BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KAREN WILLIAMS, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2012-002818** **2012-004680** **2011-017698** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **Filed June 20, 2018**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Coeur d'Alene on April 13, 2017. Richard Whitehead of Coeur d'Alene represented Claimant. Employer settled with Claimant prior to the hearing. Thomas W. Callery of Lewiston represented the State of Idaho, Special Indemnity Fund (ISIF). Oral and documentary evidence was presented and the record remained open for the taking of one post-hearing deposition. The parties then submitted post-hearing briefs and this matter is now ready for decision.

ISSUES

The issues to be decided as a result of the hearing are:

1. Whether Claimant is totally and permanently disabled by either the one hundred percent method or the odd-lot doctrine; and, if so

2. Whether ISIF is liable for a portion of that total disability; and, if so

3. Apportionment under the *Carey* formula.[1]

CONTENTIONS OF THE PARTIES

Claimant contends that she is unable to return to her time-of-injury job as an animal control officer and as a result is totally and permanently disabled as an odd-lot worker. Her prior left knee injuries have combined with her last left knee injury (and a failed TKA) and chronic pain syndrome to render her totally and permanently disabled. Further, her use of alcohol and marijuana to self-medicate her chronic pain and depression has taken her out of the labor force.

ISIF contends that this is an employer's case; not an ISIF case. Claimant and her treating physician discussed the probability that she would eventually need a left knee TKA as far back as 2011 mainly due to arthritis. Claimant has never reached MMI regarding her left knee and, consequently, has no preexisting impairment to combine with her last industrial accident to cause total and permanent disability. She should have never been released to return to work without restrictions as she has never been medically stable although she was in fact so released shortly before her last accident. However, she was doing mostly administrative office work upon her release to return to work rather than working in the field.

While ISIF concedes that Claimant cannot return to being an animal control officer, they contend that she can perform sedentary work if she gets her GED, brushes up her keyboarding skills, and arranges for counseling to help control her depression. Claimant lives in a vibrant labor market (Coeur d'Alene and Spokane Valley), is very bright and presents well. She has not followed up with Washington and Idaho vocational rehabilitation services. Subjectively, Claimant's pain issues may prevent even sedentary employment; however, objectively she can perform such work.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

[1] *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686P.2d 54 (1984).

1. The testimony of Claimant, Claimant's son Michael Pinnock, Claimant's co-worker Trudy Whittenburg, and Claimant's friend Jean Curran presented at the hearing.

2. Joint Exhibits A-AM admitted at the hearing.

3. ISIF Exhibits 1-5 admitted at the hearing.

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

FINDINGS OF FACT

Hearing testimony

Claimant

1. Claimant was 55 years of age and residing in Spokane Valley at the time of the hearing. Her Springer Spaniel service dog, Sam, was present with Claimant at the hearing.

2. Claimant dropped out of school at age 15 when her parents moved into an adult-only community and told Claimant she had to find her own place to live. Claimant has not received her GED; however, she earned 36 credits at a community college while maintaining a 3.8 grade point average.

3. After she was asked to leave her home, Claimant obtained employment at Motorola in Phoenix, Arizona where she spent the next 23-and-a-half years. She worked her way "up through the ranks" but was eventually laid off when her position was eliminated in November of 2003. Claimant and her husband thereafter moved to the Spokane Valley in 2004.

4. Claimant obtained employment at a veterinary clinic as a "kennel assistant" in Spokane Valley. She then worked for the Post Falls animal shelter. About ten months later, Claimant began her employment with Employer as an animal control officer.

5. Claimant described the various duties she was required to perform as "very physical." Even so, Claimant "…loved her job. It was my dream job." HT., p. 64.

6. In 2009, Claimant was attempting to coach a loose horse through a gate when the gate fell causing Claimant to fall and injure her left knee; this was the first significant injury to that knee. A few weeks later, Claimant sat on the floor at her home and "…felt and heard" something tear in her left knee. She saw her doctor who prescribed muscle relaxers, pain relievers and a brace. Claimant's left knee pain would wax and wane thereafter.

7. On February 11, 2011, Claimant again injured her left knee while trying to control a vicious dog on a catch pole. She came under the care of Douglas McInnis, M.D., an orthopedic surgeon practicing in Coeur d'Alene who gave her a cortisone injection, a knee brace and ordered an MRI.

8. Claimant returned to full-duty work, although winter was the "slowest time" regarding animal control activities in Kootenai County and not as physical as working in the field.

9. Claimant's next accident (July 7, 2011) resulting in further injury to her left knee happened as Claimant was descending a gravel slope to the Spokane River to assist with a drowning. She slipped and hyperextended her left leg/knee and felt immediate pain in her left knee.

10. Claimant returned to Dr. McInnis who arranged for an MRI of her left knee that revealed degeneration and a meniscal tear. Dr. McInnis informed Claimant that she would need a total knee replacement (TKA) eventually. Claimant denied that Dr. McInnis told her that she needed a TKA at their first visit; only that with her arthritis she would need a TKA at some point.

11. Claimant was not off work after the above-mentioned accidents, but her left knee caused her problems with activities such as stair climbing and getting in and out of her pickup. Claimant testified that no accommodations were made for her left knee and she worked through the pain as she did not want to lose her job.

12. Claimant underwent a meniscal repair surgery in October 2011. She was released to light-duty work followed by a full-duty release.

13. On January 23, 2012, Claimant again injured her left knee when her foot slipped in gravel as she was exiting her vehicle and she "… tweaked my knee sideways." Claimant testified that the pain she felt was, "It felt - - literally felt like someone took a hot knife and drove it through my leg." HT., p. 73.

14. Following the above injury, Claimant continued to work for Employer mostly in administration until she used up all of her sick leave, vacation time and comp time and was eventually terminated in August 2012. She testified that she had no intention of leaving her job voluntarily.

15. On June 12, 2012, Claimant underwent a left TKA at the hands of Dr. McInnis. Initially, Claimant placed great hope that her TKA would enable her to return to work for Employer. However, Claimant began experiencing problems with her TKA that Dr. McInnis described as a chronic pain syndrome. Claimant testified that the pain was progressing to the point that, "The pain is there 24/7, 365 days a year. There's no relief. There's nothing I can do. I've tried." HT., p. 75.

16. Dr. McInnis referred Claimant to a pain clinic but Surety denied any further treatment. The gabapentin and Lyrica prescribed by Dr. McInnis did not work. Dr. McInnis

offered Claimant a second TKA but could not vouch for the efficacy of such a procedure; Claimant declined.

17. Claimant turned to alcohol to help relieve her unrelenting left knee pain. She admitted to drinking to excess and becoming "numb" every day since her TKA. Claimant has had a medicinal marijuana card out of Washington since 2015 and ingests the substance as a pain-relieving tool three or four times a week.

18. Claimant is on Social Security Disability. She earned between $32,000 and $35,000 annually and had medical and dental insurance, vacation and sick leave, as well as a 401(K), and PERSI benefits with the Sheriff's office. She also has a retirement plan through Motorola.

19. Claimant is also having problems with her right knee presently and may be a candidate for a right knee TKA, a procedure which Claimant states, "…will not happen." HT., p. 79. Claimant did consent to an arthroscopic procedure on her left knee accomplished by Timothy Lovell, M.D., in the fall of 2016. Claimant testified that this procedure made her left knee less mobile with less range of motion, and "…even worse than it was before." HT., p. 81.

20. Claimant developed some low back issues around 2013-2014 that she attributes to the way she walked, sat, or lifted things up off the floor caused by the weakness in her legs. Even though she received acupuncture treatments, she testified that her low back pain is getting progressively worse.

21. Claimant cannot sit for more than 15-20 minutes at a time before needing to get up and move around; she could not sit at a computer all day.

22. Claimant can drive 30-40 minutes at a time,[2] but cannot operate a vehicle with a standard transmission.

[2] Claimant's home in Spokane Valley is approximately 20 minutes to Spokane and 30 minutes to Coeur d'Alene.

23. Claimant has not had a decent night's sleep since her TKA. She can sleep an hour to an hour-and-a-half before her left knee pain wakes her up.

24. Claimant does not believe that ICRD was of much assistance to her. Claimant's Washington state vocational rehabilitation was closed pending Claimant's gaining enough stamina to maintain "test" employment of three-and-a-half hours five days a week.

25. Claimant cannot think of any job she could do that would require a 40-hour work week. Claimant testified that but for her last injury she would still be working for Employer because, "I think the difference between that injury and the ones before that is I mean it literally felt like my knee fell apart when I slipped." HT., p. 86.

26. Claimant has applied for employment at Home Depot, Lowe's, Costco, some fast food restaurants, a couple of offices, and some home health care facilities without success.

27. Claimant believes that her inability to pay attention, her lack of comprehension, and merely a drive to and from the retraining site are obstacles to being retrained.

28. At the time of the hearing, Claimant was seeing a pain management specialist as well as a counselor in Spokane Valley and has recovered from her depression.

Michael Pinnock

29. Mr. Pinnock is Claimant's son. He is an underwriter for an insurance company and moved with Claimant to Spokane Valley in 2004. Mr. Pinnock testified to certain activities, hobbies, etc. that Claimant can no longer enjoy since her 2009 accident and injury and, especially, her January 2012 accident and injury. After her TKA, Claimant began to lose hope for improvement and her level of pain increased dramatically. She lost a lot of weight. She has become depressed. "I know I'm not a doctor to diagnose depression, but she is not the same person. She is always sad or in pain. She is constantly just tolerating being awake in the morning.

I know of her constant sleeplessness, which reduced her overall energy, and she is not the same mom that I had before the injury." HT., p. 24.

30. Post-TKA, Claimant would begin drinking alcohol on a daily basis in the afternoons until she went to bed. She eventually obtained a Washington State issued medical marijuana card. Mr. Pinnock testified that he noticed an improvement in Claimant's pain tolerance and overall demeanor since she began using cannabis. Also, the cannabis has helped Claimant greatly reduce her alcohol consumption which, in turn, has increased her physical stamina.

Trudy Whittenburg

31. Ms. Whittenburg was a co-worker of Claimant at the Kootenai County Sheriff's Office in the billing department and had almost daily contact with her. She testified that Claimant's condition after the "dog incident" allowed her to do her job but that her left knee post-arthroscopic surgery swelled some and it bothered Claimant to stand for long.

32. After the "drowning incident," according to Ms. Whittenburg, Claimant decided to pursue the TKA option because she was unable to do her work. Yet, she later testified that before Claimant's TKA, "…she was able to do her job completely, and she would wrestle dogs and do everything she could." HT., p. 34.

33. After her TKA, Claimant was unable to do her job. She had problems getting in and out of vehicles and ascending/descending stairs. Claimant was in excruciating pain and frustrated that she was not improving.

Jean Curran

34. Ms. Curran, with a background in adjusting/investigating workers' compensation claims in California, is a friend of Claimant. She moved to Idaho after her retirement and worked

briefly for Employer as an animal control officer, a position that Claimant helped her to secure. Ms. Curran met Claimant approximately eight-and-a-half years ago regarding some potential animal control regulation violations.

35. Claimant and Ms. Curran would text and phone each other a couple of times a week and try to lunch together twice a month. Ms. Curran provided transportation for Claimant to and from doctors' appointments, IMEs etc., as Claimant's left knee condition prevented her from operating her own standard transmission vehicle requiring the use of the clutch.[3] Ms. Curran provided Claimant with "a shoulder to cry on." HT., p. 44.

36. Ms. Curran testified that after Claimant's first surgery, she returned to work on light duty and did not do much field work; she was still limping. After her last accident in January 2012, "Things had gotten worse. She was much more debilitated. Her level of pain was excruciating." *Id.*, p. 45. Claimant became depressed. She lost her focus and was easily distracted.

37. Following her TKA, Claimant did not improve from Ms. Curran's observation:

> No. It has - - it has continued - - she has continued to go in a declining state. I know she's - - there have been prescription pain medications given to her to try to help with the pain. Most of them didn't work or made her sick. I've seen her resort to alcohol use or marijuana use to try and mitigate some of the pain. She can't do the things that she used to love to do, including like her gardening, horseback riding, which is a passion we both share. She's pretty much isolated and stuck to being at home. Her husband does most of the shopping because she just doesn't have the physical ability to be able to get out there and do the things that she would normally do and enjoy doing.

HT., p. 46.

Pain syndrome

Philip Hanger, Ph.D., Psychologist

[3] ISIF's vocational expert testified that Claimant drove a Ford Explorer with an automatic transmission.

38. Claimant saw Dr. Hanger at her attorney's request to address her, "…psychological adjustment to her physical condition." JE AF, p. 1. Dr. Hanger met with Claimant on December 15, 2016 and prepared a Psychological Evaluation on that date. He administered various psychometric tests and reviewed available medical and mental health records.

39. Claimant informed Dr. Hanger of her cannibis and alcohol usage to help with pain relief. Dr. Hanger noted that Claimant suffered an episode of severe reactive depression in 2002 surrounding her teenage son's legal issues; that depression eventually resolved. Following her TKA in 2012 and her failure to improve, "…she began experiencing significant new onset of negative psychological symptoms, including depression and anxiety." *Id.*, p. 2. Claimant began the use of psychotropic drugs but discontinued their use due to negative side effects including weight gain. She began seeing a psychotherapist in March 2015 and experienced a "slight benefit" in resolving her depressive symptoms. Claimant acquired a service dog in July 2015.

40. Dr. Hanger reported that Claimant had undergone a Psychological Assessment by Frank Rosekrans, Ph.D., on March 15, 2015 wherein it was concluded that her psychological problems were due to her struggle with chronic and severe physical pain. Dr. Rosekrans (as well as Dr. Hanger) reached the diagnosis of Major Depressive Disorder, Moderate, with Anxious Distress, and Somatic System Disorder; Moderate, Persistent with Pain. Dr. Rosekrans recommended psychotherapeutic counseling to address Claimant's psychological distress and occupational therapy to address her physical pain complaints.

41. Based on his testing and clinical impression of Claimant, Dr. Hanger concluded that she was demonstrating a clinically significant pattern of psychological distress as a direct result of her physical limitations and valid pain experience which are causally related to the injuries she sustained in 2009, 2011, and 2012 with the most prominent causal event identified as her 2012 accident and injury.

42. Dr. Hanger opined that even though Claimant suffered from a prior depressive condition, that condition was transient and resolved so that Claimant could resume her employment. Claimant also had previous pain experiences related to injures, "However, these conditions have not resulted in the extensive and persuasive physical limitations that she has experienced since her 2012 injury." Further, "…it is concluded that the diagnoses provided below[4] are supported by clear and convincing evidence that her psychological injuries were the direct result of the injuries she sustained in 2009, 2011, and 2012 – during her employment." Finally, while noting that Claimant had always been able to return to work following transient episodes of physical and psychological distress, "Unfortunately, the psychological injuries suffered as a direct result of her work-related injury of 2012 were substantial enough to result in a disabling psychological condition preventing her from returning to work and limiting the functional abilities in her daily life." JE AF, p. 6.

43. Dr. Hanger reported that because Claimant had shown no improvement since her visit with Dr. Rosekranz in 2015, she has suffered a permanent partial impairment[5] in functioning due to her psychological condition. Claimant did not exaggerate her symptoms. Although Claimant admitted to the use of alcohol and cannibis, she did not display a pattern of an elevated risk for the development of a future substance abuse problem.

44. Dr. Hanger recommended that Claimant continue with psychotherapeutic support services through counseling as well as medication management.

DISCUSSION AND FURTHER FINDINGS

Permanent partial 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

[4] See, finding number 40 above.

[5] Dr. Hanger did not quantify or rate Claimant's permanent partial impairment.

impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

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 non-medical factors, has reduced the 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 the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

The labor market to be considered for purposes of a disability evaluation is Claimant's labor market as it exists as of the date of the hearing. *Brown v. Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012).

Vocational evidence

Douglas Crum

45. Claimant retained Mr. Crum to assess her employability. His credentials are well-known to the Commission and he is qualified to testify as an expert regarding vocational issues.

46. Mr. Crum authored a report dated October 22, 2013. (JE V). In preparation of his report, Mr. Crum reviewed medical[6] and vocational records, and interviewed Claimant on August 6, 2013.

Pre-injury labor market

47. Mr. Crum reported that Claimant, at the time of the subject injury, "…was in good health, capable of performing heavy physical demand activities on a full time basis." JE V., p. 11. He further noted Claimant's lack of a GED and strongly recommended that she obtain one.

48. Using the Kootenai County and Spokane County labor markets, Mr. Crum performed a labor market assess analysis: "Considering Ms. William's age, limited education, skills, work history, as well as the nature and combination of her (combined) local labor market, I believe that on a preinjury basis Ms. Williams had access to approximately 15.1% of the jobs in the labor market." *Id.*

Post-injury labor market

49. Mr. Crum summarized Claimant's permanent restrictions as follows:

[6] Mr. Crum prepared a comprehensive medical records summary found at pages 2-9 of his report.

Dr. Greendyke:

- Cannot return to her time-of-injury occupation.
- May perform sedentary work only.
- No standing or walking more than 10 minutes at a time.
- No kneeling or squatting.

50. Based on the above restrictions, Mr. Crum opined that Claimant has a 76% reduction in her pre-injury labor market.

51. Mr. Crum expressed concern that Claimant's lack of a GED and keyboarding skills will restrict her ability to work in her labor market with Dr. Greendyke's restrictions and urged Claimant to obtain those skills.

52. Dr. McNulty:

- Continuous standing or walking with the use of a cane should be limited to 10 minutes.
- Continuous sitting should also be limited to 10 minutes.
- Unable to climb, kneel or squat.
- Capable of sedentary work only (within the above restrictions).

53. Based on the above restrictions, Mr. Crum opined that Claimant has access to no jobs in her labor market with or without retraining.

Pre-injury wage earning capacity

54. At the time of Claimant's last accident/injury, she was earning $680.00 per week or $17.00 an hour;[7] she also received Employer-supported health insurance.

Post-injury wage earning capacity

55. Using Dr. Greendyke's restrictions, Claimant would have the ability to perform mostly entry-level clerical, and sedentary sales/customer service positions. According to the

[7] Mr. Jordan, *supra*, had Claimant's hourly wage with Employer at $15.56 per hour. See ISIF Exhibit 1, p. 5.

Washington Department of Labor, the average wage for a telemarketer was $11.21 an hour which represents a 34% reduction in wage earning capacity. Mr. Crum opined that there was but a 50% chance that Claimant would be able to secure employment with benefits equaling those of Employer; therefore, an increase of 5% would be appropriate (39% post-injury loss of access).

56. Mr. Crum utilized the factors contained within Idaho Code § 72-430 to determine the percentages of disability:

> * **Cumulative effect of multiple injuries.** At the time of her July 7, 2011 accident, Claimant was able to perform medium to heavy labor without accommodation and she was not under any physician-imposed restrictions.
>
> * **Disfigurement . . .** N/A.
>
> * **Diminished ability of the affected employee to compete in an open labor market within a reasonable geographic area considering all of the personal and economic circumstances of the employee.** Claimant has a loss of labor market of approximately 75% from her July 7, 2011 industrial accident when utilizing Dr. Greendyke's restrictions. Prior to that accident, Claimant was not restricted physically. Again, based on Dr. Greendyke's restrictions, Claimant has suffered a 39% reduction of wage earning capacity when considering her benefits package. Based on Dr. McNulty's restrictions, Claimant is totally and permanently disabled.
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> * **Occupation of the employee at the time of injury . . .** Claimant was employed by Kootenai County as an animal control officer. Her relevant prior work history consists of production laboring jobs as well as other animal care related jobs. She has few transferrable skills that would be of much help to her when considering Dr. Greendyke's restrictions. Without obtaining her GED and enhancing her keyboarding skills, her employment potential is even more limited.
>
> * **Age at time of injury.** Claimant was 50 years of age at the time of her 2012 industrial accident and protected by federal law from age discrimination. However, it is well-known that older workers do experience longer periods of unemployment than younger workers.

57. Mr. Crum concluded that, based on the information he was provided at the time and the restrictions imposed by Dr. Greendyke, Claimant has suffered permanent partial disability of 60%.

58. Based on Dr. McNulty's restrictions, Mr. Crum opined that Claimant is totally and permanently disabled.

Crum addendum

59. On February 7, 2017, Mr. Crum authored an addendum to his October 23, 2013 report based on reviewing additional information, including, *inter alia*:

* The report of William Jordan.

* Dr. Rosekrans' psychological evaluation finding Claimant to be totally and permanently disabled.

* The January 13, 2013 note from Dr. McInnis indicating that the most likely cause of Claimant's continuing problems is due to a chronic pain syndrome and Claimant should not consider a TKA revision until it is better understood why she is continuing to have problems with her left knee. Her prognosis is guarded with or without revision surgery. In the interim, Claimant cannot work.

* A report from Dr. Hanger indicating that as a result of Claimant's injuries of 2011 and 2012, "The level of psychological distress identified to this current assessment is considered to be debilitating, compromising daily functioning." JE AK, p.2.

60. Mr. Crum continues to be of the opinion that Claimant is totally and permanently disabled based on Dr. McNulty's restrictions.

William Jordan

61. ISIF retained Mr. Jordan to assess Claimant's employability. Mr. Jordan's credentials are well known to the Commission and he is qualified to testify as an expert regarding vocational issues.

62. In preparation of his Employability Report dated January 9, 2015, Mr. Jordan reviewed relevant medical and vocational records and interviewed Claimant[8] on December 1, 2014 to obtain her educational, employment and financial histories and again on December

[8] Mr. Jordan also reviewed Claimant's two pre-hearing depositions and the hearing transcript.

7, 2016 to update. See ISIF Exhibit 1. Mr. Jordan also prepared an addendum to his initial report on December 20, 2016. See ISIF Exhibit 2. He was also deposed.

63. Mr. Jordan testified that Claimant acquired transferrable skills based on her employment with Motorola, "Well, she's a skilled worker. So she has reading, math, and language skills that are in the high areas. We call that a four, four and four. And when you look at those areas, it means that she's trainable either on the job or in a formal set[ing]." Jordan Dep., p. 21. He labeled Claimant as a skilled worker meaning that she has the intellect to do a skilled job as well as semi-skilled or unskilled type of jobs.

64. Claimant began her employment with Employer in November of 2006 and worked until June 28, 2013 where her work included enforcing state and local laws and ordinances related to animal control. This was a semi-skilled position meaning that it would take from six months to a year to learn. Mr. Jordan considered this position to be generally medium in terms of the physical effort required, although it could be heavy depending on what needed to be done.

65. Mr. Jordan was aware that Claimant continued to have problems after her left knee TKA and had an arthroscopic scar-removal procedure performed by orthopedist Timothy Lovell, M.D., on November 17, 2016.

66. Mr. Jordan believes that Claimant could easily obtain her GED as she did well in the community college courses she took while in Arizona. Further, she could continue her education at one of community colleges in the Spokane area in areas like accounting assistant, administrative office management assistant, mechanic designer technician, and computer assisted drafting. Claimant could also benefit from computer skills training. Mr. Jordan was not aware whether or not Claimant had pursued any further training.

67. Mr. Jordan was aware that Claimant was using alcohol to excess following her TKA. However, she has since obtained a medical marijuana card and ingests the substance in various forms two to three times per week and has reduced her alcohol consumption.

68. The last time Mr. Jordan met with Claimant, she was accompanied by her service dog, Sam, who she is with constantly for companionship and comfort. She was ambulating with the use of a cane.

69. Mr. Jordan reviewed Dr. Greendyke's IMEs that indicate that Claimant reached MMI as of March 5, 2013 and cannot return to her time-of-injury position. His permanent restrictions are that Claimant performs only sedentary work, no standing for more than 20 minutes at a time, and no kneeling or squatting. Mr. Jordan defined "sedentary" as involving sitting and lifting 10 or 15 pounds, or less.

70. Mr. Jordan also reviewed the permanent restrictions imposed by Dr. McNulty of limiting to 10 minutes continuous walking with a cane or standing and sitting. Claimant is unable to climb, kneel, or squat. Claimant should only perform sedentary work. Dr. McNulty's restrictions are similar to Dr. Greendyke's except Dr. McNulty adds the sitting restriction.

71. Dr. McInnis, who was Claimant's treating physician for her knee surgeries except the last one performed by Dr. Lovett, gave no specific restrictions but indicated that Claimant subjectively believed she could no longer work. However, Dr. McInnis did indicate that Claimant could use adaptive equipment such as an adjustable chair and/or desk. Mr. Jordan testified that such usage would fit within the restrictions imposed by Dr. McNulty.

72. Regarding Claimant's psychological issues, Mr. Jordan referenced the report of Dr. Rosecrans, who Claimant saw at the request of WDVR, and who recommended that

Claimant pursue counseling with a licensed mental health professional, receive pharmacological treatment and be evaluated by an occupational therapist.

73. Mr. Jordan also referenced the report of Dr. Hanger, who saw Claimant on December 15, 2016 at her counsel's request. Dr. Hanger diagnosed a major depressive disorder, recurrent with anxious distress and somatic system disorder that Mr. Jordan understood to mean that Claimant's mental issues are creating physical symptoms.

74. Mr. Jordan observed that Claimant presents as disabled as she believes her physical and psychological problems prevent her from working. ICRD prepared a vocational evaluation regarding Claimant, identified potential employment, and talked with Employer and Dr. McInnis about employment opportunities; however, ICRD closed its file on Claimant because she did not feel capable of working.

75. Mr. Crum referred Claimant to WDVR, who referred Claimant to services referred to above. In addition to ordering a psychological work-up for Claimant, IWDR also arranged for a return-to-work trial program with Goodwill Industries, a thrift store. Claimant declined the program stating concerns about her stamina, a concern the program was specifically designed to address. In any event, WDVR closed its file on Claimant for non-participation, but indicated she could reapply in the future.

76. Mr. Jordan testified that Claimant applied for about 13 jobs after leaving Employer; about half of those appeared inappropriate considering her restriction of sedentary work.

77. Mr. Jordan agrees that Claimant has suffered some disability above her impairment because she can no longer perform her job with Employer and she has gone from a medium to sedentary work capacity. Even so, there are sedentary jobs within Claimant's

restrictions that she could do if properly motivated and they are available in her labor market. However, it is unlikely that she will become employed if she presents as disabled to a prospective employer.

78. Based on the restrictions given by Drs. McInnis, McNulty and Greendyke, Mr. Jordan is of the opinion that it would not be futile for Claimant to look for work.

79. Mr. Jordan testified that Claimant's potentially being tested positive for marijuana may not be as serious as it used to be now that more people are being given prescriptions for the substance. Mr. Jordan distinguishes being "high" at work from taking the drug as prescribed, as Claimant apparently does. That is, she uses the substance in the evenings to help her sleep and control her pain, rather than being under its influence at work. Mr. Jordan would have Claimant admit up-front to any prospective employer that she uses medicinal marijuana and ask for some sort of waiver from testing positive so long as she was not "high" on the job.

80. Mr. Jordan acknowledged that technology has advanced since Claimant worked at Motorola, but she has the basic skill set and ability to learn new things.

81. The Referee finds that Claimant has failed to prove she is totally and permanently disabled pursuant to the 100% method.

82. The Referee finds that, based on Claimant's testimony, the vocational opinions expressed by Doug Crum and Bill Jordan and those factors enumerated in Idaho Code § 72- 430, Claimant has suffered permanent partial disability of 65% inclusive of her permanent partial impairment from all causes. Claimant's PPI is relatively small and non-medical factors do not constitute the remaining PPD.

Odd-Lot

Although Claimant has failed to establish that she is totally and permanently disabled by the 100% method, she may still be able to establish such disability via the odd-lot doctrine. An injured worker may prove that he or she is an odd-lot worker in one of three ways (1) by showing she has attempted other types of employment without success; (2) by showing that she or vocational counselors or employment agencies on her behalf have searched for other suitable work and such work is not available; or, (3) by showing that any effort to find suitable employment would be futile. *Hamilton v. Ted Beamis Logging and Construction*, 127 Idaho 221, 224, 899 P.2d 434, 437 (1995).

83. Claimant concedes that she cannot establish odd-lot status by the first two prongs above, but asserts that for Claimant to search for suitable employment would be futile. In her opening brief, Claimant acknowledges, citing to *Fowble v. Snoline Express, Inc.*, 146 Idaho 70, 190 P.3d 889 (2008) that, "This (futility) is an extremely onerous burden and one that should not be taken lightly. Arguably, futility is the most difficult prong of the odd-lot doctrine." Claimant's Opening Brief, p. 15.

84 The Referee agrees with Claimant's assessment of the futility prong. The concept of futility inherently invites a certain amount of speculation. However, for reasons which follow, the Referee concludes that it would not be futile for Claimant to have searched, or to search, for employment.

85. Claimant, even though showing signs of discomfort at hearing, came across as a credible person. She was articulate and presented well. The Referee was impressed that Claimant was sincere in her belief that she was incapable of returning to the workforce due to,

primarily, her chronic pain and her need to use marijuana/alcohol for pain relief. However, Claimant's choice of pain relieving modalities is just that; her choice.

86. Claimant had, objectively at least, a fairly successful TKA except for the development of chronic pain syndrome and related depression and anxiety. Her physician-mandated physical restrictions place her in the sedentary work category. According to Mr. Jordan, there are an abundance of sedentary jobs available to Claimant in her relatively large labor market. Her restrictions on standing and sitting (ten minutes) can be accommodated with an adjustable work station.

87. Claimant has the full use of her upper extremities and has no restrictions regarding the ability to learn or to be retrained. In fact, Mr. Crum strongly suggested that Claimant obtain her GED and opined that, with her ability to complete over 30 hours of community college courses with high grades, she should be able to accomplish with ease. The record establishes that while Claimant has psychological conditions which warrant diagnosis under the DSM V, as noted above, she presented well at hearing; she was bright, well-spoken, and demonstrated no observable mental deficit. Further, there is much opportunity for retraining in the many community colleges in her labor market.[9]

88. Claimant, following the suggestion of Mr. Crum, registered with the WDVR that arranged for a return-to-work type position with a thrift store; however, she was convinced that she was incapable of returning to work so WDVR closed its file. The same was true regarding ICRD. Claimant has not registered with the Idaho Department of Labor and has not otherwise conducted a meaningful job search.

[9] As part of the settlement with Employer, $40,000 was set aside for retraining which Claimant has not pursued.

89. One of the challenges in applying the futility standard is that, without trying, it is difficult to know whether or not it would be futile to pursue employment. Claimant has a love for and interest in animals. Her employment as an animal control office and the excellent reviews she received suggests that there may be employment possibilities at veterinarian clinics, per stores, humane societies and the like.

90. Claimant has the demonstrated capacity to learn and develop new skills. Unfortunately, she is convinced that she cannot work and has not attempted to do so. However, having observed Claimant at hearing, the Referee is convinced that, with a little effort and positive attitude on her part, she could obtain some sort of employment and it would not be futile for her to explore, though admittedly limited by her sedentary work status, searching for suitable work.

91. Although a close call, the Referee is unable to recommend a ruling in good conscience that Claimant is totally and permanently disabled pursuant to the odd-lot doctrine.

92. Because Claimant has failed to prove that she is totally and permanently disabled, it follows that her claim against ISIF should be dismissed.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that she is totally and permanently disabled.

2. The Complaint against ISIF should be dismissed with prejudice.

RECOMMENDATION

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

DATED this __29th___ day of May, 2018.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __20th____ day of __June___, 2018, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

RICHARD WHITEHEAD
PO BOX 1319
COEUR D'ALENE ID 83816-1319

THOMAS W CALLERY
PO BOX 854
LEWISTON ID 83501

ge Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KAREN WILLIAMS, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants	**IC 2012-002818** **2012-004680** **2011-017698** **ORDER** **Filed June 20, 2018**

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has failed to prove that she is totally and permanently disabled.

2. The Complaint against ISIF is dismissed with prejudice.

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

DATED this __20th__ day of ___June__, 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 __20th__ day of __June__ 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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