

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

JOSHUA DAY,

Claimant,

v.

ALLEN CONSTRUCTION, INC.,

Employer,

and

LIBERTY NORTHWEST INSURANCE CORP.,

Surety,

Defendants.

IC 2009-018051

**ORDER ON  
RECONSIDERATION  
AND FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
ORDER**

Filed April 28, 2014

On December 17, 2013, Defendants filed a motion for reconsideration of the Commission's November 27, 2013 Order finding Claimant not medically stable at time of hearing. The Commission reasoned that Claimant did not have a chance to adequately discuss the risks and benefits of the surgery with Dr. Frizzell at the time of the surgery recommendation. Defendants argue that the Commission erred in finding Claimant not medically stable, as such was not at issue. Further, Claimant cannot be forced to submit to invasive procedures, and Claimant was uninterested in having the surgery. Defendants ask that the Commission rescind its November 27, 2013 Order, and issue an order on the hearing issues. In the alternative, Defendants ask that the Commission re-open the record to allow the parties to develop a record on the question of medical stability, and any associated time loss.

On December 23, 2013, Claimant filed a motion for reconsideration.<sup>1</sup> Claimant argues that the Commission should rescind its November 27, 2013 Order, and issue a decision on the noticed issues. In the alternative, Claimant asks that the Commission re-open the record on medical stability. Claimant submitted an affidavit that he does not wish to have the surgery recommended by Dr. Frizzell because he fears the surgery could worsen his condition.

A decision of the Commission, in the absence of fraud, is final and conclusive as to all matters adjudicated, provided that within 20 days from the date of filing the decision, any party may move for reconsideration. *See* Idaho Code § 72-718. A motion for reconsideration must present the Commission with new reasons factually and legally to support reconsideration, rather than rehashing evidence previously presented. *See Curtis v. N.H. King Co.*, 142 Idaho 383, 128 P.3d 920 (2005). The Commission will not reweigh evidence and arguments simply because the case was not resolved in the moving party's favor. On reconsideration, the Commission will examine the evidence in the case and determine whether the evidence presented supports the legal conclusions set forth in the Decision. However, the Commission is not compelled to make findings of fact under a reconsideration. *Davidson v. H.H. Keim*, 110 Idaho 758, 718 P.2d 1196 (1986).

Medical stability is prerequisite to disability in excess of impairment. Dr. Frizzell's opinion supported two alternatives—Claimant could undergo a decompression at L3-4 with laminectomies (no fusion), or Claimant was medically stable. The parties correctly noted Claimant had concerns about surgery worsening his condition. However, Claimant also testified that he only had about “80 seconds” with Dr. Frizzell to discuss the surgery.

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<sup>1</sup> Claimant's entitled motion for reconsideration was filed beyond the 20-day deadline for reconsideration. The Commission has treated Claimant's motion as a (timely) response to Defendants' motion for reconsideration.

I wasn't sure at the time [whether I wanted surgery], but I only spent like 80 seconds with Dr. Frizzell at that meeting. He must - - he was pretty busy that day or something. So we didn't get to spend much time discussing it or anything.

TR-88

Claimant's testimony of an 80-second meeting on a potential surgery did not inspire confidence that he had the appropriate opportunity to consider the surgery. In addition, as part of his claim, Claimant sought an order retaining jurisdiction beyond the statute of limitations so that he could remain eligible for additional indemnity benefits if he had the additional surgery. Given Claimant's description of his surgery consultation and his request to retain jurisdiction, the Referee was understandably, and appropriately, cautious.

However, several months have passed since hearing, and Claimant has now attested that he does not want Dr. Frizzell's recommended surgery. Claimant has had ample time to consider his options, and he has decided against the surgery due to the concern it would cause his condition to deteriorate. Claimant's concern is not unreasonable. No medical procedure is without risk, and the Commission will not require a claimant to submit to invasive medical procedures. *See Jodoin v. Far West Consulting, Inc.*, 2005 IIC 0044. Dr. Frizzell issued a PPI rating premised on Claimant's condition without the additional surgery, and both parties' vocational experts have given opinions on this foundation. Therefore, rather than rescind its previous order or conduct a new hearing, the Commission finds good reason to proceed to the noticed issues of disability in excess of impairment and retaining jurisdiction. The Commission hereby **GRANTS, in part**, Defendants' request for reconsideration. This Commission will now issue Findings of Fact, Conclusions of Law, and Order.

## ISSUES

By agreement of the parties, the issues to be decided are:<sup>2</sup>

1. Whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or, if not, whether and to what extent he is entitled to disability in excess of impairment; and
2. Whether the Industrial Commission should retain jurisdiction of this matter.

## CONTENTIONS OF THE PARTIES

Claimant suffered low back herniations at L4-5 and L5-S1 while lifting a 2,000 pound rebar pad with three coworkers on July 6, 2009. His injuries required spinal fusion surgery, performed by Dr. Frizzell, in August 2010. Dr. Frizzell issued permanent restrictions in May 2012 that the parties agree should apply to the determination of Claimant's disability. Dr. Frizzell also recommended a second low back surgery in October 2012, which Claimant declined because he is afraid it will worsen his condition.

Claimant contends that he is totally and permanently disabled as an odd-lot worker due to his July 6, 2009 low back injury requiring corrective surgery at L4-S1. He relies upon the opinions of Delyn Porter, vocational consultant, and Lecil Walker, vocational evaluator. In the event the Commission finds Claimant is not totally and permanently disabled, Claimant asserts he has suffered disability inclusive of impairment of at least 65.5%. Claimant also seeks an order retaining jurisdiction of his case beyond the statute of limitations so that he may remain eligible for additional indemnity benefits, should he decide to undergo additional surgery recommended by Dr. Frizzell in October 2012.

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<sup>2</sup> These are the issues briefed by the parties. They are slightly changed from those agreed to at the hearing.

Defendants counter that Claimant is not totally and permanently disabled, and that he has suffered no more than 60% disability, inclusive of impairment. They rely upon the vocational opinion of Mary Barros Bailey, Ph.D. In addition, they assert that there is insufficient basis to retain jurisdiction since Claimant's industrial condition is medically stable.

### **OBJECTIONS**

All pending objections preserved in the deposition transcripts are overruled.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. Claimant's testimony taken at the hearing;
2. Claimant's Exhibits (CE) A-V admitted at the hearing;
3. Defendants Exhibits (DE) 1-18 admitted at the hearing; and
4. The post-hearing depositions of Delyn Porter and Mary Barros-Bailey, Ph.D. taken July 15, 2013.

### **FINDINGS OF FACT**

1. Claimant was 33 years of age at the time of the hearing.
2. Claimant has a 9<sup>th</sup> grade education. Claimant dropped out of high school when he was 16 years old, and started working odd jobs. After a brief stint in a forestry Job Corps program, Claimant mowed lawns, landscaped yards, and worked at a potato plant. Claimant can read but has trouble with writing and spelling. Claimant's computer literacy is limited to email and basic internet searches.
3. In 1999, Claimant started as a concrete laborer with Merrick Construction. Claimant worked for seven years at Merrick Construction and earned \$17/hour. Claimant was a concrete form setter/dismantler and pourer/finisher.

4. In 2005, Claimant worked as a concrete laborer for Allen Construction for about 10 months. Claimant then worked at Jerry's Concrete in the Magic Valley for three years, working on concrete curb, gutters, and sidewalks. With the economic downturn in 2008, Claimant was laid off, and he returned to Allen Construction. Claimant worked with Allen Construction until the subject industrial accident.

5. Claimant has a criminal record, including infractions, misdemeanors, and a felony charge, which was subsequently reduced to a misdemeanor.

6. Following his industrial accident, Claimant successfully completed a 12-week Heavy Equipment vocational training course through Treasure Valley Community College and obtained his commercial driver's license.

7. Claimant currently resides with his girlfriend and her children in Pocatello, Idaho. They share an apartment that is located upstairs from the dog grooming business that his girlfriend owns and operates.

**SUBJECT INDUSTRIAL ACCIDENT: JULY 6, 2009**

8. On July 6, 2009, Claimant was working with three other men to lift a 2,000-pound oxygen tank pad when his back "blew out" and he could not move. TR-27. "Well, when I was lifting, my back just gave out; and I was hunched over. And I couldn't move for approximately 30 minutes. I kept trying, and then it - - finally I got it to where I could actually stand up." TR-28. He was earning \$17.36 per hour at the time.

**POST-INDUSTRIAL INJURY MEDICAL CARE**

9. **July 6, 2009 initial evaluations.** Claimant went immediately to the emergency department at Gooding County Memorial Hospital, where he was evaluated by David White, PA-C. Mr. White observed Claimant "is a strapping 6-foot 3-inch 280-pound healthy and active

male who has had no significant medical problems up to this point” and that he was “unable to move easily on his own and we had to help transport him from gurney for almost all movements.” CE-7, 8. Mr. White diagnosed lumbar spine intervertebral disk hemorrhage, provided pain medications, and arranged to transport Claimant via ambulance to St. Alphonsus Regional Medical Center (SARMC) in Boise.

10. At SARMC, Claimant was evaluated by Mark A. Burriesci, M.D., an emergent care physician. Claimant’s symptoms had improved with medication and x-rays appeared normal. MRI imaging revealed lumbar disc disease and possible acute compression fracture at T-12. Dr. Burriesci diagnosed low back injury, lower extremity numbness and low back pain.

11. **Follow-up care.** Claimant followed up with a physical therapist in Gooding and with Tyler Frizzell, M.D., a neurosurgeon. Dr. Frizzell diagnosed a herniation at L4-5 and a protrusion at L5-S1 and recommended an epidural steroid injection, to which Claimant did not immediately agree. He did not address T12. On a follow-up visit, Dr. Frizzell also diagnosed lumbago. Claimant continued with conservative treatment, in part administered by Mark J. Harris, M.D., a Boise physiatrist, but as of November 12, 2009, he still had right radicular symptoms and dysesthesia plus “pins and needles” and weakness in his left leg. An epidural steroid injection around this time failed to produce long-term relief. Following a December 3, 2009 MRI indicating a more significant L5-S1 herniation than shown on the prior study, and Claimant’s reports of increased right leg pain (severe now), Dr. Frizzell recommended a bilevel discectomy and fusion at L4-S1.

12. **Independent medical evaluations (IMEs).** In February 2010, Neil Schechter, M.D., an orthopedic surgeon who performed an IME at Surety’s request, disagreed with Dr. Frizzell’s recommendation, providing an alternative analysis of Claimant’s case. In April

2010, Michael V. Hajjar, M.D., a neurosurgeon, also performed an IME at Surety's request. He agreed with Dr. Frizzell's recommendation. Surety approved the procedure.

13. **Surgery.** On June 23, 2010, Claimant underwent a posterior L4-S1 decompression, iliac crest bone graft and anterior lumbar fusion with plating. During his recovery, Claimant underwent physical therapy in Gooding and continued to see Dr. Harris in Boise. He continued to have symptoms suspicious for radiculopathy, but Dr. Frizzell remained optimistic that Claimant would reach medical stability by the end of 2010. However, Claimant developed sexual dysfunction and intermittent numbness of the penis. Too, MRI images taken of Claimant's lumbar spine on January 4, 2011 revealed "a lot more granulation tissue than one would normally see." CE-74. Concerned, Dr. Frizzell referred Claimant to Paul Montalbano, M.D., a neurosurgeon, for a second opinion. These symptoms improved within a couple of months, but did not completely resolve. Dr. Frizzell wrote, "I cannot recall a similar clinical presentation in my 20 plus years of practice." CE-75.

14. **Maximum medical improvement (MMI) opinion: May 5, 2011.** Claimant underwent a CT scan on April 1, 2011 that showed granulation tissue with some nerve root compression at L5-S1. Claimant had ongoing numbness and tingling in his legs and sexual dysfunction, but no significant radicular pain, bowel or bladder dysfunction or hypesthesia in the genital region. On May 5, 2011, Dr. Frizzell opined Claimant had reached MMI and assessed a 50-pound lifting restriction. Dr. Frizzell also gave Claimant a 26% whole person permanent partial impairment based on *The AMA Guides to the Evaluation of Permanent Impairment*, Fifth Ed., for his industrial accident.

15. Dr. Frizzell continued to call in Norco and gabapentin prescriptions for Claimant until shortly before the date of hearing, but he had referred Claimant to another physician for

pain management. Claimant had not yet seen any other physician at the time of the hearing. He takes one Norco for pain, or sometimes more, approximately five days per week, when he needs it. Walking too far or standing or sitting too long prompt him to increase his intake.

16. Dr. Frizzell did not restrict Claimant from any activities based on his medications. However, Claimant testified that Norco makes him drowsy and comes with a warning not to drive or operate heavy machinery while taking it because it induces sleepiness.

17. **Post-MMI treatment.** As of November 2011, Claimant's pain on standing had increased and he still had numbness down both legs, as well as erectile dysfunction. Dr. Frizzell prescribed Viagra and ordered a new MRI, taken December 14, 2011, that showed complete resolution of his post-operative granulation tissue and good surgical results. Dr. Frizzell noted findings, however, that indicate Claimant will likely require another decompressive surgery, at L3-4, in approximately five years. He also opined Claimant would require Viagra for another year. Otherwise, Dr. Frizzell reaffirmed that Claimant was medically stable and restricted to lifting no more than 50 pounds.

18. **Functional capacity evaluation (FCE).** In May 2012, after reviewing an FCE report prepared by Tracy Ervin, P.T., following an evaluation she conducted of Claimant on May 8 and 9, 2012, Dr. Frizzell again confirmed that Claimant was medically stable, and issued the following permanent restrictions:

Lifting: 25 pounds occasionally and 15 pounds frequently (16" to waist level)

Kneeling, stair climbing, ladder climbing: Occasionally

Sitting: No restrictions

Crouching: Avoid

19. At the hearing, Claimant testified that he could not lift 15 pounds frequently without extreme low back pain, shooting pain down his legs (right worse than left), heat in his

legs and groin, and his feet falling asleep. He said he would not be able to walk. Claimant also asserted that he cannot kneel or crouch at all and he does not think he can climb a ladder. He climbs stairs in his house, sometimes with difficulty. He thinks he can only sit for 40 minutes without having to walk for at least ten minutes. He can only walk four-tenths of a mile before he has to sit down. Claimant also has trouble lifting from waist level to overhead, but he did not estimate his capability in this regard. Claimant also described other functional problems that he believes have significantly worsened since June 2012, not addressed by Dr. Frizzell in his restrictions.

20. **Dr. Frizzell's surgical recommendation:** In October 2012, Claimant complained of increased bilateral radicular symptoms, shooting pains in the backs of both legs, worse while toileting. His symptoms worsened significantly over a 36-hour period, so he sought emergent care. He was given injections of analgesics, muscle relaxers, and steroids which improved his condition. On the following day, Claimant returned for another MRI, which he took to Dr. Frizzell. Dr. Frizzell noted Claimant was unable to obtain employment because of his radiculopathy symptoms, and that Claimant had been symptomatic for six months. Dr. Frizzell recommended a simple decompression at L3-4 with laminectomies, but no fusion. As discussed above, Claimant declined Dr. Frizzell's recommended surgery.

21. **Peer review/document review.** On December 3, 2012, Michael Levy, M.D., through Medical Consultants Network, LLC, provided an opinion to Surety regarding Dr. Frizzell's second surgical recommendation. Dr. Levy was unable to obtain the medical records he needed to provide an opinion.

## ***CLAIMANT'S CREDIBILITY***

22. The Referee found that Claimant presented as a thoughtful, well-spoken, well-mannered, well-dressed and bright man. He demonstrated an ability to recall and articulate relevant facts clearly and persuasively. He was not defensive on questioning. Claimant is a credible witness.

## **DISCUSSION AND FURTHER FINDINGS**

23. The provisions of the 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). However, the Commission is not required to construe facts 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).

### **Disability in Excess of Physical Impairment**

24. "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.

25. 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 nonmedical 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).

26. The Idaho Supreme Court in *Brown v. The Home Depot*, WL 718795 (March 7, 2012) reiterated that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing. Under Idaho Code § 72-425, a permanent disability rating is a measure of the injured worker's "present and probable future ability to engage in gainful activity." Therefore, the Court reasoned, in order to assess the injured worker's "present" ability to engage in gainful activity, it necessarily follows that the labor market, as it exists at the time of hearing, is the labor market which must be considered. However, the Commission is afforded latitude in making alternate determinations based upon the particular facts of a given case. Claimant's disability will be determined as of the date of the hearing.

### ***VOCATIONAL EXPERTS***

#### **Mary Barros-Bailey, Ph.D., and Mr. Delyn Porter**

27. Both vocational experts are well-known to the Commission. Dr. Barros-Bailey has provided disability evaluations in Idaho for over twenty years. She has a doctorate in counseling with an emphasis in rehabilitation counseling, advanced professional training in Medicare set-asides, a postgraduate certificate in life care planning, a master's degree in special education and rehabilitation services, and additional relevant certifications. Mr. Porter has a master's degree in rehabilitation counseling, work experience as a Commission consultant, regional manager, and rehabilitation counselor (state and private). Mr. Porter is a certified rehabilitation counselor and Idaho workers' compensation specialist.

28. Both experts met with Claimant and reviewed medical records, educational background and vocational history. Dr. Barros-Bailey met with Claimant on October 24, 2012, but delayed her report for additional medical records. Mr. Porter met with Claimant on May 29, 2012, issued a report and then revised his opinion after reviewing Claimant's Community Partnerships of Idaho (CPI) report and conducting additional research.

29. Both experts premised their disability evaluations on Dr. Frizzell's May 17, 2012, post-fusion restrictions and focused on light occupations from the *Dictionary of Occupational Titles* in the Pocatello, Idaho job market. Mr. Porter completed a residual functional capacity (RFC) report which captured Claimant's subjective assessment of his perceived physical abilities. Dr. Barros-Bailey also recorded Claimant's opinions on his subjective limitations.

30. The vocational experts agree that Dr. Frizzell's restrictions preclude Claimant from returning to his primary vocation of concrete work. Regarding other employment, Dr. Barros-Bailey was encouraged by Claimant's Treasure Valley Community College training, as such could provide access to "no touch" trucking or delivery jobs. Dr. Barros-Bailey opined that the light duty restriction represents a 79% loss of access, though she identified suitable light duty jobs in warehousing, potato sorting, and food processing production. Dr. Barros-Bailey averaged the wage range of the post-accident light jobs she identified for an expected post-injury wage of \$11 to \$12 an hour, or a 30% wage loss from Claimant's pre-accident wage of \$17.36 an hour. Dr. Barros-Bailey thought Claimant's weak academic profile warranted higher disability than averaging loss of access and wages  $((79\% + 30\%) / 2 = 55\%)$ , and concluded that Claimant had 60% disability, inclusive of impairment.

31. Mr. Porter initially opined that Claimant's injury caused loss of labor market access of 67%, and loss of wage earning capacity of 39%, for disability of 53%, inclusive of

impairment. Mr. Porter adjusted his opinion after reviewing Claimant's Community Partnerships of Idaho (CPI) Report and some additional research of available jobs. Claimant's CPI Report showed below average spatial relations, verbal reasoning, numerical ability, perceptual speed testing, and recommended specialized placement assistance, such as a job coach, for Claimant's future job search. Mr. Porter identified the following jobs for Claimant's post-accident market: security guard, combined food preparation and serving worker including fast food, counter and rental clerk, retail salesman, light truck or delivery services, grader and sorter of agricultural products, with the caveat that Claimant could only obtain driving positions compatible with his restrictions, i.e., no-touch loads. Mr. Porter opined that Claimant lost 85% of labor market access, and that his expected post-accident wage of \$10.44 per hour resulted in a 46% loss of his wage earning capacity. Mr. Porter averaged these figures for a disability of 65.5%, inclusive of impairment. Mr. Porter argued in the alternative that Claimant was an odd-lot worker.

32. Dr. Barros-Bailey viewed the CPI Report differently. While recognizing that Claimant's poor aptitude testing show him to be ill-suited for academic training or jobs requiring specialized skills, Claimant's pre-injury labor market of low skilled jobs has never required such. Further, Claimant has shown he can acquire new skills through vocational training. Dr. Barros-Bailey thought Claimant presented well, and that he successfully passed the TVCC Heavy Equipment course with B's. To Mr. Porter, Claimant came across as a "very gruff and impersonal individual." Porter Depo., p. 42/6-8. Mr. Porter conceded there are "some inconsistencies" between Claimant's performance on the CPI Report, and Claimant's completion of the TVCC Heavy Equipment course, although he argued that vocational programs may

provide accommodations to help students complete the course. The record does not reflect that Claimant received special accommodations to complete the course.

33. Claimant has not worked since his industrial accident. Claimant started looking for jobs in Boise but did not actually apply. Around September or October 2011, Claimant moved from Boise to Pocatello to live with his girlfriend. Claimant attempted to help his girlfriend at her dog grooming shop, but felt his back hurt while washing dogs. Around March 2013, one month before the hearing, Claimant applied at McDonald's, Lowe's, Fred Meyer, Walmart, Home Depot, Costco, Stinker Riddleys, Albertson's, and the Family Dollar. Claimant also applied at the City of Pocatello Water Department, Trans Systems, Coca Cola, TCL Distributing, Denny's Towing, and Common Cents. Claimant only received interviews with Lowe's and Denny's Towing; the remainder gave no response to Claimant's applications.

34. Claimant has lost labor market access and wage earning capacity. However, Claimant's loss of wage earning capacity is overstated. Both experts assumed Claimant earned \$17.36 per hour, full-time, year-round. This is not the case. Claimant's construction work was seasonal, punctuated with periods of unemployment, and he averaged less income. Claimant's tax returns show annual wages closer to \$26,000, equivalent to full-time (2080 hours) wages of about \$12.50 an hour. This still represents a loss from his expected post-accident wages of \$10.44 (Porter) and \$11-\$12 (Barros-Bailey).

35. Both experts found Claimant's loss of labor market access to be more significant than his loss of wage earning capacity. Claimant credibly testified at hearing that he has functional problems not addressed by Dr. Frizzell's restrictions, and both experts considered Claimant's subjective reports when evaluating Claimant's post-accident labor market access. Certainly, Claimant cannot return to heavy or medium-heavy work. Claimant presented much

better to Dr. Barros-Bailey and to the Referee at hearing than he presented to Mr. Porter, such that the Commission is not persuaded that Claimant has significant cognitive or mental health issues that will require permanent job coaching. Ultimately, the Commission finds Dr. Barros-Bailey's opinion more persuasive. Claimant is young, has a solid work history, successfully completed vocational training post-accident, and presents well. When taking into consideration Claimant's physical restrictions, age, education, work experience and transferrable skills, loss of wage earning capacity, loss of job market access, and other relevant factors, the Commission finds that Claimant has incurred PPD of 60%, inclusive of impairment.

### **Odd-lot**

36. Neither party argued that Claimant is totally and permanently disabled under the 100% method. Even though Claimant has failed to prove he is totally and permanently disabled under the 100% method, he may still be able to establish such disability pursuant to the odd-lot doctrine. 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 of Idaho, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), citing *Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). 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), citing *Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

37. 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).

38. Claimant's closest approximation at attempting employment was helping at his girlfriend's dog grooming business post-accident. The record does not show that Claimant earned any wages for his efforts nor does Claimant argue that this arrangement qualified as an employee-employer relationship. Claimant continued helping until he felt like his back hurt. No physician restricted Claimant from dog grooming. However, with Claimant's back condition, dog grooming with its attendant lifting and bending seems an unlikely fit for a successful re-employment effort. A claimant cannot establish odd-lot statute merely by asserting that he or she cannot perform his or her previous type of employment. *Dehlbom v. State, Indus. Special Indem. Fund*, 129 Idaho 579 (1997) (quoting *Nelson v. David L. Hill Logging*, 124 Idaho 855 at 857(1993)). Similarly, a claimant should attempt suitable employment if he or she wishes to assert that re-employment efforts were unsuccessful, and the Commission is not persuaded that dog grooming would be considered suitable for Claimant. In this case, Claimant's help was closer to a gratuitous gesture than an attempt at reentering the workforce. No physician restricted Claimant from helping at the dog grooming business for his low back condition. Claimant has failed to show odd-lot status by the first method.

39. Claimant has not shown that he or vocational counselors or employment agencies have searched for suitable work on his behalf, and that such work is not available. Claimant has not utilized vocational counselors or employment agencies to search for suitable work. Claimant completed a vocational training program, and applied for a handful of jobs. Although Claimant

has been off-work for years, Claimant's job search has been sporadic, and the majority of Claimant's job search occurred shortly before the Commission hearing. Claimant's brief job search is insufficient to show that suitable work is not available. Claimant has failed to prove odd-lot status by the second method.

40. Claimant argues that he satisfied the third method of proving odd-lot status, or that any effort to find suitable employment would be futile.

41. Mr. Porter opined that Claimant is unlikely to secure employment without temporary good luck, assistance from a job coach, a very sympathetic employer, or superhuman efforts. Mr. Porter reasoned that Claimant's limited educational background, low cognition, and the CPI report job coaching recommendation, make it futile for him to find work. Mr. Porter did not think Claimant's post-accident vocational training would benefit Claimant's employment prospects, because Claimant's physical condition makes him unlikely to compete for trucking jobs where sitting for periods of time is required. Although Claimant was credible, the Commission notes that neither Dr. Frizzell nor the 2012 FCE issued any medical restrictions against sitting. Mr. Porter opined that Claimant's cognitive difficulties make it unlikely for him to secure or maintain employment. Mr. Porter depicted Claimant less favorably than the Referee or Dr. Barros-Bailey.

42. Dr. Barros-Bailey disagreed that it would be futile for Claimant to look for work. She was not persuaded that Claimant's CPI Report was a game changer. Though acknowledging that Claimant has poor aptitude results, none of Dr. Barros-Bailey's suggested jobs, including potato sorting, various food production and processing positions, truck driving, and entry-level cashier or retail positions, require higher education or great intellectual dexterity. While Claimant's vocational history has not been academically demanding, and he may not be suited to

be an English professor, Claimant presents well, has a consistent work history, and successfully completed a vocational program post-accident.

Q. So based on your experience, is this a case that, in your opinion, it's going to be futile for him to look for work?

A. Based on the restrictions that we have, there should be work he can do that is relatively unskilled to some level of skill, because he's able to do trucking, whether it be light or heavy trucking. Those jobs are readily available. There's quite a bit of production in processing, whether you talk about Pocatello or here, that are consistent with his profile.

I work with monolingual Spanish speakers that sometimes have a third-grade education, and they have work. Both my parents had work, and they have four years of formal training each. And so if people with more restricted profiles, vocational profiles, are able to work—although he's got some academic skills, but they shouldn't be that severe to be able to restrict him from not finding work at all under those restrictions.

Barros-Bailey Depo., p. 37/5-24.

43. Neither vocational expert was under the illusion that finding a job would be quick and easy for Claimant. Notwithstanding the obstacles, the Commission is persuaded that Claimant retains access to the labor market. The Commission finds Dr. Barros-Bailey's opinion more persuasive. Claimant has not shown that it would be futile for him to secure employment. Therefore, Claimant has failed to prove he is an odd-lot worker.

### ***Retaining Jurisdiction***

44. Whether or not to retain jurisdiction beyond the statute of limitations is within the discretion of the Commission. Where a claimant's medical condition has not stabilized or where a claimant's physical disability is progressive, it is appropriate for the Commission to retain jurisdiction. *Reynolds v. Browning Ferris Industries*, 113 Idaho 965, 969, 751 P.2d 113, 117 (1988). Retention of jurisdiction may also be appropriate in cases where there is a probable need

for future temporary disability benefits associated with surgery. *Elmore v. Floyd Smith, Jr. Trucking*, 86 IWCD 100, p. 1278.

45. Although Claimant has declined Dr. Frizzell's surgical recommendation, Claimant's ongoing complaints remain a concern. The Commission finds it prudent to retain jurisdiction in this matter beyond the applicable statutes of limitation.

### CONCLUSIONS OF LAW AND ORDER

Based on the foregoing, the Commission **ORDERS** the following:

1. Claimant has incurred 60% PPD, inclusive of impairment. Defendants are entitled to a credit against the PPD award for any amounts paid in PPI.
2. Claimant has not proven he is an odd-lot worker.
3. The Commission will retain jurisdiction beyond the statute of limitations.
4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 28th day of April, 2014.

### INDUSTRIAL COMMISSION

/s/  
Thomas P. Baskin, Chairman

/s/  
R.D. Maynard, Commissioner

/s/  
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 28<sup>th</sup> day of April, 2014, a true and correct copy of the foregoing **ORDER ON RECONSIDERATION AND FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

DENNIS R PETERSEN  
PETERSEN PARKINSON & ARNOLD  
P O BOX 1645  
IDAHO FALLS ID 83403-1645

KENT W DAY  
LAW OFFICES OF KENT W. DAY  
P O BOX 6358  
BOISE ID 83707-6358

/s/ \_\_\_\_\_