BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CRAIG B. WHARTON, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)))))))))))	**IC 00-504506** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed June 30, 2005

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Robert D. Barclay, who conducted a hearing in Pocatello on January 6, 2005. Claimant, Craig B. Wharton, was present in person and represented by Albert Matsuura of Pocatello. Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF), was represented by Paul B. Rippel of Idaho Falls. The parties presented oral and documentary evidence. This matter was then continued for the taking of two post-hearing depositions, the submission of briefs, and subsequently came under advisement on May 12, 2005.

BACKGROUND

Claimant settled her claim for compensation with Defendant Employer, Northwest Bec-Corp, dba Portneuf Valley Hospital & Rehabilitation Center, and Defendant Surety, Liberty Northwest

Insurance Corporation, in a Lump Sum Settlement Agreement (LSSA) approved by the Commission on November 18, 2004. Employer and Surety were represented by Monte R. Whittier of Boise in that matter.

ISSUES

The noticed issues to be resolved as a result of the hearing are:

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

2. Apportionment under the *Carey* formula.

At hearing, the parties stipulated Claimant was totally and permanently disabled under the "odd-lot" doctrine thus resolving the noticed issue of whether he was entitled to permanent total disability (PTD) in excess of permanent impairment. (Transcript, pp. 2-3).

The parties further stipulated Claimant was medically stable on March 24, 2004, the date he was given a permanent partial impairment (PPI) rating by Dr. Krafft. (Transcript, pp. 5-6).

ARGUMENTS OF THE PARTIES

Claimant argues a 1993 pelvic crush injury and his diagnosed reading disorder and Attention-Deficit/Hyperactivity Disorder constitute pre-existing physical impairments which were not only manifest, but posed a hindrance to his employment, and when combined with his 2000 cervical spine injury, render him totally and permanently disabled. Suggesting an apportionment of 10% for his pelvic injury, 15% for his learning disorders, and 27% for his cervical injury, Claimant further argues ISIF is liable for a proportionate share of his permanent disability under a *Carey* apportionment. He asks the Commission to take notice of the AMA *Guides* and rate him for his learning disorders.

ISIF argues Claimant has not submitted any competent medical evidence to support a finding

that his learning disabilities were a pre-existing physical impairment, and that his 1993 pelvic injury did not combine with his 2000 cervical injury to cause his total and permanent disability since any 1993 limitations were encompassed within the limitations from the 2000 injury. ISIF then argues Claimant was rendered totally and permanently disabled solely as a consequence of his 2000 cervical injury, the subsequent fusions and their accompanying work restrictions.

Claimant counters his learning disorders constitute pre-existing impairments which give rise to ISIF liability because they have a physical component, and that "but for" his 1993 pelvic injury and his learning disorders, his 2000 cervical injury would not have rendered him totally and permanently disabled; that all three impairments combined and contributed to his total and permanent disability. Claimant further argues ISIF is liable for that portion of his total disability attributable to his pre-existing conditions.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the January 6, 2005, hearing;

2. Claimant's Exhibits A through L and N through P admitted at the hearing;

3. ISIF's Exhibits 2 through 6 admitted at the hearing;

4. The deposition of Terry L. Montague, with Exhibits A and B (Claimant's original Exhibit M), taken by Claimant on February 3, 2005;

5. The deposition of Nancy J. Collins, Ph.D., with Exhibit A (ISIF's original Exhibit 1), taken by ISIF on February 3, 2005; and

6. The AMA *Guides to the Evaluation of Permanent Impairment*, Fifth Edition, of which the Referee takes notice.

ISIF's objection on p. 18 of Mr. Montague's deposition is sustained; Claimant's objection on p. 12 of Dr. Collins' deposition is also sustained.

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

FINDINGS OF FACT

1. At the time of the hearing, Claimant was 46 years old and living in Malad with his spouse and two minor children. He was raised in Utah and California, frequently moving as his father worked on highway construction projects. After completing the tenth grade, Claimant went to work for a carpet layer in southern California and learned the trade. He later went into business for himself and worked as a subcontractor for various carpet outlets. At some point in time, Claimant relocated to southeastern Idaho. He is accomplished in all aspects of the carpet-laying trade.

2. Claimant was treated for bursitis in his right knee in early 1993. His infrapatellar bursa was excised by Noah W. Klein, M.D., on May 12, 1993, at Bannock Regional Medical Center in Pocatello. There is nothing in the record to indicate the surgery was unsuccessful, or that Claimant received a PPI rating for the injury which was treated as industrial by his then employer's workers' compensation surety.

3. Claimant went to work laying carpet and helping set-up prefabricated modular buildings for Kim Andrus after recovering from his knee surgery. On August 12, 1993, while removing the plastic facing from two units being positioned together, he was caught between the units when one fell off a hydraulic jack, and the units came together. Claimant's pelvis was fractured in the accident.

4. The industrial accident occurred in Soda Springs. Claimant was taken by ambulance to Pocatello Regional Medical Center (PRMC) where he was diagnosed with a crush injury, and after a CT scan, a displaced fracture of the left inferior pubic ramus. He remained hospitalized for several days under observation and was subsequently discharged to a course of physical therapy.

5. Claimant saw J. Michael Bateman, M.D., on July 28, 1994. Dr. Bateman, a Pocatello urologist, noted Claimant was continuing to complain of pain in the area of the obturator nerve on the right, but that the nerve had been carefully studied and that there was nothing anyone could do; it would just take time to improve. He then opined Claimant was stable and assigned a PPI rating of 10% of the lower extremity or 4% of the whole person for the obturator nerve.

6. Dr. Bateman had previously opined Claimant could not return to the level of productivity he had previously demonstrated as a carpet layer due to his inability to perform heavy leg work. The vocational rehabilitation consultants retained by the parties construed that comment to mean Claimant was precluded from heavy work.

7. Claimant returned to work with Mr. Andrus, but was terminated his first day back because he was incapable of performing the work.

8. Claimant settled his August 1993 claim in a LSSA approved by the Commission on May 24, 1995. The Agreement noted Claimant had previously been paid the 4% whole person PPI rating assigned by Dr. Bateman, and that the Agreement paid an additional 5% of the whole person for disputed PPI and additional PPD benefits. No breakdown was provided in the Agreement between PPI and PPD and what was disputed. State Insurance Fund was the surety in that matter.

9. Claimant maintains Dr. Bateman's PPI rating should be 10% of the whole person because the rating does not include his trapped obturator nerve. He further maintains the nerve

entrapment results in pain in his upper right groin area going down into his right leg, and that if the nerve is pinched, he cannot walk at all. The medical records submitted to the Commission do not support his assertion the obturator nerve was not considered by Dr. Bateman; from the limited records submitted to the Commission, it appears to be the sole basis for the PPI rating.

10. As part of the LSSA, Claimant entered into a six month retraining program with Living Art Tattoo Studio in Chubbuck; the Idaho Department of Vocational Rehabilitation (IDVR) assisted in setting-up the program. The Agreement provided that temporary total disability (TTD) benefits would be paid for a period of six months. Claimant maintains he left the Studio after nine months, partly because he was not learning anything from the tattoo artist who owned the business, and partly because of the drug culture surrounding the business. He characterized the tattoo artist as a con man who ripped both him and the state off. The extent of Claimant's ability to tattoo is unknown, but he was certified to perform body piercings.

11. Claimant subsequently found work in a deli-style sandwich shop; his spouse knew the owner. The owner eventually sold the business and Claimant sought work elsewhere; the new owner wanted to turn the shop into a family operation.

12. Claimant was hired by Employer, a Pocatello assisted living facility, to work in its maintenance department prior to his leaving the sandwich shop. The maintenance job, however, was no longer available when he reported for work two weeks later, and he was offered a job in housekeeping; Claimant accepted the position. Employer subsequently trained him to be a CNA because he related well to the patients and had trouble physically performing the functions of a housekeeper. He eventually became a CNA supervisor. The supervisory position required little physical activity. Due to his limited ability to read and write, Claimant had others write his reports.

13. On October 26, 2000, Claimant injured his cervical spine in a lifting accident at Employer's facility. He and a co-worker were attempting to reposition a patient. After seeing several care providers and undergoing various diagnostic procedures, Surety sent Claimant to W. Scott Huneycutt, M.D. In a December 6, 2000, letter to Surety, Dr. Huneycutt opined Claimant's disk herniations with concomitant neck pain and cervical radiculopathy were caused by his October 2000 industrial accident, that there was no evidence of a pre-existing cervical condition, that he was unable to return to work in any capacity, but that surgical intervention would give him a fair chance of returning to his pre-injury capacity.

14. On December 15, 2000, Dr. Huneycutt, a Pocatello neurosurgeon, performed an anterior cervical diskectomy and fusion from C4 to C7 on Claimant at PRMC. He subsequently released Claimant to return to light duty work on March 1, 2001. Claimant returned to work with Employer.

15. At Surety's request, Claimant also saw David C. Simon, M.D., for physical therapy after his surgery. On April 9, 2001, Dr. Simon, an Idaho Falls physiatrist, opined Claimant was medically stable, assigned him a PPI rating of 22% of the whole person for his cervical condition, and released him to work without restrictions.

16. At IDVR's request, Claimant saw Robert E. Charlton, Ph.D., on June 13, 2001, for a psychological evaluation. IDVR was investigating retraining opportunities for Claimant. After testing, Dr. Charlton, a Pocatello psychologist, diagnosed Attention-Deficit/Hyperactivity Disorder, predominantly Hyperactive-Impulsive Type. He also diagnosed a Reading Disorder, indicating Claimant's reading level was below a functional level, or what was required to read a magazine or newspaper.

17. In August 2001 Claimant was pushed in the head by one of Employer's patients and some of his symptoms returned. Dr. Huneycutt restricted him to light-duty work.

18. Employer discharged Claimant in August 2002 after a confrontation with a new supervisor.

19. After he was terminated, Claimant worked for several months as an assistant to a Pocatello carpet layer fixing seams. He quit because of continuing hip and neck pain. Claimant has not worked since.

20. Plain x-rays of Claimant's cervical spine taken on April 23, 2003, were read by Dr. Huneycutt to show failure of the orthopedic implant device and the development of pseudoarthrosis. On July 10, 2003, he performed an anterior and posterior cervical decompression and instrumented fusion from C3 to C7. Dr. Huneycutt attributed the need for the re-do to the previous surgery which in turn was related to the October 2000 industrial accident.

21. At Surety's request, Claimant saw Kevin R. Krafft, M.D., for an IME on October 3, 2003. Dr. Krafft, a Boise physiatrist, opined Claimant had a fair prognosis, that he was medically stable, that he could perform light to medium work, and that he had a PPI rating of 29% of the whole person for his cervical condition. He later revised the PPI rating to 26% in response to a Surety inquiry.

22. In a chart note dated October 15, 2003, Dr. Huneycutt opined Claimant had a fair outcome following the second surgery, that he should be considered totally disabled, and that it was unlikely he could return to any type of meaningful manual labor. He recommended physical therapy with Eric C. Roberts, MD.

23. Claimant saw Dr. Roberts, a Pocatello physiatrist, on December 10, 2003. Dr.

Roberts opined Claimant could never return to work as a CNA and commenced a course of physical and injection therapies.

24. At Surety's request, Claimant returned to Dr. Krafft for a second IME on March 24, 2004. Dr. Krafft opined a functional capacities examination (FCE) would be appropriate to determine work restrictions, that Claimant was medically stable, and that he had a PPI rating of 30% of the whole person for his cervical condition. He deferred any permanent work restrictions until after a FCE was completed.

25. The Referee notes Dr. Krafft combined his 30% cervical PPI rating with a "pre-existing" PPI rating of 10% for Claimant's pelvis injury to get 37%, and then subtracted the 10% preexisting PPI to get a final PPI rating of 27%, all related to the October 2000 industrial injury. Under the AMA *Guides*, the 30% PPI rating for Claimant's cervical condition is appropriate; the additional arithmetic is not. The Referee finds, that as a consequence of his October 2000 industrial accident, Claimant has a PPI rating of 30% of the whole person.

26. On April 8, 2004, Dr. Roberts opined Claimant was suffering from worsening depression secondary to chronic pain, and that the pain was due to his work-related cervical condition. He prescribed an anti-depressant.

27. At Surety's request, Claimant saw Mark D. Corgiat, Ph.D., for a psychological assessment in April 2004. Dr. Corgiat, a Pocatello neuropsychologist, opined Claimant had a major depressive disorder which he attributed to his October 2000 industrial injury and subsequent functional disabilities. He further opined Claimant was not stable and recommended psychotherapy. The therapy sessions with Dr. Corgiat's office continued through at least September 2004.

28. A FCE was conducted on April 13-14, 2004. Based on Claimant's demonstrated

physical capabilities during the FCE, and in response to a Surety inquiry, Dr. Krafft assigned Claimant permanent work restrictions on May 21, 2004, which equated to sedentary to light work. He further opined Claimant did not have an impairment based on his psychological assessment.

29. On September 27, 2004, Dr. Roberts indicated he had changed the anti-depressant medication Claimant was taking at Dr. Corgiat's request, and that Claimant would require monthly visits for pain management. Claimant continued to see Dr. Roberts through at least November 22, 2004.

30. Surety had contacted the Industrial Commission's Rehabilitation Division (ICRD) Pocatello office in November 2000 to assist Claimant in returning to work. Rehabilitation Consultant Sarah J. Brown worked the case on and off, including assisting Claimant return to work with Employer after his October 2000 industrial injury, until it was closed on November 19, 2004; as a consequence of the LSSA Claimant was no longer eligible for ICRD services. In closing the case, Consultant Brown indicated she and Claimant had been unable to find work compatible with his work restrictions in Malad. She further noted a Labor Market Survey for the Malad area had been compiled in July 2004, taking into consideration Claimant's injury, education, work history, and current medical condition. The Survey was completed with the assistance of IDVR and listed 14 then current job openings, including three customer service representative positions.

31. At the time of the hearing, Claimant was seeing a Dr. Johnson in Malad for medicine management. He takes medications for pain, sleep, and depression.

32. At his post-hearing deposition, Terry L. Montague, a Nampa vocational rehabilitation counselor retained by Claimant, opined Claimant's learning disabilities would limit his ability to undertake formal training including obtaining a GED. He further opined, that as physical demands

for work decreased, the need for greater education and/or cognitive skills increased, and that Claimant lacked both. Mr. Montague also opined that if Claimant had only suffered the cervical injury, he could have found work in the service industry; that the fractured pelvis injury and its residuals precluded Claimant from continuing to work in the only skilled occupation he had ever held; and that as a consequence of his two industrial injuries and learning disabilities, Claimant was an unemployable worker. He opined Claimant was totally and permanently disabled under the odd-lot doctrine.

33. At her post-hearing deposition, Nancy J. Collins, Ph.D., a Boise vocational rehabilitation counselor retained by ISIF, opined Claimant was totally and permanently disabled solely due to the functional limitations from his cervical injury along with his subjective complaints, and that his pelvic injury did not contribute to his current disability. She further opined Claimant's learning disabilities did not appear to be problematic for him prior to his October 2000 industrial injury.

DISCUSSION

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, 793 P.2d 187 (1990). The humane purposes which it serves leaves no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

1. **ISIF Liability**. Idaho Code § 72-332 (1) provides in pertinent part that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of his or her 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 or her income benefits out of the ISIF account.

Idaho Code § 72-332 (2) further provides that "permanent physical impairment" is as defined in Idaho Code § 72-422, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become employed. This shall be interpreted subjectively as to the particular employee involved, however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

In *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court set forth four requirements a claimant must meet in order to establish ISIF liability under Idaho Code § 72-332:

(1) Whether there was indeed a pre-existing impairment;

(2) Whether that impairment was manifest;

(3) Whether the alleged impairment was a subjective hindrance; and

(4) Whether the alleged impairment in any way combines in causing total disability.

Dumaw, 118 Idaho at 155, 795 P.2d at 317.

Claimant has clearly met the first three elements of the *Dumaw* test: the pelvic crush injury constitutes a pre-existing permanent physical impairment, it was manifest and ratable, and it posed a subjective hindrance to re-employment since he was discharged immediately after returning to work

for Mr. Andrus; he could not perform the functions of his job.

The gravamen of ISIF's argument is that Claimant was rendered totally and permanently disabled solely as a consequence of his 2000 cervical injury, the subsequent fusions and their accompanying work restrictions. In other words, he cannot meet the "combines" or fourth element. ISIF relies on the vocational opinion of Dr. Collins.

To satisfy the "combines" or fourth element, the test is whether, but for the industrial injury, the worker would have been totally and permanently disabled immediately following the occurrence of that injury. *Bybee v. State, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

Both Ms. Brown and Mr. Montague, in their vocational opinions, indicated jobs were available to Claimant within his work restrictions after he was found to be medically stable by Dr. Krafft. Dr. Krafft then released him to work in the sedentary and light categories. Claimant's work restrictions were based on a FCE. Moreover, Claimant stated he left his job assisting a carpet layer and taping seams because of neck and hip pain. He has not worked since. Therefore, the Referee finds Claimant was not rendered totally and permanently disabled solely as a consequence of his October 2000 industrial injury.

The parties have stipulated Claimant is totally and permanently disabled pursuant to the odd-lot doctrine as of March 24, 2004, the date he was found medically stable by Dr. Krafft. The Referee further finds Claimant's pre-existing obturator nerve condition combined with his cervical condition to render him totally and permanently disabled pursuant to the odd-lot doctrine. The nerve condition slowed him enough that the cervical condition effectively took him out of the work force. Thus, the Referee concludes ISIF is liable to Claimant under Idaho Code § 72-332 for that portion of

his total disability attributable to his pre-existing conditions.

2. **Apportionment under *Carey*.** The Idaho Supreme Court has adopted a formula dividing liability between ISIF and the employer/surety responsible for the industrial accident in question. The formula provides for the apportionment of non-medical factors by determining the proportion of the non-medical portion of disability between ISIF and the employer/surety by the proportion which the pre-existing physical impairment bears to the additional impairment resulting from the industrial accident. *Carey v. Clearwater County Road Department*, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984). Moreover, conditions arising after the injury, but prior to a disability determination, which are not work-related, are not the obligation of ISIF. *Horton v. Garrett Freightlines, Inc.*, 115 Idaho 912, 915, 772 P.2d 119, 122 (1989).

Before applying the formula, however, it must be determined which portion of Claimant's impairment pre-existed the October 2000 industrial accident, and which portion is related to his 2000 industrial injury.

Claimant asks the Referee to assign him an impairment for his learning disabilities. In *Seltzer v. State of Idaho, Industrial Special Indemnity Fund*, 124 Idaho 144, 146, 857 P.2d 623, 625 (1993), the Idaho Supreme Court, citing *Hartley v. Miller Stephen*, 107 Idaho 688, 692 P.2d 332 (1984), held that a pre-existing psychological disorder is not a pre-existing physical impairment within the meaning of Idaho Code § 72-332. In general, these disorders are only compensated if they are proximately caused by an industrial accident and if they result in a loss of earning capacity. Claimant has not made this showing; there is no PPI rating for his learning disabilities.

Claimant has a pre-existing PPI rating of 4% of the whole person for his August 1993 industrial injury. He has a PPI of 30% of the whole person for his 2000 industrial injury. Adding

the two gives a total PPI rating of 34%, which constitutes the medical portion of Claimant's disability. The balance, or the non-medical portion of Claimant's total disability, is 66%. Under the formula adopted in *Carey v. Clearwater County Road Department*, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984), ISIF is responsible for payment of full statutory benefits commencing 441 weeks and two days after the date Claimant was found to be medically stable, or March 24, 2004.

CONCLUSIONS OF LAW

1. ISIF is liable to Claimant under Idaho Code § 72-332.

2. ISIF is responsible for payment of full statutory benefits commencing 441 weeks and two days after March 24, 2004, the date Claimant was medically stable.

RECOMMENDATION

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

DATED This 16th day of June, 2005.

INDUSTRIAL COMMISSION

/s/_____
Robert D. Barclay
Chief Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __30th_ day of __June_____, 2005, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

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