BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DIANNA LUBOW, Claimant, v. GENTLE TOUCH HOME HEALTH CARE, INC., Employer, and STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2011-013307** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed July 14, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-referenced matter to Referee Michael E. Powers, who conducted a hearing in Boise on October 30, 2015. Claimant was present and represented by Nathan T. Gamel of Nampa. Clinton O. Casey of Boise represented Employer, Gentle Touch Home Health Care, Inc., and its Surety, State Insurance Fund. Kenneth L. Mallea of Meridian represented State of Idaho, Industrial Special Indemnity Fund (ISIF). Oral and documentary evidence was presented and the record remained open for the taking of two post-hearing depositions. This matter came under advisement on March 22, 2016 and is now ready for decision.

ISSUES

The issues to be decided as the result of the hearing are:

1. Whether Claimant is entitled to permanent partial disability benefits (PPD) and the extent thereof; and, if so,
2. Whether such disability should be apportioned pursuant to Idaho Code § 72-406;
3. Whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine; and, if so,
4. Whether ISIF is liable for a portion of that disability; and, if so,
5. Whether apportionment under the *Carey* formula is warranted.

CONTENTIONS OF THE PARTIES

Claimant contends that she is an odd-lot worker due to a combination of pre-existing conditions and her last industrial accident.

Employer/Surety and ISIF argue that Claimant is not an odd-lot worker as her industrially related lumbar compression fractures healed with conservative treatment and she was released to return to her time-of-injury job once she reached MMI for that condition. Her pre-existing condition (diabetic neuropathy) was not a subjective hindrance to her employment and did not combine with her healed compression fracture to render her an odd-lot worker at the time she reached MMI. While she may have been so at the time of the hearing, such disability was caused by medical conditions occurring subsequent to her last industrial accident such as COPD and open heart surgery. ISIF argues that her disability should be established at the time she reached MMI rather than at the time of hearing because no nexus has been established between the intervening medical conditions and her last industrial accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and her vocational expert, Terry Montague, adduced at the hearing.

2. Claimant's Exhibits (CE) A-L, admitted at the hearing.

3. Defendant SIF's Exhibits (DE) 1-36, admitted at the hearing.

4. ISIF Exhibit 1, admitted at the hearing.

5. The post-hearing deposition of Douglas Crum, taken by Employer/Surety on December 9, 2015.

6. The post-hearing deposition of William Jordan, taken by ISIF, also on December 9, 2015.

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

After having considered all 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

1. Claimant was 56 years of age and residing with a friend in the Nampa/Caldwell area at the time of the hearing. Before that, she lived with her niece. Claimant "lived on the streets" for short periods of time in Nampa after having been declared at MMI from her last industrial accident.

2. Claimant has an 8th grade education and has not obtained a GED.

3. Claimant's work history is mainly performing CNA-type duties in both assisted living facilities and in patients' homes. Claimant also has some limited cashiering experience in her past, but due to her 3rd grade-level math skills, had problems with calculating change, she relied upon co-workers or the cash register itself to make the appropriate change.

4. On May 25, 2011, Claimant was transferring an in-home-care patient from her bed to a wheel chair when the patient "went dead weight" causing Claimant to feel a pop in her middle lower back.

5. Claimant immediately informed her supervisor of her accident and was sent to Employer/Surety's preferred provider and met with Stephan Martinez, M.D., who diagnosed compression fractures at L1 and L2, as well as degenerative disc disease at L5-S1. He also noted that Claimant's bilateral diabetic foot neuropathy had not increased in numbness since her accident. Dr. Martinez ordered an MRI, prescribed medications and returned Claimant to work with restrictions. He eventually referred Claimant to physiatrist Christian Gussner, M.D.

6. Claimant first saw Dr. Gussner on July 15, 2011 who also diagnosed compression fractures that he believed would heal with time. He also diagnosed low back pain, lumbar disc displacement and chronic peripheral neuropathy due to Claimant's diabetes mellitus type II. Dr. Gussner prescribed physical therapy and released Claimant to light-duty work.

7. Following a regimen of physical therapy that Claimant asserted did not help with her pain, Dr. Gussner found Claimant to be at MMI on April 16, 2012 after a repeat MRI revealed healed compression fractures. Claimant was still complaining of low back pain (9/10) and Dr. Gussner noted: "Initial pain probably related to mild L1 and L2 compression fractures which should have healed several months ago. The chronic and increasing pain in the lumbar, thoracic and now intermittently in the cervical region is unclear." DE 10, p. 31.

8. Using the 6th Edition of the *Guides to the Evaluation of Permanent Impairment*, Dr. Gussner assigned a 7% whole person PPI rating related to Claimant's industrial accident with no apportionment. He indicated that no further diagnostic testing or treatment was necessary.

9. Dr. Gussner assigned the following permanent restrictions: medium duty activity restrictions with maximum lifting 50 pounds occasionally (less than 1/3 of shift); 25 pounds frequently (less than 2/3 of shift), and limited (less than 1/3 of shift) bending/twisting/stooping and as needed position changes. *Id*.

Vocational evidence:

10. Claimant first met with ICRD consultant **Teresa Ballard** on June 20, 2011 on referral from Surety to discuss ICRD services and sign a job site evaluation for her time-of-injury position. Previously, Ms, Ballard received a "work status report" that indicated: "The claimant may return to work with the following restrictions: No lifting greater than five pounds, no bending, twisting, push/pull greater than ten pounds. Do not operate machinery while on controlled substance, use ice, prescribed medications." DE 4, p. 13.

11. Ms. Ballard noted on her Initial Interview form under "Additional Medical History" that Claimant had no other physical handicap, chronic disease, or other disability that restricted or limited physical activities or working conditions: **Diabetes controlled with diet; has no impact on her work**. DE 4, p. 4 (Emphasis in original).

12. Claimant informed Ms. Ballard that she had approximately 22 years of CNA experience and managed a motel in Alaska for about a year. Ms. Ballard listed Claimant's transferrable skills as: "Very much likes helping the elderly and the health

care field. Pleasant, very neat and expresses ideas well. Excellent spelling and penmanship." *Id.*, p. 8.

13. Ms. Ballard closed her file on May 15, 2012 because Claimant was applying for Social Security Disability and was, therefore, unavailable for work. Ms. Ballard opined that based on Claimant's permanent restrictions/limitations, Claimant could return to work at her time-of-injury position. Unfortunately, during her period of recovery Claimant was "forced" to sell her car due to financial hardship. Ms. Ballard acknowledged that being without transportation creates a disadvantage when considering an active job search; however, Claimant indicated that she would pursue a job search from her home utilizing the Idaho Department of Labor's online resources.

14. Regarding Claimant's returning to work at her time-of-injury occupation, Ms. Ballard opined:

> With regard to her time of injury occupation, it is doubtful that she could return to home health care in residential nursing home jobs where more physical exertion is required. It is my opinion, however, she would be likely to be able to pursue positions in assisted living facilities which do not typically require such physically demanding activity as does residential care or in home care. She lives in close proximity to the St. Alphonsus facility in Nampa. There are various assisted living and related facilities in the vicinity which could provide employment opportunities within walking distance of her home. It is therefore my opinion that with a focus on return to work, Ms. Lubow would in time find work within her restrictions and transferrable skills.

DE 4, p. 37.

Post-MMI health concerns:

15. On July 9, 2013, Claimant suffered a myocardial infarction (MI) that resulted in open heart surgery (four valves replaced). Claimant's MI gave rise to some significant restrictions that, according to Claimant, caused her to quit looking for work.

She also blames her MI for memory problems she has developed following her open heart surgery.

16. Claimant was diagnosed with COPD that severely limits her fatigability and endurance. She testified that her COPD is the biggest obstacle she faces in returning to work.

17. Claimant was diagnosed with diabetic peripheral neuropathy pre-last accident but informed Ms. Ballard that such did not have any impact on her ability to work. Nonetheless, Claimant testified that that condition has gradually worsened with time.

18. On August 19, 2015, **Nancy Greenwald, M.D.,** a physiatrist, performed an **IME** at State Insurance Fund's request. Dr. Greenwald reviewed approximately 16 inches of medical records, interviewed and examined Claimant, and prepared a report. DE-34. Dr. Greenwald noted that after her MI, Claimant developed memory problems and, was therefore, a "vague" historian. Dr. Greenwald's "Review of Systems" revealed "Anxiety, sleep problems, fatigue, loss of bowel and bladder control, memory loss, headaches, muscle pain, muscle spasms, diarrhea, loss of bowel [sic] control, post-menopausal, balance problems, chronic cough, shortness of breath, chest pain, swelling, and tiredness with exertion." DE-34, p. 3.

19. To illustrate the extent of Claimant's post-MMI physical and mental conditions, the following were Dr. Greenwald's diagnoses:

* Low back pain, L1-L2 compression fractures 2011.
* Cognitive deficits.
* Polyneuropathy secondary to diabetes.

* Diabetes.

* COPD.

* Hypertension.

* Arthritis in hand with positive findings today.

* Hypercholesterolemia.

* Depression.

* Status post left knee surgery, remote.

* Status post myocardial infarction with CABG x4.

Id., p. 4.

20. Dr. Greenwald found that Claimant's L1-L2 compression fractures were healed and required no further treatment. She agreed with Dr. Gussner's PPI rating of 7% whole person with no apportionment. Dr. Greenwald also agreed with Dr. Gussner's permanent physical restrictions.

Vocational evidence – continued:

21. Claimant retained **Terry Montague** to assess and evaluate her employability. Mr. Montague is well-known to the Commission and is qualified to testify and render vocational opinions as an expert in that area. Mr. Montague reviewed pertinent medial, physical therapy and vocational records. He interviewed Claimant twice and spoke to her by phone on a number of occasions. Mr. Montague prepared a report dated March 15, 2014 and testified at the hearing.

22. Mr. Montague arranged for Claimant to take a Wide Range Achievement Test (WRAT-4) that showed her reading decoding and reading comprehension at the 12th grade level, her spelling at the 8th grade level, and her math at the 3rd grade level.

Although Claimant thought she was a registered CNA, Mr. Montague could find no evidence in the state records that she had ever been registered as a CNA in Idaho.

23. Mr. Montague was critical of Ms. Ballard's list of jobs she thought Claimant could perform because of her mistaken belief that Claimant successfully performed cashiering duties in the past. However, Mr. Montague asserts that Claimant needed help with cashiering and only performed cashiering duties intermittently. Further, "I would challenge any vocational expert to dispute that the job openings identified by Ms. Ballard normally require at least a high school diploma or GED as minimum requirements for applicant consideration." CE 1, p. 486. Claimant does not have either a GED or a high school diploma and Mr. Montague opined that based on her educational background, she will not be able to obtain either one.

24. Mr. Montague references an FCE conducted on June 11, 2013 (shortly before Claimant's MI and COPD diagnosis) indicating that Claimant could perform work in the light work category meaning she could lift 20 pounds occasionally and 10 pounds frequently. Mr. Montague classified Claimant as totally and permanently disabled based on the FCE as well as her lack of transportation and episodic homelessness without considering her post-MI and COPD limitations.

25. Mr. Montague testified that he considered the following as non-medical factors in determining Claimant's total disability:

> A. They would, but there are other nonmedical factors (besides her education and age) that are more significant.
>
> Q. (By Mr. Gamel): Okay; so let's talk about those. What are some of her other nonmedical factors that you considered?
>
> A. Probably the biggest nonmedical factor that she has is that she's homeless, and second, she has no transportation. There's nobody in this room, I'm assuming, who knows what it feel like to be homeless except Ms. Lubow, but if you have no regular place to stay and you don't know where you are staying from one day to the next or if you can clean up to go

to work, in my opinion, it's impossible for her to be capable of finding and securing employment.

Q. Okay; so if I understand your opinions thus far, then some of the nonmedical factors that you considered that would have a negative impact upon her ability to secure gainful employment would be her age, her education, her lack of mobility with a car, and even her homelessness; would that be accurate?

A. That's accurate, and that's not all of the nonmedical factors I considered.

Q. Okay, what are some of the other nonmedical factors that you considered?

A. She has not been gainfully employed since 2011, so that's a significant gap in employment. Employers would look at that and wonder why. Her employment history is sporadic. She moved around a lot with various employers. She has very few employers that she had long-term employment with. That's problematic. She has limited transferrable skills. In fact, they're so limited that the last time she went before the Social Security Administration, Ann Austem who is also a vocational expert recognized in the Valley and has actually done work for ISIF determined that she couldn't even work at a sedentary level in the area and on a national basis, not just in the Boise labor market.

She's a poor speller, and last, every individual before they are offered a job, for the most part, has to appear before the employer and go through an interview process or at least present to the employer, what they look like, how they relate, how they speak, et cetera, and that would be problematic for Ms Lubow.[1]

HT., pp. 93-95.

26. In his supplemental report dated August 21, 2015, Mr. Montague opined that Claimant has incurred disability above impairment at 35% – 40% from her industrial accident alone. In reaching that conclusion, Mr. Montague relied solely on the results of the FCE because he felt that Dr. Gussner's restrictions were given some four years previously and the FCE was more recent (June 11, 2013). However, Mr. Montague

[1] Claimant has a number of dental issues including teeth missing (both upper and lower) as well as some that are rotten and in need of dental care.

agreed on cross-examination that Dr. Gussner had expressed his disagreement with the FCE and stood by his original restrictions as late as October 21, 2015. See DE 36, p. 2.

27. Mr. Montague testified that he utilized the results of the FCE over the restrictions imposed by Claimant's treating physician because Dr. Gussner was not aware of Claimant's later health issues such as her MI and COPD (nor was the physical therapist that performed the FCE). Mr. Montague testified also that Dr. Gussner was the only physician involved in Claimant's case that placed her in the medium work category; all others placed her in the light/sedentary category.

28. Mr. Montague agreed with counsel for ISIF that the SSDI Administrative Law Judge's finding that Claimant's "severe impairments" included her congestive heart failure, her coronary artery bypass graft, her COPD, and her degenerative disc disease, and that those conditions were the only ones considered by the judge in finding Claimant eligible for benefits. Mr. Montague also agreed that Claimant's diabetes produced nothing more than a minimally limiting symptom. Even though Claimant has indicated that the memory problems she developed post-MMI have severely hampered her ability to work, Mr. Montague did not factor her memory problems into his employability analysis. While her memory issues are important, Mr. Montague testified that Claimant's homelessness and lack of transportation "trumps everything else that's on the table." HT, p. 132. Finally, although Mr. Montague was present at Claimant's second deposition, he did not hear her say that she had no physical problems in doing her work prior to her industrial accident.

29. State Insurance Fund retained **Douglas N. Crum** to prepare a vocational/disability assessment. Mr. Crum's credentials are well known to the

Commission and he is qualified to render expert vocational opinions in this matter. Mr. Crum interviewed Claimant on June 5, 2015, reviewed pertinent medical[2], vocational, and SSDI records, reviewed Mr. Montague's reports, and reviewed Claimant's first deposition transcript along with the hearing transcript, prepared a report dated August 13, 2015 (DE 32)[3], and was deposed.

30. Mr. Crum opined that Claimant's loss of access to her labor market was minimal:

> So, based on a pre-injury physical capacity - - or at least medium physical demand work in light of there were no permanent physical restrictions in place at the time of this injury, I concluded that based on her education, skills, work history and all of those factors, I concluded she had access to a 9.9 percent of the jobs in her labor market on a pre-injury basis and, then, I considered the restrictions given by Dr. Gussner on April 16, 2012. These were for the compression fractures, the medium duty restriction, lifting up to 50 pounds occasionally, 25 pounds frequently. Occasional bending, stooping, twisting. Position changes as needed. And based on Dr. Gussner's opinions in that report, I felt that the claimant didn't sustain any significant measurable loss of labor market access.

Crum Depo., p. 16.

31. Mr. Crum explained why he chose Dr. Gussner's restrictions over those of the FCE and the SSDI doctors:

> Dr. Gussner, [sic] was a treating physician. He saw the claimant on several occasions. He rated her and gave a clear list of permanent restrictions that were associated specifically with the industrial injury. The functional capacity evaluation, which was done in June 2013, about a month before her heart attack, gave a list of restrictions that were significantly different than those recommended by Dr. Gussner. Especially,

[2] Mr. Crum's synopsis of the medical records he reviewed consumes 5 pages of his 13-page report.

[3] Mr. Crum was provided with additional information after his August 2015 report was prepared; however, Mr. Crum testified that none of the additional information changed his opinions expressed in his August 2015 report because most of the additional information came from doctors involved in Claimant's SSDI claim and Dr. Greenwald's report all generated post-MI.

> in terms of lifting capacity and postural things. But it was also indicated in that report that her function, her capacities, were limited by her cardiovascular condition and that if she undertook a process to improve her cardiovascular condition, her functional capacities could improve. So, based on that I didn't feel that it was a definite statement of what her permanent physical restrictions were. In addition, again, we had Dr. Gussner's recommendations.

Id., p. 17.

32. Even though Dr. Greenwald was tasked with assigning restrictions and PPI ratings to certain of Claimant's pre-existing conditions, Mr. Crum testified that, at least according to Claimant, any pre-existing conditions were not significant and she thought she was in "pretty good physical condition" at the time of her accident other than some numbness in her feet that was not considered by Claimant to be a hindrance. Further, Claimant was under no lifting restrictions (or any other kind) as of the date of the subject accident.

33. ISIF retained **William Jordan** to assess Claimant's employability. Mr. Jordan's credentials are well-known to the Commission and need not be repeated here; he is qualified to render expert vocational opinions in this matter. Mr. Jordan reviewed pertinent medical and vocational records including the FCE, attended Claimant's second deposition,[4] reviewed the hearing transcript, met with Dr. Gussner and reviewed various job descriptions with him, prepared an Employability Report dated September 2, 2015 (ISIF Ex. 1), and was deposed.

[4] Claimant's then-counsel refused to allow Mr. Jordan to interview Claimant reasoning that, due to her cognitive and memory issues, he would not likely get much more information from her than what was given during her deposition.

34. Mr. Jordan, like Mr. Crum, utilized Dr. Gussner's April 16, 2012 restrictions at the time he considered her to be at MMI versus restrictions placed closer to the time of hearing:

> Q. And do you feel that this is the correct frame of reference to be using in this case?
>
> A. Yes. He had treated her. Knew about the compression fracture, how it happened. He did some studies to see what would be the best course of direction, whether she needed to have surgery or not. It turned out she didn't have to have surgery. She was treated conservatively. Did some physical therapy. Healed from the fractures. And, then, was released. And he released her back to her time-of-injury position as a caregiver.

Jordan Dep., pp. 10-11.

35. Mr. Jordan spent about an hour with Dr. Gussner going over job descriptions:

> We review the job descriptions one by one.[5] If he has questions about what the job is, what the requirements are, that's where I come in to explain what the requirements are, what the job consists of, how it fits with her background and, then he looks at it from a medical standpoint and says yes or no, this would work or maybe it wouldn't work and these positions - - it appears that he approved all of them.

Id., p. 11.

36. Mr. Jordan testified that the job descriptions above-mentioned were a sampling of the types of jobs he believed Claimant could perform as of the time she reached MMI from her industrial injury. However, when considering Claimant's post-MMI self-imposed lifting restriction coupled with her COPD and heart issues, she is unemployable with no contribution from any residuals from her industrial accident.

[5] The job descriptions/announcements approved by Dr. Gussner (every one that was submitted to him) may be found at page 7 of Mr. Jordan's report.

37. Regarding Claimant's intermittent homelessness, Mr. Jordan testified that, "I think homelessness can be a placeability obstacle, but it's not a permanent disability. It's overcomeable. So, it goes into the mix, but it's not a permanent disability factor." *Id.*, p. 21. Claimant testified that it was not until after Dr. Gussner declared her at MMI that she became financially challenged, sold her car to pay rent, and became occasionally homeless. At the time of the hearing, Claimant was receiving about $700.00 a month in Social Security Disability benefits and was trying to save enough money to put towards a place to live.

DISCUSSION AND FURTHER FINDINGS

"Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and

economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

In *Brown v. The Home Depot,* 152 Idaho 605, 272 P.3d 577 (2012), the Idaho Supreme Court held that generally, the date of the hearing is the date upon which disability (loss of access to a claimant's labor market in that case) is to be determined. However, nothing in that decision can be read to prevent assessing disability at some other time when appropriate. Here, Claimant experienced myriad debilitating nonindustrial medical problems post-MMI and pre-hearing that, in all likelihood, rendered her totally and permanently disabled under any labor market whether at the time of MMI or at the time of hearing. Therefore, in this case, it makes more sense to assess Claimant's disability, if any, as of the date of MMI.

38. The Referee is not persuaded by Mr. Montague's opinions regarding Claimant's disability. He places too much emphasis on Claimant's sporadic homelessness, a situation that did not exist until after she was declared at MMI for her

industrial injury. Also, Mr. Montague ignored Dr. Gussner's permanent restrictions because they were issued long before Claimant's other non-industrial issues arose. However, Dr. Gussner reaffirmed those restrictions in October 2015. Instead, Mr. Montague relied exclusively on an FCE that was not ordered by any physician, but was arranged by Claimant's counsel. Dr. Gussner did not agree with the conclusions reached by the FCE. The Referee chooses to adopt Dr. Gussner's restrictions over those of the FCE[6] because Dr. Gussner treated Claimant over time, is a physician rather than a physical therapist, and issued his restrictions at a time nearer to Claimant's accident and at the same time he declared her at MMI rather than the much later FCE.

39. Mr. Crum credibly testified that Claimant's loss of access to her pre-injury labor market was minimal based on Dr. Gussner's restrictions, which were specifically given as the result of her industrial injury alone. Because the FCE referred to Claimant's cardiovascular condition that might improve with a rehabilitation program, Mr. Crum reasonably inferred that her heart condition may have played a role in increasing her restrictions. Also, the SSDI physicians' restrictions were followed her MI and COPD and were assigned for those conditions; not her healed L1-L2 compression fractures.

40. Mr. Jordan met with Dr. Gussner and reviewed various job descriptions from a medical standpoint. While the Referee agrees with Claimant that there were certain job descriptions that she could probably not perform or get hired to perform,

[6] Mr. Montague testified that he would place Claimant's disability above impairment at between 35-40% for her industrial accident alone based on the FCE. Because the Referee chooses to adopt Dr. Gussner's restrictions over those contained within the FCE and because Mr. Montague's opinion lacks foundation and is contrary to his earlier expressed opinion that the accident alone rendered Claimant totally and disabled, the Referee gives that opinion no weight.

nonetheless, there were a number of jobs or job titles that she could perform at the time she was declared at MMI for her relatively minor industrial injury.

41. Claimant's occasional homelessness and her lack of a vehicle are red herrings. She was not homeless at the time of her industrial injury or at the time she was at MMI. She ran into financial difficulties post-MMI and Defendants should not be saddled with paying for a situation over which they had no control.

42. Ms. Ballard, Dr. Gussner, Mr. Crum, and Mr. Jordan all agree that, at the time Claimant was declared to be at MMI, Claimant could have returned to work in the health care industry in some capacity. While she may not have been able to return to work at her time-of-injury job as an in-house caregiver due to heavier physical demands, Claimant could have worked in an assisted living facility which is less physically demanding. In any event, due to unfortunate circumstances arising post-MMI and before hearing, it can now never be known what Claimant could or could not have done.

43. The Referee finds that Claimant has failed to prove she suffered any PPD above her 7% whole person PPI as the result of her last industrial accident.

44. Based on the above finding, all other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that she has incurred PPD above her PPI as the result of her May 25, 2011 industrial accident.

2. All remaining issues are moot.

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 28th day of June, 2016.

INDUSTRIAL COMMISSION

___/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 14th 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:

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ge Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DIANNA LUBOW, Claimant, v. GENTLE TOUCH HOME HEALTH CARE, INC., Employer, and STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Surety, Defendants.	**IC 2011-013307** **ORDER** Filed July 14, 2016

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers 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 recommendation 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 failed to prove that she has incurred PPD above her PPI as the result of her May 25, 2011 industrial accident.

2. All remaining issues are moot.

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

DATED this 14th 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 14th 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:

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