BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ALAN C. WILLFORD, Claimant, v. COOPERATIVE SUPPLY, INC., Employer, and STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2014-026918** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed January 17, 2019**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Coeur d'Alene on May 17, 2018. Claimant, Alan Willford, was present in person and represented by Starr Kelso, of Coeur d'Alene. Defendant Employer, Cooperative Supply, Inc. (Cooperative Supply), and Defendant Surety, State Insurance Fund, were represented by H. James Magnuson, of Coeur d'Alene. Defendant, State of Idaho, Industrial Special Indemnity Fund (ISIF) was represented by Thomas W. Callery, of Lewiston. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on September 18, 2018. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

The issues to be decided are:

1. The extent of Claimant's permanent impairment including the portion thereof attributable to his industrial accident.

2. The extent of Claimant's permanent disability, including whether he is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise.

3. Whether apportionment for a pre-existing or subsequent condition pursuant to Idaho Code § 72-406 is appropriate.

4. Whether the Industrial Special Indemnity Fund is liable under Idaho Code § 72-332.

5. Apportionment under the Carey formula.

6. Whether Claimant is entitled to attorney fees.

CONTENTIONS OF THE PARTIES

Claimant asserts he is 100% totally and permanently disabled or is an odd-lot worker due to his industrial injury. Claimant also asserts he is entitled to attorney fees against Employer/Surety for unreasonably denying and delaying payment of total permanent disability benefits. Employer/Surety assert that Claimant has failed to prove he is totally and permanently disabled and maintain he has sustained permanent disability of approximately 25% due to his industrial accident. They also assert that if Claimant is found to be totally and permanently disabled, it is due to the combined effects of the industrial accident and pre-existing conditions for which ISIF bears responsibility. ISIF asserts Claimant has not shown he is totally and permanently disabled. ISIF also maintains that Claimant's pre-existing conditions were not a hindrance or obstacle to employment and do not combine with his industrial accident to render him totally and permanently disabled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant's Exhibits A through Z and AA, Employer/Surety's Exhibits 1 though 25, and ISIF's Exhibits 3 and 4, admitted at the hearing;
3. Claimant's testimony taken at hearing;
4. The post-hearing deposition testimony of Douglas N. Crum, C.D.M.S., taken by Employer/Surety on June 25, 2018; and
5. The post-hearing deposition testimony of Eric Hofmeister, M.D., taken by Employer/Surety on June 26, 2018.

All outstanding objections are overruled and motions to strike are denied.

FINDINGS OF FACT

1. Claimant was born in 1960. He was 57 years old and resided in the Coeur d'Alene area at the time of the hearing. He is right-handed.

2. Cooperative Supply (also known as Cenex) is a retail farm and ranch supplier offering gas, hay, livestock feed, fencing materials, propane, and various other commodities.

3. **Background.** In 1978, Claimant graduated from Coeur d'Alene High School. He entered the U.S. Army in 1980 and rose to the rank of Sergeant E-5. He was honorably discharged in 1986.

4. Between 1987 and 1991, Claimant worked for various entities as a construction laborer, tree faller, machinist, and sales manager at a metal anodizing company.

5. In approximately 1992, Claimant fell from a ladder and injured his dominant right hand. He underwent six hand surgeries by Peter Jones, M.D., and fully recovered his right hand

function. Also in 1992, he obtained a paralegal certificate, although he never utilized this training to obtain employment.

6. In 1996, Claimant began working for Kootenai County Solid Waste where he operated garbage trucks and loaders.

7. In October 1999, Claimant underwent C4-C7 cervical fusion after a fall at home. He recovered and later returned to his usual work.

8. In 2000, Claimant worked for the Idaho Department of Transportation as a seasonal sign and cross-walk painter.

9. From 2000 to 2001, Claimant worked as a laborer and backhoe operator for the City of Coeur d'Alene Department of Parks and Recreation and the Cemetery Department. He maintained grounds and dug graves.

10. Between approximately 1990 and 2002, Claimant was convicted on multiple occasions of driving while under the influence, disturbing the peace, and domestic violence. From approximately 2002 until 2004, he was incarcerated.

11. In approximately 2004, Claimant obtained a private investigation certificate through a correspondence course, but never utilized this training to obtain employment.

12. From 2005 until 2007, Claimant worked for The Rooter Guys installing, cleaning, and maintaining drain fields and septic tanks. He operated a backhoe and a pump truck.

13. In the fall of 2007, Claimant began working for Cooperative Supply as a stock clerk and warehouse worker. His duties included loading, unloading, and stocking animal feed, fencing materials, box merchandise, hay and straw bales, propane tanks, and other products. He also performed cleaning duties. He operated fork lifts and pallet jacks. He spent 10% or less of his time cashiering.

14. In 2009, Claimant underwent L5-S1 fusion for a pre-existing back condition. He returned to work for Cooperative Supply approximately six months later and thereafter resumed his usual work duties.

15. On July 26, 2010, Claimant injured his right shoulder while working for Cooperative Supply. On September 27, 2010, Adam Olscamp, M.D., performed arthroscopic right rotator cuff repair. Dr. Olscamp restricted Claimant to lifting 50-75 pounds over shoulder height. Claimant returned to work but noted difficulty with right shoulder range of motion and experienced right shoulder discomfort lifting 40 to 80-pound feed bags, 70-pound hay bales, and 100-pound rolls of baling wire. Consequently, he performed more work with his left shoulder. On May 3, 2011, Dr. Olscamp rated the permanent impairment of Claimant's dominant right shoulder at 9% of the right upper extremity, equating to 5% of the whole person.

16. **Industrial accident and treatment.** On September 19, 2014, Claimant was at work lifting a 100-pound propane tank into a customer's truck when he noted immediate left shoulder pain. At the time of the accident Claimant was working full-time and earning approximately $10.80 per hour. A left shoulder MRI revealed full-thickness rotator cuff tear and partial biceps tendon tear. On November 5, 2014, orthopedic surgeon Jonathan King, M.D., performed left shoulder arthroscopy, rotator cuff repair, and biceps tenodesis.

17. In approximately February 2015, Claimant began working with Industrial Commission rehabilitation consultant Maria Goodwin in an effort to return to work.

18. Claimant attended physical therapy until May 2015.

19. On May 12, 2015, Dr. King released Claimant to work with a 20-pound left arm lifting restriction and only occasional overhead reaching.

20. On June 30, 2015, Dr. King assigned Claimant permanent left shoulder restrictions of occasionally lifting up to 20 pounds, pushing or pulling up to 30 pounds, and rarely reaching above his left shoulder. Claimant's Exhibit H, p. 204.

21. On August 2, 2015, Claimant's application for Social Security Disability benefits was approved. Michael O'Brien, M.D., who reviewed Claimant's disability application, opined Claimant had significant limiting issues of his hand, neck, back, and right and left shoulders.

22. On August 29, 2015, Eric Hofmeister, M.D., examined Claimant at Employer/Surety's request. Dr. Hofmeister concluded Claimant sustained an acute left rotator cuff tear due to his 2014 industrial accident and agreed with the permanent restrictions assigned by Dr. King. Dr. Hofmeister rated the permanent impairment of Claimant's left shoulder due to his industrial accident at 4% of the whole person. On September 8, 2015, Dr. King agreed with Dr. Hofmeister's conclusions.

23. On September 21, 2015, Cooperative Supply terminated Claimant's employment because he could not return to work without restrictions.

24. Claimant continued seeking employment with assistance from Maria Goodwin. He sought employment with many businesses as detailed hereafter but received no job offers. Goodwin ultimately closed Claimant's file because no employment could be located.

25. **Condition at the time of hearing.** At the time of hearing, Claimant continued to receive Social Security Disability benefits. He testified his left shoulder continued to be painful to the degree that only with some difficulty he is able to put on a shirt without assistance.

26. **Credibility.** Having observed Claimant at hearing and compared his testimony and work search notes with other evidence in the record, the Referee found that Claimant is a credible witness. The Commission finds no reason to disturb the Referee's findings and

observations on Claimant's presentation or credibility.

DISCUSSION AND FURTHER FINDINGS

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

28. **Permanent impairment.** The first issue is the extent of Claimant's permanent impairment and the portion thereof attributable to the industrial accident. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. A determination of physical impairment is a question of fact and the Commission is the ultimate evaluator of impairment. Soto v. J.R. Simplot, 126 Idaho 536, 887 P.2d 1043 (1994).

29. The record in the present case establishes that Claimant has sustained significant injuries to his right hand, neck, low back, and right and left shoulders.

30. Claimant injured his right hand in 1992 and underwent six hand surgeries. He testified that except for mild stiffness, he fully recovered his right hand function. The record

contains no impairment rating by any physician for Claimant's right hand injury and the Commission finds no persuasive evidence that a rating is warranted.

31. Claimant injured his neck in 1999 and underwent C4-C7 cervical fusion. The record contains no impairment rating by a physician for this three-level cervical fusion. Although we conclude that Claimant is probably entitled to an impairment rating following his multi-level fusion, we will not speculate on the calculation of such a rating. Moreover, as explained *infra*, because we conclude that the ISIF has no liability in this case, then there is no need to articulate an impairment rating for purposes of applying the Carey formula.

32. Claimant injured his low back and in 2009 underwent L5-S1 fusion. The record contains no impairment rating by a physician for this lumbar fusion. Again, we will not guess at the impairment rating, if any, Claimant might be entitled to following his lumbar fusion.

33. Claimant injured his right shoulder at Cooperative Supply on July 26, 2010, and subsequently underwent right rotator cuff repair. Dr. Olscamp rated the permanent impairment of Claimant's dominant right shoulder at 9% of the right upper extremity, equating to 5% of the whole person.

34. Finally, on September 19, 2014, Claimant sustained a left shoulder injury at Cooperative Supply and underwent left rotator cuff repair. Both Dr. Hofmeister and Dr. King agreed Claimant suffered a permanent impairment of his left shoulder of 4% of the whole person.

35. The record establishes the following whole person impairments: right shoulder 5%, and left shoulder 4%; thus totaling 9% of the whole person with 4% attributable to his 2014 industrial accident and 5% attributable to preexisting conditions.

36. **Permanent disability**. The next issue is the extent of Claimant's permanent disability, including whether Claimant is totally and permanently disabled pursuant to the odd-lot

doctrine or otherwise. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995). The proper date for disability analysis is generally the date of the hearing, not the date that maximum medical improvement has been reached. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012).

37. To evaluate Claimant’s permanent disability several areas merit close examination including the physical restrictions resulting from permanent impairments and potential employment opportunities—particularly as identified by vocational rehabilitation experts and by Claimant’s own work search.

38. Work restrictions. The record contains no work restrictions for Claimant's cervical and lumbar spine impairments. However Dr. Olscamp restricted Claimant to lifting no more than 50-75 pounds overhead due to his right shoulder condition. Drs. King and Hofmeister imposed restrictions due to Claimant's left shoulder condition. Dr. King recommended "no lifting greater than 20 pounds with the left arm only occasionally, no push, pull greater than 30 pounds only occasionally and only rare reaching above shoulder." Defendants' Exhibit 2, pp. 89-90. Dr. Hofmeister agreed that Claimant's use of his left shoulder is restricted to lifting up to 20 pounds occasionally, pushing or pulling up to 30 pounds occasionally, and reaching above his left shoulder rarely. Hofmeister Deposition, Exhibit 2, p. 110.

39. Insofar as the record reveals, none of Claimant's treating physicians have opined regarding the interplay of Claimant's right and left shoulder conditions and his resulting overall restrictions. Dr. Hofmeister, the only physician deposed in the present case, was not asked and did not address this interplay of Claimant's shoulder limitations and his overall functionality. Apparently the only physician who has expressly considered the collective effect of Claimant's 2014 left shoulder injury, 2010 right shoulder injury, 2009 back injury, 1999 cervical injury, and 1992 hand injury is Michael O'Brien, M.D., in conjunction with Claimant's Social Security Disability claim. Dr. O'Brien rated Claimant's exertional limitations and opined he could occasionally lift and/or carry 20 pounds and frequently lift and/or carry 10 pounds. Dr. O'Brien concluded Claimant was only capable of light duty work.

40. Defendants are quick to assert that Claimant has essentially unrestricted use of his dominant right arm. Claimant's left shoulder limitations of lifting 20 pounds occasionally, pushing and pulling 30 pounds occasionally, establish that up to 33% of his work day he can use his left hand to lift up to 20 pounds and push or pull up to 30 pounds, but also implicitly establish

that 67% of his work day he cannot. Thus, as a practical matter, 67% of the work day Claimant's use of his left arm is very limited. In this regard, Maria Goodwin recorded that Claimant "reiterated that even though the permanent restrictions to [sic] not address reaching below shoulder height he can not reach below shoulder for a continuous amount of time." Claimant's Exhibit P. p. 442.

41. The Commission finds that Claimant is restricted to lifting no more than 50-75 pounds overhead due to his right shoulder condition. He is also restricted in the use of his left arm to lifting 20 pounds occasionally, pushing or pulling 30 pounds occasionally, and reaching above his shoulder rarely.

42. Opportunities for gainful activity. Several vocational experts have opined regarding Claimant's employability or assisted him with his employment search. Claimant has also searched for work on his own.

43. *Maria Goodwin.* Industrial Commission rehabilitation consultant Maria Goodwin assisted Claimant in seeking re-employment commencing in February 2015. From September 2015, after Dr. Hofmeister found him medically stable and provided permanent work restrictions, Claimant aggressively looked for work with Goodwin's assistance until March 28, 2016. Goodwin encouraged Claimant to pursue both light and medium duty positions.

44. In September 2015, Maria Goodwin provided Claimant contact information for Experience Works, an organization specializing in job leads for individuals over 55 years old. Claimant promptly provided Experience Works his work restrictions and thereafter kept in regular contact with Experience Works through at least December 2015.

45. In October 2015, pursuant to Goodwin's recommendation, Claimant created a profile on the Idaho Department of Labor website to further his work search. Claimant also contacted the Teamsters Union in Spokane and notified them he was looking for work. Claimant's Exhibit P, p. 437.

46. No later than November 2015, pursuant to Goodwin's recommendation, Claimant began regularly searching Craigslist and local newspapers for job openings.

47. In December 2015, pursuant to Goodwin's recommendation, Claimant began contacting the Veterans Representative at the Idaho Department of Labor to seek employment leads.

48. On December 9, 2015, Goodwin met with Claimant and:

> … discussed our progress in finding him employment. We have not been able to locate work for him according to his transferable skills and permanent restrictions. I informed him I had not located job leads for him this week. We discussed closing his rehab case however the claimant was not comfortable with making this decision. He was scheduled another appointment to meet on December 16, 2015 to continue a job search and re-evaluate services.

Claimant's Exhibit P, p. 441.

49. On December 16, 2015, Goodwin recorded:

> The claimant reports he contacted Experience Works this week and was told they do not have anything for him. He reports he has been to the library and has not found any job leads he felt he could do. He also confirmed he continues to look in the newspaper for jobs.
>
> The claimant and I discussed that we have not had luck with finding him employment.

Claimant's Exhibit P, p. 442.

50. On February 2, 2016, Goodwin recorded that Claimant was continuing to fill out on-line applications for cashiering and retail clerk positions at various businesses including Fred Meyer/Kroger, Target, and Albertsons. On March 15, 2016, she noted "he has applied for

cashiering positions with several home improvement stores however did not get an interview." Claimant's Exhibit P, p. 443. On March 15, 2016, Goodwin recorded:

> The claimant and I discussed closing his rehab case. It was mutually determined to close the case as we have been looking for work for him since September 2015 without success. He has the skills to continue to look for employment as well as resources with Experience Works and VA Services through the Idaho Dept of Labor.

Claimant's Exhibit P, p. 444. Thereafter, Goodwin kept Claimant's rehab case open for approximately two more weeks while he applied unsuccessfully for a position at Tedder Industries. Goodwin ultimately closed Claimant's rehabilitation file because no employment could be found. From Goodwin's case notes and Claimant's employment search record, it appears that Claimant diligently followed up on virtually all leads and recommendations Goodwin provided. He received not a single job offer.

51. *Claimant's work search.* In addition to his efforts in conjunction with Goodwin's assistance as set forth above, Claimant made significant further efforts to find employment. Claimant applied with temporary employment agencies Humanix and AES Employment Services, but found no employment opportunities. Commencing October 16, 2015, he regularly contacted Experience Works seeking assistance in locating employment. After more than 20 contacts with Experience Works, Claimant recorded they: "have to close my file because they can't place me but would let me know of any jobs." Claimant's Exhibit T, p. 568.

52. After Maria Goodwin and Experience Works closed Claimant's files, he still continued to seek employment. Between March 2016 and April 2018, Claimant made well over 100 contacts with businesses seeking employment.[1] He also applied for a host of jobs on-line.

[1] Claimant contacted Harbor Freight, United Pump, Big 5 Sporting Goods, Zips Restaurant, Worste Pump, Great Floors, Exxon (multiple contacts), Cabela's, Silverwood Campground, Doyles Wholesale, Dollar Store, K-Mart, A&D Minimart, Masters Fence, R-C Worste, Ramey's Yard Care, Hi-Co (Hayden), Zip Stop (Sherman), Tesoro (Sherman), Best Food, Tesoro (Ironwood), Holiday Station Store, Maverick, Hayden Corner Store, Fairway

Claimant's Exhibit T, pp. 581-659. He received no job offers. Claimant has extensively but unsuccessfully searched for work in the Coeur d'Alene area.

53. *Sara Statz.* Sara Statz, MS, CRC, CIWCS, a vocational rehabilitation expert retained by Claimant, interviewed Claimant on January 15, 2018, reviewed his medical and employment records, and prepared a report on May 1, 2018, assessing his employability. Statz affirmed Claimant's good work history with most of his pre-injury work in hands-on construction, customer service, or stocking jobs at feed stores. She noted Claimant's report of multiple misdemeanor and felony driving under the influence convictions and resultant incarceration. She opined that: "He noted some diplomas in Paralegal and Private Investigative work, though due to his criminal history he would not be able to work in these fields." Claimant's Exhibit U, p. 674. Statz noted Claimant's computer illiteracy, non-use of email, and hunt-and-peck typing skills. She expressed concern with Claimant's lesser developed "soft skills" and opined his interpersonal skills "would need to be refined for him to not only obtain employment but maintain a new job long term." Claimant's Exhibit U, p. 674. She considered Claimant's capacity appropriate for light duty work.

Grocery, Dalton Market, Jiffy Stop, Ace Hardware, Texaco, Hayden Quick Stop, System Technologies, Transtector, Xaact Products, Unitech Corporation, Precision Gate, Alternative Molding, Ground Force, Mr. Rooter, Drains Plus, C&R Industries, Accent Landscaping (multiple contacts), All Season Tree Service, Besway Lawn Service (multiple contacts), Blue Oak Landscaping, Dan Mattison Landscaping (multiple contacts), Grace Tree Service, Grass Roots Landscaping, Jacobson Tree Service, Lakeview Tree Service, New Leaf Nursery, Nolan Tree Service, Ramey's Yard Care, Senske Lawn Care, Specialty Tree Service, Specialty Tree Service, Aspen Lawnscape, Cut Above Lawn, Bluegrass Hydroseeding, B&B Sprinklers, Big Bear Landscaping, Black Diamond Landscaping, Bud's Lawn Care, Matton Landscaping, Idaho Lawns, Bushwacker Landscape, CDF Landscape, CDA Landscape, Creative Edge, Bestway Spray Service, Buds Lawn & Garden, CDA Yards, Dixie Services, Evergreen Lawn Services, Four Seasons Landscaping, Grass Roots Landscape, Lake City Lawn, Kootenai Lawn, Lawn Pro, Cutting Edge, Taylor Made Lawn, Yochum Landscape, Reagan Equipment, Senske Lawn & Tree, R&J Landscaping, SS Landscaping, Ron's Lawn, Best Foods, Ace Hardware (Post Falls), Ace Hardware (Simons), A to Z Rentals, Tesoro (Sherman Ave.), Jordon's 15th St., Zip Trip 15th St., Gittles Grocery, and Dexco Government Way. Between March 2016 and February 2017, Claimant also visited the following potential employers face to face: TAJ Store, Zip Trip 15th St., Best Food, Exxon Highway 95, Walgreens, Big Lots, Big Sheep Sporting Goods, Arby's, Hasting, Les Schwab, Carl's Jr., Silver Fox Tavern, Big 5 Sporting Goods, Exxon Government Way, Dexco Government Way, Sunset Bar, Petco, Big R, Aslin Finch Feed, Chevron, Jifi Stop, and Mobile.

54. Statz opined that considering Dr. Hofmeister's permanent work restrictions, Claimant had lost access to approximately 71% of his pre-accident labor market and without additional training may sustain a wage earning loss of approximately 33% due to his industrial injury. She noted Claimant's work search with Maria Goodwin, Experience Works, the Idaho Department of Labor Veterans Representative, his submission of multiple job applications and continued registration with job service at the Idaho Department of Labor—all of which had produced not a single employment offer. Statz concluded that: "he should be considered totally and permanently disabled as an odd lot worker. …. It would most likely be futile for him to look for additional full-time, permanent employment considering his current state." Claimant's Exhibit U, p. 677.

55. *Doug Crum.* Doug Crum, CDMS, CRC, CIWCS, a vocational rehabilitation expert retained by Employer/Surety, interviewed Claimant on January 16, 2018, reviewed his medical and employment records, and prepared a report on May 1, 2018, assessing his employability.

56. Crum opined that Claimant's right upper extremity was essentially unrestricted and thus he believed Claimant was able to lift between 35 and 50 pounds occasionally and "should have a light to medium physical capacity overall." Crum Deposition, p. 18, ll. 3-4. Mr. Crum opined Claimant had transferable skills in operating backhoes and loaders, cashiering, serving customers, warehousing, inventory handling, and in construction and siding installation. He noted that Claimant has essentially no marketable computer skills.

57. Crum opined Claimant had access to 13.5% of his local labor market prior to his 2014 left shoulder injury and 9.6% of the labor market post-left shoulder injury, representing a

29% loss of access. Crum testified regarding his calculations of Claimant's loss of labor market access:

> Q. (by Mr. Kelso) On that information that you're citing, is there any specific job duty requirements for the jobs identified?
>
> A. No.
>
> Q. Okay. So somehow you made your own determination of whether or not Mr. Willford can perform a job listed that has no specific job duty identification; is that correct? Is that what you're testifying to?
>
> A. That's true. I rely on my—on my experience and training to do that.
>
> Q. Okay.
>
> A. So again, it's my evaluation. I'm not deferring to anything else, other than my own experience and training.
>
> Q. So when you're saying you're relying on your own experience and training, when we look at like a category, a table of occupations that you have at the bottom of page 10, you just have a general, generic understanding based upon your experience of what the employer is?
>
> A. Yes.

Crum Deposition, p. 54, l. 14 through p. 55, l. 11. Crum testified that his table of occupations was a table of job categories, not specific jobs. Crum concluded Claimant "should be able to access jobs within his labor market." Defendants' Exhibit 16, p. 583.

58. Crum considered survey information from employers in potential job categories including fast food cook, combined food prep/serve, food preparation, dishwasher, janitor, pest control worker, counter/rental clerk, cashier, retail sales, stock clerk/order filler, team assembler, dry cleaning worker, packaging/filling machine operator, production helper, driver/sales worker, vehicle cleaner, freight, stock, material mover, hand packager, light truck/delivery worker. Calculating the average wages from employer survey responses in these job categories, Crum opined Claimant had lost no wage earning capacity.

59. After evaluating Claimant's post-injury labor market access and wage earning capacity, Crum concluded that "as a result of the September 19, 2014 industrial injury, Mr. Willford has sustained permanent partial disability, inclusive of permanent partial impairment, of approximately 25% of the whole person." Defendants' Exhibit 16, p. 385.

60. *Weighing the vocational evidence.* Although Crum's report accurately recited Claimant's restrictions as determined by Dr. Hofmeister, the report addresses Claimant's employability by expressly:

> factoring in the restrictions related to the (nondominant) left shoulder injury recommended by Dr. Hofmeister (endorsed by Dr. Olscamp) on August 29, 2015. Those left shoulder restrictions were:
>
> - No lifting greater than 20 pounds
> - Occasional pushing or pulling up to 30 pounds, and
> - Rare reaching above shoulder level.

Defendants' Exhibit 16, p. 583. In fact Dr. King restricted Claimant's left shoulder use to "no lifting greater than 20 pounds with the left arm only occasionally …." Defendants' Exhibit 2, pp. 89-90 (emphasis supplied). Dr. Hofmeister agreed with Dr. King's restrictions. Hofmeister Deposition, p. 24, ll. 4-6 and Deposition Exhibit 2, p. 110. As noted previously, a restriction of only occasionally lifting with the left arm necessarily implies Claimant's use of his left arm is limited for 67% of his work day.

61. Statz's report discusses Claimant's industrial injury to his left shoulder and summarizes the light strength level work restrictions imposed by Drs. King and Hofmeister. Claimant's Exhibit U, p. 672. Her report also reiterates Claimant's pre-existing right shoulder restrictions. However, Statz's report does not expressly state how she applied Claimant's right shoulder restrictions in arriving at her conclusions.

62. Claimant has presented abundant evidence of an extensive, diligent, but unsuccessful job search. Although Statz's report may provide a less detailed analysis in support of her conclusions, her conclusions are convincingly corroborated by Claimant's extensive but unsuccessful work search both on his own and with assistance from Maria Goodwin, Experience Works, and the Veterans Representative at the Idaho Department of Labor. The conclusions reached by Sara Statz regarding Claimant's permanent disability are more persuasive than those of Doug Crum in that they are consistent with Claimant's actual extensive but unsuccessful job search experience.

63. Based on Claimant's impairments totaling 9% of the whole person, his permanent physical limitations including his restrictions of lifting no more than 20 pounds occasionally with his left arm, rare over shoulder left arm reaching, and lifting no more than 50-75 pounds overhead, and considering all of his medical and non-medical factors including his age of 60 at the time of the accident and 65 at the time of hearing, formal education, computer illiteracy, inability to return to previous positions, and lack of transferable skills, Claimant's ability to engage in regular gainful activity after his 2014 industrial accident has been greatly reduced. The Commission concludes that Claimant has established a permanent disability of 70%, inclusive of his 9% whole person impairment.

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

business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status rests upon the claimant. Dumaw v. J. L. Norton Logging, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). A claimant may satisfy his burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways: (1) by showing that he has attempted other types of employment without success; (2) by showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or (3) by showing that any efforts to find suitable work would be futile. Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

65. In the present case, all of the Defendants question Claimant's work search and assert that he is employable. Claimant has proven an extensive and diligent but unsuccessful job search. He has also presented the expert testimony of Sara Statz that he is an odd-lot worker and further job searching would be futile. As noted above, Statz's conclusions are persuasive. Claimant has shown he has unsuccessfully searched for work and that further searching would be futile. He has established a prima facie case that he is an odd-lot worker, totally and permanently disabled, under the Lethrud test.

66. Once a claimant establishes a prima facie odd-lot case, the burden shifts to Defendants "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). Defendants must prove there is:

> An actual job within a reasonable distance from [claimant's] home which [claimant] is able to perform or for which [claimant] can be trained. In addition, the Fund must show that [claimant] has a reasonable opportunity to be employed at that job. It is of no significance that there is a job [claimant] is capable of

> performing if he would in fact not be considered for the job due to his injuries, lack of education, lack of training, or other reasons.

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

67. In the present case, Defendants assert that Crum located a number of actual job openings that would be appropriate for Claimant. The entirety of Crum's report addressing actual job availability provides:

> I have located the following current job openings that I believe would be reasonable targets for a job search for Mr. Willford:
>
> | | |
> |---|---|
> | Assembler | Raycap. |
> | Assembler | Integrated Personnel. |
> | Cashier | Cabelas. |
> | Cashier | Home Depot. |
> | Cashier | Maverick. |
> | Cashier | Shopko. |
> | Dishwasher | Wolf Bay Lodge. |
> | Dishwasher | Cracker Barrel. |
> | Food Team | Chipotle. |
> | Food Team | Mod Pizza. |
> | Injection Mold Operator | Accurate Molded Plastics. |
> | Marina Attendant (seasonal) | RHL. |
> | Overnight crew | McDonald's. |
> | Food prep | Olive garden. |
> | Pizza maker | Nates New York Pizza. |
> | Sandwich maker | Flying J. |
> | Warehouse associate | Polaris. |

Defendants' Exhibit 16, p. 584.

68. In his post-hearing deposition, Crum testified that excepting the warehouse associate position at Polaris, the jobs set forth above as listed on page 11 of his report "are all light to medium jobs." Crum Deposition, p. 27, l. 10. Crum testified "these are jobs that I felt that with the Claimant's present physical capacities he should be able to perform those types of jobs." Crum Deposition, p. 17, ll. 5-7. However, he acknowledged:

> Q. (by Mr. Kelso) Now, at page 11 of your report …. For any of those job openings, did you contact the employer?

A. No.

Q. Did you do any sort of job-site evaluation, similar to that done by the ICRD?

A. No.

Crum Deposition, p. 56, l. 23 through p. 57, l. 6.

69. Thus, as to each and every job listed, there is no indication that Crum confirmed whether the physical requirements of the actual job would be compatible with Claimant's restrictions. Crum acknowledged there was a difference between a job description and a job-site evaluation showing the specific physical requirements of the actual job. Crum Deposition, p. 63.

70. The need to determine the actual job duties and physical requirements rather than merely a generic or former description of a job is illustrated by Crum's opinion of Claimant's time of injury job at Cooperative Supply. Crum's report categorized Claimant's position at Cooperative Supply as medium duty work and stated Claimant was injured performing his usual and customary duties. In fact, Claimant's job at Cooperative Supply required lifting 100 pounds and his industrial accident occurred as he was moving a 100-pound propane tank—which clearly constituted heavy rather than medium duty work.

71. Other than Crum's conclusory testimony that all of the actual jobs he listed are within light to medium work, from Crum's report and deposition testimony, the following information is virtually all Defendants have provided to establish the physical requirements of the actual jobs they assert are suitable for Claimant—

a. Assembler at Raycap: Crum testified this was an "assembly line worker" engaged in making electrical machinery. He provided no description of the actual physical requirements of the job. Crum Deposition, p. 20, ll. 1-7.

b. Assembler at Integrated Personnel: Crum testified this "did not require driving" and was "some sort of a small part assembly job." He provided no description of the actual physical requirements of the job. Crum Deposition, p. 20, ll. 8-15.

c. Cashier at Cabela's: Crum acknowledged "looks like I don't have that [job] description in here." He provided no description of the actual physical requirements of the job. Crum Deposition, p. 20, ll. 16-19.[2]

d. Cashier at Home Depot: Crum testified "did not require operating a motor vehicle, and essentially it was to cashier for material and things that people went to Home Depot to buy." He believed it would be appropriate for Claimant but noted "there might be a few things that would be difficult for him, but I believe that he could probably do the job." He provided no description of the actual physical requirements of the job and acknowledged the job description did not list the physical requirements. Crum Deposition, p. 21, ll. 2-12, p. 64, ll. 3-4.[3]

e. Cashier at Maverick: Crum acknowledged "For some reason I don't have the Maverick job description either. It was a cashiering job as well." He provided no description of the actual physical requirements of the job. Crum Deposition, p. 21, ll. 24-25.[4]

f. Cashier at Shopko: Crum testified "you check and scan and cashier for people that are buying things at Shopko." He provided no description of the actual physical requirements of the job. Crum Deposition, p. 22, ll. 2-11.

g. Dishwasher at Wolf Bay Lodge: "This was a dishwasher job. Did not require any experience." Crum provided no description of the actual physical requirements of the job. Crum Deposition, p. 22, ll. 12-20.

h. Dishwasher at Cracker Barrel: "That was another dishwasher job …. It required reach and lift overhead up to 25 pounds and standing for long periods of time." Otherwise, Crum provided no description of the actual physical requirements of the job. Crum Deposition, p. 22, l. 21 through p. 23, l 3. The overhead lifting requirement alone appears incompatible with Claimant's restriction of rarely reaching overhead with his left shoulder unless he could perform virtually all of the required overhead lifting with only his right arm.

i. Food team at Chipotle: Crum testified "These restaurants make burritos and that kind of thing." He provided no description of the actual physical requirements of the job. Crum Deposition, p. 23, ll. 4-15.

j. Food team at Mod Pizza: Crum testified "that would involve making pizzas. …. It required bending, twisting, reaching … pushing, and pulling to move or handle

[2] The record indicates Claimant sought work at Cabela's but received no offer. Claimant has a criminal record including a felony DUI conviction. Both Claimant and Sara Statz indicated his criminal record hinders his employability, including in competing for positions requiring handling money, as is customary in cashiering.

[3] The record indicates Claimant sought work at Home Depot but received no offer.

[4] The record indicates Claimant sought work at Maverick but received no offer.

objects weighing up to 50 pounds. Operate handheld appliances ….” He did not provide a complete description of the actual physical requirements—including the lifting requirements—of the job. Crum Deposition, p. 23, l. 16 through p. 24, l. 4.

k. Injection mold operator at Accurate Molded Plastics: Crum testified that he had “had seen injection molding operators’ jobs before, and typically they aren’t very heavy.” He provided no description of the actual physical requirements of the job. Crum Deposition, p. 24, ll. 5-18.

l. Marina attendant (seasonal) at RHL: Crum suspected the job was “probably seasonal. It’s assisting customers pumping gas, direct people to the store, assist in moorage rental and sales.” He provided no description of the actual physical requirements of the job. Crum Deposition, p. 24, l. 19 through p. 25, l. 5.

m. Overnight crew at McDonald’s: Crum testified the job required “make food and cashier for people. …. Job requirements are greeting customers, taking accurate food orders, preparing food, ensure items are well stocked. He affirmed he had “done several job descriptions over the years for McDonald’s restaurants, and they’re all pretty much the time [sic]” but not one specific to the job he listed in his report. Crum Deposition, p. 58, ll. 6-11. He provided no description of the actual physical requirements of the job. Crum Deposition, p. 25, ll. 6-16.

n. Food prep at Olive Garden: Crum testified “That was a prep production backup worker. So this is the person that works in the back of the restaurant, and they, you know, basically are doing prep work, cutting vegetables and meats. …. Follow recipes, it says stocking the galley aisle, requirements for food safety and sanitation standards.” He provided no description of the actual physical requirements of the job. Crum Deposition, p. 25, l. 17 through p. 26, l. 3.

o. Pizza maker at Nates New York Pizza: Crum testified “it involves food prep, cleaning, making dough and sauce, shredding cheese, slicing and chopping vegetables, sweeping, mopping, taking customer orders.” He provided no description of the actual physical requirements of the job. Crum Deposition, p. 26, ll. 4-13.

p. Sandwich maker at Flying J: Crum testified the posting “doesn’t list any specific physical requirements” and he provided no description of the actual physical requirements of the job. Crum Deposition, p. 26, ll. 14-22.

q. Warehouse associate at Polaris: Crum testified the position “requires employee frequently move and/or lift up to 60 pounds on occasion, on occasion move or lift up to a hundred pounds. So I must have missed that the first time through. That job would not be appropriate for Mr. Willford.” Crum Deposition, p. 27, ll. 2-6.

72. Claimant asserts that in spite of this lengthy job list, Defendants have failed to meet the requirements of Rodriguez v. Consolidated Farms, LLC, 161 Idaho 735, 360 P.3d 856 (2017), to rebut his prima facie case by proving there is an actual suitable job available to him.

73. In Rodriguez, the injured worker sustained severe injury to his dominant hand and established a prima facie odd-lot case. Employer attempted to rebut the case with testimony by its supervisor that employer offered suitable modified work to Rodriguez. The Court described the employer's dual evidentiary burden:

> First, an employer must show that there is a type of job that is both suitable for a claimant and that occurs regularly and continuously in a well-known branch of the job market. Second, an employer must show that an actual job of that type exists within a reasonable distance from a claimant's home as of either the time of injury or the time of the hearing.

Rodriguez, 161 Idaho at 743, 390 P.3d at 864. The Court noted the Industrial Commission had reviewed the evidence and found it was impossible to know whether the modified job as described by the employer was one that Rodriguez retained the physical capacity to perform. Thus, it was unclear whether the actual job was suitable. The Court declared:

> We agree. The only evidence presented to the Commission by Appellants that a suitable job existed and had been offered was (1) conclusory testimony that a job had been offered that was suitable, and (2) a written job offer that provided no indication of suitability. Specifically, Appellants presented testimony to the Commission that "the job being offered to [Rodriguez] was essentially his time-of-injury job with any necessary modifications to account for his post-injury physical limitations." While such a job could hypothetically be adequate, a finding of suitability requires more evidence that this nebulous statement. It is concerning, to say the least, that Employer never provided the Commission with any kind of detailed breakdown of what tasks the alleged modified job would entail.
> ....
>
> The written job offer submitted into evidence was likewise insufficient to prove suitability. In reality, it is nothing more than a form document. It lists the following "work" as "available" to Rodriguez: Drip Operator; Miscellaneous Labor-Greenhouse; Compost Operator; Grounds Maintenance; Contract Support;

> Dreyer Operator; Field Mower; Cultivator; and Field Prep. The written offer contains no breakdown of what specific tasks are involved in these positions. ….
>
> The Commission was right to be troubled by the complete absence of job specifics in evidence. …. [Appellants] provided evidence of a job offer, but did not provide the necessary details for the Commission to be sure the job was suitable. We cannot expect the Commission to simply take an employer's word that a job will be suitable. There must be evidence presented of suitability.

Rodriguez, 161 Idaho at 744, 390 P.3d at 865 (emphasis supplied).

74. In the present case, Defendants have listed 16 positions which they assert should be suitable actual jobs and have presented Crum's conclusory testimony that they would be appropriate for Claimant. However, to reiterate the Court's concern in Rodriguez: "a finding of suitability requires more evidence that this nebulous statement. … Employer never provided the Commission with any kind of detailed breakdown of what tasks the alleged modified job would entail." Rodriguez, 161 Idaho at 744, 390 P.3d at 865. Absent job specifics, the record herein does not provide the necessary details to be sure any of the actual jobs are suitable. Examination of each of the jobs Mr. Crum listed reveals that none have been shown to be actually suitable for Claimant.

75. Defendants have not established that there is a suitable actual job regularly and continuously available which Claimant can perform and at which he has a reasonable opportunity to be employed. They have failed to rebut Claimant's prima facie case.

76. Claimant has proven that he is totally and permanently disabled pursuant to the odd-lot doctrine.

77. **Apportionment pursuant to Idaho Code § 72-406.** Idaho Code § 72-406 (1) provides that in cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a pre-existing physical impairment, the employer shall be liable only for the

additional disability from the industrial injury or occupational disease. The conclusions set forth above render apportionment under Idaho Code § 72-406 moot.

78. **ISIF liability**. The next issue is whether ISIF bears any liability in the present case. Idaho Code § 72-332 provides 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 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 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. In Dumaw v. J. L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court summarized the four inquiries that must be satisfied to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was a pre-existing impairment; (2) whether that impairment was manifest; (3) whether the impairment was a subjective hindrance to employment; and (4) whether the impairment in any way combined with the subsequent injury to cause total disability. Dumaw, 118 Idaho at 155, 795 P.2d at 317.

79. Pre-existing, manifest impairment. The pre-existing physical impairments at issue herein are Claimant's cervical, lumbar, and right shoulder conditions prior to his 2014 industrial accident. Claimant underwent a C4-C7 cervical fusion in 1999 after a fall at home. He underwent an S1-L5 lumbar fusion in 2009. He sustained a right shoulder injury in 2010 and underwent right biceps tendon and rotator cuff repair surgery. Dr. Olscamp thereafter restricted Claimant to lifting no more than 50-75 pounds above his shoulder.

80. Claimant's cervical, lumbar, and right shoulder conditions constitute pre-existing conditions for purposes of Idaho Code § 72-332. Each pre-existed and was manifest prior to the

2014 industrial accident. The first and second prongs of the Dumaw test have been met as to these conditions.

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

82. In the present case, ISIF and Claimant assert that Claimant's cervical and lumbar conditions did not prevent him from performing his work and did not hinder his work for any employer before the 2014 industrial accident.

83. The record contains no restrictions imposed by any physician for Claimant's pre-existing cervical or lumbar conditions. He returned to heavy work after recovering from his cervical and lumbar fusions.

84. Employer/Surety's own expert, Doug Crum, testified that regarding Claimant's pre-existing conditions: "he didn't seem to think that his prior injuries had—had much effect on his ability to work at the time of the 2014 injury." Crum Deposition, p. 9, ll. 20-22. Specifically, regarding Claimant's pre-existing right shoulder condition: "He didn't feel like it limited what he could do, what activities he was able to do, the right shoulder." Crum Deposition, p. 10, ll. 9-11. Mr. Crum testified: "that 50 to 75-pound over shoulder lifting limitation had little to no impact on his employability or ability to access jobs in his labor market …." Crum Deposition, p. 11, ll. 4-7. He noted that outside of hardrock mining there were very few jobs that required lifting more than 50 to 75 pounds overhead. Crum Deposition, p. 11, ll. 8-13.

85. However, Crum also recorded that Claimant affirmed he had some difficulty using his right arm with strenuous tasks at Cooperative Supply and sometimes had assistance

from coworkers. Defendants' Exhibit 16, p. 583. Specifically, Claimant acknowledged he experienced some problems with overhead loading and reaching; use of his right upper extremity overhead bothered him. Thus he was still able to perform all of his job duties after his right shoulder healed, but with some difficulty.

86. Claimant also acknowledged that after his 2009 lumbar fusion he had to do his work differently. After his lumbar fusion Claimant returned to work performing all of his job duties; however, he had to exercise care and was cautious with bending and lifting. Considering his lumbar condition, he testified that he could not perform a job that required constant bending, such as his job at Rooter Guys. Transcript, p. 55, ll. 5-16.

87. The Commission finds that Claimant's pre-existing lumbar and right shoulder impairments constituted a hindrance to employment prior to his 2014 industrial accident. The third prong of the Dumaw test is met as to these two impairments.

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

89. In the present case, Employer/Surety's expert, Doug Crum, opined that Claimant's pre-existing conditions did not combine with his 2014 left shoulder injury to produce total permanent disability. Crum concluded: "the pre-existing right shoulder restrictions have minimal effect on Mr. Willford's pre-injury or post-injury labor market access. There would seem to be no combined effect from the industrial injury of 2014 with his pre-existing conditions." Defendants' Exhibit 16, p. 585.

90. A scenario can be imagined in which it might be concluded that an injured worker's left and right shoulder problems combine to cause total and permanent disability. In a particular case, the limitations stemming from one shoulder might not be enough to cause total and permanent disability; it would require the addition of limitations in the contra-lateral shoulder to altogether prohibit the worker from engaging in gainful activity. Such is not the case before us. Here, the most persuasive evidence demonstrates that the Claimant's left shoulder restrictions, alone, are sufficient to leave him totally and permanently disabled, without reference to the right shoulder or low back. In reaching this conclusion, we acknowledge that the evidence does demonstrate that Claimant is restricted to some extent by both his right shoulder and low back. However, these conditions do not combine with Claimant's left shoulder injury to cause total and permanent disability; the evidence before us persuasively demonstrates that Claimant's total and permanent disability results from the left shoulder alone. We are unable to conclude that Claimant would not be totally and permanently disabled without the low back and right shoulder conditions.

91. Since, the record does not establish that but for any of Claimant's pre-existing conditions he would not have been totally and permanently disabled by the industrial accident,

the final prong of the Dumaw test has not been satisfied as to any of Claimant's pre-existing impairments.

92. Pursuant to Idaho Code § 72-332, ISIF bears no liability for Claimant's pre-existing right shoulder and lumbar impairments and the proportion of disability attributable thereto.

93. **Carey apportionment.** Inasmuch as ISIF bears no liability herein, the final issue of apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54, (1984), is moot.

94. **Attorney fees.** The final issue is Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804. Attorney fees are not granted as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804 which provides:

> If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding attorney fees is a factual determination which rests with the Commission. Troutner v. Traffic Control Company, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

95. In the present case, Claimant asserts entitlement to attorney fees for Employer/Surety's delay in providing permanent disability benefits for Claimant's 2014 industrial accident.

96. In contesting Claimant's assertion of total permanent disability, Defendants relied upon the opinion of vocational expert Doug Crum who not unreasonably concluded that Claimant should be able to find employment. Crum opined that a number of positions would likely be suitable for Claimant. Crum's opinion has been found inadequately supported by the record and unpersuasive in light of Claimant's extensive unsuccessful work search; however, Employer/Surety's reliance thereon was not unreasonable. Given Claimant's multiple pre-existing injuries, Employer/Surety's assertion that ISIF shared liability herein was not unreasonable. The Commission is the final evaluator of permanent disability. Employer/Surety's position herein was not unreasonable.

97. Claimant has not proven his entitlement to an award of attorney fees.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven he suffers permanent impairment of 9% of the whole person with 4% attributable to the 2014 industrial accident and 5% attributable to pre-existing conditions.

2. Claimant suffers permanent disability of 70%, and has proven in the aftermath of his 2014 industrial accident that he is an odd-lot worker, totally and permanently disabled under the Lethrud test.

3. Apportionment pursuant to Idaho Code § 72-406 is moot.

4. ISIF bears no liability pursuant to Idaho Code § 72-332.

5. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is moot.

6. Claimant has not proven entitlement to an award of attorney fees.

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

DATED this __17th__ day of __January__, 2019.

INDUSTRIAL COMMISSION

___/s/_____
Thomas P. Baskin, Chairman

___/s/_____
Aaron White, Commissioner

___/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___17th___ day of __January__, 2019, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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_____/s/_____