

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HELEN PSALTO,)	
)	
Claimant,	)	IC 99-028241
)	
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
	)	AND RECOMMENDATION
STATE OF IDAHO, INDUSTRIAL)	
SPECIAL INDEMNITY FUND,)	
	)	Filed
	)	May 9, 2006
Defendant.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Robert D. Barclay, who conducted a hearing in Idaho Falls on May 4, 2005. Claimant, Helen Psalto, was present in person and represented by Brad D. Parkinson of Idaho Falls. Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF), was represented by Paul B. Rippel of Idaho Falls. The parties presented oral and documentary evidence. This matter was then continued for the taking of post-hearing depositions and the submission of briefs. After the conclusion of normal briefing, Referee Barclay retired from the Idaho Industrial Commission and the matter was reassigned to Referee Alan Taylor. The parties then requested and were granted leave to submit supplemental briefing. The matter subsequently came under advisement on December 16, 2005.

BACKGROUND

Claimant settled her claim for compensation with Defendant Employer, Life Care Center, and Defendant Surety, United Pacific Insurance, in a Lump Sum Settlement Agreement (LSSA)

approved by the Commission on February 14, 2001. Employer and Surety were represented by Eric S. Bailey of Boise in that matter.

ISSUES

The noticed issues to be resolved are:

1. Whether Claimant is entitled to permanent total disability in excess of permanent impairment;
2. Whether ISIF is liable under Idaho Code § 72-332; and,
3. Apportionment pursuant to the formula set forth in Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984).

ARGUMENTS OF THE PARTIES

Claimant argues she is totally and permanently disabled due to the combined effects of her March 24, 1999, industrial accident and her pre-existing permanent impairments of her right shoulder, low back, and cervical spine.

Defendant ISIF acknowledges that Claimant is presently totally and permanently disabled, but argues that her total and permanent disability is due to the combined effects of her March 24, 1999, industrial accident and unrelated subsequent—rather than pre-existing—permanent impairments.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the May 4, 2005, hearing;
2. Claimant's Exhibits 4 through 25 admitted at the hearing; and,
3. Defendant ISIF's Exhibits A and B admitted at the hearing;

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2

After having fully considered all of 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 1938 and is right-handed. She resided in Idaho Falls from the time of her last industrial accident through the time of hearing. Claimant attended high school through the eleventh grade, but did not finish high school. She obtained her GED in 1981.

2. Claimant began working at age 15 as a waitress. In 1971 she moved from New Hampshire to eastern Idaho where she worked as a waitress, hostess, and cashier for several restaurants. She also worked as a motel maid, service deli clerk, and dietary aide.

3. Over the years, Claimant has suffered numerous health challenges. Her medical records demonstrate that she has frequently sought medical treatment for a variety of greater and lesser concerns for many years.

4. Claimant testified that in approximately 1980, or perhaps earlier, she underwent a lumbar fusion after a bad fall. The record contains no medical documentation of the fusion nor any restrictions arising therefrom. In 1984 Claimant underwent right carpal tunnel release. Also in approximately 1984 she underwent hernia repair surgery. In 1988, Claimant suffered a right shoulder injury when lifting a heavy table insert while at work. She was eventually diagnosed with right shoulder impingement syndrome and underwent right shoulder acromioplasty in 1989.

5. In 1992 Claimant suffered a right rotator cuff tear while working as a service deli clerk. A cervical spine MRI scan in 1993 revealed spinal stenosis with desiccated and slightly bulging discs at C3-4 and C4-5. Claimant underwent right rotator cuff surgery in 1994 and was

given a 3% impairment rating of the upper extremity. She was permanently restricted from any repetitive motion with her right arm at or above shoulder height. She returned to work at the deli. Claimant later settled her claim for her right shoulder injury via a lump sum agreement which quantified her right shoulder impairment at 2.5% of the whole person.

6. In May 1998, Claimant sought medical attention complaining of neck pain. She underwent a cervical spine CT scan which showed degenerative cervical spine disease. She did not pursue surgical treatment and continued working.

7. In approximately 1999, Claimant commenced employment with Life Care Center as a dietary aide. She prepared sandwiches, snacks, and deserts for patients, loaded trays and carts, and washed dishes. She testified that both of her shoulders bothered her with overhead lifting.

8. On March 24, 1999, Claimant injured her left shoulder while lifting trays at work for Life Care Center. On June 1, 1999, orthopedic surgeon Gregory E. Biddulph, M.D., performed acromioplasty, distal clavicle excision, and rotator cuff repair of Claimant's left shoulder. Claimant was off work for approximately eight weeks. While recovering from her left rotator cuff surgery, she noticed left elbow pain.

9. By August 20, 1999, Dr. Biddulph opined that Claimant could return to light duty desk work or answering telephones, but not work overhead or requiring reaching. On September 29, 1999, Dr. Biddulph found Claimant had reached maximal medical improvement for her left shoulder. He restricted her from overhead activities with her left arm, but indicated she should be fine performing activities below shoulder height. Dr. Biddulph later rated Claimant's left shoulder impairment at 8% of the whole person due to her industrial injury.

10. Claimant continued to have left elbow pain and was diagnosed with tendonitis.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 4

11. In late 1999, Claimant had cataract surgery on both eyes. In spite of surgery, she continued to experience blurred vision.

12. Claimant worked with Industrial Commission rehabilitation counselor Dan Wolford and in December 1999, Claimant began working part-time for the YMCA tending children. She initially tended infants but determined that this required too much lifting and by January 2000 she switched to tending four and five year old children.

13. In March 2000, Claimant presented to Dr. Biddulph with right knee pain. He recommended an MRI which Claimant did not pursue at that time.

14. Claimant continued working part-time for the YMCA until approximately June 2000. In performing her work tending four and five year old children, she at times lifted and held them when they misbehaved. Ultimately Claimant left her employment in June 2000 because lifting the children became too physically difficult. She did not seek work again until 2004.

15. In October 2000, Claimant presented to Dr. Biddulph with severe right shoulder pain. He diagnosed severe degenerative arthritis and opined the surgical options were total shoulder arthroplasty or hemi-arthroplasty. Claimant did not desire surgery at that time.

16. In December 2000, Claimant underwent right knee arthroscopy to repair a torn meniscus.

17. In February 2001, Claimant settled her claim for her March 24, 1999, left shoulder industrial injury via a lump sum agreement which quantified her left shoulder impairment at 8% of the whole person.

18. In August 2001, Claimant reported to Dr. Biddulph that her left shoulder was 100% following recovery from her 1999 industrial accident and surgery. However, she reported that her

right shoulder was constantly painful.

19. In November 2003, Claimant underwent a bone densitometry study which revealed osteopenia.

20. In approximately 2004 Claimant began as a part-time volunteer at the Red Cross. Her duties included serving light refreshments to blood donors.

21. In the fall of 2004, Claimant commenced working part-time for Experience Works, in a government-subsidized program where she was paid minimum wage for working part-time as a receptionist at the Red Cross. Her duties included answering telephones, cleaning manikins, and scheduling CPR and first aid appointments. By this time, Claimant experienced significant shoulder pain and difficulty with reaching even below shoulder height.

22. In January 2005, Claimant underwent a left shoulder arthrogram and MRI which revealed a full thickness left rotator cuff tear. In March 2005, Claimant underwent a right shoulder arthrogram and MRI which revealed a full thickness right rotator cuff tear and severe degenerative joint disease.

23. Claimant presently suffers arthritis in her hands, particularly in her thumbs. She has had asthma most of her life. It is aggravated by stress and also by smoke and the fumes of various cleaning compounds. Her asthma has caused her some difficulty in prior employments, including her employment as a service deli clerk. Claimant takes medication for anxiety and depression. She has tachycardia which has been controlled by medication since approximately July 2000.

24. Claimant applied for and began receiving Social Security disability benefits at some time, perhaps as early as 2001, however, the date is unclear from the record. In proceedings finding Claimant eligible for Social Security disability benefits, account was taken of Claimant's physical

and mental conditions including bilateral shoulder condition, asthma, lumbar fusion, bilateral hand arthritis, bilateral knee condition, and cognitive problems resulting in transposed numbers ostensibly due to medications prescribed for her ongoing anxiety and depression. The record does not reveal whether Claimant's tachycardia was also considered in her Social Security disability determination.

DISCUSSION AND FURTHER FINDINGS

25. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1996).

26. **ISIF Liability.** 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 his or her 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 or her income benefits out of the ISIF account. Thus, before the ISIF may be held liable for any benefits, a claimant must be totally and permanently disabled.

27. It is well established that the ISIF may be liable, if at all, only for those qualifying pre-existing permanent physical impairments as they existed at the time of the industrial accident. Permanent impairments arising after the industrial accident are not the potential responsibility of the ISIF. Furthermore, the ISIF is not liable for the further deterioration of a pre-existing condition after the industrial accident, provided the industrial accident does not cause the deterioration. Horton v.

Garrett Freightlines, Inc., 115 Idaho 912, 772 P.2d 119 (1989). These criteria are particularly material to the present case because Claimant herein suffers a number of permanent physical impairments, some of which worsened after 1999. However, the record is devoid of evidence that the worsening of Claimant's physical impairments was due to her March 1999 industrial accident. Within this framework, the extent of Claimant's permanent disability must be examined.

28. **Impairment.** An evaluation of permanent disability begins with consideration of permanent impairment. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

29. Dr. Biddulph rated the permanent partial impairment to Claimant's left shoulder resulting from the March 1999 industrial accident at 8% of the whole person. This rating is adequately explained and credible. The Referee finds that Claimant suffers an impairment of 8% of the whole person due to her March 24, 1999, industrial accident.

30. Claimant's physical impairments which she alleges pre-existed her March 1999 accident include her right shoulder condition, lumbar fusion, cervical spine stenosis, asthma, anxiety and depression. Claimant does not assert any impairment from her right carpal tunnel syndrome or

tachycardia.

31. Claimant's right shoulder injury resulted in a 2.5% whole person impairment rating and medical restrictions of no lifting at, or above, shoulder level. This rating is adequately supported in the record and is credible. The Referee finds Claimant suffered an impairment of 2.5% of the whole person to her right shoulder prior to her March 1999 industrial accident.

32. Claimant testified that her back fusion caused tenderness with lifting, standing, walking, and sitting for any period of time. In spite of her back pain, she performed her lifting duties at work as required for nearly 20 years. She did not recall any specific medical restrictions imposed due to her lumbar fusion. Claimant urges a finding of 10-15% impairment for her lumbar fusion. The record contains no rating from a medical practitioner. The American Medical Association's Guides to the Evaluation of Permanent Impairment, Fifth Edition, directs the use of the DRE methodology to rate conditions arising from an injury, such as the fall which Claimant indicated precipitated her fusion. Table 15-3 rates the loss of motion segment integrity due to surgical arthrodesis, or fusion, as a DRE Lumbar Category IV, constituting a 20-23% impairment of the whole person. The Referee finds that prior to March 24, 1999, Claimant suffered a 20% permanent impairment of the whole person due to her lumbar fusion.

33. Claimant urges a finding of 5-10% permanent impairment for her cervical stenosis. She does not cite, nor does the record provide, any report from a medical practitioner or treatise in support of her assertion. Claimant's cervical stenosis was documented by radiographic testing as early as 1993. There is no record or testimony of surgical intervention. Claimant has not established any medical restrictions arising from her cervical stenosis. The American Medical Association's Guides to the Evaluation of Permanent Impairment, Fifth Edition, directs the use of the ROM

methodology to rate such degenerative conditions. This rating methodology relies heavily upon actual range of motion measurements taken by medical experts. The record contains no such evidence. While the Commission is the ultimate evaluator of impairment, the rating of permanent impairment is a medical appraisal. Claimant has not provided sufficient evidence regarding cervical spine limitations, restrictions, or required ongoing treatment, if any, which may have pre-existed her March 1999 industrial accident. Claimant has failed to prove she suffered a permanent impairment due to her cervical stenosis prior to March 24, 1999.

34. Claimant has provided no evidence of a rating or any restrictions from a medical practitioner or treatise to support or quantify her assertions of permanent impairment due to her pre-existing asthma, anxiety or depression. Claimant has failed to prove she suffered any permanent impairment due to her asthma, anxiety or depression prior to March 24, 1999.

35. The Referee concludes that Claimant has proven she suffered permanent impairments of 8% (left shoulder), 20% (lumbar spine), and 2.5% (right shoulder), totaling 30.5% of the whole person, due to her 1999 industrial accident and pre-existing permanent impairments.

36. **Permanent Disability.** "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical

disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant.

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

38. Medical restrictions from Claimant's right and left shoulder injuries preclude her from performing any work at or above shoulder height. Although the record contains no restrictions for her lumbar fusion, medical restrictions after lumbar fusion generally preclude repeated bending, stooping, twisting, and heavy lifting, and may also preclude prolonged sitting or standing. As already noted, there are no medical restrictions in the record for Claimant's degenerative cervical spine condition, asthma, anxiety or depression. However, Claimant testified that her asthma precluded her from using various cleaning chemicals and from working in a smoky environment.

39. Much testimony at hearing pertained to Claimant's current limitations rather than her limitations and abilities in 1999 after reaching maximum medical improvement from her industrial accident and being released for work. This is significant because the record clearly establishes that

Claimant's physical and mental conditions have worsened substantially from December 1999 to November 2004, and further worsened from November 2004 to May 2005.

40. At the time of hearing—over six years after her industrial accident—Claimant testified she was unable to repetitively use her arms below shoulder level because of her shoulder conditions. No medical practitioner so restricted her when she attained maximum medical improvement in September 1999 after her March 24, 1999, industrial accident.

41. Claimant now suffers additional employment impediments, many of which did not pre-exist her 1999 industrial accident. Claimant's right knee did not bother her prior to the March 1999 industrial accident. Both of her knees became symptomatic and required surgery after the accident. Claimant testified that the arthritis in her hands, particularly her thumbs, became symptomatic during her employment with Life Care Center. However, the record does not establish that her arthritis was a significant factor or which impacted her functioning prior to her March 1999 industrial accident.

42. Claimant's impairments and resulting medical restrictions together with her personal circumstances in late 1999 would have precluded her from working in her former positions as a deli clerk or dietary aide where overhead lifting was required. They would have precluded her from working in smoky environments and with some cleaning chemicals, and from all heavy and perhaps nearly all medium work positions. However, Claimant has had extensive experience interacting with the public as a hostess and cashier, which would have likely qualified her for light duty service employments where no lifting above shoulder level was required.

43. The record is almost entirely devoid of evidence regarding the relevant Idaho Falls area job market in late 1999 when Claimant reached maximum medical improvement from her

March 1999 accident. The most concrete evidence in the record is that Claimant obtained part-time employment at the YMCA not long after recuperating from her 1999 industrial accident. In addition, Claimant testified that although her physical condition worsened after December 1999, that as of December 1999 she could have performed a desk job:

Q. Okay. So back at that point in time if you're[sic]—if your other problems hadn't come on, the ones that we've talked about that have come on in the meantime—if those hadn't come on, would you have any problems physically being able to perform the job that you're doing at the Red Cross?

A. No.

Defendant's Exhibit A, p. 75, Ll. 13 - 19. When asked about this aspect of her deposition testimony, Claimant reaffirmed at hearing:

Q. And I asked you if you could do the job at Red Cross, in December 1999, if all of these other conditions we're talking about with arthritis in your thumbs and your elbow tendonitis and your knees and your vision problems, if those hadn't come on in about that period of time, you would have been able to perform that job?

A. Yes.

Q. And so the description that you were giving a little bit earlier today in response to Mr. Parkinson's questions about the difficulties of performing that job and why you can't do that, that relates to now, how you are at this time, correct?

A. Yes.

Hearing Transcript, p. 57, Ll. 1-14.

44. Based upon Claimant's total impairment rating of 30.5% of the whole person, her restrictions to light and perhaps some medium work below shoulder height, and considering her non-medical factors, including her age of 61 at the time she was released from the 1999 industrial accident, limited formal education, lack of transferable skills for specialized sedentary and light occupations, such as computer and secretarial positions, and her inability to return to many of her

previous occupations, Claimant's ability to engage in gainful activity has been significantly reduced.

The Referee concludes Claimant has established a permanent disability of 60% of the whole person, inclusive of her permanent impairment.

45. **Odd-lot.** A claimant who is not 100% permanently disabled may still prove total permanent disability by establishing he or she is an odd-lot worker. Claimant herein alleges she is totally and permanently disabled pursuant to the odd-lot doctrine. An odd-lot worker is one "so injured that he [or she] 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 or her burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways:

1. By showing that he or she has attempted other types of employment without success;
2. By showing that he or she or vocational counselors or employment agencies on his or her 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).

46. In the present case, after Claimant's industrial injury on March 24, 1999, Dr. Biddulph released her to light duty desk work in August 1999. Dr. Biddulph found Claimant had

reached maximum medical improvement by September 1999, and opined she could perform work activities, except those above shoulder height. Industrial Commission rehabilitation consultant Dan Wolford then helped Claimant obtain part-time employment at the YMCA by approximately December 6, 1999. Claimant later worked at the Red Cross in a government-subsidized position.

47. Claimant asserts that her employment at the YMCA from approximately December 6, 1999, until June 2000, constitutes an unsuccessful work attempt, thus proving her odd-lot claim. She maintains that after working at the YMCA for approximately six months it became too difficult for her to lift the children. During the time Claimant worked at the YMCA, she experienced the onset and/or worsening of several conditions which undoubtedly hampered her ability to pick up the children. In March 2000, Claimant presented to Dr. Biddulph who diagnosed a medial meniscus tear in her right knee. This had become increasingly symptomatic and ultimately required surgical treatment a few months later. Similarly, Claimant's right shoulder worsened after commencing work at the YMCA. Although she had right shoulder complaints in 1999, by October 2000—within a few months after leaving the YMCA—Claimant presented to Dr. Biddulph “for evaluation of a new problem, that being her right shoulder.” Claimant's Exhibit 7, p. 000006. Dr. Biddulph recorded Claimant's description of progressive pain, locking, and catching, and found dramatic crepitation and grinding upon examination. He diagnosed severe degenerative arthritis of the right shoulder with bone on bone apposition. The record thus indicates that Claimant's alleged failed work attempt at the YMCA was most likely due to the significant deterioration of her physical condition after December 1999, rather than her physical limitations as they existed at the time she attained maximum medical improvement from her 1999 accident.

48. Additionally, Claimant commenced employment at the YMCA tending infants,

however, when she expressed concern in lifting the infants, her employer accommodated her concern by assigning her to tend older children which she did not have to lift. During Claimant's interview on January 20, 2000, she reported, and Kenneth Lindsay, Ph.D., recorded, that she was able to perform her daycare position at the YMCA "because the children are around four or five years old and she does not have to lift them." Claimant's Exhibit 5, p. 000002. Nevertheless, Claimant apparently later chose to lift some of the four and five year old children. This aggravated her condition and was not required by her employer. Claimant testified:

A. ... When they cried, you had to pick them up. And they were heavy children. They were getting heavier and heavier, and I just couldn't do it anymore.

Q. So you moved up to some older children but they weren't so old that you didn't have to pick them up; is that what you're trying to—

A. No, I picked some of them up because—children weren't bad all the time, but when you—when they were bad and fighting and you punished them, you baby them. I hold them in my lap or—no matter how much they weighed but—because it was me.

Defendant's Exhibit A, p. 38, L. 19 - p. 39, L. 6.

49. It does not appear that Claimant's job duties at the YMCA required overhead lifting, working above shoulder height, or any other activities exceeding the physical restrictions imposed upon her by her physicians after reaching maximum medical improvement from her 1999 accident. This was her only asserted failed work attempt and is insufficient to establish Claimant is an odd-lot worker.

50. Claimant has not searched for work and found none available. To the contrary, with Mr. Wolford's assistance Claimant found work at the YMCA after her industrial accident. She acknowledged that after recovering from her industrial accident, she could have performed a desk job. Claimant later qualified for Social Security disability benefits and ceased searching for work.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 16

51. Claimant has presented no vocational expert opinion regarding her employability, and certainly none that given her abilities and limitations in December 1999, she was not likely to be employed regularly in any well-known branch of the labor market. Claimant has failed to demonstrate that she or vocational counselors acting in her behalf have searched for other work and that other work is not available or that it would have been futile for Claimant to look for work.

52. Claimant has failed to demonstrate that she is an odd-lot worker under the Lethrud test. Having failed to prove total permanent disability, Claimant has failed to prove that the ISIF bears any liability pursuant to Idaho Code § 72-332.

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

CONCLUSIONS OF LAW

1. Claimant has failed to prove entitlement to permanent total disability in excess of permanent impairment;

2. ISIF is not liable under Idaho Code § 72-332; and,

3. The issue of apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is moot.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own, and issue an appropriate final order.

DATED this 3rd day of May, 2006.

INDUSTRIAL COMMISSION

/s/
Alan Reed Taylor, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of May, 2006, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

BRAD D PARKINSON
PO BOX 1645
IDAHO FALLS ID 83403-1645

PAUL B RIPPEL
PO BOX 51219
IDAHO FALLS ID 83405-1219

kr

/s/

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HELEN PSALTO,)	
)	
Claimant,	)	IC 99-028241
)	
v.)	
	)	ORDER
STATE OF IDAHO, INDUSTRIAL)	
SPECIAL INDEMNITY FUND,	)	Filed
	)	May 9, 2006
Defendant.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his proposed 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 failed to prove entitlement to permanent total disability in excess of permanent impairment;
2. ISIF is not liable under Idaho Code § 72-332; and,
3. The issue of apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is moot.

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

DATED this 9th day of May, 2006.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

/s/
James F. Kile, Commissioner

/s/
R. D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of May, 2006, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

BRAD D PARKINSON
PO BOX 1645
IDAHO FALLS ID 83403-1645

PAUL B RIPPEL
PO BOX 51219
IDAHO FALLS ID 83405-1219

kr /s/