BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHRISTY HACKWORTH, Claimant, v. SUPER 8, Employer, and EMPLOYER'S COMPENSATION INSURANCE COMPANY, Surety, Defendants.	**IC 2012-016233** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed July 27, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John C. Hummel, who conducted a hearing in Twin Falls on January 22, 2016. Dennis R. Petersen of Idaho Falls represented Claimant, Christy Hackworth, who was present. Alan R. Gardner of Boise represented Employer, Super 8, and Surety, Employer's Compensation Insurance Company. The parties presented oral and documentary evidence. They then took post-hearing depositions and submitted post-hearing briefs. The matter came under advisement on July 12, 2016.

ISSUES

By agreement of the parties at the hearing,[1] the issues to be decided are as follows:

[1] In addition to stipulating that partial permanent impairment was not at issue, Claimant waived the issue of attorney fees payable under Idaho Code § 72-804. Tr., 5:18-25.

1. Whether and to what extent Claimant is entitled to permanent partial disability in excess of her approved permanent partial impairment; and

2. Whether the Commission should retain jurisdiction beyond the statute of limitations.

CONTENTIONS OF THE PARTIES

Claimant suffered an industrial accident on June 24, 2012 that injured her left wrist and hand. Defendants accepted responsibility for Claimant's medical care, including four surgeries, and payment of temporary disability benefits during her period of recovery. Claimant also received payment of an 8% whole person permanent partial impairment. Claimant asserts entitlement to a permanent partial disability of 33%, inclusive of impairment. Defendants deny that Claimant has suffered any disability in excess of impairment.

OBJECTIONS

All pending objections raised in the post-hearing depositions are overruled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the hearing;

2. Claimant's Exhibits A through R admitted at the hearing;

3. Defendants' Exhibits 1 through 16 admitted at the hearing; and

4. The transcripts of the following depositions: Claimant, October 30, 2015; Dalene Studyvin, January 21, 2016; James H. Bates, M.D., March 1, 2016; Tyler R. Wayment, M.D., March 16, 2016; John M. Janzen, April 13, 2016; and Delyn D. Porter, April 13, 2016.

After considering all of the above evidence and briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the full Commission.

FINDINGS OF FACT

1. **Claimant's Background.** Claimant was born on January 28, 1977 in Fallon, Nevada. She grew up in Nevada until 1991, when she moved to Jerome, Idaho. She graduated from Jerome High School in 1995. She married after high school and had two children by her first marriage. Claimant divorced in 2011. She remarried and changed her name to "Christy Dawn Ekstrand" in January 2015. At the time of hearing Claimant was 38 years old and resided in Gooding, Idaho. Her dominant hand is her right hand. Tr., 21:7-22:1; 92:18-22; Claimant Dep., 4:21-7:21.

2. **Pre-Injury Employment.** Claimant held her first job during high school. She worked part-time as a sales clerk at Macy's in the Magic Valley Mall for six months during 1993. Tr., 22:2-24; Ex. O:247.

3. Following high school from 1995 to 1996, Claimant worked as cashier and cook at Honker's Mini-Mart, a truck stop in Jerome. Her duties included stocking shelves and cleaning. Tr., 22:25-23:20; Ex. O:247.

4. Claimant worked briefly in 1996 for each of the following employers: Sears at the Magic Valley Mall, as a sales clerk; Lakey, Inc., in Twin Falls; and FW Consulting Services, based in Sandy, Utah. She does not recall what her positions were for the latter two employers. Tr., 23:23-25:2; Ex. O:248.

5. From 1997 to 1998, Claimant worked for D & B Construction in Jerome. She performed general construction labor and operated a backhoe and dump truck. Tr., 25:4-18; Ex. O:248.

6. Claimant left the workforce in 1998 for approximately four years to become a stay-at-home mother. She and her husband made this choice because their daughter had some health issues that made daycare placement problematic. Tr., 25:25-26:13.

7. Claimant returned to the workforce in 2002 in a position with Step Ahead Learning Center, a preschool facility in Twin Falls. She was a daycare worker who worked with infants. This employment continued into 2003. In 2003 she also worked briefly for another daycare facility, KC Unlimited Kids Club, located in Twin Falls. Tr., 26:25-28:12; Ex. O:248, 250.

8. Claimant was self-employed from approximately 2003 to 2004. She operated a daycare out of her own home in Jerome. She had no other workers and performed all of the daycare operations by herself. Her daycare served four to six children. Tr., 27:13-25; Ex. O:249.

9. In 2004 Claimant worked briefly for the Jerome School District as a substitute teacher. Tr., 28:18-24; Ex. O:249.

10. Claimant worked from 2004 to 2005 for Xpress Cash Financial Services of Northwest, a payday loan company, both in Jerome and in Twin Falls. She began work for the company as a customer service representative and then received a promotion to a management position. Tr., 29:4-20; Ex. O:249.

11. Claimant worked from 2005 to 2006 for Canyonside Christian School in Jerome. In this job she operated the school's after-school care program. Tr., 30:8-25; Ex. O:249.

12. In 2007 and 2008 Claimant worked for Aardvark Legal in Jerome as an office manager. She performed bookkeeping services and assisted in the filing and preparation of legal documents in addition to providing general office support. Tr., 31:14-32:2.

13. After Claimant left Aardvark Legal in 2008, she remained unemployed through 2010. She cared for several children in her home but did not earn income from this activity as self-employment. During this period her daughter had several surgeries; the Claimant attended to her daughter's needs and worked as a stay-at-home mother. Tr., 32:11-21.

14. In December 2010 the Claimant moved to Las Vegas while she was in the process of divorcing. She lived with family there until July 2011. In 2011 she worked as a daycare worker for eight months for Kinder Cottage Preschool & Childcare while in Las Vegas. Tr., 32:22-33:16.

15. After returning to the Magic Valley in August 2011, the Claimant began work for Jerome Middle School as a paraprofessional/teacher's aide. She had her own classroom in which she coached students with learning disabilities in various subjects and helped those who had reading problems. She continued to work in this position through the end of the school year in 2014. She earned approximately $900 per month and worked 30 to 35 hours per week in this position. Tr., 34:4-35:11; Ex. O:249.

16. **Subject Employment.** On May 15, 2012, Claimant began working as a front desk clerk for Super 8, a motel business located in Twin Falls. Jerome Middle School continued to employ her after she began employment with Super 8. Her job responsibilities with Super 8 included the following: checking guests in and out of the motel, processing guest payments, performing computer work, helping guests with luggage or other room assistance, moving extra beds, delivering towels, cleaning the lobby and kitchen, and responding to requests for guest assistance. On days when a breakfast attendant was not present, she also had the responsibility of preparing guest breakfasts. She worked approximately 20 to 40 hours per week. Her customary

shift was from 3:00 to 11:00 p.m., Friday through Monday. Her initial rate of pay was $7.50 per hour. Tr., 35:12-38:9.

17. In or about 2013, Claimant received a promotion to the position of assistant manager with Super 8 and a pay raise to $8.00 per hour. Her duties as assistant manager did not change significantly from those she performed as front desk clerk, although she had managerial authority in the absence of the manager. Claimant remained regularly employed in this position through December 2014 when she and her family moved to Gooding. Claimant Dep., 15:1-25. After December 2014 through the date of the hearing, Claimant continued to occasionally work for Super 8 as a front desk clerk on on-call basis to replace absent employees. Tr., 79:5-25.

18. **Pre-Injury Medical History**. Prior to her industrial accident, Claimant's medical history was significant for the following conditions and injuries: depression; weight issues; recurrent shingles; tension headaches and migraines; asthma/COPD (chronic obstructive pulmonary disease); a moderately severe sprain of her right ankle sustained in a home accident in 2000; and a right shoulder strain and a right hip strain sustained in a motor vehicle accident in 2005. There is no evidence that any of these conditions or injuries resulted in medically-acknowledged impairments or permanent medical restrictions. Ex. 1:1-35; 2:39-41; 3:42-47.

19. **Industrial Accident.** On June 24, 2012, Claimant was working for Super 8 on her customary shift of 3:00 p.m. to 11:00 p.m. A UPS driver delivered a box to the motel and set it on the front desk counter, which was shoulder high. Claimant signed for the delivery and the UPS driver left. She then pulled the box toward her across the counter to see the name of the guest on the box. The contents of the box shifted while Claimant moved it across the counter. The box fell to Claimant's left. She caught the box with her left hand so that it would not hit the floor. The maneuver caused her left wrist to bend backwards. She heard a "pop" in her left wrist

and hand but felt no immediate pain. Within a couple of hours, however, her left wrist felt sore. A day later Claimant's left thumb felt numb and mildly swollen. Tr., 38:10-25; Claimant Dep., 36:5-24; Ex. A.

20. Claimant called her supervisor, Stephanie Pryor, to report the injury on the day that it occurred. She told Pryor she thought she had sprained her left wrist. On the following day, June 25, 2012, Pryor assisted Claimant in filling out an injury report and referred her for a medical evaluation. Tr., 39:3-13; Ex. A.

21. **Medical Treatment.** Brian Johns, M.D., of the St. Luke's Occupational Medicine Clinic in Twin Falls, evaluated Claimant on June 28, 2012. He noted that she lacked full left wrist extension by 10 degrees and had essentially no flexion in the wrist due to pain. She had mild swelling and mild to moderate tenderness without discoloration on the radial dorsal aspect of the left wrist. Sensation was intact in her fingertips and perfusion was normal. Tinel's Sign elicited complaints of pain in the left thumb and index finger. Dr. Johns diagnosed Claimant with a wrist sprain. For treatment he recommended liberal use of ice, anti-inflammatory medication (Aleve), and a brace for support. Dr. Johns restricted Claimant to no lifting above 15 pounds, no using the left hand and no overhead lifting until her follow-up appointment. Ex. D:7-9.

22. Claimant returned to Dr. Johns for follow-up on July 5, 2012. She reported persistent symptoms of pain with any pressure applied to the left thumb or index and long fingers, up to her radial wrist. She described her pain as five out of 10 and stated that she did not feel that she was getting better. A physical exam revealed results similar to the June 28th exam. Dr. Johns confirmed the diagnosis of wrist sprain, ordered three sessions of occupational therapy, prescribed continued use of ice and Aleve, and continued the previous lifting restrictions. Ex. D:10.

23. A radiographic study of Claimant's left wrist on July 5, 2012, as interpreted by Cameron J. Evans, M.D., reported that of three views of the left wrist there was no evidence of acute osseous injury. Ex. J:191-194. Dr. Johns reviewed the X-rays and agreed that they were negative for any significant findings. Ex. D:10.

24. Dr. Johns examined Claimant again on July 11, 2012. Her left wrist pain was still severe and radiating pain from her thumb to her elbow. The physical exam was consistent with the past two visits. Dr. Johns determined that the persistence of Claimant's symptoms warranted further workup in the form of an MRI. He continued previous restrictions, use of a brace, and Aleve for pain and swelling. Ex D:13-14.

25. On July 27, 2012, Claimant underwent an MRI study and further X-rays of her left wrist and upper left extremity, as interpreted by Robert Wassertrom, M.D.. The significant finding of the MRI and X-rays was a partial tear of the volar surface of the scapholunate ligament. Otherwise the studies indicated no acute abnormal findings. Ex. J:195-202.

26. At a follow-up examination on August 8, 2012, Dr. Johns noted that Claimant's symptoms were not improving. He referred her to the St. Luke's Clinic Orthopedic Department for further evaluation and treatment. Repeat diagnosis was left wrist sprain. Dr. Johns suspended physical therapy pending further evaluation and continued Claimant's previous restrictions. Ex. D:21-23.

27. On August 15, 2012, David J. Jensen, D.O., evaluated Claimant after receiving a referral from Dr. Johns. He reviewed the MRI and noted the finding of a partial tear of the scapholunate ligament. Dr. Jensen observed no obvious swelling over the left wrist. Claimant complained of pain ranging from four to seven out of 10 in intensity. She had very limited wrist

range of motion. Dr. Jensen continued the work restrictions ordered by Dr. Johns and prescribed an anti-inflammatory pain cream, Voltaren Gel. His assessment was wrist sprain. Ex. F:31-34.

28. At a follow-up visit on August 23, 2012, Dr. Jensen noted that Claimant continued to have diffuse tenderness of the left upper extremity. Her wrist range of motion was still reduced. He increased her use of the pain cream to three times per day. He added an oral anti-inflammatory to her medications. Dr. Jensen instructed Claimant to continue icing and to perform exercises to improve her range of motion. He continued the same work restrictions. *Id*. at 35-37.

29. Dr. Jensen next evaluated Claimant on August 30, 2012. Claimant reported no improvement in her condition and rated her pain as six out of 10. Dr. Jensen noted that Claimant was not making any progress with his treatment. He expressed concern that she might have damage to the ulnar collateral ligament of the thumb. He referred her to Tyler Wayment, M.D.,[2] a hand surgeon with St. Luke's Orthopedics and Plastic Surgery Clinic, for evaluation. *Id*. at 38-40.

30. Dr. Wayment first evaluated Claimant on September 24, 2012. His examination reported findings similar to those by Dr. Johns and Dr. Jensen. He reviewed her MRI and agreed that it showed a scapholunate ligament tear in her left wrist. Dr. Wayment advised Claimant that the only conservative treatment she had not yet tried was a steroid injection, which he then performed on her left radial carpal tunnel. He ordered work restrictions of no lifting over 15 pounds, no overhead lifting, and no repetitive gripping/twisting. Ex. G:44-46.

31. Claimant returned to Dr. Wayment on October 22, 2012. She reported no benefit whatsoever from the steroid injection; rather, she had an adverse reaction to the steroid with

[2] Dr. Wayment graduated from the University of Utah School of Medicine in May 2000. He completed post-graduate work in general surgery and plastic surgery, as well as a hand fellowship. He practices plastic surgery and hand surgery in Twin Falls. Wayment Dep., 5:18-6:1; Ex. 7.

increased pain and swelling. She rated her pain as seven out of 10. Dr. Wayment continued her work restrictions. His plan of treatment was to schedule Claimant for scapholunate ligament repair and wrist arthroscopy, pending Surety's approval. Ex. G:49-51.

32. Dr. Wayment took Claimant to surgery to repair her left wrist scapholunate ligament tear on November 20, 2012. She tolerated the surgery well and there were no complications. The surgery included placement of hardware into Claimant's wrist. Dr. Wayment took her off work for a period of two weeks. Ex. G:52-60.

33. At a December 3, 2012 post-surgery follow-up visit, Dr. Wayment observed that Claimant was doing well, had no complaints, and her pain was controlled. Upon examination, there was no evidence of erythema or infection. Claimant had decreased range of motion of her MP joint. He ordered occupational therapy twice a week to improve her range of motion and released her to one-handed duty at work. Ex. G:66-71.

34. At a second follow-up visit on January 14, 2013, Dr. Wayment recorded that Claimant continued to do well and had no complaints. He continued her on one-handed duty at work and scheduled her for removal of her left wrist hardware. Ex. G:74-76.

35. On January 15, 2013, Dr. Wayment performed surgery on Claimant to remove her left wrist hardware. The removal was successful and there were no complications. Ex. G:87-88.

36. At a follow-up examination on February 11, 2013, Dr. Wayment observed that Claimant still had decreased movement of her left wrist and thumb. She also had hypersensitive pain over the dorsum of her wrist. He concluded that she required more aggressive physical therapy and ordered three sessions per week for the next six weeks. He instructed her to stop using a wrist splint and gave her a 10 pound weight restriction at work. Ex. G:90-92.

37. On March 25, 2013, Claimant returned to Dr. Wayment with a complaint of her left ring finger constantly locking and triggering. This problem was inhibiting her progress at occupational therapy. Because of Claimant's previous adverse reaction to the steroid injection, Dr. Wayment concluded that trigger release surgery was indicated. He continued her 10 pound weight restriction. Ex. G:96-98.

38. Dr. Wayment performed left ring finger trigger release surgery on Claimant on April 11, 2013. She tolerated the procedure well and there were no complications. *Id*. at 103-104.

39. At a surgical follow-up visit on April 24, 2013, Dr. Wayment observed that the Claimant was "Doing much better. She is very pleased." She denied any pain. He continued her on occupational therapy sessions twice per week and released her to work with a 15 pound weight restriction. *Id*. at 105-106.

40. On June 3, 2013, Dr. Wayment observed that Claimant's wrist was getting better. She stated that she was feeling stronger. Although she still had some pain on the volar aspect of the left wrist, nevertheless the trigger was no longer an issue. Claimant was stretching up to 25 pounds. Dr. Wayment continued her on occupational therapy twice a week and a 25 pound weight lifting restriction. *Id*. at 107-109.

41. Dr. Wayment next examined Claimant on July 1, 2013. He noted that her trigger and "everything else" was doing much better. She had healed well from all her surgeries. Nevertheless, she was still experiencing tendonitis. Dr. Wayment prescribed oral Prednisone and continued Claimant on a 25 pound weight lifting restriction. *Id*. at 113-115.

42. Claimant returned to Dr. Wayment on July 31, 2013 with continued complaints of thumb pain. He observed as follows: "We are so limited with what we can do with her. Now she has this bad de Quervain's [Tenonsynovitis] that will not calm down and it is limiting her whole

hand. At this point the only thing I can recommend is a 1st dorsal compartment release." He continued Claimant's 25 pound weight lifting restriction. Ex. G:116-118.

43. On August 29, 2013, Dr. Wayment performed first dorsal compartment release surgery on Claimant's left hand. She tolerated the procedure well and there were no complications. Ex. G:124-125.

44. Dr. Wayment evaluated Claimant in post-operative follow-up on September 11, 2013. He observed that she was doing well, she had no complaints, and her pain was controlled. He released her to return to work with a five pound weight lifting restriction. He ordered no occupational therapy until further evaluation. *Id*. at 126-128.

45. On October 7, 2013, Claimant reported to Dr. Wayment that her left wrist was much better and her pain was improved. Upon examination, she had "excellent range of motion." Dr. Wayment observed that she was "doing great" and released Claimant to full duty at work. *Id*. at 129-131.

46. At another follow-up appointment on November 11, 2013, Dr. Wayment observed that the Claimant was doing well and reported that her wrist was "feeling the best it has ever felt." She still had a little decreased range of motion. He ordered occupational therapy twice a week for four weeks. He continued her on full duty at work. *Id*. at 132-134.

47. On December 16, 2013, Dr. Wayment opined that Claimant had reached maximum medical improvement. She was tolerating work well and using her left wrist normally. She still rated her pain as four out of 10. He released her to full duty at work. *Id*. at 135-137.

48. Upon referral from Dr. Wayment, Claimant received occupational therapy by Occupational Therapist Lesley Ruby at Advanced Hand Therapy in Buhl from December 5, 2012 until December 11, 2013. Claimant attended a total of 42 therapy sessions. Ex. I.

49. On December 30, 2013, Ms. Ruby prepared a "Permanent Impairment Rating Evaluation" of Claimant, which she provided to Dr. Wayment for his use in rating Claimant's impairment. The summary of Ruby's physical exam of Claimant was as follows:

> The client presents with well healed incision on the dorsum of the wrist, over the first dorsal compartment and volarly over the ring finger MPJ. She has the following active range of motion in the left wrist, 25 degrees of flexion (7% UEI) with 30 degrees of extension (3% UEI), 10 degrees of ulnar deviation (4% UEI), and 20 degrees of radial deviation (0%) (Table 15-32, page 473). These are added for a total of 14% UEI.

Ex I:186.

50. Ms. Ruby assessed Claimant's functional limitations (activities of daily living) using the QuickDASH Outcome Measure. QuickDASH uses eleven criteria to measure physical function and symptoms in people with musculoskeletal disorders of the upper limb. Claimant's "QuickDash" Score of 47.7 was based upon a survey of the eleven questions that Claimant answered in preparation of the impairment rating. Claimant responded with "moderate difficulty" to questions rating the following activities: opening a tight or new jar and performing heavy household chores (e.g., wash walls, wash floors). She reported "mild difficulty" in carrying a shopping bag or briefcase and washing a back. She stated that she was unable to use a knife to cut food. Claimant reported that she was unable to participate in recreational activities taking some force or impact through her left arm, shoulder, or hand, such as golf, hammering, tennis, etc. She stated that during the past week her hand problem had "moderately interfered" with her normal social activities with families, friends, neighbors and groups. She also stated that during the past week, she was "slightly limited" in her work or regular daily activities as a result of her hand. Claimant rated her hand pain in the "moderate" category, and rated the tingling in her hand as "mild." Finally, Claimant stated that during the past week she had experienced "mild difficulty" with sleeping due to the pain in her hand. *Id*. at 188.

51. Ms. Ruby's final recommendation for an impairment rating, as communicated to Dr. Wayment, was that Claimant had a 14% upper extremity impairment (UEI), for a whole person impairment of 8%. Ex. I:187.

52. On January 13, 2014, Dr. Wayment reviewed and adopted Ruby's recommendation for an impairment rating. He met with Claimant and observed that she was "getting along fine," although she still had a small amount of residual pain in her left hand. Using the *Guides to the Evaluation of Permanent Impairment*,[3] Section 15-7 and Table 15-35, range of motion grade modifiers, Dr. Wayment rated her final impairment at a 14% upper extremity impairment, consistent with a grade 2 modifier for functional history adjustment, which corresponded to an 8% whole person impairment. He noted that her Quick-DASH score was consistent with a grade 2 modifier. Dr. Wayment opined that Claimant had reached maximum medical improvement, and could continue full duty at work. He released her to return to work with no restrictions. Ex. G:138-139.

53. Claimant recalls that upon receiving her release from care by Dr. Wayment, he told her to be "careful" with her hand, to not lift anything too heavy that she did not feel capable of lifting, because he did not want her to damage it. Her left hand was still painful, tender, and sensitive, and her left arm still swelled down from her elbow to her wrist. Tr., 56:2-57:7.

54. **Independent Medical Examination.** At the request of Claimant's attorney, Claimant underwent an independent medical evaluation of her industrial injury by James H. Bates, M.D,[4] a physiatrist who practices in Meridian, Idaho. Dr. Bates prepared a summary report of his evaluation dated September 29, 2014. To prepare his report, he first physically

[3] Dr. Wayment's medical record does not reflect which edition of the *Guides* he used, however it appears that his references are to the Sixth Edition.

[4] Dr. Bates graduated from Creighton Medical School, completed flight surgeon training for the Navy, and then completed a residency in physical medicine and rehabilitation at the University of Missouri. He is board certified in physical medicine and rehabilitation. He practices medicine in Meridian, Idaho. Bates Dep., 4:21-5:18.

examined Claimant and then reviewed medical records from the following sources: St. Luke's Clinic, Occupational Medicine; David J. Jensen, D.O.; radiographic reports; Dr. Tyler Wayment, M.D.; Advanced Hand Therapy; and prior medical records. Ex. K.

55. Dr. Bates concluded that the occupational therapy, medical evaluation, and surgeries that Claimant had received were all related to her industrial accident of June 24, 2012. *Id*. at 212.

56. Dr. Bates noted that following her four surgeries and occupational therapy, Claimant reported that she still had pain and stiffness in the wrist. The pain was worse with lifting, activities in general, and keyboarding for prolonged periods of time. Claimant reported that heat or ice at times would make her wrist feel better. Although Claimant returned to work with Super 8, she reported to Dr. Bates that she did not lift with her left hand and that generally by the end of her shift, her wrist pain was worse and there was frequent swelling of the wrist. *Id*. at 206-207.

57. In his physical examination of Claimant, Dr. Bates found that the extension of her left wrist was 40 degrees active, 60 degrees passive with warm-up. Flexion was 35 degrees active, 40 degrees passive. Radial deviation was 15 degrees active, 20 degrees passive. Ulnar deviation was 20 degrees active, 30 degrees passive. *Id*. at 208.

58. Overall, Dr. Bates found that Claimant was independent in her activities of daily living, dressing, grooming and driving. She was also independent in light household chores and light meal preparations. *Id*. at 207.

59. Dr. Bates recorded his impression of Claimant's condition as follows: "Left wrist injury, scapholunate ligament injury. Status post debridement of scapholunate ligaments, open reduction internal fixation of the scapholunate joint, and the scapholunate joint, trigger finger

release and first dorsal compartment release." He opined that Claimant was medically stable and required no further treatment in connection with her industrial accident. Ex. K:211.

60. Dr. Bates noted that Dr. Wayment had previously rated Claimant's upper extremity impairment at 14%, equating to an 8% whole person impairment, which was obtained by the range of motion method. He noted that since Dr. Wayment's rating, Claimant had experienced a slight increase in her range of motion. Nevertheless, he opined that Dr. Wayment's overall rating was appropriate. Dr. Bates evaluated Claimant's impairment using the diagnosed-based impairment method.[5] He assessed a diagnosed-based impairment for arthrodesis of intercarpal fusion, scaphoid capitate successful fusion with a class one impairment for successful fusion. He determined the default impairment to be a 10% upper extremity impairment, but due to pain, less than normal activity for the functional grade, and clinical studies of greater than one joint being fused, he rated Claimant with a 12% upper extremity impairment. Combined with a 2% upper extremity impairment for Claimant's de Quervain's Tenonsynovitis, status post first dorsal compartment release, Dr. Bates concluded that the overall upper extremity impairment was 14%, equating to a 8% whole person impairment. Thus, although he utilized a different method than Dr. Wayment to assess Claimant's permanent impairment, Dr. Bates reached the same overall impairment rating. *Id*. at 212.

61. Unlike Dr. Wayment, Dr. Bates found that Claimant should have permanent restrictions of the left upper extremity "due to her restricted range of motion as well as the tenderness of her wrist and swelling." He found it appropriate to limit Claimant with the following restrictions: no forceful gripping, no forceful pronation, and no forceful supination. He further found that it was appropriate to allow Claimant general use of the hands, gripping, and

[5] The report does not specifically reference the *Guides to Evaluation of Permanent Impairment*. Nevertheless, it appears that Dr. Bates used the Sixth Edition.

light carrying on an occasional basis, and fine motor movement on a frequent basis. Finally, he limited Claimant to lifting side-carry with a restriction of 30 pounds with her left hand. Ex. K:212.

62. **Post-Injury Employment.** Claimant testified that after her injury and post-injury medical treatment, and continuing to the time of hearing, she was limited in performing various physical tasks that she had previously performed for Super 8. She could no longer lift items she had previously lifted nor was she able to clean the kitchen and reception area of the motel. Claimant could no longer sweep or mop and could not lift equipment in the kitchen to clean it. Equipment in the kitchen that she could not lift included the crock pot. She broke glass dishes that she tried to lift with her left hand alone. Super 8 accommodated her despite these limitations by arranging for other employees to lift items or complete cleaning she could no longer perform. Tr., 62:14-63:14.

63. For her position at Jerome Middle School, Claimant did not require any assistance or accommodations following her injury but rather performed her job in the same manner as she had prior to the injury. *Id*. at 63:15-25.

64. Claimant continued to work for Super 8 and Jerome Middle School following her injury of June 24, 2012. Her employment with Jerome Middle School lasted until the end of the school year in June 2014. Thereafter, because Claimant had moved to Wendell, she determined that the "pay wasn't worth coming over" to Jerome. Claimant's regular, full-time employment with Super 8 lasted until December 2014, when she moved to Gooding, after which she worked only occasional on-call shifts at Super 8. *Id*. at 64:6-65:5; Claimant Dep., 44:16-45:6.

65. In or about 2013 Claimant returned to work for Canyonside Christian School's after-school program for three months. She quit this employment because she could not perform

various job duties of a physical nature, including picking up children and raking leaves on the school grounds. Claimant Dep., 47:4-25.

66. In October 2014, Claimant began working at Living Waters Preschool in Wendell. She cared for children, infants to age four. Due to the weakness in her left hand, she could not pick up babies at this job. If toddlers needed to be picked up, she sat down on the floor or sat in a chair prior to lifting them. She also did not change infants' diapers due to her left hand condition. The employer accommodated her with these restrictions. This employment lasted four or five months until the preschool went out of business. She earned $8.00 per hour in this employment. Tr., 65:11-67:7.

67. After her employment with Living Waters Preschool ended, Claimant worked in 2015 for three to four weeks at U.S. Bank in Wendell. She trained to become a teller, however she quit the job because she perceived that she was "not quick enough typing or handling money because I couldn't use both hands the way I need to." *Id*. at 67:10-21.

68. In January 2015 Claimant went to work as an in-home caregiver for Havenwood Caregiver Services ("Havenwood"), based in Gooding. *Id*. at 67:22-68:4. Havenwood employed caregivers who assisted clients with nonmedical tasks of everyday living in their homes. Studyvin Dep., 7:10-13. Claimant helped clients in their homes with personal needs such as meal preparation, household cleaning (including dusting, vacuuming, sweeping, and mopping), changing bed linens, dishwashing, laundry, and similar tasks. She served three primary clients. Claimant was limited in performing this job because she had to use her right hand "to do basically everything." Claimant could not lift clients out of bathtubs or wheelchairs. She bought a special mop and sweeper to clean with so that she did not have to use her left hand. She recalled that her clients were "very accommodating" with her limitations. Claimant did not tell

her supervisor at Havenwood about her limitations or problems in performing the job because she did not want to lose her job. She resigned from Havenwood on August 7, 2015. She quit the position because she had too much pain in her left hand after performing a day of work for Havenwood. She recalled that "it got to where I couldn't take it anymore." She also quit the job because she could not do "everything they asked of me." Tr., 67:23-73:17; 85:23-86:1; Claimant Dep., 46:5-16.

69. Claimant's supervisor at Havenwood, Dalene Studyvin, recalled that Claimant performed tasks for clients that included laundry, dishes, dusting, vacuuming, linen changes, dressing, and bathing. Studyvin Dep., 8:2-13. Ms. Studyvin was unaware that Claimant had limitations in performing any of these duties. She considered Claimant to be a good worker. When Claimant resigned from Havenwood, she did not give any reason for her resignation. *Id.* at 8:14-10:2.

70. In or about April 2015, Claimant sought employment with Horizon Airlines in Sun Valley. She interviewed for a position but did not receive a job offer. As a result of a physical exam she was required to take as part of the application process, Claimant was diagnosed with COPD, which disqualified her for the position. Claimant also believed that she would have been unable to perform the job because it required lifting luggage into airplanes. Tr., 86:16-87:2; Claimant Dep., 52:13-53:8; Ex. 8:11-12.

71. In August 2015, Claimant began work as a paraprofessional for North Valley Academy in Gooding. She was working in the position at the time of hearing. In this position she helped first through twelfth grade students learn to read under a program called "Title I." She worked 35-plus hours per week. Her hourly wage was $10.66. Claimant did not have any limitations in performing this position. Claimant planned to return to work at for this employer

upon the resumption of the school year in fall 2016 if she is asked to return and there is grant funding for her position. Tr., 74:10-75:4; 80:1-5.

72. **Claimant's Condition at Time of Hearing.** Claimant believed that she would be limited from performing several of her past employment positions, including those at Honker's Mini-Mart and D&B Construction, because of the lifting requirements. She also believed that she would be limited in folding clothes at a retail clothing store like Macy's or Sears and thus it would be unlikely that she would be able to perform those jobs without an accommodation. Furthermore, Claimant would not choose to return to work in a daycare because she would not trust herself to safely pick up children with both hands. *Id*. at 75:13–76:22.

73. Claimant planned to continue working for Super 8 on an on-call basis. *Id*. at 80:6-8.

74. With regard to activities of daily living, Claimant was prevented from performing the following tasks due to the weakness of her left hand: putting on a necklace with a clasp; buttoning shirt buttons that are too small; operating a hand-held can opener; and opening a twist-off beverage can or bottle. Claimant cooked at home but did not do any food chopping; she either used a food processor or her daughter assisted her with chopping. She refrained from putting her three dogs on a leash at the same time because she would have to hold the leash with her right hand only and "they would probably knock me over." She could only pick up her grandchild if she sat down. Tr., 76:23-79:4.

75. Claimant's left arm still regularly swelled from her elbow down to the fingertips of her left hand every evening. She had pain in her wrist and hand that waxes and wanes. Claimant demonstrated using her hand and testified that she could not completely touch her palm with her left thumb. She had difficulty moving her fingers towards her palm. She stated that she

had difficulty picking up a cup with her left hand because she had no grip strength. She also indicated that she had difficult flexing her wrist forward or side to side, and that if she tried to force herself to do so, the pain was intense enough to make her nauseous. Tr., 57:8-62:1.

76. **Claimant's Credibility.** Having observed Claimant's testimony at the hearing and having reviewed her testimony in light of the record as a whole, the Referee finds that Claimant was a credible witness. Between her responses to discovery, her deposition testimony, and her testimony at hearing, Claimant demonstrated an inability to completely and accurately recall specific dates and details (for example, her past wage rates and dates of employment), however this did not ultimately affect the trustworthiness of her testimony. She testified at hearing forthrightly about her physical condition following the industrial accident and her rehabilitation.

77. Defendants argued for two primary reasons that Claimant's assertions conflict with her own testimony and other evidence in the record, thus she is not credible and the Commission should thus afford her subjective complaints little weight. *See*, Defendants' Post Hearing Brief at 11 – 21.

78. First, Defendants argued that Claimant has offered differing versions of her employment history. *Id*. at 12. For example, she testified at her deposition that she was not employed in high school but rather traveled during the summer, whereas at hearing she testified that she worked at Macy's for six months while in high school. Claimant also testified at deposition that she worked for Honker's Mini-Mart in 1997, while at hearing she testified that this employment began in 1995. There are other inconsistencies about Claimant's employment record that Defendants highlighted from Claimant's answers to discovery, her deposition and hearing testimony. The Referee has carefully reviewed the same. It is reasonable to find that

many workers when asked to account for each and every employment position that they held going back twenty years or more might not have accurate recall, might provide inconsistent dates, or fail to recall a job held for a brief period of time when asked the same questions on different occasions. These factual inconsistencies in Claimant's testimony were *de minimis* and ultimately not dispositive of the ultimate issue of disability in excess of impairment. The Referee finds that they do not lessen Claimant's general credibility.

79. Second, Defendants argued that objective evidence and her own testimony rebut Claimant's testimony regarding her functional limitations. *See*, Defendants' Post-Hearing Brief at 19. They noted that "Claimant demonstrated she could make a fist but could not touch each finger individually to her palm while the rest of her fingers remain outstretched." Defendants noted that "one only needs to extend ones own fingers and attempt to touch the palm with each finger individually to ascertain that this is a maneuver that cannot be done even by an uninjured hand." *Id*. The Referee, however, having tried the finger maneuver himself, does not agree that this is an impossible maneuver for an individual with a supposedly normal hand. While the other fingers may wobble a bit while trying to touch one finger to the palm, nevertheless they remain basically outstretched and do not follow the finger being moved to the palm. There was no assertion by Claimant or her attorney that the other fingers had to remain perfectly still while touching one finger to the palm. There is no obvious "gotcha" moment in this example.

80. Defendants further cast suspicion upon Claimant's subjective complaints by arguing that they do not find support in the objective findings of her occupational therapist, Lesley Ruby. *Id*. They noted that at hearing Claimant testified that she could not pick up a cup with her left hand alone because "it will end up on the floor" and she does not have sufficient grip strength. Tr., 59:21-60:2. Defendants suggested that this subjective complaint is not credible

because Ruby measured her left hand grip strength in November 2013 at 35 pounds. *See*, Defendants' Post-Hearing Brief at 19-20.

81. While Ruby measured Claimant's left hand grip strength at 35 pounds on November 18, 2013, nevertheless this was compared to her right hand grip strength of 85 pounds, demonstrating Claimant's significant left hand impairment. Ex. I:182. Additionally, while the QuickDash questionnaire of December 30, 2013 administered by Ruby did not ask Claimant whether she could pick up an ordinary cup with her left hand, the most analogous questions asked her whether she could "open a tight or new jar," to which she responded "moderate difficulty," and whether she could "use a knife to cut food," to which she responded "unable." *Id*. at 188. And in one of Claimant's last physical therapy sessions prior to being released on December 11, 2013, Claimant told Ruby as follows: "I can't rotate my wrist to pick something up and to put full pressure on my wrist to push up." *Id*. at 189.

82. Defendants also criticized Claimant's subjective reports of swelling and pain. She testified that at the time of her release from Dr. Wayment, her left extremity still swelled from her elbow to her fingertips and was still painful in her wrist, fingers and thumb. She further testified that her left extremity still swelled in a similar manner at the time of hearing. Tr., 56:7-57:14. While it is true, as Defendants noted, that Dr. Wayment reported that Claimant was "doing well" and "getting along fine" upon releasing Claimant from treatment on January 13, 2014, Ex. G:138, nevertheless Claimant still rated her left wrist pain as four out 10 in her last office visit with Dr. Wayment on December 16, 2013. *Id*. at 135. Dr. Wayment testified that when he treated her, he found Claimant to be "honest, straightforward" and that she was not a malingerer. Wayment, Dep., 19:15-22. Furthermore, on September 29, 2014, Dr. Bates found it

appropriate to give Claimant work restrictions due in part to "tenderness of the wrist and swelling." Ex. K:212.

83. In summary, Claimant's subjective pain complaints and personal assessment of the abilities of her left hand and wrist may not precisely or perfectly correspond to objective findings. Nevertheless, the Referee finds the Claimant's testimony credible in light of the whole record, which includes the reasonable assessment of Dr. Bates that Claimant "does not have a fully normal wrist. There's weakness, there's restriction in motion." Bates Dep., 17:6-7.

DISCUSSION AND FURTHER FINDINGS

84. 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). Nevertheless, 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).

85. **Permanent Disability in Excess of Impairment.** "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. I.C. § 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 section 72-430, Idaho Code." I.C. § 72-425.

86. The test for determining whether 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). I.C. § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

87. The proper time for determining Claimant's disability is the time of the hearing. *Brown v. Home Depot,* 152 Idaho 605, 609, 272 P.3d 577, 581 (2012). Claimant bears the burden of proving that she has suffered a disability in excess of impairment. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 34, 714 P2d 1, 3 (1985). "[A] permanent disability rating need not be greater than the impairment rating if, after consideration of the non-medical factors in I.C. § 72–425, the claimant's 'probable future ability to engage in gainful activity' is accurately reflected by the impairment rating." *Graybill,* 115 Idaho at 294, 766 P.2d at 764.

88. As a prerequisite to determining Claimant's disability in excess of impairment, the evidence must demonstrate that she is medically stable and that she has a permanent physical 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. I.C. § 72-422.

89. Dr. Wayment determined that Claimant had reached maximum medical improvement on December 16, 2013. Ex. G:135. Dr. Bates agreed that she had reached maximum medical improvement when he examined her on September 29, 2014. Ex. K:211. Both physicians agreed that she had a 14% impairment of her left upper extremity, which corresponds to a whole person impairment of 8%. Ex. G:139; Ex. K:212. Thus, the evidence shows that Claimant is medically stable[6] and has a permanent physical impairment.

90. Having established that Claimant is medically stable and that she has a permanent physical impairment, next it must be determined whether Claimant's physical impairment, in conjunction with the non-medical factors provided by I.C. § 72-430(1), demonstrate that her capacity for gainful employment has been reduced or eliminated and, if so, the extent of her disability. To make this determination it is necessary to weigh both the medical and vocational evidence in the record.

91. **Medical Evidence.** In *Poljarevic v. Independent Food Corporation*, 2010 IIC 0001, the Commission observed as follows:

> In assessing Claimant's permanent partial disability, it is first helpful to understand whether Claimant's permanent impairment has caused a loss of functional capacity, which impacts his ability to engage in physical activity. Indeed, a loss of functional capacity figures prominently in all cases involving a

[6] On April 27, 2016, Claimant filed a motion to stay proceedings in which she suggested that evidence from Dr. Wayment's deposition and an examination performed in his office on April 4, 2016 demonstrated that her wrist injury might not be medically stable. On May 5, 2016, the Referee denied the motion. The evidence in the record shows that Claimant was at maximum medical improvement.

> determination of an injured worker's disability in excess of physical impairment. *Absent some functional loss, it is hard to conceive of a factual scenario that would support an award of disability over and above impairment*; if the injured worker is physically capable of performing the same types of physical activities as he performed prior to the industrial accident, then neither wage loss nor loss of access to the labor market is implicated.

Poljarevic, 2010 IIC 0001.7 (emphasis added).

92. In this case, Dr. Wayment, Claimant's treating physician, did not assign any permanent physical restrictions to Claimant as a result of her industrial accident. Dr. Bates, an independent medical examiner, assigned certain physical restrictions. Both physicians testified in post-hearing depositions concerning their medical opinions regarding restrictions.

93. *Dr. Wayment.* While he assigned her a whole person impairment rating of 8%, nevertheless Dr. Wayment gave Claimant a full duty release to return to work without restrictions on January 13, 2014. Wayment Dep., 15:2-3. He testified regarding his familiarity with Claimant as his patient. "Over time you get to know them pretty well. I mean, I dealt with her for a year and a half. So we get to know the patient, what they can tolerate, whether or not they can tolerate, how long they are going to take recovery-wise on subsequent surgeries. Usually get a pretty good feel for that." *Id*. at 14:2-7. He observed that "I thought she had a good result. And I expected her to go on, on to a full recovery. And with time get even better. Pain usually gets less as time goes on." *Id*. at 13:15-18.

94. When Dr. Wayment gave Claimant a full duty release to return to work, he understood it to mean that there were "no restrictions on weight, activity, movement." Wayment Dep., 14:10-11. He explained further that a full duty release means there are "no restrictions at their job at that point, that they can lift whatever weight. They can use the hand to do whatever is required of the job to do." Wayment Dep., 18:8-11.

95. Asked about the restrictions assigned to Claimant by Dr. Bates, Dr. Wayment stated that "there should be no permanent restrictions on her. That we should have her to a level that the repair should be well enough that she shouldn't have a restriction." Wayment Dep., 21:4-8. He further commented that the restrictions assigned by Dr. Bates might be reasonable in the short term but not reasonable in the long term. *Id*. at 23:8-10. In his opinion, Claimant's difficulties with using her left hand should "go away. They should resolve, and the pain should just go away" over time. *Id*. at 25:24-25.

96. Counsel for Claimant asked Dr. Wayment whether he performed a functional capacity examination when he assigned Claimant her impairment rating. The following exchange took place:

> Q. When you did the impairment rating, you did not do a functional examination?
> A. *So the impairment rating does not take into account pain*. All it takes in is function of the wrist, movement. And so we, you know – I have my therapist [Ruby] do it. I haven't done it for years. But I look at them on evaluation. She takes the measurements for us. Then I evaluate that and see if that is what I would expect for what deformity they have left.
> But *it doesn't take into account poundage, how much they could lift. It doesn't take, you know, how much force they can grip*.
> Q. That would have to be a regular FCE?
> A. Yeah.
> …
> Q. It's not something you use in your practice?
> A. No.

Id. at 26:21-27:9; 27:21-22 (emphasis added).

97. *Dr. Bates*. Dr. Bates examined Claimant on September 29, 2014, after which he reviewed medical records relevant to her industrial injury. He relied upon both his findings from the physical examination and the records review to formulate an impairment rating and determine Claimant's restrictions. Bates Dep., 7:2-9. The permanent physical restrictions that Dr. Bates assigned to Claimant as a result of permanent impairment of her left wrist were as

follows: no forceful gripping; no forceful pronation and supination; general use of the hands gripping and light lifting to an occasional basis; fine motor movement to a frequent basis; and lifting side-carry, 30 pounds left hand. Bates Dep., 16:22-20:4.

98. In light of his findings from his physical exam, which showed "decreased range of motion and decreased strength," *Id*. at 6:23-25, Dr. Bates concluded that Claimant showed "impaired function of the hand or wrist." *Id*. at 10:11.

99. Dr. Bates opined that the physical restrictions he assigned were appropriate because Claimant *"does not have a fully normal wrist.* There's weakness, there's restriction in motion. It would be anticipated that certain activities would cause pain, would cause irritation, inflammation, and inhibit her function and cause pain, discomfort…" *Id*. at 17:6-10 (emphasis added).

100. Dr. Bates admitted that the strength and range of motion testing he performed on Claimant was based upon his own clinical judgment rather than using devices to test the strength of her left hand and wrist. *Id.* at 26:11-19. He further admitted that the physical limitations he assigned to Claimant were based upon the subjective pain she experienced, together with his judgment as her examiner. *Id*. at 31:24-32:16.

101. Counsel for Defendants queried Dr. Bates about the nature of the restrictions he assigned to Claimant in pertinent part as follows:

> Q. I was also interested as you talk about restrictions and the way you viewed this. I don't understand you to say there were things that she absolutely can't do because of this injury. In other words, her body just won't do it. Is that correct?
> A. That was not placed in there, or not in my report as being there.
> Q. I understand.
> A. But if it came from putting – *if a task required full range of motion of her wrist, she could not do that task*.

Id., 30:21-31:6 (emphasis added).

102. *Weighing the Medical Opinions*. As Claimant's surgeon who treated her for approximately 16 months, Dr. Wayment ordinarily would be due deference concerning his opinion that no physical restrictions were necessary for her. Nevertheless, the opinion of Dr. Bates that physical restrictions were appropriate is entitled to greater weight, for the following reasons.

103. Dr. Wayment did not perform functional testing of Claimant; rather his occupational therapist did so for him. He admitted that this functional testing did not take into account Claimant's pain, how much she could lift, or how much she could grip. Wayment Dep., 26:21-27:9; 27:21-22.

104. With regard to the pain Claimant was still experiencing with the use of her left wrist, Dr. Wayment appeared to express an aspirational belief that "the pain should just go away." *Id*. at 25:24-25. Nevertheless, the evidence shows that two years after he last saw Claimant, in January 2014, the pain associated with her left wrist had not improved and had not gone away; for example, if she attempted to move her left wrist side to side, the pain was severe enough to make Claimant nauseous. Tr., 60:25-61:5.

105. Defendants argue that restrictions assigned by Dr. Bates "seem to be based on Claimant's subjective reports of pain and swelling." *See*, Defendants' Post-Hearing Brief at 22-23. The evidence, however, shows that Dr. Bates based his restrictions not only on Claimant's pain but also his functional testing of Claimant's restricted range of motion. Ex. K:212. Furthermore, Dr. Bates testified convincingly that Claimant's pain objectively affected the range of motion and strength of Claimant's left wrist and hand, but the evidence of active resistance to movement was an element of his assessment as well. Bates Dep., 31:4-33:12.

106. The evidence demonstrates that Claimant had restricted functional abilities after her industrial accident that validated the physical restrictions assigned by Dr. Bates. Although she continued in her employment with Super 8, she could no longer perform the more physically demanding duties that required lifting or cleaning; the employer accommodated her by having other employees complete these tasks. Tr., 62:14-63:14. Claimant's brief three month re-employment with Canyonside Christian School's after-school program ended after Claimant found that she could not perform physical tasks such as raking leaves or picking children up. Claimant Dep., 47:4-25. Similarly, in her employment with Living Waters Preschool, Claimant could not pick up babies. If toddlers needed to be picked up, she sat on the floor or sat in a chair. She could not change diapers. The employer accommodated her restricted abilities. Tr., 65:11-67:7. Claimant briefly trained to become a teller with U.S. Bank, however she quit the job because she perceived that she was "not quick enough typing or handling money because I couldn't use both hands the way I need to." *Id*. at 67:10-21. Claimant also quit her employment as an in-home caregiver for Havenwood because she had too much pain in her left hand after performing a day of work, and because she believed she could not physically perform care services for her clients, such as lift assists from bathtubs. *Id*. at 67:23-73:17; 85:23-86:1; Claimant Dep., 46:5-16. Although Claimant was disqualified from employment with Horizon Airlines due to her COPD, it is unlikely she would have been able to perform the job because it required lifting luggage into airplanes. Tr., 86:16-87:2; Claimant Dep., 52:13-53:8. Finally, Claimant's testimony concerning her various difficulties with activities of daily living demonstrated impaired functional capacity. Tr., 76:23-79:4.

107. Having cast doubt upon Claimant's credibility, Defendants appear to argue that her pain, merely because it is subjective, has no place in an assessment of whether she should

validly have restrictions of her wrist and hand. The Referee disagrees with this argument and Defendants' characterization of the restrictions of Dr. Bates as having no basis in objective medical findings.

108. In summary, the evidence shows that Claimant did not have a "fully normal wrist," as Dr. Bates noted. Thus, she was not physically capable of performing the same types of physical activities that she performed prior to the industrial accident, demonstrating a functional loss. *Poljarevic*, 2010 IIC 0001.7. Having determined that Claimant had restricted physical abilities, the vocational evidence must be analyzed to determine whether she has a disability in excess of her impairment.

109. **Vocational Evidence**. Two vocational experts, Delyn D. Porter and John M. Janzen, evaluated Claimant's employability and level of disability.

110. *Delyn D. Porter.* Claimant commissioned Delyn D. Porter, M.A., CRC, CIWCS,[7] to conduct a vocational assessment and disability evaluation. Mr. Porter delivered his report on February 11, 2015. Mr. Porter interviewed Claimant and reviewed relevant medical evidence pertaining to her industrial injury, including but not limited to, medical records of Dr. Wayment and the independent medical evaluation of Dr. Bates. He took Claimant's educational and vocational history. Mr. Porter also reviewed the following information: Social Security Administration Itemized Statement of Earnings for the Claimant, 1992 – 2012; Idaho Industrial Commission Records; *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition; *Dictionary of Occupational Titles*; O*NET (Occupational Information Network, the online

[7] Mr. Porter is a Certified Rehabilitation Counselor (CRC) and a Certified Worker's Compensation Specialist – Advanced Level (CIWCS). He holds a Master of Arts, Rehabilitation Counseling, from Western Washington University, and a Bachelor of Arts, Sociology, from Idaho State University. From 1991 to 2006, he served as Vocational Rehabilitation Counselor for the Idaho Division of Vocational Rehabilitation. From 2006 to 2010, he served as a Rehabilitation Consultant for the Idaho Industrial Commission. He has served as a private vocational rehabilitation counselor/consultant since January 2011. Porter Dep., Ex. 1. He has testified in a dozen cases before the Industrial Commission since 2011. Porter Dep., 7:14-17.

version of the occupational network database published by the U.S. Department of Labor); Idaho Career Information Systems (eCIS) (online career information data published by the Idaho Department of Labor); *Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles; New Guide for Occupational Exploration*; *The Revised Handbook for Analyzing Jobs*; and *Rehabilitation Consultant's Handbook*, Fourth Edition. Ex. N:224-225.

111. Mr. Porter observed that prior to her June 24, 2012 industrial accident, Claimant did not have any permanent impairments, permanent work restrictions, or medical conditions that restricted her physical work capacity. Thus, he concluded that prior to her injury, Claimant was capable of performing all of the essential functions of her past work without difficulty, and she was also capable of performing heavy physical work. Ex. N:238.

112. Using the Idaho Occupational Employment and Wage Survey for South Central Idaho (an area encompassing a 50 mile radius from Wendell, Claimant's residence at the time of the evaluation), Mr. Porter analyzed Claimant's pre-injury and post-injury labor market access. He found the following occupational titles from the *Dictionary of Occupational Titles* relevant for Claimant's career history: hotel clerk; teacher aide I; teacher aide II; teacher, preschool; nursery school attendant; and receptionist. *Id*. at 231-233.

113. Mr. Porter next performed a vocational assessment/transferable skills analysis. He determined that Claimant had previously worked in occupations ranging from semi-skilled to skilled employment settings. He analyzed her job history according to the Specific Vocational Preparation (SVP) rating system, which is the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job. Mr. Porter determined that Claimant's employment

history included jobs with a SVP 3 level (semi-skilled, requiring over one month and up to and including three months of preparation) to a SVP 7 level (skilled, requiring over two years up to and including four years of preparation), and thus she was capable of working in such occupations that she is otherwise qualified to perform. Finally, he used the Guide to Occupational Exploration (GOE) coding system to cluster occupational titles into job work groups that have the same general type of work with similar skills and abilities, as another way to analyze Claimant's transferable skills. Based upon the analysis, he determined the GOE codes for Claimant were as follows: administration, registration, reception and information giving, specialized teaching, care of others, and teaching and instruction, general. Ex. N:237-238.

114. Mr. Porter calculated that prior to her injury, Claimant had reasonable access to and was competitive for approximately 12.5% of the total jobs in the labor market area of South Central Idaho. He then performed a post labor market analysis based upon the alternative medical opinions of Dr. Wayment and Dr. Bates. Using Dr. Wayment's opinion that Claimant did not have any work restrictions due to her impairment, Mr. Porter determined that Claimant would continue to have access 12.5% of the total jobs in her assigned labor market area, thus she would suffer no loss of labor market access. Using the permanent work restrictions assigned by Dr. Bates, which limited Claimant to a light – limited medium work capacity, Mr. Porter determined that Claimant would continue to have access to only 7% of the total jobs in her assigned labor market area, resulting in a 44% reduction in labor market access. He noted that his labor market analysis included all occupations that Claimant was qualified for and physically capable of performing prior to her industrial injury, and excluded all those occupations she was qualified to perform, but was physically incapable of performing, after her industrial accident. Ex. N:229-239; Porter Dep., 34:12-18.

115. Mr. Porter provided the following lists of jobs that Claimant would still qualify for in the South Central Idaho labor market, based upon the permanent work restrictions assigned by Dr. Bates: substitute teacher; teaching assistant/teachers aide; hotel, motel, and resort desk clerk; receptionist and information clerk; child care worker; and retail salesperson. *Id*. at 240.

116. Based upon her Social Security Earnings between 1992 and 2012, Mr. Porter calculated that Claimant was a low-wage earner with an average hourly wage of $9.39. Using the permanent work restrictions from Dr. Bates, he then determined that Claimant would still have access to unskilled and skilled jobs in her labor market with an average midpoint wage of $9.63 per hour. Thus, he concluded that Claimant had suffered no post injury loss to her wage earning capacity as a result of her injury. Ex. N:239-240.

117. Considering the factors outlined in I.C. § 72-430, Mr. Porter summarized his review of whether Claimant has a permanent partial disability as follows:

a. Claimant has not had multiple injuries resulting in impairments. Her assigned restrictions are limited to her upper left extremity.
b. Claimant has no disfigurement likely to handicap her in procuring or holding employment.
c. Claimant does have a diminished ability to compete in her labor market, considering all of her personal and economic circumstances. Mr. Porter based this opinion upon Claimant's undisputed PPI and the work restrictions assigned by Dr. Bates, as well as her high school education and limited transferable skills.
d. Claimant's age at time of injury was 35.
e. For "other" factors, Mr. Porter noted her limited educational background (no educational attainment beyond high school), the geographic location of her residence at the time (Wendell), her limited work history, and limited transferable skills. He further noted that Claimant is competing against other job seekers who have higher educational attainments and who do not have permanent work restrictions.

Id. at 241-242.

118. Mr. Porter concluded his report by noting that although Claimant suffered no post-injury wage loss, her loss of labor market access became more substantial in determining

whether she had a permanent partial disability. He chose to use the assigned permanent work restrictions from Dr. Bates, from which he calculated that Claimant had suffered permanent partial disability of 33%, inclusive of her 8% whole person, permanent partial impairment. Ex. N:243.

119. *John M. Janzen*. Defendants hired John M. Jansen, Ed.D, CRC,[8] to prepare a vocational assessment and disability evaluation of Claimant. Dr. Jansen delivered his report on December 1, 2015. Dr. Janzen reviewed the following information to prepare his report: Claimant's Answers to Interrogatories; relevant medical records relating to her injury; records of the Idaho Industrial Commission; the vocational report by Mr. Porter; Claimant's tax records; Claimant's reported Social Security Earnings; her resume; and her deposition transcript. He based his opinion on data from the following sources: *The Revised Handbook for Analyzing Jobs* (U.S. Department of Labor); May 2014 wage data for the Gooding/Twin Falls area published by the U.S. Bureau of Labor Statistics; and labor market research he completed in the Gooding/Twin Falls area. Dr. Janzen did not interview or meet with Claimant prior to preparing his report, although he noted that a "meeting with her is recommended." Ex. R:283.

120. Dr. Janzen noted that Claimant returned to both her position with Super 8 and Jerome Middle School following her industrial accident, and that she continued regular employment with the Super 8 through December 2014 and with the school until August 2014. He

[8] In addition to his 1982 doctorate in counseling psychology from the University of San Francisco, Dr. Jansen received a master of science in rehabilitation counseling and psychology from Oklahoma State University in 1974, and a bachelor of science in social work from Tabor College in 1973. He has been the principal and president of Janzen & Associates, a vocational and rehabilitation consulting firm, since 1979. His prior employment positions include rehabilitation counselor, consulting psychologist, and social worker. He was also a rehabilitation counselor and assistant area supervisor with the Idaho Department of Vocational Rehabilitation. Dr. Janzen is the past president of the Idaho Rehabilitation Association and a Certified Rehabilitation Counselor. Ex. 6. He has testified in disability and injury cases since 1981. Janzen Dep., 7:9-12. He further testified that he hasn't "really been doing workers' comp work since, oh, probably the '80s." Since that time, Dr. Janzen has practiced primarily in the area of Federal Employers Liability Act (FELA) cases that involve disability claims against railroads. *Id.* at 27:16-23. A review of reported cases before the Commission shows that Dr. Janzen testified as a vocational expert in 22 cases from 1990 to 2012.

further noted that she left both jobs for personal reasons, because of the relocation of her personal residence, not due to limitations from her injuries. He also noted that she continued to work at Super 8 occasionally, on an on-call basis. Ex. R:283-284.

121. Acknowledging that Claimant was unable to continue her employment at Havenwood due to difficulties in lifting patients and was similarly unable to continue child care work due to difficulties in lifting children, Dr. Janzen nevertheless observed that Claimant has had "no physical difficulty… in completing her employment" with Super 8 or the Jerome School District." Ex. R:284.

122. Dr. Janzen noted Claimant's previous work experience as a cook, cleaner, cashier, backhoe and dump truck operator, daycare operator, paraprofessional/teacher's aide, hotel front desk clerk and health care assistant. He noted that of these positions, hotel front desk clerk and paraprofessional/teacher's aide remained as "compatible employment options." He concluded that her current physical capabilities and transferrable skills also qualified her to compete for positions as receptionist, customer service representative, information clerk, office clerk, and administrative assistant, for which his labor market research of the general Twin Falls area showed openings. *Id*. at 284.

123. Although he acknowledged the left upper extremity restrictions assigned to Claimant by Dr. Bates, Dr. Janzen concluded that "these restrictions have not precluded her from completing paraprofessional work with students with learning disabilities or behavior problems or office and front desk work requiring typing, keyboarding, and customer service." *Id*.

124. Dr. Janzen concluded that Claimant has sustained no disability or loss of earnings capacity as result of her industrial accident and injury. He disagreed with Mr. Porter's analysis that Claimant had sustained a disability in excess of her impairment, based upon her release to

full employment by Dr. Wayment, transferable skills for physically compatible employment in accordance with the restrictions assigned by Dr. Bates, her ability to maintain full employment with her time-of-injury employers after the injury, her full-time employment with North Valley Academy, and his labor market research showing available positions within her capabilities. Furthermore, he criticized Mr. Porter's analysis because Porter did not explain which jobs he considered within Claimant's pre-injury capacities and which jobs he considered in her post-injury capacities. He also noted that Mr. Porter did not explain Claimant's transferable skills for physically compatible employment in offering his disability rating. Dr. Janzen found that consideration by Mr. Porter of Claimant working in jobs with a heavy classification or requiring a bachelor's degree to be irrelevant based upon her education, employment history, and demonstrated post-accident physical abilities. Ex. R:284-285.

125. *Mr. Porter's Addendum Report*. Mr. Porter prepared an addendum to his vocational evaluation report dated January 4, 2016. Ex. N:244A-244E. He criticized Dr. Janzen's vocational assessment because he did not meet with Claimant as part of his disability evaluation. *Id*. at 244B. He also criticized Dr. Janzen's methodology for failing to address the permanent work restrictions assigned by Dr. Bates and noted that it "appears that Dr. Janzen has chosen to base his opinion that Ms. Hackworth has not suffered any permanent partial impairment (PPD) primarily on the medical opinion of Dr. Wayment." *Id*. at 244E.

126. Mr. Porter responded to Dr. Janzen's criticism that he had not identified which jobs he had considered in his labor market analysis by stating that his analysis "included **all** occupations reported by the Idaho Department of Labor in the South Central Idaho labor market area, on a pre-injury basis, where Ms. Hackworth met the entry level requirements, and had a

reasonable expectation of being able to perform the work within her assigned labor market area." Ex. N:244C (emphasis in original).

127. Mr. Porter noted that Dr. Janzen had identified the following jobs from Claimant's employment history: cook; cleaner; cashier; backhoe operator; dump truck operator; day care operator; paraprofessional/teacher's aide; hotel front desk clerk; and health care assistant. Nevertheless, based upon her permanent work restrictions assigned by Dr. Bates, Mr. Porter opined that Claimant had lost the capacity to perform seven of those nine positions, and that she retained the ability to perform only the positions of paraprofessional/teacher's aide and hotel front desk clerk. Ex. N:244C.

128. Mr. Porter concluded as follows: "if you just consider the loss of access to Ms. Hackworth's previous jobs identified by Dr. Janzen, her loss of labor market access would be 78%. This is calculated based upon the total nine previous jobs; and considering that Ms. Hackworth would only be able to return to two of the total nine jobs, and is unable to return to seven of the nine past jobs." When considering the alternative jobs (including those identified by Dr. Janzen) in the labor market that Claimant would be capable of performing based upon her permanent work restrictions, Mr. Porter reaffirmed his calculation of total labor market loss for Claimant of 44%. *Id*. at 244D.

129. Mr. Porter restated his opinion that, despite the analysis of Dr. Janzen, based upon the work restrictions assigned by Dr. Bates, Claimant had suffered a permanent partial disability of 33%, inclusive of her 8% whole person permanent partial impairment. *Id*. at 244E.

130. *Dr. Janzen's Addendum Report*. On January 27, 2016, Dr. Janzen prepared an addendum report.[9] Prior to preparing the report, Dr. Janzen met with Claimant on January 21,

[9] Dr. Janzen prepared the addendum report following the hearing on January 22, 2016. Although counsel for Defendants did not introduce the report as an exhibit at Dr. Janzen's deposition held on April 13, 2016, the

2016. In addition to interviewing her about her current physical and employment status, Dr. Janzen administered achievement and vocational testing of Claimant "for an assessment of her academic skills, vocational interests and perception of competencies." After meeting with Claimant, Dr. Janzen updated his labor market research of the Gooding/Twin Falls area to identify employment openings consistent with Claimant's capabilities. Janzen Dep., Ex. 1:1-3.

131. Dr. Janzen stated that he continued to hold the same opinions regarding Claimant's employability and earning capacity as he stated in his December 1, 2015 report. He indicated that Claimant's achievement and vocational test results showed academic skills and expressed competencies for child care, teaching, bookkeeping, office clerk and secretarial positions. Despite the physical restrictions assigned by Dr. Bates to Claimant, Dr. Janzen asserted that the "physical demands of her current position and alternative positions consistent with her reported skills are consistent with her reported restrictions and as such, will not be a detriment to her employability." Janzen Dep., Ex.1:4.

132. Dr. Janzen stated that his labor market research in the Gooding/Twin Falls area conducted between October 2015 and January 2016 "revealed numerous openings consistent with her [Claimant's] transferable skills and physical abilities including billing and advertising clerk, receptionist, teller, administrative assistant, student life coach, customer service representative, collections clerk, office clerk, and employment and training coordinator." He opined that provided that Claimant is interested in alternative employment, "she has an excellent labor market available to her." Janzen Dep., Ex.1:4.

133. Dr. Janzen responded to Mr. Porter's analysis of nine previous jobs he identified for Claimant's employment history, in which Mr. Porter asserted that Claimant could only

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parties stipulated on April 28, 2016 to admit the report as an exhibit to the deposition. The Referee admits the report to the record.

perform two of the nine jobs, comprising a 78% loss of labor market access, and Porter's final conclusion that Claimant had access to only 44% of her labor market, post-injury. Dr. Janzen concluded that "Mr. Porter's opinions not only disregard Ms. Ekstrand's transferable skills for alternative positions, including positions consistent with the restrictions indicated by Dr. Bates, but the labor market available to her in the Gooding/Twin Falls area." He asserted that Claimant "has access to many jobs which exceed the number of jobs she has lost due to limitations imposed by her left hand."[10] Dr. Janzen concluded by opining that "Mr. Porter's indication of a 44% post injury loss of labor market access is unsupported." Janzen Dep., Ex.1:4-5.

134. *Deposition Testimony of Vocational Experts*. In his deposition, Dr. Janzen summarized his criticism of the methodology of Mr. Porter, as follows:

> Q. In reviewing Mr. Porter's reports and assessment, did you make note of the methodology he may have used in determining a percentage of disability?
> A. I. did.
> Q. And what was your understanding of what he did do?
> A. He appears to have used the *Dictionary of Occupational Titles*, which is a Department of Labor publication, and looked at the jobs she did prior to her injury, looked at the jobs she did following her injury, and then came up with a percentage of loss of jobs that are no longer compatible with her physical capacities, in his opinion.
>
> And he seems to have used – the methodology seems to have relied on Dr. Bates' indication of restriction for her, as opposed to Dr. Wayment. And his methodology also appears to have failed to consider her actual functional capacities in her transferable skills.
>
> But in answer to your question, he appears to have exclusively relied upon the *Dictionary of Occupational Titles*.
> Q. Do you have any concerns with that as a resource to rely on?
> A. Yes, I have some definite concerns. One, the *Dictionary of Occupational Titles* is outdated for purposes of understanding the requirements of jobs that exist here in the year 2016, based on the fact that the *Dictionary of Occupational Titles* has been last updated around 1981 or 1986. So the jobs have significantly

[10] Dr. Janzen listed the following positions as ones for which Claimant has "retained abilities": collection clerk, secretary, office clerk, receptionist, administrative assistant, order clerk, customer service representative, payroll clerk, bookkeeper, student life coach, employment and training coordinator, salesperson, bank teller, credit investigator, accounting clerk, audit clerk, advertising clerk, manufacturer's representative, and information clerk. Janzen Dep., Ex. 1:4.

> changed from early to late '80s to what they are right now. Not only have the duties changed, but the physical demands have changed.
>
> And my concern is, is that Mr. Porter didn't take into consideration what the jobs entail at this time and whether or not Ms. Ekstsrand has the abilities, based upon her history, to complete those jobs.
>
> So my concern is, is that the data that he used is not really relevant to her functional capacities and he comes up with a percentage that's based upon outdated information.

Janzen Dep., 10:22-12:11.

135. Dr. Janzen was "not able to determine how he came up with 12.5 percent," Janzen Dep., 12:18-19, referring to Mr. Porter's conclusion that Claimant had pre-injury access to 12.5% of her labor market in South Central Idaho. Dr. Janzen asks, "Based on what? I don't think there is any empirical evidence to back up that percentage. Has he done a random sampling of jobs over in the Twin Falls area? I didn't see that referenced by him." *Id*. at 12:19-22.

136. Dr. Janzen further criticized jobs considered by Mr. Porter in his analysis as follows: "Well, some of the jobs are not even relevant to her current employability because she has made the decision not to pursue a particular job. For example, the construction job that she previously had, she expressed the fact that she would like to --- she didn't like working outside and wanted to work inside." *Id*. at 14:1-7.

137. Dr. Janzen stressed the importance of "the direction, careerwise, that the person has gone." *Id*. at 14:14-15. Thus, he opined that it is more relevant to focus on jobs that are consistent with the injured worker's career interests than jobs "no longer have relevance to her interest or desire for employment." *Id*. at 14:15-18." Based upon the achievement and vocational testing that Dr. Janzen administered, he testified that Claimant expressed interest in jobs "working with kids," education, customer service and administrative assistant jobs. Janzen Dep., 14:22-15:4.

138. Dr. Janzen testified that the jobs that Claimant has pursued following her injury, particularly her continued employment with Super 8 and employment as a paraprofessional/teacher's aide, are consistent with the restrictions assigned by Dr. Bates. He indicated that he "was not looking at clerk typist job for her, things that would require repetitive use of her left hand, where she would be twisting her hand… So it's not repetitive hands-on task completion, and they would be compatible with Dr. Bates' restrictions." Janzen Dep., 15:10-17:6.

139. Dr. Janzen further criticized the reference materials used by Mr. Porter in his analysis – *Dictionary of Occupational Titles*, Idaho Occupational Wage Survey, O*Net, etc. – as being "simply used for vocational planning," as opposed to being use for vocational forensic purposes, "because they are way too general for that purpose." *Id*. at 18:21-19:9.

140. Dr. Janzen admitted on cross-examination that the *Dictionary of Occupational Titles* is the only available vocational data reference published source that covers the entire country and provides the physical requirements of jobs in addition to job duties. *Id*. at 23:1-8. He further admitted that vocational consultants in Social Security Disability administrative proceedings use the *Dictionary* to make disability determinations. *Id*. at 22:14-25.

141. Mr. Porter explained the use of the *Dictionary of Occupational Titles* in his vocational assessment as follows**:**

> The *Dictionary of Occupational Titles* is the reference material that is commonly used in the field of vocational rehabilitation to identify job descriptions, physical activities that an individual performs.
>
> It gives you a lot of information, including a general description, and then helps you on the trailer of those descriptions with identifying skill levels and potential and occupational exploration types of fields.

Porter Dep., 19:8-16.

142. Mr. Porter further explained that in his labor market analysis he used Claimant's educational background, transferable skills, and work history to identify how many of the total jobs in her labor market area (South Central Idaho) she would qualify prior to her injury. Based upon that, he determined that she qualified for 12.5% of the jobs in her labor market. The 12.5% figure was based upon the total number of jobs that exist within the labor market area versus the number of jobs for which Claimant qualified. Porter Dep., 33:6-22. Using Dr. Bates' restrictions, he opined that Claimant would have a reduction in labor market access to 7%, a 44% reduction. *Id*. at 35:4-36:1.

143. Counsel for Claimant asked Mr. Porter to review the various occupations identified by Dr. Janzen as relevant to Claimant's employment history and opine whether the restriction assigned by Dr. Bates would prevent her from performing them. Mr. Porter stated that Claimant could not perform as a cook because "cooks in a competitive environment are using both hands and almost constantly moving their arms and hands as they cook." *Id*. at 40:19-21. For a cleaner, he noted that she could not perform that job because of "the repetitive activity, the repetitive motion involved in that kind of work." *Id*. at 41:5-8. For a cashier, Mr. Porter indicated that Claimant would be disqualified for the same reason, repetitive motion. *Id*. at 41:10-13. For a backhoe operator, he stated she would be disqualified due to "the same issues. If you're operating a backhoe, you've got hand controls." *Id*. at 41:15-16. For a dump truck operator, Mr. Porter noted that "it's the same issues with holding onto the steering wheel and turning the steering wheel and being able to dump the bed and drive and back it up." *Id*. at 41:20-22. For a daycare operator, he expressed a "concern there would be with her ability to be able to lift and care for the kids." *Id*. at 42:4-6. For a health care assistant, Mr. Porter expressed concerns about Claimant's ability to perform that position because his "experience over the past 25 years has

been that a lot of home attendants, or home health aides, frequently have to lift much more than that [50 pounds] when caring for, showering, and toileting individuals." Porter Dep., 43:4-7.

144. Mr. Porter opined that Claimant would be able to perform the following alternative positions identified by Dr. Janzen as within her skills and capabilities, although some might require additional training: receptionist, customer service representative, office clerk, administrative assistant, collections clerk, secretary, order clerk, payroll clerk, student life coach, bookkeeper, employment and training coordinator, salesperson, credit investigator, accounting clerk, audit clerk, advertising clerk, manufacturer's representative, and information clerk. Porter Dep., 43:8-44:7; 45:12-52:1. He expressed concerns whether Claimant could perform as a bank teller based upon her experience of leaving the job with U.S. Bank, however "she may or may not, depending upon the employer." *Id*. at 50:5-11.

145. Despite the alternative jobs identified by Dr. Janzen, Mr. Porter stated that this did not change his opinions on labor market access or disability. *Id*. at 52:2-5.

146. Mr. Porter agreed that his methodology of calculating labor market access for Claimant was based upon generalized information contained in the *Dictionary of Occupational Titles* and similar reference materials to abstract out the total number of jobs in the labor market compared to the jobs that Claimant would qualify for prior to her injury and following her injury. This is opposed to identifying actual jobs in the labor market. *Id*. at 55:11-56:8. He also admitted that whether or not a worker could perform an individual job depends upon the job's specific qualifications, which might vary from generalized categories contained in reference data. *Id*. at 56:9-21.

147. *Weighing the Vocational Evidence*. Both vocational experts agree, and the evidence shows, that Claimant suffered no loss of wage earning capacity following her industrial

injury. Claimant was a minimum wage earner. At the time of hearing Claimant was earning an hourly wage of $10.66, which exceeded the minimum wage, in her position as a paraprofessional at North Valley Academy. This exceeded her time of injury wages at Super 8 ($8.50 per hour) and Jerome Middle School ($900 per month at 30 to 35 hours per week, which yields an hourly rate at or less than the minimum wage). Because there was no post-injury wage loss, whether Claimant has suffered a disability in excess of impairment depends upon evidence demonstrating a loss of access to her labor market.

148. Dr. Janzen asserts that Mr. Porter did not explain which jobs he considered within Claimant's pre-injury labor market and which jobs he considered within her restricted labor mark post-injury. Nevertheless, Mr. Porter's report listed the following job titles for Claimant's pre-injury employment that he included within Claimant's pre-injury labor market: hotel clerk, teacher's aide I, teacher's aide II, teacher, preschool, nursery school attendant, and receptionist. Mr. Porter derived these job titles from the *Dictionary of Occupational Titles.* Ex. N:231-233.[11] Furthermore, Mr. Porter identified the job titles appropriate to Claimant's post-injury labor market, based upon the restrictions of Dr. Bates, as follows: substitute teacher; teacher assistants/teacher's aide; hotel, motel and resort desk clerk; receptionist and information clerk; child care worker; and retail salesperson. *Id*. at 240. Thus, Dr. Janzen's criticism that it is unclear which occupations or jobs went into Mr. Porter's analysis is unfounded.

149. Dr. Janzen severely criticized Mr. Porter's use of the *Dictionary of Occupational Titles* as an "outdated" reference source for occupational titles. He testified in pertinent part as

[11] Defendants argued that "Mr. Porter's basic assumption that Claimant had the capacity to engage in employment with heavy physical demands fails to take into account Claimant's pre-existing COPD and ankle issues." Defendants' Post-Hearing Brief at 26. The record is clear that Claimant engaged in heavy duty work in the past in her employment at D & B Construction from 1997 to 1998. Tr., 25:4-18; Ex. O:248. Nevertheless, Mr. Porter did not include this job in his pre-injury labor market analysis. Furthermore, there is no evidence in the record that Claimant's COPD or ankle condition resulted in any permanent impairment or medically-ordered work restrictions. The Defendants' focus on these conditions is misplaced.

follows: "[T]he *Dictionary of Occupational Titles* is outdated for purposes of understanding the requirements of jobs that exist here in the year 2016, based on the fact the *Dictionary of Occupational Titles* has been last updated around 1981 or 1986. So the jobs have significantly changed from the early to late '80s to what they are right now. Not only have duties changed, but the physical demands have changed." Janzen Dep., 11:20-12:3.

150. Dr. Janzen's criticism of the use of the *Dictionary of Occupational Titles* is facile. While some occupations, and their corresponding duties and physical requirements, may have changed significantly since the 1980s, nevertheless Dr. Janzen did not assert that any specific occupations, such as front desk clerk or teacher's aide, that Mr. Porter used from the *Dictionary* have in fact changed significantly to make them inappropriate to include in a labor market analysis.[12] A review of the descriptions for the occupational titles that Mr. Porter listed from the *Dictionary* demonstrates that they appear to be reasonable and reliable job descriptions. Furthermore, while asserting that the physical demands of jobs may have changed since the *Dictionary* was last updated, nevertheless Dr. Janzen admitted that it is the only available vocational data reference that provides the physical requirements of jobs in addition to job duties. *Id*. at 23:1-8.

151. Dr. Janzen's further criticism of the use of the *Dictionary* is that it is "simply used for vocational planning," and thus it is not appropriately used for forensic purposes. Nevertheless, he admitted that it is used widely in Social Security Administration disability determinations. *Id*. at 22:14-25. The Referee disagrees that the *Dictionary* may not be used appropriately and effectively for forensic purposes to analyze labor market access in worker's

[12] All of the jobs considered in the analysis are basic minimum wage occupations that do not appear to have changed much over time. If any of them had significantly changed, one would have expected Dr. Janzen to have seized upon that for further criticism.

compensation cases. Furthermore, a review of Industrial Commission case of the past five years shows that vocational experts relied upon the *Dictionary* in fourteen cases.

152. Dr. Janzen's criticism that Mr. Porter failed to take into account Claimant's transferable skills is similarly without merit. The jobs that Mr. Porter found applicable to Claimant's post-injury labor market access are consistent with the skills that she previously developed as a motel clerk, teacher's aide, retail clerk, receptionist and information worker, and child care worker. Furthermore, Mr. Porter's report demonstrates that he adequately considered transferable skills by categorizing her transferable skills into clustered job titles, as follows: administration, registration, reception and information giving; specialized teaching; care of others; and teaching and instruction, general. Ex. N:237-238.

153. Mr. Porter's methodology of utilizing job titles relevant to Claimant's employment history from the *Dictionary of Occupational Titles* and comparing them to occupations in the Idaho Occupational Employment and Wage Survey for South Central Idaho is a valid method of determining labor market access. The Wage Survey shows the numbers of workers in specific occupations within the labor market and thus provides a reasonable overall statistical picture of the labor market. The criticism that this method provides only a generalized picture of the labor market is, again, a facile criticism. Use of these reference materials does not make the methodology invalid.

154. Disregarding his argument that it was unclear what jobs were considered in Porter's labor market analysis, Dr. Janzen critiques Mr. Porter's labor market analysis by suggesting that "some of the jobs are not even relevant to her current employability because she has made the decision not to pursue that kind of job. For example, the construction job that she

previously had…" Janzen Dep., 14:1-7. Dr. Janzen thus argues that "it is more relevant to focus on the jobs that are consistent with the injured worker's career interests. *Id*. at 14:15-18.

155. Dr. Janzen's critique that the only jobs that should be considered in a labor market analysis are those that the Claimant presently wishes to perform is not convincing. While such an approach may be appropriate when performing vocational planning for a worker, the task of calculating loss of labor market is not synonymous with vocational planning. The Referee concludes that it is appropriate to consider even jobs Claimant may no longer wish to perform to calculate her loss of labor market access. Nevertheless, as demonstrated by the list of jobs that Mr. Porter included in his pre-injury labor market analysis, the job that Claimant held briefly with D & B Construction from 1978 to 1979, an outlier, was not within Mr. Porter's analysis.

156. In contrast to Mr. Porter's methodology, Dr. Janzen's methodology is somewhat less clear and not sufficiently disclosed. Dr. Janzen asserts that he performed his own labor market research of the Twin Falls/Gooding area to find jobs compatible with Claimant's transferable skills. He states that this revealed openings for "positions of receptionist, customer service representative, administrative assistant, and hospital unit clerk." On this basis, he asserts that Claimant "has sustained no disability or loss of earnings capacity as a result of injuries from the June 24, 2012 incident." Ex. R:284.

157. While it is an appropriate method to base a labor market analysis on job openings that actually exist in the labor market, nevertheless Dr. Janzen's approach ignores the jobs that Claimant can no longer perform because of her injury, based upon the restrictions imposed by Dr. Bates. Dr. Janzen appears to acknowledge that there are jobs Claimant can no longer perform when he recites her employment history as a "cook, cleaner, cashier, backhoe and dump truck operator, daycare operator, paraprofessional/teacher's aide, hotel front desk clerk, and health

care assistant." *Id*. He then notes that Claimant retains the physical ability to perform only two of those positions, hotel front desk clerk and paraprofessional/teacher's aide. Ex. R:284.

158. It is unclear whether Dr. Janzen performed a pre-injury and post-injury labor market analysis like Mr. Porter did. Rather, the focus of his opinion seems primarily to be a critique of Mr. Porter's labor market analysis, followed secondarily by a recitation of jobs Claimant can still do and the bald assertion that this proves she has sustained no loss of labor market access.

159. Based upon a review of the evidence of their respective opinions, the Referee finds that the labor market analysis of Mr. Porter is entitled to greater weight than the analysis and critique of Dr. Janzen. The evidence shows that Claimant has sustained a loss of 44% of her labor market access because of her industrial injury, as opined by Mr. Porter.

160. Citing *Struhs v. Protection Technologies*, 1999 IIC 00653, Defendants argue as follows: "Even if a claimant might suffer loss of access to the labor market or a significant loss of wages for an indefinite period of time, where a claimant is unlikely to lose her job, the claimant suffers no disability in excess of impairment." *See*, Defendants' Post-Hearing Brief at 24. Because Claimant has been continuously employed since her industrial injury and was employed at the time of hearing, Defendants thus argue that like the claimant in *Struhs*, she has failed to prove any disability in excess of impairment.

161. The claimant in *Struhs* was a security guard injured in an automobile accident while in the employ of a contractor at the Idaho National Laboratory (INL). *Struhs*, 1999 IIC 00653.1. Like Claimant, he suffered a left extremity injury. *Id*. His injuries disqualified him from continuing to perform the duties of a security guard and he accepted a transfer to a position as an "Administrative Specialist in Security," which he held through the date of hearing. *Struhs* at

1999 IIC 0653.3. While claimant contended that if he had been able to accrue overtime hours for which security guards were eligible it would demonstrate a wage loss, nevertheless his gross annual earnings had increased substantially, nearly doubling from his hiring in 1983 to 1998. *Struhs*, 1999 IIC 0653.4. The Referee found that although he has suffered "some loss of access to the labor market," the claimant, who was three years away from retirement and planned to retire at age 65, was not in danger of losing his job, thus he had suffered no disability in excess of impairment. *Id*. at 1999 IIC 0653.6-7.

162. *Struhs* is inapposite to the present case. By the time of hearing in 1998, the claimant in *Struhs* had worked for the same INL employer for 15 years and was expected to continue to do so until he retired in three more years at age 65. In contrast, Claimant worked various minimum wage jobs, each at most for several years, since she first entered the workforce full-time in 1995, however she had nowhere near the level of job stability experienced by the claimant in *Struhs*. Undeniably, she has been continuously employed since the industrial injury, and apart from periods of time in which she deliberately left the workforce for personal family purposes, she also enjoyed regular employment throughout her career. Nevertheless, the evidence does not demonstrate, as Defendants argue, that she is assured of continuous employment and stable economic security in the future. She was 38 years old at the time of hearing and has many years of her working life ahead of her, unlike the claimant in *Struhs*. In the event of an economic downturn, Claimant as a minimum wage worker, may be subject to employment insecurity. Due to her functional limitations, her options for employment are more limited than younger, non-disabled workers who have more than high school educations and more transferable skills. It is important to note in particular the fact that due to the weakness of left hand, Claimant can no longer safely perform child care work, one of her most frequent past

occupations, which is demonstrative of her reduced employability. The evidence, therefore, does not support Defendants' contention that, merely because Claimant has had continuous employment since her industrial injury and has suffered no wage loss, she has also not suffered any disability in excess of impairment.

163. In *Deon v. H & J., Inc.*, 2013 IIC 0034, the Referee discussed a common vocational method of determining disability in excess of impairment, whereby the loss of labor marker access and expected wage loss are averaged to arrive at a worker's disability. The Referee noted that this approach "can provide a useful point of reference," however "the averaging method itself is not without conceptual and factual limitations. As the loss of labor market becomes substantial, and the expected wage loss negligible, the results of the averaging method become less reliable in predicting actual disability." *Id*. at 2013 IIC 0034:14. The following hypothetical demonstrated the concern:

> For illustration, as judged by the averaging method, a hypothetical minimum wage earner injured sufficiently to lose access to 99% of the labor market may theoretically suffer no expected wage loss if she can still perform any minimum wage job. Calculation of such a worker's disability according to the averaging method would produce a permanent disability rating of only 49.5% ([99% + 0%] ÷ 2) even though her actual probability of obtaining employment in the remaining 1% of an intensely competitive labor market may be a remote as winning the lottery. The averaging method fails to fully account for the reality that the two factors are not fully independent.

Id.

164. Mr. Porter relied upon *Deon* in concluding that he would calculate permanent partial disability for Claimant "with additional consideration for loss of labor market access," thus he calculated Claimant's permanent partial disability at 33%. Ex. N:243. Nevertheless, giving additional consideration for loss of labor market analysis is not appropriate here. Although Claimant is a minimum wage earner with no expected wage loss and a loss of labor

market access calculated by Mr. Porter at 44%, the averaging method is still more predicative of her permanent disability, unlike the hypothetical claimant posed in *Deon*. Claimant's loss of labor market access, while significant, does not exceed 50%, and it is nowhere near as devastating as the 99% loss of labor market access that was of concern in *Deon*, 2013 IIC 0034:14. Thus, the fact that Claimant has suffered no wage loss should be considered in calculating her disability. The Referee therefore finds that it is appropriate to average Claimant's wage loss (0%) and loss of labor market access (44%), resulting in a permanent partial disability in excess of impairment of 22%.

165. In conclusion, in light of Claimant's left upper extremity injury and resulting permanent partial impairment of 8% of the whole person, her age of 35 years at time of injury and 38 years at time of hearing, her diminished ability to compete in an open labor market within the Gooding/Twin Falls area based upon her documented functional loss resulting from her impaired left upper extremity, her high school education and lack of a higher education degree, and limited transferable skills, it is appropriate to find that Claimant has suffered a 22% permanent partial disability, inclusive of impairment**.**

166. **Retention of Jurisdiction**. The final issue is whether the Commission should retain jurisdiction of unresolved issues. Whether to retain jurisdiction beyond the statute of limitations is within the discretion of the Commission. When it is clear that there is a probability that medical factors will produce additional impairment in the future, it is appropriate for the Commission to retain jurisdiction. *Horton v. Garrett Freightlines, Inc.*, 106 Idaho 895, 896, 684 P.2d 297, 298 (1984). Similarly, where a claimant's medical condition has not stabilized or where a claimant's physical disability is progressive, it is appropriate for the Commission to retain jurisdiction. *Reynolds v. Browning Ferris Industries*, 113 Idaho 965, 969, 751 P.2d 113,

117 (1988). Retention of jurisdiction may be appropriate in cases where there is a probable need for future temporary disability benefits associated with surgery. *Elmore v. Floyd Smith, Jr. Trucking*, 1986 IIC 0697.6.

167. Claimant argues that Dr. Wayment testified in his deposition of "the need for him to see Claimant again and possibly do an MRI." Claimant's Opening Brief at 17. Nevertheless, a review of Dr. Wayment's testimony does not demonstrate that he opined that there is currently a probable need for further surgery of her wrist or other medical treatment that would result in further impairment or disability. Rather, upon being examined by counsel for Claimant, he speculated that Claimant *may* have some instability in her left wrist that is causing her current pain and that an MRI or diagnostic wrist scope *might* be used to determine if there is a problem requiring further surgery. Wayment Dep., 26:9-20.

168. What Dr. Wayment testified to concerning Claimant's wrist is too speculative to justify retaining jurisdiction beyond the statute of limitations. The evidence shows that Claimant is medically stable. Furthermore, there is no clear evidence of a probable need for temporary disability benefits associated with surgery. Under these circumstances, the Commission should not exercise its discretion to retain jurisdiction beyond the statute of limitations.

CONCLUSIONS OF LAW

1. Claimant has established she is entitled to permanent partial disability of 22%, inclusive of her 8% whole person partial impairment.

2. Claimant has not established that the Commission should retain jurisdiction beyond the statute of limitations.

RECOMMENDATION

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

DATED this 15th day of July, 2016.

INDUSTRIAL COMMISSION

___/s/_____
John C. Hummel, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 2016, 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:

DENNIS R. PETERSEN
P.O. BOX 1645
IDAHO FALLS, ID 83403-1645

ALAN R. GARDNER
P.O. BOX 2528
BOISE, ID 83701-2528

___/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHRISTY HACKWORTH, Claimant, v. SUPER 8, Employer, and EMPLOYERS COMPENSATION INSURANCE COMPANY, Surety, Defendants.	**IC 2012-016233** **ORDER** Filed July 27, 2016

Pursuant to Idaho Code § 72-717, Referee John C. Hummel 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 established she is entitled to permanent partial disability of 22%, inclusive of her 8% whole person partial impairment.

2. Claimant has not established that the Commission should retain jurisdiction beyond the statute of limitations.

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

DATED this 27th day of July, 2016.

INDUSTRIAL COMMISSION

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

___/s/_____
Thomas E. Limbaugh, Commissioner

___/s/_____
Thomas P. Baskin Commissioner

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 2016, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

DENNIS R PETERSEN
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sjw

___/s/_____