

(PPD/PTD) in excess of permanent impairment, including whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine.¹

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant sustained an industrial injury to her lower back on June 3, 2004 for which she underwent lumbar surgery on December 30, 2004. Claimant contends that she is totally and permanently disabled based on her permanent medical impairment combined with relevant non-medical factors. Alternatively, Claimant asserts that the evidence establishes a *prima facie* case that she is an odd-lot worker and that Defendants have failed to show that some kind of work is regularly and continuously available to her.

Defendants contend that Claimant failed to meet her burden of proof to establish total and permanent disability. Defendants argue that Claimant's current unemployment is a result of termination for a performance issue and not due to Claimant's physical limitations or lack of skills.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Exhibits A through L admitted at hearing;
2. Claimant's testimony taken at hearing;

¹ Defendants raised the issue of maximum medical stability at the outset of hearing based on recommendations for additional medical treatment that were first contemplated in September 2008. Claimant objected to the inclusion of the additional issue and maintained that the recommended treatment was to prevent Claimant's condition from deteriorating and did not impact the date of maximum medical stability previously identified as August 17, 2005. Defendants' request was denied as untimely asserted but subject to reconsideration and re-opening of the record after notice to the parties if the evidence established that failure to consider the issue of medical stability would result in an unjust or nonsensical decision. No such evidence was presented.

3. The post-hearing deposition taken on December 16, 2008 of vocational rehabilitation expert Richard G. Taylor, Ph.D., with one exhibit attached; and

4. The Industrial Commission's legal file.

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

FINDINGS OF FACT

Background

1. Claimant was born in 1951 and was 57 years old at the time of hearing. She was born and raised in Pocatello, Idaho, and returned to Pocatello after periods of working in California and New York. Claimant attended high school through the eleventh grade but became pregnant and dropped out of school to get married. Her grades in school were poor and she recalls earning Ds and Fs. Her worst subjects were math and history. Her best subject was reading and she continues to enjoy reading as a hobby.

2. During high school, Claimant received vocational training to become a certified nursing assistant (CNA). Claimant attempted to obtain a GED in the early 1970s, but experienced difficulty and did not complete the study course or take the required examination.

3. Claimant knows how to drive but has never obtained a driver's license. She pursued obtaining a license on one occasion, but did not pass the test. Claimant relies on her husband for transportation.

4. Claimant worked as a CNA in nursing homes following high school. The work was physically demanding and required her to transfer non-ambulatory residents. She stopped working as a CNA by the 1980s because of the emotional toll of having patients pass away. Her CNA license lapsed several years ago and has not been renewed.

5. The majority of Claimant's past work history involves housekeeping at motels. Claimant worked at a potato processing plant for approximately two years in the early 1980s as a trimmer and performed sanitation duties, but has otherwise cleaned hotel rooms since she stopped working as a CNA.

6. In November 1998, Claimant went to work in Pocatello as a housekeeper at a hotel property that subsequently underwent multiple name and ownership changes. Employer acquired the property and operated the hotel as The Red Lion.

7. Claimant denied the existence of back pain or problems prior to her June 2004 injury. A report of past claims reflects a 1996 low back injury while Claimant was working for Comfort Inn. There are no medical records reflecting pre-existing back problems and upon cross-examination Claimant indicated that she did not recall injuring her back in 1996 or losing time from work around that time period.

Injury and Treatment

8. On June 3, 2004, Claimant was in the hotel's dishwashing bay when she slipped and experienced an immediate onset of low back pain. She received treatment at the Portneuf Medical Center Emergency Room on the same day. Claimant was initially diagnosed with an acute lumbar strain and a course of conservative treatment was initiated.

9. Claimant's symptoms did not resolve and a lumbar MRI was performed on August 5, 2004 that identified an L5-S1 annular tear with disc collapse and thickening of the S1 nerve root. Additional conservative treatment did not eliminate Claimant's symptoms and she was referred for a surgical consultation as well as a second opinion. Both doctors felt that Claimant was an appropriate surgical candidate.

10. On December 30, 2004, Claimant underwent a bilateral hemilaminectomy at L5-S1 performed by W. Scott Huneycutt, M.D. The surgical procedure included an instrumented fusion with the implantation of titanium hardware. Claimant's immediate post-operative care was uneventful other than a brief bout of high fever and she was discharged from the hospital on January 5, 2005.

11. Dr. Huneycutt referred Claimant back to physical medicine and rehabilitation doctor, Mary Himmler, M.D., with whom Claimant treated prior to surgery. Dr. Himmler prescribed medication and physical therapy. She certified that Claimant reached maximum medical improvement on August 17, 2005 and assigned a 10% whole person permanent impairment rating in accordance with the 5th Edition of the *American Medical Association Guides to the Evaluation of Permanent Impairment*.

12. Claimant continued to report symptoms of mechanical low back pain and radiculopathy on a consistent basis during treatment with Dr. Himmler through September 2007, in spite of the fact that diagnostic studies revealed a solid fusion. Dr. Himmler prescribed various types of medication including Vicodin, Norco, Soma and Lidoderm patches. Neither medication nor use of a TENS unit provided lasting relief. Dr. Himmler referred Claimant to Ryan Hope, M.D., for treatment of chronic pain.

13. Dr. Himmler continued to manage Claimant's prescription medication care and followed Claimant's case concurrently with Dr. Hope. In October 2007, Dr. Hope ordered a repeat lumbar MRI and recommended epidural steroid injections (ESIs) and/or SI joint injections. Claimant was reluctant to pursue injections because of her fear of needles and lack of confidence in the results. Claimant did not return to Dr. Hope until September 2008 at which time Dr. Hope discussed pain management options including possible use of a spinal cord

stimulator and caudal ESIs. Claimant's repeat MRI results confirmed to Dr. Hope that Claimant would be an appropriate candidate for injections but that she did not likely need additional surgery. Two caudal ESIs were performed in October 2008 but did not improve Claimant's condition. In November 2008, Dr. Hope indicated that Claimant's options were to pursue the spinal cord stimulator or transition from short-acting opioids to long-acting opioids.

Post-Surgical Medical Restrictions

14. By March 2005, Dr. Himmler released Claimant to two hours of light-duty work per day with a gradual increase in work hours. At that time, Dr. Himmler felt that Claimant would eventually be able to return to her pre-injury housekeeping position. Claimant's work and hour restrictions fluctuated on a visit-by-visit basis during the summer of 2005. It was noted that Claimant experienced difficulty climbing stairs at work and that an elevator was not available.

15. In August 2005, Dr. Himmler released Claimant to medium-duty work which was described as six to eight hours per day as tolerated; no bending or twisting; no lifting greater than 20 pounds and room cleaning performed only with an assistant. Dr. Himmler also reviewed and approved the job description of front desk agent for Claimant. The front desk position included constant standing and twisting as well as occasional lifting up to 50 pounds. It was unclear whether Dr. Himmler intended to approve the desk agent position subject to previously assigned restrictions or if she was modifying Claimant's restrictions in accordance with the desk agent job description.

16. Dr. Himmler continued to treat Claimant throughout 2005 and 2006. She continued to make slight modifications to Claimant's work restrictions on a visit-by-visit basis depending on Claimant's reports of difficulty or discomfort performing work tasks.

17. In June 2007, Dr. Himmler completed a detailed questionnaire regarding Claimant's work limitations. It is unclear what prompted Dr. Himmler to update Claimant's work limitations in light of the fact that Claimant was not working or involved in vocational efforts during 2007. She identified that Claimant's pain and other symptoms were frequently (34% to 66% of an eight hour work day) severe enough to interfere with her attention and concentration needed to perform even simple tasks; Claimant's medications made her drowsy and dizzy; Claimant was able to walk one to two city blocks without rest or severe pain; Claimant was able to sit for 45 minutes at a time and stand for 15 minutes at a time with total sitting of at least six hours per day and total standing/walking limited to two hours per day; Claimant needed to walk for five minutes every 30 minutes of a shift; Claimant required breaks; Claimant was able to lift/carry less than 10 pounds frequently, 10 to 19 pounds occasionally; 20 pounds rarely and never able to lift 50 pounds or more; Claimant was to avoid twisting, stooping, bending, crouching and squatting; and it was estimated that Claimant's impairments and treatment would result in her being absent from work more than four days per month.

18. Dr. Hope did not address Claimant's work limitations and no physician commented on Claimant's ability to work after June 2007.

Post-Injury Employment

19. Claimant was initially proactive in her return-to-work efforts and sought assistance from the Industrial Commission Rehabilitation Division (ICRD) in October 2004. By mid-October 2004, Claimant returned to work for Employer performing modified housekeeping duties for four hours per day. Claimant was taken off of work in November 2004 pending lumbar surgery. Vocational activities were essentially on hold during Claimant's post-surgical recovery but were re-initiated in March 2005 upon Dr. Himmler's light-duty work release.

20. Claimant returned to work in March 2005, initially working two hours per day. Excellent communication among Claimant, her nurse case manager, Dr. Himmler and the ICRD consultant, along with significant flexibility and accommodation made by Employer, facilitated Claimant's return-to-work on a gradual basis. Claimant was provided with a helper in some circumstances and was subsequently assigned to a position as a room inspector that did not require her to clean rooms.

21. By mid-May 2005, Claimant attempted to work six hours per day but reported increasing symptoms to Dr. Himmler who reduced her hours to four per day. Claimant's progress stalled and efforts to gradually return Claimant to full-time work in her pre-injury job were not successful. The room inspector position was problematic because Claimant was required to climb stairs and check under beds. During May through September 2005, Claimant's work hours fluctuated and her responsibilities alternated between cleaning and inspecting.

22. In October 2005, Employer offered Claimant a position as a front desk agent which was essentially a promotion and paid a higher hourly rate than Claimant had been earning as a housekeeper/inspector. Employer provided Claimant with on-the-job training for new tasks assigned, including use of the computer.

23. ICRD closed its file in November 2005 because Claimant had successfully returned to work 30-40 hours per week for Employer at more than her pre-injury wage. However, Claimant contacted ICRD in January 2006 regarding a request for a reduction in hours worked and a few months later to request assistance in securing payment from Surety for ongoing prescription medication. Claimant was advised by her ICRD consultant that her work schedule issue was not related to her industrial injury claim. The ICRD consultant made various phone calls to resolve the medication issue.

24. Claimant testified that she experienced difficulty acquiring the skills needed in her new position as a front desk agent, especially with computer use. Her concentration was impacted because of either pain or the effects of medication she took for pain. Claimant's skills gradually improved with regard to most of her job duties, but she continued to have difficulty using the computer to post charges to customer accounts. She experienced difficulty standing for prolonged periods of time which was sometimes required.

25. Claimant was terminated by Employer in June 2006 after poor performance in response to a customer call in which the "customer" was actually an individual employed by Employer to evaluate quality assurance. The evidence does not provide an account of the nature of the poor performance or how it was interpreted by Employer. Claimant indicated that she guesses that she did not "sound right" and attributes at least some of her poor performance to experiencing pain on the day she received the test call.

26. Claimant testified that she could tolerate the front desk agent position from a physical standpoint and that she probably would have continued working for Employer if she had not been terminated.

27. Claimant has not made any efforts to seek employment since June 2006. She applied for Social Security Disability benefits soon after her termination and was receiving \$618 per month in benefits at the time of hearing. Claimant testified that she would like to work but can not think of any jobs she could perform, except maybe a ticket-taker. It did not occur to her to contact ICRD for assistance after her termination by Employer and she has not otherwise pursued vocational assistance or retraining.

Expert Vocational Evidence

28. Richard G. Taylor, Ph.D., is a vocational counselor who has been the director of services for students with disabilities at BYU Idaho in Rexburg, formerly Rick's College, during the past 30 years. He was hired by Claimant to perform a vocational evaluation. He is knowledgeable about the labor market in Pocatello and surrounding areas.

29. Dr. Taylor performed a telephone interview with Claimant in August 2007. He reviewed medical records and ICRD case notes. Dr. Taylor utilized a computerized assessment tool to calculate and compare Claimant's pre-injury ability to work and earn wages with her post-injury abilities. He relied upon the work restrictions identified by Dr. Himmler in June 2007 which restrict Claimant to sedentary work with additional limitations. He assumed those restrictions to be accurate.

30. Dr. Taylor determined that Claimant could perform 26.4% of job classifications that existed in the Idaho labor market prior to her June 2004 industrial injury. These jobs consist of unskilled to semi-skilled positions that range from sedentary to medium in terms of physical exertion level. Following the injury, Claimant had the ability to perform only .31% of job classifications in Idaho.

31. Dr. Taylor was under the impression that Claimant discontinued working for Employer in June 2007 because she was dismissed for not being not able to perform the required job duties. He noted that the restrictions assigned by Dr. Himmler in June 2007 precluded Claimant from performing either housekeeping or hotel front desk work.

32. The vocational assessment tool utilized by Dr. Taylor is based on data from the U.S. Department of Labor and Census Bureau. The statistics do not take Claimant's age into consideration.

33. Dr. Taylor acknowledges that, statistically speaking, there are a few jobs that Claimant could perform but that they are of such limited availability that competitive employment is not realistic. He does not know of any jobs that would be appropriate for Claimant and would not be able to find a placement for her if asked to do so. He testified that Claimant would not be able to find a single job in spite of significant effort and submitting multiple applications for employment.

DISCUSSION AND FURTHER FINDINGS

Permanent Total Disability

34. A claimant may establish that he or she is totally and permanently disabled by using either of the two methodologies available to establish total 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%. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho, at 281, 939 P.2d at 857. 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.

35. If the evidence of the medical and nonmedical factors places a claimant *prima facie* in the odd-lot category, the burden is then on the employer to show that some kind of suitable work is regularly and continuously available to the claimant. *Id.* A claimant can establish a *prima facie* case for odd-lot status by showing: (1) that he or she had attempted other types of employment without success; (2) that he or she, or vocational counselors or employment agencies on his her behalf, have searched for other work and other work is not available; or (3) that any efforts to find suitable work would be futile. *Fowble v. Snoline Express, Inc.*, 146 Idaho 70, 190 P.3d 889 (2008).

100% Method

36. Claimant's permanent medical impairment was rated at 10% of the whole person. Relevant non-medical factors include Claimant's limited education, age, inability to legally drive a car and minimal experience in sedentary or light types of employment.

37. Although Dr. Himmler assigned significant restrictions, there is no medical evidence that Claimant is permanently precluded from working. Restrictions assigned to Claimant in July 2007 are extremely detailed and when considered as a whole are more restrictive than what Claimant demonstrated an ability to perform on a consistent basis during 2005 and 2006. The evidence that Claimant returned to work for Employer in various capacities for approximately 15 months following her surgery should not be ignored. Claimant's failure to pursue employment, retraining or vocational services, along with the absence of medical evidence of a complete inability to work, preclude Claimant from establishing that it is more likely than not that she is 100% disabled.

38. Claimant failed to meet her burden of proof to establish that she is permanently and totally disabled based on the 100% method.

Odd-Lot Doctrine

39. Employer's efforts to retain Claimant are commendable. Employer's flexibility with Claimant's fluctuating work hours and restrictions demonstrated a willingness to accommodate multiple limitations. Employer was willing to devote time to the coordination of efforts with Claimant, ICRD and health care providers in order to facilitate Claimant's return to work. When the coordination of efforts failed to transition Claimant back into her regular duties as a housekeeper on a full-time basis, Employer initiated a job promotion and provided on-the-job training so that Claimant could continue her employment with less physical job duties, in spite of her lack of skills and experience as a front desk agent. Employer is appropriately characterized as a sympathetic employer.

40. Claimant did not meet her burden to establish that she attempted other types of employment without success. Claimant's post-injury attempts at other types of employment were limited to pursuit of modified duty work with Employer. Claimant's acceptance of a promotion to front desk clerk falls short of establishing that she attempted other types of employment without success. ICRD considered Claimant's return to work as a front desk clerk a success after Claimant maintained the position for 30 days. Claimant was initially able to perform the front desk agent job because of Employer's sympathy and willingness to provide on-going training. Claimant was physically able to handle the requirements of the job for more than eight months prior to being terminated for mishandling a phone call. Following her termination, she made no applications with other employers and did not seek further assistance from ICRD.

41. Claimant failed to meet her burden to establish that either she or someone acting on her behalf searched for other work and that it was not available. As noted in the preceding paragraphs, Claimant opted to pursue Social Security Disability benefits and did not seek

employment following her termination by Employer. Dr. Taylor performed a statistical analysis which provided a basis for his conclusions regarding Claimant's employability. However, he did not conduct an actual job search or submit applications on Claimant's behalf.

42. It is clearly Dr. Taylor's opinion that any efforts to find suitable work for Claimant would be futile. He based his opinion on multiple factors including the medical limitations assigned by Dr. Himmler; use of a vocational assessment tool that indicated Claimant was precluded from performing more than 99% of the types of jobs available in Idaho; his knowledge about the local labor market; a telephonic interview with Claimant; and his experience as a vocational counselor.

43. The opinions of Dr. Taylor are sufficient to establish a *prima facie* case that Claimant is an odd-lot worker because any efforts for her to find suitable work would be futile.

44. Defendants failed to offer evidence to show that some kind of work suitable for Claimant is regularly and continuously available. Rather, Defendants argue that Claimant did not meet her burden of proof. Specifically, Defendants assert that Claimant must have actually searched for work in order to successfully maintain that a job search would be futile. This argument is not supported by legal authority and is rejected.

45. Defendants point out multiple reasons why the opinions of Dr. Taylor should not be adopted. These include his reliance on statistical data versus a real world labor market survey; reliance on a telephonic interview with Claimant as opposed to a face-to-face meeting with her; failure to consider local classified advertisements; and failure to make inquiries of potential employers, job service agencies or job training programs. Certainly, credible evidence of actual job opportunities available to Claimant would have overcome conclusions of Dr. Taylor that were based on statistical interpretation. However, the fact that Dr. Taylor's conclusions

might be refutable does not mean that they are so unreliable as to be rejected and does not relieve Defendants of presenting evidence to overcome Claimant's *prima facie* case. The opinions of Dr. Taylor are supported by the other evidence.

CONCLUSION OF LAW

Claimant has met her burden of proof to establish that she is totally and permanently disabled pursuant to the odd-lot doctrine.

RECOMMENDATION

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

DATED this __15__ day of __May____ 2009.

INDUSTRIAL COMMISSION

_____/s/_____
Susan Veltman, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 21 day of May a true and correct copy of **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

ALBERT MATSUURA
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GLENNA M CHRISTENSEN
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BOISE ID 83701-0829

/s/ _____

/s/
Thomas E. Limbaugh, Commissioner

/s/
Thomas P. Baskin, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __21__ day of __May____, 2009, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

ALBERT MATSUURA
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jkc

/s/