BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ARTHUR BLAKE Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2013-020032** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **Issued 6/11/18**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Lewiston, Idaho, on June 26, 2017. Claimant was represented by Michael Kessinger, of Lewiston. Thomas Callery, also of Lewiston, represented State of Idaho, Industrial Indemnity Fund ("ISIF"), Defendant. Oral and documentary evidence was admitted. Post-hearing depositions were taken and the parties thereafter submitted briefs. The matter came under advisement on March 6, 2018.

ISSUES

The issues as set forth by the parties at hearing are:

1. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury or condition;

2. Whether Claimant is totally and permanently disabled either by the one hundred percent or the odd-lot method;

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

4. Apportionment under the *Carey* Formula.

CONTENTIONS OF THE PARTIES

Claimant argues that he is totally and permanently disabled due to the effects of his pre-existing lumbar spine, right hip, and bilateral knee impairments combined with injuries sustained in his most recent accident of August 1, 2013. Defendant is responsible for apportioned benefits equal to Claimant's pre-existing impairments as they relate to Claimant's total disability.

Defendant argues Claimant failed to establish the requisite criteria for recovery under Idaho Code § 72-332 and related case law. Specifically, Claimant is not totally and permanently disabled, his low back injury was not fixed and stable as of the date of his subject injury, and Claimant cannot establish the "combine with" or aggravation requirement for ISIF liability. As such, ISIF is not liable to Claimant for any benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's hearing testimony;

2. Hearing testimony from witnesses Amron Coulter and Rebecca Blake;

3. Joint Exhibits (JE) A through Z, admitted at hearing;

4. The post-hearing deposition transcript of John McNulty, M.D., taken on August 21, 2017; and

5. The post-hearing deposition transcripts of Douglas Crum and Barbara Nelson, taken on October 3, 2017.

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

FINDINGS OF FACT

General Background

1. At the time of hearing, Claimant, age 45, resided with his wife, Rebecca Blake, in Clearwater, Idaho (roughly halfway between Grangeville and Kooskia) on a ranch of about 100 acres.

2. Claimant graduated from Deary High School in 1989. He spent a few months in the military prior to being honorably discharged due to repercussions from an elbow injury Claimant suffered as a child, leaving him unable to perform certain tasks of basic training.

3. Claimant obtained a parts distribution certificate from Lewis-Clark State College, which gave him basic knowledge on locating and delivering automobile parts. During that training Claimant got a job with a company called Auto Paint and Parts. Claimant also worked for a mobile home company, setting up mobile homes.

4. Claimant next drove trucks for several years, then worked for two years as a deputy sheriff in Idaho County. He graduated POST Academy during this time. After a stint at deputy, Claimant returned to driving truck.

5. In about 2006 or 2007, Claimant bought his own log truck and hauled logs and poles from the woods. An injury to his back and hip in 2010 took Claimant out of the truck driving profession by late 2011.

6. In the spring of 2012, Claimant took a job as a service technician with Employer, a farm co-op in Grangeville. His job included shoveling grain and fertilizer, mechanic duties, some deliveries, and other physical shop jobs.

Pre-Existing Medical Overview

7. Claimant has several permanent medical conditions which pre-date the subject accident but do not rise to the level of a "permanent physical impairment" as the term is defined in Idaho Code § 72-332(2), due to the fact the conditions do not constitute a hindrance or obstacle to Claimant's ability to find or maintain employment. These include a childhood injury to his left elbow (mentioned briefly above) and bi-lateral knee surgeries. Instead, Claimant focuses on his low back and right hip conditions.

Low Back

8. Claimant's low back complaints go back at least to 1992. On a visit to St. Mary's Hospital (Clearwater Valley) dated December 2, 1999, the office notes state that Claimant's low back problems, present since 1992, had worsened to the point where, in spite of chiropractic treatment, Claimant had trouble walking due to pain.

9. An MRI taken in 2001 showed herniated discs at L3-4, L4-5, and L5-S1.

10. In October 2011, Claimant was hospitalized for pain control tracing to his low back and bilateral extremities. Epidural steroid injections were administered with no lasting benefits.

11. Claimant's intractable low back complaints and conservative treatment continued through the fall of 2011. Claimant's radiological studies demonstrated degenerative disc disease from L3 through S1, with a "quite advanced collapse at L5-S1 with reactive endplate changes" and a "broad-based herniation with annular tear at L3-4." JE F, p. 317.

12. After a discogram was performed with positive findings at L3-4 and L4-5 Claimant was scheduled in late November 2011for a decompression and fusion surgery

(L3 to L5), but cancelled when Claimant's heath insurance carrier denied authorization.

13. Claimant sought a second opinion medical examination in January 2012, which suggested physical therapy and a neuropsychological evaluation, but confirmed that if these suggested modalities failed to help Claimant, the proposed fusion surgery would not be unreasonable.

14. Claimant undertook physical therapy, nicotine cessation, and weight loss, and by the end of February 2012 Claimant was much improved. Claimant had stopped driving his logging truck, which had been hard on his back. Instead, he sold his truck and took a job with his time-of-injury employer.

15. By mid-September, Claimant was back seeking medical care for escalating low back and bilateral lower extremities pain, which he correlated to his work activities. Claimant also complained of hip pain and instances of falling due to "legs giving out". JE G, pp. 382, 389.

16. After a repeat MRI, Claimant underwent a bilateral L4-5 foraminotomy with a right L3-4 discectomy in mid-October 2012. The medical records and Claimant's testimony indicate he had a good result from this procedure, but acknowledge he continued to have some low back pain, although it was much improved. The pain reduction allowed him to return to employment. Follow up office notes from November 20, 2012 state, among other things, that Claimant "continues to have significant baseline low back pain; however, it is quite improved from pre op. He has not experienced any recurrent lumbar radicular pain or weakness." JE G, p. 394.[1]

[1] Claimant was at the physician's office on that date for hip complaints, as discussed below.

Right Hip

17. As noted above, Claimant began complaining of right hip pain in September 2012. Diagnostic studies confirmed osteoarthritis. Hip injections gave only temporary relief.

18. Claimant's right hip pain progressed with time and, on May 1, 2013, Claimant underwent right total hip replacement surgery. By July 1, 2013, Claimant was back at work with no restrictions or notable difficulty.

Accident and Post-Accident Treatment

19. On August 1, 2013, Claimant slipped and fell on a wet floor while in the course and scope of his employment with employer. He landed on his "butt and … right side" and experienced immediate pain in his back and down his legs, right more than left. Tr. pp. 73, 74. Claimant was transported to the ER in Grangeville that day.

20. Records from the ER visit note Claimant's history as having a longstanding history of back pain, but doing quite well until he fell. Claimant complained of right sided shooting pain, right sided back pain, and tingling in his toes. JE D, p. 190. X-rays showed mild disc space narrowing at L2-3 and L4-5, with moderate narrowing at L5-S1 and spurring at all levels from L2 through S1. No fractures, spondylolisthesis, or lesions noted.

21. Claimant was soon referred back to Craig Flinders, M.D., the pain clinic anesthesiologist who previously treated Claimant's low back pain, carried out Claimant's epidural injections and discogram, and ultimately performed the foraminotomy and discectomy.

22. Dr. Flinders' notes from that first visit post-accident indicate that Claimant was experiencing intractable back pain and bilateral lower extremity radiculopathy with

urinary retention. Claimant also complained of right hip pain. Dr. Flinders administered bilateral lumbar epidural steroid injections at L3-4 and obtained an MRI.

23. Over the next several weeks, Dr. Flinders performed a series of injections with minimal, temporary gains. Dr. Flinders suggested physical therapy and a second opinion examination with Gregory Dietrich, M.D., the orthopedic surgeon who had previously recommended the fusion surgery denied by Claimant's carrier. However, before that examination could take place, the surety scheduled Claimant for an IME with neurosurgeon Michael Hajjar, M.D., on October 9, 2013.

24. Dr. Hajjar's report following the October 9 examination indicated that comparing the most recent MRIs with those obtained before Claimant's decompression surgery did not show any new or traumatic findings. Claimant's pain complaints seemed to be disproportional to the doctor's objective findings, but he felt it was necessary to have a nerve conduction study and EMG performed prior to expressing any final conclusions. To that end, Dr. Hajjar scheduled Claimant to be seen by Kevin Krafft, M.D.

25. Claimant underwent the nerve studies in November 2013. The results were fairly unremarkable. A second such study in early December showed a right sided radiculopathy primarily at the S1 level, which was acute and active. At that time, Dr. Hajjar discussed the option for a lumbar decompression and stabilization surgery. Claimant desired this option.

26. On January 7, 2014, Dr. Hajjar performed surgery consisting of bilateral L3-4 and L4-5 hemilaminotomies, foraminotomies, and decompression of the spinal canal at L3, L4, and L5, together with a right hemilaminotomy and foraminotomy at L5 and S1.

27. Initially Claimant did very well post surgery, and his hip and low back pain greatly improved. By March 2014, Claimant was complaining of left sided leg pain, where previously his pain had been right sided. Dr. Hajjar scheduled an MRI and a work hardening program with a neuropsychological evaluation.

28. The MRI showed degenerative changes throughout Claimant's lumbar spine with some stenosis at L2-3 and spondylotic changes throughout the remainder of his spine, including a left sided intraforaminal disc protrusion without significant mass affect at the L4 nerve root.

29. Claimant met with Drs. Hajjar and Krafft, and Robert Calhoun, Ph.D., a Boise psychologist due to his continuing pain. Claimant was suicidal, angry, and depressed. Dr. Calhoun suggested the Workstar program if and when Claimant's psychological outlook improved.

30. Dr. Krafft suggested Claimant enter the Conditioning and Safety Training (CAST) program at St. Alphonsus. In early April 2014, Claimant began the program. At that time Claimant was still suffering severe back pain with physical limitations. Claimant completed the two week CAST program, but elected not to start work hardening.

31. Claimant continued to complain of severe low back and bilateral leg pain through the spring of 2014. In late April Dr. Krafft concluded that Claimant was at MMI and assigned Claimant a 10% whole person impairment, allocated 90% to pre-existing conditions and 10% to the industrial accident in question. Claimant was given a permanent lifting restriction of fifty pounds.

32. Claimant returned to his home and resumed treatment with Dr. Flinders, who diagnosed failed back surgery syndrome. Dr. Flinders suggested steroid injections at L4-5.

33. Initially, Claimant reported overall improvement from the injections and his pain medication regimen, prompting Dr. Flinders to repeat the injections in late July.

34. Injections given in July and September 2014 provided no relief. As of late October, Claimant was unable to walk any significant distance, and had difficulty riding in vehicles. Dr. Flinders reviewed Claimant's case with Dr. Dietrich, who had originally recommended fusion surgery in 2011. Dr. Flinders felt that Claimant was totally disabled from working.

35. On November 20, 2014, Claimant saw Dr. Dietrich. Claimant presented to the doctor as being "very disabled" and "really quite uncomfortable". JE F, p. 331. Dr. Dietrich noted that Claimant had tried extensive nonoperative treatment and rehabilitation efforts, but was still absolutely disabled by back pain and radiculopathy. Dr. Dietrich noted decompression alone did not work, which he felt was not surprising given Claimant's severe foraminal stenosis. Dr. Dietrich proposed a decompression and fusion from L2 to the sacrum "as the only thing that would give Claimant some chance at improvement". *Id.*

36. Prior to approving this surgery, the surety sent Claimant for another IME, this time with Roman Schwartsman, M.D., a Boise orthopedic surgeon. Dr. Schwartsman agreed that Claimant's needed a multilevel fusion. He initially opined that the need for surgery was the result of Claimant's pre-existing condition coupled with his August 1, 2013 work accident. Subsequently, in a letter to the surety he indicated that,

upon reviewing certain (undisclosed) records provided to him by the surety, he changed his opinion on apportionment of causation; he now believed Claimant's need for surgery was totally due to his pre-existing condition. He based his rationale on the fact that Claimant "had met the criteria for a lumbar fusion prior to his industrial injury of 08/01/2013." JE Q, p. 595. Dr. Schwartsman further noted that under his current analysis "the injury was therefore not a significant aggravating factor" when considering Claimant's need for surgery. *Id.*

37. Dr. Dietrich performed a four level (L2 to S1) decompression and fusion surgery on April 8, 2015, and by April 23 Claimant reported "feeling great with no new issues or concerns." JE F, p. 346. Claimant's pre-operative radiculopathy was gone, and he was only experiencing an occasional achy discomfort in his lumbar spine.

38. Dr. Dietrich imposed "significant permanent restrictions of minimal bending and lifting, and a maximum of 20 pounds". JE F, p. 348. Claimant was instructed in proper body mechanics. Claimant was told to be "very guarded about the extent of bending and lifting as well as the amount [of] lifting." *Id.* Claimant wanted to return to work and Dr. Dietrich surmised that a light duty job with no bending and lifting could be appropriate.

39. In December 2015, Dr. Dietrich corresponded with Cris Puckett of the Industrial Commission Rehabilitation Division. Dr. Dietrich pointed out that he was concerned about transitional breakdown at adjacent levels to Claimant's fusion, and that any job with extended driving would be a bad idea, but intermittent driving should be acceptable. Claimant should be cautious about bending and lifting, with no more than "very occasional" lifting to 20 pounds. Jobs suggested by Ms. Puckett such as

brand inspector, port inspector, weight station attendant, grain sales, gunsmithing, and estimator all sounded reasonable to the doctor. JE F, p. 365.

40. In mid-March 2016, Claimant's employer sent Claimant for an IME with Jeffrey Larson, M.D., a north Idaho neurosurgeon. Dr. Larson examined Claimant and reviewed medical records. He opined that Claimant suffered a lumbar strain in his industrial accident, causing a temporary aggravation of a pre-existing condition. Claimant's fusion surgery was unrelated to the work accident. Claimant could return to his time-of-injury job and with proper body mechanics could lift up to 75 pounds safely. Dr. Larson felt Claimant had no impairment from his industrial accident.

41. Claimant's employer sent Claimant for yet another IME in mid-January 2017. This IME was conducted by Rodde Cox, M.D., a Boise physiatrist. Dr. Cox conducted an extensive medical record review and a comprehensive physical exam.

42. Concerning causation, Dr. Cox felt "the injury of record likely caused an exacerbation of [Claimant's] pre-existing lumbar spine condition. There does not appear to be significant evidence that this caused a substantial material worsening to his underlying severe lumbar spine degenerative disc disease." JE X, pp. 788, 789. In this same report, Dr. Cox opined that Claimant's 12% whole person impairment for his low back, as well as all of Claimant's permanent physical restrictions, were due to his pre-existing lumbar disc disease. Dr. Cox felt a 35 pound lifting restriction was reasonable. Like Dr. Larson, Dr. Cox made a point of noting that Dr. Dietrich recommended a lumbar fusion "very similar" in scope to that ultimately performed after the 2013 industrial accident. JE X, p. 788.

DISCUSSION AND FURTHER FINDINGS

43. The first three listed issues are best analyzed in the context of Idaho Code § 72-332. Idaho Code § 72-332(1) provides in pertinent part that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his income benefits out of the ISIF account.

44. Idaho Code § 72-332(2) further provides that "permanent physical impairment" is as defined in Idaho Code § 72-422, provided, however, such impairment must be a permanent condition of such seriousness as to constitute a hindrance or obstacle to obtaining employment. This hindrance shall be interpreted subjectively as to the particular employee involved; however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

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

46. In *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court identified four requirements a claimant must meet to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was indeed a pre-existing permanent physical impairment; (2) whether that impairment was manifest;

(3) whether the impairment was a subjective hindrance to employment; and (4) whether the impairment in any way combined with the subsequent injury to cause total disability. *Dumaw*, 118 Idaho at 155, 795 P.2d at 317.

47. Defendant raises three points in their defense – Claimant is not totally and permanently disabled; Claimant's disability pre-dated his most-recent industrial accident, which only temporarily exacerbated his pre-existing low back condition; and Claimant's low back was never fixed and stable before his work accident in question and therefore is not a permanent physical impairment when analyzing Defendant's liability. If any of these propositions is true, the claim against ISIF fails.

Total Permanent Disability

48. 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 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 cumulative effect of multiple injuries, the age and occupation of the employee at the time of the accident causing the injury, consideration being given to the diminished ability of the 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.

49. 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). Total and permanent disability is a prerequisite to ISIF liability.

50. 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).

51. A claimant who is not 100% permanently disabled may prove total permanent disability by establishing he is an odd-lot worker. An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market - absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status rests upon Claimant. *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). He may satisfy his burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways: (1) by showing that he has attempted other types of employment without success; (2) by showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or (3) by showing that any efforts

to find suitable work would be futile. *Lethrud v. Industrial Special Indemnity Fund*, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

100% Disability

52. Claimant argues he is 100% disabled based on his permanent restrictions, geographic location, job search results, and the opinion of Douglas Crum, a vocational rehabilitation expert, as well as the qualified testimony of Barbara Nelson, ISIF's hired vocational expert.

Permanent Physical Restrictions

53. In addition to the restrictions listed above, (minimal lifting to 20 pounds, minimal bending, no prolonged driving), Dr. Dietrich apparently was asked by MetLife to rate Claimant's ability to work in December 2015. At that time, the doctor placed Claimant in the sedentary work category with limited lifting, carrying, pushing, pulling no more than 10 pounds occasionally. Dr. Dietrich noted the sedentary restrictions were due to his "concern for transitional breakdown at adjacent levels. Also [Claimant] has pain such that most jobs do not work well [because] he must be able to sit/stand change posn [positions] frequently." JE R, p. 613.

54. Claimant sought a medical opinion from John McNulty, M.D., an orthopedic surgeon from north Idaho, on December 30, 2015. After taking an oral history from Claimant, reviewing medical records, and performing an examination, Dr. McNulty diagnosed permanent aggravation of pre-existing lumbar spondylosis and degenerative disc disease. Dr. McNulty felt Claimant was at MMI. He gave Claimant an impairment rating of 9% WP because of the multilevel fusion. Dr. McNulty acknowledged Claimant's pre-existing impairment, which he rated at 5% WP,

leaving 4% (9% - 5%) impairment directly attributable to Claimant's work accident of August 1, 2013. He also apportioned Claimant's need for the multilevel fusion surgery at 75% attributed to the 2013 work accident, and 25% to Claimant's pre-existing low back condition. Finally, in his report, Dr. McNulty agreed with Dr. Dietrich's limited bending and 20 pound occasional lifting restrictions and further recommended a two-hour maximum per day driving restriction.

55. Dr. McNulty was deposed in this matter. When asked why he imposed a driving restriction, Dr. McNulty answered "[Claimant's] going to have discomfort with prolonged sitting. That was the main reason." McNulty Depo. p. 21.

Job Search

56. The only employment Claimant engaged in after his industrial accident was combine operator for Greenco. He lasted only a week at this job as it aggravated his back.

57. Claimant sought ICRD (Idaho Industrial Commission Rehabilitation Division) assistance to find suitable employment after his fusion surgery from the 2013 accident. He was assigned to Consultant, Cris Puckett.

58. During the initial interview, Ms. Puckett mentioned the types of jobs Claimant might qualify for with his restrictions and aptitudes. They included brand inspector, port inspector, weight & measure technician, weigh station attendant, cattle grazing on federal land, parts manager or distribution, grain sales, logging truck owner, part store clerk, machine lathe operator, gunsmith, or estimator. It appears from the notes and knowledge of Claimant's background that these potential job categories were just a listing of the types of work which would capitalize on Claimant's past work

and/or skills. It does not appear this was a list of actual jobs available at that time in Claimant's work area. The initial plan was to see if Claimant could return to his time-of-injury employer, and if not, to further explore jobs such as the ones listed above.

59. Claimant's employer had a position open for a site manager in Craigmont. Claimant indicated he spoke with the manager and found out it was too physically demanding and Claimant lacked the experience for the job. An estimating job listing was an hour commute each way (Ferdinand, ID), and required ability to use "sophisticated computer software", "strong MS office software skills", and prior estimating or construction management experience was preferred. Claimant lacked the computer skills and the commute was more than he wanted. Several other jobs (*e.g.*, car salesman with five years experience) exceeded Claimant's skills, restrictions, or were outside of his job market radius.

60. Claimant and/or his wife own a bit over 100 acre parcel of land on which they raise cows and hay. While working with ICRD, Claimant elected to "move forward with expanding this ranch as his vocational goal" and as a result, ICRD closed its file. JE R, p. 631c.

61. In his January 13, 2017 report, Dr. Cox indicated that Claimant mentioned that he worked about 1.5 hours a day on his cow/calf operation. Claimant testified at hearing he can drive the implements, does not have to manually buck hay, and is able to do some work at his property. His grown children and wife do much of the lifting work. At times a neighbor will assist with some projects. Claimant is not actively looking for work outside of his ranch, but instead has been trying to grow the cow/calf operation. He took out a loan not long before the hearing so he could buy more cows.

Vocational Expert Testimony

62. As previously noted, Claimant hired Douglas Crum, a vocational rehabilitation consultant, to evaluate "factors that might lead to a finding of disability in excess of impairment." JE W, p. 746. He prepared a written report dated September 29, 2016. Mr. Crum was subsequently deposed.

63. Mr. Crum began his written report by compiling a medical, education, and employment history summary. He also reviewed various employment-related documents such as a job site evaluation, past worker's compensation records and wage/income information. He reviewed literature on two different "retraining" programs, and met with Claimant.

64. Mr. Crum felt Claimant, given his age, education, work history, and skills, had pre-accident access to approximately 10.3% of the jobs available in his labor market. He relied on data from the *Idaho Occupational Employment and Wage Survey 2015* for the Idaho panhandle labor market to reach his conclusion. He reasoned the panhandle was the best approximation for Claimant's job market analysis, since, like the panhandle, Claimant lived in a very rural area with a low population, and no larger cities (Grangeville being the largest).

65. Mr. Crum reviewed the restrictions imposed by Dr. Dietrich, listing them as limited to sedentary work with limited lifting, (20 pounds maximum), carrying, pushing, pulling 10 pounds occasionally, mostly sitting, but with some brief standing or walking, and frequent position changes. Also Dr. Dietrich suggested no extended driving or sitting in a vehicle for more than several hours a day on a regular basis, but Claimant could drive intermittently. Also Claimant had to be cautious about bending and lifting.

66. Utilizing Dr. Dietrich's restrictions, Mr. Crum felt Claimant had no viable employment options in his local labor market. Lewiston was too far to commute for work. Claimant had insufficient transferable skills and physical capacity to become competitively employed in his limited local labor market.

67. Utilizing Dr. McNulty's restrictions, Mr. Crum likewise felt Claimant had no viable employment options in his local labor market. Dr. McNulty's restrictions were quite similar to those of Dr. Dietrich, but Dr. McNulty specifically limited Claimant to no more than two hours per day driving.

68. Mr. Crum acknowledged in his report that utilizing Dr. Schwartsman's final opinion on causation in 2015, wherein he indicated the industrial accident did not contribute to Claimant's need for lumbar fusion, would result in a finding of no disability related to the industrial accident.

69. Again, at his deposition, Mr. Crum affirmed the opinion that if one relied on any physician's opinion that attributes no significant impairment to Claimant's 2013 industrial accident, such reliance would yield a finding of no total disability related to the accident. This would include Drs. Larson, Cox, and Schwartsman. Conversely, relying on the opinions of Dr. Dietrich or Dr. McNulty would result in a finding that Claimant was 100% disabled.

70. There was considerable cross examination at Mr. Crum's deposition on the fact that, in his report, Mr. Crum stated that Claimant sustained total and permanent disability solely "as a result of the August 1, 2013 industrial injury", (JE W, p. 758) but at deposition he tried to apportion Claimant's total and permanent disability to a combination of pre-existing medical factors and the accident in question. While this

"flip flopping" does not cast him in a favorable light, Mr. Crum's opinions on the subject of apportionment are not relevant to the holding. Vocational rehabilitation consultants' expertise is limited to ascertaining disability as a function of pre-and post-accident labor and wage discrepancies. It invades the province of the Commission for them to opine on legal conclusions, such as apportionment figures. The undersigned routinely ignores such testimony as being irrelevant. However, Mr. Crum's attempt to "re-allocate responsibility" for Claimant's disability does not invalidate those opinions of his which are within his province; to wit, that Claimant suffered a total loss of his job market opportunity and wages when his limitations and medical restrictions, education, transferable skills, and work history are considered.

71. ISIF hired vocational rehabilitation expert Barbara Nelson to perform a disability evaluation on Claimant. On June 5, 2017, she authored a very thorough and well written report. She was subsequently deposed.

72. Ms. Nelson met with Claimant, reviewed and summarized medical records, considered his work history, education, subjective complaints and social history. She then performed a vocational analysis, wherein she recognized that in this case multiple doctors have opined on causation, impairment, and apportionment without any clear consensus. One physician (Dr. Schwartsman) even changed his opinion.

73. Ms. Nelson created a table listing each physician's opinions on causation, impairment, restrictions, and apportionment. Using that information, she recognized three alternative scenarios to consider.

74. Under Ms. Nelson's first scenario, she relied on Dr. Cox's opinion to determine disability. Dr. Cox opined that Claimant suffered no permanent impairment

in his 2013 industrial accident. Without impairment, Claimant can suffer no disability. So, while Dr. Cox did impose restrictions on Claimant's activities, and rate Claimant's various medical conditions, he found all of Claimant's impairments and restrictions were for conditions other than the industrial accident. Under this scenario, Claimant suffered no permanent disability from the subject accident. Ms. Nelson noted that Dr. Schwartsman's final opinion would likewise be consistent with Dr. Cox's opinion.

75. If Dr. Cox's opinion (and Dr. Schwartsman's final opinion) is given the most weight, both Mr. Crum and Ms. Nelson agree Claimant suffered no permanent disability in the work accident.

76. Ms. Nelson's second scenario relies on Dr. Larson's opinions, which are very similar to those of Dr. Cox. She notes that while Dr. Larson agrees with Dr. Cox and Dr. Schwartsman that the fusion surgery was necessitated by a pre-existing condition, Dr. Larson gives Claimant a 1-2% PPI for what he feels was a low back sprain suffered by Claimant in the work accident. Additionally, Dr. Larson's restrictions allow lifting from 50 to 75 pounds on an occasional basis.

77. Ms. Nelson opined that given Dr. Larson's "liberal" restrictions, Claimant would not be totally disabled, as there are "a number of jobs in his regional labor market" which would not violate Claimant's work restrictions under this scenario.[2]

78. If Dr. Larson's opinion is given the most weight, Claimant would not be considered totally disabled under either Mr. Crum's or Ms. Nelson's analysis.

[2] Ms. Nelson listed Orofino as being within Claimant's job market. In her deposition she questioned whether Orofino was too far to be considered part of Claimant's job market radius. The Referee takes judicial notice that Orofino is 45 miles and a one-hour drive from Clearwater, ID, and thus should not be considered when analyzing Claimant's job market, just as Ferdinand, ID was precluded for the same reason.

79. Under Ms. Nelson's third scenario, Dr. McNulty's opinions were afforded the most weight. Ms. Nelson did not include the restrictions given by the treating surgeon, Dr. Dietrich, since she argued he never opined on causation and thus it is not possible to determine if his restrictions were related to the work accident or pre-existing conditions. In any event, Ms. Nelson felt that, under Dr. McNulty's view of the case which assigned a 9% WP impairment apportioned 5% to pre-existing and 4% to the industrial accident with severe restrictions as set out previously, Claimant could well be considered totally and permanently disabled. She reached this conclusion after evaluating Claimant's medical and non-medical factors of age (neutral), education (not an asset), transferable skills (not compatible with Dr. McNulty's restrictions), and job market (quite limited). Ms. Nelson argued there might possibly be jobs available in retail and food service which could accommodate Claimant's restrictions, but most likely even those would be outside of his restrictions. She felt Claimant's best chance for employment would be security guard position not involving driving, and cashier for jobs not requiring extensive stocking of shelves or cleaning. She did not note any actual job openings fitting those criteria.

80. If Dr. McNulty's opinions are given the most weight, Mr. Crum argued Claimant definitely is, and Ms. Nelson felt Claimant "may well be", a "total perm." However, Ms. Nelson opined it would not be futile for Claimant, or someone on his behalf, to at least look for that rare job which would fit within his abilities and restrictions.

81. At her deposition, Ms. Nelson seemed to agree that, under Dr. McNulty's restrictions, it would be very difficult for Claimant to find employment and thus it might be futile to look. She testified that even under Dr. Dietrich's restrictions it would not be futile

for Claimant to seek employment, since Dr. Dietrich's restrictions were not quite as limiting as Dr. McNulty's.

100% Disability Analysis

82. Whether there exists for Claimant a viable employment opportunity in his labor market depends upon which physician(s) testimony one relies. The analysis preliminarily ignores the source of Claimant's disability and simply focuses on whether Claimant is 100% disabled.

83. Utilizing Dr. Larson's restrictions, Claimant cannot claim to be 100% disabled. Dr. Larson suggested a 50 to 75 pound lifting restriction, with frequent position changes. Ms. Nelson convincingly testified that there exist multiple jobs in the Grangeville/Kamiah market which would accommodate such medium to heavy work restrictions.

84. Dr. Cox imposed a 35 pound occasional lifting restriction, with no repetitive bending, twisting, or stooping. Claimant should also avoid repetitive climbing, jumping, or squatting due to hip and knees. Also, no kneeling or walking on uneven terrain, or working at unprotected heights due to Claimant's peripheral neuropathy. With these restrictions, Ms. Nelson opined that Claimant could still find employment in his work market as a cashier, retail sales clerk, concession worker, or security guard. Mr. Crum questions the viability of these jobs for Claimant, but relying only on Dr. Cox's restrictions, Ms. Nelson's opinion carries the greater weight. Utilizing Dr. Cox's restrictions, Claimant would not be 100% disabled.

85. Dr. Dietrich, Claimant's treating surgeon, initially imposed light duty restrictions on Claimant with no lifting over 20 pounds, either occasionally or

very occasionally. Dr. Dietrich also advised Claimant to be cautious with bending and lifting, and limit himself to intermittent driving. By December 2015, Dr. Dietrich, in response to a MetLife questionnaire, limited Claimant to a sedentary work category with limited lifting, carrying, pushing, pulling no more than 10 pounds occasionally. Dr. Dietrich noted the sedentary restrictions were due to his concern for transitional breakdown at adjacent levels. Dr. Dietrich felt Claimant's pain would prevent him from most jobs because he must be able to sit/stand and change positions frequently.

86. Given Claimant's lack of transitional and educational skills, his poor grammar, and the limited job market, which, as noted by Ms. Nelson is highly reliant on jobs in timber, agriculture, and health care, when coupled with the restrictions imposed by Dr. Dietrich, (with either a 10 or 20 pound lifting restriction), Claimant is 100% disabled if Dr. Dietrich's restrictions are given the most weight.

87. Dr. McNulty's restrictions were at least as limiting as those of Dr. Dietrich. Dr. McNulty imposed the same physical restrictions as Dr. Dietrich, but substituted "intermittent driving" with driving no more than two hours per day. Both Drs. Dietrich and McNulty feel Claimant needs to be able to change positions frequently, which precludes any prolonged driving. Whether labeled as "intermittent" or quantified as two hours per day, Claimant's inability to work in any job requiring frequent or prolonged driving severely hurts his chances for sustaining employment in his job area and within his transferable skills.

88. Claimant is 100% disabled if Dr. McNulty's restrictions are given the most weight.

89. Defendant argues that, regardless of which restrictions are given the most weight, Claimant cannot be 100% disabled because he and his family run a cow/calf operation which presumably provides income. While the amount of income it provides is not in the record due to Claimant not providing tax returns documenting his income, it is presumed the cow/calf operation provides net income to Claimant and his family. The notion that the cow/calf operation is simply a "hobby" is rejected.

90. Claimant, his wife, and grown children raise cows and calves on property owned by Claimant's wife. Hay grown on land owned by Claimant is used to supplement the grazing diet. The goal is to sell the creatures for a profit. This scenario certainly can be, depending on the circumstances, considered a job.

91. Claimant has stated he works about an hour and a half per day on the operation. His sons and wife do all of the heavy lifting. On occasion a neighbor has helped out with chores Claimant could not do.

92. Claimant, his wife, and children do run a cow/calf operation. The question is whether Claimant's involvement in this operation constitutes a job for the purpose of the Act.

93. It would be folly to attempt a definition of what constitutes a job in every instance, and without exception; instead a "totality of the record" analysis is appropriate. Arguably all jobs require some skill or ability, physically and/or mentally. In most jobs, effort is put forth with the goal of achieving income at least equal to, and preferably in excess of expenses. Typically there is a market for the skills or abilities of the worker, such that the worker has opportunities with multiple employers to utilize those abilities or skills. Conversely, passive investment is not a job.

94. In the present case, Claimant is more than a passive investor; he participates to some degree in the day-to-day operation of the enterprise. Claimant's exact role, as well as the role of his wife and children, is unclear. However, he testified that he works less than two hours per day in the cow/calf enterprise, and avoids lifting. While Claimant undoubtedly utilizes his skills and abilities to some extent, and the goal is to make a profit, the pivotal question is whether Claimant's current skill/ability set is marketable beyond his farm.

95. It is unlikely Claimant could go into the community and find employment working on a cattle ranch for less than two hours per day, with no lifting. Likewise, neither vocational rehabilitation expert opined that Claimant's involvement in the cow/calf operation constituted a job, and therefore he could not be totally disabled no matter what restrictions were placed on him by various physicians.

96. Defendant's argument that Claimant cannot be 100% disabled due to the fact he participates in a family-run cow/calf operation is rejected for the reasons provided above.

97. The opinions of Drs. Dietrich and McNulty are given the most weight on the issue of 100% disability. The distinctions between their restrictions are inconsequential. Dr. Dietrich was Claimant's treating physician and has the most experience with Claimant. Also, his restrictions are the most realistic given the state of Claimant's spine. It would be unreasonable to ask Claimant to lift 50 or more pounds, and even 35 pounds increases the risk of future instability, as discussed by Dr. McNulty in his deposition. Furthermore, both vocational rehabilitation experts agree that under Dr. McNulty's restrictions Claimant is totally and permanently disabled.

98. Claimant has proven he is totally and permanently disabled under the 100% method.

Odd Lot Disability

99. Even if Claimant was not 100% disabled, he would qualify as totally disabled under the odd-lot theory of disability. Any job he might find would be so limited in quantity that a stable market within Claimant's geographical market does not exist.

100. If Claimant's participation in the cow/calf operation were construed as being a job, such job would only exist due to "the sympathy of a particular employer or friends." *See, e.g., Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). Claimant was "hired" by the most sympathetic employer known – himself and his wife and children. He can set his own hours and his own job limitations. He has no set employment requirements. He cannot be fired. He can delegate necessary tasks he does not want to, or cannot do. The record does not reflect any indispensible task Claimant must undertake (and not delegate to others) to keep the business afloat. If Claimant lost this particular "job", no other employer would hire him on similar terms.

101. Furthermore, Claimant has shown he has attempted other types of employment without success. Defendants are critical of that employment choice, which was operating farm equipment for Greenco, but Claimant was reasonable in trying to do the job with the belief that the newer equipment was suitable for his conditions. He testified that the equipment run by Greenco looked comfortable, but in reality was not. He could not tolerate the vibration and bouncing associated with the job.

102. Claimant also showed that he, or vocational counselors or employment agencies on his behalf, unsuccessfully searched for other work. Claimant talked with more than one

potential employer, including his time-of-injury employer, but no suitable work was available. ICRD also looked for work, but found no viable employment opportunities. The brand inspector job was in Buhl, the port inspector in Lewiston, and there was no location given for weight inspector. Further, Ms. Nelson questioned whether Claimant could do such a job if it required bending, stooping, or crouching to inspect vehicles.

103. As Dr. Dietrich noted, it would be very difficult for Claimant to obtain employment within the restrictions imposed on him, considering his limited job market. Both vocational rehabilitation experts concede this point. Obviously, if Claimant is 100% disabled, it stands to reason there are no (or almost no) available jobs available to Claimant. Any job that might exist has not been identified. Defendant suggests a security guard job would fit Claimant's requirements but failed to identify any actual such job openings. It would be futile for Claimant to continue searching for employment by the time of hearing.

104. Having made a *prima facie* case for odd-lot disability, it is incumbent on Defendant "to show that some kind of suitable work is regularly and continuously available to the claimant." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). Defendant must prove there is an *actual* job within a *reasonable* distance from Claimant's home which he is able to perform or for which he can be trained. In addition, Defendant must show that Claimant has a reasonable opportunity to be employed at that job. *See, Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 407, 565 P.2d 1360, 1364 (1977).

105. Defendants have failed to provide proof of an actual job within Claimant's geographical job market that Claimant would have a reasonable opportunity to obtain. As noted, the car salesman job required five years previous experience, and the Pacific Cabinet jobs were

in Ferdinand. Ms. Nelson made no effort (because she was not asked) to find any real, available jobs for which Claimant was well suited with his restrictions and limitations.

ISIF Liability

106. Defendants brought a claim against ISIF under Idaho Code § 72-332, which states in relevant part;

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

107. Now that Claimant has proven his total and permanent disability, he must establish four elements to apportion liability to ISIF under Idaho Code § 72-332: (1) preexisting impairment(s); (2) which was/were manifest; (3) constituted a subjective hindrance to employment; and (4) the preexisting impairment and the subsequent injury combined to result in total and permanent disability. *Hope v. Indus. Special Indemn. Fund,* 157 Idaho 567, 571, 338 P.3d 546, 550 (2014), *reh'g denied* (Dec. 9, 2014), *citing Bybee v. Indus. Special Indem. Fund,* 129 Idaho 76, 80, 921 P.2d 1200, 1204 (1996).

Pre-Existing Manifest Impairments

108. There is no dispute that Claimant had manifest pre-existing permanent physical impairments, including his lumbar spine, right hip, and bilateral knees. Claimant's above-listed impairments have been rated. The first two elements for ISIF liability are met.

Subjective Hindrance to Employment

109. There is nothing in the record proving Claimant's bilateral knees were ever a subjective hindrance to employment at or near the time of his industrial accident. Instead, the record establishes that Claimant was able to perform any and all jobs he undertook. Likewise, Claimant testified his knees never precluded him from obtaining or maintaining employment. Nothing in the record suggests that Claimant ever found he could not do certain tasks at his work, sought accomodation at any employment, shied away from certain lines of work, or changed fields of employment due to his knee issues and surgeries.

110. The only authority cited by Claimant that his right hip was a subjective permanent hindrance to his employment is a note from Dr. Cox in 2017 wherein he rates Claimant's impairment at 10% WP, and places restrictions on Claimant of no repetitive squatting, and to "avoid jumping activities." (JE X, p. 827.) There is no showing that Claimant changed his employment due to his right hip replacement, sought accommodations in his work tasks due to the restrictions imposed on him, or deferred taking a particular job due to those restrictions. Furthermore, Dr. Cox is not clear whether those restrictions date to immediately prior to the industrial accident, or apply in 2017 when he examined Claimant. By his own admission, Claimant's right hip condition has become increasingly symptomatic with time, and by the time of hearing Claimant was contemplating revision surgery on his right hip.

111. When analyzing the "subjective hindrance" component, Claimant's pre-existing condition must be a hindrance as of the time immediately before his industrial accident. *Accord. Colpaert v. Larsens, Inc.*, 115 Idaho 852, 771 P.2d 46 (1989); *See also, Ritchie v. State of Idaho, Industrial Special Indemnity Fund*, IIC 2016-0038 (August 15, 2016);

Lubow v. Gentle Touch Health Care, Inc, Order Denying Motion for Reconsideration, 2016 WL 7975630 (Idaho Ind. Com., Dec. 21, 2016).

112. Claimant has failed to prove his right hip and bi-lateral knees constituted a subjective hindrance as of the time of his industrial accident.

113. Claimant's lumbar spine was clearly a subjective hindrance to employment, and Defendants raised no contrary argument. Claimant got out of the trucking/log hauling business due to his lumbar spine. Claimant was subject to medical restrictions on lifting, bending, twisting, and stooping at the time of his work accident.

114. Claimant has proven his lumbar spine condition constituted a subjective hindrance to him obtaining or maintaining employment.

"Combining With" Element

Claimant's Position

115. Claimant argues that the August 1, 2013 work accident permanently aggravated his longstanding lumbar spine condition which until such accident had been medically stable as the result of Dr. Flinders' surgery in December 2012. But for the August 1 accident, Claimant would have been able to continue in his employment. Claimant testified that Dr. Flinders' surgery "fixed" his low back, greatly reduced Claimant's low back complaints, and allowed him to engage in heavy capacity work without accomodation. Furthermore, Dr. McNulty testified that the 2013 industrial accident permanently aggravated Claimant's lumbar spine condition, which was medically stable prior to this accident. Claimant did not need a fusion surgery immediately prior to his industrial accident, but did need the surgery thereafter as the direct result of Claimant's slip and fall at work. Additionally, the fusion surgery

performed after the accident was more extensive in its scope than the fusion surgery proposed in 2011.

Defendant's Position

116. Defendant argues that if Claimant is found to be totally and permanently disabled, such total disability stems from the onerous restrictions placed on him after his fusion surgery. That fusion surgery was recommended, and needed in 2011, but was postponed until 2015 by a series of "palliative" treatments which "temporarily" addressed Claimant's pain complaints but did not remedy the underlying structural defects in Claimant's lumbar spine. In effect, Claimant did not reach maximum medical improvement until his 2015 fusion surgery. Because Claimant's longstanding lower back condition was not at MMI at any time prior to the 2015 fusion, there can be no "combining" of impairments. Claimant had but one impairment, his lumbar spine, which was never fixed and stable prior to the industrial accident in question, and only reached MMI in 2015. The industrial accident on August 1, 2013 did not permanently aggravate the Claimant's pre-existing lumbar condition, but was only a temporary exacerbation. Claimant would be disabled today even without that work accident, since it was the restrictions from the lumbar surgery which led to his disability, and the surgery was required well before Claimant's work injury.

Analysis

117. The argument that, because Claimant needed a fusion surgery before his industrial accident and ultimately underwent a fusion surgery after that accident, he never reached MMI prior to the 2015 surgery is not persuasive on the facts presented herein.

118. The issue presented herein comes down to function versus anatomy. Defendant argues that Claimant's spine was not anatomically "corrected" until he had

a fusion surgery which actually decompressed his compressed vertebrae. Assuming Dr. Larson is correct that the foraminotomy and discectomy, or "percutaneous decompression procedure" as he described it, did not actually decompress Claimant's lumbar vertebrae, it did nevertheless relieve Claimant's incapacitating pain.

119. Dr. Larson noted that Claimant, less than one year before the industrial accident, presented as "a man entirely disabled from his low back condition." JE U, p. 729. He discounted the "percutaneous decompression procedure" as being "controversial" and "disallowed by insurance payors." *Id.* He also opined the procedure was nothing more than a "band-aid" with "no long term benefit." [3] *Id.* at p. 730. Dr. Larson failed to support these statements with any authority or elaboration. His opinions are directly refuted by Dr. McNulty.

120. Dr. Larson (and Dr. Cox, who had a similar opinion to Dr. Larson) ignored the reality presented herein. It is true Claimant was incapacitated less than one year before his industrial accident. However, after undergoing a foraminotomy, Claimant's pain returned to levels allowing him to work in heavy to very heavy conditions up to 16 hours per day in a job he was doing right up until the moment he fell at work. He then was not able to work. There is nothing in the record to indicate Claimant would not have been able to work indefinitely into the future but for the industrial accident, which ended Claimant's ability to work in his pre-accident employment. That situation entails the very definition of "causally related."

121. Dr. McNulty was the only physician to testify in this matter. In his deposition, he noted post-industrial accident lumbar spine changes in Claimant's MRI when compared to Claimant's pre-accident films. The new finding included an L4-5 leftward protrusion and

[3] Interestingly, Claimant's fusion surgery, which was described Dr. Larson as "the definitive surgery," is proving to be of little "long term benefit" as Claimant was complaining of increasing pain at levels adjacent to his fusion by the time of hearing.

annular tear with abutment of descending L5 nerve root, as well as a slight retrolisthesis with broad base disc protrusion. Dr. McNulty determined these new findings supported his opinion that the industrial accident permanently worsened Claimant's pre-existing lumbar condition. Furthermore, the L2-S1 fusion performed post accident was not identical to the L3-L5 fusion surgery contemplated by Dr. Dietrich in 2011; it was more extensive. This fact is glossed over by both Drs. Cox and Larson.

122. Dr. McNulty convincingly testified in his deposition that Claimant's industrial accident permanently aggravated his prior low back condition.

123. Dr. McNulty also testified that Claimant did not need a fusion surgery immediately before the industrial accident. While Dr. Dietrich recommended a fusion in 2011, Claimant's health insurance carrier disallowed the operation in favor of less invasive treatments. One of those less invasive procedures, the foraminotomy, reduced Claimant's pain levels to the point where he could return to work full time and, as Claimant testified, "fixed" his condition. Since, as Dr. McNulty testified, fusion surgery is not recommended on asymptomatic patients, Claimant was not a fusion surgery candidate at the time of his industrial accident. Put another way, surgery is indicated when there is an anatomical condition which can be improved with surgery *and* the patient's pain and limitations are such that surgery can materially improve function and reduce pain. In the present case, immediately prior to the accident, Claimant did not have pain levels and limitations requiring surgery. While he may have had a surgically-correctable anatomical condition just prior to his accident, the adage "physicians do not operate on MRIs" applies here. Without the incapacitating pain, such as Claimant was experiencing when a fusion surgery was suggested in 2011, Claimant was not a surgical candidate.

124. Dr. McNulty felt Claimant was at MMI prior to the industrial accident. He also apportioned Claimant's need for lumbar surgery post accident as being 25% due to pre-existing conditions and 75% due to the industrial accident.

125. On the issues of permanent injury, MMI, combination, and PPI allocation analysis, Dr. McNulty's opinions carry the most weight.

126. Claimant's total permanent disability is the result of a combination of Claimant's pre-existing low back condition and his industrial accident. But for Claimant's pre-existing low back condition, the record fails to establish Claimant's industrial accident standing alone would have rendered Claimant totally and permanently disabled. Conversely, Claimant was not totally and permanently disabled due entirely to his pre-existing condition.

CAREY ANALYSIS

127. Since all four elements of ISIF liability are satisfied, *Carey* apportionment must be determined. Claimant's subjective hindrance impairment (expressed as a percentage of whole person) for his pre-existing low back is 5% according to Dr. McNulty. While Claimant argues for other impairments, such as bilateral knees (5.2% per knee), and 10% for right hip, such impairments were not a subjective hindrance to employment and therefore are not included with determining ISIF pro-rata liability.

128. With 4% impairment for Claimant's industrial low back injury and 5% impairment related to the above pre-existing low back condition, the apportionment of the employer's liability for disability is 4/9, or 44% WP PPI. This translates to 220 weeks (.44 x 500 weeks) from the date of medical stability, December 30, 2015. During this 220 week period, ISIF is liable for the difference, if any, between PPD benefits payable by Employer and

Claimant's entitlement to total and permanent disability. Thereafter, ISIF is solely responsible for the payment of total and permanent disability.

CONCLUSIONS OF LAW

1. Claimant suffered a compensable low back injury on August 1, 2013, and reached medical stability on December 30, 2015, resulting in a 4% whole person permanent impairment;

2. Claimant has proven he suffered from a manifest pre-existing physical low back impairment as of the date of his subject accident, resulting in a 5% whole person permanent impairment;

3. Claimant has proven his pre-existing low back condition was a subjective hindrance to employment;

4. Claimant has proven he is totally and permanently disabled under either the 100% method or the odd-lot worker doctrine;

5. Claimant has proven that his total and permanent disability is the result of the combined effects of his compensable low back injury and the permanent aggravation of his pre-existing low back condition from the industrial accident.

6. Pursuant to *Carey v. Clearwater*, 686 P.2d 54, 107 Idaho 109 (1984), the employer is responsible for the payment of a 44% disability rating commencing December 30, 2015, with ISIF responsibility for the balance of any total and permanent disability benefits owed to Claimant.

RECOMMENDATION

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

DATED this 9th day of May, 2018.

INDUSTRIAL COMMISSION

/s/
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of June, 2018, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

MICHAEL KESSINGER
PO BOX 287
LEWISTON ID 83501

THOMAS CALLERY
PO BOX 854
LEWISTON ID 83501

/s/

jsk

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ARTHUR BLAKE Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2013-020032** **ORDER** **Issued 6/11/18**

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

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

1. Claimant suffered a compensable low back injury on August 1, 2013, and reached medical stability on December 30, 2015, resulting in a 4% whole person permanent impairment;

2. Claimant has proven he suffered from a manifest pre-existing physical low back impairment as of the date of his subject accident, resulting in a 5% whole person permanent impairment;

3. Claimant has proven his pre-existing low back condition was a subjective hindrance to employment;

4. Claimant has proven he is totally and permanently disabled under either the 100% method or the odd-lot worker doctrine;

5. Claimant has proven that his total and permanent disability is the result of the combined effects of his compensable low back injury and the permanent aggravation of his pre-existing low back condition from the industrial accident.

6. Pursuant to *Carey v. Clearwater*, 686 P.2d 54, 107 Idaho 109 (1984), the employer is responsible for the payment of a 44% disability rating commencing December 30, 2015, with ISIF responsibility for the balance of any total and permanent disability benefits owed to Claimant.

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

DATED this 11th day of June, 2018.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

/s/
Thomas P. Baskin, Commissioner

/s/
Aaron White, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of June, 2018, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

MICHAEL KESSINGER
PO BOX 287
LEWISTON ID 83501

THOMAS CALLERY
PO BOX 854
LEWISTON ID 83501

jsk