

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

KRISTI ELGAAEN, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 H.J. HEINZ COMPANY, )  
 dba HEINZ USA, )  
 )  
 Self-Insured Employer, )  
 Defendant. )  
 \_\_\_\_\_ )

**IC 2004-500111**

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

Filed February 15, 2008

**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 March 23, 2007. Claimant, Kristi Elgaaen, was present and represented by Paul B. Rippel of Idaho Falls. Defendant Employer, H.J. Heinz Company (Heinz), was represented by David P. Gardner of Pocatello. The parties presented oral and documentary evidence. This matter was then continued for post-hearing depositions and briefing and subsequently came under advisement on July 30, 2007.

**ISSUES**

In her post-hearing briefing, Claimant withdrew the issue of retention of jurisdiction, thus the issues to be resolved are:

1. Whether the claim is barred by Nelson v. Ponsness-Warren Idgas Enterprises, 126 Idaho 129, 879 P.2d 592 (1994), for lack of an accident that aggravated a preexisting condition.

2. Whether Claimant sustained injurious exposure to the hazards of her alleged occupational disease during her employment with Heinz.
3. Whether Claimant contracted and incurred an occupational disease related to her employment with Heinz.
4. Whether the condition for which Claimant seeks compensation is due in whole or in part to a preexisting injury, disease or condition.
5. Whether the claim is barred by Idaho Code § 72-448 for failure to give notice of an occupational disease within 60 days after its first manifestation.
6. Whether the claim is barred by Idaho Code § 72-448 for failure to file a claim with the Industrial Commission within one year after the first manifestation of an occupational disease.
7. Whether the claim is barred by Idaho Code § 72-706(1).
8. Claimant's entitlement to permanent impairment.
9. Claimant's entitlement to permanent disability in excess of impairment.
10. Apportionment pursuant to Idaho Code § 72-406.
11. Whether Claimant is entitled to any benefits.

### **ARGUMENTS OF THE PARTIES**

Claimant argues that the bilateral basilar, or CMC, joint arthritis in her thumbs is an occupational disease resulting from her work at Heinz. She asserts entitlement to 17% permanent partial impairment and total permanent disability pursuant to the odd-lot doctrine, as a result of her occupational disease.

Defendant asserts that Claimant's bilateral basilar joint arthritis is a pre-existing condition

not causally related to her work at Heinz, that her claim for benefits therefor is barred by the Nelson decision and is also time-barred by Idaho Code §§ 72-448 and 72-706(1). Defendant maintains that Claimant is not totally permanently disabled.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;
2. Claimant's Exhibits A through N admitted at hearing;
3. Defendant's Exhibits 1 through 17 admitted at hearing; and
4. Deposition of Nancy J. Collins, Ph.D., taken by Claimant on April 25, 2007.

All objections posed during Dr. Collins' deposition are overruled. After having considered the above evidence and the arguments of the parties, the Referee submits the following Findings of Fact and Conclusions of Law.

### **FINDINGS OF FACT**

1. Claimant was 47 years old at the time of the hearing and resided in Pocatello at all relevant times. She is right hand dominant. Claimant was an excellent student and graduated from high school in 1978. After graduation she worked as a cashier at a clothing store and as a receiving clerk at a home improvement store for six years. In approximately 1984, she commenced working for Pocatello Regional Medical Center checking patients into the hospital. She also tended bar on the weekends. Claimant attended college for several years, but did not earn a degree.

2. In approximately 1991, Claimant injured her left hand when she fell on it and it "popped." Her pain was localized to her left thumb MP joint which she may have dislocated. She wrapped her thumb and did not then seek medical treatment. Her thumb improved and she

continued her normal activities, including working and playing the piano, guitar and violin without difficulty. She had no other difficulties with her hands prior to 1993.

3. In 1993, Claimant started working for Heinz in its food processing plant. Claimant was a line production associate assembling and packaging frozen dinners. The work was very fast paced. Because of her bilateral manual skills, she was often placed at line positions which required the greatest manual speed and dexterity.

4. In July 1995, Claimant fractured her left middle finger and sought medical treatment. X-rays of her hands taken at that time showed no osteoarthritis. Her finger injury resolved.

5. In approximately 1995, Claimant became a sanitation technician at Heinz. As a sanitation technician, she disassembled, cleaned, and reassembled equipment ranging from small to large machine parts weighing up to 100 pounds, and kettles capable of holding 8,000 pounds of sauce. The sanitation job paid better and was much more physically demanding than line production. Claimant's duties required her to grip high pressure hoses almost constantly, and manipulate pipe and hose fittings frequently. This required sustained forceful gripping and twisting and frequent lifting. She often held a high pressure hose for six hours of her eight hour shift. This also required a sustained grip on the nozzle trigger while moving the hose constantly. Claimant's hands became stiff and sore from the time she commenced working as a sanitation technician. The soreness improved when she was off work on the weekends such that she continued to enjoy playing a variety of musical instruments.

6. In July 1996, Claimant became a sanitation team leader at Heinz. As a working team leader, her duties included monitoring others, completing audits and other paperwork, in addition to sanitation cleaning. Claimant had to fill in regularly for absent sanitation technicians and assist with

regular sanitation duties.

7. In May 1997, Heinz reassigned Claimant to the production line. She did not have significant hand problems at the time.

8. In 1998, and occasionally at other times, Claimant worked as a waitress while she was temporarily laid off at Heinz. As a waitress she regularly lifted approximately five pounds but did not perform any heavy lifting.

9. In the fall of 1998, Claimant returned to a sanitation position with Heinz. She resumed her extensive use of high pressure hoses, various wrenches, and similar equipment. She again noted soreness and stiffness in her hands.

10. In July 1999, Claimant again became a sanitation team leader. As a working team leader, she still averaged about four hours of physical labor each shift. Claimant's bilateral hand symptoms continued. Her hand symptoms still improved somewhat when she was off work, however, they remained too sore for her to play any musical instruments when she was off work on weekends. Claimant continued working as a waitress when production was down at Heinz. She took orders and carried plates, but did not do any heavy lifting or forceful gripping. While both of her hands were sore, by early 2002, Claimant's left hand had become very sore. She began to notice intermittent sharp pains in her left thumb and had difficulty holding items.

11. On March 26, 2002, Claimant presented to David Wise, M.D., complaining of gradually worsening pain at the base of her left thumb. She reported falling on her left hand several years earlier—perhaps dislocating her left thumb—but seeking no medical treatment. Dr. Wise ordered left hand x-rays and prescribed pain medications and a splint. His record of that visit notes moderate tenderness over the MP joint of Claimant's left thumb and diagnosed thumb arthritis,

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possibly post traumatic. He recorded nothing regarding the CMC joint of Claimant's left thumb. Claimant testified that Dr. Wise did not advise her of any specific cause or diagnosis.

12. Claimant described her hand complaints to Heinz plant nurse, Marita Worthington, who gave Claimant a splint. Claimant continued working in sanitation.

13. In 2003, Claimant wore a cast on her left hand when working occasionally as a waitress because her hands were already sore from her work at Heinz. She performed no heavy lifting and her duties as a waitress did not increase her hand symptoms.

14. In April 2003, Dr. Wise noted that Claimant's left hand x-rays taken March 26, 2002, showed advanced arthritic changes at the base of the first metacarpal, or CMC joint, of Claimant's thumb. At Claimant's request, Dr. Wise referred her to orthopedic surgeon Hugh Selznick, M.D. Claimant saw Dr. Selznick in August 2003. He reviewed Claimant's 2002 x-rays and advised her she had arthritis in the CMC joint of her left thumb. Claimant declined surgical treatment because of the statistical probability of a poor surgical outcome. There is no indication Dr. Selznick advised Claimant at that time that her condition might be work-related. Claimant continued working in sanitation.

15. Dr. Wise subsequently referred Claimant to orthopedist Vermon Esplin, M.D., a hand specialist. On October 16, 2003, Dr. Esplin examined Claimant and the 2002 x-rays of her left hand. Dr. Esplin confirmed that Claimant had CMC joint arthritis in her left thumb. Dr. Esplin's notes indicate that Claimant reported she had dislocated that joint some 11 years previously, that she did not seek medical care at that time and it eventually went on to heal. Claimant later testified, and Dr. Wise's notes suggest, that she previously injured the MP—not the CMC—joint of her left thumb. Dr. Esplin noted that Claimant had experienced left thumb pain for a number of years—which

Claimant testified corresponded to her years as a sanitation technician. Dr. Esplin found no MP joint problems, but diagnosed Stage 3 CMC joint osteoarthritis in Claimant's left thumb which he initially attributed to a past traumatic injury. He described possible surgical treatments, including titanium joint replacement. There is no indication Dr. Esplin advised Claimant at the time that her condition might be work-related.

16. Claimant experienced increasing difficulties performing her sanitation duties at Heinz because of her hand pain and subsequently sought transfer to another position at Heinz less demanding on her hands. Claimant underwent a functional screening evaluation which included walking, climbing ladders, lifting weights, disassembling and reassembling equipment, and grip strength testing. She performed all tests well, but had difficulty with hand testing. Given her hand symptoms, Claimant could not qualify for any other position at Heinz.

17. Claimant's hand condition deteriorated until she could no longer tolerate sanitation duties. She worked with Heinz to complete and submit an application for Family Medical Leave. Worthington consulted with a physician in the process and Heinz approved Claimant's leave. On November 17, 2003, Claimant left Heinz on Family Medical Leave because of her hand symptoms. She was earning approximately \$15.20 per hour when she ceased working. Claimant has not worked for Heinz, or any other employer, since that time.

18. On December 2, 2003, Claimant visited Dr. Esplin briefly. Her hand pain had not resolved and she was gathering information about possible treatment plans, including surgical options. Dr. Esplin provided Claimant general literature which linked basilar joint arthritis with overuse and overloading of the CMC joint and prolonged heavy work. Other than providing this literature, there is no indication Dr. Esplin advised Claimant at the time that her condition was

related to her work at Heinz.

19. On December 24, 2003, Claimant awoke with some of her fingers partially contracted and stiff. She visited Worthington at Heinz and advised her of these new symptoms.

20. On December 30, 2003, Claimant returned to Dr. Esplin and reported awakening at night with her middle and ring fingers “locked down” and her hands tingling. Dr. Esplin noted that she had symptoms in both the left and right thumb CMC joints. He assessed osteoarthritis left greater than right. Claimant asked Dr. Esplin whether her hand condition could be caused by her work at Heinz. He responded affirmatively. This was the first time that a medical practitioner had advised Claimant that her hand condition was related to her work at Heinz.

21. On December 30, 2003, following her discussion with Dr. Esplin, Claimant went immediately to Heinz and asked Worthington to make a workers’ compensation claim for her. Claimant acknowledged that she had suffered no accident at Heinz. Worthington asked Claimant when she first noticed hand pain at work and Claimant responded that her hands were sore from the first day she worked in the sanitation department. Worthington did not record the bilateral nature of Claimant’s condition, but completed the workers’ compensation claim at Claimant’s request. Defendant subsequently denied the claim.

22. Claimant has not returned to any employment since November 17, 2003. Subsequent medical testing also revealed bilateral carpal tunnel syndrome not severe enough to warrant an impairment rating. Claimant has applied for and received Social Security Disability benefits on the basis of her bilateral hand disability.

23. The Idaho Division of Vocational Rehabilitation has assisted Claimant in enrolling in college. At the time of hearing, Claimant was attending Idaho State University and pursuing a

degree in mechanical engineering. Claimant's grade point average is 3.8; however, her hand conditions materially restrict the number of academic credit hours she can successfully complete per semester. A number of accommodations have been provided by the university to allow Claimant to pursue her studies. She has obtained voice recording software to reduce the need to write. She carries her textbooks in a special bag with her arms, rather than use her hands. She has a digital recorder and a note taker is available in her academic classes. Most of her professors provide her with prepared class notes so she does not have to write and some have allowed her additional time to complete tests requiring writing. Claimant lacks at least one and one-half years to complete her degree. If Claimant is able to continue at her present pace, she will be over 50 years of age when she completes her mechanical engineering degree.

24. Claimant has very limited use of her hands. She drops things frequently—so frequently that she uses paper plates and avoids glassware. She often uses her teeth to take lids off. She wears predominantly slip on clothing and shoes without laces, buttons or zippers. Shampooing or combing her hair, or brushing her teeth are slow difficult processes because of her hand pain. She avoids driving because of hand pain, but can drive when necessary. Hand pain disturbs her sleep at night even though she takes over the counter and prescription pain medications. She has declined surgical treatment thus far, due to the low probability of a successful outcome.

25. Having reviewed the evidence and observed Claimant at hearing, the Referee finds that Claimant is a credible witness.

### **DISCUSSION AND FURTHER FINDINGS**

26. 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).

27. **Pre-existing condition.** A threshold issue is whether Claimant's claim is barred by Nelson v. Ponsness-Warren Idgas Enterprises, 126 Idaho 129, 879 P.2d 592 (1994), for lack of an accident that aggravated a preexisting condition. Defendant asserts that Claimant's basilar joint osteoarthritis in her thumbs preexisted her employment at Heinz. Under Idaho law the aggravation of a pre-existing disease is not compensable unless the aggravation is by an industrial accident. See also Konvalinka v. Bonneville County, 140 Idaho 477, 478-479, 95 P.3d 628, 629-630 (2004). Claimant readily acknowledged that she suffered no industrial accident at Heinz. If her basilar joint arthritis preexisted her employment at Heinz, then she is precluded from receiving worker's compensation benefits under an occupational disease theory.

28. Dr. Selznick reviewed x-rays taken of Claimant's hands in July 1995 and opined they showed no osteoarthritic change in her digit joint spaces. He therefore concluded that her bilateral basal joint arthritis has occurred since 1995. There is no reliable evidence that Claimant had osteoarthritis prior to her employment with Heinz. Claimant's claim is not barred by the Nelson or Konvalinka decisions.

29. **Occupational disease.** Claimant alleges the bilateral basilar joint osteoarthritis in her thumbs constitutes a compensable occupational disease. The Idaho Workers' Compensation Law defines an "occupational disease" as "a disease due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment." Idaho Code § 72-102(21)(a). The law further provides that:

[w]hen an employee of an employer suffers an occupational disease and is thereby disabled from performing his work in the last occupation in which he was injuriously

exposed to the hazards of such disease, . . . and the disease was due to the nature of an occupation or process in which he was employed within the period previous to his disablement as hereinafter limited, the employee, . . . shall be entitled to compensation.

Idaho Code § 72-437.

30. “Disablement” means “the event of an employee’s becoming actually and totally incapacitated because of an occupational disease from performing his work in the last occupation in which injuriously exposed to the hazards of such disease,” and “disability means the state of being so incapacitated.” Idaho Code § 72-102(21)(c). Idaho Code § 72-439 limits the liability of an employer for any compensation for an occupational disease to cases where (1) “such disease is actually incurred in the employer’s employment,” and (2) for a nonacute occupational disease, where “the employee was exposed to the hazard of such disease for a period of 60 days for the same employer.” The 60 day period of exposure required by Idaho Code § 72-439 need not be a single continuous period. Jones v. Morrison-Knudsen Co., Inc., 98 Idaho 458, 567 P.2d 3 (1977).

31. Thus, under the statutory scheme, a claimant must demonstrate (1) that they were afflicted by a disease; (2) that the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment in which they were engaged; (3) that they were exposed to the hazards of such nonacute disease for a period of 60 days with the same employer; (4) that the disease was incurred in, or arose out of and in the course of their employment, and (5) that as a consequence of such disease, they become actually and totally incapacitated from performing their work in the last occupation in which they were injuriously exposed to the hazards of such disease. In addition, a claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 890 P.2d 732 (1995). “Probable” is defined as “having more

evidence for than against.” Fisher v. Bunker Hill Co., 96 Idaho 341, 528 P.2d 903 (1974).

32. Exposure. In the present case, Defendant contests whether Claimant sustained injurious exposure to the hazards of her alleged disease during her employment with Heinz. The record suggests that Heinz itself recognized the risk exposure potential. The January 2003 evaluation of physical therapist Sharik Peck of ErgoHELP documented specific sanitation technician duties that were cause for concern. Peck commented that lifting and carrying requirements resulted in Heinz employees’ hands “falling asleep” and continuous and that excessive ulnar deviation and wrist flexion were major hose-holding postures. Peck reported that Heinz plant nurse, Marita Worthington, did “not like what sustained grip in those postures can cause.” Claimant’s Exhibit K, p. 187. Claimant’s years as a sanitation technician and sanitation team leader at Heinz exposed her to the hazards resulting from prolonged and forceful gripping and overuse of her hands in unnatural postures, including CMC joint arthritis.

33. Causation. Defendant next contests whether Claimant contracted and incurred an occupational disease from her employment with Heinz. Defendant asserts that Claimant’s basilar joint arthritis was caused by pre-employment trauma, rather than by her work at Heinz.

34. Both Dr. Wise and Dr. Esplin appear to attribute Claimant’s CMC joint arthritis to her fall on her left hand and apparent dislocation of her left thumb many years earlier. However, by December 30, 2003, after further considering Claimant’s sanitation duties, Dr. Esplin assessed osteoarthritis and pain, left greater than right, and concluded that given such advanced arthritis, Stage 3 at age 43, that Claimant’s “job probably did have some significant input into worsening of her underlying arthritic condition versus causing it.” Claimant’s Exhibit C, p. 128. Dr. Esplin later repeatedly advised Claimant that her CMC joint osteoarthritis was aggravated if not caused by her

work at Heinz.

35. As noted previously, Claimant injured the MP—not the CMC—joint of her left thumb prior to working for Heinz. She specifically so testified and gestured at hearing. Significantly, Dr. Wise’s record of his March 26, 2002, examination specifically noted that Claimant’s MP joint was moderately tender, and contains no mention whatsoever of her CMC joint. Moreover, Claimant’s prior left thumb injury resolved such that she returned to her work and usual activities without incident. Later, when she was initially employed by Heinz, she demonstrated exceptional bilateral manual speed and dexterity and was therefore often assigned the most demanding positions on the line. These facts belie the assertion that her prior left thumb injury resulted in her present bilateral CMC joint arthritic condition.

36. Dr. Selznick opined that Claimant’s bilateral carpal tunnel syndrome was caused by her work at Heinz, this even though it was not entirely diagnosed until approximately six weeks after she ceased working at Heinz. He noted Claimant’s work at Heinz required extensive use of her hands in pinching, gripping, and twisting. Dr. Selznick reviewed x-rays taken of Claimant’s hands in July 1995 and opined they showed no osteoarthritic change in her digit joint spaces. He therefore concluded that the bilateral CMC joint arthritis in Claimant’s thumbs occurred since 1995 and is more likely than not, the result of cumulative work-related trauma.

37. Richard Fryer, M.D., assistant professor at the University of Utah, examined Claimant and rated her permanent impairment. He noted that diagnostic testing revealed no systemic arthritis, thus given Claimant’s relatively young age; the bilateral CMC joint arthritis in her thumbs was most likely from repetitive use.

38. Dr. Fryer’s and Dr. Selznick’s opinions are adequately explained, rest upon objective

diagnostic evidence, and are more persuasive than the opinions of Drs. Wise and Esplin to the extent they are contrary.

39. Incapacity. It is undisputed that by November 17, 2003, Claimant was totally disabled and incapacitated from performing her usual sanitation duties at Heinz, due to her hand condition.

40. The Referee concludes that Claimant has proven she contracted and incurred the occupational disease of bilateral basilar joint osteoarthritis in her thumbs during and as a result of her work at Heinz.

41. **Timely notice, claim, and Complaint.** The next issues are whether Claimant's occupational disease claim is barred by Idaho Code § 72-448 for Claimant's failure to give timely written notice to Heinz of an occupational disease within 60 days after its first manifestation, or failure to timely file a claim with the Industrial Commission within one year after the first manifestation of an occupational disease. Defendant also asserts Claimant failed to make timely application for a hearing within one year as required by Idaho Code § 72-706(1).

42. The timeliness of Claimant's notice, claim, and request for hearing all hinge upon the date of the manifestation of Claimant's occupational disease. Manifestation is defined by Idaho Code § 72-102(19) as "the time when an employee knows that he has an occupational disease, or whenever a qualified physician shall inform the injured worker that he has an occupational disease."

This definition is subjective. The employee must know that he has an occupational disease or have been so informed by a qualified physician. In addition, the knowledge required is that he has an occupational disease, not that he has symptoms that are later diagnosed as being an occupational disease. Knowledge of symptoms is not synonymous with knowledge that symptoms are caused by an occupational disease.

Sundquist v. Precision Steel & Gypsum, Inc., 141 Idaho 450, 454, 111 P.3d 1135, 1139 (2005).

43. Claimant was aware of bilateral hand symptoms from 1995 onward. She was aware she had basilar joint arthritis in her thumbs from at least August 2003 onward. However, neither Claimant, nor Heinz plant nurse Marita Worthington, who helped Claimant complete her Family Medical Leave application in November 2003, was aware Claimant's symptoms constituted an occupational disease. Dr. Esplin provided Claimant literature on December 2, 2003, which included information causing Claimant to suspect that her basilar joint arthritis was related to her work at Heinz. It was not until December 30, 2003, that a qualified physician, Dr. Esplin, first informed Claimant that her basilar joint arthritis was caused by her work at Heinz. Claimant gave Heinz notice that same day and caused a claim to be filed shortly thereafter.

44. The date of manifestation of Claimant's occupational disease was certainly no sooner than December 2, 2003. Claimant gave Heinz notice, and caused a claim to be filed well within the 60 days required by Idaho Code § 72-448. Claimant filed her Complaint herein on January 23, 2004, well within the one year period required by Idaho Code § 72-706(1). Claimant's occupational disease claim is not barred by Idaho Code §§ 72-448 or 72-706(1).

45. **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,

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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).

46. In the present case, Richard Fryer, M.D., examined Claimant on November 20, 2006, and rated her permanent impairment at 17% of the whole person due to the bilateral basilar joint arthritis in her thumbs. He concluded Claimant did not suffer any permanent impairment due to her bilateral carpal tunnel syndrome. Dr. Fryer's rating is well explained and not controverted by any other credible evidence. Claimant has proven she suffers 17% permanent impairment of the whole person due to her occupational disease of bilateral basilar joint arthritis.

47. **Permanent disability.** The next issue is Claimant's entitlement to permanent disability in excess of impairment, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine. "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 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. 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).

48. As noted above, Claimant has very limited use of her hands. She drops things frequently and must often use her teeth to remove lids. She is largely unable to manipulate laces, buttons or zippers. She avoids driving because of hand pain. In consequence of Claimant's bilateral CMC thumb arthritis, Dr. Fryer opined that Claimant is not able to perform work that requires repetitive use of her hands for either fine motor skills or for heavy lifting, that long-term repetitive keyboarding would likely aggravate her basilar joint arthritis, and that she should not use her hands for gripping, grasping, or manipulating objects weighing more than one pound; should not pinch objects for lifting or manipulating weighing more than eight ounces; or write for more than 15 minutes of every hour.

49. Vocational rehabilitation expert, Nancy Collins, Ph.D., met with Claimant on March 12, 2007, and noted her bilateral basilar joint arthritis in her thumbs. Collins opined that Claimant is limited to less than sedentary work and is totally and permanently disabled due to her bilateral CMC thumb arthritis. Collins testified that bilateral hand restrictions are among the most disabling of all conditions. She estimated that Claimant's present loss of labor market access easily exceeds 90%. Collins opined that Claimant's college studies may prepare her for eventual employment in mechanical engineering, but that her labor market would be extremely limited even assuming Claimant is able to complete her engineering degree. Entry level engineering positions require

significant use of the hands and would not be suitable for Claimant. Collins testified that Claimant might find suitable employment if she were able to complete her engineering degree and thereafter obtain a management level engineering position which required less use of her hands. Dr. Collins noted that Idaho State University extended many accommodations to Claimant which would probably not be available in real life work. Dr. Collins testified that even with an engineering degree, the combination of Claimant's age and lack of engineering experience would make finding work difficult, and that Claimant would likely need assistance or a sympathetic employer to obtain work in engineering. Collins speculated that if Claimant were able to complete her engineering degree and thereafter obtain employment in engineering management, then Claimant's disability would only be approximately 45 to 50%.

50. Claimant's pursuit of an engineering degree is commendable, however, as Collins noted, the accommodations made by Idaho State University are not real life work and the likelihood that Claimant can eventually obtain a suitable engineering management position within her geographical area given her hand restrictions and lack of engineering experience is very remote. Based on Claimant's total impairment rating of 17% of the whole person, her permanent work restrictions including restrictions on repetitive use of her hands for either fine motor skills or heavy lifting, gripping, or manipulating objects weighing more than one pound, or pinching, lifting, or manipulating objects weighing more than eight ounces; or writing for more than 15 minutes of every hour, and considering her non-medical factors, most notably her age of 44 at the time of the manifestation of her occupational disease, lack of experience and transferable skills in sedentary occupations, and her inability to return to any of her previous occupations, Claimant's ability to engage in gainful activity has been significantly reduced. Claimant was earning approximately

\$15.20 per hour before her occupational disease. The Referee concludes Claimant has established a permanent disability of 85%, inclusive of her 17% whole person impairment

51. Odd-lot. A claimant who is not 100% permanently disabled may prove total permanent disability by establishing she is an odd-lot worker. Boley v. State, Industrial Special Indemnity Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997). 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 her burden of proof and establish total permanent disability under the odd-lot doctrine in any 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 work would be futile.

Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

52. In the present case, Claimant has not worked since November 2003, the month prior to the manifestation of her occupational disease, thus she has not proven that she attempted other types of employment without success. Claimant sought alterative positions at Heinz, but none were

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suitable given her bilateral basilar joint arthritis. Claimant does not maintain, and the Referee is not persuaded, that this constitutes a sufficient work search under Lethrud.

53. As noted, Collins testified that Claimant is totally disabled. Collins' testimony establishes that Claimant is not likely to be employed regularly in any well-known branch of the relevant labor market and that it would be futile for Claimant to look for work. The Referee finds Collins' evaluation thorough and her conclusion persuasive. Claimant has demonstrated that a work search would be futile. Claimant has established a prima facie case that she is an odd-lot worker, totally and permanently disabled, under the Lethrud test.

54. Once a claimant establishes a prima facie odd-lot case, the burden shifts to the Defendant to show there is:

An actual job within a reasonable distance from [claimant's] home which [claimant] is able to perform or for which [claimant] can be trained. In addition, the [defendant] must show that [claimant] has a reasonable opportunity to be employed at that job. It is of no significance that there is a job [claimant] is capable of performing if he would in fact not be considered for the job due to his injuries, lack of education, lack of training, or other reasons.

Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 407, 565 P.2d 1360, 1364 (1977).

55. In the present case, Heinz has presented no evidence there is an actual job within the relevant labor market which Claimant is able to perform, for which she would be considered, and in which she has a reasonable opportunity to be employed.

56. Claimant has proven she is totally and permanently disabled under the odd-lot doctrine.

57. **Apportionment.** Apportionment pursuant to Idaho Code § 72-406 is moot.

### CONCLUSIONS OF LAW

1. Claimant's claim for bilateral thumb basilar joint osteoarthritis is not barred by

Nelson v. Ponsness-Warren Idgas Enterprises, 126 Idaho 129, 879 P.2d 592 (1994).

2. Claimant has proven she was exposed to the hazards of, and contracted and incurred the occupational disease of, bilateral thumb basilar joint osteoarthritis due to her employment at Heinz.

3. Claimant has proven her occupational disease claim is not barred by Idaho Code § 72-448, or Idaho Code § 72-706(1).

4. Claimant has proven she suffers permanent impairment of 17% of the whole person due to her occupational disease.

5. Claimant has proven she is totally and permanently disabled pursuant to the odd-lot doctrine due to her occupational disease.

6. Apportionment pursuant to Idaho Code § 72-406 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 18th day of January, 2008.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_  
Alan Reed Taylor, Referee

ATTEST:

/s/ \_\_\_\_\_  
Assistant Commission Secretary

## CERTIFICATE OF SERVICE

I hereby certify that on the \_\_15th\_\_ day of \_February\_\_\_\_, 2008, 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:

PAUL RIPPEL  
P O BOX 51219  
IDAHO FALLS ID 83405-1219

DAVID GARDNER  
PO BOX 817  
POCATELLO ID 83204

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

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

KRISTI ELGAAEN,	)	
	)	
Claimant,	)	<b>IC 2004-500111</b>
	)	
v.	)	
	)	
H.J. HEINZ COMPANY,	)	
dba HEINZ USA,	)	<b>ORDER</b>
	)	
Self-Insured	)	
Employer,	)	Filed February 15, 2008
	)	
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's claim for bilateral thumb basilar joint osteoarthritis is not barred by Nelson v. Ponsness-Warren Idgas Enterprises, 126 Idaho 129, 879 P.2d 592 (1994).
2. Claimant has proven she was exposed to the hazards of, and contracted and incurred the occupational disease of, bilateral thumb basilar joint osteoarthritis due to her employment at Heinz.
3. Claimant has proven her occupational disease claim is not barred by Idaho Code §

72-448, or Idaho Code § 72-706(1).

4. Claimant has proven she suffers permanent impairment of 17% of the whole person due to her occupational disease.

5. Claimant has proven she is totally and permanently disabled pursuant to the odd-lot doctrine due to her occupational disease.

6. Apportionment pursuant to Idaho Code § 72-406 is moot.

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

DATED this \_15th day of \_February\_\_\_\_\_, 2007.

INDUSTRIAL COMMISSION

\_\_\_\_\_/s/\_\_\_\_\_  
James F. Kile, Chairman

\_\_\_\_\_/s/\_\_\_\_\_  
R. D. Maynard, Commissioner

Participated but did not sign  
\_\_\_\_\_  
Thomas E. Limbaugh, Commissioner

ATTEST:

\_\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_15th day of \_February\_\_\_\_, 2008, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

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

DAVID P GARDNER  
PO BOX 817  
POCATELLO ID 83204

jkc

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