



## **ISSUES**

After due notice and by agreement of the parties, the issues to be decided as a result of the hearing are:

1. Whether and to what extent Claimant is entitled to disability in excess of impairment; and
2. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine.

## **CONTENTIONS OF THE PARTIES**

Claimant contends that he is totally and permanently disabled under the odd-lot doctrine, because there is not sufficient evidence showing that he actually has a reasonable chance of finding work in or around Orofino, Idaho. Alternatively, Claimant argues that as a result of his accepted industrial injury and subsequent right ankle fusion, he suffers permanent disability in excess of his 6% whole person impairment.

Defendants aver that Claimant has failed to show total and permanent disability under the odd-lot doctrine by any of the three established methods. Further, Defendants contend that if Claimant is entitled to any disability in excess of impairment, he is entitled to substantially less than he alleges.

## **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Oral testimony at hearing by Claimant;
3. Claimant's Exhibits A-T;
4. Defendants' Exhibits A-H;

5. Post-hearing deposition of Robert Colburn, M.D., taken by Claimant on April 21, 2006;
6. Post-hearing deposition of Debra J. Uhlenkott taken by Claimant on April 21, 2006; and
7. Post-hearing deposition of William C. Jordan taken by Defendants on May 19, 2006.

After having considered all the above evidence and the briefs of the parties, the Commission issues the following findings of fact, conclusions, and order.

### **FINDINGS OF FACT**

1. At the time of the hearing, Claimant was 57 years old and resided in Orofino, Idaho with his wife, three-year-old daughter, and ten-year-old step-daughter. Claimant graduated from high school in 1967, but has no additional formal education. Tr., p. 9.

2. Claimant suffered an industrial accident and compensable industrial injury on January 21, 1999 when he was thrown from a high-track bulldozer at a logging site. Claimant's lower legs were run over by one of the tracks of the bulldozer.

3. Claimant underwent surgery to his right ankle and was released to work on May 18, 1999, by Orie Kaltenbaugh, M.D. On January 13, 2000, Claimant began experiencing pain and returned to Dr. Kaltenbaugh. Claimant's Exhibit I.

4. Robert Colburn, M.D., performed an independent medical evaluation on November 20, 2002, at Claimant's request.

5. On December 19, 2003, Timothy J. Flock, M.D., performed a second surgery on Claimant's right ankle to remove hardware. Defendants' Exhibit C.

6. On March 24, 2004, Dr. Flock performed a fusion on Claimant's right ankle. Claimant's pain persisted and on December 9, 2004, Dr Flock fused Claimant's ankle again.

7. On June 22, 2005, Dr. Flock opined Claimant had reached maximum medical

improvement and Claimant was released to work. Dr. Flock reported that Claimant was not to return to his regular pre-injury job because he would have trouble operating foot controls. Defendants' Exhibit C, p. 55.

8. Dr. Colburn saw Claimant again on July 1, 2005 and April 12, 2006. Dr. Colburn gave Claimant a 6% whole person permanent partial impairment rating related to Claimant's right ankle and foot.

9. On October 26, 2005, Dr. Colburn described Claimant's permanent restrictions as allowing standing for only 2-4 hours at a time, less than 2 hours of kneeling at a time, no truck driving, no crawling, and no running. Dr. Colburn also noted that Claimant has no restrictions regarding working a maximum number of hours per day and no restrictions on sitting, squatting, lifting, reaching or bending. Dr. Colburn placed Claimant in the medium work category as delineated by the Dictionary of Occupational Titles exertional levels. Defendants' Exhibit E.

10. Dr. Colburn is not personally familiar with equipment or with the details of the operation of the equipment that Claimant could potentially run. Robert Colburn, M.D., Depo., p. 13. William Jordan, a vocational counselor, gave Dr. Colburn information regarding potential jobs for Claimant. After discussing the specific job requirements with Mr. Jordan, Dr. Colburn opined that Claimant could do many of the jobs on his list. Yet after discussing the specific job requirements with Claimant, and gathering Claimant's opinion of what jobs he could perform, Dr. Colburn opined that Claimant could do far less on the same list. Robert Colburn, M.D., Depo., p. 17. Dr. Colburn opined that Claimant could operate equipment that would primarily use his hands only, and that Claimant is restricted from operating equipment with a significant amount of use of foot pedals. Dr. Colburn reported

that Claimant is limited by pain, and by his inability to flex his fused ankle. Robert Colburn, M.D., Depo., p. 20.

11. At Claimant's request, Debra Uhlenkott, a vocational counselor and consultant, saw Claimant in 2002 and 2005. Debra Uhlenkott Depo., pp. 7-8. Ms. Uhlenkott reviewed Claimant's medical records as well as Dr. Colburn's IME report. She produced a report on November 21, 2005. Claimant's Exhibit R. Although Dr. Colburn released Claimant to medium duty work, Ms. Uhlenkott evaluated Claimant's restrictions and disagrees with the medium duty release. Debra Uhlenkott estimates that Claimant would not be capable of medium level work, nor at least half of the light level range due to standing, walking, and squatting requirements. In her report, Ms. Uhlenkott opined that due to Claimant's limitation to sedentary and some light level work, he has lost access to at least 70% of his pre-injury labor market. The report goes on to further describe non-exertion considerations such as Claimant's age, education, labor market, and transferable skills. When considering Claimant's exertion level and additional non-exertion factors, Ms. Uhlenkott finds that Claimant is no longer employable as a result of his industrial accident.

12. Consultant Wade Beeler with the Industrial Commission Rehabilitation Division met with Claimant in 1999 and again on January 17, 2006. Defendants' Exhibits F and H. Mr. Beeler found Claimant to be pleasant and open to exploring ideas for alternative work. A vocational evaluation was prepared by Mr. Beeler outlining several employment opportunities for Claimant.

13. William Jordan, a vocational rehabilitation counselor, met with Claimant at Defendants request on February 8, 2006. Mr. Jordan also reviewed Claimant's medical records and Dr. Colburn's IME report. Mr. Jordan produced an employability report based on

his information regarding Claimant's employability dated March 30, 2006. Defendants' Exhibit G. Considering medical and non-medical factors, Mr. Jordan concluded that Claimant has a loss of ability to engage in gainful activity in the labor market between 21% and 26%. When Mr. Jordan used Dr. Colburn's revised opinion, based on Claimant's representations as to the requirements for potential jobs, Mr. Jordan increased Claimant's disability to a 48% loss of labor market.

### **Work History**

14. Claimant worked in the logging industry, as a sawyer, for most of his life. While working for Employer as a sawyer, Claimant also ran an excavator.

15. Prior to working for Employer, Claimant worked as a prison guard in Orofino for approximately six months. Tr., p. 15. Claimant also worked in Seattle for one winter laying telephone cable. Tr., p. 17.

16. After Claimant's industrial accident and his first ankle surgery, but before Claimant's fusion surgeries, he rented an excavator and worked on his own. Tr., p. 20.

17. Claimant has held two jobs since his fusion surgeries. In July 2005, Claimant worked for three weeks laying pipe with his brother, which included operating a backhoe and hauling pipe to Lewiston. Claimant also worked for the Forest Service for 5 days, using an excavator to remove a road and re-create a natural slope. Tr., pp. 38-39.

18. Claimant receives \$1802.00 in monthly Social Security disability benefits, \$1202 for himself, \$300 for his daughter, and \$300 for his wife. William C. Jordan Depo., p. 60. At the time of the hearing, Claimant was not employed but was taking care of his three-year-old daughter during the day while his wife was at work. Tr., p. 57.

## DISCUSSION AND CONCLUSIONS

19. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 721, 779 P.2d 395, 396 (1989). The humane purposes which it serves leaves no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1966). 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).

### **Odd-lot Doctrine**

20. The Commission will begin by addressing Claimant's assertion that he is totally and permanently disabled under the odd-lot doctrine.

21. A claimant can demonstrate he or she is totally and permanently disabled by proving that he or she fits within the definition of an odd-lot worker. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939P.2d 854, 857 (1997). 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 of Idaho, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), citing *Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). 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 super human effort on their part." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984), citing *Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

22. The burden of establishing odd-lot status lies with the claimant who must

prove the unavailability of suitable work. *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 odd-lot status in 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).

23. Claimant has been given a PPI rating of 6% of the whole person for his right ankle and foot injury, as well as physical restrictions focusing on Claimant's inability to flex his fused ankle. Claimant has been given permanent restrictions which allow standing for only 2-4 hours at a time, less than 2 hours of kneeling at a time, no truck driving, no crawling, and no running. Claimant has no restrictions regarding working a maximum number of hours per day and no restrictions on sitting, squatting, lifting, reaching or bending.

24. Claimant testified that since his ankle fusion his typical day includes watching his daughter while performing little chores, such as caring for his pigeons. Tr., p. 41. Claimant used to enjoy hunting, fishing, golfing, and horse back riding, but since the fusion he has only been fishing. Tr., pp. 47-49.

25. Dr. Flock found that Claimant should not return to his regular pre-injury job, and the Commission has no doubt that Claimant has suffered a loss in his ability to engage in gainful activity. But there are jobs which Dr. Colburn and Mr. Jordan have outlined as being within Claimant's restrictions and within his capability to obtain.

26. Claimant testified that, after his ankle fusion, when he worked for three weeks with his brother laying pipe and running a backhoe, he had a hard time operating the controls

and it was difficult for him to walk on uneven ground. Claimant stated that it was not a job he could continue, though Claimant did stay the entire three weeks until the job was completed. Claimant's second job after his fusion was a small job with the Forest Service using an excavator to obliterate an existing road. Again, Claimant completed the five-day job, but he had problems getting on and off the machine and was very sore at the end of the day. Tr., p. 40.

27. Claimant's disability situation has been analyzed by several vocational professionals. Dr. Colburn produced two opinions of what jobs Claimant would perform, which Mr. Jordan analyzed to give two disability ratings. A rating of 21%-26% loss of labor market for the larger list approved by Dr. Colburn, and a rating of 48% loss of labor market for the more restrictive list. Ms. Uhlenkott opined that Claimant had lost access to at least 70% of his pre-injury labor market, ultimately finding that Claimant is no longer employable. Consultant Wade Beeler with the Industrial Commission Rehabilitation Division also prepared a vocational evaluation for Claimant outlining potential job options.

28. Ms. Uhlenkott identified Orofino and the surrounding area as Claimant's relevant labor market. Debra Uhlenkott Depo., p. 17. Ms. Uhlenkott found the majority of the jobs Mr. Jordan outlined for Claimant to be outside the market area she deemed appropriate. Mr. Jordan reported that Claimant is not limited to the Orofino labor market, stating that Claimant has traveled for jobs in the past and that many individuals travel to and from as far as Lewiston on a daily basis to work. Defendants' Exhibit G.

29. Claimant testified that he did drive a small distance out of town to his jobs when he lived in Cottonwood, Kamiah, and Kooskia. Tr., p. 53. Claimant stated that he likes to drive his pickup and he drives to town, but when he needs to go very far his wife drives. If

Claimant had to drive to Lewiston, he explained that he would put his hand under his leg to help if his hip or knee starts to hurt. Tr., pp. 46-7. Claimant also testified that the three-week job he performed for his brother included hauling pipe to Lewiston. Tr., p. 38.

30. Claimant has not been restricted from driving by his doctor, and the Commission finds that Claimant is not limited to the Orofino area. Claimant's reasonable geographical area, considering all his personal and economic circumstances, encompasses a greater area than just Orofino, including many smaller outlying towns and Lewiston.

31. Focusing on Orofino and the outlying area, the evidence shows that Claimant could handle some medium and light duty jobs. One example of a light duty position listed in the evidence is that of a security guard. Such a position is within Claimant's physical restrictions and Claimant has prior experience working as a prison guard.

32. Mr. Beeler contacted Night Force, an employer in Orofino that makes high tech rifle scopes looking for potential work for Claimant. Mr. Beeler confirmed that Night Force works with on the job-training candidates. Mr. Beeler also noted that Night Force anticipated an opening for a "scope tech" within the next month or so. Claimant had listed that gunsmithing was one of his hobbies on his paperwork. While Claimant initially expressed interest in the job and felt he could perform the demands of the job, Mr. Beeler noted that Claimant did not follow up on the opportunity. Defendants' Exhibit H. At hearing Claimant testified that he contacted the owner of Night Force, who is a friend of Claimant, and was told that he did not have any employment available for Claimant. Tr., p. 43.

33. Claimant testified that he spoke with several people in town but there is no evidence that Claimant actually applied for any jobs. Claimant said that he did not have the knowledge to perform much of the work the available jobs entailed, but he did not ask

whether the potential employers would give him any training. Claimant did not believe he could handle some of the tasks due to his physical restrictions, but he did not inquire as to whether accommodations could be made for his restrictions. Additionally, Claimant talked with a friend at Job Service, but he did not fill out an application. Those attempts do not prove that Claimant has attempted other types of employment without success.

34. At hearing, Claimant appeared personable and articulate. The Commission's review of all the evidence shows that there are jobs within Claimant's limitations and within a reasonable labor market. Claimant does not have access to the whole of the labor market but he is able to become employed.

35. Dr. Colburn, Mr. Jordan, and Mr. Beeler all proposed jobs which they felt were available and within Claimant's work restrictions. The Commission finds Claimant has not demonstrated either he or his vocational counselors acting on his behalf have searched for other work and that other work is not available. Nor has Claimant shown that any efforts to find suitable work would be futile.

36. The Commission concludes Claimant has not demonstrated that he fits into any of the three prongs of the *Lethrud* test. Therefore, the Commission finds that Claimant is not totally and permanently disabled pursuant to the odd-lot doctrine.

### **Disability in Excess of Impairment**

37. In this case, Claimant argues that if he cannot prove that he fits within the definition of an odd-lot worker, he is entitled to disability in excess of his 6% impairment rating.

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

39. The burden of proving disability in excess of impairment rests with the claimant. 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).

40. Based on the facts and discussion above, the Commission concludes that

Claimant has carried his burden of proving permanent partial disability in excess of his impairment rating. The Commission will also consider the pertinent nonmedical factors of Claimant's age, prior work experience, geographic labor market, as well as the personal and economic circumstances of Claimant. When permanent impairment and nonmedical factors are considered, the Commission finds that Claimant has a reduced ability to engage in gainful activity as reflected in a diminished ability to compete in the general labor market, equal to 60% of the whole person inclusive of his 6% permanent partial impairment.

**ORDER**

Based on the foregoing, IT IS HEREBY ORDERED That:

1. Claimant failed to prove he is totally and permanently disabled under the odd-lot doctrine.
2. Claimant has proven that he is entitled to permanent partial disability of 60%, inclusive of the 6% whole person permanent partial impairment.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this \_\_12<sup>th</sup>\_\_ day of \_\_December\_\_\_\_\_, 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 \_\_12<sup>th</sup> day of \_\_\_December\_\_\_, 2006, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS, AND ORDER** was served by regular United States Mail upon each of the following:

PAUL THOMAS CLARK  
PO Drawer 285  
Lewiston, ID 83501

GLENNA M. CHRISTENSEN  
PO Box 829  
Boise, ID 83701

/s/ \_\_\_\_\_