BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CALVIN MARK WAYMENT, Claimant, v. EVANS PLUMBING, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORP., Surety, Defendants.	**IC 2014-007090** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** **Filed February 1, 2019**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Twin Falls on June 5, 2018. Claimant was present along with his attorney, Keith Hutchinson of Twin Falls. David Farney represented Employer/Surety (Defendants) up to and through the hearing and Judith Atkinson of Boise prepared and submitted Defendants' post-hearing brief. Oral and documentary evidence was presented, post-hearing briefs were submitted, and this matter is now ready for decision.

ISSUE

The sole issue to be decided is the extent of Claimant's permanent partial disability (PPD) including whether Claimant is an odd-lot worker.

CONTENTIONS OF THE PARTIES

Claimant contends that he is totally and permanently disabled pursuant to the odd-lot doctrine. Up until and including the time of the hearing, both Claimant's and Defendants' vocational experts agreed that Claimant was an odd-lot worker. However, Defendants' expert changed her mind when presented with Claimant's hearing testimony detailing his duties on a job given Claimant out of sympathy and that fact has not changed as a result of Claimant's hearing testimony.

Defendants assert that Claimant is learning new office skills while employed by Mitch's Repair that could make him employable in the sedentary labor market to which he has been relegated due to his restrictions. While Claimant may have originally been offered his present employment out of friendship, Claimant has, and is, providing a valuable service to Mitch's and there are sedentary jobs in Claimant's labor market that he could secure and perform.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Claimant's current employer, Mitch McDowell, presented at the hearing.

2. Joint Exhibits (JE) A-T, admitted at the hearing.

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

FINDINGS OF FACT

Hearing Testimony:

Claimant

1. Claimant was 54 years of age and residing in Jerome at the time of the hearing. He graduated from Twin Falls High School in 1983.

2. Prior to Claimant's January 15, 2014 industrial injury, he was a journey level HVAC technician with an EPA refrigeration license, a journey level specialty electrician, and was a four-year apprentice plumber. Claimant has been involved in the HVAC-related industry since 1985.

3. At the time of his injury, Claimant was earning $32.00 an hour with double time for anything over 40 hours (a slow week). He had a benefit package that included medical, vacation, sick leave and retirement.

4. Claimant worked primarily in the Wood River Valley for Employer. He serviced accounts, installed hydronic heating, performed plumbing maintenance, and all things related to HVAC, plumbing, and electrical. About 75% of his work was spent on his knees in crawl spaces. As many HVAC units were in the ceiling, Claimant also used ladders extensively.

Pre-existing injuries

5. Claimant had a partial right knee replacement in 2004 with a full recovery and a return to work with restrictions. His right knee was asymptomatic prior to his last industrial accident. Claimant experienced bursitis in his left knee in 2006 that was also asymptomatic at the time of his 2014 accident. He also had some minor injuries to his left shoulder and knee resulting from a motor vehicle accident in 2007 that resolved. None of

these conditions prevented Claimant from performing heavy level work pre-accident and no physician has apportioned Claimant's current condition to any pre-existing conditions.

The accident

6. Claimant described his January 15, 2014 accident at Si Ann Dairy this way:

> Q. (By Mr. Hutchinson): This is all on January 15th?
>
> A. Uh-huh.
>
> Q. Cold?
>
> A. Yeah.
>
> Q. Cold day?
>
> A. Yeah. And, then, as I stepped over the peak of the roof I - - my footing was gone and I slid about 25 feet, got my left foot caught in a rain gutter, snapped the tib and fib. Started to go over head first. I grabbed the rain gutter with my right hand, did a quick spin, landed flat footed, stiff legged, and shoved the femur throught [sic] the plateau of my knee, compounded everything on the right - - left leg and, then. Laid there for about 40 minutes.
>
> Q. Okay. About how far was the fall?
>
> A. It was a 20 foot - - about a 25 foot slide and, then, a 16 to 18 foot drop.

HT., p. 49.

Injuries

7. Claimant underwent several surgeries on his left ankle; he also developed Complex Regional Pain Syndrome (CRPS) in his left lower extremity that feels like, "[w]alking across a hot pavement without shoes on." HT., p. 50. Claimant cannot wear a sock, tight shoe, or work boot on his left foot as, "[i]t will put me to tears." *Id.* The CRPS also affects Claimant's ability to sleep and is sensitive to the cold and changes in the weather. Claimant has had two spinal cord stimulators implanted with limited success.

8. Claimant also injured his right knee resulting in a right TKA that "… doesn't hurt too much for the most part. It gives out a little here and there." *Id.*, p. 52. Claimant's right knee also prevents him from exercising as much as he would like.

9. Claimant testified, and the Referee finds, that Claimant cannot return to any of his pre-injury work as the result of his industrial accident. He attempted to return to work with Employer post-accident training others and doing some field work, but his need to use narcotic pain medication resulted in his dismissal.

Current employment

Mitch McDowell

10. Claimant is currently employed by Mitchell (Mitch) McDowell at Mitch's Repair, Inc., in Jerome. Mitch has owned this agriculture feed and truck repair business for 37 years. Mitch has known Claimant socially for about 12 years, both before and after Claimant's 2014 industrial accident. Mitch "[k]ind of made him a job" running short errands in November of 2017 ("we weren't going to leave him homeless"). HT., p. 14. Subsequently, Mitch's office manager retired, so Claimant became an office manager "helper." Mitch's ". . . accountant girlfriend is providing some training to Claimant with data entry, answering phones, taking messages and making bank deposits." HT., p. 15. Mitch testified that Claimant's most important role currently is that of receptionist. [1]

11. Mitch is aware that Claimant has difficulty wearing socks and shoes, so Mitch keeps him out of areas where welding is taking place, other than to sweep. Mitch is also aware that Claimant takes opiate prescription medication and has had to leave work

[1] Mitch lets Claimant drive his (Mitch's) own personal vehicle to runs errands, etc. due to Claimant's opiod use, as allowing him to drive company-owned rigs could have insurance implications.

early due to pain issues but Mitch allows Claimant to take whatever time off he needs. Mitch would not be so accommodating to his other employees as equipment repair requires scheduling. Mitch hopes to keep Claimant as an employee "[i]f he can get more out of him and pay him more." HT., p. 17.

12. Claimant generally works from 7:30 am until 2:30 or 3:00 pm with an hour break for lunch. He earns $15.00 an hour without benefits.

13. Mitch described Claimant as a good employee who brings value to his business. However, Mitch would like to see Claimant do more in the parts department rather than train to be a full-time office worker.

14. Claimant has used the shop's lathe and drill press on occasion and has done some welding.

15. Claimant works about 30 hours a week; Mitch does not consider Claimant to be a full-time employee because he has to leave in the early afternoons for "…medical appointments and things." HT., p. 33.

Vocational Evidence:

Nancy Collins, Ph.D.

16. Claimant retained Dr. Collins to assess his employability following his January 15, 2014 accident. Dr. Collins' credentials are well-known to the Commission and she is qualified to give expert vocational opinions.

17. Dr. Collins authored a report dated April 2, 2018; she was not deposed. In preparation of her report, Dr. Collins interviewed Claimant, reviewed pertinent medical and vocational records, as well as Claimant's deposition testimony. Dr. Collins noted that Claimant had pre-existing medical conditions including a hernia repair, bilateral knee

arthroscopies, and a right patellofemoral arthroplasty. None of the aforementioned conditions resulted in permanent physical restrictions.

18. Dr. Collins opined that Claimant's subjective complaints have been consistent over time and with his medical records. She noted that Claimant worked for about three years with Employer after his 2014 accident and with sympathetic employers thereafter.

19. Dr. Collins identified the following permanent restrictions:

> 7- 21-15 Dr. Johnson: Claimant should work in a seated position.
>
> 6-13-17 Dr. Johnson: Claimant should perform sedentary work with 80% sitting; no lifting, pushing, pulling over 20-30 pounds, no climbing ladders or stairs, and no squatting or kneeling.

20. Dr. Collins noted that Claimant does not have any psychological condition that would limit the kind or amount of work he can perform. There is no indication that Claimant is malingering, or engaging in secondary gain or functional overlay. Further, Claimant has no pre-existing permanent physical restrictions.

21. Dr. Collins considered Claimant's left foot CRPS that causes severe left foot pain and has spread to his right foot.[2] Claimant's LE pain increases whenever he is on his feet. Because CRPS makes his feet hypersensitive, Claimant cannot wear shoes, socks, or work boots; although he can wear Birkenstocks on occasion.

22. Claimant also injured his right knee in the subject accident, although that injury is not particularly limiting and does not require pain medication; however, he still

[2] The medical records reveal that at one time, Claimant was considering a left foot amputation to relieve his left foot pain.

takes Norco 10's five times a day.[3] Claimant tries not to drive when on this medication. Claimant also takes anti-depressants for his post-injury depression.

23. Claimant informed Dr. Collins that he has the following subjective **positional** limitations:

* Sitting – does not like to sit but sitting does not increase pain.
* Standing – very short period of time before pain increases.
* Walking – can tolerate 20 minutes but painful/unable to walk on uneven ground or inclines.
* Reclining – does not like to recline during the day, but does have to get off his feet.

Lifting and carrying

* Tries not to lift any significant weights.

Postural limitations

* Bending/stooping – limited bend/stoop but increases ankle pain.
* Twisting – no limitation.
* Kneeling crouching – unable to kneel or crouch.
* Crawling – unable to crawl.
* Climbing stairs – painful to climb.
* Climbing a ladder – would not attempt.

Manipulative limitations

* Reaching all directions, including overhead – no limitation.
* Handling objects (gross manipulation) – no limitation.
* Fingering (fine manipulation) – no limitation.
* Pushing or pulling – nothing heavy.
* Twisting the wrists – no limitation.
* Working with hand tools, e.g., screwdrivers, pliers – no limitation.
* Driving – able to drive automatic transmission but not while on narcotics.

[3] Claimant informed Dr. Collins that he had filed for unemployment benefits on numerous occasions, but was deemed unqualified due to his need for narcotic pain medication.

JE - O, pp. 392-393.

24. Claimant graduated from Twin Falls High School in 1983. He has had various licenses such as HVAC, refrigeration and electrical, but has not kept them current due to the costs. He was ready to test for his journey-level plumbing license at the time of the subject accident.

25. Dr. Collins reported that Claimant worked in the HVAC business, mainly in the Wood River Valley, for 15 years. Claimant is restricted from performing that type of work at present. She categorized Claimant's work history as "highly skilled" and required medium-to-heavy physical exertion. Claimant now has restrictions confining him to sedentary-to-light work that can be performed by sitting 80% of the time. However, he does not have sedentary/light work skills that can be performed while sitting.

26. Regarding loss of access to Claimant's Twin Falls County labor market,[4] Dr. Collins opined:

> Assuming Mr. Wayment is able to lift to a light physical exertion level, and taking into account his restriction for sitting 80% of the day, he has a 99% loss of access to the labor market. This assumes he could operate a forklift, but on narcotic pain medication, this is not realistic. This does not take into account his inability to wear shoes or work boots. It does not take into account his need for narcotic pain medication.

JE-O, p. 398.

27. Dr. Collins noted that Employer had offered Claimant a job doing bidding in the office. However, Claimant would have been required to take specific computer classes that pertained to this specific type of bidding and estimating which Surety did not approve.

[4] Dr. Collins chose the Twin Falls County labor market because there is no data for the Jerome or Wood River Valley labor markets.

This cost Claimant perhaps the only opportunity he may have had to perform sedentary work. Employer has since hired another person for that position.

28. Dr. Collins opined that there are no jobs in significant numbers that exist in Claimant's labor market and he is realistically unemployable. He is not qualified or competitive for any job where he can sit 80% of the time, wear sandals to work, and work while taking narcotic pain medication (which also disqualifies him from truck driving).

29. Regarding earning capacity, Dr. Collins reported that Claimant was earning, pre-subject injury, $32.00 an hour and double that for overtime. He earned between $70,000 during the recession and $120,000 during a positive labor market. He now earns $15.00 an hour while working for his friend a few hours a day.

30. Dr. Collins concluded her report as follows:

> Mr. Wayment attempted to find any kind of work that he could perform while seated. He has attempted to work for friends in accommodated positions and is unable to work a full time schedule. In my opinion, Mr. Wayment is an odd lot worker.[5] He tried to remain with his time-of-injury employer. He tried to look for work while on unemployment. He has no sedentary work skills, requires narcotic pain medication, and because of the CRPS, cannot wear shoes and socks. In this Eastern Idaho climate, working without shoes would be very limiting.

JE – O, p. 400.

Sara Statz, MS, CRC, ABVE/F, IPEC, CIWCS

31. Defendants retained Ms. Statz to prepare a vocational evaluation to assess Claimant's employability. Ms. Statz was not deposed and her CV or other evidence regarding her qualifications to give expert opinions cannot be found in the record as presented. Because Claimant did not object to the admission of Ms. Statz' report into

[5] The Referee is aware that whether or not Claimant is an odd lot worker is not technically within Dr. Collins' province as a vocational expert but gives her opinion in that regard some weight and the foundation for that opinion more weight.

evidence and because the Referee takes judicial notice that Ms. Statz has been permitted to express expert vocational opinions in other Industrial Commission cases, the Referee finds that Ms. Statz is qualified to give expert vocational opinions in this matter.

32. Ms. Statz met with Claimant for a couple of hours on May 1, 2018; she took his social, family, medical, and work histories that were consistent with his hearing testimony and the information obtained by Dr. Collins. She also reviewed pertinent medical records and her summary thereof may be found at pp. 8-10 of her June 4, 2018 report (JE - T).

33. Ms Statz noted that Claimant had no pre-existing medical conditions, whether industrial or not, that resulted in any permanent physical restrictions. Dr. Johnson gave Claimant a permanent restriction of working in a seated position full-time; Dr. McIntire (Claimant's pain management physician) agrees.

34. Because Claimant has been restricted to sedentary work and his prior work experience has generally been heavy to very heavy, Ms Statz stated that Claimant's "… labor market is now severely limited." JE-T., p. 490. "Considering these restrictions, Claimant has lost approximately 98.21% of employment opportunity in his local labor market because of the industrial injury of 1/15/14." *Id*.

35. Ms. Statz calculated Claimant's wage loss at 71.88% assuming that he could secure a job paying $9.00 per hour and without retraining. He was making $32.00 an hour at the time of injury. With additional training in computers and customer service, he may be able to replace part of his pre-injury wages with an entry-level government job paying between $13.50 and $16.75 per hour, "[w]hile Mr. Wayment may have an increase in

wages, finding a suitable position would prove challenging with [sic] considering his extreme lack of transferrable skills to that of a Sedentary [sic] occupation." JE-T, p. 491.

36. Ms. Statz opined that while Claimant's education has not been a barrier to success in his pre-injury occupations, he would need to undergo retraining to learn office and clerical skills before re-entering the workforce. He would also have to refine his interpersonal skills and improve his professional presentation and demeanor in order to be competitive in the sedentary labor market.[6]

37. Ms. Statz expressed the following thoughts regarding Claimant's "work behaviors":

> Mr. Wayment's case demonstrated several factors that would be cause for concern when discussing "placeability" of a client. Currently, Claimant is on a regime of narcotic medications to help regulate his chronic pain. The claimant said he was let go by his pre-injury employer, Evans Plumbing, as they could no longer accommodate his need for continuous narcotic use. Mr. Wayment said he used to have to pull over in the middle of the day to take a nap after taking his narcotic pain medication. Many employers would not be able to accommodate an employee actively using narcotic pain medication as it would undoubtedly have a negative impact on either is productivity or violate the employer's drug use policy.
>
> Additionally, Mr. Wayment demonstrated numerous pain behaviors throughout his interview with this Evaluator that would cause concern for future employment. He was not able to keep his shoes on, not only would employers find this to be unhygienic, it could also violate their safety policies in the work place.

JE-T, p. 493.

38. Claimant worked with ICRD but was frustrated that they were not adequately helping him return to work. "He noted asking for help obtaining additional computer training and feeling "brushed off" by his Field Consultant."

[6] Defendants have not offered retraining in any formal sense, but are relying on whatever training in QuickBooks, and perhaps some other office chores, Claimant may be receiving at Mitch's.

Id.

39. Ms. Statz concluded that Claimant is totally and permanently disabled and that it would be futile for him to continue looking for work.

40. On August 30, 2018, Ms. Statz filed an **addendum** to her June 4, 2018 report based on the testimony of Claimant and Mr. McDowell regarding Claimant's job duties adduced at the June 5, 2018 hearing. Ms. Statz learned from the hearing testimony that since Mr. McDowell's office manager retired, Claimant is working part-time 30 hours a week for Mr. McDowell. "Since Mr. McDowell's Office Manger retired in the spring of 2018, Mr. McDowell decided to create a new position for Mr. Wayment. The claimant has been receiving training on QuickBooks Online, data entry, answering the phone, in addition to some duties in the shop such as organizing parts and some welding." JE T, p. 19. Mr. McDowell described Claimant as a good employee that he would like to see employed for the next ten years. While Mr. McDowell considers Claimant to be an asset to his company, he also testified that he required many accommodations including allowing Claimant to go barefoot at work.

41. Ms. Statz reported that the biggest accommodation made is regarding the company's attendance policy that requires an employee to be on duty from 8:00 am to 5:00 pm Monday through Friday. Because Claimant has to leave work due to pain issues between 2:30 and 3:00 pm several days a week, that leaves the reception position[7] open during those times and is a great accommodation for Mr. McDowell to make and otherwise would not be made but for a sympathetic employer.

[7] Mr. McDowell testified that the receptionist position is the most important function for Claimant.

42. While Ms. Statz acknowledges that Mr. McDowell is a sympathetic employer, she nonetheless opines that Claimant's transferrable skills have increased, Claimant has learned several new skills and is now marketable in more job fields as a result of his experience in data entry, QuickBooks, and reception duties.

43. Still of concern is Claimant's frequent absences due to pain related issues and his use of opioids. However, Claimant has demonstrated that he can work up to 30 hours a week on a sustained basis. Since Claimant has newly acquired skills to work in a clerical position, Ms. Statz posits that "…he can now leverage these newly learned skills into a part-time position with a new employer, should he choose to leave Mitch [sic] Repair." *Id.*, p. 20.

44. Ms. Statz also indicated that Claimant could explore working from home where he could elevate his feet as needed and go without wearing socks.

45. Ms Statz concluded:

> It would be this Evaluator's expert opinion the claimant has experienced a loss of 51.93% of his pre-injury labor market. This loss would translate into 77.9% disability to account for the claimant's wage loss, part-time status, chronic narcotic use, and need to have workplace accommodation for his foot wear. *Id.*, p. 21.

DISCUSSION AND FURTHER FINDINGS

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 the 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), *citing Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). 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), *citing Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

A claimant may satisfy his or her burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways:

a. By showing that he or she has attempted other types of employment without success;

b. By showing that his or her vocational counselors or employment agencies on his or her behalf have searched for other work and other work is not available; or

c. By showing that any efforts to find suitable work would be futile.

Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

A claimant's disability is to be determined, in most cases, as of the date of the hearing. See *Brown v. Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012).

46. Both Dr. Collins and Ms. Statz concluded that Claimant is currently employed by a sympathetic employer. Even after synthesizing the hearing testimony of

Claimant and Mr. McDowell, Ms. Statz continued to acknowledge that Mitch's Repair is a sympathetic employer. Ms. Statz contends, however, that Claimant's current employment has allowed him to develop, or places him on a trajectory to develop, new skills which will significantly increase his post-injury labor market, such that it can no longer be said that he is an odd-lot worker.

47. It will be recalled that Claimant commenced his employment with Mitch's Repair in November of 2017. Between November of 2017 and May of 2018, Mr. McDowell described Claimant's job as doing basically "errands." HT., p. 14. Claimant did not fill an existing position. Rather, this job was created for him. *Id.* However, in approximately May of 2018, Mitch's long-time office manager, Martha, retired, and this afforded an opportunity to expand Claimant's job responsibilities. Claimant had been working as an office manager helper for probably less than 30 days as of the date of hearing. For example, he testified that with respect to QuickBooks Online training, he had just "barely started" under the tutelage of Mr. McDowell's girlfriend, the company bookkeeper. HT., p. 75. As to his aptitude for this training, he testified that he was trying to catch-on, but that he was slow. *Id.* As of the date of hearing, Claimant spent about one-third of an average workday in the parts room, and two-thirds in the office. Claimant acts as a receptionist and handles banking deposits. HT., p. 21-22. As of the date of hearing, Claimant was not involved in other bookkeeping functions; Mr. McDowell's girlfriend handles payroll (HT., p. 23) and, as noted, Claimant is just beginning to receive training in QuickBooks.

48. Mr. McDowell testified that he hopes to be able to continue to employ Claimant, but this is somewhat dependent upon being able to "get more out of him and pay

him more." However, Mr. McDowell also expressed his intention to continue to accommodate Claimant's needs.

49. After considering the testimony of Mr. McDowell and Claimant, Ms. Statz offered the following conclusions concerning how Claimant's current employment expands his opportunities for employment in a broader segment of the labor market:

> The Claimant has learned several new skills and is now marketable in more job fields as the result of his experience in data entry, QuickBooks and reception duties. Mr. Wayment is eager to learn new skills and has worked closely with his current employer to foster these and work toward more responsibilities as an office manager/bookkeeper. … Since Mr. Wayment has acquired the skills to work in clerical positions, he can now leverage these newly-learned skills into a part-time position with a new employer, should he choose to leave Mitch's Repair. …Now that he has acquired clerical skills he could easily leverage them into either a part-time or a telework position should he carry out a concentrated job search.…He has proven the ability to work in an office and learn new clerical skills despite his physical limitations and challenges with pain management.

JE T, p. 20-21. While it was not inappropriate for Ms. Statz to consider testimony adduced at hearing in assessing Claimant's disability, her conclusions about the impact of Claimant's current position on his potential for gainful activity are speculative. Claimant does not currently possess bookkeeping or accounting skills. It is not even clear that he has the aptitude to acquire these skills. While he has demonstrated some competence in answering the phone, taking messages and otherwise performing receptionist work for a small business, he has so far demonstrated no ability to replace Martha, much less work generally as an office manager.

50. It is also important to note that Claimant's reliability is at issue. He is unable to work in full-time employment owing to the impact of his medications and his general level of pain. He is absent unpredictably based on these ongoing issues. His reliance on pain medications contributed to his loss of employment with his time of injury employer.

At present, he is most comfortable going barefoot, and while his current employer is willing to tolerate this, one might imagine that it would be intolerable to other employers, particularly in an office environment.

51. From the foregoing, the Referee concludes that Claimant has satisfied his burden of proving his odd-lot status via the route of futility, notwithstanding that he is currently employed by Mitch's Repair. The Referee is further unpersuaded that Claimant's current employment has provided him with skills such that Claimant's access to the labor market has been quantifiably expanded. Ms. Statz's opinions in this regard are largely speculative and unpersuasive.

52. Once Claimant has established his status as an odd-lot employee, the burden shifts to the Employer to demonstrate that some kind of suitable work is "regularly and continuously available" to Claimant. See *Lyons v. Industrial Special Indemnity Fund, supra*. Concerning employer's burden, the *Lyons* Court stated:

> In meeting its burden, it will not be sufficient for the Fund to merely show that appellant is able to perform some type of work. Idaho Code § 72-425 requires that the Commission consider the economic and social environment in which the claimant lives. To be consistent with this requirement it is necessary that the Fund introduce evidence that there is an actual job within a reasonable distance from appellant's home which he is able to perform or for which he can be trained.3 In addition, the Fund must show that appellant has a reasonable opportunity to be employed at that job. It is of no significance that there is a job appellant is capable of performing if he would in fact not be considered for the job due to his injuries, lack of education, lack of training, or other reasons.

Though Claimant is currently employed, Employer has failed to persuasively show that employment by what might be described as unsympathetic employers is regularly and continuously available. Defendants have failed to describe an actual job or jobs within Claimant's geographic locale which he is able to perform, or for which he may be trained.

Again, it is speculative to suggest that Claimant will acquire the skills to engage in the types of employment described by Ms. Statz.

CONCLUSIONS OF LAW

1. Claimant has sustained his burden of proving that he is totally and permanently disabled as an odd lot worker.

2. Defendants have failed to overcome the presumption of odd-lot disability.

RECOMMENDATION

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

DATED this __30th__ day of January, 2019.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __1st__ day of February, 2019, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

KEITH E HUTCHINSON
PO BOX 207
TWIN FALLS ID 83303-0207

JUDITH ATKINSON
PO BOX 6358
BOISE ID 83707-6358

ge Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CALVIN MARK WAYMENT, Claimant, v. EVANS PLUMBING, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORP., Surety, Defendants.	**IC 2014-007090** **ORDER** **Filed February 1, 2019**

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with 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 has sustained his burden of proving that he is totally and permanently disabled as an odd-lot worker.

2. Defendants have failed to overcome the presumption of odd-lot disability.

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

DATED this __1st__ day of ___February____, 2019.

INDUSTRIAL COMMISSION

__/s/_____
Thomas P. Baskin, Chairman

__/s/_____
Aaron White, Commissioner

___/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:
__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __1st __ day of __February__ 2019, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

KEITH E HUTCHINSON
PO BOX 207
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ge ___/s/_____