BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHRISTOPHER KNAPP, Claimant, v. GEM STATE STAFFING, LLC, Employer, and IDAHO STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2014-007755** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED DEC 02 2022 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Boise, Idaho, on February 14, 2022. Matthew Andrew represented Claimant. Jon Bauman represented Defendants Employer and Surety (hereafter "Defendants"). Daniel Miller represented Defendant State of Idaho, Industrial Special Indemnity Fund (hereafter "ISIF"). The parties produced oral and documentary evidence at the hearing. Post-hearing depositions were taken. The parties submitted briefs. The case came under advisement on August 15, 2022.

ISSUES

The issues enumerated at hearing were:

1. Whether Claimant's condition is due in whole or in part to a preexisting injury or condition;

2. Whether Claimant's condition for which he seeks benefits is due in whole or in part to a subsequent injury or condition;

3. Whether and to what extent Claimant is entitled to the following benefits;

    a. Medical care;

    b. Disability based on medical factors, commonly known as Permanent Partial Impairment (PPI); [1]

    c. Disability in excess of impairment (PPD), up to and including total disability pursuant to the odd-lot doctrine or otherwise;

4. Whether apportionment for a preexisting condition pursuant to Idaho Code §72-406 is appropriate;

5. Whether Claimant is totally and permanently disabled;

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

7. Apportionment under the *Carey* Formula, if applicable.

CONTENTIONS OF THE PARTIES

Claimant contends he suffered catastrophic injuries to his head, neck, and arm on March 19, 2014, while in the course and scope of his employment with Employer at a Simplot facility. Those injuries, when coupled with his preexisting impairments, rendered him totally and permanently disabled under the odd-lot doctrine.

Defendants Employer and Surety (Defendants) argue Claimant is not totally disabled. Apportionment under Idaho Code §72-406 is required when determining Claimant's

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[1] The parties did not argue or brief the issue of PPI, and that issue is deemed to be waived.

compensable PPD. If Claimant is found to be totally disabled, such total disability would be from the combined effects of his preexisting conditions which affected his work abilities, and his industrial accident of March 19, 2014. If Claimant is found to be an odd-lot worker, then ISIF is liable for Claimant's pre-existing physical impairments as they relate to his total disability.

ISIF asserts that Claimant is totally and permanently disabled due solely to the injuries he sustained in his industrial accident of March 19, 2014. Whatever preexisting conditions existed at that time were subsumed by the nature and extent of his work injuries, which in and of themselves left Claimant totally disabled. Claimant has not met the criteria for holding ISIF liable for a portion of his total permanent impairment under Idaho Code § 72-332.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and witness Christopher "CR" Knapp, Jr., taken at hearing;

2. Joint Exhibits (JE) 1 through 80, admitted at hearing;

3. The post-hearing deposition transcripts of Delyn Porter, (February 24, 2022); Barbara Nelson, (March 7, 2022); Bradley Katz, M.D., Ph.D., (March 18, 2022); Ryan Smith, D.O., (April 26, 2022), Nancy Greenwald, M.D., (May 3, 2022), and Cali Eby, (May 3, 2022).

The objection and request to strike made at page 35, line 20 of Dr. Greenwald's deposition is sustained, and the response from deponent is stricken on the ground that the testimony was non-responsive to the question. All other objections maintained through the depositions are overruled.

FINDINGS OF FACT

1. At the time of hearing Claimant was 68 years old. He was 61 at the time of his industrial accident in question.

CLAIMANT'S INDUSTRIAL ACCIDENT AND TREATMENT

2. On March 19, 2014, Claimant was operating a forklift at a Simplot facility for Employer. His work tasks involved moving pallets stacked with boxes of frozen product. While attempting to adjust a load of boxes they fell onto him, striking the back of his neck and head, which knocked him face first into his forklift mast and cut his head. After confirming the cut, he reported the accident. He was sent to St. Alphonsus emergency department for medical treatment.

3. Claimant was initially diagnosed with a scalp laceration and closed head injury. Claimant also complained of right shoulder pain and headache. The laceration was closed with staples.

4. The day following the accident Claimant was seen at St. Alphonsus Occupational Health Clinic for a severe headache located behind his right eye and right parietal lobe. His neck was also hurting. He denied numbness or tingling in his upper extremities. Claimant had no muscle weakness. His neck range of motion was full, with no radicular component. Neck x-rays and head CT scans were unremarkable. Claimant was referred to pain management and rehabilitation physician Kevin Krafft, M.D. Claimant was provided prescription pain medication and taken off work.

5. Claimant first saw Dr. Krafft on March 21, 2014. At that time, Claimant complained of a "massive" headache from above his right eye over the top of his head. JE 15, p. 1.

Claimant also noted aching in his right mid trapezius, radiating into his neck. The headache interfered with Claimant's sleep.

6. Claimant's headaches persisted. Dr. Krafft prescribed Topamax in addition to the Norco prescribed during Claimant's initial medical treatment. While the Topamax appeared to help, Claimant discontinued it after three days on advice of his sister, a nurse. By mid-April, Claimant was still complaining of intermittent headaches, which could be quite severe and often disrupted his sleep. He was again placed on Topamax and the Norco was refilled. Claimant's trapezius and neck remained sore. Dr. Krafft suggested physical therapy. Bending to tie his shoes or rising quickly made Claimant a bit dizzy. An MRI was ordered. Dr. Krafft restricted Claimant's driving to 15 miles.

7. The MRI was read as normal for his age. Claimant's headaches continued into May at a rate of about two per day. Topamax helped but made him sleepy. During this time Claimant continued his employment, but his duties were limited to light duty tasks such as desk work and picking weeds. The latter task would make him dizzy while bending. Reading would often trigger a headache.

8. In July, Claimant was still complaining of headaches twice a day which lasted from a half hour to an hour or so. He continued to work with restrictions on driving, lifting, and working from heights.

9. In September, Claimant received a right occipital nerve injection, which helped his "nagging" neck pain more than his headaches. Dr. Krafft felt Claimant's condition was improving. However, at his September 23, 2014 visit, Claimant described worsening pain after doing light yard work. Dr. Krafft ordered a Toradol injection. The injection relieved Claimant's headache symptoms for a few days before it returned. Claimant's trapezius and neck pain also persisted.

His work duties, which included finding numbers in a phone book for extended time periods, aggravated his neck pain.

10. Despite various treatments, physical therapy, and expressions of hope for improvement, Dr. Krafft could not alleviate Claimant's suboccipital pain complaints. Claimant lost his job by early November 2014. He was also diagnosed with carpal and cubital tunnel syndromes after electrodiagnostic studies. Claimant's neck, shoulder and headache complaints continued into 2015. Claimant received transforaminal epidural injections for his neck pain after an MRI showed C6/7 right neuroforaminal narrowing and flattening of the cord, with multilevel spondylosis in Claimant's cervical spine. The injections provided relief to Claimant's shoulder symptoms but not his headaches or neck pain. Claimant continued to complain of dizziness and lightheadedness.

11. Dr. Krafft referred Claimant to neurosurgeon Timothy Johans, M.D., who saw Claimant on May 14, 2015. Dr. Johans' assessment included cervical strain, right occipital neuralgia, persistent headaches and neck pain, and damage to Claimant's inner ear when he hit his head in the industrial accident. Dr. Johans described Claimant as being at "wit's end."

12. Dr. Johans felt neck surgery (specifically a C5-6 and C6-7 anterior decompression and fusion) might help Claimant's neck and headache complaints, but he had some reservations. He felt it would more likely be beneficial in preventing further weakness and numbness in Claimant's hands. Claimant wanted the surgery in spite of the fact it might not help his neck and headache situation.

13. The surgery went forward on November 17, 2015. By November 30 Claimant was complaining of dizziness and double vision. He noted he had been in a rear end car accident a few days prior to his neck surgery, but no accidents post-surgery. He was preliminarily

diagnosed with left cranial nerve 6 palsy and diplopia. By December 7, 2015, Claimant could not see much out of his left eye. Dr. Johans sent Claimant to the ER as a medical emergency. Claimant was treated medically for loss of vision but at the time of hearing was still unable to see out of his left eye.

14. In late December 2015, Claimant was diagnosed with a right ulnar neuropathy with profound and very progressive weakness and numbness. Dr. Johans felt Claimant needed a right ulnar nerve decompression "as soon as we possibly can" to prevent further weakness and numbness. That surgery went forward on February 9, 2016. Claimant was left with residual burning numbness and weakness in his right upper extremity. He testified he cannot feel anything in his right hand, cannot lift even light weights, drops dishes, and had to modify his eating utensils by wrapping them in foam in order to grip them.

15. Claimant also had similar issues in his left arm, albeit not as dramatic as his right. Dr. Johans performed a left ulnar nerve release on March 22, 2016, in an effort to prevent the profound loss of sensation and strength Claimant incurred in his right arm. The left sided decompression surgery left Claimant with residual numbness in his pinky, ring and middle finger, but he regained strength following the surgery.

16. In late 2016, Claimant hired Bradley Katz, M.D., Ph.D, a professor of ophthalmology and neurology at the University of Utah, to provide an independent medical examination regarding Claimant's left eye disability rating. He spoke with Claimant and conducted a review of medical records provided to him. He diagnosed sixth nerve palsy and central retinal vein occlusion in Claimant's left eye.

17. Dr. Katz opined Claimant's vision problem precluded him from returning to work as a forklift operator. He could still drive privately, but not commercially. Those were the only

restrictions given, and Dr. Katz felt there were a number of jobs Claimant could do. Claimant's vision loss was permanent. Using the 6th edition of the *AMA Guides to Permanent Impairment*, Dr. Katz rated Claimant at 18% visual system impairment for his occlusion and diplopia. Dr. Katz attributed 70% of the diplopia and vision loss to his neck surgery and 30% to his preexisting diabetes. He was deposed post hearing.

18. Other treatments Claimant underwent include a left eye injection which improved the diagnosis of sixth nerve palsy but did nothing to enhance Claimant's ability to see out of that eye. He also underwent bilateral carpal tunnel release surgeries, which also did little to improve his symptoms.

19. In April 2018, Nancy Greenwald, M.D., performed an IME and record review on behalf of Employer. Her opinions will be discussed in greater detail below.

20. Beginning in April 2019, upon referral from Lawrence Green, M.D., who had been treating Claimant for headaches since June 2017, Claimant began treating with Ryan Smith, D.O., for his headaches and syncope. Dr. Smith was deposed post hearing.

21. In May 2019, Claimant saw Timothy Doerr, M.D., for a second opinion. Dr. Doerr detailed Claimant's medical history and conducted an examination. Dr. Doerr saw Claimant as a treating physician thereafter and in January 2020, performed a C4-5 fusion surgery for right C5 radicular pain and weakness in his trapezial region radiating to his right shoulder, causing right bicep weakness. Dr. Doerr stressed the surgery would not improve Claimant's bilateral distal upper extremity weakness and numbness because those conditions were due to a combination of his diabetic polyneuropathy and cubital and carpal tunnel syndromes (which had been previously decompressed).

22. Dr. Doerr's surgery left Claimant completely dissatisfied, as he testified his neck pain was worsened by the procedure.

CLAIMANT'S PRIOR INJURIES, AND CONDITIONS, WITH RATINGS

23. Claimant has a long list of injuries, accidents, and medical conditions which predate his industrial accident of March 19, 2014. Those which were given an impairment rating from Dr. Greenwald are listed below.[2]

24. In 1993, Claimant was involved in a MVA with complaints of right hand numbness thereafter. In 1996 Claimant was involved in another motor vehicle accident in which he claimed injuries including a concussion, right hand numbness, and headaches. The right hand numbness tended to "come and go" throughout his medical history, so Dr. Greenwald declared this condition to be an ulnar neuropathy, and assigned it a 1% upper extremity permanent impairment.

25. Claimant suffered left eye vision issues from a central retinal vein occlusion in 2003, which improved with time, but became permanent after 2014. Dr. Greenwald assigned Claimant a 10% whole person impairment rating for this condition.

26. Claimant had bilateral knee replacements due to severe osteoarthritis in 2004, for which Dr. Greenwald assigned Claimant a 44% lower extremity permanent impairment rating.

27. Claimant had longstanding polyneuropathy from his diabetes, for which Dr. Greenwald assigned him an 8% lower extremity impairment rating. His upper extremities were evaluated separately.

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[2] For all ratings, Dr. Greenwald utilized the *AMA Guide to Evaluation of Permanent Impairment,* 6th Ed.

28. Claimant also complained of left leg numbness predating his industrial accident. Dr. Greenwald assessed this condition as symptomatic documented radiculopathy, class II, which carries a 12% whole person default impairment rating.

29. Claimant's longstanding bilateral partial hearing loss was assigned a 2% whole person impairment rating.

30. Calculating all Claimant's rated preexisting impairments converted to whole person and utilizing the combined values chart, Dr. Greenwald concluded Claimant was entitled to a 38% whole person impairment rating.

31. Next, Dr. Greenwald assigned Claimant impairment ratings for his industrial injuries, with apportionment for those conditions which had a preexisting component but were permanently aggravated in the work accident.

32. Dr. Greenwald found Claimant suffered from cervical stenosis prior to March 19, 2014, but that the accident of that date permanently aggravated this condition. However, the diagnosis did not explain Claimant's loss of feeling in his right lower arm and hand, which Dr. Greenwald noted was nondermatomal in distribution. She assigned Claimant an 8% whole person impairment rating for this condition, 2% of which is preexisting, 6% WP PPI related to his work accident.[3]

33. Dr. Greenwald opined that Claimant's right ulnar neuropathy, based on his history of complaints since the work accident, was, on a more probable than not basis, related in part to his industrial injury. She assigned Claimant a whole person impairment rating of 5% and

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[3] Dr. Doerr also assigned Claimant an 8% PPI rating for his neck and apportioned 2% as preexisting.

apportioned 50% of that rating to Claimant's preexisting diabetes, leaving Claimant a 3% WP PPI rating attributable to his industrial accident.

34. Dr. Greenwald noted Claimant also suffered from left ulnar neuropathy, but with delayed onset of symptoms post accident. She could find nothing in the medical records to support a causative connection between the work accident and Claimant's subsequent left upper extremity ulnar neuropathy. She concluded Claimant's left ulnar neuropathy was due exclusively to his diabetes, but not on a preexisting basis. In other words, she felt Claimant's left ulnar neuropathy arose after the accident but was unrelated to it. She did not rate this condition.

35. Dr. Greenwald gave Claimant a 3% whole person permanent impairment rating for his severe post-trauma headaches, even though she felt a component of those headaches (50%) was due to Claimant's diabetic diplopia which developed post accident, but was unrelated to the accident.

36. Dr. Greenwald listed and discussed in her report dated April 17, 2014, a number of other medical issues both related and unrelated to Claimant's work accident in question which she felt were not permanent and did not qualify for a PPI rating.

37. Dr. Greenwald also assigned work restrictions. Post-injury restrictions included no lifting greater than 40 pounds, no end range of motion neck extension or flexion, avoid compression of right elbow or forearm, no frequent power gripping of right hand. Claimant should avoid fine motor activities with his right hand. Preexisting restrictions would also include (in addition to no frequent power gripping) no creeping, crawling, kneeling, commercial driving (due to left eye). No unprotected heights, ladders or step ladders due to polyneuropathy, and no lifting greater than 50 pounds, no torquing maneuvers. Claimant should also avoid loud noise environments.

CLAIMANT'S TESTIMONY

38. Claimant credibly testified at hearing and his testimony, unless it conflicts with other records (such as the facility where he was initially treated for his work injuries), is considered reliable.

39. Claimant graduated high school in Nevada in 1971. After high school he went to work as an apprentice carpet layer. About a year into that job Claimant attended a six-month training session at Mohawk Industries in Georgia, where he learned the carpet and vinyl laying trade. When his employer retired in approximately 1973, Claimant opened his own carpet and flooring store.

40. Claimant initially ran all aspects of his carpet business. He became certified in operating a forklift for use in his business. At some point, his son, Christopher Knapp, Jr., known as CR, joined him. CR learned the trade from Claimant.

41. Claimant ran his business in Nevada until 2008, at which time he moved to New Plymouth, Idaho, where his parents resided. Four years later his son joined him in Idaho.

42. When Claimant arrived in Idaho he opened a carpet business, which he ran by himself until his son joined him. Claimant and CR both worked as installers, sometimes together, sometimes separately.

43. In early 2014, Claimant took a "moonlighting" job with Employer because his carpet business was not making enough money for both Claimant and CR. Employer sent Claimant to a Simplot facility, where he operated a forklift. It was there he had the work accident in question.

44. Prior to his industrial accident Claimant had a number of health issues as partially discussed above. He also had a prior worker's compensation claim while working for Heinz

in 2011 (while also running his carpet business). He injured his low back, but it resolved. He injured his hand in a car accident, but that injury resolved as well.

45. When asked about his early symptoms after the 2014 accident in question, Claimant testified that his main complaints were "massive headaches," numbness in his arm and left hand, and dizziness. Claimant's other complaints at hearing included injury to the top of his head and left eye, numbness in his left hand (3 fingers numb). His right upper extremity, from hand to mid-bicep was numb. He had numerous blackouts and falls which led to him hurting his left knee, right shoulder, legs, hands, elbows. He noted that he aches from when he arises in the morning until he goes to bed, and then his complaints make sleeping difficult.

46. Claimant recalled having neck fusion surgery in an effort to address his "massive headaches." Claimant's pain "starts in the front of my forehead and goes all the way back into the back of my neck and all the way down into my shoulder and it's been the same way and that's how I ended up going to [Dr. Johans], complaining to Dr. Krafft that I can't stand the pain and it gets so bad that it – almost to the point where I will cry." Tr. p. 38. Claimant testified the neck surgery with Dr. Johans did nothing to provide any relief.

47. Claimant testified he lost sight in his left eye after his neck surgery. He then had decompression surgeries on his arms, right side first. That surgery did not help Claimant's right arm/hand numbness. The left arm surgery helped alleviate Claimant's stabbing pains but his little, ring, and middle finger on his left hand remained numb.

48. Claimant testified his right arm hurts like it is either hot or cold, and aches. He cannot feel any touch, but it hurts constantly. He has taught himself to do things left-handed. He has no grip strength in his right hand. He cannot lift a half gallon of milk. He uses foam wrap on his eating utensils to help him hold them. He uses paper plates and plastic cups so they will not

break if dropped. The carpal tunnel surgeries were not beneficial. Without looking, he cannot tell if he has something in his right hand or not. Claimant is right hand dominant.

49. Claimant wears prism glasses to help him drive; without them he has double vision.

50. Claimant's neck hurt more after his surgery with Dr. Doerr than it did before.

51. Claimant began walking with a cane to assist with his dizziness after the accident.

52. Claimant treated with Dr. Green for his headaches and dizziness, but he was unable to remedy Claimant's issues. Claimant next saw Dr. Smith and was still treating with him at the time of hearing. Dr. Smith ordered a tilt table test which Surety refused to authorize, as discussed below.

53. After his neck surgeries, Claimant's range of motion was diminished. He also has noticed a change in his temperament. He tends to lose his temper easier. He is more irritable with others at times. He testified that he enjoyed talking to people in his business and loved his trade before his work accident.

54. After his accident, Claimant testified that he stayed on with Employer for about a year (8 months) but the work assignments changed significantly. He sat at a desk and went through phone books looking for addresses of businesses for Employer to call on to drum up business. He told Employer he was having massive headaches during this time. Employer would also have Claimant pick weeds and trash from the premises. He fell twice doing that task. One time he hit his head against the building when he lost his balance.

55. After the work accident, Claimant turned his carpet business over to his son once he realized he was not able to "do the work." After 2016, Claimant had no remaining ownership interest in the business. Claimant testified he could not safely operate

a forklift with his current limitations. He explained why he could not do the jobs Defendants' vocational expert suggested were available to him.

56. In cross examination by Defendants, Claimant had no recollection of being diagnosed with incomplete retinal vein occlusion in his left eye in 2003.

57. Claimant acknowledged that on occasion he would answer the phones or talk with customers at his son's carpet store for a few hours at a time.

58. Under examination by ISIF, Claimant acknowledged he was a "one man shop" in Idaho until his son came up from Nevada; he did all aspects of purchasing, selling, and installing flooring. Claimant testified it was very physically demanding. Claimant recognized that by the time of his accident at Simplot, he "was nowhere near as fast as I was in my younger days, but I could still complete the task. I could still go into a residence and do it [install flooring, move furniture] on my own without having a helper or something like that. But it was a more physically demanding job than it was when I was a younger man." Tr. p. 82. Claimant put in eight hours a day in his carpet business and an additional eight hours a night at Simplot.

59. Claimant denied his vision prior to the Simplot accident impacted the way he did his job in his flooring business. He also denied his vision had any effect on his ability to drive a forklift before the accident. He had no neck mobility issues, or issues of any type. Claimant noted the forklift job was also physically demanding and there were "a lot of young gentlemen in there that were, you know, in their 30s, early 40s and you had to keep up with them." Tr. p. 84.

60. Claimant testified that even when his son was working with him in Idaho, he would still do manual labor flooring tasks. Sometimes his son helped him and sometimes Claimant did the jobs alone.

61. Claimant testified that after his bilateral knee replacement surgery, he "felt like a new man, even though they still hurt I felt so much better after having it replaced." Tr. p. 86.

62. Claimant denied his diabetes impacted his ability to work in any way prior to the industrial accident in question. Claimant took Metformin for his blood sugar and most of the time kept it in check. He pointed out that stress or emotional upset would make his blood sugar spike. Claimant lost about 75 pounds when he was first diagnosed with diabetes. He gave up candy, limited his bread, potatoes, and "stuff like that" and takes Metformin daily.

63. When examined about his headaches, Claimant answered, "I don't know how tough I am or how tough I'm not, but some of these headaches are so bad they are close to making [me] cry. That's how bad they get." Tr. p. 89.

64. Claimant acknowledged he was on Tramadol and Advil, (sixteen 500 milligram tablets daily) at the time of hearing. Claimant testified his headaches had increased in number of days per month and length of time per headache since 2014 to the time of hearing. Sometimes he would have a "massive" headache nearly every day in a month. When discussing options to lessen the headaches, Claimant noted there was a medication he could take on occasion which helped lessen their severity, but he must limit how often he uses it. He testified that sometimes his headaches are "so massive … I'm ready to cry and they have gotten nothing but worse." Tr. p. 94. The headaches disturb his sleep "every night" which causes him to suffer from fatigue and exhaustion. *Id.*

65. Claimant denied having a problem with dizziness, fainting, or falling before the industrial accident but those issues were a concern at the time of hearing. Claimant uses a walker on occasion, and a cane the rest of the time, mainly for shorter trips.

66. Claimant testified that "every single day I feel like I'm so worn out that I can't get through the day and when I go and sit in my recliner, because my neck or my head – head hurts so bad, … I put towels on my face. *** I put ice bags on it just try to do anything to try to fall asleep." Tr. p. 96.

67. Before the Simplot accident, Claimant testified he loved to hunt and fish. He used his vacations strictly for hunting and fishing. He no longer hunts and fishes.

LAY WITNESS TESTIMONY

68. Witness Christopher Knapp, Jr., (CR), testified at hearing in a credible manner and made a plausible first impression.

69. CR worked with Claimant in the carpet business from about 1999 until Claimant signed the business over to him in about 2016. CR mainly did flooring installation.

70. When asked about Claimant's activity level prior to the 2014 work accident, CR initially testified "I would say it was very active. You know, pretty much one hundred percent." He quickly walked that back, clarifying, "Well, probably not a hundred percent, but he was very active." Tr. p. 108. On Claimant's non-work activities, CR testified that Claimant enjoyed hunting, fishing, four wheeling, jet skiing, and camping before the accident but did no such activities since. Claimant had a strong work ethic and was a "go, go, go type person." He took little time off from working, and when he did it was to pursue outdoor hobbies.

71. CR acknowledged Claimant had artificial knees, cataract surgeries, and some "back issues" which led, in CR's opinion, to Claimant "not being able to work at full capacity or a hundred percent like he used to." No time frame was elicited for reference.

72. CR gave examples of Claimant's limitations by pointing out that Claimant would at times ask CR to get something for him while Claimant was working in a different part of

a building. CR claimed Claimant "pretty much" stopped using a knee kicker shortly before moving from Nevada, and while working in Idaho before his accident. He noted Claimant also had difficulties hauling flooring product up stairs or into buildings in this time frame and would sometimes ask CR to carry it. CR attributed these difficulties to Claimant's knees and low back.

73. CR saw Claimant slowing down while hunting in later years. Around the house, CR hung the Christmas lights because Claimant did not like being on ladders.

74. Since the accident, CR has had to help Claimant with many daily tasks, from carrying groceries, mowing his lawn, caring for Claimant's fruit trees. Professionally, CR has completely taken over the business. He used to have Claimant help run the showroom while CR was out on a job, but that did not work out well. Claimant's "people skills" deteriorated since the accident, and he has little patience, get angry easily, and projects as an unhappy person. He has actually cost CR business based on website reviews and personal conversations with complaining customers. CR does not believe any carpet store would hire Claimant due to his physical limitations on carrying product to show customers, or take to their homes, and because of his mental capacity and short temper.

75. CR acknowledged his father ran the carpet business by himself for about four years after moving to Idaho from Nevada. Even when CR arrived in Idaho, he and Claimant would occasionally do installation jobs separately.

76. CR acknowledged Claimant, prior to March 19, 2014, was able to, and did, work two jobs – carpet sales and installation during the day and operating a forklift at Simplot at night.

77. CR noticed Claimant's limitations were mildly increasing with time before the accident, but thereafter Claimant "has just taken a nosedive." Tr. p. 122.

78. CR testified Claimant was "brutally honest" and would not intentionally misrepresent facts under oath.

MEDICAL EXPERT TESTIMONY

79. Drs. Greenwald, Katz, and Smith were deposed post hearing.

Dr. Katz

80. Dr. Katz was deposed on March 18, 2022. He explained that his examination with Claimant was via Skype. He subsequently prepared his written report after reviewing those medical records previously provided to him.

81. Dr. Katz testified that Claimant's left eye conditions were due in large part to his treatment for his industrial accident; specifically the surgery on his neck. Dr. Katz claimed he has seen this pattern before (no ocular problems immediately after the accident, but cropping up during treatment thereafter), but did not explain why it happens or the science of how it happens.

82. He described central retinal occlusion as a blood clot in the central retinal vein which causes blood to be trapped in the eye as blood vessels break due to increasing pressure. This can lead to permanent damage. There are a number of risk factors for this, including old age, high blood pressure, diabetes, high cholesterol, or smoking. Dr. Katz felt Claimant's occlusion was related to his neck surgery.

83. Sixth nerve palsy is weakness in the sixth ocular nerve, which controls the muscles that move the left eyeball to the left. Dr. Katz opined it was Claimant's neck surgery which led to this weakness. The palsy caused Claimant to have double vision.

84. Because of the risk factor of diabetes predisposing Claimant to central vein occlusion, Dr. Katz attributed 30% of Claimant's impairment rating to his preexisting diabetes.

85. In cross examination, Dr. Katz was provided with medical records from around 2003 where Claimant was treated for central retinal occlusion of his left eye in Nevada. Dr. Katz had not previously seen those records. He was also shown records from the time of Claimant's neck surgery showing Claimant's blood sugars were not "out of control" at the time of surgery, contrary to what Dr. Katz had previously stated when forming his opinion that Claimant's left eye issue was 70% related to his neck surgery and hence the industrial accident. Shown this new information, (prior retinal occlusion and stable blood sugars at the time of surgery in 2015), Dr. Katz acknowledged his apportionment was inaccurate. He declined to offer a new apportionment but felt it would probably place more emphasis on Claimant's diabetes, although he still felt Claimant's left eye issues were at least partially the result of his 2015 neck surgery.

Dr. Smith

86. Dr. Smith was deposed on April 26, 2022. He began treating Claimant for his fainting and headaches in 2019. Dr. Smith was attempting to determine the cause of Claimant's syncope in order to prescribe a treatment.

87. In a letter dated April 29, 2021, Dr. Smith wrote that Claimant's headaches and syncope were related to his 2014 industrial accident. He had no reason to change that opinion as of the date of his deposition.

88. Dr. Smith pushed for a tilt test to assist in determining the cause of Claimant's syncope but could not obtain authority from Surety. The test is useful in determining if there is an autonomic nervous system issue behind Claimant's loss of consciousness. Knowing the root cause assists in fashioning an appropriate treatment.

89. By the time of his deposition, Dr. Smith was not aware of Claimant's current condition, so that when asked if the tilt table test would be helpful, he responded,

"[i]f his condition has been unchanged and no other cause has been found, then it could be helpful." Smith Depo. p. 13.

90. Dr. Smith did not have an opinion on whether Claimant could return to work in the flooring business, other than to advise him not to work at heights or elevated positions. He also noted that as long as Claimant continued to have headaches he would be prescribed pain medication for them.

91. In cross examination, Dr. Smith agreed that syncope and loss of consciousness are the same thing. Neurogenic syncope stems from the brain, but syncope can also come from heart and blood pressure issues (orthostatic hypotension). A tilt test helps distinguish the type of syncope a person is experiencing.

92. Dr. Smith, as a neurologist, does not actually conduct the tilt table tests; instead, he refers patients to physicians, such as cardiologists, who do such testing.

93. Dr. Smith testified that he felt the tilt table test was the most logical next step after he had performed multiple other testing to attempt to determine the cause of Claimant's syncope. He recognized there are tests other than the tilt table which could be used, but given the limited resources in Idaho for testing the autonomic nervous system, the tilt table made the most sense to him. Claimant could obtain alternative testing either at University of Utah or Oregon Health Sciences University in Portland, or even the University of Washington, but Dr. Smith would not consider sending Claimant out of state until after having a tilt table test conducted in Idaho.

94. To become a headache specialist, Dr. Smith, after college, attended four years of medical school, four more years of neurology training, then an additional year or so in subspecialization training at Mayo Clinic. Dr. Smith is board certified in headache medicine.

Dr. Greenwald

95. Dr. Greenwald was deposed on May 3, 2022. She is board certified in physical medicine rehabilitation and brain injury medicine.

96. Dr. Greenwald felt Claimant's headaches were due to the combination of his diabetic diplopia, (caused by his central vein occlusion and injury to his cranial 6 nerve), and Claimant's cervicogenic injury from his work accident in question.

97. Dr. Greenwald did not assign work restrictions for Claimant's headache, as that is rarely appropriate.[4] Her focus on individuals with chronic pain is to move them forward through their pain, to reengage in the community or back to work instead of sitting at home.

98. Dr. Greenwald confirmed her belief that Claimant's dizziness, blackouts, and falling episodes were not related to his work accident but more likely were related to his diabetes. As such, a tilt table test would not be related to his industrial injury. Likewise, Claimant's left eye issue was not related to the 2014 work accident in Dr. Greenwald's opinion.

99. Dr. Greenwald opined that Claimant should wean off Tramadol, which he had been using for years to mitigate his post traumatic headaches. She explained Tramadol is a narcotic which, according to her, may alleviate the pain momentarily but the body makes more pain receptors in response to the narcotic. With more pain receptors, more narcotic is needed to satiate the receptors, which causes what Dr. Greenwald calls a "rebound effect." She acknowledged weaning off narcotics can be quite difficult because of the patient's increasing pain during the weaning process. Dr. Greenwald recommended Claimant be weaned from Tramadol,

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[4] Subsequently in her deposition, Dr. Greenwald explained that restrictions are put in place for the safety of the patient, to prevent further damage or injury.

along with counseling from a "good cognitive behavior therapist" and alternative medication for pain management during the months-long process. Greenwald Depo. pp. 32 - 34.

100. Dr. Greenwald did not feel Claimant's headaches, standing alone, would be sufficient to render him unemployable. Instead, she argued headaches were part of Claimant's chronic pain syndrome which required an attempt at a functional recovery rather than more injections, medications, or surgeries. As she put it, "I do feel that functionally he could do more things, and it might help some of his pain...." Greenwald Depo. pp. 46, 47.

101. In cross examination, Dr. Greenwald staunchly reiterated her position that Claimant's headaches were cervicogenic (in part) and not migrainous in nature but conceded Dr. Smith felt they were migraine-type headaches. She also conceded a concussion can lead to migraine headaches but it is not a common occurrence. She also grudgingly conceded that when rating migraine headaches, frequency and duration is considered. Cervicogenic headaches simply get a 3% impairment rating without further consideration for frequency. Migraine headaches can rate up to a 5% WP PPI.

102. Dr. Greenwald testified that from her "drone position" looking over the entire medical presentation, Claimant "needed to progress into a chronic pain program or something like that." Greenwald Depo. p. 74.

VOCATIONAL WITNESSES

103. Each party in this matter hired a vocational expert, who prepared reports and testified in deposition. Claimant hired Delyn Porter, Defendants hired Cali Eby, and ISIF hired Barbara Nelson.

104. Porter and Nelson agreed Claimant is totally and permanently disabled, although they disagreed on the cause(s). Porter and Eby agreed Claimant's disability is the result

of the combination of preexisting conditions and injuries sustained in the industrial accident in question.

Delyn Porter

105. Mr. Porter prepared a report dated February 13, 2019, after interviewing Claimant and reviewing records. Mr. Porter relied to a great extent on Dr. Greenwald's assessments. For example, he noted that Dr. Greenwald's "after-the-fact" restrictions for Claimant's preexisting conditions "took [Claimant] out of work as a carpet and flooring installer." In the next sentence, he argued the restrictions from the subject industrial accident "also take him out of his past work as a forklift operator or material handler." JE 32, p. 37. Mr. Porter opined Claimant's overall function placed him in the sedentary to below sedentary work capacity, citing chronic headaches, dizziness leading to occasional falls, minimal left eye vision, numbness and tingling in his hands and fingers with minimal function in his right hand, bilateral hearing loss, bilateral knee replacements, and limited mobility. Mr. Porter then concluded that Claimant was totally and permanently disabled as a result of his preexisting and non-industrial medical conditions combined with his industrial injuries, impairments, and restrictions.

106. Mr. Porter also felt there were no jobs available to Claimant outside of a "sympathetic employer" situation; it would be futile for Claimant to look for a job. He then embarked on a legal analysis of ISIF liability, pronounced them liable, and even took the time to calculate their *Carey* formula percentages. This latter legal analysis is afforded no weight, as it is beyond the scope of his expertise and invades the province of the fact finder herein.

107. On February 24, 2022, Mr. Porter prepared an addendum to his initial report. He reviewed additional medical records, and reports of the other vocational experts engaged in the case. The primary purpose of the addendum is to rebut the opinions of the other experts.

108. Mr. Porter was critical of Cali Eby on many fronts, from her past experience to the specifics of her disability analysis, which he felt ignored relevant information and physician opinions. He highlighted Dr. Smith's opinions that Claimant had no headaches or episodes of syncope prior to the industrial accident but developed severe and debilitating headaches thereafter. There was no known cure for the headaches in Dr. Smith's opinion, and they might persist for life. Mr. Porter also noted Dr. Smith attributed these conditions to the industrial accident.

109. Mr. Porter opined that due to Claimant's advanced age and potential for age discrimination in the labor market, combined with his use of a cane for his ongoing syncopal issues and debilitating headaches, Claimant was "no longer **competitively** employable …." (Emphasis in original.) He then noted that, in his opinion, Claimant's "ongoing problems with syncope and frequent debilitating headaches present a very significant barrier to [Claimant's] actual placeability in a competitive work setting." JE 78, p. 15. Mr. Porter was likewise critical of Ms. Eby's proposed jobs available to Claimant, as they ignored many of the actual requirements of the proposed positions.

110. Mr. Porter then looked at Barbara Nelson's report. He agreed with her factual statement that the 2014 industrial accident alone would cause Claimant's total and permanent disability but disagreed with the legal logic of her report. Instead, Mr. Porter attempted to analyze the Idaho Supreme Court's ruling in *Aguilar v. State of Idaho Industrial Special Indemnity Fund*, 164 Idaho 893, 436 P.3d 1242 (2019), in an attempt to explain his understanding of the term "combines with." His misguided and inaccurate legal analysis is afforded no weight.

111. After the hearing Mr. Porter was deposed. His direct testimony was brief and simply reiterated his report conclusions. In cross examination from Defendants, he agreed that Dr. Greenwald opined Claimant's post traumatic headaches' origin had an element of

diabetic diplopia in addition to the cervicogenic, trauma related component, and further that Claimant's falls were not related to his industrial accident. Asked if he agreed the headaches were not a cause for imposing work restrictions, Mr. Porter agreed, but pointed out the nature and scope of Claimant's headaches took Claimant out of a competitive labor market. As he put it, "I am not assigning restriction. I am saying he wouldn't be able to work." Porter Depo. p. 38.

Cali Eby

112. Defendants hired Cali Eby to prepare a vocational report, which she did on September 2, 2021. Prior to doing so, she reviewed records and met with Claimant. She performed a labor market analysis and earning capacity evaluation to calculate a disability rating for him.

113. Ms. Eby opined that the pre-accident restrictions provided by Dr. Greenwald after the accident were appropriate and would have precluded Claimant from working in the carpet installation industry and/or driving a forklift, among other jobs. She did acknowledge that Claimant actually had no work restrictions at the time of his work accident in question, and indicated he had no physical limitations which impaired his ability to work in his chosen jobs. If the preexisting restrictions were calculated, Claimant already had a restricted job market at the time of his injury and lost an additional 49.5% of his job market. If the preexisting restrictions were not considered, Claimant lost 73% of his job market after the work accident. Under either scenario, Claimant lost no earning capacity. He was still employable in either case. His permanent disability in the former scenario would be 24.8%, inclusive of his 12% impairment rating. Using an unrestricted job market analysis, Claimant's permanent partial impairment rating would be 36.5%. Finally, Ms. Eby concluded that "[t]aking Dr. Doerr's restrictions for light work with limited neck movement, [Claimant's] loss of access is 13.6% of pre-injury labor market

access with no loss of earning capacity. This disability calculation would not exceed his impairment rating."

114. Ms. Eby was deposed on May 5, 2022. Therein, she explained that using the Dictionary of Occupational Titles and O*NET, and knowing Claimant's past employment skills, she was able to create a transferable skills assessment. She believed Claimant was employable, based on his physical restrictions as assigned by Drs. Greenwald and Doerr, in light sales jobs, supervising, and estimating.

115. Dr. Doerr's restrictions were less limiting, as he only restricted Claimant to 25 pounds lifting and no repetitive neck movement. That accounted for the lesser permanent impairment rating when compared to Dr. Greenwald's restrictions. Ms. Eby did not think it appropriate to combine the two physicians' restrictions when assigning Claimant a PPD rating. Ms. Eby did admit she was not aware if Dr. Doerr's restrictions were for Claimant's neck only, or were meant to be all-inclusive.

116. Ms. Eby felt Claimant could still do carpet sales post-accident. She testified Claimant claimed to her that his daily headaches "only" limited his function on about two days per week, so she did not limit his labor market access in any way based on his headaches. As support for her position, she noted no physician had given Claimant work restrictions on account of his headaches. She also noted her belief that it was improper to analyze subjective complaints like headaches when assessing permanent disability; instead, the proper thing is to "rely on medical professionals to provide permanent restrictions." Eby Depo. p. 18.

117. Ms. Eby admitted temperament and personality, along with age and appearance are factors which influence job placeability.

Barbara Nelson

118. ISIF hired Barbara Nelson to conduct a disability evaluation. She prepared a report dated February 2, 2022 and was deposed post hearing.

119. Ms. Nelson reviewed the medical record and prepared a 55 page medical summary. She observed Claimant during his Zoom deposition and briefly interviewed him thereafter.

120. While noting from a medical standpoint, Claimant presented a complicated picture, from a disability standpoint his case was straightforward. Even with all his pre-injury medical conditions, Claimant had never been assigned any permanent restrictions. Claimant, at the time of his industrial accident, was able to perform unmodified, unaccommodated work as a certified forklift operator at night, while concurrently working at his carpet business during the days. Claimant repeatedly denied having any pre-accident hindrances to employment.

121. Significantly, Claimant had not complained of headaches since a motor vehicle accident in 1996. In fact, there were several references in the medical records from then until 2014 where Claimant specifically denied headaches, including records from the physician treating Claimant for his decreased vision in his left eye due to a retinal vein occlusion in 2003.

122. From the outset of his medical treatment for his work accident of March 19, 2014, Claimant consistently complained of headaches which he has described as "massive," "splitting," "severe," "debilitating," and similar descriptions. Ms. Nelson documented a medical record chronology which spanned seven single-spaced typed pages of her report wherein Claimant was complaining of, or treated for these headaches, from 2014 until the time of her report. She noted the headaches waxed and waned, but never resolved. In 2019, his migraine-type headaches occurred as frequently as 28 days per month. Claimant has been prescribed narcotic pain medications for years in an attempt to mitigate the severity of the headaches.

123. In 2021, Claimant told Ms. Eby he had "functionally limiting" headaches about twice a week. In his 2022 deposition, he testified when his headaches were severe, prescription pain pills do not even "touch" his pain. His headaches disrupt his sleep nightly.

124. In looking at Claimant's non-medical disability factors, Ms. Nelson noted Claimant's significant skills in the flooring industry, and agreed with Ms. Eby that Claimant has transferable skills in customer sales, service, blueprint reading, construction knowledge, management and supervision, and computer software for inventory and billing in the flooring industry. While Claimant denied any work limitations prior to his industrial accident, he had largely given up the installation portion of his business by early 2014, (either due to his knees, or due to the fact he was getting older and had the skills and authority as the owner of his business to transition to office work). However, the important fact, according to Ms. Nelson, was that Claimant had been performing a job which was at least moderately heavy work for months prior to his accident without any modification or accommodation. He was also able to work long hours (up to 16) on a daily basis.

125. After his accident, Ms. Nelson noted Claimant "suffered a plethora of [health] problems," many, but not all, of which were either fully or partially related to his work accident. She further noted "all of the physicians who have examined him have related [Claimant's headaches] to his work accident," although Dr. Greenwald partly attributed them to Claimant's diplopia which he acquired post-accident. JE 76, p. 12. Ms. Nelson quoted several of Claimant's treating physicians identifying Claimant's' headaches as "post-traumatic." Drs. Green and Smith also specifically relate those headaches to Claimant's industrial accident in question.

126. Against this backdrop, Ms. Nelson stated "I do not believe it is necessary to construct a series of scenarios based on various medical theories about causation of [Claimant's] post-injury medical conditions other than his headaches. Further, I do not believe that his non-medical factors play a significant role in this particular disability analysis." JE 76, p. 12. Instead, Ms. Nelson felt Claimant's severe post-traumatic headaches, which can occur almost daily, sometimes with photophobia and phonophobia, tremendously restrict Claimant's activities, and are the overriding component of Claimant's current and permanent disability. She pointed out that Claimant had tried at least 13 different medications and has undergone multiple injections to treat his headaches. None of these treatments were particularly successful for long term pain relief. Dr. Greenwald previously assigned Claimant a 3% PPI rating for his chronic headaches.

127. Ms. Nelson recognized the subjective nature of headaches requires a skeptical view of disability. She argued that prior to considering headaches as a permanent disability, the medical record must support findings that the headaches are frequent, severe, debilitating, and have lasted for an extended period of time. Claimant must also have received ongoing physician care and followed prescribed therapies. Finally, there must be indications that the condition is not expected to improve. Ms. Nelson then found that Claimant met all of the criteria for consideration of headaches as a permanent disability. She concluded Claimant's headaches "affect his level of functioning to the point where he could not perform basic work activities on a regular basis. The records validate the frequency of his headaches and confirm he would need to miss work due to the migraines. They endorse the lack of probability that he will recover from this chronic condition." (Underscoring omitted.) JE. 76, p. 13.

128. Ms. Nelson next explained the rationale for her conclusion. She noted severe headaches create intermittent and unforeseen absenteeism, which could be frequent, prolonged, and unpredictable. Most employers would not tolerate such absences on an ongoing basis.

129. On one medical factor alone – Claimant's chronic, intractable migraine-type headaches resulting from his industrial accident of March 19, 2014 – Ms. Nelson concluded Claimant was totally and permanently disabled under the odd-lot doctrine. She felt there was no need to consider other factors. She cited the medical records of Drs. Krafft, Green, Greenwald, and Smith as foundation for her opinion.

130. Ms. Nelson concluded Claimant's "severe migraine condition fully eclipses any other medical or non-medical factor in his case. His disability would have been total without any of these preexisting conditions." JE 76, p. 16.

131. Ms. Nelson was deposed on March 7, 2022. She pointed out therein that pain which produces a functional loss is a medical factor to be considered when determining permanent disability. Claimant's headaches fit that criterion. She also made clear that no other factors besides headaches were required to conclude Claimant was totally and permanently disabled.

132. In cross examination, Ms. Nelson noted that while Dr. Greenwald attributed Claimant's headaches to a combination of his accident-related neck problems and his unrelated diplopia, the diplopia was not a preexisting condition; instead, it was diagnosed well after the accident, and after Claimant had begun treatment for his headaches.

133. Ms. Nelson agreed Claimant had transferrable skills which would be useful if he could "show up for work on a regular basis, stay at work all day, every day, not have to leave work early because of a headache, not have to call into work at the last minute sick" due to a headache. Nelson Depo. p. 32. She then reiterated her position was Claimant

is not reliable enough, due to his headaches, to work on a full-time, continuous basis. Ms. Nelson also testified that in her opinion, Claimant could not perform any of the jobs listed by Ms. Eby as being available to Claimant.

134. Ms. Nelson testified that all of Claimant's other medical issues, such as his dizziness, fainting, left eye blindness, right arm weakness, and any other condition, medical and non-medical, "of course doesn't enhance his employability or his ability to work, but … just the headaches alone make it impossible for him to obtain or retain employment." *Id,* pp. 41, 42.

DISCUSSION AND FURTHER FINDINGS

135. The most logical way to approach this potentially complex case is to first determine if Claimant is totally and permanently disabled. (Enumerated issue #5.) If he is not, ISIF has no chance of liability, and parsing out which conditions are attributable to the accident in question, which pre-date the accident, and which arose after, and are unrelated to, the accident, all of which contribute to Claimant's less-than-total permanent disability rating, becomes important. *See Page v. McCain Foods, Inc.,* 145 Idaho 302, 179 P.3d 265 (2008). If Claimant is totally and permanently disabled, then Defendants are liable for total permanent disability benefits, subject to contribution from ISIF if all criteria for the Fund's liability are met, and perhaps a deduction in benefit liability if Claimant's total and permanent disability at the time of hearing has subsequent, unrelated components to it. *See Aguilar v. Industrial Special Indemnity Fund*, 164 Idaho 893, 436 P.3d 1242 (2019). Separately, there is an issue of entitlement to medical benefits for a tilt table test, which will be addressed thereafter.

TOTAL AND PERMANENT DISABILITY

136. 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 impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425.

137. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988).

138. The extent and causes of permanent disability are factual questions committed to the particular expertise of the Commission, which considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Indus.,* 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund,* 130 Idaho 278, 939 P.2d 854 (1997); *Thom v. Callahan,* 97 Idaho 151, 155, 157, 540 P.2d 1330, 1334, 1336 (1975). The Idaho Supreme Court in *Brown v. The Home Depot,* 152 Idaho 605, 272 P.3d 577 (2012) iterated that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing.

139. Claimant asserts he is totally and permanently disabled under the odd-lot doctrine. An odd lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State, Industrial Special Indemnity Fund,* 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), citing *Arnold v. Splendid Bakery,* 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). Such workers are not regularly employable "in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department,* 107 Idaho 109, 112, 686 P.2d 54, 57 (1984) citing *Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

140. The burden of establishing odd lot status rests upon Claimant. *Dumaw v. J. L. Norton Logging*, 118 Idaho at 153, 795 P.2d at 315 (1990). He may establish total permanent disability under the odd lot doctrine in any one of three ways:

a. By showing he has attempted other types of employment without success;
b. By showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or
c. By showing that any efforts to find suitable work would be futile.

Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

141. The parties to this case argue along two different disability lines. According to them, either Claimant is, as two out of three vocational rehabilitation experts opined, totally disabled (either as a consequence of multiple maladies, or due to debilitating headaches), or, while partially disabled, Claimant still has work opportunities available to him, and is not totally disabled. However, there is a third possibility which needs examination, one that was not fleshed out by any party herein; namely that Claimant is not yet at MMI, despite earlier pronouncements to the contrary by the very physician who tacitly appears to support this third position.

142. In her deposition, Dr. Greenwald testified that Claimant suffers from a chronic pain syndrome which is fed in part by his continued reliance on narcotic pain medication. As she explained, the narcotic medication causes the body to create more pain receptors which then require more narcotics, thus creating a cycle of narcotic dependency. In this scenario, Claimant's headaches and other bodily pain are a function of the very narcotic medication he uses to "control" this pain.

143. Dr. Greenwald testified that Claimant should wean off the narcotics, a long and painful process, and by doing so, his headaches would likely lessen or resolve. Implicit in this testimony is the suggestion that Claimant's debilitating headaches are not permanent.

144. This belief, while not directly discussed, was the basis for Dr. Greenwald's testimony about Claimant's headaches. When asked if the headaches alone rendered Claimant unemployable, she replied that they would not, but *not* because of the presence of other impairments. Rather, she testified that because his headaches were part of a chronic pain syndrome, they could be treated and mitigated with modalities which encourage "functional recovery" as discussed above. Likewise, in her written report of April 17, 2018, Dr. Greenwald suggested Claimant's headaches could likely improve with "continued treatment by Dr. Green for headaches and depression for a year from now. Generally, post traumatic headaches improve when depression improves." JE 30, p. 25.

145. The overall tenor of Dr. Greenwald's testimony (and the statement quoted above) suggest Dr. Greenwald's belief Claimant's headaches are not a permanent condition. If that is true, then he cannot be said to be at maximum medical improvement, which contemplates a condition which is not likely to improve or progress significantly within the foreseeable future. Dr. Greenwald's testimony suggests with proper treatment, including weaning Claimant from narcotic pain medications, proper counseling for his pain and his depression, his headaches would more likely than not improve.

146. There are several reasons to discount Dr. Greenwald's testimony. Besides the fact it was developed well after her last report, and after any other physician had an opportunity to respond, the basic premise is speculative at best. Neither of Claimant's treating headache physicians, including Dr. Smith, who specializes in headache medicine, suggested weaning Claimant from Tramadol. Neither opined that Claimant's headaches (or their severity) were due to his continuing medication regimen. All treating physicians saw fit to keep Claimant on narcotic pain medication as a palliative treatment. Claimant has suffered from disabling, massive headaches since the accident, and through the time of hearing nearly eight years later. The idea that there is a curative treatment available now is speculative. On the record presented it is not reasonable to expect a fundamental or marked change in Claimant's condition in the foreseeable future.

147. The greater weight of the evidence supports the notion that Claimant's debilitating headaches are permanent, and, as Dr. Greenwald originally stated, Claimant is at MMI, and was as of the time of her report in 2018. His ongoing palliative care is a reasonable response to his permanent condition. *See Rish v. Home Depot, Inc.,* 1612 Idaho 702, 390 P.3d 428 (2017).

148. Likewise, the opinions of Dr. Smith and Dr. Green, who attributed Claimant's headaches to his 2014 industrial accident, carry more weight than that of Dr. Greenwald, who believes Claimant's headaches are the result of his cervicogenic trauma in the 2014 industrial accident, permanently aggravated by the subsequent development of diabetic diplopia and perpetuated by depression and Tramadol usage. Claimant's headaches began as soon as he was injured and have continued thereafter. His diabetic double vision was not a source of headaches prior to his accident, and in fact did not develop until well after his work accident and onset of massive headaches. Claimant did not complain of disabling, massive headaches prior to his accident.

Whatever transient headaches Claimant felt prior to his accident were not akin to his post traumatic headaches, as he so testified.

149. While by all accounts Claimant is significantly if not totally disabled, Ms. Eby opined that Claimant's skillset provides him with opportunity for employment in spite of his disabilities. She based her opinion solely on physician restrictions and an O*NET search of jobs which align with Claimant's skill set. She specifically rejected the idea that "subjective" complaints could form the basis for disability. This myopic view ignores reality.

150. Ms. Nelson agreed that Claimant had transferrable skills but felt Claimant's unpredictable and disabling headaches trumped his skillset when it came to finding and maintaining employment in the real world. Likewise, Mr. Porter felt Claimant had no chance to find employment absent a sympathetic employer.

151. The weight of the evidence supports the finding that Claimant is totally and permanently disabled. Both Mr. Porter and Ms. Nelson testified that Claimant's headaches alone take him out of the workforce, even though Mr. Porter did not base his conclusion on that fact. As noted in *Bybee*, *supra*, 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." (Emphasis added.) As Ms. Nelson convincingly testified, Claimant's lack of dependability in showing up for whatever job he could find would be his employability death knell. No reasonable employer could tolerate the interruption in business Claimant's unpredictable and debilitating headaches would cause.

152. It would be futile for Claimant to seek employment because even if he found an employer willing to hire him, his lack of ability to show up consistently for work would,

absent a sympathetic employer or working for a relative, would make it very difficult to hold such employment. See Idaho Code § 72-430(1).[5]

153. Considering the record as a whole, Claimant has proven by a preponderance of the evidence that he is totally and permanently disabled.

PREEXISTING CONDITIONS AND IDAHO CODE § 72-406 DEDUCTION

154. Listed issue 1 – whether Claimant's condition for which he seeks benefits is due in whole or in part to a preexisting injury or condition, and issue 4 – whether apportionment for a preexisting condition pursuant to Idaho Code §72-406 is appropriate, involve an interrelated two-step analysis. Determining whether Claimant's permanent disability is due, at least in part, to a preexisting condition is a necessary component of Idaho Code §72-406 analysis. However, Idaho Code §72-406 only applies in "cases of permanent disability less than total." Finding Claimant totally and permanently disabled renders issue 4 moot.

155. For reasons explained both *infra* and *supra,* Claimant's acknowledged preexisting conditions, including his bilateral knee replacements, diabetes with polyneuropathy and other related symptoms, and bilateral partial hearing loss, do not factor into his total permanent disability finding as determined herein.

156. As a matter of law, apportionment under Idaho Code §72-406 is inapplicable to the facts of this case.

157. Considering the record as a whole, Claimant has proven his total and permanent disability is not, in whole or in part, due to a preexisting injury or condition.

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[5] Claimant also argues he attempted other employment without success by continuing to work doing light-duty tasks for Employer until he was fired. He also argues he worked with ICRD until they could find no suitable employment for him and closed their file. The merits of those arguments are subsumed by the futility prong of odd-lot disability and need not be discussed in detail herein.

SUBSEQUENT CONDITION ANALYSIS

158. Claimant argues none of his time-of-hearing conditions arose independently and subsequently from the work accident in question. Instead, those conditions which manifested after the accident were sequalae from the accident.

159. Defendants raise no argument in briefing to contradict or rebut Claimant's position. In fact, Defendants argue in briefing that "Claimant's permanent disability, whatever its extent, is the result of the combined effects of his preexisting impairments and the industrial injury." Defs' Post-Hearing Brief, p. 12. Likewise, ISIF's post-hearing briefing was silent on the issue of subsequent conditions as it affects Defendants' liability.

160. Considering the record as a whole, Claimant has proven by a preponderance of the evidence that his total and permanent disability is not due in whole or in part to any condition which arose subsequently and independently from his industrial accident of March 19, 2014.

ISIF LIABILITY UNDER IDAHO CODE § 72-332

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

162. Idaho Code § 72-332(2) further provides that "permanent physical impairment" is as defined in Idaho Code § 72-422, provided, however, as used in this section such impairment

must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become unemployed. This shall be interpreted subjectively as to the particular employee involved; however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

163. The elements Claimant must prove to establish ISIF liability are as follows: (1) Claimant suffered from one or more preexisting physical impairments; (2) the preexisting impairment was manifest; (3) the preexisting impairment was a subjective hindrance to employment; and (4) the combined effects of the preexisting impairment and the subsequent injury resulted in total and permanent disability; or the subsequent injury aggravated and accelerated the preexisting impairment to cause total and permanent disability. I.C. § 72-332. *Aguilar v. State of Idaho, Industrial Special Indemnity Fund,* 164 Idaho 893, 902, 436 P.3d 1242, 1251 (2019).

164. It is beyond dispute Claimant suffered from several manifest preexisting physical impairments. The issues are whether those impairments, or any of them, were a subjective hindrance to Claimant's employment, and whether it was the combined effects of any or all those impairments and the subsequent industrial injuries (or the aggravation or acceleration of any of such preexisting physical impairments by the industrial accident) which resulted in Claimant's total and permanent disability.

Subjective Hindrance

165. While Claimant had several manifest preexisting impairments, the only such impairment which arguably could be considered a subjective hindrance would be Claimant's bilateral knee replacements. While the evidence of subjective hindrance is scant, it could be that

an employer other than Claimant or his family member might be reluctant to hire Claimant to *install* carpets due to the frequent crawling, kneeling, and using a knee kicker (a device used to stretch carpet in tight spaces by the forcible use of the installer's knees) in light of his knee replacements.[6] However, a detailed analysis of this subject is unnecessary, as the "combining" element of ISIF liability is absent in this case.

Combined Effects

166. The final requirement for ISIF liability is that the combined effects of the preexisting impairment and the subsequent injury resulted in total and permanent disability; or the subsequent injury aggravated and accelerated the preexisting impairment to cause total and permanent disability. This requires a "but for" analysis.

167. Claimant's debilitating headaches, standing alone, render his totally and permanently disabled. In other words, even if Claimant had no other impairments which were a hindrance to his employment, the fact that he suffers from recurring, disabling headaches would take him out of the workforce due to his inability to maintain a predictable, uniform work schedule. Even if Claimant had full use of both eyes, both arms, both legs and knees, no diabetic polyneuropathy, and a solid back, he still would have been rendered fully disabled by the intractable headaches caused by his work accident. As such, one cannot say that "but for" Claimant's preexisting impairments he would not have been rendered totally and permanently disabled by the work accident in question. Claimant's continuing and frequent headaches eclipse all of his other impairments and standing alone those headaches render Claimant totally and permanently disabled.

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[6] He could still have operated a forklift, worked in flooring sales and service, and run a carpet store without any hindrance from his knees.

168. Considering the record as a whole, Claimant and Defendants have failed to establish the criteria for ISIF contribution to Claimant's total and permanent disability under Idaho Code § 72-332.

169. Apportionment analysis using the *Carey* Formula is moot.

FURTHER MEDICAL CARE

170. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury, and for a reasonable time thereafter. An employer is only obligated to provide medical treatment necessitated by the industrial accident, and is not responsible for medical treatment not related to the industrial accident. *Williamson v. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d 1365 (1997).

171. Claimant argues he is entitled to additional medical care, specifically a tilt-table test to assist in determining whether his syncope and dizziness are due to his head injury or other issues, such as blood pressure deviations.

172. Dr. Smith, who treated Claimant for his syncope and dizziness, recommended Claimant undergo a tilt-table test (or perhaps more than one if determined necessary by the cardiologist to whom Dr. Smith would refer Claimant for the testing). Several different medical conditions could be responsible for Claimant's syncope and dizziness and the testing is designed to ferret out which condition is the culprit for his complaints.

173. Admittedly, Claimant's condition may not prove to be related to his work accident upon further testing. At least two physicians in this case feel Claimant's fainting and dizziness

are not due to his industrial injuries. Claimant's treater, Dr. Smith, has not reached a conclusion on the etiology and thus would like the further diagnostic studies.

174. Defendants argue Claimant has not established the need for the testing to a "reasonable degree of medical probability" because Dr. Smith testified at deposition that the testing "could be helpful" if Claimant's "condition has been unchanged [since his last visit with Dr. Smith], and no other cause has been found [as of the date of Dr. Smith's deposition.]" Dr. Smith also conceded that orthostatic hypotension (unrelated to the work accident) could be the root of Claimant's complaints of dizziness. Finally, Dr. Smith acknowledged that diabetes is a risk factor for a particular and common type of syncope known as autonomic neuropathy.

175. Dr. Greenwald testified that in her opinion Claimant's falls and dizziness was not caused by his work accident. She did not testify as to the reason for Claimant's condition; instead, she suggested Claimant have a medical work up done by his primary care physician to determine the source of his complaints.

176. As of the date of hearing there was no definitive explanation for Claimant's syncope and dizziness, although there were conflicting medical opinions on whether the condition was, or was not, related to Claimant's work injury. Diagnostic tests are performed to assist in determining the etiology of a person's complaints when multiple causes are suspected. If Dr. Smith knew the reason for Claimant's syncope, he would not need to order additional diagnostic testing. Once the testing confirms the root of Claimant's complaints, then appropriate treatment can be fashioned. It may be that further testing rules out the industrial accident as a causative factor in Claimant's complaints, but that is why testing is done, to rule in or rule out various potential causes.

177. As a treater, Dr. Smith felt a referral to a cardiologist for possible testing on a tilt-table was reasonable and necessary to assist in reaching a conclusion on the reason for Claimant's syncope. The fact that other physicians speculate that Claimant's syncope is unrelated to his accident does not make the request for testing unreasonable since there is no consensus on this issue. If additional testing rules out the industrial accident as a causative factor, then Claimant's further treatment for his condition would not be Defendants' responsibility, but the testing to make that determination is both reasonable and necessary as a result of Claimant's work injury.

178. Considering the record as a whole, Claimant has proven by a preponderance of the evidence that he is entitled to additional medical testing in the form of tilt-table testing to assist in determining the root cause of his syncope and dizziness.

CONCLUSIONS OF LAW

1. Considering the record as a whole, Claimant has proven by a preponderance of the evidence that he is totally and permanently disabled.

2. As a matter of law, apportionment under Idaho Code §72-406 is inapplicable to the facts of this case.

3. Considering the record as a whole, Claimant has proven his total and permanent disability is not, in whole or in part, due to a preexisting injury or condition.

4. Considering the record as a whole, Claimant has proven by a preponderance of the evidence that his total and permanent disability is not due in whole or in part to any condition which arose subsequently and independently from his industrial accident of March 19, 2014.

5. Considering the record as a whole, Claimant and Defendants have failed to establish the criteria for ISIF contribution to Claimant's total and permanent disability under Idaho Code § 72-332.

6. Apportionment analysis using the *Carey* Formula is moot.

7. Considering the record as a whole, Claimant has proven by a preponderance of the evidence that he is entitled to additional medical testing in the form of tilt-table testing to assist in determining the root cause of his syncope and dizziness.

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 5th day of October, 2022.

INDUSTRIAL COMMISSION

Brian Harper

Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of December, 2022, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by email transmission and by regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHRISTOPHER KNAPP, Claimant, v. GEM STATE STAFFING, LLC, Employer, and IDAHO STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2014-007755** **ORDER** FILED DEC 02 2022 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Brian Harper submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation.

Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own. Based upon the foregoing, IT IS HEREBY ORDERED that:

1. Considering the record as a whole, Claimant has proven by a preponderance of the evidence that he is totally and permanently disabled.

2. As a matter of law, apportionment under Idaho Code §72-406 is inapplicable to the facts of this case.

3. Considering the record as a whole, Claimant has proven his total and permanent disability is not, in whole or in part, due to a preexisting injury or condition.

4. Considering the record as a whole, Claimant has proven by a preponderance of the evidence that his total and permanent disability is not due in whole or in part to any condition which arose subsequently and independently from his industrial accident of March 19, 2014.

5. Considering the record as a whole, Claimant and Defendants have failed to establish the criteria for ISIF contribution to Claimant's total and permanent disability under Idaho Code § 72-332.

6. Apportionment analysis using the *Carey* Formula is moot.

7. Considering the record as a whole, Claimant has proven by a preponderance of the evidence that he is entitled to additional medical testing in the form of tilt-table testing to assist in determining the root cause of his syncope and dizziness.

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

DATED this the 2nd day of December, 2022.

INDUSTRIAL COMMISSION

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

Aaron White, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of December, 2022, a true and correct copy of the foregoing **ORDER** was served by email transmission and regular United States Mail upon each of the following:

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