BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KRISTEN ARNEAL, Claimant, v. ECLIPSE TRAFFIC CONTROL & FLAGGING, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2010-022632** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED** **OCTOBER 2, 2017**

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 Coeur d'Alene on November 15, 2016. Claimant, Kristen Arneal, was present in person and represented by Michael J. Verbillis, of Coeur d'Alene. Defendant Employer, Eclipse Traffic Control & Flagging, Inc. (Eclipse), and Defendant Surety, State Insurance Fund, were represented by H. James Magnuson, of Coeur d'Alene. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on July 14, 2017.

ISSUES

The issues to be decided are: [1]

[1] Claimant's entitlement to medical and temporary disability benefits were issues noticed for hearing; however, the parties apparently resolved these issues as they did not argue them as issues in their briefing. Claimant's briefing simply requests that her entitlement to medical care be kept open. Pursuant to Idaho Code § 72-432 medical care remains open for Claimant's lifetime provided causation is established.

1. The extent of Claimant's permanent partial impairment and causation thereof;

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

3. Apportionment pursuant to Idaho Code § 72-406.

CONTENTIONS OF THE PARTIES

All parties acknowledge Claimant suffered an industrial accident on November 10, 2010, resulting in a torn left knee meniscus and ACL. Claimant subsequently underwent left knee arthroscopic meniscectomy and later total left knee arthroplasty. Claimant asserts that as a result of her industrial accident she suffers chronic regional pain syndrome (CRPS) in her lower left extremity and is totally permanently disabled pursuant to the odd-lot doctrine. Defendants deny Claimant currently suffers CRPS and allege she sustained a 10% permanent impairment of her left knee due to her industrial accident. They contend Claimant suffers at most a 25% permanent disability inclusive of her permanent impairment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file.

2. Claimant's Exhibit A and Defendants' Exhibits 1 through 17, admitted at the hearing.

3. The testimony of Claimant taken at the hearing.

4. The post-hearing deposition testimony of Nancy J. Collins, Ph.D., taken November 29, 2016, by Claimant.

5. The post-hearing deposition testimony of Scott K. Magnuson, M.D., taken December 21, 2016, by Claimant.

6. The post-hearing deposition testimony of Douglas N. Crum, CDMS, taken March 13, 2017, by Defendants.

7. The post-hearing deposition testimony of Dennis Chong, M.D., taken April 19, 2017, by Defendants.

All outstanding objections are overruled and motions to strike are denied.

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. Claimant was born in 1960. She is right-handed. She was 56 years old and lived in the Coeur d'Alene area at the time of the hearing. Eclipse is an employer that provides flaggers and other traffic control personnel and equipment for various large construction projects including road building and maintenance.

2. **Background.** Claimant was born in California where she graduated from high school in 1978 and then attended junior college for one year. She relocated to Orlando, Florida where she obtained an associates degree in journalism in 1980. Claimant then went into aerospace micrographics and worked for Martin Marietta at the Kennedy Space Center. She transferred to Vandenberg Air Force Base where she assisted with ground support for the space shuttle. Her duties included mass producing documents for engineers and photocopying and preparing documents for micro fiche.

3. By 1988, Claimant relocated to California where she worked at Kinko's for three years as a manager. Her duties included securing new accounts, customer service, and Xerox machine maintenance. She was on her feet her entire work day.

4. Claimant thereafter worked for four years as a hardware store stocker in Astoria, California. Her duties included stocking and operating a cash register. Her work required frequent lifting and she was on her feet her entire work day. Claimant subsequently worked for a potter making designs on pots, glazing, and eventually progressed to throwing pots on a wheel. In 1994 she began working for another potter. Her duties were physically demanding and included transporting pots up and down a hill in a wheelbarrow, pulling pots from kilns, and delivering pots to markets for sale. In approximately 1998, Claimant moved to Lucerne Valley, California and worked making computer components from thermoplastic. The work required her to be on her feet all day. From 2004 until 2005, Claimant worked in Henderson, Nevada at an RV park. She also helped refurbish and remodel old casinos where she demolished walls and laid tile.

5. In 2006, Claimant came to the Coeur d'Alene area and began working seasonally for Eclipse Traffic Control. She completed training and became a certified flagger. She proved herself responsible and was one of 12 individuals out of 300 hired also cleared by Eclipse to drive trucks. She drove trucks, towed wheeled signs and other devices, and dropped cones, delineators, and bases. She was usually in and out of a truck, moving trucks and dropping cones all day long—sometimes for as long as 16 hour per day. Her longest work period was 26 hours.

6. **Industrial accident and initial treatment.** On September 14, 2010, Claimant was working for Eclipse from a truck without a tailgate when her left foot slipped and caught between the truck bed and the rear bumper. She fell to the ground on her left side, wrenching her left knee. Claimant was earning approximately $22.56 per hour at the time of her accident. She noted immediate left knee soreness and was unable to straighten her left knee. Claimant worked two more days wearing knee braces while her left knee worsened.

7. On September 17, 2010, Claimant sought medical care, was examined, received x-rays, and was told she had severely strained left knee ligaments. She underwent physical therapy for six weeks, improved, and then returned to work. Although able to return to work, she noted ongoing left knee pain and swelling and could not fully extend her left leg. Over time, her left foot gradually began to turn inward. Her treating physician recommended a left knee MRI; however, the Surety refused authorization. Claimant continued working.

8. In 2011, Claimant left Eclipse and began working as a flagger for Cat's Eye Excavating earning $31.00 to $38.00 per hour. She later worked part-time as a flagger for Perfection Traffic Control. Claimant continued working with increasing left knee pain and swelling until October 2013, when she could no longer tolerate the physical requirements of her work.

9. In October 2013, Claimant underwent a left knee MRI as ordered by Scott Brown, MD. The MRI revealed left knee meniscal and anterior cruciate ligament pathology. On July 31, 2014, Dr. Brown performed left knee arthroscopic surgery for meniscus repair. After recuperating from arthroscopy, Claimant continued to note limited left knee extension and observed that her left foot still turned inward.

10. Claimant sought further medical care from Jeffrey Lyman, M.D., although the Surety discouraged her visit. Dr. Lyman recommended total left knee arthroplasty. Surety then sent Claimant to James Kopp, M.D., who concurred with Dr. Lyman's recommendation that Claimant needed total left knee arthroplasty.

11. **Total knee arthroplasty and sequela.** On June 2, 2015, Dr. Lyman performed total left knee arthroplasty. As a routine part of the surgical procedure, Dr. Lyman drilled into Claimant's left tibia and temporarily attached a jig to guide placement of the arthroplasty

implant. The total knee arthroplasty surgery was successful; however, when the stitches were removed, Claimant experienced extreme pain in her left shin which she later described as feeling like a drawing knife peeling off bone. Dr. Lyman's records document that shortly after surgery, Claimant developed extreme sensitivity to anything touching her left shin, including her boot, her pant leg, bed sheets, tall grass, or running water. Dr. Lyman suspected chronic regional pain syndrome (CRPS) and referred Claimant to Scott Magnuson, M.D., for treatment of her ongoing lower left extremity pain.

12. On July 23, 2015, Dr. Magnuson examined Claimant and diagnosed CRPS. Claimant received approximately five sympathetic nerve blocks that reduced her left shin sensitivity for only a few days but allowed her to more fully participate in physical therapy. Dr. Magnuson prescribed Lyrica and Nortriptyline, which significantly adversely affected Claimant's balance. He subsequently prescribed Gralise, an extended release form of Gabapentin, for nerve pain. Evening doses of Gralise affected Claimant's balance less and allowed her to sleep. When taking Gralise, her usual pain level was 6 to 8 out of 10. Claimant has inadvertently gone without medication for one day and by the following day she felt her former hypersensitivity symptoms returning, including increased pain and a sensation of insects crawling on her left shin.

13. **Condition at the time of hearing.** At the time of hearing Claimant continued to treat periodically with Dr. Magnuson. She testified of left lower extremity pain on her shin between her left knee and ankle. She described her left shin symptoms as tingling, swelling, and feeling like a heat rod through the bone. Anything touching her left shin "sends her through the roof." If touched, her left shin will "heat up" and her pain increase for two or more hours. She sleeps with her left lower extremity on top of the sheets. She does not cross her legs when

seated. Her shin pain is worse with cold weather. Claimant explained that she cannot tolerate shaving her left anterior shin and cannot tolerate water running on her left shin. She does not shower, but rather bathes and washes her hair in the sink. Because of her left shin sensitivity, Claimant cannot wear pants, socks, or boots on her left lower extremity. She picks her path carefully when walking so as to not bump anything. She no longer does yard work as even grass touching her left shin is extremely painful.

14. At hearing Claimant wore low shoes without a sock or hose on her left foot and long pants with the left pant leg rolled up above her left knee. Her left anterior shin was unshaven.

15. Claimant testified that she can walk only approximately 20 minutes and stand only 20 to 40 minutes before her left shin pain worsens. Claimant has moderate balance problems when she turns her head rapidly, which she attributes to her use of Gralise. She takes Gralise each evening and is especially unsteady and feels "spacey" until approximately noon. Thereafter her balance improves but her shin pain gradually worsens.

16. Claimant has inquired about work in a restaurant, hardware store, Kinko's, and various other places but was advised that the dress code at each business would require her to wear long pants. She believes her balance issue and standing limitation would preclude her from doing her previous flagging job, although she enjoyed her job and would like to go back to work as a flagger.

17. When Surety refused to authorize refills of Claimant's Gralise prescription for a time, Dr. Magnuson tried to keep Claimant on Gralise by providing samples. Claimant takes no other prescription medications and has no other health issues.

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

DISCUSSION AND FURTHER FINDINGS

19. 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. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

20. **Impairment.** The first issue is the extent and causation of Claimant's permanent impairment. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment, Waters v. All Phase Construction, 156 Idaho 259, 262, 322 P.3d 992, 995 (2014), and "in conducting a permanent impairment evaluation, is not limited to record or opinion evidence of a physician requested to give a permanent impairment rating." Soto v. J.R. Simplot, 126 Idaho 536, 539-540, 887 P.2d 1043, 1046-1047 (1994).

21. A two-step analysis is appropriate in impairment and disability evaluations and requires "(1) evaluating the claimant's permanent disability in light of all of his physical impairments, resulting from the industrial accident and any pre-existing conditions, existing at the time of the evaluation; and (2) apportioning the amount of the permanent disability attributable to the industrial accident." Horton v. Garrett Freightlines, Inc., 115 Idaho 912, 915, 772 P.2d 119, 122 (1989). In the present case, there is no assertion or evidence of any pre-existing condition or impairment resulting from any cause other than the industrial accident. Two physicians have opined regarding the permanent limitations resulting from Claimant's industrial left knee injury.

22. Dr. Magnuson. Dr. Magnuson is a board certified physician with specialty in anesthesiology and subspecialty in pain management, an area in which he has practiced since 1997. He commenced treating Claimant in July 2015. During his treatment, he observed Claimant had left lower extremity pain disproportionate to any inciting event, persistent allodynia, vasomotor symptoms manifest in skin color changes, and edema. Based upon these observations he diagnosed CRPS. Dr. Magnuson aggressively treated Claimant's CRPS and her condition improved somewhat. After approximately six months of treatment, Claimant's left lower extremity edema, and abnormal hair growth virtually resolved and her left lower extremity range of motion improved. However, her left shin allodynia persisted. The resolution of some of Claimant's CRPS symptoms, including edema and abnormal hair growth, attests to the efficacy of Dr. Magnuson's treatment. On August 4, 2016, Dr. Magnuson wrote that Claimant was likely at maximum medical improvement with ongoing disability from her industrial injury. The record contains no impairment rating by Dr. Magnuson for Claimant's persisting condition.

23. Dr. Magnuson testified that Claimant's self reports of standing, walking, or sitting for only an hour were reasonable given her chronic symptoms and were consistent with his interactions with and observations of Claimant. Dr. Magnuson further testified that he has seen no indication of malingering or lack of credibility in her reports. During the time Surety refused to refill Claimant's Gralise prescription, Dr. Magnuson provided Claimant free Gralise samples because he found her reported complaints valid and her need genuine. He opined that at this time, a year and a half after her CRPS symptoms began, Claimant's symptoms "potentially may get a little bit better," Magnuson Deposition, p. 15, ll. 23-24, but he believed she would have ongoing pain issues.

24. Dr. Chong. Dennis Chong, M.D., is board certified in physical medicine and rehabilitation. On June 28, 2016, Dr. Chong examined Claimant at Defendants' request and opined she had no work restrictions. He diagnosed complication post left total knee arthroplasty with persistent allodynia of the left anterior tibia related to her industrial accident. During examination, he measured an area of allodynia of approximately 20 by 8 centimeters over the front of Claimant's left shin. Nevertheless, Dr. Chong opined that her CRPS had resolved. However, he opined it was understandable that Claimant limited her activities secondary to her allodynia. Dr. Chong observed that the residual symptom:

> [Claimant] had as a complication of her left total knee arthroplasty was an area of allodynia over the front of her left shin. …. This area is slightly more pigmented, meaning of a darker appearance. And the hair growth in that area is present. …. This is one specific area that she does not shave her legs because she finds it too sensitive to shave her legs.

Chong Deposition, p. 17, l. 20 through p. 18, l. 6.

25. Dr. Chong opined that because some of Claimant's other symptoms had improved he believed Claimant's allodynia would have a good prognosis to improve during the two to

three years after the onset of her initial symptoms. Nevertheless, Dr. Chong awarded additional permanent impairment on the basis of Claimant's allodynia. He rated Claimant's left knee impairment at 25% of the left lower extremity, equating to 10% of the whole person, pursuant to the AMA Guides to the Evaluation of Permanent Impairment, (Guides) Sixth Edition. Dr. Chong's rating effectively includes 4% lower left extremity impairment for Claimant's persistent allodynia of the left anterior tibia area.

26. Pain itself can produce functional loss and thus is a medical factor to be considered in determining permanent impairment. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 754-55, 769 P.2d 1122, 1126-27 (1989). Claimant's credible testimony and her consistent well documented reports to Drs. Lyman and Magnuson establish that her left shin allodynia limits her ability to walk, stand, and wear boots, pants, and socks.

27. Considering the medical records herein and Claimant's credible left shin pain complaints and her resulting functional limitations, the Referee finds that Claimant suffers permanent impairment of 10% of the whole person attributable to her industrial left knee injury.

28. **Permanent disability**. The next issue is the extent of Claimant's permanent disability, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that

in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant.

29. 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 extent and causes of permanent disability "are factual questions committed to the particular expertise of the Commission." Thom v. Callahan, 97 Idaho 151, 155, 157, 540 P.2d 1330, 1334, 1336 (1975). A disability evaluation requires "the Commission evaluate [claimant's] disability according to the factors in I.C. § 72–430(1), and make findings as to her permanent disability in light of all of her physical impairments, including pre-existing conditions, and that it then apportion the amount of the permanent disability attributable to [claimant's] accident." Page v. McCain Foods, Inc., 145 Idaho 302, 309, 179 P.3d 265, 272 (2008). The proper date for disability analysis is the date of the hearing, not the date the injured worker reaches maximum medical improvement. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012). Work restrictions assigned by medical experts and suitable employment opportunities identified by vocational experts may be particularly relevant in determining permanent disability.

30. Work restrictions. In the present case, the parties rely upon the opinions of Drs. Chong and Magnuson regarding Claimant's functional limitations.

31. *Dr. Chong.* Other than indicating Claimant should not stand or walk more than eight hours per day, Dr. Chong did not place any work restrictions upon Claimant due to her total left knee arthroscopy or left shin allodynia. However, he specifically reported: "Understandably, Ms. Arneal is self-limiting secondary to the allodynia for contact to the left anterior tibial skin area." Chong Deposition, Exhibit 2, p. 11. Dr. Chong opined Claimant could perform sedentary work not requiring much walking and standing.

32. *Dr. Magnuson.* Dr. Magnuson testified he encourages his CRPS patients to be as active as they can. However, he opined that Claimant's pain will limit her and that "doing a physical job like standing and flagging is just not realistic." Magnuson Deposition, p. 28, l. 24 through p. 29, l. 1. He opined that potentially a job that is not so physical where she was given the opportunity "to move frequently as she needs to" may be tolerable and "from a theoretical standpoint, having a more sedentary job where she was able to adjust her position from sitting to standing and take some breaks, I think may be reasonable." Magnuson Deposition, p. 29, ll. 3-11. He was unsure whether Claimant would be able to tolerate an eight-hour work day. Dr. Magnuson testified that Claimant's self reported limitations of standing, walking, or sitting for no more than an hour before experiencing increased discomfort are reasonable based upon his lengthy interaction with Claimant and his knowledge of her chronic condition. He documented her persistent allodynia with abnormal sensations to light touch in her lower left extremity. Dr. Magnuson noted that the evening dose of Gralise prescribed to manage Claimant's persistent allodynia has the side effect of making her feel "loopy," confused, and unsteady in the morning.

33. The Referee finds Dr. Magnuson's opinions well explained, supported by his extensively documented observations and dealings with Claimant, consistent with Claimant's credible testimony, and persuasive. Claimant's left shin allodynia limits her ability to stand or

walk for more than an hour, shower, and wear boots, pants, and/or socks on her lower left extremity.

34. Opportunities for gainful activity. Claimant's opportunities for gainful employment have been evaluated by two vocational experts, Dr. Nancy Collins, and Douglas Crum. Their opinions are examined below.

35. *Dr. Collins*. Nancy Collins, Ph.D., interviewed Claimant via Skype on October 10, 2016, and subsequently opined:

> Dr. Magnuson, her treating pain doc, feels that she should avoid work where she is standing. All of her work history has been standing. She has no real sedentary work history or sedentary work skills.
>
> I think the combination of her chronic pain, her inability to wear clothing over her left lower extremity and her need for this medication that makes her dizzy really leaves her with such a small part of the labor market without retraining that she should be considered an odd lot worker.

Collins Deposition, p. 9, ll. 3-13. Dr. Collins noted that Claimant's left shin allodynia effectively limited her to sedentary work and also precluded her from wearing clothing over her left lower extremity: "So that leaves her with work she can perform indoors. In northern Idaho it gets very cold, as you well know. And work where there's not a dress code indicating that you would need to have long pants on or boots." Collins Deposition, p. 10, ll. 19-23.

36. Dr. Collins also noted that Claimant was unable to drive until afternoon, because she takes Gralise every evening and "is dizzy and she feels like she would get a DUI if she were to drive before the medication wears off." Collins Deposition, p. 11, ll. 4-6. Dr. Collins confirmed, as did Dr. Magnuson, that dizziness is a known side effect of Gralise. Dr. Collins also noted that Dr. Magnuson found reasonable Claimant's report that she must avoid standing and walking for more than an hour—which corresponded with Claimant's report that her left leg

swells and her pain increases if she is on her feet too long. Dr. Collins noted that Claimant spends about 40% of the day with her left leg elevated.

37. Dr. Collins believed that Claimant was not computer literate and did not have sedentary work skills, such as typing or keyboarding, which would make her competitive for the kind of sedentary work Dr. Collins believes Claimant could realistically perform. Dr. Collins opined that assuming Claimant had such skills and was competitive for customer service work; she would sustain only a 64% loss of labor market access and would not be totally disabled.

38. *Douglas Crum.* Douglas Crum, DMS, a vocational expert retained by Employer/Surety, interviewed Claimant on September 26, 2016, and prepared a report evaluating her disability. Mr. Crum noted that Claimant's work as a flagger was seasonal and the year prior to her industrial accident, she earned $16,780—barely above minimum wage on an annual basis. He testified that Claimant had done clerical, recordkeeping, customer service, and retail management work pre-injury. Mr. Crum concluded that accepting Dr. Chong's opinion that Claimant's only work restriction was to avoid standing and walking more than eight hours per day, Claimant may sustain a loss of labor market access of perhaps 10%, but could restore her time-of-injury wage earning capacity.

39. Mr. Crum testified that he did not consider Claimant's self-stated limitations in determining her post-injury labor market access. He acknowledged that if Claimant's self-stated standing and walking limitations are accepted, then she would be limited to sedentary employment. Mr. Crum opined that assuming Claimant was restricted to the sedentary labor market; she would sustain approximately a 50% loss of labor market access. Averaging 50% loss of access with no anticipated loss of wage-earning capacity would produce a permanent disability including impairment of approximately 25%. There is no direct indication that

Mr. Crum considered the impact of Claimant's left lower extremity allodynia and the prevalence of work dress code requirements on her employability. Mr. Crum acknowledged that if all of Claimant's self-stated limitations were accepted, then Dr. Collins' assessment of Claimant's overall permanent disability would be more accurate than his.

40. *Weighing the vocational opinions.* Both Dr. Magnuson and Dr. Chong agreed that Claimant cannot return to her pre-injury job as a flagger, which often required her to be on her feet more than eight hours per day. Although Mr. Crum emphasized Claimant's pre-injury clerical, recordkeeping, customer service, and retail management work, it appears she has not performed sedentary work since shortly after 1988 when she relocated to California where she worked at Kinko's as a manager and was on her feet her entire work day.

41. Defendants assert that Claimant could be employed at a call center in the Coeur d'Alene area earning $11.00 per hour. Dr. Collins' report noted that Claimant does not have sedentary work skills, including computer skills or office related experience. Nevertheless, she addressed customer service work:

> Without some kind of skill enhancement, it will be very difficult for Ms. Arneal to be competitive for any kind of work. One occupation she might consider, at least on a part-time basis, would be customer service work where she is in an office setting with no front office duties. She could wear shorts and work the afternoon or evening shift so that her medication does not interfere with her work. This option would only provide a limited labor market.
>
> At this time, she does not have the computer skills necessary to perform this type of work. There are numerous options on-line or on site through North Idaho College or other private training institutions. Not everyone is cut out to perform this type of work so even with these skills she might not be successful.

Claimant's Exhibit A, p. 13.

42. Dr. Collins specifically discussed the possibility of work at a call center in her post-hearing deposition in response to Claimant's counsel's questions:

> Q. … let's assume for the sake of this discussion today that she were to acquire some sedentary skills such as keyboarding, computer literacy or anything of that nature, does that change of [sic] picture for her employability?
>
> A. I think that it does in that—I did say in my report that I thought one job that might work for her if she had those skills would be customer service. Work call center work. There's a significant number of jobs in Coeur d'Alene. They have evening shifts, so the medication would have worn off by the time she went to work. She would be at an inside environment. I think they probably could make an accomodation for her wearing shorts. Because it's seated, you're in a cubicle typically. She might be able to elevate her leg.
>
> But she would need to have those skills. She needs to have typing skills and at least some computer literacy in order to be competitive for that work.
>
> Q. …. Can you give us some numbers on what would be her loss of access if she was suddenly gifted with these secretarial and computer-type skills? ….
>
> A. Well, there are like almost 1,600 customer service jobs in Coeur d'Alene. If you look at her labor market access preinjury and you include that as part of her skill set, it looks like she has a 64 percent loss of access to the labor market. Now that's assuming she is competitive for customer service work.

Collins Deposition, p. 16, l. 12 through p. 17, l. 21. Dr. Collins opined that if Claimant had sedentary work skills, including keyboarding and computer literacy, she would not be totally disabled.

43. Mr. Crum testified that Claimant "has some aptitudes that would allow me to think that she probably would be able to find work in a sedentary job, perhaps in a call center. You know, she has experience in managing people and in doing retail sales work." Crum Deposition, p. 38, ll. 7-11. Claimant's last experience managing people was more than 25 years ago. Her last experience in retail sales was also more than 25 years ago. Both positions required her to be on her feet continually.

44. Although Claimant's skills are dated, the record establishes that she has some typing, keyboarding, and computer literacy skills which Dr. Collins opined would be required to allow Claimant to compete for sedentary jobs potentially compatible with her physical

limitations. Claimant's Application For Employment with Eclipse dated June 12, 2006, contains the following questions and answers as indicated: "DO YOU HAVE KEYBOARDING EXPERIENCE?" "YES" is checked. "DO YOU HAVE COMPUTER EXPERIENCE?" "YES" is checked. "IF YES, HOW MANY YEARS? 10." "WHAT COMPUTER PROGRAMS ARE YOU FAMILIAR WITH AND IN WHAT CAPACITY HAVE YOU USED THEM? Micro Comp. MAC 2 yrs[,] General PC Programs / Windows etc." "SUMMARIZE ANY SPECIAL TRAINING, SKILLS …. Xerox Tech. Training School – 6 wk course & cert[,] Micro comp. MAC Adult Ed Courses." Defendants' Exhibit 13, p. 2. The application further represents that Claimant is a published author. As previously noted, Claimant earned an associates degree in journalism. Given her journalism degree, keyboarding experience, and 10 years of computer experience as of 2006, the record establishes that she has some sedentary work skills, including at least some typing, keyboarding, and computer literacy skills. The record does not necessarily establish that her skills are current and competitive; however, Claimant is not without some foundation in these important work skills that Dr. Collins opined would be critical to her employment in the sedentary labor market.

45. As previously noted, the Referee finds valid Claimant's self-stated standing and walking limitations as found reasonable by Dr. Magnuson. Furthermore, Claimant cannot tolerate wearing clothing over her left lower extremity and her prescription Gralise produces significant morning dizziness. Claimant's left shin allodynia precludes her from all outdoor work, sedentary jobs with dress codes requiring long pants, socks, or boots; and jobs where she cannot change position from sitting to standing approximately hourly. Thus Claimant can access only a portion of the sedentary positions in her area.

46. Based upon Claimant's permanent impairment of 10% of the whole person, inability to return to her time of injury work, demonstrated pre-injury ability to earn up to $31.00 per hour seasonally, essentially sedentary work limitations, lack of sedentary work experience in the last 25 years, and considering all of Claimant's medical and non-medical factors including but not limited to her inability to return to any of the positions she has held since 1988, her age of 50 at the time of the industrial accident and 56 at the time of the hearing, and her chronic left lower extremity allodynia and resulting limited standing and walking tolerance, need to change positions hourly, and inability to wear pants, socks or boots on her left lower extremity, Claimant's ability to compete in the open labor market and engage in regular gainful activity after her industrial accident has been greatly reduced. The Referee concludes that Claimant has proven permanent disability of 65%, inclusive of her 10% whole person permanent impairment.

47. Odd-lot. Claimant alleges she 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 she 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). "Whether a claimant is an odd-lot worker is a factual determination." Bybee v. State, Industrial Special Indemnity Fund,

129 Idaho 76, 82, 921 P.2d 1200, 1206 (1996). A claimant may establish a prima facie case of total permanent disability under the odd-lot doctrine in any one of three ways:

1. By showing that she has attempted other types of employment without success;
2. By showing that she or vocational counselors or employment agencies on her behalf have searched for other work and other work is not available; or
3. By showing that any efforts to find suitable work would be futile.

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

48. In the instant case, Claimant has presented no evidence of any failed attempts at other types of employment. She has presented limited evidence of an unsuccessful work search. The record establishes Claimant inquired about work at a Mexican restaurant, Ace Hardware, Home Depot, Ziggy's, Kinko's, and various other unnamed places but was advised that the work dress code at each business would require her to wear pants—which would be intolerable given her persistent left shin allodynia. This work search is incompletely described, seemingly limited in scope, and alone is not sufficient to satisfy the Lethrud test.

49. Claimant also asserts that a work search would be futile. She relies upon the opinion of Dr. Collins. Dr. Collins opined that without more training, Claimant would not be regularly employed in any well known branch of the labor market. Dr. Collins' opinion is supported in part by Dr. Magnuson's conclusion that Claimant should avoid work where she is standing and the fact that all of her work history for at least 25 years prior to her accident required extensive standing. However, Dr. Collins' opinion is also based in part upon her understanding that Claimant lacks sedentary work skills including typing, keyboarding, and computer literacy. Dr. Collins acknowledged that if Claimant had such sedentary work skills she would not be totally disabled. Claimant indeed possesses at least dated keyboarding and

computer literacy skills. Claimant has not proven that a work search would be futile. She has not established a prima facie case that she is an odd-lot worker under the Lethrud test.

50. Claimant has not proven she is totally and permanently disabled pursuant to the odd-lot doctrine.

51. **Apportionment.** The final issue is apportionment pursuant to Idaho Code § 72-406 which provides in pertinent part:

> (1) In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

52. In the instant case, the record contains no evidence of any pre-existing physical impairment. No apportionment pursuant to Idaho Code § 72-406 is appropriate.

CONCLUSIONS OF LAW

1. Claimant has proven she suffers permanent partial impairment of 10% of the whole person due to her 2010 industrial accident.

2. Claimant has proven permanent disability of 65%, inclusive of her 10% whole person permanent impairment. Claimant has not proven she is totally and permanently disabled pursuant to the odd-lot doctrine.

3. No apportionment pursuant to Idaho Code § 72-406 is appropriate.

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 __25__ day of September, 2017.

INDUSTRIAL COMMISSION

_/s/_____
Alan Reed Taylor, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __2nd__ day of _October_____, 2017, 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:

MICHAEL J VERBILLIS
PO BOX 519
COEUR D'ALENE ID 83816-0519

H JAMES MAGNUSON
PO BOX 2288
COEUR D'ALENE ID 83816-2288

_/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KRISTEN ARNEAL, Claimant, v. ECLIPSE TRAFFIC CONTROL & FLAGGING, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2010-022632** **ORDER** **FILED** **OCTOBER 2, 2017**

Pursuant to Idaho Code § 72-717, Referee Alan 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 she suffers permanent partial impairment of 10% of the whole person due to her 2010 industrial accident.
2. Claimant has proven permanent disability of 65%, inclusive of her 10% whole person permanent impairment. Claimant has not proven she is totally and permanently disabled pursuant to the odd-lot doctrine.
3. No apportionment pursuant to Idaho Code § 72-406 is appropriate.

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

DATED this __2nd_ day of __October_____, 2017.

INDUSTRIAL COMMISSION

_Participated but did not sign _____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

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

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __2nd__ day of _October_____, 2017, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

MICHAEL J VERBILLIS
PO BOX 519
COEUR D'ALENE ID 83816-0519

H JAMES MAGNUSON
PO BOX 2288
COEUR D'ALENE ID 83816-2288

sc

_/s/_____