BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KENT CLEMENT,

Claimant,

v.

PRESTON SCHOOL DISTRICT 201,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,

Defendants.

IC 2014-028268

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Sonnet Robinson, who conducted a hearing on September 29, 2020. Claimant, Kent Clement, was present in person and represented by Patrick George of Pocatello. Steven Fuller of Preston represented Defendant/Employer. Bren Mollerup of Twin Falls represented Defendant/ISIF. The parties presented oral and documentary evidence. Post-hearing depositions were taken. The matter came under advisement on March 24, 2021 and is ready for decision.

ISSUES

The issues[1] to be decided are:

1. Whether or not Claimant's condition is attributable in whole or in part, to a pre-existing injury or injuries/infirmities/or conditions.
2. Degree of permanent disability including whether Claimant is totally and permanently disabled under the "Odd Lot" doctrine or by the 100% method due to his medical and non-medical factors;
3. ISIF's liability pursuant to Idaho Code § 72-332; and,
4. *Carey* apportionment if liability is established.

CONTENTIONS OF THE PARTIES

Claimant contends that he is totally and permanently disabled via the 100% method and the odd lot method. All vocational and medical experts agree that Claimant is totally and permanently disabled. Claimant's Employer was not a sympathetic employer.

Defendant/Employer contends that Claimant was totally and permanently disabled prior to the industrial accident and was employed by a sympathetic employer. Defendant/Employer argues that if Claimant was found totally and permanently disabled after his October 2014 injury, ISIF is liable for apportionment of that total and permanent disability.

ISIF also contends that Claimant was totally and permanently disabled prior to the industrial accident and was employed by a sympathetic employer.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

[1] Causation, Claimant's further entitlement to medical care, permanent partial impairment, and permanent partial disability were noticed, but not argued, and are deemed waived.

1. The Industrial Commission legal file;

2. Joint Exhibits 1-19;

3. The testimony of Claimant, Kent Clement, Janine Juhasz, and Craig Kunz, taken at hearing;

4. The post-hearing depositions of:

   a. Kenneth Newhouse, MD, Delyn Porter, MA, CRC, CIWCS, taken by Claimant;

   b. Brian Tallerico, DO, and William Jordan, MA, CRC, CDMS, taken by Defendant/Employer;

   c. Barbara Nelson, MS, CRC, taken by ISIF.

All outstanding objections are overruled.

After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 69 years old at the time of hearing and was head custodian for Employer until he retired in 2016. JE 18:4.

2. **Relevant Medical History.** On August 10, 1987, Claimant injured his low back helping escort an inmate while working for the California Department of Correction. JE 9:1. Claimant treated conservatively with medications and physical therapy until a CAT scan revealed a herniated disc at his L5-S1 level. JE 6:6, 11. On September 4, 1987, Claimant underwent a microdiscectomy at his L5-S1 level, left side. JE 6:2.

3. Claimant recovered and was rated at "Category "B" – Disability Precluding Very Heavy Work" which translated to a 20.5% permanent disability rating; Claimant's surgeon wrote

that Claimant had lost one quarter of his ability to bend, stoop, lift, push, pull, or climb. JE 6:19; JE 9:3. Claimant returned to his normal duties as a correctional officer. JE 6:19, 23.

4. On June 3, 1992, Claimant again experienced low back pain while escorting a prisoner. JE 9:12. An MRI revealed Claimant had re-herniated his left L5-S1 disc, and Claimant underwent a laminectomy and microdissection on August 19, 1992. *Id.* at 13. Claimant returned to full-time work without restriction on March 1, 1993. *Id.* at 4.

5. On October 15, 1995, Claimant injured his left knee while responding to an alarm. *Id.* at 32. Claimant eventually underwent an arthroscopic partial meniscectomy and debridement and Claimant's treating physician restricted him from running, jumping, and standing, sitting, or walking for over 8 hours. *Id.* at 32, 26. Claimant was unable to return to his time of injury job due to these restrictions. *Id.*

6. Claimant applied for industrial disability retirement and was evaluated on October 30, 1997 by Elvert Nelson, MD. *Id.* at 28, 31. Dr. Nelson opined that Claimant had suffered a medial meniscus tear, had degenerative arthritis in the medial compartment, and was restricted to light work. *Id.* at 37. Claimant's application for disability retirement was approved on February 6, 1998. *Id.* at 39. Claimant's permanent disability rating was 71%. *Id.* at 44.

7. On June 8, 1998, Dr. Nelson supplemented his evaluation indicating that work as a computer technician should fit Claimant's physical capacities, which were outlined as follows: "approximately half the time in a sitting position, and approximately half the time in a standing or walking position with a minimal demand for physical effort whether standing, walking[,] or sitting… [no] repetitive squatting, kneeling, crawling, or climbing stairs. He can do these activities infrequently or rarely throughout an eight-hour workday." *Id.* at 46.

8. Claimant moved to Idaho, and in the winter of 2003, fell down some steps, injuring his left hip. Clt. Dep. 8/22/2019, 20:17-25. Brad Larson, MD, replaced Claimant's hip. *Id.* 21:4-9; JE 4:2.

9. On February 6, 2009, Claimant complained of low back and knee pain. JE 6:29-30. Claimant's lumbar X-ray revealed "severe" disk space narrowing at L5-S1 and facet joint degeneration at L4-L5 and L5-S1. *Id.* Claimant's right knee X-ray showed tricompartmental degenerative changes and moderately severe medical compartment joint space narrowing. *Id.* at 30. Claimant's left knee X-ray showed severe medial compartment joint space narrowing and medial and lateral degenerative changes. *Id.* On June 1, 2010, Claimant underwent bilateral L4-L5, L5-S1 ESI shots to treat his chronic low back pain. *Id.* at 31.

10. On May 3, 2011, Claimant underwent a second total left hip arthroplasty because his previous arthroplasty had failed. JE 4:7. Claimant followed-up on August 4, 2011 and reported doing well regarding his left hip. *Id.* at 16.

11. On May 19, 2011, Claimant presented for evaluation of his low back. JE 6:38. Claimant complained of pain in his low back, which radiated into his legs. *Id.* Fusion surgery was recommended at L4-5 and L5-S1, which was performed on June 28, 2011. *Id.* at 65.

12. The surgery was not successful, and Claimant continued to complain of leg pain and foot drop; on November 10, 2011, Claimant underwent a revision laminectomy at L4-L5 and L5-S1 and a revision foraminotomy along the L5 and S1 nerve roots. *Id.* at 71. Thereafter, Claimant's foot drop resolved.

13. Claimant again reported leg pain in July 2012. *Id.* at 82. Claimant's EMG revealed chronic L5-S1 radiculopathy, and Claimant was informed that surgery was indicated on December 6, 2012. *Id.* at 78-81. However, Claimant did not undergo lumbar surgery at that time.

14. Claimant presented to Nathan Momberger, MD, regarding his left knee on March 20, 2013. JE 5:2. Claimant underwent a left total knee replacement on July 16, 2013. *Id.* at 6. On August 14, 2013, Claimant reported he had minimal pain and a good outcome from the left knee replacement. *Id.* at 11.

15. On November 18, 2013, Claimant presented to Brent Miller, MD, regarding right hand and wrist pain which had progressively worsened over the past two months. JE 7:4. Claimant reported difficulty with gripping and pushing. *Id.* Dr. Miller ordered an MRI, which showed a large central TFCC tear and severe arthritis, amongst other findings; Dr. Miller described Claimant as presenting with "multiple complex problems involving the right wrist… beyond conservative or nonoperative management" and recommended surgery. *Id.* at 6. Claimant declined surgery at that time.

16. On May 30, 2014, Claimant again presented to Dr. Momberger, this time for his right knee. JE 8:2. Claimant again reported a good recovery from his left knee replacement. *Id.* On June 24, 2014, Claimant underwent right knee replacement surgery to treat his end stage degenerative joint disease. *Id.* at 3. On September 25, 2014, Claimant reported disappointment that he was not pain free yet and was "obsessing over a few cement flex (sic) in [the] capsular area." *Id.* at 11. Dr. Momberger recorded that Claimant's right knee looked excellent and that Claimant was doing well. *Id.*

17. **Industrial Accident.** On October 9, 2014, Claimant was about to go on vacation and was showing his temporary replacement a light Claimant wanted replaced while he was gone. Clt. Dep. 4/19/2018, 60:1-12. Claimant described the accident as follows:

> I turned and started to walk out that door, and they had put these steps that you move around as a prop… they had set them right in front of the door. They are painted black, and the floor is painted black. I didn't see them. So I just turned, and

> I took a step, and I fell over. Actually, I probably would have went clear on my head off the stage. Jason grabbed me and pulled me back.

Id. at 60:25-61:8. Claimant felt a "pop" and pain. *Id.* at 61:18-22. Claimant went to Coeur d'Alene the next day and biked for a mile or two before the pain in his right knee forced him to stop. *Id.* at 62:3-8. Claimant sat down to rest and when he stood back up, his knee locked and started to "hurt really bad." *Id.* at 62:9-14. Claimant returned to work and reported the injury. *Id.* at 63:4-15. Claimant's knee was swollen, in pain, and Claimant ended up going to the hospital with 104 fever. *Id.*

18. On October 20, 2014, Claimant presented to Jacob Curtis, DO, regarding his right knee; Claimant reported pain that was limiting his range of motion. JE 8:13. Dr. Curtis assessed septic arthritis and treated Claimant with antibiotics for three weeks. *Id.* at 15.

19. On November 5, Claimant presented to Dr. Momberger who assessed traumatic hemarthrosis; Dr. Momberger suspected that Claimant's fever was because of medication or withdrawal because of a negative culture from his knee, but ultimately opined Claimant's fever was of "unknown origin." *Id.* at 12. Claimant was anxious to return to work, and Dr. Momberger released Claimant back to work with restrictions against lifting, bending, climbing, squatting, or prolonged walking or standing on hard surfaces. *Id.* at 12; JE 19:2.

20. On January 8, 2015, Claimant returned to Dr. Momberger. JE 8:34. Claimant was still experiencing pain in his knee, mostly at night and with laying on his side or lateral movement. *Id.* Claimant's X-rays revealed a substantial change from previous X-rays: there was a "fairly significant" fragment of bone cement that had broken free from the posterior rim of the tibial component. *Id.* Dr. Momberger recommended observation for the next three months because it would be a complicated procedure to remove the fragment, especially so soon after his last surgery. *Id.*

21. In a letter to Surety, Dr. Momberger opined that the mobile bone cement fragment was a direct result of his work-related injury, and that if Claimant did require surgery, it would be because of his traumatic fall on October 9, 2014. JE 19:4-5. Dr. Momberger closed with "[t]o be clear, had the patient not fallen and not developed an acute hemarthrosis, it is unlikely that any of the events of the last three months with regards to Mr. Clement's ability to work would have been affected." *Id.* at 5.

22. Claimant's pain and swelling increased thereafter, and on April 13, 2015, Claimant underwent a one-component arthroplasty revision and loose body removal performed by Dr. Momberger. JE 8:36. Claimant followed up on April 23, 2015 and Dr. Momberger recorded Claimant was doing well. *Id.* at 41. Claimant returned on July 16, and reported he was not doing as well as he would like; Dr. Momberger opined Claimant was not at maximum medical improvement (MMI). *Id.* at 42.

23. On October 22, 2015, Claimant reported he had trouble when he swam, walked long distances, or walked up and down stairs; overall Claimant was still unhappy with the results of his surgery. *Id.* at 44. Dr. Momberger recommended waiting another six months and advised Claimant that additional surgery was only going to have detrimental effects and to critically assess whether his pain was worth an additional surgery which may not improve his condition. *Id.*

24. In February 2016, Claimant wrote a letter to Preston School District explaining that he had decided to retire because his body was "catching up to [him]." JE 18:4; Tr. 154:5-8.

25. Claimant continued to have pain in his right knee and on April 18, 2016, Claimant underwent an open synovectomy, polyethylene exchange, and loose body removal performed by Dr. Momberger. JE 8:48. Dr. Momberger took samples from Claimant's knee during the surgery

which revealed a staph infection. *Id.* at 50. Claimant returned on April 25, Claimant's arthroplasty components were removed, and an antibiotic spacer was placed in his knee. *Id.*

26. Claimant's right knee infection cleared up, and Claimant underwent another total right knee arthroplasty on July 5, 2016. *Id.* at 63. Post-surgical X-rays showed a "very faint nondisplaced crack" in Claimant's tibia. *Id.* at 69. At follow-up on August 18, Claimant reported he already felt better than he did after his previous right knee surgeries. *Id.* at 71.

27. On January 5, 2017, Dr. Momberger declared Claimant's right knee at MMI. *Id.* at 73. On March 17, 2017, Dr. Momberger responded to a letter from Surety regarding restrictions and an impairment rating. JE 19:8. Dr. Momberger wrote "[t]he patient has retired and I feel that this will help him with the day to day demands of his knee understanding that he will have significant compromise." *Id.* Dr. Momberger rated Claimant at 20% whole person for his total knee arthroplasty, according to the 5th Edition of the AMA Guides to the Evaluation of Permanent Impairment, without apportionment, and released Claimant with no restrictions. *Id.*

28. Claimant returned to Dr. Momberger on July 12, 2017. *Id.* at 74. Claimant was frustrated with his results from knee surgery and felt his pain and swelling were worse than they had been in January. *Id.* Dr. Momberger opined:

> I think the patient has had a suboptimal result after multiple surgeries for chronic ongoing pain. I told the patient we're really towards the end of our options here as far as reconstructing his knee. I do not think he or his wife have any stomach for further knee surgery right now. I do not think there is frankly anything to fix right now. Having said that, I would say he has had a very mediocre result after complex series of surgeries, including two-stage revision for knee replacement… I think he needs to learn to live [with] his disability and his wife is confident he will be able to do that.

Id. On August 16, 2017, Dr. Momberger restricted Claimant from any impact concerning the knees such as jumping, jogging, or jumping jacks. JE 19:9.

29. **Unrelated Post-Accident Treatment.** An MRI of Claimant's low back taken September 9, 2015 revealed significant lateral recess narrowing and significant left neuroforaminal narrowing at Claimant's L3-L4 levels. JE 6:87. Claimant saw Vikas Garg, MD, on December 15, 2017 and reported worsening pain in the last year, down his right leg, and that his pain was worse with walking. *Id.* at 89. Claimant received two ESI shots to treat his pain. *Id.* at 92-95. Claimant underwent an extension of his previous fusion at L3-L4 on July 15, 2019. JE 16:7.

30. On February 28, 2017, Claimant underwent a right scaphoid four-corner fusion, right distal ulna resection. JE 7:14. Claimant developed acute carpal tunnel syndrome and underwent a right open carpal tunnel release and flexor tenosynovectomy. *Id.* at 16. Claimant complained of numbness and pain at several follow-up appointments, and by March 12, 2018, a revision open carpal tunnel release was recommended. *Id.* at 23. This is the last medical record regarding Claimant's right wrist.

31. Claimant underwent a functional capacity assessment on September 5 and 6, 2017 with Brendan Bagley, PT, CEAS. JE 10:3. Mr. Bagley found Claimant gave consistent, full effort during the two-day testing. *Id.* at 6. Mr. Bagley recorded Claimant's capacities as follows:

Abilities	Occasionally	Frequently	Constantly	Functional Considerations
Lift-Carry	10 lbs	5 lbs	0 lbs	Limping right leg, unsafe balance
From Floor	10 lbs	5 lbs	0 lbs	Weakness right leg, pain in knee
To shoulder	15 lbs	10 lbs	5 lbs	Poor balance shifting weight on feet
Push Pull	Push 67 ft Pull 61 ft	Push 33 ft Pull 30 ft	Push 16 ft Pull 15 ft	Weakness right leg
Hand Grip Right Hand Grip Left	Right: 69 lbs Left: 130 lbs	Right: 34 lbs Left: 65 lbs	Right:17 lbs Left: 32 lbs	Unrelated right wrist fusion
Pinch Grip (3pt) Pinch Grip (3pt)	Right: 19 lbs Left: 25 lbs	Right: 9 lbs Left: 12 lbs	Right: 4 lbs Left: 6 lbs	Same as above

Hand Coordination	XX			Unrelated right wrist fusion
Sit		XX		Stiffness, pain right knee
Stand-Walk	Rarely			Stiffness, weakness, pain right knee
Bend-Reach (trunk)	Not safely able			Weakness, pain right knee/low back
Low Level Activity	Not safely able			Unsafe, leg weakness, kneeling on knee replacement
Elevated activity	XX			Knee pain and fatigue
Climb Stairs	Not safely able			Unsafe, poor balance

Id. Mr. Bagley recorded that Claimant's abilities significant decreased on the second day of testing. *Id.* at 2. Mr. Bagley ultimately opined that Claimant's function would preclude him from most occupations because he lacked the essential abilities to safely perform work at a sedentary or light level of work; specifically, Claimant's limitations in sitting prevented him from being able to perform even sedentary work. *Id.* at 2, 6.

32. On June 16, 2018, Brian Tallerico, DO, examined Claimant at Defendant/Employer's request. JE 14:1. Dr. Tallerico conducted a physical exam, reviewed records, and interviewed Claimant. Claimant attributed his retirement to his orthopedic injuries as follows: 50% his low back, 25% his right knee, and 25% his right wrist, more specifically his right thumb weakness. *Id.* at 11. Going up and down stairs or inclines/declines was the most uncomfortable activity for Claimant. *Id.* at 12. Dr. Tallerico diagnosed: right knee contusion/hemarthrosis and a fractured cement mantle related to the industrial injury, on a more probable than not basis; subsequent surgery to remove the cement related to the industrial injury, on a more probable than not basis, which was complicated by an infection, requiring a two-stage revision, indirectly related to the industrial injury on a more probable than not basis.

33. Dr. Tallerico opined that Claimant's significant orthopedic conditions were obstacles prior to his industrial injury but did not issue any pre-injury restrictions related to any individual condition. *Id.* at 18. Dr. Tallerico adopted Claimant's apportionment regarding his inability to work as 50% low back, 25% right knee, and 25% right wrist. *Id.* Dr. Tallerico, utilizing the 6th edition of the AMA Guides, rated Claimant's right knee at 15% whole person with 60% attributed to the industrial accident and 40% pre-existing, his left knee at 10% whole person[2], his right wrist at 7% whole person, and his lumbar spine at 19% whole person impairment. *Id.* at 18, 24, 19.

34. Dr. Tallerico was deposed on December 18, 2020. Regarding Claimant right wrist, post-fusion, Dr. Tallerico would expect Claimant to have restrictions against forceful grip activities and heavy or repetitive lifting; Dr. Tallerico thought it would be difficult for Claimant to move furniture or garbage, screw in a lightbulb, or any other activity requiring manipulation. Tallerico Depo. 10:14-11:24. Regarding Claimant's pre-existing low back condition, Dr. Tallerico opined that prolonged sitting, standing, walking, or remaining in any single position for an extended period would be difficult; heavy lifting, repetitive lifting, getting up and down off the floor, excessive ladder climbing, overhead activities, and shoveling snow would also be difficult. *Id.* at 12:1-23. Claimant's bilateral knee conditions would make it difficult to kneel or crawl. 12:24-13:5.

35. Dr. Tallerico admitted that any revision of a joint replacement, such as Claimant's revision hip replacement, will not be as good as the primary replacement:

> the results are poor every time you go back in and redo a joint the outcomes as far as satisfactory scores and objective assessments, range of motion, stability, that

[2] Dr. Tallerico rated Claimant at 25% of the lower extremity, which translates to 10% whole person in the AMA Guides.

> type of thing goes down. Not drastically so, but it does inch downward… every time you go back in and redo it, it may drop 10% or so.

Id. at 14:6-10, 13-15. However, regarding Claimant's right knee revision specifically, Dr. Tallerico would not assign any further restrictions than for Claimant's primary right knee replacement; in other words, Claimant's revision did not change or increase the restrictions for his right knee. *Id.* at 19:24-20:6. Dr. Tallerico believed that Claimant had returned to baseline with respect to his right knee. *Id.* at 35:9-13.

36. On cross, Dr. Tallerico explained that, in his view, most of the reduction in satisfaction with a revision joint replacement was subjective and explained by patient dissatisfaction about having to do another surgery. *Id.* at 48:14-50:18. Dr. Tallerico does consider risk when assigning restrictions, but did not think Claimant was at any greater risk of injury because of his right knee revision and did not think Claimant's increased risk vis-à-vis another knee injury merited further restrictions. *Id.* at 61:12-70:23.

37. On November 22, 2019, Kenneth Newhouse, MD, issued a report at the request of Claimant. JE 13:1. Dr. Newhouse conducted a physical exam, reviewed records, and interviewed Claimant. Claimant relayed that pre-accident, his total right knee replacement was "much more functional for day-to-day activities with respect to walking, climbing, going up and down stairs, sitting and kneeling" than it was post-accident and subsequent two-stage revision. *Id.* Dr. Newhouse agreed with the restriction issues by Mr. Bagley and opined that "at this point [the patient] cannot do his job." *Id.* at 2. Dr. Newhouse agreed with Dr. Tallerico's ratings and apportionment for the right knee, and clarified that prior to the industrial injury, Claimant's right knee impairment would have been 21%-25% lower extremity whereas post-accident it was 37% lower extremity. *Id.* Dr. Newhouse rated Claimant's left hip at 25% lower extremity (10% whole person). *Id.*

38. Dr. Newhouse opined that Claimant's post-accident right knee restrictions were greater than they were pre-accident. *Id.* at 3. He explained Claimant's knee was now "not nearly as functional as his previous knee replacement," that this was due to decreased capacity and tolerance, and that because of the crack in Claimant's tibia he would be at greater risk if he returned to work. *Id.* at 3. The only treatment options available if he injured his right knee again were fusion or amputation. *Id.* Regarding Claimant's pre-existing injuries, Dr. Newhouse opined that Claimant's total hip replacement, total knee replacement, revision total knee replacement, and fused wrist all contributed to Claimant being totally and permanently disabled. *Id.*

39. Dr. Newhouse was deposed on November 13, 2020. Dr. Newhouse opined that most patients will not recover from a total knee replacement for approximately six to 12 months after surgery, and therefore Claimant would have been expected to improve after his right total knee replacement in June but for the October accident; Dr. Newhouse opined Claimant was "nowhere near" MMI when his accident occurred. Newhouse Depo. 21:2-8; 51:7-8. Dr. Newhouse related all post-injury knee surgeries to Claimant's October 9, 2014 accident on a more probable than not basis. *Id.* at 26:11-14. Dr. Newhouse opined that the results from revision total knee replacements were "not as good as" primary (first) total knee replacements. *Id.* at 26:24-27:4; 35:18-23. Specifically, if Claimant was injured again at work, his treatment options would be a knee fusion or amputation; further, Claimant's FCE showed his strength, flexibility, and endurance (his physical capacity) had lessened to the point where he was no longer capable of doing his job. *Id.* at 33:19-35:23. Dr. Newhouse opined that Claimant was 100% medically disabled based on his many orthopedic issues and his use of narcotics. *Id.* at 37:6-19.

40. Dr. Newhouse explained that his opinion that Claimant was totally medically disabled was based on the restrictions identified by the FCE. *Id.* at 55:4-23. When asked whether

Claimant was medically disabled prior to his October injury, Dr. Newhouse replied "[t]he only thing I would say is he was working; he was doing his job." *Id.* at 58:22-59:2. Dr. Newhouse clarified that he did not discuss with Claimant the scope of any accommodations Claimant received while employed. *Id.* at 64:25-65:20. Dr. Newhouse only considered the fact that Claimant was employed and earning a paycheck when he concluded that Claimant was not medically disabled prior to the industrial accident. *Id.* at 65:21-66:20.

41. Claimant was deposed on April 19, 2018 by Defendant/Employer. JE 2. Claimant had a good result from his left total knee replacement but reported it was a little harder to walk up and down stairs and to kneel afterward. *Id.* at 53:8-13. After Claimant's non-industrial right knee replacement in June of 2014, Claimant returned to work but "more or less" just supervised other employees while recovering from his surgery. *Id.* at 58:1-59:20.

42. Claimant recalled he started having right wrist problems between 2008 and 2010. *Id.* at 75:9-11. He confirmed that he sought treatment in November 2013, as noted in ¶ 15, but declined the surgery recommended at that time. *Id.* at 76:17-77:2. Claimant remembered his right wrist did affect some of his activities: he utilized his left hand to push a broom and to push down tables, but stated he "made up for it the best I could and still accomplish my job." *Id.* at 75:13-77:22.

43. Regarding Claimant's left hip, Claimant reported after his revision surgery his left hip caused him "little problems." *Id.* at 83:6. Claimant reported if he could not do something because of his left hip, he would get help, for example, if there was a heavy snow, he would get assistance with shoveling. *Id.* at 83:9-20. Prior to the industrial accident, Claimant also had trouble going up and down stairs because of his hips and knees and lifting more than 50 pounds because of his back and knees. *Id.* at 85:14-87:11.

44. Regarding his low back prior to the accident, Claimant reported he had a difficult time moving tables and emptying the garbage, and required help from special education students to complete those tasks: "[Mrs. Littlewood] had her kids come and help me because I was having a lot of difficulty doing my job." *Id.* at 101:18-103:6. Claimant testified that the principal at that time, Mr. Lords, "got to the point where - - I guess he didn't want to see me suffering. Instead of asking me to do my work that I should be doing, sometimes he would go do it or have some kids do it without even asking me to do it or telling me to do it." *Id.* at 103:9-13.[3] At the time of this deposition, Claimant felt he could not lift more than 5 or 10 pounds without issue, couldn't stand or sit very long, and couldn't think of a type of work he could perform within his restrictions. *Id.* at 114:18-23.

45. Claimant was deposed on August 22, 2019 by ISIF. JE 3. After Claimant's November 2011 back surgery, Claimant recalled his low back:

> improved a little bit. But for the rest of the time I was there I had the special ed kids empty the garbage for me. And my right - - well I - - pretty much the rest of the time I had, like I just said, the kids doing most of my work. I tried to move the tables and stuff myself. And sometimes it caused me a lot of pain. But that kind of brings me to my right wrist.

Id. at 28:10-16. Claimant did not recall exactly what his physician issued restrictions were from his low back surgery, but believed it was that he should not lift more than 20 or 30 pounds. *Id.* at 29:3-7. Claimant recalled that in addition to help with emptying the trash and moving the tables, that he also got help carrying ladders because of his low back. *Id.* at 30:4-13.

46. Claimant recalled that after his October 2014 industrial accident, while he did return to work, he was unable to do most of the work and had the "kids" doing most of his work for him until his retirement in 2016; he attributed this to his back, right knee, and wrist. *Id.* a 40:23-41:18.

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[3] The transcript incorrectly refers to the principal as "Mr. Wards" instead of "Mr. Lords."

Regarding the special education students helping Claimant, Claimant recalled they began helping in 2003 as a way for students to learn life skills, but after 2009, the level of help increased significantly: "and so from then on I had them help me quite a bit." *Id.* at 57:4-58:11. Help with snow removal underwent a similar trajectory, Claimant remembered requiring more help after his back surgery. *Id.* at 64:5-65:2.

47. At hearing on September 29, 2020, Janine Juhasz testified regarding her recollection of Claimant's abilities while working with him. See Tr. Ms. Juhasz worked with Claimant starting in approximately 2003 and acted as his replacement when he was out for vacations or surgeries. Tr. 21:11-22:16. Ms. Juhasz recalled that in 2013-2014, Claimant operated the backpack leafblower and shoveled snow from the steps but noted that snow removal was a team effort. *Id.* at 33:1-34:9. She noted Claimant used the "scrubber" machine in 2012 and 2014, once to remove varnish in the gym and once to remove glue from the floors. *Id.* at 36:24-37:25. In 2013-2014, Ms. Juhasz observed Claimant repairing and maintaining doors, lockers, heating and cooling appliances, desks, and plumbing; she observed him putting up the American flag and replacing the filters on the roof of the building in 2013. *Id.* at 39:6-44:4.

48. After Claimant returned to work from his non-industrial right knee replacement, Ms. Juhasz testified he helped her wax and scrub the floors and install soap and toilet paper dispensers. *Id.* at 50:18-51:8. Ms. Juhasz observed Claimant had difficulty with sitting for long periods of time and with stairs; more specifically, that he utilized the elevator or had to grip the railing. *Id.* at 47:19-49:23. Ms. Juhasz testified that when Claimant was recovering from his surgeries, he was not able to do his regular duties and that he assigned those tasks to her and a crew, both in 2013 and 2014. *Id.* at 55:10-56:8.

49. Craig Kunz also testified at hearing. See Tr. Mr. Kunz was head of maintenance and Claimant's supervisor from about 2004 onward. Tr. 62:17-63:20. Mr. Kunz was head of maintenance for all the schools, and so did not observe Claimant "all day on a daily basis." *Id.* at 65:18-20. Mr. Kunz recalled that Claimant asked for help with lifting and climbing, that Claimant had help with folding up chairs and tables in the cafeteria, but Mr. Kunz was not aware if he had assistance with that task every day. *Id.* at 64:17-66:7. Mr. Kunz relayed that Claimant asked him to do tasks that would normally fall under Claimant's job description such as climbing a ladder, changing a lightbulb, moving desks, and carrying in snow melt; Claimant could not complete these tasks because it would hurt his knee, his hip, or his back. *Id.* at 72:19-73:4; 74:25.

50. At hearing, Claimant testified that when the special education students first came to work with him, it was at the request of their teacher so they could learn life skills. Tr. 128:22-129:8. Claimant recalled that after his June 2011 and November 2011 low back surgeries, the students helped him move tables, take out the garbage, and scrub, but once he recovered from his November surgery, he only had the students help him take out the trash and sweep the hallways. *Id.* at 129:15-131:5. Claimant explained he could have taken out the trash and swept the floors if he needed to, but the student's teachers wanted the students to help him. *Id.* at 131:2-23. However, if the trash was too heavy, more than 25 or 30 pounds, he would not have been able to empty it and would have asked the students to help. *Id.* at 132:2-13.

51. On cross, Claimant testified that prior to his industrial industry, he tried to avoid lifting more than 30 pounds because his low back. *Id.* at 166:9-17. Claimant affirmed that he thought he was able to do his job prior to his industrial injury, but that he did have help and did require help after his surgeries and injuries: "I did it. I did have help. I had some of the people help me when I was having problems, but I did all the work and I did it enough [sic] manner that was

good enough that my supervisors never gave me anything except an outstanding mark on everything." *Id.* at 175:3-176:23. Regarding the last industrial injury, Claimant testified "[t]he knee was kind of the thing that broke the camel's back. I was pushing as hard as I could and then when that happened, it got to the point where I just couldn't do it anymore." *Id.* at 200:6-10.

52. Claimant was cross-examined about inconsistencies between his deposition testimony and his hearing testimony, which is examined in the credibility and combination sections below.

53. **Vocational History.** Claimant graduated high school and worked as a cook, a carpenter, in construction, spraying weeds, and as a custodian; he worked as a correctional officer for the State of California from 1984 until 1997, and he moved to Idaho in 1999. Clt. Depo. 4/19/18, 18:3-35:25. After Claimant moved to Idaho, he obtained a realtor's license but was not successful at selling houses. *Id.* at 36:14-16. Claimant then got his CDL license and worked as a truck driver for about four months before obtaining his position as head custodian with Employer in March of 2003. *Id.* at 37:9-24. Claimant's other relevant vocational training includes computer technician courses at Sierra College and a welding certification. *Id.* at 18:11-20:18.

54. Claimant explained that about three quarters of the work he did for Employer was in his physical capacity, cleaning and repairing, and about one quarter was supervising other employees. Clt. Depo. 8/22/19 9:22-25. Claimant described the most physical aspect of his daily job was to clean the cafeteria and the hallways. *Id.* at 9:2-6.

55. Claimant's performance was evaluated almost[4] every year Employer employed him. See JE 18. Principal Barbara Taylor reviewed Claimant's performance in 2004 and 2005. *Id.* at 62-63, 68. Ms. Taylor marked Claimant as outstanding ("employee is clearly superior in job

[4] There is no 2015 performance evaluation at Exhibit 18.

performance, individual initiative, performance skills, and ability to work effectively without direct supervisor") in 28 different categories. *Id.* at 62. The 28 different categories were not task related, but were general in nature, for example: good attendance, good public relations, knowledgeable about the job, uses time efficiently; Ms. Taylor only had positive comments for Claimant and specifically noted the "school is the cleanest it has been in years." *Id.* at 62-63.

56. In 2006 and 2007, Principal Reid Carlson rated Claimant as outstanding across the same 28 different categories and only had positive comments. In 2008 and 2009, Principal Richard Brodock rating Claimant as outstanding across the same 28 categories and only had positive comments; in 2009, Mr. Brodock noted Claimant hired four new employees to assist him. *Id.* at 56-59.

57. From 2010 until his retirement in 2016, Claimant was evaluated by Principal Jeff Lords. *Id.* at 44-55. Again, Claimant was marked as outstanding in all 28 categories in 2010, 2011, 2012, 2013, and 2014; in 2016, the evaluation forms changed but Claimant was still marked as outstanding in all 25 available categories. *Id.* In 2010 and 2011, Mr. Lords noted there were no performance improvement programs needed; in 2012, 2013, 2014, and 2016, that area of the evaluation was left blank. *Id.* Mr. Lords's comments on Claimant's performance were all positive, generic, and remarkably similar[5] from evaluation to evaluation from 2010 until 2014. *Id.* In 2016, Mr. Lords noted "[Claimant] has had some health issues as of recent but has still tried to give his best effort in keeping up with his job responsibilities." *Id.* at 45.

58. **Vocational Experts.** On May 15, 2020, Delyn Porter conducted a vocational assessment at Claimant's request. JE 11:1. Mr. Porter interviewed Claimant, reviewed medical

[5]The comments from 2010 and 2011 are almost identical. *Id.* at 53, 55. Other frequently appearing superlatives included: dependable/reliable (2010, 2011, 2012, 2013, 2014); good use of time/punctual (2010, 2011, 2012, 2013); good communication/communicates well (2010, 2011, 2012, 2013, 2014); and knowledgeable (2012, 2013, 2014). *Id.* at 47-55.

reports, and examined Claimant's labor market. See JE 11. Mr. Porter, relying on Dr. Tallerico, recorded that Claimant had 42% pre-existing impairments based on his right knee, left knee, low back, and right wrist; Mr. Porter did not include Claimant's left hip. *Id.* at 25. Mr. Porter wrote that Claimant's testimony showed he had difficulty in his job prior to the accident, specifically difficulty with pushing a broom with his left hand, moving tables in the cafeteria, shoveling snow, going up and down stairs, and carrying heavy items. *Id.* at 27. However, despite these difficulties, Mr. Porter opined that Claimant remained competitively employed at the time of the accident. *Id.* Mr. Porter concluded that Claimant was totally and permanently disabled, and that Claimant's pre-existing conditions were a subjective hindrance to employment, which in his opinion, combined with the industrial injury to cause total and permanent disability. *Id.*

59. Delyn Porter was deposed on November 24, 2020. Mr. Porter opined that Claimant's position as head janitor with Employer was beyond the restrictions issued for his 1995 knee injury, but that Claimant "sucked it up" and did the job, nonetheless. Porter Depo. 15:9-16:3. Mr. Porter opined that Claimant's positive performance evaluations supported his conclusion that Claimant was not totally and permanently disabled prior to the industrial accident and showed Employer was not a sympathetic employer. *Id.* at 16:11-29:20. Mr. Porter ultimately opined that Claimant was 100% totally and permanently disabled and odd-lot, and that he became so after his October 2014 industrial accident. *Id.* at 38:1-24.

60. On cross, Mr. Porter opined that Claimant's low back was a subjective hindrance to his work for Employer and that "he relied on others that he supervised and then the students to perform some of his job tasks" because of his physical difficulties in performing those tasks. *Id.* at 43:13-44:7. Mr. Porter was questioned regarding Claimant's 20% and 71% disability ratings for his low back injury and left knee injury in California, plus his additional medical issues:

> Q: [Mr. Fuller] Since that time, he has had a right knee problem, a left [sic] wrist problem, the revision on his left hip - - well, the hip and a revision. And in looking at all that, those other issues, those other disabling, actually, medical problems, you don't think he reached 100% disability by the time he had his right knee surgery in June of 2014?
>
> A: Well I think his work performance for the school district contradicts a sedentary work restriction, and so I think you have to look at that with a little bit of skepticism. If he's restricted to semi-sedentary work and he's doing a job that based on the Dictionary of Occupational Titles falls into a medium to heavy work category and he did that job for ten years, either - - a couple of things happened. Either he improved well beyond what any doctor expected him to improve, or he was working beyond what he was - - or should have been doing, but obviously was able to do that - - within that time period.

Id. at 46:15-47:8. Mr. Porter admitted that when Claimant returned to work after his non-industrial right knee replacement, he had difficulties completing his tasks and that Claimant was not "back to where he had been" prior to the right knee surgery; however, Mr. Porter emphasized that Claimant was still performing his job at this time. *Id.* at 47:14-48:21.

61. Mr. Porter admitted he relied on Claimant's testimony and Claimant's work evaluations to conclude that Claimant was employable prior to the industrial accident. *Id.* at 53:12-22. Mr. Porter emphasized that Claimant was a supervisor and could have delegated tasks and that he "was still employed in his supervisory position competitively," but admitted there was no evidence Claimant could outsource all his tasks or that his job had been modified to be supervisory only. *Id.* at 55:7-56:5. Mr. Porter's definition of a sympathetic employer is one that "allows you to remain employed despite the fact that you can't do the job." *Id.* at 62:8-12. Mr. Porter opined that Employer became a sympathetic employer after Claimant's industrial injury. *Id.* at 63:2-8.

62. On June 1, 2020, Lee Barton conducted a job search at Claimant's request. JE 12:1. Mr. Barton interviewed Claimant, reviewed medical reports, searched job listings, and contacted placement agencies. See JE 12. When Mr. Barton asked about returning to work with Employer, Claimant relayed:

> [H]e had the best job possible when he worked for the high school. His employer was exceptionally considerate of his physical limitations and provided many accommodations. He was able to hire additional help as necessary, often hiring three and up to five students to help out. He described this as the perfect job and would return to it if he thought he could. His 10/09/2014 accident was the final straw, and he voluntarily retired rather than continue in a job which he did not feel like he could perform any longer. He did so out of a sense of loyalty to his employer.

Id. at 4-5. Mr. Barton recorded Claimant's restrictions as less than sedentary work on a part time basis with limited sitting capabilities due to his low back and knee. *Id.* at 5. Mr. Barton surveyed the surrounding area for jobs; of the 600+ jobs identified, only 18 jobs were sedentary, and none were less than sedentary. *Id.* The sedentary jobs identified required more education than Claimant possessed. *Id.* The three staffing agencies that Mr. Barton contacted had no available jobs for which Claimant would be suited and "did not encourage" Claimant to apply. *Id.* Mr. Barton opined that Claimant's age of 69 was a hindrance to employment, and that based on his injuries and age, Claimant was totally and permanently disabled. *Id.*

63. On November 26, 2019, Bill Jordan conducted a vocational assessment of Claimant at Defendant/Employer's request. JE 16:2. Mr. Jordan interviewed Claimant, reviewed medical reports, and examined Claimant's labor market. See JE 16. Mr. Jordan wrote to Dr. Tallerico to clarify Claimant's pre-injury restrictions for his right TKA; Dr. Tallerico wrote that Claimant would have been restricted as follows: no lifting, pushing, pulling, carrying greater than 100 pounds, no kneeling or repetitive squatting, no excessive stair or ladder climbing. *Id.* at 30. Dr. Tallerico opined that these restrictions would not have changed or increased because of his industrial injury and revision TKA and that Claimant had returned to baseline with respect to the permanent restrictions related to his right knee. *Id.*

64. Claimant relayed to Mr. Jordan that post-revision hip surgery Claimant required help with lifting anything greater than 20-30 pounds and had difficulty with stairs. *Id.* at 8.

Pre-injury, Claimant required help to move tables and empty garbage. *Id.* at 9. Claimant explained that at the time of the interview, his most limiting condition was his low back. *Id.* at 7.

65. Mr. Jordan assessed Claimant's disability under multiple scenarios. Utilizing Dr. Momberger's restrictions against jumping, jogging, and jumping jacks, Claimant's loss of access to the labor market would be nominal as there were no occupations that Claimant would qualify for where that would be a requirement. *Id.* at 19. Utilizing Dr. Tallerico's right knee restrictions, Claimant lost access to 31% of the labor marker, however, since there were no additional restrictions due to Claimant's injury, Mr. Jordan opined that no permanent disability beyond impairment was attributable to the industrial accident. *Id.* at 20. Regarding total and permanent disability, Mr. Jordan wrote that if Dr. Tallerico's opinion of 50% attributable to Claimant's low back, 25% to his right wrist, and 25% to his right knee is adopted, then the industrial injury would be responsible for 9% of his total and permanent disability. *Id.*

66. Mr. Jordan then opined that according to Claimant's self-reported limitations prior to the industrial accident these limitations and accommodations "may lead the Idaho Industrial Commission to conclude that the Evaluee was totally and permanently disabled prior to the injury claim of 10/09/14." *Id.* Mr. Jordan wrote that if Claimant was considered back to baseline regarding his right knee, then Claimant was totally and permanently disabled because of the post-injury worsening of his pre-existing conditions, namely his right wrist and low back. *Id.*

67. Bill Jordan was deposed on January 13, 2021. Mr. Jordan opined that Claimant "self-accommodated" in his job for Employer by hiring extra help, using special education students to perform tasks, and using his non-dominant hand for tasks. Jordan Depo. 23:16-24:21. Mr. Jordan affirmed his opinion that Claimant "could have been considered" totally and permanently disabled

prior to the industrial accident, but also that Claimant's total and permanent disability could be due to the post-accident worsening of Claimant's pre-existing conditions. *Id.* at 25:5-29:3.

68. On cross, Mr. Jordan clarified that he thought that Claimant was totally and permanently disabled the entire time he worked for the Preston School District because the California disability system rated Claimant as totally and permanently disabled.[6] *Id.* at 30:15-35:6. However, he also added that Claimant was released to light duty by the California system and Mr. Jordan would not have said he was totally and permanently disabled from performing every job in 2003 when he started working for Employer. *Id.*

69. On June 11, 2020, Barb Nelson conducted a vocational assessment of Claimant at ISIF's request. JE 17:1. Ms. Nelson reviewed records and analyzed Claimant's employment history but did not interview Claimant; Ms. Nelson explicitly excluded the effect of the COVID-19 pandemic from her analysis. *Id.* at 4-5. Ms. Nelson listed excerpts from Claimant's 2018 deposition wherein he discussed accommodations provided to him by his Employer and opined that based on what Claimant relayed "he was not able to perform the essential functions of the job." *Id.* at 9-10, 16. It was her professional opinion that the accommodations Employer provided would not have been considered reasonable by any other employer. *Id.* at 17. Ms. Nelson concluded:

> It is my strong professional opinion that the residuals from Mr. Clement's 2014 industrial right knee injury did not combine with his pre-existing problems to render him unable to perform his time-of-injury job. He had already lost the ability to perform it in anywhere close to a customary fashion. Any other employer with whom he might apply and request the accommodations he was allowed to take at Preston High School would (rightly) feel the accommodations would cause the employer substantial difficulty and expense…
>
> Several of Mr. Clement's other orthopedic conditions, however, had worsened *after* his industrial right knee injury in 2014… It is understandable that he wanted to

[6] Claimant was rated at "71% of total disability." JE 9:44.

> retire in 2016, especially considering that he had a steady flow of retirement income, but it is simply not due to his right knee injury, which left him with restrictions that did not limit his employability any more than it had been before his 2014 accident.

Id. at 18.

70. Barbara Nelson was deposed on January 13, 2021. Ms. Nelson opined that Claimant's work for Employer exceeded Claimant's restrictions as assigned by his physician in California. Nelson Depo. 12:25-13:10. Ms. Nelson opined that Employer was a sympathetic employer and explained her opinion as follows:

> the fact that his job was somewhere between two-thirds and three-quarters physical, and he was having to hire extra people, or have coworkers do some of the work, that he had to sit down and direct other people to do his job. He was pulling special education kids out of the classroom to do parts of his job… all of those pointed to me that he was having a hard time completing the special functions of his job. And when that happens, and an employer keeps someone on, that points to them being sympathetic.

Id. at 19:12-22. Ms. Nelson admitted any guess about why the Employer was sympathetic was speculation, but nonetheless, the difference between Claimant's job description and his actual performance led to her conclusion that Claimant was totally and permanently disabled prior to his October 2014 work accident. *Id.* at 20:16-21:17. Ms. Nelson did not believe she could state with precision when Claimant became totally and permanently disabled but noted Claimant's orthopedic problems began in 2009 and continued up until the industrial accident. *Id.* at 21:20-22:4; 36:5-17.

71. Regarding Claimant's California disability ratings of 20% for his low back and 71% for his left knee, Ms. Nelson explained that Claimant's disability was high prior to working for Employer based on those numbers, however, at the time of those ratings, California rated disability differently and used an earlier guide with higher ratings. *Id.* at 25:6-27:7. Ms. Nelson did not think Claimant was totally and permanently disabled prior to becoming employed with Employer: "I

think his work history demonstrates that he was not." *Id.* at 25:14-15. Ms. Nelson testified that she would expect favorable performance evaluations from a sympathetic employer.

72. **Credibility.** Ms. Juhasz testified credibly, and at times, had trouble recalling specific details or timelines. Mr. Kunz testified credibly. Claimant testified credibly, but his hearing testimony was inconsistent with his deposition testimony, what he reported to vocational and medical experts, and with Mr. Kunz's hearing testimony. Claimant's depositions and reports to vocational and medical experts are consistent with each other and closer in time to the events Claimant was being asked to recall; to the extent that Claimant's hearing testimony contradicts prior consistent statements, it will be discounted.

DISCUSSION AND FURTHER FINDINGS

73. The provisions of the 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). A worker's compensation claimant has the burden of proving, by a preponderance of the evidence, all the facts essential to recovery. *Evans v. Hara's, Inc.*, 123 Idaho 473, 479, 849 P.2d 934 (1993). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447–48, 74 P.2d 171, 175 (1937).

74. **Total Permanent Disability.** Permanent disability results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent

impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. Evaluation of permanent disability is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the cumulative effect of multiple injuries, the age and occupation of the employee at the time of the accident causing the injury, consideration being given to the diminished ability of the employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. 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). Generally, the proper date for disability analysis is the date of the hearing. *Brown v. Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012).

75. There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment together with the relevant nonmedical factors totals 100%. If a claimant has met this burden, then total and permanent disability has been established. The second method is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. *Boley v. State of Idaho, Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939P.2d 854, 857 (1997). 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 of Idaho, Industrial Special Indemnity Fund*, 129

Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

76. The first step to determining Claimant's disability is weighing and deciding between the competing impairment ratings. Dr. Tallerico, Dr. Newhouse, and Dr. Momberger all provided ratings for Claimant's right knee. Dr. Tallerico rated Claimant's right knee at 15% whole person, with 40% apportioned to Claimant's pre-existing right knee issues; Dr. Newhouse agreed with this rating. Dr. Momberger rated Claimant's right knee at 20% whole person with no apportionment.

77. Dr. Tallerico's rating is accepted for purposes of this decision; Dr. Tallerico used the more recent edition of the Guides (6th Edition vs. 5th Edition), appropriately apportioned Claimant's rating for his pre-existing arthroplasty and degenerative joint disease, and Dr. Newhouse agreed with his rating.

78. Claimant's rated impairments[7] are as follows: 15% whole person right knee (9% accident related, 6% pre-existing), 10% whole person left hip, 10% whole person left knee, 7% whole person right wrist, and 19% whole person low back. Claimant's medical impairment totals 61%.

79. Claimant was issued restrictions from his 1995 left knee injury, his 2011 low back surgeries, the FCE done at his request, and his right knee surgery. This decision adopts Claimant's FCE restrictions as the most accurate depiction of Claimant's abilities because it was the closest in time to the hearing date and assessed the impact of all of Claimant's injuries and surgeries to date.

80. The restrictions identified by Claimant's FCE are extensive. Claimant can "rarely" stand/walk, frequently (34%-66% of the day) sit, lift/carry 10 pounds occasionally, and is not

[7] Claimant's California ratings were all for "permanent disability."

safely able to climb stairs, bend-reach, or conduct "low-level activity." JE 10:6. PT Bagley opined that Claimant "lacked the essential abilities to safely perform work at the sedentary or light level of physical demand capacity for an 8 hour/day, 40 hour/week occupation." *Id.* at 2. Claimant's sitting restriction was the most vocationally limiting according to PT Bagley.

81. Claimant's relevant non-medical factors include his age, work history, and education. Claimant was 69 at the time of hearing. Mr. Barton opined that Claimant's age would be a hindrance to employment, and no vocational expert disagreed. Claimant's work history is almost exclusively semi-skilled and unskilled labor. Claimant worked as a laborer/carpenter, janitor, prison guard, and very briefly as a truck driver. The only customer service-oriented job that Claimant held was as a realtor, at which he was unsuccessful. Claimant's only current and relevant education includes a high school diploma, an active CDL, and computer technician courses at Sierra College which he completed in 1998.

82. Every vocational expert agreed Claimant was totally and permanently disabled at the time they conducted their evaluations. Mr. Porter opined that Claimant was disabled under both the 100% method and odd-lot. Mr. Barton, Mr. Jordan, and Ms. Nelson agreed Claimant was totally and permanently disabled, although none specified by which method.

83. Claimant is 100% totally and permanently disabled and was at the time of hearing.[8] Claimant's medical impairment of 61% is significant, as are his restrictions. These factors coupled with his age, 69 at the time of hearing, his limited education, and his work history supports the conclusion that Claimant is 100% totally and permanently disabled.

[8] This finding does not consider the effect of COVID-19 on the labor market. In *Brown, supra*, the Supreme Court wrote that "the Commission may disregard the effects of temporary fluctuations in the applicable labor market resulting from changing economic conditions" and COVID-19's economic effects were temporary fluctuations. Further, the vocational experts did not consider COVID-19 in their labor market analysis, except for Barb Nelson, who excluded its effects.

84. **ISIF Liability.** 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.

85. In *Aguilar v. Industrial Special Indemnity Fund*, 164 Idaho 893, 436 P.3d 1242 (2019), the Idaho Supreme Court summarized the four inquiries that must all 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 or was aggravated and accelerated by the subsequent injury to cause total disability. *Aguilar*, 164 Idaho at 901, 436 P.3d at 1250.

86. In *Mitchell v. State, Industrial Special Indemnity Fund*, 062017 IDWC, IC 2005-528356 (Idaho Ind. Com. 2017), the Commission analyzed when it was appropriate to assess the four elements of an ISIF claim. Citing to *Colpaert v. Larson's Inc.*, 115 Idaho 825, 771 P.2d 46 (1989), the Commission stated:

> From *Colpaert*, it is clear that in determining whether the elements of ISIF liability are satisfied, a preexisting condition must be assessed as of the date immediately preceding the work injury. A snapshot of Claimant's preexisting condition must be taken as of that date, and from that snapshot Claimant's impairment must be determined, as well as whether Claimant's condition was manifest and constituted a subjective hindrance to Claimant. Finally, it must be determined whether Claimant's preexisting condition, as it existed immediately before the work accident, combines with the effects of the work accident to cause total and permanent disability. *Colpaert* lends no support to the proposition that in evaluating ISIF liability for a preexisting but progressive condition, that condition should be

> assessed as of the date of hearing, i.e., at a time when Claimant's condition is much worse.

Mitchell, at ¶ 58.

87. **Manifest, Pre-existing Impairment.** To be manifest, the impairment must not only be in existence before the industrial accident and injury occurred, but Claimant and/or others must have been aware of the condition. *Horton v. Garrett Freightlines, Inc.*, 115 Idaho 912, 772 P.2d 119 (1989). Claimant's left hip, left knee, right wrist, and low back were all manifest pre-existing impairments.

88. Further discussion of whether Claimant's pre-existing right knee condition constituted a pre-existing physical impairment is warranted. Claimant had a significant pre-existing right knee condition. It was severe enough to cause him to undergo a right total knee replacement on June 24, 2014, less than four months prior to the subject accident. Claimant's pre-existing right knee condition figures in the genesis of his current right knee complaints; the subject accident caused a "fairly significant" fragment of bone cement to break off from the posterior rim of the tibial prosthesis. Thereafter, Claimant underwent four further surgical procedures, but enjoyed "suboptimal results" from these interventions. Drs. Newhouse and Tallerico acknowledged that Claimant's current right knee impairment is the product of his pre-existing condition and the effects of the work accident. Only Dr. Momberger assigned all of Claimant's current right knee impairment to the subject accident, notwithstanding that he was the physician who thought Claimant's pre-existing knee condition was severe enough to warrant the June 24, 2014 TKA. As noted, *supra.*, the opinions of Drs. Newhouse and Tallerico are found to be more persuasive. If, as Drs. Tallerico and Newhouse have proposed, an impairment rating can be assigned to Claimant's pre-existing knee condition, the normal course of evaluation would be to next assess whether this pre-existing impairment was itself manifest, constituted a subjective

hindrance and in some way combined with the other accident produced and pre-existing impairments to cause total and permanent disability. The problem with following the usual route in this case, is that it is clear that Claimant was not medically stable from his June 24. 2014 right knee TKA at the time of the subject accident. While it is possible, in retrospect, to say that Claimant's pre-existing right knee condition was significant enough to warrant an impairment rating, that is not the equivalent of saying that at the time of the subject accident Claimant had a pre-existing permanent physical impairment of the right knee. Idaho Code § 72-422 defines permanent impairment as "any anatomic or functional abnormality or loss after maximum medical rehabilitation has been achieved and … is considered stable or nonprogressive at the time of evaluation." Claimant was still in a period of recovery at the time of his accident and therefore his pre-existing right knee condition, later rated by Drs. Newhouse and Tallerico, cannot be considered as a permanent impairment for purposes of ISIF liability. *Quincy v. Quincy*, 136 Idaho 1, 27 P3d 410 (2001). This seems somewhat counterintuitive, particularly since the record reflects that it was end stage degenerative joint disease that led to the decision to offer Claimant the June 24, 2014 TKA. Consider the following example: a claimant has degenerative low back disease which started gradually, but progressed over the course of thirty years to involve multiple levels of his lumbar spine. He is an accident waiting to happen, and finally does have a work-related accident which causes further injury to his low back. He has multiple surgeries and is eventually pronounced medically stable and ratable. He is given a 30% impairment rating with one half of that rating assigned to his pre-existing, progressive, low back disease. Were the ISIF involved in such a case, there is no reason the Commission would not consider Claimant's pre-existing low back condition for purposes of ISIF liability, notwithstanding that the condition was a progressive condition at the time of the accident. *Colpeart v. Larson's Inc., supra.* The difference between the hypothetical and

the current case lies in the fact that Claimant's pre-existing right knee condition is not simply a progressive condition. Claimant underwent surgical repair of his right knee, and had not yet recovered from that procedure when the accident occurred. It is quite possible that more of his function would have eventually returned, similar to his left knee, had the accident not interrupted his recovery. No physician has argued that Claimant was ratable at the time of the accident. Therefore, the Referee concludes that it is inappropriate to consider the pre-existing right knee condition as a pre-existing impairment for purposes of ISIF liability. However, as discussed *infra*, excluding the pre-existing right knee condition from consideration does not affect the Referee's determination that Claimant was totally and permanently disabled prior to the subject accident.

89. **Subjective Hindrance.** The Idaho Supreme Court set out the definitive explanation of the "subjective hindrance" requirement in *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 686 P.2d 557 (1990). Under this test, evidence of the claimant's attitude toward the preexisting condition, the claimant's medical condition before and after the injury or disease for which compensation is sought, nonmedical factors concerning the claimant, as well as expert opinions and other evidence concerning the effect of the preexisting condition on the claimant's employability are considered in determining whether a particular condition was a subjective hindrance to that particular claimant. *Id.*

90. *Low Back.* Claimant's low back was a subjective hindrance just prior to the accident. Claimant reported restrictions against lifting more than 20-30 pounds because of his low back and testified at various times that he either avoided lifting heavy objects or sought help with lifting heavy objects because of his back. Claimant had four low back surgeries prior to the industrial injury. Claimant considered his low back an obstacle to completing all his duties as head custodian. Claimant's low back was a subjective hindrance.

91. *Left Hip.* Claimant has undergone two left hip arthroplasties. Claimant enjoyed a greater level of functionality after his second arthroplasty but remained limited by his left hip. Claimant reported he had difficulty going up and down stairs, completing snow removal, and lifting heavy objects. Regarding his left hip and snow removal, Claimant testified:

> Q: [Mr. Fuller] How were you able to continue to work with that particular problem?
>
> A: When I couldn't do something I would get somebody to help me.
>
> Q: So you were able to perform some of your functions as a head janitor there by having other people assist you with your responsibilities especially if they involved - -
>
> A: I'll give you an example
>
> Q: - - Manual labor?
>
> A: I get a lot of snow. I have to shovel the snow off the sidewalk and stuff. If it was going to be a heavy snow, I would call up somebody and say you've got to come and help me shovel.

Clt. Depo. 4/19/18 83:7-20. Claimant's left hip was a subjective hindrance at the time of the accident.

92. *Left Knee.* Claimant injured his knee in 1995 in a work-related accident, underwent surgery, and was issued onerous restrictions. However, Claimant underwent a left knee arthroplasty in 2013 and reported a 'considerable' increase in function. Clt. Depo. 8/22/19 35:11. Regarding his left knee post-arthroplasty, Claimant reported he avoided kneeling on it, that walking up and down stairs was more difficult, and lifting more than 50 pounds was difficult. Despite its increased function from its pre-arthroplasty state, Claimant's left knee was a subjective hindrance at the time of the accident.

93. *Right Wrist.* Claimant reported right wrist pain and difficulty with pushing down the tables in the cafeteria, with pushing a broom, and with gripping on a pre-accident basis. In

November 2013, Claimant's physician recommended a fusion surgery to treat his complex right wrist problems, which Claimant declined. Claimant self-accommodated by using his left hand. Claimant's right wrist was a subjective hindrance at the time of the accident.

94. **Combination.** The fourth and final element required for ISIF liability is that the impairment from the industrial accident and injury must either "combine with" the pre-existing impairments, or "aggravate and accelerate" the pre-existing impairments, to render a person totally and permanently disabled. Idaho Code § 72-332. If a claimant has already established total and permanent disability, and a defendant argues a claimant was totally and permanently disabled prior to the work accident despite regularly working a job, the burden shifts to defendant to show claimant was working because of a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on claimant's part. *Aguilar*, *supra*; *Bybee*, *supra*. As a legal term of art, "sympathetic employer" has been defined as an employer that is willing to make accommodations that are out of the ordinary to obtain an employee's beneficial services. *Christensen v. S. L. Start & Associates, Inc.*, 147 Idaho 289, 207 P.3d 1020, 1024 (2009).

95. Both Defendants argue that Claimant was totally and permanently disabled prior to the industrial accident and that Claimant was employed by a sympathetic employer who allowed Claimant to hire or recruit additional help to complete his job responsibilities, a significant accommodation. Claimant responds that his performance evaluations demonstrate he was performing his job and that there's evidence Claimant performed aspects of his job unassisted.

96. Claimant argues his performance evaluations demonstrate he was performing his job adequately; the evaluations allowed for areas of improvement or correction and none appeared. Claimant received 100% marks across every category and praise.

97. Claimant is correct that his performance evaluations are universally positive.

However, the performance evaluations are without detail and generically positive, especially the evaluations by Principal Lords in recent years. Additionally, a performance report conducted on May 24, 2016 is very positive and Claimant received "outstanding" marks in all nineteen (19) categories in which he was evaluated, despite the evaluation taking place at a time when Claimant's expert, Mr. Porter, contends that Claimant was totally and permanently disabled due to the combined effects of his pre-existing conditions and the subject accident. JE 18:44-45; Porter Depo. 56:18 – 58:14. Further undercutting their weight is Ms. Nelson's observation that a favorable performance evaluation should be expected from a sympathetic employer. The evaluations are not, standing alone, strong evidence that Claimant completed his duties without assistance or accommodation.

98. Regarding his need for accommodation, Claimant gave frank answers at his 2018 and 2019 depositions:

> Q: [Mr. Fuller]: Okay. Do you believe you were able to perform your duties satisfactorily while you were working at Preston High School?
>
> A: I did the best I could.
>
> Q: Tell me what you mean by the best you could.
>
> A: Well I thought I performed my duties satisfactorily most of the time until my injuries caused me problems.
>
> Q: So do you believe that your injuries that you had previous - - and we're going to get into those in a moment - - were something of a hindrance to your employment or your ability to do all the things you wanted to do?
>
> A: Yes.

Clt. Depo 4/19/18 38:10-23.

> Q: [Mr. Fuller] You've described a multitude of symptoms and a number of problems here, and that's - - I'm interested in knowing if those were restrictive in your movements, caused you to restrict your movements, your activities, your ability to work at full capacity?

Q: [Mr. George] Prior to the accident.

Q: [Mr. Fuller] Yes.

A: Prior to 2014, yes, it did. In fact, I had special ed class - - Mrs. Littlewood - - I was having a really hard time moving the tables or emptying the garbage, and so she would have disability class - - the ones that were functional come out and empty the garbage for me and move the tables back and forth for me while I just swept them and scrubbed them.

Id. at 101:10-25; Claimant again affirmed how much Mrs. Littlewood's students helped him in his 2019 deposition:

A: And so in November of 2011, I went in and they did a laminectomy. And I was off work for a month or so, and then I came back to work. And from that time on I really didn't do a whole lot. I had the special ed kids, especially that first part, they moved the tables. So I just more or less supervised them cleaning the kitchen and things for me. And if I had to shovel snow, I called up my substitutes and had them pretty much do it for me.

Q: [Mr. Mollerup] And did that continue until you left, or was there a time where your back improved to where you could do those things again?

A: It improved a little bit. But for the rest of the time I was there I had the special ed kids empty the garbage for me. And my right - - well, I - - pretty much the rest of the time I had, like I just said, the kids doing most of my work. I tried to move the tables and stuff myself. And sometimes it caused me a lot of pain. But that kind of brings me to my right wrist.

Clt. Depo. 8/22/19 27:23-28:16 (emphasis supplied). When questioned further, Claimant admitted that, from approximately November 2011 and going forward, he was not emptying the garbage, was in pain if he "walked around very much," had Mrs. Littlewood's students help him move the cafeteria tables, had coworkers carry ladders and buckets of wax, and hired additional help to shovel snow because he "physically couldn't do what I could do before." *Id.* at 29:8-30:18; 60:12-14; 64:11-12. Claimant was candid that his coworkers were aware he was having issues prior to the accident because of his physical condition:

Q: [Mr. Fuller] Would it be fair to say that your back injury was a hindrance

or obstacle to your doing all of your duties at the Preston School District prior to October –

A: Yes.

Q: -- 9, 2014?

A: Sorry. Yes, it was. **It caused me a lot of problems before I had my right or left knee done.**

Q: Before you had your industrial accident. –

A: Yes.

Q: -- you've described a multitude of symptoms and a number of problems here, and that's – I'm interested in knowing if those were restrictive in your movements, caused to [sic] you restrict your movements, your activities, your ability to work at full capacity?

MR. GEORGE: Prior to the accident.

MR. FULLER: Yes.

THE WITNESS: Prior to 2014, yes, it did. In fact, I had special ed class – Mrs. Littlewood – I was having a really hard time moving the tables or emptying the garbage, and so she would have her disability class – the ones that were functional come out and empty the garbage for me and move the tables back and forth for me while I just swept them and scrubbed them.

Q: (BY MR. FULLER) Do you think if we were to ask Julie Smith or Janeen Juhauz [sic] whether they also observed that you were not able to do all that you could do before because of your back, because of your pre-existing knee condition or hip and so forth – do you think they would be able to testify with regards to that kind of thing?

A: Oh, I know they would.

Q: Did you ever discuss it with them, or did you ever talk to them about, "Hey, you seem to be slowing down," or "You seem to be in pain" or things like that?

A: I talked to – I believe it was Julie a few months – a couple months ago, and she asked me how I was doing and – getting along. And she goes, "You weren't doing so good before you left work." She said I – "Are you doing better now?"

Q: And my focus would be on how you were prior to the industrial injury. Do you think [co-workers] would have noticed something then? Did you ever talk to

them about it before the industrial injury?

...

A: Yeah they know what problems I was having. They would say I was having problems. You could ask Mrs. Littlewood. Like I said, she had her kids come and help me because I was having a lot of difficulty doing my job so she would be able to testify to that too.

Q: What about Mr. Wards [sic – Lords] who is the - - I believe was the principal at the time?

A: Yes. He got to the point where - - I guess he didn't want to see me suffering. Instead of asking me to do my work that I should be doing, sometimes he would go do it or have some kids do it without even asking me to do it or telling me to do it.

Q: Did these things take place, that you just talked about, prior to the industrial injury?

A: Yes.

Clt. Depo. 4/19/18 100:25-103:16 (emphasis added).

99. From the testimony at both of Claimant's pre-hearing depositions referenced above, it is clear that Claimant was unable to perform all tasks of his position and relied on others to complete these tasks starting in 2011, approximately three years before the subject accident.

100. When Claimant was cross-examined at hearing regarding his deposition answers, Claimant repeatedly relied on his performance evaluations to bolster his assertion that he was performing his duties satisfactorily. See Tr. 174:22-24, 175:3-7, 19-22, 188:21-22. Claimant also attempted to re-contextualize his deposition answers to different time frames or directly contradicted them. For example, regarding snow removal, at hearing Claimant testified that he only required help when "anybody else" would have required help because it was snowing so hard; in 2018 and 2019, Claimant admitted he needed help with snow removal because of his low back and hip. Tr. 172:9-12; Clt. Depo. 4/19/18 83:7-20; Clt. Depo. 8/22/19 64:10-19. There are several similar examples.

101. Claimant's deposition answers are also more similar to what he told his doctors and the vocational experts. During the interview portion of his exam, Dr. Tallerico recorded "[Claimant] seems very pleased with how his employer treated him over the last couple of years given his significant orthopedic issues and the fact that he did require a lot of help to do his normal day-to-day activities." JE 14:10. When Lee Barton asked Claimant about returning to work with Employer, Claimant relayed: "[H]e had the best job possible when he worked for the high school. His employer was exceptionally considerate of his physical limitations and provided many accommodations. He was able to hire additional help as necessary, often hiring three and up to five students to help out." JE 12:4-5. Claimant told Bill Jordan he required help with lifting anything greater than 20-30 pounds, that he had difficulty with stairs, and that pre-injury, Claimant required help to move tables and empty garbage. JE 16:8-9. In 2013, Claimant told Dr. Miller he had difficulty with pushing and gripping, that it was difficult to even shake someone's hand. JE 7:4. In 2012, Claimant reported right leg and left leg pain related to his low back to Dr. Huneycutt that resulted in a recommendation for surgery. JE 6:78-83.

102. Claimant also argues there were other aspects of his job he continued to perform without assistance. There is uncontradicted testimony that Claimant ordered and maintained supplies, trained and supervised, repaired and maintained heating, cooling, and plumbing equipment, and that just prior to the industrial accident, Claimant operated the scrubber without assistance and installed soap and toilet paper dispensers.

103. However, the fact that Claimant was still able to perform some work does not defeat a finding that Claimant was totally and permanently disabled prior to the industrial injury via the odd-lot method. An odd-lot worker is not one who is incapable of work, but one who is "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 of Idaho, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Further, as noted in *Christensen, supra*, a sympathetic employer does not mean the employee needs charity, just that the employer is willing to make accommodations that are out of the ordinary. The inquiry boils down to whether Claimant could secure similar accommodation in the general labor market or whether that search would be futile.

104. The evidence demonstrates Claimant was not able to perform all the specialized or necessary functions of his position prior to his industrial injury and that Employer made accommodations out of the ordinary for Claimant's physical condition. Claimant's job was between two-thirds and three-quarters physical, and Claimant required assistance with the most physically taxing tasks or could not perform them. Employer allowed Claimant to hire additional help for snow removal, utilize students to empty garbage and fold/move tables, and assign other coworkers to do heavy lifting for Claimant. Ms. Nelson's opinion is the most persuasive on this point:

> It is my strong professional opinion that the residuals from Mr. Clement's 2014 industrial right knee injury did not combine with his pre-existing problems to render him unable to perform his time-of-injury job. He had already lost the ability to perform it in anywhere close to a customary fashion. Any other employer with whom he might apply and request the accommodations he was allowed to take at Preston High School would (rightly) feel the accommodations would cause the employer substantial difficulty and expense.

JE 17:18 (emphasis supplied.) Ms. Nelson's opinion that any other employer in the labor market would not make these accommodations is persuasive and well-reasoned; it is difficult to imagine another employer allowing an employee to hire someone else to perform a core function at employer's expense, such as snow removal. Further, it is difficult to imagine employment where the heavy labor can be done by students without cost. Claimant would not be able to find another

job in his labor market that would make similar accommodations. Defendants have met their burden to show that Claimant was working for a "sympathetic employer" prior to the industrial accident.

105. Accordingly, the evidence demonstrates that Claimant was totally and permanently disabled prior to the industrial accident, even without considering the condition of his right knee, which had not reached medical stability from the June 2014 TKA at the time of the industrial accident. Because Claimant was totally and permanently disabled prior to the industrial accident, it follows that Claimant's pre-existing conditions did not "combine with" -- nor were they "aggravated and accelerated" by -- the industrial accident to cause total and permanent disability. The fourth and final element of ISIF liability has not been satisfied.

106. Claimant was totally and permanently disabled prior to the industrial accident via the odd-lot method.[9] Claimant was employed by a sympathetic employer.

CONCLUSIONS OF LAW

1. Claimant was totally and permanently disabled via the 100% method at the time of hearing.

2. Claimant was totally and permanently disabled prior to the October 2014 accident and employed by a sympathetic employer.

3. All other issues are moot.

[9] Claimant was totally and permanently disabled via the odd-lot doctrine pre-accident and became 100% totally and permanently disabled by the time of hearing because of the post-accident worsening of his conditions. Claimant did not lose any additional labor market post-accident, accident-related or otherwise, because he was already totally and permanently disabled, but he did continue to gain medical impairments because of his unsuccessful hand surgeries and the extension of his low back fusion.

RECOMMENDATION

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

DATED this 25th day of May, 2021.

INDUSTRIAL COMMISSION

Sonnet Robenson

Sonnet Robinson, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of June, 2021, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

PATRICK GEORGE
PO BOX 1391
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STEVEN FULLER
PO BOX 191
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BREN MOLLERUP
PO BOX 366
TWIN FALLS ID 83303-0366

ge

Gina Espinoza

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KENT CLEMENT, Claimant, v. PRESTON SCHOOL DISTRICT 201, Employer, and IDAHO STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Surety, Defendants.	**IC 2014-028268** **ORDER** FILED JUN 29 2021 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Sonnet Robinson submitted the record in the above-entitled matter, together with her 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 these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

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

1. Claimant was totally and permanently disabled via the 100% method at the time of hearing.

2. Claimant was totally and permanently disabled prior to the October 2014 accident and employed by a sympathetic employer.

3. All other issues are moot.

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

DATED this 28th day of June, 2021.

INDUSTRIAL COMMISSION

Aaron White, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

ATTEST:
Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of June 2021, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

PATRICK GEORGE
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