BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DIANA K. WALKER, Claimant, v. CLEAR SPRINGS FOOD COMPANY, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2004-515150** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed December 9, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Twin Falls on September 11, 2015. Claimant was present and represented by L. Clyel Berry of Twin Falls. Kent W. Day of Meridian represented Employer, Clear Springs Food Company, and its Surety, Liberty Northwest Insurance Corporation (Defendants). Oral and documentary evidence was presented and the record remained open for the taking of four post-hearing depositions. The parties then submitted post-hearing briefs and this matter came under advisement on July 22, 2016.

ISSUES

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

1. Whether Richard Hammond, M.D., should be designated as Claimant's treating physician;

2. Whether Claimant is entitled to additional permanent partial impairment (PPI);

3. Whether Claimant has experienced a change in her condition since the Commission's October 25, 2007 decision such that a manifest injustice will result without further deliberation;[1] and

4. Whether Claimant is entitled to further permanent partial disability (PPD) including whether she is now an odd-lot worker.

CONTENTIONS OF THE PARTIES

Claimant contends that since the 2007 hearing, she has been abandoned by her Surety-approved orthopedic surgeon and would like her care transferred to neurologist Richard Hammond, M.D., who has seen her twice for IMEs.

Claimant further contends that her previously awarded 13% whole person PPI should be increased to 33% to account for two surgical procedures performed after the 2007 decision.

Finally, Claimant argues that she is an odd-lot worker based on conditions and events that occurred post-2007.

[1] On or about May 19, 2009, Claimant filed her application to reopen this matter under Idaho Code § 72-719 to address a change in the nature of Claimant's injury. On June 4, 2009, the Commission found Claimant's Idaho Code § 72-719 motion timely filed. At the 2015 hearing, counsel for Defendants indicated that he did not believe that "manifest injustice" was an issue, and the Referee proceeded accordingly.

Defendants agree that Claimant's circumstances have changed since the 2007 decision; the real question is the extent of those changes.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant presented at the January 25, 2007 (TR-1) and the September 11, 2015 hearing (TR-2) and, where relevant, Claimant's pre-hearing deposition testimony.

2. The Industrial Commission legal file generated as a result of the 2007 hearing.

3. Claimant's Exhibits (CE) 5-31 admitted at the hearing.

4. Defendants' Exhibits (DE) S and T admitted at the hearing.

5. The post-hearing deposition transcripts of: Richard J. Hammond, M.D., taken by Claimant on February 12, 2016; R. Tyler Frizzell, M.D., Ph.D., taken by Defendants on April 4, 2016; Douglas Crum, CDMS, taken by Claimant on April 28, 2016; and Mary Barros-Bailey, Ph.D., taken by Defendants also on April 28, 2016.

All objections made during the course of taking the above-referenced depositions are overruled with the exception of Defendants' objection at pages 33 and 34 of Dr. Hammond's deposition, which is sustained.

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

BACKGROUND

Claimant suffered an accident on May 25, 2004, which resulted in a hearing held on January 25, 2007, and a decision filed on October 25, 2007. That decision found that Claimant had proven causation and awarded her certain TTD/TPD benefits, a 13% whole person PPI rating, and a PPD rating of 50% inclusive of her 13% PPI rating.

FINDINGS OF FACT

Claimant's 2015 hearing testimony:

1. Claimant was 50 years of age, resided in Gooding, and was unemployed at the time of the hearing. While married at the time of the 2007 hearing, she has since divorced due to "Financial issues. Depression on my part. More fighting." TR-2, p. 30. Claimant is currently in a relationship that has lasted for five years; however, there is tension because Claimant's chronic pain limits her ability to perform housework and other activities.

2. On the date of the 2007 hearing, Claimant was still employed at Clear Springs, her time-of-injury employer, in a modified capacity; however, she quit on the 17th anniversary of her employment (April 17, 2007) because she was no longer physically capable of performing even modified duties.

3. Claimant then obtained employment in the fall of 2007 with Christopher and Banks (C and B), a women's clothing store located in the Magic Valley Mall in Twin Falls. She hung up clothes, folded clothes on tables, rang up purchases, and generally helped customers. Claimant informed C and B of her physical restrictions and the need to take medications, including Oxycodone, which affected her concentration and made

her tired. C and B agreed to accommodate Claimant's restrictions. Claimant last worked for C and B in March 2012[2] and has not worked since.

4. By the time of the January 25, 2007 hearing, Claimant had undergone a micro diskectomy at L4-5 in July of 2004, a "re-do" in December 2004, and a fusion at L4-L5 in August of 2005 - - all performed by David Verst, M.D. After each procedure, Dr. Verst referred Claimant to Dr. Dille, a physiatrist, for follow-up care including pain and medication management.

5. Claimant testified that her pain is getting progressively worse since the 2007 hearing. She has trouble sitting/standing/walking for prolonged periods of time. She is unable to stoop, crawl, or kneel. Claimant is also unable to climb ladders and is restricted in climbing and descending stairs, as well as lifting. Her main limiting pain is in her left lower extremity.

6. Claimant believes her depression is getting worse:

> I'm not the same person. I'm not the same person. I am not as outgoing as I used to be. I keep to myself more. I cancel, you know, friend appointments and stuff when I don't feel good. Shane and I can't do the same activities like we used to. Relations [intimate] with us are not the same.

TR-2, p. 78.

7. Claimant was not looking for work at the time of the hearing, as she did not believe there were any jobs she could do for which she was qualified. She testified that no one from ICRD found a job for her or told her to apply for any.

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[2] On March 29, 2012, Claimant was working at C and B when she reached over to pick up a piece of paper and her legs went numb, causing her to fall. Claimant was taken to emergent care with new symptoms of right leg and feet numbness and pain. C and B and Clear Springs eventually stipulated that this incident was a temporary aggravation of her original Clear Springs injury.

8. Claimant summed up how her condition has changed since the 2007 hearing and decision:

> The lower - - the lower back and the left leg has gotten progressively worse. I'm not able to do a lot of activities with family members. Even doing simple things around the house is more difficult or I can't do them at all. Like laundry and the whole thing. I don't vacuum. It's changed my life in lots of ways. The pain has. And it's hard to describe that with Shane or other family members or friends.

Id., p. 79.

9. Claimant described her left-sided foot drop, which is constant and interferes with her walking, this way:

> It's hard to describe it. I don't much - - my toes in my left side are very weak, so I can't grab like a shoe - - you know, when you're in your shoes, like sandals, and my foot will just - - it's weak. I can't keep it up like I would the right. You try to keep your right toes up and my left toes, just - - I can't get them to go up hardly.

Id., p. 95.

Change of physician

10. Defendants have satisfied their duty under Idaho Code § 72-432(1) to provide appropriate medical care following Claimant's accident. However, Claimant's original treating physician, Dr. Verst, has, in every sense, abandoned Claimant by failing to respond to either her, her attorney, or Defendant Surety regarding continued care and treatment.

11. Idaho Code § 72-432(4)(a) provides that a claimant may petition the Commission for an order allowing for a change of physician under certain circumstances.

12. Claimant requests that the Commission allow her to change physicians from Dr. Verst, an orthopedic surgeon, to Dr. Hammond, a neurologist who is known to Claimant for having performed two IMEs at her attorney's request. Dr. Hammond

accurately diagnosed two lumbar spine conditions (a herniation at L3-L4 and stenosis at L5-S1) and is qualified to act as Claimant's treating physician.

PPI

13. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 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 Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

14. Claimant asserts that she is entitled to whole person PPI in excess of the 13% awarded by the Commission in its 2007 decision. She argues that the 33% whole person PPI assigned by Dr. Hammond better reflects her change in condition medically. Defendants respond that "The parties have little to no differences with regard to the issue of whether or not Claimant is entitled to additional permanent partial impairment over the 13% impairment she was awarded on October 25, 2007 as a result of the previous Commission proceeding." Defendants' Responsive Brief, p. 15.

15. Dr. Hammond testified that, utilizing the 5th edition to the *AMA Guides to the Evaluation of Permanent Physical Impairment* (Guides),[3] the maximum PPI allowed is 28% whole person, the rating he assigned as of the date of the first hearing. However, he testified in his deposition that due to Claimant's additional diagnoses of a new disk at L3-L4 and increased stenosis at L5-S1, it would be unfair to not award an additional 5% for a whole person PPI rating of 33%.

16. Dr. Frizzell, based on the new finding at L3-L4, would assign an additional 1% whole person PPI on top of his original 27% for a total PPI rating of 28%.

17. Exercising the discretion afforded by *Urry*, supra, the Referee finds that Claimant is entitled to a total whole person rating of 33% without apportionment. Defendants are allowed credit for any PPI rating previously paid.

PPD/Odd-Lot

18. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the

[3] Although the 6th Edition to the Guides was available at the time Dr. Hammond expressed his opinion, he relied on the 5th Edition because that edition was used regarding Claimant's PPI at the time of the first hearing.

disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

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

20. The parties are in agreement that Claimant has suffered some increase in her permanent disability above the 50% inclusive of impairment awarded in the 2007 decision; the question is to what extent that disability has increased. Claimant presently contends that she is totally and permanently disabled based on factors that followed the first hearing. There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her

medical impairment together with the relevant nonmedical factors totals 100%. If a claimant has met this burden, then total and permanent disability has been established. Claimant does not argue that she is totally and permanently disabled by this method and the Referee so finds.

21. The second method is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939P.2d 854, 857 (1997). An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State of Idaho*, *Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), *citing Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). Such workers are not regularly employable "in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984), *citing Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

Medical deposition testimony

Richard J. Hammond, M.D.:

22. Dr. Hammond is board certified in neurology and sleep disorders. He has practiced in Twin Falls for over 24 years. He distinguishes a neurologist from a neurosurgeon in that a neurologist is more of a diagnostician and will refer to a

neurosurgeon for surgery in appropriate cases and, if necessary, will resume care for pain management post-surgery.

23. Claimant saw Dr. Hammond on April 29, 2010 at her attorney's request for an examination and medical records review, including actual lumbar MRI films for comparison that showed a new herniation at L5-S1 on the left and significant arthritis in the facet joint posterior to L5-S1 which had broken down as a result of an earlier L4-L5 fusion (next-level degeneration). Dr. Hammond recommended a surgical consult regarding whether or not a fusion at L5-S1 might be warranted.[4]

24. Dr. Hammond assigned certain physical restrictions:

> Yes. So I said that her restrictions were greater than 2007. She can work a six to eight- hour day as tolerated. Her lifting should be significantly reduced, 10 to 15 pounds maximum. No stooping, bending, kneeling, squatting, crawling, walking up and down stairs. She cannot pull greater than 15 pounds. And can't lift - - a total preclusion of never lifting greater than 20 pounds.

Dr. Hammond depo., p. 13.

25. On June 15, 2015, Dr. Hammond again saw Claimant and was asked to comment regarding changes in Claimant's condition between then and when he first saw Claimant in 2010:

> She was still having pain down her left leg. Even after the surgery and fusion, they had her on - - tried a dorsal column stimulator, which didn't work very well. And she was on some medications that had a modicum of success. And then she also had another incident of worsening, significant worsening of symptoms that occurred in March of that year.[5]

Id., p. 16.

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[4] Dr. Verst performed a L4-L5 decompression and fusion on October 9, 2012.

[5] Claimant exacerbated her symptoms when she arose from her couch necessitating a trip to the ER. Dr. Hammond testified that Claimant could expect to experience such exacerbations in the future.

26. Dr. Hammond recommended a CT lumbar myelogram which was accomplished and confirmed his suspicion of an L3-L4 disk herniation. Dr. Hammond was also concerned regarding the natural progression of her prior lumbar fusion:

> Yeah, the greater concern still, I think, is that L5-S1 further narrowing of that neuroforamen and further encroachment upon the L5 nerve root. And that will continue to progress over time, causing A, [sic] more pain down that left leg, and then eventually further nerve loss, which was described in my first EMG way back when, 2010. We do have evidence of nerve loss. And so with further progression of that narrowing, more and more of the L5 will die off, causing further worsening of function and certainly increasing pain. The L3/4 will generate more pain. It can migrate further on its own. And that also puts a little bit of pressure on that L4 nerve root.

Id., p. 25.

27. Dr. Hammond was concerned that without surgical intervention at L3-L4 and L5-S1, Claimant is at risk for further nerve damage at those levels and that is why strict adherence to his physical restrictions will be important for Claimant and why he recommended a surgical consult.

28. Dr. Hammond testified that the FCE Claimant underwent shows the maximum she could do at the time of the FCE, not what she is capable of doing (much less) on a daily workday basis. Whether she undergoes surgery or not, Claimant's back pain will continue and her sciatica will become worse which will lower her functional capacity. Any potential employer will need to make accommodations for her physical restrictions, medication usage with related side effects, and time off from work as needed.

29. On cross-examination, Dr. Hammond acknowledged that Claimant could work at C and B within the physical restrictions he assigned to her. However, Dr. Hammond increased his restrictions in August of 2015 based upon the FCE she had

completed. Dr. Hammond agreed that an FCE is subjective in that the outcome is at least somewhat dependent upon the examiner's opinions and observations. An FCE is a snapshot in time of what a claimant can do on a specific day followed by an attempt by the examiner to extrapolate the results into the future. Dr. Hammond agreed that Claimant could work as long as she adhered to the physical restrictions he imposed.

30. Dr. Hammond is aware that Dr. Frizzell, a neurosurgeon, is against surgical intervention:

> Well, his is also a theoretical concern that if she has the fusion, she might break down the next level. But she may not. So same thing what I'm saying, she will probably progress - - she will progress at the L5-S1, and the surgery may help to prevent that worsening, but that could be some time before that actually occurs.

Id., p. 39.

R. Tyler Frizzell, M.D., PhD.:

31. Dr. Frizzell is a board certified neurosurgeon practicing in Boise. He first saw Claimant at Defendants' request on June 17, 2013. IMEs constitute about 5% of his practice. Dr. Frizzell reviewed pertinent medical records and examined Claimant. He defined Claimant's main problem as a decrease in function of her left L5 nerve root. Dr. Frizzell concluded that Claimant was a suitable candidate for a spinal cord stimulator that can be helpful in treating an L5 radiculopathy.

32. Dr. Frizzell again saw Claimant on December 8, 2014, at which time he examined her and determined that his prior diagnosis of L4-L5 fusion and spinal cord stimulator was correct. Even though Dr. Frizzell agreed the pain management provided by Dr. Dille was reasonable and necessary, he, nonetheless, did not believe that treatment resulted in any improvement in Claimant's condition. Dr. Frizzell found Claimant to be

at MMI and requested an FCE to assist him in assigning work restrictions.[6] He assigned a 24% whole person PPI rating.

33. Based on his own examinations and the FCE conducted on June 26, 2015, Dr. Frizzell opined that Claimant could perform sedentary work with ad lib position changes. She can lift 5 pounds occasionally. Dr. Frizzell was never provided with any job descriptions to determine if the work required would have been within his restrictions.

34. Based on Dr. Hammond's diagnosis of a new herniation at L3-L4 naturally progressing from the L4-L5 fusion, Dr. Frizzell agreed with Dr. Hammond's recommendation of obtaining a CT myelogram, which showed a moderate disk herniation at L3-L4 and ruled out a pseudoarthrosis at L5-S1.

35. Dr. Frizzell is not recommending further surgery at this time:

> The odds of a successful outcome were stacked against her. A, she's not had significant relief with many of the prior surgeries, b, it would be a major procedure with potential for life-threatening risk, such as aortic injury, and, c, once she has L3-4 fused, then she would potentially further march up the spine and now develop a protrusion at L2-3.

Dr. Frizzell depo., p. 24.

Vocational deposition testimony

Douglas Crum, C.D.M.S:

36. Claimant retained Mr. Crum to assess her employability. Mr. Crum's credentials are well known to the Commission and he is qualified to express expert vocational opinions in this matter.

[6] An FCE dated February 12, 2015 conducted by STARS was objected to by Claimant for being "invalid" and was not admitted into evidence. Another FCE was conducted by Wright Physical Therapy on June 26, 2015 and is of record.

37. Mr. Crum interviewed Claimant by phone on November 3, 2006 and prepared a report dated January 3, 2007. (CE 20). At that time, Claimant was still employed at Clear Springs in a part-time modified capacity.

38. Following the 2007 hearing and decision and the filing of Claimant's petition for a change of condition or to correct a manifest injustice, Mr. Crum prepared another report dated December 14, 2010. (CE 24(a)). Mr. Crum reviewed additional vocationally relevant medical records and, again, offered a vocational opinion regarding Claimant's employability.

39. Because Claimant's condition worsened[7] after his December 2010 report, Mr. Crum authored another report dated August 24, 2015. (CE 24(b)). Mr. Crum was provided with and reviewed additional medical records from Drs. Frizzell and Hammond as well as the Wright FCE and Dr. Mary Barros-Bailey's vocational report. Mr. Crum also re-interviewed Claimant in person.

40. Mr. Crum testified that he understood Dr. Hammond's physical restrictions to be:

> I recited his restrictions that he agreed with the FCE findings that claimant stand less than five percent of the day. And he is talking about the WorkWell FCE. That she could not walk more than five percent of the day. She can sit up to 50 percent of the day. She should be allowed to move on add [sic-an] ad lib basis. She could stand five to ten minutes at a time. Or 60 minutes total in a workday. She can walk about ten minutes at a time for a total of 30 minutes per workday. And that she can perform combined standing and walking for a total of 90 minutes per workday.
>
> Q. (By Mr. Berry): With regard to Diana's labor market access how did Dr. Hammond's recommended restrictions affect that?

[7] By that time, Claimant had undergone the fusion at L5-S1 and the neurostimulator implant.

> A. Significantly. I felt that the restrictions that were recommended by Dr. Hammond at that point would result in Ms. Walker's being unable to find a job in the competitive labor market.[8]

Mr. Crum depo., p. 18.

41. Mr. Crum also conducted a vocational evaluation based on the June 20, 2015 FCE performed by Wright Physical Therapy in Twin Falls:

> That report put her somewhere in the sedentary to light range in terms of lifting capacity. It also recommended significant limitations for bending while standing, elevated work, kneeling, half kneeling, stairs and sitting. Those were all restricted to occasional. And he recommended rarely stand, crouch, or walk. That was in the context of a six minute test that they do. So those are the ones that they recorded here. And those were all important to me in determining an opinion on labor market access.
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> * * *
>
> It is my opinion she does not have access to any jobs in her labor market based on those FCE results, combined with her age, education, work experience, skills, that sort of thing, in that labor market.

Id., p. 19.

42. Mr. Crum testified that prior to Claimant's 17-year career at Employer's she had worked as a sales clerk and as a part-time grocery checker. Her only employment post-Clear Springs was at C and B, discussed earlier. She has "limited" computer skills and has never worked in an office environment. Claimant had difficulties with math and reading in school and was in a special reading class in elementary school. However, other than reading difficulties, Claimant has basic literary skills.

43. After Mr. Crum completed his August 2015 report, he had the opportunity to review, *inter alia*, Dr. Hammond's post-hearing deposition testimony:

> He clarified some of the capacities for lifting and carrying. In particular he indicated that she should never carry more than 15 pounds waist to floor. I'm sorry. Should never lift more than 15 pounds from

[8] Mr. Crum considered Gooding, Wendell, Shoshone, Fairfield, Jerome, Twin Falls, Filer, and Buhl as Claimant's labor market.

> waist to floor. Should not carry greater than 20 pounds, ever. He indicated that he felt that it would not be reasonable to assume that an employer could accommodate Ms. Walker sufficiently to make her competitive for hire. It was his opinion.

Mr. Crum depo., pp. 28-29.

44. Mr. Crum also understood Dr. Hammond to have advised Claimant to avoid stooping, bending, kneeling, squatting, crawling, and ascending/descending stairs and ad lib position changes. Mr. Crum testified that this new information from Dr. Hammond did not change his opinions, but reinforced them.

45. Mr. Crum was also provided with Dr. Frizzell's deposition testimony and testified:

> Yeah, he made several comments about capacities that were slightly different from what he previously said. He felt she could perform sedentary work with positional change periodically ad lib. He felt that she should never lift greater than five pounds occasionally. He felt that she could sit up to 30 minutes at a time[9] or about 15 percent of the day. Later on he kind of changed that in his deposition. He indicated that she could stand - -

Id., p. 31.

46. When asked to provide an opinion regarding Claimant's disability above impairment utilizing only Claimant's medical factors in the Magic Valley labor market, Mr. Crum testified:

> I honestly can't think of any jobs she would be able to do consistently that exists in any sort of significant quantities. About the only thing I can think of would be perhaps some sort of a receptionist job or a very, very light cashiering job. Like a ticket taker at a theater or something like that. Of course, she doesn't have the skills for any of those things.
>
> Q. (By Mr. Berry): That was my next question. If you then factor in Diana's unique non-medical factors, her age, her education, her work experience, the lack of computer word processing experience, how does

[9] Dr. Frizzell also indicated that Claimant be allowed to take a five-minute break after sitting for 30 minutes and for ad lib position changes.

> that then affect her employability if you combine the non-medical factors with the medical factors recommended by Dr. Frizzell?
>
> A. I believe she is totally disabled. I believe she doesn't have any reasonable access to any jobs in her labor market.

Id., p. 32.

47. Mr. Crum discussed his concerns regarding the "averaging method" where an individual's decrease in wage earning capacity is averaged with his/her loss of labor market access:

> I start getting concerned about averaging them when there is a huge disparity between the loss of access in particular and loss of wage earning capacity. For instance, a minimum wage earner, if they could return to work, probably would have no wage loss. But might have a very extensive loss of access to the labor market. And in the past I have proposed disability that is pretty straight average. Typically in that case I would increase my recommendation. And I know the commission - - [and they have done it].

Id., p. 34.

48. Mr. Crum considers Claimant's age to be an obstacle in obtaining employment in that older workers tend to be unemployed longer between jobs compared with younger workers. He also considers Claimant's prescription pharmaceutical usage to be a problem to the extent that Claimant's concentration, focus, and attentiveness may be affected. Likewise, Claimant's susceptibility to spontaneous exacerbations could prove to be problematic employment-wise.

49. Mr. Crum summarized his vocational opinions in this matter by testifying that if one were to utilize the restrictions found in the Wright FCE and Drs. Hammond's and Frizzell's restrictions, Claimant is unemployable within her labor market and it would be futile for her to seek employment consistent with her medical and nonmedical factors. It is doubtful that an employer would hire Claimant over a younger, less

physically restricted, less pharmaceutical-dependent, and perhaps better educated applicant.

Mary Barros-Bailey, PhD., C.R.C:

50. Defendants retained Dr. Barros-Bailey to evaluate Claimant's employability. Her credentials are well-known to the Industrial Commission and need not be repeated here. Her CV is attached to her deposition as Exhibit 1. Dr. Barros-Bailey is qualified to give expert vocational opinions in this matter.

51. Claimant first met with Dr. Barros-Bailey on December 5, 2011. She prepared three reports as she received additional information including the Wright FCE, the reports and deposition transcripts of Drs. Hammond and Frizzell, the hearing transcript, and Mr. Crum's reports.

52. Dr. Barros-Bailey testified that the deposition testimony of Drs. Frizzell and Hammond eliminated some of the jobs she had originally opined Claimant could compete for:

> I think my last report, September 25 [2015], when I address some of the opinions of Mr. Crum in the three particular areas, such as a teller, I think some of those would probably be really impacted with the five pounds. Filing clerk. When she was working at Christopher & Banks she only took a little bit of merchandise at a time. There is no reason why she has to take a whole ream. So there is no reason she cannot do that type of work given the restrictions. There might be some employers - - again, it changes per practice settings. But as a general occupation there is no reason she shouldn't be able to do some of those types of jobs. Same thing with file clerk. It depends on the practice setting. But, then again, from the sitting and the lifting perspective there is no reason she shouldn't be able to do a lot of those jobs.

Dr. Barros-Bailey depo., pp. 16-17.

53. Dr. Barros-Bailey described Claimant's labor market as "pretty vibrant" and would include Twin Falls, Filer, Jerome, and Kimberly. She opined that "Gooding

might be a little far out" by which she meant that most of the jobs for which Claimant may be competitive would be closer to the center of the Magic Valley labor market. Dr. Barros-Bailey did concede that Claimant has suffered a significant loss of access to her labor market.

54. Regarding that loss of access, Dr. Barros-Bailey testified:

> Q. (By Mr. Day): So can you kind of lay out for us then, within that 16 percent of the labor market that remains there, what jobs in particular or types of jobs that you are of the opinion that she is going to be able to compete for considering her entire circumstances? All of her medical and nonmedical factors?
>
> A. Sure. I mean, one of the things that was - - and it was four years ago that I met with her. But one of the things that really struck me is how she presented. She was very professional. Presented very well. She was well dressed. She was working at the time. She had talked about how she had gone through a period of depression where she wasn't working and it helps to be working. She's got the presentation and demeanor, at least when I met with her, to fit very well, and to present very well, for entry-level jobs such as, you know, filing clerk. Such as office clerk. Even as receptionist. Those kind of lower skilled, more clerical kind of jobs that allow, in most settings, for some variability in terms of sitting and standing.

Id., pp. 19-20.

55. Dr. Barros-Bailey testified that file clerk/receptionist-type jobs do not generally require retraining or word processing skills; however, "There is [sic] lots of different components to it." *Id.*, p. 21. She also testified that Claimant would suffer a wage loss as entry-level positions start at between $8.25 and $9.11 per hour.[10] Dr. Barros-Bailey used a computer program called Oasis to arrive at an 84% loss of access to previously available sedentary jobs. She did not quantify Claimant's wage loss.

56. Dr. Barros-Bailey acknowledged that when using Dr. Hammond's restrictions along with the Wright FCE that Claimant's overall disability is between

[10] Dr. Barros-Bailey assumed that prospective entry-level positions would provide similar benefits as Claimant was receiving at Clear Springs, including a 401(k), in addition to salary.

70-75%, which is more than the 50% awarded by the Commission. She does not believe that Claimant is an odd-lot worker or that it would be futile for her to seek employment. Dr. Barros-Bailey did not attempt to find Claimant a job as that was not something she was retained to do.

57. Dr. Barros-Bailey conceded on cross-examination that she was unaware of the fusion performed by Dr. Verst until she read Mr. Crum's report and that she had not reviewed any records from Dr. Dille and his pain clinic. Dr. Barros-Bailey briefly reviewed the second hearing transcript but did not recall seeing Claimant's testimony regarding the side effects she was experiencing from her various prescription medications or any physician's opinion regarding the same.

58. Besides presenting well, Dr. Barros-Bailey believes Claimant has this to offer:

> She engages in the labor market. She looks younger than her stated age. She has got high school diploma [sic]. She has got a variety of work history in terms of being prolonged period with certain employers [sic]. And so there are a variety of things that come with the whole package of Diana.

Id., pp. 55-56.

59. The Referee is more persuaded by the opinions expressed by Mr. Crum than those expressed by Dr. Barros-Bailey. Mr. Crum was more focused on the practicalities involved with establishing an individual's employability rather than the nationally-based computer programs relied upon by Dr. Barros-Bailey. Regardless of the set of restrictions used, Mr. Crum credibly opined that Claimants age, almost 50, would be a factor in her employability, especially if retraining was required. He also factored in Claimant's pharmaceutical usage as deterrent to her being hired over someone without

the need for pharmaceuticals. Mr. Crum also discussed Claimant's acute exacerbations of her symptomatology as being problematic for potential employers.

60. Mr. Crum expressed more of an understanding of the reality of Claimant's employment situation than did Dr. Barros-Bailey. He personally interviewed Claimant twice, the latest interview being in February 2015, at a time when Claimant was no longer employed. Dr. Barros-Bailey's one and only interview with Claimant took place on December 5, 2011 at a time when she was still employed by C and B. Mr. Crum also reviewed pertinent medical records and deposition and hearing transcripts as they became available. Dr. Barros-Bailey did not review Claimant's November 12, 2013 deposition testimony and only "skimmed" Claimant's hearing testimony. Also of note is that Dr. Barros-Bailey did not review the medical records of Dr. Dille at Southern Idaho Pain. Finally, at her deposition, Dr. Barros-Bailey testified that Gooding, Claimant's residence at the time of the hearing, may be too distant to place her in the Magic Valley labor market, including Twin Falls. She acknowledged that the "Oasis" computer program she uses to establish loss of access does not consider or account for specific individuals such as Claimant, or others with specific lifting, endurance, or need for positional allowances, but, rather, is geared toward "ranges" of individuals.

61. In sum, the Referee finds that Mr. Crum had a much better understanding of Claimant's employability as of the time of the hearing than did Dr. Barros-Bailey and, therefore, his opinions are entitled to more weight.

62. Claimant has proven that she is totally and permanently disabled pursuant to the odd-lot doctrine.

63. Once a claimant establishes that he or she is an odd-lot worker, the burden shifts to defendants to show that there is suitable work regularly and continuously available which the claimant could perform.

> In meeting its burden, it will not be sufficient for the Fund to merely show that appellant is able to perform some type of work. Idaho Code § 72-425 requires that the Commission consider the economic and social environment in which the claimant lives. To be consistent with this requirement, it is necessary that the Fund introduce evidence that there is an actual job within a reasonable distance from appellant's home which he is able to perform or for which he can be trained. In addition, the Fund must show that appellant has a reasonable opportunity to be employed at that job. It is of no significance that there is a job appellant is capable of performing if he would in fact not be considered for the job due to his injuries, lack of education, lack of training or other reasons.

Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 406-7, 565 P.2d 1360, 1363-4 (1977).

64. The Referee finds that Defendants have failed to rebut Claimant's *prima facie* odd-lot case as no employment consistent with the *Lyons* criteria has been located for Claimant.

CONCLUSIONS OF LAW

1. Claimant has proven that she has suffered a change of condition since the October 25, 2007 Decision and is entitled to relief pursuant to Idaho Code § 72-719.

2. Dr. Richard Hammond is designated as Claimant's treating physician.

3. Claimant has proven she is entitled to 33% whole person PPI. Defendants are entitled to a credit for any PPI previously paid.

4. Claimant has proven she is totally and permanently disabled as an odd-lot worker.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 15th day of November, 2016.

INDUSTRIAL COMMISSION

___/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of December, 2016, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

L CLYEL BERRY
PO BOX 302
TWIN FALLS ID 83303

KENT W DAY
PO BOX 6358
BOISE ID 83707-6358

___/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DIANA K. WALKER, Claimant, v. CLEAR SPRINGS FOOD COMPANY, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2004-515150** **ORDER** Filed December 9, 2016

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has proven that she has suffered a change of condition since the October 25, 2007 Decision and is entitled to relief pursuant to Idaho Code § 72-719.

2. Dr. Richard Hammond is designated as Claimant's treating physician.

3. Claimant has proven she is entitled to 33% whole person PPI. Defendants are entitled to a credit for any PPI previously paid.

4. Claimant has proven she is totally and permanently disabled as an odd-lot worker.

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

DATED this 9th day of December, 2016.

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 9th day of December 2016, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

L CLYEL BERRY
PO BOX 302
TWIN FALLS ID 83303

KENT W DAY
PO BOX 6358
BOISE ID 83707-6358

___/s/_____