BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KAYE WARNER, Claimant, v. PLEXUS, Employer, and TRAVELERS INDEMNITY, Surety, Defendants.	**IC 2016-003316** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed November 30, 2018**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on January 17, 2018. Claimant, Kaye Warner, was present in person and represented by J. Brent Gunnell, of Nampa. Defendant Employer, Plexus, and Defendant Surety, Travelers Indemnity, were represented by W. Scott Wigle, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on June 20, 2018. The undersigned Commissioners agree with the outcome proposed by the Referee, but believe different analysis should be applied to the opinions of the vocational experts and therefore issue their own findings of fact, conclusions of law, and order.

ISSUE

The issues to be decided by the Commission were narrowed at hearing and by the parties' briefing. The sole issue is the extent of Claimant's permanent disability due to her industrial

accident, including whether Claimant is totally permanently disabled pursuant to the odd-lot doctrine.

CONTENTIONS OF THE PARTIES

The parties agree that Claimant suffered an industrial accident on January 29, 2016, when she tripped and fell while at work, injuring her left shoulder, wrist, and thumb. Defendants accepted the claim and provided medical and temporary disability benefits. Claimant underwent left shoulder, and left wrist and thumb surgeries. She was ultimately released to modified work and returned to work at Plexus for several months but ceased work due to increasing symptoms. She has been unable to find work elsewhere. Claimant asserts she is totally and permanently disabled pursuant to the odd-lot doctrine. Defendants maintain Claimant successfully returned to modified work at Plexus, is not totally permanently disabled, and her permanent disability is minimal.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant's Exhibits A through T and Defendants' Exhibits 1 though 28, admitted at the hearing.
3. The testimony of Nancy Collins, Ph.D., taken at hearing.
4. The testimony of Adam Castillo taken at hearing.
5. The testimony of Whitney Crockett taken at hearing.
6. The testimony of Claimant, Kaye Warner, taken at hearing.
7. The testimony of David Adams taken at hearing.
8. The testimony of Cliff Anderson taken at hearing.

9. The testimony of Floyd Atkinson taken at hearing.

10. The post-hearing deposition testimony of Mark Williams, D.O., taken by Claimant on February 2, 2018.

11. The post-hearing deposition testimony of David Lamey, M.D., taken by Claimant on February 27, 2018.

12. The post-hearing deposition testimony of Rodde Cox, M.D., taken by Defendants on March 22, 2018.

13. The post-hearing deposition testimony of William Jordan, M.A., C.R.C., C.D.M.S., taken by Defendants on April 10, 2018.

All outstanding objections are overruled.

FINDINGS OF FACT

1. Claimant was born in 1962 and is left-handed. She was nearly 56 years old and resided in Nampa at the time of the hearing. Plexus is a large manufacturing facility that contracts to produce high complexity low volume electronic systems and circuit boards for larger projects. Plexus employs from 400 to 700 workers according to the needs of its clients.

2. **Background.** Claimant was born in Oregon and later attended Payette High School. She moved to Montpelier and in 1980 graduated from Bear Lake High School. After high school she worked at several fast food restaurants and a truck stop. Claimant also worked for several years making motorcycle and snowmobile helmets. From 1980-82, she worked as a nurse's aide in a hospital. From 1984-85, she worked at a nursing home. From 1994 until 2009, Claimant worked as a cashier at Albertsons in Elko, Payette, Nampa, and Boise. She eventually earned $12.17 per hour at Albertsons.

3. In approximately 2010, Claimant attended the Milan Institute in Nampa and completed training as a medical assistant. However, she found the training very challenging and did not pursue certification fearing she would be unable to pass state certification testing.

4. In 2014, Claimant started working for Adecco, a temporary employment agency, and was assigned to work at Plexus. After working for Adecco approximately 18 months she was hired directly by Plexus as a production associate. Her work at Plexus required two-handed holding and lifting. She lifted 10 to 15-pound trays into racks above her head multiple times daily. She also lifted baskets and buckets of parts. As a production associate her duties included building panels with frameworks of metal bars weighing from 20 to 40 pounds. She often wired as many as 500 components into panels. This required her to reach with both arms, push in wires, and manipulate a screwdriver with her dominant left hand. The production pace was fast and constant. She enjoyed her position and her 12-hour shift schedule with alternating three days on, four days off; and four days on, three days off. By January 2016, Claimant was earning $11.17 per hour and also receiving medical, dental, and optical insurance, and 401k benefits.

5. **Industrial accident and treatment.** On January 29, 2016, Claimant was working at Plexus when she tripped over a chain and fell onto her extended left hand and then onto her side. She noted immediate left hand pain. Her production lead and direct supervisor Cliff Anderson immediately encouraged her to obtain medical care. At St. Alphonsus Urgent Care Claimant was diagnosed with a left wrist sprain. In follow-up at St. Alphonsus Occupational Health she was also noted to have left shoulder symptoms. She underwent physical therapy. Left hand and wrist x-rays revealed bone-on-bone arthritis. A left shoulder MRI showed supraspinatus tendon strain and suspected labral tear.

6. On May 10, 2016, Clark Robison, M.D., performed arthroscopic left shoulder subacromial decompression and distal clavicle excision. He found no labral or rotator cuff tendon tears. Claimant recuperated from surgery and Dr. Robison released her to light-duty work.

7. Upon Claimant's release to light-duty work, Plexus provided her modified work in a water spider position. The water spider position required ordering, obtaining, and distributing parts to production associates for use in fabrication. Parts ranged from small nuts and washers to 40-pound steel bars. Claimant's duties included ordering parts via computer, removing parts and materials from pallets, and transferring parts to points of use for the builders. Mr. Anderson was promoted to production supervisor. He testified that 20 to 25% of the water spider job was moving steel bars. Floyd Atkinson became a production lead and Claimant's direct supervisor.

8. Claimant's left hand symptoms continued and on September 21, 2016, David Lamey, M.D., performed a left thumb scapho-trapezium-trapezoid (STT) and carpometacarpal (CMC) arthroplasty. He opined Claimant's industrial accident permanently aggravated pre-existing arthritis at the base of her left thumb. On January 17, 2017, Dr. Lamey recorded Claimant's left hand grip strength at 25 pounds as compared to 65 pounds for her right hand. He noted that her left thumb condition made it difficult to prepare food, dress, or write. However, Dr. Lamey released Claimant to work with no activity restrictions. She returned to work at the water spider position.

9. On February 24, 2017, Mark Williams, D.O., examined Claimant at her request. He found her medically stable and rated the permanent impairment of her left shoulder, wrist, and hand at 10% of the whole person due to her industrial accident. On April 11, 2017, Rodde

Cox, M.D., examined Claimant at Defendants' request. He rated the permanent impairment of her left shoulder and left hand at 12% and 16% respectively of the left upper extremity for a combined rating of 26% of the upper extremity. He apportioned 5% to Claimant's pre-existing left hand arthritis, with the remaining 21% upper extremity—equating to 13% of the whole person—attributable to her industrial accident. Dr. Cox's impairment rating is acknowledged by all parties and Defendants have or are paying this impairment rating in full.

10. Claimant enjoyed working at Plexus. After returning to work following her left hand surgery, she tried to complete the duties of her water spider position. However, she discovered that if she used her dominant left hand frequently, her left wrist became swollen and painful by the end of the shift. Thus she favored her left wrist and avoided using her left thumb. She delivered pallets of materials as best she could with her non-dominant right hand and a pallet jack. She used her right hand to pick up most parts; however she was unable to lift 40-pound steel bars with only her right hand. Claimant was encouraged by Plexus supervisors to obtain assistance from co-workers with heavier lifting but she perceived that assistance was not always readily available. She noted significant left hand pain by the end of each work shift. Her left hand swelling and pain did not fully resolve during her days off work. Claimant believed her assigned duties at Plexus exceeded her medical restrictions and that Plexus knew she was effectively being pressured to work beyond her restrictions.

11. In the summer of 2017, Claimant began training two new associates. They refused to lift 40-pound steel bars leaving Claimant to find help to do the task. Claimant's left hand and shoulder pain increased. She missed a few days of work due to the increasing pain and was written up for missing work without a doctor's excuse. Claimant talked about her increasing

symptoms with a trainer at Plexus who indicated she could help with heavier lifting; however, this trainer was not always present to provide help during Claimant's shift.

12. Claimant testified that on one occasion Mr. Atkinson, her immediate supervisor, directed Claimant to move some tables—a task Claimant believed exceeded her restrictions against lifting heavier items. Claimant did as directed and was subsequently criticized by her trainer for moving the tables. Claimant testified that she was not written up nor was she reprimanded by any supervisor at Plexus for refusing to do a task she believed was beyond her abilities, but was generally told to "Do what you can." Claimant Deposition, p. 85, 25. Claimant's left hand and shoulder pain continued to worsen to the point she decided that she could no longer perform her assigned duties as a water spider.

13. On July 24, 2017, Claimant left her employment at Plexus without prior notice. She did not talk to anyone at Plexus about her decision before leaving but walked out mid-shift. She has not worked since that time.

14. Mr. Atkinson, as Claimant's direct supervisor, was advised of her work restrictions but did not recall Claimant having complaints regarding her assigned duties. However, he acknowledged that Claimant sometimes told him she was in pain and hurting but did not recall Claimant ever indicating she had such physical problems performing her duties that she could not continue working. He did not recall asking Claimant to move tables—a task that he acknowledged would have exceeded her restrictions.

15. Plexus supervisors Anderson, Atkinson, and Plexus environmental health and safety generalist David Adams testified at hearing that had they been informed that Claimant's left hand and shoulder pain were worsening they would have assigned her less strenuous work

duties. They believed she had successfully returned to work in the water spider position with adequate assistance from coworkers to perform the heavier lifting.

16. On October 16, 2017, Dr. Lamey observed that Claimant showed poor left thumb extension and concluded she needed to wear a rigid left thumb splint which would need to be replaced periodically throughout her life. He observed this would limit some of her activities. Lamey Deposition, p. 14. Thereafter Claimant wore the rigid left thumb splint most of the time to avoid pain in her left thumb.

17. **Condition at the time of hearing.** At the time of hearing, Claimant tended her seven and four year old grandsons several hours each day, five days per week for which her daughter paid her approximately $100.00 per week. However, Claimant declined to tend her two month old grandchild fearing that, given her left hand pain and weakness, she might drop the infant. Claimant continued to have left shoulder and hand symptoms for which she took over-the-counter medications.

18. **Credibility.** Having observed Claimant, Nancy Collins, Ph.D., Adam Castillo, Whitney Crockett, David Adams, Cliff Anderson, and Floyd Atkinson at hearing and compared their testimony with other evidence in the record, the Referee found that all are credible witnesses. The undersigned Commissioners see no reason to disturb the Referee's findings and observations on credibility.

DISCUSSION AND FURTHER FINDINGS

19. 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). 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).

20. **Permanent disability**. The sole issue is the extent of Claimant's permanent disability due to her industrial accident, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine. "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. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of 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.

21. 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). The extent and causes of permanent disability "are factual questions committed to the particular expertise of the Commission." Thom v. Callahan, 97 Idaho 151, 155, 157, 540 P.2d 1330, 1334,

1336 (1975). The proper date for disability analysis is the date of the hearing, not the date the injured worker reaches maximum medical improvement. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012). Work restrictions assigned by medical experts and suitable employment opportunities identified by vocational experts may be particularly relevant in determining permanent disability.

22. Work restrictions. In the present case, the parties cite work restrictions as determined by Drs. Williams, Cox, and Lamey.

23. On February 24, 2017, Dr. Williams opined that Claimant was restricted to light-duty work with her left hand. He restricted her from overhead work, reaching more than 21 inches from her body, ladder climbing, and repetitive fingering or handling. He limited her to occasionally lifting 10 pounds and frequently lifting two pounds with her left hand. At hearing, Claimant demonstrated that 21 inches from her body is approximately to the knuckle of the middle finger of her right hand and, for practical purposes, is approximately as far as she can reach. Dr. Williams explained the 21-inch reaching restriction was to reduce Claimant's risk of further injury to her left shoulder. He testified that he did not intend to entirely preclude Claimant from working and believed "based on the surgeries that she had and the most common outcome with both, that there would be something that she could find that would allow her to return to some work." Williams Deposition, p. 42, ll. 5-8. Dr. Williams later affirmed Claimant's need to wear a splint on her left thumb to protect the joint and acknowledged that "it does limit her ability to move the thumb across the palm. In touching, grasping, or grabbing, the movement of the thumb is significantly limited." Williams Deposition, p. 21, ll. 7-10.

24. On April 11, 2017, Dr. Cox restricted Claimant from repetitive high force gripping with her left hand and all work above shoulder level. Dr. Cox later explained the gripping restriction:

> [W]ith the wrist injury I wouldn't want her doing anything that required her to grip heavily, like running power tools or having to use a wrench or a screwdriver or something that required an excessive amount of—or an abundance of gripping type activity. I didn't feel she was particularly limited in fine-motor activity, but high-force gripping.

Cox Deposition, p. 15, ll. 5-10.

25. On February 14, 2018, Dr. Lamey agreed with the restrictions determined by Dr. Cox. Dr. Lamey specifically agreed that Claimant should avoid repetitive high-force gripping involving her left hand; however, when asked if he would restrict her from all repetitive work because of her left hand he testified: "No. …. I don't think so. I think that if it does not require any forceful gripping that she could use the hand." Lamey Deposition, p. 20, ll. 1-5. Dr. Lamey indicated that scar tissue forming as a consequence of Claimant's hand surgery may reduce tendon motion resulting in difficulty gripping.

26. While Claimant's overhead work restrictions are acknowledged by all of the physicians, her most significant limitation is in the use of her dominant left hand. The pivotal question is the extent to which Claimant may use her dominant left hand. Dr. Cox restricted her left hand use only to the extent of avoiding repetitive forceful gripping. Dr. Lamey concurred. However, Dr. Williams restricted Claimant's left hand use to only occasional handling, fingering, and lifting 10 pounds. He defined occasional as up to 33% of the time. Dr. Williams acknowledged that part of this restriction was based on his physical examination of Claimant and "[p]art of it is subjective." Williams Deposition, p. 35, l. 25. There is some evidence calling into question Claimant's subjective left hand complaints.

27. Grip strength testing administered by Dr. Lamey showed 65 pounds with Claimant's right hand and only 25 with her left. In response to Claimant's report of persistent symptoms, Dr. Lamey addressed her assertions of left hand and thumb atrophy, overuse, pain, and swelling:

> Q. (by Mr. Gunnell) Would there be concerns about muscle atrophy as a result of having to wear a splint most of the time?
>
> A. I suppose, if you wore the splint all the time, yes; but I don't think there is a need to do that. You know, I think her grip should still be reasonably good. When you have arthroplasty or any kind of a joint replacement like that, you know, normally, motion is full. In her case, it's not. Normally, pain relief is pretty good. ….
>
> Q. Would you expect her pain to increase with overuse of that thumb?
>
> A. No, I don't think so, unless something else, like another joint, is becoming arthritic or something.

Lamey Deposition, p. 12, l. 16 through p. 13, l. 11. Claimant's left hand complaints may be the product of additional arthritis in her left hand, as mentioned by Dr. Lamey in his testimony. While her arthritis may have progressed in other joints in her left wrist, no party has specifically so asserted or produced evidence that such a development would relate to her industrial accident.

28. Dr. Cox testified that in his manual muscle examination of Claimant she demonstrated giveaway weakness—as differentiated from true muscle weakness—in her entire left arm: "All I can say is she didn't give me a full effort on her strength testing." Cox Deposition, p. 28, ll. 6-7. He testified that although Dr. Lamey's grip strength testing showed 65 pounds with Claimant's right hand and only 25 with her left, such grip strength testing in only one position "doesn't tell you anything about the patient's effort." Cox Deposition, p. 25, ll. 19-20.

29. Claimant's daughter testified that Claimant's left shoulder symptoms have improved since she ceased working at Plexus; however, her left thumb symptoms have worsened. Transcript, p. 80. Claimant credibly testified that her left hand and shoulder pain worsened post-surgery when she worked as a water spider at Plexus and has not significantly improved since she quit working.

30. Claimant's deposition and hearing testimony of her left thumb symptoms and use of a thumb splint are consistent and are corroborated by the consistent testimony of her children at hearing. The record as a whole establishes that Claimant's subjective complaints of debilitating left thumb pain are credible.

31. The undersigned Commissioners conclude that the restrictions imposed by Dr. Williams are most persuasive. Due to Claimant's left shoulder, wrist, and hand condition resulting from her industrial accident, she is restricted from overhead work, reaching more than 21 inches from her body, ladder climbing, and repetitive left hand fingering or handling. She is also limited to occasionally lifting 10 pounds and frequently lifting two pounds with her left hand and will need to wear a left thumb brace regularly.

32. Opportunities for gainful activity. Claimant asserts her left shoulder, wrist, and thumb conditions make it difficult for her to work. Two vocational experts have addressed her employability and Claimant herself has sought employment.

33. *Nancy Collins*. Nancy Collins, Ph.D., a vocational expert retained by Claimant, interviewed Claimant on September 24, 2016, and prepared a report evaluating her disability. Dr. Collins has been a vocational rehabilitation counselor and consultant for 30 years and has testified for both defendants and claimants for approximately 25 years. She noted that Dr. Lamey initially released Claimant without activity restrictions whereas Dr. Williams

restricted Claimant to occasionally lifting 10 pounds with her left arm and occasional reaching 21inches from her body. Dr. Collins noted that Dr. Cox's restrictions, with which Dr. Lamey later agreed, included avoiding repetitive high force left hand gripping and above shoulder level work with her left hand. Dr. Collins observed that a high force gripping restriction effectively precluded Claimant from heavy lifting.

34. Dr. Collins opined that Claimant has no significant keyboarding or office related computer skills and very dated and limited medical knowledge. Dr. Collins noted that for 30 years Claimant worked in fast paced repetitive hand gripping employment requiring frequent to constant use of her hands and arms, such as a production associate at Plexus, cashier at Albertsons, or fabricator in helmet manufacturing. Dr. Collins opined that applying Dr. Cox's work restrictions, Claimant sustained at least a 40% loss of labor market access. Applying Dr. Williams' work restrictions, Dr. Collins opined Claimant's "restriction for occasional use of her dominant arm and hand for reaching and handling is very significant. … Ms. Warner's loss of labor market access exceeds 90%." Claimant's Exhibit N, p. 8.

35. Dr. Collins noted Claimant is left-handed and must use a splint that functionally eliminates movement in her left thumb, resulting in very little opposition in her left thumb. Dr. Collins indicated wearing a wrist splint would be an issue when applying for hand intensive positions. She accepted Claimant's report that repetitive left hand activities cause pain and swelling so she performs most activities with her non-dominant right hand. Dr. Collins noted that Claimant has transferable skills particularly within small retail environments. However, her non-dominant right hand dexterity is slow and not viable for production pace work. Dr. Collins testified:

> I included sedentary and light jobs as those jobs she could still perform, but her most significant restriction is for occasional handling, reaching and fingering and

> it's her dominant arm. So, … that's the most significant restriction you can really have, because we all know we use our hands constantly to perform anything basically. So, 92 percent of all job titles in the DOT require frequent to constant reaching and handling. So, you're significantly limited if those are your restrictions. If you can only use that dominant arm one percent to 33 percent of the time, there are very few jobs left.

Transcript, p. 25, l. 19 through p. 26, l. 6 (emphasis supplied). She reported that Claimant would likely not be placeable in any job. Dr. Collins offered no opinion as to Claimant's wage loss in either her report or during her testimony at hearing due to difficulty identifying a suitable position.

36. Dr. Collins evaluated the 30 positions recommended by Bill Jordan in his report and based upon the Dictionary of Occupational Titles job description of each job, opined that nearly all would be unsuitable for Claimant:

> In reviewing the ones that he did include, in my opinion she's not competitive for most of them and in order to perform these jobs you would only have to rely on Dr. Cox's restriction, not Dr. Williams' restrictions, because all of these jobs would require frequent to constant reaching and handling and some of them would be heavier than her lifting restriction. All the medically related jobs that are here, which there are a lot—a medic—well, transfer driver probably doesn't need any medical knowledge, but med tech, medical receptionist, phlebotomist, med tech aide, phlebotomy processor, plasma processor, donor center TAG, pharmacy TAG, medical assistant—she really has no—her medical experience is over 30 years ago, other than two months as a home companion. So, you know, those are not relevant. She's not going to be competitive for these medical jobs. So, that eliminates a lot of the jobs here. And, the, he even has a production work in here. Call center jobs she doesn't have the computer skills for. So, while they may be within the restrictions from Dr. Cox, she would not be considered for these jobs—for most of these jobs and she would have to use her left arm and hand on a frequent and constant basis.

Transcript, p. 29, l. 17 through p. 30, l. 14. Dr. Collins opined that while Mr. Jordan believed Claimant could work as a bus monitor, such positions are uncommon and typically involve special needs students often having mobility limitations consequently requiring gripping, pushing, pulling, and even lifting by the monitor to assist such students. She concluded:

> [T]aking into account her functional limitations, her subjective complaints and Dr. Williams' specific restrictions for her and based on those restrictions it's my opinion that she's really an odd lot worker, that there are not jobs available in significant numbers or regularly available that she would be competitive for. She might be able to get a job, but she'd have a really difficult time keeping the job, because she's just not going to be fast enough using her nondominant hand to complete the activities.

Transcript, p. 33, ll. 10-19.

37. *William Jordan*. Defendants retained vocational expert William Jordan, M.A., CRC, CDMS, to evaluate Claimant's employability. Mr. Jordan has been a vocational specialist for almost 40 years and affirmed that he performs the majority of his work for the defense. He interviewed Claimant on December 4, 2017, and issued an employability report on January 4, 2018. Mr. Jordan noted Claimant had extensive experience as a cashier and also completed a medical assistant course through the Milan Institute in approximately 2012 but did not attempt state certification testing thereafter. He observed that even without state certification, some employment opportunities would be open in this medical area. Jordan Deposition, p. 28.

38. Mr. Jordan observed that none of the physicians have indicated Claimant cannot work and none have restricted her to less than full-time hours. He provided examples of positions regularly available in her labor market that he opined fit within the restrictions of either Dr. Cox or Dr. Williams or both, including: non-emergency transport driver, med tech, registrar, optician, female caregiver, medical receptionist, mobile phlebotomist, med tech aide, teller, plasma processor, pharmacy tech, medical assistant, front desk agent, customer service associate, medical office receptionist, food service associate, call center sales rep, production worker, and quality control tech. Defendants' Exhibit 26, p. 482. Mr. Jordan reviewed job descriptions with Dr. Cox who approved the following: nurse's aide, clothing sorter, companion, cashier, security

watch guard, self-service cashier, Medical Assistant, coffee counter attendant, barista—coffee maker, sales clerk bakery, school bus monitor, counter attendant cafeteria, breakfast attendant, and delivery driver auto parts. Dr. Cox also approved Claimant's production associate and water spider positions at Plexus. Jordan Deposition, p. 32.

39. Mr. Jordan opined that accepting the restrictions imposed by Dr. Cox; Claimant would sustain a loss of labor market access of 20% and a 3% wage loss producing a 12% permanent disability, inclusive of her permanent impairment. Thus, Mr. Jordan concluded that if Dr. Cox's restrictions are adopted, Claimant has no permanent disability in excess of her 13% whole person permanent partial impairment.

40. Mr. Jordan testified that accepting Dr. Williams' more extensive restrictions, there were still jobs available. Mr. Jordan opined that given the restrictions imposed by Dr. Williams, Claimant would sustain a loss of labor market access of 56% and a 3% wage loss producing a 28% permanent disability, inclusive of her permanent impairment. Defendants' Exhibit 26, p. 484.

41. *Claimant's job search.* Claimant testified at hearing she believes there are jobs she can do and she has been looking for work. Mr. Jordan testified that in her interview Claimant reported she thought she could work as a customer service clerk at Albertsons cashing checks, handling money orders, and distributing tobacco products, a cashier at Michael's, a cashier at Kmart, or a cashier at Burlington. Jordan Deposition, p. 11-12.

42. Between November 10 and December 8, 2017, Claimant submitted a total of 18 job applications—12 online—to potential employers, all without success. She applied at Where You Have a Habit, Chevron, Domino's, Jackson's, Family Dollar, Great Clips, Wal-Mart, Albertson's, Country Store, Denny's, Napa Auto Parts, Cloverdale Nursery, Target, Meridian

Village, Chicago Connection, Albertson's Warehouse, Clean Authority, and Martinizing Cleaning.

43. Additionally, in approximately December 2017, Claimant's daughter, Whitney Crocket, an employee of Idaho Employment Training Services, sent Claimant's resume through several on-line services to approximately 50 companies including Packaging Corporation of America, American Tire Distributors, Bretz RV, Oldcastle, Buffalo Wild Wings, Gem State Staffing, IES Custom Staffing, Franz Family Bakery, Burlington Stores, Follett, Sodexo Frontline, Pro Moto Billet, NPC International, FedEx, Tomlinson & Associates, Liveops, Key Bank, One Main, Mosaic Field, Shopko, Sprint, Camping World, AAA Oregon/Idaho, Stage, T-Mobile, Stanley Steemer, Albertsons, Michaels, American Express Global, State Farm Agency, Terminex, Aspire Human Services, Mister Car Wash, LaborMAX Staffing, Denny's, Mor Furniture, Fred Meyer, Heartland RV, Northwestern Marketing Concepts, Redneck Trailer Supplies, Kmart, Volt, and PepsiCo. Claimant received no interviews or employment offers.

44. Between January 13 and 15, 2018, Claimant canvassed Nampa and submitted approximately 25 resumes or job applications to the following: coffee shop attendant at Flying M, associate at Now World of Nutrition, Farm Store, Lucky's Dog Grooming, circulation assistant at Caldwell Library, dispatcher, playroom attendant at Shire Pharmaceuticals, sales associate at JC Penny, jewelry sales associate, front desk associate at Massage Envy, part-time teller at Westmark Credit Union, dispatch assistant, scheduling agent at O2 Photography, cashier at Craft Warehouse, cashier at Idaho Center Chevron, cashier at Flying J, hostess at Enrique's Mexican Restaurant, food server at Yogurt Court, cashier at Maverick, retail associate at Ross Stores, crew member at Sodelicious, front desk receptionist at Fast Lane, associate at Kart

Racing, part-time cashier at St. Lukes Meridian, and associate at two different call centers. Claimant received no interviews or employment offers.

45. Claimant called and inquired about the jobs that Mr. Jordan identified in his January 2018 report. She determined that nearly every position either required experience she did not possess or lifting in excess of 40 pounds. The billing position at Premier required higher computer skills, the phlebotomy position was filled and also required state certification that Claimant lacked, and the medical technician position at Brookdale Assisted Living required state certification that Claimant lacked.

46. *Weighing the vocational evidence.* Claimant's significant work search factors into the evaluation of the expert vocational testimony but is not altogether convincing. With some exceptions, her work search was a matter of distributing resumes, the majority of the resumes being sent electronically by her daughter, with little if any follow-up contact of potential employers by Claimant. Careful targeting of employers with available positions that would be suitable given Claimant's work restrictions as imposed by Dr. Williams is not apparent. Mr. Jordan believed that while Claimant's daughter had electronically sent Claimant's resume to a number of potential employers, and Claimant had actually talked with some potential employers, she had applied in-person for only a few open positions. Jordan Deposition, p. 55. Mr. Jordan therefore characterized Claimant's job search as cursory rather than extensive, and testified that to be effective she needed to work with "someone that would help her to determine the right kinds of jobs to apply for, coach her about talking with employers in-person, taking the resume by directly, scheduling appointments, that sort of thing." Jordan Deposition, p. 56, ll. 20-23.

47. Considering Dr. Williams' left hand occasional handling restriction, Mr. Jordan opined Claimant's loss of labor market access was 56%; Dr. Collins opined it exceeded 90%.

While Mr. Jordan acknowledged that Dr. Williams restricted Claimant to occasional handling/fingering with her dominant left hand, he offered little explanation of the probable impact of this restriction on Claimant's employability. His opinion does not appear to realistically apply Dr. Williams' restriction against frequent or constant handling or fingering with Claimant's dominant left hand and Claimant's slower paced handling and lesser manual dexterity when forced to rely upon her non-dominant right hand for anything more than occasional use. Mr. Jordan's recitation of potential jobs for Claimant does not clearly differentiate between jobs suitable per Dr. Cox's work restrictions and those Mr. Jordan deems suitable per Dr. Williams' work restrictions. Mr. Jordan admitted that Claimant's wearing a splint on her dominant hand would be a competitive disadvantage in seeking employment and that her age of 56 may also be a disadvantage. Mr. Jordan's opinion of Claimant's loss of labor market access is less persuasive than that of Dr. Collins.

48. Dr. Collins testified that 92% of the job titles in the Dictionary of Occupational Titles require frequent to constant handling. She thus opined Claimant sustained a 92% loss of labor market access. Dr. Collins also based her opinion upon the assumption that Claimant was restricted to lifting 20 pounds. Transcript p. 49, ll. 4-13. This is a misstatement; in fact, no physician limited Claimant's overall lifting to 20 pounds. Dr. Williams opined that Claimant was restricted to no lifting greater than 15 pounds and no carrying greater than 10 pounds with the left arm on an occasional basis. He also opined Claimant could likely lift 40 pounds on occasion with both arms. Williams Deposition, p. 37, ll. 17-18. Claimant has no positional restrictions and no driving limitations. She testified that she had no difficulty driving with her right hand. Dr. Williams restricted Claimant from frequent or constant handling with the left hand, thus implicitly affirming her capacity to use her left hand to engage in occasional handling,

defined as up to 33% of the time. Left hand use up to 33% of the time plus unlimited right hand use, taken in conjunction with Dr. Williams' indication that Claimant can occasionally lift up to 15 pounds with her left hand and 40 pounds using both hands, suggest additional potential employment opportunities not addressed by Dr. Collins.

49. Significantly, the record establishes viable employment options for Claimant. Claimant performed the work of a water spider at Plexus for several months after her left hand surgery. The unloading of pallets of 20 to 40 pound metal bars increased her left hand pain until it became intolerable. However, Plexus personnel including Adams and supervisors Anderson and Atkinson affirmed help was available for lifting. Claimant herself acknowledged at hearing that she did not always seek help with lifting while working at Plexus in her water spider position even though she had been directed to do so:

> Q. (by Mr. Gunnell) Did you ever talk to your immediate supervisors about problems you were having at work?
>
> A. I talked to the trainer about it.
>
> Q. About the—who was the trainer?
>
> A. Annie Hall.
>
> Q. And did she provide any help to you?
>
> Q. Yes. She just—she said if you need help let me know, you know, but she was busy doing her own thing when I would need help, so, you know, I'm not the kind of person to ask for help every minute, you know. Either I can do it or I can't, you know.
>
> Q. And did you sometimes ask for help when—
>
> A. Yes.
>
> Q. –there was [sic] people around you that could have helped you?
>
> A. Yes, I did.

Transcript, p. 116, l. 25 through p. 117, l. 15 (emphasis supplied).

50. Dr. Collins acknowledged at hearing that there are two jobs of the 30 listed by Mr. Jordan that Claimant can perform within the restrictions imposed by Dr. Williams. She testified:

> [I]f you look at these job descriptions, every single one of them, with the exception of one, required frequent reaching and handling and it's listed right on the page on the job description under physical demands. The only one that doesn't is the—again, school bus monitor and that indicates it's not present. Now, there was one other customer service rep where it was occasional and she, according to the doc, could do occasional reaching and handling and that was a customer service rep. So, maybe those two jobs if they were regularly available and she had the skill set to perform them.

Transcript, p. 34, ll. 7-22. Focusing further on the customer service position, Dr. Collins explained:

> [W]hat we think of as customer service jobs in Boise are the call center jobs and that's not what this is. This is a sedentary job where you're talking to people who are returning merchandize, like maybe at a grocery store or a department store. So, it has to do with the billing and merchandize. It's more of a clerical kind of job and she really doesn't have any clerical skills, but she has worked with the public, she has—had worked in the grocery business, so she does have some of those skills and it if was not fast paced she could maybe do that job, if she could primarily use her right hand and use her left hand occasionally.

Transcript, p. 35, ll. 11-23.

51. Thus, while not numerous, there appear to be viable employment options in addition to the water spider and less strenuous positions at Plexus that are suitable for Claimant given Dr. Williams' restrictions. Claimant does not assert that Plexus is a sympathetic employer that is somehow willing to accept inadequate job performance.

52. Claimant's actual wage loss is unclear. Dr. Collins provided no opinion on Claimant's wage loss, and Mr. Jordan acknowledged that while he estimated a wage loss of only 3% (from $11.15 to $10.91 per hour), Claimant received health, dental, and vision benefits and a

401(k) program at Plexus generally equating to an additional "$3 or $4 an hour." Jordan Deposition, p. 66, ll. 10-11. Mr. Jordan assumed that all of Claimant's potential future employers would provide a similar benefits package. The record contains little support for this assumption. A larger loss of earnings is more probable due to the fact that all of the benefits Claimant enjoyed at Plexus, including medical, dental, and vision insurance and 401k benefits, may not be available from prospective future employers. Thus Claimant's loss of earnings per Mr. Jordan's analysis may range from 3% to as much as 28%. Claimant's actual wage loss, whatever that may be, when considered with Dr. Collins's testimony that 92% of jobs in the Dictionary of Occupational Titles require frequent to constant handling and fingering and that Claimant had lost access to more than 90% of the labor market, produces a potential range of permanent disability of 47.5% ([3% + 92%] ÷ 2) to as much as 60% ([28% + 92%] ÷ 2).

53. The Commission has previously observed the limitations arising from simply averaging the estimated loss of labor market access and the expected wage loss, declaring:

> the averaging method has its limitations as the two measures averaged are not entirely independent. Complete loss of labor market access produces complete expected wage loss. As the loss of labor market access becomes more substantial, the expected wage loss is less significant in predicting actual disability.
>
> The Commission discussed this very phenomena in Deon v. H&J, Inc., 2013 WL 3133646 (Idaho Ind. Com. May 3, 2013):
>
> > Rating an injured worker's permanent disability by averaging her estimated loss of labor market access and expected wage loss, as Drs. Collins and Barros-Bailey have done in the instant case, can provide a useful point of reference. However, the averaging method itself is not without conceptual and actual limitations. As the loss of labor market access becomes substantial, and the expected wage loss negligible, the results of the averaging method become less reliable in predicting actual disability. For illustration, as judged by the averaging method, a hypothetical minimum wage earner injured sufficiently to lose access to 99% of the labor market may theoretically suffer no expected wage loss if she can still perform any minimum wage job. Calculation of such a worker's disability according to the averaging method would produce a

> permanent disability rating of only 49.5% ([99% + 0%] ÷ 2) even though her actual probability of obtaining employment in the remaining 1% of an intensely competitive labor market may be as remote as winning the lottery. The averaging method fails to fully account for the reality that the two factors are not fully independent.

Gonzales v. Champion Produce, Inc., 2014 WL 4659388, at 8 (Idaho Ind. Com. Aug. 22, 2014). We believe these considerations are present in the instant matter, and warrant giving more weight to Claimant's labor market access loss.

54. The weight to be given evidence is a question for the Industrial Commission. Murray v. Hecla Mining Co., 98 Idaho 688, 571 P.2d 334 (1977). The extent of an injured worker's disability for work is a factual matter committed to the particular expertise of the Industrial Commission. Gordon v. West, 103 Idaho 100, 645 P.2d 334 (1982)(citing Thom v. Callahan, 97 Idaho 151, 540 P.2d 1330 (1975)). The Commission concludes that the facts of this case warrant giving more weight to Dr. Collins' opinion that Claimant has suffered a 92% labor market access loss. Even though we believe, as set forth in ¶45-51 above, that some employment opportunities do exist for Claimant, we nevertheless conclude that the labor market access loss proposed by Dr. Collins is closer to the mark than the figure proposed by Mr. Jordan. In addition to the reasons set forth *infra*, we believe that Claimant's work search, though imperfect, lends more support to Dr. Collins' opinion than to Mr. Jordan's.

55. Based upon Claimant's permanent impairment of 13% of the whole person, permanent physical restrictions as determined by Drs. Cox, Lamey and especially Dr. Williams including her restriction to using her dominant left hand only occasionally for handling and fingering, and considering all of Claimant's medical and non-medical factors including but not limited to transferable skills, extremely dated and limited medical training, inability to return to her previous positions, and age of 54 at the time of the industrial accident and 56 at the time of

the hearing, Claimant's ability to compete in the open labor market and engage in regular gainful activity after her industrial accident has been significantly reduced, but not altogether eliminated. Claimant has proven permanent disability of 70%, inclusive of her 13% whole person permanent impairment.

56. **Odd-lot.** Claimant also alleges she is totally and permanently disabled pursuant to the odd-lot doctrine. A claimant who is not 100% permanently disabled may prove total permanent disability by establishing he is an odd-lot worker. 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, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). 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). The burden of establishing odd-lot status rests upon the claimant. Dumaw v. J. L. Norton Logging, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). A claimant may satisfy his burden of proof and establish a prima facie case of total permanent disability under the odd-lot doctrine in any one of three ways:

1. By showing that he has attempted other types of employment without success;
2. 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
3. By showing that any efforts to find suitable work would be futile.

Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

57. In the instant case, other than Claimant's leaving her water spider position at Plexus, she makes no assertion of a failed attempt at other types of employment. Claimant walked out of her water spider job. She failed to take advantage of the help with lifting that was offered her by her trainer and others at Plexus. Such does not constitute a failed work attempt sufficient to satisfy the first prong of the Lethrud test, but rather a failure by Claimant to fully avail herself of the assistance offered.

58. Claimant has presented evidence of an unsuccessful work search. She alone, and with the assistance of her daughter, contacted more than 90 prospective employers without success. This constitutes a significant work search. However, the second prong of the Lethrud test requires a showing that suitable work is not available, most often established by evidence of an unsuccessful job search. However, when a substantial part of the job search is not shown to be more than the distribution of electronic resumes without apparent reasonable follow-up, the large number of electronic submissions is insufficient to prove that suitable work is not available. Moreover, while Dr. Collins initially opined that a work search would be futile, she later testified that two positions identified by Mr. Jordan may be viable employment options. Finally, Plexus established that it had directed Claimant to ask for assistance with lifting in her water spider position and that lighter duty positions were available to Claimant had she notified Plexus of her difficulty performing the water spider position. Claimant has not proven that other work is not available or that a work search would be futile. She has not established a prima facie case under the Lethrud test.

59. Claimant has not proven that she is totally and permanently disabled pursuant to the odd-lot doctrine.

CONCLUSION OF LAW AND ORDER

1. Claimant has proven she suffers permanent disability of 70%, inclusive of her 13% permanent impairment, due to her industrial accident. She has not proven that she is an odd-lot worker, totally and permanently disabled.
2. Pursuant to Idaho Code § 72-818, this decision is final and conclusive as to all matters adjudicated.

Dated this __30th__ day of ____November____, 2018.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

_____/s/_____
Thomas P. Baskin, Commissioner

_____/s/_____
Aaron White, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___30th___ day of __November_, 2018, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

J BRENT GUNNELL
1226 E KARCHER RD
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W SCOTT WIGLE
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_____/s/_____