

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RAMONA SOMMER,)	IC 2001-012652
)	
Claimant,)	
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW,
)	AND RECOMMENDATION
STATE OF IDAHO, INDUSTRIAL)	
SPECIAL INDEMNITY FUND,)	
)	Filed: July 7, 2008
Defendant.)	
_____)	

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 Pocatello, Idaho, on October 2, 2007. Reed W. Larsen of Pocatello represented Claimant. Thomas B. High of Twin Falls represented Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF). Employer, Home Depot USA, Inc., and Surety, Insurance Company of the State of Pennsylvania, entered into a settlement with Claimant prior to the hearing. The parties submitted oral and documentary evidence at hearing. The record was held open for the taking of post-hearing depositions. The parties submitted post-hearing briefs, and the matter came under advisement on March 28, 2008, and is now ready for decision.

ISSUES

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

1. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine;
2. Whether Claimant is totally and permanently disabled;

RECOMMENDATION - 1

3. Whether the Industrial Special Indemnity Fund is liable under Idaho Code § 72-332; and

4. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant asserts that she is totally and permanently disabled as an odd-lot worker as a result of an industrial accident that occurred on May 24, 2001. She further contends that ISIF is liable for a portion of her total permanent disability pursuant to Idaho Code § 72-332, and calculates ISIF's apportioned share to be 94% using the calculation set out in *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 117, 686 P.2d 54, 62 (1984).

ISIF argues that Claimant is not totally and permanently disabled under the odd-lot doctrine, but even if she were, ISIF is not liable because her disability did not result from a combination of her pre-existing impairments and her May 2001 injury. In particular, ISIF contends that Claimant's pre-existing impairments alone affected her employability, or in the alternative, that she was an odd-lot worker prior to the industrial accident that gives rise to this proceeding.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Randy D. Parkin, taken at hearing;
2. Joint Exhibits A through BBB, admitted at hearing;
3. Claimant's exhibits DDD, EEE, GGG, and HHH, admitted at hearing;
4. Post hearing depositions of Nancy J. Collins, Ph.D., taken December 12, 2007;

William C. Jordan, MA, CRC, CDMS, taken December 12, 2007; David R. Anderson, M.D., taken July 31, 2007; and Hugh Scott Selznick, M.D., taken October 26, 2007.

RECOMMENDATION - 2

All objections made in the course of the depositions of William Jordan and Dr. Anderson are overruled. 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. Claimant was born in the United States and traveled with her family throughout the west though her school years. Claimant married a Canadian, with whom she had three children. The family moved to Canada, where Claimant continued to reside until 2001.

2. In 2001, Claimant returned to Pocatello to take care of her elderly mother. At the time of hearing, Claimant was 66 years of age. Her mother had died, and Claimant was preparing to return to Canada immediately following the hearing to be near her children and grandchildren.

EDUCATION

3. Claimant attended high school in Pocatello. After the high school graduation ceremony, but before she had finished her required coursework, her father pulled her out of school, so she never actually received a diploma. Claimant eventually earned a GED. In addition, Claimant accumulated approximately 142 college credits over the years—some in Canada, and some in the United States. Differences in graduation requirements between the two countries, and the length of time over which she accumulated the credits, prevented her from ever receiving a degree.

WORK HISTORY

4. Claimant has a wide-ranging work history. She worked on the family farm and herded cattle while she was growing up. In 1962, she worked for her parents as a waitress and

maid at the Clayton Hotel and Bar. In 1963, she went to work for the U.S. Forest Service in Challis, Idaho, as a clerk/typist and postal clerk. She later transferred to the Deer Lodge National Forest in Butte, Montana. In addition to her clerk/typist duties, Claimant worked as a fire dispatcher for the forest. In the late 1960s or early 1970s, Claimant went to work for the City of Butte as an administrative secretary for a federally funded community redevelopment project. She also worked as a police dispatcher for the city until 1973, when her husband's job in Butte ended and the family moved to Canada.

5. Claimant started working on the green chain in the sawmills in and around Fort St. John. Later she worked as a piler for the lumber coming out of the kiln. In 1975, Claimant became a lumber grader—a position she held until 1981, when she and her family moved to Victoria, B.C.

6. After moving to Victoria, Claimant found work at a greenhouse as a gardener. In 1983, she became the manager of a nursery. In 1983, Claimant divorced her husband, who died a short time later in a motor vehicle accident, and Claimant recognized that she needed to find more remunerative employment.

7. Claimant returned to school to update her secretarial skills, and while she was taking classes, she also worked for the school as a secretary and taught computer courses, and special courses for legal and medical secretaries. When Claimant finished her training course, she went to work as a legal secretary for a firm of solicitors in Victoria.

8. Claimant left the law firm after a year, and in 1985 she started her own business providing secretarial services. With a staff consisting of a part-time secretary and a receptionist, Claimant handled the secretarial work for five offices. Claimant sold the business after a year, and went to work at Nanaimo Regional General Hospital in Nanaimo, B.C.

9. Claimant worked at the hospital from 1986 until 1998, primarily in clerical and secretarial positions. After leaving the hospital, Claimant worked a variety of part-time or seasonal jobs, including sales associate in the garden department of the Nanaimo Wal-Mart, teaching at the Nanaimo and Parksville campuses of Malaspine University, delivering newspapers, and as a housekeeper, receptionist, night janitor, and contract gardener at a retirement community in Nanaimo.

10. Claimant first went to work for Employer at its Nanaimo store in September 2000. She started as an associate in the electrical department. In April 2001, she transferred to the Idaho Falls, Idaho, store in preparation for the opening of the Pocatello store in July 2001.

11. In addition to the work discussed herein, Claimant worked as a writer starting in about 1990. She wrote free-lance gardening columns for both *The Daily News*, in Nanaimo, and *Ladysmith-Chemainus Chronicle* in Ladysmith, B.C. In 1994, she published her book, *Island Gardening*.

PRIOR MEDICAL HISTORY

12. Claimant has a lengthy medical history, which is extraordinarily well documented thanks in part to the Canadian health system. Portions of her medical history directly relevant to this proceeding are discussed herein.¹

¹ The Referee directs the attention of Counsel to the case of *Mills v. J.R. Simplot Co., and State of Idaho, Industrial Special Indemnity Fund*, 2007 I.I.C. 0903 (December 14, 2007), and, in particular, to footnote 1 of that decision. Although the Referee did not take the time to actually calculate the total pages of exhibits in this proceeding, the ratio of *relevant* exhibits to total exhibits was discouraging. The exhibits filled four binders, taking up almost an entire foot of shelf-space. Given that Claimant's pre-existing diagnoses and conditions were not disputed, and her subsequent injuries are not relevant to the issue of disability, the material relevant to a decision in this proceeding could easily have fit into one 2-1/2 inch binder.

13. When Claimant was in her early twenties, she was injured in a motor vehicle accident when she was ejected from the vehicle. She injured her right knee and hip in the accident.

14. In the early 1970s, Claimant began experiencing intermittent neurological symptoms. The differential diagnosis at that time was multiple sclerosis (MS). The MS diagnosis was confirmed in 1982. Claimant's MS symptoms are largely in remission, but occasionally will flare for a period of time. Claimant's MS causes urinary retention and urinary urgency, which Claimant has managed for many years by self-catheterization.

15. In the mid-1980s, Claimant began having trouble with her right knee. An arthroscopy revealed degenerative arthritis. Claimant had an arthroscopic abrasion arthroplasty in 1986 in an attempt to forestall a complete right knee arthroplasty.

16. In 1992, Claimant underwent a total left hip arthroplasty with a good post-surgical result.

17. In early April 1995, Claimant had a total right hip arthroplasty, followed several weeks later by a complete right knee replacement. She had excellent results from both procedures.

18. In 1997, Claimant's employer observed that she seemed to have suffered some hearing loss and recommended that she have a hearing test. Claimant was tested, hearing loss was noted, and she was fitted with hearing aids. At some point in time, the hearing aids became unusable, and Claimant stopped wearing them and did not replace them.

19. Claimant has a long history of degenerative arthritis in her left knee, and has been counseled that she will need a total left knee replacement, the timing of which is at her discretion.

THE INDUSTRIAL ACCIDENT

20. Claimant was working in the outdoor garden center at the Idaho Falls store on May 24, 2001, when a cart loaded with bricks rolled into her, bumping her on the right leg and causing some pain in her hip. She did not fall, and continued to work. At lunch, she went to her car and iced her hip, and when she returned to the store after her break, her hip pain made it difficult to walk. Claimant immediately reported the accident and sought medical care. She was treated by Stephen Coker, M.D. X-rays showed that she had fractured her greater trochanter just below her artificial hip joint. The fracture was not displaced, and Claimant was treated conservatively with good results. She returned to work part-time in July at the Pocatello store and continued to work without difficulty.

21. In December 2001, Claimant encountered Dr. Coker at her workplace, and he noted that she was still limping. He recommended that she start some home exercises to strengthen her right hip abductor muscles. Claimant was familiar with the exercises because of her previous hip surgery. Claimant started performing the exercises that evening and after one or two repetitions felt a “pop.” She immediately stopped the exercises and from that point forward began having increasing pain in her hip.²

22. Claimant continued to see Dr. Coker. She was told that her trochanteric fracture had healed and was offered little in the way of treatment for her worsening hip pain. On March 28, 2002, Richard T. Knoebel, M.D., conducted an independent medical evaluation (IME) of Claimant’s condition. He declared her to be medically stable, and awarded her permanent partial impairment of 6% of the whole person for the trochanteric fracture.

² In its briefing, ISIF takes the position that this incident constituted a new injury. There is no support in the record for such a position, and no physician, whether as a treater or an evaluator, suggested that Claimant’s hip revision was anything other than a result of her industrial accident.

23. Claimant continued to work and to have worsening hip pain. In the spring of 2004 she managed to obtain new imaging of her right hip. The imaging revealed substantial deterioration of her artificial hip and dislocation of her trochanteric fracture. Dr. Coker referred Claimant to Dr. Selznick due to the complexity of her situation.

24. After conducting some additional diagnostic testing, Dr. Selznick undertook a revision of Claimant's right hip arthroplasty. During surgery, Dr. Selznick confirmed that Claimant's trochanteric fracture had not healed and had become displaced. In addition, the plastic lining of the hip joint was not just deteriorating, but had broken. The migrating fragments of the broken lining had caused significant bone loss in the top of Claimant's femur. Dr. Selznick chipped out the old plastic liner, leaving the metal hip socket from Claimant's initial arthroplasty. He installed a new liner in the existing metal hip socket and inserted a new femoral stem and a new ball for the hip joint. He then realigned the displaced trochanter and clamped the bone in place. Dr. Selznick described the surgery as extremely challenging.

25. Post-operatively, Claimant did extremely well. In fact, four weeks after her surgery Dr. Selznick described her as "doing exquisitely well status post a very difficult right hip revision." Dr. Selznick Depo., Ex. 2, p. 13.

26. When Dr. Selznick saw Claimant for her eight-week follow-up, he noted:

She is doing really well. She still has a bit of an antalgic gait but her pain is markedly improved and she is very pleased. I do not think going back to work would be in her best interest. Given all her total joints, her arthritic condition of the left knee, and the fact that she has now had a revision surgery of that right total hip, I do not think she would be a candidate to return to work.

I do think medical disability and/or retirement should be considered for this gal who is 63. I do not think returning to a laborious type job would be appropriate for her.

Id., at p. 12.

27. At Claimant's final follow-up visit, Dr. Selznick observed:

My clinical impression is that [Claimant] is doing absolutely fabulously after very extensive revision surgery of her right hip, which included a polyethylene liner exchange, removal of a loose cemented stem, and conversion to a long-stemmed prosthesis. It was a very involved surgery, and at this point, her interval result is absolutely excellent.

Restrictions would including [sic] no lifting more than 25 lbs., except on an occasional basis, and no stooping, bending, or crouching. She should avoid twisting activities. No excessive walking, no ladders, no impact type activities, and no jumping.

At this point, given [Claimant's] extensive revision surgery of her right hip, I believe that she is not a candidate to return to work, and I would suggest early retirement. Her right hip was, indeed, injured at work, and this necessitated her revision surgery because of premature loosening of her right total hip. She has now had her second total hip. She is young, i.e. she was born in 1941, and I just would not recommend her returning to the labor type position that she was doing previously. Sedentary activities only are recommended just to protect her in the future as far as that right hip is concerned.

Id., at pp. 10-11.

NON-INDUSTRIAL POST-ACCIDENT MEDICAL HISTORY

28. In January 2002, Claimant had surgery on her left foot to remove a bunion.

29. In April 2003, Claimant had a triple arthrodesis with screw and staple fixation on her right foot.

30. In April 2005, hearing tests showed bilateral hearing loss that could result in loss of speech signal from 50% to 100% without amplification. At the time of hearing, Claimant did not have hearing aids. She testified that she did not have the financial ability to purchase the recommended hearing aids.

31. In September 2005, an ophthalmologic examination showed Claimant had a refractive error that was corrected by prescription lenses, mild cataract with minimal effect on

her visual acuity, a small visual field limitation, a surgically treated left retinal tear that was stable, and experienced problems with glare at night.

32. In October 2006, Claimant tripped and fell, sustaining a comminuted fracture of her right proximal humerus with impaction, displacement, and angulation. She was treated conservatively with good results.

PPI

33. On March 2, 2005, Christian Gussner, M.D., a physiatrist, and Paul J. Collins, M.D., an orthopedic surgeon, saw Claimant for an IME at the request of Employer. The panel reviewed Claimant's medical records, took a patient history, conducted a thorough examination, and offered opinions as to causation, calculated impairment ratings, and imposed restrictions.

Relevant findings included:

- The panel agreed with Drs. Knoebel and Selznick that the need for the complete revision of Claimant's right hip arthrodesis was due to the industrial accident of May 24, 2001;
- Claimant was medically stable *vis a vis* her right hip;

RATINGS

- The panel gave Claimant the following whole person impairment ratings, calculated using the *AMA Guides to the Evaluation of Permanent Impairment*, 5th ed., (*AMA Guides*):

Pre-existing Conditions

- 15% for the first right hip arthroplasty;
- 15% for the left hip arthroplasty;
- 15% for the right knee arthroplasty;
- 3% for the pre-existing arthritis in the left knee based on the diagnoses-related

method or 8% based on the loss of range of motion method;

- 0% to 35% for moderate to severe hearing loss;³
- 4% for her right foot triple arthrodesis;⁴
- Claimant's MS is not ratable at the present time, but could become ratable on either a temporary or permanent basis should her symptoms become active. MS is a progressive neurological disease whose course is highly variable;
- Rating for Claimant's vision deficit was deferred;

Industrial Injury

- 0% net impairment for the second right hip arthroplasty (actually rated at 15%, but apportioned entirely to the first arthroplasty and accounted for in the pre-existing rating for a total of 15% for the right hip following the second surgery;
- 6% for the fracture of the greater trochanter attributable to the industrial injury;

Subsequent Injury

- 0% for left foot surgery resulting in non-union of the second metatarsal;
- Claimant's 2006 shoulder injury occurred subsequent to the panel report and is not included in the panel's ratings;

RESTRICTIONS

- Hip replacements—avoid stooping, crouching, squatting, kneeling, ladders, and impact

³ By subsequent letters dated June 2, 2005, and January 16, 2007, Dr. Gussner calculated Claimant's PPI for hearing loss to be 7% based on the results of a hearing test conducted in February 1997, and 13% PPI for hearing loss based on the results of a hearing test conducted in April 2005. Dr. Gussner could not estimate Claimant's actual PPI at the time of her industrial injury except to note that the earliest test was four years prior to her industrial accident and the second was four years after her industrial accident, so an average of the two ratings (10%) would represent a logical progression of Claimant's hearing loss between the two dates.

⁴ Claimant's triple arthrodesis of the right foot occurred subsequent to her industrial injury, but was related to a 1998 trauma.

activities; lifting restricted to 25 pounds occasionally and 10 pounds repeatedly; continuous walking not to exceed one hour; these restrictions were not materially increased as a result of the industrial accident and subsequent revision of the right hip prosthesis;

- Right foot arthrodesis—avoid high impact activities, squatting, kneeling and use of ladders; lifting and walking restrictions are the same as for the hip replacements;
- Left foot surgery resulting in non-union of the second metatarsal—avoid high-impact activities;
- Right knee arthroplasty—avoid squatting, kneeling and high impact activities; lifting and walking restrictions are the same as for the hip replacements;
- Left knee arthritis—avoid forceful repetitive movement or high impact activity; avoid continuous or frequent squatting and kneeling;
- MS—variable, depending upon symptoms; avoid prolonged exposure to warm temperatures

34. Dr. Anderson, an ophthalmologist, examined Claimant in the late summer of 2005 at the request of Employer. On September 20, he provided an impairment rating of between 10% and 29% of the whole person based on the *AMA Guides*. The impairment related primarily to loss of field of vision and glare symptoms. Pursuant to a request from Employer, Dr. Anderson clarified via letter dated October 13, 2005, that he rated Claimant's visual impairment at 28.6% of the whole person based on Table 12-10 of the *AMA Guides*. Subsequently, on January 24, 2007, Dr. Anderson again reviewed his impairment rating of Claimant and offered the following explanation:

[Claimant's] main concern on the August 8, 2005 evaluation was limited night driving due to glare. On September 2, 2005, her glare visual acuity was 20/50 in the right eye and 20/60 in the left eye.

In the State of Idaho, she can qualify for driver's license without wearing glasses. She does have an astigmatism correction which does improve her visual function. Wearing correction glasses should reduce her glare and improve her visual activity. Even though she can obtain a driver's license, day and night, with or without glasses, she still may feel uncomfortable driving at night due to her glare symptoms. This is not unusual for a 63 year old. As one ages, the pupils tend to become smaller which allows one to see clearer, however, smaller pupils let in less light. This results in decreased vision at night.

In review of her impairment rating, it is noted that she has excellent visual acuity of 20/20-2 in the right eye and 20/20-1 in the left eye. The impairment rating primarily results from a constricted visual field, and her glare symptoms, which may be subjective.

Her correct vision should not impact her abilities to read, operate machinery, view computer screens, or work in low light situations. It is my recommendation that she utilize the best lighting situation possible. Her visual function should not impact her activities of daily living except that she may prefer to limit her driving to daylight hours. Because of her concerns regarding night driving, I would recommend that she not pursue career choices that involve professional nighttime driving.

Ex. UU.

35. ISIF took Dr. Anderson's deposition prior to the hearing. One purpose of the deposition was to determine whether Dr. Anderson, who first saw Claimant in 2005, could extrapolate from pre-accident medical records the status of Claimant's vision at the time of the industrial injury. Dr. Anderson testified that based on his review of the pre-accident medical records, Claimant's vision in May 2001 would "be quite close" to her vision in 2005 when he examined her.

VOCATIONAL EVIDENCE

Nancy Collins

36. Claimant retained Nancy Collins, Ph.D., to provide a vocational evaluation of

Claimant including disability, employability, restrictions, and pre-existing conditions. The Commission is familiar with Dr. Collins' qualifications as a vocational expert. Her report is dated May 10, 2005. Dr. Collins reviewed Claimant's work history and found that Claimant had worked at unskilled, semi-skilled, and skilled positions, and was not limited as to new skill acquisition. Over the course of her work life, she had performed work at every level of physical exertion—from very heavy to sedentary. Taking into account the restrictions placed on her by the IME panel, Dr. Collins determined that Claimant was limited to sedentary work, but did not have access to all jobs in the sedentary exertion level.

37. Dr. Collins used a software program to identify Claimant's transferrable skills. Comparing Claimant's skills to jobs available in the national labor market, Dr. Collins initially identified 122 jobs for which Claimant had the requisite skills. Adjusting for a sedentary exertion level reduced the available job titles by half. Accounting for hearing loss and some loss of dexterity in her hands due to her MS, there were no job titles available to her in the national labor market. In particular, Dr. Collins noted that call center or customer service jobs on the telephone were problematic for individuals with hearing loss, and Claimant's problems with her hands affected her ability to keyboard.⁵ Dr. Collins noted that Claimant's treating physician did not believe Claimant should return to work given her age and medical history. Dr. Collins opined that Claimant's age was an important factor affecting Claimant's employability.

38. Dr. Collins also discussed the issue of Claimant's earning capacity in her report, finding that Claimant had no earning capacity other than the highly speculative potential of earning a small sum from her writing endeavors.

⁵ In September 2005, Employer offered Claimant a position in the call center. Claimant declined the position because her past experience taught her that she could not hear sufficiently well to do telephone work.

39. Ultimately, Dr. Collins opined that Claimant was totally and permanently disabled subsequent to her 2001 industrial accident.

William Jordan

40. ISIF retained William Jordan, MA, CRC, CDMS, to prepare a report addressing Claimant's employability before and after her May 2001 industrial accident. Mr. Jordan's vocational qualifications are well known to the Commission. Mr. Jordan met with Claimant to obtain her employment and educational history and reviewed pertinent medical records to obtain information regarding injuries, impairments, and restrictions. Mr. Jordan's report is dated September 17, 2007.

41. Mr. Jordan's report and Dr. Collins' report are generally consistent with regard to Claimant's background and her employment, educational, and medical history. Where the experts differ is in their analysis of how those facts affect employability. Mr. Jordan determined that both sedentary and some light-duty jobs were available to Claimant given her demonstrated skills and her physical restrictions. Mr. Jordan identified fifteen occupational titles available in the Pocatello labor market for which Claimant had the necessary skills and which were within her physical restrictions. Within those fifteen occupational titles were approximately 3,330 jobs in the Pocatello area.⁶

42. Mr. Jordan also identified 18 job openings that were listed with the Idaho Department of Labor at the time he prepared his report and for which Claimant was qualified. Mr. Jordan deemed all of these positions to be within Claimant's physical limitations. Included were a number of secretarial positions (legal, administrative, medical, etc.), customer service representatives, and some managerial positions in retail establishments.

⁶ These are not job openings, but rather the cumulative number of those positions that are utilized by employers in the labor market at the time of the survey.

43. Finally, Mr. Jordan contacted 11 employers regarding the type of work that was required for specific openings. These positions included customer service, market research, sales, and management positions.

44. Mr. Jordan concluded that the only non-medical factor that affected Claimant's employability was her age. He opined that Claimant was capable of returning to work in sedentary or light positions and that there were regular and continuous openings for positions that were within Claimant's restrictions and for which she had the necessary skills. While Claimant had a number of medical conditions that affected her employability, most of them pre-existed her employment with Employer and had not precluded her from working prior to May of 2001.

45. Mr. Jordan did not believe that Claimant's efforts to find employment constituted a meaningful job search. He noted that Claimant's search was limited to sending her resume with a form cover letter to businesses that she found in the phone book. Claimant was not registered with the local Job Services office, and had not made use of the Job Service listings in her work search. Neither did she take advantage of the services available to her through the Industrial Commission Rehabilitation Division (ICRD). Claimant failed to concentrate her efforts on actual job openings, to fill out and return applications, or seek to meet with potential employers. She interviewed for two positions but did not hear back and did not follow up. Mr. Jordan described Claimant's scattergun letter writing campaign as one of the least effective ways to seek work.

ICRD

46. In November 2004, Employer/Surety referred Claimant's case to ICRD. Randy Parkin staffed the case. Mr. Parkin contacted Claimant regarding the referral, and began staffing

the case by contacting the parties and gathering medical records. Mr. Parkin staffed Claimant's case through February 2007, making regular contacts with Claimant and the other parties. Mr. Parkin was aware of Claimant's job search efforts, which he characterized as a good effort to find employment as compared to all of the injured workers he has encountered. Ultimately, Claimant focused on other issues, including a return to Canada, and ICRD closed her case file.

47. At Employer's request, Mr. Parkin did prepare a labor market analysis. The revised report is dated February 22, 2006 on the first page and September 15, 2006 on the remaining pages. The Referee believes that the report was actually finalized on February 22, 2007, with the initial report prepared in September 2006. Mr. Parkin looked at all the same factors that Dr. Collins and Mr. Jordan did in reaching their conclusions. Mr. Parkin concluded that Claimant had a number of employment options within the Pocatello area that were within her limitations and for which she was qualified. The positions were also roughly equivalent in earning capacity to her pre-injury wage.

DISCUSSION AND FURTHER FINDINGS

DISABILITY

48. The definition of "disability" under the Idaho workers' compensation law is:

. . . a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided in section 72-430, Idaho Code.

Idaho Code § 72-102 (10). 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. A 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. Idaho Code § 72-425. Among the pertinent nonmedical factors are the following: the nature of the physical disablement; the cumulative effect of multiple injuries; the employee's occupation; the employee's age at the time of the accident; the employee's diminished ability to compete in the labor market within a reasonable geographic area; all the personal and economic circumstances of the employee; and other factors deemed relevant by the Commission. Idaho Code § 72-430.

49. The burden of proof is on the claimant to prove disability in excess of impairment. Expert testimony is not required to prove disability. The test is not whether the claimant is able to work at some employment, but whether a physical impairment, together with non-medical factors, has reduced the claimant's capacity for gainful activity. *Seese v. Ideal of Idaho*, 110 Idaho 32, 714 P.2d. 1 (1986).

50. There are two ways that a worker can prove total and permanent 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).

When a claimant cannot make the showing required for 100% disability, then a second methodology is available:

The odd-lot category is for those workers who are so injured that they can perform no services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.

Jarvis v. Rexburg Nursing Center, 136 Idaho 579, 584 38 P.3d 617, 622 (2001) citing *Lyons v.*

Industrial Special Indem. Fund, 98 Idaho 403, 565 P.2d 1360 (1977). The worker need not be physically unable to perform any work:

They are simply 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.

Id., 136 Idaho at 584, 38 P.3d at 622

51. For the reasons discussed below, the Referee finds that Claimant is statutorily totally and permanently disabled as a result of her impairment and non-medical factors alone.

Impairment

52. Claimant had a rather remarkable medical history prior to the industrial injury that is at issue here, most notably, bilateral hip replacements and a knee replacement. Other factors that pre-existed her industrial injury, such as her degenerative left knee and her hearing loss, were of lesser magnitude. Claimant's MS, which alone could have been completely debilitating, has not been a significant factor in limiting Claimant's activities of daily living, notwithstanding her need for self-catheterization, and will not be analyzed further.

53. None of Claimant's pre-existing conditions were industrial in nature, and none were ever rated contemporaneously. By any reasonable measure, a calculation of Claimant's undisputed impairment prior to the injury at issue was substantial. Claimant's whole person PPI before the subject injury was 96% (15% [right hip] + 15% [left hip] + 15% [right knee] + 10% [hearing] + 8% [left knee]⁷ + 4% [ankle] + 29% [vision]⁸).

⁷ The IME panel identified a range of 3% to 8% PPI for the degenerative arthritis in the left knee. Given the severity of the degeneration, and the fact that Claimant had repeatedly been told that she could have a left knee arthroplasty any time she chose, the Referee finds that 8% represents the rating most appropriate for Claimant's left knee condition.

⁸ While Claimant's documented loss of visual field and glare symptoms may have constituted a 28.6 impairment (rounded up to 29%) under the *AMA Guides*, it did not result in any disability. Claimant could obtain an unrestricted drivers' license in Idaho without the use of corrective lenses, and without legal restrictions on night driving.

54. The IME panel rated Claimant's impairment as a result of the industrial accident at 6%, which was the rating given by Dr. Knoebel in 2002. Even by the IME panel's ratings, Claimant's total impairment exceeds 100%, and that doesn't consider pertinent non-medical factors. Further, the Referee finds that Dr. Selznick's rating of the subject injury better represents Claimant's impairment. Dr. Selznick, who performed Claimant's hip revision surgery, disagreed with Dr. Knoebel's 6% rating for two reasons. First, Claimant had not reached medical stability from her industrial accident when she was rated in 2002. In fact, she did not become medically stable until mid-September 2004, some three months after her revision surgery. Second, Dr. Knoebel rated Claimant for a healed, non-displaced fracture of the greater trochanter, when, in fact, she reached maximum medical improvement with a non-union and some displacement of the fracture despite Dr. Selznick's otherwise extraordinary surgical outcome. Dr. Selznick estimated Claimant's PPI resulting from the industrial injury to be between 25% and 40% including the total joint, or 10% to 25% for the trochanteric fracture alone. Averaging the extremes of Dr. Selznick's range, and rounding up, results in a PPI rating of 17% for the displaced fracture with nonunion—a rating that the Referee finds better reflects Claimant's real condition as a result of the industrial accident and is consistent with the rating obtained by using the diagnosis-based estimates of impairment (DRE method) as set out in the *AMA Guides*. Adding the pre-existing impairment and the PPI related to the industrial accident results in a total PPI of 113%.

Restrictions

55. Claimant's case is illustrative of the difference between impairment and disability. One can have substantial impairment but little or no disability. Such was the case for

Claimant prior to her industrial accident. She experienced neither significant loss of access to employment, nor significant loss of wage-earning capacity as a result of her accumulated impairments prior to her industrial accident.

56. What changed for Claimant as a result of her industrial injury were her work restrictions. Following her accident she was, at a minimum, limited in lifting, stooping, crouching, squatting, kneeling, ladders, impact activities, and walking. The IME panel opined that these restrictions, and other incidental restrictions related to her knees and her fused ankle, were really no different than the restrictions that her bilateral hip replacements and her right knee replacement imposed upon her before the accident. Mr. Jordan's vocational opinion was premised in part on the IME panel's opinion—and since the panel viewed Claimant's restrictions as virtually the same both before and after the industrial injury, there were still many jobs available within her restrictions for which she was qualified. The Referee finds the panel's approach, and Mr. Jordan's reliance upon it, flawed in that it formulates work restrictions that did not previously exist, applies them retroactively, then analyzes Claimant's condition as though the restrictions had always been in place.

57. Dr. Selznick takes a different approach to Claimant's restrictions. He does not presume that she has any prior work restrictions, noting that prior to the accident, she was by all accounts functioning very well. Dr. Selznick generally agreed with the restrictions that the panel would have imposed following Claimant's hip revision. However, agreeing with the restrictions is not the same as an authorization to return to work. Dr. Selznick was clear in both his chart notes and especially in his deposition, that he believed that not only should Claimant live a sedentary lifestyle, but that she should not return to *any* kind of work. Dr. Selznick's reasoning was not necessarily that Claimant was unable to work, but that it was in her long-term best

interest not to do so. He discussed at length in his deposition the extraordinarily good result that had been achieved as a result of the hip revision, but that Claimant should do everything in her power to assure that she did nothing to re-injure her right hip because there was neither enough luck nor enough femur left to be able to fix Claimant's hip again. In fact, the *AMA Guides* use just such an example in discussing the use of the DRE method of calculating impairment:

A good example is that of an individual impaired because of a successful replacement of a hip. This person may function well but require prophylactic restrictions of activities of daily living to prevent a further impairment, such as premature failure of the prosthesis.

AMA Guides, §17.2j, p. 545.

58. Claimant's hearing loss is also a significant factor in nudging Claimant from a worker with substantial impairment but little disability to being totally and permanently disabled. Assuming for purposes of argument that Dr. Selznick's opinion on Claimant's ability to work is disregarded, her relatively small hearing impairment translates into a substantial obstacle to employment. To presume that her hearing loss can be eliminated by the use of hearing aids is speculative, particularly with regard to work requiring use of the telephone. Whether hearing aids would permit Claimant to function effectively in a job where telephonic communication is key (customer service, call center, secretarial, receptionist) is unknown, yet such positions seem to present the most likely opportunities for sedentary employment. In fact, Claimant does not have hearing aids, nor did she have hearing aids at the time of the industrial injury. Her disability must be determined based on *actual* current condition, not speculatively on what her condition might be *if* she were to wear hearing aids. See, *Dursteler v. Basic American Foods, and Lumbermen's Mutual Casualty Co., and State of Idaho, Industrial Special Indemnity Fund*, 2006 I.I.C. 0284 (04/25/2006). Having observed Claimant at hearing, it is clear that her hearing can make communication difficult. While she may be able to compensate in face-to-face

conversations, it is apparent that in her current condition she would not be suited to a job requiring substantial use of the telephone.

59. Finally, Claimant's age does play a part in her disability, and while it might not represent an obstacle in every circumstance, in combination with her other impairments, it makes her a less-than-attractive candidate for hire.

60. Claimant's cumulative impairments alone exceed 100%, and non-medical factors are also a consideration in calculating her disability. Claimant is 100% disabled as a matter of law, and there is no need to analyze whether Claimant is an odd-lot worker.

ISIF LIABILITY

61. Once total disability has been determined, there are four requirements that must be proven in order for a claimant to establish ISIF liability under Idaho Code § 72-332.

1. Whether there was a preexisting impairment;
2. Whether the impairment was manifest;
3. Whether the impairment was a subjective hindrance; and
4. Whether the impairment in any way combines in causing total permanent disability.

Dumaw v. J. L. Norton Logging, 118 Idaho 150, 155, 795 P.2d 312, 317 (1990). ISIF's defense in this proceeding is based upon the fourth requirement set out in *Dumaw*.

62. To satisfy the "combined with" requirement in I.C. § 72-332(1), a claimant must show that *but for* the pre-existing impairments, he would not have been totally disabled. *Garcia v. J.R. Simplot Co.*, 115 Idaho 966, 772 P. 2d 1973 (1989). (Emphasis added). Although the "combined with" requirement of Idaho Code § 72-332 has generated a number of appellate decisions, ISIF has been relieved of liability in two common scenarios: 1) where the claimant was already totally disabled as an odd-lot worker prior to the last industrial injury; and 2) where

the Claimant became totally disabled solely as a result of the last industrial injury. The Court has carefully laid out a framework for analyzing these two common situations and determined that the “combined with” requirement has not been met in either situation. In this proceeding, ISIF makes three arguments in support of its position that Claimant has failed to establish the requisite “combination.”

Odd-Lot

63. ISIF asserts that Claimant was totally and permanently disabled as an odd-lot worker before the accident that is the subject of this proceeding. This argument is not supported by the record. As discussed previously, prior to the last accident, Claimant was under no work restrictions and was working in a light-to-medium position without any real problems from her multiple joint replacements, her hearing, or her age. There is no evidence that Employer was “sympathetic” or made accommodations that enabled Claimant to work. She was not a long-time employee who might have been retained in honor of many years of loyal service. Employer is a large international retailer, and Claimant was a regular employee. Nothing in the record suggests that Employer was Claimant’s employer of last resort.

Statutorily Permanently Disabled

64. ISIF next argues that Claimant was statutorily totally and permanently disabled *prior* to her industrial injury by virtue of her combined impairment ratings. Once again, the Referee points to the previous discussion herein regarding the difference between impairment and disability. Claimant did, in fact, have substantial impairment prior to her industrial accident. But impairment is not disability, and prior to the industrial accident, the Referee is hard-pressed to find even minimal disability associated with Claimant’s considerable impairment. In particular, Claimant’s 29% rating for her loss of visual field and glare symptoms did not prevent

her from obtaining an unrestricted drivers' license in Idaho—even without corrective lenses.

Claimant Disabled as a Result of Hearing and Age Alone

65. Finally, ISIF asserts that Claimant fails the “combined with” test because it was her hearing and her age alone, not her industrial accident, that caused her disability. The fallacy of this argument is easily demonstrated:

- Claimant was hired by Employer in September 2000. At that time, she was 59 years old. According to Dr. Gussner's analysis, Claimant's hearing impairment was about 10% at the time she was hired.
- On the date of her injury, when Claimant was working full-time at a light-to-medium position, she was 59 years old with a hearing impairment of about 10%.
- According to ISIF's argument, immediately after the industrial accident Claimant was totally and permanently disabled because she was 59 years old and had a 10% hearing impairment.

Claimant had no restrictions and little, if any, disability (despite substantial impairment) immediately before her accident. Yet, according to ISIF's argument, immediately after her accident, her hearing and her age, both unchanged, caused her to be totally and permanently disabled.

66. Ultimately, it was the combination of Claimant's pre-existing conditions with the injury she sustained in the industrial accident that limited Claimant to sedentary work and/or a sedentary lifestyle.

CAREY APPORTIONMENT

67. The *Carey* formula only applies when a preexisting impairment combines with the current injury to create total and permanent disability. *Hamilton v. Ted Beamis Logging &*

Constr., 127 Idaho 221, 899 P.2d 434 (1995). Its original purpose was to apportion any non-medical disability factors between the employer and the ISIF. The formula comes from *Carey v. Clearwater County Road Department*, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984), in which the Idaho Supreme Court held:

[T]he appropriate solution to the problem of apportioning the nonmedical disability factors, in an odd-lot case where the fund is involved, is to prorate the nonmedical portion of disability between the employer and the fund, in proportion to their respective percentages of responsibility for the physical impairment.

Henderson v. McCain Foods, Inc., 142 Idaho 559, 567, 130 P.3d 1097, 1105 (2006). In *Carey*, the Claimant was deemed totally and permanently disabled as an odd-lot worker. But use of the *Carey* formula is not limited to odd lot cases—it is equally applicable to allocate non-medical factors when a claimant’s medical and non-medical factors total 100%.

68. As it turns out, the formula for allocating the non-medical portion of a claimant’s disability is precisely the same formula used to calculate the apportionment of total disability between ISIF and other sureties when ISIF has been found liable pursuant to Idaho Code § 72-332. Whether a claimant’s total disability resulted from the application of the odd-lot doctrine, from a combination of medical and non-medical factors, or from medical factors alone, the formula set out in *Carey* is used to apportion the disability between liable parties.

69. Claimant had permanent impairments of 96% before the industrial accident and 113% after the accident, making ISIF liable for 85% of Claimant’s total disability (96/113). Had Employer/Surety remained parties to the proceeding, they would have been liable for the remaining 15% (17/113).

CONCLUSIONS OF LAW

1. Claimant is totally and permanently disabled based on medical factors alone.
2. ISIF is liable for 85% of Claimant’s disability benefits.

RECOMMENDATION

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

DATED this 19 day of June, 2008.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RAMONA SOMMER,)	
)	
Claimant,)	IC 2001-012652
)	
v.)	
)	ORDER
STATE OF IDAHO, INDUSTRIAL)	
SPECIAL INDEMNITY FUND,)	Filed: July 7, 2008
)	
Defendant.)	
_____)	

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 totally and permanently disabled based on medical factors alone.
2. ISIF is liable for 85% of Claimant's disability benefits.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 7 day of July, 2008.

INDUSTRIAL COMMISSION

James F. Kile, Chairman

/s/ _____
R.D. Maynard, Commissioner

/s/ _____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of July, 2008, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS**, and **ORDER** were served by regular United States Mail upon each of the following persons:

REED LARSEN
PO BOX 4229
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THOMAS B HIGH
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TWIN FALLS ID 83303-0366

djb

/s/ _____