

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CAROL CUNNINGHAM,)	
)	
Claimant,)	IC 2003-516713
)	
v.)	
)	
STATE OF IDAHO, INDUSTRIAL)	FINDINGS OF FACT,
SPECIAL INDEMNITY FUND,)	CONCLUSIONS OF LAW,
)	AND RECOMMENDATION
)	
Defendant.)	Filed: February 23, 2007
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on September 7, 2006. Debra Young Irish of Boise represented Claimant. Lawrence E. Kirkendall of Boise represented Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF). Defendant Employer and Surety resolved their disputes with Claimant by lump sum settlement agreement prior to the hearing. The parties submitted oral and documentary evidence, and filed post-hearing briefs. The matter came under advisement on December 4, 2006, and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant is totally and permanently disabled;
2. Whether ISIF is liable under Idaho Code § 72-332; and
3. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant asserts that she is totally and permanently disabled, either as a matter of law, or as an odd-lot worker. Claimant had pre-existing impairments (cervical fusion, degenerative joint disease (osteoarthritis), hearing loss, and obesity) that were manifest and a hindrance in obtaining employment, and these pre-existing impairments combined with her last accident, a torn meniscus in her right knee, to make ISIF liable for a portion of her total and permanent disability.

ISIF contends that Claimant is not totally and permanently disabled either as a matter of law, or as an odd-lot worker. Even if Claimant were found to be totally and permanently disabled, ISIF is not liable because her pre-existing impairments were not a hindrance to employment and because her pre-existing impairments did not “combine with” her last industrial accident to cause total permanent disability.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Douglas Crum, taken at hearing;
2. Claimant’s Exhibits A and B, admitted at hearing; and
3. Defendant’s Exhibits 1 through 23, admitted at hearing.

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

FINDINGS OF FACT

1. At the time of the hearing, Claimant was 63 years of age. She was twice divorced and had no children living at home.

EDUCATION

2. Claimant graduated from Borah High School in Boise. She attended Boise State University for two years, majoring in education, but received no degree. Subsequently, she took college classes on an occasional basis and received a vocational education training certificate. Claimant also participated in training opportunities through her work.

EMPLOYMENT

3. Although Claimant has worked in a variety of fields over the course of her life, the bulk of her recent relevant experience entailed helping individuals become self-sufficient by helping them enter into and become successful in the world of work.

4. At the time of her last industrial injury on August 14, 2003, Claimant was employed by the Idaho Department of Corrections as a Correctional Officer at the women's work-release center in Boise. Duties included monitoring the inmates at the center, and their coming and going to and from work sites. Claimant performed inmate searches, inmate counts, and was responsible for facility security checks during her shift.

5. Prior to working as a Correctional Officer, from 1997 until approximately 2001, Claimant was an employment coordinator with the Idaho Department of Corrections. During that time she worked at the men's work release center in Nampa, then later moved to the women's work release center in Boise. Her main function was to work with inmates and employers to facilitate the transition of inmates from incarceration to employment. Job duties included counseling inmates regarding their marketable skills, teaching them how to make a job search, and how to keep a job once they got one. Claimant also worked with employers of inmates to work through problems so that inmates would be able to retain their jobs when they were released from custody.

6. Before going to work for the Idaho Department of Corrections, Claimant worked for about ten years for the Idaho Department of Health and Welfare in the welfare-to-work program designed to transition welfare recipients into wage earners. Claimant taught life skills, such as conflict resolution and dealing with change, as well as how to identify marketable skills, prepare a resume, find, apply for, and interview for jobs, and how to retain employment once it had been obtained.

7. Prior to her work for the Idaho Department of Health and Welfare, Claimant had worked in a variety of jobs, including office clerical, personnel, automobile sales, and for a period of time owned a retail clothing store.

PRE-ACCIDENT MEDICAL HISTORY

Degenerative Joint Disease

8. Claimant's medical records show a long history of degenerative joint disease dating back to the mid-1980s. By 1989, imaging showed bilateral degenerative arthritis in her knees. In 1990, imaging confirmed degenerative joint disease in her cervical spine. By 1992, Claimant was complaining of pain in her neck, shoulder, knee, hip, and feet, all of which was attributed to arthritis. By 1994, imaging showed degenerative changes in her thoracic and lumbar spine. In 1995, Claimant complained of constant severe low back pain.

Obesity

9. Claimant's medical records also show a long history of obesity. Claimant testified that when she was in her twenties, she weighed between 130 and 135 pounds. By 1987, medical records recorded her weight at 233 pounds. By January 1995, Claimant's weight had increased to 270 pounds. By June 2003, Claimant's weight had climbed to over 300 pounds. Medical records consistently attribute Claimant's worsening arthritis complaints to her

increasing weight.

Cervical Spine

10. As noted previously, Claimant had degenerative changes in her cervical spine as early as 1990. In October 1993, Claimant sustained an injury to her neck while in the employ of the Idaho Department of Health and Welfare. Claimant's workers' compensation claim was accepted and medical care, including a two-level fusion at C5-6, C-6-7, was provided. Claimant received an impairment rating for her cervical injury of 15%. She was released to return to work without restrictions. Claimant testified that she had to modify the way she worked after the cervical surgery because of a loss of range of motion.

Depression

11. Claimant testified to a history of depression that pre-dates the medical records in evidence. The medical records show that Claimant started taking medication for her depression in 1987 while being treated by Martin Gabica, M.D. Claimant was prescribed an assortment of different prescription anti-depressants from her various treating physicians over the next ten years. In 1996, Claimant started seeing a psychiatrist, Scott Hoopes, M.D., and continued treating with him through 2000. In 2001, she started treating with Stephen Bushi, M.D., who diagnosed a mood disorder and restarted her on medication. Dr. Bushi was still treating Claimant at the time of hearing. In 2002, Claimant began seeing Milton Klein, a counselor, for therapy for her depression and anxiety. Claimant continued to treat with Mr. Klein until his retirement in August 2004, at which time she discontinued counseling.

Summary

12. A June 4, 2003, chart note from Anne Poinier, M.D., Claimant's regular treating physician, provides a clear picture of Claimant's condition prior to her August 14, 2003,

industrial accident. On that date, Claimant complained of “substernal chest discomfort, which is generally pleuritic in nature,” that had recurred again with exertion. Defendant’s Ex. 10, p. 231.

[Claimant] also notes lower extremity edema. She is not particularly adherent to a low salt, low calorie diet, but is up 12 pounds since her visit in late April 2003. She does not complain of shortness of breath but does feel she is working hard when she is up and around, which is not surprising, given her weight of over 300 pounds.

* * *

[Claimant’s] blood pressure continues to be under poor control. . . . In reviewing her prior blood pressures, they fairly commonly have been elevated in the clinic setting. This certainly has not improved with [Claimant’s] weight gain.

* * *

[Claimant] is also very concerned about her weight gain. Apparently she weighed between 135 and 155 in her 20s. After having children and ending a marriage, she ate for emotional reasons and has not been able to stop. She is now over 300 pounds. She does not have a family history of diabetes but certainly is at risk for this. She complains of fairly severe bilateral knee pain as well as low back pain. Her hypertension has become more and more difficult to control and [Claimant] seems miserable. She may also have underlying cardiac disease. . . . She, as above, has not been particularly strict with regard to her diet, and her activity has been less and less as the aches and pains affecting her knees and back have progressed.

Id. In her clinical assessment, Dr. Poinier stated:

Weight gain.

. . . I indicated to her she would likely be a quite good candidate for gastric bypass surgery, as her health continues to be compromised as a result of morbid obesity. She will think this over, and we can continue an ongoing dialogue in this regard.

* * *

Knee pain and back pain.

Likely secondary to osteoarthritis stemming from morbid obesity. A new prescription was written for [Claimant] for pool therapy to get her moving again, as weight bearing exercise is almost impossible at this point, given her pain.

Id., at p. 232.

ACCIDENT

13. On August 14, 2003, Claimant injured her right knee when she tripped on a curb and fell to her knees. She reported the accident immediately, but did not seek medical attention

at that time. Claimant worked her regular shifts on August 15, 16, and 17 despite pain in her knees. On August 18 toward the end of her shift, Claimant was walking several inmates to the kitchen to prepare breakfast. As she walked she felt a pop and excruciating pain in her right knee. She was not able to finish her shift and was taken to St. Luke's Regional Medical Center by a co-worker. Following x-rays and an MRI, Claimant was eventually referred to Roman Schwartzman, M.D., an orthopedic surgeon. Dr. Schwartzman diagnosed a tear of the posterior horn of the medial meniscus. While there were causation questions at the outset, the claim was accepted as an employment-related injury. Initially, Dr. Schwartzman suggested conservative treatment and restricted Claimant to sedentary work only. When she was still using crutches and complaining of pain and difficulty walking more than a month after the accident, he recommended arthroscopic knee surgery.

14. Dr. Schwartzman performed the arthroscopic surgery in mid-October. Claimant participated in physical therapy and successfully completed the WorkFit program at Idaho Elks Rehabilitation Hospital. Throughout this period, Claimant remained on sedentary duty. Claimant never returned to her time-of-injury position, and her sedentary work assignment terminated on January 9, 2004.

15. At the conclusion of the WorkFit program, Claimant underwent a functional capacity assessment. The assessment indicated that Claimant could sit without limitation with regular breaks and that she could be on her feet for up to three hours a day, but not longer than fifteen minutes at a time. She could not squat, crawl, crouch or kneel. She could bend, climb stairs, balance, and lift up to twenty-seven pounds occasionally, and lift up to twelve pounds frequently. When she was discharged from the program, Michael S. Weiss, M.D., imposed permanent restrictions, including light to medium level work, no kneeling, avoidance of torquing

maneuvers, and no squatting, crawling or crouching, minimal stooping, stair-climbing, and no working at unprotected heights.

16. At the request of Surety, Dr Weiss conducted an independent medical exam of Claimant on February 3, 2004. While Dr. Weiss did not believe Claimant was medically stable at that time, he did not expect any functionally significant change in her capabilities. According to Dr. Weiss, Claimant was functionally limited to light work. She was to avoid impact activity of her lower extremities and torquing maneuvers of the cervical spine, and would need to make *ad lib* positional changes. Dr. Weiss gratuitously noted that Claimant met the requirements for Social Security disability based solely on her obesity and history of pain-limited motion in any weight-bearing joint.

17. Because Claimant was not yet medically stable, Dr. Weiss gave Claimant a “provisional” impairment rating:

For right medial and lateral meniscectomy	22% of lower extremity
For moderate/severe arthritis of right knee	25% of lower extremity
For lost range of motion of right lower extremity	10% of lower extremity
Total	48% of lower extremity or 19% whole person
For degenerative changes in left knee	20% of lower extremity or 8% whole person
Pre-existing cervical fusion	15% whole person
Total Combined Whole Person Impairment	37%

Dr. Weiss apportioned Claimant’s total impairment as follows:

Pre-existing (cervical, bilateral knees)	28% whole person
Last accident (right knee, meniscectomy, loss of range of motion)	9% whole person

18. Dr. Schwartzman generally agreed with Dr. Weiss’s functional limitations and

impairment rating, but thought that limitation to a sedentary work level was more in line with Claimant's physical capacity as demonstrated by the valid functional capacity assessment that was conducted as part of the WorkFit program.

VOCATIONAL EVIDENCE

19. Vocational evidence in the record was limited to Claimant's testimony, and the testimony and written report of Douglas Crum, a vocational rehabilitation consultant retained by ISIF.

Claimant

20. Claimant testified that she always intended to continue to work once her employment with the Idaho Department of Corrections ended, and actively searched for a new job. Claimant testified that she "applied for" a number of jobs that she had not written down or reported and could not now remember. When pressed on cross-examination, it became apparent that Claimant's definition of a job application was somewhat ephemeral. In some instances, it was no more than talking to the friend of a friend who worked for a particular employer. Without supporting evidence, the Referee cannot accept Claimant's testimony regarding the diligence of her job search at face value. A comparison of Claimant's testimony and ICRD records reflects Claimant's verifiable job search:¹

Applications filed for open positions	4
Interviews received	2
Casual inquiries made	6
Available positions Claimant deemed unsuitable	7

¹ It was difficult to sort out from Claimant's testimony and the records of ICRD precisely what positions Claimant applied for, inquired about, or dismissed based on her belief that they were unsuitable. This summary represents only those numbers that find some support in the records and the ICRD notes.

21. Claimant also testified that she worked with Industrial Commission Rehabilitation Division (ICRD) staff to find employment. ICRD records indicate that Claimant attended eleven of the twenty scheduled ICRD appointments, and either cancelled or was a no-show for nine appointments. ICRD records also indicate that Claimant was given approximately nineteen referrals for job openings that she either agreed to apply for or research further.

Douglas Crum

22. ISIF retained Douglas Crum to prepare a report addressing Claimant's level of disability from a vocational standpoint. Mr. Crum is a certified disability management specialist and has twenty years experience in the vocational rehabilitation field. In preparing his report, Mr. Crum reviewed pertinent medical records, ICRD case notes, Claimant's deposition, and personally interviewed Claimant. Subsequent to the preparation of his report, but prior to hearing, Mr. Crum also reviewed the depositions of Dr. Schwartzman and Johanna Smith, along with Claimant's personnel file from the Idaho Department of Corrections.

23. Mr. Crum concluded that even if Claimant were limited to sedentary work (as Dr. Schwartzman believed), her physical capacity and skills made her employable in the Boise job market. In particular, Mr. Crum noted that Claimant is clearly intelligent, articulate, and has a lot of skills. Mr. Crum testified that the Treasure Valley has a good supply of semi-skilled jobs in the light and sedentary categories. In his report, Mr. Crum specifically identified a number of positions that were potentially suitable, including savings and loan and bank tellers, collections, night auditor, patient account representative, and call center and customer service representatives. Mr. Crum conceded that Claimant's age could be a factor that worked against her, but he still believed that her knowledge and skills were such that she could work if she chose to do so.

DISCUSSION AND FURTHER FINDINGS

TOTAL AND PERMANENT DISABILITY

24. For workers' compensation purposes, total disability means an inability to sell one's services in a competitive market. Appropriate considerations in making such a finding include both medical and non-medical factors, such as age, gender, education, training, usable skills, and economic and social environment. *Hamilton v. Ted Beamis Logging & Const.*, 127 Idaho 221, 899 P.2d 434 (1995).

25. There are two ways to establish permanent total disability.

First, a claimant may prove a total and permanent disability if his or her medical impairment *together with the nonmedical factors* total 100%. If the Commission finds that a claimant has met his or her burden of proving 100% disability via the claimant's medical impairment and pertinent nonmedical factors, there is no need for the Commission to continue. The total and permanent disability has been established at that stage. *See Hegel v. Kuhlman Bros., Inc.*, 115 Idaho 855, 857, 771 P.2d 519, 521 (1989) (Bakes, J., specially concurring) ("Once 100% disability is found by the Commission on the merits of a claimant's case, claimant has proved his entitlement to 100% disability benefits, and there is no need to employ the burden-shifting odd lot doctrine").

Boley v. State, Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997) (emphasis added).

26. The second method of establishing permanent and total disability is under the odd-lot doctrine. An employee is disabled under the odd-lot doctrine if she proves that, while she is physically able to perform some work, she is so handicapped that she would not be employed regularly in any well-known branch of the labor market absent a business boom, sympathy of a particular employer or friends, temporary good luck, or superhuman effort on her part. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). When, as in this matter, evidence of a claimant's employability is in dispute, the claimant bears the burden of establishing a *prima facie* case of odd-lot status. *Huerta v. School Dist. #431*, 116 Idaho 43,

773 P.2d 1130 (1989).

An employee may prove total disability under the odd-lot worker doctrine in one of three ways:

- (1) by showing that [she] has attempted other types of employment without success;
- (2) by showing that [she] or vocational counselors or employment agencies on her behalf have searched for other work and other work is not available; or,
- (3) by showing that any efforts to find suitable employment would be futile.

Hamilton, 127 Idaho at 224, 899 P.2d at 437 (Citations omitted).

Disability Totals 100%

27. Dr. Weiss calculated Claimant's total combined permanent physical impairment at 37%. This included her pre-existing cervical fusion, pre-existing degenerative changes in her left knee, and her right knee injury. Dr. Weiss's impairment rating is uncontroverted. In order to be totally and permanently disabled as a matter of law, all other factors affecting Claimant's employability must make up the remaining 63%. On the record before her, the Referee cannot find Claimant is 100% disabled as a matter of law.

Medical Factors

28. Claimant argues that additional non-rated medical factors, including degenerative disease in her lumbar spine, and obesity contribute to her disability.

Lumbar spine. There is insufficient evidence in the record for the Commission to make a finding regarding the amount of additional impairment that is attributable to degenerative changes in Claimant's lumbar spine. The *AMA Guides to the Evaluation of Permanent Impairment*, 5th Ed. (*AMA Guides*), suggest that when rating an impairment to the spine that is of indeterminate cause (no history of injury) or age-related, the ROM (range of motion) method is the favored methodology. There is no evidence in the record concerning Claimant's range of

motion in her lumbar spine. Assuming for purposes of argument that the DRE (diagnoses related estimate) method might be utilized, Claimant falls somewhere between DRE Lumbar Category I and DRE Lumbar Category II—there are clinical findings, and some structural change, but no radiculopathy—which correlates to a 9% whole person impairment. See Table 15-3, p. 384, *AMA Guides*.

Obesity. Claimant's obesity is certainly a physical condition that impacts her life in a negative way. However, it is not necessarily permanent, as demonstrated by Claimant's loss of 68 pounds in the year prior to her hearing, and is, to some extent, an impediment of her own making. More importantly, the Commission is unaware of any accepted methodology for rating obesity as an impairment. The Commission declines Claimant's invitation to till such unplowed ground.

Non-Medical Factors

29. Claimant identifies three non-medical factors, including Claimant's age, her previous occupation, and her mental history of depression that contribute to Claimant's disability in excess of her impairment.

Age. The Referee concurs that Claimant's age is an obstacle to obtaining employment. If Claimant were unskilled, uneducated, and lived in a rural area with a limited labor market, the disability in excess of impairment attributable to her age could be substantial. Claimant's transferable skills, and the fact that she lives in an area with a robust and growing labor market mitigate, to some extent, the impact that her age has on her employability.

Previous Occupation. The Referee cannot find that Claimant's previous occupation in any way hinders her ability to obtain employment. The bulk of Claimant's work in the fifteen years preceding her last injury was in the field of teaching self-reliance to individuals who were

transitioning from a non-working to a working environment. Her time-of-injury job as a correctional officer was something of an aberration in her employment history, and appears designed to hasten her departure from the women's work release center. As Mr. Crum testified at hearing, on one of the two occasions that he looked at potential job listings for Claimant, there was an opening for a self-reliance specialist, a job she previously held. Whether Claimant submitted an application for the position is unclear on the record. In any event, most of Claimant's relevant work experience was in light to sedentary positions that could easily accommodate Claimant's physical restrictions.

Depression. Claimant has a long history of depression, which was well-managed with medication and counseling prior to her last accident. Following her last accident, Claimant's depression worsened. While she continued to be treated by Dr. Bushi and was compliant with her medication regime, she had discontinued counseling when her former counselor, Milt Klein, retired in August 2004. Despite repeated recommendations from Dr. Bushi, Claimant had not resumed counseling as of the date of the hearing. Claimant's depression certainly makes it more difficult for Claimant to undertake a job search. Her depression also eliminates some potential jobs that are within her restrictions and for which she is otherwise qualified. Neither, however, contributes substantially to disability in excess of impairment.

Odd Lot

30. Claimant argues in the alternative that if she is not totally disabled as a matter of law, that she is totally and permanently disabled as an odd-lot worker. As previously discussed, Claimant bears the burden of establishing a *prima facie* case for odd-lot status by one of three methods: 1) by showing what other types of employment she has attempted; 2) by showing that she, or someone on her behalf has searched for suitable work and none is available; or 3) that

efforts to find suitable work would have been futile. Since Claimant has not attempted work since her injury, a discussion of the first method is unnecessary. Neither does Claimant rely on the third method of establishing odd-lot status, as she has not asserted at hearing or in her briefing that a job search would be futile. The Referee cannot find on the record before her that Claimant, or others on her behalf, have conducted a job search sufficient to satisfy the requirements of the second method of establishing odd-lot status.

Search/Unavailable

31. Claimant argues that she has established her status as an odd-lot worker under the second methodology because she searched for other work, and ICRD staff searched for other work and none was available. The Referee is not persuaded by Claimant's argument.

32. As discussed in the findings of fact, *infra*, Claimant's testimony regarding the diligence of her job search is not entirely reliable. While the importance of networking and making inquiries cannot be underestimated, networking and inquiries alone do not a job search make. While Claimant may have expended substantial energy stewing about her work situation, the record does not demonstrate that her agitation translated into action.

Claimant's interaction with ICRD, while not as dismal as Defendant asserts, was desultory at best. Claimant barely attended more scheduled meetings than she rescheduled or for which she just failed to appear. Her follow-up on job leads provided by ICRD consultants was half-hearted at best. Whether Claimant's indifference stemmed from her depression or the fact that she was already receiving social security disability and was disinclined to return to work is uncertain.

Claimant attributed her lack of commitment to working with ICRD and her scattered job search to the fact that she considered herself something of a vocational expert. Her inability to

use the skills she had long used to help others to help herself was a crushing blow. Being told how to do what she had spent years teaching others to do was demoralizing. No doubt all of those feelings were real. However, they do not excuse Claimant's lack of diligence in conducting a meaningful, realistic, and focused job search, or enlisting the help of others to do so.

CONCLUSION

33. Claimant has failed to establish that she is totally and permanently disabled either as a matter of law or as an odd-lot worker. While Claimant most certainly has some disability in excess of her rated impairment, and in fact, may be able to establish that her disability is substantial, the posture of this proceeding does not require the Commission to quantify Claimant's disability if it is less than total.

34. Since the Commission finds that Claimant is not totally and permanently disabled, it need not address the issue of ISIF's liability under Idaho Code §72-332 or the apportionment of same under the *Carey* formula.

CONCLUSIONS OF LAW

1. Claimant is not totally and permanently disabled, either as a matter of law or as an odd-lot worker.

2. All other issues are moot.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 14 day of February, 2007.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 23 day of February, 2007 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

DEBRA YOUNG IRISH
PO BOX 1949
BOISE ID 83701-1949

LAWRENCE E KIRKENDALL
2995 N COLE RD STE 260
BOISE ID 83704-5976

djb

/s/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CAROL CUNNINGHAM,)
)
 Claimant,)
)
 v.)
)
 STATE OF IDAHO, INDUSTRIAL)
 SPECIAL INDEMNITY FUND,)
)
 Defendant.)
 _____)

IC 2003-516713

ORDER

Filed: February 23, 2007

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her 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 recommendation of the Referee. The Commission concurs with this recommendation. 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 is not totally and permanently disabled, either as a matter of law or as an odd-lot worker.
2. All other issues are moot.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 23 day of February, 2007.

INDUSTRIAL COMMISSION

/s/ _____
James F. Kile, Chairman

/s/_____
Thomas E. Limbaugh, Commissioner

/s/_____
R.D. Maynard, Commissioner

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 23 day of February, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

DEBRA YOUNG IRISH
PO BOX 1949
BOISE ID 83701-1949

LAWRENCE E KIRKENDALL
2995 N COLE RD STE 260
BOISE ID 83704-5976

djb

/s/_____