BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERESA KAY RITCHIE, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2008-014338** **IC 2008-020389** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed August 15, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue who conducted a hearing in Boise on May 1, 2015. Dennis Petersen represented Claimant. Paul Augustine represented ISIF at hearing after the death of Jay Meyers. Employer and Surety settled with Claimant prior to hearing and did not appear. The parties presented oral and documentary evidence. The record was held open for the receipt of more legible copies of certain evidence and to supplement certain missing documents. After post-hearing depositions, the parties submitted briefs. The case came under advisement on March 18, 2016. Referee Donohue submitted proposed findings of fact and conclusions of law on June 30, 2016. Because the Commission concludes that different treatment is warranted for the issue of ISIF liability, the Commission substitutes this decision for that proposed by the Referee.

ISSUES

The issues to be decided according to the Notice of Hearing are:

1. Whether Claimant is entitled to disability in excess of impairment, including total and permanent disability;
2. Whether Claimant is entitled to permanent total disability under the odd-lot doctrine;
3. Whether ISIF is liable under Idaho Code § 72-332; and
4. Apportionment under *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984).

An issue about retained jurisdiction was withdrawn.

CONTENTIONS OF THE PARTIES

Claimant contends she is totally and permanently disabled as an odd-lot worker. A compensable accident in 2008 caused asthma and/or reactive airway dysfunction syndrome ("RADS"). It caused a 15% PPI. Shortly thereafter she suffered a knee injury in a compensable accident. Two pre-existing conditions, one to her thoracic spine and one to her feet, qualify under the three-factor test enunciated in *Lethrud v. ISIF*, 126 Idaho 560, 887 P.2d 1067 (1995). Together they resulted in 28% PPI. Thus, ISIF under *Carey* is liable for disability based upon a 28/43rds ratio which equates to 71.4%. This results in ISIF liability beginning at the end of 143 weeks after an MMI date of May 8, 2013, the date David Shrader, M.D., rated Claimant's respiratory condition.

ISIF contends Claimant worked after the accident and is not totally and permanently disabled. She ceased employment for reasons unrelated to her asthma or knee. She has neither sought nor found other work because she provides care for her husband. If she is found totally disabled, her progressively debilitating bilateral foot condition which pre-existed the accidents eclipses all other impairment and restrictions. This negates the "combining with" prerequisite to ISIF liability enunciated in *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990).

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant;
2. Claimant's Exhibits A through GG;
3. Defendant's Exhibits 1 through 28; and
4. Depositions of physiatrists Gary Walker, M.D., and James Bates,

M.D., orthopedic surgeon Joseph Petersen, M.D., and pulmonologist David Shrader, M.D., and of vocational experts Delyn Porter, William Jordan, and Nancy Collins, Ph.D.

All objections made in post-hearing depositions are overruled.

FINDINGS OF FACT

1. Claimant began working for Assisted Living Concepts, known as Warren House ("Employer"), as a personal service assistant, a caregiver, in 2003. When she was hired, Employer was aware a physician had imposed a 25-pound lifting restriction. Employer provided her a position which did not exceed that restriction. The elderly residents at Warren House were somewhat mobile and did not require assistance which involved significant lifting.

2. In 2005 Claimant ended employment from Warren House while recovering from foot surgery. Claimant worked for other employers before she returned to Warren House in 2007. Employer's director, Blake Crockett, contacted Claimant and offered her a job. They discussed a part-time job which would not exceed Claimant's physical capacity. The position was officially titled "meaningful pursuits coordinator" but she was often referred to as a "life enrichment director" or "activities director." Claimant accepted. The written job description mentions working seven evenings per week between the hours of 6:00 to 9:00. Before the 2008 accidents Claimant's hours were highly variable, but she usually worked from two to four hours per day. Infrequently, she was asked to help in the kitchen. Employer provided her a stool to sit on in the kitchen.

3. On April 18, 2008 Claimant was substituting for one of the cooks when she was exposed to an odorous mist, likely phosphine gas. She completed her shift despite respiratory irritation and symptoms, and sought medical care that evening.

4. On June 11, 2008 Claimant fell and hurt her right knee.

5. Both events were compensable accidents. After the accidents Claimant's hours remained highly variable, but she usually worked about one and one-half to two hours per day.

6. Claimant continued to work for Employer until March 2010. A new director informed her she would be required to work additional hours as a caregiver. Claimant did not accept this change of job description.

Medical Care: 2008

7. A Cassia Regional Medical Center ER record dated April 18 suggests the chemical exposure actually occurred on April 17. A "strong family history of asthmatic conditions" was reported. An ER physician diagnosed, "1. Chemical-induced bronchospasm, which has responded to a nebulizer treatment. 2. Probable asthma." He released Claimant to regular duty. Here and elsewhere in the record, the potentially inconsistent accident dates are immaterial. Similarly, the suggestions of preexisting asthma here and elsewhere in this record are inconsistent with all other evidence of record and are given little weight.

8. On May 21, 2008, otolaryngologist Temp Patterson, M.D., examined Claimant after her chemical exposure. Claimant's primary symptom was a dry cough. Among other things Claimant reported a family history of asthma. Dr. Patterson found chronic rhinitis secondary to exposure to "Trichloral ethylene." She noted, "I do suspect that with time the condition will resolve." Claimant was given a rescue inhaler. On June 4, Dr. Patterson examined Claimant and noted improvement. Dr. Patterson expected a three-to-six month recovery period.

9. On June 11, 2008, Claimant visited Cassia Regional Medical Center ER after the fall at work. Upon examination an ER physician noted some tenderness, redness, and swelling at the right knee. X-rays were "essentially negative" showing only mild degenerative changes. At a June 13th follow-up an ER physician noted a possible meniscal tear and ordered an MRI. The MRI confirmed the degenerative disease as well as the tear. The radiologist for the MRI reported "degenerative tearing of the medial meniscus."

10. On June 20, 2008, Dr. Petersen released Claimant to return to work "as tolerated." He specified continuing use of a brace, crutches, and the opportunity to sit as needed. Upon examination he found significant degenerative joint disease and a torn meniscus. The latter he opined to be work related. He anticipated that meniscus surgery would hasten the degenerative joint disease until she would need a total knee replacement.

11. During arthroscopic surgery on July 1, 2008, Dr. Petersen removed the torn portions of the meniscus. He continued her light-duty restriction until September 10, 2008, when he released her to "regular duty work." In post-hearing deposition, Dr. Petersen opined that as of September 10, 2008 Claimant required no additional restrictions due to her acute knee injury and surgery.

12. Dr. Petersen declared Claimant's knee to be medically stable as of October 1, 2008. On an October 22, 2008 visit he rated PPI for the knee at 1% whole person. He again prognosticated a future total knee replacement would be required because the surgery would hasten her degenerative joint disease. His next note is dated March 26, 2010 for an unrelated thumb condition.

13. September 3, 2008 is the first date of a medical note involving sensitivity to odor. Dr. Patterson wrote, "Still can't be around cigarette smoke, even if on clothing only.

Went to rodeo, smoke bomb by clown [produced] smoke in arena, had to leave. Trouble with even putting a log on the wood fire. Wondering if may be with her for life. Has to use emergency inhaler." Dr. Patterson's assessment noted, "Asthma – seems to be permanently exacerbated by chemical exp[osure] (Reactive Airways Dysfunction Syndrome)."

14. On December 3, 2008, Claimant visited Cassia Regional Medical Center ER after a car accident. She was treated for bruises, particularly to her left leg. X-rays and CT scans were negative for acute injury.

15. In a December 16, 2008, note Dr. Patterson included "smoke and chemicals" as irritants.

Medical Care: 2009

16. On June 16, 2009, Dr. Patterson's assessment noted, "chemical burns causing asthma."

17. On December 1, 2009, Dr. Patterson's assessment noted, "Reactive airways dysfunction secondary to chemical exposure. Stable, but not resolving."

Medical Care: 2010

18. On June 1, 2010, Dr. Patterson supported Claimant's claim for Social Security Disability by opining Claimant "is able to work as long as she is not exposed to any kind of chemicals or smoke, and as long as she stays on her inhalers." Dr. Patterson opined the chemical exposure caused RADS and that Claimant would need her inhaler for life.

Medical Care: 2011

19. Dr. Shrader, although hired as a forensic evaluator by Employer and Surety,

provided some treatment for Claimant's respiratory condition in 2011. No other material medical treatment was provided in 2011.

Medical Care: 2012

20. For the first time since 2007, on February 16, 2012, podiatrist Jeffrey Bray, D.P.M., examined Claimant's feet. His diagnoses mentioned only her foot problems. He opined that she was disabled from even a sedentary job. Dr. Bray's opinions were consistent with problems continually worsening over the years.

Medical Care: 2013

21. On March 7, 2013, Dr. Petersen opined again that Claimant's meniscal tear was work related and the degenerative disc disease was preexisting. He declined to rate her PPI associated with her T6 compression fracture from memory.

22. On June 24, 2013, Claimant fell again on her right knee. In a visit to Cassia Regional Medical Center that day she described the old industrial knee injury but not a recent fall. A physician's assistant suggested a total knee replacement. In Claimant's August 2014 deposition she testified the June 2013 fall worsened her right knee condition. It did not further impair her activities of daily living.

23. September 5, 2013 X-rays of Claimant's feet showed osteoarthritis and bone spurs. Knee X-rays showed osteoarthritis in the right knee.

Prior Medical Conditions

24. Claimant suffered an automobile accident in 1976. She fractured her thoracic spine at T6, and Dr. Annest imposed a 20- to 25-pound lifting restriction. As a result she could no longer "throw tires" or buck bales as she had in the past.

25. Claimant suffered an automobile accident in September 1990. She suffered a

whiplash injury and a TMJ condition which resulted in jaw surgery.

26. The earliest medical record in evidence is dated January 1991. At issue was Claimant's potential for a return to work, with or without retraining. Joseph Petersen, M.D., noted the history of TMJ and back injuries. After examination he recommended a maximum 15-pound lifting restriction, albeit allowed on a repetitive basis. In post-hearing deposition, Dr. Petersen opined that Claimant's T6 condition and 1991 restriction remained clinically consistent after all these years.

27. Dr. Petersen performed carpal tunnel surgeries in May and July 1995. In post-hearing deposition, Dr. Petersen opined that these surgeries did not increase or change her 1991 restriction.

28. Neither the 1990 automobile accident nor the 1995 carpal tunnel surgeries hindered her employment afterward.

29. Dr. Petersen diagnosed a medial meniscus tear and knee bruise in July 1996. An X-ray showed a small fracture of the condyle. Dr. Petersen tried conservative measures before he would consider surgery. Claimant failed to show for a follow-up visit in September. No other medical records contemporaneously mention knee symptoms until the 2008 industrial accident. In post-hearing deposition Dr. Petersen acknowledged that he considered it possible that the meniscus tear he observed in 2008 might include a component of chronic degeneration from the 1996 injury, but that the 2008 accident likely caused an acute tearing as well. Moreover, the 2008 accident likely accelerated the degenerative condition and would result in a need for future care. For her part, Claimant testified that between the date of the 1996 right knee injury and the date of the 2008 right

knee injury she had no right knee problems, and was essentially asymptomatic. (Transcript 62/9-63/8).

30. In February 2001, Temp Patterson, M.D., examined Claimant for complaints of snoring and inadequate sleep. She recommended a sleep study. The records refer to an eventual diagnosis of sleep apnea and that Claimant used a CPAP machine.

31. Beginning about 2001, Claimant developed bilateral foot problems, starting at the base of her right big toe. She underwent two surgeries on her right foot and one on her left. On July 17, 2001, Dr. Bray examined her feet. He noted several conditions and recommended foot surgery, first on the right.

32. Multiple foot surgeries occurred, but the record does not include the operative reports. Among other things, the record mentions a fusion in her foot nearest her right great toe and a complex Achilles tendon procedure about her left heel.

33. Dr. Bray's next note is dated April 6, 2004. It notes continuing foot pain and swelling, with focus on the Achilles tendon. After conservative care Dr. Bray recommended surgery. On June 8, 2004, Dr. Bray recommended "a desk job or a job that requires very little standing or walking would be in her best interest."

34. Orthopedist Ronald Kristensen, M.D., provided a consultation on June 29, 2004. He examined Claimant and took X-rays and an MRI. He diagnosed several foot problems. He opined surgery was reasonable. He recommended she change jobs to one not requiring walking on concrete floors. Claimant's left Achilles tendon surgery was performed in July of 2004. She was non-weight bearing for a period of four to five months during her recovery following that surgery. (Transcript 50/10-20; Claimant's 2014 Deposition 19/11-24). These restrictions left her unable to perform her job at Assisted

Living Concepts. Then, four to five months after her left Achilles tendon surgery, Claimant underwent an emergency hysterectomy, which prolonged her recovery. Six months after her foot surgery, Assisted Living Concepts filled her position due to her inability to return to work during her period of recovery. (Transcript 50/21-51/6). In June of 2005, Dr. Bray authored a letter in support of Claimant's interest in vocational rehabilitation in which he stated:

> I have told [Claimant] that I do not believe she will ever return to a job that involves standing or walking. I have recommended that she seek further education and training regarding a job that would allow her to sit at a desk. ...

(See, Claimant's Exhibit P at 9).

35. As noted above, in 2007, Claimant returned to work for Assisted Living Concepts in a different position at the Warren House in Burley as Activities Director. She described the conditions under which she agreed to accept the job:

> A. It was – I told him. I told him right off I said I cannot walk the floor and he knew that, you know, and he said this is not walking the floor, this is a two to four hours a day, coming in, organizing the activities, helping with it. If you're doing a craft or whatever, helping those that have difficulties putting the craft together, ordering supplies for these activities, overseeing the activities. He said we have two PSA workers, which is the caregiver workers, that will be there at the time same time, that can go walk the floor to gather people for the activities and stuff, so that you should be able to do this.
>
> Q. Okay. So, you accepted the job?
>
> A. I did.

(Transcript 55/21-56/9).

Even so, when she was seen by Dr. Bray in August of 2007, she presented with complaints of bilateral foot pain significant enough to cause her to inquire of Dr. Bray whether he felt that her feet problems were such that she might be eligible for disability. Dr. Bray

indicated that he would support her in this regard. (Claimant's Exhibit P at 10-11). However, Claimant continued to work at the Warren House until March 2010.

36. Claimant's history to Dr. Bray concerning the nature and extent of her feet complaints must be compared against the history given by Claimant to Dr. Petersen's in-take nurse following Claimant's June 11, 2008 right knee injury. Just prior to her right knee arthroscopy, Claimant described how she had been getting along prior to the June 11, 2008 right knee injury:

> Prior to this injury, she had been hiking, bike riding, and walking without difficulty with her grandchildren.

Claimant confirmed that she gave this history to Dr. Petersen. Explaining her statements, she indicated that prior to her knee injury she was able to ride a bike and walk eight blocks or so, even though she did experience some foot pain while doing these activities. (Claimant's 2014 Deposition 51/2-53/17).

37. Claimant worked as Activities Director at the Warren House until March of 2010. At that time, the new director of the facility told her that he was changing the requirements of Claimant's job to require her to work for some period every day as a PSA. She declined to accept these changes because of the amount of walking and standing expected of a PSA. Because of her feet and her knees, she could not perform these activities. Therefore, she left her position at the Warren House. (Transcript 70/1-71/21).

38. Claimant also testified that between the date she started her position as Activities Director (2007) and the date of hearing, her feet difficulties have continued to progress. (Transcript 75/7-14: 95/14-96/2: 105/24-106/3; Claimant's 2014 Deposition 60/1-24).

39. On February 16, 2012, Claimant was again seen, after a long hiatus, by Dr. Petersen. At that time, she described her subjective feet complaints as follows:

> She presents today with the chief complaint of bilateral foot pain. I have not seen Teresa for several years now. She states that the pain in her feet has progressively worsened since her last visit. She states that she has pain and cramping in both of her feet. She states that she has a lot of pain on the dorsum of the right foot. She points to the Lisfranc joint. Also, she states that she has a lot of pain in the Achilles tendon area on her left foot. She states that if she were to try and stand for 15 minutes consecutively, she would have to sit down for 45 minutes. She states that if she continued to do this throughout the day, after a couple of hours she would only be able to stand for 5 minutes. She states that she has not been working since her last visit simply because she cannot due to foot pain – even a sedentary type job. She describes the pain in her right foot as a sharp stabbing pain and in her left foot as a dull aching pain.

(Exhibit P at 15).

40. Following his February 6, 2012 exam of Claimant, Dr. Bray proposed that Claimant was not a good candidate for work, "even in a sedentary type job." (Claimant's Exhibit P at 16).

41. At the time of her September 18, 2012 Deposition, Claimant elaborated on the nature and extent of her bilateral foot problems:

> Q. Okay. Now, are you continuing to have problems with your feet?
>
> A. Yes. They're getting worse all the time.
>
> Q. And describe to me some of the things that you either can't do anymore because of your feet or that you're having problems doing because of your feet.
>
> A. I can only be on my feet or walking very short periods of time before I have to elevate them and put ice on them for the swelling and pain. Then I can - - once the swelling goes down, I can get up and go change the water on the yard, you know, those type of things, but I can't be walking a lot or standing a lot because of them. Even sitting in a chair for long periods of time causes them to swell and to get muscle cramps.

Q. Give me an example. Like how long can you be on your feet before you have to get off them and elevate them?

A. Oh, maybe 20 minutes to half an hour, at the very most.

Q. And if you're on your feet for 20 minutes to half an hour and you have to get off them and elevate them, how long do you have to elevate your feet?

A. Oh, for probably an hour, 45 minutes on a good day, but usually about an hour with ice packs.

Q. And with sitting, how long can you sit continuously without having to elevate your feet?

A. They start to - - I start to have muscle cramps and swelling after about half an hour to 45 minutes. Before I have to elevate them, have to elevate them, take my shoes off with ice packs, an hour probably in time.

(Claimant's 2012 Deposition 44/13-45/24).

Therefore, as of 2012, Claimant's bilateral foot problems severely restricted not only her ability to walk and stand, but also her ability to sit. As noted, Claimant contends that her difficulties in this regard have only progressed as time has passed. (Hearing Transcript 75/7-14; Transcript 105/24-106/23).

42. From the foregoing, we conclude that Claimant suffers from bilateral foot complaints, the severity of which has progressed from the early 2000s to the date of hearing. Clearly, Claimant's feet complaints had not progressed enough by March of 2010 to keep her from performing the requirements of her job as Activities Director, since she successfully performed that job until March of 2010.

Forensic Medical Opinions

43. On March 1, 2011, pulmonologist David Shrader, M.D., examined Claimant at Employer and Surety's request. Dr. Shrader performed respiratory tests. He noted

Claimant disputed whether there existed a family history of asthma. A Methacholine challenge showed "irritable airways with bronchospastic disease consistent with asthma," responsive to her inhaler. He opined Claimant's exposure to phosgene gas with trichloroethylene caused her respiratory condition. He opined that Claimant could work, but should avoid fumes, odors, and irritants.

44. On August 1, 2012, Dr. Shrader examined Claimant and performed respiratory tests. He opined her symptoms were permanent. He opined annual assessments were required for proper medication adjustments.

45. On May 8, 2013, Dr. Shrader rated Claimant's PPI related to her respiratory system at 15% whole person. He confirmed his earlier opinions about work restrictions. In post-hearing deposition, Dr. Shrader opined the lung scarring which he noted in his clinical record was not clinically significant. He explained that "asthma" is a general term which can be caused by many different factors. Claimant is sensitive to irritants of airborne particulate. She is not allergic. The sensitivity was likely caused by the 2008 accidental chemical exposure. Her sensitivity would be likely variable as to severity and specific irritants over time. Even temperature itself can be a factor, as she might be worse on cold days. He was unable to predict a likelihood whether she would or would not need long-term future medical management of this condition, but an annual spirogram with any physician was recommended. He noted Claimant's concerns, but would not opine whether Claimant could or should not work as a result of the condition.

46. On August 12, 2013, physiatrist James Bates, M.D., performed a records review and forensic examination at Claimant's request. He opined she suffered PPI 10% whole person for her knee and foot conditions. This PPI included the 1% whole person PPI

which had been attributed to her knee surgery. He did not address the extent to which additional knee impairment was accident related versus degenerative. He did use the *Guides*' combining table to reduce the PPI applied to Claimant's right foot and knee conditions. Dr. Bates recommended restrictions. These included standing as tolerated up to 10-20 minutes and walking 2-5 minutes as tolerated with assistive devices, avoiding uneven surfaces, no stooping, squatting, or bending. He did not separate these restrictions as being knee vis-à-vis foot related. In post-hearing deposition, Dr. Bates well explained the bases for his opinions. He acknowledged that a substantial portion of his understanding comes from Claimant's self-reporting of her history and physical tolerances.

47. On January 8, 2014, physiatrist Gary Walker, M.D., reviewed records and examined Claimant at the request of Employer and Surety. Using the *Guides* he opined Claimant would be rated at 14% whole-person PPI for the T-spine fracture; he concurred with Dr. Bates' 4% whole-person PPI for each foot; he opined a 1% whole-person PPI for Claimant's right knee should be attributable to the 1996 nonsurgical meniscus tear and not to the 2008 accident, the 2008 condition being eclipsed by the 1996 event; he rated her right knee degeneration since the 1996 event and her feet to rate a 10% whole-person PPI; he concurred with Dr. Shrader's 15% whole-person PPI for the respiratory injury. Dr. Walker then applied the *Guides*' combining table. He recommended restrictions of sedentary work only, no walking more than 20-50 feet occasionally, and maximum lifting of 10 pounds. He would not opine about the causal relationships involved in considering whether a future total knee replacement should be attributed to work vis-à-vis degeneration. In post-hearing deposition Dr. Walker explained that the 1% PPI for the meniscal tear was attributed to the old injury because the *Guides* does not provide a

different rating for surgery versus the lack of it. Dr. Walker did opine it would be reasonable to attribute the 1% PPI to the 2001 accident as well because that is when Claimant became symptomatic.

48. Both Drs. Bates and Walker reviewed radiologists' reports of past X-rays and MRIs, particularly the older ones, instead of actual films. For medical history prior to 1991 they relied upon Claimant's memory.

Vocational Factors

49. Claimant was born March 10, 1957. She graduated from Burley High School in 1975. In the early 1990s she attended the College of Southern Idaho and earned an Associate's degree. She also took courses at Idaho State University but did not receive another degree. Claimant has been active with the Boy Scouts of America and is Woodbadge trained.

50. In the course of her adult life Claimant has worked as a caregiver, substitute teacher, office clerk and manager, life skills trainer, store manager, salesperson, baker, truck driver, newspaper delivery person, teacher's assistant, stock clerk, order filler, insurance specialist, quality control clerk, assembly and food processing line worker, secretary, feed-lot worker, and activities director.

51. Different employers in different ways have accommodated her lifting restriction.

52. From 1988 into 1990 Claimant worked for Dunlap Chiropractic. She did not know why that income does not show on her Social Security earnings record.

53. Claimant's Social Security earnings records show:

YEAR(S)	MEAN AVERAGE ANNUAL WAGE
1981-1987	2,600
1988, 89	0
1990	5,924
1991	0
1992-1998	2,062
1999-2003	16,905
2004-2007	2,362
2008	7,201
2009	7,840
2010	1,067

54. She and Employer separated employment about March 2010. A new director announced he would be assigning Claimant to return to her old caregiver duties as a result of budget cuts. She believed the caregiver duties exceeded the physical capacity of her feet and knee.

55. The best evidence shows Claimant's time-of-injury wage likely was $8.53 per hour. The record shows multiple alternative wage rates. Claimant's daily hours worked was highly variable.

56. In 2011, Claimant earned income working as an in-home caregiver. Her sister-in-law, Retta, was the patient. Retta arrived in Claimant's home in December 2010 with early stages of dementia or Alzheimer's disease. Claimant was a paid caregiver for Retta for a period of time. Pay was discontinued when the employer learned that Claimant owned the home in which she performed the caregiver tasks. Now a paid caregiver tends Retta in Claimant's home on a less than full-time basis. Claimant still provides caregiver tasks when the paid attendant is not present. In her September 2012 deposition Claimant testified that she believed she was capable of returning to the job and hours she worked at the time of injury if paid caregivers were present to tend her husband and Retta and if she

kept her rescue inhaler with her.

57. Claimant's husband suffered a disabling injury in 1984. Despite the progressive nature of the disability, he continued to work until 2004. By 2012 he was essentially wheelchair bound. Claimant provided an increasing role as an unpaid caregiver. At the time of hearing a paid caregiver assisted him in the home on about a ¾-time basis. Claimant provides unpaid care the remainder of the time.

58. Neither Retta nor Claimant's husband requires Claimant to lift them.

59. In 2012, Claimant worked for a few days for chiropractor Ronald Christensen as a receptionist. At hearing she testified that her sensitivity to odors caused her to discontinue that employment, but in deposition she mentioned pain in her feet and lack of computer skills while not actually stating a reason for discontinuing that employment. In her August 2014 deposition she testified she used her rescue inhaler twice during that employment.

60. Claimant has inquired about other jobs, but has not completed any applications.

Expert Vocational Opinions
Delyn Porter

61. Delyn Porter reviewed records and evaluated Claimant at Claimant's request. His report is dated November 6, 2013. He opined that if Dr. Bray's 2012 restrictions are applied Claimant is totally and permanently disabled from her preexisting foot conditions alone. If either Dr. Shrader's or Dr. Bates' restrictions are considered in isolation, Claimant is nearly totally and permanently disabled. He opined that before the 2008 accidents Claimant was competitive for about 14% of the jobs in the Burley labor market (which includes Twin Falls). Afterward she was competitive for about 1.5% of such jobs.

This represents a 91% loss of labor market access. He opined Claimant's pre-2008 wage earning capacity was $12.09 per hour at full-time employment as indicated by her 2000 earnings record. He considered as fact that Claimant earned $9.80 at her time of injury. Considering the wage attributable to the few positions for which Claimant remained competitive, loss of earning capacity was calculated to be 10%.

62. Mr. Porter opined a job search for Claimant would be futile, thus qualifying her as an odd-lot worker.

63. In an addendum, Mr. Porter evaluated Dr. Walker's restrictions and the reports of other vocational experts. His opinion that Claimant is an odd-lot worker did not change.

64. In post-hearing deposition Mr. Porter, contrary to his earlier written opinion that she had access to 1% of the local labor market, could not think of a job that she could perform. Otherwise, he did not change his opinions after reviewing the hearing transcript and physicians' depositions. He also opined that Claimant's work for Employer would qualify as a sympathetic employer situation.

Nancy Collins, Ph.D.

65. Nancy Collins, Ph.D., reviewed records and evaluated Claimant at Surety's request. Her report is dated June 28, 2013. She opined that if Dr. Bray's 2012 restrictions are applied Claimant is totally and permanently disabled from her preexisting foot conditions alone. She opined that if Dr. Patterson's restrictions are applied Claimant has lost access to 20 to 30 percent of her labor market as a result of her respiratory condition. Claimant's time-of-injury wage at $9.80 per hour for about two hours per day means she has no loss of earning capacity.

66. Dr. Collins actually observed Claimant experience a respiratory reaction to odor during an interview and that, having used her inhaler, Claimant could function despite her asthma. This response was consistent with Dr. Collins' experience in other cases. Dr. Collins has observed other individuals with RADS. From a functional/vocational standpoint, Claimant's condition appears less severe than these.

67. But for Claimant's foot condition, Claimant could return to her old job and/or perform sedentary, part-time jobs in the local labor market. Assuming Claimant has only 5% of the labor market available to her because of her feet, she loses another 20-30% of that 5% because of her respiratory condition.

William Jordan

68. Bill Jordan reviewed records and evaluated Claimant at ISIF's request. His report is dated January 30, 2014. He opined that if Dr. Bray's 2012 restrictions are applied Claimant is totally and permanently disabled from her preexisting foot conditions alone. He considered as fact that Claimant's time-of-injury wage was $8.53 per hour on a significantly part-time basis. Without ascertaining a specific percentage or range of disability, he opined jobs were available within Claimant's restrictions which would allow her to regain her time-of-injury wage.

69. In an addendum, Mr. Jordan opined that Dr. Walker's restrictions would not change his vocational opinions. Claimant could work from a wheelchair if necessary to accommodate her feet. Her respiratory condition would not combine with other conditions to result in a complete loss of labor market access.

70. In a second addendum dated June 5, 2014 Mr. Jordan identified specific jobs Claimant could work. Nevertheless, he stated that if Claimant were found totally

and permanently disabled, she was so disabled before the 2008 right knee injury. The 2008 right knee injury did not combine with her foot injury, and she worked for a sympathetic employer.

71. In post-hearing deposition, Mr. Jordan well explained his reasoning in identifying jobs potentially available to Claimant. Like Dr. Collins, Mr. Jordan has worked with clients whose respiratory conditions are significantly more severe than Claimant's.

72. While all three vocational experts opined that the feet restrictions imposed by Dr. Bray in 2012 would, standing alone, cause Claimant to be totally and permanently disabled, none of the experts rendered an opinion that Claimant's bilateral foot problems, as they existed immediately prior to Claimant's respiratory exposure, would cause total and permanent disability either alone, or in combination with Claimant's other pre-existing conditions and occupational injuries.

DISCUSSION AND FURTHER FINDINGS OF FACT

73. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996).

74. Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447−48, 74 P.2d 171, 175

(1937). See also, *Dinneen v. Finch*, 100 Idaho 620, 626−27, 603 P.2d 575, 581−82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

75. The Referee found that Claimant made a good first impression as a pleasant, credible person, and this finding is accepted by the Commission. Her demeanor gave no indications of intention to mislead. Where Claimant's testimony corrected or amplified upon medical records which refer to a family history of asthma or to preexisting asthma, Claimant's testimony carries greater weight. Where Claimant has given varying reasons for leaving one or another job, all reasons are taken together as multi-factorial bases for her decisions. In every other aspect and instance, Claimant's testimony has been consistent with other evidence of record.

76. The record shows Claimant has been a good worker, valued by her employers. Her return to Warren House in 2007 does not represent the act of a sympathetic employer. Accommodations afforded by this and other employers do not rise to the level of establishing that any employer was a sympathetic employer as that term is used for odd-lot disability determinations. Rather, the evidence shows it likely Warren House valued the skills, character, and work ethic she brought to the job.

77. According to Dr. Petersen, Claimant's 2008 knee injury became medically stable on October 1, 2008. According to Dr. Patterson, Claimant's 2008 respiratory injury became medically stable on December 1, 2009. As developed above, Claimant continued to work at her time-of-injury position until March of 2010. Neither her residual respiratory nor right knee limitations prevented her from performing the requirements of this job.

78. As developed above, Claimant suffered from a number of pre-existing physical conditions, but only two are relevant to a discussion of ISIF liability. Claimant's

T6 injury resulted in a 14% PPI rating and a permanent lifting restriction of 15 pounds. Claimant's thoracic spine condition remained essentially stable from 1991 through the date of hearing. This condition was manifest and hindered Claimant in her ability to perform remunerative activities by denying her access to many jobs she had been able to perform before the T6 injury. However, Claimant's thoracic spine condition did not limit her in her ability to perform her time-of-injury job.

79. The other vocationally significant pre-existing condition is Claimant's bilateral foot problems, first noted in the early 2000s. The severity of Claimant's bilateral foot problems has progressed over time. By August of 2013, Claimant's progressive condition was rated at 4% of the whole person for each foot. The record does not reflect that any physician offered an opinion as to the extent of Claimant's bilateral foot impairment immediately prior to her 2008 respiratory exposure. Even so, it is clear that these problems were manifest and constituted a subjective hindrance to Claimant prior to the subject accident. However, Claimant was able to perform the requirements of her time-of-injury job through March of 2010, the progression of her foot difficulties notwithstanding. However, by as early as February of 2012, Claimant's bilateral foot complaints had progressed to the point that all vocational experts who rendered opinions in this case proposed that Claimant's bilateral foot problems, standing alone, were sufficient to cause total and permanent disability.

Permanent Disability

80. **"**Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be

reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430.

81. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 766 P.2d 763 (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, 896 P.2d 329 (1995).

82. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423 and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See*, *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

83. If a claimant is able to perform only services so limited in quality, quantity, or dependability that no reasonably stable market for those services exists, that worker is to be considered totally and permanently disabled. *Id.* Such is the definition of an odd-lot worker. *Reifsteck v. Lantern Motel & Cafe*, 101 Idaho 699, 700, 619 P.2d 1152, 1153 (1980); see also, *Fowble v. Snowline Express*, 146 Idaho 70, 190 P.3d 889 (2008). Odd-lot presumption arises upon showing that a claimant has attempted other types of

employment without success, by showing that the claimant or vocational counselors or employment agencies on the claimant's behalf have searched for other work and other work is not available, or by showing that any efforts to find suitable work would be futile. *Boley*, *supra.*; *Dehlbom v. ISIF,* 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997). Odd-lot status is a question of fact for the Commission to decide. *Boley*, *supra.*

84. Idaho Code § 72-332 specifies that the ISIF may share responsibility for an injured worker's total and permanent disability if that total and permanent disability is caused by a combination of the permanent effects of the work-related accident and a "pre-existing impairment."

85. In order to hold the ISIF responsible for some percentage of an injured worker's total and permanent disability, the statute requires 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. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990). To satisfy the "combined with" element of the *prima facie* case, it must be demonstrated that but for the pre-existing impairment, Claimant would not be totally and permanently disabled. *Bybee v. ISIF*, 129 Idaho 76, 921 P.2d 1200 (1996).

86. In the case of a pre-existing impairment which is progressive, some rule must be applied to determine the point in time at which the impairment is 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. For example, let us assume that as of the date of an industrial accident, a hypothetical claimant suffers from a progressive

neurological condition which, though manifest, is not significant enough to constitute a subjective hindrance to claimant's employability. However, when hearing on the merits is held three years later, claimant's pre-existing neurological condition has progressed to the point that it does constitute a subjective hindrance, so much so that it combines with claimant's accident-produced condition to cause claimant's total and permanent disability. If the subjective hindrance component is assessed as of the date of accident, a critical element of the *prima facie* case against the ISIF could not be satisfied. However, if the subjective hindrance component of the *prima facie* case is assessed as of the date of hearing, this component of ISIF liability would be met.

87. It might be argued that the recent case of *Brown v. The Home Depot*, 152 Idaho 605, 272 P3d 577 (2012) supports a conclusion that the nature of Claimant's pre-existing but progressive condition should be evaluated as of the date of hearing. In *Brown*, the Commission evaluated claimant's disability based on his labor market as it existed as of the date of medical stability. On appeal, claimant argued that his disability should have been evaluated based on his labor market as it existed as of the date of hearing. By the date of hearing, the Idaho economy was in recession, and employment opportunities for claimant were significantly more limited than they were as of the date of medical stability. Therefore, claimant would likely be entitled to a higher award of disability if that evaluation was conducted with his date of hearing labor market in mind. The Court narrowly identified the issue before it as which of the two labor markets in question should be utilized in evaluating claimant's disability. The Court observed that under Idaho Code § 72-425, a permanent disability rating is intended to be a measure of claimant's "present and probable future ability to engage in gainful activity." The word "present" implies that

the Commission must evaluate claimant's disability based on conditions extant as of the date of hearing. Otherwise, such evaluation would not be reflective of claimant's "present" disability. Arguably, this rationale extends to all factors relevant to the evaluation of Claimant's disability. However, the *Brown* Court ruled only that the relevant labor market for evaluating claimant's disability is claimant's labor market as of the day of hearing. Nothing in *Brown* specifically addresses the question presented in this matter, i.e. in the case of a progressively worsening preexisting condition, at what point in that progression should ISIF liability be evaluated?

88. Although not addressed in *Brown*, the timing of making the aforementioned assessment of the *prima facie* elements of a case against the ISIF has been addressed in *Colpaert v. Larson's, Inc.*, 115 Idaho 852, 771 P2d 46 (1989).

89. Colpaert was hired by Larson's in 1979. Prior to her date of hire, she was afflicted with a condition known as ataxia, a progressive neurological condition which attacks nerves and muscles throughout the body. Both Colpaert and her employer were aware of this condition at the time she was hired. Colpaert informed Larson's that she would not be able to perform work which required her to negotiate stairs or stand on her feet for long periods of time. Larson's nevertheless hired claimant with the intent of accommodating these restrictions.

90. In December of 1982, claimant suffered a work-related injury to her right shoulder. Following surgery she returned to work in March of 1983. She was discharged in April of 1983 for reasons unconnected to her work injury. In June of 1983, claimant was given a 15% upper extremity rating for her shoulder injury.

91. It was shown that claimant's ataxia was a progressive condition which worsened after claimant left her position with Larson's.

92. A hearing on the matter was held on November 22, 1984. In its subsequent decision of April 28, 1987, the Commission concluded that claimant's accident-produced impairment should be increased to 30% of the upper extremity. The Commission also concluded that the elements of ISIF liability had been satisfied for claimant's pre-existing and progressive ataxia. The ISIF appealed, citing a number of errors. First, the ISIF argued that because claimant's pre-existing ataxia was a progressive condition, she could not be deemed to have had a "permanent" physical impairment at the time of her industrial accident. The Court rejected this argument, concluding that the progressiveness of claimant's pre-existing condition is irrelevant to the process by which claimant's permanent physical impairment is rated. The statute merely requires that the assessment of claimant's pre-existing impairment be conducted at a point in time immediately prior to the work-related accident:

> In this case the Commission relied upon the testimony of Dr. Robert Burton, a neurologist hired by the surety to determine that Colpaert's ataxia produced an impairment of 30% of the whole man prior to December 12, 1982, the date of her shoulder injury. The rating of the permanent physical impairment is made at a point in time just prior to a claimant's industrial accident or injury. In other words, the rating is made, based on expert testimony, *at a specific point in time*. Thus, whether the condition is progressive or not does not impact this rating and the income benefits which flow from it.

(Colpaert Decision at 4).

Therefore, for the purpose of assessing ISIF liability, a snapshot of the extent and degree of claimant's permanent physical impairment is taken immediately prior to the industrial accident.

93. The ISIF also argued that the Commission erred in concluding that claimant's ataxia was "manifest" prior to her employment because there was no medical diagnosis of claimant's ataxia prior to her date of hire. The Court rejected this hypertechnical construction of the statute and affirmed the Commission ruling that claimant's permanent physical impairment was manifest prior to the work accident of December 12, 1982. "Manifest" means that either the employer or the employee was aware of the preexisting condition so that the condition can be established as having existed prior to the work injury. *Royce v. Southwest Pipe of Idaho*, 103 Idaho 290, 647 P2d 746 (1982). In the underlying case, the Commission concluded that claimant's ataxia was manifest prior to the work injury because both claimant and employer were aware of the condition, and in fact discussed how to accommodate claimant's limitations from that condition before her date of hire.

94. The ISIF also challenged the Commission's conclusion that claimant had satisfied her burden of demonstrating that claimant's ataxia constituted a subjective hindrance or obstacle to employment. The Court rejected this argument, citing testimony of claimant demonstrating that prior to her date of hire, she told employer that she had a condition which limited her in her ability to negotiate stairs and stand/walk for protracted periods of time. This evidence was found sufficient to support the Commission conclusion that claimant's pre-existing impairment constituted a subjective hindrance to her employability.

95. Finally, the Court upheld the Commission conclusion that the effects of claimant's ataxia and her accident produced injury combined to cause total and permanent

disability. Supporting this conclusion was testimony that claimant's ataxia interfered with her recovery from her shoulder injury and left it incomplete.

96. From *Colpaert*, it is clear that in determining whether the elements of ISIF liability are satisfied, a pre-existing condition must be assessed as of the date immediately preceding the work injury. A snapshot of Claimant's pre-existing condition must be taken as of that date, and from that snapshot Claimant's impairment must be determined, as well as whether Claimant's condition was manifest and constituted a subjective hindrance to Claimant. Finally, it must be determined whether Claimant's pre-existing condition, as it existed immediately before the work accident, combines with the effects of the work accident to cause total and permanent disability. *Colpaert* lends no support to the proposition that in evaluating ISIF liability for a pre-existing but progressive condition, that condition should be assessed as of the date of hearing, i.e. at a time when Claimant's condition is much worse.

97. In order to determine whether a pre-existing condition constituted a subjective hindrance as of a point in time immediately preceding a work accident, one must assess, as the Commission did in *Colpaert*, the nature of the limitations/restrictions extant as of that date. It follows that in determining whether the pre-existing condition combines with the effects of the work accident to cause total and permanent disability, that assessment, too, must be performed in view of the limitations/restrictions arising from the pre-existing impairment as of a point in time immediately preceding the work accident, not the limitations/restrictions relating to the condition as it may have progressed as of the date of a subsequent hearing. To do otherwise would be to hold the ISIF responsible for something other than a "pre-existing" condition. In what sense can an impairment and

related limitations be said to pre-date the work accident when some portion of the impairment and limitations arose after the work accident? The only solution that comports with the statutory design upon holding the ISIF responsible only for pre-existing impairments is to measure all elements of ISIF liability as of a point in time immediately preceding the work accident. *Colpaert* makes it clear that the ISIF cannot be held for the progression of impairment or limitations/restrictions which arise subsequent to the date of injury.

98. Having reached this conclusion, it is not necessary for us to determine whether Claimant is totally and permanently disabled as of the date of hearing. All we need determine is whether Claimant was totally and permanently disabled as a result of the combined effects of her pre-existing conditions (as they existed prior to the work accidents) and the residual effects of the work accidents after Claimant reached medical stability. Claimant's pre-existing feet problems, assessed as of the date immediately prior to her 2008 accident, were not sufficiently severe to cause Claimant to be totally and permanently disabled when those problems are combined with the thoracic spine condition and Claimant's work-related injuries. This conclusion finds all the support it needs in the fact that Claimant continued to be able to work at her time-of-injury job for approximately 15 months subsequent to her December 1, 2009 date of medical stability for her respiratory condition. Further, Claimant did not leave her job as Activities Director because of her inability to perform the same. Rather, she left because Employer had designs upon adding to her job certain responsibilities which she was incapable of performing. Although Claimant's pre-existing feet problems were significant as of the dates of the 2008 accidents, they had not yet progressed to the point that she was totally and permanently

disabled as a result of that pre-existing condition, her thoracic spine condition and the subject work accidents.

99. For these reasons, we conclude that the ISIF bears no responsibility in this matter, even though Claimant probably is totally and permanently disabled as of the date of hearing.

CONCLUSIONS OF LAW AND ORDER

1. For purposes of evaluating ISIF liability, pre-existing conditions must be rated as of the date immediately preceding the work accident. As well, whether such impairments were manifest, constituted a subjective hindrance to employment, and combined with the work accidents to cause total and permanent disability must be determined based on the pre-existing condition as it existed immediately prior to the work accident.

2. Claimant's pre-existing conditions, as they existed prior to the work accidents, did not combine with the residual effects of the work accidents to cause total and permanent disability.

3. ISIF is not responsible for the progression of Claimant's bilateral foot problems in the years since the industrial accidents.

4. ISIF is not liable for the payment of benefits since the threshold element of total and permanent disability is not satisfied.

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

DATED this 15th day of August, 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 15th day of August, 2016, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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ka ____/s/_____