disability.

66. Dr. Frizzell was asked whether Claimant's pre-existing low back condition combined with the effects of the October 3, 2011 accident to cause total and permanent disability. He responded only with his opinion that Claimant is totally and permanently disabled.

67. Shortly after the October 3, 2011 industrial accident, both Dr. Verst and Dr. Jorgensen addressed the issue of the extent to which the October 3, 2011 accident caused or contributed to the L3-4 lesion. Dr. Verst opined that the L3-4 lesion pre-dated the accident of October 3, 2011, and that the nature and extent of the lesion visualized on the most recent studies simply represented the natural progression of the degenerative condition. He proposed that the need for surgery at L3-4 was not causally related to the October 3, 2011 accident. Therefore, Dr. Verst's opinion lends no support to the proposition that Claimant's pre-existing low back condition combined with the subject accident to cause total impairment and disability.

68. In his letter of April 24, 2012, Dr. Jorgenson responded to Dr. Verst's opinion. Of course, Dr. Jorgenson was aware of the previous L4-5 fusion. However, his letter reflects that he relied on a history from Claimant that Claimant's low back had been entirely asymptomatic for several years prior to the October 3, 2011 accident, notwithstanding that Claimant had been engaged in heavy labor during this timeframe. From this he concluded that Claimant's symptoms and need for treatment were directly referable to the October 3, 2011 accident. Dr. Jorgenson's letter does state that Claimant's pre-existing low back condition combined with the subject accident to cause or contribute to Claimant's need for further care. As such, it lends no support to the proposition that the pre-existing condition combined with the subject accident to cause total and permanent disability.

69. Even were we to conclude that the pre-existing fusion at L4-5 somehow contributed to the need for extension of the fusion to include the L3-4 level, this would not be sufficient to support the conclusion that the pre-existing condition and the subject accident combined to cause Claimant's total and permanent disability. Just because the pre-existing condition and the accident of October 3, 2011 influence the decision to fuse Claimant at L3-4 does not mean that he became totally and permanently disabled as a result of the combined effects of the pre-existing conditions and the subject accident. *See, Corgatelli v. Steel West, Inc., supra.*

70. One would expect to find evidence relating to the "combining with" component of the *prima facie* case in the testimony of the forensic vocational experts retained by the parties to support or challenge the claim against the ISIF. Dr. Janzen, the expert retained by the ISIF, opined that Claimant's hypertension, right eye deficit, depression, and diabetes were not vocationally significant based on the limitations/restrictions given by Dr. Friedman, and in light of the more significant low back problems. With respect to the pre-existing low back condition Dr. Janzen testified that Claimant is not any worse off now than he was before the subject accident. In other words, a comparison of the restrictions/limitations applicable to Claimant on a pre-injury basis with those applicable to Claimant as of the date of hearing reveals no significant difference. Claimant's low back condition was just as limiting to Claimant on the date of hearing as it was prior to the October 3, 2011 accident. Nothing in Dr. Janzen's testimony supports a conclusion that Claimant's pre-existing low back condition combined with the work accident to cause permanent and total disability.

71. Delyn Porter, Claimant's vocational expert, assumed that Claimant had medium duty restrictions prior to the subject accident, and light duty restrictions thereafter. As developed

above, we have concluded that Claimant's low back limitations/restrictions did not materially change following the 2011 accident. Porter also opined that Claimant is totally and permanently disabled. However, his report does not address how, or whether, Claimant's total and permanent disability is a result of the combined effects of Claimants pre-existing condition and the additional injuries caused as a consequence of the subject accident. His report does not explain why Claimant would not now be totally and permanently disabled were it not for the existence of the pre-existing low back condition. Nor do the statements he made in his post hearing deposition testimony cure this failing. At best, the testimony quoted *infra* is conclusory and does not explain why Claimant would not be totally and permanently disabled "but for" the pre-existing impairments.

72. Claimant's testimony, too, is insufficient to satisfy the "but for" test. Claimant testified, and gave a history to Dr. Jorgensen, to the effect that following the 2009 settlement he returned to heavy labor which he successfully performed without symptoms until the 2011 accident. Following the 2011 accident Claimant has testified that he is in constant pain and is unable to perform any of the work that he has attempted. This testimony in no way supports the "combining with" element or the *prima facie* case. It is just as consistent with the proposition that the 2011 accident is wholly responsible for disability referable to Claimant's lumbar spine.

73. It is Claimant's burden to prove the combined with component of the *prima facie* case. As developed above, we conclude that the evidence is insufficient to allow us to conclude that Claimant would not have been totally and permanently disabled but for the existence of his pre-existing impairments.

CONCLUSIONS OF LAW AND ORDER

1. Claimant was totally and permanently disabled as of the date of hearing.

2. As of the date of injury, Claimant had pre-existing impairments as follows: low back, 19%; hypertension, 17%; right eye, 15%; depression, 5%; diabetes, 10%. The aforementioned impairments were manifest as of October 3, 2011.

3. Claimant's impairment for diabetes, hypertension and right eye vision loss did constitute subjective hindrance to Claimant's employment as of the date of the October 3, 2011 industrial accident.

4. Claimant has failed to prove that but for his pre-existing impairments he would not be totally and permanently disabled.

5. All other issues are moot.

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

DATED this __13th__ day of _October_, 2017.

INDUSTRIAL COMMISSION

__/s/_____
Thomas E. Limbaugh, Chairman

__/s/_____
Thomas P. Baskin, Commissioner

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

ATTEST:

__/s/_____
Assistant Commission Secretary