BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LARRY WETZSTEIN Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2015-020536** **IC 2017-014557** **IC 2017-010537** **IC 2017-021300** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED February 4, 2022**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Douglas A. Donohue who conducted a hearing in Twin Falls on January 20, 2021. James Arnold represented Claimant. Anthony Valdez represented ISIF. Self-insured employer Amalgamated Sugar Company had settled previously. The parties presented oral and documentary evidence. The parties took post-hearing depositions and submitted briefs. The case came under advisement on November 1, 2021 and is ready for decision.

ISSUES

The issues to be decided according to the parties at hearing are:

1. Whether Claimant is entitled to total and permanent disability;
2. Whether Claimant is entitled to permanent total disability under the odd-lot doctrine;
3. Whether apportionment is appropriate under Idaho Code § 72-406;
4. Whether ISIF is liable under Idaho Code § 72-332; and
5. Apportionment to establish ISIF's share of liability under *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984).

Section 406 apportionment is not relevant to a matter in which ISIF is the sole remaining defendant. At hearing, issues in the Notice of Hearing not listed above were withdrawn by the parties.

CONTENTIONS OF THE PARTIES

Claimant contends he is totally and permanently disabled both 100% and as an odd-lot worker. Such disability arises from prior right shoulder injuries combining with left shoulder injuries and a right wrist injury which are the subject of his consolidated Complaints herein.

ISIF contends that Claimant cannot establish he is totally and permanently disabled under the 100% analysis. Both Claimant's and ISIF' vocational experts have opined that there are jobs Claimant can do despite all physicians' restrictions. Claimant does not qualify as an odd-lot worker. He conducted only a brief, belated, minimal job search designed more to contradict ISIF's vocational expert rather than to actually obtain a job. Claimant has not shown that an actual job search would likely be futile. Alternatively, admitting a preexisting impairment was manifest and a hindrance, the preexisting condition does not combine to create total and permanent disability, which combining is a prerequisite for ISIF liability.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant;
2. Joint exhibits A-Z and AA-II admitted at hearing; and
3. Post-hearing depositions of vocational experts Delyn Porter and William Jordan.

All objections raised in post-hearing depositions are OVERRULED.

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

FINDINGS OF FACT

1. Claimant worked for Amalgamated Sugar Company ("Employer") near Paul beginning about 2011. He maintained and repaired equipment. He began as a mechanic's helper third class, and in the off-season he worked maintenance and repair ("M&R"). In later seasons he worked as a dry line operator.

2. On July 30, 2015 he injured his left shoulder performing M&R cleaning a plugged auger. He torqued a 48" pipe wrench which suddenly broke free. He felt something tear in his left shoulder.

Injuries and Form 1 Filings

3. Claimant timely filed a Complaint regarding this July 30, 2015, injury. A Form 1 shows Employer was notified of the alleged accident and injury on the day it occurred. This occurrence is undisputed.

4. On May 16, 2017 Claimant's attorney filed a Form 1 alleging a January 1, 2017 accident which further injured his left shoulder. Whether this constitutes a second accident or a compensable consequence either of being released too early to work at that activity level or of an as-then undiagnosed infection is immaterial. Claimant's left shoulder remained injured and in recovery during this period of time.

5. A Form 1 was filed alleging an April 3, 2017 accident and further injury to Claimant's left shoulder. Again, whether this constitutes another accident, or a compensable consequence of the 2015 accident and injury is immaterial.

6. On July 26, 2017 Claimant's attorney filed a Form 1 alleging a May 3, 2017 accident with further injured Claimant's right shoulder and right wrist. The record does not support more than a temporary exacerbation of right shoulder pain but does support a 1% upper extremity

permanent impairment to the right wrist. Again, whether this constitutes an independent accident or a compensable consequence of overuse of the right upper extremity as a result of the left shoulder injury is immaterial.

7. The Complaints regarding these incidents were consolidated. All are considered part and parcel of the original July 30, 2015, accident and injury.

Medical Care: 2015

8. On July 30, 2015 Claimant visited the company nurse immediately for what was initially considered a muscle strain. During the next few weeks diagnostic imaging revealed substantial rotator cuff tearing—one record described it as a "complete rupture"—and biceps tendon tearing as well as severe degenerative changes including osteoarthritis.

9. Claimant began physical therapy on August 12.

10. On August 18 Brian Johns, M.D. released Claimant to modified work. He restricted Claimant from any use of his left hand.

11. He visited Gilbert Crane, M.D. on August 27. Dr. Crane had treated and performed surgery on Claimant's right rotator cuff years earlier. On this first visit Dr. Crane recommended surgery and concurred with the order for physical therapy in anticipation of surgery.

12. On September 14 Gilbert Crane, M.D. performed arthroscopic debridement, decompression, rotator cuff repair, and a clavicle resection to reconstruct Claimant's left shoulder. Ten days later Dr. Crane released him to work with his right hand only. Claimant was cautioned to wear an immobilizer on his left arm. Dr. Crane's notes suggest Claimant was able to perform light duty for Employer with this restriction.

13. More physical therapy to aid surgical recovery was performed. Therapy visits temporarily increased pain, but Claimant was compliant and, over time, reported a general trend

of decreased pain and increased functionality.

Medical Care: 2016

14. On January 14 Dr. Crane released Claimant to work with temporary restrictions including no left-arm lifting over 5 pounds and no overhead lifting or reaching.

15. Effective January 15 Employer stopped temporary disability benefits stating Claimant had been "released and returned back to 12 hour shifts at full pay." Nevertheless, physical therapy continued. The return to work increased Claimant's pain with use and decreased his functionality, primarily his strength. This was addressed in physical therapy. Despite some gains, by March 14 Claimant reported debilitating pain with use.

16. After about 2 months of failure to improve, another MRI on March 21 showed a new rotator cuff tear and some worsening degeneration along with the surgical changes. Claimant reported no new traumatic event. Dr. Crane noted, "[T]here is no identifiable cause for his recurrent tear that either one of us can come up with. Larry has been very compliant with his restrictions and with his physical therapy protocols." Dr. Crane opined surgery was urgent.

17. On May 17 Richard Wathne, M.D. examined Claimant and provided a second opinion in which he concurred with Dr. Crane's recommendation for surgery. Dr. Wathne opined Claimant's need for surgery was likely directly related to the original injury.

18. On June 29 Dr. Wathne performed an arthroscopic acromioplasty with revision of the rotator cuff repair and a biceps tendon tenodesis.

19. On July 28 Dr. Wathne provided a light-duty work release effective August 15. He insisted Claimant wear a sling at all times.

20. On August 5 another round of physical therapy began. Improvement progressed. By September Dr. Wathne had released Claimant to return to work with "extreme precautions."

Physical therapy continued.

21. On November 1 Dr. Wathne released Claimant to return to full work duties with no restrictions.

Medical Care: 2017

22. On January 3 Dr. Wathne rated Claimant's permanent impairment at 8% of the left upper extremity. Dr. Wathne noted, "he has returned back to his full work duties without restrictions." He noted some residual rotator cuff inflammation and provided treatment. Dr. Wathne allowed Claimant to continue full work without restrictions.

23. On January 10 Claimant phoned Dr. Wathne's office and reported sharp pain and grinding when he reached out forward.

24. On February 27 James Bates, M.D. reviewed records and examined Claimant for forensic purposes at Employer and Surety's request. He distinguished between medical stability and maximum medical improvement. He opined Claimant was not at MMI because of a distortion of soft tissues around the left AC joint and specific musculature which could be improved with focused physical therapy. Without such treatment he deemed Claimant medically stable and rated the left shoulder PPI at 12% upper extremity which represents a 7% whole person rating. He restricted Claimant to occasional left arm work at or above shoulder level with specific poundage limits for various manipulations.

25. On April 5 a note of Cameron McHan, N.P. shows Claimant sought treatment for additional left shoulder pain after he strained it while reaching the day before.

26. On April 6 another MRI showed a large recurrent rotator cuff tear.

27. On April 13 Dr. Wathne examined Claimant's left shoulder and suggested another surgery. Dr. Wathne restricted Claimant to light work with no lifting with his left arm.

28. On September 6 Claimant visited orthopedist C. Scott Humphrey, M.D. He examined Claimant and reviewed records including the April 6 MRI. He doubted whether another rotator cuff repair surgery would be successful. Instead, he recommended a reverse shoulder arthroplasty. He anticipated that this would allow Claimant to return to work, albeit with a 25-pound lifting restriction.

29. On November 14 Dr. Humphrey performed the reverse shoulder arthroplasty. He also removed hardware from earlier surgeries.

30. On November 27 Dr. Humphrey released Claimant to return to work with restrictions including no lifting over 1 pound with the left arm. He expressly allowed sedentary work including typing.

31. An infection was discovered after tissue was cultured. A PICC line was placed. Casi Wyatt, D.O. at Sawtooth Epidemiology noted Claimant may have had this infection since the first surgery. She further noted, "Symptoms of C acnes infections are pain and failure of surgical repairs." The 6-week antibiotic treatment to ameliorate the infection slowed Claimant's surgical recovery.

Medical Care: 2018

32. Treatment for infection continued. Antibiotics were discontinued in April.

33. At a March 14 visit with Dr. Humphrey, Claimant mentioned his right shoulder was painful and worsening. Dr. Humphrey responded by providing shoulder strengthening exercises bilaterally to "offload the demand on the right shoulder."

34. On April 16 Dr. Humphrey relaxed the restriction to allow Claimant to lift 5 pounds.

35. On May 16 Dr. Humphrey responded "I agree" to a case manager's written

summary of their earlier conversation. Most relevant was the indication that Dr. Humphrey would not opine that Claimant's recent right shoulder symptoms were caused by overuse as a result of his left shoulder condition. Dr. Humphrey separately authored a similar summary of the conversation.

36. On June 1 Dr. Humphrey relaxed the restriction to allow Claimant to lift 25 pounds with his left arm.

37. On August 7 Dr. Humphrey opined Claimant had reached maximum medical improvement (MMI). He deferred making an impairment rating to Dr. Waters.

38. On September 10 Stanley Waters, M.D. reviewed records and examined Claimant at the adjustor's request. Dr. Waters noted a 1972 knee surgery, and 2008 right shoulder surgery preceded the left shoulder accident. He agreed Claimant to be at MMI and rated permanent impairment at 34% of the upper extremity (20% whole person) for the left shoulder injury. He concurred in permanent restrictions of the left arm: no lifting, pushing, or pulling over 25 pounds, and no repetitive overhead activities. Dr. Waters did not address other sources of permanent impairment.

Medical Records 2020

39. A functional capacity evaluation ("FCE") was conducted over two days in March 2020. Claimant gave full effort, but his perceived ability was less than his actual ability. The evaluator thought this a result of fear of injury or re-injury. Of note, Claimant's heart rate performing tasks was "consistently at 80-90% of his max heart rate." The FCE reported Claimant could lift-carry and lift to waist 25 pounds occasionally, lift to shoulder 20 pounds occasionally, and push-pull 58 pounds occasionally. Weights of half each of these were assigned to frequent performance of these activities. Constant use was disallowed for all but push-pull. Constant push-

pull weights were halved again. The report specifically warned against work as a truckdriver.

Prior Medical Records

40. In 1972 Claimant underwent left knee surgery.

41. On May 30, 2006 Claimant injured his right shoulder. Dr. Crane began with conservative care. He noted Claimant was able to work despite the pain. Dr. Crane continued to monitor Claimant's condition and eventually determined surgery was necessary. Symptoms lingered. His physicians expressed concern that he would attempt to work above his shoulder's ability to safely function. Claimant received assistance from Industrial Commission Rehabilitation Division ("ICRD") consultants in 2009. ICRD looked for lighter jobs within the industry because it was not recommended that he return to his time-of-injury position. ICRD closed its file in December 2010 after a significant job search was unfruitful.

42. Claimant received medical care for a head injury in a motor vehicle accident in 2008. This did not result in permanent injury relevant to any analysis herein.

43. On August 3, 2009 Dr. Crane performed right shoulder arthroscopic surgery. He debrided and repaired the rotator cuff and biceps tendon.

44. In September 2009 Claimant underwent physical therapy following right rotator cuff surgery. He was compliant and reported that his pain had reduced and his functionality improved. Therapy continued until the end of January 2010.

45. After Claimant reached medical stability in 2010 Dr. Crane rated right shoulder permanent impairment at 6% of the upper extremity. He imposed a restriction against lifting more than 50-75 pounds with the arm extended away from the body. He noted that although Claimant could perform a significant portion of the requirements of a job as a sprinkler system mechanic, the overhead work and heavy lifting requirements were too much to do without assistance.

46. Four months later, Dr. Crane checked a box agreeing with "restrictions" from a Functional Capacity Examination ("FCE") conducted September 14, 2010. The FCE warned that Claimant's "perceived abilities … are greater than those objectively evaluated in the FCE." The FCE reported safe lifting limitations in pounds: Waist to floor—60 rarely, 45 occasionally, and 25 frequently; Waist to crown—40 rarely, 25 occasionally, and 15 frequently. The FCE reported carrying limitations in pounds: Right—50 rarely, 40 occasionally, 25 frequently; Left and front—70 rarely, 50 occasionally, 30 frequently.

47. In May 2014 Claimant reported right heel pain which was shown to be achilles tendinitis. Conservative care resulted in no permanent impairment or restrictions.

Forensic Medical Evaluations

48. On February 27, 2017 Dr. Bates distinguished between medical stability and maximum medical improvement. He opined Claimant was not at MMI because the condition could be improved with focused physical therapy. Without such treatment he deemed Claimant medically stable and rated the left shoulder PPI at 12% upper extremity which represents a 7% whole person rating. He restricted Claimant to occasional left arm work at or above shoulder level with specific poundage limits for various manipulations.

49. On October 29, 2018 Dr. Bates opined Claimant medically stable.

50. On April 2, 2020 Dr. Bates reviewed records, took Claimant's history, and examined Claimant. The examination showed right arm worsening since his 2018 examination, and the left arm was stable. He agreed with right arm restrictions suggested by the March 2020 FCE. He opined that his PPI rating of Claimant's shoulders from 2018 remained unchanged. He opined Claimant's right wrist condition was ratable at 1% upper extremity which converts to also 1% whole person. Dr. Bates opined that the condition of the left upper extremity caused overuse

of the right upper extremity which exacerbated the right wrist condition. However, he found no PPI attributable to that overuse.

Vocational Factors

51. Claimant was 60 years old as of the date of hearing. He is right-hand dominant.

52. Claimant is a high school graduate—a "C" average student throughout—and attended a semester at College of Southern Idaho. He attended a refrigeration course at a technical school in Arizona and worked with ventilation systems in potato cellars. He obtained a commercial driver's license (CDL) and attended truck driving school. The CDL is still valid, but he never worked as a trucker. He is licensed to perform electrical wiring of pivot irrigation systems.

53. He worked mostly—about 30 years—in the agricultural irrigation industry but also as a furniture deliveryman, in the HVAC industry, and as a mechanic in other industries before he began working for Amalgamated Sugar Company. All jobs involved medium to heavy work. All involved significant use of arms and hands.

54. In January 2018 Social Security Administration found Claimant disabled under its criteria, effective August 1, 2017.

55. At hearing, Claimant testified that he had not sought employment since leaving Amalgamated Sugar Company in Spring 2018 until January 2020. In January 2020, Claimant did make some job applications online in response to Mr. Jordan's vocational report. He did not speak to any potential employer face-to-face or by telephone. Regarding a potential job with Rain for Rent, Claimant testified he made one online application, maybe two, but never visited the company premises. Testimony that he applied "lots and lots" of times, and that he once went to Nampa and physically applied in person appears to pertain to a job search years earlier, just before he hired on with Employer. Claimant's testimony indicates a job search effort neither similar to the one that

resulted in the job with Employer nor such as is reasonably expected where one is actually attempting to secure employment.

56. Claimant lives alone and is able to independently perform all daily tasks and routine yard work. He does get someone to change the occasional overhead lightbulb when one burns out.

Right arm restrictions

57. In 2010 treating surgeon Dr. Crane opined PPI for the right shoulder at 6% of the upper extremity. He restricted Claimant from lifting 50-75 pounds away from his body with the right arm. He also opined that the overhead work and heavy lifting involved in Claimant's work in the pivot sprinkler industry was probably "too much".

58. In 2018 Dr. Bates reviewed additional records and again examined Claimant. He assigned a right shoulder PPI at 10% of the upper extremity or 6% whole person. He suggested work restrictions for the right arm at: lifting—40 pounds rarely, 25 pounds occasionally, 15 pounds frequently; carrying—in front, 30 pounds, and right side 50 pounds rarely, 40 pounds occasionally, 25 pounds frequently, and he limited him to rarely work with the hand away from the body. Dr. Bates acknowledged the possibility that right shoulder symptoms may be related to overcompensation following left shoulder injuries but opined that this possibility could not be considered more probable than not.

59. Also, in the 2018 evaluation Dr. Bates opined Claimant was medically stable regarding his left shoulder and agreed with Dr. Waters' 34% upper extremity PPI. Dr. Bates suggested a maximum 25-pound lifting restriction and rare, cautious use away from the body.

60. In 2020 Dr. Bates once again reviewed records and examined Claimant. He opined Claimant's PPI for either shoulder had not changed. He considered Claimant's previously noted right wrist complaints to be chronic and rated them at 1% upper extremity. He did opine that wrist

symptoms were likely related to overuse to compensate for left shoulder injuries. He agreed with FCE limitations for the right arm which had become more pronounced since 2018.

Left arm restrictions

61. In 2018 Dr. Humphrey imposed a 25-pound lifting restriction.

62. Also, in 2018 Dr. Waters rated Claimant's left upper extremity PPI at 34% and translated it to 20% whole person. He added pushing and pulling to the 25-pound lifting restrictions impose by Dr. Humphrey. He restricted Claimant from repetitive overhead activities.

63. Dr. Bates rated Claimant's left upper extremity PPI at 34% (20% whole person), noted the 25-pound restrictions, and included "no ladder climbing". He urged caution when rarely using the left arm outstretched from Claimant's body.

64. The results of the 2020 FCE were considered to represent reasonable restrictions by physicians that commented.

Vocational Experts

65. In November 2018 Delyn Porter evaluated Claimant at Claimant's request. He interviewed Claimant, reviewed medical records, and entered data into his computer program. He identified a 50-mile radius as constituting Claimant's local labor market. He did not quantify that market by numbers of jobs in any way. He did not quantify Claimant's pre- or post-injury available jobs. He did not opine about potential wage loss. He opined Claimant an odd-lot worker under the futility prong of the test, opined ISIF liable, and calculated *Carey* apportionment.

66. In May 2020 Mr. Porter submitted an addendum report. He reviewed records of Dr. Bates, an FCE, and a report from Nancy Collins. Dr. Collins' report was not included in the joint exhibits. No weight is given to references to Dr. Collins' report. Mr. Porter noted that at the FCE Claimant performed as if somewhat more limited than Dr. Bates' 2018 restrictions.

67. In October 2019 William Jordan evaluated Claimant at ISIF's request. He interviewed Claimant, reviewed medical records, contacted employers in Claimant's local labor market, and contacted Dr. Humphrey. Mr. Jordan identified multiple recent job openings listed in Claimant's local labor market and potentially suitable job descriptions from the Dictionary of Occupational Titles. From this list he provided 12 job descriptions with their physical requirements, and Dr. Humphrey approved each of the 12 as medically suitable for Claimant. Mr. Jordan identified in detail Claimant's prior employments and wages. Mr. Jordan identified specific employers who had actual job openings and would accept Claimant's application. Mr. Jordan analyzed several of Claimant's specific assets and obstacles to obtaining employment. He based wage-loss analysis on a pre-injury wage of $17.29 per hour and arrived at an average potential wage loss of 8%. Mr. Jordan analyzed Claimant's pre-injury access to the local labor market at 26% of all employment. He opined Claimant's right and left shoulder conditions combine to produce a 54% whole person PPD.

68. In deposition Mr. Jordan testified in detail about specific jobs which, in his opinion, Claimant could perform within his restrictions. He testified that the jobs he expressly identified represented a "small sampling" of the job market available to Claimant. Mr. Jordan confirmed his up-to-date familiarity with the local labor market. He confirmed that his opinions remained the same as of the date of hearing.

DISCUSSION AND FURTHER FINDINGS OF FACT

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

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

71. Claimant has been a willing worker throughout his adult work life. When he suffered a right shoulder injury he transferred to a new industry after 30 years or so working in agricultural irrigation. At hearing Claimant's demeanor appeared forthright. His trial testimony, his 2010 deposition testimony, and his 2019 deposition testimony indicate a reliable and willing worker as well as a credible person. Claimant makes a good first impression as a hard worker and as an intelligent and personable fellow, albeit a bit stoic.

Permanent Impairment

72. Permanent impairment is defined and evaluated by statute. Idaho Code §§ 72-422 and 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975). Impairment is an inclusive factor of permanent disability. Idaho Code § 72-422.

73. Claimant's permanent impairments before and after the 2015 injury are reasonable and not in dispute.

Permanent Disability

74. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423 and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See*, *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

75. "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 as provided by Idaho Code § 72-430.

76. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 766 P.2d 763 (1988). In sum, the focus of a determination of permanent disability is on a claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995). A claimant's local labor market access in the area around his home is the general geographical scope for assessing permanent disability. Combs v. Kelly Logging, 115 Idaho 695, 769 P.2d 572 (1989).

77. Estimation of loss of labor market access is generally based upon the percentage of suitable jobs regularly available at the time of the accident compared to suitable jobs regularly

available after recovery. Claimant does not suggest that this measure is unreasonable here. Only Mr. Jordan provided direct analysis of this question. His opinion of overall disability rated just under 60% of the whole person, considering all prior injuries and current conditions as well as all other medical and nonmedical factors is reasonable.

78. While Mr. Porter's written report recited at length facts of record, it did not substantially contribute to one's understanding of the local labor market or Claimant's access to it. It did not provide facts or analysis of potential wage loss. He treated a 50-mile radius as Claimant's labor market but did not further identify the number of jobs available generally, available to Claimant at any time, or the number lost as a result of this accident. He noted "a few jobs" remained available but deemed the number "so small" without stating a sufficient estimate or fact which might be useful to this analysis. He failed to provide an opinion about Claimant's percentage of permanent partial disability or a factual basis upon which PPD can be calculated. Moreover, in his addendum Mr. Porter cites work performed by Dr. Collins and essentially agrees with her labor market access opinions. Dr. Collins' report is not in evidence. Her methodology in this instance has not been established of record. Mr. Porter's impressions of Dr. Collins' opinions do not substitute for a foundation to qualify Mr. Porter's analysis.

79. In deposition Mr. Porter opined that Claimant had lost 100% of his labor market access to jobs he had performed previously. This is not a reasonable measure for analysis. The number of jobs formerly performed is relevant to neither the numerator nor denominator in determining percentage loss of local labor market access. Mr. Porter did not provide a meaningful analysis of Claimant's loss of labor market access.

80. Claimant undoubtedly has permanent disability in excess of impairment. His inability to work with his arms overhead or to lift medium to heavy loads with his arms or to lift

much at all with his arms away from his body caused the Referee to carefully consider at length whether Claimant was 100% disabled. Claimant's effort to return to work successfully after his right shoulder injury goes far in demonstrating the contrast between the earlier and the newer conditions. Among the nonmedical factors, age was the most significant. The question of age is inherently a weighing of whether the physical effects of aging increase disability or whether age is the basis for the worker's view that maybe it is time to retire rather than return to work. Here, Claimant was only 60 at the time of hearing. He returned to work light duty with Employer early during his recovery from the 2015 accident. He is entitled to a great deal of respect for a lifetime of dependable labor and to his perspective of his ability to continue to work.

81. Although he attempted to minimize and dismiss the fact, Mr. Porter acknowledged there were jobs Claimant could perform. By definition, this would mean that Claimant's permanent disability was something less than 100%. One need not consider Mr. Jordan's factual analysis that produced an overall permanent disability rating of 54% to reach this conclusion.

82. Claimant failed to make a *prima facie* showing that he likely is totally and permanently disabled 100%.

Odd-Lot Disability

83. If a claimant is able to perform only services so limited in quality, quantity, or dependability that no reasonably stable market for those services exists, she is to be considered totally and permanently disabled. *Id.* Such is the definition of an odd-lot worker. *Reifsteck v. Lantern Motel & Cafe*, 101 Idaho 699, 700, 619 P.2d 1152, 1153 (1980); *also see*, *Fowble v. Snowline Express*, 146 Idaho 70, 190 P.3d 889 (2008). Odd-lot presumption arises upon showing that a claimant has attempted other types of employment without success, by showing that she or vocational counselors or employment agencies on her behalf have searched for other work and

other work is not available, or by showing that any efforts to find suitable work would be futile. *Boley, supra.*; *Dehlbom v. ISIF*, 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997).

84. Upon establishing the presumption, the burden shifts to a defendant to show suitable work is regularly and continuously available. *Rodriguez v Consolidated Farms, LLC.*, 161 Idaho 735, 390 P.3d 856 (2017).

85. Claimant appears to be on the stoic side and has maintained a "can-do" attitude in his work life. Nevertheless, by his own admission, his prior right shoulder condition was manifest and constituted a hindrance to his ability to work. He would take more trips with lighter loads, take longer to complete tasks, would use various mechanical assists to reduce stress on his right shoulder, and would substitute his non-dominant left arm and hand to perform some tasks which increased pain in his right shoulder. His testimony established that his knee occasionally was briefly painful but did not establish that his knee condition constituted a hindrance when working for Employer.

86. However, establishing "manifest" and "hindrance" puts the cart before the horse. Claimant must first make a *prima facie* showing that he is an odd-lot worker under at least one of the established prongs of the legal test for qualifying as an odd-lot worker.

87. Claimant did not show he unsuccessfully attempted work after his right wrist injury.

88. Claimant did not show he or others on his behalf looked for work after his right wrist injury when he stopped working light duty for Employer in 2018. Rather, he made minimal online inquiries in response to Mr. Jordan's vocational report in October 2019.

89. Mr. Porter's bare opinion is insufficient establish a *prima facie* case for odd-lot status on the futility prong of the analysis. Mr. Porter provided conclusory opinions about whether Claimant meets legal criteria to be designated an odd-lot worker and whether ISIF bears legal

liability. His "analysis" merely parroted the adjectives used in other cases but did not show how or why these adjectives may be applicable. He then took it upon himself to assign Employer and ISIF respective liability under the *Carey* formula. He offers insufficient factual analysis to support his conclusory opinion. He has not established himself qualified to render a legal opinion about the "futility" standard. He has not provided a basis upon which one can evaluate the local labor market or quantify Claimant's loss of access to it.

90. One may be tempted to say "close enough" for such a good worker whose active, bilateral, shoulder mobility has been so reduced by work accidents. This temptation is particularly acute where Employer's liability has been agreed upon by settlement and only ISIF is left to foot the bill. However, saying "close enough" in this instance would erode and violate the standards required under the odd-lot doctrine. In a way—and for good reason—the odd-lot doctrine is already saying "close enough" for an injured worker for whom the facts and sympathies make a finding of total and permanent disability desirable.

91. Moreover, even if odd-lot status was found here, it merely would shift the burden to ISIF to establish a regularly available job description within Claimant's restrictions and local labor market. Mr. Jordan's analysis has established that.

92. Claimant failed to make a *prima facie* showing that he is an odd-lot worker.

ISIF ISSUES

93. Claimant, being neither 100% disabled nor an odd-lot worker, cannot establish the liability of ISIF.

CONCLUSIONS

1. Claimant was compensably injured, resulting in permanent impairment and disability;

2. Claimant failed to make a prima facie showing that he likely is totally and permanently disabled, by either the 100% or the odd-lot methods; and

3. ISIF bears no liability as a result.

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 _16th_ day of December, 2021.

INDUSTRIAL COMMISSION

Douglas A. Donohue, Referee

ATTEST:

Assistant Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LARRY WETZSTEIN Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2015-020536** **IC 2017-014557** **IC 2017-010537** **IC 2017-021300** **ORDER**

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

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

1. Claimant was compensably injured, resulting in permanent impairment and disability;

2. Claimant failed to make a prima facie showing that he likely is totally and permanently disabled, by either the 100% or the odd-lot methods; and

3. ISIF bears no liability as a result.

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

DATED this 3rd day of February, 2022.

INDUSTRIAL COMMISSION

Aaron White, Chairman

Thomas P. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Paul Jeffries
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February, 2022, a true and correct copy of the foregoing **ORDER** was served by regular United States mail and Electronic Mail upon each of the following:

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