BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STEVE TALBOT, Claimant, v. SUMMIT WALL SYSTEMS, Employer, and ADVANTAGE WORKERS COMPENSATION INSURANCE CO., Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2012-004039** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **FILED 11/14/17**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a video-conference hearing in Twin Falls, Idaho, on December 9, 2016.[1] Jeffrey Stoker of Twin Falls represented Claimant. R. Daniel Bowen of Boise represented Defendants Employer and Surety. Anthony Valdez of Twin Falls represented Defendant State of Idaho, Industrial Indemnity Fund (ISIF).

[1] The Referee and court reporter attended the hearing via video conference from Boise. The parties were in Twin Falls at the local Industrial Commission office.

The parties submitted oral and documentary evidence at hearing and prepared post-hearing briefs. Post-hearing depositions were taken. The matter came under advisement on July 25, 2017. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law, and order giving different treatment to the issue of ISIF liability.

ISSUES

The issues listed as ripe for decision at hearing were:

1. Whether and to what extent Claimant is entitled to permanent partial disability (PPD) benefits in excess of impairment, including total permanent disability (TPD) pursuant to the odd-lot doctrine;

2. Whether Claimant is totally and permanently disabled;

3. Whether apportionment for a pre-existing or subsequent condition is appropriate;

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

5. Apportionment under the *Carey* formula; and

6. Whether Claimant is collaterally estopped from denying positions taken previously in prior claims regarding the extent of his permanent disability.

At hearing, Mr. Bowen, who had requested listed issue 6, conceded the issue was most likely not going to be an issue moving forward. No party even mentioned the issue in briefing. Listed issue 6 is waived, and will not be discussed herein. The parties did in post-hearing briefing list and present arguments for and against the additional issue of whether Defendants Employer and Surety (hereinafter listed as Employer) are entitled to a credit for benefits previously paid for "PPI" against future permanent disability benefit payments. This issue will be addressed herein.

CONTENTIONS OF THE PARTIES

Claimant asserts that he is totally and permanently disabled as a result of his subject industrial injury in combination with several pre-existing medical issues, including his back, left hand, and COPD. Furthermore, Defendants Employer and Surety are not entitled to a credit toward Claimant's TPD benefits for any payments previously made for "PPI" benefits.

Employer and Surety note that Claimant's right wrist injury (the subject accident) did not, by itself, render Claimant totally and permanently disabled. Instead, Claimant was severely compromised in his ability to work prior to the subject accident, which accident simply "sealed the deal" as far as Claimant's total disability. The majority of Claimant's total disability resulted from a prior left hand injury, and Claimant's back condition. These Defendants are entitled to a credit for previous payments made in accordance with Claimant's PPI rating. If ISIF is found to not be liable for a share of Claimant's permanent disability payments, then benefits should be apportioned as required by Idaho Code § 72-406.

Defendant ISIF argues that Claimant's current total permanent disability is the product of his progressive COPD, which was diagnosed post-industrial accident. Claimant was not totally disabled as a result of his industrial accident, even in conjunction with his pre-existing condition of left wrist injury. Claimant's other "pre-existing" complaints are not verified with medical records, and are subject to scrutiny. Claimant was released by his treating physician to full duty work after his subject accident, and his low back pain and COPD developed thereafter. As such, Claimant's disability must be evaluated as his MMI date. As of MMI, Claimant was not totally disabled. ISIF is not liable under Idaho Code § 72-332.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;

2. Joint Exhibits 1 through 26, admitted at hearing ("JE");

3. ISIF's Exhibits A and B, admitted at hearing;

4. The post-hearing deposition transcript of Robert Friedman, M.D., taken on January 13, 2017[2];

5. The post-hearing deposition transcripts of Nancy Collins, Ph.D., and William Jordan, both taken on April 26, 2017.

All objections preserved through the depositions are overruled, with the exception of the objection made at page 38 of Mr. William Jordan's deposition, which is sustained.

FINDINGS OF FACT

BACKGROUND

1. Claimant was fifty-eight years of age on the date of hearing.

2. All parties agree that by the time of hearing Claimant was totally and permanently disabled. Disagreement arises when attempting to determine when and why Claimant became a "total perm."

MEDICAL HISTORY OVERVIEW

3. Before 2012, Claimant sustained several injuries.[3] Records for distant medical events are non-existent. Certain accidents took place in Arizona and California. Evidence of them is limited to Claimant's testimony.

4. Claimant dislocated his ankle at age 13. At age 17, Claimant was involved

[2] Exhibit 1 to the Friedman deposition is a copy of Dr. Friedman's complete report. Joint Exhibit 19 contains that report with several pages missing. It was agreed by the parties to attach Exhibit 1 to the deposition in lieu of amending the Joint Exhibits.

[3] Not all of Claimant's injuries are discussed herein; transient and unrated conditions without residual complaints are omitted from this decision.

in the first of his seven motorcycle accidents. He testified this accident injured his back and fractured his right ankle. Three years later, Claimant broke his elbow in a skateboarding accident. The following year, he injured his low back again in a work-related accident.

5. After eleven uneventful years, in 1989 Claimant resumed his injury procession with a right foot injury from his seventh motorcycle accident, followed in about 1991 with a left shoulder separation injury while playing softball. The following year, he had increasing back pain from hanging sheetrock, and testified to 2.5 years of chiropractic treatment for the condition.

6. In 1998, Claimant tore his right ACL in an industrial accident. This is the first accident for which medical records are included in evidence. Claimant underwent ACL reconstructive surgery by William May, M.D., of Twin Falls.

7. By late 2004, Claimant testified he was having low back issues to the point he contacted Idaho Division of Vocational Rehabilitation to discuss a change of employment to something less demanding on his back. Claimant recalls he was seen in Twin Falls by an orthopedic surgeon from Sun Valley, who diagnosed degenerative disc disease upon examination. The name of this doctor is unknown and no records of this exam were produced.

8. In 2005, Claimant was seen by Dr. May for a suspected left medial meniscus tear which was treated conservatively.

9. In April 2009, Claimant developed MRSA after getting a sliver of metal stuck under his left middle finger. Treatment was extensive, and the infection left Claimant with permanent impairment of his left hand, including loss of strength, dexterity, and range of motion in his fingers.

10. By 2010, there is a note in Claimant's medical records that he was having trouble with chronic, frequent coughing and shortness of breath. No formal diagnosis was made at that time. That same record notes Claimant's continuing back pain.

11. At the time of his industrial accident, February 7, 2012, Claimant was working for Employer when he fell from scaffolding and injured his right wrist. Reparative surgery was required. The injury left Claimant with residual limitations.

EDUCATION/EMPLOYMENT OVERVIEW

12. In 1974, Claimant dropped out of high school. He did not complete 11th grade.

13. Over his career, Claimant has worked almost exclusively in the construction trade, either in plumbing, carpentry, installing acoustical tile, hanging sheetrock, framing (wood and metal), and concrete work. Other brief job stints included busboy, shipping clerk, and delivery truck driver while a teenager, and later (2005) he worked for a company doing truck conversions for about two months.

DISCUSSION AND FURTHER FINDINGS

PERMANENT DISABILITY

14. 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 impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. 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 the accident causing the injury, 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 test for determining whether Claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced [the claimant's] capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). Claimant bears the burden of establishing his claim for permanent disability benefits.

15. As noted previously, all parties concede that by the time of hearing Claimant was totally and permanently disabled. However, ISIF contends it would be improper to assess Claimant's permanent disability at the time of hearing, due to progressing health issues not present at the time of the last industrial accident. Instead, it argues the proper time to assess disability is when Claimant reached MMI with regard to his subject injury, and Claimant was not totally disabled at such date. Claimant disagrees, and argues that the time of hearing is the correct time to determine permanent disability, but even if a previous point in time is used, Claimant was still totally disabled. Thus the threshold issue to determine is at what point in time Claimant's disability should be analyzed.

16. In *Ritchie v. State of Idaho, Industrial Special Indemnity Fund*, IIC 2016-0038 (August 15, 2016), the Commission held that for the purpose of evaluating ISIF liability, pre-

existing conditions must be evaluated as of the date immediately preceding the work accident, and ISIF is not liable for the progression of pre-existing conditions which render Claimant totally disabled between the date of the subject accident and hearing. Further, per *Ritchie, Brown v. The Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012) only requires that Claimant's disability be evaluated based on Claimant's labor market as of the day of hearing. There is no specific prohibition against evaluating Claimant's disability as of the date of MMI so long as this constraint is observed.

MEDICAL EVIDENCE AND TESTIMONY

Dr.Friedman

17. Employer hired Robert Friedman, M.D., a physical medicine and rehabilitation physician in Boise, to examine Claimant and evaluate his medical condition. Dr. Friedman prepared a report and was deposed.

18. In his report, Dr. Friedman noted Claimant's left hand impairment was previously rated at 18% whole person. Dr. Friedman agreed with that rating, calling Claimant's use of his left hand "extremely limited." Dr. Friedman observed that Claimant did fairly well functionally while his right hand was unimpaired.

19. Dr. Friedman also stressed the significant limitations placed on Claimant by his COPD and psoriatic arthritis (a condition which will be discussed further below). In 2010, when Claimant first complained of shortness of breath, Dr. Friedman opined Claimant would have had a 6% whole person impairment associated with those conditions. By 2014, when Claimant met with a pulmonologist and a formal diagnosis was made, Claimant's impairment for his obstructive breathing was rated at 17% whole person.

Dr. Friedman noted that Claimant's conditions affecting his breathing were progressive and would continue to progress.

20. Dr. Friedman noted Claimant had been assessed a 6% whole person impairment for his right wrist industrial accident in 2012. Due to the ravages of psoriatic arthritis, Claimant will continue to lose function of his right wrist. By the time of his examination with Dr. Friedman in 2016, Claimant's right wrist impairment was up to 10% whole person.

21. Claimant's surgically-repaired ACL warranted a 2% whole person impairment by Dr. May; Claimant had a good outcome from that surgery.

22. Dr. Friedman found Claimant had bilateral shoulder joint difficulties which sounded like degenerative disease bilaterally. Claimant's 2002 right AC joint injury played into Dr. Friedman's impairment rating for Claimant's bilateral shoulder condition at 2% whole person for each shoulder.

23. Dr. Friedman next determined Claimant had evidence of progressive lumbosacral spine degenerative disease, which he rated at 9% of the whole person as of February 7, 2012. Claimant was also entitled to a 12% impairment rating for a lumbar spine compression fracture, but this occurred <u>after</u> the 2012 accident.

25. In summary, Dr. Friedman provided the following pre-injury whole-person ratings; 18% for Claimant's left hand, 9% for his lumbar spine, 6% for his COPD, 2% for his ACL, and 2% each (4% cumulative) for Claimant's shoulders.

26. Given Claimant's physical condition, Dr. Friedman gave restrictions of "less-than-sedentary," including no lifting or carrying, and no walking greater than fifty feet. He could do his personal activities of daily living (ADLs) such as bathing, self-feeding, dressing, and grooming.

27. Dr. Friedman was deposed. His opinions concerning Claimant's limitations and restrictions relating to his pre-existing impairments were discussed at length during his testimony and are discussed, *infra*.

28. Dr. Friedman explained psoriatic arthritis, which is associated with psoriasis. Claimant had psoriasis for a very long time, and it led to him contracting psoriatic arthritis, an inflammatory process. The disease destroys joints, making them rigid. In the spine, the disease makes the entire spine rigid, unmoving throughout. It tends to attack large joints, such as in wrists, metacarpals, and shoulders. The condition is contributing to Claimant's degenerating condition. Dr. Friedman has no way of determining when the disease first began to manifest, and cannot opine on whether it was a "pre-existing" condition present in 2012.

29. Claimant's breathing problems have two components. First, his ongoing psoriatic arthritis restricts his ability to expand his chest as it rigidifies the spine and ribs connected thereto. In other words, Claimant cannot take a large volume of breath due to a chest cavity which does not properly expand. This condition is termed a "restrictive disease." Second, Claimant has emphysema, or COPD. When he inhales or exhales the lung tissue collapses due to damage to the lungs themselves. This condition is related to Claimant's long-standing smoking habit (since age 13 and continuing at the time of hearing).

30. Dr. Friedman was able to segregate the COPD from the restrictive disease, and rate the COPD as a pre-existing condition (6%), based on Claimant's history of being unable to climb more than one flight of stairs without stopping to catch his breath.

Dr. Wayment

31. As noted above, Tyler Wayment, M.D., a Twin Falls hand surgeon, treated Claimant's hand injuries. Dr. Wayment's first involvement with Claimant came

in 2009 when the doctor surgically debrided Claimant's left hand middle finger, left hand, and left forearm on multiple occasions to treat a MRSA infection. Once the infection was finally controlled, Claimant was left with permanent residual functional loss of use in his left hand.

32. At year's end 2009, Dr. Wayment released Claimant to full duty work. In February 2010, Claimant returned to the doctor, complaining of ongoing hypersensitivity to cold and loss of dexterity in his left hand. Claimant stated he was laid off from his job because he could not keep up. Claimant had contacted the Industrial Commission to explore other employment opportunities. Dr. Wayment believed it was time for Claimant to be rated for his permanent impairment of his left hand, and encouraged Claimant to seek help through the Commission. Dr. Wayment kept Claimant on full-duty work release.

33. One year post-injury Claimant still had pain and loss-of-use issues in his left hand. By his visit to Dr. Wayment on March 5, 2010, Claimant was complaining of chronic or frequent coughing and shortness of breath. Dr. Wayment noted Claimant's MRSA infection had been severe, affecting his entire left hand. Claimant's left fingers had loss of range of motion and decreased strength. He was given an impairment rating of 18% whole person.

34. Claimant next came under Dr. Wayment's care in early May 2012, after conservative care for Claimant's right wrist fracture of February 7, 2012 failed. The fracture was the result of an accident arising out of and in the course of employment for Employer.

35. On June 26, 2012, Dr. Wayment performed arthroscopic debridement surgery with ulnar shortening on Claimant's right wrist at the triangular fibrocartilage complex (TFCC).

36. Claimant progressed after surgery and physical therapy with no significant complications. By his November 14, 2012 visit, Claimant's complaints were limited to achiness in his forearm, weakness, and minimal tenderness to palpation over the TFCC. Dr. Wayment

decided to stop therapy and release Claimant to full duty work. Dr. Wayment felt Claimant should reach MMI from his right hand injury by year's end.

37. On December 28, 2012, Dr. Wayment saw Claimant in followup consultation. Claimant relayed difficulty swinging a hammer with his right hand, and discomfort with ulnar deviation. Claimant's right hand was also sensitive to cold. Dr. Wayment declared Claimant at MMI from his industrial right wrist injury and kept him at full-duty work release. Dr. Wayment sent Claimant to David Jensen, D.O., for a PPI rating.

38. Although Dr. Wayment continued Claimant at full duty, Dr. Wayment noted in his December 28 office notes that he was:

> "a little concerned that [Claimant] is not going to tolerate heavy construction on that wrist with what is going on there. I think he would really benefit from reeducation to keep him in the work force. I think an excellent position for him would be a semi truck driver where he would not have to be to [sic] hard on that wrist. We will get him referred to the Industrial Commission and see if we cannot get worker's compensation to help him get reeducated."

JE 10, p. 434.

Post-January 2013 MMI Evaluations

39. Michael Sant, M.D., of Idaho Physical Medicine and Rehabilitation in Twin Falls evaluated Claimant on November 8, 2013 in conjunction with Claimant's application for government disability benefits. Claimant also underwent a functional capacity evaluation in 2016. Furthermore, he had pulmonary testing done after reaching MMI for his 2012 accident.

40. Dr. Friedman diagnosed psoriatic arthritis and explained at his deposition the ramifications of that disease on Claimant's major joints. Dr. Friedman could find no evidence that the disease's manifestation clearly pre-dated Claimant's 2012 industrial accident. As such, there is no way of knowing if testing done after January 2013

which could be affected by the arthritis demonstrates limitations solely from pre-existing conditions. The evaluations and testing performed after Claimant's MMI date from the subject accident are not considered in determining the issues herein. The same rationale applies to any other evaluations performed after the applicable date for determining permanent disability but not specifically mentioned herein.

VOCATIONAL EXPERTS

Dr. Collins

41. Claimant hired Nancy Collins, Ph.D, a vocational and rehabilitation expert from Boise to conduct a vocational assessment and render an opinion regarding Claimant's employability and vocational disability. She prepared a report dated November 8, 2016. She was deposed on April 26, 2017.

42. A detailed analysis of Dr. Collins' 2016 report is not necessary for reasons noted below. In summary, coupling Dr. Collins' expertise in evaluating Claimant's subjective information provided to her, his educational level, physical attributes, age, past work experience, medical records, and physician restrictions, with the use a software program known as *SkillTran*, Dr. Collins determined Claimant had lost 100% of access to the labor market as of the time of her report.

43. Furthermore, Dr. Collins opined that Claimant's total disability was due to a combination of pre-existing conditions and his right-hand injury from 2012. She also rendered opinions on ISIF liability by noting Claimant had manifest pre-existing conditions, which were a subjective hindrance to employment, and combined with his 2012 industrial accident to render Claimant totally and permanently disabled.

44. The major defect with Dr. Collins' report is that she did not discuss Claimant's limitations as they existed on January 30, 2013 (MMI date), render opinions as to his employability on such date, and opine at what point in time he became totally disabled. Accordingly, Dr. Collins' written report carries little weight.

45. At her post-hearing deposition, Dr. Collins' testimony was more focused on Claimant's limitations, employability, and disabilities as of MMI from his subject accident. She opined that even Claimant's left hand injury alone, when coupled with Claimant's subject accident rendered him totally and permanently disabled. She testified that "as soon as he was at MMI and provided the occasional use of his right hand restriction…it is my opinion he really had no access to work." Collins depo. p. 8. She noted that over 92 percent of all jobs require frequent to constant upper extremity use, including handling, reaching, fingering, and feeling. While Claimant was a skilled worker, he had little education, and little chance for employment or retraining outside of the construction field.

46. Dr. Collins also noted Claimant's pre-existing low back issues, a condition which he had complained about for years before 2012, and even left the plumbing field in an effort to accommodate, played a part in her opinion of total disability.

47. Dr. Collins testified that Claimant told her his knees were an issue when he was doing acoustical work, causing him to avoid doing work low to the ground. This testimony is consistent with Claimant's deposition testimony, wherein he testified that when working for Employer he worked as part of a two-person team. He typically worked from the top of the stud where he could stand. This helped with his back, but also allowed him to avoid getting down on his knees. Typically though, Claimant's knees usually only bother him in the cold.

48. As far as manifest pre-existing conditions which would have constituted a subjective hindrance to Claimant's employment, Dr. Collins listed left hand, low back, and COPD as the primary factors which coupled with Claimant's right hand injury to render him totally disabled as of the end of January 2013.

49. When asked, Dr. Collins confirmed her opinion that as of January 30, 2013, Claimant was totally and permanently disabled as a result of the combination of the pre-existing conditions – low back, left hand, and COPD – and Claimant's right wrist injury residual limitations.

50. Under cross examination by ISIF, Dr. Collins acknowledged that no doctor had placed restrictions on Claimant regarding any of his conditions which may have existed prior to the subject accident. She also admitted Claimant returned to his time-of-injury job after reaching MMI with regard to his left hand, and was likewise released after his right wrist injury to full duty work with no restrictions noted by Dr. Wayment.

51. Dr. Collins disagreed that truck driving, even local, would be an acceptable job for Claimant after his 2012 injury. She noted that in addition to his low back condition, driving would be inappropriate due to Claimant's limitations involving his hands and wrist. Truck driving requires repetitive use of both hands, and rarely does it not involve any activity other than driving. Even local driving typically involves other associated tasks. Furthermore, even if the job was only driving, Claimant was not capable of sustained driving for eight-hour workdays.

52. Dr. Collins agreed that Dr. Wayment and Dr. Jensen placed no lifting restrictions on Claimant after his recovery from the subject accident. She further agreed that no physician

(other that Dr. Friedman after the fact) has ever placed restrictions on Claimant's sitting or standing, or number of hours per day he could work, or even in what type of environments.

Mr. Jordan

53. ISIF hired William Jordan, a Boise-based disability management and vocational specialist to prepare an employability report on Claimant. Mr. Jordan prepared a written report dated November 23, 2016. He was also deposed.

54. Mr. Jordan reviewed Claimant's medical history to the extent it was available, interviewed Claimant, seeking his subjective perception of functional abilities and taking a detailed history of various facets of Claimant's family, social life, and employment. He reviewed wage and job history data back to the 1970s. He then analyzed Claimant's job market access in light of his 2009 left hand injury, but before Claimant's 2012 right hand injury. Mr. Jordan also considered Claimant's labor market access after 2012, which included the potential for retraining away from the construction industry. Finally, Mr. Jordan opined on whether before his 2012 accident Claimant's various pre-existing conditions would have constituted a subjective hindrance to employment. Mr. Jordan argued they were not, for reasons discussed below.

55. As noted previously, Mr. Jordan felt Claimant was totally and permanently disabled by the time of his report to ISIF (November 23, 2016).

56. Mr. Jordan was deposed on April 26, 2017. Therein, he acknowledged the fact that Dr. Wayment assigned Claimant an 18% whole person impairment rating for his MRSA-afflicted left hand.[4] While at one point in the deposition he described

[4] Physical therapist Leslie Ruby first rated Claimant's left hand PPI at 18%, but Mr. Jordan pointed out that Dr. Wayment's notes appear to suggest that he too calculated the rating, and did so at 18% whole person.

Claimant's impairment as affecting his left middle finger, on cross examination he conceded Claimant's left hand injury impacted range of motion to all his digits but his thumb, created difficulty with Claimant's ability to grasp, was painful and stiff, and intolerant to cold. However, he noted Dr. Wayment did not impose work restrictions when releasing Claimant to full duty work in 2010. Mr. Jordan also felt it was significant that Claimant thereafter returned to his time-of-injury construction work.

57. Mr. Jordan noted there were no medical records which indicated Claimant could not perform his regular employment. He also pointed out that when Claimant chose to get out of plumbing earlier in his life, due to low back complaints, he did so of his own accord; he "didn't have a doctor's statement saying he needed to change his occupation. He just decided to do that." Jordan depo. p. 18.

58. Mr. Jordan was aware that after Claimant's left hand injury, Claimant lost a job in Pocatello due to what Claimant claimed was his inability to perform up to the level of his co-workers because of left hand and shortness of breath issues. Mr. Jordan noted that according to Department of Employment summary Claimant was released from that job due to "lack of work." Unfortunately, Mr. Jordan did not produce that document as part of his report or deposition.

59. In general, Claimant's job history involved a number of times where he worked for a matter of just days, or weeks. According to Mr. Jordan, sometimes Claimant would quit, sometimes he was laid off, sometimes the job ended. But, Mr. Jordan found no instances where Claimant was physically incapable of doing the job.

60. In response to ISIF's questioning, Mr. Jordan agreed that Dr. Wayment's records show nothing indicating Claimant complained to Dr. Wayment about COPD or low back pain

after his 2012 right wrist injury. This is not exactly accurate, since Claimant did note back pain, chronic coughing, and shortness of breath. *See, e.g.,* JE 10, p. 404. *See also* JE 10, p. 389 (Same complaints in 2010). But, from a hyper-technical point of view, it could be argued Claimant did not report *low* back pain, or COPD *per se.* Mr. Jordan did not clarify if he was mistaken, or being hyper-technical. It is assumed he was mistaken.

61. Mr. Jordan acknowledged that Dr. Wayment released Claimant in November 2012 to full duty work without restrictions after his right wrist injury, but felt Claimant would be an excellent candidate for retraining out of construction and into truck driving due to his injuries.

62. Mr. Jordan also noted Claimant had tried to work at a fish farm for one day, but did not continue thereafter. He pointed out that Claimant has not worked to any real degree since his right wrist injury and not all that much between 2010 and the subject accident.

63. Repeatedly, Mr. Jordan was asked to confirm that no physician had placed "restrictions or limitations" related to his various injuries and conditions, to which he agreed. It is assumed that Mr. Jordan was affirming that no doctor had placed *restrictions* on Claimant.

64. As noted by Dr. Collins in her deposition, and testified to by Dr. Friedman, doctors *restrict* patients in work activities, such as restricting how much or how often they lift, pull, push, etc. or restricting the percentage of the work day should be spent in various movements or activities. Restrictions are suggested to prevent further injury, or to maintain the health of the patient. Restrictions do not necessarily define the limits of a patient's physical capabilities, but suggest how they should behave in order to prevent further injury. For example, a 50 pound lifting restriction does not mean a patient is incapable of lifting greater than 50 pounds, but rather that lifting more than 50 pounds puts the patient in jeopardy of re- or further injury.

65. *Limitations* are not placed on patients by physicians; they represent the limits of a patient's physical ability to perform an act. A limitation of 50 pounds lifting means the person cannot lift more than 50 pounds. Dr. Collins provided a good example of the difference. A quadriplegic has severe limitations on what the person can do. A doctor would have no reason to place work restrictions on such person, as they would not be in a position to exceed the restrictions to their potential detriment. In short, restrictions set boundaries on a person's activities, and are often below what the person is capable of doing. Limitations are the physical limits of the person's abilities, and are not set by a physician or anyone other than the affected person.

66. Mr. Jordan took into account the fact that no doctor had placed restrictions on Claimant regarding his hands, wrists, back or respiratory system when determining if Claimant was disabled after the MMI date for his subject right wrist injury. He concluded that Claimant was employable in the construction field at the end of 2012, when released by Dr. Wayment. Claimant also had access to other jobs in the community at that time, including estimating, truck driving, and customer service jobs. Mr. Jordan noted that Claimant "wasn't restricted from doing any of [those jobs]." Jordan depo. p. 37.

67. When questioned on whether the jobs as listed would require reaching, fingering, grasping requirements which would be impacted by Claimant's injuries to his hand and wrist, Mr. Jordan responded "[Claimant] was released to full duty on those by the treating physician on 12-28-12. So he would be able to, according to my understanding of what the physician was doing, do those activities for all of those jobs." Jordan depo. pp. 37, 38. Mr. Jordan also felt that "based on the records there was nothing restricting [Claimant] from returning to work." Jordan depo. p. 39.

68. Mr. Jordan also testified that Claimant's right wrist injury did not combine with his pre-existing conditions to render him totally and permanently disabled as of the end of 2012.

69. Mr. Jordan suggested that if Claimant could not hammer more than occasionally, he could use a nail gun. When asked if he would be able to grip the nail gun, Mr. Jordan responded that he had no medical indication that Claimant could not grip the nail gun.

70. Mr. Jordan acknowledged he had not reviewed Dr. Friedman's deposition prior to testifying at his deposition.

Total Disability Analysis

71. Total and permanent disability may be proven either by showing that Claimant's permanent impairment together with nonmedical factors totals 100% or by showing that he fits within the definition of an odd-lot worker. *Christensen v. S.L. Start & Assoc., Inc.,* 147 Idaho 289, 292, 207 P.3d 1020, 1023 (2009). Claimant's claim to 100% disability is considered first.

100% DISABILITY

72. Under the 100% method, Claimant must show that his medical impairment and nonmedical factors combine to equal a 100% disability. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 989 P.2d. 854 (1997).

73. Mr. Jordan's opinion that Claimant was not totally and permanently disabled at the point in time when he reached MMI for his right wrist injury, regardless of the inclusion of other pre-existing conditions, to whatever extent they existed, is contrary to the opinions of Drs. Friedman and Collins. Mr. Jordan had not reviewed Dr. Friedman's January 13, 2017 deposition when he rendered his opinion at his deposition on April 26, 2017. Had he done so, he may have been hard pressed to rebut Dr. Friedman, given that Mr. Jordan testified that he does not make judgment about

medical determinations, but rather uses the information and proceeds from there. While he noted that Dr. Friedman's report was prepared long after 2012, and after Claimant had deteriorated, he was unaware of the fact (or at least did not acknowledge) that Dr. Friedman had imposed restrictions on Claimant for his various conditions as of 2012, albeit after-the-fact.

74. Mr. Jordan agreed that Claimant would have had low back issues and COPD prior to his 2012 injury. But, as he made clear in his report and deposition testimony, and as is argued by ISIF, no doctor had labeled Claimant's conditions, or assigned restrictions based upon them, or rated most of them for impairment, prior to the end of 2012.

75. In briefing, on the issue of whether Claimant was totally and permanently disabled as of his MMI date following his 2012 industrial accident, ISIF argues that Claimant;

> "had the ability to learn to drive truck. The fact that he never did do that does not equate to a finding that his left hand injury combined with his right hand injury to make [Claimant] permanently disabled. Mr. Jordan further established through his testimony and written evaluations that [Claimant] was employable in several other positions at the time he was also pursuing (or not pursuing) the truck driving trade."

ISIF brief, pp. 16-17.

76. Of course, the question is not whether Claimant had the ability to learn how to drive a truck. The question is whether Claimant could viably make a living driving a truck, van, or limousine. While ICRD, Dr. Wayment, and perhaps even Claimant felt it would be a good idea for Claimant to obtain commercial driving training, being trained does not guarantee Claimant could have endured the job.

77. Both Dr. Friedman and Dr. Collins opined that the vibration involved in commercial driving would have precluded Claimant from pursuing driving as a profession as of the end of 2012. Furthermore, Dr. Collins convincingly testified at deposition that just considering Claimant's hands and wrists, he would not have had the ability to grip the steering wheel for an entire work day, day in and day out. Also, any other tasks associated with the job would have been difficult for Claimant. As she noted, rarely does a driving job simply require driving. Dr. Collins opined that Claimant could also not return to his time-of-injury job or the construction profession in general after his 2012 accident.

78. Dr. Collins testified in her deposition that Claimant was 100% disabled at the time he reached MMI after his 2012 accident. Dr. Friedman felt the restrictions placed on Claimant would put him is a sedentary to less-than-sedentary work classification.

79. ISIF has argued in briefing that Claimant was not totally disabled because Dr. Wayment released Claimant to work at his time-of-injury job, or any other job for which he was qualified, in late 2012. ISIF cites to no authority that stands for the proposition that a claimant cannot be totally disabled unless his treating physician imposes such restrictions as to render the claimant unable to return to any job for which he is otherwise qualified.

80. Dr. Wayment was not deposed in this case. It is not clear why he did not impose restrictions. It has been suggested that Claimant asked Dr. Wayment to not give him restrictions. The record does not establish that Dr. Wayment did not impose restrictions due to this request. Perhaps he did, perhaps he did not. Regardless, he did note his skepticism that Claimant would be able to return to construction work.

81. It would be rare that one could sustain a hand injury resulting in an 18% whole person impairment rating and yet have no physical limitations. As noted, those limitations are separate from physician-imposed restrictions. Claimant convincingly testified to his limitations that precluded him from competing competitively in the construction field. Even if the doctor chose not to give restrictions for whatever reason, Claimant's physical limitations were manifest to him as he tried to work in his chosen field.

82. The deposition testimony of Drs. Friedman and Collins carries more weight than Mr. Jordan's testimony and report, even combined with the implications that ICRD felt truck driving might be an appropriate job for Claimant. As noted previously, Dr. Wayment's opinion on this subject is given little weight as well.

83. When considering the record as a whole, Claimant was 100% totally and permanently disabled as of January 30, 2013, the date he reached MMI from his 2012 right wrist injury.

ISIF LIABILITY

84. Idaho Code § 72-332 states in relevant part;

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

85. Idaho Code § 72-332 specifies that the ISIF may share responsibility for an injured workers total impairment and disability if such total and permanent disability is caused

by a combination of the permanent affects of the work related accident and a pre-existing impairment.

86. In order to hold the ISIF responsible for some percentage of an injured worker's total and permanent disability, the statute requires demonstration of (1) a pre-existing physical impairment which was (2) manifest, (3) constituted a subjective hindrance to claimant's employment and (4) combined with the compensable industrial impairment to render claimant totally and permanently disabled. *See, Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990). To satisfy the "combined with" element with the prima facie case, it must be demonstrated that "but for" the pre-existing impairment, claimant would not be totally and permanently disabled. *Bybee v. ISIF*, 129 Idaho 76, 921 P.2d 1200 (1996). When evaluating whether pre-existing conditions qualify for purposes of ISIF liability, special rules must be applied to pre-existing conditions which are progressive, i.e. which pre-dated the subject accident but worsened thereafter. The Commission treated this issue in *Ritchie v. State of Idaho Industrial Special Indemnity Fund, supra*. Relying on *Colpaert v. Larsons Inc., Inc.*, 115 Idaho 852, 771 P.2d 46 (1989), the Commission adopted the following rule for evaluating pre-existing conditions which progress in severity following the subject work accident:

> From Colpaert, it is clear that in determining whether the elements of ISIF liability are satisfied, a preexisting condition must be assessed as of the date immediately preceding the work injury. A snapshot of Claimant's preexisting 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 Claimant's preexisting condition, as it existed immediately before the work accident, combines with the effects of the work accident to cause total and permanent disability. Colpaert lends no support to the proposition that in evaluating ISIF liability for a preexisting but progressive condition, that condition should be assessed as of the date of hearing, i.e. at a time when Claimant's condition is much worse.

> In order to determine whether a preexisting condition constituted a subjective hindrance as of a point in time immediately preceding a work accident, one must assess, as the Commission did in Colpaert, the nature of the limitations/restrictions extant as of that date. It follows that in determining whether the preexisting condition combines with the effects of the work accident to cause total and permanent disability, that assessment, too, must be performed in view of the limitations/restrictions arising from the preexisting impairment as of a point in time immediately preceding the work accident, not the limitations/restrictions relating to the condition as it may have progressed as of the date of a subsequent hearing. To do otherwise would be to hold the ISIF responsible for something other than a "preexisting" condition. In what sense can an impairment and related limitations be said to pre-date the work accident when some portion of the impairment and limitations arose after the work accident? The only solution that comports with the statutory design upon holding the ISIF responsible only for preexisting impairments is to measure all elements of ISIF liability as of a point in time immediately preceding the work accident. Colpaert makes it clear that the ISIF cannot be held for the progression of impairment or limitations/restrictions which arise subsequent to the date of injury.

Ritchie at ¶ 96, 97.

87. Dr. Friedman is the only physician who attempted to assess Claimant's pre-existing impairments as of the date immediately preceding the February 7, 2012 industrial accident. His testimony reliably informs the Commission's assessment of a number of the elements of the *prima facie* case against the ISIF.

PRE-EXISTING IMPAIRMENTS

88. The Commission accepts Dr. Friedman's opinion that as of the February 7, 2012 right wrist injury, Claimant had the following permanent physical impairments; COPD 6%, low back 9%, left hand 18%, right shoulder 2%, left shoulder 2%, ACL 2%. All of these impairments are expressed in percentages of the whole person. Some of these impairments, notably the rating for Claimant's COPD, right wrist, and low back continued to progress, i.e. worsen, following the subject 2012 accident. However, per *Colpaert*, they must be evaluated as of the date immediately preceding that accident.

MANIFEST

89. "Manifest" means that either the employer of 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). Here, the record amply supports the fact that each of the aforementioned impairments was known to Claimant prior to the subject accident.

SUBJECTIVE HINDRANCE

90. Next, Claimant must demonstrate the aforementioned pre-existing impairments constituted a "subject hindrance" to obtaining employment. The Idaho Supreme Court set forth the definitive explanation of the "subjective hindrance" in *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 686 P.2d 557 (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. at 172, 563.

91. All parties agree Claimant's left hand injury was a hindrance to employment.

92. The record establishes that Claimant's COPD, although not labeled as of February 2012, was present, manifest, and a hindrance to Claimant's employment. He had trouble climbing a flight of stairs, and had coughing fits which would last an extended period

of time. These issues made him less competitive in the work place and cost him a job in Pocatello when he could not keep up with the production of his co-workers.

93. Likewise, Claimant's low back issues, although not diagnosed with confirmatory x-ray and/or MRI films until after his 2012 industrial accident, were nevertheless present for years prior. Claimant sought less demanding work due to his back issues, which led him to acoustical tile installation. Claimant's low back issues were a hindrance to employment prior to 2012.

94. Claimant testified that he chose to work in ways that would not require him to be on his knees. Likewise, while his shoulders bothered him, he managed to work around whatever issues they presented. Claimant did not lose work, fail to get jobs, or have to limit the types of jobs for which he applied as the result of his knees and/or shoulders. Working around the human condition, with its various limitations, aches, pains, and issues, is not always sufficient to constitute a hindrance. Claimant does not seriously argue his knees and shoulders were a subjective hindrance to him obtaining, or maintaining employment. The record supports a finding that Claimant's knees and shoulders were not a subjective hindrance to his employment.

95. ISIF's argument that because no physician imposed restrictions on Claimant for any of his pre-existing conditions, they could not have been a hindrance to employment ignores Claimant's testimony on the negative impact his low back and COPD had on his employment. Claimant's low back caused him to seek employment outside the field of plumbing. It also impacted his ability to lift heavy materials, thus making him less competitive on certain jobs. His COPD cost him a job, as noted above. It also prevented him from applying for work involving significant stair climbing.

COMBINED WITH a.k.a. "BUT FOR" ANALYSIS

96. To satisfy the "combined with" element, the standard is whether, *but for* Claimant's pre-existing conditions, Claimant would have been totally and permanently disabled immediately following the occurrence of his subject accident. This test encompasses the scenario where each element contributes to the total disability. *See Eckhart v. State Indus. Special Indem. Fund.*, 133 Idaho 260, 985 P. 2d 685 (1999); *Bybee v. State, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

97. No party argues Claimant's February 7, 2012 industrial right wrist injury rendered Claimant totally disabled in and of itself. If it were not for Claimant's pre-existing conditions, his right wrist injury incurred in 2012 would not have rendered him totally disabled.

98. There is some question as to whether Claimant was totally and permanently disabled before his 2012 accident. After his 2009 left hand injury stabilized, Claimant's employment history is quite limited. As noted in Mr. Jordan's report, Claimant worked just a handful of assorted jobs lasting from one day to one month in duration between 2009 and 2012. However, the record shows that even before 2009 Claimant would often take piecemeal work of limited duration. No expert has testified that Claimant was totally disabled prior to his right hand injury in 2012, and the record supports the proposition that Claimant, although suffering disabilities, was not totally disabled prior to February 7, 2012.

99. As noted, in evaluating the combined with component of the *prima facie* case, it is important to understand the extent and degree of the restriction referable to the pre-existing impairments, as those restrictions existed as of the date immediately preceding the subject accident. Dr. Friedman gave the following restrictions for the relevant pre-existing impairments:

A) Left Hand. As of February 7, 2012, Claimant had loss of grip strength in the left hand, and was unable to entirely close his fingers. Dr. Friedman testified that Claimant would be unable to use a hammer in his left hand. Claimant was limited to light duty work with his left hand, lifting of 20 pound occasion and 10 pounds repetitively. He did not believe that Claimant retained repetitive grip strength in the left hand. Friedman depo. pp. 16-19. Claimant's left hand injury was of such severity that it was utilized by Claimant basically as an assist to his uninjured right hand. Friedman depo. pp. 29-30.

B) Low Back. As of February 7, 2012, Claimant's low back condition entitled him to medium duty restrictions. According to Dr. Friedman, Claimant should have had restrictions against lifting 50 pound occasionally, 25 pounds repetitively as a result of his low back condition. Dr Friedman would also have restricted Claimant from twisting or torquing movements and no exposure to prolonged low frequency vibration as a result of his pre-existing low back impairment. Friedman depo. pp. 37-39.[5]

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[5] Dr. Friedman did not himself propose any limitations against bending, prolonged sitting or prolonged standing that Claimant should have observed as of February 7, 2012, even after having been invited to do so (Friedman depo. pp. 38-39). However, after delineating the limitations he thought appropriate for Claimant as of February 7, 2012 there is the following exchange:

> Q. [By Daniel Bowen]: As to the lifting restrictions, they overlap and, in fact, the subsequent hand ones are event more limiting?
> A. Correct.
> Q. But as to the bending, Torquing, prolonged sitting, prolonged standing, that would be different?
> A. Correct. And limiting exposure to low-frequency vibration.

Friedman depo. p. 40.

The question might have invited an objection, since it is premised on a recitation of low back limitations that Dr. Friedman did not testify to. However, he also seems to have agreed with Counsel's characterization. The proposed limitation against prolonged standing was forgotten when Counsel's attention turned to establishing whether Claimant's diagnosis of COPD contributed something new to Claimant's disability:

> Q. [By Daniel Bowen] To give you an example of some of the distinctions I'm trying to make - - I'm trying to think of different job descriptions that might provide us a vehicle - - I was a meter

C) COPD. As of the date of the subject accident, Dr. Friedman testified that Claimant reasonably had the following limitations/restrictions for his diagnosis of COPD:

> Q. [By Daniel Bowen]: Sure. Now Dr. Friedman, with respect to the COPD, do you have an opinion, within a reasonable degree of medical probability, as to whether or not that would have been a hindrance to this gentleman's employment or seeking employment or performing various kinds of employment prior to February of 2012?
>
> A. Yes.
>
> Q. And what's your opinion, sir?
>
> A. It would have made it difficult for him to seek employment. He was actually only able to climb one set of stairs and then have to take a break. The type of employment he had, he would have needed, if he had to go up multiple stairs or stories in a building, would have required power assistance. We call those elevators. But I would have expected he would have had difficulty walking around for long distances; stairs, at 13 stairs for a flight of stairs, should translate to somewhere between 100 and 200 feet before he has to stop to catch his breath.

Friedman depo. pp. 50-51.

Therefore, Claimant's respiratory condition would have prevented him from engaging in work related activities requiring walking for long distances or climbing more than one flight of stairs at a time.

> reader for the power company when I was a very young man, and I would wander around town with my meter book and try to avoid your dogs all day long on my feet.
> A. Um-hmm.
> Q. Hand problems wouldn't have really played a role, for instance, in my ability to do that job. Low-back pain probably wouldn't have played a role unless it involved something where it was so severe I couldn't be on my feet, but a respiratory problem might have.
> A. No, it would have. Because it would mean that he could probably walk one or two houses before he had to stop and catch his breather. And that's assuming there's no incline or decline, which is harder to walk up and down, and no dogs requiring a very rapid evacuation, which has happed at my house with my Doberman.

Friedman depo. pp. 50-51.

Since Dr. Friedman did not initially propose any low back limitations relating to bending, standing or walking, and since he did not object to the walking/standing hypothetical later posed by Claimant's counsel, we will endorse only those limitations originally proposed by Dr. Friedman.

100. The accident of February 7, 2012 left Claimant with additional permanent restrictions for his right hand. As of his date of medical stability following the subject accident, Dr. Friedman testified that Claimant reasonably had right wrist restrictions as follows:

> Q. [By Daniel Bowen] And what is your opinion?
>
> A. My opinion is he should have been given light-duty restrictions to his right write, based on the surgical procedures that were performed and the expected outcome, which is 20 pounds occasional, 10 pounds repetitive, no repetitive gripping.

Friedman depo. p. 27.

101. While the ISIF argues that Claimant's pre-existing left upper extremity impairment cannot constitute a subjective hindrance to Claimant because he was released without contemporaneous restrictions, we find Dr. Friedman's opinion concerning Claimant's left upper extremity impairment to be more persuasive. That Claimant was not given permanent restrictions at the time he received his 18% PPI rating is not dispositive of the question of whether Claimant actually should have been given such limitations/restrictions. *Poljarevic v. Independent Food Corp.* IIC 2010-0001 (January 13, 2010). The fact that Dr. Friedman's opinion in this regard is rendered well after the date of MMI does not make his opinion more or less credible. Dr. Friedman's testimony finds good support in the record and in Claimant's testimony.

102. It seems clear to the Commission that of Claimant's pre-existing physical impairments, the left wrist injury most obviously combines with Claimant's right hand injury to contribute to Claimant's total and permanent disability. As noted, Claimant was able to continue employment following his left hand injury because he was right hand dominant, and employed his left hand simply as an assist to his right. Dr. Friedman recognized that with both right and left

hand restrictions in place, Claimant was much more limited than he was with only a unilateral upper extremity restriction:

> A. And the answer is I agree. And his left-hand problems were permanent and had been there since ’09, so he was doing everything right-handed, basically, using his left hand as an assist. I would have expected him to be able to do a lot of things, because he couldn’t even close his hand grip. He couldn’t get his finger all the way closed, so he couldn’t make a fist on the left. It’s not that he wouldn’t, he couldn’t. It doesn’t go now. So his left hand would have been an assist to his right. He injures his right wrist, now he has big problems with not only employment but just taking of himself. And I would expect him not to be able to open jars, pinch and pull things small, because now he can’t do it with either hand. So this is going to be a really big difference for him not only in employment but living.
>
> Q. Doctor, thank you so much for the explanation.
>
> A. Um-hmm.
>
> Q. With that explanation in mind, do you have an opinion, within a reasonable degree of medical probability, as to whether the results of the 2009 left-wrist problem combined with the results of the February 2012 right-wrist problem produced an impact and/or limitation on this gentleman’s ability to perform labor?
>
> A. Yes.
>
> Q. And what is your opinion, sir?
>
> A. My opinion is it significantly restricts him. I don’t know how you would measure it, but I know that he would have to have a very generous employer who would markedly modify a commercial carpenter’s job to be employed.
>
> Q. And that impact on his ability to perform carpentry work comes about as a result of the interplay between the two injuries, limiting his ability to use tools and perform the activities of his profession?
>
> A. Absolutely.

Friedman depo. pp. 29-31.

These observations make intuitive sense. The impact of bilateral upper extremity restrictions such as those described by Dr. Friedman is much more significant than even the complete loss of

one upper extremity. Bilateral upper extremity restrictions leave Claimant with no plan B. He is unable to rely on an uninjured hand to perform the work once done by the injured extremity. Considered separately, limitations relating to the right and left hands are not nearly as significant as those restrictions combined. We conclude that Claimant's pre-existing left wrist impairment does combine with the subject accident to contribute to Claimant's total and permanent disability.

103. Employer also argues that the pre-existing impairments for COPD and low back injury are also additive to this calculation, and that Claimant could not be deemed to be totally and permanently disabled without consideration of those conditions as well. In other words, it appears to be Employer's position that the left wrist and right wrist, standing alone, are not sufficient to cause Claimant's total and permanent disability. Although it is true that Nancy Collins eventually endorsed the proposition urged upon the Commission by Employer, we find Dr. Collins initial observations to be more probative of this question than the answers that she later gave in response to questions posed by Defense counsel. Dr. Collins initially expressed the view that Claimant is totally and permanently disabled as a result of the combined effects of the left and right hand injuries alone:

> Q. [By Jeff Stoker]: In reference to those opinions can you tell me basically what findings or determinations you made that led you to those opinions?
>
> A. Well, Steve performed fairly physical work all of his work life. His work required constant upper extremity use. Gripping, handling, fingering, feeling, reaching. Those capacities that are required typically in trade jobs or heavy physical labor. He had a number of functional limitations over the years relative to his back and his knee. But the two primary limitations that I feel totally disable him was a left hand injury that left him just having the left hand as an assist. And his right hand performing most of the upper extremity functions. So following the 2009 left hand injury he was able to continue to do some of the physical work, but he wasn't very fast. And he lost a job because he couldn't keep up with the other union workers. But he could go back and do somewhat lighter - - not lighter, but work that didn't require such a production rate. When he sustained the injury to

his right dominant hand, and subsequently got restrictions for that hand to occasional use, at that point he really lost access to every job.

Q. So when you give us these opinions in your letter report that we have talked about when did those become applicable to his situation?

A. Well, as soon as he was MMI and was provided the occasional use of the right hand restriction from Jensen and then from Sant at that point it is my opinion he really had access to no work. The Dictionary of Occupational Titles states that over 92% of all jobs require frequent to constant upper extremity use. So handling, reaching, fingering, feeling. Those kinds of things. He was a skilled worker, but his education level was low. He certainly didn't present as somebody who could do other skilled work outside of the construction arena. So I think at that point in time he didn't have use of either hand for frequent to constant use.

Q. Dr. Jensen issued a letter on February 7, 2013 where he discusses impairment and limitations. And that is where he limited his use of a hammer to occasional use to earn a 33 percent. As of that time once he had reached that point where he had that limitation with regard to his right hand would you agree at that time then he had reached the level of being totally disabled?

A. I do.

…

Q. [By Daniel Bowen] Dr. Collins, we have identified the left hand, the COPD, the low back, both as it affects respiratory function, and as it affects ability to lift, as pre-existing conditions which you feel played a role in producing the total and permanent disability. Were there any others I missed

A. No. I think primarily it is his right and left hand injuries that preclude most of the jobs. But certainly his low back and his breathing issues contributed as well.

Collins' depo. pp. 7-9, 29.

Dr. Collins' opinion that Claimant is totally and permanently disabled as a consequence of the combined effects of the left and right upper extremity injuries is well explained and persuasive. While, she later agreed that Claimant's low back and COPD also contribute to Claimant's total and permanent disability, these opinions are less persuasive, because they are not well explained. Dr. Collins testified that Claimant's pre-existing low back condition constituted a subjective

hindrance which limited Claimant even though he continued to do heavy work prior to the subject accident. She also testified that Claimant's low back condition combined with the subject accident contributed to Claimant's total and permanent disability. However, she did articulate exactly how Claimant's low back limitation combined with the subject accident to cause total and permanent disability. It will be recalled that Claimant's low back condition as of February 7, 2012 reasonably restricted him against performing more than medium duty work, with the admonition that he also avoid torquing and twisting motions and low frequency vibration. Dr. Collins testified that while the truck driving job proposed by Dr. Wayment would probably exceed the recommendation that Claimant avoid low frequency vibration, the gripping of the steering wheel of such a vehicle was actually ruled out by Claimant's bilateral upper extremity injuries, standing alone. Collins depo. pp. 49-52.

104. Dr. Friedman testified that Claimant's low back limitations/restrictions are different than those imposed by Claimant's upper extremity injuries. Therefore, he proposed that Claimant's pre-existing low back impairment is additive to Claimant's disability. (Friedman depo. pp. 39-40). However, neither Dr. Collins nor Dr. Friedman explained how, as a practical matter, the admonition against torquing and twisting adds anything to the equation for Claimant, who is unable to engage in repetitive grasping and can lift only 20 pounds maximally because of upper extremity injuries; if Claimant cannot, as Dr. Collins proposed, due any meaningful work with his hands, does it matter that Claimant has restrictions against twisting and torquing activities? If so, the vocational significance of additional limitations against twisting and torquing was not explained by either Dr. Collins or Dr. Friedman.

105. Dr. Collins also explained, on questioning by Claimant's counsel, that Claimant's diagnosis of COPD was vocationally significant, and helped explain Claimant's total and

permanent disability. However, other than her testimony that Claimant's limitations/restrictions from this condition combined with his other impairments to cause total and permanent disability, she did not explain exactly why the limitations/restrictions imposed by Dr. Friedman for this condition are relevant to evaluating Claimant's disability. (Collins depo. pp. 21-23). On the other hand, Dr. Friedman did offer some credible observations on the question of whether the restrictions he imposed for Claimant's COPD were vocationally significant in light of Claimant's upper extremity impairments:

> Q. [By Daniel Bowen]: Sure. Now Dr. Friedman, with respect to the COPD, do you have an opinion, within a reasonable degree of medical probability, as to whether or not that would have been a hindrance to this gentleman's employment or seeking employment or performing various kinds of employment prior to February of 2012?
>
> A. Yes.
>
> Q. And what's your opinion, sir?
>
> A. It would have made it difficult for him to seek employment. He was actually only able to climb one set of stairs and then have to take a break. The type of employment he had, he would have needed, if he had to go up multiple stairs or stories in a building, would have required power assistance. We call those elevators. But I would have expected he would have had difficulty walking around for long distances; stairs, at 13 stairs for a flight of stairs, should translate to somewhere between 100 and 200 feet before he has to stop to catch his breath.
>
> Q. To give you an example of some of the distinctions I'm trying to make - - I'm trying to think of different job descriptions that might provide us a vehicle - - I was a meter reader for the power company when I was a very young man, and I would wander around town with my meter book and try to avoid your dogs all day long on my feet.
>
> A. Um-hmm.
>
> Q. Hand problems wouldn't have really played a role, for instance, in my ability to do that job. Low-back pain probably wouldn't have played a role unless it involved something where it was so severe I couldn't be on my feet, but a respiratory problem might have.

> A. No, it would have. Because it would mean that he could probably walk one or two houses before he had to stop and catch his breather. And that's assuming there's no incline or decline, which is harder to walk up and down, and no dogs requiring a very rapid evacuation, which has happed at my house with my Doberman.
>
> …
>
> Q. [By Daniel Bowen]: Basically, you would expect that a job that required him to walk around most of the day, certain postal jobs, meter-readings jobs, et cetera, like that, probably weren't in the cards for this gentleman even prior to the February 7, 2012 accident?
>
> A. Correct. Based on the history he provided of what his ability were before he had that injury.

Friedman depo. pp. 50-51, 52.

Therefore, while Claimant's upper extremity limitations/restrictions would not prevent him from performing a job that required mainly walking for long periods of time, such as a security guard or meter reader, he would be foreclosed from this type of employment by virtue of the limitations/restrictions stemming from Claimant's COPD.

106. We agree with Dr. Collins that Claimant's disability stems largely from the combined effects of his bilateral upper extremity injuries. However, based on Dr. Friedman's testimony, it seems that Claimant's pre-existing impairment for COPD also contributes to, and is finally responsible for causing, Claimant's total and permanent disability. From the evidence discussed above, we conclude that the record as a whole establishes that but for Claimant's industrial accident on February 7, 2012 he would not have been totally and permanently disabled as of that date due to his pre-existing conditions alone. But for Claimant's pre-existing conditions involving his left upper extremity and his diagnosis of COPD Claimant would not have been rendered totally and permanently disabled by his industrial accident. It is only as a result of the combined effects of the work accident and Claimant's pre-existing left hand and

respiratory conditions that Claimant became totally and permanently disabled. We conclude that Claimant's low back condition is not vocationally relevant when considering the more impactful limitations relating to COPD and Claimant's bilateral upper extremities. Therefore, for purposes of ISIF liability, the ISIF will share responsibility for Claimant's total and permanent disability via the *Carey* Formula for Claimant's pre-existing physical impairments involving his left upper extremity and his respiratory system.

CAREY APPORTIONMENT

107. The Commission has found that Claimant's relevant pre-existing impairments equal 18% for Claimant's left hand and 6% for Claimant's COPD, as calculated for the time immediately preceding the work accident. Claimant's accident produced impairment as of his January 30, 2013 date of medical stability of 6%. These impairments total 30% of the whole person, leaving an additional 70% disability to be apportioned between the ISIF and Employer per the *Carey* Formula. Employer's responsibility is calculated as follows: 6/30 x 70% = 14% + 6% PPI = 20% of the whole person. Therefore, Employer is responsible for the payment of disability, inclusive of impairment, for 100 weeks (500 weeks x 20%) commencing January 30, 2013, at the appropriate PPD rate. As explained below, Employer's responsibility to pay this 20% rating is inclusive of the 6% PPI rating for the right wrist. If this rating has been paid, Employer is entitled to apply this payment as a credit against its obligation to pay the 20% award. This credit shall be applied at the front end of Employer's obligation since it is not an overpayment to which I.C. § 72-316 might otherwise apply. Therefore, Employer's obligation to pay the remaining 14% PPD owed pursuant to this order commences 30 weeks (500 X 6%) following Claimant's January 30, 2013 date of medical stability. ISIF is responsible for the difference between the weekly benefits payable by Employer for the 100 week period and the

appropriate TTD rate. One hundred weeks after January 30, 2013, ISIF is responsible for the payment of total and permanent disability benefits for the balance of Claimant's life.

ACKNOWLEDGEMENT OF DISABILITY PAYMENTS PREVIOUSLY MADE

108. In *Dickinson v. Adams County*, IIC 2017-0007 (March 21, 2017), the Commission, relying on language of the Act, and as explained by the Idaho Supreme Court in *Mayer v. TPC Holdings, Inc.*, 160 Idaho 223, 370 P.3d 738 (2016), reiterated that "permanent impairment" is simply a component of "permanent disability" and only disability benefits are paid in Idaho. This is true even if it is common practice for practitioners to discuss the concept of "permanent impairment benefits." In reality, benefits paid under the common parlance of "impairment" benefits are actually "disability" benefit payments.

109. In the present case, Employer owes disability benefits to Claimant in a set amount. Some of those benefits have been previously paid. Some are yet to be paid. Disability payments made previous to this decision are not forfeited or ignored. It is acknowledged herein that some disability benefits have been previously paid, and those payments are credited toward the total benefit amount due and owing Claimant.

CONCLUSIONS OF LAW AND ORDER

1. Claimant suffered a compensable right wrist injury on February 7, 2012. He reached a point of medical stability on January 30, 2013 resulting in 6% whole person impairment.

2. Claimant has proven that he is totally and permanently disabled under the 100% method of January 30, 2013.

3. Claimant has proven that his total and permanent disability is the result of the combined effects of his compensable right wrist injury and his pre-existing impairment relating to his respiratory system and his left upper extremity.

4. Pursuant to *Carey v. Clearwater*, 686 P.2d 54, 107 Idaho 109 (1984), Employer is responsible for the payment of a 20% disability rating commencing January 30, 2013, with ISIF responsibility for the balance of any total and permanent disability benefits owed to Claimant pursuant to this decision.

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

DATED this _14TH_ day of __November__, 2017.

INDUSTRIAL COMMISSION

___/s/_____
Thomas E. Limbaugh, Chairman

___/s/_____
Thomas P. Baskin, Commissioner

_Unavailable for Signature_____
R.D. Maynard, Commissioner

ATTEST:
____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _14th_ day of _November_, 2017, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

JEFFREY STOKER
PO BOX 1597
TWIN FALLS ID 83303

DANIEL BOWEN
PO BOX 1007
BOISE ID 83701

/s/

esl