BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KENNETH CHRISTIANSEN, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2013-018456** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED MAY - 7 2021 INDUSTRIAL COMMISSION

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 Boise, Idaho, on October 21, 2020. Claimant was represented by Daniel Luker. Daniel Miller 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 10, 2021.

ISSUES

At hearing, the parties acknowledged the issues to be decided are:

1. Whether Claimant is totally and permanently disabled;
2. Whether ISIF is liable under Idaho Code § 72-332; and
3. Apportionment under the *Carey* Formula, if applicable.

BACKGROUND INFORMATION

Claimant was severely injured while working for Nelson Construction Co., (Nelson's) in an industrial accident on July 10, 2013. Claimant sued Nelson's for benefits, and Nelson's

sued ISIF for apportionment. Nelson's and Claimant settled prior to hearing, and Claimant assumed the apportionment claim against ISIF.

CONTENTIONS OF THE PARTIES

Claimant argues the injuries he received in his 2013 industrial accident at Nelson's, when combined with his pre-existing physical impairments, render him totally and permanently disabled (either by the 100% method or by the odd-lot doctrine). Pre-existing medical impairments include –

- Left hand degloving and related shoulder injury,
- Loss of hearing in right ear and partial hearing loss in left ear,
- Arthroplasty of right 4th and 5th toes due to foot deformity,
- Chronic anxiety disorder and depression, and
- Low back issues,

and his relevant non-medical factors –

- Lack of education,
- Sex offender conviction and registration as sex offender,
- Advanced age, and
- Past work history.

Defendant is responsible for apportioned benefits equal to Claimant's pre-existing permanent physical 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, and as such 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. Joint Exhibits (JE) 1 through 67;[1]

3. The post-hearing deposition transcript of Robert Friedman, M.D., taken on November 12, 2020;

4. The post-hearing deposition transcript of Nancy Collins, Ph.D., taken on November 24, 2020; and

5. The post-hearing deposition transcript of William Jordan, taken on December 3, 2020.

All objections preserved during the depositions, including those made regarding JE 65 and 66, are overruled.

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. Claimant was 63 years old at the time of hearing. He quit school in ninth grade and obtained a GED[2] in 1998 while incarcerated on a felony sex offense. Claimant is a registered sex offender. He spent twelve weeks in the army, quitting just after basic

[1] At the time of hearing, Claimant objected to the admission of proposed Joint Exhibits 65 and 66 (prepared by expert witness William Jordan) and the matter was taken under advisement pending Mr. Jordan's deposition. The objection is hereby overruled, and the proposed exhibits are admitted.

[2] Claimant testified he only passed the GED testing with considerable help from his teacher during the test, who would "guide" Claimant to the right answers with not-so-subtle questions such as "are you sure?" until Claimant hovered over the correct choice.

training with an honorable discharge. Claimant has minimal reading and computer skills and almost no writing ability. His past employment has typically been in medium to heavy physical exertion level manual labor jobs in the unskilled to semi-skilled categories.[3]

RELEVANT PAST MEDICAL CONDITIONS

2. Since 1979 Claimant has had no hearing ability in his right ear. In 2010, he was fitted for a hearing aid in his left ear to assist with partial hearing loss in that ear.

3. In 2005, Claimant suffered a degloving and crush injury to his left hand which also impacted his left shoulder, resulting in rotator cuff surgery. Claimant testified he permanently lost strength and dexterity in his left hand and arm from that accident.

4. Claimant received a PPI rating of 6% UE for loss of motion in his index finger and 10% UE PPI due to his left shoulder use restriction, for a combined whole-person (WP) PPI rating of 9%. An FCE done in connection with that accident placed Claimant's work abilities in the medium strength category. However, he was released by his physician to return to work without restrictions.

5. Claimant testified in deposition and at hearing that prior to his most-recent work accident (July 10, 2013), his left shoulder and hand caused some issues with his ability to perform certain tasks while working for Nelson's, such as tightening large bolts and shoveling, but after the 2013 accident his left shoulder hurt much worse and was more restricted.

[3] See generally Claimant's deposition of October 8, 2019, (JE 41) pp. 91 – 116, as well as the vocational reports of William Jordan and Nancy Collins.

6. In 2010, Claimant underwent a same day surgery to correct a hammer toe condition of his fourth and fifth toes on his right foot. It appears from the record that recovery was uneventful.

7. Records from the VA in 2008 document a chronic anxiety disorder for which Claimant refused treatment. According to those records, Claimant's anxiety was worsened by thinking about his degloving accident. Beginning in 2009, Claimant was prescribed bupropion as part of a "stop smoking" regimen. Subsequent VA records show the bupropion (Wellbutrin) was also used to treat Claimant's anxiety, with good effect.

8. Numerous depression screenings administered by the VA to Claimant through the years preceding the industrial accident in question were uniformly negative for depression.

10. From time-to-time Claimant's back would bother him, mostly after heavy shoveling. He saw a chiropractor from two to four times a year. Nothing in the record suggests Claimant's back problems were significant prior to his 2013 accident, although his low back did cause periodic temporary pain and movement limitation which was well treated with electric stimulation or acupuncture. Before 2013, Claimant engaged in snowmobiling, motorcycle riding, sky diving, and camping.

CLAIMANT'S 2013 INDUSTRIAL ACCIDENT

11. On July 10, 2013, Claimant's job duties included hoisting one-ton bags of crushed glass with a forklift over a metal bin, where he would then pull a cord on the bottom of the bag which would open the bag and allow the glass to spill into the bin. On that day, when Claimant pulled the cord on a full bag of glass, the straps holding the bag to the forklift broke and the bag of glass fell onto Claimant, crushing him and dragging him partially into and across the lip of the metal bin.

12. The accident resulted in multiple facial fractures to Claimant's sinus cavities, eye sockets, nose, and jaw; it knocked out Claimant's teeth[4] and lacerated his lower lip to the point of nearly tearing it off. Additionally, the accident injured Claimant's shoulders and neck. Claimant also received a concussion in the accident which led to recurring headaches and bouts of dizziness. Claimant's bilateral pectoralis major muscles were damaged; the left muscle was almost completely torn away from Claimant's chest, and the right was partially torn. The pectoralis injuries were not able to be repaired, thus leaving Claimant with "obvious deformities of the pectoralis major bilaterally" and significant corresponding weakness. JE 19, p. 2285.

13. Claimant underwent a series of surgeries to reconstruct and repair his face, nose, and mouth throughout the fall and winter of 2013.

14. By 2014 Claimant had returned to work at Nelson's with several limitations. He could no longer climb a ladder or shovel more than on a very limited basis. Even with the reduction in the physical aspects of his work Claimant noticed his body had "deteriorated" with pain in his shoulders, upper chest, and back. His legs regularly went numb. Tr. p. 34. In February 2014, Claimant told Nancy Greenwald, M.D., that he was having memory issues, continuing intermittent neck pain, low grade pain in his thoracic and lumbar spine, and fatigue. Claimant's lower lip had no feeling in it, which bothered him while shaving. Claimant had trouble breathing normally. He was not sleeping well. He suffered from borderline depression.

15. Dr. Greenwald felt Claimant's greatest injury causing functional loss was his pectoralis ruptures. She placed his functional limitations due to this injury in the moderate to

[4] Claimant testified his teeth were knocked out but at various points in the record there is mention of damage to Claimant's dentures. In either event, Claimant suffered damage to his mouth which resulted in dental implants and dentures.

severe category and noted his ruptures prevented his upper arm motion as well. She assigned Claimant a 22% WP impairment for the pectoralis injuries. Dr. Greenwald also assigned Claimant impairments for his lower back (2% WP) and for his concussive symptoms (2% WP). Finally, she assigned an 8% WP impairment rating for Claimant's facial lacerations and numbness, nasal obstruction, and scarring.

16. In late October 2015, Dr. Greenwald saw Claimant for issues related to depression, spinal pain and bilateral arm weakness. Cervical MRIs showed multi-level spondylotic changes and neural foraminal stenoses. Dr. Greenwald diagnosed cervical radiculitis at C4 through C6. Claimant underwent a right C4-5 transforaminal epidural steroid injection.

17. At his January 20, 2016 visit with Dr. Greenwald, Claimant's cervical pain was back, he was having pain when walking, and was suffering from depression. Claimant's pain "was wearing him down" and he wanted to go on disability. Dr. Greenwald felt it was important to treat his depression and started him on antidepressants.

18. Claimant's bilateral arm weakness continued to the point where Dr. Greenwald referred Claimant to Paul Montalbano, M.D., for a neurological surgery consultation August 2015. Dr. Montalbano recommended a two-level cervical fusion, related to the 2013 industrial accident. The surgery took place on November 20, 2017. Claimant did not return to work after this surgery. Claimant was on SSDI at the time of the hearing.

19. After the cervical surgery, Dr. Greenwald provided an impairment rating of 15% WP for Claimant's neck injury with no apportionment for pre-existing conditions. She also ordered permanent work restrictions at that time of no chest press or chest adduction maneuvers, occasional shoveling, rare ladder climbing, and a 15-pound lifting restriction due to the neck injury.

DISCUSSION AND FURTHER FINDINGS

20. Claimant asserts ISIF liability pursuant to 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 SIF account.
>
> (2) "Permanent physical impairment" is as defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become unemployed. This shall be interpreted subjectively as to the particular employee involved, however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

21. Idaho Code § 72-422 defines a permanent impairment as "any anatomical 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."

22. To establish ISIF liability, Claimant must prove his preexisting permanent physical impairment(s) combined with the subsequent industrial injury to cause total permanent disability.

PERMANENT DISABILITY

23. "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.

24. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company,* 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). 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).

25. Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Indus.,* 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund,* 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability rests with Claimant. *Seese v. Idaho of Idaho, Inc.,* 110 Idaho 32, 714 P.2d 1 (1986).

TOTAL PERMANENT DISABILITY

26. The first prerequisite to ISIF liability is a finding that Claimant is totally and permanently disabled. *See e.g., Hope v. Indus. Special Indemn. Fund*, 157 Idaho 567, 571, 338 P.3d 546, 550 (2014); (*After* the Commission determines a worker is totally and permanently disabled, the worker must establish four elements to apportion liability to the ISIF....) (Emphasis added.) A finding of disability less than total, after taking into account all of Claimant's medical and non-medical factors which negatively impact his

ability to engage in gainful activity, now and in the future, precludes the possibility of ISIF liability. The parties disagree on whether Claimant is totally and permanently disabled.

27. Total permanent disability may be established using either the 100% method or the odd-lot doctrine. Under the 100% method, Claimant must prove his medical impairment and non-medical factors combine to equal a 100% disability. Under the odd-lot doctrine, Claimant must show he was 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, absent business boom, the sympathy of the employer, temporary good luck, or a superhuman effort on Claimant's part. *See, e.g. Carey v. Clearwater County Road Dept.,* 107 Idaho 109, 112, 686 P.2d 54, 57 (1984).

Total Disability Summary and Analysis

28. Claimant first argues he is totally and permanently disabled under the 100% method due to his pre-existing medical impairment and those caused by the industrial accident in question. He points out his 2005 degloving/shoulder injuring accident resulted in a 9% WP impairment rating. Claimant received additional WP PPI ratings from injuries occasioned solely by his 2013 accident as follows; 8% - facial lacerations/numbness; 22% - pectoralis ruptures; 2% - concussion; 2% - low back pain; and 15% - cervical injury.

29. Claimant asserts he is entitled to have the Commission determine (rate) his other "anatomical or functional abnormalities" under I.C. § 72-422. These abnormalities include Claimant's hearing loss (total in right ear; hearing aid assisted in left); arthroplasty of his right fourth and fifth toes; Claimant's chronic anxiety disorder related to his degloving injury; depression, (which Claimant alleges pre-existed, and was aggravated by Claimant's 2013 accident); and his low back condition, (which pre-existed, but was allegedly aggravated

by the 2013 accident). While Claimant received a rating for his low back injury from 2013, no apportionment (or additional rating) was added for his pre-existing low back issues.

30. After all the rated and ratable conditions are evaluated, Claimant argues his non-medical factors affecting his permanent disability rating must be considered. These include Claimant's age, lack of education, criminal history and sex offender status, and past work history which was limited to manual labor which often exceeded his current work restrictions. None of these non-medical factors is in serious dispute.

31. Claimant urges the Commission to assign such impairment ratings to Claimant's unrated abnormalities that when combined with his rated impairments and coupled with his non-medical factors, Claimant is 100% disabled. For reasons explained below, this invitation is rejected.

32. As the Commission noted in *Gormley v. South State Trailer Supply,* IIC 2010-019605, the Idaho Supreme Court in *Mazzone v. Texas Roadhouse, Inc.,* 154 Idaho 750, 302 P.3d 718 (2013), made it clear the Commission is not empowered to apply its own interpretation to medical guides, such as the *AMA Guides to the Evaluation of Permanent Impairment* to assess a claimant's permanent impairment. However, the Commission can and must evaluate a totality of the evidence to determine whether a claimant is totally and permanently disabled. In reality, as noted in *Gormley*, finding an exact PPI rating for any of Claimant's pre-existing medical conditions is only relevant if and when apportionment of responsibility for those conditions between the employer and ISIF is appropriate. In this case, for reasons set out below, such apportionment is not required.[5]

[5] As pointed out in *Gormley,* if Claimant herein satisfied all elements of ISIF liability, the Commission would not be able to apportion those unrated physical impairment between employer and ISIF under the *Carey* formula. As such, even if Claimant prevailed in its case against ISIF, such apportionment could only include impairments related to Claimant's 2005 industrial accident for which PPI ratings were supplied. *See Gormely* at ¶ 22, pp. 12-14.

33. Claimant also argues that Claimant is totally and permanently disabled under the odd-lot doctrine. This argument will be analyzed further below.

34. While Claimant argues for total disability under two separate theories (100% and odd-lot), there is no need under the facts of this case for a separate detailed analysis under each method. In the first place, a finding of total permanent disability is a "yes/no" condition precedent to analysis of ISIF liability. As noted above, only when a claimant is found to be totally and permanently disabled does there even arise a potential for ISIF liability. Obviously, if Claimant is not totally disabled under the odd-lot theory, he cannot be totally disabled under either theory, since the "100% method" of total disability carries the more onerous criteria for total disability.[6] If Claimant is an odd-lot worker, he has met the threshold for ISIF liability and there is no need to determine if Claimant is also totally disabled under the 100% method. This is especially true where, such as here, the facts do not support a 100% disability finding. As such, the analysis will focus on whether Claimant is an odd-lot worker.

Total Disability under the Odd-Lot Method

35. Claimant has the burden of establishing odd-lot status, which he may do in any one of three ways: (1) by showing that he has attempted other types of employment without success;

[6] Claimant argues that when his rated pre-existing impairments are coupled with those unrated impairments which the Commission should rate for him, the sum of all impairments would equal or exceed 100%, thus making him 100% disabled *and* fulfilling Claimant's requirement for showing the combining element of I.C. § 72-332. Even if such a rating was undertaken by the Commission, Claimant's impairments would fall far short of 100% and thus his arguments on this subject are unpersuasive. Additionally, it is not axiomatic that even if the past impairments when coupled with the last accident produce aggregate PPI ratings of 100% the "combining" element is definitionally satisfied. For example, there could be times when all pre-existing impairments were rated, but a claimant's last accident produced injuries sufficient for the claimant to be permanently and totally disabled without considering his pre-existing impairments, or his last injuries completely overshadowed his previous impairments, *e.g.*, the last accident caused amputation of a claimant's previously impaired but still useful arm. Also, not all rated impairments are necessarily a subjective hindrance to employment (such as Claimant's toe surgery, if rated) which would preclude them from inclusion in the "combining" analysis.

(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).

36. Dr. Collins argued that it would be futile for Claimant to seek employment when all of his medical and non-medical factors are considered. She noted Claimant's post-accident medical restrictions (most notably his 15-pound overhead lifting limit, no climbing, and ad lib position changes every 20 minutes) limit Claimant's work opportunities to be a courier/messenger (if Claimant had a reliable car). However, when his non-medical factors are considered, they would greatly reduce Claimant's chances of landing such employment. His age, felony record (including and most notably his sex offender status), and inability to write reports all preclude this type of employment, which do not exist in large numbers to begin with and are not readily available.

37. Mr. Jordan opined it was not futile (under certain criteria) for Claimant to seek employment, as there are jobs in the community for which Claimant would be qualified to hold even with his medical restrictions, personal limitations, and non-medical factors. Mr. Jordan noted Claimant returned to his time-of-injury employment and worked there (with accommodation) from December 2013 until he underwent neck surgery in 2017.

38. Mr. Jordan considered various restrictions placed on Claimant by Dr. Greenwald (treating physician), and Robert Friedman, M.D., (IME physician hired by employer). He also considered Claimant's self-perception of limitations. Under Claimant's self-perception, Mr. Jordan agreed Claimant would be totally and permanently disabled. Under Dr. Friedman's less-restrictive restrictions (25 pounds

repetitive lifting, 15 pounds over the shoulder lifting), Claimant would have lost 28% of the available job market in Mr. Jordan's opinion. Under Dr. Greenwald's more severe restrictions (15 pounds lifting), Claimant lost access to 72% of his pre-accident job market. Under both physician's restrictions Claimant lost no wages, and thus his permanent partial disability (1/2 of loss of job market) would be less than Claimant's PPI rating of 41%. Mr. Jordan concluded that Claimant's PPD was covered by his PPI rating.

39. While Mr. Jordan listed numerous jobs which Claimant would medically "qualify" for, most or all of those jobs are not realistic when the whole record is examined. While a more detailed analysis of vocational rehabilitation testimony and reports would be applicable in many cases, under the limited issues presented herein (ISIF's liability) and analysis on that limited issue, it is sufficient to find that Dr. Collins' opinions carry the greater weight, and her finding that Claimant is totally disabled under the odd-lot doctrine is more solidly grounded in the record as a whole.

40. Claimant was a marginal job seeker even before the 2013 accident. He gained his employment with Nelson's not through expertise and skill, but by persistence. He testified he would go by the shop every few days asking for work until finally he was put to work doing janitorial and maintenance jobs. He later was promoted to his time-of-injury position when the person who had that job left work for back surgery. Claimant thought his job at Nelson's was his "dream job" and in fact indicated he would go back to work there again if offered the job.

41. In many respects, Claimant did find his dream job at Nelson's. He did not have to interact with the public (which he testified he does not like to do), he had limited tasks which were repetitive and easy to learn, there was no paperwork or math or reading.

His non-medical factors did not hinder him at Nelson's. His past medical restriction of 50 pounds lifting (from his 2005 injury) was not an impediment, nor was his limited use of his left hand. Nor was his hearing loss. He enjoyed his work there.

42. After his 2013 accident and subsequent surgeries Claimant became depressed and more than once stated that he was not the same man he was before the accident. His anger issues worsened, and his attitude suffered. Claimant was forced to give up many hobbies he enjoyed prior to the accident, including snowmobiling and motorcycle riding. He applied for and obtained SSDI benefits.

43. Looking at Mr. Jordan's proposed employment opportunities, many can be eliminated by Claimant's criminal background. Any employer who requires a criminal background check would be unlikely to hire Claimant. As noted by Defendant, not all felonies are created equal, and sex offender on an L & L conviction is more abhorrent than many. By law, jobs putting the offender near children are illegal for sex offenders to apply for.

44. While technically Claimant did have a CDL he testified on how he obtained it and the fact that he never used it commercially and could not pass the physical when it came up for renewal. Also, stating that Claimant had "basic computer skills" as Mr. Jordan did, overstates Claimant's aptitude.

45. When reviewing the record as a whole, the restrictions imposed by Dr. Greenwald, his treating physician, are given more weight than those of IME physician Dr. Friedman.

46. Given Dr. Greenwald's restrictions, even if a few jobs may exist for Claimant, it would take a sympathetic employer in a very limited range of employment to hire Claimant.

47. When considering the totality of the evidence, Claimant has proven he is totally and permanently disabled under the odd-lot doctrine.

ISIF LIABILITY

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

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

49. After Claimant is found to be totally and permanently disabled, he must, in order to establish ISIF liability under Idaho Code § 72-332, prove the following: (1) a permanent pre-existing physical impairment; (2) which was manifest; (3) a subjective hindrance to employment; and (4) the preexisting impairment and the subsequent injury combined to result in total and permanent disability, or a permanent aggravation and acceleration of the pre-existing permanent physical impairment caused total and permanent disability. *Aguilar v. State of Idaho, Industrial Special Indemnity Fund,* 164 Idaho 893, 436 P.3d 1242 (2019).

50. Claimant argues the following pre-existing permanent physical impairments meet all the criteria for imposing liability on ISIF;

- Left upper extremity (hand and shoulder) injuries occasioned in 2005 (9% WP PPI rating);
- Hearing loss; total in right and diminished capability in left (no PPI rating);
- Depression (status as pre-existing disputed, and no PPI rating);
- Low back problems (no PPI rating).

51. Of the argued pre-existing impairment conditions listed above, only Claimant's left upper extremity conditions were rated. The three unrated impairments will be disposed of first.

52. To begin with, the Commission has made it clear it is Claimant's duty to come to hearing armed with impairment ratings for pre-existing conditions, such as was done in cases like *Talbot V. Summit Wall Systems,* IIC 2012-004039 (Nov 14, 2017), where Dr. Friedman undertook to belatedly rate the claimant's pre-existing impairments for use in the claimant's case against ISIF. As noted in *Gormley, supra,* (a case cited by Claimant herein in post-hearing briefing);

> [t]he Commission has had on occasion in the recent past to reiterate to practitioners the importance of coming to hearing armed with all facts necessary to prove apportionment in both total and less-than-total cases. *** It seems necessary to repeat that failure to prove such a foundational element of the case against the [ISIF] will ordinarily leave the Commission with no choice but to conclude that the elements of [ISIF] liability have not been satisfied.

Gormley at ¶ 22, p. 14. Claimant's failure to prepare ratings for the alleged pre-existing impairments precludes apportionment of those impairments. Furthermore, the alleged pre-existing impairment suffer from other fatal flaws, discussed briefly below. Finally, none of the alleged pre-existing conditions combined with, or were permanently aggravated to the point of leaving Claimant totally disabled by the 2013 accident, as further discussed hereinafter.

53. There is no medical record effectively establishing the claim that Claimant suffered from depression prior to the 2013 accident, notwithstanding Dr. Friedman's attempt to equate anxiety with depression. VA records consistently documented a lack of depression on testing and subjective statements from Claimant. The fact that Dr. Friedman testified that

anxiety and depression are often found together, and sometimes are coded identically is of little import. The weight of the medical records establish that Claimant suffered from anxiety, particularly when he thought about the degloving accident, prior to 2013. After his accident at Nelson's, he developed depression, increased anger management issues, and felt like he was no longer the man he used to be, which affected his desire to work and his daily life activities.

54. While Claimant did have hearing loss well prior to 2013, there is no evidence such condition was a subjective hindrance to his obtaining or keeping employment. He testified that it caused him at times to misjudge where a noise was coming from but gave no instances of when or how his hearing loss hindered him from finding or keeping employment. Claimant's post-hearing briefing cites no actual examples of how or why Claimant's hearing loss hindered his employment.

55. Claimant failed to prove by a preponderance of the evidence that his hearing loss was a subjective hindrance to employment.

56. Prior to 2013, Claimant would have periodic episodes where his low back would hurt. He testified to one instance where he needed acupuncture to resolve a low back/radicular pain issue. The salient point is that the treatment resolved the problem. Claimant also testified that on occasion, if he shoveled more than normal, his back would have episodes of pain to the point he would seek chiropractic treatment. Periodic sore back muscles which respond to electrical stimulation therapy do not constitute a permanent physical impairment. Furthermore, Claimant did not present any evidence establishing how his back condition hindered his employment in any meaningful way. He never lost a job or failed to get a job he was seeking or quit a job due to his low back condition. At most,

Claimant's low back was an episodic situation caused by overuse and treatable with limited chiropractic care on a sporadic basis. It was not an employment-limiting condition.

57. While it is true that Claimant's low back hurt him more at some point after his 2013 accident, Dr. Greenwald did not relate Claimant's post-accident low back complaints to a pre-existing physical impairment. The record in this regard shows that in March 2015, Claimant experienced severe low back pain when bending over to pick up a tarp. He was treated at the VA after several consecutive trips to the chiropractor in a week proved ineffective. Claimant was prescribed medication and told it might take up to three weeks for back issue to resolve. No further notes exist from the VA regarding this episode. Claimant testified to persistent low back pain with leg weakness after his 2013 accident.

58. While Dr. Friedman testified that Claimant's low back issues pre-2013 were permanently aggravated by the 2013 accident, there is little evidence to support such opinion. He does not identify what Claimant's pre-accident low back condition was, and how that condition was permanently aggravated in 2013. His conclusory opinion carries little weight when the record as a whole is considered. Claimant's testimony on his continuing back problems focused on his post-2013 condition, thus implying that the 2013 accident was responsible for his current low back pain and weakness.

59. Claimant's only rated pre-existing physical impairment, his left upper extremity, came with permanent restrictions including a 50-pound lifting restriction. This was conceivably a subjective hindrance to employment, as it precluded certain heavy-duty jobs from Claimant's consideration. While Claimant did not testify as to any potential jobs he would have applied for if not for his restrictions or spoke of any jobs he lost due to his restrictions, there existed jobs for which Claimant would probably otherwise be qualified if not for the lifting restrictions.

Individuals with limited education tend to work in low-skill heavy work capacity jobs and limiting access to such work would have been at least a potential hindrance for Claimant. As such, Claimant has satisfied the first three prongs of Idaho Code § 72-332. The remaining analysis will focus on the "combining" element of Idaho Code § 72-332.

"Combining Element"

60. Even though after his 2013 industrial accident Claimant was rendered totally and permanently disabled, none of his alleged pre-existing physical impairments "combined with" his injuries suffered in 2013 to render Claimant totally and permanently disabled.

61. The major contributor to Claimant's total disability was the tremendous injuries he suffered to his bilateral pectoralis major muscles and the resultant medical restrictions and personal limitations caused by such injury. Claimant's cervical spine injury and surgery with resultant lifting limitations also greatly contributed to his permanent disability. Claimant's depression suffered after the 2013 accident affected Claimant's outlook for employment and motivation. While no expert testified that Claimant's depression was a permanent condition, the reality of Claimant recognizing his physical limitations, impacts on his life at his age and without prospects for retraining or further education, and a dearth of suitable jobs is a factor in Claimant's inability to successfully seek work. These elements combined to render Claimant totally and permanently disabled.

62. While Claimant's left hand and shoulder were rated pre-existing physical impairments, those injuries did not contribute to his total disability. Even if Claimant had a fully functioning left hand and no problems at all with his left shoulder, his injuries suffered in the 2013 accident would have rendered him totally and

permanently disabled. As such, there is no "but for" element involved, as Claimant cannot make the argument that "but for" his prior left upper extremity impairments he would not have been totally disabled as a result of his 2013 accident.

63. Likewise, the evidence does not support, and the Claimant does not contend, that Claimant's left upper extremity pre-existing impairment was permanently aggravated and accelerated by the 2013 accident to cause total and permanent disability.

64. Claimant's unrated hearing loss and low back conditions likewise did not figure into Claimant's total disability rating for the same reason. Neither condition can be said to fit into the "but for" analysis. Even if Claimant had perfect hearing and no low back issues at any point in his life he still would be totally disabled as the result of the permanent injuries suffered in his 2013 accident. The fact that Claimant has more consistent low back complaints after his 2013 industrial accident makes his life more difficult, but even without such low back pain and weakness Claimant would still be permanently and totally disabled from his neck surgery and pectoralis major tears, and the medical restrictions and physical limitations resultant therefrom, coupled with his non-medical factors and his mental outlook.

65. Claimant's permanent injuries resulting from his 2013 industrial accident, when coupled with his non-medical factors discussed above, standing alone, are sufficient to declare Claimant an odd-lot worker. As such, his other pre-existing physical impairments do not allow for apportionment of benefits against ISIF under the workings of Idaho Code § 72-332.

66. Claimant has failed to prove by a preponderance of the evidence that he is entitled to benefits from Defendant State of Idaho, Industrial Special Indemnity Fund under Idaho Code § 72-332.

CONCLUSIONS OF LAW

1. Claimant has proven by a preponderance of the evidence that he is totally and permanently disabled as an odd-lot worker.

2. Claimant has failed to prove by a preponderance of the evidence that he is entitled to any benefits from Defendant State of Idaho, Industrial Special Indemnity Fund under Idaho Code § 72-332.

3. Analysis of the application of the *Carey* Formula is moot.

RECOMMENDATION

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

DATED this 23rd day of April, 2021.

INDUSTRIAL COMMISSION

Brian Harper

Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of May, 2021, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by email transmission and by regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KENNETH CHRISTIANSEN, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2013-018456** **ORDER** FILED MAY - 7 2021 INDUSTRIAL COMMISSION

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 recommendation of the Referee. The Commission concurs with this recommendation.

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, IT IS HEREBY ORDERED that:

1. Claimant has proven by a preponderance of the evidence that he is totally and permanently disabled as an odd-lot worker.

2. Claimant has failed to prove by a preponderance of the evidence that he is entitled to any benefits from Defendant State of Idaho, Industrial Special Indemnity Fund under Idaho Code § 72-332.

3. Analysis of the application of the *Carey* Formula is moot.

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

DATED this the 6th day of May, 2021.

INDUSTRIAL COMMISSION

Aaron White, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of May, 2021, a true and correct copy of the foregoing **ORDER** was served by email transmission and by regular United States Mail upon each of the following:

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