BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBIN HARRIS, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2011-008513** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED** **JULY 20, 2018**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Pocatello on June 23, 2017. Claimant, Robin Harris, was present in person and represented by Albert Matsuura, of Pocatello. Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF), was represented by Steven R. Fuller, of Preston. Claimant settled with her former employer, Maag Prescription Center, LLC (Maag) and its surety, State Insurance Fund, prior to hearing. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on February 2, 2018.

ISSUES

The issues to be decided are:

1. Whether Claimant is permanently and totally disabled pursuant to the odd-lot doctrine or otherwise.[1]

[1] The noticed issue of whether Claimant's condition is due, in whole or in part, to a pre-existing and/or subsequent injury or condition is effectively subsumed in the discussion of permanent disability.

2. Whether ISIF is liable pursuant to Idaho Code § 72-332.

3. Apportionment under the Carey formula.

CONTENTIONS OF THE PARTIES

Claimant alleges that she is totally and permanently disabled pursuant to the odd-lot doctrine as a result of numerous pre-existing conditions and her 2011 back injury at Maag. She asserts that ISIF is liable for a portion of her total permanent disability benefits pursuant to Idaho Code § 72-332.

ISIF denies all liability contending that Claimant is employable, not totally and permanently disabled. ISIF also argues that most of Claimant's alleged pre-existing conditions did not constitute a hindrance or obstacle to employment and/or did not combine with her 2011 industrial accident to render her totally and permanently disabled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition testimony of Robin Harris taken October 20, 2016;
3. Joint Exhibits A through Y, AA and BB, admitted at the hearing;
4. Claimant's testimony taken at hearing;
5. The post-hearing deposition testimony of Gary Cook, M.D., taken by Claimant on July 18, 2017;
6. The post-hearing deposition testimony of Terry Montague taken by Claimant on September 11, 2017;
7. The post-hearing deposition testimony of William C. Jordan, C.R.C., C.D.M.S., taken by Defendant on September 11, 2017; and

8. The post-hearing deposition testimony of David C. Simon, M.D., taken by Defendant on September 14, 2017.

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

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

FINDINGS OF FACT

1. Claimant was born in 1960. She resided in Redmond, Oregon and was 56 years old at the time of the hearing. Maag is located in Pocatello and is a family-owned full-service pharmacy that also offers durable medical equipment.

2. **Background.** Claimant was born in Pocatello where she attended school through the eighth grade. She left school during the ninth grade at age 16, married, and started working at various fast food restaurants as a waitress and cashier. At approximately age 17, Claimant earned certification for road construction flagging and thereafter worked seasonally as a flagger for two different paving companies over the course of approximately four years. Her duties included standing all day, monitoring traffic, and holding directional signs.

3. In 1981, at the age of 19, Claimant's then husband struck her and knocked her down. She landed hard on her tailbone on a concrete floor. The next day her low back, neck, and shoulders were very stiff. She did not seek medical treatment immediately. Although the initial pain and stiffness improved, she developed chronic lower back symptoms that gradually worsened over the years.

4. In approximately 1983, Claimant left Pocatello and thereafter lived for seven years in Salem, Oregon and 15 years in Redmond, Oregon. Claimant first sought medical treatment for her low back and neck symptoms in 1983 in Milwaukee, Oregon. She presented to

a chiropractor who x-rayed her and asked if she had been in a car accident. When she told him of the domestic abuse she had suffered, he identified that as the cause of her problems. He provided chiropractic adjustments.

5. Commencing in approximately 1984, Claimant and her second husband owned and operated their own antiques business in Oregon where they moved, cleaned, and sold antiques. They later began conducting estate sales also. Claimant regularly sold goods on eBay. From 1998 through 2001, Claimant also worked for the Redmond School District as a kitchen worker.

6. Claimant's low back pain worsened and on April 7, 2003, Kathleen More, M.D., performed left L4-5 laminectomy and foraminotomy to address Claimant' back problems that had persisted since 1981. After recuperating from surgery, her back pain was significantly improved but not entirely resolved. However, she returned to her antique business which "requires a lot of standing and lifting." Exhibit C, p. 19.

7. On or about July 14, 2004, Claimant was wearing a seatbelt when her car was rear-ended by a motorcycle driving at high speed. "She did not notice it right away, but over the last two days she has become very sore especially with her wrist, shoulder, back and neck." Exhibit B, p. 13. Knee and wrist x-rays were negative. Physical therapy was prescribed. Her back pain persisted.

8. In approximately 2005, Claimant left Oregon and worked at a call center in Pocatello.

9. From February to June 2006, Claimant worked at a pharmacy in McCall and also began training to obtain her pharmacy technician's license.

10. In September 2006, Claimant began working for Maag in Pocatello as a pharmacy technician. There she completed her pharmacy technician training and obtained her certification. Her duties at Maag included greeting customers, covering the front desk, answering phones, taking orders for medications over the phone, taking care of tills, preparing medications for outside delivery, ordering vitamins, filling prescriptions, restocking the pharmacy, stocking all front end items, and cleaning the store at the end of the day. Claimant's duties expanded over time. She cross-trained between pharmacy and durable medical equipment where she helped fit customers with walking boots, canes, crutches, and compression hose. She performed some outside deliveries.

11. Claimant's low back symptoms continued to worsen after her 2004 motor vehicle accident. On July 7, 2009, Benjamin Blair, M.D., performed a revision L4-5 hemilaminectomy and microdiscectomy. After recuperating from surgery, Claimant returned to her work at Maag.

12. By March 2011, Claimant was still living in Pocatello, working over 40 hours per week at Maag, and earning $14.50 per hour.

13. **Industrial accident and treatment.** On March 14, 2011, Claimant was working at Maag helping a customer. Claimant knelt to retrieve a package of compression stockings and upon arising felt leg and foot pain that caused her to limp. She did not immediately seek medical attention but continued to work at Maag for a few days. She then presented to a podiatrist, Dr. Howard, thinking that her problem was limited to her foot. Dr. Howard directed her to Dr. Blair for evaluation of her low back.

14. On April 11, 2011, Claimant bent over at her home to turn off the bathtub water and felt searing lower back and radiating left leg pain. She presented at the emergency room,

came under the care of Dr. Blair, was found to have L4-5 disc herniation, and received conservative treatment.

15. On May 26, 2011, David Simon, M.D., examined Claimant at the request of the State Insurance Fund. When Claimant completed a past health history questionnaire at Dr. Simon's office she indicated a prior history of asthma, anxiety, and gall bladder removal. Claimant was then using an inhaler as needed for her asthma.

16. On September 23, 2011, Claimant applied for Social Security Disability benefits.

17. On November 1, 2011, Kenneth Little, M.D., performed L4-5 fusion with instrumentation. Claimant testified at hearing that the fusion relieved symptoms from nerve pressure in her leg and increased her walking, standing, and moving tolerances. Transcript, pp. 165-166.

18. In March 2012, Claimant underwent rehabilitation at the STARS work hardening program in Boise. On April 5, 2012, she completed the STARS program. She reported persisting back pain. Dr. Krafft found Claimant had reached maximum medical improvement and rated the permanent impairment of her low back at 8% of the whole person, attributing 2% to her 2011 accident at Maag and 6% to her pre-existing back condition. He observed Claimant had exceeded her pre-injury physical capacity and had demonstrated the ability to lift 35 pound repeatedly. Dr. Krafft released Claimant to return to work; however, she made no attempt to return to work after he released her. Transcript, p. 160.

19. By letter dated July 6, 2012, Claimant was awarded Social Security Disability benefits retroactive to her date of application (September 23, 2011). Claimant understood that if she were to return to work she would jeopardize her continuing receipt of Social Security Disability benefits.

20. Jeff Chung, M.D., examined Claimant on January 8, 2013, April 11, 2013, and September 19, 2013, at the request of the State Insurance Fund. Dr. Chung noted she had developed a new lumbar radiculopathy.

21. **Vocational efforts.** While recovering from her 2011 accident, Claimant received job development assistance from Industrial Commission rehabilitation consultant Chris Horton. With his encouragement she obtained her GED in 2012. In 2013, the Idaho Division of Vocational Rehabilitation paid for Claimant to receive several months of on-line medical billing and coding training. She passed the training course, but did not pass the state certification test. Claimant was offered an opportunity to retake the certification test, but she was caring for her dying father and chose not to do so. She did not seek employment after completing her training.

22. In March 2013, Mr. Horton recorded:

> The claimant and I discussed job search activities …. The claimant reports that she has an upcoming surgery (unrelated to her industrial injury) and also states that she does not anticipate completing her program in school until late August. I explained to the claimant that we could plan to meet biweekly or weekly for different vocational activities; however the claimant stated that she does not feel that she is at a point where she is ready for work search activities. I explained to the claimant that since she is not interested in pursuing available ICRD vocational services I would likely proceed forward with case closure. I also explained to the claimant that our services are available at any time and we can re-open her case in the future if she feels better able to participate in these vocational activities.
> ….
>
> **Reason for Closure:** Claimant has reached medical stability in regards to her industrial injury and has been released with no restrictions. She states she no longer is interested in participating in ICRD services as she has upcoming medical procedures unrelated to her industrial injury and does not feel she can be involved in vocational activities at the time.

Exhibit U, p. 30. Claimant's unrelated upcoming surgery in March 2013 involved excision of a Morton's neuroma from her foot. She acknowledged that she did not return to work for Maag because she needed neuroma foot surgery.

23. Claimant's file was closed although Mr. Horton considered Claimant capable of working in several clerical positions, including outpatient receptionist, hospital admitting clerk, court clerk, governmental eligibility interviewer, bill and account collector, insurance claims and policy processing clerk, and, with completion of further training, medical biller-coder. Claimant did not attempt any of these potential options.

24. In 2014, Dr. Chung agreed that Claimant had reached maximum medical improvement in April 2012; however he rated her low back permanent impairment at 13% of the whole person, attributing 8% to her pre-existing back condition and 5% to her 2011 accident.

25. In approximately 2014, Claimant moved back to Redmond, Oregon where her adult children live.

26. On September 16 and 17, 2014, Claimant underwent a functional capacity evaluation by Sharik Peck, P.T. He concluded Claimant was unable to return to any employment.

27. In 2015, Terry Montague performed a vocational evaluation and concluded Claimant was totally disabled. Also in 2015, William Jordan performed a vocational evaluation and concluded Claimant was employable. Their evaluations are discussed hereafter.

28. On December 29, 2016, Claimant was examined by Gary Cook, M.D., at Claimant's counsel's request. Dr. Cook assessed multiple pre-existing impairments as discussed hereafter. He opined Claimant was totally disabled from working.

29. On April 11, 2017, Claimant was again examined by Dr. Simon, this time at Defendant's request. Dr. Simon opined Claimant was capable of lifting 20 pounds and performing light-duty work 40 hours per week.

30. **Condition at the time of hearing.** Claimant is five feet five inches tall. She weighed approximately 250 pounds at the time of hearing and reported to Dr. Simon that she had gained approximately 60 pounds since her 2011 accident. She continued to reside in Redmond, Oregon near her adult children and received Social Security Disability benefits of approximately $828.00 per month. She reported persisting low back pain and multiple other complaints.

31. **Credibility.** The record contains information calling into question Claimant's credibility. Claimant's expert vocation witness, Terry Montague, noted inconsistencies in her statements to him as compared to her hearing testimony. Mr. Montague interviewed Claimant in 2014 and produced an initial vocational evaluation wherein Mr. Montague reported that Claimant advised him she returned to her work at Maag less than a month following her 2009 lumbar surgery and had no difficulties performing all of her regular duties at Maag from that time until her 2011 accident. However, at hearing, Claimant testified she had various difficulties performing her duties at Maag after returning to work following her 2009 surgery. When confronted with this discrepancy at his post-hearing deposition, Mr. Montague testified:

> Q. [by Mr. Matsuura] … is there a conflict between what she testified to at hearing versus what she reported to you initially at the time you made your report?
>
> A. Yes.
>
> Q. How is that different?
>
> A. …. she was having, according to her hearing testimony, some difficulties with her job duties. And that was not what she reported to me when I met her in October of 2014.
>
> ….
>
> Q. [by Mr. Fuller] So, again you don't know when she was telling you the truth or if she was telling you the truth back when the report was done or whether she was telling you the truth at the hearing?

> A. All I can tell you that [sic] is that what she told me in 2014 was different than what I read in her hearing transcript.

Montague Deposition, p. 98, ll. 6-22; p. 99, l. 25 through p. 100, l. 6. Claimant denied any inconsistency in her statements.

32. Claimant had not filed her present Complaint against the Industrial Special Indemnity Fund at the time Mr. Montague produced his October 2014 report. Claimant was then only asserting liability against Maag and the State Insurance Fund. Montague Deposition, p. 103, ll. 5-9.

33. Claimant's testimony at hearing was occasionally equivocal. During cross-examination at hearing Claimant testified she did not believe she would still be working at Maag even if her March 14, 2011 accident had not occurred:

> Q. [by Mr. Fuller] If the incident had not taken place on March 14, 2011, in your mind would you have continued to work there for the next six months? The next year?
>
> A. No. I had actually gone to them and told them I was having problems prior to that even happening and asking them if I could go to lesser hours.

Transcript, p. 155, ll. 12-18. Claimant then explained that before her accident she had talked to Maag management about working fewer hours and they were not receptive to her request. However, after a brief hearing recess, on redirect examination, Claimant changed her response:

> Q. [by Mr. Matsuura] Mr. Fuller asked you about whether or not you—or if you—the work accident hadn't happened in March 2011, whether or not you would have continued working at Maag drug regardless of—in spite of—well, regardless, and I think your answer was, well, I was having problems, and I would not have continued or—
>
> A. No. What I was trying to say after—if the accident wouldn't have happened, yeah, I would still be working there to this day.

Transcript, p. 181, l. 20 through p. 182, l. 4.

34. Furthermore, as the following exchange at hearing illustrates, Claimant was at times evasive when responding to questions eliciting information she perceived to be unfavorable to her claim:

> Q. [by Mr. Fuller] …. Since you have made application and received Social Security Disability benefits, have you made any attempt to return to full-time work?
>
> A. No.
>
> Q. Is it your understanding that if you did return to full-time employment that you would lose your Social Security Disability benefits?
>
> A. No.
>
> Q. You are not aware of that?
>
> A. No.
>
> Q. That if you went back to work that they would not offset your Social Security Disability benefits?
>
> A. No. I was actually told that if I did end up getting through all of this stuff and go back to work part-time that you can make up to a certain amount.
>
> Q. Yes, you can make up [to] a certain amount. But if you went back full time as a full-time employee, say, at Maag pharmacy and were making what you were at that time, is it your understanding that you would lose your Social Security Disability benefits?
>
> A. Yes.

Transcript, p. 162, l. 5 through p. 163, l. 3.[2]

35. Claimant has made serious assertions not supported by her medical records. She asserted the STARS work hardening program in 2012 irritated her back and she stopped after only completing three weeks of the six-week program. However, Dr. Krafft's notes indicate that

[2] As noted, Claimant applied for Social Security Disability benefits on September 23, 2011—before her lumbar fusion surgery which she acknowledged improved her functionality—and was awarded benefits on July 6, 2012, retroactive to her September 2011 date of application.

Claimant progressed nicely at STARS and exceeded her pre-injury work level by the third week in the program. Exhibit R, pp. 20-21. Claimant testified she did not agree with Dr. Krafft's conclusion because: "I told him I was still hurting." Harris Deposition, p. 74, ll. 19. When subsequently examined by Dr. Chung in January 2013, Claimant asserted she was injured during the STARS program. However, Dr. Chung noted: "I found nothing in the patient's medical records or subsequent diagnostic studies that supports the patient's contention she was injured during this functional restoration program." Exhibit R, p. 24.

36. A number of medical records document Claimant is prone to somaticizing and establish her propensity to emphasize and even overstate her physical symptoms. Dr. Chung evaluated Claimant on January 7, 2013.[3] He thoroughly reviewed Claimant's medical records and reported:

> After the patient's 7-28-09 surgery with Dr. Blair she had postoperative pain to the point that another L-spine MRI scan was done on 10-14-09; it was benign. Ms. Harris complained of so much right hip pain that MRI scans of her hips bilaterally were done on 11-25-09; they were normal. On 3-10-10 the patient had had enough persistent low back pain that Dr. Blair discussed the option of taking her back to the OR for an L4-5 fusion, she declined this option.
> ….
>
> Ms. Harris was complaining of so much left ankle weakness when she had her 9-27-12 benign NCV/EMG her doctors were suggesting an AFO. The fact that her 9-27-12 NCV/EMG was benign proves her self-perceived motor weakness and complaints of her left foot dragging at the time was not physiologic. ….
>
> On 6-15-12, Dr. Little noted that Ms. Harris' CT myelogram was benign and that she wasn't a candidate for additional low back surgery.

Exhibit R, pp. 20, 22-23. Dr. Chung observed: "On 5-25-11, Dr. David Simon opined that Ms. Harris re-injured her L4-5 disc at work on 3-14-11. I agree. Dr. Simon went on to say in

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[3] Claimant's medical expert, Dr. Cook, acknowledged that Dr. Chung "was very objective and gave a good evaluation." Cook Deposition, p. 89, ll. 13-14.

that report that Ms. Harris' pre-existing problems with chronic pain and anxiety would adversely affect her prognosis. I believe he has been proven correct." Exhibit R, p. 24.

37. After reviewing her extensive medical records, Dr. Chung concluded: "The fact that Ms. Harris has had documented negative chest pain workups on 6-16-03, 6-10-05, 8-1-05, 9-10-10, and 11-7-11 indicates that she is a somaticiser (she expresses psychological distress through physical complaints)." Exhibit R, p. 18. Dr. Chung then listed 12 benign diagnostic studies Claimant received dating from December 2001 to September 2010 and observed: "Multiple clinicians have opined in the past that Ms. Harris is prone to anxiety induced chest pain and other physical complaints. She has had an MMPI on 3-5-12 that documents that she has somatoform tendencies." Exhibit R, p. 67. "These negative/benign studies indicate that there is a reasonable medical probability that Ms. Harris' complaints of chronic neck pain, chest pain, mid back pain, abdominal pain, flank pain, and right hip pain between 12-21-01 to 9-10-10 had a psychogenic basis." Exhibit R, pp. 18-19.[4]

38. Dr. Chung noted that Claimant's MMPI of March 5, 2012 reflected somatoform tendencies. Dr. Simon explained that somatoform tendencies "indicate that there's a tendency to have psychological issues or symptoms manifest themselves in physical symptoms. … Somebody will have physical symptoms and, yes, it's not due to anything physical that's going on, but it's due to psychological symptoms or issues." Simon Deposition, p. 29, ll. 3-12. Psychologist Robert Calhoun, Ph.D., performed a psychological pain evaluation of Claimant at

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[4] The following June 17, 2005 office note by Kelly Conrad, M.D., who performed a sleep lab consultation, is instructive: "I will not be too surprised if in fact her level of sleep-disordered breathing is not that severe. Her entire history and the way that it is presented suggest that there is a very prominent psychogenic component to at least some of these complaints." Exhibit A, p. 13. He recorded: "Complaints of severe breathlessness-? prominent psychogenic component." Exhibit A, p. 19. The subsequent sleep study documented severe snoring, but 91% sleep efficiency and only mildly obstructive sleep apnea.

the STARS program on March 5, 2012, and recorded: "She is highly somatically preoccupied. It is difficult for her to distract herself from her pain." Exhibit M, p. 19.[5]

39. Having observed Claimant at hearing, and compared her testimony with other evidence in the record, particularly medical records, the Referee finds that Claimant is highly focused on her pain perceptions and is prone to overstate her physical complaints, especially when she perceives it to be advantageous to her claim.

DISCUSSION AND FURTHER FINDINGS

40. 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).

41. **Permanent disability.** The first issue is the extent of Claimant's permanent disability, including whether she is totally and permanently disabled pursuant to the odd-lot doctrine. "Permanent disability" or "under a permanent disability" results when the actual or

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[5] The following July 11, 2010 office note by Ronald Louks, M.D., is illustrative:

> This is a 49-your-old female who complains of shortness of breath, multiple chest pains that are frequently non exertional. …. She has felt at times that she was going to pass out because she could not get any air. …. She has aches and pains in her arms, back, neck, and shoulders. …. She has nausea and abdominal pain. She has chest pains in the front of the chest, sometimes on the right and sometimes on the left, and also gets pain in the posterior thoracic region. ….
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> Less than a month ago, the patient had a CT scan of the chest and also a CT scan of the abdomen and pelvis; both were normal. She had a resting electrocardiogram, which was normal. ….
>
> Spirometry today showed excellent peak flow and just mild reduction of the mid maximal flow rate.

Exhibit G, pp. 1-2.

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. "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. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant.

42. 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 extent and causes of permanent disability "are factual questions committed to the particular expertise of the Commission." Thom v. Callahan, 97 Idaho 151, 155, 157, 540 P.2d 1330, 1334, 1336 (1975). A disability evaluation requires "the Commission evaluate [claimant's] disability according to the factors in I.C. § 72–430(1), and make findings as to her permanent disability in

light of all of her physical impairments, including pre-existing conditions, and that it then apportion the amount of the permanent disability attributable to [claimant's] accident." Page v. McCain Foods, Inc., 145 Idaho 302, 309, 179 P.3d 265, 272 (2008). Generally, the proper date for disability analysis is the date of the hearing, not the date the injured worker reaches maximum medical improvement. Brown v. Home Depot, 152 Idaho 605, 609, 272 P.3d 577, 581 (2012).

43. In Ritchie v. ISIF, 2016 WL 6884645 (Idaho Ind. Com. 2016), the Commission considered how a progressive pre-existing condition should be treated for purposes of evaluating ISIF liability. Relying on Colpaert v. Larsen's, Inc., 115 Idaho 852, 771 P.2d 46 (1989), the Commission concluded that for a progressive pre-existing condition, elements of ISIF liability must be assessed as of the date immediately preceding the work accident. The Commission stated:

> From Colpaert, it is clear that in determining whether the elements of ISIF liability are satisfied, a pre-existing condition must be assessed as of the date immediately preceding the work injury. A snapshot of Claimant's pre-existing condition must be taken as of that date, and from that snapshot Claimant's impairment must be determined, as well as whether Claimant's condition was manifest and constituted a subjective hindrance to Claimant. Finally, it must be determined whether Claimant's pre-existing condition, as it existed immediately before the work accident, combines with the effects of the work accident to cause total and permanent disability. Colpaert lends no support to the proposition that in evaluating ISIF liability for a pre-existing but progressive condition, that condition should be assessed as of the date of hearing, i.e. at a time when Claimant's condition is much worse.
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> In order to determine whether a pre-existing condition constituted a subjective hindrance as of a point in time immediately preceding a work accident, one must assess, as the Commission did in Colpaert, the nature of the limitations/restrictions extant as of that date. It follows that in determining whether the pre-existing condition combines with the effects of the work accident to cause total and permanent disability, that assessment, too, must be performed in view of the limitations/restrictions arising from the pre-existing impairment as of a point in time immediately preceding the work accident, not the limitations/restrictions relating to the condition as it may have progressed as of

> the date of a subsequent hearing. To do otherwise would be to hold the ISIF responsible for something other than a "pre-existing" condition.

Ritchie, 2016 WL 6884645 at 6 (emphasis supplied).

44. In Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 565 P.2d 1360 (1977), the Court allowed evidence from the market vacated by claimant after injury as well as the labor market of residence at the time of the hearing, stating: "After his last injury, appellant moved from Orofino, Idaho, to New Meadows, Idaho. A claimant should not be permitted to achieve permanent disability by changing his place of residence. Therefore, in meeting its burden the Fund can introduce evidence of an actual job within either community." Lyons, 98 Idaho at 407 n. 3, 565 P.2d at 1364 n. 3. See also Davaz v. Priest River Glass Co., 125 Idaho 333, 337, 870 P.2d 1292, 1296 (1994).

45. Claimant herein resided in Pocatello at the time of her 2011 accident, but at the time of hearing lived in Redmond, Oregon, a community of approximately 40,000, with resorts, restaurants, and active logging and seasonal fire-fighting support operations nearby. She asserts that her 2011 industrial accident at Maag, in combination with her pre-existing conditions and non-medical factors, render her totally and permanently disabled. Her permanent disability must be evaluated based upon her medical factors, including her permanent impairments, the physical restrictions arising from her permanent impairments, and her non-medical factors, including her capacity for gainful activity and potential employment opportunities. Specifically, in light of Brown, Lyons, Colpaert, and Ritchie, Claimant's permanent disability must be evaluated based upon her labor market in both Pocatello, Idaho and Redmond, Oregon at the time of the 2017 hearing, with the permanent impairments and limitations resulting from her March 14, 2011 industrial accident as they existed at the time she achieved maximum medical improvement on April 5, 2012, and with all her pre-existing conditions and their corresponding permanent

impairments and resulting limitations/restrictions as they existed immediately preceding her March 14, 2011 industrial accident.

46. Impairments. "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. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

47. *The rating physicians.* Claimant asserts a permanent whole person lumbar spine impairment of 8% pre-existing her industrial accident and additional lumbar impairment of 5% due to her 2011 accident. Claimant also asserts pre-existing permanent impairments for at least 12 other conditions including: asthma (20%), gastroparesis (16%), urinary incontinence (19%), right shoulder motion deficit (8%), left shoulder motion deficit (8%), upper extremity central nervous system dysfunction (12%), thoracic spine T8 compression fracture (4%), left hip motion deficit (9%), patellar subluxation (2%), fibromyalgia (3%), migraine headaches (5%), and left foot bunion (5%).

48. Several physicians have rated Claimant's lumbar permanent impairment, including Drs. Krafft, Chung, Simon, and Cook. Dr. Krafft is a practicing board certified physiatrist and director of the STARS program. Dr. Chung is a practicing board certified physiatrist who also performs independent medical evaluations. Dr. Simon is also a board certified physiatrist who performs independent medical evaluations for claimants and defendants but principally treats patients in his own clinic. Only Dr. Cook rated Claimant's non-lumbar pre-

existing impairments. Dr. Cook is an anesthesiologist who retired from active practice in 2008. He is not board certified in any specialty. Dr. Cook has not treated patients in approximately ten years; rather, he has performed independent medical evaluations exclusively since 2008. Cook Deposition, p. 77. He acknowledged that he has performed medical evaluations for plaintiffs or claimants and has never done one for "the defense side." Cook Deposition, p. 81, l. 12.

49. Dr. Cook rated Claimant's pre-existing impairments on December 29, 2016, and acknowledged that in doing so there were overlapping symptoms and it was difficult to separate out which specific pain symptom could be assigned to which pathology. He testified of the objective he was given in rating Claimant's permanent impairment:

> A. …. I understood this is going to go to the second fund and to basically rate everything that was ratable, and there is distinct pathology in each of these cases.
>
> Q. [by Mr. Fuller] So as I understand it, because this is going to the second injury fund, you were trying to include everything that was possible to include?
>
> A. I was told that was the objective.

Cook Deposition, p. 119, ll. 15-22.[6]

50. Several aspects of Dr. Cook's opinion are concerning. Dr. Cook testified that in formulating his opinions he "didn't have all of Ms. Harris' records," Cook Deposition, p. 89, l. 19, and further acknowledged that he did not look at all of the records that Dr. Chung reviewed and cited in his report, upon which Dr. Cook then relied. Cook Deposition, p. 90, ll. 11-15. Furthermore, Dr. Cook modified his written opinion during his deposition. Dr. Cook's written report provides:

> The law firm of Albert Matsuura, Partner/Owner Goicoechea Law Offices, requests an Independent Medical Evaluation/Impairment Rating for persistent and worsening cervical, thoracic, and lumbar spine pain, bilateral shoulder pain and

[6] Dr. Cook testified that Claimant's cumulative impairment rating for all of her pre-existing conditions according to the AMA combined values chart is 72%. Cook Deposition, p. 64, ll. 10-11.

> motion deficits, upper extremity numbness, limitations in stamina, strength, pain with standing, walking, and lifting. She experiences station and gait problems with a tendency to fall frequently.
>
> These complaints originate from a workplace industrial accident on or about March 14, 2011.

Exhibit S, p. 2. At his deposition, when questioned about his declaration that these complaints originated from the 2011 accident, Dr. Cook testified: "If I were to amend that, I would say these became predominately disabling following a workplace accident." Cook Deposition, p. 97, ll. 5-7.

51. Another concerning aspect of Dr. Cook's opinion is his reliance upon Claimant's pain reports, including her responses to the PDQ (Pain Disability Questionnaire) and QuickDASH inventories he administered on December 29, 2016, to determine her permanent limitations. As noted above, Claimant tends to overstate her pain and resulting limitations. Dr. Simon questioned the prudence of Dr. Cook relying upon Claimant's reports of physical pain to evaluate her permanent impairment: "Some of the impairments [Dr. Cook] decided to address are based on little more than her subjective symptoms. Considering that she has somatoform tendencies, her subjective complaints are hardly appropriate for determining objective impairment." Exhibit AA, pp. 12-13.

52. The most concerning aspect of Dr. Cook's opinion is his evaluation of apparently progressive pre-existing conditions on December 29, 2016—more than five and a half years after Claimant's March 14, 2011 accident. Dr. Cook acknowledged that Claimant's functioning improved and she regained her pre-injury condition after participation in the STARS program in 2012, but thereafter her condition declined:

> I felt that Dr. Krafft saw her at one specific point in time. During that work hardening period, she was able to obtain physical lifting requirements up to 35 pounds and then that was basically her pre-injury condition. He released her

> back, but subsequently her overall condition deteriorated probably again [due] to deconditioning. And the fact is I agree with Dr. Simon that her lifting is not over 20 pounds.

Cook Deposition, p. 86, ll. 13-21 (emphasis supplied).

53. Dr. Cook did not fault Dr. Krafft for releasing Claimant to return to work in April 2012, but reiterated that her condition worsened between 2012 and 2016:

> Q. [by Mr. Fuller] Now, [Dr. Krafft] has released her to go back to work. You said just now that her condition may have progressed or maybe in some ways regressed after that. Is that your opinion?
>
> A. That was my opinion based on her history and the fact she was unable to go back to meaningful work, so I am just basing it on her opinion. But—and the fact that when I saw her in December of 2016, her strength had markedly diminished and actually she—her lifting was limited to with one arm 8 pounds and both arms 15 pounds roughly.
>
> Q. So you are not saying that Dr. Krafft was incorrect in releasing her to go back to work, but you are saying that her condition progressively got worse after that? I'm trying to understand.
>
> A. Right. Yeah.

Cook Deposition, p. 87, l. 21 through p. 88, l. 11 (emphasis supplied). Dr. Cook also expressly agreed with Dr. Chung that Claimant developed a new lumbar radiculopathy after July 25, 2013, and left foot pain after her March 14, 2011 industrial accident. Cook Deposition, p. 101.

54. Dr. Cook concluded that when he examined Claimant on December 29, 2016, she had "gotten progressively worse—at that point when I saw her, she had basically reached the point where she was no longer able to function either in terms of stamina, strength, and actual physical capacity in her former work requirements." Cook Deposition, p. 12, ll. 21-25 (emphasis supplied). He testified that after her accident, "everything just culminated in her progressive deterioration…." Cook Deposition, p. 13, ll. 6-7 (emphasis supplied).

55. Numerous comments suggest Dr. Cook evaluated Claimant and rated her conditions as they existed on December 29, 2016—more than five and a half years after her industrial accident and more than four and a half years after she reached medical stability and maximum medical improvement from her 2011 industrial accident. The effect of progressive pain and weakness after the date of the 2011 industrial accident are not the responsibility of ISIF. While most of the conditions Dr. Cook rated may have pre-existed Claimant's industrial accident, he repeatedly recognized a number of her complaints as progressive. It follows that those conditions had increased in severity between Claimant's March 2011 accident and the December 2016 evaluation and rating by Dr. Cook. It also follows that Dr. Cook's December 2016 impairment ratings do not necessarily accurately evaluate Claimant's pre-existing permanent impairments with their limitations/restrictions as they existed immediately preceding her March 14, 2011 accident.

56. Dr. Cook nevertheless testified that Claimant's pre-existing impairments he rated in 2016 would have been rated no differently in May 2012, when Dr. Krafft found Claimant had reached maximum medical improvement from her March 2011 accident:

> Q. (by Mr. Matsuura) Based on the histories and the documentation in the medical records and your physical exam performed in the course of the impairment rating and evaluation and the IME, can you say that the impairment ratings assigned to her condition that you arrived at in December 2016 would be the same ratings on—that those conditions would have in May of 2012 when she was deemed to be at MMI by Dr. Krafft?
>
> A. Yes.
>
> Q. Okay. I'd note in your records you say that some of these conditions may be progressive as far as symptomatology goes—
>
> A. Right.

> Q. –when you saw her in December of 2016. Would the progression of the symptomatology between May of 2012 and 2016 affect the impairment ratings you assigned those conditions?
>
> A. No. Because the majority of her conditions were pre-existing and my report reflects that her—it was addressed specifically to her lumbar complaints at the time I saw her in December of 2016.

Cook Deposition, p. 67, ll. 4-24 (emphasis supplied).

57. Given Claimant's March 14, 2011 accident, opinions comparing impairments in December 2016 with those existing as of May 2012 miss the mark. As noted above, "a pre-existing condition must be assessed as of the date immediately preceding the work injury. A snapshot of Claimant's pre-existing condition must be taken as of that date, and from that snapshot Claimant's impairment must be determined." Ritchie, 2016 WL 6884645 at 6. Close scrutiny of Dr. Cook's deposition testimony and pre-existing medical records further belies his assertion that the progression of Claimant's symptomatology would not affect the impairment ratings he assigned for Claimant's pre-existing conditions.

58. All alleged impairments, including Claimant's pre-existing conditions, are addressed below.

59. *Lumbar spine*. On April 5, 2012, Dr. Krafft examined Claimant, found her condition medically stable, and rated the permanent impairment of her lumbar spine at 8% of the whole person, attributing 6% to her pre-existing back conditions and 2% to her 2011 industrial accident. On January 7, 2013, Dr. Chung examined Claimant and rated her lumbar spine impairment at 13% of the whole person, assigning 8% to her pre-existing back conditions and 5% to her 2011 industrial accident. Exhibit R, p. 25. On December 29, 2016, Dr. Cook examined Claimant. He deferred to and agreed with Dr. Chung's impairment rating of Claimant's lumbar spine. In 2017, Dr. Simon examined Claimant and also agreed with Dr.

Chung's lumbar spine impairment rating. Dr. Chung's rating is persuasive due to his consideration of Claimant's 2003 and 2009 back surgeries that preceded her 2011 industrial accident and is further supported by the concurrence of Drs. Simon and Cook. Claimant has proven she suffers a lumbar spine impairment of 13% of the whole person; 8% attributable to her pre-existing conditions and 5% attributable to her 2011 industrial accident.

60. *Asthma*. On December 29, 2016, Dr. Cook rated Claimant's pre-existing permanent impairment for asthma at 20% of the whole person. Exhibit S, p. 25. He ostensibly rated Claimant's asthma pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition; however, he acknowledged: "there were no post bronchodilator studies done to assess her FEV1." Cook Deposition, p. 49, ll. 12-13. Post bronchodilator studies are generally utilized by the AMA Guides when rating permanent impairment due to asthma. Dr. Cook admitted that "her FEV1 didn't support that, but her symptom severity did support the assignment of Class 2 …." Cook Deposition, p. 147, ll. 16-18.

61. While Dr. Cook testified he rated Claimant's asthma based on her symptom severity in 2016, his deposition testimony establishes that her asthma symptoms worsened after her 2011 accident. Claimant moved from Pocatello to Redmond, Oregon after her 2011 accident. Dr. Cook acknowledged that "her move to Oregon and to a high humidity climate, traveling during fire season, et cetera, has exacerbated" her asthma symptoms. Cook Deposition, p. 147, ll. 23-25.

62. Dr. Cook explained a significant impairment rating was in order because asthma impacts functionality and restricts walking. However, at hearing Claimant affirmed that before March 2011 she "used to do a lot of walking." Transcript p. 156, l. 20. She testified:

> I was still going for long walks back then. I used to walk out on the Indian Wells trail. I walked several miles. I used to go out on a golf cart with my husband

> then. I was still doing, you know, my hiking and camping and fishing, playing volleyball.

Transcript, p. 83, ll. 16-20. Claimant's final report from her STARS work hardening program on April 5, 2012, recorded "client has demonstrated the ability to walk up to 20-minute increments at 2.6 miles per hour on the treadmill in the clinic with minimal difficulty. …. The client is able to traverse 5 flights of stairs with a functional (alternate reciprocal) gait pattern." Exhibit M, p. 60.

63. Significantly, Dr. Cook recorded on December 29, 2016, Claimant was five feet five inches tall, weighed 250 pounds and was morbidly obese: "This represents approximately a 60-pound weight gain from the time of the accident." Exhibit S, p. 32. In addressing Claimant's occupational limitations due to her asthma, Dr. Cook testified:

> Generally, occupations require us to sustain exertion and, you know, she experiences just pretty must constant—or consistent shortness of breath, and it varies with the season with which it—exposures, the weather. But she usually has some degree of shortness of breath, and I think that's been exacerbated lately by her weight gain. At least that's what she kind of related to me. But anything that requires any exertion for any sustained length of time, I think is beyond her capacities.

Cook Deposition, p. 164, l. 25 through p. 165, l. 10 (emphasis supplied).

64. Claimant's medical records clearly establish asthma as a longstanding issue prior to her 2011 accident. She reported shortness of breath requiring multiple prednisone tapers no later than 1999. She also used inhalers. She noted increased symptoms during fire season and when in close proximity to cats. Claimant testified that the deodorizing orange spray used in the restroom at Maag triggered asthma symptoms. She described shortness of breath less than a year prior to her 2011 industrial accident. However, Claimant's asthma was generally well controlled. Exhibit A, p. 9. Prior to the 2011 accident, no physician restricted Claimant's activities due to her asthma and she was able to "do a lot of walking."

65. Dr. Cook's testimony establishes Claimant's asthma symptoms worsened after her March 14, 2011 accident, thus his 20% rating based on the severity of her symptoms in December 2016 overstates her pre-existing impairment as of the date immediately preceding her March 14, 2011 accident. As noted, the Commission is the ultimate evaluator of permanent impairment. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

66. The Referee finds Claimant has proven she suffered a pre-existing permanent impairment of 15% due to asthma as of the date immediately preceding her March 14, 2011 accident.

67. *Gastroparesis*. On December 29, 2016, Dr. Cook rated Claimant's permanent impairment for gastroparesis at 16% of the whole person. Exhibit S, p. 27. He acknowledged that he found no record of medical treatment relating to this diagnosis other than reference to a 2002 fundoplication procedure, and a 2007 EGD. Cook Deposition, p. 154. After his 2016 evaluation, Dr. Cook recorded that Claimant "Was recently placed on Omeprazole treatment" and considered this daily medication management in arriving at an impairment rating of 16%. Exhibit S, p. 27. There is no indication Claimant required daily medication for gastroparesis at the time of her 2011 accident. Dr. Simon testified that Claimant did not list this item as a problem on her questionnaire or mention it when he examined her in 2017. Simon Deposition, pp. 33-34. No physician placed permanent work restrictions on Claimant due to this condition prior to her 2011 accident.

68. Nevertheless, the November 11, 2010, notes of Laura Gonzalez, M.D., recorded Claimant "has pretty severe gastroesophageal reflux and failed Nissen fundoplication that apparently has unraveled. She is being followed by Dr. Tom Davis for these issues. He

performed endoscopy and had to remove a good bolus that had gotten entangled with the patient's sutures from the prior Nissen." Exhibit G, p. 10. Dr. Louks' December 8, 2010 office notes assessed delayed gastric emptying. The November 10, 2011 notes of Derek Wright, M.D., provide: "Had a Nissen for GERD in 2002. Problems this last year, had an EGD and full workup last year, Dr. Davis. Diagnosed gastroparesis." Exhibit I, p. 12.

69. Dr. Cook indicated gastroparesis could result in explosive diarrhea but that Metrazol was available over the counter to treat it. Cook Deposition, pp. 154-155. At hearing Claimant asserted her upper digestive problems caused diarrhea forcing her to rush to the bathroom on occasion and thereby impacting her work at Maag.

70. The Referee finds Claimant has proven she suffered a pre-existing permanent impairment of 16% due to gastroparesis as of the date immediately preceding her March 14, 2011 accident.

71. *Urinary incontinence*. On December 29, 2016, Dr. Cook rated Claimant's permanent impairment for female stress urinary incontinence at 19% of the whole person. Exhibit S, p. 28. He calculated this rating by combining impairments of 13% due to mild urinary incontinence and 7% impairment for uterine prolapse. Claimant indicated this condition arose after the birth of her third child.

72. Dr. Cook testified that prior to Claimant's 2011 accident, "she had intermittent symptoms and would wear a pad and that seemed to take care of it." Cook Deposition, p. 156, ll. 23-25. His deposition testimony establishes that Claimant's incontinence worsened after her 2011 accident. Dr. Cook's December 29, 2016 report noted: "Current Symptoms: Intermittent urine loss with coughing, sneezing, or limited lifting, recently worsening." Exhibit S, p. 28.

73. Dr. Cook reported that at the time of his December 2016 examination, Claimant was five feet five inches tall, weighed 250 pounds and was morbidly obese: "This represents approximately a 60-pound weight gain from the time of the accident." Exhibit S, p. 32. Significantly, Dr. Cook expressly testified that after Claimant's November 2011 fusion surgery, her stress incontinence increased:

> Q. [by Mr. Fuller] What I'm trying to get at is did she report to you that her symptoms increased after the accident or after the surgery—the fusion surgery?
>
> A. They apparently did, and I'm not sure if that's just because of just her deconditioning or her weight gain.
>
> Q. Okay.
>
> A. I just attributed it to probably weight gain, and she was more sedentary and with that deconditioning her ability to lift and her core muscles were reduced in strength, so she just couldn't hold her bladder.

Cook Deposition, p. 157, ll. 8-19.

74. No physician placed permanent work restrictions on Claimant due to this condition prior to her 2011 accident.

75. Dr. Cook's testimony establishes that Claimant's urinary incontinence worsened after her 2011 accident, thus his 19% rating based on her symptoms in December 2016 overstates her pre-existing impairment as of the date immediately preceding her March 14, 2011 accident. As noted, the Commission is the ultimate evaluator of permanent impairment. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

76. The Referee finds Claimant has proven she suffered a pre-existing permanent impairment of 15% due to urinary incontinence as of the date immediately preceding her March 14, 2011 accident.

77. *Right and left shoulders.* On December 29, 2016, Dr. Cook rated Claimant's permanent impairments for right shoulder motion deficit at 8% and left shoulder motion deficit at 8% of the whole person. Exhibit S, pp. 18-22. Dr. Cook "used loss of range of motion rather than the diagnosis based impairment, because my rationale was that we don't have definitive evidence of internal derangement based on imaging." Cook Deposition, p. 33, ll. 17-20. The record contains a reference to "a lot of tension in her neck and shoulders" on October 2, 2009, in the notes of Dan DesFosses, DPT. Exhibit D, p. 33. When specifically questioned at his deposition, Dr. Cook could not identify the medical record he relied upon to diagnose Claimant's pre-existing shoulder conditions as opposed to simply Claimant's report of shoulder complaints on December 29, 2016. Cook Deposition, p. 102, ll. 11-25. Dr. Cook was not aware of any other reference to shoulder symptoms prior to the March 2011 accident and did not know whether the shoulder tension noted in 2009 thereafter resolved. Cook Deposition, pp. 139-140.

78. Prior to her 2011 accident, Claimant was able to work with her husband in the antique business, work at a public school cafeteria in Oregon, and perform her duties at Maag which included overhead stocking. On March 5, 2012, psychologist Robert Calhoun, Ph.D., performed a psychological pain evaluation before Claimant started the STARS program, noting her March 14, 2011 work injury and recording: "The patient reportedly has [sic] surgery performed by Dr. Little in November 2012 [sic]. The patient states that her pain improved significantly. The patient reports that otherwise she is healthy. She denied having other chronic medical problems." Exhibit M, p. 16. At the conclusion of the STARS program on April 5, 2012, Peggy Wilson, PT, CEAS, recorded Claimant's demonstrated work capacities including "LIFTING: …. Knuckle to Shoulder: Repetitive 30 pounds; maximum not tested. Shoulder to Overhead: Repetitive 15 pounds: maximum not tested. Note: Maximum lifting

capacities were not tested as client had exceeded the amount of weight required to be lifted at her job." Exhibit M, p. 59. Dr. Cook was unaware of any medical record indicating Claimant sought treatment for her shoulders or cervical spine after May 2012. Cook Deposition, p. 107. It was not until September 17, 2014, that Claimant's right and left shoulder range of motion was measured and deficits were noted by Sharik Peck, PT.

79. Rating Claimant's pre-existing permanent shoulder impairment at the time of her 2011 accident based upon her range of motion demonstrated three and a half years later on September 16 and 17, 2014, or five and a half years later on December 29, 2016, is troubling as it is uncertain to what extent Claimant's right and left shoulder range of motion may have been deficient as of the date immediately preceding her March 2011 accident.

80. Dr. Cook testified of shoulder impingement tests he administered as part of his December 29, 2016 evaluation, noting: "Generally it is considered that if those three tests are positive, that is strongly indicative of an internal derangement. And like I say, I have no imaging to support that …." Cook Deposition, p. 108, ll. 21-24. Dr. Cook's report indicated that two of the three tests were positive on December 29, 2016: "Neer Test is positive. Speed's Test is positive. Hawkin's Test is negative." Exhibit S, p. 32. Again, rating Claimant's pre-existing permanent shoulder impairment at the time of her 2011 accident, based upon two positive and one negative shoulder impingement tests on December 29, 2016, is also troubling.

81. Furthermore, Dr. Cook admitted a significant delay in the alleged manifestation of Claimant's shoulder problems, speculating her shoulder condition may have originated in 2003:

> Q. [by Mr. Fuller] The testing that you did in December of 2016 in which you said you felt like that she had an internal derangement in her shoulder, of course is close to five years after the actual incident.
>
> A. Right.

Q. Or I should say the industrial accident for which we are here, the 3/14/11, but it is even further back than that, because didn't you indicate that she probably hurt her shoulder back in –was it 2001 when she—

A. Or 2003.

Q. Or 2003.

A. With the motor vehicle accident and whiplash event.

Q. So you are talking about a condition that now has surfaced to the point that it's causing a problem in 2016.

A. Yeah, that's typically the way it progresses. I mean, I'm sure she's experienced intermittent shoulder pain over the years, but generally with shoulder injuries and speaking from firsthand experience, they manifest gradually, and it is usually by increasing pain and loss of motion or ability to extend or things like that.

Q. But this didn't really show up until after March 14, 2011; is that right?

A. I believe so, yes.

Cook Deposition, p. 109, l. 13 through p. 110, l. 14 (emphasis supplied).

82. Dr. Cook expressly acknowledged he could not opine regarding Claimant's shoulder range of motion at the time of the 2011 accident:

Q. [by Mr. Fuller] And you are not aware whether or not this problem that you observed with her range of motion occurred before or after 3/14/11?

A. No, I'm not. I can't make a comment about the actual timing.

Cook Deposition, p. 142, ll. 21-25.

83. Dr. Cook's testimony does not persuasively establish that Claimant's alleged shoulder condition preceded her March 14, 2011 accident, but rather suggests it gradually manifested thereafter.

84. No physician placed permanent work restrictions on Claimant due to this condition prior to her 2011 accident.

85. Claimant has not proven she suffered a pre-existing permanent impairment of her right and/or left shoulders as of the date immediately preceding her March 14, 2011 accident.

86. *Upper extremity nervous system dysfunction*. On December 29, 2016, Dr. Cook rated Claimant's permanent impairment for upper extremity central nervous system dysfunction at 12% of the whole person. Dr. Cook considered this "probable CNS dysfunction, nonverifiable radicular complaints." Cook Deposition, p. 42, ll. 15-16. He recorded Claimant's report of bilateral hand numbness, burning, paresthesia, and grip strength loss. Dr. Cook noted that while Claimant had a cervical spine MRI showing "she does have pathology, but it would fall under the nonverifiable radicular components … and it is not substantiated by electrodiagnostic testing, which wasn't done, and it is not substantiated significantly by imaging, although she does have evidence of some mild central canal stenosis." Cook Deposition, p. 50, ll. 9-16.

87. Dr. Cook testified that Claimant's shoulder motion deficits, thoracic spine, and CNS function were rated separately: "CNS dysfunction was rated separately and that just basically includes her generalized pain, so I—that was a separate condition." Cook Deposition, p. 120, ll. 3-6. However, he acknowledged:

> I mean its really hard to kind of parse out 30 percent of pain is attributable to this and 20 percent is attributable to that and 50 percent is attributable to that. This particular condition, I can't make that differentiation. I mean, her pain is so diffuse and encompassing, and that's why I included it under the—included the diagnosis of chronic pain syndrome because it does tend to take over their lives.

Cook Deposition, p. 120, ll. 11-19.

88. Dr. Cook opined that Claimant's diminished left hand strength resulted from her 2001 abuse by her spouse and/or her 2003 automobile accident. He acknowledged that his opinion of the nature and degree of the progression of Claimant's diminished left hand grip strength manifest by dropping things was speculative and whether it started in 2011, 2012, or

2013 he did not know. Cook Deposition, p. 127. However, he opined that Claimant's physical findings in December 2016 were "the result of a progressive deterioration" from a preceding event. Cook Deposition, p. 128, ll. 5-6. He admitted there were no medical records prior to 2011 indicating she dropped things.

89. Dr. Simon questioned Dr. Cook's rating because there was no record or diagnostic imaging of brain or spinal cord injury warranting a permanent impairment rating for central nervous system dysfunction. Dr. Simon testified that Claimant did not list this item as a problem on her questionnaire or mention it when he examined her in 2017. Simon Deposition, pp. 33-34. As noted above, Claimant reported to Dr. Calhoun that other than back pain, she was healthy and denied having other chronic medical problem. Exhibit M, p. 16. Dr. Simon noted that "radiculopathy means pathology with a nerve root, which is after the nerve leaves the spinal cord. So it's not a central nervous system problem." Simon Deposition, p. 35, ll. 4-7.

90. Dr. Simon testified that the most common cause of the bilateral upper extremity symptoms Claimant reported to Dr. Cook:

> is carpal tunnel syndrome, and that's a fairly simple thing to diagnose and treat if that's what she has. So I think that's the most likely thing. Now, theoretically, someone could have radiculopathy … but she had had an MRI of the cervical spine done, which did not show anything that would give you such a problem.

Simon Deposition, p. 35, ll. 13-21. He noted that Claimant's 2012 cervical MRI revealed mild multilevel degenerative spondylosis which is "just arthritis … degenerative changes that happens to everybody as we get older. A hundred percent of people by age sixty" and is probably asymptomatic. Simon Deposition p. 61, l. 24 through p. 62, l. 2.

91. Responding to Claimant's report that she occasionally drops things, and Claimant's counsel's question of "whether you call it central nervous system impairment or …

carpal tunnel, does it really make a difference what you call it if there's functional conditions that result from that condition?" Simon Deposition, p. 50, ll. 8-13, Dr. Simon testified:

> When it comes to an impairment rating it definitely matters because—and the most common cause of a symptom like that is carpal tunnel syndrome, and you can fix that, and there's no permanent impairment; whereas, if it was truly a central nervous system problem, say somebody has a stroke five years ago and now they drop glasses because of that stroke, that's a permanent problem …."

Simon Deposition, p. 51, ll. 5-12. He reemphasized that Claimant's cervical spine MRIs showed no abnormality in the spinal cord, nothing in her symptoms or exam findings indicated she had suffered a stroke, and no electrodiagnostic testing had been done to evaluate for carpal tunnel syndrome.

92. Dr. Cook's testimony does not persuasively establish that Claimant's alleged CNS condition preceded her March 14, 2011 accident. Dr. Simon's testimony that Claimant's condition is more likely treatable carpal tunnel syndrome which may well have arisen after her accident, rather than permanent central nervous system impairment is consistent with the medical records and persuasive.

93. Claimant has not proven she suffered permanent impairment of her central nervous system as of the date immediately preceding her March 14, 2011 accident.

94. *Thoracic spine*. On December 29, 2016, Dr. Cook rated Claimant's permanent impairment for thoracic spine T8 compression fracture at 4% of the whole person. Exhibit S, p. 24. Dr. Cook explained: "I rated the thoracic spine vertebral fracture because there is actual imaging evidence of a pathology at approximately T8 and T10, T-11 level. She has –there is kyphotic wedging, loss of disc height, mild wedging, repeat MRI, progressive degenerative changes." Cook Deposition, p. 47, ll. 3-8. Dr. Cook considered this pre-existing based upon Claimant's report to him and a remote T8 compression fracture confirmed by Darrel Brodke,

M.D., on January 28, 2014. Dr. Cook was not aware of any medical record prior to Claimant's 2011 accident documenting any thoracic vertebra compression fracture. Cook Deposition, p. 114, l. 21. Dr. Simon testified that Claimant did not list this item as a problem on her questionnaire or mention it when he examined her in 2017. Simon Deposition, pp. 33-34. However, given the imaged loss of disc height, degree of vertebral body compression, and extent of chronic degenerative changes Dr. Cook persuasively opined this preceded Claimant's 2011 accident. Cook Deposition, p. 146, ll. 11-12.

95. Claimant has proven she suffered a pre-existing permanent impairment of 4% due to her T8 compression fracture as of the date immediately preceding her March 14, 2011 accident.

96. *Left hip motion deficit*. On December 29, 2016, Dr. Cook rated Claimant's permanent impairment for left hip motion deficit at 9% of the whole person. He explained that Claimant "does have hip motion deficits and that does restrict her ambulation, and it has affected her gait." Cook Deposition, p. 53, ll. 6-8. Dr. Cook admitted that the only left hip MRI that was done "really didn't show any deficits." Cook Deposition, p. 149, l. 15. However he assigned a left hip impairment rating based upon Claimant's left hip motion he observed on December 29, 2016. There is little reliable evidence that Claimant's left hip motion deficit assessed by Dr. Cook five and a half years after her 2011 accident existed at the time of her accident.

97. Dr. Simon observed:

> with the left hip motion deficits that he rates, yeah, the guide says you can assign [an] impairment rating for hip motion deficits, but what's the underlying problem causing that? If somebody just hasn't stretched in a while and it's not permanent, then with a stretching program you can improve your range of motion, it's not rateable [sic] then.

Simon Deposition, p. 57, ll. 13-20.

98. Dr. Cook's testimony does not persuasively establish that Claimant's alleged condition preceded her March 14, 2011 accident. Available diagnostic imaging does not so establish. Dr. Simon's testimony that Claimant's hip condition as of December 29, 2016, has not been shown to be a permanent and thus ratable impairment is persuasive.

99. Claimant has not proven she suffered permanent impairment of her left hip as of the date immediately preceding her March 14, 2011 accident.

100. *Patellar subluxation*. On December 29, 2016, Dr. Cook rated Claimant's permanent impairment for patellar subluxation at 2% of the whole person. Dr. Cook discussed Claimant's reported knee pain noting that she "had a diagnosis of a left chondromalacia and subluxation of her patella, but I don't think this has been definitively established on a basis of imaging." Cook Deposition, p. 22, ll. 5-8. Dr. Cook testified that Claimant's patellar subluxation

> is due to laxity of the femoral patellar tendon, and the tendon will actually slip outward from the knee, and they can sometimes result in–rarely buckling, but generally in pain, just because that patella slips over …. The cartilage just gets repeatedly chewed up about this tracking of the patella so it leads to pain.

Cook Deposition, p. 117, l. 17 through p. 118, l. 1. He affirmed this condition is not something that just goes away and that if Claimant's patellar subluxation commenced at the time of her 2003 automobile accident, the condition would have progressed and worsened over time. Dr. Cook also testified:

> Q. [by Mr. Fuller] So can you explain the absence of treatment for this condition from 2003 until 2016?
>
> A. I would give anything, knowing we took these x-rays, and I would have to go back and look. But other than the fact that it probably represents her gain of weight due to sedentary changes in her lifestyle and the fact that she underwent a condition of deconditioning, and she just got less support from her supporting

> musculature in the knees. Sometimes that—the surrounding muscles, if they are inclined to walk, that tends to support and reduce the tracking, but if they become sedentary and less active, then that allows that support to be lost and the patella will tend to shift to the outside.

Cook Deposition, p. 118, ll. 10-23. As noted, Dr. Cook recorded Claimant weighed 250 pounds and: "This represents approximately a 60-pound weight gain from the time of the accident." Exhibit S, p. 32.

101. Dr. Cook was unable to identify any medical record showing Claimant had problems with patellar subluxation prior to her 2011 industrial accident or prior to his evaluation of Claimant in 2016. Cook Deposition, p. 150-151. He was unclear of the onset of this condition but acknowledged "It is not a significant disabling impairment." Cook Deposition, p. 54, ll. 9-10. He admitted "I have no objective means of going back and referring it to her status prior to injury. …. She actually couldn't recall when she started walking with a limp, but she does now …." Cook Deposition, p. 55, l. 18 through p. 56, l. 3.

102. No physician placed permanent work restrictions on Claimant due to this condition prior to her 2011 accident.

103. Claimant has not proven she suffered permanent impairment due to patellar subluxation as of the date immediately preceding her March 14, 2011 accident.

104. *Fibromyalgia*. On December 29, 2016, Dr. Cook rated Claimant's permanent impairment for fibromyalgia at 3% of the whole person. Exhibit S, p. 29.

105. Some of Claimant's early medical records reference fibromyalgia. In January 2001, Matthew Lasala, M.D., assessed probable fibromyalgia. Claimant then weighed 242 pounds. Exhibit A, p. 6. On December 5, 2001, Ruth Herbert, FNP, recorded of Claimant:

> She's not walking, she does no routine regular vigorous exercise. She has been told by Dr. Depper, rheumatologist that she might have fibromyalgia. …. Morbidly obese, depressed affect. …. CHRONIC NECK AND LOW BACK

> PAIN, POSSIBLY SECONDARY TO FIBROMYALGIA EXACERBATED BY BODY HABITUS. …. I feel her main treatment modalities need to be aerobic fitness and just generally more physical exercise.

Exhibit B, p. 3.

106. On June 6, 2002, Ruth Herbert, FNP, examined Claimant, who was very distraught, and assessed chronic pain issues with fibromyalgia, obesity, anxiety, and depression. Exhibit B, p. 6. On March 5, 2003, Lori McMillian, FNP, examined Claimant, and recorded:

> She is very worried about not even having asthma. She states that every time she is listened to, she is told her lungs are fine. …. Fibromyalgia and back pain. This has been an ongoing ordeal. She states that she is just uncomfortable all the time. There is no radiculopathy or muscle weakness to distal extremities, which is quite frustrating because she is always so uncomfortable. She has tried different muscle relaxers and pain pills. She was seen by Dr. Depper who diagnosed the fibromyalgia, but she has never been back.

Exhibit B, p. 11.

107. However, subsequent records, most significantly those more closely preceding Claimant's 2011 industrial accident, make no mention of fibromyalgia. Claimant apparently never returned for treatment by Dr. Depper. No fibromyalgia was reported in the records from her 2012 STARS program; to the contrary, Claimant reported to Dr. Calhoun that except for her low back issues, "otherwise she is healthy. She denied having other chronic medical problems." Exhibit M, p. 16.

108. Dr. Cook acknowledged that fibromyalgia is "not part of the AMA guides DBI diagnosis, but it is a condition that does cause pain …." Cook Deposition, p. 62, ll. 21-24. Dr. Cook admitted that the diagnosis of fibromyalgia in and of itself is controversial in the medical community. However, he cited Claimant's reports of disabling pain as justifying an impairment rating: "She's had long-standing pain and it's—like I say, it is hard to parse out

which percentage of pain belongs to –this whole lady's body is in pain." Cook Deposition, p. 159, ll. 1-4.

109. As noted above, Dr. Cook repeatedly opined that Claimant suffered progressive deterioration and pain, and had gotten progressively worse. As also noted, Claimant is prone to somaticizing, highly focused on her pain perceptions, and prone to overstate her physical complaints. Dr. Chung noted Claimant's five negative chest pain workups and 12 benign diagnostic studies between 2001 and 2011 document she expresses psychological distress through physical complaints and establish a reasonable medical probability that her complaints of neck, chest, mid back, and flank pain had a psychogenic basis. Exhibit R, pp. 18-19. As Dr. Simon observed, given her somatoform tendencies, her subjective complaints are "hardly appropriate for determining objective impairment." Exhibit AA, pp. 12-13.

110. Dr. Cook's testimony does not persuasively establish that Claimant suffered a pre-existing permanent impairment due to fibromyalgia as of the date immediately preceding her March 14, 2011 accident. No physician placed permanent work restrictions on Claimant due to this condition prior to her 2011 accident.

111. Claimant has not proven she suffered permanent impairment due to fibromyalgia as of the date immediately preceding her March 14, 2011 accident.

112. *Migraines*. On December 29, 2016, Dr. Cook rated Claimant's permanent impairment for migraine headaches at 5% of the whole person. Dr. Cook admitted:

> Migraine headaches are the only headaches that can be rated according to the AMA guides. And she has a long-standing history of migraine headaches that has become progressively worse, and interestingly enough, migraine headaches are very commonly associated with traumatic events, so this may well date back—I'm sure it's pre-existing, since it predated her 2011 industrial injury.

Cook Deposition, p. 48, ll. 12-19. However, when specifically questioned about records of migraine headaches before 2011, Dr. Cook testified:

> Q. [by Mr. Fuller] Do you have any medical records, or are you aware of any medical records that indicate that she had severe migraine headaches prior to 3/14/11?
>
> A. Offhand I would say, no, but let me—
>
> Q. And I guess what I'm saying to you, Doctor, I'm not saying that she didn't ever have one. I'm talking about the kind of migraine headaches that would cause a disabling—
>
> A. A disabling—sorry. I didn't mean to speak over. No, I really don't have a record of that.

Cook Deposition, p. 131, ll. 13-22.

113. Dr. Cook's report indicates that he rated Claimant's permanent impairment due to her migraine headaches based upon a MIDAS questionnaire establishing "She missed 8 to 10 days of ability to perform normal ADLs in the past three months due to Headaches." Exhibit S, p. 22. Based upon the questionnaire, Dr. Cook concluded Claimant had a Class 4 severe disability impairment. He noted that the frequency and duration of her migraine headaches had increased: "The pattern of increased headache frequency and its severity manifest with progressive worsening following her first lumbar surgery in April of 2003 and the subsequent MVA in 2003. The novel frequency occurrence of 6 to 8 times per month has persisted to the present." Cook Deposition, p. 143, ll. 11-17. However, at hearing, Claimant testified regarding migraine headache frequency prior to her 2011 accident: "Prior to the 2011—it depended on my—actually, to be honest, on certain situations and certain activities that I may or may not be doing, so I probably had them, I don't know, two or three times a month, sometimes eight." Hearing Transcript, p. 48, ll. 12-16. Thus Dr. Cook evaluated Claimant's permanent impairment due to migraine headaches at a rate significantly greater than the frequency she asserted at

hearing. His rating of 5% impairment is not persuasive. No physician placed permanent work restrictions on Claimant due to this condition prior to her 2011 accident. As noted, the Commission is the ultimate evaluator of permanent impairment. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

114. Claimant has proven that she suffered a pre-existing permanent impairment of 3% due to migraine headaches as of the date immediately preceding her March 14, 2011 accident.

115. *Bunion*. On December 29, 2016, Dr. Cook rated Claimant's permanent impairment for left foot bunion at 5% of the whole person. Exhibit S, p. 28. He admitted "There is no single diagnostic category which fits this claimant's injury. The Foot and Ankle Regional Grid—Lower Extremity Impairments, Metatarsal—tarsal fracture/dislocation category was chosen due to the inclusion of malalignment angulation." Exhibit S, p. 29. Dr. Cook observed that "bunion deformities develop very slowly and [are] progressive." Cook Deposition, p. 158, ll. 3-4. He noted Claimant's bunion may be due to improper footwear and also testified "there can be other conditions just based on weight and possible traumatic injury." Cook Deposition, p. 61, ll. 6-7. Claimant asserts no traumatic injury to her left foot; however, she testified she wore high heels at work for a time. She acknowledged that the symptoms from her bunion were remedied by wearing flat shoes, instead of high heels. Her extensive walking before her 2011 accident and her performance on the treadmill at STARS demonstrated that given proper footwear, her bunion was not a significant limitation to her physical capacity.

116. Dr. Cook acknowledged he had seen no medical records of any treatment for this condition. He relied upon Claimant's report that she "consulted Kert Howard, D.P.M., in or around 2010. Permanent and stationary records are not available to this examiner to corroborate

this history." Exhibit S, p. 28. However, the record reveals that on March 14, 2011—the day of Claimant's accident at Maag—she presented to Dr. Howard who recorded:

> red tender area over the first metatarsal head. This area appears swollen and inflamed. She also has popping and clicking in the third interspace consistent with a Morton's neuroma. …. X-ray shows a moderate to severe bunion deformity with the sesamoid in position three. The hallus is drifting laterally pushing against the other digits.

Exhibit H, p. 1.

117. Claimant has proven she suffered a pre-existing permanent impairment of 5% due to a left foot bunion as of the date immediately preceding her March 14, 2011 accident.

118. Claimant has proven that she suffers the following whole person permanent physical impairments: 13% due to her lumbar spine, 15% due to her asthma, 16% due to her gastroparesis, 15% due to her urinary incontinence, 4% due to her T8 compression fracture, 3% due to her migraine headaches, and 5% due to her left foot bunion thus totaling 71% of the whole person.

119. Physical restrictions. Claimant asserts that her physical capacity is severely reduced and she is severely restricted. Several medical experts have opined regarding her functional capacity and permanent restrictions.

120. *Dr. Krafft.* Claimant participated in the STARS work hardening program in March and April 2012. Prior to commencing the program, on March 5, 2012, Peggy Wilson, PT, CEAS, evaluated Claimant's capacity and produced a Work Hardening Initial Report noting: "Decreased strength (severe lower extremity strength deficits; client unable to stand from a deep squat position). …. Severe deconditioning." Exhibit M, p. 4.

121. During the STARS program Claimant pushed weighted carts, lifted weighted boxes, and performed other exercise therapy. She acknowledged making progress in the STARS

program but believed she was pushed too hard. Claimant reported she left the program early because she was hurting so much. In contrast, Dr. Krafft reported Claimant progressed nicely and exceeded her pre-accident physical capacity in only three and a half weeks whereupon she was discharged from the program and released to return to her pre-injury job.

122. On April 5, 2012, at the conclusion of Claimant's participation in the STARS program, Ms. Wilson again evaluated Claimant's capacity and produced a Work Hardening Final Report noting:

> LIFTING:
> Floor to Knuckle (deep squat): Repetitive 15 pounds; maximum not tested.
> 12" to Knuckle: Repetitive 35 pounds; maximum not tested.
> Knuckle to Shoulder: Repetitive 30 pounds; maximum not tested.
> Shoulder to Overhead: Repetitive 15 pounds: maximum not tested.
> Note: Maximum lifting capacities were not tested as client had exceeded the amount of weight required to be lifted at her job.
>
> PHYSICAL DEMAND CHARACTERISTICS (PDC) OF WORK LEVEL:
> CURRENT: Light to Light-Medium.
> PRE-INJURY JOB: Sedentary Light.
>
> CARRYING: The client is able to carry 30 pounds for 100 feet without difficulty. Maximum efforts were not assessed.
> PUSHING: The client is able to perform dynamic pushing for 50 feet with a calculated force of 55 pounds (object weighted with 100 pounds) with minimal difficulty. Maximum efforts not tested.
> PULLING: The client is able to perform dynamic pulling for 50 feet with a calculated force of 46 pounds (object weighted with 100 pounds) with minimal difficulty. Maximum efforts were not assessed.
> BENDING: The client is able to perform repetitive bending 20 times with minimal difficulty.
> SQUATTING: the client is able to perform squatting 10 times with moderate difficulty.
> ….
> WALKING: The client indicates her walking tolerance is up to 2 hours. The client has demonstrated the ability to walk up to 20-minute increments at 2.6 miles per hour on the treadmill in the clinic with minimal difficulty.
> STANDING: The client indicates her standing tolerance is approximately 2 hours. …..
> SITTING: The client indicates her sitting tolerance is approximately 60 minutes.

> STAIR CLIMBING: The client is able to traverse 5 flights of stairs with a functional (alternate reciprocal) gait pattern. Pre-heart rate 100 bpm. Post-heart rate 135 bpm.
> ….
> JOB SPECIFIC ACTIVITIES: The client has demonstrated the ability to perform various job specific tasks including donning and doffing of various compression socks, fitting various braces, lifting and handling individual's legs for the application of stockings and/or braces without difficulty.
> ENDURANCE: The client has been tolerating Work Hardening up to 4 hours a day, 5 days a week without difficulty.
> ….
> The client has demonstrated that she is able to perform the critical demands of her pre-injury job with Maag Pharmacy; she may benefit from a gradual transition to full-time work (beginning at 6 hours per day and progressing to full-time over 1-2 weeks).

Exhibit M, pp. 59-61.

123. Claimant's physical capacity demonstrated at the STARS program in April 2012 is highly significant as it coincides with Claimant reaching maximum medical improvement. Previously, she had been less active for many months recovering from her November 2011 lumbar fusion and was severely deconditioned. At the conclusion of the STARS program, Dr. Krafft recorded that Claimant had demonstrated the ability to lift 35 pounds repetitively and he released her to return to her time of injury job.

124. *Sharik Peck*. Sharik Peck, PT, conducted a functional capacity evaluation of Claimant on September 16 and 17, 2014, that documented Claimant's ability to lift and carry 15 pounds occasionally and 5 pounds frequently, lift from the floor zero pounds occasionally and frequently, lift to the shoulder 10 pounds occasionally and five pounds frequently, push 62 pounds occasionally and 31 pounds frequently, and pull 65 pounds occasionally and 32 pounds frequently. He noted Claimant's active shoulder range of motion was limited during the FCE.

125. After the September 16 and 17, 2014 FCE, Mr. Peck concluded that Claimant was precluded from working in any job primarily by her low back and left lower quadrant condition.

He reported: "The FCA results reveal that Ms. Harris' abilities will preclude her from working safely in any 8 hour/day, 40 hour/week occupation according to the Dictionary of Occupational Titles at this time." Exhibit T, p. 1. He specified her limitations:

> Ms. Harris lacks the ability to maintain static posture while reaching away from the body. She lacks the ability to kneel and lift/carry items from the floor. She lacks the ability to lift and carry weight loads due to trunk dynamic instability and weakness. The combined effect of these limitations will preclude her from working in the competitive labor market at any level described in the Dictionary of Occupational Titles.

Exhibit T, pp. 3-4.

126. *Dr. Cook.* Dr. Cook accepted the functional capacity evaluation and conclusions of Mr. Peck. Dr. Cook further recorded his observations and Claimant's complaints at the time he examined her on December 29, 2016, and which he also relied upon to evaluate her capacity for employment, including:

> She experiences near falls at least twice monthly and falls at least monthly. She walks with a limp. "She cannot kneel, she cannot squat, stoop, bend, or voluntarily lift her knees."
> ….
>
> HER LIMITATIONS:
> Standing: Limited to 20 to 45 minutes. ….
> Sitting: Limited under ordinary circumstances is limited to 30-45 minutes. ….
> Walking: Limited to approximately 300 to 400 feet. This was verified by her timed physical therapy treadmill walking and her FCE. ….
> Stair climbing: She is limited to three steps, with single step gait.
> ….
> Severe limitations on work above chest height and activities above chest level:
> ….
> She essentially can perform no sustained or significant lifting above her head. ….
> Shampooing her hair can be accomplished with a single, brief effort. ….
>
> She cannot reliably lift her hands above her head. Her lifting to chest height is limited to approximately 10 to fifteen pounds. This is on a rare, single-event basis.

Exhibit S, pp. 5, 9-10.

127. *Dr. Simon.* Dr. Simon opined Claimant was restricted to lifting 20 pounds but capable of full-time employment in various sedentary and light-duty positions. Dr. Simon testified that functional capacity evaluations can be helpful, but "there's still a lot of subjectivity in it." Simon Deposition, p. 30, l. 24. Dr. Simon observed that comparison of Claimant's performance during the functional capacity testing at STARS in 2012 contrasted with her performance during the functional capacity testing administered by Mr. Peck in 2014, demonstrated the worsening of her condition. Simon Deposition, p. 63. Dr. Simon attributed the 2014 FCE results to Claimant's increased age and her deconditioning. Exhibit V, p. 10.

128. *Evaluating the differing physical capacities and restrictions.* As noted above:

> [I]in determining whether the pre-existing condition combines with the effects of the work accident to cause total and permanent disability, that assessment, too, must be performed in view of the limitations/restrictions arising from the pre-existing impairment as of a point in time immediately preceding the work accident.

Ritchie, 2016 WL 6884645 at 6 (emphasis supplied).

129. Claimant's physical capacity observed at the conclusion of the STARS program and the restrictions imposed by Dr. Krafft in April 2012 are highly significant as they are contemporaneous with Claimant reaching maximum medical improvement from her March 2011 accident. They are based upon Claimant's demonstrated ability to lift repetitively and function over the course of three weeks after a period of focused therapy and conditioning to remedy months of inactivity and deconditioning. The functional capacity and restrictions determined by Mr. Peck and Dr. Cook are not persuasive as they arise from Claimant's performance nearly two and a half years and four and a half years, respectively, after reaching maximum medical improvement from her 2011 accident, during which additional time she was not working, largely inactive, gained approximately 60 pounds, and became again deconditioned. Applying the

comparison recommended by Dr. Simon, the most sharply contrasting reported differences in Claimant's physical capacity are:

	April 2012	September 2014/December 2016
Lifting floor to knuckle (lbs)	15	0
Lifting 12" to knuckle (lbs)	35	10
Lifting Knuckle to shoulder (lbs)	30	10-15
Lifting shoulder to overhead (lbs)	15	cannot reliably lift hands above head
Carrying (lbs)	30	15
Bending (repetitions)	20	cannot
Squatting (repetitions)	10	cannot
Walking (feet)	4,576 [7]	400
Stair climbing	5 flights	3 steps

130. Claimant's demonstrated functional capacity documented in April 2012 and the resulting restrictions imposed by Dr. Krafft and Dr. Simon most reliably address Claimant's capacity and the limitations of her pre-existing conditions as of the date immediately preceding her March 14, 2011 accident together with her limitations resulting from her 2011 accident. The 20-pound lifting restriction imposed by Dr. Simon is prudent given Claimant's history of two pre-accident lumbar surgeries followed by her November 2011 lumbar fusion as treatment for her March 14, 2011 accident.

131. Competitiveness in the open labor market. Claimant's efforts to secure employment and the opinions of several experts assessing Claimant's employability are addressed below.

132. *Claimant's efforts.* Claimant testified that she could not work as a medical coder/biller because she could not sit that long. However, to attend her deposition, she drove

[7] Utilizing feet as the common unit for comparison of walking distances, 20 minutes (1/3 of an hour) x 2.6 miles per hour = .8667 miles x 5,280 feet per mile = 4,576 feet.

from Redmond, Oregon to Pocatello, Idaho in two days, stopping every two hours or less.[8] Claimant testified at her deposition that she enjoys going for drives and often goes for drives because the Redmond area is so beautiful. At hearing Claimant testified that she could not work as a pharmacy technician because she was in too much pain. However, the record—particularly Dr. Cook's testimony—establishes that her pain has been increasing since her 2011 accident until it had become disabling by the time he examined her in 2016.

133. Claimant's disinclination to return to work is documented in the record. Claimant made no effort to return to work for Maag when she completed the STARS program and was released by Dr. Krafft to her pre-injury job, even though consultant Chris Horton contacted Maag and then informed Claimant that Maag liked her and was willing to have her return. Dr. Krafft also released Claimant to various other positions, but she excused herself from attempting to work in any of these positions stating she was not released by her surgeon, Dr. Little, even though she had made no effort to see Dr. Little since 2012, and he had concurred in her release to return to work by Dr. Krafft.

134. Claimant completed an on-line medical coder-biller course but failed the state certification test and declined to retake it. The only other interest Claimant has expressed was to ask about managing an apartment for disabled residents in Oregon and was declined. She has made no other attempt to find employment in either Redmond or Pocatello.

135. *Dr. Krafft.* After Claimant progressed through the STARS program and exceeded her pre-accident physical capacity in only three and a half weeks, Dr. Krafft released her to return to work as a pharmacy technician. He also released her to work as a customer service

[8] The referee takes notice that the distance from Redmond, Oregon to Pocatello, Idaho is approximately 560 miles.

representative, office assistant, receptionist, or sales representative. Claimant never worked or attempted to find work in any of these areas.

136. *Dr. Cook.* Dr. Cook opined that Claimant was not able to work. He reported: "given the constellation of Ms. Harris' overwhelming and disabling pathology and associated symptoms, that to a reasonable degree of medical certainty, she will never regain part-time or full-time employment in the workforce." Exhibit S, p. 17. When deposed, he testified:

> Q. (by Mr. Matsuura) [W]as she employable at least from a medical standpoint or able to engage in gainful work activity prior to March of 2011?
>
> A. Yes. She was able to –I think she's had a very—various job titles, and she was functioning as a pharmacy tech prior to her work injury. Subsequent to that I think, for want of a better word, she reached a tipping point in just the cumulative effects of all her combined impairments plus the deconditioning and the enforced sedentary role she had following her work injury, plus her obesity all contributed to the fact that she was not able to return to the workforce in a productive capacity.

Cook Deposition, p. 70, ll. 8-21.

137. Dr. Cook accepted the 2014 functional capacity evaluation performed by Sharik Peck and opined that Claimant is no longer able to perform full-time work, even at a sedentary level. However, Dr. Cook did not criticize the opinions of other physicians who had examined Claimant previously and concluded otherwise:

> Q. [by Mr. Fuller] …. [Y]ou indicated, I believe, in previous testimony that she would be unable to perform even at a sedentary level.
>
> A. Right.
>
> Q. That conflicts, I believe, with some of the other doctors who have examined her, Dr. Krafft, some of the others who have released her for going back to work. Is this just simply a disagreement between doctors, or do you have a specific criticism of what they have done that says—
>
> A. No. No.
>
> Q. –I'm right, they are wrong?

A. No, no criticism implied. It is just the fact that their opinions were delivered at a date prior to my—you know, to that particular window they saw her at, compared to the point I saw her at, and these are her current limitations, and that's why I make this—

Q. So, again, her problems could have progressed since—

A. Right.

Q. –since they saw her—

A. Right.

Q. –to the point where you are saying—

A. Now, she's no longer suitable for employment on a sedentary basis.

Cook Deposition, p. 134, l. 5 through p. 135, l. 5.

138. The reality of Dr. Cook's opinion is that at the time he examined Claimant on December 29, 2016—five and a half years after her March 14, 2011 accident—she was no longer able to work.

139. *Dr. Simon*. Dr. Simon examined Claimant on April 11, 2017, and recorded: "The examinee is a significantly overweight middle-aged female (she reports that she gained 60 pounds since surgery)." Exhibit AA, p. 10. He considered her ongoing problems "a continuation of her chronic pre-existing problems." Exhibit AA, p. 12. Dr. Simon opined she was capable of lifting 20 pounds and performing light work 40 hours per week. He reviewed her jobsite evaluation for her pharmacy technician position at Maag and testified she could return to that position. Simon Deposition, pp. 23-24. Dr. Simon opined Claimant could perform the duties of a medical coder/biller or customer service at a call center. He concluded: "It's my opinion that she is not permanently or totally disabled and that she is capable of working within the restrictions that I assigned." Simon Deposition, p. 44, ll. 4-7.

140. *Chris Horton*. Industrial Commission rehabilitation consultant Chris Horton assisted Claimant from June 2011 through March 2013 in rehabilitation, job search, and job development. On July 10, 2012, when discussing Claimant's possible retraining, Chris Horton indicated to Surety "that the claimant would likely not experience a large wage loss in returning to work on an immediate basis utilizing her transferable skills." Exhibit U, p. 25.

141. Claimant's file was closed in March 2013, although Mr. Horton considered her capable of working in several local clerical positions with the indicated hourly wages: outpatient receptionist ($10.32), hospital admitting clerk ($11.64), court clerk ($13.95), governmental eligibility interviewer ($16.06), bill and account collector ($14.61), insurance claims and policy processing clerk ($13.52), and with completion of training, medical biller-coder ($14.88). Claimant advised Mr. Horton she thought she could perform the work of a medical coder/biller and so testified at hearing. Transcript p. 127-128.

142. On March 26, 2013, Mr. Horton recorded his vocational recommendations:

> My recommendation is that the claimant possesses transferable skills and is physically able to perform jobs in her labor market which are within her pre-injury status and wage. Also, upon completion of her current vocational program she will have obtained enough skills and training to acquire a position that will be near if not the same as her pre-injury status and wage also expanding the claimant's labor market. The claimant expressed that at this time she does not feel she is able to seek work effectively.

Exhibit U, p. 32.

143. *Terry Montague.* Claimant presented the expert testimony of Terry Montague who interviewed Claimant and reviewed her work history, medical records, and physical restrictions. Mr. Montague has no certifications in vocational rehabilitation and was retiring after the day of his deposition. He has bachelors and masters degrees in sociology, and his educational background does not directly relate to vocational rehabilitation. From 1989 through

1995 he regularly attended annual and quarterly trainings by the Industrial Commission Rehabilitation Division where he was then employed. He has not attended any vocational training or continuing education seminars since 1995.

144. Mr. Montague assessed Claimant's employability and reported she had no difficulty performing her job at Maag after her 2009 back surgery and before her 2011 industrial accident. Mr. Montague was not aware of any pre-accident restrictions imposed on Claimant by any physician. He relied upon Dr. Cook's endorsement of the functional capacity of Claimant as determined by Sharik Peck.[9]

145. Mr. Montague produced a written report in March 2015 and a supplemental report in April 2016. He relied upon Mr. Peck's assessment that Claimant was precluded from working safely in any eight-hour per day, 40-hour per week job primarily by her low back and left lower quadrant condition and lacked the ability to maintain a static posture while reaching away from her body, lifting and carrying items from the floor, or lifting and carrying weight loads.

146. Mr. Montague testified:

> Dr. Cook is the only physician who has indicated that there is no work available for her on full-time basis.
>
> Given the FCE results from Mr. Peck and the medical opinion of Dr. Cook, Ms. Harris would not be able to return to work as pharmacy technician and perform all the jobs that she did at the time that she worked in that capacity. She would also not be able to return to a number of other occupations that she's held in the past

[9] During his testimony, Mr. Montague repeatedly referred to Claimant's physical restrictions recognized by "the medical community" which he later defined:

> Q. [by Mr. Fuller] …the medical community you were referring to that agree with Mr. Sharik Peck was just Dr. Cook, wasn't it?
>
> A. That's correct.

Montague Deposition, p. 70, ll. 6-9.

> because of her inability to remain on her feet for prolonged period of time or to carry heavy and lift items, heavy items.

Montague Deposition, p. 24, ll. 4-16. He opined that if Dr. Cook's conclusions were accepted it "would probably be futile for Ms. Harris to actually try to find work." Montague Deposition, p. 28, ll. 11-13.

147. Mr. Montague testified that Claimant's 73% pre-existing impairments and her 13% back impairment total "about 86 percent impairment" and constituted "Too many obstacles to employment." Montague Deposition, p. 30, ll. 12, 20.[10] He acknowledged that Claimant suffered progressive worsening conditions after her 2011 accident, had gained 60 pounds, and was described as morbidly obese. He testified that such obesity "would be problematic for most employers." Montague Deposition, p. 56, l. 15. Mr. Montague listed non-medical factors problematic to her employment, including: limited education (only GED), age of nearly 57, physical appearance, morbid obesity, significant limp, and six year gap of non-employment. Montague Deposition, p. 31. He admitted that Claimant's age of almost 57 at the time of hearing would be a non-medical factor hindering her employability, but in 2011, immediately following her accident he would probably not have considered her age a negative factor in her employability. Montague Deposition, p. 72, ll. 16-25.

148. Mr. Montague opined that Claimant's relevant work history included her work at Rite Aid Pharmacy in McCall, Maag Pharmacy in Pocatello, and self-employment with her husband in Oregon conducting estate sales and selling antiques. He questioned the Industrial Commission rehabilitation consultant's conclusions that Claimant could perform clerical-type positions because it was based solely on Dr. Krafft's work restrictions and because it did not

[10] During his deposition, Dr. Cook amended his written report of the combined value of Claimant's pre-existing impairments to a total of 72%. Cook Deposition, p. 64, ll. 5-6.

consider Claimant's lack of transferable skills to perform clerical or secretarial work. Montague Deposition, p. 33. However, Mr. Montague admitted that Claimant's work experience at Maag provided her transferable skills in customer service and cashiering.

149. Mr. Montague disagreed with William Jordan's assessment, discussed hereafter, that there were a number of employment options available to Claimant in Pocatello and Redmond. Mr. Montague testified:

> Q. (by Mr. Matsuura) [H]ow did you familiarize yourself with any available jobs and what was your assessment with respect to her ability to obtain any gainful employment in the Pocatello labor market?
>
> A. Well, I didn't attempt to do a job placement analysis on her in either the Redmond, Oregon, or the Pocatello labor market simply because the medical community, particularly Dr. Cook, would make it impossible for her to secure and maintain gainful activity.
>
> The jobs that were identified by Mr. Jordan were not from the time of hearing. They were from—well, I'm not even sure when they were exactly. His report was dated in December of 2016, and these are jobs that are routinely found within both labor markets and they still are today and would have been in June of this year.
>
> But, again, if you look at the actual job description for these occupations he's listed, Ms. Harris did not meet the—many of the requirements, either physically didn't meet them or vocationally didn't meet them or educationally didn't meet them. She didn't have the skill set necessary or the experience to secure these jobs and expect to be hired in these positions.

Montague Deposition, p. 36, l. 17 through p. 37, l. 17.

150. Mr. Montague testified he "didn't find any issue with the jobs identified by Mr. Jordan from a physical capacities perspective" however, "the job announcements that he said were available for Ms. Harris required either more experience, greater education, or transferable skills than Ms. Harris currently has." Montague Deposition, p. 96, ll. 16-23. Mr. Montague opined that Claimant could not realistically work as a phone solicitor, at a call center, or similar positions as she had inadequate prior experience in these areas. However, Mr. Montague

acknowledged that Claimant worked part-time at Bennett's, a call center, but opined she did not have to use a computer in prior occupations. As noted above, Claimant was self employed with her husband in estate sales and selling antiques on E-Bay.

151. Mr. Montague admitted that applying the restrictions imposed by Drs. Krafft, Simon, and Chung, Claimant could work as a pharmacy technician, medical coder/biller and perform other light duty positions if provided sit/stand options with a bathroom nearby. Montague Deposition, p. 66. He further acknowledged that Maag was pleased with Claimant's work and wanted her to return after the 2011 accident. He conceded that absent Dr. Cook's opinion, Claimant's restrictions imposed by the other doctors would not preclude her from employment. Montague Deposition, p. 74, ll. 19-24.

152. Mr. Montague acknowledged that Claimant did not engage in any active job search after she was medically stable and did not return to her time of injury employment at Maag because she required surgery for a foot neuroma unrelated to her industrial injury.

153. *William Jordan.* ISIF presented the expert testimony of William Jordan, CRC, CDMS. Mr. Jordan initially interviewed Claimant, examined her medical records and prior work history, and produced a disability evaluation employability report for the State Insurance Fund on July 24, 2015. After Claimant settled her claim against the State Insurance Fund, Mr. Jordan produced an addendum report on December 20, 2016, at the request of Defendant ISIF.

154. Mr. Jordan testified that Claimant had no work restrictions placed upon her by any physician prior to her March 14, 2011 industrial accident. Claimant's duties at Maag constituted light duty work, including exerting 20 pounds of force occasionally, 10 pounds frequently, with standing and walking. Mr. Jordan noted that additional duties, including taking

out the trash, vacuuming, cashiering, and stocking, all fell within the range of light duty work. Jordan Deposition, p. 24.

155. Mr. Jordan considered Claimant's successful completion of the STARS work hardening program wherein Dr. Krafft recorded on April 5, 2012, that Claimant exceeded her pre-injury work level by demonstrating the ability to lift 35 pounds repetitively, perform multiple job specific tasks including bending over to assist customers, donning and doffing compression socks, fitting braces, lifting and handling customers legs to fit compression socks and braces for four hours per day five days per week. She reported lumbar pain of 5 to 6 out of 10, which she demonstrated the ability to manage by alternating her work positions. Jordan Deposition, pp. 27-28. Mr. Jordan noted that Dr. Krafft released Claimant to return to her work at Maag as a pharmacy technician on April 5, 2012, and also approved job site evaluations and released her to work as a customer service representative, customer service representative 2, office assistant, receptionist, and sales representative. Mr. Jordan reviewed these additional occupations, noted they constituted light and sedentary work compatible with Claimant's 35 pound lifting restriction, and opined those positions "would have been available back at that time and they are still available today." Jordan Deposition, p. 30, ll. 16-18.

156. Mr. Jordan reviewed the September 2014 FCE performed by Sharik Peck. He reviewed Dr. Cook's report and Dr. Simon's reports, noting that Dr. Simon considered it prudent to restrict Claimant to lifting no more than 20 pounds, rather than 35, but concurred with Dr. Krafft that there was no objective reason Claimant could not return to her pharmacy technician position at Maag or work as a medical coder-biller. Mr. Jordan opined that Claimant's deposition and hearing statement indicated her condition had clearly worsened since

her March 14, 2011 industrial accident. Mr. Jordan testified that in 2015 Claimant reported to him she could not push a shopping cart or engage in any exercise program.

157. Mr. Jordan contacted Maag and was advised that Claimant's medical coder/biller training would be valuable to Maag even though Claimant was not certified and she could pursue on-the-job training useful towards completing certification. He specifically discussed Claimant's return to work with management at Maag and was assured "They really liked her." And had noted after she had had the injury and she was going to be gone for a while that she should contact them back and they would work with her in going back to work. That was also noted on the job site evaluation that was done by the ICRD." Jordan Deposition, p. 53, ll. 20-25.

158. Mr. Jordan identified other employment options. He noted that Claimant owned a computer and was computer literate, had worked as a cashier and was familiar with a computerized cash register, and had worked as a phone survey worker and was familiar with reading scripts to customers over the phone and logging results into a computer. Mr. Jordan opined that sedentary and light jobs comprise 60 to 80% of the job market and that Claimant's customer service skills would be an asset to potential employers. She had done bookkeeping and clerical tasks for Attic Antiques with her husband, worked as a demonstrator, and Maag highly endorsed her customer service skills. Mr. Jordan testified that Claimant could consider employment in light or sedentary positions as a pharmacy technician, crossing guard, counter concessions clerk, hostess, cashier, kiosk cashier, counter rental clerk, retail sales clerk, telemarketer, telephone surveyor, sales associate, bookkeeper, customer service representative, hotel/motel clerk, loan interviewer, reception information clerk, order filler, and office clerk. Jordan Deposition, pp. 47-48. Mr. Jordan reviewed available positions in July 2015 and identified sedentary positions potentially suitable for Claimant including:

> receptionist/greeter at Express Employment Professionals, patient Financial Advocate at Bingham Memorial Hospital, front office clerk at Bingham Memorial Hospital, customer service associate at Convergy's, which is a telephone survey company in Pocatello. She could be a phone sales rep, that was for LiveFree Company, emergency response kind of setup for older people.
>
> She could do telemarketing rep, insurance work for a company called Insurance Smart. She could be a telephone interviewer for Bernett Company in Pocatello. She could do customer service associate work at Allstate, which is a call center in Pocatello. She could be a biller at Bingham Memorial Hospital, receptionist for Portneuf Medical, full-time office assistant for LiveFree Emergency Response, an administrative assistant for Home Hospice and Health.
>
> So those were sedentary occupations. The other ones that I looked that were more light/medium types of occupations, light to medium, would be jewelry sales at Fred Meyer, sterile processing tech at Portneuf Medical, hostess at Red Lobster, school crossing guard, product demonstrator at Nichols & Associates, and driver for delivery at Alliance Title and Escrow, cashier at Chartwells, a restaurant there, office assistant for Access Home and Hospice, a receptionist/office assistant for Idaho Eye Center, office assistant at Miracle Ear.

Jordan Deposition, p. 48, l. 23 through p. 49, l. 25. Mr. Jordan noted that positions with opticians would entail on-the-job training leading to certification as Claimant progressed and that her demonstrated customer service skills and cashiering experience would be valuable to those positions.

159. Mr. Jordan testified of other positions available to Claimant:

> health and wellness associate at Rite Aid, and she had worked at Rite Aid once before. Medical office supports, East Cascade Women's Group. Front office team member, Step & Spine Physical Therapy. Customer service rep, Central Oregon Heating. Medical front office work, the Center for Ortho and Neuro Care. Receptionists at the Kiefer Auto Group. There are all in Redmond, Oregon, area.
>
> Other jobs that were looked at in the Pocatello area included work at home sales and service rep, and that was at Convergy's; … customer service associate at Convergy's; inbound sales—home agent at LiveOps' company; patient financial associate, admitting, at the Portneuf Medical Center; registrar at the Portneuf Medical Center; customer insurance rep call center for Allstate; patient care coordinator for Belltone company; customer service for ProFit mattress, both part-time and full-time work there; and phone sales representative at Wireless Medical Alert.

Jordan Deposition, p. 51, l. 13 through p. 52, l. 7. Mr. Jordan opined that based on Claimant's work experience and transferable skills she would be able to learn to do any of these jobs.

160. Mr. Jordan opined that if Claimant's Morton's neuroma was causally related to her 2011 accident and assuming sedentary and light work restrictions, she would experience a 45% loss of labor market access and a 17% wage loss, producing approximately a 32% permanent disability. If Dr. Krafft's work restrictions were applied, Claimant would have a 24% loss of labor market access and no wage loss, producing approximately a 12% permanent disability. Jordan Deposition, pp. 58-59. Mr. Jordan concluded that Claimant was employable and not totally and permanently disabled.

161. *Weighing the vocational opinions.* Mr. Montague's opinion is founded upon the conclusions of Dr. Cook who rated Claimant's pre-existing impairments—several based on range of motion measurements—five and a half years after her industrial accident. Mr. Montague's opinion is also founded in part upon Mr. Peck's FCE observations taken of Claimant three and a half years after her accident. The record establishes Claimant's physical capacity substantially declined after she reached maximum medical improvement on April 5, 2012, thus Dr. Cook's opinion, Mr. Peck's conclusions, and Mr. Montague's opinion are not persuasive.

162. Regarding Claimant's alleged physical limitations precluding her from performing a host of routinely available sedentary and light-duty jobs, Mr. Jordan succinctly stated the essence of the present dispute: "Based on Dr. Cook's statements, she wouldn't be able to do any of these jobs. But based on Drs. Krafft, Little, Chung, Simon, and Dr. Bray, and even Dr. Blair, she would be able to do these kinds of positions." Jordan Deposition, p. 52, ll. 20-24. Mr. Jordan's opinion of Claimant's employability is comprehensive, well supported by the record, and persuasive.

163. Based on Claimant's permanent impairments totaling 71% of the whole person, her physical capacity and permanent physical restrictions due to her pre-existing impairments as of the time immediately preceding her March 14, 2011 accident and those due to her accident as determined at the time she reached maximum medical improvement therefrom on April 5, 2012, and considering all of her medical and non-medical factors, including her age at the time of her 2011 industrial accident and at the time of the hearing, limited formal education, GED, computer literacy, previous employment, and transferable skills, Claimant's ability to engage in regular gainful activity after her 2011 industrial accident has been reduced. However, the Referee concludes that Claimant has not established that her permanent disability exceeds her 71% whole person permanent impairment.

164. Odd-lot**.** A claimant who is not 100% permanently disabled may prove total permanent disability by establishing he is an odd-lot worker. An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market - absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status rests upon the claimant. Dumaw v. J. L. Norton Logging, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). A claimant may satisfy his burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways: (1) by showing that he has attempted other types of employment without success; (2) by showing that he or vocational counselors or employment

agencies on his behalf have searched for other work and other work is not available; or (3) by showing that any efforts to find suitable work would be futile. Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

165. In the present case, Claimant inquired about one position in Redford but has otherwise presented no evidence of an unsuccessful work search. She has presented the opinion of Mr. Montague that it would be futile for her to look for work. However, as noted above, Mr. Montague's opinion is founded upon the conclusions of Dr. Cook and Mr. Peck, whose opinions are not persuasive, thus Mr. Montague's opinion is similarly unpersuasive.

166. Claimant has not established a prima facie case that she is an odd-lot worker under the Lethrud test.

167. Claimant has not proven she is totally and permanently disabled due to her March 14, 2011 industrial accident and her multiple pre-existing conditions.

168. **ISIF liability**. The next issue is whether ISIF bears any liability pursuant to Idaho Code § 72-332. Idaho Code § 72-332(1) provides in pertinent part that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his income benefits out of the ISIF account.

169. Inasmuch as Claimant has not proven she is totally and permanently disabled, ISIF bears no liability pursuant to Idaho Code § 72-332.

170. **Carey apportionment.** Apportionment under the formula set forth in Carey v.

Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is moot.

CONCLUSIONS OF LAW

1. Claimant has not proven she is totally and permanently disabled due to her March 14, 2011 industrial accident and her multiple pre-existing conditions.

2. Claimant has not proven that ISIF bears any liability pursuant to Idaho Code § 72-332.

3. Apportionment under the Carey formula is moot.

RECOMMENDATION

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

DATED this __10th____ day of July, 2018.

INDUSTRIAL COMMISSION

_/s/_____
Alan Reed Taylor, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __20th__ day of _July_____, 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:

ALBERT MATSUURA
PO BOX 2196
POCATELLO ID 83206-2196

STEVEN R FULLER
PO BOX 191
PRESTON ID 83263

_/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBIN HARRIS, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2011-008513** **ORDER** **FILED** **JULY 20, 2018**

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

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

1. Claimant has not proven she is totally and permanently disabled due to her March 14, 2011 industrial accident and her multiple pre-existing conditions.

2. Claimant has not proven that ISIF bears any liability pursuant to Idaho Code § 72-332.

3. Apportionment under the Carey formula is moot.

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

DATED this __20th_ day of _July_____, 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 _July_____, 2018, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

ALBERT MATSUURA
PO BOX 2196
POCATELLO ID 83206-2196

STEVEN R FULLER
PO BOX 191
PRESTON ID 83263

sc _/s/_____