

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BERLIN GONZALES,

Claimant,

v.

CHAMPION PRODUCE, INC.,

Employer,

and

LIBERTY NORTHWEST CORP.,

Surety,
Defendants.

IC 2011-029488

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

Filed 8/22/2014

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 Boise, Idaho on April 1, 2014. Claimant, Berlin Gonzales, was present in person and represented by Richard S. Owen, of Nampa, Idaho. Defendant Employer, Champion Produce, Inc. (Champion), and Defendant Surety, Liberty Northwest Corp., were represented by Joseph M. Wager, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken, briefs were submitted, and the matter came under advisement on July 15, 2014.

ISSUES

The issues to be decided were narrowed at hearing and are:

1. The extent of Claimant's permanent disability, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise;
2. Whether the Commission should retain jurisdiction of the case.

CONTENTIONS OF THE PARTIES

The parties agree that Claimant suffered an accident at work on December 6, 2011, and thereby sustained 33% whole person impairment. Claimant asserts that he is totally permanently disabled and that the Commission should retain jurisdiction of the case. Defendants assert that Claimant has, at most, a permanent disability of 65%, inclusive of his impairment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Joint Exhibits A through R, and Claimant's Exhibits A through E, admitted at the hearing;
3. The testimony of Claimant taken at the April 1, 2014 hearing;
4. The post-hearing deposition of Vivek Kadyan, M.D., taken by Claimant on April 23, 2014;
5. The post-hearing deposition of Douglas N. Crum, CDMS, taken by Claimant on April 24, 2014; and
6. The post-hearing deposition of Mary Barros-Bailey, Ph.D., taken by Defendants on May 8, 2014.

All objections posed during the depositions are overruled. Claimant's motion to strike Exhibit 1 to Defendants' Responsive Brief is granted as the exhibit is not timely per JRP 10. After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. **Background.** Claimant was 42 years old and resided in Parma at the time of the hearing. He was born in Nampa and completed the sixth grade. He was expelled from school part way through the seventh grade and placed in juvenile detention. He tried unsuccessfully to obtain his GED and was advised he had third grade math skills and third or fourth grade reading comprehension skills. He attempted to enlist in the military but was unable to pass the entry tests.

2. After leaving school, Claimant worked at a dairy milking cows. He worked a variety of temporary or seasonal jobs including picking rock, stacking onion bags, cleaning pens, irrigating, and other field work. He learned to drive a forklift and worked at Rogers Brothers Seed Company for several years. He then worked at Kit RV in Caldwell where he also operated a forklift. He became a lead man and worked there five or six years until his father died. Claimant left Kit RV and grieved his father's passing. Claimant next worked for Spires Concrete in Kuna. He performed general labor helping to build forms and pour foundations for several years until Spires went out of business.

3. In 2010, Claimant began working for Champion as a forklift operator. His work was seasonal, but increased as he gained experience. By 2011, Claimant had worked for Champion nearly ten months. He enjoyed his job and considered Champion a good employer.

4. **Industrial accident and treatment.** On December 6, 2011, Claimant was at work for Champion standing beside his parked forklift when another forklift rounded the corner with a bin on the forks and crushed Claimant against his parked forklift. Claimant was pinned between the two forklifts for approximately 30 seconds, then fell to the ground but never lost consciousness. He was taken by ambulance to a hospital where he was diagnosed with multiple

pelvic ring fractures, including mildly displaced left acetabular fracture, displaced left superior and inferior pubic rami fractures, mid left sacrum fracture, and diastasis of the left sacroiliac joint and the symphysis pubis. Claimant was also diagnosed with left external iliac artery occlusion, thrombo-occlusion of the left common femoral and superficial femoral arteries resulting in left lower extremity ischemia, together with hip, back, neck, and arm contusions. Jeffrey Symmonds, M.D., promptly performed right to left femoral/femoral artery bypass grafting utilizing an eight millimeter gore-tex graft, ligation of the fully occluded left external iliac artery, extensive left lower extremity arterial thrombectomy, and arteriography. The procedures were successful in restoring circulation to Claimant's left lower extremity.

5. On December 8, 2011, Gregory Schweiger, M.D., performed open reduction internal fixation of Claimant's anterior and posterior pelvic fractures, including left ramus fractures and left sacroiliac joint dislocation. The surgery, though successful, was unable to fully restore the normal geometry of Claimant's crushed pelvis. Claimant was released from the hospital on December 22, 2011. Initially, he was confined to a wheelchair.

6. In January 2012, Claimant began treating with psychologist Robert Calhoun, Ph.D., for the psychological trauma of his accident. Dr. Calhoun recorded that Claimant experienced flashbacks and nightmares reliving the accident and diagnosed Claimant with PTSD due to his accident. Thereafter Claimant continued counseling with Dr. Calhoun regularly for nearly two years.

7. By March 2012, Claimant had progressed to touch down weight bearing with a walker. A May 11, 2012, pelvic CT scan revealed avascular necrosis of the left femoral head.

8. Claimant's back injury from his accident became increasingly symptomatic and on May 24, 2012, Paul Montalbano, M.D., performed L5-S1 laminectomy, discectomy, and

fusion with instrumentation. Claimant also continued with significant testicular pain from the accident and on September 26, 2012, William Fredricksson, M.D., performed bilateral epididymectomy. However, Claimant continued to suffer testicular pain thereafter.

9. Claimant's cervical injury from the accident became increasingly symptomatic. On January 21, 2013, Dr. Montalbano performed C4-7 anterior cervical discectomy and fusion with instrumentation. Even after cervical surgery, Claimant continued to experience intermittent left arm numbness, particularly in his middle, ring, and little fingers. He periodically noted pain from his left hand up his arm to his left shoulder. He used a TENS unit, ice, and prescription medications to manage these symptoms. When his left arm is painful, he protects it and prevents anything from contacting it.

10. Claimant's left hip became increasingly symptomatic as the avascular necrosis caused by his accident progressed. On April 15, 2013, Roman Schwartzman, M.D., performed a total left hip replacement. Dr. Schwartzman prescribed a cane on July 9, 2013. Claimant now favors his left hip and walks with a cane or a walker. He is unable to sleep on his left side due to hip pain.

11. On October 21, 2013, Vivek Kadyan, M.D., rated Claimant's combined permanent impairments due to his industrial accident at 33% of the whole person, including 14% whole person impairment for his pelvic fractures, 10% whole person impairment for his left hip replacement, 7% whole person impairment for his lumbar fusion, 6% whole person impairment for his cervical fusion, and 1% whole person impairment for numbness and parasthesia in the genital femoral nerve.¹

¹ Dr. Kadyan testified that Claimant's chronic testicular pain is a "substantial barrier for him." Kadyan Deposition, p. 19, l. 20.

12. After reaching medical stability, in November 2013, Claimant returned to Champion to inquire about light-duty employment. However, Champion had no suitable work available and Claimant became tense and anxious during his visit due to his PTSD. He continued counseling with Dr. Calhoun.

13. At the time of hearing, Dr. Kadyan continued to manage Claimant's medications monthly; these included Norco, Trazodone, Ambien, Ultram, Soma, Zoloft, and aspirin. Claimant also received periodic testosterone injections. Claimant will likely need prescription medications and a physician's supervision of his medications for the rest of his life.

14. **Current abilities.** Claimant is able to drive approximately 25 miles before he must stop because of increasing pain. His girlfriend usually drives him. He rarely drives alone and testified that he needs company while driving to help keep him from becoming disoriented.

15. Claimant doubts that he can lift 20 pounds. He notes persistent left leg, hip, and back pain. He cannot bend at the waist without significant back and groin pain. He experiences neck pain when looking up or down, including when studying GED materials. He has ongoing testicular pain and pain with urination.

16. Claimant can walk approximately 50 feet without resting, due to the resulting hip and low back pain. He has difficulty with balance and must be cautious on stairs and uneven ground. He has repeatedly fallen because of poor balance. He clings to handrails and must climb stairs one at a time, always leading with his right foot. Because of his balance issues, he always uses a walker or at least one cane to support himself when standing or walking. He was advised to use two canes during a recent medical appointment. Claimant uses a chair when showering.

17. Claimant's present math ability is rudimentary. He is proficient with addition and subtraction, but struggles with multiplication, division, and higher math. Additionally, Claimant reads little. He dropped out of school in the seventh grade and has struggled throughout his life with reading comprehension. He was approximately 18 or 19 before he finally obtained his own driver's license because he had to take the written examination seven or eight times before passing. The prescription medications necessitated by his injuries hinder his concentration and focus.

18. Claimant would like to return to work. His highest paying job was with Spires Concrete Systems where he earned nearly \$14.00 per hour. He usually earned \$8.00 to \$10.00 per hour as a forklift driver. Claimant can no longer perform any of his pre-injury jobs. He has sought return to work assistance from Industrial Commission rehabilitation consultant Teresa Ballard, who has encouraged him to obtain his GED. Claimant testified at hearing that he is attending a GED preparation program at the College of Western Idaho and plans to continue working towards his GED. However, Claimant is not optimistic he will get a job given his physical limitations.

19. **Credibility.** Having observed Claimant at hearing and compared his testimony with other evidence in the record, the Referee finds that Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

20. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however,

need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. ConAgra, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

21. **Permanent disability.** The first issue is the extent of Claimant's permanent disability. The parties agree that Claimant suffers permanent impairment of 33% of the whole person. Claimant relies upon the opinion of vocational expert Douglas Crum who concluded Claimant is 100% permanently disabled, or is an odd-lot worker. Defendants rely upon the opinion of vocational expert Mary Barros-Bailey who concluded Claimant is employable and has permanent disability of no more than 65%, inclusive of his impairment.

22. "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 non-medical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of 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. In sum, the focus of a determination of permanent disability is on the claimant's ability

to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995). The proper date for disability analysis is the date of the hearing, not the date that maximum medical improvement has been reached. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012).

23. Physical restrictions. To evaluate permanent disability, permanent physical restrictions resulting from the industrial accident merit particular consideration. Both Dr. Kadyan and Dr. Schwartzman have placed restrictions on Claimant's work activities.

24. *Dr. Kadyan*. Dr. Kadyan is board certified in physiatry and spinal cord injury. He has helped coordinate medical care for Claimant's multiple injuries and supervises Claimant's prescription medications monthly. Dr. Kadyan testified that the normal geometry of Claimant's crushed pelvis could not be surgically restored, that his gait is thus affected, and he cannot walk normally. Dr. Kadyan opined that Claimant's unnatural gait will be an ongoing source of pain. In addition, Dr. Kadyan confirmed that Claimant has multiple other persisting orthopedic and nerve injuries from his accident that cause ongoing pain.

25. Dr. Kadyan permanently restricted Claimant to light duty work of lifting no more than 20 pounds with the majority of his time spent sitting. Dr. Kadyan testified that Claimant will need to stand every half hour, but will be unable to stand for more than 20 to 30 minutes at a time. Dr. Kadyan also restricted Claimant from climbing ladders, walking on uneven surfaces (including grass), or working at unprotected heights. Dr. Kadyan affirmed that Claimant needs to use at least one cane, and possibly two, when standing; thus any lifting would be only from a seated position or one-handed at best. Kadyan Deposition, p. 24.

26. *Dr. Schwartzman*. Dr. Schwartzman performed Claimant's total left hip replacement and on August 6, 2013, permanently restricted Claimant from lifting more than 30

pounds, and from all squatting, kneeling, stooping, ladder climbing, or walking on uneven ground.

27. The restrictions imposed by Dr. Kadyan and Dr. Schwartzman are similar in large part and amply supported by the record. The Referee finds that Claimant must use at least one cane when standing or walking. Furthermore, Claimant is permanently restricted from lifting more than 20 pounds, sitting more than 30 minutes, standing more than 30 minutes, and from all squatting, kneeling, stooping, ladder climbing, walking on uneven ground, or working at unprotected heights.

28. Ability to compete in the open labor market. Having determined appropriate permanent work restrictions, Claimant's ability to compete for employment in the open labor market, as evaluated by the opinions of two vocational experts, merits examination.

29. *Mary Barros-Bailey.* Mary Barros-Bailey, Ph.D., interviewed Claimant on January 7, 2014, reviewed his employment history and medical records, and on February 27, 2014, issued her vocational report. She concluded that Claimant had no residual transferable skills. She opined that applying Dr. Kadyan's light duty and positional restrictions, Claimant had lost access to 67% of his labor market. She observed that if Claimant were relegated to sedentary work, he would sustain a 99% loss of labor market access. Concluding that Claimant's capacity fell between the light and sedentary work levels, Dr. Barros-Bailey took the midpoint between these figures and concluded Claimant had lost access to 83% $([67\% + 99\%] \div 2)$ of his labor market. She did not consider Dr. Schwartzman's restrictions.

30. Dr. Barros-Bailey next opined Claimant suffered only a slight wage loss of 2%. She averaged Claimant's loss of labor market access and his projected wage loss to arrive at a permanent disability of 42.5% $([83\% + 2\%] \div 2)$. She further testified that studies indicate those

with visible disabilities—such as a cane—experience an additional 15% loss of earning capacity and those not graduating high school or having a GED experience an additional 30% loss of earning capacity. Considering these data, Dr. Barros-Bailey added 7.5% ($15\% \div 2$) and 15% ($30\% \div 2$) for Claimant’s visible disability and lack of GED respectively. She assigned Claimant a permanent disability of 65% ($42.5\% + 7.5\% + 15\%$), inclusive of impairment. Joint Exhibit M, p. 583. She recommended that Claimant seek professional services in his GED and job search efforts.

31. At her post-hearing deposition, it became apparent that Dr. Barros-Bailey had not been fully apprised of Claimant’s use of canes and its impact on his work abilities:

Q. [by Mr. Owen] Okay. It’s true, isn’t it, that if he can only sit for 30 minutes at a time and then has to stand for several minutes, that will affect his productivity if he’s required to sit at his job?

A. [by Dr. Barros-Bailey] It depends on what he’s doing.

Q. What can you do that won’t have your productivity decreased if you have to stand up every 30 minutes? Give me an example.

A. I will give you an example: somebody is working assembling or packing things. Whether you’re standing or sitting, you’re just reaching at a different level.

Q. Are you assuming that he’s also able to do his job when he’s standing?

A. If he just needs to stand for three to four minutes, I don’t see anything that tells me [he] can’t continue to do reaching while he’s standing.

Q. What if he’s required to use two canes while he’s standing? How is he going to use his hands?

A. Then that would be an issue if he needs to use his canes.

Q. That would be a problem, wouldn’t it?

A. Yes.

Barros-Bailey Deposition, p. 43, ll. 3-25.

32. Dr. Barros-Bailey testified that Claimant may increase his labor market access by 30% if he obtained his GED. Her disability rating of 65% includes half of this amount, 15%, attributable to Claimant's lack of a GED. Dr. Barros-Bailey apparently concluded the probability that Claimant would obtain his GED was 50%. While this conclusion is not unreasonable, the Referee is persuaded that the record as a whole indicates that achieving his GED will be a very significant challenge for Claimant and he is less, rather than more, likely to do so. Claimant dropped out of school after the sixth grade. Academic testing as part of his GED preparation revealed rudimentary math and reading comprehension abilities. Claimant has struggled with reading comprehension all his life. He was unable to pass military entry testing. He required seven or eight attempts before finally passing the written portion of his driver's license test at age 18 or 19. His mental focus and concentration are now adversely affected by prescription medications, some of which he will likely take the rest of his life. If Dr. Barros-Bailey had added to her disability rating the full 30% for lack of GED, Claimant's permanent disability would then have been 80% (42.5% + 7.5% + 30%).

33. *Douglas Crum*. On January 7, 2013, Douglas Crum, C.D.M.S., interviewed Claimant at his counsel's request to evaluate Claimant's permanent disability. He reviewed Claimant's work history, educational history, and physical restrictions. Mr. Crum noted that Claimant has limited math and reading comprehension skills, no computer skills, and has never worked a desk job. Mr. Crum opined that Claimant had pre-injury access to 9.3% of the labor market.

34. Applying Dr. Kadyan's work restrictions, Mr. Crum concluded that as a result of Claimant's industrial accident he could not return to any of his pre-injury jobs and "there are no jobs that he could do in the labor market that he would be competitive for within his

restrictions.” Crum Deposition, p. 19, ll. 5-7. Mr. Crum testified that the restrictions Dr. Kadyan imposed on Claimant were the most significant restrictions that he had ever seen Dr. Kadyan impose on any patient. Mr. Crum opined Claimant would not be able to return to work, is totally and permanently disabled, and a job search would be futile. He testified that the averaging method utilized by Dr. Barros-Bailey did not provide a fair evaluation of Claimant’s disability because his loss of labor market access was so significant. Crum Deposition, p. 30. Mr. Crum further observed: “Another significant factor in Mr. Gonzales’s employability is the current depressed state of the local labor market with high levels of competition for almost any job opening, with which he will compete with other young workers, some of whom will have better skills and superior physical capacities.” Claimant’s Exhibit E, p. 35.

35. *Weighing the vocational opinions.* Vocational experts often evaluate permanent disability by averaging both loss of labor market access and expected wage loss, as did Dr. Barros-Bailey in the present case. However, the averaging method has its limitations as the two measures averaged are not entirely independent. Complete loss of labor market access produces complete expected wage loss. As the loss of labor market access becomes more substantial, the expected wage loss is less significant in predicting actual disability. The Commission discussed this very phenomena in Deon v. H&J, Inc., 2013 WL 3133646 (Idaho Ind. Com. May 3, 2013):

Rating an injured worker's permanent disability by averaging her estimated loss of labor market access and expected wage loss, as Drs. Collins and Barros-Bailey have done in the instant case, can provide a useful point of reference. However, the averaging method itself is not without conceptual and actual limitations. As the loss of labor market access becomes substantial, and the expected wage loss negligible, the results of the averaging method become less reliable in predicting actual disability. For illustration, as judged by the averaging method, a hypothetical minimum wage earner injured sufficiently to lose access to 99% of the labor market may theoretically suffer no expected wage loss if she can still perform any minimum wage job. Calculation of such a worker's disability according to the averaging method would produce a permanent disability rating of only 49.5% $[(99\% + 0\%) \div 2]$ even though her actual probability of obtaining

employment in the remaining 1% of an intensely competitive labor market may be as remote as winning the lottery. The averaging method fails to fully account for the reality that the two factors are not fully independent.

As the residual labor market becomes increasingly small, the disability rating obtained by the averaging method becomes increasingly skewed, especially in labor markets with high unemployment rates where competition for the remaining portion of suitable jobs will be fierce.

36. In the present case, Claimant's circumstance approaches that of the hypothetical wage earner discussed in Deon. Dr. Barros-Bailey estimated Claimant's loss of labor market access at 83% and his estimated wage loss at 2%. Mr. Crum opined Claimant "doesn't have a reliable labor market available to him" while his estimated wage loss was "a low percentage." Crum Deposition, p. 27, ll. 3-4 and p. 30, l. 24. Mr. Crum also noted the depressed local labor market and the high level of competition for available job openings. Applying the averaging method in such circumstances produces a skewed and inadequate rating of Claimant's actual disability.

37. Based on Claimant's permanent impairment of 33% of the whole person, his extensive permanent physical restrictions as determined by Dr. Kadyan and Dr. Schwartzman, and considering all of his medical and non-medical factors, including his age of 40 at the time of the industrial accident and 42 at the time of the hearing, sixth grade education, lack of any other formal education, rudimentary math and reading comprehension skills, lack of computer skills, inability to return to any of his previous positions, and lack of transferable skills, Claimant's ability to compete in the open labor market and engage in regular gainful activity after his industrial accident has been greatly reduced. The Referee concludes that Claimant has established a permanent disability of 90%, inclusive of his 33% whole person impairment.

38. **Odd-lot.** Claimant also alleges he is totally and permanently disabled pursuant to the odd-lot doctrine. A claimant who is not 100% permanently disabled may prove total

permanent disability by establishing he is an odd-lot worker. An odd-lot worker is one “so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.” Bybee v. State, 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 his burden of proof and establish a prima facie case of total permanent disability under the odd-lot doctrine in any one of three ways:

1. By showing that he has attempted other types of employment without success;
2. By showing that he or vocational counselors or employment agencies on his 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).

39. In the present case, Claimant has presented no evidence of any failed attempts at other types of employment or of any significant but unsuccessful work search. However, Mr. Crum opined that a search for suitable work would be futile given the restrictions imposed by Dr. Kadyan and Dr. Schwartzman. Although Dr. Barros-Bailey opined Claimant would be employable based upon Dr. Kadyan’s restrictions, she relied upon the averaging method with its limitations discussed above. Furthermore, she ultimately acknowledged that Claimant would not

be a very productive employee if he had to support himself with canes while standing every 30 minutes.

40. The Referee finds Mr. Crum's opinion persuasive and concludes that an employment search would be futile. Claimant has established a prima facie case that he is an odd-lot worker, totally and permanently disabled, under the Lethrud test.

41. Once a claimant establishes a prima facie odd-lot case, the burden shifts to the employer "to show that some kind of suitable work is regularly and continuously available to the claimant." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The employer must prove 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 [employer] 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).

42. In the present case, Dr. Barros-Bailey testified that when she sought positions consistent with the restrictions imposed by Dr. Kadyan, she found no actual jobs:

In this case, given all the factors that he had going, I needed to check out how much these restrictions really impacted his ability to do work. So I looked at two different sources: I looked at actual jobs available at the time to see if anything came up, and when I came up with it—and I think I have it listed on the top of page 8 of my report. I didn't find any current positions available to fit the profile, though one was found that required prolonged standing.

Barros-Bailey Deposition, p. 18, ll. 13-22.

43. Dr. Barros-Bailey then contacted eight temporary staffing agencies inquiring about such positions and was advised by one that such positions did not exist, by two that they had such positions—although none currently available, and by the other five that such positions

sometimes or rarely existed. Dr. Barros-Bailey concluded “there was a small pool of jobs that fit within the restrictions that we were looking at.” Barros-Bailey Deposition, p. 20, ll. 1-2. However, she arrived at this conclusion without considering Claimant needs to use canes when standing. There is no showing of an actual suitable job for which Claimant can compete while using canes.

44. Defendants have not shown there is a suitable actual job regularly and continuously available in Claimant’s labor market which he can perform and which he has a reasonable chance of obtaining. Claimant has proven he is totally and permanently disabled pursuant to the odd-lot doctrine.

45. **Retention of jurisdiction.** The final issue is whether the Commission should retain jurisdiction of the matter. Whether to retain jurisdiction beyond the statutes of limitations is within the discretion of the Commission. Where a claimant's medical condition has not stabilized or where a claimant's physical disability is progressive, it is appropriate for the Commission to retain jurisdiction. Reynolds v. Browning Ferris Industries, 113 Idaho 965, 969, 751 P.2d 113, 117 (1988). Retention of jurisdiction may be appropriate in cases where there is a probable need for future temporary disability benefits associated with surgery. Elmore v. Floyd Smith, Jr. Trucking, 86 IWCD 100, p. 1278.

46. Claimant has been found to be totally and permanently disabled, entitling Claimant to total and permanent disability benefits, as anticipated by Idaho Code § 72-408, for life. Further, Claimant is always entitled to receive reasonable medical care related to his industrial injury under Idaho Code § 72-432. With those issues resolved, the Referee sees no need to retain jurisdiction and declines to do so.

CONCLUSIONS OF LAW

1. Claimant has proven he suffers a permanent disability of 90%, including his permanent impairment, and is totally permanently disabled pursuant to the odd-lot doctrine.
2. The Commission declines to retain jurisdiction beyond the applicable statutes of limitations.

RECOMMENDATION

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

DATED this 6th day of August, 2014.

INDUSTRIAL COMMISSION

_____/s/_____
Alan Reed Taylor, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of August, 2014, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

JOSEPH M WAGER
PO BOX 6358
BOISE ID 83707-6358

RICHARD OWEN
PO BOX 278
NAMPA ID 83653

mg

_____/s/_____

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IC 2011-029488

ORDER

Filed 8/22/2014

Pursuant to Idaho Code § 72-717, Referee Alan R. Taylor submitted the record in the above-entitled matter, together with his recommended 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 has proven he suffers a permanent disability of 90%, including his permanent impairment, and is totally permanently disabled pursuant to the odd-lot doctrine.
2. The Commission declines to retain jurisdiction beyond the applicable statutes of limitations.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 22nd day of August, 2014.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas P. Baskin, 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 22nd day of August, 2014, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

RICHARD OWEN
PO BOX 278
NAMPA ID 83653

JOSEPH M WAGER
PO BOX 6358
BOISE ID 83707-6358

mg

_____/s/_____