BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JESSE MASSEY, Claimant, v. CHAMPION HOME BUILDERS, INC., Employer, and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2013-017303** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED DEC 15 2017**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Douglas A. Donohue who conducted a hearing in Boise on February 10, 2017. Matthew Andrew represented Claimant. Matthew Pappas represented Champion Home Builders, Inc. Paul Augustine represented ISIF. The parties presented oral and documentary evidence. The parties submitted briefs. The case came under advisement on July 3, 2017. This matter is now ready for decision.

ISSUES

The issues to be decided according to the Notice of Hearing are:

1. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;

2. Whether apportionment for a preexisting condition under Idaho Code § 72-406 is appropriate;

3. Whether and to what extent Claimant is entitled to disability in excess of impairment, including total permanent disability;

4. Whether Claimant is entitled to permanent total disability under the odd-lot doctrine;

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

6. Apportionment to establish ISIF's share of liability under *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984).

CONTENTIONS OF THE PARTIES

Claimant contends he was injured in a compensable industrial accident while lifting a bucket of screws on June 29, 2013. He had a bilateral L5 pars defect before the accident which was asymptomatic and became symptomatic because of this accident. L5-S1 surgery helped, but also caused right leg numbness which was not present before the surgery. Dr. Kevin Krafft's opinions, restrictions, and 7% PPI rating should be given little weight because Dr. Krafft has conflict-of-interest ties to the State Insurance Fund, imposed restrictions inconsistent with a functional capacity assessment (FCA) which he ordered and which was performed by his subordinate at his work-hardening program, and was repeatedly dismissive of Claimant's reports. Dr. Mark Williams' opinions are entitled to more weight. Disability opinions of Dr. Mary Barros-Bailey, Ph.D. are entitled to greater weight than those of William Jordan. Even Mr. Jordan admits that if Dr. Williams' restrictions are valid Claimant is totally and permanently disabled. Claimant is totally and permanently disabled as an odd-lot worker under the futility prong of the odd-lot test. ISIF is not liable because Claimant's learning disabilities do not constitute *physical* impairments and his preexisting low back condition was totally asymptomatic—therefore, not an impairment—before the accident. Similarly, if Claimant is not found totally and permanently disabled, his disability should be rated at 55% and section 406 apportionment is inappropriate.

Employer and Surety contend Claimant's PPI is confirmed by the opinion of Dr. Krafft and disability at the rate opined by William Jordan, 29-41% inclusive. Claimant is receiving Social Security Disability. He has not significantly attempted and does not want to return to work. He has not established that an attempt to return to work would be futile. In the

"highly unlikely" event that the Commission may find Claimant an odd-lot worker, ISIF liability is appropriate with Surety liable for the first 33% which translates to 165 weeks. Most of Claimant's partial disability relates to his preexisting condition, for which a second, non-industrially related surgery was performed. Section 406 apportionment would be appropriate on a 1/3 industrial, 2/3 nonindustrial basis.

ISIF contends Claimant's 1974 accident did not result in permanent physical impairment related to cognitive function. Claimant worked thereafter to the date of the industrial accident without apparent impairment or hindrance. He is not totally and permanently disabled now. Even if found otherwise, the "combining" element prerequisite to ISIF liability is not present.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Testimony at hearing of Claimant and his wife, Deborah;

2. Joint exhibits 1 through 31 admitted at hearing;

3. Post-hearing depositions of physicians Paul Montalbano, M.D., Kevin Krafft, M.D., and Mark Williams, D.O., and of vocational experts Mary Barros-Bailey, Ph.D., and William Jordan.

All objections raised in depositions are overruled.

The Referee submits the following findings of fact and conclusions of law for the approval of the Commission and recommends it approve and adopt the same.

FINDINGS OF FACT

1. Claimant worked at various positions on the line for Employer, building manufactured mobile homes. On June 29, 2013, a Saturday, while sheetrocking a mobile home he lifted a bucket of screws and felt immediate back pain which took him to his knees. He notified a supervisor and left work. When he was not better Monday morning he sought medical attention.

2. A July 1, 2013 note by a physician's assistant identified objective indicators of a low back condition. X-rays showed multilevel lumbar degenerative disease including spondylolisthesis L5 on S1 and stenosis throughout, particularly at L1-2.

3. Light duty was allowed and Claimant tried it for about one week, but hurt too much with any activity.

4. Follow-up on July 8 with the physician's assistant included a complaint of pain radiating into the right groin with right anterior thigh paresthesias.

5. On July 31, 2013 Michael Weiss, M.D., examined Claimant. He allowed a light-duty work release to remain in place. Employer provided some very light-duty work on a full-time basis at a reduced wage until the September 2013 surgery.

6. A lumbar MRI on August 5, 2013 showed disc degeneration and facet arthropathy with anterolisthesis L5 on S1 and chronic bilateral L5 pars defects. Nerve root flattening was observed at L5-S1 as well.

7. On September 11, 2013 neurosurgeon Paul Montalbano, M.D., reviewed records and examined Claimant at Surety's request. He recommended surgery, including fusion at L5-S1. He opined the industrial accident "converted an asymptomatic condition to a symptomatic condition." X-rays on September 11 and 20 were consistent with the recent MRI results. On September 17 Dr. Montalbano noted that Claimant was weaning off tobacco in preparation for surgery. He had been released from work.

8. On September 19, 2013 neurosurgeon Michael Hajjar, M.D., examined Claimant on referral from Primary Health. Dr. Hajjar concurred in the recommendation for surgery.

9. Claimant was given a choice and selected Dr. Montalbano to perform the surgery. On September 23, 2013 Dr. Montalbano performed surgery, a decompression and fusion.

September 24 X-rays confirmed that the fusion had ameliorated the anterolisthesis. An undated note (sent by fax September 25) recommended an external, bone-growth stimulator to enhance effectiveness of the fusion. Claimant was fitted with a back brace during recovery.

10. Post-surgery, Claimant was repeatedly cautioned by more than one physician that tobacco use likely would adversely affect the fusion.

11. An October 22, 2013 X-ray showed satisfactory positioning of surgical hardware.

12. Beginning October 23, 2013 Dr. Montalbano prescribed physical therapy. Physical therapy notes show Claimant cooperative and that he made "slow but steady" progress. The physical therapy regimen was extended additional weeks.

13. In a November 18, 2013 follow-up note, Dr. Montalbano expressed concern, having observed "popping" with certain leg motions. Dr. Montalbano opined, "This 'popping' is usually painful."

14. December 17, 2013 X-rays showed the surgical and remaining degenerative conditions unchanged from October.

15. On January 22, 2014 Dr. Montalbano opined Claimant medically stable and referred him to physiatrist Kevin Krafft, M.D., for an impairment rating. Dr. Montalbano next examined Claimant in May 2015.

16. On February 3, 2014 Dr. Krafft examined Claimant in the role of an IME physician, reviewed diagnostic imaging, and ordered a functional capacity assessment (FCA). Applying the *Guides*, sixth edition, he rated Claimant's PPI at 7% whole person. He imposed as "preliminary" a lifting restriction of 20 pounds, a pushing/pulling restriction of 40 pounds, specific motion restrictions, and a four-hour daily work limit with position changes. Dr. Krafft deferred final restrictions until the FCA could be performed.

17. The FCA was performed using the whole-body KEY protocol. The physical therapist noted Claimant performed according to Claimant's perception of his abilities, but actually could have done more.

18. On March 4, 2014 Dr. Krafft again examined Claimant after Claimant described ongoing pain, a lump in his back, and muscle spasm. Dr. Krafft noted the FCA reported as "conditionally valid" with less than full effort on Claimant's part. Dr. Krafft recommended permanent restrictions of lifting 50 pounds occasionally, pushing/pulling to 75 pounds, an 8-hour work day, limit specific body motions to occasional, limit standing and walking combined to 4 hours continuously with a 30-minute break thereafter.

19. Both Claimant and his wife testified they were dissatisfied with the level of attention Dr. Krafft paid to Claimant's complaints.

20. A March 25, 2014 visit to his family physician, Colby Anderson, P.A. for refill of high blood pressure medication included references to Claimant's "chronic pain syndrome," "discogenic syndrome," and prior surgery. Dr. Anderson provided treatment for other conditions but was not significantly involved in treating Claimant's back condition.

21. On June 18, 2014 family practice and sports medicine physician, Mark Williams, D.O., reviewed records and examined Claimant at Claimant's request. He opined Claimant was not medically stationary. He acknowledged the presence of Waddell's signs with disproportionate reports of pain on examination. He suggested alternatively that Claimant "is having a failed back surgery, or has had a new injury, or is not being honest in his recovery." He recommended Dr. Krafft's "preliminary" restrictions as more appropriate.

22. An April 20, 2015 lumbar MRI showed surgical changes and degenerative stenosis throughout. It indicated possible loosening of the surgical hardware.

23. A May 6, 2015 neurosurgical consultation was performed by Dr. Montalbano. He recommended "urgent" surgery, decompression L1 through L4, opining that Claimant was at risk for cauda equina syndrome. He again took Claimant off work. X-rays confirmed the earlier arthrodesis was solid.

24. On May 21, 2015, Dr. Hajjar performed a records review at Surety's request. He opined that the 2013 surgery was successful and degenerative lumbar symptoms which arose at L1-L4 18 months later were entirely unrelated to the industrial accident and surgery. He well explained the factors influencing this opinion, including the fact that the L4-5 disc space immediately above the surgical fusion was not of concern.

25. On October 16, 2015 Dr. Williams again reviewed records and examined Claimant at Claimant's request. He noted Claimant's Waddell signs significantly reduced from the prior examination in 2014. He diagnosed severe degenerative disc disease and spinal canal stenosis. He opined the L1-4 problems were unrelated to the original industrial injury or 2013 surgery. He rated Claimant's PPI at 14% whole person, entirely work related with additional 29% whole-person PPI which was not work related.

26. A March 30, 2016 evaluation by Dr. Montalbano pre-surgery confirmed the need for L1 through L4 decompression. Surgery was performed in April 2016 after Claimant's Social Security Disability allowed eligibility for coverage.

27. On July 15, 2016 Dr. Montalbano responded by a check-the-box agreement to Claimant's attorney's July 12 correspondence. He agreed that Claimant's 2016 proposed surgery and impairment was nonindustrial. It was distinct from the industrially related 2013 surgery and impairment.

Prior Medical Records

28. In 1974 Claimant suffered multiple injuries in a motor vehicle accident. He was in a coma for a significant period of time. Claimant had always had difficulty in school. After this accident, he lost part of his earlier, limited, abilities to read and to perform basic math. He also experienced some other lessening of cognitive function. Now, he believes his ability to read, cipher, and think has returned to its pre-accident levels.

29. In 2004 Claimant visited an emergency room complaining of left hand numbness increasing for about 10 weeks, eventually also occurring on the right side without precipitating incident.

30. In 2007 Claimant visited an emergency room for a large laceration of his left great toe. X-ray showed no fracture.

31. A 2009 X-ray showed no fracture of his left fingers.

32. A 2011 foreign body in his eye required removal and administration of ointment. No follow-up was required.

33. In 2012 a "sore cluster" coincided with low back and left leg pain. A physician diagnosed shingles.

34. A 2012 new eye problem found another foreign body.

35. A lingering cold with bronchitis in 2013 resulted in an emergency room visit and a brief release from work.

36. Beginning January 4, 2013 Claimant worked light duty while recovering from complaints diagnosed by X-ray as a degenerative right shoulder, but returned in about two weeks to full-duty work without restrictions. This resulted in a worker's compensation claim because the previously asymptomatic arthritis lit up with increasing soreness with use at work.

37. Claimant takes medication to combat high blood pressure.

Vocational Factors

38. Born April 29, 1957 Claimant was 59 years old at the date of hearing.

39. Claimant had difficulty achieving success in education and attended special education classes. He stopped attending school altogether when he suffered was injured in 1974 in a motor vehicle accident. He did not graduate and has not earned a G.E.D. He did attempt some G.E.D. classes while living in Payette a few years before the industrial accident.

40. Claimant has worked in carpentry, framing and roofing residential construction. He has worked as a sheetrocker for more than 15 years. He has worked as a lumper, loading and unloading big rigs for truck drivers. He has worked for Western Trailers at a job he could not well describe but which he considered "simple work." He has worked as a brick mason's hodcarrier. He has worked as a commercial painter, handyman, and maintenance worker. One significant maintenance worker job also involved lawn and landscaping care, including pruning and irrigating an apple orchard. He has worked as a laborer in a production lumber yard. He can and has driven forklifts and operated scissor-lifts while employed at various other jobs. He has worked as a lumberjack with a chainsaw and as a lumber mill worker, where he operated a clamshell lift to move downed trees. He performed minor maintenance on chainsaws as part of his other job. He has performed some automobile engine repair, but not recently, and doesn't believe his skills would be useful on newer vehicles.

41. Except for scissor-lift operation, he has received no qualifying certificates.

42. ICRD consultant Sandy Baskett provided services from October 2013 to September 2014. Using Dr. Krafft's restrictions which allowed medium-duty work, she discussed suitable jobs. Claimant disputed he was able to perform fully within Dr. Krafft's

restrictions. Ms. Baskett closed Claimant's file without finding him a job offer.

43. Claimant began his application for Social Security disability benefits in May 2014. He was later approved.

44. Mary Barros-Bailey, Ph.D., met with Claimant on December 9, 2015 and conducted a disability evaluation at Claimant's request. Her written report is dated March 23, 2016. Claimant identified disabilities significantly more inclusive than—and described abilities significantly below the level of—restrictions imposed by either Drs. Krafft or Williams. She opined that considering Dr. Williams' restrictions Claimant would be totally and permanently disabled. Considering Dr. Krafft's, Claimant's loss of access would rate about 79% but reemployment would be "improbable." Considering all vocational factors with Dr. Krafft's restrictions, Claimant's permanent disability would range 50-55% inclusive of PPI. Uncertainty existed depending upon the outcome of possible future L1-L4 surgery.

45. William Jordan provided a written report to Surety dated January 27, 2017. He reviewed records and attended Claimant's 2014 deposition. He did not personally interview or test Claimant. He met with Dr. Krafft on June 9, 2014. They discussed Claimant's injury and vocational factors. Dr. Krafft approved or approved with modifications a number of job descriptions and actual job openings as being within Claimant's medical restrictions. Using Dr. Krafft's restrictions, Mr. Jordan opined a loss of access rated at 57% and overall disability at 28-38% inclusive of PPI. Using Dr. Williams' restrictions, Claimant would so nearly be totally and permanently disabled that a finding of odd-lot worker status would likely result.

DISCUSSION AND FURTHER FINDINGS OF FACT

46. The provisions of the Idaho Workers' Compensation Law are to be liberally

construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996).

47. Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447−48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 626−27, 603 P.2d 575, 581−82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

48. Claimant's descriptions of the precipitating event have been reasonably consistent throughout the medical records.

49. Claimant, by demeanor and substantive testimony was entirely credible. His attempt to present a stoic, just-the-facts demeanor was not entirely successful, and his testimony was all the more persuasive for it as he described the effect of the injury on his expected future work life. Claimant's testimony showed minor difficulty in articulating his thoughts. This appeared consistent with his education and did not impair his credibility at all.

50. Claimant was deposed twice before the hearing, once by Surety and once primarily by ISIF. Claimant testified that Dr. Montalbano told him he is "a broken man," referring to his back condition. Claimant's testimony, then and at hearing, shows a perception and belief that both his ability to perform specific activities and his endurance are significantly less than physicians and the FCA have indicated. The FCA showed Claimant performed at a higher level than he thinks he can. Moreover, Dr. Krafft's restrictions take into account objective findings combined with FCA evidence that Claimant was capable of more than he showed at the FCA. Claimant's perception

and belief about his disabilities, apparently genuinely held, receive less weight. The record supports a finding that this credible Claimant can do more than he believes he can.

Causation

51. A claimant must prove that he was injured as the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001).

52. Here, Claimant had a preexisting, asymptomatic degenerative condition. It became symptomatic at L5-S1 as a result of the industrial accident. After surgery and a long but reasonable recovery period he reached medical stability. Upon reaching medical stability Claimant was not pain-free, but Dr. Montalbano testified such pain was not unexpected.

53. Claimant's degenerative condition at L1-4 progressed and became symptomatic after the medical stability date, but Claimant has not shown it likely that this was aggravated or accelerated by the industrial accident. The resulting 2016 surgery was not causally related to the industrial accident.

54. Drs. Montalbano, Krafft, and Williams agree that Claimant's L5-S1 surgery was a work-related consequence of his industrial accident and that the L1-L4 surgery was likely

the result of nonindustrial progression of his preexisting degenerative lumbar condition.

55. Dr. Williams entered the scene at a later time. Dr. Williams' opinion about medical stability is outweighed by the opinions of Drs. Montalbano and Krafft.

Impairment and Disability

56. Permanent impairment is defined and evaluated by statute. Idaho Code §§ 72-422 and 72-424. It is an aspect of permanent disability limited to medical factors. *Mayer v. TPC Holdings, Inc.*, 160 Idaho 223, 370 P.3d 738 (2016); *Dickinson v. Adams County*, 2017 IIC 0007 (March 21, 2017). When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Waters v. All Phase Construction*, 156 Idaho 259, 262, 322 P.3d 992, 995 (2014); *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

57. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423 and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). **"**Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430.

58. The test for determining whether a claimant has suffered a permanent

disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 766 P.2d 763 (1988). In sum, the focus of a determination of permanent disability is on a claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

59. Per *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008) the apportionment of disability under both Idaho Code § 72-406 and Idaho Code § 72-332 envisions a two step process. First, the Commission must determine Claimant's disability from all causes combined as of the date of hearing, and second, it must then apportion disability between the work accident and other conditions. Applying this process to the instant matter would require an evaluation of Claimant's disability as of the date of hearing and then a judgment about the extent and degree to which Claimant's disability should be apportioned to the work accident. However, there is good reason to depart from the general rule based on the facts of this case, and the manner in which the case was tried. It is acknowledged that the Claimant's multilevel problems at L1-L4 are not related to the subject accident. While Dr. Williams did give Claimant an impairment rating for the L1-L4 levels, the record contains little to no information concerning the impact the of the L1-L4 surgery on Claimant's ability to engage in gainful activity. Nor have the vocational experts weighed in on the impact of the L1-L4 lesions on Claimant's employability. Finally, Claimant had been medically stable from effects of the L5-S1 surgery for a period of months before new problems emerged at L1-L4. The limitations/restrictions that have been developed in connections with Claimant's evaluation by Drs. Krafft and Williams are based

on the work caused lesion at L5-S1. For these reasons, Claimant's non-work related L1-L4 condition is disregarded in evaluating his work related disability. Of course, per *Brown v. The Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012), the evaluation of Claimant's disability must be based on his labor market as it existed as of the date of hearing, albeit only in connection with limitations/restrictions which derive from the work related injury.

60. In Claimant's brief he attacks Dr. Krafft *ad hominem*, and the doctor's opinions based upon his relationship to State Insurance Fund. State Insurance Fund is not a party in this case, and the perceptions of Claimant and his wife do not show it likely that Dr. Krafft's opinions are not objective. Dr. Krafft well explained his evaluation and bases for opinions in deposition.

61. Claimant is critical of Dr. Krafft for ordering the FCE with the seeming intent of ignoring the recommendation that Claimant is capable of lifting no more than 29 pounds. Of course, as Dr. Krafft pointed out in deposition, he could not have ordered the FCE with an intent to disregard its recommendations, because he had no foreknowledge of what those recommendations might be. Dr. Krafft did review the FCE, and the recommendations from that evaluation were among the data points from which he synthesized his ultimate opinion on Claimant's limitations/restrictions. It was significant to Dr. Krafft that the results of the FCE were only "conditionally valid" per Ms. Kelly. Her summary clearly reflects that Claimant was thought to have given less than full effort during the exam. It was entirely appropriate for Dr. Krafft to consider this information in formulating his opinions on Claimant's limitations/restrictions.

62. Dr. Montalbano performed the 2013 surgery and treated Claimant through recovery. He was in the best position to opine about causation, medical stability, and permanent

impairment. He concurred with Dr. Krafft's rating of 7% whole person impairment, industrially related, without apportionment. Dr. Krafft's proposed restrictions comport more nearly with Dr. Montalbano's objective findings and with the FCA as adjusted for the therapist's perception of Claimant's lack of full effort.

63. Dr. Williams first saw Claimant on June 18, 2014. At that time, Dr. Williams noted that Claimant's presenting subjective complaints were greater than had been reported by prior treaters/evaluators. Claimant's pain complaints were in excess of what Dr. Williams would normally expect following L5-S1 surgery. At deposition, Dr. Williams acknowledged that Claimant's subjective complaints might, to some extent, be mediated by non-work related spine problems at L1-L4. The limitations/restrictions recommended by Dr. Williams derive, at least in part, from Claimant's subjective pain complaints. Ultimately, Dr. Williams proposed that given the severity of Claimant's subjective complaints, he either had a failed back surgery, a new injury, or was not being honest in his presentation. Dr. Williams also noted that on exam, Claimant did exhibit some positive Wadells signs.

64. In conclusion, Dr. Williams' opinion concerning the limitations/restrictions attributable to Claimant's L5-S1 injury is less persuasive than the opinion of Dr. Krafft. Dr. Williams acknowledged that he based his limitations/restrictions, at least in part, on Claimant's subjective complaints. However, he acknowledged that those complaints seemed to be in excess of what he would expect. Further, he acknowledged that Claimant's pain complaints might well be mediated by L1-4 problems which were emerging during this time frame; problems which all parties acknowledge are not work related.

65. The record shows it likely Claimant suffered a permanent impairment rated at 7% of the whole person as a result of the industrial accident. Apportionment is not appropriate.

Moreover, Dr. Krafft's proposed restrictions likely constitute a more accurate assessment of Claimant's abilities to safely work.

66. Opinions of both vocational experts concerning Claimant's permanent disability are within a reasonable range where Dr. Krafft's restrictions are applied. Methodology, although somewhat differing between these experts, reasonably reflects and accommodates all relevant factors. Considering all factors including the advisory opinions of these experts, Claimant has not shown it likely that he is totally and permanently disabled. He has established that he likely has lost access to more than half of his labor market as it existed on the date of hearing, but not much wage loss. Considering all relevant factors, Claimant's permanent disability should be rated at 55% of the whole person, inclusive of medical factors representing 7% whole person.

Odd-Lot Disability

67. The burden of establishing odd-lot status rests upon the claimant. *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). A claimant may satisfy this burden and establish total permanent disability under the odd-lot doctrine in any one of three ways: (1) by showing that he has attempted other types of employment without success; (2) by showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or (3) by showing that any efforts to find suitable work would be futile. *Lethrud v. Industrial Special Indemnity Fund*, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

68. Claimant performed a minimal job search. He testified that he presented potential employers with the FCA as well as Dr. Krafft's written restrictions. It is unclear upon what basis Claimant felt it necessary to include the FCA, which expressly notes his effort as suboptimal, in any discussion of potential employment with any potential employer. Ms. Baskett attempted a

job search on Claimant's behalf, but after Claimant continued to dispute the accuracy of Dr. Krafft's restrictions and applied for Social Security disability, she closed his file. Claimant has not established it likely that a job search would be futile. Claimant failed to show it likely that he qualifies as an odd-lot worker.

ISIF Issues

69. Claimant is not totally and permanently disabled. The first prerequisite of ISIF liability has not been established.

CONCLUSIONS

1. Claimant is eligible for permanent disability benefits, rated at 55% percent of the whole person, inclusive of PPI and without apportionment for aggravation of his L5-S1 degenerative condition caused by a work related accident on June 29, 2013;

2. Claimant is not likely totally and permanently disabled as an odd-lot worker; and

3. ISIF bears no liability in this matter.

RECOMMENDATION

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

DATED this 30TH day of NOVEMBER, 2017.

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:

/S/_____
Assistant Commission Secretary dkb

CERTIFICATE OF SERVICE

I hereby certify that on the 15TH day of DECEMBER, 2017, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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dkb /S/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JESSE MASSEY, Claimant, v. CHAMPION HOME BUILDERS, INC., Employer, and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2013-017303** **ORDER** **FILED DEC 15 2017**

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

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

1. Claimant is eligible for permanent disability benefits, rated at 55% percent of the whole person, inclusive of PPI and without apportionment for aggravation of his L5-S1 degenerative condition caused by a work related accident on June 29, 2013.

2. Claimant is not likely totally and permanently disabled as an odd-lot worker.

3. ISIF bears no liability in this matter.

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

DATED this 15TH day of DECEMBER, 2017.

INDUSTRIAL COMMISSION

/S/_____
Thomas E. Limbaugh, Chairman

/S/_____
Thomas P. Baskin, Commissioner

/S/_____
R. D. Maynard, Commissioner

ATTEST:
/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15TH day of DECEMBER, 2017, a true and correct copy of the **ORDER** was served by regular United States Mail upon each of the following:

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