BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JANA TIPTON, Claimant, v. DOUGLAS HAMMOND, Employer, and IDAHO STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2015-011507** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **Filed 1/14/20**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Boise, Idaho, on June 17, 2019. Matthew Andrew represented Claimant. Jon Bauman represented Defendants Employer and Surety (hereafter "Defendants"). Kenneth Mallea represented Defendant State of Idaho, Industrial Special Indemnity Fund (hereafter "ISIF"). The parties produced oral and documentary evidence at the hearing. Post-hearing depositions were taken. The parties submitted briefs. The case came under advisement on October 29, 2019.

ISSUES

The issues enumerated at hearing were:

1. Whether Claimant's condition is due in whole or in part to a pre-existing injury or condition;

2. Whether and to what extent Claimant is entitled to the following benefits;

    a. Permanent Partial Impairment (PPI); [1]

    b. Disability in excess of impairment (PPD), including total disability pursuant to the odd-lot doctrine;

3. Whether apportionment for a pre-existing condition pursuant to Idaho Code §72-406 is appropriate;

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

5. Apportionment under the *Carey* Formula.

CONTENTIONS OF THE PARTIES

Claimant contends she was rendered totally and permanently disabled under the odd-lot doctrine when she injured her right hand while driving a dump truck on May 5, 2015 in the course and scope of her employment with Employer. Even if she is not found to be totally disabled, her permanent disability should not be subject to apportionment under Idaho Code § 72-406 because her pre-existing conditions did not limit Claimant's ability to work prior to her industrial accident herein.

Defendants Employer and Surety (Defendants) argue Claimant is not totally disabled, suffered from several pre-existing conditions which affected her work abilities, and apportionment under Idaho Code § 72-406 is required when determining Claimant's compensable PPD. If Claimant is found to be an odd-lot worker, then ISIF is liable for

[1] The parties did not argue or brief the issue of PPI, and that issue is deemed to be waived.

Claimant's pre-existing physical impairments as they relate to her total disability.

ISIF asserts that Claimant is not even close to being a "total perm" and has not met the criteria for holding ISIF liable for a portion of Claimant's total permanent impairment under Idaho Code § 72-332 even if she was totally and permanently disabled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and witness Terry Tipton taken at hearing;

2. Joint Exhibits (JE) 1 through 50, admitted at hearing[2];

3. The post-hearing deposition transcript of Mary Barros-Bailey, Ph.D., taken on July 17, 2019; and

4. The post-hearing deposition transcript of Kathy Gammon, taken on July 24, 2019.

All objections preserved through the depositions are overruled.

FINDINGS OF FACT

1. At the time of hearing Claimant was a 62 year old married woman who resided with her husband in Cascade, Idaho during the summer and Yuma, Arizona in the winter.

2. On May 5, 2015, while driving a farm truck for Employer, Claimant sustained fractures to her first metacarpal bone of her right thumb. The injury resulted in a closed reduction and pinning surgery by orthopedic surgeon Robert Hansen, M.D. Complications from that procedure led to Claimant undergoing a second surgery on her right hand, which was

[2] During Ms. Gammon's deposition, Claimant's counsel marked several documents as exhibits 51 through 55. He did not request them to be admitted on the record, but no other counsel objected to their use in the deposition. Some of the documents were pages out of previously admitted exhibits, which were simply "marked up" during the deposition. To the extent the documents were discussed during the deposition, they will be reviewed in conjunction with the deposition testimony as illustrative and afforded the weight to which they are entitled.

performed on August 12, 2015. After these two surgeries Claimant was left with limited use of her right hand.

3. After attending physical therapy Claimant underwent her first functional capacity evaluation (FCE) in February 2016. The conducting therapist felt Claimant demonstrated a capacity for working a seven-hour day at sedentary level, with occasional bending, stooping and crouching (due to pre-existing conditions).

4. On March 15, 2016, Dr. Hansen examined Claimant for an impairment evaluation. He found Claimant was at MMI, and assigned her a permanent impairment rating of 20% upper extremity (12% WP). He placed work restrictions on Claimant of no lifting more than ten pounds and limited repetitive use of her right hand, with no forceful twisting or turning.

5. Defendants had concerns over the FCE findings, (namely a failure to focus on Claimant's right upper extremity limitations), and requested Dr. Hansen order a second FCE, which he did.

6. On May 22, 2017, Claimant underwent a second FCE with a different provider. The results of the second FCE moved Claimant into a "sedentary-light" job category. In both FCEs, Claimant's limitations were based on several factors, including low back pain in addition to right hand pain and weakness.

DISCUSSION AND FURTHER FINDINGS

7. The seminal issue for resolution is the extent of Claimant's permanent disability attributable to her accepted industrial accident. Permanent disability results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. Evaluation (rating) of permanent disability is an appraisal of the injured

employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425.

8. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988).

9. The extent and causes of permanent disability are factual questions committed to the particular expertise of the Commission, which considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Indus.,* 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund,* 130 Idaho 278, 939 P.2d 854 (1997); *Thom v. Callahan,* 97 Idaho 151, 155, 157, 540 P.2d 1330, 1334, 1336 (1975).

10. The burden of establishing permanent disability is upon Claimant. *Seese v.Idaho of Idaho, Inc.,* 110 Idaho 32, 714 P.2d 1 (1986).

INFORMATION RELEVANT TO PERMANENT DISABILITY[3]

Work Experience and Expertise

11. Claimant has a long and steady work history in spite of her lack of a high school diploma or GED. While in her twenties Claimant worked as a loan interviewer/clerk at AVCO Financial, where she interviewed loan applicants, completed loan applications, performed credit and employment checks, and handled accounts receivable in addition to receptionist duties. She briefly served as a waitress. Beginning in the early to mid-1980s she and her then-husband started a long haul trucking company which operated in all 48 states. Claimant served as the company dispatcher and did some over-the-road driving. She also did the company payroll, paid taxes and "pretty much just kept the company going" for over fifteen years, up to approximately 1999. Her trucking company employed as many as eight employees. Thereafter Claimant obtained work with the Ada County Highway District (ACHD) as a road equipment operator. While at ACHD Claimant worked her way, through experience and additional training courses, into a lead worker on a "broom crew." In that capacity Claimant supervised up to 18 workers on a daily basis. Her supervisory duties included mapping her crew's daily work areas, arbitrating disputes, and prioritizing the work schedule. Claimant had input on performance evaluations.

12. After more than a decade working for ACHD Claimant was fired for insubordination. She next worked driving a taxi for a brief stint and then got on with

[3]When determining Claimant's right to permanent partial disability benefits it is necessary to know or determine her permanent partial impairment rating, as Claimant is entitled to permanent disability benefits only to the extent such permanent partial disability exceeds her impairment. Although the parties agreed at hearing that there was an issue regarding the extent of Claimant's permanent partial impairment benefits due her, no party briefed that issue and it does not appear from the record there are competing medical assessments on this issue. As such, Claimant's permanent partial impairment whole-person rating for her pre-existing impairments is 18%, as found by Dr. Rogers and discussed below, and 12% WP impairment due to her industrial accident, for a total whole person PPI rating of 30%.

Employer for seasonal agricultural work (May through October) beginning in 2013. Shortly before her industrial accident with Employer Claimant also took a part-time cashiering job at Home Depot.

Prior Medical Conditions

13. During the pendency of this litigation Defendants sent Claimant's medical records to Beth Rogers, M.D., for review and analysis of Claimant's "ratable" pre-existing conditions as gleaned from those records. Dr. Rogers identified the following medical issues as ratable; COPD, left hip osteoarthritis, low back pain, cervical spondylosis, right upper extremity paresthesias, and gastritis. Claimant's chronic sinusitis, although ratable, could not be rated by Dr. Rogers without additional testing; the same applied to Claimant's left upper extremity paresthesias and peripheral arterial disease. Claimant's hypertension would be ratable if controlled only with medication; if controlled by diet and exercise, it would not be ratable. Claimed depression not diagnosed as a mood disorder such as major depressive disorder was not ratable, nor were her claims of headaches, and diagnoses of microscopic hematuria, osteopenia and hyperlipidemia.

14. Dr. Rogers calculated Claimant's non-industrial pre-existing conditions as follows;

- COPD 6%
- Gastritis 5%
- Hip arthritis 3%
- Low back 2%
- Neck pain 2%

Combining the impairments as per the 6th edition of the Guides combined values chart led to a total combined impairment of 18% for Claimant's pre-existing conditions.

15. Dr. Rogers also suggested appropriate work restrictions for Claimant's lumbar condition to include no lifting greater than 35 pounds, rarely between 25 and 34 pounds, occasionally between 10 and 24 pounds. Claimant could lift up to 10 pounds continuously and up to 14 pounds frequently. Dr. Rogers felt Claimant should not engage in repetitive or prolonged bending or twisting, and should limit her squatting to occasionally. Claimant should not sit or stand for prolonged periods of time.

16. Claimant should limit her climbing to seldom, with occasional stooping and crouching due to her left hip arthritis. Claimant's walking should be limited to four hours per day. Her neck condition would also limit Claimant's repetitive cervical rotation and extension. Finally, due to Claimant's long history of heavy smoking with emphysematous changes on her chest CT scan, coupled with Claimant's chronic sinusitis, Dr. Rogers felt Claimant should restrict herself to light-duty work for that condition.

Social Security Disability Claim

17. On April 4, 2014, Claimant began her process of seeking Social Security Disability benefits. Her claimed grounds for total and permanent disability included an assertion that she had been unable to work since October 25, 2013, due to severe pain in her bones and joints which precluded her from even climbing into and out of a truck cab. (At the time she applied for SSDI benefits Claimant had just completed her seasonal agricultural truck driving stint, the same job in which she injured herself in May of 2015.) Claimant indicated the pain made it impossible to work. Claimant also stated she had difficulties standing, walking (1/8 mile maximum), and driving for more than a "limited time." Claimant also asserted she had pain when turning her neck, bending over, and her hands were "always weak and sore." As part of her application process Claimant described how her hip, neck, and low back pain

limited her ability to work in her garden, or sew, and affected her sleep. She also claimed to have difficulty putting on her socks and pants on occasion. Her hands hurt constantly. She also needed help with household chores. Even sitting for a few minutes was allegedly uncomfortable or painful.

18. Claimant was initially denied SSDI benefits; she began the appeal process shortly thereafter. For her appeal she hired an advocate to assist her in the process. Her appeal was pending at the time of her industrial accident in question.

19. After her accident Claimant included her industrial hand injury to her litany of complaints. Ultimately a hearing was held, and thereafter on May 23, 2016, Claimant received a favorable decision on her SSDI claim. Claimant's date of disability was determined to be October 25, 2013, the date on which Claimant claimed to be unable to engage in any work activity due to her multiple complaints. In his written decision Administrative Law Judge David Willis noted Claimant's residual functional capacity (limited light duty), age, education, and prior work experience were all factors in his determination that Claimant was disabled for SSDI purposes. Claimant's right hand injury and limitations were noted in the decision, as were Claimant's other above-stated conditions.

20. At her deposition in January 2018 Claimant testified that her hips did not impact her ability to drive a truck or her employment in any way, but did impact her gardening. She also admitted that she had no medical care for her hips or neck prior to her industrial accident, nor did she take any medication, even over-the-counter, for her hips or neck. Claimant could also not remember her low back interfering with her work driving a dump truck for Employer prior to 2015. Claimant acknowledged she worked seasonally, from May through October, for Employer from 2013 until her hand accident in May 2015. Her work

required her to drive her truck through various row-crop fields with corrugates, which was very bumpy. Even this activity did not cause Claimant any difficulties with her low back, neck, or hips. Claimant also acknowledged she did not start taking osteoporosis medication until after May 2015.

21. Claimant testified that she operated her truck's clutch with her left leg without issue, performed daily safety checks on her truck, including checking tire pressure and fluid levels. She also daily climbed onto her truck to wash the windshield. She was able to perform such activities without difficulty up to the time of her industrial accident in 2015.

22. At hearing Claimant reiterated her ability to perform all her work tasks as set out above, and also testified that she maintained a large garden which involved bending, stooping, kneeling, pulling and hoeing weeds, and operating a rototiller prior to her 2015 work accident. She also bowled in a league up to the time of her subject work accident.

Vocational Experts

23. Claimant and Defendants each hired vocational experts to provide opinions on the degree of Claimant's permanent disability. Claimant utilized Mary Barros-Bailey, Ph.D. Defendants utilized Kathy Gammon. Both experts prepared reports and were deposed. The two experts not surprisingly reached different conclusions; Dr. Barros-Bailey felt Claimant was totally disabled and it would be futile to even look for work, while Ms. Gammon felt Claimant was highly employable. Their opinions are discussed in greater detail below.

Dr. Barros-Bailey

24. In mid-August 2016 Dr. Barros-Bailey prepared a disability evaluation report after interviewing Claimant regarding her background, education, employment, and subjective current physical limitations. Dr. Barros-Bailey also reviewed Claimant's post-accident medical

and ICRD records, including Claimant's first FCE results. Dr. Barros-Bailey looked at Claimant's transferable skills based on the *Dictionary of Occupational Titles* and the U.S. Department of Labor's *Revised Handbook of Analyzing Jobs*, 1991.

25. Dr. Barros-Bailey opined that due to Claimant's age, lack of GED and transferable skills, coupled with sedentary level job restrictions imposed by the FCE and technological changes to jobs Claimant held in a distant past, Claimant had lost access to 98% of her labor market (either Cascade or Treasure Valley). Dr. Barros-Bailey opined Claimant was totally disabled and it would be futile for Claimant to even attempt to find work.

26. On May 1, 2019 Dr. Barros-Bailey prepared a supplemental disability report after reviewing additional records, including the second FCE report and medical records generated since her first report. She also looked at Claimant's deposition and Ms. Gammon's disability report. Dr. Barros-Bailey modified her opinions to include her conclusion that Claimant was not limited to sedentary work, but could also do light-duty jobs as defined by USDOL standards. Dr. Barros-Bailey also opined that "greater than 50% of [Claimant's] disability would be apportioned to pre-injury conditions." JE 38, p. 892.

27. The remainder of Dr. Barros-Bailey's May report was devoted to rebutting Ms. Gammon's report findings and opinions. Particularly, Dr. Barros-Bailey noted Claimant's age was older than the median age for all occupations listed by Ms. Gammon; thus Dr. Barros-Bailey argued Claimant had a "placeability" disadvantage. Also Dr. Barros-Bailey argued Claimant's remote jobs were not "elastic" and thus did not contain truly transferable skills. Technological evolution has left Claimant behind and she would need training in modern computer programs to be marketable.

28. Dr. Barros-Bailey was deposed on July 17, 2019. Therein she stressed that Claimant's lack of a high-school diploma or GED in and of itself eliminated Claimant from a large number of jobs. Additionally Dr. Barros-Bailey testified that Claimant's lack of current-software skills was also a major block to employment in a sedentary to light work range.

29. Dr. Barros-Bailey acknowledged that based on Claimant's past experiences in various work positions she would theoretically have transferable skills, but when real-world job requirements are taken into account, including changes in technology, Claimant, although "employable" in a job-category sense, would not be "placeable" in a real job with a real employer.

30. In cross examination Dr. Barros-Bailey acknowledged that based upon the second FCE findings Claimant would qualify for a large percentage of light-duty jobs in addition to sedentary work. Dr. Barros-Bailey admitted Claimant presented well, was likeable, had a greater-than-average supervisory span of control (18 workers under her supervision) at ACHD, and would be looking for a job (if she chose to) in a job market that is the best it has been "in a very long time."

Ms. Gammon

31. On August 8, 2017, rehabilitation counselor and physical therapist Kathy Gammon authored a disability assessment report on Claimant for Defendants. Ms. Gammon reviewed medical, personnel, Social Security Administration, and related records and interviewed Claimant as part of her assignment. Ms. Gammon's report provided a detailed work and medical treatment history for Claimant. She noted therein that after reaching MMI in March 2016, Claimant was released to work with restrictions placing her in the sedentary strength and selected light strength category, which would have allowed Claimant to return to

her time-of-injury job. Instead, Claimant informed the ICRD consultant with whom she was working that Claimant would voluntarily not be returning to the labor market.

32. Ms. Gammon analyzed Claimant's pre-existing conditions and determined that as a result of those disabilities Claimant was relegated to sedentary strength work by those conditions, as they limit Claimant's time spent walking to a sedentary level.

33. Ms. Gammon was critical of the first FCE Claimant had undergone because it did not isolate Claimant's right upper extremity limitations. Based on this observation, a repeat FCE was conducted, as noted above. The two FCEs demonstrated significant differences, particularly with Claimant's lifting capacity. Whereas the first FCE recorded Claimant's lifting maximum at 14.8 pounds, the second FCE recorded Claimant's maximum lifting at 19.2 pounds. As a result of the second FCE, Claimant was found to be capable of most light duty work in addition to sedentary work jobs with respect to her upper extremities.

34. Unlike Dr. Barros-Bailey, Ms. Gammon found Claimant's transferable skills could be applied to a number of existing jobs in Claimant's job market of Treasure Valley and/or Cascade area. Ms. Gammon did stress Claimant should obtain her GED, as there were free online study courses and the testing was not expensive. Additionally College of Western Idaho provides assistance at no cost for individuals seeking a GED. Even without a GED, Claimant's experience in semi-skilled to skilled work gave her on-the-job experience many employers would consider "high school equivalency" when looking at Claimant's resume.

35. In her first report, Ms. Gammon concluded that due to pre-existing disabilities Claimant was precluded from medium and light duty jobs, and had lost approximately 56% of her access to the labor market. Isolating her industrial accident restrictions, Claimant remains eligible for sedentary and many light duty jobs. However, Claimant's pre-existing disabilities

preclude her from those light duty jobs due to her walking limitations. As such, Claimant's pre-existing disabilities have a greater negative impact on her access to employment than does her industrial injury.

36. In Ms. Gammon's opinion, Claimant suffered no wage earning capacity loss as the result of her industrial accident. She could return to her time-of-injury job or any other of numerous jobs listed by Ms. Gammon at wages comparable to her time-of-injury wage.

37. Ms. Gammon averaged Claimant's loss of access figures with her loss of wage figure ($0), and calculated Claimant's permanent disability from pre-existing conditions at 28%.

38. Ms. Gammon's estimated Claimant's permanent partial disability from the subject accident at 11%. However, in arriving at this number, it appears Ms. Gammon did not compare Claimant's pre-injury access to her post-injury access; rather, Ms. Gammon estimated 11% disability on the "loss of access to the open labor market." In other words, she arrived at this number without reference to Claimant's pre-existing disability. In her addendum of May 23, 2019, discussed below, Ms. Gammon corrected this error and compared Claimant's actual pre-injury labor market access (including her pre-injury restrictions) to her post-injury access.

39. In her May 23, 2019 addendum, Ms. Gammon updated her analysis in response to Dr. Barros-Bailey's observations. Ms. Gammon included limited light duty and sedentary jobs in Claimant's pre-injury labor market. However, she did not recalculate Claimant's pre-injury disability. Presumably it would be less than 28%, since it is based on less onerous restrictions. Ms. Gammon also addressed Claimant's labor market loss from the subject accident, proposing that as a result of the accident, Claimant suffered additional labor market loss of 4%, over and above the loss of labor market relating to her pre-existing infirmities. . Under this scenario, Claimant's permanent disability attributed to her industrial accident was reduced to 2% (4%

labor market loss + 0% wage loss/2 = 2%). In essence, Claimant had the same access to the labor market both pre-injury and post-injury under this scenario:

> According to Ms. Tipton's *pre-injury limitations*, she is capable of a partial range of Light strength work (due to her position limitations) in addition to a full range of Sedentary strength work. According to her *post-injury limitations* she qualifies *for the same level of work*. Both prior to her industrial injury and following her industrial injury, Ms. Tipton *continues to qualify for a partial range of Light strength work in addition to the full range of Sedentary strength work.*

JE 42:925 (emphasis in original).

40. Ms. Gammon did not specify if the 11% and 2% were in addition to Claimant's 12% PPI rating, but from the content of her discussion it appears she simply calculated disability based on an assessment of Claimant's ability to engage in gainful activity. That being the case, Ms. Gammon's permanent disability ratings for Claimant were less than, and eclipsed by, Claimant's PPI benefits previously paid by Defendants.

41. Ms. Gammon wrote several addendums to her original report. The first provided additional detail regarding Claimant's skills acquired during her time at ACHD, all of which would assist Claimant's future ability to find employment should she choose to look for work. Her second addendum focused on employment opportunities closer to Claimant's Cascade residence. It highlighted the jobs in the Cascade area available to Claimant. It also documented a number of Treasure Valley jobs available at that time. Ms. Gammon's final addendum was a rebuttal to Dr. Barros-Bailey's evaluation and opinions. Ms. Gammon also adjusted Claimant's pre-injury range of work from sedentary, as in her original report, to sedentary and many light duty jobs, as noted above.

42. On July 24, 2019, Ms. Gammon was deposed. Therein she noted Claimant had extensive prior experience with trucking software (routing, mileage, tracking, invoicing) called PC Miler, which is still used in the industry today, which Claimant could utilize in looking for

work in the trucking field. Ms. Gammon acknowledged there are different software programs used in the industry, but PC Miler was one of those in current use. Ms. Gammon noted that employers often look for skill sets such as ability to plan, organize, prioritize, (all skills Claimant acquired while working for ACHD and in running a trucking company for over a decade), and for an employee with a good work attitude; specific computer program skills can in many instances be learned on the job. Claimant has basic computer skills.

43. Ms. Gammon noted the ICRD consultant found several jobs which would be available to Claimant but ICRD closed its file when Claimant indicated she was not planning on returning to the workforce.

44. Cross examination was primarily focused on Claimant's attempt to invalidate the scores of jobs Ms. Gammon had listed in her reports as being available to Claimant. The examination first centered on Claimant's argument that one can not use jobs from the distant past (15 years or longer) when evaluating transferable skills, a notion to which Ms. Gammon did not agree. Next, all jobs listed as available to Claimant in the Treasure Valley were excluded by Claimant's counsel, under the contested rationale that Cascade, Claimant's part-time residence at the time of hearing, was the only job market the Commission could consider when determining disability.[4]

ANALYSIS

45. Claimant asserts her permanent disability is such that she is totally disabled under the "odd-lot" doctrine. An odd-lot worker is one "so injured that [s]he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable

[4] No explanation was provided by Claimant as to why the Yuma, AZ job market should not be considered when Claimant resided there for roughly six months each year since she retired.

market for them does not exist." *Bybee v. State, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well - known branch of the labor market - absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status rests upon Claimant. *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). Demonstration of total and permanent disability is a prerequisite to ISIF liability.

46. Claimant may satisfy her burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways: 1) by showing that she has attempted other types of employment without success; 2) by showing that she or vocational counselors or employment agencies on her behalf have searched for other work and other work is not available; or 3) 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). Claimant is pursuing odd-lot status under the third method of proof.

47. Analysis of this claim is made problematic by Claimant's past sworn testimony to the Social Security Administration, which stands in stark and irreconcilable contrast to her sworn testimony herein. Claimant's willingness to at best exaggerate her symptoms and limitations in order to receive an economically favorable outcome taints this file. Claimant's subjective complaints and limitations must be viewed with skepticism unless verifiable with objective evidence. Her capacity for gainful employment hinges upon the severity of her physical limitations, and it is difficult to ascertain the true extent of those limitations in light of Claimant's propensity to provide less-than-accurate information when it suits her cause.

48. Claimant married her current husband in September 2012. At that time she owned a home in Nampa; he was retired (with PERSI and social security benefits) and owned a home in Cascade. The two of them commuted to his Cascade home on the weekends, while staying in Nampa during the week while Claimant worked. A year and a half later Claimant began her effort to obtain Social Security Disability benefits, claiming she was unable to work. SSDI benefits, if obtained, could augment her PERSI retirement benefits she was receiving from her time at ACHD.

49. Claimant painted a picture of being quite disabled as of 2013 – a picture she later recanted both by her words and her deeds. While she had some typical middle age ailments such as mild to moderate arthritis, and osteopenia, these conditions did not really prevent her from sitting more than 15 minutes or walking more than 1/8 of a mile, despite what she stated in her disability application.[5] When deposed in this case Claimant admitted her conditions did not hamper her ability to work.

50. During the time she was pursing SSDI benefits Claimant continued to work and in the process she injured her right hand. Her past behavior when seeking disability benefits raises the possibility that Claimant exaggerated her industrial injury complaints and subjective limitations to enhance her disability rating. She underwent an FCE and hired a vocational rehabilitation expert to support her claim that she was totally and permanently disabled.

51. Claimant persevered in her quest for SSDI benefits and in 2016 was declared eligible for disability benefits backdated to October 2013. She sold her Nampa house and moved

[5] Claimant's husband testified at hearing that during this time frame and up to the time of hearing he and Claimant took long walks, and "did a lot of walking." Tr. p. 142

to Cascade with her husband. The next year they bought a double wide in Yuma where they spend their winters. Claimant considered herself retired as of 2016.

52. It is difficult in this case to ascertain the true extent of Claimant's limitations attributable to her right hand injury and pre-existing conditions since she has shown a willingness to exaggerate symptoms and limitations in similar situations. Claimant presented at hearing and to her vocational rehabilitation expert as a person who had very limited use of her right hand, had difficulties with daily activities, and could not work due to a combination of her pre-existing conditions and her work injury. (Many of these same complaints were made to the Social Security Administration before Claimant's industrial accident.) Claimant's vocational rehabilitation expert found Claimant profoundly disabled such that it would be futile for Claimant to even look for a job.

53. Claimant bears the responsibility to prove her total and permanent disability. Her proof depends on accurate and honest representations regarding her limitations. If she is capable of doing more activities than she admits to, or if she magnifies her symptoms to her physician or FCE provider, the conclusions they reached would be tainted, and thus entitled to little weight.

54. Objectively there is evidence Claimant has mild to moderate degenerative changes in her low back and hips, and osteopenia or mild osteoporosis. Claimant has COPD from her long-standing pack-a-day smoking addiction. Claimant testified in this case that none of these conditions negatively affected her ability to work. Claimant also testified that her lack of a GED never hindered her from finding work.

55. Medical records generated since her industrial accident show Claimant can not fully extend the index finger of her right hand, although her treating physician felt there was

a surgical alternative to address this problem if Claimant would stop smoking. To date Claimant has been unwilling and/or unable to do so.

56. Subjectively, Claimant testified she has lost grip strength in her right hand from the work injury in addition to lack of mobility in her index finger. She testified to a number of daily living and hobby activities made difficult by her lack of grip strength. She testified her right hand hurts with overuse. She painted a picture of a right hand that is extremely limited, even with simple activities such as stirring a pot or typing a text message on her phone. These complaints are not that dissimilar to those presented when applying for SSDI benefits.

57. Dr. Barros-Bailey's opinions are suspect on several grounds. First, Claimant's lack of a GED has never hindered her from finding long-term employment. As noted, potential employers rarely if ever ask to see the actual certificate, and Claimant's extensive work experience would more than make up for a lack of a GED. If not, obtaining one at no or little cost to Claimant would not be difficult as there are on-line and brick and mortar classes to prepare her to pass the test. Scholarships covering the cost of the test are also available. However, it is unlikely, as pointed out by Ms. Gammon, that Claimant would actually need to get her GED to find suitable work.

58. Dr. Barros-Bailey also discredits most of Claimant's transferable skills with a theory that after 15 years Claimant loses most skills she had acquired in past jobs but not used recently. While this concept may be used in SSDI proceedings, most people could easily dispute the notion with real-world examples. Furthermore, most jobs teach transferable general skills which can be used for life in many different situations and careers. Specifically Claimant gained valuable supervisory and organizational skills in many of her past employments, including running a trucking company and working for ACHD. Claimant's

resume lists her prior job experiences, even those remote jobs. Claimant must think those jobs have some relevance to future employment.

59. Next, Dr. Barros-Bailey's analysis failed to distinguish between Claimant's pre-existing impairments and her industrial injury disability. Dr. Barros-Bailey did acknowledge that the majority of Claimant's disability is unrelated to her right hand injury, but did not assign any numerical apportionment beyond "greater than 50%" to Claimant's pre-existing conditions. If Claimant is less than totally disabled Dr. Barros-Bailey's opinions do not assist in determining the extent of permanent disability attributable to Claimant's industrial accident other than to note such injury is not the predominate source of Claimant's disability.

60. Finally, Dr. Barros-Bailey opined that technology left Claimant behind, and uncompetitive for employment due to her lack of computer skills. In reality, Claimant and her husband run an ice cream truck in Cascade, and have a karaoke/DJ business. Claimant maintains a Facebook page advertising her husband's ice cream truck. She also has a Facebook page where she advertises Tipton Resources DJ Music, and holds herself out as an aspiring model for Craze Agency. Claimant also ran a Facebook page at one time called "Undercover Blankets by Jana" which sold homemade blankets and other items. She testified she did her taxes online as well. Most importantly, Claimant utilized a still-current software program known as PC Miler for well over a decade while running a trucking company. Claimant's computer skills are greater than portrayed by Dr. Barros-Bailey. As Ms. Gammon pointed out, many employers want a person with general computer knowledge, such as Claimant has demonstrated and testified to, and the employer will train the employee on the specific applications for that position.

61. After analyzing Ms. Gammon's reports and deposition testimony, her opinions and disability calculations are more persuasive than those of Dr. Barros-Bailey. Ms. Gammon's analysis was far more in-depth, well-reasoned, and in line with the realities of this case. It was Ms. Gammon who uncovered the fact the first FCE was not valid, as agreed to by Claimant's treating physician. It was the second FCE, which focused on Claimant's injured right upper extremity, which more accurately determined Claimant's true physical capacity with her injured hand, and thus opened up considerably more employment opportunities than previously assumed. Ms. Gammon's opinion that there were a multitude of jobs available to Claimant both in the Treasure Valley and the Cascade region was consistent with the ICRD findings.

In essence, it would not be "futile" for Claimant to look for work. Claimant has failed to prove she is totally and permanently disabled as an odd-lot worker.

62. Idaho Code § 72-406(1) provides:

> In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

Thus, where permanent disability is less than total, it is a "statutory dictate that an employer is only liable for the disability attributable to the industrial injury." *Page v. McCain Foods, Inc.*, 145 Idaho 302, 309 fn. 2, 179 P.3d 265, 272 fn. 2 (2008). Consequently, where, as here, apportionment under Idaho Code § 72-406 is at issue, a "two-step approach is envisioned for making an apportionment." *Brooks v. Gooding County EMS*, 2013 IIC 0064.29 (September 12, 2013). First, the claimant's permanent disability from all causes combined must be determined;

second, a determination must be made of the extent to which the injured worker's permanent disability is attributable to the industrial accident. *Id*.

63. Neither Ms. Gammon nor Dr. Barros-Bailey have opined as to Claimant's disability from all causes. Ms. Gammon originally provided a 28% disability figure relating to Claimant's pre-existing conditions, but did not revise that number when certain of her underlying assumptions were modified. She also opined that the subject accident added only slightly (by 2%) to Claimant's pre-existing disability. Therefore, while we do not have a precise value for Claimant's disability from all causes, we do know that the subject accident contributed only 2% to that aggregate.

64. Claimant previously received disability benefits equal to 12% of the whole person. For her to obtain additional disability benefits she must prove permanent disability (PPD) in excess of her 12% medical disability (PPI). Here she has not done so. Using Ms. Gammon's analysis, the highest PPD rating available to Claimant attributable to her industrial injury is not greater than her PPI rating. Since Claimant's PPD rating is not higher than her PPI rating for which she was previously paid benefits, Claimant has not shown a right to additional permanent disability benefits when the record as a whole, including Ms. Gammon's analysis and opinions, are considered.

65. Claimant has failed to prove her entitlement to additional permanent disability payments over and above those previously paid to her.

66. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove by a preponderance of the evidence that she sustained permanent partial disability in excess of her 12% whole-person medical disability (PPI).

2. All other issues are moot.

RECOMMENDATION

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

DATED this 23rd day of December, 2019.

INDUSTRIAL COMMISSION

/s/
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of January, 2020, 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:

MATTHEW ANDREW
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JON BAUMAN
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KENNETH MALLEA
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MERIDIAN ID 83680

/s/

jsk

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JANA TIPTON, Claimant, v. DOUGLAS HAMMOND, Employer, and IDAHO STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2015-011507** **ORDER** **Filed 1/14/20**

Pursuant to Idaho Code § 72-717, Referee Brian Harper submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation.

Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing, IT IS HEREBY ORDERED that:

1. Claimant has failed to prove by a preponderance of the evidence that she sustained permanent partial disability in excess of her 12% whole-person medical disability (PPI).

2. All other issues are moot.

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

DATED this the 14th day of January, 2020.

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 14th day of January, 2020, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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/s/

jsk