BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

WENDY WARREN, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2017-019349** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Pocatello, Idaho, on December 1, 2022. Reed Larsen represented Claimant. Bren Mollerup represented Defendant State of Idaho, Industrial Indemnity Fund (ISIF). The parties submitted oral and documentary evidence at hearing and prepared post-hearing briefs. Post-hearing depositions were taken. The matter came under advisement on July 11, 2023.

ISSUES

The issues listed as ripe for decision at hearing were:

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

[1] Both parties agreed in briefing that Claimant was totally disabled, so this issue is a non-issue and will be treated as such.

CONTENTIONS OF THE PARTIES

Claimant asserts she is totally and permanently disabled as the result of her subject industrial right shoulder injury in combination with pre-existing medical issues, including her bilateral carpal tunnel symptoms, back pain, and right knee and foot pain. Defendant ISIF is liable for its share of Claimant's total and permanent disability.

Defendant argues Claimant was totally and permanently disabled before her June 29, 2017 industrial accident and was employed by a sympathetic employer. Furthermore, Claimant's industrial shoulder injury did not combine with her pre-accident conditions to render Claimant totally and permanently disabled. Finally, Claimant did not present any evidence supporting impairment ratings for those preexisting conditions which she argues combined with her subject work accident to produce her total and permanent disability. Without such ratings, it is impossible to apportion liability under the *Carey* formula. This lack of proof on a critical foundational element is fatal to Claimant's case.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;

2. Joint exhibits 1 through 53, admitted at hearing;

3. Joint exhibits 54 through 58, admitted post hearing by stipulation of the parties, with the acquiescence of the Referee;

4. The post-hearing deposition transcript of Barbara Nelson, M.S., taken on March 28, 2023;

5. The post-hearing deposition transcript of Nancy Collins, Ph.D., taken on March 29, 2023.

All objections preserved through the depositions are overruled.

FINDINGS OF FACT

1. Claimant was sixty years of age on the date of hearing.

2. Claimant has a history of mental and physical issues and has been receiving Social Security supplemental disability benefits (SSDI) for her mental/psychological impairments since 2000.

MEDICAL OVERVIEW

3. In 2010, Claimant underwent right carpal tunnel release surgery, with a revision surgery in 2012. Due to ongoing numbness in her right hand, she had surgery on her ulnar nerve at the elbow, but never recovered full feeling or strength in her right hand. She continued to have pain in her elbow. For this injury Claimant received restrictions of no lifting over 30 pounds, limited fine manipulation, and frequent change of position.

4. In 2011 and 2012, Claimant underwent two carpal tunnel surgeries on her left hand. After the second surgery, Claimant regained her full use of her left hand and received no work restrictions.

5. Claimant has complained of intermittent neck pain since her teen years.

6. In 2013, Claimant injured her right knee. Two surgeries were performed to repair meniscus tears, lateral and medial, one in 2013 and one in 2015. By 2018, Claimant was again complaining of right knee pain. In 2020 she had right knee replacement surgery, which greatly improved her condition.

7. Claimant's left knee has been more mildly symptomatic for years, with a diagnosis of mild osteoarthritis for which she has had steroid injections and physical therapy.

8. Claimant has a long history of low back pain and sciatica. In early 2017, Claimant had an injection to treat her low back pain, which was helpful for a time. In 2019, Claimant underwent lumbar discectomy and fusion surgery, with good results.

9. Claimant treats episodic COPD with medication.

INDUSTRIAL ACCIDENT OVERVIEW

10. Claimant's industrial accident in question occurred on June 29, 2017. While lifting a crate at work for her employer, Oneida School District 351 (Employer), she felt a pop in her right shoulder. By the following day the pain was severe. Imaging revealed rotator cuff tears, as well as labral tears. Steroid injections were performed, and Claimant attended physical therapy. Finally, on January 29, 2018, Claimant had surgery to repair her right shoulder. Six months after surgery, Claimant was still experiencing stiffness, grinding, popping, aching, and shooting intermittent pains, which was addressed with a steroid injection.

11. Brian Tallerico, DO, examined Claimant for Employer on July 20, 2018.[2] At that time he opined Claimant could return to her employment with restrictions of no lifting, pushing, pulling, or carrying greater than 35 pounds, with no overhead lifting, pushing, pulling, or carrying greater than 20 pounds.

12. Claimant testified that by the time of hearing her shoulder had a "great" recovery, with no limitations. She did note that she still had restrictions on her right hand, however. Tr. p. 29.

13. Claimant was working 12 hours per week for Employer at the time of her accident. She testified she could not have worked full time for Employer because she had a "bad knee"

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[2] Dr. Tallerico first examined Claimant in an IME setting prior to her surgery, so this examination was his second.

(which was later replaced in 2020) which bothered her when working.[3] However, she also testified that after her 2015 surgery on her right knee she did not have any limitations on her physical activities until it started burning and hurting to the point she sought out medical treatment in 2020.

14. When asked why Claimant could not work a full-time job at the time of hearing, Claimant responded that she was having difficulties with her hands and elbow, and it was difficult to stand for prolonged periods of time. Also, prolonged sitting bothered her sciatic nerve.

EDUCATION/EMPLOYMENT OVERVIEW

15. Claimant dropped out of high school in or after 11th grade. She has no GED.

16. Claimant has never worked a full-time job. In her early 20s, (in the 1980s) she worked part time jobs as a waitress. Thereafter, she did not work until taking a part-time position at the Oneida County Senior Center doing food prep in 2015 for about a year, which bothered her carpal tunnel. She went to work for Employer for better wages in 2016.

DISCUSSION AND FURTHER FINDINGS

PERMANENT DISABILITY

17. 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.

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[3] Claimant's hours were also calculated, with the cooperation of Employer, to ensure she would not exceed the number of hours she could work and still be eligible for her SSDI benefits.

18. Both parties concede that Claimant was totally and permanently disabled at the time of hearing.

ISIF LIABILITY

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

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

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

21. In *Aguilar v. Industrial Special Indemnity Fund*, 164 Idaho 893, 901, 436 P.3d 1242, 1250 (2019), the Idaho Supreme Court summarized the four inquiries that must all be satisfied to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was a preexisting impairment; (2) whether that impairment was manifest; (3) whether the impairment was a subjective hindrance to employment; and (4) whether the impairment in any way combined with the subsequent injury or was aggravated and accelerated by the subsequent injury to cause total disability.

22. Defendant contends Claimant was totally and permanently disabled prior to her industrial accident. Defendant points out Claimant's only employment since before the turn of the century have been a couple of part-time endeavors which proved too much for her medical conditions. Carpal tunnel complaints and back pain impacted Claimant's ability to work at the senior center. Defendant argues Claimant only worked a "few hours" over two months

for Employer before her shoulder accident. (Defendant calculated Claimant worked for only 156.7 hours for Employer over 52 days of part-time work.)

23. Claimant disagrees that she was totally disabled prior to her work accident, arguing instead that her right shoulder injury is "the straw that broke the camel's back." Claimant argues her case

> "is not the same situation as most odd-lot total perm cases, but the policy of the statute and the principles of *Carey* are best followed by [the Commission] concluding that where there is a straw that breaks the camel's back, the previous load of that straw is born by ISIF, hence the 9% impairment (given by Dr. Tallerico) for the June, 2017 accident, and 91% impairment for ISIF."

Cl. Brief p. 24.

24. Claimant makes this unique argument because she presents her case for adjudication with a number of past ailments for which there are no impairment ratings provided. Moreover, it is unclear whether or to what extent each of those ailments were a subjective hinderance to her working in a field in which she was qualified for employment, which were actually permanent *vis a vis* those which were ameliorated with treatment after the date of her shoulder injury, and which, if any, of her preexisting ailments combined with her shoulder injury to produce what the parties agree is total and permanent disability. In reality, Claimant simply threw all her past medical ailments on the table and asked the Commission to sort out her case for her under the "broken back" theory, espoused in this case by her vocational rehabilitation expert, Nancy Collins, Ph.D. *See* Collins Depo. p. 12.

25. In spite of the parties' various and interesting arguments for and against ISIF liability, and while it is not self-evident how Claimant's shoulder injury – which recovered well in Claimant's testimony, and which had less-restrictive lifting restrictions than her carpal tunnel restrictions (with the exception of overhead lifting, which was reduced to 20 pounds overhead

after the shoulder surgery) – combined with any other permanent impairment to cause Claimant's total and permanent disability, such arguments are not pivotal in determining Claimant's claims against ISIF. Instead, this case is most simply resolved based on Claimant's lack of impairment ratings for *Carey* analysis.

26. The *Carey* formula derives from the case of *Carey v. Clearwater County Road Department*, 107 Idaho 109, 686 P.2d 54, (1984), and is the way apportionment of liability between the employer and ISIF is determined in Idaho. The formula prorates the non-medical portion of disability between the employer/surety and ISIF in proportion to their respective percentages of responsibility for the physical impairment. Distilled down, the formula works by adding the impairment ratings (technically medical disability ratings) from a claimant's past ratable impairments[4] and the claimant's impairment ratings from the subject accident, and then subtracting that number from 100 (total disability) to determine the claimant's non-medical disability. Then, the ratio between past and subject impairments are used to determine respective percentages of responsibility between employer and ISIF.[5] As such, it is *imperative* that the claimant's past impairments be quantified. Without such quantification, one cannot apply the *Carey* formula to determine ISIF liability.

27. In her reply brief, Claimant acknowledges she has no such preexisting impairment figures, but asks the Commission to supply them for her. Citing to *Urry v. Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989) and *Smith v. J.B. Parson Co.*, 127 Idaho 937,

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[4] For the sake of simplicity, the example ignored the "combined value" of multiple past impairments and the "combined value" of subject accident impairments, if any, when describing how the formula operates.

[5] Once the *Carey* formula workings are considered, it becomes apparent how misguided Claimant's request, set out *supra* at page 7 of this document, (simply subtracting Claimant's shoulder impairment from 100, making ISIF responsible for 91% of Claimant's total disability) is, and how far from the "principles of *Carey*" such argument strays.

908 P.2d 1244 (1996), Claimant argues that while permanent impairment is a medical appraisal, that fact "does not obscure the fundamental principle that the Industrial Commission, rather than a treating or evaluating physician, is the fact finder and ultimate evaluator of impairment." She notes that while physicians may provide helpful information, "there is no distinction between expert testimony and evidence of other character as regards to the evaluation of an injured workers impairment." As such, she argues the Commission may assign her a rating "based on substantial and competent evidence in the record." She then point-blank requests the Commission to assign her impairment ratings for her bilateral carpal tunnel symptoms, back pain, foot pain, and right knee pain as they existed immediately preceding her shoulder injury in question. Cl. Closing Brief, pp. 11, 12.

28. For several reasons, the undersigned will not assign Claimant impairment ratings for her various unrated medical issues as set out above.

29. To begin with, this is not a situation where the Referee is asked to review the record and choose between competing physician opinions based on competing logic, methodology, arguments, and testimony. Instead, Claimant would like the Referee to just pick an impairment number for those various ailments which Claimant listed in briefing. Furthermore, under *Mazzone, infra,* the rating cannot utilize the *Guides*, which is routinely, if not exclusively used by medical professionals when assigning impairment ratings.

30. While there is no physician guidance in the record, that fact, standing alone, is not fatal to Claimant's request. *See Smith, supra.* (Referee determined claimant suffered 3% impairment based on medical record and testimony of the claimant, without any rating from a physician, which finding was affirmed on appeal.) The mere fact that in at least one case there was sufficient evidence in the record to allow the fact finder to make an impairment rating for

a past impairment without medical direction, and in such case(s) the fact finder used his or her discretion to make such a finding, that fact does not bind the Referee in this case.

31. Claimant asks the Referee to create an impairment number utilizing the most tenuous method available, to wit, by simply looking at the record and pronouncing an impairment rating. Perhaps in a case where there truly was "substantial and competent evidence" available in the record to aid in making such a pronouncement, such a request would not be beyond the realm of possibility, such is not the case at bar.

32. To be clear, there is no *requirement* that the fact finder assign permanent impairment ratings for a claimant when there is no medical testimony for guidance, but even if there was such a mandate, it would require a record complete enough to allow for an educated assignment. Here, the evidence of permanent impairment of some quantifiable measure is lacking. Of note, Claimant did not even attempt to suggest probable ratings, or even ranges, of impairment for her alleged permanent disabilities. She did not weave together the medical records, her testimony, and other evidence found in the record to present a cogent argument for any impairment ratings. Instead, she merely introduced 900 pages of exhibits into the record and claimed that somewhere therein was "substantial and competent evidence" to allow for a well-reasoned, non-arbitrary, non-speculative assignment of permanent impairment for each of her ailments.

33. This Referee found no such "substantial and competent" evidence to allow him to confidently pronounce impairments without resorting to rank speculation. Even if allowed the discretion to make such a pronouncement when certain criteria are met (substantial and competent evidence in the record, coupled with assessments that her injuries were permanent and manifest on the date of her last injury), given the record herein, the Referee finds the underlying

criteria set out above are *not* met in this case. This Referee disagrees with the assertion that there is substantial and competent evidence in the record to allow such assignments. It would be speculative for the undersigned to assign impairment ratings as suggested by Claimant, and he will not undertake such endeavor.

34. Claimant's testimony is insufficient to allow for an accurate calculation without medical guidance. In fact, for some of her ailments, such as foot pain, there is scant record at all. Claimant did not point to specific records which would illuminate her impairment sufficiently to allow for such a rating.

35. Next, it is not a foregone conclusion that Claimant's back and knee issues, while present on the date of her shoulder injury, were at MMI on such date. Both conditions were subsequently treated surgically, and both improved greatly as a result. Claimant testified her knee began hurting in 2018 (well after the accident in question) and by 2020 she needed a knee replacement which helped her significantly. Injections in 2017 helped Claimant's back until 2019, when she underwent surgery that likewise improved her condition. Conditions which were not at MMI, or manifest, on the date of the subject accident are not permanent impairments for the sake of ISIF liability. The record is insufficiently developed to allow for a determination of medical stability, much less an impairment rating. These types of issues illustrate the need for medical testimony on impairment.

36. Finally, and perhaps most importantly, all the above arguments may be moot in light of the Supreme Court's holding in *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 302 P.3d 718 (2013). Therein the Court highlighted that the referee, as a fact finder, is not a medical expert. "When a referee exceeds his or her role as a finder of fact and injects his or her own medical opinions into the proceedings" the findings might not represent the most competent

adjudication. 154 Idaho at 760. Citing to U.S. Supreme Court and decisions from across the country, the *Mazzone* Court noted that while the Referee may use utilize his expertise to draw inferences from conflicting evidence presented at hearing, he may not use his expertise as a substitute for evidence presented at hearing, or act on his own information. The Court reaffirmed the principle that fact finding in a contested case should be exclusively governed by the record of the hearing. Certainly, the Referee may not rely on treatises or other works not admitted into evidence, such as the *AMA Guides to the Evaluation of Permanent Impairment* to determine impairment ratings.[6]

37. Directly to the point at issue herein, the Commission, in *Gormley v. South State Trailer Supply*, IC 2010-019605 (March 4, 2016), clarified to all practitioners practicing in the field of worker's compensation in Idaho that impairment evaluation requires medical knowledge, and when the claimant fails to produce impairment ratings, the Commission *will not* supply such a rating. Lack of impairment ratings for preexisting conditions leaves the Commission unable to apportion responsibility between the employer and the ISIF under the *Carey* formula. The Commission specifically noted it

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

Id at 14.

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[6] While it is not mandatory that permanent impairment ratings be calculated using the *Guides*, they do represent the industry standard, and not using the reference materials promotes even more uncertainty that the Referee's decision on impairment rating is sound and not speculative.

38. The clear admonition of the Commission in *Gormley* applies here as well. This Referee will not, on the record provided, attempt, without the use of the *AMA Guides*, to assign Claimant an impairment rating for her bilateral carpal tunnel symptoms, the only preexisting ailment to have any chance of being a qualified preexisting impairment in this case.

39. Next, Claimant argues the Commission should retain jurisdiction to allow her to get ratings for her preexisting conditions, as was allowed in *Green v. Green,* 160 Idaho 275, 371 P.3d 329 (2016). However, the present case is distinguishable from *Green.*

40. In *Green*, the Supreme Court found the Commission had the discretionary authority to hold the record open to allow Claimant to supply impairment ratings. After the hearing, the Commission found the claimant was "likely entitled to an impairment rating" but the record failed to establish the impairment rating, and on the particular facts of that case the Commission determined an assessment of the extent and degree of claimant's preexisting impairment was "mandated" due to "overwhelming proof" the claimant suffered from a preexisting impairment which would impact ISIF liability. *Id* at 279. Under those particular facts, the Commission concluded "justice" demanded that the claimant's ratable back impairment be rated.

41. The Supreme Court upheld the discretionary power of the Commission to retain jurisdiction until the parties could supply the missing information to allow for a just allocation of benefit payments between Employer/Surety and ISIF. The Court pointed out that historically the Commission had discretionary power by statute and case law to correct a claimant's failure or oversight to submit evidence to establish the amount of compensation to which such claimant is entitled when there is no question but that the claimant was entitled to compensation.

42. The tenor of *Green* and cases cited therein make clear that *in cases where the evidence clearly establishes the claimant's right to compensation*, (including meeting all four

elements of proof borne by Claimant against ISIF), where an oversight or failure to submit the impairment rating occurs, the Commission has discretion to hold the matter open to allow for correction of such oversight.

43. In the present case, it is not clear that Claimant is entitled to any compensation against ISIF. Far from "overwhelming evidence" of compensability, Claimant herein has presented no substantial evidence that her preexisting impairments other than her bilateral carpal tunnel syndrome met any of the elements for establishing ISIF liability. No evidence supports her contention that her right knee, her back, or her foot were manifest permanent injuries which hindered her employment as of the date of her shoulder injury. Furthermore, while she received work restrictions for her carpal tunnel prior to her shoulder injury, the restrictions for her shoulder were less onerous than the restrictions for her carpal tunnel. Claimant made no "but for" presentation, (other than her expert's "camel with a broken back" theory which was wholly inadequate as persuasive evidence), explaining how her two injuries, shoulder and preexisting carpal tunnel combined to produce her total and permanent disability. Instead, Claimant tried to argue that there was actually an "aggravation" of her "upper right extremity" when she injured her shoulder. This argument has no merit. Just because her wrist and her shoulder are both considered part of her upper right extremity, a distinct injury to Claimant's shoulder is not an aggravation to her wrist. Claimant did not establish her right wrist was aggravated by her work accident and resultant shoulder injury, and that further it was the aggravation to her wrist that combined with any other ailment to render her totally and permanently disabled.

44. When all of the evidence is considered, Claimant has failed to prove the elements of ISIF liability have been satisfied.

45. All other issues are moot.

CONCLUSIONS OF LAW

1. When all of the evidence is considered, Claimant has failed to prove the elements of ISIF liability have been satisfied.

2. All other issues are moot.

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 26th day of July, 2023.

INDUSTRIAL COMMISSION

Brian Harper

Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of August, 2023, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by email transmission and regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

WENDY WARREN, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2017-019349** **ORDER** FILED AUG 11 2023 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. When all of the evidence is considered, Claimant has failed to prove the elements of ISIF liability have been satisfied.

2. All other issues are moot.

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

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IT IS SO ORDERED.

DATED this the 11th day of August, 2023.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Aaron White, Commissioner

ATTEST:

Christina Nelson
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of August, 2023, 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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