BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GUADALUPE LOPEZ, Claimant, v. 1 & 1 HOME CARE, INC., dba AAA HOME CARE, Employer, and STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2015-005194** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED** **OCTOBER 11, 2019**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on February 20, 2019. Claimant, Guadalupe Lopez, was present in person and represented by Clinton E. Miner, of Middleton. Defendant Employer, 1&1 Home Care, Inc., dba AAA Home Care (AAA), and Defendant Surety, State Insurance Fund, were represented by Jon M. Bauman, of Boise. Defendant, State of Idaho, Industrial Special Indemnity Fund (ISIF), was represented by Daniel A. Miller, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on August 14, 2019.

ISSUES

The issues to be decided are:[1]

[1] Claimant's entitlement to medical benefits was a listed hearing issue but was not addressed by Claimant at hearing or in briefing and thus is not considered herein.

1. The extent of Claimant's permanent impairment attributable to the industrial accident and that attributable to pre-existing injuries or conditions;

2. The extent of Claimant's permanent disability, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise;

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

4. Whether the Industrial Special Indemnity Fund is liable under Idaho Code § 72-332; and

5. Apportionment under the Carey formula.

CONTENTIONS OF THE PARTIES

All parties acknowledge Claimant suffered an industrial accident on February 17, 2015, when she fell and fractured her hip. Claimant asserts she is now totally and permanently disabled. Employer/Surety assert that Claimant has failed to prove she is totally and permanently disabled due to her 2015 industrial injury and also assert that if Claimant is found to be totally and permanently disabled, it is due to the combined effects of her industrial accident and pre-existing permanent impairments for which ISIF bears responsibility. ISIF maintains that Claimant's pre-existing conditions were not a hindrance or obstacle to her employment and that her industrial accident does not combine with her pre-existing conditions to render her totally and permanently disabled. ISIF notes that prior to her accident Claimant worked without restrictions and was fully able to function.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file.

2. The parties' Joint Exhibits 1 through 35, admitted at the hearing.

3. The testimony of Claimant, Jamie Lopez, and Melissa Rodriguez-McDowell, taken at hearing.

4. The post-hearing deposition testimony of Delyn D. Porter, M.A., CRC, taken March 19, 2019, by Defendants, Employer/Surety.

5. The post-hearing deposition testimony of Kenneth E. Newhouse, M.D., taken on April 11, 2019, by Claimant.

6. The post-hearing deposition testimony of Barbara Nelson, M.S., CRC, taken on April 15, 2019, by Defendant, Industrial Special Indemnity Fund.

7. The post-hearing deposition testimony of Beth Rogers, M.D., taken on April 22, 2019, by Defendants, Employer/Surety.

8. The post-hearing deposition testimony of Nancy J. Collins, Ph.D., taken on April 26, 2019, by Claimant.

9. The post-hearing deposition testimony of Nancy Greenwald, M.D., taken on April 30, 2019, by Defendants, Employer/Surety.

All outstanding objections are overruled and motions to strike are denied.

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

FINDINGS OF FACT

1. **Background**. Claimant was born in 1957 in Mexico. She was 61 years old and resided in Nampa at the time of the hearing. She is right-handed, five feet nine inches tall, and weighs approximately 280 pounds. She fluently speaks, reads, and writes Spanish. She speaks and to a lesser extent reads English, but cannot write in English.

2. Claimant attended public school in Sonora, Mexico through the sixth grade. Thereafter, at the age of 12, she began working. She packed water from a well, worked for a nurse, and performed housework including meal preparation and laundry for her aunt and others. From the age of 15 until 21, Claimant worked for another aunt housecleaning and also stocking, ordering, serving customers, and tending a small store.

3. In approximately 1979, at the age of 21, Claimant came to the United States. She worked in the fields in Arizona and then worked cleaning offices in Phoenix. She subsequently met her husband and started a family. She continued house cleaning, babysitting, and also worked fabricating mobile homes for a time. For approximately four years she drove an ice cream truck and sold ice cream until she was robbed at gunpoint while selling ice cream.

4. In approximately 2000, Claimant moved to Idaho and began working at AAA as a home health care aide. AAA sent Claimant to provide cleaning, mopping, laundry, cooking, grocery shopping, and personal care assistance including showering, bathing, and dressing to elderly individuals and disabled youth and adults. Claimant's job with AAA was physically demanding. She worked five days per week with youth, seven days per week with adults. Her work required standing or walking seven to eight hours per day, bending, kneeling, moving clients, and lifting up to 75 pounds. She had no problems performing her work duties.

5. In April 2005, Claimant was kicked in the knee while assisting a client. She was examined and diagnosed with a knee contusion. Knee x-rays revealed degenerative joint disease. Her knee pain resolved within approximately two weeks and she missed no time from work.

6. In 2006, Claimant's husband was permanently disabled by a stroke. Claimant cared for him. He became one of the AAA clients for whom she provided care. He weighed approximately 230 pounds and Claimant lifted him on occasion.

7. In February 2009, Claimant injured her right shoulder while caring for a client. Her shoulder pain resolved and she missed no time from work.

8. In February 2014, Claimant was stopped when her vehicle was hit by another car. She developed headaches and back and neck pain. After several months of physical therapy her pain entirely resolved.

9. Prior to 2015, Claimant enjoyed gardening and regularly knelt to tend her garden. She mowed the lawn and was self sufficient in caring for her garden, lawn, and home.

10. In February 2015, Claimant continued to care for her husband as a client of AAA. She also worked for AAA assisting a profoundly disabled 12-year old client weighing approximately 70 pounds. The client lived in a two-story home. Claimant arrived at the client's home each week day by 5:00 a.m. where she changed, fed, and dressed him for school. She carried the client's wheelchair and then the client down a flight of stairs and placed him in the wheel chair in preparation for boarding a bus to school. Claimant met the client when he returned from school on the bus. She carried him and then the wheelchair back up the stairs and fed, bathed and dressed him. Due to plumbing issues in the client's home in February 2015, Claimant had to carry five-gallon buckets of water from the kitchen to a downstairs bathroom to bathe the client daily.

11. Immediately prior to February 17, 2015, Claimant used no prescription medication, was not treating with any physician for any medical issue, and no physician had recommended to her any work or activity restrictions.

12. **Industrial accident and treatment.** On February 17, 2015, Claimant was carrying the client's wheelchair down the stairs when she slipped and fell down the stairs, fracturing her right hip. Claimant drove herself home, but upon arriving could hardly get out of

her car. She presented to the emergency room and was taken to surgery that same day by Erik Heggland, M.D. Dr. Heggland performed a screw fixation of Claimant's right femoral neck fracture. At the time of the accident, Claimant was earning $10.60 per hour and working approximately 60-65 hours per week.

13. Following Claimant's right hip surgery, she suffered significant ongoing right hip pain that did not resolve. Her persisting hip pain affected her gait and she developed increasing left knee pain and popping.

14. On August 11, 2015, Darby Webb, M.D., performed a second right hip surgery consisting of total right hip arthroplasty for femoral neck non-union. Claimant continued to suffer left knee pain and popping due to the altered gait she adopted from the time of her first hip surgery until her total hip replacement.

15. In June 2016, under the direction of Nancy Greenwald, M.D., Claimant attended a WorkFit rehabilitation program for 15 days; however, she did not believe the program strengthened her significantly. She entered the program using a walker for stability. WorkFit records indicate Claimant progressed physically during her participation in the program. She was encouraged to wean off using a walker.

16. On June 24, 2016, Dr. Greenwald found Claimant had reached maximum medical improvement and rated her permanent impairment. Dr. Greenwald provided final work restrictions for Claimant of no ladder climbing, avoiding kneeling or crawling, changing positions as needed, and lifting no more than 35 pounds. Dr. Greenwald imposed no standing or walking restrictions and did not require Claimant to use a walker.

17. **Work search.** Claimant was assisted by Commission rehabilitation consultant Melissa Rodriguez-McDowell in her search for work commencing in August 2015.

18. Claimant contacted AAA several times seeking work but testified she was told all available work was heavy duty and until Claimant could leave her walker behind AAA had no suitable work for her.

19. Claimant applied for positions with other employers. With assistance from her daughter and others, she completed numerous, mostly on-line, applications. Claimant presented in person for interviews with at least 10 businesses seeking employment. She attended each interview with a walker and was rejected each time. She was repeatedly informed to come back when she could work without a walker. Claimant's work search journal lists approximately 141 potential employers she contacted unsuccessfully seeking employment and the date of her contact with each. Exhibit 14.

20. **Condition at the time of hearing.** At the time of hearing, Claimant testified her right hip and left knee were painful. Her right hip pain compels her to regularly alternate sitting and standing positions. She cannot kneel. Claimant now has painful shoulders and can only sit, stand, or walk, for approximately an hour. Since her accident she is unable to tend her garden. She does little sweeping, no mopping and no vacuuming at her home. Claimant can slowly climb stairs but only with the support of a handrail. She believes she suffers from depression. She is not convinced that she has diabetes or high blood pressure. However, she agrees with Dr. Greenwald's report that she suffers depression. Claimant does not like to take medications, including those for depression.

21. At the time of hearing Claimant was receiving Social Security Disability benefits; however, she would have preferred to be working with people. Claimant was motivated to find work as she was permitted to earn up to $1,000.00 per month without affecting her Social Security benefits.

22. **Credibility.** AAA asserts Claimant is not credible because she testified that AAA did not offer her employment. AAA asserts that it offered her suitable employment which she declined. Defendants further assert that Claimant's professed need to use a walker is not credible, that her use of a walker is not medically indicated, and that she sabotaged her own job search by taking her walker to each interview. Both assertions are addressed hereafter. Having observed Claimant and her daughter at hearing and compared their testimony with other evidence in the record, the Referee finds that both are credible witnesses.

DISCUSSION AND FURTHER FINDINGS

23. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

24. **Permanent impairment.** The first issue is the extent of Claimant's permanent impairment, including the portion thereof attributable to her industrial accident and the portion attributable to pre-existing conditions. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho

Code § 72-424. A determination of physical impairment is a question of fact and the Commission is the ultimate evaluator of impairment. Soto v. J.R. Simplot, 126 Idaho 536, 887 P.2d 1043 (1994).

25. In the present case on June 24, 2016, Dr. Greenwald rated Claimant's right hip impairment at 10% of the whole person due to her industrial accident. Kenneth Newhouse, M.D., examined Claimant on June 1, 2017, at her counsel's request and rated her permanent impairment due to her right hip condition at 12% of the whole person. Dr. Greenwald's rating is more persuasive than Dr. Newhouse's rating because she examined and monitored Claimant repeatedly before, after, and during her participation in the 15-day WorkFit rehabilitation program and thus had more extensive opportunity to evaluate Claimant's condition.

26. Physiatrist Beth Rogers, M.D., reviewed Claimant's medical records at Employer/Surety's request and rated her pre-existing whole person impairments as follows: right knee arthritis of 10%, left knee arthritis of 3%, diabetes of 3%, gastroesophageal reflux disease of 1%, and hysterectomy of 1%; collectively totaling 18% whole person permanent partial impairment. Exhibit 6.

27. Claimant has proven she suffers permanent impairments totaling 28% of the whole person, with 10% attributable to her 2015 industrial accident and resulting right hip fracture and 18% attributable to her pre-existing conditions.

28. **Permanent disability**. The next issue is the extent of Claimant's permanent disability, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise. "Permanent disability" or "under a 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 permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. 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 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. In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995). The proper date for disability analysis is the date of the hearing, not the date that maximum medical improvement has been reached. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012).

29. To evaluate Claimant's permanent disability several items merit examination including the physical restrictions resulting from her permanent impairments and her potential employment opportunities—particularly as identified by vocational experts.

30. Work restrictions. Prior to her February 17, 2015 work accident, no medical provider had discussed or imposed any restrictions on Claimant's work or other activities.

31. Dr. Rogers, who never examined Claimant but nevertheless rated her pre-existing permanent impairments, recommended restrictions based upon those pre-existing impairments,

including: overall limited to light-duty work with lifting up to 20 pounds occasionally; no kneeling, crouching, stooping, squatting, climbing, or walking on uneven ground with the right knee; and seldom to occasional kneeling, crouching, stooping, squatting, climbing, or walking on uneven ground with the left knee. Dr. Rogers testified in reviewing Claimant's records and determining pre-existing permanent impairments and restrictions she did not have Claimant's deposition, formal job description at AAA, or specific information about how Claimant was functioning in her job, her stamina, walking, standing, or kneeling activities except as may have been stated in the medical records,. Rogers Deposition, pp. 30-31, 34.

32. Dr. Rogers questioned Claimant's need for a walker, critiquing surveillance video footage of Claimant getting into a car, and testified: "it's very difficult for people with functional impairments to get in and out of cars. She did it fairly easily without a walker." Rogers Deposition, p. 26, l. 24 through p. 27, l. 2. Yet as noted Dr. Rogers rated Claimant's pre-existing impairments including 10% whole person right knee and 3% whole person left knee and recommended specific lower extremity restrictions including no kneeling, crouching, stooping, squatting, or walking on uneven ground with the right knee.

33. Dr. Newhouse testified that in his practice he examines the patient, discusses the patient's history and imaging studies before arriving at reasonable work or other activity restrictions. He affirmed that "it would be impossible for me to look at an x-ray with the patient absent having not seen that patient, not examine[d] that patient and be able to come up with what I would consider to be reasonable restrictions." Newhouse Deposition, p. 38, l. 23 through p. 39, l. 2.

34. Following Claimant's completion of the WorkFit program, Dr. Greenwald concluded that Claimant could return to full-time work but due to her right hip condition, she

should not climb ladders and should avoid kneeling or crawling, change positions as needed, and not lift more than 35 pounds. Dr. Greenwald imposed no restrictions for standing or walking and did not require use of a walker. She concluded Claimant's FCE performed at the conclusion of the WorkFit program was invalid because she did not put forth full effort. However, Dr. Greenwald testified that in determining restrictions she never relied upon the results of any functional capacity evaluation:

> I actually want to explain a little bit about my thinking of functional capacity assessments. I actually do not use the limitations found on that to make a decision on work restrictions. I never use them. I use work restrictions on what the diagnosis is, her diagnosis and status after total hip arthroplasty.

Greenwald Deposition, p. 24, l. 20 through p. 25, l. 2.

35. Ryan Bishop, DPT, of Wright Physical Therapy, performed a one-day WorkWell functional capacity evaluation of Claimant on April 7, 2017, and concluded she was restricted to: lifting floor to waist 20 pounds rarely, 17.5 pounds occasionally, and 7.5 pounds frequently; lifting waist to crown 15 pounds rarely, 10 pounds occasionally, and 5 pounds frequently; sitting frequently; walking occasionally; forward bending and overhead work rarely; and no stair climbing, kneeling, half-kneeling, or crouching. Exhibit 3. Mr. Bishop recorded:

> Client gave maximal effort on all test items as evidenced by predictable patterns of movement including increase accessory muscle recruitment, counterbalancing and use of momentum, and physiological responses such as increase heart rate. Functional limitations noted are consistent with physical impairments and diagnosis with continued core and hip weakness.

Exhibit 3, p. 612. On June 1, 2017, Dr. Newhouse agreed with the conclusions of the FCE completed by Mr. Bishop. Newhouse Deposition, p. 45.

36. Dr. Greenwald was Claimant's treating physician from March 7 until June 24, 2016, and had opportunity to evaluate Claimant's functionality particularly as she monitored Claimant's condition during her participation in the WorkFit rehabilitation program

for 15 days. However, as Dr. Greenwald did not consider Claimant's actual performance because she never utilizes the results of a functional capacity evaluation but rather relies solely on her diagnosis of the patient's condition—in Claimant's case right hip total arthroplasty—to assign work restrictions, Dr. Greenwald's restrictions are not as persuasive as the valid FCE performed by Mr. Bishop and adopted by Dr. Newhouse.

37. The Referee finds that Claimant is restricted to lifting floor to waist 20 pounds rarely, 17.5 pounds occasionally, and 7.5 pounds frequently; lifting waist to crown 15 pounds rarely, 10 pounds occasionally, and 5 pounds frequently; sitting frequently; walking occasionally; forward bending and overhead work rarely; and no stair climbing, kneeling, half-kneeling, or crouching.

38. The parties dispute Claimant's need to use a walker. Claimant attended the hearing with a walker and testified she used the walker as a precaution to prevent her from falling. Claimant has fallen at least twice without the walker. She acknowledged that using the walker makes her shoulders hurt, but she feels more stable and secure with the walker. From the beginning of the WorkFit program, Dr. Greenwald encouraged Claimant to wean herself off of a walker to help strengthen her right leg and reduce her shoulder wear and pain. Dr. Greenwald testified Claimant did not need a walker and would be better off without it. Dr. Newhouse explained how Claimant's right hip abductor weakness which he documented affected her gait, stability, and fall risk. When asked whether it was reasonable for Claimant to use a walker he responded: "Absolutely." Newhouse Deposition, p. 33, l. 14. In short, no doctor has recommended Claimant use a walker; however, Dr. Newhouse persuasively opined it was reasonable for her to do so.

39. Opportunities for gainful activity. Four vocational experts have evaluated Claimant's capacity for gainful employment. Their opinions are addressed below.

40. *Melissa Rodriguez-McDowell*. Industrial Commission rehabilitation consultant Melissa Rodriguez-McDowell began assisting Claimant on August 10, 2015. She met with Claimant on only one occasion. On August 11, 2015, Claimant underwent total hip replacement surgery. On August 12, 2016, Ms. Rodriguez-McDowell closed Claimant's rehabilitation file.

41. Ms. Rodriguez-McDowell opined Claimant had transferable job skills in care giving and home health care but was not advised of Claimant's prior store experience. She prepared a job site evaluation which she submitted to Dr. Webb who indicated Claimant could return to modified duties on January 4, 2016, and could continuously sit, occasionally stand, push or pull five pounds, and perform sedentary work for four hours per day.

42. In June 2016, Dr. Greenwald provided final restrictions including avoiding ladder climbing, kneeling, crawling, and lifting more than 35 pounds. Ms. Rodriguez-McDowell provided these restrictions to AAA who was to follow up with Claimant. On or about July 14, 2016, AAA indicated they could accommodate Claimant's restrictions. Yesi Gil of AAA advised Ms. Rodriguez-McDowell that AAA had contacted Claimant about employment but she declined to work without her walker. Ms. Rodriguez-McDowell understood AAA offered Claimant a job, but Claimant chose not to return to work. Ms. Rodriguez-McDowell then closed Claimant's file per protocol when an injured worker refuses work. Exhibit 23, pp. 1060 and 1059, Exhibit 17 case notes.

43. Ms. Rodriguez-McDowell testified the 141 jobs Claimant applied for would be within her restrictions. She was not aware of any physician requiring Claimant to use a walker. Ms. Rodriguez-McDowell opined Claimant would be employable at jobs paying from $8.00 to

$10.00 per hour. She noted Claimant is bilingual and thus more marketable than monolinguals. Ms. Rodriguez-McDowell had no contact with Claimant after closing her file but believed Claimant would be employable in other positions as indicated in her case notes. At hearing she testified she believes Claimant is still employable.

44. *Delyn Porter*. Delyn Porter, MS, CRC, a vocational rehabilitation expert retained by Employer/Surety, interviewed Claimant on January 23, 2019, reviewed her medical and employment records, and prepared a report dated January 25, 2019, and two subsequent addendums assessing her employability.

45. Mr. Porter acknowledged that Claimant told him she was having no knee symptoms at the time of her 2015 industrial accident. She had no knee, back, neck, or shoulder problems prior to her 2015 industrial accident other than immediately after acute injuries to her knee in April 2005, her shoulder in February 2009, and her neck and back in 2014—all of which resolved within approximately six weeks or less. Mr. Porter admitted Claimant was performing heavy duty work at the time of her 2015 industrial accident.

46. Mr. Porter is bilingual and testified that Claimant's command of English was best characterized as "street language" adequate for most daily conversations, that Claimant "gets along" but does not always use full sentences, conjugate verbs correctly, or display appropriate syntax. Mr. Porter affirmed that Claimant reads English with difficulty and is not able to write in English. Porter Deposition, pp. 39-40. Indicative of this limitation, Mr. Porter testified that Claimant's cover letters accompanying her written job applications were addressed: "Dear Blank" and would not have favorably impressed a potential employer. Porter Deposition, pp. 26-27. Further addressing Claimant's job search, Mr. Porter opined that some of the positions Claimant applied for contained physical requirements exceeding the work restrictions

imposed even by Dr. Greenwald. Mr. Porter also testified that Claimant's attendance at all of her employment interviews with a walker would present her in a negative light.

47. Mr. Porter opined that accepting Dr. Rogers' restrictions or the FCE restrictions found by Ryan Bishop and agreed to by Dr. Newhouse, Claimant was limited to sedentary work, but lacked the skills necessary to compete for sedentary positions. Mr. Porter concluded that Claimant was totally and permanently disabled under the odd-lot doctrine and it would be futile for her to search for work.

48. Mr. Porter observed that Dr. Rogers' pre-accident 20-pound lifting restriction was more onerous that Dr. Greenwald's 35-pound post-accident lifting restriction. He testified that relying upon the pre-existing permanent impairments and related work restrictions found by Dr. Rogers, Claimant was totally and permanently disabled before her February 17, 2015 industrial accident. Porter Deposition, p. 17. "Based on my review of the records, the 02/17/2015 industrial accident does not contribute any additional permanent disability beyond that imposed by Dr. Rogers as a result of the pre-existing and non-industrial medical history." Exhibit 10, p. 705. Mr. Porter opined that accepting only Dr. Greenwald's work restrictions Claimant was employable post-accident in her labor market. Porter Deposition, p. 21.

49. *Barbara Nelson*. Barbara Nelson, MS, CRC, a vocational expert retained by ISIF, interviewed Claimant on January 16, 2019, reviewed her medical and employment records, and prepared a report dated January 31, 2019, assessing her employability. Ms. Nelson testified that before Claimant's 2015 industrial accident, she worked long hours at a heavy work job: "She wasn't in any kind of a modified job. She didn't have any accommodations. She wasn't seeking medical care. She wasn't taking medications. She wasn't in any kind of therapy. So she was

just a strong, hard, tough worker." Nelson Deposition, p. 12, ll. 20-24. Claimant told Ms. Nelson that she was having no knee symptoms prior to her 2015 industrial accident.

50. Ms. Nelson noted that Dr. Greenwald's restrictions were significantly different from those of the other practitioners and from Claimant's capacity demonstrated on objective testing. Accepting the FCE limitations documented by Mr. Bishop and endorsed by Dr. Newhouse, Ms. Nelson opined Claimant was limited to a partial range of sedentary and light positions. Ms. Nelson concluded that considering Claimant's "residual physical capacities, in combination with her nonmedical factors, her age, her lack of education, her lack of transferable skills, her lack of literacy …. The conditions of the labor market, I felt that she was not employable." Nelson Deposition, p. 24, ll. 11-16. Ms. Nelson concluded Claimant is totally and permanently disabled due to her 2015 industrial accident.

51. *Dr. Collins*. Nancy Collins, Ph.D., a vocational expert retained by Claimant interviewed Claimant on April 14, 2016, reviewed her medical and employment records, and prepared a report on May 6, 2016, assessing her employability.

52. Dr. Collins testified that Claimant's records documented no restrictions, limitations, or ongoing medical treatment prior to her 2015 industrial accident. Claimant told Dr. Collins that she was having no knee symptoms prior to her 2015 industrial accident. Dr. Collins noted Claimant was an in-home caregiver that helped disabled clients with bathing, cleaning, transfers requiring a lot of lifting, bending, and kneeling. She found no evidence of accomodation or periods of absence. Dr. Collins was not persuaded by Mr. Porter's opinion that Claimant was disabled prior to her hip fracture noting: "The fact that Ms. Lopez was working at a heavy physical exertion level, 65 hours a week, with no need for mobility assistance prior to her industrial accident, is not considered." Exhibit 8, p. 651. She disagreed with Mr. Porter's

opinion that Claimant was totally and permanently disabled before she broke her hip in her 2015 industrial accident "because she had had very little treatment for any of those [pre-existing] conditions, and she was performing a heavy to very heavy job almost 4,000 hours a year, you know, more than 12 hours a day, and it just would make no sense." Collins Deposition, p. 11, ll. 21-25.

53. Dr. Collins testified that some of the jobs recommended by Ms. Rodriguez-McDowell required standing and walking all day, lifting beyond Claimant's restrictions, and that Claimant lacked qualifications to compete for some positions.

54. Dr. Collins noted Claimant had worked since she was six years old and had a good work ethic. She opined Claimant's work search was a legitimate effort, that Claimant wanted to work, and could have earned up to $1,000.00 per month in supplemental income by working without jeopardizing her Social Security benefits.

55. Considering Dr. Greenwald's work restrictions of lifting no more than 35 pounds, no kneeling, and with ad lib position changes to sit, stand, or walk, Dr. Collins opined Claimant had lost 94% of her labor market access and would experience a 46% loss of earning capacity. Dr. Collins opined that "because her labor market access is so limited, I feel that this vocational factor should be given twice the weight, leaving her with a 78% disability inclusive of impairment. Again this assumes Ms. Lopez is able to wean from using the walker." Exhibit 8, p. 648.

56. Dr. Collins reviewed the results of the FCE done by Wright Physical Therapy, finding Claimant limited to standing eight minutes at a time, overhead lifting for one minute, and forward flexing for one minute. Dr. Collins testified that "you need to pay attention to not only the physical restrictions from the physicians, but also the functional limitations that are

identified" by the FCE in determining viable employment options. Collins Deposition, p. 40, ll. 7-9. Considering the results of the FCE conducted by Mr. Bishop, Dr. Collins opined Claimant was totally permanently disabled. She opined that given all of the information she reviewed Claimant was not employable and was precluded from the competitive labor market because of her hip fracture.

57. *Evaluating the vocational opinions.* Defendants assert Claimant sabotaged her own work search by attending interviews with her walker. While this may be accurate, Dr. Collins opined that if Claimant presented for an interview without her walker, was hired, and then presented for work with her walker: "I think the employer would have the right to deny her employment at that point. Even if she came in with a cane instead of a walker, or she walked in with a very awkward, slow gait, she's going to present as a liability, safety issue. So no, I would never recommend that." Collins Deposition, p. 21, ll. 4-9. As noted above, Claimant's use of a walker is reasonable.

58. The opinion of Dr. Collins regarding Claimant's permanent disability is persuasive in that it is supported by the record and consistent with Claimant's actual extensive but unsuccessful job search experience. The conclusions reached by Dr. Collins and Ms. Nelson that Claimant is essentially precluded from the competitive labor market are similar, thorough, well-reasoned, and persuasive.

59. As noted above Dr. Collins found Dr. Greenwald's work restrictions of lifting no more than 35 pounds, no kneeling, and with ad lib position changes to sit, stand, or walk, precluded Claimant's access to 94% of her labor market and resulted in a 78% permanent disability inclusive of impairment. It follows that by applying the more persuasive and more onerous work restrictions found by Mr. Bishop and adopted by Dr. Newhouse, Claimant's loss of

labor market access and her resulting permanent disability will be greater. Indeed, Claimant's circumstance approaches the hypothetical scenario described in Deon v. H&J, Inc., 2013 WL 3133646 (Idaho Ind. Com. May 3, 2013), wherein the Commission noted that evaluating permanent disability by averaging loss of labor market access and expected wage loss produces an increasingly skewed result as the residual labor market decreases:

> [T]he averaging method itself is not without conceptual and actual limitations. As the loss of labor market access becomes substantial, and the expected wage loss negligible, the results of the averaging method become less reliable in predicting actual disability. For illustration, as judged by the averaging method, a hypothetical minimum wage earner injured sufficiently to lose access to 99% of the labor market may theoretically suffer no expected wage loss if she can still perform any minimum wage job. Calculation of such a worker's disability according to the averaging method would produce a permanent disability rating of only 49.5% ([99% + 0%] ÷ 2) even though her actual probability of obtaining employment in the remaining 1% of an intensely competitive labor market may be as remote as winning the lottery.

Deon, 2013 WL 3133646

60. Based on Claimant's right hip impairment of 10% of the whole person due to her industrial accident and her pre-existing impairments including right knee arthritis of 10%, left knee arthritis of 3%, diabetes of 3%, GERD of 1%, and hysterectomy of 1%; collectively totaling 18% whole person permanent partial impairment, her permanent physical limitations including her restrictions of lifting floor to waist 20 pounds rarely, 17.5 pounds occasionally, and 7.5 pounds frequently; lifting waist to crown 15 pounds rarely, 10 pounds occasionally, and 5 pounds frequently; sitting frequently; walking occasionally; forward bending and overhead work rarely; and no stair climbing, kneeling, half-kneeling, or crouching; and considering her non-medical factors including her age of 58 at the time of the accident and 61 at the time of hearing, limited sixth grade formal education in Mexico, limited transferable skills, limited English reading proficiency and inability to write in English, and inability to return to her

previous positions, Claimant's ability to engage in regular gainful activity in the open labor market in her geographic area has been significantly reduced. The Referee concludes that Claimant has suffered a permanent disability of 90%, inclusive of her 28% whole person permanent impairment.

61. Odd-lot**.** A claimant who is not 100% permanently disabled may prove total permanent disability by establishing he is an odd-lot worker. An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." Bybee v. State, 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 the claimant. Dumaw v. J. L. Norton Logging, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). A claimant may satisfy his burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways: (1) by showing that he has attempted other types of employment without success; (2) by showing that he or vocational counselors or employment agencies on his 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).

62. In the present case, Claimant has presented significant direct evidence of her own extensive but unsuccessful work search. Dr. Collins opined that Claimant's employment search was genuine, that she was motivated, and could have earned up to $1,000.00 per month without

jeopardizing her Social Security benefits. Claimant's assertion that she is unemployable is corroborated by the expert testimony of Dr. Collins and Ms. Nelson that Claimant is an odd-lot worker and it would be futile for her to search for work. As noted, Dr. Collins' and Ms. Nelson's conclusions are persuasive. Claimant has shown she has unsuccessfully searched for work and that further searching would be futile. She has established a prima facie case that she is an odd-lot worker, totally and permanently disabled, under the Lethrud test.

63. Once a claimant establishes a prima facie odd-lot case, the burden shifts to Defendants "to show that some kind of suitable work is regularly and continuously available to the claimant." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). Defendants must prove there is:

> An actual job within a reasonable distance from [claimant's] home which [claimant] is able to perform or for which [claimant] can be trained. In addition, the Fund must show that [claimant] has a reasonable opportunity to be employed at that job. It is of no significance that there is a job [claimant] 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.

Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 407, 565 P.2d 1360, 1364 (1977).

64. In the present case, AAA asserts it offered Claimant a job which Claimant declined, thus rebutting any prima facie odd-lot case. The parties dispute this point. Ms. Rodriquez-McDowell testified she understood AAA offered Claimant work within her restrictions. However, the restrictions were those assigned by Dr. Greenwald, including a 35 pound lifting capacity, rather than those later imposed by Mr. Bishop and Dr. Newhouse, which have been found more persuasive.

65. Furthermore, referring to a letter to Claimant signed by AAA Care Coordination Department Manager Yesenia "Yesi" Gil, Ms. Rodriguez-McDowell testified:

> [S]he went to do a visit for the injured worker's spouse and during that time it was indicated that the injured worker was unable to resume work due to pain and that she is still using a walker.
> ….
>
> Q. (by Mr. Bauman) … after you received the correspondence from Jessie Gill [sic] that you have just testified about, was it your understanding that the employer had offered Mrs. Lopez a job within her restrictions?
>
> A. Yes.

Transcript, p. 134, ll. 21-24 and p. 135, l. 21 through p. 136, l. 1.

66. However, Claimant testified she contacted AAA on three or four occasions after her second hip surgery seeking work and AAA did not offer her work within her restrictions:

> [S]he told me you just got the job with AAA and I was going over there and at that time Jessie [sic]—it was on the ones that way there. I was always asking for her and she was coming and she was telling me all the time you know everything is heavy over here, we don't have nothing [sic] for you.
> ….
>
> Q. And do they have any office work that you could do?
>
> A. Nobody offer [sic] me nothing [sic]. They always told me the same thing, that there was nothing for me, because everything was heavy for me, lifting the—I take—I take some of the load—it was 15 to 20 pounds. No kneel. No kneel. No stairs and those things and I taking the paper in and they told me, sorry, but we don't have nothing [sic] for you.

Transcript, p. 78, l. 8 through p. 79. L 9.

67. Ms. Rodriguez-McDowell's case notes indicate that AAA on several occasions during the course of Claimant's post-accident treatment advised her it did not have suitable work given her temporary restrictions. Exhibit 17, pp. 949-950. Ms. Rodriguez-McDowell's case notes of July 6 and 14, 2016, provide:

> 07-06-16 ….
> I contacted Yesi Gil of AAA … we discussed the claimant's permanent work restrictions. …. She indicates she may be able to accommodate. She will review further and advise if she can provide work to the claimant
> ….

> 07-14-16 ….
> I spoke with Yesi Gil …. She said she contacted the claimant and is waiting for a response. She is able to accommodate the permanent work restrictions. She will prepare a written work offer and follow-up if/when she hears from the claimant.
> ….
>
> 08-12-16 ….
> Reason for closure: The claimant has been released to return to work. Her time of injury employer has offered her a position within her permanent work restrictions and she has declined the work offer.

Exhibit 17, pp. 954-955.

68. However, the record contains no direct testimony of or written offer from AAA to Claimant of suitable employment after she completed the WorkFit program and was given permanent restrictions by Dr. Greenwald. The only arguably relevant correspondence from AAA is an August 3, 2016 letter from Yesi Gil to whom it may concern which provides in pertinent part:

> We received the latest work restrictions for G. Lopez … on 7/6/16 from Melissa Rodriguez-McDowell via email.
> ….
>
> On 07/24/16 I completed an Agency Quality Assurance visit for Ms. Lopez's spouse and met with Mr. Lopez in person. During this time I asked her about her status, and wellbeing she indicated that she was unable to resume work due to pain and stated she is still using a walker, which would make it very difficult for her to help with any clients.

Exhibit 23, p. 1059.

69. AAA has not proven it offered Claimant employment within her restrictions after she reached maximum medical improvement from her 2015 industrial accident.

70. Even assuming AAA offered Claimant a position on or about July 24, 2016, Claimant asserts Defendants have failed to meet the requirements of Rodriguez v. Consolidated Farms, LLC, 161 Idaho 735, 360 P.3d 856 (2017), to rebut her prima facie case.

71. In Rodriguez, the worker sustained severe injury to his dominant hand and established a prima facie odd-lot case. Employer attempted to rebut the case with testimony by its supervisor that employer offered suitable modified work to Rodriguez. The Court noted the Industrial Commission had reviewed the evidence and found it was impossible to know whether the modified job as described by the employer was one that Rodriguez retained the physical capacity to perform. Thus, it was unclear whether the actual job was suitable. The Court declared:

> We agree. The only evidence presented to the Commission by Appellants that a suitable job existed and had been offered was (1) conclusory testimony that a job had been offered that was suitable, and (2) a written job offer that provided no indication of suitability. Specifically, Appellants presented testimony to the Commission that "the job being offered to [Rodriguez] was essentially his time-of-injury job with any necessary modifications to account for his post-injury physical limitations." While such a job could hypothetically be adequate, a finding of suitability requires more evidence that this nebulous statement. It is concerning, to say the least, that Employer never provided the Commission with any kind of detailed breakdown of what tasks the alleged modified job would entail.
> ....
>
> The written job offer submitted into evidence was likewise insufficient to prove suitability. In reality, it is nothing more than a form document. It lists the following "work" as "available" to Rodriguez: Drip Operator; Miscellaneous Labor-Greenhouse; Compost Operator; Grounds Maintenance; Contract Support; Dreyer Operator; Field Mower; Cultivator; and Field Prep. The written offer contains no breakdown of what specific tasks are involved in these positions. ....
>
> The Commission was right to be troubled by the complete absence of job specifics in evidence. .... [Appellants] provided evidence of a job offer, but did not provide the necessary details for the Commission to be sure the job was suitable. We cannot expect the Commission to simply take an employer's word that a job will be suitable. There must be evidence presented of suitability.

Rodriguez, 161 Idaho at 744, 390 P.3d at 865.

72. In the present case, Defendants have asserted AAA offered Claimant a suitable actual job and have presented Rodriguez-McDowell's conclusory testimony that a job was

offered and would be appropriate for Claimant. However, no document has been produced memorializing the alleged job offer. To reiterate the Court's concern in Rodriguez: "a finding of suitability requires more evidence than this nebulous statement. .... Employer never provided the Commission with any kind of detailed breakdown of what tasks the alleged modified job would entail." Rodriguez, 161 Idaho at 744, 390 P.3d at 865. Absent job specifics, the record herein does not provide the necessary details to be sure any actual job that may have been offered to Claimant by AAA was suitable.

73. Furthermore, Defendants have failed to satisfy the other prong of Rodriguez that this type of job is generally available. As the Rodriguez Court observed: "This prima facie showing concerns positions that regularly occur in the labor market. A single job, offered by an employer who has a previous relationship with a claimant, is of limited relevance in this context because it is unlikely to be representative of a 'branch of the labor market.'" Rodriguez, 161 Idaho at 742, 390 P.3d at 863. The Court explained the employer's dual evidentiary burden and the rationale therefore:

> [I]n order to carry its burden, an employer must provide evidence showing that a "kind of suitable work" in a "well-known branch of the labor market" exists and is "regularly and continuously available" in that market.
>
> Once an employer has shown that a kind of suitable work exists, then the employer "must introduce evidence that there is an actual job within a reasonable distance from [claimant's] home which he is able to perform or for which he can be trained." Id. at 407, 565 P.2d at 1364. While clearly interrelated, providing evidence of an actual job opportunity is a separate evidentiary showing from providing evidence that a kind of suitable work exists that is regularly and continuously available in a well-known branch of the job market. In other words, an employer has a dual evidentiary burden once a claimant has made a prima facie showing of odd-lot status. First, an employer must show that there is a type of job that is both suitable for a claimant and that occurs regularly and continuously in a well-known branch of the job market. Second, an employer must show that an actual job of that type exists within a reasonable distance from a claimant's home as of either the time of injury or the time of the hearing.

> Appellants have confused these burdens. They focus their argument on the proposition that an actual job existed that was offered to Rodriguez. They claim that the single job offered was itself both suitable and regularly and continuously available. Even if they had proven such a job offer, which they clearly failed to do, Appellants needed to show that a kind of job, not merely a single, unique, job tailored to Rodriguez' impairments, existed in the labor market. The reason for this rule is to protect disabled claimants. To allow an employer's burden to be satisfied by showing the existence of a single job tailored to a claimant would burden a claimant with significant risk. Companies' needs change. Companies go out of business. This is why the law requires not only a showing that a single job exists, but also a showing that it is a kind of job that exists regularly and continuously in a well-known branch of the labor market. Accordingly, if the single job opportunity offered by the employer ceases to exist, the claimant will have a legitimate chance to find another job of the same type.

Rodriguez, 161 Idaho at 743-744, 390 P.3d at 864-865.

74. Defendants have not established that there is a suitable actual job regularly and continuously available which Claimant can perform and at which she has a reasonable opportunity to be employed. They have failed to rebut Claimant's prima facie case.

75. Claimant has proven that she is totally and permanently disabled pursuant to the odd-lot doctrine.

76. **Apportionment pursuant to Idaho Code § 72-406**. Idaho Code § 72-406 (1) provides that 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 pre-existing physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease. The conclusions set forth above render apportionment under Idaho Code § 72-406 moot.

77. **ISIF liability**. The next issue is whether ISIF bears any liability in the present case. Idaho Code § 72-332 provides that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing

impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his income benefits out of the ISIF account. In Dumaw v. J. L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court summarized the four inquiries that must be satisfied to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was a pre-existing impairment; (2) whether that impairment was manifest; (3) whether the impairment was a subjective hindrance to employment; and (4) whether the impairment in any way combined with the subsequent injury to cause total disability. Dumaw, 118 Idaho at 155, 795 P.2d at 317.

78. Hindrance or obstacle. Claimant's pre-existing impairments include right knee arthritis of 10%, left knee arthritis of 3%, diabetes of 3%, GERD of 1%, and hysterectomy of 1%; collectively totaling 18% whole person permanent partial impairment. Even assuming all of Claimant's impairments rated by Dr. Rogers pre-existed and were manifest prior to her 2015 industrial accident, this does not establish they were a hindrance or obstacle to her employment. The third prong of the Dumaw test requires that "the pre-existing condition constituted a hindrance or obstacle to employment for the particular claimant." Archer v. Bonners Ferry Datsun, 117 Idaho 166, 172, 786 P.2d 557, 563 (1990).

79. While Dr. Rogers rated Claimant's pre-existing permanent impairments, the only indication that Dr. Rogers could point to that Claimant had knee symptoms prior to her 2015 industrial accident was the note of June 24, 2016, from occupational therapist Cameron Burnett that the accident had made her knee pain worse. Rogers Deposition, p. 37. Dr. Rogers never examined Claimant but rated her pre-existing permanent impairments and imposed restrictions

based upon those pre-existing impairments, including: overall limited to light-duty work with lifting up to 20 pounds occasionally; no kneeling, crouching, stooping, squatting, climbing, or walking on uneven ground with the right knee; and seldom to occasional kneeling, crouching, stooping, squatting, climbing, or walking on uneven ground with the left knee. Dr. Rogers admitted that in determining pre-existing impairments and restrictions she did not have Claimant's deposition, formal job description, or specific information about how Claimant was functioning in her job, her stamina, walking, standing, or kneeling activities except as may have been stated in the medical records. Rogers Deposition, pp. 30-31, 34.

80. Claimant asserts that her bilateral knee conditions did not prevent her from performing her work and testified that they did not hinder her work for any employer before the 2015 industrial accident. Claimant told Dr. Collins and Ms. Nelson that she was having no knee symptoms prior to her 2015 industrial accident.

81. Dr. Collins noted Claimant as an in-home caregiver helped disabled clients with bathing, cleaning, and transfers—duties requiring a lot of lifting, bending, and kneeling. She found no evidence of accomodation or periods of absence. Dr. Collins was not persuaded by Mr. Porter's opinion that Claimant was disabled prior to her hip fracture correctly noting she was working at a heavy physical exertion level, 65 hours a week, with no need for assistance prior to her industrial accident. Similarly, Ms. Nelson testified that before Claimant's 2015 industrial accident, she worked long hours at a heavy work job: "She wasn't in any kind of a modified job. She didn't have any accommodations. She wasn't seeking medical care. She wasn't taking medications. She wasn't in any kind of therapy. So she was just a strong, hard, tough worker." Nelson Deposition, p. 12, ll. 20-24.

82. The Referee finds that Defendants have not proven that any of Claimant's

pre-existing impairments constituted a hindrance or obstacle to her employment prior to her 2015 industrial accident. The third prong of the Dumaw test is not met as to any of Claimant's pre-existing impairments.

83. Combination. Finally, to establish ISIF liability, the pre-existing impairment must combine with the subsequent industrial injury to cause total permanent disability. "[T]he 'but for' standard … is the controlling test for the 'combining effects' requirement. …. The 'but for' test requires a showing by the party invoking liability that the claimant would not have been totally and permanently disabled but for the pre-existing impairment." Corgatelli v. Steel West, Inc., 157 Idaho 287, 293, 335 P.3d 1150, 1156 (2014), rehearing denied (Oct. 29, 2014). This test "encompasses both the combination scenario where each element contributes to the total disability, and the case where the subsequent injury accelerates and aggravates the pre-existing impairment." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

84. Ms. Nelson opined that Claimant's pre-existing conditions did not contribute to her disability "Because she was demonstrating for a long period of time the ability to do heavy work for long hours with no absences, with no medical care, with—not taking medications, without modifications." Nelson Deposition, p. 25, ll. 15-19.

85. The record in the instant case contains no persuasive evidence that any of Claimant's pre-existing impairments combined with the 2015 industrial right hip injury to render her totally and permanently disabled. The final prong of the Dumaw test has not been satisfied as to any of Claimant's pre-existing impairments.

86. The weight of the evidence does not establish that any of Claimant's pre-existing impairments were a hindrance or obstacle to employment and combined with her 2015 industrial

accident to render her totally and permanently disabled.

87. Pursuant to Idaho Code § 72-332, ISIF is not liable for Claimant's pre-existing impairments.

88. **Carey apportionment.** Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54, (1984), is moot.

CONCLUSIONS OF LAW

1. Claimant has proven she suffers permanent impairment of 28% of the whole person with 10% attributable to her 2015 industrial accident and 18% attributable to her pre-existing conditions.

2. Claimant has proven permanent disability of 90%, inclusive of impairment and is totally and permanently disabled pursuant to the odd-lot doctrine.

3. Apportionment pursuant to Idaho Code § 72-406 is moot.

4. Pursuant to Idaho Code § 72-332, ISIF is not liable for Claimant's pre-existing impairments.

5. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is moot.

RECOMMENDATION

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

DATED this __3__ day of October, 2019.

INDUSTRIAL COMMISSION

_/s/_____
Alan Reed Taylor, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __11__ day of _October_____, 2019, 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:

CLINTON E MINER
412 S KINGS AVE STE 105
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JON M BAUMAN
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DANIEL A MILLER
401 W FRONT STREET SUITE 401
BOISE ID 83702

_/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GUADALUPE LOPEZ, Claimant, v. 1 & 1 HOMES CARE, INC. dba AAA HOME CARE, Employer, and STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2015-005194** **ORDER** **FILED** **OCTOBER 11, 2019**

Pursuant to Idaho Code § 72-717, Referee Alan Taylor 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 recommendations 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 proven she suffers permanent impairment of 28% of the whole person with 10% attributable to her 2015 industrial accident and 18% attributable to her preexisting conditions.
2. Claimant has proven permanent disability of 90%, inclusive of impairment and is totally and permanently disabled pursuant to the odd-lot doctrine.
3. Apportionment pursuant to Idaho Code § 72-406 is moot.
4. Pursuant to Idaho Code § 72-332, ISIF is not liable for Claimant's preexisting impairments.

5. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is moot.
6. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this __11__ day of _October_____, 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 __11__ day of _October_____, 2015, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

CLINTON E MINER
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sc _/s/_____