BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT NELSON Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2018-009611** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Alan Taylor. Upon his retirement this matter was reassigned to Referee Douglas A. Donohue who conducted a hearing in Burley on July 26, 2021. Andrew Adams represented Claimant. Anthony Valdez represented ISIF. Employer 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 April 13, 2022 and is now 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 ISIF is liable under Idaho Code § 72-332; and
4. Apportionment to establish ISIF's share of liability under *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984).

CONTENTIONS OF THE PARTIES

Claimant contends he is totally and permanently disabled both 100% and as an odd-lot worker under the futility prong of the test. His prior conditions combine to cause the total and permanent disability under criteria that makes ISIF liable.

ISIF contends that Claimant did not suffer permanent impairment as a result of the accident. Dr. Chong diagnosed a muscle strain which resolved in a few weeks. Further, Claimant cannot establish he is totally and permanently disabled under the 100% analysis. Claimant does not qualify as an odd-lot worker. He conducted no genuine job search. Claimant has not shown that an actual job search would likely be futile. Claimant earlier denied his prior conditions were manifest and denied they were a hindrance before he gave differing testimony at hearing. Claimant, in an earlier matter, was charged with insurance fraud, a felony, which he pled down to a misdemeanor and paid restitution.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant;
2. Joint exhibits 1-40 admitted at hearing; and
3. Post-hearing depositions of physicians Dallas Rindfleisch, D.O., and Benjamin Blair, M.D., of vocational experts Cali Collins Eby and Kent Granat.

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 Hoppy Enterprises, LLC, dba Dependable Auto Sales. He sold used cars and performed additional executive functions necessary when, as often, he was the only employee present on the lot.

2. On March 29, 2018, Claimant was opening a lift door and felt a pop in his back. Not thinking anything of it at the time he finished his workday. He woke with back pain the next morning.

Medical Care: 2018

3. On March 30, 2018, Claimant visited Dallas Rindfleisch, D.O. Claimant had previously seen Dr. Rindfleish in January 2016 for a consultation about potential bariatric surgery, in March 2016 for an upper respiratory infection, and in December 2017 with a complaint of daytime somnolence. He considered Dr. Rindfleisch to be his primary treating physician.

4. At the December 2017 visit, Dr. Rindfleisch also prescribed Norco for chronic pain. Claimant testified that he had been taking Norco regularly perhaps as early as 2010. Despite a long-term prescription for Norco, Claimant's opioid use has not been shown to be a factor in his recovery or function.

5. At the March 30 visit to Dr. Rindfleisch, Claimant described the garage door accident at work. He stated he needed a refill on his chronic pain medications. Dr. Rindfleisch examined Claimant. An X-ray was taken and compared to a 2012 X-ray. Multilevel degenerative disease in the lumbar spine without spondylolysis or spondylolisthesis was reported by the radiologist. Dr. Rindfleisch diagnosed acute back pain with left radiculopathy. He prescribed Prednisone and Gabapentin for this condition. He took Claimant off work temporarily.

6. On April 16, Claimant again visited Dr. Rindfleisch. Claimant acknowledged a continuance of his earlier symptoms and added a report of right sided pain as well. Dr. Rindfleisch added a diagnosis of neuropathic lumbar spondylopathy.

7. A lumbar MRI on April 25 showed degeneration at L5-S1 with epidural fat which contributed to the thecal sac stenosis. It also noted degenerative facet spondylosis. Around this

time Claimant weighed well over 350 pounds.

8. On April 30, Dr. Rindfleisch opined that the accident likely caused a flare of arthritis and possible disc bulge in his back. He recommended an MRI and physical therapy. He scheduled nerve branch blocks to determine the likelihood of a successful nerve ablation procedure. He allowed Claimant to return to light-duty work, four hours per day.

9. On May 14, Dr. Rindfleisch performed the nerve branch blocks at L2 through L5. These provided 100% relief of pain. Post-procedure diagnosis was lumbar facet arthropathy.

10. On May 21, Claimant returned to Dr. Rindfleisch and reported the "other side was hurting." Dr. Rindfleisch planned bilateral nerve branch blocks.

11. On May 30, Dr. Rindfleisch took Claimant back off work.

12. On June 20, Dr. Rindfleisch performed bilateral blocks. This note twice acknowledged that Claimant reported no relief. However, it also twice carried over the language from the May 14 note which reported that Claimant experienced 100% relief. The new information is deemed to be accurate and not the re-transcribed portion from the earlier note.

13. On July 11, Dr. Rindfleisch performed a caudal epidural injection nerve block at the sacrococcygeal joint. Post-procedure diagnosis was lumbar stenosis.

14. On July 25, Dr. Rindfleisch recommended significant weight loss.

15. On August 3, Dennis Chong, M.D. reviewed records and conducted a forensic evaluation of Claimant at Employer's request. He opined that Dr. Rindfleish's diagnostic injections indicated chronic mechanical back pain and not inflammation from acute injury. He opined Claimant's low back pain was primarily related to his "morbid super obesity." He opined it likely that the morning onset of pain on March 30 was caused by shifting epidural fat related to his restlessness in bed which, in turn, was related to deoxygenation from sleep apnea and

Claimant's failure to use his CPAP. Dr. Chong opined, "This [acute low back pain with left sciatica] is not industrially related." He went on to opine, "At the most, the claimant may have sustained a mild lumbar sprain/strain, which would have resolved within a few weeks if this was industrially related." (Ex.27, p.8). He opined Claimant was medically stable. He opined that as far as a possible work-related injury was concerned Claimant could return to work without restrictions. He deemed further injections to be unreasonable. He found no work-related permanent impairment.

16. On August 23, Brent Greenwald, M.D. examined Claimant upon referral from Dr. Rindfleisch He noted a lumbar MRI showed no acute changes. He noted, "The epidural lipomatosis is not acute." He indicated, but did not frankly opine, that Claimant's condition was related to weight and preexisting degenerative condition without being industrially related.

17. In an undated note "[t]o whom it may concern" Dr. Rindfleisch responded to Dr. Chong's report. He agreed with Dr. Chong's analysis that Claimant's weight contributes to his pain and radiculopathy but noted that Claimant carried this weight before the accident.

18. On September 10, Dr. Chong authored an addendum report having reviewed additional records as well as Dr. Rindfleisch's undated note. He opined that Dr. Greenwald's diagnostic imaging and diagnosis offered no objective suggestion that Claimant suffered an injury or acute aggravation or exacerbation of his preexisting degenerative condition.

19. On September 18, Dr. Rindfleisch performed an injection at Claimant's SI joint. Claimant did not report much immediate relief.

20. On November 30, Dr. Greenwald expressly agreed with Dr. Chong's August 3 report.

Medical Care: 2019

21. On January 9, Benjamin Blair, M.D. reviewed records and examined Claimant for forensic purposes at Claimant's request. By history and for the first time to a physician, Claimant reported he felt "mild discomfort immediately" at the time of the garage door incident. Before this, Claimant had denied any discomfort until the next morning. Further, Claimant denied any previous history of lumbar pain. Dr. Blair opined Claimant's diagnosis was lumbar spine stenosis aggravated by lipomatosis. He deemed Claimant medically stable. He rated Claimant at 11% whole person PPI for his back condition. He imposed restrictions of no lifting over 35 pounds occasionally, 25 pounds continuously, and motion and position limitations. Dr. Blair noted that having no restrictions before the accident, Claimant's condition was work related. He noted that Claimant's spinal stenosis was due to lipomatosis which preceded the work accident, but by history, only first became symptomatic then.

22. On March 4, Claimant visited Dr. Rindfleisch. Claimant reported new left leg pain from his gluteus to his foot beginning February 19. Examination revealed erythema on his foot. Dr. Rindfleisch thought it likely piriformis syndrome and provided a steroid injection.

23. On March 5, Dr. Rindfleisch performed a transforamial steroid injection. The pain Claimant described was lateral on his leg. In earlier descriptions it had been posterior. Dr. Rindfleisch performed bilateral L4-5 foraminal injections. He performed a second set on March 12 and a third set on March 19.

24. On April 8, 15, and 17, Dr. Rindfleisch performed similar steroid injections at L5-S1.

25. A piriformis injection was performed on April 19.

26. Also on April 17, injections were performed at L3-4. Although the notes for April

23 and 29 appear to contain typographical errors about the location of the injection sites, L3-4 appears to be correct for these second and third injections.

27. On May 2, David Simon, M.D. performed electrodiagnostic testing. Claimant reported his left leg symptoms were "much worse" since the April 25, 2018 MRI. All nerve conduction was normal. EMG showed "acute denervation" in muscles associated with the L5 nerve root distribution.

28. On May 29, Dr. Rindfleisch began evaluating and preparing Claimant for weight-loss surgery.

29. On May 30, Dr. Rindfleisch performed another caudal epidural injection.

30. On June 12, Dr. Simon noted Claimant's history of arthritis. On examination he found mild left ankle weakness in dorsiflexion. He admitted Claimant to Madison Memorial Hospital for diagnostic testing. A lumbar MRI showed moderate facet spondylosis throughout the lumbar spine and a "small" paracentral disc protrusion at L5-S1. Dr. Simon referred Claimant to Brandon Kelly, M.D. for consultation about possible L4-5 surgery.

31. On July 8, an X-ray showed a stable lumbar spine with degenerative disease most pronounced at L5-S1.

32. On July 9, Dr. Kelly evaluated Claimant for L4-5 surgery. Claimant did not return.

33. Dr. Rindfleisch continued treating Claimant with follow-up visits. In deposition Dr. Rindfleisch could not explain why several notes of his monthly visits were not in the record. Additionally, Claimant received physical therapy through Dr. Rindfleisch's office, but no notes of that therapy are in the record.

Medical Care: 2020-Hearing

34. On July 29, 2020, Dr. Chong provided an addendum report having reviewed

additional records. He opined that neither medical treatment since his last addendum nor Dr. Blair's findings provide any objective bases for tying Claimant's condition to the original work-related event of March 29, 2018. The left L4-5 disc extrusion was new, not present before 2019. This occurred without a described traumatic event and was deemed "consistent with the natural progression of the chronic degenerative process."

35. On December 21, 2020, Dr. Rindfleish included TENS therapy.

Medical Care: Weight Loss

36. On January 26, 2016, Claimant visited Lisa Medvetz, M.D. for a weight loss consultation. He weighed 346 pounds. Dr. Rindfleisch provided a consultation on January 28. On September 15 at a mental status evaluation prior to bariatric surgery he weighed 355. The record does not show why such surgery was not performed then.

37. On July 9, 2020, Tammy Fouse, D.O. again evaluated Claimant for possible weight loss surgery. He weighed 379 pounds and reported his maximum weight had been 390. Upon review of systems he generally reported back, hip and knee pain without detail. He was encouraged to lose weight prior to surgery. At an August 5 follow up he weighed 367. On the date of his laparoscopic sleeve gastrectomy, October 21, he weighed 335.

38. At the last follow up visit of record following his gastrectomy on April 21, 2021, Claimant weighed 269.

Prior Conditions: Medical Records

39. Claimant's first medical record of a left knee injury is dated December 9, 1988. Surgery on December 20 for a torn meniscus. Compliance issues about physical therapy were noted during his recovery. In mid-April 1989 he fell on his knee. On July 18, 1989, Rheim Jones, M.D. rated the knee at 8% lower extremity PPI and imposed no work restrictions.

40. The knee developed a Baker's cyst. A second surgery was performed November 7, 1989. On January 7, 1990, Dr. Jones increased his rating to 10% lower extremity PPI. In a February 20, 1990 follow-up, Dr. Jones noted popping upon "near full extension." On May 8, 1990, Dr. Jones imposed a permanent restriction of "no frequent bending or squatting or no lifting of more than 50 pounds."

41. The May 8 restriction was based largely on Claimant's subjective pain reports. On June 7, 1990, after a surety reported to Dr. Jones that Claimant was playing baseball Dr. Jones noted, "If this is true, I release all of the above restrictions." While Claimant acknowledged that he did play competitive coed softball after 1990, Dr. Jones' restrictions were imposed based on a subjective report and were removed based on nondetailed hearsay.

42. In September 1991, Claimant sought medical treatment for a right knee injury which he alleged occurred at work on August 3. Dr. Jones' examination noted reports of pain at extremes of motion, significant quadriceps atrophy, swelling of the joint, and a positive McMurray sign. X-ray was negative, and Dr. Jones suspected a torn medial meniscus. In follow-up on September 18, Dr. Jones noted additional objective findings on examination and recommended diagnostic arthroscopic surgery. After his surgery—on the same day—Claimant went to a baseball game and his surgical stitches pulled out. In early December after physical therapy Dr. Jones rated a 7% lower extremity PPI. He did not address possible restrictions.

43. On February 16, 1993, Claimant injured his ankle playing basketball. He tore ligaments. Claimant healed quickly without significant complaints of pain.

44. In January 1996, Claimant injured his shoulder at work. After an equivocal MRI Dr. Jones recommended acromioplasty for a likely rotator cuff repair.

45. On July 3, 2002, Claimant visited Summit Orthopedics. He complained of swelling

and tenderness in both knees from playing softball. No traumatic event was identified. Dr. McCowin thought it benign and recommended ice and rest with a return visit in the fall. Claimant did not return until June 2004. Left knee arthroscopic surgery was performed on December 16, 2004. An ACL tear was repaired, the medial femoral condyle was grafted, and degenerative osteophytes and chondromalacia were ameliorated. By April 2005, Claimant reported he had recovered sufficiently to return to softball, albeit at pitcher instead of outfield to lessen the amount of running.

46. On December 21, 2006, Flint Packer, D.O. examined Claimant for a general physical examination. Claimant offered no lower extremity complaints, and Dr. Packer found no abnormalities there. Claimant weighed 292 pounds.

47. On June 2, 2009, Dr. Packer addressed osteoarthritis among other conditions. He prescribed a continuation of meloxicam and fish oil. The record does not show when arthritis treatments began.

48. On June 18, 2009, Dr. Packer addressed gout in Claimant's right great toe.

49. On May 16, 2010, Claimant visited EIRMC emergency for an odd complaint of numbness or paresthesias in his left arm descending into his hip and gluteus.

50. On May 27, 2010, David Simon, M.D. treated Claimant's gout. Unrelated knee pain is mentioned as "intermittent." Examination showed no swelling, a normal gait, and no indication of a flare-up of acute gout. Claimant returned to Dr. Simon two years later, on August 7, 2012, for nonspecific joint pain which was of uncertain relationship to gout.

51. On January 30, 2012, Dirk Bigler, D.O. opined a left knee X-ray showed prior ACL surgery, small degenerative osteophytes, and small joint effusion. Also on that date, Steven Smith, M.D. evaluated a right knee X-ray for purposes of disability determination.He noted minimal

degenerative changes. Dr. Smith also evaluated a lumbar X-ray and found it normal. The record does not reveal the basis upon which a lumbar X-ray was ordered.

52. On June 1, 2012, Claimant visited EIRMC emergency after dropping a box of tiles on his toe.

53. In June and July 2012, Claimant made two visits to Jerry Cooper, D.P.M. for gout.

54. On February 19, 2013, Claimant again visited Dr. Simon. This visit focused on a right ankle injury one month earlier. Examination described a mild antalgic gait, no edema, and no atrophy. Dr. Simon found mild tenderness to palpation and pain on passive eversion. Dr. Simon provided an ankle brace and recommended an MRI.

55. On March 13, 2013, Claimant underwent an ankle MRI. It showed a ligament tear and underlying degeneration.

56. On March 25, 2013, Dr. Andary evaluated Claimant's right ankle. He noted Claimant had rolled his ankle more than once since the work accident. He noted Claimant's weight at 320 pounds. He examined Claimant and reviewed the MRI. He recommended surgery but acknowledged that additional conservative treatment was reasonable as well. He expressed disagreement with Dr. Schwartsman's opinion about how much of the ankle condition was work related versus pre-existing. He recommended Claimant lose weight. In follow-up Dr. Andary noted that therapy was not significantly helpful. He informed Claimant that arthritis prevented a completely pain-free recovery. Dr. Andary discussed alternative potential surgeries with Claimant.

57. On August 12, 2013, Claimant visited Dr. Andary and reported left knee symptoms arising after he twisted it in yet one more ankle event. A left knee X-ray showed arthritis. Dr. Andary injected Lidocaine.

58. On June 4, 2014, a left knee MRI showed prior surgery, osteoarthritis, and a partial

tear of the ACL graft.

59. On June 12, 2014, Claimant visited Brigham Redd, M.D. after he injured his left knee at work. At that visit he denied left knee pain since his 2004 ACL reconstruction. He denied any strenuous activities for "several years." Dr. Redd examined Claimant, found mild indicators of injury and diagnosed a knee sprain. Dr. Redd did not impose temporary restrictions. On June 13, Dr. Redd questioned Claimant's veracity about whether his condition arose at work. He noted that Claimant's private health insurance was only month to month. Dr. Redd scheduled arthroscopy upon a diagnosis of degenerative joint disease.

60. On June 20, 2014, Claimant underwent left knee arthroscopic surgery.

61. On July 22, 2014, Dr. Redd noted he found chondromalacia. Claimant's ACL graft was about 80% intact and needed no revision. He removed scar tissue which he thought were likely "remnants" from the prior ACL reconstruction. Dr. Redd predicted likely a future knee replacement.

62. On December 27, 2017, Claimant visited Dr. Rindfleisch with a complaint about daytime somnolence. Claimant received a CPAP but by August 2018 reported he did not use it often. He was not seen again by Dr. Rindfleisch until after the subject accident.

63. On January 10, 2018, Claimant underwent detailed evaluation for daytime somnolence. He identified only Ambien when asked about medication intake.

Vocational Factors

64. Claimant was a licensed car salesman and sales manager for Employer for more than one year before his accident. He is familiar with the paperwork and computer programs necessary to complete all dealer requirements when selling a car.

65. He served more than one year and was honorably discharged from the Army. He

attended high school through 12th grade but did not graduate. He earned a GED and attended one semester at Idaho State University.

66. Claimant has worked in various retail jobs at stores and as a travelling salesman. He has sold cars, radio advertising, and water softeners as well as various general mercantile sales. He has been a delivery driver, stocked shelves, driven forklift, and worked janitorial and sold janitorial supplies. He has worked as a sales manager and as a store manager.

67. He has worked as a salaried employee, for an hourly wage, on a commission basis, and for combinations of these. He has received pay based upon a percentage of a store's overall sales.

68. Claimant has qualified for Social Security Disability. He received approval in October 2018 with a March 2018 effective date.

69. He applied for and received unemployment benefits from August through November 2018.

70. Born March 9, 1967 Claimant was 54 years of age on the date of hearing.

Vocational Experts

71. Beginning May 2018, Claimant received assistance from ICRD consultants Ken Blanchard and Dan Wolford. Mr. Blanchard contacted Employer and was told that Claimant could work within his restrictions as a car salesman there. Claimant began light-duty work on a part-time basis. These notes do not show Dr. Rindfleish took Claimant off work at the end of May. An ICRD note of November 30, 2018 records Dr. Chong's opinion that Claimant can return to his time-of-injury job without restriction. On January 28, 2019, Mr. Wolford noted that Claimant was receiving Social Security benefits and did not anticipate returning to work. Mr. Wolford noted, "The claimant has no restrictions/limitations that preclude him from working in the capacity he is

otherwise qualified to perform."

72. On October 6, 2020, Claimant underwent a functional capacity evaluation (FCE). It showed Claimant was deconditioned from longstanding lack of activity. He reported his pain before testing at "15" on a 10-point scale at times. The examiner reported that Claimant met the validity testing for giving at least minimal effort.

73. On December 1, 2020, vocational consultant Kent Granat reviewed records and interviewed Claimant by telephone. Claimant reported limitations greater than physician-described restrictions. Mr. Granat accepted the subjective limitations as major factors for determining permanent disability. Using three methods of determining labor market access, he opined Claimant's loss at 100%, 100%, and 98%. He analyzed appropriate nonmedical factors and opined that Claimant was totally and permanently disabled by a combination of medical and nonmedical factors. He opined that Claimant's pre-existing condition combined with current medical factors to cause permanent disability.

74. On July 8, 2021, vocational consultant Cali Eby reviewed records, including Mr. Granat's report, and interviewed Claimant via Zoom. Claimant described subjective limitations greater than physicians' restrictions. She noted Claimant's 126-pound weight loss since bariatric surgery, noted that the FCE and Social Security determinations preceded this surgery, and suggested additional evaluation of subjective limitations after his weight stabilized in the future. Using Dr. Chong's analysis Claimant suffered no PPI and required no restrictions as a result of his industrial accident. Using Dr. Blair's restrictions, she opined Claimant suffered a 65% loss of access to the labor market. She opined that even using the more restrictive FCE data, Claimant could return to some types of car sales, managerial positions relating to car sales, and/or other jobs as a salesman. She recognized, but did not quantify, the possibility of a loss of wage-

earning capacity depending upon what type of sales position he might work. She opined Claimant was not totally and permanently disabled. She noted he had not conducted a job search recently.

75. On July 19, 2021, Mr. Granat reviewed additional records, including Ms. Eby's report. He also contacted Claimant by telephone to compare work histories pertaining to Claimant's duties in 2014 through 2016 as reported by Ms. Eby vis-à-vis by Claimant to Mr. Granat. Mr. Granat was expressly asked to opine about ISIF liability. He noted Claimant had tried unsuccessfully to return to work as a car salesman. He deemed any attempt to return to any work futile. He opined that even accepting Ms. Eby's opinions about possible jobs, Claimant would be an odd-lot worker based upon a combination of preexisting conditions and the work accident.

76. In post-hearing deposition Mr. Granat explained that the 10-pound lifting restriction upon which he based his disability evaluation was an amalgam of various specific reports. He explained why he believes his evaluation more nearly adheres to Claimant's representations about his function and work history than Ms. Eby's report. For example, because Claimant was the sole person on Employer's car lot, he did not supervise anyone and, therefore, his duties cannot be termed "managerial."

77. In post-hearing deposition Ms. Eby testified that Claimant described his managerial experience working for a previous employer in the automotive sales industry. He told her he had hired and fired workers. She testified that Claimant described himself as having been a "manager" when he worked for Employer. She included "administration" as a "sort of management" when describing the tasks he performed there and for prior employers. She described how she evaluated disability separately for each set of restrictions imposed by various physicians. She opined that even using the more restrictive set, there existed a number jobs as a car salesman which Claimant

could still perform. He could also sell industry specific software. She opined that Mr. Granat underestimated the extent to which Claimant's skills were transferrable to selling other products for other industries. She opined that many sales jobs are regularly and continuously available to Claimant given his most sedentary restrictions, hundreds more if he were to fit the light work category. Ms. Eby criticized Mr. Granat's use of an amalgam of various sources rather than addressing Claimant's potential disability separately for each specific source.

Claimant's Testimony

78. On June 13, 2019, before Employer settled out of this matter, Claimant was deposed by Employer's attorney. Claimant acknowledged that following a 1996 shoulder injury he was charged with insurance fraud and repaid benefits he had received. He denied that probation was ordered.

79. Also, in that 2019 deposition, Claimant testified that he suffered an ankle injury in 2013 and, as of the date of that deposition, had continuing problems which affected his ability to walk at work and elsewhere. Cumulative injuries, including a 2014 left knee injury, had left him with arthritis which affected his work. He disputed various physicians' records about his history and symptoms reported in these earlier years. Confronted with the 2018 MRI showing lumbar bone spurs, Claimant testified, "I never had any back problems before. Nobody has ever told me that it was bone spurs." (Ex. 38, p.72, ll.1-3). Seconds later he waffled about prior back arthritis:

> Q. But no arthritic condition of your back?
> A. No, not that I was ever told until this.

(Ex. 38, p.72, ll.13-14). Claimant redirected these questions about arthritic symptoms by answering whether he had been told he had arthritis in his back.

80. In the 2019 deposition, he described his ability to perform chores at home. He testified that he no longer did any yard work but was able to perform all indoor chores intermittently depending on whether he was having a good day or a bad day of pain. He felt he was entirely unable to work on

that date but denied that the condition of his knees or ankle contributed to that inability because, "I was working before with my knees and my ankle." (Ex. 38, p.85, ll. 9-10).

81. On July 17, 2020, ISIF questioned Claimant in a deposition. Employer had settled its portion of the case by then. Between the dates of the depositions Claimant had also obtained Social Security Disability approval backdated effective to the date of the industrial accident. Claimant had not yet undergone gastric bypass surgery by this time. Claimant testified to dissatisfaction with benefits regarding an earlier workers' compensation claim involving his ankle. He described in much greater detail about his work after the prior accidents and the subject accident—the pain and adjustments he made to his work in response to pain—than he did in his earlier deposition. For the first time, he claimed he missed workdays because of his chronic left knee or his ankle condition. In contrast, he also testified that before the subject accident he was able to do "everything" at work but could not function well enough to work in the days immediately after.

82. At hearing on July 26, 2021, Claimant testified he had been accused of insurance fraud by Dr. Simon after a right shoulder injury for which he had filed a workers' compensation claim in about 1996. He testified that no criminal charges were brought but that he was placed on probation until he repaid the money. On cross examination he admitted that he had been charged with a felony, he made a plea agreement for a misdemeanor, repayment, and probation.

83. As of the date of hearing Claimant had lost over 100 pounds since his bariatric surgery.

84. At hearing Claimant's testimony painted a picture of pain since 1988 for various conditions—knees, ankle, gout, arthritis, sleep disorder—which worsened progressively. He described missing work to a much greater extent than he had in depositions. He testified his

employers had made accommodations to help him work. Upon cross examination this testimony was shown to be inconsistent with the testimony given when Employer and not ISIF was a party to the case. He testified at hearing that at his last employment he was a "one-man show," and performed tasks associated with selling cars at a used car lot, both physical and managerial. This is consistent with earlier deposition testimony but inconsistent with the bulk of his hearing testimony about this point and inconsistent with his description of function given to Mr. Granat.

85. Claimant testified that he attempted to return to work unsuccessfully and that Employer sent a letter to the Commission stating he was unable to work. That document is not in the record. When asked about it he said it was "on my phone out in the car." It was never produced. The record does show that Claimant was released to light-duty work up to four hours per day very early on in his recovery. After a few weeks Dr. Rindfleisch took him off work entirely as a temporary matter during recovery. It does not show that Claimant attempted any work after he became medically stable and was released to full duty.

Medical Experts' Depositions

86. Dr. Rindfleisch testified that despite Claimant's weight loss, epidural fat is impinging upon his nerve root. He was not asked to opine upon whether, to what extent, or for how long Claimant's condition was likely work related.

87. Dr. Blair testified about the bases for his opinion that the accident aggravated an asymptomatic preexisting condition. Both Dr. Blair's PPI rating and restrictions are dependent upon Claimant's subjective reports of continuing symptoms. Dr. Blair recalled that the L4-5 disc bulge seen in the June 2019 MRI did not appear to Dr. Blair as a cause of Claimant's symptoms. He was unable to opine whether a small disc bulge may have been present at the April 2018 MRI but went unremarked.

DISCUSSION AND FURTHER FINDINGS OF FACT

88. 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).

89. 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).

90. Claimant presents well on first impression. The Referee observed Claimant's demeanor and observed no indicia to undermine Claimant's credibility. Claimant's demeanor was consistent with one who would be successful at selling cars.

91. However, substantive credibility is another matter. How much weight to assign to Claimant's testimony and representations to physicians and vocational experts is difficult. A substantial portion is wholly subjective. Expert opinions vary depending upon how much each expert believed Claimant's subjective reports. Claimant's subjective reports have varied. This variance is largely marked by whether his reports were given before or after the inclusion of ISIF as well as the approval date for Social Security. These inconsistencies are both specific--some are mentioned hereinabove--and general. A careful reading suggests that Claimant was attempting to shade the impressions he gave about his pre-existing conditions depending upon which party was

deposing him.

92. Objective medical information of record is given greater weight than Claimant's varying recollections.

Permanent Impairment and Disability

93. 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.

94. 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).

95. "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.

96. 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).

97. Here, because ISIF is the only remaining Defendant, one need not precisely calculate the extent of Claimant's permanent disability. It matters only whether Claimant is or is not 100% totally and permanently disabled.

98. Based on the medical record and the vocational reports, the Commission concludes that Claimant has failed to show that he is 100% disabled or is an odd-lot worker. Claimant's current restrictions, even those proposed pursuant to the FCE, would not prevent Claimant from returning to his time of injury job. Non-medical factors do not significantly lessen Claimant's labor market access or wage-earning capacity. Indeed, Claimant's ability to make a good first impression, his articulacy, his experience as a salesman generally and as a car salesman specifically favor a finding of an ability to work.

99. Both Mr. Granat and Ms. Eby provided opinions worth considering. However, where multiple medical opinions treating an injured worker's physical restrictions exist, it is more helpful to the Commission for vocational experts to evaluate disability under each of the several competing opinions. To pick one set of restrictions as being better than another is to adopt a medical opinion not shown to be generally within the qualifications of a vocational expert. To synthesize a set of restrictions from a number of competing medical opinions is *a fortiori* not shown to be generally within the medical knowledge of a vocational expert. In evaluating

Claimant's disability, Mr. Granat assigned significant weight to Claimant's subjective recitation of what he could and could not do, rather than the medical opinions defining restrictions. Further, the medical opinion he did consider was an amalgam of the several medical opinions before the Commission. By either Dr. Chong's or Dr. Blair's restrictions, Claimant does not approach total and permanent disability under Ms. Eby's analysis. Even using the FCE limitations, Ms. Eby was able to identify specific jobs regularly and continuously available to Claimant in his local labor market. The opinion of Ms. Eby is more persuasive.

100. Obesity is a major factor that deserves express consideration. Claimant worked the job weighing from about 320 to 390 pounds for decades. The Idaho Supreme Court has held that obesity is to be considered as of the date of hearing. *Sharp v. Thomas Bros. Plumbing*, 170 Idaho 343; Docket No. 48568 (May 18, 2022). Claimant, having undergone bariatric surgery, had reduced his weight to about 269 by the date of hearing. If anything, his weight loss is a factor arguing for better labor market access, not worse.

101. Considering all medical and non-medical factors Claimant failed to show by a preponderance of evidence that he is 100% totally and permanently disabled.

Odd-Lot Disability

102. 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).

103. 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).

104. Claimant did not attempt work after he reached medical stability.

105. Claimant did not seek work after he reached medical stability nor after he began receiving Social Security benefits.

106. Claimant relies upon Mr. Granat's assertion that a job search would be futile. Mr. Granat, in turn, relied upon Claimant's subjective limitations and his reports that he never was a manager. Claimant's reported subjective limitations are inconsistent with the restrictions described Dr. Blair. Claimant's reports that he never was a manager are inconsistent with his testimony and representations to Ms. Eby.

107. Claimant failed to show it likely that he qualifies an odd-lot worker.

ISIF Liability

108. A prerequisite to the apportionment of disability to the ISIF is a finding that Claimant is totally and permanently disabled. *Wernecke v. St. Maries Joint Sch. Dist. No. 401*, 147 Idaho 277, 284, 207 P.3d 1008, 1015 (2009). As set forth above, the Commission has determined that as of the date of hearing Claimant is not totally and permanently disabled. Therefore, his claim against the ISIF must fail. *Id.* However, even if it be assumed that Claimant had met his burden of proving total and permanent disability, his claim against the ISIF would yet fail because, as developed below, he has not met his burden of proving that he suffered a permanent injury as a result of the subject accident. Therefore, it could not be concluded that the subject accident

"combined with" Claimant's pre-existing impairments to cause total and permanent disability. If Dr. Chong's analysis is followed, Claimant suffered no PPI and therefore no permanent disability as a result of the industrial accident. All physicians who have opined agree that fatty tissue alongside the spine is the source of Claimant's continuing symptoms.

109. Dr. Chong opined that this was not caused by the lifting of the garage door, and Dr. Greenwald agreed. Dr. Chong opined that lifting the garage door probably caused a muscle strain or sprain which would be expected to resolve in a few weeks. He described Claimant's reported leg sensations as "sciatica." Neither muscle strain nor sciatica explained Claimant's reportedly significant symptoms the next morning. Dr. Chong described Claimant's sleep apnea and deoxygenation as causing restlessness which during the night pressed the fat, which compressed the nerve root at the thecal sac.

110. Dr. Rindfleisch opined early on—about one month after the accident—that the accident probably caused a flare-up of Claimant's arthritic back. At that time he was still trying to arrive at a diagnosis and was looking for a possible L4-5 disc bulge. He agreed with Dr. Chong that the fatty tissue was a relevant problem but noted that Claimant had long been morbidly obese and had worked without back pain before the accident. The record does not show that he was asked to provide a date of medical stability or to rate PPI or to impose permanent restrictions.

111. Dr. Blair agreed about the fatty tissue pressing the spinal nerve and acknowledged that the condition pre-existed the industrial accident. However, he accepted Claimant's representations that he had been entirely free of back and radicular leg pain before the accident and that he felt pain immediately at the time of the accident. Thus, he opined Claimant's preexisting asymptomatic lumbar condition became painful in the accident and was further aggravated by the fatty tissue. He rated PPI from this condition at 11% whole person. He imposed

lifting restrictions of 35 pounds occasionally, 25 pounds continuously and added some motion and position restrictions.

112. Some testimony surrounded an examination by a Dr. Arnold for Claimant's Social Security Disability application. Dr. Arnold's notes are not found in the record, only commentary by others about his examination. This hearsay is too remote to be weighed against actual medical records. Similarly, Claimant described chiropractic care by history and acupuncture treatment. The record does not include these records. The Referee will not speculate about what they might have shown.

113. The 2020 FCE showed Claimant functioned at a much more limited ability.

114. Each set of opinions has its strengths and drawbacks. Dr. Chong well described the mechanism of injury and the absence of an industrial cause. However, one must either ignore Claimant's reports of an utter absence of prior back pain or call it sheer coincidence that pain arose from a cause other than the garage door lifting.

115. Dr. Blair does not well describe how lifting the garage door would be consistent with the position of the fatty tissue suddenly causing pain. Moreover, he expressly relied upon Claimant's report that it did so and was entirely asymptomatic beforehand. He was unaware or ignored Claimant's reports and testimony that he felt no pain until the next morning. Nevertheless, his opinion has a better temporal link between the accident and symptoms of the injury.

116. The FCE well described Claimant's function on the days of testing. However, the bar for validity was low—Claimant showed at least minimal effort—and performance of the various tasks retained a measure of subjective control and reporting by Claimant. Further, no M.D. or D.O. of record has expressly adopted or affirmed the FCE findings as more accurate than the physician's own imposed restrictions.

117. For purposes of benefit eligibility, it is Claimant's burden to prove his case more likely than not by a preponderance of the evidence. Given Claimant's inconsistency of testimony at different times, considering his prior criminal conviction for misdemeanor insurance fraud lessens the weight assigned to his testimony generally, and considering that Dr. Chong's reasonable opinions do not require reliance upon Claimant's representations while Dr. Blair's do, Claimant has failed to prove he suffered any PPI caused by the garage door lifting accident. For this reason, as well, Claimant's claim against the ISIF must fail.

CONCLUSIONS

1. Claimant failed to show that he likely is totally and permanently disabled, by either the 100% or the odd-lot methods.

2. Claimant has failed to show that he suffered permanent impairment as a result of the subject accident.

3. For either of these reasons ISIF cannot be held responsible for any part of Claimant's disability.

RECOMMENDATION

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

DATED this __23rd___ day of December, 2022.

INDUSTRIAL COMMISSION

Douglas A. Donohue, Referee

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of December, 2022, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION** was served by regular United States Mail and Electronic Mail upon each of the following:

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Mary McMenomey

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT NELSON Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2018-009611** **ORDER**

Pursuant to Idaho Code § 72-717, Referee Doug 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 failed to show that he likely is totally and permanently disabled, by either the 100% or the odd-lot methods.

2. Claimant has failed to show that he suffered permanent impairment as a result of the subject accident.

3. For either of these reasons ISIF cannot be held responsible for any part of Claimant's disability.

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

DATED this 23rd day of December, 2022.

INDUSTRIAL COMMISSION

Aaron White, Chairman

Thomas B. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Paul Jeffries
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of December, 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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