BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

EDDIE B. JENKINS, Claimant, v. OLD DOMINION FREIGHT LINE, Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Surety, Defendants.	**IC 2010-029666** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** January 19, 2018

BACKGROUND

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John C. Hummel, who conducted a hearing in Boise, Idaho, on August 8, 2016. Bruce D. Skaug, of Boise, represented Claimant Eddie B. Jenkins, who was present in person. R. Daniel Bowen, of Boise, represented Defendants, Employer Old Dominion Freight Line and Surety New Hampshire Insurance Company. The Referee admitted oral and documentary evidence. The parties took post-hearing depositions and submitted briefs. The matter came under advisement on March 31, 2017.

ISSUES

The issues to be decided according to the notice of hearing are as follows:

1. Whether and to what extent Claimant is entitled to the following benefits:

    a. Medical care;

b. Permanent Partial Impairment (PPI); and

c. Disability in excess of impairment;

2. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine, or otherwise; and

3. Whether apportionment for a preexisting condition pursuant to Idaho Code § 72-406 is appropriate.[1]

CONTENTIONS OF THE PARTIES

Claimant argues the low back injury he suffered in the industrial accident on November 26, 2010, and the subsequent three accident-related spine surgeries, have left him in chronic pain and permanently disabled as an odd-lot worker. He contends that Defendants cannot meet their burden as outlined in *Rodriguez v. Consolidated Farms,* IIC No. 42708 (2017) to demonstrate that there was suitable work actually available to Claimant within a reasonable distance from his home that he is able to perform. He urges the Commission to adopt the opinion of his vocational expert, Terry Montague, that Claimant is an odd-lot worker because it would be futile for him to seek work. Claimant also requests that Employer/Surety continue to pay for Claimant's industrially-related medical care as the need arises.

Defendants argue that Claimant is not totally and permanently disabled. They assert that there is no current dispute about medical care. Defendants concede that Claimant has suffered permanent partial disability (PPD) in excess of impairment, but argue that it is in the range of 35% and 42%. They contend that the opinion of Bill Jordan, their vocational

[1] At hearing, the parties stipulated that Claimant was entitled to a whole person PPI of 25%, Tr., 5:18-6:21. Defendants waived the issue of apportionment pursuant to Idaho Code § 72-406. *See*, Defendants' Post-Hearing Brief at 22-23.

expert, is more persuasive. Defendants argue that it would be inappropriate to rely on Mr. Montague's physical restrictions and vocational opinion, because he is not a physician and he improperly inflated Claimant's prior earnings.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's testimony, taken at hearing;

2. Claimant's wife, Lynette C. Jenkins's testimony, taken at hearing;

3. William C. Jordan's testimony, taken at post-hearing deposition on December 6, 2016;

4. Terry L. Montague's testimony, taken at post-hearing deposition on October 3, 2016;

5. Richard Radnovich, M.D., testimony, taken at post-hearing deposition on November 2, 2016;

6. Rodde D. Cox, M.D., testimony, taken at post-hearing deposition on November 17, 2016;

7. Claimant's Exhibits A through H, admitted at hearing; and

8. Defendants' Exhibits 1 through 17, admitted at hearing.

OBJECTIONS

All objections preserved in the post-hearing depositions are overruled, with the exception of Defendants' continuing competency objections to the testimony of Mr. Montague regarding the physical effects of Claimant's prescription medications, which is sustained. Montague Dep., 19:23-23:18. Mr. Montague was not qualified to render an expert medical opinion regarding the effects of medication. I.R.E. §§ 601 and 702.

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. Claimant was 64 years old at the time of hearing. Claimant presently resides in Boise, Idaho. Claimant had an active upbringing and played several high school sports. Claimant completed high school and has taken some college courses. Claimant was an inconstant student, earning a lot of D's, C's, but some A's and B's. Tr., 39:7-19; 40:21-41:16; 42:8-9.

2. From high school until age 21, Claimant worked at Restline Furniture, cutting foam for mattresses and cushions. *Id*. at 39:23-40:4. Thereafter he worked as a retail salesperson at Kinney Shoes (Karcher Mall), in Nampa, Idaho. Claimant received a promotion to assistant manager, responsible for scheduling and bank deposits. His employment with Kinney Shoes lasted approximately four years. *Id*. at 44:8-45:12. Thereafter, Claimant began his career as a truck driver, which would span the next 31 years. Claimant started driving a dump truck and a ready-mix truck at G&B Ready-Mix, and then held various trucking jobs for the following companies: Ida Cal Freight Line, Old Dominion, Miller Brothers, Con-way, Con-Way Western Express, V-1 Oil Company, J.R. Simplot Company, DHS, and Jerry Fallout Trucking and Transystems. *Id*. at 45:21-49:12.

3. In 1995, Claimant strained his lower back while working for J.R. Simplot Company. In 2004, Claimant strained his shoulder while working at Con-Way Freight. Claimant recovered from those past work accidents, which did not require surgery, and suffered no residual problems. *Id*. at 93:18-95:22.

4. Claimant worked for Employer as truck driver for approximately three weeks in November 2010. Tr., 52:14-54:8. On November 26, 2010, while working for Employer, Claimant felt a searing pain in his low back as he was pulling on a dolly, a large set of wheels with hooks that connects two trailers of a truck rig. *Id*. at 55:21-56:14. Despite his pain, Claimant completed the roundtrip to Twin Falls from Boise. Upon returning to the dock, Claimant reported the incident to his supervisor, went home, and later called dispatch when his symptoms failed to subside. *Id*. at 56:17-57:7.

5. Within a few days of the November 26, 2010 accident, Claimant's pain radiated to his right knee and ankle. *Id*. at 57:13-25.

6. Claimant treated conservatively. Nevertheless, his persistent symptoms prompted a neurological consultation with Peter Reedy, M.D., on January 12, 2011. Ex. D:34-36. Dr. Reedy proposed a lumbar laminectomy and discectomy. *Id*. at 36.

7. On January 26, 2011, Dr. Reedy performed a right L4-5 partial hemilaminectomy and L4 discectomy, with favorable results. *Id*. at 37-38. Claimant reported "90-95%" improvement of his symptoms. Per the June 9, 2011 Work Conditioning Final Report through Saint Alphonsus Rehabilitation Services, Claimant was 100% compliant in attending treatment sessions and demonstrated the capacity to work in medium to medium-heavy positions. Ex. 4:140-142.

8. Dr. Reedy referred Claimant to Kevin Krafft, M.D., for an impairment rating. Ex. D:51. Dr. Krafft gave Claimant a 7% PPI rating, and indicated that as of June 14, 2011, Claimant could be released to his pre-injury position without restrictions. Ex. D:66; Ex. 4:145; Ex. 6:197-199.

9. Following his recovery from surgery and June 2011 maximum medical improvement, Employer offered Claimant a part-time, modified job sweeping the dock and cleaning windows at the Employer's facility. Claimant accepted the offer and this work lasted until July 2012. Tr., 58:12-59:24.

10. Unfortunately, Claimant's relief was temporary and his low back and right leg pain increased. Ex. D:39-42. Dr. Reedy, however, was hesitant to repeat the L4-5 procedure and requested a second opinion from R. Tyler Frizzell, M.D. *Id*. at 49. Dr. Frizzell advised against a repeat decompression because decompressing Claimant's facets and foramina more on the right side at L4-5 could relieve Claimant's leg symptoms at the risk of aggravating Claimant's back area. Ex. D:168-169. Thereafter, Dr. Reedy referred Claimant to Paul J. Montalbano, M.D, who recommended a L3-L5 decompression and fusion with instrumentation. Ex. D:180.

11. On July 30, 2012, Dr. Montalbano performed a L3-L4-L5 laminectomy, right L3 partial medial facetectomy, and bilateral L3 to L5 foraminotomy for decompression with instrumentation in left L3 to L5. Ex. D:190-197. Claimant's initial recovery was uneventful. On September 26, 2012, Dr. Montalbano released Claimant to four-hour work days with a 25-pound weight limit. *Id*. at 206. On October 31, 2012, Dr. Montalbano referred Claimant to Rodde Cox, M.D., for an impairment rating and permanent work restrictions. *Id*. at 210.

Rodde D. Cox, M.D.

12. In addition to conducting independent medical exams (IMEs), Dr. Cox practices physical medicine and rehabilitation. Cox Dep., 5:3-24. He first evaluated Claimant on January 2, 2013 for an impairment rating. *Id*. at 6:3-13. In his examination

Dr. Cox found that Claimant had abnormal findings of diminished reflexes and some residual radiculopathy unresolved by the surgeries. Cox Dep., 8:9-14.. Dr. Cox initially gave Claimant a 15% whole person PPI rating, and restrictions of no lifting over 35 pounds on an occasional basis and avoiding repetitive bending, twisting, and stooping. *Id*. at 8:15:-17; 9:15-19; Ex. D:247-249.

13. By June 12, 2013, Claimant returned to Dr. Montalbano with complaints of lower extremity symptomatology involving his hip, buttock, posterior lateral thigh, calf, and feet. Dr. Montalbano ordered an MRI scan of Claimant's lumbosacral spine. Ex. D:213. Claimant's MRI showed "anticipated postoperative changes from the level of L3 to L5. There is no evidence of canal/foraminal stenosis. There is evidence of solid arthrodesis." Ex. D:214. Dr. Montalbano prescribed physical therapy and an anti-inflammatory medication.

14. On February 12, 2014, Claimant returned to Dr. Montalbano with concerns about worsening low back pain and bilateral lower extremity numbness, tingling, and pain. *Id*. at 216. Dr. Montalbano again ordered an MRI scan of the lumbosacral spine, and CT scan and x-rays to rule out canal/foraminal stenosis, assess his fusion, and next segment degeneration. This time, Dr. Montalbano recommended surgical intervention to address a disc herniation on the right at L2-L3, i.e., removing Claimant's prior instrumentation and then extending Claimant's fusion at the level of L2-L3, with associated decompression. *Id*. at 214.

15. On March 10, 2014, Dr. Montalbano admitted Claimant for the recommended third surgery, which proceeded without incident. Dr. Montalbano's three-month postoperative evaluation recorded Claimant having complaints of paraspinal muscle spasm,

but otherwise being "neurologically intact." Ex. D:238. At Claimant's four-month postoperative review, Dr. Montalbano adjusted Claimant's medications and referred him to Vivek Kadyan, M.D., for pain evaluation and management. *Id*. at 239.

16. Dr. Kadyan reviewed and adjusted Claimant's medications. The September 8, 2014 and October 10, 2014 visits with Dr. Kadyan were encouraging; Claimant was in a "better spot" with less pain, and increased activity. *Id*. at 258-259. Nevertheless, Claimant's respite proved to be brief, as his pain complaints increased at the December 2014 visit. As a result, Dr. Kadyan suggested a spinal cord stimulator trial. *Id*. at 261-262.

17. Dr. Montalbano then asked Robert Calhoun, PhD, a psychologist, for his opinion on Claimant's candidacy for a spinal cord stimulator. Dr. Calhoun evaluated Claimant on June 8, 2015. He concluded that Claimant was a poor candidate for a stimulator, given his "recalcitrance to medical interventions thus far, current somatoform tendencies, heightened somatic focus, histrionic personality traits, and lack of insight into how psychological stress factors can exacerbate his pain." Ex. 12:360. Dr. Calhoun recommended brief cognitive behavioral pain management therapy, and suggested the possibility that Claimant could wean off his Norco and better cope with his pain. *Id*.

18. Without Dr. Calhoun's endorsement, Dr. Montalbano would not approve a spinal cord stimulator. Ex. D:241. On July 22, 2015, Claimant requested a referral to Richard Radnovich, M.D. Ex. D:286.

Richard Radnovich, M.D.

19. Dr. Radnovich first met with Claimant on November 3, 2015, upon Dr. Kadyan's referral. Ex. D:504-505. Dr. Radnovich diagnosed Claimant with lumbar post-laminectomy syndrome. He adjusted medications to try to resolve Claimant's back

pain. Ex. D:504-505. On June 28, 2016, Claimant reported that he noticed his right drop foot getting worse. *Id*. at 518; Radnovich Dep., 25-26. Dr. Radnovich did not document Claimant's cane usage or any discussion with Claimant about his ability to drive. *Id*. at 41:17-20; 42:10-24.

20. Dr. Radnovich did not challenge Dr. Cox's impairment rating, as reflected in the following exchange in his deposition:

> Q. And there's a 25-percent impairment rating provided to my client by Dr. Cox in an IME. Do you have any reason to disagree with that impairment rating?
>
> A. Without looking at and calculating it myself, no. He does a pretty good job at those. I don't find myself in disagreement with – I find myself in disagreement with his numbers sometimes, but I don't find myself in disagreement with the mechanism why how he calculates something. So I have no reason to believe that that's not a good number.

Id. at 31:18-32:4.

21. Over objection from Defendants, Dr. Radnovich testified about Claimant's ability to safely drive. He acknowledged that it would be reasonable for Claimant to feel wary about driving because he had disclosed cognitive problems due to his use of pain medications. Dr. Radnovich testified that he "would not want him [Claimant] to drive under those circumstances." Nevertheless, he declined to recommend a physician order against driving for Claimant. *Id*. at 32:5-34:8.

22. ***Dr. Cox's Impairment and Restrictions.*** On April 1, 2015, Dr. Cox evaluated Claimant again and reviewed additional documentation, including records related to Dr. Montalbano's fusion extension, recent imaging studies, and Dr. Kadyan's records. Ex. 9:273-288. Claimant's main complaint was of continued right lower back and right leg pain, with radiculopathy on the right side. *Id*. at 9:286. Dr. Cox adjusted Claimant's

impairment rating to a 25% whole person PPI. Ex. 9:287. He also changed Claimant's physical restrictions to no lifting above 25 pounds and avoidance of repetitive bending, twisting, stooping, and prolonged exposure to low-frequency vibration. *Id*.; Cox. Dep., 12:14-25.

23. On June 10, 2016, Dr. Cox re-evaluated Claimant and reviewed additional medical records generated for him during the past year, but kept his previous impairment rating of 25% and previous restrictions. Ex. 9:289-298; Cox Dep., 13:5-16:22.

24. Over objection from Claimant, Dr. Cox opined that it was not futile for Claimant to attempt to return to work and that there were a number of jobs he was capable of performing. *Id*. at 19:17-23; 20:12:-21:11.

25. Dr. Cox did not recall during the three times he examined Claimant that Claimant had difficulty rendering a history due to his medication usage. *Id*. at 20:6-9. Dr. Cox was aware of Claimant's use of narcotic medication, however he did not restrict Claimant from driving and did not consider Claimant unsafe to drive solely based upon medication. He further testified that if Claimant and his wife expressed concerns about safe driving due to medication, he would refer Claimant for further testing to make a definitive medical determination on Claimant's ability to drive. *Id*. at 26:11-28:19.

26. ***Industrial Commission Rehabilitation Division (ICRD) and Claimant's Return-to-Work.*** ICRD worked with Claimant from May 2011 to September 2013 to assist him with re-employment. Ex. 14:372-407. IRCD monitored Claimant's medical status and discussed job development. Claimant was interested in returning to work as a truck driver following his release to return to work, however on August 25, 2011 Employer declined to

re-employ him. Ex. 14:387. IRCD closed Claimant's case on September 19, 2013 because Claimant had reached medical stability and was no longer looking for work. *Id*. at 403.

27. Employer rejected Claimant's release to return to work as insufficient, because it did not account for Claimant's occasional need to help loading and off-loading trucks, or very-heavy lifting. When physical therapist Peggy Wilson questioned the validity of Employer's job task analysis, Employer notified Ms. Wilson and ICRD that it would be conducting its own analysis before making a final return-to-work determination for Claimant. On August 25, 2011, Claimant failed Employer's functional capacity examination (FCE). Thereafter, Employer discharged him due to inability to meet the minimum qualifications of the position. Ex. 15:411.

28. Aside from his attempt to return to work with Employer, Claimant's job search was sporadic and unsuccessful. Tr., 100:9-15.

29. Claimant received approval for Social Security Disability benefits after his last back surgery. He has not actively looked for work since April 2015. *Id*. at 67:23-68:2.

30. Claimant's tax returns showed adjusted gross income as follows: $36,802 in 2009; $64,057 in 2010 (married, filing jointly); $37,826 in 2011; $25,022 in 2012; $29,099 in 2013; and $15,995 in 2014. Ex. H:537-562.

Vocational Testimony

Terry Montague

31. Mr. Montague, Claimant's vocational expert, opined that Claimant is totally and permanently disabled. Ex. G:580; Montague Dep., 34:9-13.The Commission is familiar with Mr. Montague's credentials.

32. Mr. Montague reviewed Claimant's medical records and wage information. Ex. G:567-568; 570-573; 577-579. He also completed a transferrable skills and labor market analysis. *Id*. at 568-569; 579. Mr. Montague noted that Dr. Cox was the only physician who established physical work restrictions for Claimant. Montague Dep., 18:8-12. He could not understand, however, why Claimant's physicians, treating or otherwise, including Dr. Cox, did not further restrict Claimant beyond those restrictions stated by Dr. Cox. Ex. G:575. He explained that "no physician has recommended that Mr. Jenkins should avoid prolonged sitting or standing, walking on uneven surfaces or up and down inclines, climbing of ladders or stairs frequently and many other permanent work restrictions normally recommended by the medical community for multiple lumbar surgeries including fusion with residual lower extremity symptoms which have been documented in this case." Ex. G:575.

33. Despite his concern that Claimant's medical work restrictions did not go far enough, Mr. Montague chose not to address this issue with Dr. Cox, because Defendants had retained Dr. Cox for an IME and Dr. Cox was not Claimant's treating physician. Montague Dep., 18:2-7. Thereafter, Mr. Montague identified several areas of potential restrictions for Claimant, and added "generalized limitations" from Dr. Radnovich based upon Claimant's pain symptoms. *Id*. at 18:13-17. Over Defendants' competency objections, Mr. Montague consulted the Physicians' Desk Reference for potential side effects from Claimant's medications, added those to his report, and opined that Claimant's medication use would further interfere with his ability to secure employment. *Id*. at 19:3-25:10.

34. Mr. Montague opined that Claimant can only perform sedentary or light work according to the work restrictions recommended by Dr. Cox. *Id*. at 26:11-13. Despite this,

Mr. Montague concluded that Claimant's chronic pain and the prescription medication required to treat that pain render him significantly impaired and unable to work as a truck driver or anything else. Ex. G:573; 579; Montague Dep., 18:13-19:11. In addition to truck driving positions, Mr. Montague excluded for Claimant any jobs involving driving a motor vehicle, working in a factory, or positions that require the use of scaffolding, conveyor belts, or stairs. Ex. G:580.

35. Mr. Montague considered various additional factors in evaluating Claimant's employability, including lower extremity radiculopathy, difficulty walking with his "dropped foot," use of a cane, sleep apnea (post-accident diagnosis), Claimant's advanced age of 64 years old, limited education, and sporadic employment since 2010. Ex. G:576.

36. Mr. Montague calculated Claimant's wage loss as 82-87%; in doing so, he relied upon Claimant's representation that he often made over $40,000 yearly and in some years as much as $64,000. *Id*. at 579. He projected that Claimant *could have earned* $64,000 for Employer had he continued in his time-of-injury job. *Id*.; Montague Dep., 32:4-13.

37. Mr. Montague concluded that Claimant's loss of labor market percentage was within the range of 65-70%, because Claimant can no longer perform very heavy, heavy or medium jobs. Ex. G:579. He concluded that Claimant's job search would be futile without a sympathetic employer or super human effort. Montague Dep., 32:25-33:6.

38. On July 27, 2016, Mr. Montague authored an addendum to his report of July 20, 2016. Ex. G:626-627. The addendum detailed his attendance at an office visit with Dr. Radnovich, Claimant, and Claimant's wife. During the visit, they discussed Claimant's recent sleep apnea diagnosis. Montague Dep., 27:5-20. Mr. Montague stressed that this

appointment and the fact of Claimant's sleep apnea diagnosis reinforced his opinion that Claimant was totally and permanently disabled under the odd-lot doctrine. Ex. G:626.

39. Mr. Montague questioned whether the jobs Mr. Jordan identified actually exist, whether they were within Claimant's lifting restrictions, and whether Claimant had the necessary customer service and computer skills to be competitive for these positions. He was particularly critical of a NAPA Auto Parts job, a DirecTV position, and a Clearwater market research interviewer position identified by Mr. Jordan as within Claimant's capabilities. He opined that the first job exceeded Claimant's physical restrictions and that the latter jobs required computer and customer service skills that Claimant did not have. Mr. Montague questioned whether Mr. Jordan discussed the Clearwater market research position with that employer; he reported that the employer's representative told Mr. Montague that she had no recollection of Mr. Jordan or of their conversation. Montague Dep., 36:1-48:16.

William "Bill" Jordan

40. Defendants' vocational expert, Mr. Jordan, prepared an employability report dated July 27, 2016. Ex. 16:421-471. He concluded that Claimant is capable of gainful employment and is not totally and permanently disabled. *Id*. at 435. The Commission is familiar with Mr. Jordan's credentials.

41. Mr. Jordan used Dr. Cox's restrictions in forming his vocational opinion. He also met with Dr. Cox to obtain his approval for potential job positions he had identified for Claimant. *Id*. at 425.

42. Mr. Jordan interviewed Claimant and discussed Claimant's perceived limitations of being unable to do yard work, mow the lawn, and difficulties with household

chores. They also discussed Claimant's needs for a cane to ambulate and narcotic medication to be functional. Ex. 16:423.

43. Mr. Jordan presented two scenarios for Claimant's PPD in his employability report and a third in his deposition.[2] In the first scenario, taking into account Claimant's subjective perception of his abilities, his pain contingent activity level, his lack of a job search except to maintain entitlement to unemployment benefits, receipt of SSD benefits, and retirement age, Mr. Jordan found it unlikely that Claimant would have access to any portion of the labor market in the future. Ex. 16:435. Nevertheless, Mr. Jordan testified that according to the objective medical evidence regarding Claimant's physical restrictions, it was not futile for Claimant to obtain employment, thus rendering the first scenario unlikely. Jordan Dep.,18:19-19:2.

44. In the second scenario, Mr. Jordan considered Dr. Cox's evaluation and limitations given after Claimant's third lumbar fusion procedure and medical stability (25 pounds lifting on an occasional basis, avoid repetitive bending, twisting, stooping or prolonged exposure to low-frequency vibration). Ex. 16:435. Mr. Jordan opined that under the second scenario, Claimant's loss of access to the labor market is 59% with a 10% wage loss. *Id*.

45. The third scenario was a slight variant of the second; while it used Dr. Cox's evaluation and limitations, nevertheless it recognized Claimant's subjective limitations as a legitimate factor. Under this approach, Claimant's loss of access to the labor market remains 59%, but his wage loss is 24%, because Claimant's subjective limitations would

[2] In his deposition, Mr. Jordan modified his second scenario slightly, thus although the report states only two scenarios, three scenarios are discussed herein.

reduce work hours Claimant could complete, but not the types of jobs Claimant could access. Jordan Dep., 17:15-18:4.

46. Mr. Jordan opined that Claimant's PPD falls within the range of 35% to 42%, inclusive of PPI, which is the average of the Claimant's loss of labor market access (59%) with the wage loss scenarios of 24% or 10%. *Id*. at 18:2-4.

47. Mr. Jordan disagreed with Mr. Montague's futility conclusion. *Id*. at 18:15-23. While acknowledging that Claimant was 64 years old and may not wish to seek employment, Mr. Jordan stressed that none of the physicians indicated that Claimant would be unable to work from a medical perspective. *Id*. at 20:3-21:1.

48. Mr. Jordan concluded that Claimant has transferrable skills sufficient to compete for jobs in the light work category. Ex. 16:434; Jordan Dep., 43:5-8. He noted that Claimant is computer literate enough to complete internet searches, perform hunt-and-peck typing, use email, engage in texting, and use social media. Mr. Jordan also considered that Claimant previously owned his own semi-truck and leased the truck to other drivers. Claimant had three years of management experience and two years of foreman experience, including exceptional leadership skills and a good safety record. Claimant previously scheduled 15 company drivers and outside trucks for delivery routes, coordinated a number of trucks to locations that supply field contractors, was a foreman over ten people, and created schedules for employees as an assistant manager of a major retail store with some bank deposits and payroll responsibilities. *Id*. at 21:2-22:23. Mr. Jordan believed that Claimant could overcome his obstacles of being out of the labor market and find employment after a diligent job search. *Id*. at 38:18-39:14; Ex. 16:434.

49. Mr. Jordan noted Claimant's hesitancy to drive, however he observed that Dr. Cox thought Claimant could drive, as long as he avoided loading or unloading activities. Jordan Dep., 23:4-20.

50. Dr. Cox, whose impairment rating report indicated that he was aware of Claimant's medication use, Ex. 9:285-286, reviewed and approved Mr. Jordan's selected occupational job titles and job site evaluations (JSEs) as within Claimant's ability to perform.[3] Ex. 16:425; Jordan Dep., 25:12-21. Mr. Jordan explained that he arranged for Dr. Cox to review the potential job descriptions rather than Dr. Radnovich, because the former rendered the impairment rating and identified restrictions. *Id*. at 74:1-13.

51. Mr. Jordan criticized Mr. Montague for discounting Dr. Cox's opinion and for failing to disclose the methodology of his transferrable skills analysis. *Id*. at 27:19-29:4. A further critique by Mr. Jordan was that it was inappropriate for Mr. Montague to supply his own work restrictions for Claimant based upon Claimant's subjective perceptions rather than relying strictly upon a physician's restrictions. Jordan Dep., 30:11-25. Mr. Jordan disputed Mr. Montague's accusation that he had failed to contact actual employers while conducting his vocational research. *Id*. at 34:18-35:5. Mr. Jordan further criticized Mr. Montague for basing his wage loss analysis on Claimant's potential wages, which exceeds Claimant's recorded annual earnings for the past five years. *Id*. at 49:10-50:19.

[3] Mr. Jordan concluded that Claimant was employable in the light category in the following jobs: delivery driver/auto parts clerk for NAPA auto parts; customer service rep/sales through DirecTV; Clearwater Research market research interviewer; truck dispatcher/broker; Edwards Theater ticket taker; Caldwell Transportation special education bus driver; United Security school crossing guard; Specialty Construction & Supply; flagger; Wal-Mart greeter; carwash attendant (automatic); convenience store clerk; assembler of small products; assembler rework department worker (Plexus Company); and Can-Ada Security guard/watch guard. Jordan Dep., 25:22-27:10; Ex. 16:425.

Barbara K Nelson

52. On April 12, 2013, Barbara K. Nelson[4] completed a vocational analysis for Claimant. Ex. 15:408-420. She concluded that Claimant could return to work under Dr. Cox's restrictions, and that he had reasonable access to the following job categories: parking lot attendant, security guard, driver, sales worker, amusement/recreation attendant, cashier, courier/messenger, bus driver, transit, inner city, and a taxi driver and a chauffer. Ex. 15:419-420. The Commission is familiar with Ms. Nelson's credentials.

53. Ms. Nelson acknowledged that Claimant faces tough competition for jobs given his age, limited formal training and physical impairment. *Id*. at 419. Nevertheless, she opined that Claimant was still re-employable. *Id*. She concluded that Claimant had suffered a 35% loss in labor market access, due to the work restrictions recommended by Dr. Cox. *Id*. at 420. Ms. Nelson based her wage loss calculation on Claimant's average weekly wage during the two weeks he was employed, which is $875.62 weekly or $21.89 per hour, rather than on Claimant's proposed, but hypothetical, earning potential of $70,000 annually. *Id*. at 419. She concluded that Claimant suffered a 60% wage loss. *Id*. at 420. After averaging Claimant's loss of access and wage loss, Ms. Nelson opined Claimant's PPD was 47.5% PPD, inclusive of impairment. *Id*.

Claimant's Present Condition and Credibility

54. Claimant's wife, Lynette Jenkins, testified that Claimant's condition has deteriorated following his back surgeries. She stated that she does 98% of the driving, but acknowledges that Claimant has driven occasionally since his accident. Tr., 37:13-21.

[4] Claimant's previous attorney, Stratton P. Laggis, retained Ms. Nelson for a disability assessment in 2013. Ex. 15:408.

Ms. Jenkins feels that Claimant's narcotic pain medication usage also negatively impacts his activities of daily living. Tr., 30:8-14.

55. Claimant does not feel optimistic about qualifying for a CDL on his present opioid regimen and physical limitation. *Id*. at 47:12-48:25.

56. Claimant still complains of numbness in his back and feet, chronic back pain that radiates into his right leg and foot, drop foot, "fogginess" from his opioid medication use and recently diagnosed with sleep apnea. Tr., 68:17-71:6; 78:14-79:23. Claimant is relatively sedentary, and limits his activity to a few chores in the house (not outside), spending time on his laptop and smart phone, and taking occasional walks around the neighborhood or to the grocery store. *Id*. at 89:7-90:25.

57. Having observed Claimant's demeanor during hearing testimony, the Referee finds that Claimant testified forthrightly about his injury, abilities, and condition.

DISCUSSION

58. ***Medical Care***. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). For the purposes of Idaho Code § 72-432(1), medical treatment is reasonable if the employee's physician requires the treatment and it

is for the physician to decide whether the treatment is required. *Mulder v. Liberty Northwest Insurance Company*, 135 Idaho 52, 58, 14 P.3d 372, 402, 408 (2000).

59. Claimant requests ongoing or continuing medical care without specificity. Defendants argue that there is no dispute at present regarding these issues, and that Claimant's most recent care from Dr. Radnovich has been paid as bills have been submitted. Pursuant to Idaho Code § 72-432 medical care remains open for Claimant's lifetime provided causation is established. Accordingly, the Commission will address this issue should a dispute arise. There is no present controversy regarding medical care.

60. ***Permanent partial impairment.*** The first issue is the extent of Claimant's permanent impairment. "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. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Waters v. All Phase Construction*, 156 Idaho 259, 262, 322 P.3d 992, 995 (2014).

61. The parties agreed that Claimant had sustained a 25% whole person PPI as a result of the injury from his the industrial accident. Tr., 5:18-20. Dr. Cox issued this impairment rating on April 1, 2015, and reaffirmed the rating on June 10, 2016. At the same time of his impairment rating evaluation, Dr. Cox also gave restrictions against lifting over 25 pounds,

avoid repetitive bending, twisting, stooping, and prolonged exposure to low-frequency vibration. Ex. 9:29; Cox Dep., 12:14-25; 16:22.

62. Dr. Radnovich did not challenge Dr. Cox's impairment rating. Radnovich Dep., 28:17-21.

63. Dr. Cox's undisputed testimony is persuasive. Claimant is entitled to a 25% whole person PPI as a result of his injury sustained in the industrial accident.

64. ***Permanent Disability.*** "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.

65. The test for determining whether Claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced Claimant's capacity for gainful employment." *Graybill v. Swift & Company,* 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on Claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

66. Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the advisory opinions

of vocational experts. *See*, *Eacret v. Clearwater Forest Industries,* 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State of Idaho, Industrial Special Indemnity Fund,* 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon Claimant. *Seese v. Ideal of Idaho, Inc*., 110 Idaho 32, 714 P.2d 1 (1986).

Total Disability under the 100% Method

67. Total permanent disability may be established using either the 100% method or the odd-lot doctrine. Under the 100% method, Claimant must prove his medical impairment and non-medical factors combine to equal a 100% disability. Under the odd-lot doctrine, Claimant must show he was 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, absent business boom, the sympathy of the employer, temporary good luck, or a superhuman effort on Claimant's part. *See, e.g. Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984).

68. Claimant does not argue that he is permanently disabled under the 100% method, but rather under the odd-lot method, discussed below.

Total Disability under the Odd-Lot Method

69. Claimant has the burden of proving odd-lot status. *Dumaw v. J. L. Norton Logging,* 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). He may 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).

70. Claimant asserts odd-lot worker based upon the third prong, the futility of obtaining suitable work. He relies on the vocational testimony of Mr. Montague to demonstrate futility. Defendants argue that Claimant cannot meet his burden of proving odd-lot status based on Mr. Jordan's vocational testimony. These vocational experts sharply diverged in their evaluation of the case.[5] Claimant argued that Mr. Jordan's analysis was outdated and unpersuasive for its reliance on the *Dictionary of Occupational Titles*. Defendants argue that Mr. Jordan's opinion is persuasive. Both parties asserted that the experts went outside their area of expertise. Claimant objected to Dr. Cox's assertion that he believed Claimant could find employment as being a vocational opinion outside his expertise, and Defendants contended that Mr. Montague exceeded his expertise with his discussion of the prescription drug side effects and additional work restrictions for Claimant. Claimant asserts that Mr. Montague was simply presenting known prescription drug side effects.

71. Dr. Cox should not be relied upon for vocational testimony. Nevertheless, it is appropriate for Dr. Cox, as a medical professional, to identify the appropriate restrictions for Claimant and to opine on whether Claimant can physically perform such job tasks. The Referee agrees with Defendants that Mr. Montague exceeded his vocational expertise when he added "generalized restrictions" from Dr. Radnovich and added pages from the Physician's Desk Manual to bolster his vocational analysis. Mr. Montague is not a medical professional and was unqualified to render a medical opinion as to Claimant's physical

[5] Mr. Montague insinuated that Mr. Jordan lied about the vocational contacts he made—an assertion Mr. Jordan strongly denies. While it is not uncommon for vocational experts to vary in their opinions, it is a rare case where one accuses the other of dishonest or unethical methodology. Mr. Montague did not offer any direct testimony impeaching Mr. Jordan's testimony. Moreover, Claimant did not adopt Mr. Montague's accusations in briefing. The Referee is not persuaded that Mr. Jordan falsified his report and gives no weight to Mr. Montague's opinion in this regard.

restrictions and limitations. To find that Claimant is significantly impaired by his medication and thus unable to work, there must be support in the medical record and expert medical testimony. *See, e.g., Benner v. Home Depot, Inc*., 2013 IIC 002 (extensive discussion of Claimant's prescription drug medication and the impact on Claimant). Mr. Montague's introduction of research from the Physician's Desk Manual regarding Claimant's prescription drug usage and its side effects violates *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 759, 302 P.3d 718, 727 (2013).

72. Mr. Montague was not competent to develop Claimant's medically-based work restrictions. Mr. Montague's analysis also suffered from his failure to address the medication issue with Dr. Cox, who again, was the only one to provide permanent work restrictions. Thus, there was an opportunity to develop a sound medical record supporting Mr. Montague's conclusion that Claimant's medication usage significantly hindered his employability, nevertheless that did not occur in this case**.**

73. Claimant had the opportunity to introduce medical testimony concerning Claimant's restrictions and limitations, but he did not do so. Dr. Radnovich, Claimant's physician, did not restrict Claimant in the manner proposed by Mr. Montague. For example, Dr. Radnovich, who was sympathetic to Claimant's concerns, did not restrict Claimant from driving.

74. In light of the totality of the evidence, it is reasonable to find that Claimant could overcome his vocational barriers and obtain employment after a diligent job search, as Mr. Jordan opined. Mr. Montague's conclusion that it would be futile for Claimant to seek suitable employment is not persuasive and is not supported by the record.

Additionally, the credible opinion of Ms. Nelson, Claimant's initial vocational expert, that Claimant was employable, supports a finding that Claimant is not an odd-lot worker.

75. Because Claimant has not made a *prima facie* showing that he is an odd-lot worker, the burden of proof does not shift to Employer to demonstrate that some kind of suitable work is regularly and continuously available to Claimant. *Rodriguez v. Consolidated Farms,* IIC No. 42708 (2017); *Lyons v. Industrial Special Indem. Fund,* 98 Idaho 403, 565 P.2 1360 (1977).

76. Claimant does not qualify as an odd-lot worker and is not totally and permanently disabled.

Permanent Partial Disability

77. Although Claimant is not totally and permanently disabled according to either the 100% method or the odd-lot doctrine, nevertheless he has experienced a significant partial disability in excess of his 25% impairment, due to his wage loss and loss of access to the labor market, as discussed below.

78. With respect to Claimant's wage loss, Ms. Nelson rejected as unrealistic Claimant's suggestion that, had he remained in his time-of-injury position, he would have earned $70,000 annually. Instead, she based her wage loss analysis on Claimant's average weekly wage during the three weeks he was employed, which was $875.62 weekly or $21.89 per hour. She then compared his $21.89 per hour wage at time of injury to an average hourly wage of $8.66 derived from the possible jobs he could perform post-accident, a substantial wage loss of 60%. Ex. 15:419-420.

79. In comparison, Mr. Montague's 82%-87% wage loss analysis is less persuasive for relying on hypothetical earnings, as Claimant was not on track to earn

$70,000 annually, and also varied from Claimant's tax returns and earnings history. Mr. Jordan's recommended wage loss of 24% or 10% also varied from Claimant's tax returns and earnings history, but in the opposite direction to such an extent that it improperly discounted Claimant's wage loss.

80. Because of the concerns identified above regarding the wage loss analysis of Mr. Montague and Mr. Jordan, the Referee concludes that the wage loss analysis of Ms. Nelson is the most persuasive. Claimant suffered a wage loss of 60% as result of his industrial accident.

81. Considering the impairment and restrictions given by Dr. Cox, Claimant is employable, but has lost access to very heavy, heavy and some medium-heavy positions. Ms. Nelson's vocational analysis under Dr. Cox's restrictions suggested a 35% loss in labor market access. Despite their spirited disagreement and different methodologies, Mr. Montague and Mr. Jordan both proposed similar loss of labor market access figures, 65-70% and 59%, respectively.

82. Mr. Jordan's reasoning that Claimant has transferrable skills that could result in employment, albeit in a lower-paid occupation other than the trucking industry, is persuasive. Claimant loss of labor market access is thus 59%.

83. Claimant has established permanent partial disability (PPD) of 59.5%, inclusive of impairment, based upon an average of his wage loss (60%) and loss of access to the labor market (59%).

84. ***Apportionment.*** Idaho Code § 72-406 allows apportionment of disability in less than total cases for preexisting impairments. Defendants waived apportionment as an issue. Additionally, the record contains no evidence that Claimant had any pre-existing

impairments for which it would appropriate to apportion Claimant's disability award. Thus, Claimant is entitled to 59.5% PPD, inclusive of impairment, without apportionment.

CONCLUSIONS OF LAW

1. Pursuant to Idaho Code § 72-432, medical care remains open for Claimant's lifetime, provided causation is established. Accordingly, the Commission will address this issue should a dispute arise.

2. Claimant is not 100% disabled and does not qualify as an odd-lot worker.

3. Claimant's suffered 25% whole person PPI as a result of the accident.

4. Claimant has permanent partial disability of 59.5%, inclusive of PPI.

5. Apportionment under Idaho Code § 72-406 is not appropriate.

DATED this _11th___ day of January, 2018.

INDUSTRIAL COMMISSION

_/s/_____
John C. Hummel, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _19th__ day of _January___, 2018, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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_/s/_____

sjw

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

EDDIE B. JENKINS, Claimant, v. OLD DOMINION FREIGHT LINE, Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Surety, Defendants.	**IC 2010-029666** **ORDER** January 19, 2018

Pursuant to Idaho Code § 72-717, Referee John C. Hummel 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. Pursuant to Idaho Code § 72-432, medical care remains open for Claimant's lifetime, provided causation is established. Accordingly, the Commission will address this issue should a dispute arise.

2. Claimant is not 100% disabled and does not qualify as an odd-lot worker.

3. Claimant's suffered 25% whole person PPI as a result of the accident.

4. Claimant has permanent partial disability of 59.5%, inclusive of PPI.

5. Apportionment under Idaho Code § 72-406 is not appropriate.

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

DATED this __19th__ day of ____January_____, 2018.

INDUSTRIAL COMMISSION

__/s/_____
Thomas E. Limbaugh, Chairman

__/s/_____
Thomas P. Baskin, Commissioner

__/s/_____
Aaron White, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __19th_ day of __January_____, 2018, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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sjw _____/s/_____