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** **ORDER DENYING RECONSIDERATION** Filed December 21, 2016

This matter is before the Idaho Industrial Commission ("Commission") on Claimant's Motion for Reconsideration, timely filed July 21, 2016, asking the Commission to reconsider its decision of July 14, 2016. Defendants Gentle Touch Home Health Care, Inc. ("Employer") and the State Insurance Fund ("Surety") timely filed their Objection to Claimant's Motion for Reconsideration on August 10, 2016. Defendant Industrial Special Indemnity Fund ("ISIF") timely filed its Response to Claimant's Motion for Reconsideration on August 10, 2016. Claimant timely filed her Reply on August 19, 2016.

BACKGROUND

Claimant suffered an accident at work on May 25, 2011 while transferring a patient from her bed to a wheelchair. As a result, she suffered compression fractures at L1 and L2. Claimant contended at hearing that she is totally and permanently disabled under the odd-lot doctrine due to a combination of pre-existing conditions and her last industrial accident. Defendants Employer, Surety, and ISIF contended that the bulk of Claimant's disability came from

non-industrial medical conditions that occurred after Claimant had reached MMI, and her pre-existing diabetic polyneuropathy was not a subjective hindrance to her employment and did not combine with the industrial injury to produce total and permanent disability. The Idaho Industrial Commission's July 14, 2016 Findings of Fact, Conclusions of Law, Recommendation, and Order concluded that "Claimant has failed to prove that she has incurred PPD above her PPI as the result of her May 25, 2011 industrial accident" and that all remaining issues are moot.

RECONSIDERATION

A decision of the Commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated, provided that within 20 days from the date of the filing of the decision, any party may move for reconsideration. Idaho Code § 72-718. However, "[i]t is axiomatic that a claimant must present to the Commission new reasons factually and legally to support a hearing on her Motion for Rehearing/Reconsideration rather than rehashing evidence previously presented." *Curtis v. M.H. King Co.*, 142 Idaho 383, 388, 128 P.3d 920 (2005).

On reconsideration, the Commission will examine the evidence in the case and determine whether the evidence presented supports the legal conclusions. The Commission is not compelled to make findings on the facts of the case during reconsideration. *Davidson v. H.H. Keim Co., Ltd.*, 110 Idaho 758, 718 P.2d 1196 (1986). The Commission may reverse its decision upon a motion for reconsideration, or rehear the decision in question, based on the arguments presented, or upon its own motion, provided that it acts within the time frame established in Idaho Code § 72-718. *See*, *Dennis v. School District No. 91*, 135 Idaho 94, 15 P.3d 329 (2000) (citing *Kindred v. Amalgamated Sugar Co.*, 114 Idaho 284, 756 P.2d 410 (1988)). A motion for reconsideration must be properly supported by a recitation of the factual findings and/or legal conclusions with which the moving party takes issue. However, the Commission is not inclined

to re-weigh evidence and arguments during reconsideration simply because the case was not resolved in a party's favor.

"Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." *Curtis v. M.H. King Co.*, 142 Idaho 383, 385, 128 P.3d 920, 922 (2005), citing *Uhl v. Ballard Medical Products, Inc.*, 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003). The burden on a workers' compensation claimant is to establish by the weight of the evidence that his injury was the result of a compensable accident or occupational disease to "a reasonable degree of medical probability". Furthermore, "a worker's compensation claimant has the burden of proving, by a preponderance of the evidence, all facts essential to recovery." *Evans v. O'Hara's, Inc.*, 123 Idaho 473, 479, 849 P.2d 934, 940 (1993).

The principal contention made by Claimant in support of her motion for reconsideration is that the Commission erred in failing to conduct its assessment of Claimant's loss of ability to engage in gainful activity as of the date of hearing. Essentially, Claimant argues that the exposure of Employer/Surety and ISIF for disability should be based on Claimant's medical and non-medical factors as they existed as of the date of hearing. Therefore, in evaluating the liability of Employer/Surety and the ISIF, the Commission should have considered not only the permanent effects of the accident, but also Claimant's pre-existing conditions, including those conditions which predated Claimant's accident but which progressively worsened through the date of hearing. Cited in support of these propositions is the case of *Brown v. The Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012). According to Claimant, *Brown* stands for the proposition that Claimant's loss of access to the labor market must be assessed at the time of hearing instead of the date of maximum medical improvement. She further contends that *Brown* requires that her disability be evaluated based on her physical condition as of the date of hearing. Claimant

misapprehends the holding of *Brown*. *Brown* held that in order to assess Claimant's present and probable future ability to engage in gainful activity, the relevant labor market for evaluating the non-medical factors under Idaho Code § 72-430 is Claimant's labor market at the time of hearing. Nothing in *Brown* requires that Defendants be charged with responsibility for physical conditions which either predated the accident or arose between the date of injury and the date of hearing.

In this case, the Referee determined that when considering the universe of Claimant's manifold physical ailments, it is clear that she would be totally and permanently disabled in any labor market whether it be the one that existed at her date of MMI or the date of hearing. Therefore, the Referee concluded that it made more sense to evaluate Claimant's disability as of her date of maximum medical improvement from the effects of the subject accident in order that the disability evaluation be conducted with only her work-caused impairments in mind. The Referee went on to reason that when only Claimant's accident-caused limitations/restrictions are considered, she failed to demonstrate any disability over and above her 7% PPI rating. As explained below, we believe that the Referee reached the correct result in this case albeit by a somewhat different path than the Commission takes.

Per *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008), the apportionment of disability under both Idaho Code § 72-406 and § 72-332 envisions a two-step process. First, the Commission must determine Claimant's disability from all causes combined, and second, it must then apportion disability between the work accident and other conditions. Here, the Commission agrees with Claimant that, in accordance with *Brown, supra,* there is no reason not to apply Claimant's time of hearing labor market to the evaluation of disability in this case. We further conclude, as did the Referee, that taking into account all of Claimant's physical injuries,

along with her relevant non-medical factors, Claimant is totally and permanently disabled based on her labor market as it existed as of the date of hearing. However, having found Claimant to be totally and permanently disabled, the Commission must next make an assessment of whether Claimant's total and permanent disability should be borne by Employer and the ISIF.

In addition to the effects of the work accident, Claimant suffers from other conditions, some or all of which, may contribute to her total and permanent disability. Some of these conditions pre-date the accident of May 25, 2011. Of these, one is a condition which has progressively worsened since the subject accident. Finally, as of the date of hearing, Claimant suffered from certain physical maladies which arose between the May 25, 2011 accident and the date of hearing. All of these conditions require somewhat different treatment in order to ascertain whether, or to what extent, Employer or Employer and ISIF can be held responsible for these conditions.

In order to hold ISIF responsible for some percentage of Claimant's total and permanent disability, Idaho Code § 72-332 requires a demonstration of (1) a pre-existing physical impairment which was (2) manifest, (3) constituted a subjective hindrance to Claimant's employment and (4) combined with the compensable industrial impairment to render Claimant totally and permanently disabled. In the case of a pre-existing impairment which is progressive, some rule must be applied to determine the point in time at which that impairment should be rated and to determine whether it is manifest, constitutes a subjective hindrance to employment and combines with the work accident to cause total and permanent disability. Although not addressed in *Brown*, *supra*, the timing of making such an assessment of the *prima facie* elements of a case against ISIF has been addressed in *Colpaert v. Larsens, Inc.*, 115 Idaho 852, 771 P.2d 46 (1989). *Colpaert* makes it clear that in determining whether the elements of ISIF

responsibility are satisfied, a pre-existing condition must be assessed as of a date immediately preceding the work injury. See also *Ritchie v. ISIF* (IIC, filed August 15, 2016). Therefore, notwithstanding that a condition may have progressed and worsened following a claimant's work injury, the liability of ISIF for pre-existing impairments is evaluated as of a date immediately preceding the work injury.

Turning first to the requirement that Claimant identify a pre-existing impairment in order to implicate ISIF liability, we note that in her August 19, 2015 report, Dr. Greenwald addressed the extent and degree of Claimant's pre-existing impairments. Dr. Greenwald identified the following conditions as warranting a whole person impairment rating as of the date of the May 25, 2011 accident:

Diabetic Polyneuropathy 15% + 5 %

Type II Diabetes Mellitus 13%

Hypertension 6%

Arthritic hands 1%

Depression 5%

Left knee injury 3%

Claimant's testimony establishes that only one of these conditions, her diagnosis of diabetic polyneuropathy, has progressed in severity since the date of injury. However, Dr. Greenwald's report makes it clear that the rating she gave for Claimant's polyneuropathy was assessed as of the date of the May 25, 2011 accident. With respect to Dr. Greenwald's diagnosis of preexisting arthritis of the hands, Dr. Greenwald evidently determined that this condition pre-dated the subject accident because of a record, possibly a record generated in connection with Claimant's 2005 application for Social Security disability, which referenced hand arthritis.

Next, Claimant must demonstrate that the aforementioned impairments were "manifest" at the time of the subject accident. "Manifest" means that either the employer or employee was aware of the condition so that the condition can be established as existing prior to the injury. *See Royce v. Southwest Pipe of Idaho*, 103 Idaho 290, 647 P.2d 746 (1982). Here, Claimant's 2005 application for Social Security disability reflects that her pre-existing hypertension, diabetes and diabetic neuropathy were known to her as of the date of that application. Dr. Greenwald's report reflects that Claimant was diagnosed with hand arthritis and depression in 2005, and if this is the case, we assume that those diagnoses were shared with Claimant, and that those conditions too were "manifest" prior to the date of the subject accident. Finally, Claimant underwent knee surgery many years prior to the subject accident and it was this surgery, and resulting arthritis, that led Dr. Greenwald to award Claimant a 3% whole person rating for her knee condition. Again, we conclude that Claimant was aware of this condition prior to the subject accident.

Next, Claimant must demonstrate that the aforementioned pre-existing impairments constituted a "subjective hindrance" to obtaining employment. The Idaho Supreme Court set out the definitive explanation of the "subjective hindrance" requirement in *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 686 P.2d 557 (1990):

> Under this test, evidence of the claimant's attitude toward the preexisting condition, the claimant's medical condition before and after the injury or disease for which compensation is sought, nonmedical factors concerning the claimant, as well as expert opinions and other evidence concerning the effect of the preexisting condition on the claimant's employability will all be admissible. No longer will the result turn merely on the claimant's attitude toward the condition and expert opinion concerning whether a reasonable employer would consider the claimant's condition to make it more likely that any subsequent injury would make the claimant totally and permanently disabled. The result now will be determined by the Commission's weighing of the evidence presented on the question of whether or not the preexisting condition constituted a hindrance or obstacle to employment for the particular claimant.

Archer makes it clear that an injured worker's attitude towards a pre-existing condition is but one factor to be considered by the Commission in determining whether or not the pre-existing impairment constituted a subjective hindrance to Claimant. After *Archer*, the Commission is required to weigh a wide variety of medical and non-medical factors, as well as expert and lay testimony, in making the determination as to whether or not a pre-existing condition constituted a hindrance or obstacle to employment for the particular claimant as of the date of the work injury.

The record does not persuade us that Claimant's diagnosis of diabetes, for which she was given a 13% impairment rating, constituted a subjective hindrance to her employability at the time of the accident. While Claimant testified that at some point following her diagnosis, her diabetes was uncontrolled, by the time of the accident it was controlled with medication. Claimant did not testify that this condition limited her in any significant respect at or around the time of the subject accident. Nor is there other testimony or evidence which would establish that this diagnosis constituted a subjective hindrance at the time of the work accident.

Similarly, while Claimant may have been entitled to an impairment rating for hand arthritis prior to the work accident, there is no evidence that this condition hindered her ability to engage in gainful activity as of the date of the subject accident. Indeed, Claimant's testimony established that she had no difficulties using her upper extremities in gainful activity as of the date of the subject accident. (Claimant's July 14, 2015 deposition at 19/6-8).

Finally, there is no evidence that Claimant's knee condition, depression or hypertension hindered her ability to engage in gainful activity prior to the subject accident.

This leaves the Commission to consider whether Claimant's diagnosis of diabetic polyneuropathy, her most serious pre-existing impairment, hindered her in her ability to engage

in gainful activity prior to the May 25, 2011 accident. Even though this pre-existing condition worsened between the date of the subject accident and the date of hearing, *Colpaert* and *Ritchie* make it clear that the Commission must consider the condition as it existed at the time of the accident in determining whether it constituted a subjective hindrance to Claimant. On this point, the testimony and evidence of record is in conflict. Most notably, Claimant's 2005 application for Social Security disability reflects that she considered herself disabled due to severe and unrelenting foot pain/numbness related to her diagnosis of diabetic polyneuropathy. (Defendant's Exhibit 13). Indeed, Claimant's handwritten self-report reflects that her problems with her feet are the sole reason for her contention that she was disabled in 2005. Dr. Bates, who evaluated Claimant on January 4, 2006 for purposes of her application for Social Security disability benefits, concluded that while Claimant suffered from hypertension and diabetic polyneuropathy, only her diabetic polyneuropathy impacted her ability to engage in gainful activity. Dr. Bates eventually concluded that Claimant was only capable of engaging in sedentary remunerative activities as a consequence of her diabetic polyneuropathy. It is interesting to note that in connection with her application, Claimant indicated that due to her neuropathies, she had been required to cut back her work hours from 40 to 32 hours per week, and that in February of 2005 she was laid off by her then employer because she was no longer able to perform her job duties due to her bilateral lower extremity neuropathies.

While Claimant's 2005 Social Security disability application reflects that her bilateral lower extremity neuropathies were sufficiently serious to leave her unable to perform CNA type work, records and testimony generated subsequent to the date of that application reveal that Claimant did in fact return to CNA, or similar type work, after her 2005 application for Social Security disability was denied. Moreover, the record reflects that Claimant returned to full time

work, i.e. 40 hours per week, in her customary employment following the denial of her application. (Defendants' Exhibit 4 at 7). Not surprisingly, the subject of Claimant's diabetic polyneuropathy came up at her prehearing depositions, and at hearing.

Claimant described her employment activities between 2000 and the date of injury at her October 17, 2013 deposition. Following her 2005 Social Security disability application, Claimant worked as a housekeeper at a motel in Alaska, and also as a CNA for several Idaho employers. Records of the ICRD reflect that in the two to three years prior to the subject accident, Claimant was employed on a full-time basis as a CNA. Claimant described her time of injury position with Gentle Touch as being generic CNA type work involving a good deal of time on her feet and a good deal of heavy physical labor. (July 14, 2015 deposition 15/18-18/3). In both her 2013 and 2015 depositions she testified that she had no difficulty performing the physical demands of her work at Gentle Touch prior to the subject accident:

> Mr. Mallea:
> Q. Okay. In doing your work at Gentle Touch, did you have problems physically doing your work?
>
> Claimant:
> A. No.
>
> Q. Did you have any problems with the emphysema that you now have?
>
> A. Not at that time.
>
> Q. Was your diabetes controlled at that time?
>
> A. Yes.
>
> Q. Did you have limitations or restrictions in doing your work at Gentle Touch from your low back?
>
> A. No.
>
> Q. Did you have limitations or difficulties from your neck?

A. No.

Q. Did you have any problems or limitations resulting from your knee?

A. No.

Q. Did you have any problems with your upper extremities: Arms, elbows, hands, wrists?

A. No.

Q. Were there times at Gentle Touch where you had to call in sick or take a break because you couldn't do the work?

A. No.

Q. Did you have any symptoms of any cardiac condition while you worked for Gentle Touch?

A. Not at that time.

Q. Okay. Did you have problems with your upper arms, wrists, and hands in moving a patient or in transitioning a patient?

A. No, I did not.

Q. Let me just ask it, then. Did you have any problems, that you can remember, in doing your work as a CNA before this injury?

A. Not - - no. I was in pretty good physical health at the time.

. . .

Mr. Skaug:
Q. And just before this accident happened you had some numbness in your feet I believe you testified?

Claimant:
A. Yes.

Q. In a month before that. Was that interfering with your ability to perform your job at all?

A. No.

Q. Were you having any knee issues in the months prior to your accident - -

A. No.

Q. at work? And your back I believe you testified was healthy and fine in the months prior to your accident; correct?

A. Yes.

Claimant's July 14, 2015 deposition 18/11-19/24 . . . Claimant's October 17, 2013 deposition 72/15-75/2.

At the time Claimant was referred to the ICRD in June of 2011, consultant Teresa Ballard recorded a history from Claimant to the effect that Claimant's diabetes had no impact on her ability to work. (Defendant's Exhibit 4 at 04).

At the October 30, 2015 hearing, on direct examination Claimant testified that she had suffered from diabetic polyneuropathy for years and that her neuropathy has progressed since first being diagnosed in the early 2000s. She testified that her 2005 Social Security disability application correctly described both her symptoms and the impact of those symptoms on her ability to engage in gainful activity. Immediately prior to the industrial injury, Claimant testified that by the end of her shift she would experience "horrible pain" in her feet due to her diabetic polyneuropathy. (Hearing Transcript 45-48…55-60).

ISIF challenged Claimant's testimony on direct by reminding her of statements she made in her prehearing depositions, as well as other references in the record tending to denigrate the assertion that Claimant's diabetic polyneuropathy was a hindrance to her prior to May 25, 2011. Claimant did not explain why the answers that she gave during her depositions differed so markedly from the testimony she gave at hearing concerning the impact of her diabetic polyneuropathy. (Hearing Transcript 69/18-72/22). On examination by ISIF Claimant was also asked to reconcile her testimony on direct with information provided in connection with her September 2013 application for Social Security disability benefits. In that application she

asserted that the illnesses/injuries which she contended leave her disabled are her back injury and her heart surgery. Her diabetic polyneuropathy is not referenced in that document. (Defendant's Exhibit 28E). Moreover, at the time she was evaluated by David Sim, M.D., in connection with her 2013 application for Social Security disability, she reported to him that her problems with lower extremity diabetic polyneuropathy developed only over a year or so prior to November 5, 2013. (Defendant's Exhibit 28F).

Therefore, on the question of whether or not Claimant's diagnosis of diabetic polyneuropathy constituted a subjective hindrance to Claimant at the time of the May 25, 2011 accident, the evidence, particularly the testimony of Claimant, is in conflict. Claimant's insistence that her diabetic polyneuropathy was severely debilitating as early as 2005 is also challenged by the fact that subsequent thereto Claimant worked on a full time basis in employment of a type which she contended she could no longer perform in 2005. Further, Claimant's diabetic polyneuropathy did not significantly figure in the ICRD notes, or Claimant's 2013 application for Social Security disability benefits.

The Commission is mindful of the distinction drawn between findings of observational and substantive credibility. Observational credibility goes to the demeanor of the Claimant on the witness stand, and it requires that the Commission actually have heard the testimony in order that it may make some judgment on Claimant's observational credibility. The substantive credibility of a witness may be judged on the basis of inconsistencies and inaccuracies in the Claimant's testimony, or as compared to other facts of record, and does not require the presence of the Commission at hearing in order that the Commission make some judgment about Claimant's substantive credibility. *Stevens McAtee v. Potlatch Corp*., 145 Idaho 325, 179 P.3d 288 (2008). In this case, Claimant's testimony concerning the impact of her polyneuropathy is

internally inconsistent. It is also, in some respects, inconsistent with other facts of record. These conflicts leave us unable to give credence to those aspects of Claimant's testimony and the averments of the 2005 Social Security disability application to the effect that Claimant's diabetic polyneuropathy was a subjective hindrance to Claimant's employment. In this regard, perhaps the most striking fact is that it is known and acknowledged that Claimant continued to work at full time employment as a CNA even after she alleged that she was no longer able to perform the physical requirements of this type of work. We conclude that the evidence fails to establish that Claimant has met her burden of demonstrating that as of May 25, 2011, her pre-existing diabetic polyneuropathy constituted a subjective hindrance to Claimant's employment.

Even were we to conclude that Claimant has established that her diabetic polyneuropathy constituted a subjective hindrance as of May 25, 2011, we do not believe the evidence establishes that Claimant's diabetic polyneuropathy combined with the effects of the subject accident to cause total and permanent disability. Following her date of medical stability from the effects of the subject accident Claimant was given medium duty restrictions by Dr. Gussner. These restrictions were later endorsed by Dr. Greenwald in 2015. With these restrictions in mind, Teresa Ballard, the ICRD representative, concluded that while Claimant might not be able to return to her time of injury employer, she retained the skills and physical abilities to perform other types of work in the health care industry. Claimant, too, seems to have acknowledged this. Claimant testified that prior to her MI, she had been looking for work. Although ICRD records reflect that Claimant's file was closed because of her stated intention to pursue Social Security disability, Claimant testified that she was only giving this application some thought, and that her intention had actually been to search for employment, at least until she suffered her MI in 2013. (October 17, 2013 deposition 63/16-65/5). Clearly, Claimant did not believe that her low back

and pre-existing polyneuropathy combined to cause total and permanent disability. Claimant argues that it was inappropriate for the Commission to endorse the limitations/restrictions imposed by Dr. Gussner and later supported by Dr. Greenwald. Instead, Claimant contends that the Commission should have found the results of the June 11, 2013 FCE to be a better indicator of Claimant's physical capacity. It is argued that since this FCE took place closer to the date of hearing, it is a better indicator of the impact of the subject accident and Claimant's progressively worsening diabetic polyneuropathy on her functional capacity. However, in making this argument, Claimant fails to recognize that the impact of Claimant's diabetic polyneuropathy must be assessed as that condition existed immediately prior to the date of the subject accident, not as it progressively worsened subsequent to the subject accident. The Commission continues to believe that Dr. Gussner's limitations/restrictions most accurately describe Claimant's functional capacity. Suffice it to say that the record contains insufficient evidence to persuade the Commission that as a result of the combined effects of Claimant's low back injury and her pre-existing polyneuropathy Claimant is totally and permanently disabled.

Based on the foregoing, we conclude that as of May 25, 2011, Claimant's pre-existing conditions do not meet the elements of ISIF lability. Further, we conclude that while Claimant was totally and permanently disabled as of the date of hearing, she was not totally and permanently disabled as a result of the combined effects of the subject accident and her documented pre-existing impairments.

Having determined that Claimant's pre-existing conditions did not combine with the subject accident to cause total and permanent disability, we must next consider Employer's exposure for less-than-total disability. As developed above, per *Page v. McCain Foods, supra*, in a less than total case a claimant's disability from all causes should be first assessed, and then

apportionment analysis should be undertaken pursuant to Idaho Code § 72-406. For purposes of this analysis, Claimant's disability from all causes is that disability resulting from the effects of the subject accident and her pre-existing conditions as they existed as of the date of the subject accident. While the Referee did not first evaluate Claimant's disability from all causes, based on the analysis the Commission employed above in connection with Claimant's pre-existing impairments and ISIF liability, we are unable to conclude that the degree of Claimant's disability was increased or prolonged by virtue of any of her pre-existing impairments. Therefore, Claimant's disability is accurately assessed by considering the limitations/restrictions stemming solely from Claimant's May 25, 2011 back injury.

Further, we believe that the Referee correctly measured Employer's responsibility for disability from the accident produced impairment and other non-medical factors referenced at Idaho Code § 72-430.

Claimant takes exception to the Referee's reliance on the opinions of Dr. Gusner and Doug Crum in evaluating Claimant's disability. We find no error in the Referee's reliance on these experts in lieu of the FCE evaluation and the opinion of Mr. Montague. In connection with Mr. Montague's assessment that Claimant's state of homelessness is the most important non-medical factor relevant to assessing her disability, we would note several things: First, Claimant was not homeless as of the date of hearing. As of the date of hearing she had had a roof over her head for approximately six months, and was saving up from her SSDI benefits to find a place of her own in which to live. (Transcript 81/25 – 82/17). Second, the record does not reflect whether Claimant's sporadic problems with homelessness have more or less to do with her accident caused condition as opposed to her subsequent physical maladies. For these reasons as well we believe the Referee gave appropriate weight to the issue of Claimant's homelessness.

The Referee acknowledged that even with the more lenient restrictions authored by Dr. Gussner, Claimant might not be able to perform her time-of-injury job. However, there was ample evidence of other health care jobs available to Claimant within Dr. Gussner's restrictions, based on the ICRD records and the testimony of Mr. Crum. Based on this evidence, the Referee concluded that Claimant's impairment rating encompassed her accident-caused disability.

Finally, although Claimant has not argued the point, we believe it is important to provide some further explanation for a conclusion which may appear, at first blush, contradictory: while Claimant was assuredly permanently and totally disabled as of the date of hearing, neither employer nor ISIF can be held responsible for Claimant's total and permanent disability. We have found that Claimant's pre-existing conditions, as they existed prior to May 25, 2011, did not combine with the effects of the subject accident to cause total and permanent disability. That Claimant was totally and permanently disabled as of the date of hearing is the result of the additional impact of two conditions which arose subsequent to the date of injury, and are in no wise connected to the subject accident. Claimant suffered an MI and developed COPD following the subject accident, and these conditions, combined with her other ailments have caused total and permanent disability. However, we are aware of no mechanism by which either Employer or ISIF could be held responsible for the effects of Claimant's COPD or MI. As respects the ISIF, neither Claimant's COPD nor her MI qualify as "pre-existing" conditions for purposes of Idaho Code § 72-332. Similarly, there is no basis in Idaho law to hold Employer liable for those physical maladies which arise subsequent to a work injury, and which are altogether unconnected to the work injury. We believe that the Referee correctly concluded that the exposure of Employer and ISIF for Claimant's disability must be evaluated without consideration of the impact of her post-accident conditions of COPD and MI.

Based on the foregoing, we continue to adhere to the recommendation made by Referee Powers that Claimant has failed to demonstrate disability in excess of her 7% PPI rating.

DATED this 21st day of December, 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 21st day of December, 2016, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States Mail upon each of the following:

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____/s/_____