BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

PENNIE SOLTERO, Claimant, v. CONAGRA FOODS, Employer, and OLD REPUBLIC INSURANCE COMPANY, Surety, Defendants.	**IC 2011-028027** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed July 16, 2015

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Douglas A. Donohue, who conducted a hearing in Pocatello on July 18, 2014. Claimant was represented by Albert Matsuura, Esq. Defendants were represented by Nathan Gamel, Esq. The case came under advisement on March 9, 2015. On or about June 15, 2015, Referee Donohue submitted his Findings of Fact, Conclusions of Law and Recommendation to the Industrial Commission. The Commissioners have reviewed the proposed Decision, along with the evidence adduced at hearing, and by way of post hearing depositions. For reasons that will be evident to anyone who compares the recommendation to this decision, the Commission has chosen not to adopt the recommendations of the Referee, and in lieu thereof, makes its own Findings of Fact and Conclusions of Law.

ISSUES

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

1. Whether and to what extent Claimant is entitled to permanent disability in excess of impairment, including 100% total permanent disability;

2. Whether Claimant is permanently and totally disabled under the odd-lot doctrine;

3. Whether apportionment of permanent disability for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate.

In her request for calendaring, the single issue raised by Claimant was the extent and degree of her disability in excess of impairment, including whether she is permanently and totally disabled under the odd lot doctrine. In their response Defendants raised the additional issues of whether Claimant's disability, if less that total, should be apportioned under Idaho Code § 72-406, and if total, should be apportioned between Employer and ISIF under Idaho Code § 72-432. However, the ISIF is not a party to these proceedings, and therefore no finding by the Commission treating the issue of ISIF liability could bind the ISIF. Although the notice of hearing reflects that the issue of ISIF apportionment is reserved, it is not reserved for this case. Rather, it may be raised, if at all, in connection with a complaint filed against the ISIF.

CONTENTIONS OF THE PARTIES

Claimant contends she is totally and permanently disabled, 100%, alternately, as an odd-lot worker. Her 20-pound lifting restriction and non-medical factors, particularly her learning disabilities, leave her unable to compete in the labor market.

Employer and Surety acknowledge Claimant may have some disability in excess of PPI. She failed to prove total permanent disability under either theory. She had a 25-pound lifting restriction imposed in 1992 and worked continuously thereafter. With a recent 20-pound lifting restriction, five fewer pounds does not render her totally and permanently disabled. Claimant was motivated to seek work for a while, but after Social Security Disability benefits kicked in, she has stopped looking for work. Moreover, whatever partial disability she now has is largely apportionable to her preexisting conditions.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant;

2. Claimant's exhibits A through L;

3. Defendants' exhibits 1 through 20; and

4. Depositions of vocational rehabilitation specialist Terry Montague and ICRD consultant Chris Horton.

All objections made in post-hearing depositions are overruled.

FINDINGS OF FACT

1. Claimant was born August 22, 1961 and was 52 years old as of the date of hearing.

2. Claimant dropped out of high school after completing the 10th grade. She explained that she dropped out because she could not learn how to read. Although she testified that she is pursuing her GED, testing undertaken prepatory to pursuing a GED program demonstrated that she must improve her reading proficiency before she can participate in a structured GED program. (Hearing Transcript, 44/11-45/9.) Claimant believes that she currently reads at about a third grade level, while she self-rates her math skills at about the fourth grade level. She testified that she can read a child's "ABC" book and that she cannot handle math problems more sophisticated than dividing by a one digit number. (Hearing Transcript, 49/23-50/20.) Claimant intends to pursue reading and math studies on her own until she is proficient enough to enroll in a GED program.

3. Since leaving high school Claimant has performed unskilled work. She initially worked at area cafes washing dishes. She then briefly worked as a general laborer at the Simplot facility in Aberdeen. In approximately 1983, she began work at Lamb Weston, ConAgra's

predecessor-in-interest. At Lamb Weston, Claimant was initially employed on the trim line, and then in sanitation. In the sanitation department she used high pressure hoses to clean manufacturing equipment. She performed this work for approximately 11 years. Then, in approximately 1993, Claimant took a position as a chemical room attendant. She worked there until the subject accident.

4. Claimant has suffered a number of work-related injuries over the years for which claims were made. Only one of these, a claim filed in 1992, is relevant to the instant proceeding.

5. In March of 1988, Claimant presented to Stephen Maloff, M.D., with complaints of right hand pain which extended up her proximal arm and into her shoulder. Claimant was placed on light duty work and given a wrist immobilizer. By May of 1988 she was doing somewhat better, and allowed to return to her job in sanitation. Dr. Maloff's records from March through May of 1988 do not suggest that he ever came to a definitive diagnosis for Claimant's right upper extremity problems.

6. Claimant was not seen again by Dr. Maloff until January 27, 1992. At that time, Dr. Maloff took a history from Claimant that she was suffering from long-standing and accelerating discomfort in regards to her right upper extremity. (*See* Defendants' Exhibits at 288.) Electrodiagnostic testing was normal. However, Claimant did exhibit a positive Tinel sign. On or about January 27, 1992, Claimant also caused an Employer's First Report to be filed with her employer, which identifies a date of initial diagnosis of March 12, 1987 and references an injury to her right upper extremity which she related to the use of a high pressure hose and banding. (*See* Defendants' Exhibits at 406.) An amended Form 1 dated January 30, 1992, and filed with the Industrial Commission on January 31, 1992, references the same right upper extremity condition, but relates it to the use of a banding hammer and the act of banding.

Finally, the amended Form 1 references a date of exposure or initial diagnosis of January 20, 1992. At any rate, it seems clear that the employer's first reports referenced above identify the same injury. Dr. Maloff's notes do not reflect that he was ever able to come up with a definitive diagnosis for Claimant's intractable hand, arm and shoulder pain. He expressed his skepticism that Claimant would ever be able to return to her time-of-injury job with Lamb Weston.

7. In June of 1992, Claimant was seen by Ercil Bowman, M.D., at the instance of Employer. Dr. Bowman noted that Claimant gave a history of persistent pain/discomfort in her right upper extremity between 1987 and 1992. She told Dr. Bowman that in 1991 she left her job in sanitation to change to a utility laborer position in the packaging department. This job evidently required her to use a banding machine which significantly increased her discomfort. At the time of his evaluation of Claimant, Dr. Bowman noted that Claimant presented with complaints of pain in the volar wrist that went up to the mid-forearm, and then up the medial border of the arm to the shoulder. No abnormalities were noted on clinical exam, however, and Dr. Bowman ultimately concluded that Claimant had a "possible over use syndrome" up the right upper extremity. He was, however, unable to find evidence of a physical impairment. (*See* Defendants' Exhibits at 297-303). Dr. Bowman did not give Claimant any specific limitations/restrictions.

8. On September 25, 1992, Claimant was seen at Employer's instance by Michael Phillips, M.D. To Dr. Phillips, as well, Claimant gave a history of persistent right upper extremity symptomatology since 1987. Dr. Phillips noted that neither blood, radiological or electrodiagnostic testing had suggested a cause of Claimant's complaints. As of the date of his evaluation of Claimant, Claimant complained of pain in the wrist radiating to the forearm along the lateral epicondyle and up into the deltoid and coracobrachialis areas of the arm. She also

complained of pain and discomfort in the shoulder area in the region of the supraspinatus muscle. Claimant's physical exam was unremarkable. Dr. Phillips noted that Claimant demonstrated neither symptoms nor physical signs of neuromuscular impairment of the right upper extremity. Nerve conduction studies were normal, ruling out a nerve compression syndrome in the extremity. He was unable to detect any localized tenderness over the tendons of the wrist which might suggest a chronic tenosynovitis. There were no physical signs to suggest underlying clinical rheumatoid arthritis or other connective tissue disorder. However, he evidently concluded that Claimant's complaints of pain and discomfort in the right upper extremity were legitimate, for he diagnosed her as suffering from mild fasciitis of the right arm and forearm, chronic in nature. He concluded with the following remarks relevant to his views on Claimant's permanent limitations/restrictions:

> Considering the severity of Ms. Soltero complaints I believe it would be difficult to return her to her usual and customary occupation of sanitation utility laborer. When questioned she did not seem to function well with her most recent return to work in lighter capacity. She states working at the trim table and other lighter positions still aggravated her right upper extremity symptoms. I see no medical contra indication however to returning her to the type of work activity. The usage of a high pressure hose and lifting over 25 pounds would most likely be very difficult considering her complaints.
>
> Summary In conclusion Ms. Soltero has developed a rather chronic myofasciitis of the right upper extremity. I do not believe she could successfully return to her previous manual labor position. I see no medical contra-indication to a lighter type duty restricting her lifting to less than 25 pounds. Avoidance of repetitious activity the use of heavy objects such as a high pressure hose would be desirable.
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> Defendants' Exhibits at 308.

When Claimant was seen by Dr. Maloff on October 26, 1992, Dr. Maloff expressed his agreement with Dr. Phillips' evaluation, indicating that he was willing to allow Claimant to return to work on the trim line. He cautioned, however, that this repetitive type work might be problematic for Claimant, though certainly less onerous than her sanitation job. In a note dated

August 16, 1993, Dr. Maloff stated that Claimant was doing reasonably well, although she felt she was sometimes being asked to do more than anticipated by Dr. Phillips. Dr. Maloff reiterated the restrictions given by Dr. Phillips, specifically, that Claimant should be restricted from lifting more than 25 pounds and should not be involved in the use of high pressure hoses and similar activity. He continued to express his agreement with the diagnosis given by Dr. Phillips but said he was unable to define what, if any, impairment was warranted by this condition. He recommended that Claimant undergo a functional capacity evaluation. This evaluation did not demonstrate any deficiencies in strength, and therefore provided no support for an impairment rating.

9. Notwithstanding a lack of specific objective findings, Dr. Maloff nevertheless offered Claimant an impairment rating on June 30, 1994, of 15% of the upper extremity. (*See* Defendants' Exhibits at 296). Surety eventually paid an impairment rating of 7.5% of the upper extremity, representing the average of the 15% upper extremity rating given by Dr. Maloff and the 0% impairment rating given by Dr. Phillips. This rating of $4,455.00 was paid on or about September 23, 1994. (*See* Defendants' Exhibits at 428). Defendants have erroneously suggested that the payment of this rating represents the payment of a rating for a 1987 claim that exists independent of the impairment rating for Claimant's 1992 claim. In fact, the only rating paid to Claimant for the problems that first arose in 1987, and were later rated in 1993 is the 7.5% impairment rating referenced in the September 23, 1994 Notice of Claim Status.

10. In connection with the 1992 claim, Claimant sought and received the assistance of the Industrial Commission Rehabilitation Division. Claimant's ICRD file is extensive, but the Commission's rehabilitative efforts are synopsized in the April 22, 1993 Summary of Services and Closure. The closure notes reflect that following Dr. Phillips' IME, a position for Claimant

as a chemical room attendant was identified with Employer which was thought to fit within the restrictions given by Dr. Phillips. Per the consultant, a detailed job site evaluation conducted of the chemical room attendant job confirmed that the job was suitable for Claimant. Claimant had been performing the new job for a little over two months as of the date of file closure, without apparent complaints. Interestingly, the job site evaluation for the position of chemical room attendant, prepared in January of 1993, reveals that the job required maximum lifting of only 35 pounds occasionally. (*See* Defendants' Exhibits at 552.)

11. In connection with the 1992 claim, Claimant also underwent a vocational evaluation performed by Joy Plummer, a vocational evaluator employed by SWIFT (Special Workers Industries for Training). To Ms. Plummer, Claimant gave a history of having attended school through grade 7 in American Falls, with additional education through the eleventh grade in a special needs school in Salt Lake. Claimant reported having significant difficulty in school due to dyslexia and related problems with reading. Testing performed by SWIFT demonstrated that Claimant's academic skills were well below average. In fact, Ms. Plummer observed that based on the results of academic testing, further formal education did not appear to be feasible. While Claimant was found to have average to above average visual processing ability, she had below average ability relating to short-term memory, long-term retrieval, auditory processing, processing speed and comprehension. On the positive side, testing performed by SWIFT demonstrated that Claimant possessed good transferrable skills in relation to work involving handling, sorting, inspecting, tending and related work duties. Ms. Plummer cautioned, however, that the work for which Claimant seemed to have the best aptitude was also the type of work that might be unsuitable for her due to her persistent right upper extremity complaints.

12. In January of 1997, Claimant filed her complaint with the Industrial Commission in which she sought additional benefits for the 1992 right upper extremity injury. (*See* Defendants' Exhibits at 423.) That complaint was later dismissed upon stipulation of the parties.

13. Claimant continued to work in the chemical room attendant position, and did so until the subject accident of November 11, 2011. Claimant testified that after she took the chemical room attendant job, her right upper extremity complaints significantly resolved:

> Q. And into April - - this is April 18, 1988 - - you were then complaining of pain in your right bicep and also into your right shoulder, still. So my question is this: When you had the conversation with Dr. Maloff and he said - - according to you - - he said, "You're going to have this problem for the rest of your life," did that turn out to be true? Did you continue from that point on to have that pain in your right wrist, up your right arm, and into the deltoid part of your right shoulder like he said you would?
>
> A. No. When I took the chemical room job, I would just use my arm once in a while, and it wasn't that bad.
>
> Q. What do you mean by not "that bad"?
>
> A. Just into the wrist part, when I lifted the jug. This is the only part it was really bothering me.
>
> Hearing Transcript, 56/12-57/2.

However, Claimant evidently admitted to having more significant symptoms in her right upper extremity in this job at the time of her pre-hearing deposition:

> Q. Do you recall- - and I took your deposition and it was on the phone, so this is kind of the first time we've met face to face - - and I asked you a question about what the status was of your right arm leading up to the November 2011 accident. And you told me that your arm actually never got better, that when lifting things like jugs, you actually continued to experience pain and tingling and even five-finger numbness in your right hand leading all the way up to the November 2011 injury. Do you recall telling me that?
>
> A. I don't remember.
>
> Q. Do you have any reason to doubt telling me that?

A. I just don't remember what I - - you know, when we talked. I have a really bad memory.

Q. Okay. But when you told me that, I imagine when you told me that, under oath, during your deposition that would have been true - -

A. Yes.

Q. - - correct?

Hearing Transcript, 57/3-23.

…

Q. Now - - scratch that. I went through a little bit of your prior deposition testimony with you as far as telling me that your right-extremity symptoms, dating back to 1992, actually never went away. You couldn't remember that testimony.

So let me change my question just a little bit. Do you remember that actually being accurate; in other words, did you actually continue to experience pain and swelling from 1992 to November of 2011 in your right extremity?

A. In my wrist.

Q. And you also told me during your deposition that you also had swelling into your hands, as well, when you were engaged in lifting. Do you recall some swelling in your hands and fingers?

A. My hands and my fingers, yes.

Q. So right wrist, your right hand. Do you recall testifying at your deposition that in September of 2011 - - so at least two months prior to your date of accident for this claim - - that you actually had started experiencing right-shoulder pain that was bad enough that you reported it to your lead? So this would have been two months before your November 2011 accident.

A. I don't remember that.

Q. Okay. Do you have any reason to - - I mean, that's what you told me during your deposition. Do you have any reason to dispute the accuracy of that?

A. No. I just don't remember, you know what we - - how - - let's see.

Q. Is that accurate, that you did report that you had right-shoulder pain in September of 2011 when you reported that to your lead?

A. Yes.

Q. Where in your shoulder?

A. It was in here, up in here.

Q. In the front of your shoulder?

Hearing Transcript, 68/19-70/5.

…

Q. So in September of 2011, you were experiencing right-shoulder pain; correct?

A. Yes.

Q. And you reported that right-shoulder pain to your job lead; correct?

A. Yes.

Q. And you were just showing me that that pain that you were experiencing was in the front part of your shoulder; correct?

A. Yes, like the muscle.

Q. Okay. So it's in the front-shoulder-muscle area?

A. Yeah.

Q. Is that where you're experiencing pain after - - is that where you were experiencing pain in your right shoulder after the November 2011 accident, as well?

A. No. It was back here.

Q. So it's a different part of your shoulder?

A. Yes.

Q. And so do you continue to experience pain in the front of your right shoulder?

A. Not as much now.

Q. It's still there?

A. It's there.

Hearing Transcript, 70/17-71/16.

Therefore, while performing her job as a chemical room attendant, Claimant did experience some ongoing pain/discomfort in the right upper extremity, particularly the right hand and wrist. It is less clear to what extent she suffered from pain in the right arm and shoulder, although it does seem clear that in the two months prior to the date of the subject accident Claimant experienced some discomfort in the front of her right shoulder, but of a different sort than the right shoulder pain she experienced as a result of the subject accident.

14. There is no dispute that on November 11, 2011, Claimant suffered a compensable accident/injury while working as a chemical room attendant. She described the accident as follows:

> Q. Let's talk about the work accident that occurred on November 11th, 2011. What job were you performing that day?
>
> A. I was lifting the chemicals off the chemical machine. And I was - - I picked it up, and I went like that, and my arm popped. And I put it back down. And it started hurting really bad.
>
> Q. So let's back up a little bit. You say lifting chemicals off the chemical machine. Could you explain that a little better for us, as far as the - -
>
> A. There's a chemical machine in the back there that you set a chemical - - I mean a jug inside. And you put it - - whatever you want, it shows. And then you push it, and it fills up with the chemical.
>
> Q. So it's a dispensing machine - -
>
> A. Yes.
>
> Q. - - that you're filling jugs from - -
>
> A. Then after it's full, you pick it up, and you put it on the cart. And that's how I was doing it.
>
> Q. So you picked up the jug from the dispensing machine?

A. Yes. Then my arm - -

Q. Now, what - -

A. I go like that, and it popped. And it started hurting really bad.

Hearing Transcript, 36/23-37/23.

Claimant was initially seen at Physician's Immediate Care Center. Jay Wiley, D.O., ordered an MRI of Claimant's right shoulder which was performed on December 21, 2011. That study was read as follows:

> 1. Large multiloculated paralabral cyst, seen posterior and superior to the glenoid margin that is presumed to be from a nonvisualized posterosuperior labral tear. This dissects into the suprascapular and spinoglenoid notches and has led to significant atrophy and fatty infiltration of the teres minor muscle.
>
> 2. Mild tendinopathy of the distal supraspinatus but no partial or full-thickness tears.
>
> 3. Mild osteoarthrosis of the AC joint that, in association with anterior down-sloping of the acromion, leads to mild to moderate encroachment of the supraspinatus outlet.
>
> 4. Intact humeral head, long biceps tendon, and biceps anchor.
>
> Defendants' Exhibits at 46-47.

Claimant was then briefly seen by Chris Johnson, D.O., before being referred for further evaluation to Kenneth Newhouse, M.D. Dr. Newhouse initiated conservative therapies which proved unsuccessful in relieving Claimant's right shoulder discomfort.

15. At the instance of Surety, Claimant was evaluated by Brian Tallerico, D.O. on March 16, 2012. To Dr. Tallerico, Claimant did not give a history of her prior right upper extremity complaints and treatment from 1992. Dr. Tallerico reported that Claimant complained of continuous right shoulder pain involving the entire shoulder region. She also complained of some catching and popping in the right shoulder, with accompanying weakness and loss of

motion. Dr. Tallerico diagnosed a right shoulder sprain/strain referable to the subject accident with resultant subacromial impingement/rotator cuff tendonitis. He also diagnosed a pre-existing right superior posterior labral tear with a paralabral cyst extending to the teres minor muscle. Dr. Tallerico evidently concluded that the labral tear was pre-existing based on the MRI finding of significant atrophy and fatty infiltration of the teres minor muscle. However, he proposed that the labral tear could have been aggravated by the November 11, 2011 industrial accident. Dr. Tallerico recommended that Claimant undergo arthroscopic subacromial decompression. As well, he recommended arthroscopic evaluation of the labral tear to see whether these tears could be repaired. He expressed concern about the feasibility of repairing the labral tear in view of the probability that it had been torn a "long time". He also had concerns about the paralabral cyst demonstrated on the MRI, and felt that the cyst was probably compressing the suprascapular nerve, and that great care should be taken to preserve nerve function.

16. Dr. Newhouse agreed with Dr. Tallerico's recommendations. He performed a shoulder reconstruction surgery on or about May 2, 2012. Surgical findings included glenohumeral joint chondrosis, posterior labral tearing, posterior labral cyst and anterior superior labral tearing.

17. Claimant had a difficult recovery post surgery. However, by January 10, 2013, Dr. Newhouse felt that Claimant had reached a point of medical stability. Using the fourth edition of the Guides to the Evaluation of Permanent Impairment, Dr. Newhouse gave Claimant an 8% whole person rating. Dr. Newhouse gave Claimant permanent restrictions on or about January 11, 2013. He recommended that she avoid all lifting, pushing/pulling, climbing and reaching above shoulder height. He would allow her to occasionally reach below shoulder level as well as occasionally engage in repetitive arm/hand activity. He would allow her to engage in

grasping/handling on a frequent basis. He felt that these restrictions would be permanent. In a subsequent letter to the Industrial Commission dated February 15, 2013, Dr. Newhouse amended these restrictions to allow Claimant to lift and push/pull weights of up to five pounds on an occasional basis.

18. Claimant was seen again by Dr. Tallerico for the purpose of a closing exam on February 15, 2013. Again, it does not appear that Dr. Tallerico had a history from Claimant of her 1992 injury. Nor does it appear that Dr. Tallerico reviewed any of the medical records generated in connection with treatment following the 1992 injury. Dr. Tallerico diagnosed Claimant as suffering from a right shoulder sprain/strain related to the November 11, 2011 industrial accident. He also felt that the accident permanently aggravated Claimant's pre-existing degenerative labral tear, paralabral cyst and underlying chondromalacia. Finally, Dr. Tallerico opined that the shoulder reconstruction surgery performed by Dr. Newhouse was causally related to the subject accident. He recommended no further treatment and concurred that Claimant was medically stable. However, under the sixth edition of the AMA Guides to the Evaluation of Permanent Impairment, he felt that Claimant was only entitled to a 5% PPI rating.

19. Dr. Tallerico offered the following opinion on the extent and degree of Claimant's permanent limitations/restrictions referable to her right shoulder condition:

> She does have permanent work restrictions. Given her significant shoulder pathology, I would recommend no extended overhead use of the right arm and shoulder; no lifting, pushing, pulling, or carrying with the right upper extremity greater than 20 pounds; no ladders; and no repetitive activities below waist or shoulder level, such as mopping, sweeping, cleaning.
>
> In other words, I feel that the examinee, due to her right shoulder condition, would be best served in a sedentary or light duty position.
>
> Defendants' Exhibits at 193.

In a note dated March 12, 2013, Dr. Newhouse stated that he had reviewed Dr. Tallerico's report and agreed with Dr. Tallerico's recitation of Claimant's permanent limitations/restrictions. However, Dr. Newhouse continued to feel that Claimant was entitled to an 8% PPI rating.

20. On April 26, 2013, Claimant resigned because Employer had no more work within her restrictions.

21. On March 28, 2013, Claimant reported to Social Security, "I broke my arm at work and the doctor told me I only can lift five pounds." On June 18, 2013, Social Security approved Claimant for disability benefits effective December 4, 2012. The bases for disability included "torn rotator cuff, asthma, diabetes, high blood pressure, learning disability."

22. On July 23, 2013, John Dickey, Ph.D., provided a psychological assessment.

23. Claimant returned in September 2013 for recently arising shoulder area complaints. Dr. Newhouse thought this short-term problem was related to cystic changes and/or synovitis.

24. In December of 2012, Claimant was referred by her attorney to the Industrial Commission Rehabilitation Division. Her case was originally handled by Chris Horton, who later transferred the case to Seli Mena. Mr. Horton contacted Employer for the purpose of performing a job site evaluation of Claimant's time-of-injury position as chemical room attendant. That job site evaluation differs from the one prepared by the ICRD in connection with Claimant's 1992 claim. The 2012 job site evaluation reflects that Claimant was expected to lift up to 50 pounds on an occasional basis as a chemical room attendant. The job site evaluation also reflects that Claimant's job required reaching at shoulder height or below on a continuous basis, reaching above shoulder height occasionally, grasping/handling continuously, climbing occasionally, and engaging in fine manipulative activities occasionally. Claimant elaborated on

the requirements of her job at hearing. She testified that on an average day, she might be expected to lift twelve 5-gallon jugs. However, on a "cleanup" day, Claimant might be expected to lift/move up to sixty-five 5-gallon jugs. Cleanup days occurred either weekly or bi-monthly depending on the needs of production. (Hearing Transcript, 33/10-35/6.) When asked about her vocational goals, Claimant told Ms. Mena that she needed a job which provided health benefits and which did not require computer skills. She stated that she felt she was able to perform a job doing laundry if heavy lifting was not required. She also confirmed that she had a valid driver's license and that school bus driving might be another option to explore. In a note dated May 16, 2013, Claimant told Ms. Mena that she had checked into jobs at Walgreens and other local convenience stores, and felt that she could work as a cashier so long as she was not required to lift heavy objects. On June 5, 2013, Ms. Mena's notes reflect that Claimant reported actively seeking work, but experiencing frustration at not being considered because of her lack of a GED. Claimant was given some additional job referrals to pursue.

25. In a note dated June 20, 2013, Ms. Mena reported that Claimant had recently become eligible for Social Security disability benefits, and was allowed to earn up to $1,800 per month without endangering her entitlement to SSDI. However, Claimant indicated that having been found entitled to SSDI benefits, she was unsure whether she would continue seeking work. Rather, she intended to focus more on obtaining her GED. (*See* Defendants' Exhibits at 353.) On July 16, 2013, Claimant confirmed her intentions to pursue her GED instead of concentrating on a work search. However, she did express interest in part-time employment. On August 7, 2013, Ms. Mena provided Claimant with referrals for three jobs, school bus driver, substitute food service worker and delivery driver. Claimant did not contact these potential employers. She and Ms. Mena determined that it was appropriate to close the ICRD file. As part of the

closure, Ms. Mena performed a labor market survey. Based on the limitations/restrictions proposed by Dr. Tallerico, Ms. Mena felt that Claimant was capable of performing the following jobs: route delivery courier, restaurant hostess, food demonstrator, convenience store cashier and school food service worker. Importantly, Ms. Mena qualified these recommendations by noting that Claimant would likely be unable to perform all aspects of some of the recommended jobs without some modification. For example, while Claimant might physically be able to perform most of the tasks associated with cashiering at a convenience store, she might not be able to perform heavier stocking work.

26. Chris Horton shared these concerns at the time of his deposition. For example, Mr. Horton testified that work in school food services might be unrealistic for Claimant in view of the fact that those types of jobs do require a fair amount of lifting, sometimes up to 40 to 50 pounds. (Horton Deposition, 19/14-20/6.) He also confirmed that in his experience, most convenience store cashiering positions require a good deal of heavy lifting and that most of these jobs fall into the medium strength category. (Horton Deposition, 20/11-21/3.) Mr. Horton also conceded that certain of Claimant's nonmedical limitations may impact her ability to perform the jobs referenced in the labor market survey. Claimant's poor reading skills might impact her ability to perform a route delivery job since she would presumably have difficulty reading addresses and delivery labels. (Horton Deposition 28/13-29/10.) Claimant's poor math skills might make her unsuited to work as a cashier. (Horton Deposition, 31/11-19.)

27. At the same time, however, Horton testified that in his interactions with Claimant, she did not present as one who was laboring under a significant cognitive impairment. Moreover, as did Ms. Plummer, Mr. Horton felt that Claimant had a number of positive attributes

which he felt qualified as "transferrable job skills", including listening, time management, monitoring, decision making and coordination." (Horton Deposition, 32/16-34/6.)

28. Terry Montague is a private vocational rehabilitation specialist who was engaged by Claimant for the purposes of performing a forensic evaluation of Claimant's residual employability following the work accident. Mr. Montague is well known to the Industrial Commission. His CV reveals that he has significant work experience and training in the area of vocational rehabilitation, albeit without any formal degrees or certifications related to vocational rehabilitation. (*See* Defendants' Exhibits at 327-333.) Montague was not asked to evaluate whether, or to what extent, Claimant's disability should be apportioned between the subject accident and a pre-existing condition. (Montague Deposition, 6/19-7/3.) Indeed, Montague was unaware of Claimant's 1992 claim, and the impairment and limitations assigned to Claimant as a result of that prior claim. (Montague Deposition, 40/8-23.)

29. In conducting his evaluation, Mr. Montague reviewed medical and other records generated in connection with the subject accident, and also had the opportunity to interview Claimant. By self-report, Claimant is dyslexic, per the results of testing administered during childhood. Montague assumed that Claimant was dyslexic in performing his evaluation. The record contains no testing results or other medical record which confirm this diagnosis. However, the TABE testing and psychological assessment completed at ISU in 2013 are consistent with the diagnosis of dyslexia according to John Dickey, Ph.D, the licensed psychologist who supervised and interpreted Claimant's testing. (*See* Claimant's Exhibits at 191.) Consistent with the testing previously performed at Ms. Plummer's instance in 1992, the WAIS-IV test administered by Dr. Dickey demonstrated that Claimant has an IQ in the extremely low range. Her greatest difficulties are in the areas of verbal comprehension,

attention, concentration and simultaneous/sequential processing. She scored relatively higher in the area of perceptual reasoning, suggesting that she has strengths in areas which require nonverbal reasoning and perceptual organization. Again, this is consistent with the 1992 testing tending to demonstrate that Claimant's abilities are best suited for work involving handling, sorting, inspecting, tending and related duties.

30. The TABE testing relied upon by Montague suggests that in May of 2013, Claimant's reading comprehension was at a fourth grade level. (*See* Defendants' Exhibits at 192.) By self-report, Claimant's reading abilities have not progressed much as a result of her self-directed studies. She can add and subtract, but has limited math skills beyond that. (Transcript, 50/4-20.) Montague assumed that Claimant is essentially unable to read, write and perform math operations in a way required by the sedentary/light jobs for which she is now physically suited.

31. In conducting his evaluation, Montague considered the opinions of Drs. Newhouse and Tallerico. He was aware that Dr. Newhouse had limited Claimant to no more than five pounds lifting, and that Dr. Tallerico had issued a somewhat more generous limitation to avoid lifting of greater than 20 pounds. However, he was evidently unaware that Dr. Newhouse had later expressed his agreement with the limitations/restrictions provided by Dr. Tallerico. (*See* Claimant's Exhibits at 65.) Even so, Montague did not believe that Dr. Tallerico's more generous lifting restrictions opened up a wider range of employment opportunities for Claimant. In connection with Montague's ultimate opinion on Claimant's residual employability, it is worth reviewing exactly what Dr. Tallerico said concerning Claimant's limitations/restrictions:

> She does have permanent work restrictions. Given her significant shoulder pathology, I would recommend no extended overhead use of the right arm and

shoulder; no lifting, pushing, pulling, or carrying with the right upper extremity greater than 20 pounds; no ladders; and no repetitive activities below waist or shoulder level, such as mopping, sweeping, cleaning.

In other words, I feel that the examinee, due to her right shoulder condition, would be best served in a sedentary or light duty position.

Per Montague, the 20 pound lifting restriction is not the most vocationally significant restriction given by Tallerico. Rather, Claimant's most significant restriction is the admonition that she avoid "repetitive activities below waist or shoulder level, such as mopping, sweeping or cleaning". In this regard, Montague testified:

Q. I didn't see in your report any specific analysis as to how - - or whether or how the distinction between 5 pounds and 20 pounds would make a difference in your opinion. Does it make any difference?

A. In Ms. Soltero's case, no. And the reason for that is when we look at occupations that are classified as sedentary or light, most of them - - in fact the overwhelming majority of those occupations are going to require greater education than she currently possesses. And they're going to require higher cognitive skills in terms of math, language, than she has.

Q. Okay. So even if we assume that Dr. Tallerico's 20-pound lifting restriction is the governing restriction - -

A. Okay.

Q. - - it does not change your opinion that she's still totally and permanently disabled?

A. No. And part of the reason that that is so, because in addition to the 20 pounds, even Dr. Tallerico said she should do no repetitive activities below waist or shoulder level with the right hand.

Montague Deposition, 30/18-31/13.

…

Q. Okay. If she were allowed to lift 26 pounds by the medical doctor, would that change your opinion that she's totally and permanently disabled?

A. If that was the only change, no. If she still has the restriction for repetitive use of her right thumb and hand, that's the real crux of what's going on.

Montague Deposition, 31/22-32/2.

32. As both Dr. Dickey and Ms. Plummer have noted, testing performed on Claimant demonstrates that she is best suited to jobs which exploit her relative skills in material handling, sorting, manipulating, etc. However, per Dr. Tallerico, Claimant must avoid repetitive activities below waist or shoulder level, which strongly suggests that light/sedentary jobs requiring these activities might be beyond Claimant's physical ability, even if such jobs require less than 20 pounds lifting.

33. Aside from Claimant's physical limitations, Montague testified that Claimant's lack of transferrable job skills, coupled with her low level intellectual ability and lack of a GED conspire to remove Claimant from even more of the labor market which she technically retains the physical abilities to compete in. Although Chris Horton and Joy Plummer described Claimant as possessing certain "transferrable skills", Montague denigrated these assertions; Having good coordination or time management skills does not constitute a "transferrable skill" based on how that term is defined in the field of vocational rehabilitation. Setting this semantic dispute aside, it is not clear that Mr. Montague would disagree with Horton and Plummer concerning their observations that Claimant does possess certain personal attributes that made her a good candidate for production and materials handling-type work. In the final analysis, what seems to be most significant to Mr. Montague is Claimant's physical limitations/restrictions in combination with her low level of intellectual functioning. Claimant will have difficulty performing route delivery jobs discussed by Mr. Horton because she has very poor reading and writing skills. She will have difficulty working as a hostess/cashier because she does not have the math skills to run a cash register or make change. The food demonstrator job referenced by the ICRD may be impossible for Claimant because it may require repetitive activities below

waist or shoulder level. Other jobs will be unavailable to Claimant because even though they may fall within her residual physical abilities, she will never be able to compete for them because she does not have a GED, and is not likely to obtain one.

34. In the final analysis, Montague testified that it would be futile for Claimant to search for employment based on her limitations/restrictions and relevant nonmedical factors. He testified that at the very least, Claimant is totally and permanently disabled under the odd lot doctrine.

DISCUSSION AND FURTHER FINDINGS OF FACT

35. 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).

36. 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).

37. The Referee observed that Claimant makes a good first impression, and presented as honest and sincere. Her long work record with Employer and Employer's predecessor speaks for itself as a positive factor of credibility. Her lack of GED was evident in her manner of considering and responding to questions. Her attorney appropriately used leading questions

significantly during examination in order to obtain an accurate, relevant, and efficient record. Claimant's word usage—"aploma" for diploma, "spencer" for dispenser—is indicative of Claimant's frequent mild confusion with language. We rely on the Referee's findings in this regard.

Causation

38. The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be evidence of medical opinion—by way of physician's testimony or written medical record—supporting the claim for compensation to a reasonable degree of medical probability. No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993). A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973).

39. It is not seriously disputed by the parties that the labral tear of her right rotator cuff is compensable. Rather, the extent to which it caused permanent disability is the primary dispute.

PPI

40. Permanent impairment is defined and evaluated by statute. Idaho Code §§ 72-422 and 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

41. The record reflects that after a bit of a struggle, Dr. Maloff determined that Claimant was entitled to a 15% upper extremity (9% whole person) rating as the result of her 1992 claim. Dr. Phillips did not find any objective basis upon which to award Claimant an impairment rating for her right upper extremity complaints, but did confirm the diagnosis of fasciitis. The surety averaged the ratings given by Drs. Maloff and Phillips and eventually paid Claimant a 4.5% whole man rating for her diagnosis of work-related fasciitis.

42. The record does not reflect that either Dr. Newhouse or Dr. Tallerico was aware of the 1992 claim and related impairment and restrictions. It is understandable, then, that neither physician considered the question of whether, or to what extent, Claimant's pre-existing condition contributed to the PPI ratings given following the 2011 accident. Possibly, some of the deficits in range of motion which contributed to the impairment rating calculated by Dr. Tallerico actually predated the subject accident and are more related to Claimant's 1992 claim. However, the record is devoid of any information that would allow us to reach any conclusion on whether or not, or to what degree, Claimant's current impairment is in some respect referable to her 1992 claim. Similarly, the record leaves us unable to ascertain whether the limitations/restrictions given by Dr. Tallerico are entirely the product of the subject accident. Dr. Newhouse, Claimant's treating physician, found it appropriate to award Claimant an 8% PPI rating, while Dr. Tallerico felt that a 5% rating was appropriate. As Claimant's treating physician, we believe that Dr. Newhouse was in a better position to make a judgment concerning Claimant's permanent physical impairment following the work injury, and therefore conclude that Claimant has an 8% PPI rating referable to her right upper extremity injury. There is no medical evidence that any of this impairment is assignable to a pre-existing condition, and therefore Claimant is entitled to the full 8% rating.

Permanent Disability

43. **"**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.

44. 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).

45. 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).

46. 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, he 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). Taken from, *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 he or vocational counselors or employment agencies on his 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).

47. As noted, in support of her assertion that she is totally and permanently disabled, Claimant relies on the testimony of Terry Montague who was retained by Claimant to perform a forensic evaluation of Claimant's disability. Mr. Montague has testified that Claimant is totally and permanently disabled under the odd lot doctrine since, in his opinion, it would be futile for Claimant to pursue employment in light of her physical limitations/restrictions and relevant nonmedical factors. Montague is pessimistic about Claimant's chances for obtaining employment in her labor market, reminding the Commission of Claimant's inability to read and write and her diagnosis of dyslexia. In fact, the record clearly establishes that Claimant does possess some rudimentary reading and writing skills, and lends no support to the proposition that she is dyslexic, other than Claimant's self-report. Still, even though Mr. Montague may have overstated certain of Claimant's nonmedical deficits, it seems clear that if he has done so, he has not done so by very much. More problematic to the Commission are the assumptions made by Mr. Horton and Ms. Mena that Claimant has sufficient facility with words and numbers to make her a good candidate for cashiering or route delivery positions. In his deposition testimony, Mr. Horton candidly acknowledged that Claimant might not be suited for these jobs. Ms. Mena proposed that Claimant might be a candidate for a part-time job as a school bus driver.

However, it is altogether unclear that Claimant could obtain a commercial driver's license (CDL). Claimant related to Mr. Montague that she had to engage in considerable subterfuge in order to obtain a driver's license in the first place, and that she has been careful to always renew it in timely fashion in order to avoid being retested. Mr. Horton candidly admitted that Claimant's limited IQ will impact her ability to compete for those limited jobs that she may be physically capable of performing. Of the remaining jobs discussed by the ICRD, Mr. Horton acknowledged that the cashiering job and lunch lady job might be beyond Claimant's physical capacity, and that she probably could not perform these jobs without accommodation from employer. From Mr. Horton's testimony, we conclude that the ICRD was overly optimistic about Claimant's physical limitations and the impact of her relevant nonmedical factors on employability.

48. A great deal has been made of the fact that Dr. Newhouse abandoned his efforts to establish Claimant's limitations/restrictions, and deferred to those generated by Dr. Tallerico. Therefore, Claimant is able to lift up to 20 pounds instead of being limited to five. It is suggested that this opens up a larger and more diverse segment of the labor market to Claimant. However, as Montague pointed out, the most significant of Claimant's physical restrictions is the admonition that she avoid engaging in repetitive activities below shoulder level. Claimant's nonmedical attributes make her best suited for material handling and production line type jobs but the restriction against engaging in repetitive activities below shoulder height leaves her unable to perform the type of work for which she is best suited.

49. Defendants also point out that Claimant's recent qualification for Social Security disability benefits has left her with no incentive to search for employment, and that she cannot prove odd lot status by demonstrating that she has unsuccessfully searched for work. It is true

that Claimant gave up her work search following the notification of her entitlement to SSDI benefits. In fact, it seems that her work search even prior to that date was half-hearted at best. Montague acknowledged that Claimant's work search at Walgreens and perhaps other places of business, was undertaken to satisfy her job search requirements for purposes of unemployment compensation. Finally, Claimant's receipt of SSDI benefits makes it pointless for her to pursue any job that would pay her more than $1,800 per month. We agree that all of these facts cast some doubt on Claimant's ability to prove odd lot status by demonstrating that she has unsuccessfully looked for employment. However, we need not determine whether Claimant could establish odd lot status by this route since we are persuaded that Claimant has put on sufficient proof to establish that it would be futile for her to look for employment.

50. Therefore Claimant has met her prima facie case of proving odd lot status. Having done so, the burden shifts to Defendants to show that there is an actual job or jobs within a reasonable distance from Claimant's home which she is capable of performing, or for which she can be trained. *Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 565 P2d 1360 (1977). Although the IRCD records do tend to establish that Claimant was referred to a number of actual job openings, the evidence does not establish that Claimant was capable of performing these jobs. The testimony of Horton and Montague demonstrate that Claimant was not likely to be successful in any of the job openings referenced by the ICRD.

51. Because we find Claimant to be totally and permanently disabled under the odd lot doctrine, we do not reach the issue of apportionment of disability under Idaho Code § 72-406, which applies only in less than total cases.

CONCLUSIONS OF LAW AND ORDER

1. Claimant reached medical stability following her industrial accident on January 10, 2013.

2. Claimant has suffered permanent physical impairment of 8% of the whole person referable to her right upper extremity injury.

3. Claimant is totally and permanently disabled under the odd lot doctrine, and is entitled to the payment of total and permanent disability benefits from January 10, 2013 forward.

4. The issue of apportionment under Idaho Code § 72-406 is moot.

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

DATED this 16th day of July, 2015.

INDUSTRIAL COMMISSION

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

Participated but did not sign
_____
Thomas E. Limbaugh, Commissioner

__/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of July, 2015, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** were served by regular United States Mail upon each of the following:

ALBERT MATSUURA
PO BOX 2196
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ka __/s/_____