BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KATHY THOMAS, Claimant, v. WOODGRAIN MILLWORK, INC., Employer, and TWIN CITY FIRE INSURANCE CO., Surety, Defendants.	**IC 2013-023484** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed April 7, 2017

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. He conducted a hearing in Boise on April 28, 2016. The parties presented oral and documentary evidence and later submitted briefs. Todd Joyner represented Claimant. Lora Breen represented Defendants Employer and Surety. The case came under advisement on November 21, 2016. Referee Doug Donahue submitted proposed findings of fact and conclusions of law to the Commission for review. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

The issues to be decided according to the Notice of Hearing and as agreed to by the parties at hearing are:

1. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;

2. Whether and to what extent Claimant is entitled to:
   a. permanent partial impairment,
   b. disability in excess of PPI including total permanent disability, and
   c. medical care;
3. Whether Claimant is entitled to total permanent disability under the odd-lot doctrine; and
4. Whether apportionment of permanent partial disability for a pre-existing condition is appropriate under Idaho Code §72-406;

CONTENTIONS OF THE PARTIES

Claimant contends she was injured in a compensable lifting accident on August 20, 2013. Her major symptoms included mid back pain and left upper extremity paresthesia. A herniated disc pressed against her spinal cord. Surgery included arthrodesis from T3 through T10. Later, low back and bilateral leg pain arose. Differing physicians have rated her PPI at 13% and 22% whole person. They have imposed restrictions. Non-medical factors combine with PPI to render Claimant totally and permanently disabled. Claimant's local labor market is centered in Ontario, Oregon. Mary Barros-Bailey, Ph.D. opined Claimant's loss of labor market at 58% or 99%, depending upon which physician's restrictions are applicable. Nancy Collins, Ph.D. opined Claimant's loss of labor market at 82% or 91% upon the varying restrictions. The overall disability opinions of these vocational experts should be higher. ICRD consultant Sandy Baskett conducted a job search on Claimant's behalf and was unable to place Claimant in gainful employment. Claimant qualifies as an odd-lot worker because a job search would be futile. Defendants have failed to carry their burden of showing apportionment under Idaho Code §72-406 is appropriate.

Defendants contend that Claimant's permanent disability, while significant, does not rise to the level of total permanent disability as an odd-lot worker or otherwise. Claimant has failed to show a factual basis for applying the "futile" prong of odd-lot analysis. She has not attempted

to show a factual basis for applying any other. Claimant has skills and the ability to develop skills. She performs hobbies which require skills transferrable to gainful employment. Claimant has not significantly looked for work. Dr. Gussner's and Dr. Collins' opinions should receive more weight than Dr. Williams' and Dr. Barros-Bailey's. Claimant's actual restrictions differ from her subjective self-limitations. Ultimately, permanent disability should be assessed at no more than 61% whole person. Moreover, this disability should be apportioned because of pre-existing conditions.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant, her friends Lisa Barras and Bruce Hunter, surveillance investigator Matthew Mann, and ICRD consultant Sandra Baskett;
2. Claimant's exhibits A through V;
3. Defendants' exhibits 1 through 12;
4. Post-hearing depositions of Mark Williams, D.O., Christian Gussner , M.D., and Nancy Collins, Ph.D.

All objections in depositions are OVERRULED.

At hearing, Claimant again raised a matter upon which the Referee had ruled earlier. Despite relevant discovery requests by Defendants, Claimant did not reveal an issue or allege disability arising from a preexisting condition involving her eyesight until Claimant's vocational expert addressed this issue in a March 30, 2016 report. When Defendants became aware of a potential issue relating to eyesight, they moved to vacate the hearing. Defendants also contacted their vocational expert to ask her to consider the newly discovered vision condition in assessing disability. Claimant responded to the motion to vacate by acknowledging that Claimant's eyesight was not a component of any claim for total and permanent disability, whether 100% or odd-lot considerations. The Referee denied Defendants' motion to vacate the hearing and ruled

that, as a sanction for nondisclosure, Claimant was precluded from alleging eyesight as a basis for impairment or disability at the hearing. In that Order, the Referee expressly allowed Claimant to move to vacate the hearing for the purpose of including the issue for consideration at a hearing on a later date. Claimant did not move to vacate. Rather, at hearing, Claimant objected to certain evidence, including the testimony and report of Defendants' vocational expert, as untimely. The Referee again gave Claimant an opportunity to vacate the hearing to allow consideration of the eyesight issue. Claimant declined.

Claimant's objection to the written report of Defendants' vocational expert is not well taken. The eyesight condition is a longstanding condition with Claimant and should have been revealed timely. The written report of Claimant's vocational expert was dated within 30 days of the hearing. Claimant's attempt to squeeze Defendants' preparation into a 20-day window is not impressive. Moreover, the record was held open to allow Claimant an opportunity to have her vocational expert evaluate and respond to Defendants' expert's opinions. The Referee takes as hyperbole and rhetorical exuberance Claimant's attorney's threats to intentionally violate Commission rules and deadlines in future cases.

The undersigned Commissioners see no reason to disturb the Referee's rulings regarding pre-hearing and hearing procedure.

FINDINGS OF FACT

1. Claimant worked for employer for about 10 years.

2. On August 20, 2013 Claimant injured her upper back lifting at work.

3. After chiropractic and other conservative treatment were unsuccessful, an MRI showed a herniated disc pressing her spinal cord at T7-8. Decompression surgery followed with stabilization of her T-spine from T3-10.

Medical Care: 2013

4. Claimant first visited Doug Williams, D.C. on August 28, 2013. She reported neck to mid-back pain including leftward scapular pain, with some left shoulder and hand paresthesias. Throughout his notes, Dr. Williams records Claimant's history and complaint as "subjective" and examination findings as "objective." These examination findings include many points traditionally referred to as "subjective" findings by medical doctors and physical therapists. Examples include diminished voluntary range of motion and reports of pain or tenderness, etc. She visited Dr. Williams regularly.

5. On October 22 Lawrence Sladich, M.D. released Claimant to return to work with restrictions. He formalized the referral to Dr. Williams, and included a referral to an MD, Beth Rogers.

6. At an October 29 visit with Dr. Williams, Claimant reported more low back discomfort and less T-spine, neck and scapular pain.

7. On a November 5 visit with Dr. Williams, the upper rather than the lower back pain was more significant.

8. On November 7 Dr. Williams reported that Claimant had stated she was capable of continuing light-duty work with continued chiropractic care. Dr. Sladich approved five more visits.

9. On November 19 Claimant reported to Dr. Williams ongoing T-spine pain into her left scapular region. She reported left arm paresthesias throughout her whole arm in a nonradicular pattern. He requested an MRI.

10. Notes of Dr. Williams, interim to the above, establish generalized pattern of improvement, perhaps slowed by overhead and reaching activity required by her light-duty work.

11. On November 21 a handwritten note by Dr. Sladich ordered discontinuance of chiropractic treatments.

12. Claimant visited Dr. Beth Rogers on December 11. (Dr. Rogers had performed an EMG and nerve conduction study on Claimant's other shoulder in 2007.) Upon examination Dr. Rogers further limited Claimant's light-duty restrictions and referred her to physical therapy. Claimant did not again visit Dr. Rogers until after physical therapy was completed.

13. A December 27 CT scan showed kidney stones.

Medical Care: 2014

14. A January 6 MRI showed borderline central canal stenosis at C3-C7.

15. On January 15 Robert Friedman, M.D. reviewed records and evaluated Claimant at Surety's request. Early in his written report Dr. Friedman erroneously identifies the date of accident at 4/20/13 but later correctly identifies it as 8/20/13. He opined she was not yet medically stable and that a left cervical radiculopathy required additional treatment.

16. After physical therapy, on March 13 Dr. Rogers modified Claimant's light-duty restrictions to "no sweeping, light sanding, pending authorization for cervical/thoracic injections."

17. On April 9 Paul Montalbano, M.D. provided a neurosurgical consultation. After MRI review (T-spine showed the disk bulge pressing the spinal cord; L-spine showed degenerative spondylosis) and an examination he recommended surgery, a T7-8 decompression with a T3-T10 stabilization. This was performed May 6. He opined the T7-8 disk herniation was caused by the industrial accident.

18. Dr. Montalbano's records include undated requests for an external bone growth stimulator and a thoracic-lumbar-sacral-orthotic brace. The brace was to be worn when out of bed for the first 4-6 weeks after surgery.

19. Physical therapy began June 5. It continued two to three times per week through November 19.

20. On August 29 Christian Gussner, M.D. examined Claimant upon referral from Dr. Montalbano. She reported symptomatic improvement since the surgery. Dr. Gussner reviewed her prior diagnostic imaging. He began treating Claimant through follow-up visits.

21. On September 3 Dr. Montalbano examined Claimant and allowed her light-duty work, four hours per day, no lifting over 20 pounds. On October 29 Dr. Montalbano opined Claimant had reached medical stability. He sent Claimant to Dr. Gussner for an impairment rating and restrictions.

22. On November 21 Dr. Gussner concurred that Claimant was medically stable with a 6% whole person impairment without apportionment. Permanent restrictions included lifting 20 pounds occasionally, 10 pounds repetitively with limited bending/twisting/stooping and ad lib position changes. He reviewed a job site evaluation (JSE) and noted her job description appeared incompatible with her restrictions. He recommended ongoing palliative pain management treatment. He treated Claimant palliatively thereafter.

Medical Care: 2015

23. Dr. Gussner examined Claimant at a pain management visit about every other month through 2015 and to the date of hearing.

24. At a June 23 visit to Dr. Barry Acor, Claimant reported no back pain. Nevertheless, Norco remained on her current medication list.

25. On September 11 a functional capacity evaluation (FCE) was performed by R. Bret Adams, MPT. He recommended restrictions more limiting than previous physicians had indicated. In deposition, Mr. Adams testified that he included shoulder function because

limitations "were obvious." Mr. Adams commented upon Claimant's thoracic range of motion when he testified:

> Yeah. It's the most stable part of your spine. You have ribs that support all that. You have very limited space between ribs. The thoracic spine is designed to be in neutral [position] most of the time and flexed slightly. It's a rotation joint that provides most of your ability to twist.

26. At an October 8 visit to Eric Klein, M.D. for kidney stones, Claimant reported no back or joint pain. Nevertheless, Norco remained on her current medication list.

27. On November 4 Claimant underwent a procedure to ameliorate her kidney stones.

Medical Care: 2016

28. On January 4 Claimant sought out Mark Williams, D.O. for a forensic medical evaluation. He reviewed medical records and examined Claimant. He opined Claimant was medically stationary and rated permanent impairment at 22% whole person for her T-spine. Considering other impairments, including pre-existing impairments, he rated a 28% whole-person impairment using the combined values chart of *AMA Guides*. Comparing previous restrictions to the September 2015 FCE and considering other factors based upon his experience, he accepted the more limiting restrictions as appropriate.

29. On January 9 Claimant presented at an urgent care facility for left knee and right elbow pain after a fall down stairs the day before. An MRI showed a sprain of the medial collateral ligament (MCL). (In deposition Dr. Gussner testified she sprained her anterior cruciate ligament, not her MCL.) Follow-up visits were required. Another physician, not Dr. Gussner, treated this injury.

30. In deposition, Dr. Gussner opined that since she has reached medical stability, Claimant does not show clinical evidence of residual spinal cord damage. He does not dispute Dr. Montalbano's initial impression that injury to the spinal cord at T7-8 caused temporary

myelopathic bilateral leg pain during Claimant's recovery. Based upon solely objective findings, Dr. Gussner testified he would have imposed restrictions in the light-medium range; Claimant's subjective pain and limited motivation to return to work factored into his disallowance of any work in the medium range of labor.

31. In deposition, Dr. Gussner criticized overemphasis upon an FCE when considering permanent restrictions. An FCE will produce varying results from day-to-day based upon subjective factors. Objective factors—diagnosis, surgery—are primary bases for considering permanent restrictions. Mr. Adams' FCE does not cause Dr. Gussner to change his restrictions. Dr. Gussner testified Claimant has never shown a clinical shoulder deficit during any of this several examinations of her. Moreover, Dr. Gussner opined that the surveillance video was more consistent with his clinical observations, treatment, and restrictions than with the arm and shoulder motion restrictions identified by the FCE.

32. As a consequence of providing ongoing palliative care, having reviewed Claimant's clinical picture more carefully—particularly her dysasthetic leg symptoms—and further considered the *AMA Guides*, Dr. Gussner revised his PPI rating upward from 6% to 13% whole person. He opined that neither Claimant's vision nor her shoulder condition warrants an impairment rating. He opined that continued long-term, low-dosage opioids were appropriate for palliative pain management in the future.

33. Dr. Gussner opined that Claimant is at low risk for opioid abuse, and the record does not indicate any such abuse has occurred.

Prior Medical Care

34. Claimant was diagnosed as cross-eyed at age 7 in 1968. This congenital esotropia and nystagmus was ameliorated with strabismus surgery. Another eye surgery was performed in 1977. The record does not show any medical treatment for her vision between ages 16 and 26,

but in 1987 her vision was assessed at 20/40 and 20/30 with a diagnosis of amblyopia. Cosmetic surgery followed. In 1989 a right eye cyst was removed. Claimant sought eye examinations in August 2013 and August 2014. Another eye examination was conducted March 15, 2016. As an adult, Claimant can drive wearing corrective lenses.

35. An October 2006 industrial accident caused a left rotator cuff tear which required surgery. On April 11, 2008, after a lengthy postsurgical recovery period, surgeon George Nicola, M.D. opined her to be at MMI and rated her left shoulder impairment at 6%, whole person, with a 50% apportionment for a preexisting condition, then added 2% for residual weakness. With a 5% whole person impairment deemed industrially related, he nevertheless imposed no permanent restrictions.

36. A January 2007 right shoulder surgery was performed to correct AC joint arthrosis and impingement syndrome. It left her with scar formation, shoulder pain with certain activity, and right upper extremity paresthesias. Postsurgical recovery was slow. After five months she was released to full duty with no restrictions.

37. An April 2011 leg injury left residual paresthesias.

38. On April 16, 2013 Claimant visited Jocele Skinner, M.D. for multiple chronic conditions. Among these, chronic low back pain was identified, but no relevant signs or symptoms were found upon examination. Assessment noted stable leg pain with nightly Norco. Claimant's course of treatment has long been complicated by recurrent kidney stones with multiple procedures to alleviate these. Dr. Skinner's partners, Barry Acor, M.D. and Eric Klein, M.D. have worked as a team to provide general medical care over the years.

Vocational Factors

39. Born in 1961 Claimant was 54 years of age at the date of hearing. She is left-hand dominant.

40. Claimant earned a high school diploma. She has some college credits with an eye toward a music degree, but has earned no degree or certificate. Claimant is musically adept, both singing and playing piano by ear. She has taught herself to use some computer software and to surf the internet.

41. Claimant has performed restaurant work, handled livestock, and delivered auto parts. She worked various machines and performed some clerical functions for Employer. She had a supervisory role for about two years with Employer.

42. In the years 2009 through 2013 Claimant's income has ranged from $24,637 to $30,885 with irregular fluctuations within that range. She worked full time before the accident.

43. Claimant has significant supervisory experience as a church volunteer—a ward Primary president and a counselor in a stake Primary presidency—mostly involving children up to age 12, their ecclesiastical teachers, and ward Primary presidents. She also volunteers supervising 10 year-old boy scouts. She has also been involved with a community choral group.

44. Beginning July 22, 2014 ICRD consultant Sandy Baskett assisted Claimant in a job search. Attempts to return to work with Employer were unsuccessful. During recovery, Employer had no light duty available at a level Dr. Gussner would approve. Upon reviewing Dr. Gussner's permanent restrictions, Employer had no job that fit. Starting early 2015, Ms. Baskett searched for other employment on Claimant's behalf. Claimant believed she was unable to perform every potential job, including part-time work, which Ms. Baskett identified. Claimant did not follow-up many of the job leads provided. By mid-February 2015 Claimant was focused upon applying for long-term disability. She stopped communicating with Ms. Baskett. After months of unsuccessful attempts at contact, Ms. Baskett identified specific employment options available and closed the file in July 2015.

45. Mary Barros-Bailey, Ph.D. performed a disability evaluation at Claimant's request. Her written report is dated March 30, 2016. She interviewed Claimant and reviewed records. Claimant reported self-limitations somewhat greater than Dr. Williams' restrictions. Considering Dr. Gussner's restrictions, particularly requiring ad lib position changes, Dr. Barros-Bailey opined that Claimant has lost 53% of her local labor market access. This loss would be greater depending upon whether a reaching restriction should be applied. Wage loss was also considered important, but not quantitatively calculated in her report. Considering Dr. Williams' restrictions, particularly prohibiting significant reaching, Dr. Barros-Bailey opined that Claimant has lost 99% of her local labor market access. Dr. Barros-Bailey evaluated Claimant's vision condition and found it "virtually impossible" to measure quantitatively the extent to which this factor might affect disability.

46. Surveillance with video was performed April 5 through 7, 2016. Claimant is observed in various activities, none of which unambiguously exceed Dr. Gussner's imposed restrictions. However, Claimant performs without hesitation or indication of discomfort certain tasks which likely exceed the self-imposed limitations she has articulated to physicians, vocational counselors, and others. These are brief activities. The surveillance does not provide relevant indication of Claimant's stamina for activity over a work day. There is no relevant difference between the redacted and unredacted versions of the surveillance videos.

47. Nancy Collins, Ph.D. performed a vocational evaluation at Defendants' request. Her written report is dated April 26, 2016. She reviewed records, including the surveillance video, and interviewed Claimant. Claimant reported self-limitations somewhat greater than observed on the surveillance video and greater than Dr. Williams' restrictions. She opined Dr. Gussner's restrictions would yield an 82% loss of labor market access; Dr. Williams, 91%;

and a loss of earning capacity rated at 30%. Dr. Collins calculated these to result in overall disability, inclusive of PPI, at 56% based upon Dr. Gussner's restrictions and 61% based upon Dr. Williams'.

DISCUSSION AND FURTHER FINDINGS OF FACT

48. 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). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447–48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 603 P.2d 575 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

49. Claimant's demeanor at hearing raised no concerns. Claimant makes an excellent first impression as a nice, honest woman with a mild personality. Her position changes during testimony appeared unprompted and genuinely related to discomfort while seated for a significant period of time. There is a mild inconsistency between her medical restrictions and her self-imposed limitations. The surveillance video shows that when Claimant is not focused upon her physical condition as she was at hearing, she can be more active. However, Claimant appears to genuinely believe she is unable to function at levels greater than her self-imposed limitations. Claimant is a credible witness. The undersigned Commissioners see no reason to disturb the Referee's findings on credibility.

Causation

50. A claimant must prove that she was injured as the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001).

51. Here, Claimant established that her T7-8 injury caused a spinal cord compression. Surgery was required. She had residual myopathic leg pain during recovery as a result of the accident and now requires palliative pain management for dysesthetic leg pain. The thoracic spine fusion has limited her ability to twist and to a lesser degree to flex and extend that portion of her spine while bending. It has resulted in lifting and other restrictions affecting her ability to work.

Medical Care

52. An employer is required to provide reasonable medical care for a reasonable time. Idaho Code § 72-432(1). A reasonable time includes the period of recovery, but may or may not extend to merely palliative care thereafter, depending upon the totality of facts and circumstances. *Harris v. Independent School District No. 1*, 154 Idaho 917, 303 P.3d 604 (2013). One factor among many in determining whether post-recovery palliative care is reasonable is based upon whether it is helpful, that is, whether a claimant's function improves with the palliative treatment. *Id.*; *see also*, *Sprague v. Caldwell Transp., Inc.*, 116 Idaho 720,

591 P.2d 143 (1979)(overruled by *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015) to the extent *Sprague* suggested its articulated factors were exclusive.)

53. As treating physician, Dr. Gussner well explained the reason for his recommendation of future pain management, including the use of long-term, low-dose opioid medication. His opinions are persuasive. Claimant is entitled to all related medical care to the date of medical stability and to related palliative care thereafter. Claimant is entitled to reasonable future medical care benefits as set forth by Dr. Gussner.

Permanent Partial Impairment

54. Permanent impairment is defined and evaluated by statute. Idaho Code §§ 72-422 and 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

55. Here, the differing medical opinions about PPI, 13% versus 22%, are not particularly significant. Claimant's permanent disability eclipses either. Nevertheless, Dr. Gussner, as a treating physician, was and is in a better position to evaluate Claimant's condition over time. He is more familiar with Claimant. He revised his rating upward after additional consideration. This kind of frankness in an expert demonstrates one aspect of how multiple visits over time provide an advantage in accuracy. The preponderance of evidence shows it likely Claimant suffered a 13% PPI as a result of the industrial accident.

Permanent Disability

56. "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. That section 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."

57. 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, 766 P.2d 763 (1988). In sum, the focus of a determination of permanent disability is on a claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

58. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423 and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See*, *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733,

40 P.3d 91 (2002); *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

59. If the degree of disability resulting from an industrial injury is increased because of a pre-existing physical impairment, the employer can be held liable only for the disability referable to the industrial injury. *See* Idaho Code § 72-406(1). In such cases, a two-step process is envisioned. *See Horton v. Garrett Freightlines, Inc.*, 115 Idaho 912, 772 P.2d 119 (1989). First, Claimant's disability must be evaluated in light of all physical impairments and non-medical factors extant as of the date of hearing. Next, the Commission must determine what part of Claimant's disability is referable to the subject accident. *Page v. McCain Foods*, 145 Idaho 302, 179 P.3d 265 (2008). As set forth in paragraphs 34-38, *infra*, Claimant likely suffers from impairments which pre-date the subject accident. Considering these pre-existing impairments, Claimant's accident produced impairment and all relevant non-medical factors, the Commission concludes that Claimant has suffered disability of 65%.

60. Dr. Gussner recommended the following limitations for Claimant following his exam: lifting 20 pounds occasionally, 10 pounds repetitively with limited bending/twisting/stooping, and ad lib position changes. Dr. Gussner did not impose any limitations based upon Claimant's shoulder or eyesight.

61. Dr. Williams recommended the following limitations: lifting floor to waist 15 pounds occasionally; waist to shoulder five pounds occasionally; no above shoulder lifting; minimal to no over the shoulder work; carrying ten pounds occasionally; walking occasionally; standing occasionally; stooping rarely; squatting occasionally; twisting rarely; kneeling occasionally; crawling rarely; sitting for no more than 15 minutes at a time without changing

positions limiting to four hours maximum a day; standing 20 minutes at a time with change in position with four hours maximum; frequent changes in position tolerated; all work to be done within 21 inches of the body and any work done in front of the Claimant be done with the ability to rest her arms; no excessive stair climbing; and no ladder climbing. Dr. Williams did not impose any limitations based on Claimant's eyesight.

62. The Commission finds Dr. Gussner's testimony regarding Claimant's physical limitations to be more credible as explained *supra* at 55. Dr. Gussner is Claimant's treating physician and had been for almost two years prior to his post-hearing deposition. He had the longest time to observe Claimant, to examine Claimant, and to listen to Claimant's subjective complaints regarding her injury. Dr. Williams, while credible, examined Claimant on only one occasion.

63. Both vocational experts rendered opinions based on Dr. Gussner's restrictions. There were common observations between them. They both remarked on Claimant's work history of "heavy" labor prior to her injury and concluded that she was no longer capable of performing any of these jobs due to her limitations. Both experts agreed Claimant is now limited to "light" work based on Dr. Gussner's restrictions. Dr. Collins and Dr. Barros-Bailey personally observed Claimant's need to switch positions often since her injury, a limitation identified by Dr. Gussner.

64. Both vocational experts opined Claimant could work at a light duty job that specifically accommodated her need to sit/stand over the course of the day. Dr. Barros-Bailey opined "Unless she is in a work setting that is accommodated to include a hydraulic sit/stand desktop, it is unlikely that, based on the sit/stand needs and restrictions, [Claimant] will be able to secure and retain competitive employment." Dr. Collins stated "with accommodations such as

a work station with sit/stand options, and ergonomic arm rests, [Claimant] could perform some of the clerical positions identified."

65. Based on Dr. Gussner's limitations, Dr. Barros-Bailey concluded Claimant lost access to 53% of the southwestern Idaho market with similar figures for Eastern Oregon. Based on the same restrictions, Dr. Collins proposed a loss of access of 81% based on the Boise Metropolitan area and stated her numbers were based on the "20% of employers I feel would be able to accommodate [Claimant's] need to change positions throughout the day."

66. Wage loss was calculated by both experts as well. Dr. Barros-Bailey averaged Claimant's reported wage on the accident report (15.07/hour) and Claimant's wage in other reports (14.37/hour) to come up with pre-accident earnings[1] of 14.72/hour. She assumed a $9 post-accident wage based on entry-level pay in clerical positions and on Oregon's high minimum wage. In post-hearing deposition, she testified that Claimant's wage loss would be approximately 40%. Dr. Collins based her calculations on 14.37/hour as Claimant's time of injury wage and a $10 post-injury wage. Dr. Collins explained her post-injury wage assumed a clerical position that would pay between $9 and $11 and that based on Oregon's higher minimum wage, an assumption of $10 was accurate. Dr. Collins calculated wage loss at 30%.

67. Both vocational experts opined as to Claimant's permanent disability based on an average of wage loss and loss of access. Dr. Barros-Bailey opined a 53% disability rating inclusive of impairment based on Dr. Gussner's restrictions. Dr. Collins opined a 56% disability under Dr. Gussner's restrictions.

[1] Dr. Barros-Bailey further testified at her post-hearing deposition that she arrived at 14.72 by looking at the total yearly wages reported and concluded that either Claimant worked overtime or was paid more than 14.37 an hour.

68. Therefore, Dr. Barros-Bailey and Dr. Collins came to essentially the same conclusions concerning Claimant's disability, at least under Dr. Gussner's restrictions. However, they got there by slightly different routes.[2]

69. *Return to Work Attempts*. ICRD consultant Sandy Baskett had contact with Claimant over time. She noted Claimant's lack of motivation to seek work after Employer was unable to provide a job within Dr. Gussner's restrictions. She offered several job leads on which Claimant did not follow up. When she closed her file, Ms. Baskett identified several regularly available jobs which for Claimant could compete.

70. Claimant's non-medical factors cut both ways. Her permanent disability rating is lowered due to her pleasant personality and loyalty, her high school diploma and ability to complete college credits, her transferable skills such as data entry, light machine operation, and word processing, and her lackluster job search. Her disability rating is increased due to her inability to return to any position at her prior employment, her lack of college degree, her age of 54, and her limited work opportunities in the Ontario/Fruitland area.

71. Considering Claimant's limitations as described by Dr. Gussner and her relevant non-medical factors, the Commission concludes that both Dr. Collins and Dr. Barros-Bailey have understated Claimant's disability and that Claimant has proven permanent disability of 65%, inclusive of her 13% whole person permanent impairment. The Commission agrees with the vocational experts that Claimant could secure clerical or similar type work. But, Claimant must also find an employer who is willing and able to accommodate her standing/sitting restrictions. Dr. Collins stated she based her analysis on an "educated guess" that 20% of the employers with

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[2]Dr. Barros-Bailey testified that she generally does average wage loss and loss of access to arrive at disability. However, she appears not to have done so here, and her explanation is ambiguous. She testified, "…but the loss of the wages is less than the loss of access, and when I combine the two, I came up with 53%," The Commission is unable to determine whether Dr. Barros-Bailey found loss of access to be more significant and therefore entitled to greater weight, or whether she arrived at her disability figure by some other calculus.

work suitable for Claimant would offer her the accommodations she requires. Her opinion is therefore somewhat speculative. Dr. Barros-Bailey did not estimate the number of employers that might accommodate Claimant; she only stated it would be difficult to find *any* position other than a clerical job with a sit/stand desk, *supra* at 64. There is no evidence that any of the vocational experts looked into whether or how Claimant would be accommodated in her labor market other to opine she would require a sit/stand desk.

72. Sandy Baskett searched for jobs for Claimant in her local labor market. Ms. Baskett suggested 17 jobs to Claimant over a two month period and listed an additional five when closing the file. A closer look shows that almost all of the jobs identified by Ms. Baskett would require a sit/stand desk for Claimant and two to four exceeded Claimant's physical restrictions.[3] Eight of the jobs identified by Ms. Baskett exceeded Claimant's skill set and experience level,[4] and in eight positions Claimant lacked the preferred, but not required, qualifications for that position (e.g. previous experience in a medical office). A two month snapshot of the local job market is not dispositive, and Claimant may have secured one of these jobs if she applied, but what this does illustrate is what is available in the slice of market that is left to Claimant post-injury.

73. The Commission is aware that Claimant will be in an employment market where she is protected by the ADA. However, the Commission is also aware of reality. If Claimant wishes to be employed, she will be competing in a market at a disadvantage based on her need for accomodation. Even if it is not apparent in an interview that Claimant requires accomodation,

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[3]Nutrition assistant: ability to lift in excess of 25 pounds; bookkeeper: occasional lifting of 25 pounds, extended sitting, frequent standing; inventory clerk: receive plant supplies; living skills trainer: work in residential homes… assist[ing] with cooking, cleaning, hygiene, and other daily living skills.

[4] Tax preparer: [experience] prepar[ing] complex tax returns; administrative assistant: proficient in Microsoft Office; full charge bookkeeper: [minimum] 24 months experience; bookkeeper: strong computer skills; verification clerk: must type 40 WPM; office clerk: [must] type 40 WPM, [must have] computer experience with Work and Excel; sales associate: cashier experience; data entry: type 40 WPM.

it will be become clear once a conditional offer of employment is made. Dr. Barros-Bailey, at post-hearing deposition, addressed the intersection of the available market left to Claimant and her required accomodation:

> "Now, if she were one of us… we could probably get hired by somebody. As a matter of fact, tonight for my graduate class I'm having somebody…presenting to the class, asked for a chair because she has a back injury and needs to sit and stand. And so somebody like that has a skill level to be able to be hired and do their job. Somebody who doesn't have that skill level, who has all of the other nonmedical factors, is going to have a really hard time finding a job, even with a hydraulic table."

74. Claimant is employable, but she requires both additional training *and* accomodation to compete for a clerical position. Claimant should have and still should take the classes suggested by Sandy Baskett and it is to her detriment that she did not. However, it will be difficult for Claimant to find a clerical position considering her limited experience with basic office software and required accomodation, pleasant personality notwithstanding. For these reasons, the Commission concludes that both Dr. Collins and Dr. Barron-Bailey understated Claimant's disability. Claimant has proven disability from all causes of 65%, inclusive of 13% impairment.

75. Having determined that Claimant's disability from all causes combined is 65%, it is next necessary to determine the amount of disability referable to the industrial accident. While there is evidence that Claimant did have impairment which pre-dated the subject accident, there is no persuasive evidence that these pre-existing impairments produced limitations/restrictions which impact Claimant's ability to engage in gainful activity.

76. Dr. Gussner did not find any objective evidence of shoulder impairment in his examinations and found "the shoulder restrictions were inconsistent with the video and my knowledge to-date of Ms. Thomas." Dr. Gussner did not limit Claimant's reaching, did not

observe shoulder impairment, and Claimant performed work prior to this injury that involved overhead reaching. The Commission/Referee does not find persuasive Dr. Williams one-time examination, Mr. Adams one-time FCE, or Claimant's subjective limitations regarding reaching or shoulder impairment.

77. Claimant's eyesight is limited. All experts, including both vocational experts and Dr. Gussner and Dr. Williams, did not opine as to how limited Claimant might be regarding her vision. Dr. Collins stated at post-hearing that her disability ratings were primarily based on Claimant's back injury, and Dr. Barros-Bailey, *supra* at 46, found it impossible to measure how claimant's vision may impact her disability. Further examination of the Claimant's vision is unnecessary, however, because Claimant is precluded from alleging this as a basis for her disability.

78. For these reasons, we conclude that all of Claimant's aforementioned disability is referable to the subject accident.

Odd-Lot

79. If a claimant is able to perform only services so limited in quality, quantity, or dependability that no reasonably stable market for those services exists, she is to be considered totally and permanently disabled. *Id.* Such is the definition of an odd-lot worker. *Reifsteck v. Lantern Motel & Cafe*, 101 Idaho 699, 700, 619 P.2d 1152, 1153 (1980). Taken from, *Fowble v. Snoline Express*, 146 Idaho 70, 190 P.3d 889 (2008). Odd-lot presumption arises upon showing that a claimant has attempted other types of employment without success, 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 by showing that any efforts to find suitable work would be futile. *Boley*, *supra.*; *Dehlbom v. ISIF*, 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997).

80. Claimant cannot return to her old job. That employer has no other job within her restrictions. Claimant did not attempt work unsuccessfully after her surgery. Instead, she has performed avocational roles that require skills which have value in the workplace.

81. Claimant did not cooperate with Ms. Baskett's attempts to find work for her.

82. Dr. Collins opined a job search would not be futile. Dr. Collins noted that because Claimant has worked essentially only two jobs in her adult life, she may fear a job search. However, the fact that she has worked and kept her only jobs for substantial periods of time is actually an asset in seeking work.

83. Claimant failed to establish that she likely qualifies as an odd-lot worker. Assuming *arguendo*, that she did so qualify, the analysis of Ms. Baskett and Dr. Collins shows there are suitable jobs regularly available to rebut the presumption of odd-lot status.

CONCLUSIONS OF LAW AND ORDER

1. Claimant injured her thoracic spine in a compensable accident;
2. Claimant is permanently impaired rated at 13% of the whole person as a result of the industrial accident;
3. Claimant is permanently disabled, rated at 65% whole person, inclusive of PPI, without apportionment for preexisting conditions;
4. Claimant is not totally and permanently disabled as an odd-lot worker; and
5. Clamant is entitled to past and future medical care, including palliative use of opioid medication as set forth by Dr. Gussner.

DATED this 7th day of April, 2017.

INDUSTRIAL COMMISSION

___/s/______________________________
Thomas E. Limbaugh, Chairman

___/s/_____________________________
Thomas P. Baskin, Commissioner

__/s/______________________________
R.D. Maynard, Commissioner

ATTEST:

__/s/______________________________
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April, 2017, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

TODD M JOYNER
1226 EAST KARCHER RD
NAMPA ID 83687-3075

LORA RAINEY BREEN
1703 W HILL RD
BOISE ID 83702

ka __/s/____________________________