BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRUDY DEON, Claimant, v. H & J, INC., d/b/a BEST WESTERN COEUR D'ALENE INN & CONFERENCE CENTER, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2007-005950** **IC 2008-032836** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed May 3, 2013**

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 Coeur d'Alene, Idaho on October 16, 2012. Claimant, Trudy Deon, was present in person and represented by Steven Nemec, of Coeur d'Alene, Idaho. Defendant Employer, H & J, Inc., d/b/a Best Western Coeur d'Alene Inn & Conference Center (H&J) and Surety, Liberty Northwest Insurance Corporation, were represented by Roger Brown, of Boise, Idaho. Claimant settled with State of Idaho, Industrial Special Indemnity Fund (ISIF), prior to hearing. The parties presented oral and documentary evidence. No post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on December 24, 2012.

ISSUES

The issues to be decided are:[1]

1. The extent of Claimant's permanent partial impairment.

2. The extent of Claimant's permanent disability, including whether Claimant is permanently and totally disabled pursuant to the odd-lot doctrine or otherwise.

3. Whether apportionment for a pre-existing or subsequent condition pursuant to Idaho Code § 72-406 is appropriate.

4. Apportionment under the Carey formula.

5. Claimant's entitlement to additional medical benefits.

CONTENTIONS OF THE PARTIES

Claimant alleges that she is totally and permanently disabled pursuant to the odd-lot doctrine solely as a result of her 2008 industrial accident at the Coeur d'Alene Inn and resulting injury to her dominant right hand. She also asserts entitlement to medical benefits for a functional capacity evaluation performed September 16, 2011. Defendants readily acknowledge Claimant's 2008 industrial accident and have provided extensive medical and temporary disability benefits. However, Defendants contend that Claimant is employable and suffers no permanent disability beyond 2% upper extremity impairment or in the alternative, that Claimant's permanent disability is minimal.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

[1] The issue of Claimant's entitlement to an award of attorney fees was noticed for hearing. However, as Defendants correctly note, Claimant argues no claim for attorney fees in her briefing. This issue is therefore deemed abandoned.

2. Claimant's Exhibits 1-25, admitted at hearing;

3. Defendants' Exhibits 26-28, admitted at hearing;

4. The testimony of Claimant, Daniel Brownell, and Mary Barros-Bailey, taken at the October 16, 2012 hearing.

All objections posed during the pre-hearing depositions are overruled.

The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. Claimant was born in 1955 and is right-handed. She was five feet five inches tall, 57 years old, and resided in Coeur d'Alene at the time of the hearing. She graduated from high school in Montana in 1974, but had trouble with reading and spelling. She worked as a dishwasher and cook at a café during the summer while in high school. From 1975 to 1976, she worked for the school district as a rehabilitation technician for disabled children. In that capacity, Claimant worked directly under the supervision of a licensed physical therapist. From approximately 1976 until 1986, Claimant worked seasonally for the U.S. Forest Service, planting trees and maintaining campgrounds. From 1979 to 1980, she pursued nurse's training but had difficulty with reading and spelling. She ultimately obtained a CNA certification but never worked as a CNA. From approximately 1984 to 1988 she worked as a dishwasher and cook at a café.

2. From 1988 until 1993, Claimant worked for Alpha Health Services as a rehabilitation technician caring for disabled children and adults. On two occasions Claimant was assaulted by a patient while working. The most severe assault occurred in 1990, when Claimant was driving a car. A patient riding in the front passenger seat became agitated, grabbed

Claimant's head, and violently forced it underneath the car's dashboard, injuring her neck and shoulders. Claimant subsequently underwent cervical and bilateral first rib resection surgeries. She was compelled to change occupations and later received a 6% whole person permanent impairment rating for her neck and shoulder injuries. She obtained a two-year associates degree in drafting.

3. From 1997 until 2002, Claimant worked for Boeing as a drafting technician. She performed hand and computerized drafting. She earned a 3-D drafting certificate while working at Boeing. In 2002, Claimant was laid off at Boeing. Thereafter she obtained an HVAC certificate from North Idaho College. She worked at a furniture factory, building and sanding furniture while she earned her certificate.

4. In 2003, Claimant began working full-time as a maintenance technician for Employer H&J at the Coeur d'Alene Inn, a 150-bed motel. Her duties included all aspects of room and kitchen maintenance and repair except removing and replacing carpets. She also maintained the pool and removed snow. She walked 80% of her work day and regularly lifted 50 pounds.

5. In February 2006, Claimant was at home feeding four Rottweiler dogs in a fenced area when one of the dogs pulled her down. Three of the Rottweilers attacked her, lacerating her scalp and left arm, and very seriously lacerating both of her legs. She managed to escape from the fenced area and a friend transported her to a hospital emergency room. Claimant was hospitalized for two weeks and underwent extensive suturing and surgeries, including skin grafting on both of her legs. She was off work for several months, and then gradually returned to work part-time. After approximately one year she resumed full-time work at the Coeur d'Alene

Inn. She was later rated with a 7% whole person permanent impairment due to her lower extremity injuries, including nerve damage, sustained in the Rottweiler attack.

6. By October 2008, Claimant was earning $9.75 per hour and working 40 hours per week. H&J also provided health insurance and an IRA account as part of her compensation.

7. On October 4, 2008, Claimant was called into the kitchen at the Coeur d'Alene Inn to clean out the drain. She used a small power auger or electric snake. During Claimant's efforts to clear the drain, the auger caught Claimant's right glove and right hand. Another employee had previously removed the safety shut-off switch from the auger and Claimant was unable to free her hand or shut off the auger. The electric snake encircled, twisted, and crushed her right hand and wrist until another employee responded to Claimant's shouts and unplugged the auger. The electric snake also struck Claimant's right eye or eyelid. Claimant was taken by ambulance to the emergency room at the Kootenai Medical Center. She was diagnosed with right hand sprain, right fourth and fifth finger sprain, and contusion.

8. Approximately one week after the accident, Claimant developed irritation and blurry vision in her right eye. She presented to North Idaho Immediate Care and was diagnosed with pink eye. However, Patrick Mullen, M.D., later diagnosed herpes simplex keratitis in Claimant's right eye, but opined it was not related to her industrial accident. No medical evidence relates Claimant's right eye condition to her industrial accident.

9. In November 2008, Claimant underwent a right hand MRI. Michael Ludwig, M.D., reviewed the MRI, examined Claimant's right hand, and diagnosed disruption of the A2 pulley system of the fourth digit with palmar bowing of the flexor tendon, partial disruption of the A2 pulley system of the fifth digit with palmar bowing of the flexor tendon, and non-displaced fracture of the distal aspect of the proximal phalanx of the fifth digit. Dr. Ludwig

referred Claimant to Dr. Mullen, a hand surgeon. Dr. Mullen noted collateral ligament tears at the PIP joints of Claimant's right ring and little fingers. He suspected right wrist injuries and ordered a right wrist MRI which was read as normal. Claimant wore a cast on her right hand for approximately six weeks. Dr. Mullen prescribed physical therapy and braces. He referred Claimant to Anthony Sestero, M.D., who prescribed further physical therapy.

10. In December 2008, Claimant began utilizing the services of Industrial Commission rehabilitation consultant Beth Grigg.

11. On April 28, 2009, Claimant commenced light-duty work part-time using her right hand for repetitive motion no more than four hours per day. She continued to experience debilitating right hand and wrist pain.

12. On June 3, 2009, Claimant's supervisor reported to Ms. Grigg that although Claimant had a release to full-time work on that date, he did not believe Claimant was physically capable of performing all of her pre-injury job duties.

13. In August 2009, Claimant came under the care of Spencer Greendyke, M.D. On August 12, 2009, Dr. Greendyke released Claimant for full-time work but restricted her to lifting no more than five pounds with her right hand. He also ordered EMG testing. On August 19, 2009, Craig Stevens, M.D., performed EMG testing and wrote:

> The study reveals ulnar neuropathy at the right elbow with involvement of both the dorsal cutaneous branch as well as the origin of the ulnar sensory fibers adjacent to the canal of Guyon. …. This ulnar neuropathy is moderate in severity but certainly appears consistent with her symptoms. The study does reveal some persisting ulnar sensory nerve function but definite evidence that an injury has occurred.

Exhibit 14, p. 155 (emphasis supplied).

14. On October 28, 2009, Dr. Greendyke found Claimant had reached maximum medical improvement.

15. No later than November 6, 2009, Claimant's light-duty employment at Coeur d'Alene Inn was terminated. H&J had no available work within her restrictions.

16. On November 18, 2009, Dr. Stevens performed an independent medical examination of Claimant at Defendants' request. Dr. Stevens found Claimant medically stable and rated her permanent impairment at 2% of the upper extremity due to her EMG-documented ulnar neuropathy and upper extremity collateral ligament injuries. He declined to impose any work restrictions and opined Claimant should be released to full-duty work without restriction.

17. After being terminated from her employment at Coeur d'Alene Inn, Claimant filed for unemployment benefits and registered with the Idaho Department of Labor, looking for work. Claimant also continued meeting with rehabilitation consultant Beth Grigg, who assisted Claimant in her employment search. Ms. Grigg recorded Claimant's report that she was not able to grip a phone for long, turn a screwdriver, type on a keyboard, lift dishes, carry groceries, wring out wash rags, or perform fine finger manipulation with her right hand.

18. In December 2009, Ms. Grigg closed Claimant's file because she had not followed up on any of the job leads Grigg provided. Claimant told Ms. Grigg that she did not know what work she could physically perform.

19. On May 13, 2010, Claimant was adjudged disabled by the Social Security Administration due to her industrial right hand injury and residual dog attack injuries.

20. Claimant ultimately applied for a "couple dozen" jobs, including drafting positions and jobs at Lowes and Home Depot. She received no job offers.

21. On September 16, 2011, Claimant underwent a hand functional assessment by Virginia Taft, P.T., at the Coeur d'Alene Hand Therapy & Healing Center. The assessment concluded that Claimant would need to have primarily left-handed work and that she was

restricted to lifting five pounds with her right hand, 20 pounds with both hands, and minimal repetition. Her range of motion was noted to be minimally limited but with pain on finger extension and gripping or twisting movements. Finger manipulation of common objects showed minimal to severe limitation with decreased speed. Ms. Taft concluded that retraining was a questionable option due to Claimant's hand, vision, and age limitations.

22. On September 4, 2012, Ms. Taft authored an addendum to her September 16, 2011 functional capacity evaluation. She reported that Claimant's hand function had not improved since her September 2011 assessment. Taft noted that Claimant had sensation deficits of numbness and tingling with activity, which increased with sustained gripping or twisting. Taft reported that Claimant's sensory loss interfered with her right hand coordination and speed and that Claimant showed severe limitation in speed of movement when repeatedly lifting as little as one pound. Taft also noted that Claimant "used her right hand as an assist rather than as her dominant hand. She modified as possible using right index/middle fingers and thumb rather than full grip, her left hand or she used 2 hands, for example, to lift a coffee cup." Exhibit 12, p. 144. Taft concluded that Claimant could not return to her previous job or to a cashiering position as such would require sustained repetitive movement and lifting.

23. On September 13, 2012, John McNulty, M.D., examined Claimant and diagnosed chronic right wrist, ring, and little finger sprain, weak grip, and ulnar sensory loss at the right wrist and hand. He opined that she suffered permanent impairments of 1% of the whole person due to her chronic right ring finger PIP joint sprain, 1% of the whole person due to her chronic right little finger PIP joint sprain, and 2% of the whole person due to her right ulnar sensory nerve injury due to her 2008 industrial accident. Dr. McNulty also found Claimant suffered

permanent impairments of 6% of the whole person secondary to her pre-existing cervical spine injury and 7% of the whole person secondary to her pre-existing lower extremity condition.

24. At the time of hearing, Claimant was receiving approximately $1,004.00 per month in Social Security Disability benefits.

25. At hearing, Claimant testified that she performs home exercises and used hot paraffin, a TENS unit, and over-the-counter medication to manage the pain in her right hand and wrist. She wears a wrist brace when doing any right-handed activities. Although she is right-handed, she does not use her right hand to operate her cell phone, load the dishwasher, lift her clothes basket, comb her hair, brush her teeth, operate her TV remote, or button the buttons on her clothing. All of these activities she performs only with her non-dominant left hand. Claimant can no longer pick up a gallon of milk with her right hand. She no longer paints, knits, crochets, sews, gardens or remodels her home because of her right hand condition. She cannot type or keyboard with her right hand because she cannot repetitively stretch her fingers to reach the upper row of keys. Claimant testified that she suffers constant right hand pain which increases with activity and that her right hand condition is her greatest limitation.

26. At hearing, Claimant testified that standing and walking cause leg pain as a result of the Rottweiler attack. She walks with a shuffling gait and is limited by leg pain to walking no more than half a mile.

27. Claimant's right eye herpes infection significantly impairs her vision and requires ongoing medication and avoidance of bright light irritation. She has adequate vision in her left eye to qualify for a driver's license. With a brace on her right hand, she is able to operate a manual transmission.

28. Having observed Claimant at hearing, and compared her testimony with other evidence in the record, the Referee found that Claimant is a credible witness. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

DISCUSSION AND FURTHER FINDINGS

29. 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).

30. **Permanent impairment.** "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 non-progressive at the time of 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 employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized 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).

31. Claimant herein alleges permanent impairments to her neck, legs, and right hand. On September 13, 2012, Dr. McNulty opined that Claimant suffered permanent impairments of

6% of the whole person due to her pre-existing cervical spine injury and 7% of the whole person due to her pre-existing lower extremity condition secondary to the Rottweiler attack. The record establishes, and Defendants do not contest, these impairment ratings.

32. The parties dispute the extent of Claimant's permanent impairment due to her right hand condition. On August 19, 2009, Dr. Stevens performed EMG testing of Claimant's upper right extremity and concluded Claimant's "ulnar neuropathy is moderate in severity" and "certainly appears consistent with her symptoms." Exhibit 14, p. 155 (emphasis supplied). However, on November 18, 2009, Dr. Stevens performed an independent medical examination at Defendants' request and noted that Claimant had presented for EMG testing on August 19, 2009, and that he had then "determined that she exhibited features of a very mild ulnar neuropathy." Exhibit 14, p. 162 (emphasis supplied). Dr. Stevens found Claimant medically stable on November 18, 2009, and characterizing her ulnar sensory deficit as very mild, rated her permanent impairment at 2% of the upper extremity due to her ulnar neuropathy and upper extremity collateral ligament injuries. He declined to impose any work restrictions and opined Claimant should be released to full duty without restriction.

33. On September 13, 2012, Dr. McNulty examined Claimant and opined that she suffered permanent impairments of 1% of the whole person from her chronic right ring finger PIP joint sprain, 1% of the whole person from her chronic right little finger PIP joint sprain, and 2% of the whole person from her right ulnar sensory nerve injury—all due to her 2008 industrial accident. Dr. McNulty's impairment rating is more persuasive that Dr. Stevens' as it is supported by the MRI findings documenting A2 pulley disruption of the PIP joints of Claimant's right ring and little fingers and is further supported by Dr. Stevens' August 19, 2009 EMG testing wherein he found ulnar neuropathy of moderate severity.

34. Claimant has proven that she suffers permanent physical impairments of 6% of the whole person due to her pre-existing cervical condition, 7% of the whole person due to her pre-existing lower extremity condition and 4% of the whole person due to her right hand condition. Claimant has proven she suffers whole person permanent impairments of 17%, including 4% whole person impairment due to her 2008 industrial accident.

35. **Permanent disability.** The next issue is the extent of Claimant's permanent disability, including whether she 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. 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). Pursuant

to Idaho Code § 72-422, the proper date for disability analysis of a claimant's labor market access is the date of hearing, and not the date that maximum medical improvement has been reached. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012).

36. Claimant asserts that her 2008 industrial accident at Coeur d'Alene Inn renders her totally and permanently disabled. Her permanent disability must be evaluated based upon her medical factors, including the physical restrictions arising from her permanent impairments, and non-medical factors, including Claimant's capacity for gainful activity and ability to compete in the open labor market within her geographical area.

37. Physical restrictions. In November 2009, Dr. Stevens opined that Claimant had no physical restrictions due to her 2008 industrial accident. He explained that although objective diagnostic medical testing disclosed persisting abnormalities, Claimant would not further injure herself by working without restrictions. Dr. Stevens' opinion is premised in part on his November 2009 conclusion that Claimant's industrial accident caused very mild ulnar neuropathy of her upper right extremity, contradicting his conclusion after EMG testing in August 2009 that her accident caused ulnar neuropathy of moderate severity.

38. Claimant's September 2011 hand functional capacity evaluation by Virginia Taft at the Coeur d'Alene Hand Therapy & Healing Center concluded that Claimant would need to have primarily left-handed work and that she was restricted to lifting five pounds with her right hand, 20 pounds with both hands, and minimal repetition. Taft's 2012 addendum noted that Claimant "used her right hand as an assist rather than as her dominant hand" and concluded that Claimant could not return to her previous job or to a cashiering position. Exhibit 12, p. 144. Dr. McNulty agreed with Ms. Taft's evaluation and restricted Claimant from lifting more than 20

pounds and from repetitive lifting and grabbing with her right hand. He further noted that Claimant's pre-existing lower extremity impairment limited her ability to climb stairs or ladders.

39. Claimant's supervisor at H&J reported that after Claimant's release to full-duty work in 2009, she was not able to perform all of her pre-injury duties. Her employment at Coeur d'Alene Inn was terminated for this very reason.

40. The Referee found Ms. Taft's and Dr. McNulty's opinions regarding Claimant's restrictions more consistent, accurate, and persuasive than Dr. Stevens' opinion. The Commission finds no reason to disturb the Referee's findings and observations on Ms. Taft's and Dr. McNulty's credibility.

41. Ability to compete in the open labor market. Three vocational experts have opined regarding Claimant's ability to compete in her labor market, Nancy Collins, Mary Barros-Bailey, and Daniel Brownell. The conclusions of each are examined below.

42. *Nancy Collins*. Vocational expert Nancy Collins, Ph.D., interviewed Claimant and reviewed her work history, medical records, and physical restrictions. On September 4, 2012, Dr. Collins authored a report on behalf of ISIF, who later settled with Claimant prior to hearing. In her report, Dr. Collins concluded that Claimant was not totally disabled but opined:

> Considering the opinion of Dr. Stevens, Ms. Deon has no disability in excess of impairment. Considering restrictions that limit her to some light and sedentary jobs that do not require repetitive use of her right dominant hand, she will experience a 90% loss of access to the labor market. In my opinion, she will not experience a significant earnings loss. Based on a wage of $9.70 per hour in her time of injury job and an $8.50 return to work wage, she will experience a 12% loss of earning capacity. Ms. Deon is 56 years of age and I do think her age should be considered in her disability rating. In my opinion, Ms. Deon's disability inclusive of impairment is 56% based on restrictions from Dr. Dickey, Dr. Greendyke and the hand assessment. …. This analysis assumes equal value is given to the two vocational factors of earning capacity and labor market access.

Exhibit 7, pp. 64-65.

43. Dr. Collins' report does not demonstrate extensive familiarity with the degree of competition present in Claimant's current labor market. Additionally, in reaching her conclusions, Dr. Collins did not have the benefit of Virginia Taft's September 4, 2012 addendum to the functional capacity evaluation, or Dr. McNulty's September 13, 2012 report in which he agreed with Ms. Taft's conclusions. Nevertheless, Dr. Collins found 56% permanent disability by equally weighting Claimant's loss of labor market access (90%) and her estimated wage loss based on the difference between her time of injury wage and her likely post-accident wage (12%). Thus 90% + 12% = 102% ÷ 2 = 51% to which Dr. Collins apparently added 5% for Claimant's age to reach her disability rating of 56%.

44. Dr. Collins' calculations did not take into account Claimant's full compensation package at the time of her 2008 accident, including IRA and health insurance benefits through H&J which Dan Brownell testified effectively increased her compensation by as much as 30%. Brownell testified that most jobs in Claimant's labor market do not provide these benefits. If Dr. Collins had calculated Claimant's wage loss based on a time of injury wage of $9.75 per hour, plus 30% benefits, thus totaling $12.68, versus a likely post-injury wage of $8.50, Claimant's wage loss would equal: ($12.68 - $8.50) ÷ $12.68 or 33%. The calculation would then be: (90% + 33%) ÷ 2 = 62%. Adding 5% for Claimant's age would then yield a 67% permanent disability rating.

45. *Mary Barros-Bailey*. Vocational expert Mary Barros-Bailey, Ph.D., testified in behalf of Defendants. She has 22 years of experience in vocational rehabilitation, including 19 years in Idaho. Dr. Barros-Bailey has evaluated disability cases from Alaska to Idaho to Brazil. She met with Claimant in 2011 and reviewed her medical records. On October 11, 2011, Dr. Barros-Bailey issued her vocational report concluding that Claimant:

> has substantially reduced ability to access the labor market to the level of a 73% loss of access. She would still be able to access a variety of jobs, however, that do not require regular bilateral work and pay within $1 of her wage at injury (e.g. cashiers at median wages of $9.01 per hour per the 2011 Idaho Occupational Employment and Wage Survey), thus resulting in a slight wage of [sic] earning capacity. ….
>
> For Ms. Deon, age is a factor in that her functional age combined with all her medical conditions is probably greater than her chronological age and should be considered in disability. Consequently, considering Trudy's age, work and education histories, transferable skills, functional restrictions associated with the industrial injury, and other non-medical factors, I believe she has sustained a 45% disability inclusive of impairment. Note that given no functional assumptions available in previous Industrial Commission records, there is no basis upon which to apportion this disability opinion.

Exhibit 8, pp. 82-83. Dr. Barros-Bailey's report does not demonstrate extensive familiarity with the degree of competition present in Claimant's current north Idaho labor market.

46. In July 2012, Dr. Barros-Bailey issued a supplemental report criticizing Dan Brownell's finding that Claimant suffered 85% permanent disability. Dr. Barros-Bailey indicated that Claimant was earning only $9.70 per hour at the time of her industrial accident and that even a minimum wage job would result in only a 25% reduction in Claimant's wages.

47. At hearing, Dr. Barros-Bailey testified that she uses the average of an injured worker's loss of labor market access and estimated wage loss as the starting point to determine permanent disability. She testified that in evaluating Claimant's permanent disability, she added Claimant's loss of labor market access (73%) and her estimated wage loss based on the difference between her time of injury wage and her likely post-accident wage of $9.01 per hour as a cashier, equaling 7%. Thus 73% + 7% = 80% ÷ 2 = 40%. Dr. Barros-Bailey then adjusted the average upward by adding 5% for Claimant's age, to arrive at a final disability rating of 45%.

48. Significantly, Dr. Barros-Bailey apparently misread the September 16, 2011 Hand Function Assessment by Virginia Taft who concluded that if Claimant were: "to return to work,

she would need to have primarily left handed work with a weight load on the right of less than 5# lifting, up to 20# with both hands, minimum repetition, and self paced." Exhibit 12, p. 147 (emphasis supplied). Instead, Dr. Barros-Bailey stated in her report:

> The second [medical] opinion is the 9/16/11 functional capacity evaluation that estimates Trudy to lift no more than 5# with her left hand and to lift no more than 20# bilaterally. Note that Trudy is right hand dominant and there were no limitations or restrictions indicated to the dominant upper extremity. She would also need to have minimal repetition and self pacing on the left upper extremity.

Exhibit 8, p. 82 (emphasis supplied).

49. In addition to misunderstanding Taft's September 16, 2011 evaluation, Dr. Barros-Bailey was not provided, and thus did not consider, the functional capacity evaluation addendum authored by Ms. Taft on September 4, 2012. Therein Ms. Taft concluded that Claimant could not return to "her previous job or to a cashiering position which would require sustained repetitive movement and lifting." Exhibit 12, p. 144. Hence, Dr. Barros-Bailey did not fully consider Claimant's right hand lifting restriction or her restriction against repetitively using her right hand. Dr. Barros-Bailey was not provided, and thus did not consider Dr. McNulty's September 13, 2012 report wherein he agreed with Ms. Taft's conclusions.

50. Dr. Barros-Bailey acknowledged that her calculations did not take into account Claimant's full compensation package at the time of her accident, including IRA and medical benefits through H&J which are not provided by most employers in her labor market and which effectively increased her compensation by as much as 30%.

51. *Daniel Brownell*. Claimant called Daniel Brownell to testify at hearing. Mr. Brownell served as a vocational rehabilitation consultant for the Industrial Commission for 29 years in Coeur d'Alene, retiring in 2010. He is intimately familiar with the labor market in the Coeur d'Alene area, has performed thousands of job site evaluations, and has placed numerous

individuals in jobs within that area. Brownell testified that as of August 12, 2012, there were 6,531 unemployed workers in Kootenai County and that shortly prior to hearing Verizon had laid off another 200 employees.

52. Mr. Brownell testified that H&J is the fifth or sixth largest employer in Claimant's labor market and employs literally "hundreds and hundreds of employees and lots of facilities, lots of diversified work" including parking lot attendants. Transcript, p. 76, ll. 6-7. Yet Claimant was laid off due to lack of work as H&J had no work available for Claimant within her medical restrictions. Brownell also testified that Claimant's time of injury wage of $9.75 per hour plus benefits should be evaluated with the understanding that her benefits at H&J added 20-30% to her compensation and that most jobs in her labor market do not provide those benefits. He affirmed that if those benefits were considered, her hourly wage would total $12.00 to $13.00 per hour. Transcript pp. 88-89.

53. Mr. Brownell met with Claimant several times commencing in September 2011. He familiarized himself with her medical records, work history, educational background, injuries and resulting work limitations. He noted that Claimant struggled with reading and spelling in high school and in her attempt to complete a nursing program. She needed a special tutor to help her obtain her associates degree in drafting at North Idaho College because she was only reading at an eighth grade level. Brownell testified that Claimant's drafting and HVAC training are now outdated and not marketable. He opined that Claimant's extended period of unemployment subsequent to her 2008 industrial accident was a significant factor diminishing the likelihood of acquiring future employment. Brownell considered Dr. McNulty's opinion the most recent and up to date physician's opinion of Claimant's condition and restrictions. Brownell also relied upon the functional capacity evaluation performed in September 2011 by Virginia Taft and the

September 2012 addendum to that evaluation. He opined that Claimant's most significant physical limitation was her restriction from repetitively using her dominant right hand. Mr. Brownell opined that Claimant could not return to any of her prior occupations and that very rarely are there jobs in her labor market that would be regularly available and compatible with her physical limitations.

54. Mr. Brownell reviewed Dr. Barros Bailey's report and did not agree with Dr. Barros-Bailey's conclusion that Claimant could work as a cashier. Rather, Brownell cited Dr. McNulty's and Virginia Taft's conclusions and opined that Claimant could not work competitively as a cashier due to her 2008 industrial injury. He also opined that Claimant would not be competitive for work as a parking lot attendant or ticket taker due to her right hand limitations. Brownell concluded:

> Based upon the claimant's entire case profile inclusive of age, education, work skills and current physical capabilities, there are extremely limited work opportunities. Also considered is the fact that these positions are filled and a competitive unemployed labor force of hundreds await the competition for a new job opening. Ms. Deon would also require a sympathetic employer who would accommodate all her physical limitations.

Exhibit 6, p. 49.

55. Mr. Brownell opined that Claimant suffers permanent disability of 85 to 90% or greater, inclusive of permanent impairment. He opined that none of this disability was attributable to her cervical, shoulder, bilateral leg or right eye conditions. Transcript p. 108. He testified that Claimant had lost access to 90% of the labor market and that the 10% of the labor market which she could still potentially access was comprised of unskilled sedentary jobs for which she would have to compete with 6,500 other job-seekers to obtain. Brownell demonstrated keen familiarity with the extent of competition in Claimant's labor market. He concluded that Claimant was "barely" employable and needed "definitely a sympathetic

employer" in order to return to work. Transcript p. 95, ll. 10-11.

56. *Further analysis of the vocational opinions.* All of the vocational experts' disability rating opinions are helpful. However, none is entirely persuasive and without limitation.

57. Dr. Barros-Bailey's disability rating of 45% is unpersuasive because it arises from failure to consider Claimant's full compensation (including her IRA and health insurance) at H&J, a material misreading of Virginia Taft's 2011 hand functional capacity evaluation, failure to consider the 2012 addendum to that evaluation, failure to consider Dr. McNulty's 2012 report, and the erroneous assumption that Claimant could work competitively as a cashier.[2]

58. Dr. Collins' disability rating of 56% is not entirely persuasive because it fails to consider Claimant's full compensation package (including her IRA and health insurance) at H&J.

59. 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

[2] As previously noted, Dr. Barros-Bailey was never provided these 2012 reports.

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.

60. As the residual labor market becomes increasingly small, the disability rating obtained by the averaging method becomes increasingly skewed, especially in labor markets with high unemployment rates where competition for the remaining portion of suitable jobs will be fierce. This is exactly Claimant's situation herein. All of the vocational experts acknowledged that Claimant has lost access to a substantial portion of her labor market. Dr. Barros-Bailey noted that Claimant suffered only a minimal expected wage loss. Mr. Brownell testified that Claimant must compete with over 6,500 unemployed workers who are seeking jobs in Claimant's labor market.

61. Finally, neither Dr. Collins, Dr. Barros-Bailey, nor Mr. Brownell included the limitations/restrictions related to Claimant's preexisting impairments, totaling 13%, in calculating Claimant's disability. In Mr. Brownell's case, he specifically testified that in performing his evaluation he considered Claimant's preexisting impairments, but concluded that none of Claimant's 85% - 90% disability is attributable to those preexisting impairments. (Transcript 107/15 - 108/22)

62. Similarly, Dr. Collins was aware of Claimant's prior injuries, noting in her report that Claimant's pre-existing impairments did limit Claimant in some activities. (See Claimant's exhibit 7 at 61). However, when it came to evaluating Claimant's disability, it appears that Dr. Collins considered only those limitations/restrictions related to the subject accident. It is unclear whether Dr. Collins felt that Claimant's pre-existing impairments and related limitations were vocationally significant in light of the limitations stemming from the subject accident.

63. Like Dr. Collins, Dr. Barros-Bailey was aware of Claimant's pre-existing impairments as well as the fact that these impairments permanently affected Claimant's function to some extent. However, in evaluating Claimant's disability, it appears that Dr. Barros-Bailey considered only the limitations/restrictions stemming from the subject accident. (See Claimant's exhibit 8). At hearing she explained that she did not include consideration of pre-existing limitations in her report because those limitations were never quantified. (See transcript 130-131, 135).

64. Having considered all of the vocational experts' permanent disability ratings, the Commission declines to fully adopt any of the offered ratings. The Commission is the ultimate evaluator of disability.

65. Claimant has unsuccessfully looked for work in the Coeur d'Alene area on herown and through the unemployment office. She did not fully avail herself of Beth Grigg's assistance and failed to follow-up on job leads Grigg provided. Claimant's own job search, which she testified included submitting a "couple dozen" applications, is not consistent with a diligent and earnest effort to find employment. There is no indication that Brownell performed an independent job search specifically on Claimant's behalf. However, Brownell's conclusion—that Claimant would need a sympathetic employer to accommodate all of her limitations such that she could find employment—is amply supported by the record as a whole. Brownell testified that Claimant would not be competitive for ticket taker positions, parking lot attendant positions, or the like. He also persuasively testified that Claimant's time of injury Employer is the fifth or sixth largest employer in North Idaho, employing literally hundreds of workers, and that if H&J could not accommodate Claimant's limitations, Claimant was unlikely to find an employer that would—except for a sympathetic employer.

66. Based on Claimant's permanent impairments totaling 17% of the whole person, her permanent physical restrictions, particularly those to her dominant right upper extremity, and considering all of her medical and non-medical factors, including her age of 56 at the time of the industrial accident, limited formal education, reading challenges, inability to return to previous positions, outdated specialized training, and limited transferable skills, Claimant's ability to compete in the open labor market and engage in regular gainful activity after her 2008 industrial accident has been greatly reduced. The Commission concludes that Claimant has established a permanent disability of 85%, inclusive of her 17% whole person impairment.

67. Odd-lot**.** 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 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).

68. In the present case, Defendants assert that Claimant is employable and not an odd-lot worker. Claimant has not demonstrated that she unsuccessfully attempted other types of employment. As noted above, Claimant has testified she submitted a "couple dozen" applications and has been registered with job service for approximately four years. This suggests a modest unsuccessful work search. However, far more persuasive, is Mr. Brownell's testimony that it would require a sympathetic employer to accommodate Claimant's limitations in order for her to obtain employment. As concluded above, Brownell's opinion in this regard is persuasive and tantamount to a showing that efforts to find suitable work regularly and continuously available in the open labor market would be futile. Claimant has established a prima facie case that she is an odd-lot worker, totally and permanently disabled, under the Lethrud test.

69. Once a claimant establishes a prima facie odd-lot case, the burden shifts to defendants "to show that some kind of suitable work is regularly and continuously available to the claimant." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). Defendants must prove there is:

> An actual job within a reasonable distance from [claimant's] home which [claimant] is able to perform or for which [claimant] can be trained. In addition, the [defendants] must show that [claimant] has a reasonable opportunity to be employed at that job. It is of no significance that there is a job [claimant] 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, 407, 565 P.2d 1360, 1364 (1977).

70. In the present case, Defendants through Dr. Barros-Bailey identified only one type of job—cashier—that she believed was suitable for Claimant given her physical restrictions.

Mr. Brownell testified convincingly that Claimant is not competitive for a cashier position given the restrictions enumerated by Virginia Taft and agreed upon by Dr. McNulty.

71. Defendants have not shown that there is an actual job regularly and continuously available which Claimant can perform and at which she has a reasonable opportunity to be employed. Claimant has proven that she is totally and permanently disabled pursuant to the odd-lot doctrine commencing November 18, 2009, the date Dr. Stevens found her medically stable from her 2008 industrial injuries.

72. **Idaho Code § 72-406(1) apportionment.** Inasmuch as Claimant is totally and permanently disabled, the issue of apportionment pursuant to Idaho Code § 72-406(1) is moot.

73. **Carey apportionment.** The next issue is apportionment pursuant to the Carey formula. Although Claimant settled with ISIF prior to hearing, a determination of ISIF's liability pursuant to Idaho Code § 72-332 must be made before the extent of Defendants' liability can be determined pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54, (1984).

74. Idaho Code § 72-332(1) provides in pertinent part that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his income benefits out of the ISIF account.

75. Idaho Code § 72-332(2) further provides that "permanent physical impairment" is as defined in Idaho Code § 72-422, provided, however, as used in this section such impairment

must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become unemployed. This shall be interpreted subjectively as to the particular employee involved; however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

76. In Dumaw v. J. L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court identified four requirements a claimant must meet to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was indeed a pre-existing impairment; (2) whether that impairment was manifest; (3) whether the impairment was a subjective hindrance to employment; and (4) whether the impairment in any way combined with the subsequent injury to cause total disability. Dumaw, 118 Idaho at 155, 795 P.2d at 317.

77. Pre-existing, manifest impairments. The pre-existing physical impairments at issue herein are those to Claimant's neck and shoulders (6%), and legs (7%), prior to her 2008 industrial accident. There is no dispute that her neck and shoulder, and her leg conditions existed and were manifest in 1990 and 2006 respectively. Claimant's neck, shoulder, and leg impairments constitute pre-existing conditions for purposes of Idaho Code § 72-332 because each preexisted and was manifest prior to her 2008 industrial accident. The first and second prongs of the Dumaw test have been met.

78. Hindrance or obstacle. The third prong of the Dumaw test considers "whether or not the pre-existing condition constituted a hindrance or obstacle to employment for the

particular claimant." Archer v. Bonners Ferry Datsun, 117 Idaho 166, 172, 786 P.2d 557, 563 (1990).

79. Claimant underwent cervical and bilateral first rib resection surgeries shortly after suffering her 1990 assault injury. Thereafter she changed employment, obtained drafting training, and commenced working in a lighter industry. Mr. Brownell acknowledged that Claimant's job change was necessitated by her cervical limitations. Her pre-existing cervical condition thus constituted a hindrance or obstacle to employment.

80. Claimant's pre-existing leg condition limited her walking ability. She testified that even after recovering from the Rottweiler attack, she could only walk approximately one-half mile due to the pain in her legs. Dr. McNulty opined that her leg condition limited her ladder and stair climbing ability.

81. The Commission finds that Claimant's pre-existing neck, shoulder, and leg impairments constituted a hindrance to her employment. The third prong of the Dumaw test is met.

82. Combination. Finally, to satisfy the "combines" element, the test is whether, but for the industrial injury, the worker would have been totally and permanently disabled immediately following the occurrence of that injury. This test "encompasses both the combination scenario where each element contributes to the total disability, and the case where the subsequent injury accelerates and aggravates the pre-existing impairment." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Significantly, ISIF is not liable where the last industrial injury, itself, renders a worker totally and permanently disabled. Selzler v. State of Idaho, Industrial Special Indemnity Fund, 124 Idaho 144, 857 P.2d 623 (1993).

83. The record in the instant case does not establish that Claimant's pre-existing cervical and shoulder condition combines with her 2008 injuries to render her totally and permanently disabled. To the contrary, the upper extremity restrictions arising from Claimant's 2008 industrial accident entirely supersede those resulting from her cervical and shoulder condition.

84. The record contains some evidence that Claimant's pre-existing leg impairment contributes to her total and permanent disability. As noted, her pre-existing leg condition limited her standing and walking tolerances and Dr. McNulty opined that her leg condition precluded her from working on ladders or frequently using stairs. However, Mr. Brownell persuasively testified that Claimant's right upper extremity condition alone precluded her from competing in the open labor market and relegated her to employment only by a sympathetic employer. Dr. Barros-Bailey acknowledged that upper extremity limitations are among the most disabling conditions. Neither Dr. Collins nor Dr. Barros-Bailey opined that Claimant's pre-existing leg condition combined with her upper extremity condition to produce disability.

85. The record does not establish that Claimant's pre-existing leg condition combined with her 2008 industrial accident to render her totally and permanently disabled. Rather, Claimant's right upper extremity condition alone renders her totally and permanently disabled. Thus apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984), is not appropriate.

86. **Medical care.** The final issue is Claimant's entitlement to medical care. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician

or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Of course an employer is only obligated to provide medical treatment necessitated by the industrial accident, and is not responsible for medical treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995).

87. Claimant herein requests medical benefits for reimbursement for a functional capacity evaluation recommended by Dr. Greendyke and performed September 16, 2011, by Virginia Taft. When Defendants refused to provide the evaluation, Claimant, at the recommendation of her attorney, had the evaluation performed at her own expense. Defendants in their briefing do not expressly contest Claimant's request for reimbursement. The evaluation was recommended by her then treating physician and is compensable.

88. Claimant has proven her entitlement to reimbursement for her functional capacity evaluation by Virginia Taft.

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CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven she suffers whole person permanent impairment of 17%, including 4% whole person impairment due to her 2008 industrial accident.

2. Claimant has proven she suffers permanent disability of 85% inclusive of impairment, and has proven that she is an odd-lot worker, totally and permanently disabled under the Lethrud test.

3. Apportionment pursuant to Idaho Code 72-406 is moot.

4. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is not appropriate.

5. Claimant has proven her entitlement to reimbursement for her functional capacity evaluation by Virginia Taft.

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

DATED this _3rd_____ day of ____May_____, 2013.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Chairman

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

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

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _3rd_____ day of ____May_____, 2013, 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:

STEVEN J NEMEC
1626 LINCOLN WAY
COEUR D'ALENE ID 83814

E SCOTT HARMON
PO BOX 6358
BOISE ID 83707-6358

_/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRUDY DEON, Claimant, v. H & J, INC., d/b/a BEST WESTERN COEUR D'ALENE INN & CONFERENCE CENTER, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2007-005950** **IC 2008-032836** **NOTICE OF RECONSIDERATION** Filed May 3, 2013

The Commission hereby notifies the parties of its decision to reconsider, on its own motion, the Findings of Fact, Conclusions of Law and Order, per the provisions of I.C. § 72-718. By way of background, on or about May 3, 2013, the Commission issued its Findings of Fact, Conclusions of Law and Order in this matter. The decision, as originally drafted and proposed by Referee Taylor was not adopted in its entirety by the Commission due to the Referee's treatment of the vocational opinions offered by Nancy Collins, Mary Barros-Bailey and Dan Brownell. The Commission revised the proposed opinion to give different treatment to how Claimant's pre-existing permanent physical impairment of 13% of the whole person affected his permanent disability. However, the Commission adopted Referee Taylor's ultimate conclusion that Claimant is totally and permanently disabled as a result of the subject accident alone, and that Employer therefore bears full responsibility for Claimant's total and permanent disability.

As of the date of hearing, Referee Taylor was aware that Claimant had reached an independent settlement with the ISIF, which settlement had been approved by the Industrial Commission. However, it does not appear that Referee Taylor was aware of the substance of that settlement and a copy of the settlement was not made an exhibit to the proceeding against Employer/Surety. Nor do we have any reason to believe that Employer/Surety has any independent knowledge of the terms and conditions of Claimant's settlement with the ISIF.

However, having reviewed and approved the Claimant's settlement with the ISIF, as guided by the court's recent decision in *Wernecke v. St. Maries Joint School Dist. No. 401,* 147 Idaho 277, 207 P.3d 1008 (2009), the Commission is aware of the terms and conditions of that settlement. The conclusions reached in connection with Claimant's claim against Employer/Surety implicate the need to consider the impact of the settlement with the ISIF on the award made against Employer/Surety. Essentially, the question is how or whether Claimant's settlement with the ISIF, a copy of which is attached hereto as exhibit A, affects Employer/Surety's obligation to pay total and permanent disability benefits to Claimant as anticipated by the Findings of Fact, Conclusions of Law and Order. Does Claimant's settlement with the ISIF have some collateral estoppel effect against Claimant? *See*, *e.g.*, *Jackman v. State Industrial Special Indemnity Fund*, 129 Idaho 689, 931 P.2d 1207 (1997). In particular, we note that the subject lump sum settlement agreement specifies that the parties to that agreement stipulated to a *Carey* apportionment of 60/40, with ISIF accepting 60% responsibility for Claimant's total and permanent disability for purposes of the settlement. Of course, Employer/Surety is not a party to that settlement agreement, so it cannot be bound by that stipulation. However, the question that interests the Commission is whether the stipulation binds Claimant in connection with her prosecution of the claim against Employer/Surety.

Under Idaho Code § 72-718, a decision of the Commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated; provided, within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision. In any such event, the decision shall be final upon denial of a motion for rehearing or reconsideration, or the filing of the decision on rehearing or reconsideration.

The Commission may reverse its decision upon a motion for reconsideration, or rehearing of the decision in question, based on the arguments presented, or upon its own motion provided that it acts within the time frame established in Idaho Code § 72-718. *See*, *Dennis v. School District No. 91*, 135 Idaho 94, 15 P.3d 329 (2000) (*citing Kindred v. Amalgamated Sugar Co.*, 114 Idaho 284, 756 P.2d 410 (1988)). However, in taking this action, it is not our intention to foreclose either of the parties from themselves pursuing a motion for reconsideration under I.C. § 72-718 for any other issues they believe need to be reconsidered by the Commission.

Because the issue that is of concern to us could not ripen in the absence of a particular outcome in Claimant's case against Employer/Surety, and since the issue is not among those originally noticed for hearing, the Commission invites the parties to submit additional briefing on the issue for the Commission to consider before determining whether the Findings of Fact, Conclusions of Law and Order should be reconsidered based on the approved lump sum settlement agreement between Claimant and the ISIF. The Commission will set a telephone conference in the immediate future to discuss with the parties how best to proceed.

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ORDER

Within ten (10) days, the parties are directed to submit available dates and times for such conference.

DATED this __3rd____ day of _____May_____, 2013.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Chairman

_____
R.D. Maynard, Commissioner

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _3rd_____ day of _____May_____, 2013, a true and correct copy of the foregoing **NOTICE OF RECONSIDERATION** was served by regular United States mail upon each of the following:

STEVEN J NEMEC
1626 LINCOLN WAY
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E SCOTT HARMON
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_/s/_____