BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RODRIGO RODRIGUEZ, Claimant, v. CONSOLIDATED FARMS, LLC, dba ELK MOUNTAIN FARMS, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Surety, Defendants.	**IC 2010-022129** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AND DISSENTING OPINION** Filed September 24, 2015

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above entitled matter to Referee Michael E. Powers. Referee Powers conducted two hearings, the first on July 16, 2014 in Boise (Boise Hearing) and the second in Coeur d'Alene on July 23, 2014 (Coeur d'Alene Hearing). Claimant was present at the first hearing and was represented by Sam Johnson, Esq., of Boise. W. Scott Wigle, Esq., also of Boise, represented Employer/Surety. Regina Montenegro served as an interpreter. Oral and documentary evidence was presented at the Boise Hearing and testimony was presented at the Coeur d'Alene Hearing. The record remained open for the taking of two post-hearing depositions, those of Dr. Mary Barros-Bailey and Terry Montague. The parties submitted post-hearing briefs and the matter came under advisement on May 15, 2015. On or about August 11, 2015, Referee Powers provided the

Commission with his proposed Findings of Fact, Conclusions of Law and Recommendation. The Commission has reviewed Referee Powers' proposed recommendation, along with the evidence and testimony of record. While the Commission ultimately reaches the same conclusion as did Referee Powers, the Commission believes that certain aspects of Referee Powers' recommendation require further elaboration and discussion. To that end, the Commission declines to adopt Referee Powers' recommendation, and adopts its own Findings of Fact, Conclusions of Law and Order, in which most of Referee Powers' proposed recommendation has been preserved.

ISSUE

The sole issue to be decided is the extent, if any, of Claimant's disability above his impairment including whether Claimant is an odd-lot worker.

CONTENTIONS OF THE PARTIES

Claimant contends that, as a result of a severe crushing injury to his right arm and certain non-medical factors, he is totally and permanently disabled.

While acknowledging the severity of Claimant's injury that placed certain restrictions on the use of Claimant's right (dominant) arm, Defendants contend that with modifications, Claimant could have returned to his time-of-injury job, but he chose to leave the area instead. Further, no physician has indicated that Claimant cannot work and there are jobs within his restrictions that are available in his labor market (Boise/Caldwell).

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant at the Boise hearing.
2. Joint Exhibits (JE) 1-32 admitted at the Boise hearing.

3. The testimony of ICRD consultant Richard Hunter and Employer's general manager Edward Charles Atkins, Jr., taken at the CDA hearing.

4. The post-hearing depositions of Terry L. Montague, M.A., taken by Claimant on December 19, 2014, and Mary Barros-Bailey, Ph.D., taken by Defendants on February 3, 2015.

All objections made during the course of taking the above-referenced depositions are overruled.

FINDINGS OF FACT

1. Claimant was 56 years of age and resided in Boise at the time of the hearings. He was born in Mexico where he finished the fifth grade. Due to the death of his father at that time, Claimant had to leave school and work in the fields until he left for the United States in 1979 at age 21. He is currently a permanent, legal resident of the US.

2. When Claimant arrived in California from Mexico, he worked pruning and harvesting fruit trees. In 1989, Claimant moved to Bonners Ferry and began his employment with Employer, a 2000 or so acre hop farm. Claimant performed most of the tasks required to run the hops operation and most of his duties required the use of both of his hands. At the time of his industrial accident, Claimant was in charge of the irrigation system for the entire operation which, at times, required him to work seven days a week. He used a four-wheeler to go from field to field where he checked for problems with the drip irrigation system.

3. Claimant's employment was seasonal; however, he was always hired back at the beginning of the new season as he was considered a valuable employee with much institutional knowledge of the running of the operation as the result of his 21 years of employment there.

4. Claimant described the machine he was operating at the time of his accident this way:

> It used to be that before the machine would cut the string in the field, bring it in, and, then, strip the string. The guide. Then they modified the system. Now the machines harvests [sic] the hops in the field and, then, they come and empty it in a loader and the hop goes in a band, a belt, and the machine swings it. The trash goes on one side and the hops go on the other side. But there are many, many belts, many chains. It is very loud the noise it makes and that's why when I had my accident I was alone and nobody could hear my screams, my yells.

Boise Tr., p. 31.

5. On September 8, 2010, Claimant severely injured his dominant right hand/arm:

> When I started operating the machine - - and we always begin by checking everything to make sure the things are working well. There is a band[1] in which the clean hops fall and that band began - - that belt began to work slowly and sometimes it would stop. It was not normal. There is - - the belt is there and the roller became loaded with dirt. It would accumulate. So, I carried - - I grabbed a tool, a hook, a cutting hook. My idea was to make a cut in the dirt and, then, apply an air hose to blow the dirt away, but when I enter my hand in order to make a gash the conveyor belt sped up. It caught my hand and it broke the three fingers and my arm up until here and I was trapped there for several minutes. I don't know. Around eight minutes. Something like this. While I was trapped there the band kept rolling and that was what ruined my tendons, the inside of my arms, my tendons, my - - nerves. I yelled and hollered, but nobody could hear me. One of the mechanics, Ricardo Mendez, he was fixing something else in another machine that had broken down, so very close to the machine where I was working. All the parts are right there for the machine. He came close to the machine to fix whatever he was working on and he was the one that heard my scream and he turned the machine off. He turned it off. And, then, he removed two screws from one of the sides and lowered it and I was able to take my hand off.

Boise Tr., pp. 32-33.

6. Claimant's subsequent medical treatment consisted of six surgeries, physical therapy, and resulted in physical limitations/restrictions.

[1] Claimant uses the terms "band" and "belt" interchangeably.

7. In September 2011, before his sixth hand surgery,[2] Claimant returned to work for four hours a day five days a week without success. Claimant was also offered employment with Employer after his sixth surgery but he declined because of the pain and the pain medications he was taking, as well as the fear that once his workers' compensation case was over he would be fired.

8. Claimant moved to Boise in July of 2012 to be near his daughter who was attending BSU. He is currently under the care of Kevin Krafft, M.D., a local physiatrist, who provides pain and sleep medications. Claimant receives Social Security Disability Insurance benefits. He is in good health other than his right arm/hand problems. He does not believe there is any work that he can perform due to his right upper extremity limitations.

9. Claimant testified that operating machinery requires the use of his right hand:

> It's not that I would feel bad, if it's work - - it's hard to explain, because, for example, take a tractor. To climb up to a tractor and drive it, okay, but all the levers in the tractor, you drive with your left and the right hand is busy operating. That's in the tractors. If I take the water truck, it has a hose that I think is six inches - - you have to connect the hose and turn on the lever in order to - - the buttons in order to irrigate ahead of you or to the left or to the right, they are in our right hand. I can't do that. For the loader it has a knob on the - - in the steering wheel, but the lever is - - to grab, to lift, to release, it's on the right hand. To drive the four wheeler one is driving on the pavement - - one is not on the pavement, you're in the field with the - - with holes, with grooves, with pits. My hand doesn't have the strength to be controlling with strength where ever it - - to be controlling the vehicle.

Boise Tr, pp. 56-57.

10. Claimant admitted that he did not attempt to try to drive the four wheeler after Employer offered to switch the controls to the left side of the machine.

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[2] This surgery was performed in an attempt to make the fingers on Claimant's right hand more flexible. Claimant testified that he is worse after the surgery and now cannot flex those fingers at all.

DISCUSSION AND FURTHER FINDINGS

Total permanent disability

11. "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 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 the 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, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

12. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). 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).

13. Among the nonmedical factors to be considered by the Commission in determining permanent disability is "the diminished ability of the (claimant) to compete in an open labor market within a reasonable geographic area considering all the personal and economic circumstances of the employee …". *See* Idaho Code § 72-430(1). In *Davaz v. Priest River Glass Co.*, 125 Idaho 333, 870 P.2d 1292 (1994), the Court considered whether the hub of the reasonable geographic area to be considered by the Commission in making its assessment is the place at which the injury occurred, claimant's place of residence at the time of injury, or claimant's place of residence at the time of hearing. The *Davaz* Court concluded that a careful reading of the provisions of Idaho Code § 72-430(1) yields the conclusion that "reasonable geographic area" refers to the area surrounding claimant's place of residence at the time of hearing. The Court reasoned:

> If the "personal and economic circumstances of the employee" at the time of hearing do not reflect a compensable need, then the spirit of the workers compensation law would not be served by awarding disability based upon an antecedent, but no longer existing, need.

See also *Brown v. Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012). However, the general rule announced in *Davaz*, is not without a caveat. Citing to *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 565 P.2d 1360 (1977), the *Davaz* Court recognized that there may be instances where a labor market other than claimant's residence at the time of hearing is appropriately considered in determining claimant's disability. In *Lyons*, the Court allowed consideration of the labor markets surrounding both the claimant's place of residence at the time of injury and his place of residence at the time of hearing, because the claimant's place of residence at the time of hearing offered fewer opportunities for employment than his place of residence at the time of

injury. The *Lyons* Court reasoned that an injured worker should not be permitted to increase his disability by the expedient of changing his place of residence. Discussing *Lyons*, the *Davaz* Court concluded that the lesson of that case is that the Commission should consider the more promising labor market from which the claimant moved in its determination of employability and that limiting the scope of consideration to the less economically favorable geographic area surrounding an injured worker's new place of residence would result in an unwarranted disability compensation windfall.

14. Therefore, it may be said that the general rule is that an injured worker's disability is to be evaluated based on his place of residence as of the date of hearing, unless the claimant has moved from a more favorable labor market to a less favorable labor market, in which case the Commission has the discretion to consider both labor markets in performing its disability evaluation.

15. It is conceded that, generally speaking, the Treasure Valley labor market affords Claimant more opportunities for employment than the Bonners Ferry labor market in which he resided as of the date of injury. Therefore, there would be no reason to depart from the general rule announced in *Davaz*, *supra*, that Claimant's disability should be evaluated based on his place of residence as of the date of hearing. However, as developed *infra*, this matter is complicated by the fact that while the Bonners Ferry labor market assuredly offers Claimant fewer employment opportunities than the Treasure Valley labor market, Claimant did have an actual bona fide job offer in Bonners Ferry which he declined to accept, in favor of moving to the Treasure Valley, where he has neither searched for employment, nor received any offers of employment. In light of this, it is at least arguable that for this particular Claimant, his time of injury labor market is more favorable than the labor market in which he resided as of the date of

hearing. Based on the peculiar facts of this case, the Commission concludes that per the reasoning of *Davaz, supra*, it is appropriate for the Commission to consider Claimant's time-of-injury labor market, as well as his time-of-hearing labor market, in evaluating Claimant's ability to engage in gainful activity.

16. Although a claimant may have failed to establish that he or she is totally and permanently disabled by the 100% method, he or she may still be able to establish such disability via the odd-lot doctrine. An injured worker may prove that he or she is an odd-lot worker in one of three ways (1) by showing he or she has attempted other types of employment without success; (2) by showing that he or she or vocational counselors or employment agencies on his or her behalf have searched for other suitable work and such work is not available; or, (3) by showing that any effort to find suitable employment would be futile. Hamilton v. Ted Beamis Logging and Construction, 127 Idaho 221, 224, 899 P.2d 434, 437 (1995).

IMEs

17. On January 28, 2012, **R. David Bauer, M.D.,** an orthopedic surgeon, performed an IME of Claimant at Surety's request. Claimant's chief complaint at that time was stiffness in his right hand and wrist. Dr. Bauer concluded that Claimant was at MMI with no further treatment being necessary. He further opined that Claimant cannot work at this time due to his non-functioning right upper extremity. He could perform sedentary work, "However, he would be unable to use his upper extremity to manipulate a cash register, computer, etc., and he would be unable to drive to employment. I believe these restrictions are permanent." JE 11, p. 443. Dr. Bauer calculated a 35% upper extremity PPI (21% whole person).

18. Dr. Bauer subsequently clarified his initial report by stating that, with "adaptive equipment" such as a steering wheel "suicide knob," may increase the range of motion in

Claimant's right hand. Dr. Bauer recommended that an occupational/hand therapist evaluate Claimant which would allow him (Dr. Bauer) to further delineate Claimant's abilities and restrictions. He did indicate that Claimant could drive with a suicide knob or other assistive device.

19. Dr. Bauer further clarified his initial report by indicating that the use of the term "sedentary" regarding Claimant's work category was in error. Claimant has unlimited capacity to stand, sit, and walk. Dr. Bauer would defer to an occupational therapist to determine what tasks Claimant could perform with his right upper extremity.

20. On May 17, 2012, **Royce Van Gerpen, M.D.,** an occupational medicine practitioner, performed an IME of Claimant at his treating hand surgeon's request. He did not approve the JSE provided by Mr. Hunter (see below), although he did not believe Claimant was unable to work at all.

FCEs

21. The **first** FCE conducted in this matter was on January 9, 2012 at Bonner General Hospital by therapist Shauna Andres. Claimant was cooperative, but limited by some subjective pain complaints on some of the activities. Ms. Andres noted abilities/strengths, "Client met requirements for elevated work, forward bending, standing work, crouch, kneel/half-kneel, stairs, ladders." JE 10, p. 413. Limitations were weakness in right-hand grip strength with pulling and pinching. Ms. Andres indicated that Claimant's physical limitations as noted above may be a barrier to returning to work absent some job modifications.

22. A **second** FCE was accomplished on January 28, 2013 at STARS by therapist Suzanne Kelly at Dr. Krafft's request. The five-hour testing was deemed to be valid and Claimant expended full effort. The FCE indicated that Claimant could function in the medium

work category. When utilizing the JSE prepared by ICRD consultant Richard Hunter (see below), "The client demonstrated the ability to perform the critical work demands of this job." JE 15, p. 496.

23. A **third** FCE was accomplished on April 23, 2014 by therapist Bret Adams at Claimant's vocational expert's request. The therapist utilized a JSE prepared by that expert and Claimant which included photographs of various aspects of Employer's hop operations. Mr. Adams concluded:

> Terry L. Montague, M.A. with Vocational Rehabilitation requested my opinion on Mr. Rodriguez's ability to operate equipment such as a tractor, forklift, or various construction equipment. Although no specific tests were performed to simulate these demands, based on his low function in his right upper extremity with simple reaching and grasping, I would not recommend that he operate any equipment requiring the use of his right arm. In addition, he demonstrated some left scapular dysfunction during testing which would likely limit his ability to safely drive for extended periods using only his left arm. Based on this, I would recommend that he only be allowed to drive 4 hours a day. This would have to be an automatic transmission vehicle as well.

JE 30, p. 811.

The vocational experts

<u>ICRD consultant Richard Hunter</u>

24. Richard Hunter is an Industrial Commission Rehabilitation Division (ICRD) field consultant out of the Sandpoint field office. Mr. Hunter has been with the Industrial Commission since 1996. He testified at the Coeur d'Alene hearing regarding his basic responsibilities:

> We, as a neutral party, work with all parties involved in a work comp injury: the employer, the injured worker, the medical providers, and the insurance company to facilitate an early return to work as close as possible to pre-injury status and wage.

CDA Tr., p. 27.

25. Mr. Hunter follows the ICRD reemployment model that he described as:

> We follow it, it is - - our first step is to help them return to their time of injury job. If unable to return to time of injury job, we look at alternate or modified duties with employer. If that is not possible, then we look at transferable skills and new employment that would fit within the restrictions the doctor gives, as well as - - if that is not possible, our next step is to go to on-the-job training or formal training.

Id., p. 7.

26. Mr. Hunter opened his file on Claimant on May 10, 2010 as a referral from Surety's nurse case manager. Mr. Hunter understands Spanish but does not speak it very well. Claimant understands English but does not speak it very well but they were able to communicate effectively. However, there was always an interpreter available when he met with Claimant if the need arose.

27. On June 8, 2010, Mr. Hunter met with Employer's representative, Ed Atkins, to conduct a JSE to determine the physical aspects of Claimant's job and to also determine whether modifications or alternate work was available. Mr. Hunter noted that Employer valued Claimant as a long-time, experienced employee that they very much wanted to keep and was not merely being sympathetic.

28. Mr. Hunter supplied Claimant's hand therapist with certain hand tools Claimant needed to use so that the therapist could see how the use of the tool(s) affected his injured hand and whether the tools could be modified for easier use. As Claimant did not have the grip strength in his right hand to actually fix a broken irrigation hose, the idea was that Claimant would flag a break in the system and have a co-worker perform the actual repairs.

29. Mr. Hunter identified a barrier he found in attempting to return Claimant to work and that was Claimant's attitude regarding why Employer would want to return him to work and why he did not want to try any modified or alternate duties:

> Yeah, he had expressed a real concern. He felt that - - and that his employer would not want to bring him back, he didn't understand why he would modify or provide alternate duties. He felt that once he returned to work and the work comp system - - or the work comp claim was over, that he would be dismissed.

CDA Tr., p. 20.

30. In the spring of 2012, Mr. Hunter had set up a meeting with Claimant to discuss return to work issues. Claimant did not attend the meeting on the advice of his attorney. At about that time, Claimant's only daughter had moved to Boise. Also, Claimant's wife developed diabetes which affected her eyesight to the extent that she had to quit her job with Employer. Claimant decided to move his family to Boise; Mr. Hunter is unsure whether Employer made him a job offer before Claimant's move. Mr. Hunter has had no contact with Claimant after he moved; Claimant's file was transferred to an ICRD consultant in Boise.

31. In June 2010, Mr. Hunter completed a job site evaluation (JSE) for Claimant's pre-injury position with input from Employer. The JSE was not translated into Spanish and was not reviewed by Claimant for accuracy. No physician to whom the JSE was sent by Mr. Hunter indicated that Claimant could return to his time-of-injury job due to lack of gripping capability with his right hand.

<u>ICRD consultant Teresa Ballard</u>

32. Claimant's ICRD file was transferred to ICRD consultant Teresa Ballard of the Nampa field office upon his moving from Bonners Ferry to Boise. After Claimant expressed some initial concerns regarding ICRD's involvement in this matter, Ms. Ballard finally met with Claimant on October 29, 2012. Claimant indicated at that time that it was not only his hand that bothered him, but also he was now experiencing pain from his right hand, up his arm, and across his shoulder to his left arm. He was also having trouble sleeping. He was going to address these issues with Dr. Krafft, a local physiatrist who had assumed his care.

33. Ms. Ballard submitted a JSE to Dr. Krafft.[3] He indicated that Claimant was at MMI and could return to work for eight hours a day effective February 7, 2013 with the following restrictions: No lifting in excess of fifty pounds occasionally and thirty-five pounds overhead occasionally with both hands; and fifteen pounds occasionally with the right hand overhead. No pushing or pulling greater than seventy-five pounds, limit simple grasping with the right hand frequently. JE 27, p. 760. Dr. Krafft also assigned a whole person 37% PPI rating.

34. On August 1, 2013, Ms. Ballard spoke to Employer's general manager who indicated they still have a modified duty job available for Claimant and expressed hope that he would return.

35. At page 37 of Mr. Montague's deposition (see below), he quotes Ms. Ballard regarding her ultimate opinions in this matter. He lists "October 23rd" as the date of the entry in her ICRD case notes. However, the Commission is unable to find any corresponding case note or corresponding quote anywhere in her case notes.

Terry L. Montague, M.A

36. Claimant retained Mr. Montague to assess his employability. Mr. Montague has previously testified as a vocational expert before the Commission and is qualified to do so in this case. He interviewed Claimant, reviewed pertinent medical and vocational records, as well as physical and occupational records. He prepared a report dated June 29, 2014. See JE 30.

37. Because Claimant was always one of the first workers to be hired in the spring and the last to be let go in the fall, Mr. Montague concluded that he was a valuable, dependable employee.

[3] The Commission presumed that the JSE referenced above was the one prepared by Mr. Hunter and Employer.

38. Claimant's entire work history consists of unskilled agricultural labor, which, according to Mr. Montague, means that he has no transferrable skills; therefore, only unskilled work should be considered in alternate job placement.

39. Mr. Montague was critical of the JSE prepared by Mr. Hunter:

> When I met with Mr. Rodriquez for the first time back on March 31st, I noted that I had reviewed the job site evaluation that had been completed with his employer and found there was no signature on that document and asked why he had not signed that document.
>
> Q. (By Mr. Johnson): And - - I'm sorry. What did the claimant tell you when asked if he participated in that job site evaluation?
> A. He indicated to me that until I showed him that job site evaluation form and went over it with him, he had never seen that nor had he discussed that with Mr. Hunter.
>
> Q. Okay. And so in terms of the scope of the job site evaluation that was completed by Mr. Hunter, was it limited just to the employer's perspective of what Mr. Rodriquez did on a day-to-day basis?
> A. Correct.
>
> Q. And in a voc rehab setting, is it important to bring the claimant into the dialogue as well?
> A. It is.
>
> Q. And explain why that's important, and if you would, tell us how important of a component that would constitute.
> A. Well, when we're - - let me just start with talking about what the job site evaluation is. It's probably the most critical document that the Industrial Commission Rehabilitation Division oversees.
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> When I was first working for the Industrial Commission, we did not have a job site evaluation form. And myself and about six other seasoned consultants were asked to spend several months working on a form to present at our annual training, where we had all the field consultants throughout the state attend. And we spent an entire day and a half working on the development of the job site evaluation form because we realized that we were asking physicians, occupational therapists, physical therapists to offer opinions on whether or not an individual could safely return to work based on what they were doing at the time of injury. And a lot of the - - a lot of physicians were telling us they were uncomfortable with the question, can they go back to work or not, without knowing what the person actually was going to be required to do.

> As a result of that, we developed the form, and, for the most part, it's still in tact. There's been some tweaking of it over the years, but it's essentially the same form we developed when I was at the Industrial Commission.
> The Industrial Commission Rehab Division, which is the neutral party in the Workers' Compensation system, goes out and solicits input from both the employer and the injured worker to make sure that it's an accurate representation of what they were required to do at the time of the injury.
> In this particular case, we had the employer's perspective, but when I reviewed that with Mr. Rodriquez, he indicated that he did much more than what the job site evaluation that had been completed by Mr. Hunter with the employer said. He also said he lifted much greater weight and had other factors that we needed to consider.
> And in an attempt to make sure that we had an objective assessment, I asked him if he would help me complete a job site evaluation, so that we could get his perspective to the physicians who had previously reviewed the job site evaluation completed by Mr. Hunter.

Montague dep., pp. 19-21.

40. Mr. Montague found it "problematic" that the JSE prepared by Employer and Mr. Hunter without Claimant's input was sent to Claimant's physicians, and occupational and physical therapists involved in preparing an FCE. It was not an objective assessment of what Claimant actually did on the job. With that in mind, Mr. Montague prepared his own JSE. Claimant's daughter and son-in-law took photographs of the equipment and environmental settings within which Claimant performed work. He reviewed those with Claimant and otherwise got his input regarding his perception of his job duties. Mr. Montague then sent the JSE to all the physicians and therapists who had received the JSE prepared by Mr. Hunter and Employer.

41. Mr. Hunter also sent his JSE and accompanying letter of explanation to physical therapist Greg Adams:

> I submitted that to Brett Adams here in Boise, and he is with the Idaho Spine and Sports Physical Therapy. And I asked him to make a determination as to whether or not it would be reasonable for Mr. Rodriguez to return to work, and if so, under what circumstances or what - - what recommendations would he make.

> I also asked that he give me an assessment - - since there had been some discussion as to Mr. Rodriquez being able to go back and operate a tractor, forklift or other construction equipment. I asked him to give us his assessment as to whether or not, based on the performance of Mr. Rodriquez, that was a reasonable vocational objective.

Id., p. 26.

42. When asked by defense counsel how Mr. Adams became involved in this case, Mr. Montague responded:

> I informed Sam (Claimant's counsel) that, based on the fact that the functional capacity evaluation (sic- job site evaluation) originally submitted by Mr. Hunter was not a fully accurate representation of what he could do and previous functional capacity evaluations had relied upon that to offer an opinion as to what he could safely do, we should have another functional capacity evaluation completed.
> And Sam said, "Well, who would we do that - - who would do that?"
> And I said, "There's a gentleman I know that is very credible. He does functional capacity evaluations on both sides, for both defense and plaintiffs' work. His name is Bret Adams. Let's try to get Mr. Rodriquez to him and have him review the job site evaluation[4] that Mr. Rodriquez put together as well as do a functional capacity assessment, because there hasn't been one done for some time."

Id., p. 42.

43. Mr. Montague sent his JSE and Mr. Adam's FCE to three of Claimant's treating physicians. Only one, Dr. Van Gerpin, responded. He agreed with Mr. Adams' FCE and the permanent restrictions flowing therefrom. Dr. Van Gerpin did not believe Claimant could return to work for Employer but did not believe Claimant could not work at all. Dr. Van Gerpin and the other two physicians were only provided with Mr. Adams' FCE and not earlier ones done in January 2012 and January 2013. Both of those FCEs relied upon the JSE prepared by Mr. Hunter and Employer and that is why Mr. Montague felt compelled to get his own FCE done by Mr. Adams.

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[4] Mr. Montague, later in his testimony on cross examination clarified that he did not do a job site evaluation, *per se*, but rather it was a "job description" based on what Claimant told him regarding his actual job duties. Mr. Montague did not review with Employer his job description.

44. Mr. Montague disagrees that Claimant's time-of-injury wage of $11.55 per hour is an accurate reflection of his actual loss of earnings because Claimant worked many more hours than 40 hours a week. Mr. Montague calculated that based on Claimant's earnings of $30,058.68 in the five years preceding Claimant's injury, he would need to find a full-time job paying $14.45 an hour to earn his average annual income he made pre-accident.

45. Mr. Montague concluded that Claimant is an odd-lot worker:

> Q. And you used the odd-lot doctrine to help formulate those opinions?
> A. Yes, because they look at not just medical factors but non-medical factors as well. And in this case, Mr. Rodriquez has a fifth-grade education from Mexico, which is marginal education. He has no transferrable skills. He's 58 years of age now. He was 56 at the time - - or 54 at the time of the injury. While he can understand English to some degree, he's not fluent in English. He can't read in English. He can't write in English or spell in English. Those are non-medical factors that would be considered by the Industrial Commission and I considered in terms of formulating my opinions.
>
> * * *
>
> I determined that Mr. Rodriquez had lost 100 percent of his access to the labor market,[5] and as a result, he's lost 100 percent of his wage earning capacity. Without any job or any ability to earn an income, he has no capacity for compensation, and as a result, he's an odd-lot case.

Id., pp. 33-34.

46. Mr. Montague relies on the futility prong in establishing Claimant's odd-lot status:

> Without some huge business boom or sympathy of a particular employer or friends, temporary good luck or superhuman effort on his part, it would be futile for him to be out looking for work.
>
> He has had a significant and by some physicians' description a severe crush injury to his right dominant hand and arm. He can't do simple grasping motions. He has extremely limited use of his right arm. When you look at that fact alone and then couple it with the fact that he has a fifth-grade education from Mexico, he

[5] Mr. Montague testified that it did not matter whether Claimant's labor market was in Bonners Ferry or Boise; he was still an odd-lot worker.

> doesn't speak fluent English, he does not perform any skilled or semiskilled work, he's in his late 50s now, his chances of being offered work is nil.

Id., p. 58.

47. Mr. Montague conceded on cross examination that Claimant's best chance at employment post-injury was with Employer. He agreed that Mr. Hunter's focus on identifying reasonable accommodations/modifications was in accordance with ICRD's return to work model.

Mary Barros-Bailey, Ph.D

48. Defendants retained Dr. Barros-Bailey to prepare a disability evaluation regarding Claimant. Dr. Barros-Bailey's qualifications are well-known to the Commission and will not be repeated here. Her updated CV can be found at Exhibit 1 to her deposition. She is qualified to testify as an expert in this matter.

49. In preparation for arriving at her vocational opinions, Dr. Barros-Bailey reviewed medical records, ICRD case notes, JSEs, FCEs, and interviewed Claimant.[6]

50. Dr. Barros-Bailey opined that Claimant's best option for returning to work would have been to return to work for Employer. She testified that had Claimant stayed in Bonners Ferry and not returned to work for Employer, he would have a hard time finding a job because, "There's not a lot going on up there." Barros-Bailey dep., p. 13. Dr. Barros-Bailey also opined that southern Idaho provided a much better job market than Bonners Ferry due to its larger population base.

51. Dr. Barros-Bailey was faced with two sets of restrictions; one by Dr. Krafft and the other the STARS FCE. When dealing with two sets of restrictions, Dr. Barros-Bailey testified

[6] Ms. Barros-Bailey speaks fluent Spanish and had no difficulty communicating with Claimant.

that she is ethically bound to give two separate vocational opinions; she is not at liberty to choose one over the other.

52. Dr. Barros-Bailey, using both sets of restrictions, opined as follows regarding Claimant's disability:

> So I came up with two different opinions, and the opinions are based on three factors - - three main factors. They're based on loss of access, applying the functional opinions of each of the two sources, looking at the wages for the residual jobs, vis-à-vis, his wage at the time of injury, and then I also, on each one, gave him about a five percent factor for issues of education, age, disfigurement, and limited language. That came into play, in my opinion.
>
> Q. (By Mr. Wigle): And the end result of that was?
> A. So based on the functional capacity evaluation, limitations, I came up with a 57 percent impairment - - or disability inclusive of impairment. Dr. Krafft was 34 percent inclusive of impairment.
>
> Q. And 34 percent is actually less then his - -
> A. 35 percent - - I think he gave 37 percent. It was somebody else that gave him 35. Let me look.
>
> Q. Less than his impairment?
> A. Yes. His impairment was 37, I think.
>
> Q. Even with the more restrictive set of restrictions that you were working with, the numbers came out to 57?
> A. Correct.

Id., pp. 17-18.

53. Dr. Barros-Bailey testified that she has placed Spanish speaking amputees in a dairy and as a tractor driver. She does not think it would be futile for Claimant to look for work:

> Q. Knowing what you know about Mr. Rodriquez's physical limitations and his background and history, if he were [sic] motivated to return to the work force, and if he were [sic] still living in the Boise area, assuming he was, do you think it's futile for him to look for work?
> A. No. I think there's going to be a small pool of jobs, but I think he would be able to find something.
>
> Q. It might take him a while?
> A. It might take him a while.

Q. Do those jobs exist?
A. Those jobs exist.

Id., pp. 19-20.

54. Dr. Barros-Bailey did not review either hearing transcript or Mr. Montague's report, which was prepared approximately one year after hers. She also did not review Mr. Adams' April 2014 FCE. She did review Mr. Hunter's JSE, but did not review it with Claimant; however, she did ask Claimant about the work he performed at Employer's. In her loss of access analysis, Dr. Barros-Bailey considered the entire state of Idaho geographical area, rather than the Bonners Ferry or Treasure Valley labor markets. She utilized the state to "smooth out the averages" because if the Treasure Valley labor market was used, Claimant's loss of access would be lower than if the Bonners Ferry labor market was used.

55. Dr. Barros-Bailey testified that Mr. Hunter's JSE has no bearing on her opinions regarding Claimant's disability because it was data prepared for a very specific purpose, that is, to describe the time-of-injury job duties and provide the information to doctors. Only if a doctor provided functional restrictions for future work would a JSE be of much importance to her.

56. Dr. Barros-Bailey explained why, when she averaged Claimant's loss of access of 83% with his loss of earning capacity of 11% and arrived at 47% PPD, her final opinion was 57% PPD:

> From a couple of different scenarios. Because we're dealing with somebody who has limited English, limited education, he's got - - he wears a glove, he's got that disfigurement aspect that may affect his employment with certain employers, and so I thought that the average of 47 percent was probably a low - - it was probably too low, given the non medical factors, and it should be higher.

Id., p. 54.

Return to modified work offer

57. Edward Atkins Jr., is Employer's general manager. He testified at the Coeur d'Alene hearing. Employer grows and processes hops for Anheuser-Busch, known for its Budweiser beer, on approximate 3,000 acres between Bonners Ferry and the Canadian border. Mr. Atkins explained:

> Q. (By Mr. Wigle): Is there something about the soils or the climate or both up around Bonners Ferry that is conducive to growing hops?
> A. Both. The location was originally picked because it is basically on the 49th parallel similar to the famous hop growing regions in Europe. And we originally grew primarily European aroma type hops.
> So similar climate, it is in the bottom of a rich fertile valley so the soils are good. There is a river that runs through the valley that provides irrigation water so it is in ideal location for these type of aroma hops.

CDA Tr., p. 55.

58. Mr. Atkins described his progression within Employer's hop farm at the CDA hearing:

> Okay. I was hired there in 1987 as a mechanic. I quickly became the shop foreman at the main shop. I served in that position for approximately five years, and was promoted then to maintenance manager. I served in that position - - well, I can't remember how many years, roughly five, eight years, and I was promoted then to the business manager. I served as the business manager up until the fall of 2008, and then I was promoted to the general manager.

Id., p. 59.

59. Mr. Atkins testified that Claimant was one of Employer's core group of employees, i.e., one of the last workers to be let go in the fall, and one of the first workers to be hired back again in the spring. To be a core employee, "He is one of our more skilled employees in terms of ability, work ethics, attitude." *Id.*, p. 61. Mr. Atkins considered Claimant to be his friend.

60. Mr. Atkins remembers that Claimant attempted a return to light-duty work in the fall of 2011 for a few days, although he did not recall exactly what jobs he tried. Employer was working on a plan to have Claimant return to work in the spring of 2012:

> Q. (By Mr. Wigle): During the late fall, early winter leading up to the spring of 2012 were efforts being made to find something for him in the spring of 2012 when the season started?
> A. Yes, we assumed that he was - - after the surgeries were complete that he would be able to come back and work for us in some capacity, so we did look at all the various tasks that we performed at the farm and make some type of assessment as to what he would be capable of doing, and the drip operator position, as I mentioned earlier, we were scaling up, getting ready to scale up, which we did in 2012 and have since. It was a very viable position for him, again, especially as we increased hop production he would transition back into a supervisory role.
>
> . . .
>
> Q. I have seen discussions about the possibility or the need to modify an ATV so that it could be controlled by controls on the left side rather than the right side?
> A. That's correct.
>
> Q. Is that something you were going to do for him?
> A. Yes, we were going to take the same mechanisms that they use on snowmobiles. A lot of snowmobiles have both right and left-hand throttles for side-hilling, and we had looked at using controls similar to what they use on snowmobiles so that you have both left and right-hand throttle.
>
> Q. Was that doable?
> A. Yes, I believe it was.
>
> Q. Were you to the point where you would have been willing to assign another worker to help him?
> A. Yes, he would typically have helpers already, so like currently the drip operator we have, he has anywhere from two to 15 people working for him through the season, so it would be just a matter or reassigning certain responsibilities with Rodrigo's handicap, so to speak, but is was easily workable.
>
> Q. In order to come back to work for you in the spring of 2012 did he need to be able to forcibly grip a tool in his right hand?
> A. Would we have liked him to have been able to? Yes. Did he have to be able to? No. It would just be a matter of reassigning - - as it said, basically his staff, his crew would have to assist him in whatever - - with whatever limitation

> he had. But the main focus was his process knowledge, what he brought to managing the system. And as I mentioned, as time progressed he would have had a diminishing role in the actual physical requirements of operating the system anyway, because you assume more of a supervisory role.
>
> Q. With more acreage?
> A. With more acreage, yes.

Id., p. 68.

61. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility. Because the Referee heard Claimant's testimony at the earlier Boise hearing regarding his fear that even if Employer hired him back, as soon as the workers' compensation case was over, he would be fired, the Referee listened to Mr. Atkins' testimony in that regard carefully:

> Q. (By Mr. Wigle): What was Mr. Rodriquez's value to your company, where did it lie?
> A. Like myself and several others at farm, over time - - hops are a very unique crop with unique needs and skill sets that are built over time. Rodrigo had always shown that he was a hard worker, he showed a lot of initiative. He had pretty good communication skills in terms of being bilingual, and he had built all this process knowledge over time.
> At the time we only had him as a drip operator without a lot of other training. We had - - prior to downsizing we had other folks that were familiar with the system, but we lost all of those folks.

Id., pp. 68-69.

62. Claimant formally declined Employer's invitation to continue working for them via a letter from his counsel stating that none of the positions offered fit within his physical restrictions and his employment may well endanger Claimant's health and safety. See JE 24, p. 684.

63. Both of the forensic vocational evaluations that have been performed in this matter can be criticized, but perhaps the evaluation performed by Mr. Montague is the most problematic. Mr. Montague was critical of ICRD consultant Hunter for his failure to review the

JSE of the time of injury job with Claimant. Mr. Montague sought to correct this shortcoming by preparing an assessment of Claimant's time of injury job with the assistance of Claimant and his daughter. However, Mr. Montague did not share or review this evaluation with Employer. Therefore, Montague's criticism of the Hunter JSE might also be extended to the one he performed. More problematic is Mr. Montague's insistence that the first two functional capacity evaluations performed in this case are somehow flawed because of their reliance on the Hunter JSE. Admittedly, if the Hunter JSE is inaccurate in describing the requirements of Claimant's time of injury job, then it would be difficult, if not impossible, for the therapists who performed Claimant's first two functional capacity evaluations to render an accurate opinion on the question of whether, based on Claimant's measured functional capacity, he could perform the requirement of his time of injury job. However, an inaccurate JSE in no wise impacts the independent assessment of Claimant's functional capacity, measured at the time of those evaluations. Montague's belief that the consideration of an inaccurate JSE somehow taints the process of assessing Claimant's functional capacity suggests a misunderstanding of what it is that is being measured in the course of a FCE.

64. It is equally problematic that Montague chose to rely only on some of the functional capacity evaluations in performing his assessment of Claimant's disability. Specifically, he chose not to rely on the STAARS evaluation in performing his analysis. This, of course, is the FCE that demonstrates the greatest functional ability. Instead, Montague based his evaluation on the other FCEs, both of which demonstrated less residual functional capacity. It was these FCEs that he referred to several physicians for comment. The Commission agrees with Defendants that this selection bias demonstrates that Mr. Montague's approach and conclusions are not entirely objective.

65. In comparison, Dr. Barros-Bailey did consider both sets of limitations/restrictions that were available to her at the time she performed her evaluation and rendered two different opinions on the extent and degree of Claimant's disability based on those differing assumptions. In each case, she considered Claimant's limitations in the light of Claimant's nonmedical factors. In the case of the limitations/restrictions authored by Dr. Kraft, Dr. Barros-Bailey concluded that Claimant suffered disability, inclusive of impairment, of approximately 34%.

66. Assuming the applicability of the limitations/restrictions identified in the January 19, 2012 FCE, Dr. Barros-Bailey concluded that Claimant has suffered disability in the range of 57% of the whole person, inclusive of impairment. She elaborated that she arrived at this figure after calculating accident-caused wage loss of 11%, based on a time of injury wage of $12.55 per hour, and loss of access to the labor market of 83%. Dr. Barros-Bailey testified that the usual convention would be to average Claimant's wage loss with his loss of access to the labor market to yield a disability of 47%, inclusive of impairment. However, based on the disfiguring aspect of Claimant's injury, Dr. Barros-Bailey testified that her ultimate conclusion is that Claimant has a disability of 57% of the whole person, inclusive of impairment, based on the results of the 2012 FCE. This analysis can be criticized for Dr. Barros-Bailey's understatement of Claimant's time of injury wage. As pointed out by Mr. Montague, in the five years prior to the date of injury, Claimant earned, on average, slightly over $30,000 per year. In a full-time position (2080 hours per year), Claimant would need to obtain employment paying approximately $14.50 per hour in order to replace his time of injury earnings. Therefore, it might be argued that based on the methodology she used, Dr. Barros-Bailey's disability assessment understates Claimant's disability.

67. Referee Powers, of course, had the opportunity to observe Claimant at the time of hearing. His synthesis of Claimant's disability, when considering the various limitations/restrictions that have been authored by medical professionals, and Claimant's known nonmedical factors such as his work history, transferrable job skills, education, language barrier, disfigurement, etc., is that Claimant has suffered a disability of 57% of the whole person, inclusive of his impairment rating. The Commission is unwilling to disturb the Referee's judgment in this regard. However, the Commission does believe it is necessary to elaborate on Referee Power's conclusion that Claimant is also totally and permanently disabled under the "odd lot" category.

68. Claimant can only prove odd-lot status by the path of demonstrating that it is futile for him to look for employment based on his limitations and relevant nonmedical factors. Claimant cannot show that he has attempted other types of employment without success, or that others have searched for work on his behalf and have been unable to identify any suitable employment.

69. Claimant has the ability to speak both Spanish and English. His supervisor, Mr. Atkins, testified that except where some specialized vocabulary might be called for, he generally had no trouble communicating with Claimant in English. (CDA Tr., 73/14-24). Claimant has what might generously be described as a modest educational background, having completed the fifth grade in Mexico. He has no transferrable job skills by training or vocation. As of the date of hearing, he was 56 years old. His restrictions are such that he has only very limited use of his dominant hand. The most recent FCE performed at Mr. Montague's instance suggests that Claimant is also developing some difficulties in his left upper extremity that may also impact his ability to engage in physical activity. On the plus side of the equation, Claimant is reliable, loyal

and dependable, as demonstrated by his 20+ years of employment by his time of injury employer, and the high regard in which that employer holds him. These are all attributes which, though not technically "transferrable skills", must be considered as factors which would auger in favor of Claimant's employability.

70. While hop farming, at least as described by Mr. Atkins, is a unique agricultural pursuit, the Commission takes judicial notice of the fact that hops are also grown in areas of the Treasure Valley. Possibly, Claimant has something to offer such a farmer? Well, no one checked. At the end of the day, it is impossible to ignore the fact that Claimant is essentially an older, uneducated field worker, with severe impairment of dominant upper extremity function, who will find it extremely difficult to compete for any of his past relevant employments, or other work for which he is currently suited from a physical standpoint. The Commission finds it difficult to believe that prospective employers, i.e., ones with no prior association with Claimant, would preferentially hire Claimant over younger, physically able, unskilled workers. For these reasons, we conclude, as did Referee Powers, that Claimant has made a *prima facie* showing of total and permanent disability under the odd-lot doctrine by the path of futility.

71. If Claimant makes a *prima facie* showing that he is an odd-lot worker, then the burden of proof shifts to Employer to demonstrate that some kind of suitable work is regularly and continuously available to Claimant. *See Lyons v. Industrial Special Indem. Fund*, *supra*. The *Lyons* Court elaborated on the type of proof required to overcome the *prima facie* showing of total and permanent disability under the odd-lot doctrine:

> In meeting its burden, it will not be sufficient for the Fund to merely show that appellant is able to perform some type of work. Idaho Code Sec. 72-425 requires that the Commission consider the economic and social environment in which the claimant lives. To be consistent with this requirement it is necessary that the Fund introduce evidence that there is an actual job within a reasonable distance from appellant's home which he is able to perform or for which he can be trained.

> In addition, the Fund must show that appellant has a reasonable opportunity to be employed at that job. It is of no significance that there is a job appellant 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.

Therefore, it has been held that employer has not met this burden of proof by showing that a job survey conducted by a vocational rehabilitation specialist tended to demonstrate that five different employers had had job openings in the recent past for work that was consistent with Claimant's limitations/restrictions (*Nielson v. State of Idaho Industrial Special Indem. Fund*, 106 Idaho 878, 684 P.2d 280 (1984)), or by showing that a vocational rehabilitation specialist opined that although they did not exist in great numbers, there were probably some light duty jobs which Claimant could perform within his limitations/restrictions, or which could be modified to suit Claimant's limitations (*Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990)). *See also Hoye v. Daw Forest Products, Inc.*, 125 Idaho 582, 873 P.2d 836 (1994).

72. Mr. Montague, of course, did not believe that Claimant is employable, either in Bonners Ferry or in the Treasure Valley. Dr. Barros-Bailey agreed that Claimant has no realistic opportunities for employment in Bonners Ferry, but that he does have some opportunities for employment in the Treasure Valley. She does not believe that it is futile for Claimant to look for work. She testified that she has found work for Spanish-speaking amputees in the past, and believes that there are some driving jobs which Claimant would be qualified to perform, particularly if he takes advantage of certain assistive technologies. As developed above, this testimony is not sufficient to satisfy Defendants' burden to adduce evidence to overcome the Claimant's *prima facie* showing. *Hoye v. Daw Forest Products, Inc., supra*; *Dumaw v. J.L. Norton Logging, supra; Nielson v. State of Idaho Industrial Special Indem. Fund, supra*. However, the evidence in this case also establishes that Claimant's time-of-injury-employer offered to employ him at an actual job in the spring of 2012. Referee Powers found that this was

a bona fide offer of employment, and that Employer was sincere in its stated willingness to accommodate Claimant's physical limitations in order to make use of his vast knowledge of the hop farming operation. Per Employer, Claimant's job would be largely supervisory, and he would have subordinates available to whom he would assign the physical tasks that he had previously performed. As developed above, in proving that some kind of suitable work is regularly and continuously available to Claimant, it is necessary that Defendants introduce evidence that there is an actual job within a reasonable distance from a Claimant's home which he is able to perform or for which he can be trained. The Commission concludes that the job described by Mr. Atkins in his testimony is an "actual job". As developed above, we further conclude that since both the Bonners Ferry and Boise labor markets must be considered in evaluating Claimant's disability, this actual job must be treated as a job which lies within a reasonable distance from Claimant's home, notwithstanding that Claimant currently resides in the Treasure Valley.

73. However, it is impossible to know whether the modified job, as described by Mr. Atkins, is one that Claimant has retained the physical capacity to perform. Therefore, it is unclear whether the actual job is "suitable." As problematic, is the requirement that the suitable work be "regularly and continuously available" to Claimant.

74. Mr. Atkins explained that the demand for hops waxes and wanes depending on the vagaries of the marketplace:

> Q. (By Mr. Wigle): About how many acres does Elk Mountain Farms have in cultivation currently?
> A. We have approximately 3,000 acres in terms of cultivation, approximately 2,000 of that is in field crops or hops.
>
> Q. Five hundred is timber land?
> A. And the rest is infrastructure, dikes, grasslands.

> Q. What determines how much of the property is going to be devoted to hops in any given year?
> A. Generally the brewery's needs in terms of their inventory levels of hops.
>
> Q. Do you participate in the discussions as to how much product you need to produce?
> A. I do.
>
> Q. I take it other people in the company participate as well?
> A. That's correct.
>
> Q. How much does it vary from year to year?
> A. In this particular time frame we were at full production in hops in 2009 with approximately 1,700 acres in hops, and the spring of 2010, due to inventory levels, we reduced that acreage down to approximately 300. We maintained that acreage until the spring of 2012 and we have been planting hops since.
>
> Q. So you are back in expanded production mode now.
> A. In terms of hops, that's correct.

CDA Tr., 53/24 – 55/2.

75. Therefore, when inventory levels were high, as they were in 2010, acres in production dwindled from 1700 acres to 300 acres. Currently, Employer is enjoying high demand, which has allowed it to significantly expand acres in production with a commensurate increase in its workforce. Mr. Atkins testified that it is the current expansion which supports Employer's ability to treat the job to which they propose to return Claimant as mainly a supervisory job, a job in which the physical components of the work which Claimant once performed can be performed by his subordinates. (*See* CDA Tr., 68/3-71/3). However, it does not seem unreasonable to suppose that the same factors which drove the decrease in production in 2010 might arise again in the future, leaving Employer without the luxury of treating Claimant's position as largely supervisory in nature. On this evidence, we cannot conclude that Defendants have met their burden of proving that suitable work is "regularly and continuously available" to Claimant, notwithstanding that Employer's current offer of employment is

legitimate and sincere. The Commission concludes that Defendants have failed to rebut Claimant's *prima facie* showing of odd-lot status.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven his entitlement to permanent total disability benefits pursuant to the odd-lot doctrine, effective February 7, 2013, the date Dr. Kraft assigned to Claimant a PPI rating.

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

DATED this 24th day of September, 2015.

INDUSTRIAL COMMISSION

__/s/_____
R.D. Maynard, Chairman

__/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

Commissioner Thomas E. Limbaugh dissenting.

After reviewing the record in this case, I respectfully dissent from the majority decision finding Claimant totally and permanently disabled by virtue of the odd-lot doctrine. In my opinion, Claimant, though suffering from a considerable amount of disability, is able to be regularly employed and it would not be futile for him to search for work. In particular, the facts show that there are jobs available for Claimant and that Claimant could obtain employment

simply by accepting the offer of work extended to him by Employer, which Employer suggested would remain open for him whenever he wanted to return.

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). There are three methods of proving odd-lot status: (1) attempts at other types of employment were unsuccessful; (2) the worker, vocational counselors, employment agencies or other job service agencies have unsuccessfully searched for work for the worker; or (3) that any efforts of the employee to find suitable employment would be futile. *Fowble v. Snoline Express, Inc*., 146 Idaho 70, 190 P.3d 889 (2008).

The majority acknowledges that Claimant does not reach odd-lot worker status under the first two prongs of the test but concludes that Claimant is an odd-lot worker under the third prong of the test because any effort to find suitable employment would be futile. This is an extremely onerous burden and one that should not be taken lightly. Arguably, futility is the most difficult prong of the odd-lot doctrine.

According to the majority, Claimant reaches odd-lot worker status fairly easily under this third prong due to the fact that Claimant is "essentially an older, uneducated field worker, with severe impairment of dominant upper extremity function", with no transferable skills, who will find it very hard to compete for employment with younger workers who have no physical restrictions. Given his circumstances, it is futile for Claimant to even look for work and thus, he has made a *prima facie* showing that he is an odd-lot worker. The majority then goes on to explain that Employer fails to rebut Claimant's *prima facie* showing that he is an odd-lot worker

because Employer is unable to demonstrate that some kind of suitable work is regularly and continuously available to Claimant.

In coming to this conclusion, the majority totally discounts Employer's job offer and the testimony of several vocational experts. In the spring of 2012, without Claimant even seeking work, Employer extended a written job offer to Claimant asking him to return to work. At the time this job offer was extended to Claimant, Claimant was still living on Employer's premises in the Employer provided housing that Claimant had lived in for the past twenty years. (CDA Tr. 19, 71) Employer assured Claimant that they would make whatever modifications to their equipment and to his job duties that would be necessary for Claimant to be able to return to work. (*Id*. at 68-70) Rather than attempting to return to work and remain with Employer, Claimant declined the job in writing through his attorney, applied for and began receiving social security disability, and chose to move to Boise to be closer to his daughter.

The majority finds fault with Employer's job offer stating that it is "unclear whether the actual job is suitable", and that the work might not be regularly and continuously available to Claimant. However, Employer made it more than clear that Claimant was more than just an unskilled laborer. According to Employer, Claimant was "the guy" when it came to hops irrigation and was a skilled, knowledgeable, and valued employee and that they would make whatever accommodations that would be necessary to get him back to work. *Id*. Additionally, while it is true that Claimant is more limited now than he was before his injury, this does not mean he is incapable of working. Dr. Krafft indicated that while Claimant clearly has some limitations, with modifications, he is fully capable of returning to work and that he should work with ICRD regarding work alternatives. (Exhibit 14, pp. 482-483, 490)

The majority also finds fault with Employer's job offer because hops production fluctuates from year to year and therefore, the job might not be "regular and continuously available" in years of low production when hops production decreases. However, Employer made it clear that Claimant was one of their "core employees" and that if they needed to lay off workers, Claimant would be one of the last to go. Additionally, Employer is not just a small Idaho hops farm. Employer is actually a subsidiary of a subsidiary of Anheuser-Bush. (CDA Tr. 53) The likely-hood that production would drop off enough that Employer's entire group of core employees would loose their jobs seems extremely low.

Finally, the majority opinion discounts the opinion of the vocational experts who were involved in this case. ICRD consultant Richard Hunter testified that after meeting with Employer it was clear that Employer was not merely being sympathetic when offering Claimant a job. Rather, it was clear from speaking with Employer that Claimant was a respected and valued employee and that Employer very much wanted to keep Claimant due to his twenty plus years with Employer and his vast knowledge and experience in raising hops. (CDA Tr. 13-14, 19) Additionally, ICRD consultant Teresa Ballard contacted Employer on February 7, 2013 and confirmed that Employer's job offer to Claimant was still open. (Exhibit 27, p. 761) Employer testified at hearing that given Claimant's longevity with Employer and vast experience with hops, they would still hire him back if he wanted his job. (CDA Tr. 72-73) Therefore, it is my opinion that the evidence does lead to the conclusion that there was, and still is, suitable work regularly and continuously available to Claimant.

Unfortunately, Claimant never made an attempt to return to his job, or any job, despite Employer and ICRD's efforts to get him employed. Since Claimant made no attempt, we are left to discuss whether it would have been futile for him to attempt. Given the evidence in the

record, it clearly would not have been futile for him to attempt to find a job. Employer testified that Claimant could still have his job and that they would make whatever modifications he needed. Additionally, taking into consideration Claimant's skill and experience in dealing with hops farming and with irrigation of crops in particular, Claimant is clearly more than just an "unskilled laborer" with no transferable skills. Dr. Barros-Bailey testified that although returning to Employer would have been Claimant's easiest way to find employment, she does not think it would be futile for Claimant to look for work in the Boise area and that there are jobs available that he could perform with his restrictions if he took the time to look. (Barros-Bailey dep. 19-20) Although Claimant's industrial injury has significantly reduced his labor market access, the record does not support the proposition that Claimant's efforts to find suitable employment would be futile.

For the foregoing reasons, it is my opinion Claimant is not totally and permanently disabled. Claimant undoubtedly suffers some amount of permanent partial disability but he has not proven that he fits within the futility prong of the odd lot doctrine. I respectfully dissent from the majority decision.

DATED this 24th day of September, 2015.

INDUSTRIAL COMMISSION

__/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of September, 2015, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AND DISSENTING OPINION** was served by regular United States Mail upon each of the following:

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__/s/_____