BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DEACON EASTERLY, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2012-005507** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED OCT 20 2023 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Sonnet Robinson, who conducted a hearing on February 14, 2023. Claimant, Deacon Easterly, testified live via Zoom and was represented by Stephen Nemec of Coeur D'Alene. Thomas Callery of Coeur D'Alene represented Defendant/ISIF. The parties presented oral and documentary evidence. Post-hearing depositions were taken. The matter came under advisement on August 8, 2023 and is ready for decision.

ISSUES

The issues to be decided are:

1. The extent of liability of ISIF pursuant to the requirements of Idaho Code § 72-332;
2. If applicable, any apportionment pursuant to the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant contends he is totally and permanently disabled as a result of the combination of his pre-existing left wrist, right shoulder, and left eye injury and his most recent right ankle injury

via the odd-lot doctrine. Claimant relies on the opinions of Dr. McNulty, Dr. Cox, and Dr. Jacobsen and the vocational assessment of Sara Statz to establish Claimant's total and permanent disability.

ISIF contends that Claimant's pre-existing impairments did not combine to render Claimant totally and permanently disabled; if Claimant is totally and permanently disabled, it is the result of the most recent industrial accident alone. The post-accident deterioration of Claimant's left eye, right shoulder, and left wrist do not allow for ISIF liability as the relevant conditions must be assessed pre-injury.

Claimant responds that his left eye, right shoulder, and left wrist injury were manifest, subjective hinderances to employment, and combine with his 2012 right ankle injuries to render him totally and permanently disabled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Joint Exhibits 1-31;
3. The testimony of Claimant, Deacon Easterly, and his wife, Ginny Easterly, taken at hearing;
4. The post-hearing depositions of:
    a. John McNulty, MD, Cher Ann Jacobsen, MD, and Sara Satz, taken by Claimant;
    b. Barbara Nelson, taken by ISIF.

All outstanding objections are OVERRULED.

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

FINDINGS OF FACT

1. Claimant underwent an OMAC independent medical exam (IME) with Walter Fife, MD, and Leslie Bornfleth, MD, on February 28, 2002 to examine him for a March 16, 1999 injury to his left wrist. JE 8. Claimant reported his right thumb was fused 1996 and a tendon repair in his left index finger in 1991. JE 8:113. Claimant's March 16 injury was a hyperextension injury to his left wrist and then two weeks later he suffered a crush injury. *Id.* at 112. At the time of the evaluation, Claimant had undergone a left wrist arthroscopy and a left wrist fusion, and had current complaints of left shoulder, left elbow, and left wrist pain with some numbness into his fingers. *Id.* Drs. Fife and Bornfleth opined that Claimant's injuries included a left wrist sprain and dysesthesias in the dorsal branch of his ulnar nerve, both related to his industrial injury on a more probable than not basis. Claimant was limited by pain in his wrist and forearm: "there are permanent residuals from this injury, although we would not put any restrictions on the use of his extremity except those that are self imposed by his level of pain…it has been suggested that he should not lift more than 25 pounds. However, we think this should be under the patient's discretion as to how much he wants to lift… it may be wise to restrict him from being employed as a professional driver." *Id.* at 117. Claimant's injury was rated 11% of the upper extremity. *Id.* at 118.

2. Claimant attended another IME on September 27, 2005 with David Whitney, MD, for the same March 1999 left wrist injury. JE 9:121. Dr. Whitney summarized records related to Claimant's left wrist treatment; he recorded Claimant's orthopedic surgeon, Dr. Jones, recommended Claimant be restricted from heavy or repetitive use of his left arm and had assigned him a 6% upper extremity rating. *Id.* at 124-125. He noted that Claimant in 2001 had reported to Dr. Jones that he was 100% improved. *Id.* at 124. Dr. Whitney conducted a physical examination

and noted some inconsistencies with decreased sensation, but that Claimant had decreased grip strength, radial deviation, and supination. *Id.* at 129-130. Dr. Whitney agreed with the 11% upper extremity rating previously given and that Claimant was at MMI. *Id.* at 131-132. Dr. Whitney did not assign any restrictions.

3. On February 24, 2009, Claimant presented to Jonathan King, MD. JE 21:395. Claimant was five-month post-op from a right shoulder arthroscopy, SLAP repair, debridement of his right rotator cuff tear, and subacromial decompression. *Id.* Dr. King recorded Claimant was doing exceptionally well; he still had occasional pain with push-ups or pull-ups but was otherwise asymptomatic. *Id.* Dr. King released Claimant to full-duty work. *Id.*

4. On August 12, 2011, Claimant presented to Premier Urgent Care for an injury to his left eye; Claimant reported he was welding, and hot slag went underneath his safety glasses and entered his left eye. JE 23:563. Claimant returned the next day reporting his discomfort had increased overnight; Claimant was diagnosed with a corneal abrasion, and prescribed drops and hydrocodone. *Id.* at 564

5. On August 25, 2011, Claimant returned to Dr. King with right shoulder complaints following a recent fall on his right elbow and shoulder. JE 21:394. Dr. King recommended a cortisone injection and possible MRI if Claimant did not improve; Claimant underwent the cortisone injection with no complications. *Id.* at 392-393.

6. On November 7, 2011, Erik Skoog, MD, authored a letter regarding Claimant's left eye injury to Roy Murdock of the Idaho Industrial Commission Rehabilitation Division (ICRD). JE 23:622. Dr. Skoog wrote that Claimant had a faint corneal scar, but no active inflammation; his vision had improved to 20/40 in left eye. *Id.* Dr. Skoog wrote he had explained to Claimant "that I saw nothing on my exam that would prevent him from working," however, Claimant felt he could

not weld, and Dr. Skoog did not feel comfortable telling Claimant he could weld when Claimant himself did not feel comfortable. Further, Dr. Skoog wrote that corneal scars of this nature did not usually cause light sensitivity. *Id.*

7. On November 16, 2011, Claimant underwent an IME with Michael Berg, MD for his work-related left eye injury. JE 23:527. Claimant reported light sensitivity, double vision, and blurry vision. *Id.* Dr. Berg opined that Claimant's corneal scar would clear completely and he was unable to explain why Claimant's left eye showed decreased visual acuity. *Id.*

8. On December 13, 2011, Claimant presented to Kelly Moffatt, OD. JE 23:420. Claimant's presenting problem was severe photophobia from a previous left eye injury. Claimant was prescribed a tinted contact lens and "noted quite an improvement in office with photophobia with current tint and left wearing [the contact lens]." *Id.* at 421. Claimant sent Dr. Skoog a fax around this time stating he was doing "wonderful" and requesting a full duty work release. *Id.* at 525. On December 22, Claimant returned to the clinic and reported much improvement in glare from driving and welding because of the tinted contact lens, although his vision seemed a bit down. *Id.* at 425.

9. On April 27, 2012, Claimant was examined by Richard Besinger, MD for a second IME regarding his left eye injury. JE 10:135. Claimant had headaches with reading and avoided driving at night "but will do it if necessary;" he only wore his dark-tinted contact lens while welding. *Id.* Claimant was able to comfortably use his right eye for welding and "he is welding at his usual efficiency with his [dark contact lens]." *Id.* at 137. Dr. Besinger's impression was that Claimant received a corneal abrasion which left him with a distorted cornea and an irregular astigmatism. *Id.* at 138. Claimant was at MMI per Dr. Besinger, had no restrictions except the self-

imposed one of wearing his dark lens so he could work as a welder, and rated him at 3% whole person impairment (WPI) for this injury. *Id.* at 134, 139, 140.

10. On February 24, 2012, Claimant suffered the subject industrial accident when he stepped off an 18-inch stool and twisted his right ankle while coming down. JE 11:144; JE 4:61-62; JE 7:98; Tr. 30:21-31:16. Later that day, Claimant presented to James Winter, MD for the work-related right ankle sprain. JE 11:144. His ankle was swollen and painful. *Id.* An X-ray showed no acute fracture, and Claimant was prescribed a boot to wear. *Id.* at 144, 145. On February 26, Claimant followed-up with Dr. Winter. JE 11:142. Claimant's ankle was slightly swollen but he wished for a full-duty work release and felt he could perform his job safely. *Id.* Dr. Winter released him to full duty as long as he wore his boot. *Id.*

11. On August 22, 2012, Claimant was seen by Cher Jacobsen, MD, his primary care physician. JE 27:794. Claimant reported that the residual headaches he suffered from his previous episode of viral meningitis were slowly improving and he wanted to transition from Tramadol to Tylenol or Advil; Dr. Jacobsen advised Claimant to let her know if over-the-counter medication was insufficient at treating his headaches. *Id.* at 795.

12. On March 4, 2013, Claimant underwent an initial physical therapy (PT) assessment with Diana Smith on referral from John Swanson, MD for his right shoulder. JE 18:206. Claimant reported right shoulder pain following a traction injury and painful range of motion. *Id.* at 207. At Claimant's April 19 appointment, PT Smith recorded "no pain in R shoulder since injections. Able to do full upper body workout at his PT sessions today (up to 25# pound bicep curls and 20# overhead military press) without pain. Recommend d/c from PT to full-duty work." JE 18:215.

13. On March 15, 2013, Claimant returned to Dr. Jacobsen and reported he had continued daily headaches associated with stress and aggravated by bright lights; Dr. Jacobsen

recommended a neurology consult and to resume his Tramadol usage for the worst headaches. JE 27:797, 801.

14. On July 11, 2013, James Lea, MD, examined Claimant. JE 20:314. Dr. Lea recorded Claimant had suffered from viral meningitis in 2011, which was associated with fainting and severe headaches. *Id.* This eventually resolved, however, Claimant now reported severe headaches with associated loss of consciousness and most recently, a severe headache and loss of consciousness while driving with his wife: "it was so intense he broke his partial denture." *Id.* Dr. Lea was not convinced Claimant was having seizures, but prescribed Keppra and recommended an MRI, an EEG, and an MR angiogram to rule out aneurysm. *Id.* at 316. On July 16, 2013, Claimant's brain MRI and MR angiogram were read as normal. JE 27:838, 836.

15. On August 6, 2013, Claimant returned to Dr. Jacobsen who recorded Claimant was still experiencing headaches related to his viral meningitis and eye injury, but Dr. Jacobsen had spoken with Dr. Lea who did not feel Claimant had seizures and released him to drive again. JE 27:807. Dr. Jacobsen now felt Claimant's headaches were more likely related to his eye injury and undertreated sleep apnea and recommended a full sleep study. *Id.* at 810.

16. On April 1, 2015, Claimant presented to Erik Skoog, MD. JE 23:431. Claimant reported light sensitivity, headaches, and blurred vision, but that his contact lens was useful for welding. JE 23:431. On September 17, 2015, Claimant returned to Dr. Moffatt and reported his headaches had been getting more frequent, especially while reading. *Id.* at 448. Claimant received a new prescription. *Id.* at 449.

17. On April 28, 2016, Michael Drager, DPM, examined Claimant's right ankle. JE 12:149. Claimant reported he had rolled his ankle in 2012 and then twice in 2013; he felt his ankle

was weak, difficult to bear weight on, and that it hurt on a daily basis. *Id.* Dr. Drager's impression was "lateral ankle ligament rupture with instability" and he referred him to Dr. Dow. *Id.*

18. On June 28, 2016, Spencer Greendyke, MD, examined Claimant for an IME. JE 13. Claimant described his initial ankle injury in 2012, and that in March 2013, he injured his ankle again in the same way, and had a third twisting injury in 2013.[1] JE 13:153. He reported chronic pain since the initial injury of two to three out of 10. *Id.* Claimant reported that his supervisor told him he would be fired if he sought medical attention for his March 2013 injury and he did not seek treatment for his December 2013 injury because he was worried about losing his job. *Id.* Claimant reported that since that time, his ankle pain and instability had increased, and he had been laid off from his time of injury position along with many other individuals due to a slowdown. *Id.* Dr. Greendyke noted Claimant displayed no pain behavior, symptom magnification, or inappropriate responses during his examination. *Id.* at 156. In pertinent part, Dr. Greendyke diagnosed Claimant with: (1) persistent right ankle instability and pain, industrially related; (2) synovial impingement on dorsiflexion, industrially related, and; (3) "absence of anterior talofibular ligament and calcaneofibular ligament on the right, producing instability, industrially related." *Id.* at 158. Dr. Greendyke recommended that Claimant be considered for right lateral ankle reconstruction and right ankle arthroscopy with synovial debridement. *Id.* at 159.

19. Claimant was interviewed by Julie King on July 26, 2016 at ICRD. JE 1:1. Claimant reported his 2008 right shoulder surgery and that he had no permanent restrictions related to that surgery. *Id.* at 2. Claimant also reported his left eye injury, right thumb fusion, and left wrist fusion; Claimant noted his left arm hurt constantly and that his left elbow popped out of socket. *Id.*

[1] These three injuries will be referred to as the 2012 ankle injury, as Claimant told Dr. Greendyke his pain began with his initial injury.

Claimant's time of injury job required frequent lifting of up to 50 pounds (there were lifting devices to assist lifting above 50 pounds), frequent reaching at his shoulder level, occasional reaching above the shoulder and climbing, continuous grasping and handling, reading blueprints and schematics, and occasional data entry and keyboarding; Claimant agreed with this job site evaluation (JSE). JE 2:5-6; JE 23:521.

20. On August 2, 2016, Claimant returned to Dr. Drager and reported his ankle was so weak his motorcycle had fallen on him because his ankle would not hold him up. JE 12:150. Dr. Drager wrote "he is simply unable to perform his duties as a welder and mining machine equipment mechanic and he will be given a letter for that." *Id.*

21. On August 9, 2016, Claimant presented to Kevin Dow, DPM. JE 14:162. Dr. Dow reviewed X-rays and examined Claimant; he recommended an MRI and arthroscopic debridement, Brostrum lateral ankle stabilization, and possibly a syndesmotic repair, depending on the results of the MRI. *Id.* at 164.

22. On September 6, 2016, Claimant underwent (1) extensive arthroscopic debridement of his right ankle; (2) Brostrom lateral ankle stabilization; (3) open repair of his syndesmosis; and (4) anterior tibial exostectomy, performed by Dr. Dow. JE 14:165. On September 13, Claimant followed up with Bucklee Eller, ARNP, and reported he was having a lot of pain. On September 27, Claimant was still having a lot of pain, but it was improving. *Id.* at 168. By October 18, Claimant's pain had completely resolved, but he was having numbness and tingling, and he felt stiff and sore from being immobile so long. *Id.* at 170. Claimant was prescribed a walking boot and physical therapy. *Id.* at 171.

23. Claimant attended an initial physical therapy evaluation on October 26, 2016. JE 18:218. PT Smith recorded limited ankle range of motion, strength, and tolerance of weight bearing

and walking. *Id.* 220. Claimant continued PT regularly. See JE 18. On December 2, 2016, Claimant reported continued swelling, pain, numbness, and decreased range of motion; Claimant had cut his foot two weeks prior but could not feel the cut due to numbness. JE 18:232. The physical therapist wrote Claimant was steadily progressing and recommended Claimant continue PT. *Id.*

24. Claimant returned to Dr. Dow on December 13, 2016 and reported he was making progress, but still felt weak and stiff; Claimant requested the screws be removed from his ankle. JE 14:173. Dr. Dow wrote "[it] is not unreasonable to have them removed, he [would] like to go ahead and work on surgery scheduling at this time." *Id.*

25. On January 10, 2017, Claimant underwent surgery with Dr. Dow to have his screws removed. JE 14:174.

26. On January 18, 2017, Claimant returned to PT and reported he felt no different after the surgery. JE 18:241. On January 19, Claimant reported to NP Eller that his ankle was feeling a lot better however, he still had significant pain in the lateral aspect of his foot. JE 14:176. NP Eller recommended Claimant talk to Dr. Dow about surgical intervention for his sural nerve pain if he did not start improving. *Id.*

27. On January 24, 2017, Dr. Dow examined Claimant. JE 14:178. Claimant continued to have sural nerve pain and Dr. Dow injected Claimant's sural nerve with Marcaine and Kenalog; Claimant reported numbness in the nerve and Dr. Dow recommended he continue aggressive physical therapy. *Id.* Claimant continued to attend physical therapy. See JE 18.

28. On February 14, 2017, Claimant reported only a couple of hours of relief from the injection and the pain was "as bad as any he's ever felt." JE 14:179. Dr. Dow wrote he was out of options and referred Claimant for a second opinion with Dr. Darron Wooley. *Id.*

29. Claimant saw Dr. Wooley on March 6, 2017. JE 16:195. Dr. Wooley did a repeat injection, which provided Claimant with relief for about 24 hours before his pain returned. Dr. Wooley recommended Claimant consider nerve transection/reposition. JE 16:195. Claimant was discharged from physical therapy on March 14 per Dr. Wooley's recommendation. JE 18:259. Claimant returned to Dr. Dow on March 28, who concurred with that a sural nerve neurectomy was appropriate and wrote "unfortunately it does happen during surgery that retraction alone or scar tissue formation or an actual nerve injury can occur." JE 14:181.

30. On July 11, 2017, Scott Brown, DO, examined Claimant's right ankle. JE 21:376. Dr. Brown recommended an EMG to delineate the extent of the neuropathy in Claimant's ankle and proceed with surgery if indicated. *Id.*

31. On July 26, 2017, Claimant's EMG showed (1) right common peroneal neuropathy with axonal injury and incomplete denervation to the peroneal longus, tibialis anterior and EDB; (2) intact bilateral sural sensory response; (3) no proximal denervation. JE 15:189, 190.

32. On August 8, 2017, Claimant returned to Dr. Brown who ordered an MRI of the right knee to investigate possible peroneal entrapment. JE 21:373. The MRI was read on August 21, as showing no abnormality in the common peroneal nerve. *Id.* at 388.

33. On September 28, 2017, Claimant underwent a right sural neurectomy performed by Dr. Brown. JE 21:386. Claimant followed up with Dr. Brown on October 20, 2017 and reported pain relief and was referred to physical therapy. *Id.* at 368.

34. On November 1, 2017, Claimant reported to his physical therapist he had a "whole new pain" at the top of right foot, toe, and posterolateral ankle. JE 18:278. Claimant returned to Dr. Brown who recommended Claimant discontinue physical therapy due to his new symptoms and increase his Gabapentin. JE 21:367. When Claimant returned on November 11, he was

improved; Dr. Brown recommended he continue Gabapentin for symptom control. JE 21:365. On December 1, Claimant reported difficulty walking, but a reduction in pain; Dr. Brown wrote Claimant would likely need Gabapentin for years to come. *Id.* at 363. On February 2, 2018, Dr. Brown recommended an FCE and followed by IME. JE 21:360.

35. On March 1, 2018, Claimant participated in an FCE conducted by Andy Peaker, MOTR/L, CHT, CEAS. JE 17:196. Claimant gave maximum effort and demonstrated cooperative behavior. *Id.* at 197. Claimant's limitations were recorded as follows: occasional bending/stooping/kneeling, climbing, walking, and standing; "seldom" crouching; and no lifting and carrying greater than a light/medium physical demand level. Claimant could not carry 50 pounds on a frequent basis as required by his previous work. Claimant could sit on a frequent basis and handle/reach/grasp/finger on a frequent to continuous basis. *Id.* at 198. Claimant's left hand demonstrated greater grip strength than his right hand, but less pinch strength. *Id.* at 200-201. Claimant's left forearm and left wrist demonstrated normal range of motion and strength. *Id.* at 203. Claimant's right shoulder demonstrated normal range of motion and strength. *Id.* Claimant reported walking, standing, and driving aggravated his symptoms. JE 31:1552. PT Peaker recommended Claimant participate in a four-to-six-week program of OT/PT that should emphasize cardiovascular conditioning, general strengthening, and functional work activities; PT Peaker anticipated Claimant would be able to work full-time at the medium duty strength level at the conclusion of this program. *Id.* at 198. PT Peaker opined that Claimant did not appear to be at MMI at the time of his evaluation, however Claimant received no further treatment after this evaluation and was declared MMI by Dr. Cox on July 31, 2018, *infra*.

36. On March 16, 2018, Rodde Cox, MD, examined Claimant at Employer's request for an IME. JE 19:295. Dr. Cox reviewed records, examined Claimant, and issued opinions.

Claimant reported falling a lot, ankle pain, hypersensitivity at the top of his foot, and that both knees had started to bother him about a year after the surgery. *Id.* at 305. Dr. Cox recorded Claimant's right ankle range of motion was restricted, atrophy of his right calf, hypersensitivity over his peroneal nerve, and tenderness to palpitation on his medial and lateral ankle. *Id.* at 308. Dr. Cox recorded no nonphysiologic findings and no symptom magnification. *Id.* Dr. Cox's conclusions were (1) multiple right ankle sprains with right ankle instability, post multiple surgeries; (2) peroneal neuropathy; (3) sural neuropathy/status post sural nerve neurolysis. *Id.* Dr. Cox recommended additional nerve studies, found Claimant was not yet at MMI, and opined that Claimant's symptoms were related to his accident to a reasonable degree of medical certainty. *Id.* at 309-310.

37. On April 2, 2018, Claimant was diagnosed with new onset diabetes, which had progressed from his previous diagnosis of insulin resistance. JE 27:723. On April 9, Dr. Jacobsen recorded Claimant could not renew his CDL because of high doses of Neurontin for pain relief. *Id.* at 721.

38. On May 3, 2018, Claimant presented to Dr. Moffatt for diabetic refraction and reported blurry vision in his left eye, which was moderate, and occurred at both short and long distance constantly. JE 23:467.

39. On May 9, 2018, Claimant returned to Dr. Jacobsen regarding his diabetes and reported he had lost four pounds from changing his diet and beginning a daily two-mile walking exercise program, plus his normal upper body weightlifting exercises. JE 27:717.

40. On June 5, 2018, Claimant reported to Dr. Jacobsen he had lost 40 pounds and "even his R peroneal nerve damage pain is vastly improved…he is not sure if it is his improved diet, weight loss, exercise, improved diabetic control, improved mood, improved sleep, use of his

foot drop brace, or ??? He and I both agree it is probably a combination of all those things." JE 27:714-715.

41. On July 2, 2018, Claimant underwent the additional EMG testing recommended by Dr. Cox with Dr. Ludwig. JE 15:183. On July 27, Dr. Brown recorded his recommendation that Claimant return to Dr. Cox now that testing was complete and that there were no surgical indications at that time. JE 21:345.

42. On July 31, 2018, Dr. Cox updated his IME report; Dr. Cox reviewed additional records including the EMG done by Dr. Ludwig. JE 19:292. Dr. Cox opined Claimant showed evidence of peroneal, tibial, and sural neuropathy. Claimant was now at maximum medical improvement and had permanent restrictions including avoiding working at unprotected heights, limit standing and walking to no more than two hours at a time, and limit standing and walking to no more than four hours in an eight-hour day. *Id.* at 293. Dr. Cox rated Claimant at 10% WPI with no apportionment. *Id.*

43. On October 4, 2018, Dr. Jacobsen recorded Claimant likely had a muscle strain in his mid-back from "pursuing avid upper body workouts at his gym." JE 27:707.

44. On January 2, 2019, Claimant presented to Ramsis Benjamin, MD, for memory loss. JE 20:317. Claimant denied headaches, double vision, vertigo, and syncope and reported he worked out for an hour three times a week using a treadmill and free weights. Dr. Benjamin evaluated Claimant and noted "good cognitive facilities;" Dr. Benjamin recommended Claimant reduce his Gabapentin and increase his nortriptyline. *Id.* at 320.

45. On March 8, 2019, Claimant reported an increase in symptoms in his right foot, with pain at 6/10 and no benefit from his custom AFO; Claimant reported the worsening was associated with titrating down his Gabapentin at the recommendation of his neurologist due to

memory impairment. JE 21:331. Dr. Brown recommended Claimant discuss transitioning to Lyrica with his neurologist. *Id.* at 332.

46. On March 26, 2019, Claimant was diagnosed with unspecific anxiety disorder and unspecified depressive disorder by Susan Hennige, MSW, LCSW. JE 19:399.

47. On April 25, 2019, Claimant settled his 2012 right ankle workers' compensation claim with Employer/Surety. JE 7.

48. On August 6, 2020, Claimant returned to Dr. Moffatt for a dilated diabetic eye examination; Dr. Moffatt recorded Claimant was in stable condition and was okay to continue using his tinted soft lens for photophobia as needed, especially when welding. JE 23:486.

49. On December 14, 2020, Claimant reported to Dr. Jacobsen he had an increase in headaches recently and "that the trigger is too much screen time." JE 27:673. Claimant had already had success in mitigating the headaches by modifying his behavior, such as taking an intermission while watching a movie. *Id.*

50. On April 27, 2021, the Social Security Administration (SSA), found that Claimant was totally and permanently disabled with a date of disability beginning on May 1, 2016 on reconsideration. JE 25:637; 31:924. ALJ Freund found Dr. Jacobsen's opinions persuasive versus Dr. Vu, Dr. Coolidge, or Dr. Vestal, independent SSD physicians. JE 25:641.

51. On September 10, 2021, Dr. Jacobsen authored a "To Whom It May Concern" letter regarding Claimant's conditions and restrictions. JE 26. Dr. Jacobsen wrote:

> Due to his multiple injuries and sequalae, Deacon is now unfortunately effectively fully disabled and unable to secure employment in any capacity. The nerve injury to his R lower leg results in severe intractable pain and sleep disturbance unless he takes a combination of sedating nerve pain relieving medication (Gabapentin and Nortriptyline). Those medications often cause sedation, cognitive impairment, and fall risk. His neuropathy condition adversely affects his balance and gait, and he is a fall risk at any time when his concentration lapses. When his medications are causing sedation and cognitive fog, he has been advised not to work or drive for his

> safety and the safety of others. The level of sedation and mental impairment is widely variable and unpredictable, and therefore he is unable to commit to a consistent and reliable work attendance. The nerve damage that resulted in balance/gait abnormalities also limits his ability to stand or walk for prolonged periods and prevents him from climbing or ambulating on anything other than a smooth and dry surface, etc. Sitting in one position for prolonged periods triggers his nerve pain and understandably makes attention to anything other than his pain condition impossible. His left eye injury results in vision loss and light sensitivity. He is unable to spend time outside in bright light (even with dark glasses) or use a computer screen for more than short interval[s] without suffering severe headaches. His upper body range of motion/function is limited in both extremities due to the cumulative nature of his R shoulder and L hand and wrist injuries/surgical correction. Finally, Deacon has a long standing mood disorder (anxiety and panic primarily) diagnosis that is usually in good control on medication, but which has understandably worsened due to his current pain and physical disability.
>
> All of these unfortunate circumstances have rendered Deacon incapable of obtaining and maintaining employment in any field. His injuries are permanent, severe, disabling, and he is not expected to be able to function consistently enough to be employable at any capacity.

JE 26:645-646.

52. Dr. Jacobsen was deposed on March 17, 2023. Dr. Jacobsen explained she is a family practice physician, board-certified, and had been Claimant's primary care physician since before 2009. Jacobsen Depo. 5:16-6:13. Regarding Claimant's left index finger, right thumb fusion, left wrist fusion, and right shoulder injury/surgery, Dr. Jacobsen testified she was not Claimant's treating physician at the time of those injuries; Claimant had complained to her that his left wrist fusion "causes him some difficulty" and that his right shoulder injury caused "some of the range of motion [sic] and some pain, I think a burning type pain," but that she hadn't treated either condition. Claimant had not complained regarding his left index finger or thumb fusion. *Id.* at 7:13-9:22.

53. Regarding Claimant's eye injury, Dr. Jacobsen recalled Claimant had complained about that injury "[i]ntermittently, usually with regard to driving. Driving at night particularly. Light sensitivity is a real problem for him, and headaches. Most recently, I believe was the

headaches…probably just a bright light problem." *Id.* at 10:19-22; 11:6. Dr. Jacobsen did not believe Claimant could look at a screen for six hours a day because he had "difficulty after about 15 minutes with bright lights and computer screens. In fact, he was taking a medication to help relieve headaches when he was just doing recreational screen, and he was encouraged to take breaks, which worked well for him." *Id.* at 11:7-15. Dr. Jacobsen would restrict Claimant from driving at night long distances and would limit Claimant from looking at screens for more than 15 to 30 minutes based on Claimant's report to her that that's when his headaches would start. *Id.* at 11:16-12:1.

54. Dr. Jacobsen opined that Claimant's anxiety and depression were well controlled with his medications. *Id.* at 15:4-24. However, Claimant did have some anger issues which tended to come out in large groups and was caused by his anxiety. *Id.* at 16:18-24. Dr. Jacobsen considered Claimant's right ankle and eye injury to be his most disabling conditions; more specifically, Claimant's chronic nerve pain, sedation from his nerve pain medications, and light sensitivity induced headaches were the most limiting. *Id.* at 16:25-18:10.

55. On cross-examination, Dr. Jacobsen explained she had reviewed Claimant's other records "more than a skim, less than a study." Jacobsen Depo. 20:15-19. Dr. Jacobsen did recall that Claimant's eye related restrictions were only welding with his dark contact and did not recall that any doctor restricted Claimant from night driving. *Id.* at 23:11-24. Dr. Jacobsen confirmed that Claimant "has mentioned [headaches] more recently in the past few years," and that the trigger was screen time. *Id.* at 24:4-15. Dr. Jacobsen did not recall when Claimant's first headache complaint occurred but did recall that Claimant's light sensitivity began after his 2011 eye injury. *Id.* at 24:22-25:9. Dr. Jacobsen described Claimant's current nerve pain medications as causing "sedation, dizziness, cognitive fogging," and confirmed that those side effects posed real

difficulties for Claimant in returning to work. *Id.* at 25:19-26:10. Dr. Jacobsen confirmed that her records recorded headaches in April 2016 from his eye injury but did not recall any prior headache complaints. *Id.* at 28:14-29:5.

56. On September 5, 2022, John McNulty, MD, evaluated Claimant at his request for an IME. JE 28:840. Dr. McNulty reviewed select records, examined Claimant, and issued restrictions and impairment ratings. Regarding his right ankle, Claimant reported he could not walk more than ¼ mile at a time and had to stop at least three times for break and reported complete sensory loss in his right foot. Regarding his left eye, Claimant reported decreased vision, sensitivity to bright lights, and that he struggled to drive at night. Regarding his shoulder, Claimant complained of limited range of motion, pain, and an occasional pop. Regarding his left wrist, Claimant complained of weakness and limited range of motion. *Id.* at 840-841. Dr. McNulty assessed (1) multiple right ankle sprains causing instability, status post-stabilization, and right peroneal, tibial, and sural nerve injuries; (2) left eye cornea injury; (3) right [sic-left] wrist joint fusion and injury; (4) left index finger laceration with mild range of motion loss; (5) right thumb CMC joint fusion; (6) status post right shoulder slap repair and rotator cuff debridement with range of motion and strength loss. *Id.* at 844.

57. Dr. McNulty rated Claimant's ankle at 14% WPI assigned restrictions related to the ankle of no continuous standing/walking more than 10 minutes at a time, no climbing ladders, rarely ascending/descending stairs, and maximum 20 pounds lifting. Dr. McNulty agreed with the prior rating of 3% for Claimant's corneal abrasion and "that he was precluded from welding" after the injury; further, Claimant should avoid night driving. Dr. McNulty rated Claimant's non-industrial shoulder condition at 5% WPI with work restrictions including a 30-pound maximum floor to shoulder lifting and overhead lifting limited to five pounds on an occasional basis.

Dr. McNulty agreed with the prior wrist fusion rating of 11% of the upper extremity with work restrictions of "avoid activities that require repetitive right forearm supination." Claimant's non-industrial left finger laceration at 1% WPI with no restrictions. *Id.* at 845. Claimant's right thumb was asymptomatic and required no impairment rating. *Id.*

58. Dr. McNulty was deposed on March 10, 2023. Dr. McNulty retired from clinical practice in November of 2021 and was still a board-certified orthopedic surgeon. McNulty Depo. 5:11-23. Dr. McNulty confirmed that Claimant's 11% upper extremity impairment rating for his left wrist translated to a 7% WPI. *Id.* at 11:15-12:7. Dr. McNulty confirmed that he based his physical restrictions for Claimant's right shoulder on the exam he performed in September of 2022. *Id.* at 13:9-17. Dr. McNulty would defer to other eye physicians on Claimant's left eye impairment and restrictions; he recorded the restrictions against night driving from Claimant's records and Claimant's reports. *Id.* at 13:18-14:15.

59. On cross-examination, Dr. McNulty was not surprised that Claimant had been released to full duty by Dr. King for his right shoulder injury: "again, my restrictions are based on his examination of his shoulder…when I saw him. And that was… 13-and-a-half years later." *Id.* at 20:1-8. Dr. McNulty had reviewed Dr. Jacobsen's September 2021 letter and testified that Claimant had not told him about sitting causing him pain or mentioned the cognitive effects of his medications. *Id.* at 25:13-26:7.

60. **Vocational History**. Claimant retrained as a welder after his left wrist injury. JE 5:88. Claimant has a GED and CDL, although he testified his CDL had expired. *Id.* JE 4:56. Claimant worked in general labor, short-haul trucking, welding, and bartending/security. See JE 4. Claimant does not have computer skills but can use a smartphone. Claimant worked in a supervisory position at Employer. *Id.* at 68.

61. On November 18, 2021, Barb Nelson issued a vocational report on behalf of ISIF. JE 29. Ms. Nelson reviewed records and interviewed Claimant. Claimant reported ankle swelling/pain and that he could only walk up to ½ a mile. JE 29:867. Ms. Nelson considered Claimant's relevant previous injuries including his pre-existing right thumb injury, pre-existing left wrist injury, pre-existing right shoulder injury, and pre-existing left eye injury; Ms. Nelson also considered the impact of his most recent ankle injuries. *Id.* at 873-876. Ms. Nelson observed that at 51, Claimant "could possibly" experience some age-based discrimination, but that it was not common in today's labor market with low unemployment rates. Claimant's GED would help him secure many opportunities which required a high school diploma or equivalent. *Id.* At 877. Claimant had skills in technical instructions and blueprints, mathematical skills, strong mechanical and spatial reasoning, knowledge of tools and production and assembly, excellent hand-eye coordination and dexterity, inventory skills, and customer service skills, communication, time management, and problem solving. *Id.* at 878. Claimant's geographic area had low unemployment, favorable for job seekers.

62. Ms. Nelson wrote that Claimant was totally and permanently disabled from his last industrial injury alone based on the opinions of Dr. Jacobsen and Dr. McNulty: "the restrictions are profoundly limiting and do not allow him to work in any of the occupations for which he has transferable skills or other entry level occupations for which he could otherwise compete… even if he had [no pre-existing conditions], he would still be totally disabled." *Id.* at 879. Considering Dr. Cox's opinions, Claimant was not totally and permanently disabled, and she identified two jobs that Claimant was qualified for. *Id.* at 880. Ms. Nelson concluded that Claimant did not have restrictions for his left wrist and right shoulder prior to the industrial accident and that if Claimant was totally and permanently disabled, it was the result of the 2012 ankle injury alone. *Id.*

63. Barb Nelson was deposed on May 16, 2023. Ms. Nelson had reviewed Dr. Jacobsen's updated records, Ms. Statz's vocational report, the hearing transcript, and Dr. McNulty's and Dr. Jacobsen's depositions since authoring her original report. Nelson Depo. 9:25-10:10. Ms. Nelson described the Spokane/CDA area job market as diverse with major retailers, call centers, tourism, manufacturing, agriculture, timber, and mining; the unemployment rate was less than 4% at the time of her deposition, a very favorable market for job seekers. *Id.* at 15:23-16:16. Ms. Nelson explained that Dr. McNulty's restrictions would keep him from doing any of his past work and any light-duty employment all together; Claimant could still qualify for some sedentary assembly manufacturing work, but "those would be kind of the needle in the haystack kind of jobs." *Id.* at 25:8-7. Most of the sedentary jobs available were "clerical, managerial, professional, and he would not have transferable skills for that work." *Id.* Dr. Cox's restrictions, on the other hand, left a few occupations open to Claimant that were "fairly regularly available in most labor markets," such as auto parts delivery. *Id.* at 26:11-27:12. Ms. Nelson opined that Dr. Jacobsen's restrictions left Claimant totally and permanently disabled based on his ankle injury alone. *Id.* at 29:1-5. Regarding Claimant's subjective complaints, Ms. Nelson observed "he goes from describing going to the gym at least three days a week, walking two miles at a time, to having to sit in a chair and basically stay home all the time and basically do nothing." *Id.* at 34:17-22. Regarding Dr. McNulty's and Dr. Jacobsen's restrictions, Ms. Nelson reiterated:

> [his pre-existing impairments] don't matter because the [ankle] restrictions are so profoundly limiting. They don't allow him to work in any job that's well known in the labor market that he ever did before or that he ever hoped to do, and that it really doesn't matter whether he had some visual impairment or some wrist restrictions before or didn't, just those restrictions alone and the way they describe his functioning and his pain and his side effects from medication, that takes him - - those totally take him out of being able to work.

Id. at 35:16-36:5.

64. On cross-examination, Ms. Nelson commented regarding Dr. Jacobsen's restriction on computer screen time and its effect on sedentary jobs: "he would never have access to that employment anyway. He does not have the computer skills to do that work, regardless of whether he had an eye restriction or screen restriction or not. He could not qualify for that work." *Id.* at 39:20-40:12.

65. Sara Statz issued a vocational report on behalf of Claimant on January 20, 2023. JE 30. Ms. Statz conducted a Zoom interview and reviewed records. *Id.* at 881. Ms. Statz noted Claimant had work experience in welding, fabricating/installing/repairing, transporting, abrading, merchandising, and material moving. *Id.* at 888.

66. Ms. Statz conducted a pre-injury local labor market search and concluded Claimant had access to 6.54% of jobs in his labor market before his 2012 injury; however, if Claimant's access was calculated not including his pre-injury restrictions, Claimant had access to 12.62% of his labor market. *Id.* at 899; see FN 30. Ms. Statz recorded Claimant's pre-injury restrictions as: (1) no lifting over 25 pounds, restricted from professional driving, avoid repetitive forearm supination; (2) 30-pound maximum floor-to-shoulder level lifting, no greater than 5-pound overhearing lifting on an occasional basis with right upper extremity; (3) no welding and no night driving. *Id.* at FN 29. Utilizing Dr. Cox's restrictions, Claimant had lost access to 74.77% of his labor market; Ms. Statz did not calculate Claimant's loss if he was unrestricted prior to the industrial injury. *Id.* at 900. Utilizing Dr. Jacobsen's restrictions, Claimant had lost 100% of his labor market access. *Id.* Utilizing Dr. McNulty's restrictions, Claimant had lost 74.77% of his labor market access. *Id.* Utilizing both Dr. McNulty's and Dr. Cox's restrictions, Claimant had 18.92% wage loss.

67. Ms. Statz observed "while [Claimant] would be limited to sedentary jobs, he would

compete with highly qualified candidates. He would no longer command a wage premium as he lacks clerical training or experience." *Id.* at 901. Claimant's poor computer skills were another factor which made him "ill-suited" to entering entry level clerical positions without extensive retraining. *Id.* at 902. Ms. Statz opined that Claimant's geographic location did not pose any challenges to finding work. Ms. Statz also opined that Claimant's "difficulty managing his emotions" would be a concern for future problems at work. *Id.* at 903. Ms. Statz considered Claimant's age and wrote he would be unlikely to face overt age discrimination but may have difficulty adapting to a new workplace and career change. *Id.* at 904. Regarding COVID-19, Ms. Statz wrote that there was increased demand for unskilled and entry-level clerical positions, however, Claimant's lack of clerical skills would deter employers from considering him. *Id.*

68. In conclusion, Ms. Statz wrote that utilizing Drs. Cox and McNulty's restrictions resulted in 75% disability (weighing labor market loss more heavily) and utilizing Dr. Jacobsen's opinions would result in total and permanent disability.

69. Sara Statz was deposed on May 3, 2023. Ms. Statz explained that Dr. Jacobsen's opinion supported a finding of total and permanent disability. Statz Depo. 14:25-15:10. Dr. Cox's restrictions allowed all sedentary and some light duty positions; Dr. McNulty's restrictions eliminated all light duty positions, essentially leaving only sedentary positions. *Id.* at 15:11-17:1. Ms. Statz opined that Dr. McNulty's restrictions against repetitive supination of his left arm prohibited assembly type work, including those jobs identified by Ms. Nelson. *Id.* at 19:6-24; 24:4-26:3. Ms. Statz explained she weighted labor market access loss in her disability calculations because the averaging method would "really undercut the severity of the limitations and disability suffered in this case." *Id.* at 21:17-22:6. Regarding the auto parts delivery job identified by Ms. Nelson, Ms. Statz had personally called four area auto parts delivery stores, and all identified

lifting requirements of up to 50 or 60 pounds and standing/walking at least four hours; the Auto Zone in CDA required all eight hours to be standing or walking. *Id.* at 26:4-27:17. Regarding the transport job identified by Ms. Nelson, Ms. Statz opined that that was "professional driving" so against his restrictions from Fife and Bornfleth and also required night driving, which he could not do. *Id.* at 27:23-28:11.

70. On cross-examination, Ms. Statz recalled Claimant told her he lifted up to 50 pounds at his job at Ground Force. *Id.* at 33:22-34:7. Ms. Statz did not believe the right shoulder restrictions played much of a part in Claimant's disability, because his other restrictions already put him at the light and sedentary levels of work, specifically his ankle injury took him out of heavy and medium duty work. *Id.* at 34:14-35:2.

71. Claimant went into establishments to ask about jobs in 2021-2022. JE 5:82-83. Claimant spoke to 35 employers and 23 were not hiring; a few could not accommodate Claimant's restrictions, specifically his limitation against standing more than four hours a day, and Claimant did not meet the qualifications for at least three employers. *Id.* Claimant turned in a resume or application at two employers. *Id.*

72. On September 10, 2020, Claimant was deposed. JE 4. Claimant testified regarding his left index that it was "weak" and that it made welding more difficult. JE 4:57. Claimant testified his right thumb fatigued faster after the fusion and that he had sharp pains while driving, and difficulty welding. *Id.* Claimant got out of trucking because of his left wrist injury and struggled with lifting heavy objects. *Id.* at 58-60. Claimant testified his employer told him he had to transition into assembly and stop welding because they did not want the liability of him putting his contact in and out to weld. *Id.* at 60. Claimant also testified that he had had double vision since 2011 and was 20/40 in his left eye due to the accident. *Id.* Claimant reported he presently could not "put

[his] arm over [his] head," and he avoided working overhead. *Id.* at 61. Claimant testified he left Continental Contractors because he was having problems with his wrist and ankle; at Continental, Claimant did "heavy haul, CDL driving." *Id.* 63. Claimant reported he was in a lot less pain after his surgery with Dr. Brown, however he couldn't "walk on it, for the most part," and still wished they would have "take[n] his leg off." *Id.* at 65. Claimant reported he still hunted, fished, and camped, but that he fell more than he actually hunted. *Id.* at 66-67. Claimant testified he could only walk 10 minutes at a time before his knee started to hurt. *Id.* at 67. Claimant wore his AFO brace 90%-95% of the time. *Id.*

73. At hearing on February 14, 2023, Mrs. Easterly testified Claimant's right thumb showed less mobility and he dropped things. Tr. 10:23-11:2. She also testified he lost range of motion and could no longer lift heavy things due to his left wrist. *Id.* 11:19-24. Similarly, Claimant's right shoulder limited his lifting ability and range of motion. *Id.* at 12:6-9. Mrs. Easterly testified she was Claimant's eyes and that he basically couldn't read without his glasses and wore his sunglasses everywhere. *Id.* at 13:9-21. Mrs. Easterly noted it was difficult for Claimant to walk or stand for any amount of time due to his ankle injury: "my husband is always an easy 15 feet behind me." *Id.* at 14:22-15:7. Mrs. Easterly confirmed Claimant still drove, and returned to work after his eye injury, and still had his hunting and fishing license. *Id.* at 16:10-18.

74. Regarding his left wrist, Claimant testified he lacked range of motion and that if stuff was "too heavy, it will pull and literally tear the muscles in my wrist." Tr. 21:1-12. Regarding his right shoulder, Claimant reiterated he could not put his arm over his head and struggled with lifting heavy objects; Claimant could still weld overhead but "not very often." *Id.* at 24:21-25:4. Claimant testified he had light sensitivity, migraines after a "matter of minutes" when looking at a computer screen and could not drive at night due to his eye injury. *Id.* at 26:22-27:18. Claimant

testified he left Continental Contractors because they closed down his division. *Id.* at 30:13-14. When asked why he felt he couldn't work a 40-hour work week, Claimant cited his migraines, chronic pain from his ankle that shot up through his leg to his low back, and that his medication was so strong "there's times I forget who my son is." *Id.* at 40:16-41:13.

75. Claimant testified he had two interviews during his job search. Tr. 42:13-15. During the interview process at Qualfon, Claimant testified "I was going to go in to do an in-person interview until they found out that I have to wear contact lenses if I look at a computer." *Id.* at 42:24-43:2. Claimant reiterated he got migraines from looking at computers, but it is not clear from his testimony if this was communicated to Qualfon and/or if this was why Claimant was rejected; Claimant added he also gets cramps in his hip from sitting too long. *See* Tr. 42:24-43:10. Claimant's second interview was with Cooper Fab, but when he went in for the welding test and started to put his contacts in, they told him they did not need him. *Id.* at 43:11-18. It was Claimant's perception he was rejected frequently from jobs because he was too much of a liability, and that at least two employers had told him as much. *Id.* 43:18-44:5. Claimant did not think he could do assembly work because of his limitations on standing, sitting, and handling; he got vertigo and he would fall. *Id.* at 44:19-45:2. Claimant testified regarding driving jobs identified by Ms. Nelson, that although he did not write it down on his list, he had talked to someone at O'Reilly's and they would not hire him. *Id.* at 45:33-11. He could not do a driving job where he sat all the time due to cramping. *Id.* at 45:14-23.

76. On cross-examination, Claimant did not recall doing well on the COMPASS test, and that that he scored a 95 on reading, but he did recall getting mostly A's when he studied welding. Tr. 48:21-49:11. Claimant testified at Employer that anything above 20 pounds, he used a crane to move. *Id.* at 50:17-21. Claimant testified he could still drive and ride his motorcycle; he

had not ridden in two years because "a two-hour motorcycle ride put me down for three days." *Id.* at 52:25-53:20.

77. **Credibility.** Claimant and his wife testified sincerely. However, where his testimony is contradicted by contemporaneous medical records, the medical records will be relied upon. Further, Claimant has memory difficulties. Claimant presented to Dr. Benjamin, a neurologist, specifically for memory loss. At hearing, Claimant testified to his memory loss and demonstrated difficulty recalling recent and distant events. Tr. 37:4-6.

DISCUSSION AND FURTHER FINDINGS

78. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992). A worker's compensation claimant has the burden of proving, by a preponderance of the evidence, all the facts essential to recovery. *Evans v. Hara's, Inc.*, 123 Idaho 473, 479, 849 P.2d 934 (1993). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447–48, 74 P.2d 171, 175 (1937).

79. **Total Permanent Disability.** A prerequisite to a finding of ISIF liability is a finding that Claimant is totally and permanently disabled. *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 284, 207 P.3d 1008, 1015 (2009). Claimant argues that he is totally and permanently disabled via 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 of Idaho, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). 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).

80. Generally, the proper date for disability analysis is the date of the hearing. *Brown v. Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012). 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 Industries*, 136 Idaho 733, 40 P.3d 91; *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). Pain may be considered as a medical factor, a non-medical factor, or both, but it must be considered. *Funes v. Aardema Dairy*, 150 Idaho 7, 11, 244 P.3d 151, 155 (2010).

81. Claimant's disability must be assessed as of the date of hearing. *Brown, supra.* Dr. Jacobsen's restrictions, articulated in her letter of September 2021, are the only set of restrictions in the record that encompass all of Claimant's impairments at the time of the February 14, 2023 hearing. *See* JE 26: 645-646. Both Ms. Nelson and Ms. Statz agree that Dr. Jacobsen's restrictions render Claimant totally and permanently disabled. JE 29:879; JE 30:900. Thus, the record supports a finding that Claimant is totally and permanently disabled as of the date of hearing, and the Referee so concludes.

82. **ISIF Liability.** Idaho Code § 72-332 provides that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of his employment, and by reason of the combined effects of both

the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his income benefits out of the ISIF account.

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

84. In *Mitchell v. State, Industrial Special Indemnity Fund*, IIC 2005-528356 (June 20, 2017), the Commission analyzed when it was appropriate to assess the four elements of an ISIF claim. Citing to *Colpaert v. Larson's Inc.*, 115 Idaho 825, 771 P.2d 46 (1989), the Commission stated:

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

Mitchell, at ¶ 58.

85. **Pre-existing Impairment.**[2] Claimant argues he has several pre-existing impairments including: (1) 1991 left index finger injury; (2) 1997 right thumb fusion; (3) 1999 wrist injury; (4) 2008 right shoulder injury; and his (5) 2011 left eye injury. The record establishes that all these impairments pre-date his 2012 ankle injury.

86. **Manifest.** To be manifest, the impairment must not only be in existence before the industrial accident and injury occurred, but Claimant and/or others must have been aware of the condition. *Horton v. Garrett Freightlines, Inc.*, 115 Idaho 912, 772 P.2d 119 (1989). The record establishes that these pre-existing impairments were manifest.

87. **Subjective Hindrance.** Again, per *Mitchell*, *supra*, a pre-existing condition must be assessed as of the date immediately preceding the most recent work injury, including whether the condition was a subjective hinderance. The Idaho Supreme Court set out the definitive explanation of the "subjective hindrance" requirement in *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 686 P.2d 557 (1990). Under this test, evidence of the claimant's attitude toward the preexisting condition, the claimant's medical condition before and after the injury or disease for which compensation is sought, nonmedical factors concerning the claimant, as well as expert opinions and other evidence concerning the effect of the preexisting condition on the claimant's employability are considered in determining whether a particular condition was a subjective hindrance to that particular claimant. *Id.*

88. Left Index Finger Injury. Claimant's left index finger injury was not a subjective hinderance. Claimant worked with his hands daily as an assembly technician; it required "continuous grasping and handling" per the ICRD job site evaluation. At the 2018 FCE, Claimant

[2] Claimant does not argue this depression or anxiety are pre-existing, manifest impairments which qualify for ISIF liability.

demonstrated the ability to "handle/reach/grasp/finger on a frequent to continuous basis." Dr. McNulty issued no restrictions related to this injury. Claimant's later testimony that his left index finger was "weak" does not rise to the level of subjective hinderance when he was still able to complete his job duties competently, there are no subjective complaints before his 2012 ankle injury, no physical findings of weakness or limitation before his 2012 ankle injury, and the physical findings that were recorded in 2018, closer to his time of injury, demonstrate no weakness; any weakness reported in 2020 or 2023 is not pre-existing in nature.

89. Right Thumb Fusion. Similar to his left index finger, Claimant's right thumb fusion was not a subjective hinderance. Dr. McNulty noted his right thumb was asymptomatic in 2022 and issued no restrictions or impairment for this injury. Again, Claimant worked with his hands daily as an assembly technician; it required "continuous grasping and handling" per the ICRD job site evaluation. At the 2018 FCE, Claimant demonstrated the ability to "handle/reach/grasp/finger on a frequent to continuous basis." Claimant's later testimony that his right thumb fatigued faster does not rise to the level of subjective hinderance when he was still able to complete his job duties competently, there are no subjective complaints before his 2012 ankle injury, and no physical findings of weakness or limitation before his 2012 ankle injury, and the physical findings that were recorded in 2018, closer to his time of injury, demonstrate no fatigue; any reported fatigue in 2020 or 2023 is not pre-existing in nature.

90. Left Wrist Injury. Claimant's left wrist injury is a much closer call than his finger and thumb injuries. Per Dr. Whitney, Claimant was restricted by his surgeon, Dr. Jones, from heavy or repetitive use of his left arm and Claimant had restricted range of motion. Drs. Fife and Bornfleth noted that Claimant did not have any formal restrictions, other than self-imposed ones, i.e., limiting his lifting if it was painful; they did not endorse a 25-pound lifting limitation. Drs. Fife

and Bornfleth did write "it may be wise to restrict him… from being employed as a professional driver." However, Claimant's testimony that he got out of trucking after his left wrist injury is somewhat contradicted by his demonstrated work history of continuing to drive truck for Steel Structures of America (light) and Panhandle Concrete (heavy). Claimant also "drove a few trucks" for Employer. JE 4:58. Claimant drove truck for Continental Contractors and testified he left Continental Contractors because of his wrist and ankle at his 2020 deposition; however, when asked specifically why he could not return to 18-wheeler driving, Claimant testified his ankle "won't let me." JE 4:56. Further, Claimant testified at hearing that he left Continental Contractors because they closed down his division and he was laid off. Tr. 30:13-14. Claimant's 2018 FCE demonstrated normal range of motion and strength in his left forearm and wrist. Claimant agreed with the job site evaluation (JSE) that his work at Employer required him to frequently lift 50 pounds and reported the same to Sara Statz; it was not until hearing that Claimant asserted he did not lift more than 20 pounds without assistance. Further, it's not clear if Claimant attributed this at hearing to his right shoulder or his left wrist. In 2016, Claimant did report that his left arm constantly hurt to the ICRD consultant. However, in June and October 2018, Claimant was still doing his normal upper body workouts per his reports to Dr. Jacobsen. Dr. McNulty opined that Claimant should "avoid activities that require repetitive right [sic-left] forearm supination" and gave no specific weight restriction. Claimant's medical records do not demonstrate any pre-2012 subjective complaints of wrist weakness after his 2005 IME with Dr. Whitney.

91. Considering the evidence as a whole, it does appear Claimant had some loss of range of motion in his wrist, notwithstanding the FCE results. Claimant's examination with Dr. Whitney in 2005 and his examination with Dr. McNulty in 2022 both demonstrate left wrist loss of range of motion. Dr. Jones, his surgeon, restricted Claimant from repetitive or heavy use

of his left wrist. Claimant transitioned jobs because of this injury, retraining as a welder. Claimant has demonstrated his left wrist injury was a subject hinderance to employment.

92. Right Shoulder Injury. Claimant's right shoulder injury was not a subject hinderance to employment prior to his 2012 right ankle injury. Claimant was released without restrictions by Dr. King after his surgery. When Claimant experienced a re-aggravation of right shoulder pain in March of 2013, it resolved quickly: Claimant's physical therapist recorded in April 2013 "no pain in R shoulder since injections. Able to do full upper body workout at his PT sessions today (up to 25# pound bicep curls and 20# overhead military press) without pain. Recommend d/c from PT to full-duty work." JE 18:215. This is echoed in Dr. Jacobsen's records where in 2018 Claimant suffered a mid-back strain due to "avid" upper body workouts at the gym. Claimant did not complain of right shoulder pain to Julie King at ICRD, but did complain of left arm pain, and confirmed Dr. King released him without restrictions. Claimant also agreed he lifted up to 50 pounds at his job at Ground Force and reported to Ms. Statz he also lifted up to 50 pounds at his work at Ground Force. Claimant had normal range of motion and strength in right shoulder during his FCE in 2018. Dr. McNulty testified that his restrictions for Claimant's right upper extremity were issued based on his presentation in September 2022; it did not surprise Dr. McNulty that Claimant was released without restrictions after his right shoulder surgery. Claimant's issues with right shoulder range of motion and pain start to consistently appear after his deposition testimony in 2020 and were not a subjective hinderance prior to his 2012 ankle injury.

93. Left Eye Injury/Headaches. Claimant reported light sensitivity immediately and consistently after his 2011 industrial accident. When Claimant received a dark contact lens for welding, he faxed Dr. Skoog he was doing "fabulous" and asked for a full-duty work release. At the time of his 2012 ankle injury, Claimant's only work restriction related to his eye was that he

had to wear his dark contact lens while welding. This was a subjective hinderance to employment; Claimant's job was not continuously welding, and he was required to take his contact in and out frequently to complete tasks other than welding. Tr. 55:16-56:14. His employer moved him to assembly from welding because of his eye injury per Claimant's reports. Claimant's left eye injury was a subjective hinderance to his employment at Employer's, specifically that he could no longer weld. Further, his interview at Cooper Fab was cut short due to his need to wear a dark contact lens for welding. To be clear, Claimant was not restricted from welding *per se*, however, he has shown it likely that his need for a dark contact lens while welding precludes most employers from considering him.

94. Claimant also claims his headaches, which are associated with bright lights and screens, are related to his left eye injury and a subjective hinderance. Claimant did not complain of headaches related to screens until December 2020. Claimant was not restricted from working with screens or bright lights until September 2021 by Dr. Jacobsen. Dr. Jacobsen essentially confirmed this at her deposition, stating his issues with his left eye were "**most recently** … the headaches," and "he has mentioned [headaches] **more recently** in the past few years." Jacobsen Depo. 10:19-23; 24:6-7. Dr. Jacobsen also testified that Claimant's headaches were well managed with breaks and medication when he was using screens recreationally. *Id.* at 11:10-15. Claimant has complained of headaches since at least 2011, however, there is no evidence Claimant was restricted or limited in his work duties or even his personal activities until his 2020 complaints regarding screens, which was resolved by taking breaks. Claimant still read blueprints, schematics, and keyboarded at his time of his injury job. Regardless of origin or cause (the record supports potential causes including viral meningitis, undertreated sleep apnea, or his left eye injury), Claimant's headaches did not become a subjective hinderance until after his 2012 ankle injury.

95. **Combination.** The fourth and final element required for ISIF liability is that the pre-existing impairments must "combine with" the impairment from the industrial accident and injury to render a person totally and permanently disabled or permanently aggravated and accelerated a pre-existing condition to cause total and permanent disability. To satisfy this element, a claimant must show that but for the pre-existing impairments, he would not have been totally permanently disabled. *E.g.*, *Andrews v. State of Idaho, Industrial Special Indemnity Fund*, 162 Idaho 156, 395 P.3d 375 (the Court affirmed the Commission's finding that ISIF was not liable because the claimant's total and permanent disability resulted solely from the industrial accident).

96. As set forth above, Claimant is totally and permanently disabled as of the February 14, 2023 Hearing. However, as developed below, Claimant is totally and permanently disabled as a result of his 2012 ankle injury alone and the sequalae from those injuries, as an odd-lot worker. Claimant's pre-existing impairments do not combine with his accident produced impairments to cause his total and permanent disability.

97. There are three sets of restrictions (Dr. Cox, Dr. McNulty, and Dr. Jacobsen), but only one represents all of Claimant's time of hearing impairments, and that is Dr. Jacobsen's September 2021 list of restrictions. Neither Dr. Cox nor Dr. McNulty considered the side effects of Claimant's nerve pain medication for his ankle injury.

98. Claimant and his wife agreed at hearing that he is currently limited in sitting, standing, walking, and Claimant testified he suffers such extreme side effects from his pain medications that "there's times I forget who my son is." Tr. 40:16-41:13. Dr. Jacobsen wrote:

> Those medications often cause sedation, cognitive impairment, and fall risk. His neuropathy condition adversely affects his balance and gait, and he is a fall risk at any time when his concentration lapses. When his medications are causing sedation and cognitive fog, **he has been advised not to work** or drive for his safety and the safety of others. The level of sedation and mental impairment is widely variable and unpredictable, **and therefore he is unable to commit to a consistent and**

> **reliable work attendance.** The nerve damage that resulted in balance/gait abnormalities also **limits his ability to stand or walk for prolonged periods** and prevents him from climbing or ambulating on anything other than a smooth and dry surface, etc. **Sitting in one position for prolonged periods triggers his nerve pain** and understandably makes attention to anything other than his pain condition impossible.

JE 26:645-646 (emphasis supplied). Claimant's sitting, standing, walking, and medication related cognitive impairments render Claimant totally and permanently disabled and are solely related to his ankle injuries and associated nerve pain. Claimant attempted to wean down his medications due to their cognitive side effects per his neurologist's recommendation but was unable to do so due to the pain it produced; Claimant's nerve pain was so bad he reported to Dr. Brown he had no benefit from his custom AFO and his pain was at a 6/10 at just a reduced level of medication. Claimant's pain is a part of his disability, as are his medication related side-effects.

99. Both Dr. Jacobsen, at deposition, and Claimant, at hearing, agreed his most limiting conditions were his ankle injury and his screen-induced headaches; as explained above, Claimant's headaches do not qualify as a subjective hinderance as of the date of the subject accident, and therefore cannot constitute a basis to implicate ISIF liability. Regardless, Claimant's ankle injury alone, without even considering his screen induced headaches, render Claimant totally and permanently disabled, as explained above. Even if Claimant had no screen-induced headaches, he would not be able to work a sedentary desk job due to his medication related side effects. Further, per Ms. Nelson and Ms. Statz, Claimant would not be qualified for any sedentary desk job; he has no transferable skills for that type of position, would be competing against "other highly qualified candidates" per Ms. Statz, and has poor computer skills according to both vocational experts and Claimant himself.

100. Ms. Statz and Ms. Nelson both agree that Dr. Jacobsen's restrictions render Claimant totally and permanently disabled. Ms. Nelson explained that "just [Dr. Jacobsen's]

restrictions alone and the way they describe his functioning and his pain and his side effects from medication, that takes him - - those totally take him out of being able to work." Nelson Depo. 36:1-36:5. Ms. Statz agreed in her report, specifically recording that Dr. Jacobsen's opinion that his medications cause sedation and cognitive fog and that he had been advised not to work resulted in 100% loss of labor market. JE 30:900.

101. Dr. Jacobsen's limitations on walking and standing are further supported by Dr. McNulty's restrictions. Dr. McNulty issued restrictions of no continuous standing/walking more than 10 minutes at a time, no climbing ladders, rarely ascending/descending stairs, and maximum 20 pounds lifting related to Claimant's ankle injury alone. According to Ms. Nelson, these restrictions alone, also render Claimant totally and permanently disabled. Ms. Nelson explained there were some jobs Claimant could still do with these restrictions, but they were akin to a needle in a haystack, i.e., not regularly and continuously available in the labor market. Dr. McNulty's restrictions do not account for Claimant's medication's side effects and the cognitive fog/sedation they demonstrably produce according to Claimant and Dr. Jacobsen.

102. Claimant's accident-produced restrictions far exceed and eclipse his pre-existing impairment related restrictions and they do not combine to cause total and permanent disability. Claimant's pre-existing impairments, as assessed prior to the 2012 ankle injury, include a limitation on very heavy and heavy work from his left wrist injury and a prohibition against welding without dark contact lens due to his left eye injury.

103. Claimant's ankle injuries also preclude Claimant from very heavy and heavy work, i.e., the left wrist injury adds nothing to Claimant's overall disability that is not already included in his ankle injury restrictions. Ms. Statz explained that Claimant's ankle injuries alone already prohibited heavy and medium duty work when discussing the impact of his right shoulder injury.

This is not the case where but for Claimant's left wrist injury, Claimant would not be totally and permanently disabled. As explained above, Claimant was rendered totally and permanently disabled by his ankle injuries alone.

104. Claimant's restriction against welding without a dark contact lens similarly does not combine with his ankle injuries to result in total and permanent disability. Claimant's ankle injuries alone prohibit him from returning to welding. There is no evidence that but for Claimant's left eye injury, Claimant would not be totally and permanently disabled. Again, Claimant was rendered totally and permanently disabled by his ankle injuries alone.

105. No physician has opined that it is a combination of Claimant's pre-existing conditions and his accident produced restrictions that result in total and permanent disability. Claimant has failed to prove his is totally and permanently disabled as result of the combination of his pre-existing impairments and accident produced impairments.

CONCLUSIONS OF LAW

1. Claimant is totally and permanently disabled as a result of his 2012 ankle injury alone;

2. ISIF is not liable for any portion of Claimant's disability;

3. *Carey* formula apportionment is 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 29th day of September, 2023.

INDUSTRIAL COMMISSION

Sonnet Robinson

Sonnet Robinson, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October, 2023, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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Gina Espinoza

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DEACON EASTERLY, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2012-005507** **ORDER** FILED OCT 20 2023 INDUSTRIAL COMMISSION

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

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

1. Claimant is totally and permanently disabled as a result of his 2012 ankle injury alone.

2. ISIF is not liable for any portion of Claimant's disability.

3. *Carey* formula apportionment is moot.

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

DATED this 20th day of October, 2023.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Aaron White, Commissioner

ATTEST:
Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October 2023, a true and correct copy of the foregoing **ORDER** was served by *E-mail transmission* and by regular United States Mail upon each of the following:

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