BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DOUGLAS WESTMAN, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2015-020206** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED FEBRUARY 16, 2024 IDAHO 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 May 10, 2023 in Pocatello, Idaho. Claimant, Douglas Westman, testified and was represented by Andrew Adams of Idaho Falls. Paul Augustine of Boise represented Defendant/ISIF. The parties presented oral and documentary evidence. Post-hearing depositions were taken. The matter came under advisement on December 21, 2023 and is ready for decision.

ISSUES

The issues to be decided are:

1. Whether Claimant is totally and permanently disabled via the odd-lot method or otherwise;
2. Whether ISIF is liable for benefits;
3. If applicable, apportionment pursuant to the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant contends he has multiple pre-existing, manifest impairments which were

subjective hinderances to employment and which combine with his 2015 injury to his dominant right hand to cause total and permanent disability. Both vocational experts believe Claimant is totally and permanently disabled via the odd lot method. ISIF's vocational expert improperly applied the "but-for" test by focusing on whether Claimant is totally and permanently disabled from the last accident alone and not whether the pre-existing impairments added to the subsequent injury equaled total and permanent disability as required by statute. ISIF is liable for benefits.

ISIF contends Claimant is totally and permanently disabled via his last accident alone. Claimant's expert agreed that the restrictions from his last industrial injury left him no available labor market. Claimant did not meet the "but for" standard required by case law.

Claimant responds that the last accident "almost" took away Claimant's entire labor market; the remaining disability is because of his pre-existing impairments. Under this logic, Claimant has met the combined with element for ISIF liability.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Joint Exhibits 1-56[1];
3. The testimony of Claimant, Douglas Westman, taken at hearing;
4. The post-hearing depositions of:
    a. Delyn Porter, taken by Claimant;
    b. Barbara Nelson, taken by ISIF.

All outstanding objections are OVERRULED.

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[1] Pages 30-35 of Exhibit 41 were not admitted; Mr. Augustine objected at hearing on the basis that the opinion was untimely produced pursuant to JRP 10. See HT 8:8-12:15.

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 was born in Lynwood, California on January 7, 1964 and was 59 years old at the time of hearing. JE 54:4. Claimant grew up in Klamath Falls, Oregon. JE 54:5. Claimant is a third-generation meat cutter and learned the trade from his father. *Id.*

2. On December 20, 1999, a stack of frozen turkeys fell on Claimant injuring his thoracic spine, right shoulder, and causing an acute abdominal hernia. JE 6:3. Claimant underwent hernia surgery and a revision, but still had thoracic pain. *Id.*

3. In October of 2000, Claimant underwent an excision of the superior angle of the right scapula related to this injury. JE 13:4. Claimant's shoulder surgeon observed that Claimant would not be able to return to work as a meat cutter secondary to thoracic pain. *Id.* at 5.

4. On June 26, 2001, Claimant underwent a thoracic microdiscectomy at his right T8-9, also related to this injury. JE 6:11.

5. On October 26, 2001, Claimant requested a prescription for a back brace; his neurosurgeon agreed and prescribed him one to be used intermittently for support at work. *Id.* at 21-22. Claimant testified at hearing that the back brace helped keep him upright to strengthen his core, and after about a year he no longer needed it. HT 28:24-29:14.

6. On January 10, 2002, Claimant was released by his neurosurgeon to a "trial of full time, medium duty work," which Claimant understood to be a temporary restriction. JE 6:25; HT 89:11-17. When asked specifically about this injury, Claimant reported in 2009 and in 2022 that he was released with no restrictions. JE 13:5; 54:6. At hearing, Claimant testified he had to do things differently after this injury and tried to get out of meat cutting per his physician's

recommendation by working in maintenance at an RV park. HT 30:16-32:19. Claimant worked in maintenance for about six months before returning to meat cutting. *Id.* at 29:18-33:6.

7. On September 6, 2008, Claimant was lifting a 50–80-pound box when he twisted and fell, injuring his left knee and low back. JE 8:1. Claimant was working as a meat cutter for Ridley's at the time and was required to lift up to 90 pounds, and perform repetitive gripping, grasping, and reaching. JE 13:5. Claimant treated extensively for this injury including a left partial medial meniscectomy and patellofemoral compartment chondroplasties and bilateral carpal tunnel releases; Claimant also received treatment for his right shoulder and SI joint injections. JE 10:27.

8. On June 4, 2009, Claimant was examined by Lori Welter, MD, for an IME. JE 10:33. Dr. Welter rated Claimant's impairments at 1% whole person for his left knee, 0% for his right shoulder, 3% whole person for his SI joint impairment, 0% for bilateral carpal tunnel releases, and 2% for volar hernias for a total of 6% whole person. JE 10:31-32. Regarding work restrictions, Dr. Welter wrote:

> He tells me that to work as a meat cutter, typically he would have to lift 50 to 90 pounds frequently during the day. He also states that likely he would not be hired as meat cutter if he could not lift up to 100 pounds. He also finds that working in a cold, damp environment would be bothersome. The repetition of cutting and wrapping numerous packages of meat during the day would likely flare his symptoms as well per his report. Also of note, when he was first diagnosed with carpal tunnel, it was recommended he not return to meat cutting.

JE 10:32. Claimant explained at hearing that in this excerpt Dr. Welter was merely repeating what he had told her. HT 41:10-23. Claimant testified at deposition that he was released to full duty work. JE 54:8. At hearing, Claimant confirmed he was released to full duty work and did not have any ongoing problems with his left knee. HT 37:25-38:9.

9. Claimant then went to work for Horlacher's Meat; at deposition, he testified he did not have any difficulties performing this job and wore his back brace and knee braces, which was

required of everyone working in the plant at that time. JE 54:8. At hearing, Claimant contradicted this testimony and testified that he wore prescribed back braces and knee braces. HT 43:16-46:15.

10. On August 25, 2009, Claimant was prescribed a left shoe lift due to a leg length discrepancy where his right leg was 8mm longer than his left leg. JE 10:34. Claimant then went to work at JBS as a meat cutter and passed two pre-employment physicals. JE 54:12.

11. At JBS, Claimant injured his left wrist at work in March 2012 and his left wrist and low back in September of 2012. JE 18:1.

12. On January 25, 2013, Claimant underwent a lumbar microdiscectomy and synovial cyst removal at L5-S1 to treat a herniated disk. JE 8:17.

13. On October 10, 2013, Claimant was rejected by Social Security Disability for disability related to his left wrist, low back, and high blood pressure as his condition was expected to improve. JE 55:4.

14. On November 15, 2013, Claimant underwent a left wrist fusion after a series of interim surgeries failed to alleviate Claimant's symptoms. JE 8:47.

15. Claimant was released to full duty work on November 27, 2013 for his lumbar spine. JE 8:53. At deposition, Claimant confirmed his surgeon released him from this injury with no restrictions. JE 54:13. Claimant was referred to pain management on December 27, 2013 by his primary care physician for his ongoing left wrist and low back pain and limited to lifting 25 pounds for his low back pain. JE 14:15.

16. On December 30, 2013, Claimant was released to full duty work for his left wrist. *Id.* at 54. Claimant recalled he had no restrictions for this injury both at deposition and at hearing. JE 54:13; HT 58:22-24. Claimant testified Dr. Miller prescribed him a wrist brace, however, at this December appointment Dr. Miller instructed Claimant to discontinue the brace; at his next

appointment on May 12, 2014, Claimant was still wearing the wrist brace at work to lift. JE 10:95-98; HT 99:17-25.

17. Claimant then went to work for RSM as a route driver delivering meat and other food products and had "no problems" performing that job and passed a pre-employment physical. JE 54:13-14. Claimant utilized a hand truck and cart, but stacked boxes of refried beans and carne asada weighing up to eighty pounds each and spent the day bending and stooping to do so. *Id.* at 14-15. Claimant continued to wear knee braces which his boss at RSM paid for. *Id.* at 20.

18. At hearing, Claimant added details like that he also wore an elbow brace and that RSM bought him a brodie knob for his steering wheel, special hand truck, special hand cart, and a battery-operated pallet jack: "they accommodated me because they wanted to hire me." HT 57:7-59:20; 65:18-24. Claimant added that this work was about as vigorous as meat cutting and that he was in "the best shape of [his] life" while performing this job because of all the walking and pulling. *Id.* at 63:18-25. Claimant testified he lifted/slid 50-to-60-pound boxes. HT 104:2-10.

19. In 2014, Claimant received ongoing left hand and wrist injections. See JE 10. On June 16, 2014, Claimant's grip strength had improved from 60 pounds to 80 pounds. On October 6, 2014, Claimant was still reporting pain on the radial side of his left wrist when lifting, however, Claimant had excellent grip strength. JE 10:100.

20. On January 14, 2015, Claimant reported that about six weeks prior on November 29, 2014, he twisted his left knee at work and then hit his right knee immediately after. JE 10:102. Claimant reported his prior left knee injury from 2009 but explained that he had been doing fine until the recent injury. *Id.* Claimant received injections in both knees. *Id.* Claimant was released to regular work as tolerated. *Id.* at 103

21. On February 23, 2015, Claimant received a left knee injection and reported his right knee was "doing okay;" Claimant reported utilizing a "strap…wrap," but the note does not clarify on what side, left or right, although context suggests it was the left side. *Id.* at 104. Claimant did not receive any updated restrictions.

22. Claimant was seen on April 6, 2015 by Brian Richardson, MD, and diagnosed with right knee osteoarthritis; Dr. Richardson recommended a right knee MRI, a series of injections, and prescribed hydrocodone for his knee pain. JE 21:2. At hearing, Claimant explained that he was able to keep going and had no restrictions regarding his knees. HT 120:10-24.

23. Around this time, his employer at RSM, bought his brother's business, Great Western Foods, and a chicken plant, and hired Claimant to run the meat department. Claimant began this position approximately two months before he was injured. JE 54:15-16. Claimant reported that while he was working at Great Western Foods, he continued to perform the heavy, repetitious labor of cutting meat and packaging it; he did not struggle from a physical standpoint as long as he wore his braces. *Id.* at 16. Claimant confirmed this testimony at hearing but added that they used carts and that it was more pulling than lifting. HT 70:3-24. Claimant agreed with the job site evaluation that it was lifting about 75 pounds 1/3 of the day. *Id.* at 106:6-12. Claimant had stopped taking his pain medication before moving to Idaho to start this job; he needed to find a new pain management physician first. JE 54:24.

24. **2015 Industrial Accident.** On July 20, 2015, Claimant presented to the ER after his right hand became stuck in a meat grinder at work. JE 22:1. Claimant's second through fourth digits were partially amputated, the remnants of those fingers were fractured, in addition to his fifth digit. *Id.* at 3. Claimant underwent immediate surgery to pin his broken fingers and amputate his partially amputated fingers. *Id.* at 10.

25. On August 26, 2015, at this initial interview with the Industrial Commission Rehabilitation Division, Claimant reported he had no prior restrictions. JE 56:19. Claimant's time of injury job was classified as "heavy." *Id.* at 22.

26. On September 16, 2015, Claimant complained of right shoulder pain, which he believed had been aggravated by the accident; he reported his prior surgery from 2000 to his scapula. JE 28:2, 5. Claimant was evaluated for his right shoulder complaints by John Andary, MD, on November 15, 2015; he diagnosed significant aggravation of glenohumeral arthritis, a significant labral tear, and subacromial bursitis with partial thickness rotator cuff tear. JE 34:3. Claimant underwent surgical repair and tenodesis; Claimant was rated at 6% upper extremity for his shoulder and released with no restrictions. *Id.* at 12-14.

27. On December 9, 2015, Claimant was referred for pain management to Jason Poston, MD. JE 35:1. On June 7, 2016, Claimant was diagnosed with complex region pain syndrome. *Id.* at 79.

28. Claimant was evaluated for prosthetics in 2015, and eventually received a prothesis in 2016 and another in 2019. See JE 29, 30, 35. However, Claimant frequently had to send it back to the manufacturer due to malfunctions and eventually gave up on utilizing a prothesis all together when it got stuck on the steering wheel while he was driving. HT 78:6-12.

29. On October 13, 2016, Vermon Esplin, MD, agreed with the restrictions identified by an FCE and an impairment rating for Claimant's industrially related injuries. JE 30:44. Without the prosthesis, Claimant could not lift more than 25-30 pounds bilaterally on a rare basis, or five to 15 pounds on a frequent or repetitive basis. With the prosthesis, Claimant should not lift more than 10 pounds and should avoid cold, moist, or humid environments, and that frequent fingering

and handling would be "hard." *Id.* Claimant was rated at 32% whole person impairment at this time for his upper extremity alone, not including his CRPS. *Id.*

30. Claimant underwent a series of stellate ganglion blocks to treat his chronic hand pain and CRPS, but these were limited in effectiveness; on December 5, 2016, a spinal cord stimulator was discussed. JE 35:180.

31. On January 25, 2017, Nancy Greenwald, MD, evaluated Claimant for a spinal cord stimulator. JE 43:1. Dr. Greenwald reviewed records and interviewed and examined Claimant. Claimant reported his pre-injury surgeries to his thoracic spine, left wrist, bilateral carpal tunnel, right scapula, and lumbar spine; Claimant reported his chronic right knee pain and was wearing a right knee brace at the time of the evaluation. *Id.* at 4-5. Dr. Greenwald did not recommend a spinal cord stimulator because she did not believe Claimant met the criteria for CRPS.

32. On February 3, 2017, Craig Beaver, PhD, issued his report regarding the appropriateness of a spinal cord stimulator for Claimant. JE 44:1. Dr. Beaver administered psychological tests, interviewed Claimant, and reviewed records. *Id.* Dr. Beaver found "no contrary indications for a spinal cord stimulator trial." *Id.* at 23.

33. Claimant settled the indemnity portion of his case with Employer on April 5, 2017; future medical benefits were left open. JE 56:31.

34. On November 30, 2017, Dr. Esplin revised Claimant's permanent restrictions to max lifting 0-5 pounds with the right hand, repetitive lifting of 0-5 pounds on the right hand, and limited grasping, pinching, and twisting on the right side. JE 30:65.

35. On June 28, 2018, Claimant complained of low back pain and reported his prior L5-S1 discectomy; Claimant stated he did well for about three years after that surgery but had developed predominantly right sided low back pain after limping due to an injured knee. JE 35:324.

PAC Willardson noted this was a new complaint for this clinic. *Id.* PAC Willardson recommended an SI joint injection. *Id.*

36. On January 22, 2019, Dr. Greenwald reviewed additional records, and examined and interviewed Claimant to evaluate whether Claimant should receive a spinal cord stimulator. JE 43:32. Since her previous exam, Claimant had his right knee replaced and he was happy with the outcome. *Id.* at 36. Dr. Greenwald recommended Claimant try a peripheral nerve stimulator and if that did not work, a spinal cord stimulator. Dr. Greenwald emphasized that Claimant should wean off opiates and that the best options to treat neuropathic pain were non-opiate medications. *Id.* at 38.

37. On May 7, 2019, Claimant was implanted with a spinal cord stimulator. JE 35:401. Throughout 2020 and 2021, Claimant continued to receive hydrocodone 10mg to treat his hand pain and low back pain, although he reported good results from the spinal cord stimulator treating his phantom limb pain. See JE 35:530-569.

38. Claimant had approximately nine surgeries related to the 2015 industrial accident, with the last being performed on February 8, 2021, amputating his right index finger at the metacarpophalangeal joint in an attempt to improve Claimant's prothesis' function. JE 45:48, JE 51:1, JE 30:87. At the time of hearing, Claimant was still pursuing a prosthetic glove which may allow him to type but would not increase his ability to lift. HT 78:15-79:12.

39. On October 12, 2021, Claimant elected to undergo a total left knee replacement because he had had left knee pain for "many years." JE 52:1.

40. **Vocational History**. Claimant did not graduate high school but earned his high school diploma while in the Navy. JE 54:4. Claimant was in the Navy for four years. *Id.* After discharge from the Navy, Claimant went back to meat cutting; he is a third-generation meat cutter

and had previously been an apprentice meat cutter with his father. *Id.* Claimant explained that meat cutting requires lifting of about 60 to 70 pounds. *Id.* at 7. After his 2015 injury, Claimant looked for salesman jobs for restaurants but would have to pursue further college and take out loans. *Id.* at 22. Claimant has not sought work since he qualified for Social Security Disability (SSD). *Id.* Claimant testified at deposition that if it wasn't for his right hand, he would have returned to meat cutting over receiving SSD. *Id.* at 26.

41. On October 14, 2016, Delyn Porter issued a vocational report on behalf of Claimant. JE 41:1. Mr. Porter utilized the restrictions and ratings identified by Dr. Esplin in 2016, not 2017, and only had records regarding the 2015 injury. *Id.* at 2-10.

42. Claimant had a high school degree and attended community college for one year. *Id.* at 11. Claimant had entry level computer skills. *Id.* at 12. Per his employment history, Claimant had been a meat cutter for over 30 years. Meat cutting is "heavy" work requiring exerting 50 to 100 pounds of force occasionally. *Id.* at 16, 18.

43. Regarding pre-existing injuries, Claimant only reported his left wrist fusion and hypertension. *Id.* Claimant denied any pre-existing impairments, permanent work restrictions, or limitations and reported he was capable of performing all the essential functions of his past jobs. *Id.* at 14. Claimant reported difficulty twisting with his left wrist, and utilizing a knee brace although on which side is not indicated. *Id.*

44. Mr. Porter concluded that considering only Claimant's past work history, he had lost 100% of his labor market. However, utilizing Idaho Occupational Employment and Wage Survey for the Idaho Fall area, Claimant only had access to 4% of the jobs in his labor market and had therefore lost 75.4% of his labor market access; Claimant's wage loss was 31.8%. *Id.* at 22-23. Mr. Porter opined that Claimant was an odd-lot worker due to his age, lack of transferable

skills, limited educational background, and his exertional and positional restrictions. *Id.* at 24, 27. Mr. Porter wrote that Claimant had no pre-existing impairments and if Claimant was not totally and permanently disabled, his labor market loss was so substantial that the averaging method frequently utilized by vocational experts would not capture his full disability. *Id.* at 27-28. Therefore, he concluded that alternatively, Claimant's permanent disability would be 65.4%. *Id.*

45. Mr. Porter was deposed on August 22, 2023. Porter Depo. Since his 2016 report, Mr. Porter had reviewed Ms. Nelson's report and explained that a lot of the pre-existing conditions she had listed were new to him. Porter Depo., 10:13-17. Mr. Porter believed Claimant's shoe lifts and braces were subjective hinderances to employment despite the fact that Claimant still worked as a meat cutter with them. *Id.* at 13:15-15:10. Mr. Porter ultimately opined that Claimant's pre-existing injuries were manifest, subjective hinderances and further: "had it not been for the last injury, he could have continued working, albeit in a limited fashion, as a meat cutter. But that last injury took him out of what he could do as a meat cutter." *Id.* at 19:22-20:1.

46. On cross-examination, Mr. Porter agreed that Claimant had not reported any left wrist restrictions to him; he agreed Claimant had told him he had no pre-existing conditions at the time of his 2016 report. Porter Depo. 23:6-24:12. Further, that he was able to perform all the essential functions of his job without restriction or modification. *Id.* at 25:1-5. Mr. Porter confirmed that Claimant reported no difficulty standing. *Id.* at 28:20-29:10. Mr. Porter confirmed his opinion that Claimant had 100% labor market loss considering his previous employment and only had access to 4% in the total job market after the injury; the remaining 4% jobs were in sales and customer service. *Id.* at 36:5-37:20. Claimant's age, disfigurement of his right hand, and that he was a hunt and peck typist would be detriments to employability in the residual 4% labor market. *Id.* at 37:25-38:17. Mr. Porter opined that Claimant was an odd lot worker and maintained

his opinion that ISIF remained liable for disability. *Id.* at 39:21-40:15. Mr. Porter was not aware Dr. Esplin had imposed stricter restrictions in 2017 since Mr. Porter's evaluation. *Id.* at 43:13-25. Mr. Porter agreed the updated restrictions limited Claimant even further. *Id.* at 44:1-13. Those restrictions put Claimant in "below-sedentary…and there's no jobs out there that fall in the below-sedentary." *Id.* at 44:14-21. Mr. Porter confirmed his opinion that wearing braces to work were subjective hinderances to employment. *Id.* at 46:20-47:3.

47. On December 9, 2016, Lee Barton issued a vocational report on behalf of Employer. Claimant reported his prior left wrist fusion, and Mr. Barton had no pre-industrial injury records. *Id.* at 2. Mr. Barton concluded, similar to Mr. Porter, that Claimant could not return to meat cutting. *Id.* at 8. However, Mr. Barton was more optimistic that Claimant could utilize his knowledge of sales, computer skills, and management skills to work in positions such as a salesperson, clerk, manager, or telemarketer. *Id.* Mr. Barton concluded that a work search would not be futile and that a credible job search would be fruitful. *Id.* at 10.

48. On April 28, 2023, Barb Nelson issued a vocational report on behalf of ISIF. She interviewed Claimant and reviewed records. JE 53:1. Claimant reported he would not drive while on narcotic medication due to the death of his son when he was hit by an intoxicated driver at four years old; Ms. Nelson recorded that this self-imposed limitation was reported by Claimant several other times in the records she reviewed. *Id.* at 24-25.

49. Ms. Nelson observed Claimant's age, 59, was an employment detractor and that Claimant had basic computer skills and could only keyboard with one hand. *Id.* at 26-27. Ms. Nelson observed that although Claimant had an excellent work ethic per his work history, due to the most recent injury, there were significant roadblocks in returning to work such as "ongoing problems with his hand prothesis, chronic pain with opioid dependence resulting in the inability to

drive and limited transferable skills for [the] work that he could now physically perform." *Id.* at 27. Ms. Nelson opined that Claimant's decision to not drive while on narcotic medication was "undoubtedly wise." However, it was a huge vocational obstacle as he lived in rural Blackfoot. *Id.*

50. Claimant did retain some transferable skills including communication, customer service, the ability to budget, keep records, conduct inventory, and time management and leadership skills. *Id.* at 28. Claimant lived in a thriving labor market, and the closest city with good employment opportunities was Pocatello, 30 minutes away. *Id.*

51. Ms. Nelson observed that Claimant had several pre-existing injuries, but that he always returned to meat cutting after these injuries, which was a heavy-duty position and required continuous bilateral handling. *Id.* Ms. Nelson noted that Claimant had worked extremely hard to make his prosthetic work, but ultimately was unable to utilize it due to its complex design requiring frequent repairs and his inability to tolerate wearing it for more than four hours; at the time of her interview, he had not had a prosthetic hand for several years. *Id.* at 28-29. Due to his 2015 industrial injury and without the prosthesis, Claimant required assistance with basic functions and was not able to type, grasp, write, or lift at a competitive level for most jobs. *Id.* at 29.

52. Ms. Nelson concluded that Claimant was totally and permanently disabled due to his 2015 injury, chronic pain, opioid medication, age, limited education, minimal computer skills, and that he was now eight years past when he had last worked; it would be futile for Claimant to look for work: "he either would never be selected for an opening, or he would not have been able to consistently perform the work in the rare chance that he had been selected." *Id.* at 29-30. It was Ms. Nelson's opinion that Claimant's pre-existing injuries did not combine with his last accident to produce total and permanent disability because per her review of the record, he had no permanent restrictions prior to the 2015 accident. In her view, the last accident alone was what

caused him to become totally and permanently disabled, i.e. the partial hand amputation, chronic pain, and failure of his prosthetic hand. *Id.* at 30-31.

53. Barb Nelson was deposed on September 18, 2023. Nelson Depo. Since authoring her report, Ms. Nelson had also reviewed the hearing transcript and Mr. Porter's deposition. Nelson Depo. 8:16-20. Ms. Nelson opined that Claimant's hearing testimony regarding his pre-existing injuries did not change her opinion because she assumed he already had subjective hinderances from his pre-existing accidents. *Id.* at 13:12-23. Specifically, Ms. Nelson believed Claimant's left wrist was a subjective hinderance. *Id.* at 17:8-10. However, Ms. Nelson reaffirmed her opinion that it was the last accident alone which rendered Claimant totally and permanently disabled; there were no jobs available to Claimant with a five-pound lifting restriction. *Id.* at 22:16-23:2.

54. On cross-examination, Ms. Nelson emphasized that in her opinion, if Claimant could have gone back to work after this most recent injury, he would have:

> He attempted to rehabilitate himself, but he was just old and didn't have any computer skills. And he really hadn't done anything else, to speak of, in his life. And it wasn't a problem with motivation or desire. It was just a combination of his physical limitations and his non medical factors that just did not work out. And it would be futile for him to even to continue to try.

Nelson Depo. 26:5-27:14.

55. **Credibility.** Claimant's hearing testimony is occasionally contradicted by medical reports, vocational reports, and his prior deposition testimony. Where Claimant's hearing testimony is contradicted by prior records and testimony, the prior records and testimony will be relied upon.

DISCUSSION AND FURTHER FINDINGS

56. 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).

57. **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). There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment together with the relevant nonmedical factors totals 100%. If a claimant has met this burden, then total and permanent disability has been established. The second method is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. *Boley v. State of Idaho, Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939P.2d 854, 857 (1997). 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).

58. Claimant argues that he is totally and permanently disabled via the odd-lot doctrine and ISIF concedes that Claimant is totally and permanently disabled via the odd-lot doctrine.

Claimant is totally and permanently disabled via the odd-lot doctrine.

59. **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.

60. 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.

61. **Pre-existing Impairment and 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). Claimant argues he has several pre-existing impairments including: his thoracic spine, his right shoulder, his left knee, his low back, his bilateral carpal tunnel syndrome, his volar hernias, his left wrist, and his right knee. All of these impairments existed and were manifest prior to the July 2015 injury.

62. **Subjective Hindrance.** 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. (emphasis supplied).

63. 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.*

64. **Thoracic Spine.** Claimant reported at an IME in 2009, he had been released from his previous 1999 injury with no restrictions; Claimant understood that "trial" of medium duty labor was a temporary restriction. There is no evidence Claimant was required to wear a back brace by a physician as a restriction based on this injury; the back brace Claimant did wear was requested

by him. At hearing, Claimant testified inconsistently that he only wore his back brace for a year after this injury and then that he wore it for the rest of his life. In 2015, Claimant reported to ICRD that he had no prior restrictions. In 2016, Claimant reported to Delyn Porter he had no prior restrictions. At deposition in 2022, Claimant explained he worked for RSM and Greater Western Foods delivering heavy product and cutting meat in a heavy-duty job with "no problems." In other words, Claimant performed a heavy-duty job without thoracic complaints for many years prior to the 2015 injury. Claimant's non-specific hearing testimony that he did things differently because of this injury is unpersuasive in light of other evidence of record. Claimant's thoracic spine was not a subjective hinderance prior to the 2015 injury.

65. **Right Shoulder**. Claimant cites no evidence that his right shoulder was a subjective hinderance prior to the industrial injury; Claimant suffered two injuries to his right shoulder prior to the industrial accident but received no restrictions or impairment. Similar to the thoracic spine, Claimant reported he had no prior restrictions in 2015, 2016, and 2022, there are no records of him complaining of right shoulder pain until after the injury, and Claimant continued to work a heavy-duty job. Claimant's right shoulder was not a subjective hinderance.

66. **Left Knee**. Claimant's left knee is a closer call. Claimant's left knee was injured in 2008 and was rated at 1% with no restrictions. Claimant wore shoe lifts due to a leg length discrepancy, which is not described anywhere in the records as being the result of his left knee injury or sequela from his surgeries. Claimant reported in 2015 that he had done well after his left knee injury with no complaints until his November 2014 twisting injury. Claimant received two left knee injections at that time but was released without restrictions by his treater and consistently testified that he was able to work without restrictions regarding his left knee. Regarding a left knee brace, Claimant inconsistently testified that the braces were safety equipment everyone had to wear

(2022 deposition), bought by his various employers at Horlacher's and RSM vs. a special knee brace that was prescribed for him. There is no evidence in the record that Claimant was prescribed a left knee brace. The records do note he was wearing a knee wrap/strap in 2014, but whether it was on his right or left side and its origin was unspecified. JE 10:104. Further, Claimant's consistent testimony that he was able to work without restrictions on his left knee, even at hearing, and an explicit release from his left knee treating physician in 2015 to work without restrictions is persuasive evidence that Claimant's left knee was not a subjective hinderance.

67. **Lumbar Spine.** Claimant first injured his low back in 2008 and then again in 2012; Claimant was rated 3% whole person impairment for his SI joint dysfunction for the 2008 injury. After both injuries, Claimant's treating physicians released him without restrictions. In December 2013, Claimant was restricted by his primary care physician to only lift 25 pounds due to his low back pain, only one month after he was released by his low back surgeon with no restrictions. However, Claimant did not follow this 25-pound lifting restriction per his uncontradicted testimony, and it appears nowhere else in the record; Claimant's surgeon's opinion is entitled to more weight regarding his lumbar spine than his primary care physician. When Claimant complained again of low back pain in 2018, he reported he had done well for three years after his 2013 surgery and did not have any low back pain until he started limping from a knee injury. Claimant reported he had no prior restrictions in 2015, 2016, and 2022 at deposition, and Claimant continued to work a heavy-duty job. Claimant's lumbar spine was not a subjective hinderance.

68. **Bilateral Carpal Tunnel.** Claimant underwent two carpal tunnel surgeries prior to the 2015 industrial injury and was rated at 0% impairment for this condition. At an IME, the Dr. Welter noted Claimant was recommended not to return to meat cutting at the time he was diagnosed with carpal tunnel. This evidence is not persuasive as to subjective hinderance. First,

per the record itself this recommendation occurred when Claimant was first diagnosed with carpal tunnel, and not after he had surgery on this condition. Second, Claimant did return to meat cutting for an additional six years after this recommendation was recorded. Third, similar to the other conditions of record, Claimant reported he had no restrictions multiple times and meat cutting is repeatedly described by the job site evaluation, by Claimant, by his treaters, and by the vocational experts as a job that required frequent bilateral handling. Claimant's bilateral carpal tunnel condition was not a subjective hinderance to employment.

69. **Volar Hernias.** Claimant suffered bilateral volar hernias as a result of his 2008 accident and was assigned 2% whole person impairment. Claimant received no restrictions related to this injury. Claimant's assertion that he was recommended not to return to meat cutting due to these injuries is derived from Dr. Welter's note: "Also of note, when he was first diagnosed with carpal tunnel, it was recommended he not return to meat cutting." JE 10:32. Claimant reported he had no prior restrictions in 2015, 2016, and 2022, and Claimant continued to work a heavy-duty job. Claimant's volar hernias were not a subjective hinderance to employment.

70. **Left Wrist**. In briefing, ISIF concedes that Claimant's left wrist was prior subjective hinderance. Claimant's left wrist was fused in 2013. Claimant was released from this injury without restrictions. However, Claimant reported in 2016 to Delyn Porter he struggled to twist his left wrist prior to the 2015 injury. Unlike his other pre-existing injuries, Claimant reported the left wrist fusion to both Mr. Porter and Mr. Barton. He also received repeated injections in his left thumb and wrist throughout 2014, with the last occurring on October 6, 2014, nine months prior to the last industrial injury. His physician recorded his left forearm strength was excellent, but Claimant continued to have pain with lifting and continued to wear his left wrist brace despite his doctor instructing him to discontinue wearing the brace. Claimant's job involved frequent

lifting, bending, and stooping at RSM and frequent bilateral handling and heavy lifting at Greater Western Foods. Claimant was able to perform both these jobs with his prescribed wrist brace. Despite the lack of physician issued restrictions, Claimant's left wrist was a subjective hinderance prior to the industrial injury.

71. **Right Knee**. Claimant injured his right knee in November 2014. He received an injection in the right knee and his right knee was "doing okay" in February 2015. However, by April 2015, Claimant was prescribed hydrocodone for his right knee pain and Dr. Broadhurst recommended an MRI and three right knee injections for his right knee pain. There is no record of a right knee MRI prior to the industrial injury, nor the prescribed injections. Per Claimant's other testimony of record, Claimant would not have driven while on hydrocodone, and no physician recommended Claimant get his knee replaced until after he was granted social security disability. See HT 82:16-84:18. Claimant was still able to perform his job duties for both RSM and Greater Western Foods and consistently testified he worked without restrictions for his knees. Similar to his left knee, Claimant testified inconsistently whether he wore knee braces as safety equipment purchased by his employers (2022 deposition testimony) or prescribed knee braces; there is no evidence he was prescribed a right knee brace prior to the 2015 industrial injury although the records do note he was wearing a knee wrap/strap in 2014, which side or its origin is unspecified. JE 10:104. Although a close call, Claimant's right knee injury was not a subjective hinderance to employment until after the 2015 industrial injury. Claimant was consistently wearing a right knee brace post-injury per his exam with Dr. Greenwald and eventually underwent a total right knee replacement.

72. **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.

73. Both the parties' arguments center on whether this fourth and final element of ISIF liability has been met. Claimant argues that ISIF's expert, Ms. Nelson, has ignored the first three elements of ISIF liability in reaching her conclusion that the last accident alone rendered Claimant totally and permanently disabled; Claimant essentially argues that the "but for" test, i.e., that for the "combined with" element to be met the pre-existing impairments must contribute to the overall disability is inapposite of the statute and that because the last injury cannot be both 100% disabling where the expert admits there are pre-existing impairments, Claimant's last injury must combine to cause total and permanent disability.

74. Defendant/ISIF responds that there is no evidence that Claimant's pre-existing impairments combine with the last accident to render Claimant totally and permanently disabled. Claimant here is totally and permanently disabled via the odd lot method; no vocational expert opined there was a job Claimant could return to "but for" his pre-existing impairments.

75. Claimant's arguments are unpersuasive. Per the statute and *Aguilar*, the pre-existing impairments must combine with the last injury to cause total and permanent disability. Claimant's arguments misapply the fourth and final requirement of Idaho Code § 72-332. Even assuming Claimant is correct, and the Claimant was 100% mathematically disabled from the last injury alone and had pre-existing impairments, the plain language of the statute requires the "combined effects" of both the pre-existing impairments and last accident produce total and permanent disability. Idaho Code § 72-332(1). If the effects of the last accident do not "combine" with the pre-existing impairments, no ISIF liability can be found. In other words, Claimant being

mathematically 100% disabled from the last accident does not waive the requirement that the pre-existing impairments must combine with that accident to produce total and permanent disability.

76. If Claimant's logic were followed to its natural conclusion, *any* manifest, pre-existing impairment, that was a subjective hinderance would render ISIF liable regardless of how disabling the last accident was on the claimant's employment. If the last accident rendered a claimant a paraplegic with no brain function, but they had pre-existing manifest impairments which were subjective hinderances, ISIF would be liable because *any* pre-existing impairment for which a mathematical number can be assigned cannot be added to 100% to equal more than 100% per this logic. See Clt's Opening Brief, p. 19. Any pre-existing disability whatsoever, regardless of its actual contribution (i.e. combination with) to the total and permanent would result in ISIF liability.

77. Claimant's cite to *Christensen v. S.L Start & Associates, Inc* 147 Idaho 289, 207 P.3d 1020 (2009) that a claimant's disability "could not be greater than total" is unavailing. In *Christensen*, the claimant asked the Supreme Court to modify the plain language of the statute to allow ISIF liability where a claimant was totally and permanently disabled prior to being hired by the employer and their last industrial injury. The Court rejected the proposition that a claimant's disability "could not be greater than total" in the context of a claimant being totally and permanently disabled <u>prior</u> to the last industrial accident and declined to modify the statute as requested and directed the claimant to the legislature for an appropriate policy and legislative change. Claimant's situation here is the opposite of *Christensen*. Claimant is totally and permanently disabled from the last accident alone.

78. Claimant's focus on the "but for" test not being in statute ignores that the "but for" test is another way of stating the combined effects test. It does not replace statutory language but

merely provides a simpler way to view the evidence. *Aguilar*, cited extensively by Claimant, endorses the "but for" test: "the Commission correctly identified the "but for" test as being applicable…" *Aguilar*, 164 Idaho 893, 901, 436 P.3d 1242, 1250 (2019). *Aguilar* did not overrule the "but for" test.

79. Turning to the evidence, Defendant is correct that there is simply no evidence providing that the combined effects of Claimant's pre-existing impairment and the accident produced his total and permanent disability. Claimant's left wrist, while a subjective hinderance, does not contribute to Claimant's overall total disability. The left wrist injury does not combine with his last injury to produce total and permanent disability; there is no evidence Claimant's inability to twist his left wrist or left wrist brace contributes to any loss of labor market when compared to the loss of labor market from his last industrial injury. There are no jobs Claimant could perform "but for" his pre-existing left wrist impairment.

80. Claimant argues that Claimant could work as a manager "but for" his pre-existing restriction against standing; the restrictions against standing combined with the restrictions from the industrial injury render Claimant totally and permanently disabled. This is a correct application of the law, but an incorrect summation of the facts. Claimant did not have a standing restriction prior to the industrial accident; there is no evidence whatsoever that Claimant struggled to stand due to any pre-existing impairment. Claimant's cite to his deposition testimony to support this "restriction" is: "I can't stand on the line and cook and still be able to order and, you know, run the place because I can't do what I used to do on the physical aspect." (emphasis supplied). JE 54:23. It is clear from the context that Claimant is referring to standing and cooking; in other words, Claimant can't cook with just his left hand. Even if Claimant was referring to standing in

isolation, there is simply no evidence that this restriction is pre-existing and is much more likely the result of his post-accident knee replacements or post-accident lumbar surgery.

81. Claimant's restrictions from the 2015 injury are so onerous that there are no jobs available to him regardless of his left wrist impairment. There is no persuasive evidence Claimant had a pre-existing standing restriction. Claimant's last injury was a traumatic partial amputation of his dominant right hand. Claimant can no longer lift more than five pounds with his dominant right hand. Claimant, after more than seven years of effort, has been unable to increase the function of his right hand with multiple prosthetics, surgeries, pain medications, and a spinal cord stimulator. Claimant is on narcotic pain medications for both his hands and his low back and will not drive while those medications are in effect. Again, despite efforts to wean Claimant off opiates for his right-hand pain, including a spinal cord stimulator, Claimant's most recent records with Dr. Poston still demonstrate opiates prescribed for his right-hand pain.

82. Further, Claimant's last accident, just considering Dr. Esplin's 2017 restrictions and not the effects of his pain medication, puts Claimant at "below-sedentary" per Mr. Porter with "no jobs" available to him. There is no contribution from his pre-existing manifest impairments. They do not combine with his accident produced restrictions to produce total and permanent disability as required by statute and case law. Claimant's last accident alone rendered him totally and permanently disabled.

CONCLUSIONS OF LAW

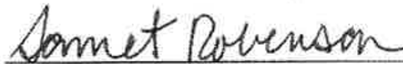
1. Claimant is totally and permanently disabled via the odd-lot method;
2. ISIF is not liable for any disability;
3. In light of the previous finding, application of the *Carey* formula is moot.

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 January, 2024.

INDUSTRIAL COMMISSION



Sonnet Robinson, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of February, 2024, 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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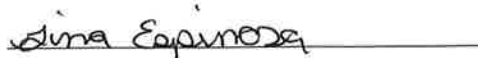


BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DOUGLAS WESTMAN, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2015-020206** **ORDER** **FILED** **FEBRUARY 16, 2024** **IDAHO 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 via the odd-lot method.

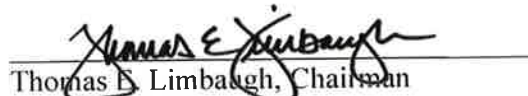
2. ISIF is not liable for any disability.

3. In light of the previous finding, application of the *Carey* formula is moot.

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

DATED this _16th_____ day of __February_______________, 2024.

INDUSTRIAL COMMISSION



Thomas E. Limbaugh, Chairman

Claire Sharp

Claire Sharp, Commissioner

Aaron White, Commissioner

ATTEST:
Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __16th____ day of __February____________ 2024, 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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