BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JUANITA JUAREZ, Claimant, v. CINTAS CORPORATION, Employer, and FIDELITY & GUARANTY INS. COMPANY, Surety, and THE PHOENIX INSURANCE COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2009-024273** **IC 2012-012488** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed September 23, 2015

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Boise, Idaho, on January 13, 2015. David Farney, of Nampa represented Claimant. Nathan Gamel, of Boise, represented Employer and Surety. Paul Augustine, of Boise, represented State of Idaho, Industrial Indemnity Fund (ISIF). Oral and documentary evidence was admitted. Post-hearing depositions were taken. The parties filed post-hearing briefs. The matter came under advisement on August 11, 2015.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether the Claimant's conditions are due in whole or in part to a preexisting and/or subsequent injury or condition;

2. Whether and to what extent Claimant is entitled to permanent partial or permanent total disability benefits in excess of permanent impairment, up to and including total permanent disability pursuant to the odd-lot doctrine;

3. Whether the Claimant is totally and permanently disabled;

4. Whether apportionment for a pre-existing or subsequent condition is applicable pursuant to Idaho Code § 72-406;

5. If the Claimant is found to be totally and permanently disabled, whether ISIF is liable under the workings of Idaho Code § 72-332;

6. Apportionment under the *Carey* formula; and

7. Whether the collateral estoppel defense is available to Defendant under the facts of this case.

CONTENTIONS OF THE PARTIES

Claimant injured her left shoulder in 2009 in an industrial accident with Employer. Following surgery, Claimant was released to full duty and returned to work. In March 2012, Claimant injured her right shoulder while working for Employer. While treating for her right shoulder injury, Claimant disclosed continuing problems with her left shoulder. She was given permanent restrictions applicable to both arms.

Claimant contends she is totally and permanently disabled under the odd-lot doctrine. She tried unsuccessfully to find employment within her restrictions, and to continue to look would be futile.

Employer/Surety (Defendants) argues Claimant is not totally and permanently disabled under any criteria for such finding. Furthermore, they are entitled to Idaho Code § 72-406 apportionment for Claimant's preexisting left shoulder impairment. If it is determined that Claimant is totally and permanently disabled, ISIF bears a proportional responsibility for Claimant's benefits, as calculated using the *Carey* formula.

ISIF argues Defendants failed to prove all pre-requisite conditions for ISIF liability under Idaho Code § 72-332. Moreover, Claimant did not prove her total disablement under the odd-lot doctrine. As such, ISIF is not liable for any of Claimant's disability.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, taken at hearing.

2. The testimony of Teresa Ballard, taken at hearing.

3. Claimant's Exhibits (CE) A-V, admitted at hearing.

4. Defendant's Exhibits (DE) 1-19, admitted at hearing. (ISIF offered no exhibits.)

5. The post-hearing deposition transcripts of Nancy J. Collins, Ph.D., and Douglas Crum, CDMS, both of which were taken on March 3, 2015;

6. The post-hearing deposition transcript of Roman Schwartsman, M.D., taken April 24, 2015.

All objections preserved during the depositions are overruled. ISIF'S motion to strike testimony of Dr. Collins, beginning at page 34 of her deposition is denied.

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

FINDINGS OF FACT

BACKGROUND AND PRE-INDUSTIAL INJURY EMPLOYMENT

1. At the time of hearing, Claimant was a 61 year old divorced woman residing in Nampa, Idaho with two of her grown children.

2. Claimant was born into a migrant working family and moved frequently. As a result she attended multiple grade schools, none for very long. She did not learn to read or write English or Spanish, although she can speak both fluently. Her math skills are rudimentary. She stopped attending school in sixth grade, and worked in the fields until she was seventeen. She has no GED.

3. Claimant next went to work for Simplot sorting and packing potatoes. Thereafter she obtained assorted jobs through temporary employment agencies. The jobs included envelope stuffing, janitorial and housekeeping, sorting onions, and according to Nancy Collins, Ph.D, Defendants' vocational rehabilitation expert, assembling computers.

4. In 2005, Claimant hired on with Employer's Nampa facility. She worked in the bulk folding room, where products such as towels of varying sizes and apron/bibs were folded, sorted and bundled for delivery. At times during her employment, Claimant would fold the product; other times she would operate a machine which packaged the folded and

sorted products into bundles. The bundles were loaded into large linen bags and shelved awaiting delivery.

FIRST INDUSTIAL INJURY

5. On August 13, 2009, Claimant injured her left shoulder while shelving a linen bag full of shop towels. She ended up under the care of orthopedic surgeon Roman Schwartsman, M.D.

6. Claimant underwent left shoulder surgery on November 16, 2009, for a complex rotator cuff tear, partial thickness biceps tendon tear, impingement, and fraying/tearing of the labrum.

7. After surgery and rehabilitative physical therapy, on March 18, 2010, Claimant was released to return to full-duty work. One month later, on April 22, 2010, after meeting with Claimant in follow up to see how she was tolerating work, Dr. Schwartsman declared Claimant medically stable and assigned her a 6% upper extremity impairment with no apportionment for preexisting conditions. She was given no work restrictions.

8. After Claimant returned to work, she continued to experience pain in her left shoulder. At times the pain was enough to cause Claimant to complain to her supervisor. She did not, however, seek additional medical treatment.

9. Claimant's department was cut from four to two workers, while simultaneously output expected from her department rose. She worked ten hour shifts, and was expected to fold up to 1400 shop towels per hour for an entire shift. She also at times ran the binding machine, although that required more reaching and increased Claimant's left shoulder pain. Claimant was able to perform her various duties, albeit with significant

pain. She testified that after her left shoulder surgery, she was, on two occasions, moved from running the machine to folding towels due to her left shoulder pain.

SECOND INDUSTIAL INJURY

10. On March 8, 2012, Claimant injured her right shoulder while moving a linen bag full of towels. She sought medical treatment for the injury.

11. On May 14, 2012, Claimant underwent right shoulder surgery for her industrial injury.

12. Claimant was released for light duty work post surgery but her right shoulder remained painful.

13. In late October 2012, Dr. Schwartsman ordered a repeat MRI, which showed a new tear. On December 12, 2012, Claimant underwent a second right shoulder surgery to correct the tear.

14. During the course of treatment for her right shoulder, Claimant informed Dr. Schwartsman that she was also having left shoulder pain. Dr. Schwartsman was unaware that Claimant's pain complaints had continued unabated after her left shoulder surgery in 2010. The doctor ordered a left shoulder MRI in October of 2013, which showed a high grade partial thickness tear in the previously-repaired left rotator cuff. Dr. Schwartsman recommended surgery, but Claimant declined.

CLAIMANT'S POST-SURGERIES STATUS

15. Dr. Schwartsman imposed permanent restrictions on Claimant. With regard to her right shoulder – no lifting greater than fifteen pounds within the frame of her body, and no lifting greater than five pounds above chest level or outside the frame of her body. Regarding Claimant's left shoulder – no lifting greater than ten pounds within the frame of

Claimant's body and no lifting outside the frame of her body. The "frame of her body" means a rectangle from Claimant's hips to her shoulders. It excludes lifting with outstretched arms in front or to the side of Claimant's torso. It allows for lifting with bent elbows in proximity to Claimant's side.

16. Dr. Schwartsman explained in his deposition that his restrictions were not bilateral; each upper extremity had its own separate restrictions. It was never made clear whether that meant Claimant was limited to fifteen pounds lifting (the greatest weight allowed with either arm), or if she, utilizing both arms, could lift up to twenty five pounds, the aggregate limit of each individual arm (15 pounds right arm plus ten pounds left). In the absence of direct contrary evidence, it is assumed Claimant can lift no more than fifteen pounds using either her right arm alone or both arms together.

17. Employer had no work for Claimant within her restrictions. Claimant is not working, and has not worked since she was last employed by Employer.

DISCUSSION AND FURTHER FINDINGS

18. The threshold issue in this case can be distilled down to whether Claimant is totally and permanently disabled, and if so, whether her total disablement is due to the combined effects of her two shoulder injuries, or would she still be considered totally disabled on the basis of her right shoulder injury alone.[1] To assist in this analysis each of the parties hired expert vocational consultants. Their opinions and conclusions are discussed below.

[1] Of course, her non medical factors weigh into the findings, but those factors are constant, and apply with the same weight throughout the "combined with" analysis.

Douglas N. Crum

19. Claimant hired Douglas Crum, a vocational rehabilitation consultant from Boise, to evaluate Claimant regarding the extent of her permanent disability.

20. At the time of his initial evaluation in August 2013, Mr. Crum could not have known that Dr. Schwartsman would impose restrictions for Claimant's left shoulder in October. Mr. Crum's evaluation was necessarily limited to the restrictions imposed for Claimant's right shoulder, and his opinions assumed Claimant's left shoulder injury carried no permanent restrictions.

21. As part of his evaluation, Mr. Crum reviewed Claimant's provided medical records, work history, wage information, job-search information, and details concerning her job duties and accidents. He also interviewed Claimant.

22. Utilizing labor market statistics for the Boise Metropolitan Statistical Area labor market, Mr. Crum calculated that prior to the March 2012 industrial accident, Claimant had access to approximately 8.7% of the jobs in her labor market. Based on the permanent restrictions recommended by Dr. Schwartsman for Claimant's right shoulder, and using the same factors as his pre-injury analysis encompassed, Mr. Crum found that Claimant's post-right shoulder injury reduced her labor market access by 64%, to 3.1% of the jobs in her labor market.

23. After her 2012 industrial injury, Mr. Crum felt Claimant would likely be relegated to minimum wage jobs. Because Claimant was earning just $9.00 per hour at the time of her 2012 accident, her wages would only decline by 19% under this analysis.

24. Mr. Crum then assessed the cumulative effect of Claimant's injuries and determined that Claimant had no previous permanent physical limitations or medical

conditions which adversely affected her ability to work. Until the 2012 accident, Claimant was able to perform her job duties.

25. Considering all medical and non-medical factors, Mr. Crum evaluated Claimant as having a 60% permanent partial disability inclusive of her permanent partial impairment. He felt Claimant might well be totally disabled, but reserved such judgment until Claimant conducted a more complete job search. As he stated in his report dated August 29, 2013;

> *...it is possible that even with a concerted and focused job search, [Claimant's] injury related problems may result in her being unable to obtain and/or maintain work in the competitive labor market. If, after a more extensive job search [Claimant] is unable to find employment in the competitive labor market, I would be happy to reassess the issue of increased or, possibly, total disability.*

(Italics in original.) CE T, p. 243.

26. On February 11, 2014, after Dr. Schwartsman had imposed his final restrictions regarding both of Claimant's shoulders, Mr. Crum prepared a supplemental disability assessment report. By the time of this supplemental report, Mr. Crum had been provided with the results of Claimant's job search, Dr. Schwartsman's final permanent restrictions, and a vocational assessment report dated December 9, 2013, by ICRD consultant Teresa Ballard.

27. In light of Claimant's unsuccessful job search, in which she had made approximately 135 appropriate job contacts, applications, or inquiries, Dr. Schwartsman's increased level of restrictions, and Ms. Ballard's analysis and conclusion that Claimant was not employable, Mr. Crum opined that Claimant was totally and permanently disabled.

28. Mr. Crum was deposed on March 3, 2015. At his deposition, he testified that is was his opinion that Claimant was totally disabled even without considering her left

shoulder restrictions. He felt the left shoulder restrictions "didn't really add that much" to Claimant's disability. He believed Dr. Schwartsman's restrictions went to Claimant's physical capacity, not just restricting her left shoulder. Crum depo. pp. 30, 31.

29. Mr. Crum relied on Claimant's job search to bolster his opinion that Claimant would have a difficult time getting through the hiring process even with those few jobs she could theoretically perform. He noted her illiteracy, poor math and record keeping skills, lack of computer skills, and no experience with sales as stumbling blocks to most jobs which otherwise fall within her restrictions.

30. Upon cross examination, Mr. Crum admitted that at the time of his initial report, he did not find Claimant to be totally disabled, but in his second report he concluded, based on job search and newly revealed restrictions for Claimant's left shoulder, that she was totally and permanently disabled. He testified that while he included Claimant's left shoulder restrictions in his second report, even without such restrictions he still believed Claimant was totally disabled simply on the results of her job search and right shoulder restrictions. Mr. Crum explained his analysis as follows;

> I think that the left shoulder restrictions given in October of 2013 by Dr. Schwartsman are not necessary to the analysis in my opinion to make her totally and permanently disabled…. Because, again, I felt that the restrictions given by Dr. Schwartsman for the right shoulder the way he wrote them indicated her overall physical capacity. And so, the restrictions for the left shoulder I think only reduced her capacity by 5 pounds or something like that from an already low state.

Crum depo. pp. 48, 49.

31. Mr. Crum summed up his final opinions by noting that when he first analyzed Claimant using only right shoulder restrictions, he felt she was close to being totally disabled but wanted to see what results a competent job search would yield before

declaring her as such. After seeing the job search results he was of the opinion it would be futile for Claimant to continue her employment search, and that she was indeed totally and permanently disabled, with or without Dr. Schwartsman's left shoulder restrictions.

Nancy J. Collins, Ph.D.

32. Defendants hired Nancy Collins, Ph.D. as a vocational expert in this matter. She was asked to provide a vocational assessment on the issue of Claimant's then-current employability and future disability resulting from the 2012 industrial accident.

33. Dr. Collins reviewed medical and vocational records, relevant legal documents, and interviewed Claimant. She also spoke directly with Dr. Schwartsman regarding Claimant. Dr. Collins conducted an analysis and prepared a report dated December 8, 2014.

34. Dr. Collins believed Claimant's restrictions allowed her to work with her arms stretched in front of her body in any position where she could "see her hands", but not above her shoulders. Dr. Collins placed Claimant in the sedentary to light work category, but noted Claimant had no sitting requirements, and could work on her feet as needed. Dr. Collins felt the most limiting factor was Claimant's inability to work above shoulder level or outside the frame of her body.

35. Dr. Collins opined that Claimant lost 97% of her labor market if confined to sedentary work, and 47% if allowed to work in the light category in non-agricultural, or housekeeping positions, although the latter positions typically would fall outside of Claimant's restrictions.

36. Dr. Collins felt Claimant could still work in positions involving sorting, inspecting, and grading products, fast food work, some packaging and productions jobs, and parts assembly. Dr. Collins determined Claimant had lost 14% of her earning capacity.

37. Dr. Collins was critical of Claimant's job search. She opined that Claimant contacted businesses which were not hiring, and considered jobs which were not within her restrictions. Dr. Collins noted she could not see where Claimant had applied for any sorting, inspection, production, or assembly jobs. Additionally, Dr. Collins asserted that Claimant had not kept in contact with Employer for potential employment.

38. Dr. Collins felt Claimant's loss of access was significant at 75% of her market. If Claimant's loss of market was averaged with her 14% loss of earning capacity, she would have a 44.5% disability in excess of impairment. Dr. Collins felt averaging was not appropriate, and the disability figure should be weighted toward her loss of access, but gave no final number.

39. Dr. Collins was deposed on March 3, 2015. At that time she continued to believe Claimant could, under the terms of her physician-imposed restrictions, repetitively extend her arms out in front of her in a reaching motion. She also felt Claimant could reach to her sides so long as she could see her hands. Many of the jobs envisioned by Dr. Collins contemplated Claimant reaching in front of her with arms extended.

40. Other jobs Dr. Collins believed Claimant could do included stuffing envelopes, and sorting onions or potatoes on a conveyor belt, both of which jobs Claimant had performed prior. She also felt Claimant could assemble sandwiches, work in fast food establishments, and assemble computers (which Claimant had once done) or other light assembly work.

41. Dr. Collins believed Claimant had not contacted any temporary employment agencies when looking for post-accident work. Most of Claimant's work to date had been

arranged through such agencies, and would have been the best option for finding employment. Dr. Collins was also critical of ICRD's lack of job recommendations; she felt ICRD had dropped the ball in assisting Claimant. She noted ICRD showed Claimant how to use a computer to look for jobs, but since Claimant cannot read, that was an unproductive gesture. All in all, Dr. Collins felt Claimant had not done a legitimate job search.

42. Dr. Collins claimed she found jobs for which Claimant was qualified on two random dates while conducting her analysis. They included fast food jobs and one sorting onions. There was an assembly job through Atlas Staffing which, according to Dr. Collins included labeling, quality control, filling, packaging, boxing inventory, but no lifting. There were numerous McDonald's job openings. She felt Claimant could always get a job there, as turnover is high and there is a constant need for employees. She identified a "production job" with unknown details, along with deli worker jobs at San Francisco Style Sourdough Eatery, Chipotle Grill, Subway, and Togo Sandwiches. There was a listing for a prep cook at the airport, and an opening at Popeye's restaurant. Dr. Collins also noted potential jobs which may or may not be available at any given time, including hospital sitter, especially for Spanish speaking patients, and care giver for someone who does not need lifting or assistance with transfers.

43. She conceded that each of the jobs listed may have requirements beyond the obvious main tasks, and one would need to speak with each employer to determine the suitability of the job in light of Claimant's restrictions. Her point was that at least some of the listed jobs should be suitable if Claimant conducted a reasonable job search.

44. Dr. Collins testified to the fact that she did not feel Claimant was totally disabled, and jobs exist in the Treasure Valley within Claimant's restrictions and abilities.

45. Defendants asked Dr. Collins to opine hypothetically on whether, if Claimant was found to be totally and permanently disabled, would the left shoulder have combined with the right shoulder to produce the total disability. Dr. Collins had trouble answering the question because she believed Claimant was not totally disabled. However, when pressed, she pointed out that if Claimant had full use of her non-dominate left arm, it would "allow her a larger market access." She went on to note, "I do think if she's found to be totally disabled that it would certainly - - she would be much more disabled with bilateral restrictions than with restrictions just for one arm." Collins depo. pp. 35, 36. Finally, when asked if it was her opinion that but for the preexisting left shoulder restriction Claimant would not be totally and permanently disabled, Dr. Collins testified,

> I don't think she's totally and permanently disabled with the restriction she has from Dr. Schwartsman anyway. But if for some reason they felt she was, she would be much more disabled with the bilateral restrictions. I think you could certainly – they could consider the combined with.

Collins depo, p. 37.

46. On cross examination, Dr. Collins admitted that fast food jobs could require things like stocking, taking out trash, cleaning, setting out food, or related activities outside of Claimant's restrictions. Dr. Collins also acknowledged working with pots and pans would be beyond Claimant's lifting restrictions. She also conceded Claimant had applied with at least one staffing agency in her job search.

William C. Jordan

47. ISIF hired William Jordan, a Boise-based vocational consultant, to evaluate Claimant's employment potential.

48. Mr. Jordan reviewed medical and vocational information and interviewed Claimant. He prepared an employability report dated November 6, 2014. He was not deposed.

49. Mr. Jordan noted in his report that in Claimant's answers to discovery she clearly did not believe her prior left shoulder injury was a hindrance to her employment, nor did her left shoulder injury "combine with" her right shoulder injury to produce her total disability.

50. Mr. Jordan opined that there might exist, with retraining, some job opportunities for Claimant. He suggested she could be taught to use a cash register or learn some basic computer skills. Assuming this training was successful, Mr. Jordan offered that perhaps Claimant could work as a phone solicitor or survey worker; perhaps she could work at a kiosk, or maybe a greeter. He thought she might qualify for some type of light assembly, but would have to be careful not to exceed her restrictions.

51. Mr. Jordan also opined that if Claimant is totally disabled, it was solely due to her industrial accident of March 8, 2012, plus the non-medical factors of low education/illiteracy, age and limited skills.

Teresa Ballard

52. Teresa Ballard, an ICRD consultant with over thirty years' experience in the field, testified at hearing. Ms. Ballard assisted Claimant after her 2012 injury.

53. During the time Ms. Ballard was assisting Claimant find work, she assumed Claimant had no restrictions applicable to her left shoulder. Ultimately, Ms. Ballard concluded Claimant was unemployable, and further believed it would be futile for Claimant to continue to look for work. At the time she first reached this conclusion, she was unaware of the fact Dr. Schwartsman had imposed left shoulder restrictions.

54. Ms. Ballard testified that many of the jobs suggested for Claimant would

likely not work for her. For example, she lacks the education to interact successfully in phone solicitation work, lacks math and interpersonal skills for retail work, and jobs such as fast food worker often require lifting, reaching, and working outside the frame of the body. She did acknowledge that perhaps Claimant could do some sorting, light assembly, or food production work with proper accomodation. Ms. Ballard was skeptical that Claimant could actually procure such employment, since those jobs often require additional work tasks beyond Claimant's limitations as part of employment.

55. Ms. Ballard could not identify any jobs in Claimant's labor market that would be available to Claimant in her current state. Ms. Ballard also testified that Claimant is not employable just considering her right shoulder restrictions. Finally, Ms. Ballard testified it would be very difficult for Claimant to find work at the current time even if she had no shoulder issues, and no restrictions. With no restrictions, employment options would exist for Claimant beyond Cintas, but they would be quite limited.

PERMANENT DISABILITY CLAIM

56. The initial issue for determination is to what extent Claimant is entitled to permanent disability benefits, up to and including total permanent disability under the odd-lot doctrine. Permanent disability results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. Evaluation (rating) of permanent disability is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in

determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, 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. 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 [Claimant's] capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). Claimant bears the burden of establishing her claim for permanent disability benefits.

57. Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Indus.,* 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund,* 130 Idaho 278, 939 P.2d 854 (1997). The Idaho Supreme Court, in *Brown v. The Home Depot,* 152 Idaho 605, 272 P.3d 577 (2012) iterated that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing.

58. Defendants acknowledge Claimant has suffered a permanent disability in excess of impairment. Dr. Collins, their expert, evaluated Claimant's permanent disability resulting from both industrial accidents and non-medical factors somewhere between

44.5% and 75%, and believed the disability rating should be closer to 75% than 44.5%. Mr. Crum concluded Claimant suffered a 60% permanent disability inclusive of a 6% upper extremity impairment as the result of her 2012 industrial accident and non-medical factors.

59. After reviewing and considering all relevant medical and nonmedical factors and evaluating the advisory opinions, the Referee finds the Claimant suffered disability from both industrial accidents and non-medical factors of 60%, *exclusive* of impairment.

Odd-lot Doctrine

60. No party argued that Claimant is totally and permanently disabled under the 100% method. Even though Claimant has failed to prove she is totally and permanently disabled under the 100% method, Claimant asserts her permanent disability is such that she is totally disabled under the "odd-lot" doctrine. An odd-lot worker is one "so injured that [s]he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market - absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status rests upon Claimant. *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990).

61. Claimant may satisfy her burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways: 1) by showing that she has attempted other types of employment without success; 2) by showing that she or vocational counselors or employment agencies on her behalf have searched for other work and other

work is not available; or 3) by showing that any efforts to find suitable work would be futile. *Lethrud v. Industrial Special Indemnity Fund*, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995). Claimant is pursuing odd-lot status under the second and third methods of proof.

62. While the record supports the fact that Claimant contacted well over one hundred potential employers looking for work since being laid off by Employer, Defendants question the efficacy of such search. They point out Claimant's inquiries were often with "front desk" personnel, at companies not hiring. That approach is illegitimate in Defendants' opinion. Instead, they argue Claimant should have used temporary agencies, should have inquired at businesses actually hiring, and should have looked for longer than four months before quitting her search.

63. In response, Claimant pointed out she did contact at least two temporary employment agencies, did conduct a job search for six months, and applied at some of the very places, such as McDonald's, that Dr. Collins stressed would be appropriate places to look for work. The record supports Claimant's rebuttal.

64. While certainly there are more effective ways of finding employment than calling a front desk, or applying to places not currently looking for workers, the record as a whole supports the legitimacy of Claimant's search. She applied at numerous fast food establishments, contacted Employer multiple times to see about suitable work, used two different "temp" agencies, and persevered in her search at least until she was told by ICRD consultant Teresa Ballard that further searching would be futile. As Mr. Crum noted, "I wouldn't necessarily characterize [Claimant's] job search as extensive, but I think it

was competent." Crum depo p. 65. On the issue of an adequate job search, more weight is assigned to Mr. Crum than the other vocational experts.

65. As previously noted, Ms. Ballard felt it would be futile for Claimant to continue looking for employment. While her overall effort has been questioned, Ms. Ballard's expertise with the local employment market and who is or is not employable in this market has not been. Her opinion, given her knowledge of the labor market, Claimant's assets and shortcomings, her abilities and restrictions, is given weight.

66. When considering the record as a whole, Claimant had proven she is totally and permanently disabled as an odd-lot worker under the second and third methods of proof–unsuccessful job search, and futility of searching further.

67. Once a claimant establishes a prima facie odd-lot case, the burden shifts to the employer "to show that some kind of suitable work is regularly and continuously available to the claimant." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The employer must prove there is an actual job within a reasonable distance from Claimant's home which she is able to perform or for which she can be trained. In addition, Defendants must show that she has a reasonable opportunity to be employed at that job. It is of no significance that there is a job Claimant is capable of performing if she would in fact not be considered for the job due to her injuries, lack of education, lack of training, or other reasons. *See, e.g. Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 407, 565 P.2d 1360, 1364 (1977).

68. Defendants attempt to rebut Claimant's *prima facie* odd-lot finding by asserting there are a number of jobs for which Claimant would qualify in the local labor market. They rely on Dr. Collins' assessment of suitable employment opportunities as set forth in deposition.[2]

69. As noted previously, Dr. Collins listed several job openings she found while investigating Claimant's employability. A basic flaw in Dr. Collins' analysis is that she misunderstood the nature of Claimant's restrictions. She believed Claimant could reach in front of her with outstretched arms. Dr. Schwartsman clarified in his deposition that such is not the case. Dr. Collins also thought Claimant could work outside the frame of her body, so long as she could see her hands. This is inaccurate as well, and greatly exceeds the movements Dr. Schwartsman felt were permissible. With those misunderstandings in mind, Dr. Collins' proposed jobs look more tenuous. For example, sorting onions, and the Atlas Staffing assembling job, may or may not require Claimant to reach to an unacceptable point. Understandably, Defendants did not establish that the job could be done without reaching, since Dr. Collins believed forward reaching was permissible. Defendants likewise failed to show that the sandwich assembly jobs did not require additional tasks, such as stocking, cleaning, or reaching. Claimant unsuccessfully tried to obtain work at McDonald's, so without additional information, it is difficult to find Claimant had a reasonable opportunity to obtain the McDonald's jobs listed by Dr. Collins. Finally, an unidentified production job does not provide anywhere close to sufficient information to rebut the odd-lot finding.

70. To her credit, Dr. Collins acknowledged Claimant's chance to obtain employment in any suitable job would be highly dependent on the employer, and the additional job duties not

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[2] They also point to Dr. Schwartsman's testimony, but he is not qualified to render an opinion on vocational opportunities, and certainly did not list an actual, specific job for which Claimant had a reasonable opportunity to obtain. His "opinion" in this regard carries no weight, and is disregarded.

listed in the job offer. That is the type of needed information which is lacking in this case. After all, as noted by Ms. Ballard, Claimant would have a very difficult time finding work outside of Cintas even without any shoulder issues.

71. Defendants have not met their burden of showing there is an actual job within a reasonable distance from Claimant's home which she is able to perform or for which she can be trained, for which she has a reasonable opportunity to be employed.

72. Claimant has proven she is totally and permanently disabled as of the date of hearing pursuant to the odd-lot doctrine.

ISIF APPORTIONMENT

73. Idaho Code § 72-332(1) provides in pertinent part that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his income benefits out of the ISIF account.

74. Idaho Code § 72-332(2) further provides that "permanent physical impairment" is as defined in Idaho Code § 72-422, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become unemployed. This shall be interpreted subjectively as to the particular employee involved; however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing

physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

75. In *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court identified four requirements a claimant must meet to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was indeed a pre-existing impairment; (2) whether that impairment was manifest; (3) whether the impairment was a subjective hindrance to employment; and (4) whether the impairment in any way combined with the subsequent injury to cause total disability. *Dumaw*, 118 Idaho at 155, 795 P.2d at 317.

Preexisting manifest impairment causing employment hindrance

76. Claimant's left shoulder constitutes a preexisting physical impairment. It was manifest. It made work painful and on more than one occasion led Claimant to complain to her supervisor and rotate into a job duty which was less aggravating to her left shoulder. While Claimant continued to work through the pain, it did, at times, hinder her in certain employment activities. While she was able to rotate into a different job function in the same department, so as not to interfere with her or her department's productivity, her painful left shoulder reasonably could be considered a hindrance or obstacle in her employment.

Combined with, or "but for" analysis

77. The crux of the issue is whether Claimant's physically impaired left shoulder "combined with" her 2012 right shoulder injury to render her totally and permanently disabled. But for Claimant's preexisting left shoulder impairment, would her right shoulder injury render her totally disabled? Put another way, if Claimant had no left shoulder impairment, would she still be considered totally and permanently disabled solely on the basis of her right shoulder injury (and non-medical factors)?

78. To satisfy the "combines" element, the test is whether, but for a pre-existing physical impairment, the worker would have been totally and permanently disabled immediately following the occurrence of the second injury. This test "encompasses … the combination scenario where each [injury] contributes to the total disability…." *Bybee v. State, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

79. Mr. Crum and Ms. Ballard both testified the belatedly-imposed left upper extremity limitations imposed by Dr. Schwartsman do not alter the fact that they each believed Claimant was totally disabled prior to those additional restrictions being imposed. While Mr. Crum actually withheld judgment on whether Claimant was totally disabled until he saw the results of her job search, it was the job search results, and not Dr. Schwartsman's additional restrictions, which led Mr. Crum to his conclusion that Claimant was totally disabled. Ms. Ballard reached that same conclusion even before learning of the additional restrictions.

80. Defendants' expert, Dr. Collins, was put in the unenviable position of having to opine on mutually exclusive propositions. She believed Claimant was not totally disabled, even with the restrictions placed on both of Claimant's upper extremities. As such, the two injuries combined could not render Claimant totally disabled. However, she was asked to assume a proposition she felt was not valid, and then comment on how that proposition was arrived at. Her basic response, which was set forth above, was that two injuries are worse than one; therefore if Claimant was totally disabled, it had to be the result of both injuries in combination.

81. Defendants identified no jobs which Claimant could have done after the 2012 right shoulder industrial accident, if it had not been for ("but for") her left shoulder injury. Instead, the record shows that Claimant was precluded from working due to the restrictions

imposed by Dr. Schwartsman for Claimant's right shoulder.

82. The fact Claimant also received left shoulder restrictions certainly, as noted by Dr. Collins, makes her "much more disabled." Collins depo. p. 36. But being "much more disabled" is not the standard for determining ISIF's liability. If Claimant is determined to be totally disabled as the direct result of the 2012 right shoulder injury, the fact she has other restrictions does not make her "more totally" disabled.

83. In order to satisfy the fourth requirement under *Dumaw,* the party seeking to shift responsibility to ISIF (in this case, Defendants) must establish that Claimant was not rendered totally disabled by her right shoulder injury alone. They have failed to do that. The Referee finds the opinions of Mr. Crum and Ms. Ballard that Claimant's 2012 industrial injury rendered her totally disabled (when combined with non medical factors) without considering her preexisting left shoulder condition to be more persuasive than that of Dr. Collins.

84. Defendants failed to prove Claimant's preexisting physical impairments combined with her industrially related 2012 shoulder injury to render her totally and permanently disabled, and ISIF bears no responsibility for Claimant's disability.

85. Defendants Employer and Surety bear sole responsibility for Claimant's total permanent disability.

86. The issues of apportionment, both under Idaho Code § 72-406 and Idaho Code § 72-332, are moot.

87. The issue of collateral estoppel is waived due to Defendants' failure to present any evidence relevant to the contention, or to brief the issue.

CONCLUSIONS OF LAW

1. Claimant is entitled to a PPD rating of 60% exclusive of PPI.
2. Claimant is entitled to total permanent disability benefits pursuant to the odd-lot doctrine.
3. ISIF is not liable for benefits under Idaho Code § 72-332.
4. Apportionment under Idaho Code § 72-406 is inapplicable to the facts.
5. Apportionment under the *Carey* formula is inapplicable to the facts.
6. The issue of collateral estoppel is deemed waived and withdrawn.

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 26th day of August, 2015.

INDUSTRIAL COMMISSION

_/s/_____
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September, 2015, 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:

DAVID FARNEY
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jsk

_/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JUANITA JUAREZ, Claimant, v. CINTAS CORPORATION, Employer, and FIDELITY & GUARANTY INS. COMPANY, Surety, and THE PHOENIX INSURANCE COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2009-024273** **IC 2012-012488** **ORDER AND CONCURRING OPINION** Filed September 23, 2015

Pursuant to Idaho Code § 72-717, Referee Brian Harper 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 is entitled to a PPD rating of 60% exclusive of PPI.

2. Claimant is entitled to total permanent disability benefits pursuant to the odd-lot doctrine.

3. ISIF is not liable for benefits under Idaho Code § 72-332.

4. Apportionment under Idaho Code § 72-406 is inapplicable to the facts.

5. Apportionment under the *Carey* formula is inapplicable to the facts.

6. The issue of collateral estoppel is deemed waived and withdrawn.

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

DATED this 23rd day of September, 2015.

INDUSTRIAL COMMISSION

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

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

Concurring Opinion of Commissioner Thomas P. Baskin

1. While I concur with the ultimate result in this case, I believe the path taken by the parties in briefing represents an incorrect approach to the evaluation of this complex case.

2. I believe that the jumping off point is to recognize that there are two complaints in this case for two separate accidents, the first occurring on or about August 13, 2009, and

involving the left shoulder, and the second occurring on or about March 8, 2012, and involving the right shoulder. These separate entities were consolidated for the purposes of hearing by Order of the Commission dated March 21, 2013. That the cases were consolidated for the purposes of hearing in no wise diminishes the fact that two separate injuries are at issue, each requiring separate proof on the workers' compensation benefits claimed. Among the issues noticed for hearing is the extent and degree of Claimant's entitlement to permanent partial disability in excess of impairment, including whether Claimant is totally and permanently disabled under the odd lot doctrine. The Notice of Hearing does not reflect that the claim for disability benefits, either partial or total, is made only with respect to the 2012 right shoulder injury. And yet, the principle focus of the briefing is on whether the 2009 left shoulder injury is a preexisting condition which implicates Idaho Code § 72-406 apportionment or ISIF liability.[1] The parties have not addressed the issue squarely before the Commission in this matter; is Claimant entitled to an award of disability benefits for either or both of the claims that have been consolidated for purposes of hearing? I believe that the correct approach is to evaluate Claimant's entitlement to benefits for each accident, and then address the issue of ISIF liability or Idaho Code § 72-406 apportionment, as necessary.

3. When evaluating an injured worker's permanent disability, a two-step approach is called for. First, Claimant's disability from all causes must be assessed as of the date of hearing. Second, the Commission must determine the amount of permanent disability attributable to the industrial accident, or in this case, industrial accidents. *See Horton v. Garrett Freightlines, Inc.*, 115 Idaho 912, 772 P.2d 119 (1989); *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265

[1] At page 25 of their brief, Defendants argue that if Claimant is found to be less than totally and permanently disabled, some part of that disability must be apportioned to Claimant's left shoulder injury under the provisions of Idaho Code § 72-406. It is unclear how this would avail Defendants because it is they who are responsible for any disability flowing from the left shoulder injury. The 2009 claim has not been settled, and no statute of limitations defense to the payment of further indemnity benefits on that claim has been asserted.

(2008). Here, I find no fault with Referee Harper's determination that as of the date of hearing, Claimant is totally and permanently disabled from all causes combined under the odd lot doctrine. However, I believe that the appropriate next step is to apportion disability between the 2009 accident, the 2012 accident, and other preexisting/superseding conditions/events. It makes no sense to me to perform this analysis in something other than chronological order. Therefore, consideration must first be given to the extent and degree of Claimant's disability referable to the 2009 accident, there being no evidence that Claimant suffered from conditions predating that accident which resulted in either impairment or permanent limitations/restrictions. Indeed, Dr. Schwartzman's testimony is to the effect that Claimant's full thickness rotator cuff tear, partial thickness biceps tendon tear, and labral tearing were all acute findings referable to the 2009 accident. Following repair of these complex tears, Dr. Schwartzman released Claimant to return to full work on or about April 22, 2010 and gave her a six percent upper extremity rating for the effects of the 2009 accident. He apportioned no part of this rating to a preexisting condition.

4. I recognize that there is a factual dispute over Claimant's left shoulder's course following her return to work. However, like the Referee, I am persuaded that at some point shortly after her return to work in April of 2010, Claimant again began to experience difficulties with the left shoulder, and that these left shoulder difficulties continued through the date on which she finally revealed a correct history to Dr. Schwartzman in September of 2013. MRI evaluation of the left shoulder conducted in October of 2013 revealed, per Dr. Schwartzman, thinning/wearing out of the previous repair to the left rotator cuff. After Claimant declined surgical intervention for the newly-discovered left shoulder problems, Dr. Schwartzman imposed, for the first time, left shoulder restrictions. As developed in the Referee's Opinion,

these restrictions are similar in nature to those previously given by Dr. Schwartzman to Claimant for her right shoulder, but are more onerous in restricting her ability to lift and carry.

5. The question much discussed during the course of Dr. Schwartzman's deposition was whether the left shoulder limitations/restrictions given by Dr. Schwartzman in the fall of 2013 should be considered to have been extant ever since the 2009 injury, or at least, since Claimant was pronounced medically stable and ratable in April of 2010. In other words, notwithstanding the fact that the limitations/restrictions were given in the fall of 2013, should they be viewed as being retroactive to Claimant's date of medical stability in April of 2010? While this issue may well be relevant to the determination of whether the left shoulder injury qualifies as a condition which implicates ISIF liability, I am not convinced that it is important to know the answer to this question in order to evaluate Claimant's disability referable to the 2009 accident. Dr. Schwartzman's testimony makes it clear that he is of the view that the thinning/wearing out of the left rotator cuff revealed in the October 2013 MRI is a natural and probable consequence of the original work accident. (*See* Schwartzman Dep., 49/16-51/3). Dr. Schwartzman was unaware of any intervening mishap/event that might be responsible for the condition observed in the October 2013 MRI, and he was unwilling to say that those findings were simply the natural consequence of the aging process. Therefore, the only medical evidence on the question links the 2013 limitations/restrictions to the 2009 accident by way of Dr. Schwartzman's conclusion that the thinning of the rotator cuff is related to the 2009 injury.

6. I agree with the Referee that the most persuasive vocational testimony establishes that Claimant is totally and permanently disabled by virtue of the limitations/restrictions given by Dr. Schwartzman for the right shoulder. It seems clear that in rendering her opinion that the right shoulder alone did not leave Claimant totally and permanently disabled, Dr. Collins'

analysis suffers from her misunderstanding of the nature of the limitations/restrictions given by Dr. Schwartzman for the right upper extremity. Dr. Collins believed that Dr. Schwartzman would allow Claimant to perform reaching activities that he would clearly not allow. Therefore, the findings of Mr. Crum are more persuasive to me on the issue of the disability flowing from the right shoulder condition. Mr. Crum found that this condition, standing alone, was sufficient to render Claimant totally and permanently disabled under the odd lot doctrine.

7. Of course, as has been pointed out, Mr. Crum did not consider the left shoulder in his analysis. However, if Claimant's less onerous right shoulder limitations/restrictions support a conclusion that she is totally and permanently disabled, I believe that her even more onerous left shoulder limitations/restrictions support a conclusion that Claimant is totally and permanently disabled by virtue of her left shoulder injury alone.

8. Therefore, I would conclude that Claimant has made a *prima facie* showing of total and permanent disability under the odd lot doctrine for the effects of the 2009 injury, standing alone.

9. Having reached this conclusion, it is not necessary to consider the extent and degree of disability referable to the 2012 right shoulder injury, nor is it necessary to consider whether some part of the responsibility for Claimant's total and permanent disability should be borne by the Industrial Special Indemnity Fund. I recognize that vis-à-vis the 2012 industrial injury, the impairment arising from the 2009 injury qualifies as a preexisting impairment. *See*, *Quincy v. Quincy*, 136 Idaho 1, 27 P.3d 410 (2001). However, if Claimant is totally and permanently disabled by virtue of the 2009 injury alone, the "combining with" requirement of the *prima facie* case of ISIF liability cannot be met.

10. Although I would have approached the evaluation of this case differently, I concur with the ultimate conclusion that Claimant is totally and permanently disabled, and that the elements of ISIF liability have not been met.

DATED this 23rd day of September, 2015.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September, 2015, a true and correct copy of the foregoing **ORDER AND CONCURRING OPINION** was served by regular United States Mail upon each of the following:

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jsk