BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LORRAINE WRIGHT,

Claimant,

v.

NEW ALBERTSONS, INC.,

Self Insured Employer,

Defendant.

IC 2012-005453

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

Filed July 31, 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael Powers, who conducted a hearing in Boise, Idaho, on January 17, 2014. Richard Owen of Nampa represented Claimant. Michael McPeek of Boise represented Albertsons. Oral and documentary evidence was admitted. Post-hearing depositions were taken. The parties filed post-hearing briefs. The matter came under advisement on May 7, 2014.

ISSUE

By agreement of the parties, the sole issue to be decided is the extent of Claimant's permanent partial disability (PPD), which may be total and permanent.[1]

[1] At hearing, the parties also included the issue of retention of jurisdiction, but Claimant subsequently withdrew that issue.

CONTENTIONS OF THE PARTIES

Claimant argues in favor of total permanent impairment flowing from her industrial accident while working for Albertsons. Even if Claimant is not totally disabled, her permanent disability exceeds her impairment.

Defendant argues that Claimant has failed to prove her total disablement under the odd-lot doctrine, although she is entitled to additional disability benefits in excess of her PPI.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, taken at hearing.

2. Exhibits 1-19 and A-F, admitted at hearing.

3. The post-hearing deposition transcripts of Douglas Crum, C.D.M.S., and Nancy J. Collins, Ph.D., which were taken on February 6 and 21, 2014, respectively;

5. The post-hearing deposition transcript of Michael Severson, M.D., taken January 28, 2014;

6. The post-hearing deposition transcript of Rodde Cox, M.D., taken February 18, 2014.

The lone objection in the depositions (Crum depo. at p. 36) is overruled.

After having considered 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.

FINDINGS OF FACT

1. At the time of hearing, Claimant was a 65-year-old married woman residing near Caldwell, Idaho with her husband and a sixteen-year-old granddaughter. Prior to moving to Idaho in 1991 she lived and worked in California.

2. Claimant has a high school education, took some college courses and has job skills she acquired through a lifetime of working, as briefly summarized below.

3. During her adult life, Claimant worked in the following occupations prior to her working for Albertsons:[2]

- Motel maid (briefly);
- Bus driver (three to four years in California and four to five years in Idaho);
- Cashier moving to supervisor at department store (total of four to five years);
- Restaurant waitress (approximately 19 years);
- Light duty bookkeeper and cashier at Safeway (approximately six years);
- Telephone debt collector (two to three years);
- Long haul truck driver as part of team with husband (approximately two years);
- Ran a home business growing and packaging raspberries.

Albertsons Employment

4. In approximately 1993, Claimant first began working for Albertsons. She was employed in the bakery as a night time "cleaner" and bread maker. This was a part-time job. She worked at this position for about three months.

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[2] At times Claimant held two positions simultaneously, thus making her years worked look greater than her years.

5. Dissatisfied with her hours and the fact she did not get benefits as part of her job, Claimant quit Albertsons.

6. Claimant returned to work for Albertsons in 1999. Her first position was selling money orders, lottery tickets and performing customer service tasks.

7. After a few months in the "booth" Claimant was promoted to cashier. She held that position for the next several months. She then took the job of scan clerk.

8. Scan clerks are in charge of making sure the correct prices are in the computer and on the price tags throughout the store.

9. As a scan clerk, Claimant originally worked thirty hours per week. By the time of the accident, Claimant was working approximately twenty hours per week, the minimum to maintain her right to company benefits.

Claimant's Accident and Initial Treatment Summary

10. On February 1, 2012, Claimant leaned forward while changing price tags and felt a snap in her lower back. She felt stiff, but managed to work the remainder of her shift that day.

11. The following day Claimant was in significant pain and could not work. She sought treatment at Saltzer Medical Clinic in Nampa, where she was examined by Harold Kunz, M.D. He gave her medication and scheduled a follow-up in a week.

12. By the time Claimant presented for follow-up on February 6, 2012 she had developed left leg pain radiating into her foot, and difficulty urinating. She was directed to go immediately to St. Luke's for an MRI.

13. Her lumbar MRI showed degenerative disk disease and facet disease with moderate foraminal stenosis on the left at L3-4 and bilateral foraminal stenosis at L4-5

secondary to disk bulge and facet hypertrophy. Claimant was discharged with instructions to follow-up with Spine Wellness Center.

14. Claimant was next seen by Cody Heiner, M.D. Over the course of several visits, her symptoms first improved, and then deteriorated to the point where Dr. Heiner suggested a neurosurgical evaluation, to which Claimant ultimately agreed.

15. Ronald Jutzy, M.D., a Boise neurosurgeon, saw Claimant on March 8 and April12, 2012. Following the April visit, Dr. Jutzy determined Claimant would benefit from a decompression with subsequent instrumentation to stabilize her lumbar spine. Since he did not perform such surgeries, he referred Claimant to neurosurgeon Paul Montalbano, M.D. for further care.

16. Dr. Montalbano ordered a repeat MRI and took x-rays, which showed a significant progression in Claimant's lumbar disk herniations. Dr. Montalbano noted on April 25, 2012 that Claimant's "disk herniation is quite larger than her prior study and accounts for the symptomatology involving her left leg. Her instability at L4-L5 accounts for her low back pain." DE 8, p. 74. He recommended surgery to include a left L3-4 extraforaminal microdiskectomy and an L4-L5 decompression, fusion, and instrumentation.

17. The proposed surgery took place on May 15, 2012. Claimant's post-surgery condition waxed and waned through her recovery. Although the pain in her left leg lessened with surgery, her lower back pain persisted, and she developed right-sided leg pain. Post-surgical MRI studies showed Claimant's back fusion was intact. Dr. Montalbano referred Claimant to Michael Severson, M.D., a pain management specialist.

Claimant's Pain Management Treatment Summary

18. Dr. Severson initially saw Claimant on September 26, 2012 for her

continuing low back and right leg pain. Dr. Severson's treatment plan included epidural injections, which Claimant refused, due to a then on-going contamination scare nationwide. He also prescribed medication and discussed other options Claimant might try, including a spinal cord stimulator.

19. Over the course of treatment with Dr. Severson, Claimant struggled to find a medication regimen which would substantially reduce her pain while not making her feel drugged.[3] Numerous combinations were tried until she and Dr. Severson settled upon Oxycontin and Oxycodone, which still affected her mental status, but reduced her pain to manageable levels.

20. Over time, in addition to a host of different drug combinations, Claimant tried epidural injections (once the contaminated drugs were recalled), and a trial of a TENS unit, none of which relieved her pain without unwanted side effects. Finally, she and Dr. Severson elected to try a spinal cord stimulator. Prior to allowing the trial, Surety scheduled Claimant for an IME with Robert Friedman, M.D.

21. Dr. Friedman was not in favor of a spinal cord stimulator, opting instead for epidural steroid injections. Claimant agreed to them, but they provided no lasting relief.

22. Eventually, Surety authorized a trial with the spinal cord stimulator. With it, Claimant's leg pain was "virtually eliminated," while in Claimant's opinion her back pain was improved by at least 50 percent.

23. Based on the successful trial study, Claimant had a permanent spinal cord stimulator implanted. Dr. Montalbano performed the surgery on June 28, 2013.

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[3] At various times, Claimant referred to the feeling as "loopy and incoherent." Tr. p. 64, l. 14, or "cloudy." Tr. p. 71, l. 18.

24. Initially, Claimant was pleased with the results of the stimulator. One month post-implant, Dr. Montalbano noted that "[claimant] has significant capture of her preoperative symptomatology. She is quite pleased with her clinical course." DE 8, p. 95. By August 2013, Dr. Montalbano felt Claimant had reached MMI and was ready for an impairment rating and permanent work restrictions.

25. On November 27, 2013, Rodde Cox, M.D., a physical medicine and rehabilitation physician, examined Claimant on behalf of Defendants, and ultimately rated her permanent impairment at 25% whole person, with no apportionment, which finding is not disputed by the parties. His opinions are discussed in greater detail below.

26. Claimant testified the stimulator relieved her leg pain, but her back pain persisted at the time of hearing. She had not been able to eliminate, or even reduce, her opiate usage, which had been her goal when agreeing to the spinal cord stimulator. As of the hearing date, she was taking 20 mg. Oxycontin three times per day, and 10 mg. Oxycodone as a "kicker" at least twice a day.

DISCUSSION AND FURTHER FINDINGS

27. Neither party denies Claimant suffered a permanent physical disability in excess of her 25% PPI rating. Claimant argues she is totally disabled under the odd-lot doctrine, while Defendants claim Claimant's disability is considerably less than total. The disability analysis focuses on two categories – Claimant's physical limitations, and her disability. Contrasting opinions regarding her physical limitations are put forth by the two primary physicians; Dr. Severson, relying on his treating doctor/patient relationship with Claimant, and Dr. Cox, utilizing the findings of a functional capacity evaluation and his examination of Claimant. For the disability rating analysis, Claimant relies on Douglas

Crum, C.D.M.S., while Defendants utilize the opinions of Dr. Nancy Collins. Each of these components will be addressed below.

Physical Limitations

28. On the recommendation of Dr. Cox, Claimant participated in a functional capacity evaluation (FCE), on December 20, 2013. A full chart of Claimant's measured capabilities for various activities is set out in DE 17, p. 242. Those of most significance to this decision were set out in Claimant's Opening Brief at p. 18 and shown below:

Activity	**Capabilities**
Work Day	8 hours
Sitting	8 hours (60 minute duration)
Standing	8 hours (55 minute duration)
Walking	5 to 6 hours frequently long distances
Lifting	(Various levels) Up to 25 lbs. occasional; 10 lbs. frequent
Balance	Occasionally
Bend/Stoop	Occasionally
Climb stairs	Occasionally
Crawling	Occasionally
Crouching	Not at all
Head/Neck Flexion	Occasionally
Kneeling	Occasionally
Squatting	Not at all

29. Dr. Cox explained the purpose of an FCE in his deposition. As he explained:

> it's oftentimes difficult in a practice setting to really determine what a person's full physical capabilities are. So, the functional capacity evaluation is – allows us to kind of put them through their paces to try to get a better understanding of what their capabilities are in a more structured format. That also allows us to kind of look at their effort and how much effort they put forth as opposed to just them telling you, well, I think I could do this or I think I could do that. It allows us to try and be more formal in assessing that.

Cox depo., p. 14, ll. 5-15. Later in his deposition, Dr. Cox elaborated on the rationale for having the patient demonstrate capabilities, rather than simply stating them:

> Q. When you have an evaluation like this that's talking about, for example, sitting or standing for a particular amount of minutes at a time and then having a break, what's the significance of those types of restrictions? What are they trying to get at?
>
> A. Well, again, it's trying to really estimate what her true work capacity or capabilities are as opposed to just patient report.
>
> Q. And what are some of the issues that arise if you just focus on patient report?
>
> A. Well, I mean, you see both ends of the spectrum. Sometimes patients underestimate what they think they can do. Sometimes patients overestimate what they think they can do. So, that's part of the reasons why these functional capacity evaluations were developed, is to try and better objectify or quantify as opposed to just having them come into your office and put them through a physical examination to try and quantify what we think they're capable of doing.

Cox depo., p. 16, ll. 10-25; p. 17, ll. 1-3.

30. Dr. Cox noted the testing was considered valid, and Claimant gave a full effort. He agreed with the FCE results, and found them to be more or less in line with his findings upon examination. He had anticipated Claimant would be able to lift more weight but the difference was not significant and he felt the FCE limitations were reasonable. In

short, he felt the FCE findings presented a good picture of Claimant's capabilities and limitations.

31. Dr. Severson disagreed with the FCE findings. He felt Claimant was significantly more restricted in what she could do. In particular, he felt Claimant could not be on her feet, standing and/or walking, in any combination, for more than two hours per day. He also felt she should be bending and stooping on a rare basis only. Finally, he opined she should limit her sitting to half an hour without a break,[4] and should use her cane as needed for balance, especially when walking long distances.

32. Dr. Severson testified at length about Claimant's drug sensitivities and how it affected her ability to learn, concentrate and focus. He opined that if she felt impaired, she should refrain from driving. He pointed out she could be charged with DUI if she failed the field tests associated with such a stop.

33. Dr. Severson believed his repeated visits with Claimant put him in the best position to evaluate her limitations, both mental and physical. However, he acknowledged he did not do a hands-on physical examination on each of Claimant's visits, and in fact only conducted one detailed physical examination during the course of his treatment up through the time of his deposition. He also recognized Dr. Cox's expertise in evaluating Claimant's work limitations. As noted during cross-examination in his deposition:

> Q. Okay. In your note of your visit of December 9th, on the second page there was a reference under, "Plan."
>
> A. Yes.
>
> Q. It's under the sentence, "She will follow-up with Dr. Cox

[4] He did acknowledge she could sit for eight hours if she had the chance to take breaks as noted.

> with respect to Workers' Compensation and how much she can do"?
>
> A. Yes.
>
> Q. And I'm not – were you indicating by that that you were deferring to him in terms of what her restrictions or limitations would be relative to work function?
>
> A. Yes. Because he had been evaluating her, I – my rationale was that he was spending more time with her, and this is his area of work compared to mine. I don't typically do Functional Capacity Assessments or IMEs.

Severson depo., p. 50, ll. 19-25, p. 51, ll. 1-8. Dr. Severson did, on re-direct, confirm that he believes his assessment is also relevant, due to his long-standing medical relationship with Claimant.

34. While Claimant's counsel stresses Dr. Severson's physical restrictions in support of Claimant's odd-lot status, the doctor's opinions are of limited value when considered in the totality of the facts. To begin with, Claimant's vocational rehabilitation expert did not rely on Dr. Severson's opinions when preparing his written report (although by the time of his deposition he adopted them as supportive of his opinions). While Dr. Severson may have visited on numerous occasions with Claimant, he conducted but one detailed physical examination of her. His opinion on Claimant's limitations is primarily based upon her subjective statements and complaints. The purpose of an FCE is to find out how closely a patient's statements match her real-world capabilities. The FCE is often the better gauge of one's abilities. Most importantly, not even Claimant agrees with Dr. Severson's restrictions. During the hearing, she agreed that she could sit for an hour; after

that she gets "fidgety."[5] Tr. p. 80. She testified she can stand and move for 55 minutes without a break, so long as she can walk around. She pointed out she is able to shop at Walmart, walking throughout the building. She felt certain she could work for four hours, but was not sure about an eight-hour shift, although she noted she has not worked a full-time eight-hour shift in years. She believes she could work a job similar to her employment at Emporium, if she was in a department such as baby clothes, lingerie, or other light duty lifting. At the time of hearing, Claimant was looking for a retail job.

35. Dr. Cox's opinions on Claimant's limitations, as set forth in the FCE, are more persuasive than those imposed by Dr. Severson, and will be considered an accurate representation of Claimant's abilities and restrictions when determining her permanent physical disability.

Vocational Expert Disability Analysis

36. Idaho Code §72-422 defines permanent disability as "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 evaluation." One is under a permanent disability "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." I.C. §72-423. As defined in I.C. §72-425 "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

[5] She sat for over an hour during her questioning at hearing, although she noted she was at the edge of her tolerance of comfort by the end of her time on the witness stand.

factors…." Those "pertinent nonmedical factors" include that nature of the physical disablement, the disfigurement and its effect on procuring or holding employment, the cumulative effect of multiple injuries , the employee's occupation and age at the time of the accident, the employee's diminished ability to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, in addition to other factors the commission may deem relevant. I.C. §72-430.

37. The test for determining if Claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Greybill v. Swift & Company,* 115 Idaho 293, 294, 66 P.2d 763, 766 (1988). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.,* 110 Idaho 32, 714 P.2d 1 (1986).

38. Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Indus.,* 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund,* 130 Idaho 278, 939 P.2d 854 (1997). The Idaho Supreme Court in *Brown v. The Home Depot,* 152 Idaho 605, 272 P.3d 577 (2012) iterated that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing.

Douglas Crum

39. Claimant hired Douglas Crum, C.D.M.S., a vocational rehabilitation consultant from Boise, and well known to the Commission, to evaluate Claimant's

permanent disability. After reviewing her medical records and interviewing Claimant, Mr. Crum initiated his evaluation of her disability by calculating her loss of access to the labor market and her potential wage loss.

40. Employing labor market statistics from the Idaho Department of Labor's Occupational Employment & Wage Survey for the Boise Metropolitan Statistical Area, Mr. Crum concluded that immediately prior to the subject accident, Claimant had access to approximately 9.5% of the jobs in her local labor market. Factoring in Claimant's FCE restrictions, and Claimant's mental issues, such as her subjective complaints of forgetfulness, inability to concentrate, and what Mr. Crum perceived as a general presentation of a woman not in good health (evidenced in part by her use of a cane at times, and her slow and unsteady gait), Mr. Crum then calculated Claimant's post-injury labor market access. His analysis led him to the opinion that Claimant, post-accident, had access to only .4% of the jobs in the Ada/Canyon County labor market, a 95% loss of labor market access. He determined her only hope of employment was "a few cashiering, paying/receiving and security related jobs." DE 19, p. 278.

41. Claimant was earning $14.02 per hour at the time of her industrial accident. Based on his experience, Mr. Crum opined that should Claimant find a job, she would most likely be paid the current minimum wage of $7.25 per hour. Therefore, according to Mr. Crum, Claimant has suffered a 48% loss of earning capacity.

42. Mr. Crum noted that at the time of injury, Claimant had no other vocationally significant medical conditions which would affect her ability to work.

43. Citing her age, 65 at the time of hearing, as a significant contributing factor, along with the 95% loss of labor market access, Mr. Crum concluded his analysis by declaring Claimant totally and permanently disabled on an odd-lot basis.[6]

Dr. Nancy Collins

44. Defendants hired Nancy Collins, Ph.D., a forensic vocational consultant from Boise and well known to the Commission, to evaluate Claimant's permanent disability. Dr. Collins reviewed Claimant's medical records and interviewed her. Dr. Collins then consulted the Dictionary of Occupational Titles (DOT), and software which utilizes the DOT to first categorize types or groups of jobs which have demands similar to Claimant's past employment, to look for transferable skills. She used this information to determine Claimant's general pre-accident labor market access. She then adjusted for Claimant's current restrictions and determined a general loss of market access. Using the restrictions set forth by Dr. Cox and the FCE, Dr. Collins determined, when utilizing her computer program, Claimant sustained a 31% loss of directly transferable labor market due to her industrial accident. When Dr. Collins included unskilled jobs into her equation, Claimant's loss of access jumped to 43%.

45. Dr. Collins next consulted the Occupational Employment Quarterly and the Idaho Occupational Employment and Wage Survey for 2012, which allowed her to refine her analysis specifically to the local Ada/Canyon County labor market. Dr. Collins looked

[6] Mr. Crum made no attempt to quantify a percentage permanent disability rating, even though averaging her loss of market and loss of wage earning capacity would give a permanent disability percentage of 71.5%. Of course, there is no way to know if Mr. Crum felt averaging would be appropriate in this case, and if not, why not.

at directly transferable jobs in the greater Boise market and determined Claimant had a 23% loss of local access. When Dr. Collins removed all commercial driving jobs, Claimant's loss of access in the local market increased to 25%.

46. Taking all factors into account, Dr. Collins opined Claimant's realistic loss of access to the local labor market to be 33%.

47. Next, Dr. Collins evaluated wage earning capacity. She noted there is typically a difference between part-time and full-time wages. While Claimant had been working part-time, Dr. Collins noted the FCE did not restrict Claimant to part-time work. Dr. Collins determined the range of starting wages for directly transferable skills, including part and full-time employment, would be between $8.00 to $11.00, which equated to a 22% to 43% decrease in Claimant's wage earning potential. Dr. Collins felt a 33% loss of wage earning potential was realistic for Claimant's situation.

48. After examining Claimant's loss of labor market access and loss of wage earning potential, Dr. Collins felt Claimant suffered a 33% permanent partial disability from her industrial accident.

Permanent Physical Disability

49. Mr. Crum's assessment that Claimant's injury limitations have precluded her from 95% of her pre-injury job market is overly pessimistic. Claimant testified she would be able to return to light retail sales, at least on a part-time basis. Claimant agreed with many of the FCE findings. She was able to sit and concentrate during the hearing. She was pleasant, forthright, and likeable at hearing. It appears Claimant could do light retail work on a part-time basis. In addition, a customer service job similar to the "booth girl" position Claimant described during her testimony appears to fall within her limitations.

Claimant expressed disdain for phone collection work, and while she most likely would not choose to return to that profession, Dr. Collins convincingly opined such a position would fall within Claimant's restrictions.

50. Dr. Collins' opinion on Claimant's PPD rating is overly optimistic. It is not reasonable to assume Claimant would still be qualified for two-thirds of her pre-accident job market with her current physical and psychological limitations. Dr. Collins did not ignore, but discounted Claimant's understandable unwillingness to drive while medicated, which precludes her not just from driving jobs, but also jobs further from her home, where getting to and from work could be a problem. In Claimant's favor, cashiering, customer service, and retail are the three highest "in-demand" jobs in Claimant's job market. Collins depo. p. 20, l 25, p. 21, ll. 1-3. Claimant is qualified for certain jobs in each of those categories.

51. Giving credit to the fact that Claimant has in-demand skills in light and sedentary jobs, but acknowledging her limitations, the Referee finds it is reasonable to average the loss of access figures from the two experts. In light of her skills and post-accident limitations, Claimant has lost access to 64% of her pre-accident job market.

52. Mr. Crum felt Claimant would be limited to minimum wage jobs should she find employment. Dr. Collins was a bit more optimistic, figuring a starting hourly wage of between $8.00 and $11.00. Given those opinions by the vocational experts, Claimant's general presentation of a woman not in good health, her age of 65, and Claimant's low wage history, the Referee finds that the jobs she could obtain would be more likely to have a starting hourly wage near $8.00. This represents a 43% reduction in Claimant's wage earning capacity.

53. Averaging Claimant's access loss (64%) and earning capacity loss (43%) yields a 53.5% permanent physical disability figure.

54. Claimant is entitled to a 53.5% permanent partial disability (PPD) rating inclusive of PPI.

Odd-Lot Analysis

55. 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).

56. Claimant may satisfy her burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways: 1) by showing that she has attempted other types of employment without success; 2) by showing that she or vocational counselors or employment agencies on her 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. It is unclear under which of the three above-listed mechanisms Claimant believes she qualifies for odd-lot status. Certainly, it cannot be the first prong. Claimant

returned to work post-accident for Albertsons under a temporary program, and continued to work for her allotted time under the program. She has not shown she unsuccessfully attempted other employment post-accident.

58. At hearing, Claimant testified to the job search she has conducted. Her search consisted of "talk[ing] to a few people at some stores," looking online to "see who is hiring in my neighborhood" and applying online to an unknown number of retail businesses. The only specific instance on which Claimant testified involved an online application at Kohl's. She recounted how she answered the first three questions and was instructed not to apply since she did not qualify. It is unknown why she did not qualify, and if it had anything to do with her industrial accident. Tr. pp. 88, 89. Her job search efforts do not qualify under the second prong of *Lethrud.*

59. Most likely, Claimant is arguing that it would be futile for her to look for work; however, she cannot meet this prong either. Claimant testified at hearing that she would be able to work at least part-time in light retail, such as in a clothing department. Tr. p. 91. Also, while Claimant does not want to go back to phone collections, there is little evidence she could not do so. She said the job was "strenuous" but when asked to elaborate, she said she did not like "lying to people, or trying to get information out of people that aren't forthcoming." Tr. p. 93. Although she claimed she lacked the concentration to do investigation work, such as looking through the "Thrifty Nickel" or other publications to locate debtors, there is no evidence that all collection agencies require this level of investigation, or even that Claimant was required to do this background work in her old employment. Dr. Collins convincingly opined that collection agent would be a

job well suited for Claimant, as would light retail. Claimant has not proven it would be futile to attempt to find work in these fields due to her injury.

CONCLUSIONS OF LAW

1. Claimant is entitled to a PPD rating of 53.5%, inclusive of PPI.

2. Claimant is not entitled to permanent total disability pursuant to the odd-lot doctrine.

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 __14th___ day of July, 2014.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __31st___ day of __July___, 2014, 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:

RICHARD S OWEN
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NAMPA ID 83653

MICHAEL G MCPEEK
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ge Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LORRAINE WRIGHT, Claimant, v. NEW ALBERTSONS, INC., Self-Insured Employer, Defendant.	**IC 2012-005453** **ORDER** **Filed July 31, 2014**

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 is entitled to a PPD rating of 53.5%, inclusive of PPI.

2. Claimant is not entitled to permanent total disability pursuant to the odd-lot doctrine.

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

DATED this __31st___ day of ___July____, 2014.

INDUSTRIAL COMMISSION

__/s/_____
Thomas P. Baskin, Chairman

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

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __31st___ day of __July___ 2014, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

RICHARD S OWEN
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MICHAEL G MCPEEK
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ge __/s/_____