BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROSALIE FAULKNER, Claimant, v. IDAHO TRANSPORTATION DEPARTMENT , Employer, and STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2008-011081** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed September 26, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Twin Falls on November 17, 2011. Claimant was present and represented by Keith E. Hutchinson of Twin Falls. Neil D. McFeeley of Boise represented Employer, Idaho Transportation Department[1] and its Surety, State Insurance Fund. Anthony M. Valdez of Twin Falls represented State of Idaho, Special Indemnity Fund (ISIF). Oral and documentary evidence was presented and the record remained open for the taking of post-hearing depositions. The parties then submitted post-hearing briefs and this matter came under advisement on April 24, 2012.

ISSUES

By agreement of the parties, the issues to be decided are:

[1] The parties, as well as the Commission, have referred to Employer as both the Idaho Department of Transportation (IDOT) and the Idaho Transportation Department (IDT). According to the Department of Administration's website directory, the Idaho Department of Transportation is the correct designation.

1. Whether Claimant's condition is due in whole or in part to a preexisting condition;[2]

2. Whether Claimant is entitled to permanent partial disability (PPD) including whether Claimant is an odd-lot worker;

3. Whether apportionment pursuant to Idaho Code § 72-406 is appropriate;

4. Whether ISIF is liable, and, if so,

5. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant contends that she is totally and permanently disabled as an odd-lot worker as a result of either a combination of her pre-existing back surgeries, inhalation inhalation/respiratory injuries, and her last industrial back injury.

Employer/Surety contends that Claimant is not totally and permanently disabled under any theory, in that there are jobs she could perform within her labor market and her job search has been less than satisfactory. Her last accident did not result in any impairment; therefore, she is entitled to no disability. Further, her last accident did not result in any more restrictions than Claimant had before that accident. However, in the event the Commission is not so persuaded, ISIF should be liable for the greatest portion of Claimant's disability.

ISIF also contends that Claimant is not totally and permanently disabled and, thus, they bear no responsibility. However, in the event the Commission is not so persuaded, ISIF argues that Claimant's preexisting back condition was not a subjective hindrance to employment and her inhalation injury did not combine with her last accident to render her an odd-lot worker. Further, Claimant's own vocational expert has opined that it was the last accident alone that caused her permanent disability.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, presented at the hearing.

2. Claimant's Exhibits 1-16, admitted at the hearing.

3. Employer/Surety's Exhibits A-I, admitted at the hearing.

[2] This issue will not be considered separately, but will be considered in conjunction with the remaining issues.

4. ISIF's Exhibit 1, admitted at the hearing.

5. The post-hearing deposition of Clinton LaMar Dille, M.D., taken by Claimant on December 8, 2011.

6. The post-hearing deposition of Douglas N. Crum, CDMS, taken by Defendants on February 2, 2012.

7. The post-hearing deposition of C. Timothy Floyd, M.D., taken by Defendants on February 2, 2012.

8. The post-hearing deposition of William C. Jordan, MA, CRC, CDMS, taken by Defendants on February 3, 2012.

All objections made during the taking of the above depositions are overruled.

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

FINDINGS OF FACT

Background

1. Claimant was 51 years of age and resided with her ex-husband on a ranch three-and-a-half miles north of Bliss, Idaho, a small rural community west of Twin Falls and south of the Wendell/Gooding area. Her residence is 15 miles from Gooding, 13 miles from Hagerman, 16 miles from Glenns Ferry, 20 miles from Wendell, 30 miles to Jerome, and 42 miles from Twin Falls. Claimant graduated from Gooding High School in 1979 with a 3.5 grade point average. She participated in basketball, volleyball, track, and softball. She completed a computer literacy and ten-key course at CSI and has, to some extent, kept those skills current.

Work history

2. Claimant was raised in rural south central Idaho and engaged in all activities related to that rural lifestyle. Claimant spent most of the 1990s engaging in farm labor activities including truck driving and operating farm equipment. From 1997 to 2000, Claimant worked as a counter person in an auto parts store, where she suffered an inhalation injury. After an unsuccessful attempt to return to work at the parts store, Claimant worked for a short time as a lab assistant in a cheese factory, but had to leave due to asthma attacks. Claimant then worked for about a year at the Walker Center, an

alcohol treatment facility, where she monitored patients' medications and activities. From there, Claimant began employment with Employer herein, Idaho Transportation Department (ITD), out of its Gooding facility as a transportation technician. Following the subject accident and injury and an unsuccessful attempt to return to work there, Claimant worked for a trucking company as a parts room worker, but was either fired or mutually agreed to terminate due to the frequency of doctors' appointments and the effects of the medications she was taking. At the time of the hearing, Claimant worked part-time on call as a substitute mail carrier; her ex-husband did the driving for her.

Prior health history

3. Claimant injured her back in 1997 in a non-industrial slip and fall which resulted in a laminectomy and an eventual fusion at L5-S1. Claimant testified that it took her about a year to recover.

4. In 2000, Claimant suffered a severe chemically induced bronchitis injury when she was exposed to sulfuric acid liberated from an exploding car battery while employed at an auto parts store. Claimant's course of recovery from this injury was long and involved. She was eventually awarded an 18% whole person impairment for her chronic bronchitis and an additional 20% whole person impairment for her respiratory injury.

The subject accident

5. On March 12, 2008, Claimant suffered an industrial accident lifting a railroad tie. She described her accident at hearing as follows:

> That day we were doing a guardrail job out north of Shoshone, and I was working with the Shoshone crew. We had a bunch of guardrails [sic – that] needed to be replaced. We had loaded it, and went out there. Everybody was there. We should [sic – not?] have been working. Highway 75 is really kind of a nasty road to be working on, because people don't slow down for you.
>
> So I'm the only woman on the crew. So I told the guys, I said, Come on guys, let's get started, and they said, Well, if you want to get started go ahead, get us some ties. John went with me, John Connell went with me, and he lifted a tie, and he threw it over his shoulder. They're only five-foot ties.
>
> I didn't lift it over my shoulder, but I reached down to get it, and when I got it turned around I went, Oh my God, this is heavy. I can't believe you threw that over your shoulder, John. But I wasn't going to

> wuss out, so I packed it and threw it in the hole. I already knew I messed something up.

Hearing Transcript, p. 39.

Dr. Floyd

6. Claimant testified that she experienced a sharp pain in her lower back and buttocks. She presented to Timothy Floyd, M.D., the orthopedic surgeon who had performed her previous back surgeries, on March 20, 2008. Dr. Floyd noted that he had performed back surgeries on Claimant in 1997 and that, although she had experienced a few flare-ups, she had done well ". . . but for the past year or two has had increasing pain in the low back radiating into the buttock and the posterior upper thigh, but nothing distally as far as the knee or further." Claimant's Exhibit 5, p. 12. Dr. Floyd further noted that, "Her symptoms became worse after she slipped and fell on the ice at work." *Id.*[3] Dr. Floyd diagnosed low back pain of uncertain etiology and ordered a lumbar MRI which, other than showing some degenerative changes, was essentially normal. Dr. Floyd prescribed physical therapy which Claimant commenced on April 2, 2008.

7. As Claimant reported from 75 to 100% improvement in her low back condition with physical therapy, Dr. Floyd released her to return to work on September 2, 2008 with no restrictions. However, on September 19, 2008, Claimant returned to Dr. Floyd complaining that her back pain was becoming "worse and worse" and she was "essentially miserable." *Id.*, p. 34. Dr. Floyd diagnosed back pain without a surgical etiology and referred Claimant to Kevin Krafft, M.D., a physiatrist, for an impairment rating. For some reason this referral was not accomplished, so on September 30, 2009, Dr. Floyd again sought authorization for an IME with Dr. Krafft.

Dr. Rogers IME

8. Before Claimant saw Dr. Krafft, she was seen by Beth Rogers, M.D., an orthopedic surgeon, at Surety's request on March 16, 2009. At that time, Claimant's chief complaints were low back and bilateral buttocks pain. Claimant informed Dr. Rogers that she "did great" after her initial surgeries with no complaints of back or

[3] At Claimant's request, on April 3, 2008, Dr. Floyd "corrected" his March 20, 2008 record by noting that Claimant's ". . . pain began on March 12, 2008 after she lifted a railroad tie at work." Claimant's Exhibit 5, p. 23.

leg pain until the subject accident. Currently, Claimant's back pain is intense and is basically 'ruining her life." She cannot sit for more than 20 to 30 minutes and has trouble sleeping. Claimant attributes 75% of her pain to her back and 25% to her legs. After examining Claimant, Dr. Rogers diagnosed a lumbosacral strain superimposed on foraminal stenosis at L5-SI and lumbar facet arthropathy and probable bilateral L5 radiculopathy related to the subject accident. However, to the extent Claimant had complaints following her back surgeries, apportionment to some degree would be appropriate for PPI purposes. Dr. Rogers recommended that Claimant undergo a bilateral epidural steroid injection at L5-S1, as well as a formal physical therapy program.

9. Regarding physical restrictions, Dr. Rogers indicated, "In a longer term, I do not think permanent work restrictions would be any different than would be indicated due to her prior surgeries." Claimant's Exhibit 10, p. 3. Dr. Rogers did not find Claimant at MMI. She believed Claimant should be weaned from all of her narcotic medications.

Dr. Dille

10. Claimant began treating with chronic pain specialist Clinton Dille, M.D., and his physician's assistant, John Urrutia, on July 7, 2009 for facet joint injections. Dr. Dille's treatment plan included primarily narcotic pain medications. Dr. Dille diagnosed Claimant with facet arthrosis or lumbosacral spondylosis which he described as degenerative joint disease of the small facet joints of the back. Dr. Dille injected Claimant L4-5 facet joints bilaterally. By July 14, Claimant was subjectively 50% improved. Dr. Dille repeated the injection and by August 26 she claimed a 95% reduction in her pain level. Dr. Dille discontinued Claimant's injections as well as her Hydrocodone. By October 21, Claimant's pain level had increased to 5/10 so Dr. Dille restarted the Hydrocodone.

11. By March 10, 2010, Claimant's pain had increased to the point where Dr. Dille again injected Claimant, with no real long-term reduction in her pain. In June 2010, Dr. Dille administered an SI joint epidural injection, which decreased her pain by 50% according to Claimant. Dr. Dille opined that the only other treatment option available to Claimant was another fusion at the level above her previous fusion; a "last resort" procedure.

12. Dr. Dille testified in his deposition that Claimant's facet arthrosis could be related to her fusion in 1998, in that it is common for the joints above or below the fusion to also become arthritic. However, Dr. Dille was unable to state to a reasonable degree of medical probability the degree to which the injury played a role in the development of Claimant's facet arthrosis as compared to Claimant's prior fusion surgery.

13. Dr. Dille testified as follows regarding Claimant's two-plus year of opiate usage and his attempts, if any, to wean her therefrom:

> Q. (By Mr. Valdez): Is there a concern that you'd have to try and get her off the opiates long term?
>
> A. Not really. I mean, if - - the truth of the matter is taking the VIMOVO, which is naproxen, is probably more risky than taking the opiates because of the chance of causing liver problems. So the opiates have very, very minimal, if any, risk to heart, liver, kidneys. So they're probably less my concern. Of course, she is taking some Tylenol with her medication, which does affect the liver. And so somewhere along the line that could come into play as well. But you don't - - you know, you're just classifying the opiates. And in my opinion, the Tylenol or the acetaminophen that's with that is the bigger risk than the opiates is [sic].

Dr. Dille Deposition, p. 29.

Dr. Dille has no plans to discontinue Claimant's opiate usage, which he describes as "low-level," because, at least according to Claimant, she is not able to function normally without them.

Dr. Krafft IME

14. Dr. Floyd referred Claimant to Kevin Krafft, M. D., on September 30, 2009 for an IME to address restrictions and other matters. Claimant saw Dr. Krafft, a physiatrist, on November 20, 2009[4] for an impairment rating. Her chief complaint at the time was low back pain radiating into both buttocks. Utilizing the *AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition,* Dr. Krafft concluded that Claimant has suffered whole person PPI of 9% for her prior back surgeries and her current non-verifiable radicular complaints. Because Claimant informed Dr. Krafft that she was

[4] Dr. Krafft's November 20 report references an October 26, 2009 note regarding Claimant's family, social, employment and medical histories; however, the Referee is unable to locate that note in the exhibits.

asymptomatic from her prior back surgeries until the subject accident,[5] he apportioned Claimant's PPI at 3 % for the subject accident and 6 % for Claimant's previous back surgeries.

15. Based on a Functional Capacities Evaluation accomplished on November 13, 2009, Dr. Krafft recommended that Claimant limit her lifting to 25 pounds occasionally, avoid low-frequency vibration, and limit sitting to 5 hours at 45-minute intervals, limit standing to 4 hours at 20-minute intervals, and limit walking to 2 hours at frequent moderate distances.

Dr. Floyd Deposition testimony

16. Dr. Floyd, Claimant's treating surgeon, testified by way of deposition. He has specialized in spine surgery since 1999 and performed the two back surgeries on Claimant in 1997 and 1998. Dr. Floyd testified that his "philosophy" regarding placing restrictions on patients who have undergone surgeries such as Claimant's depends upon whether the need for said surgeries was industrial or not. If industrial, he would impose restrictions; if non-industrial, he would not. Therefore, in this matter, he did not formally assign restrictions because Claimant's two back surgeries were non-industrial.[6] However; even so, Dr. Floyd testified:

> Q. (By Mr. McFeeley): Okay. And what would be the general limitations that you would place on a person?
>
> A. Well, you know, frankly, that depends on whether or not it's a work comp case or not. And if it's a work comp case, then I usually tell them to limit - - depending whether it was a male or female and their body habitus, I would recommend that they limit their frequent lifting to between 30 and 50 pounds, and I would recommend that they limit their bending, climbing, stooping, twisting activities.
>
> Q. In a situation such as Ms. Faulkner, obviously a female, what would the general limitations have been?
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> A. Well, she had an L5-S1 fusion. And so a lot of people are born with the L5 and S1 fused together and really don't have any restrictions.

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[5] This is contrary to what Claimant told Dr. Floyd regarding her back pain increasing over the past year or so when she saw him in March 2008.

[6] Dr. Floyd's "philosophy" regarding restrictions is concerning to this Referee, in that whether industrial or not, an injured worker is entitled to know what activities may increase his or her risk of further injury, and an employer should also be aware of those activities so that the employer may not assign tasks exceeding any restrictions and exposing the worker to the risks of re-injury.

> So I can't remember at that time what my philosophy was, because it's really more of a philosophical than a medical question, but currently I wouldn't recommend really any restrictions.
>
> At that time I probably would have told her no lifting over 30 pounds on a frequent basis and then the other restrictions I just mentioned.

Dr. Floyd Deposition, p. 11.

17. Regarding a PPI rating, Dr. Floyd testified that had Claimant's low back injury involved a workers' compensation claim, he would have assigned a PPI rating of between 8% and 12% whole person for a single level fusion without a neurological deficit.

18. Although Claimant testified that she was pain-free after her earlier back surgeries, Dr. Floyd's March 20, 2008 office note indicated that she had experienced increasing low back pain radiating into her buttocks and posterior upper thigh for the past year or two. Claimant informed Dr. Floyd that her symptoms became worse after she slipped and fell on ice at work.[7] Dr. Floyd testified as to his understanding of Claimant's situation at that time:

> Well, that's kind of what she told me. I mean, you know, everybody has back pain off and on, but according to my note, at least - - again, I don't recall this interview, but according to my note, she described a pattern of intermittent flare-ups of back pain that sounds like the - - and I don't know if it was the intensity or the frequency, but that she was having increasing pain in the year or two prior to her coming to see me.

Dr. Floyd Deposition, pp. 17-18.

Dr. Floyd could not find any anatomic reasons for Claimant's complaints. He expected an annular tear that almost always heals on its own.

19. Dr. Floyd had no idea as to the etiology of Claimant's back pain when he saw her in September of 2008. He agrees with Dr. Krafft's physical restrictions and testified that they were "probably very similar" to those that would have been given after her prior surgical fusion. However, Dr. Floyd testified that if she had a successful fusion, as he opined she did, he would not restrict her unless it was for workers' compensation purposes.

[7] Remember, this was her first doctor visit after the railroad tie lifting incident.

20. Dr. Floyd testified that there is an increased chance of needing a fusion at an adjacent level of the fused level, but that the need for such fusion would be a combination of original fusion and ". . . something wrong with their biology that leads to a breakdown of discs." *Id.*, at p. 40. Dr. Floyd questions Dr. Dille's opinion that a fusion at L5-S1 can lead to arthritis at L4-L5 because, in Claimant's case, the fusion was done anteriorly so as not to disturb the anatomy of the posterior facet joints. Further, the lifting of a railroad tie would not result in the lasting pain of which Claimant complains. Moreover, Dr. Floyd does not believe that scar tissue is to blame for Claimant's low back symptoms because the scar tissue identified on a post-surgical MRI shows the scar tissue right behind a solid fusion, so there could be no pulling or tethering of the nerves. Finally, Dr. Floyd does not know what is causing Claimant's mid-back, buttocks, and coccyx area pain.

21. Dr. Floyd testified that Claimant was a compliant patient; however, he ". . . never understood why her pain was as severe as it was and required the treatment and medication that it required." *Id.*, p. 44. Dr. Floyd further testified that, "I was being vague on purpose" concerning the last remark. *Id.* Dr. Floyd was concerned about Claimant's narcotic medication usage and recommended that she wean herself off them. He testified, "And, you know, somebody can break their back and have less pain and medication requirement." *Id.*, p. 45.

DISCUSSION AND FURTHER FINDINGS

The vocational experts

Douglas N. Crum, CDMS

22. Claimant retained Mr. Crum to assess her employability. Mr. Crum's credentials are well known to the Commission and will not be repeated here. Mr. Crum reviewed relevant medical and vocational records, interviewed Claimant, prepared a report (Claimant's Exhibit 7), and was deposed. Since authoring his February 23, 2010 report, Mr. Crum has reviewed Claimant's two deposition transcripts, the hearing transcript, and the vocational assessment of William Jordan, Defendants' vocational expert.

23. Mr. Crum confirmed that Claimant had taken some computer classes at CSI in connection with a retraining program for a previous industrial injury, and was

computer literate. He referenced Claimant's rural upbringing and farm work history as well as her jobs at an auto parts store, a cheese factory, the Walker Center in Gooding, Idaho, and ITD.

Post-injury, Claimant worked for D & B Trucking and is currently a substitute carrier on a rural mail route.

24. Other than some sensitivity issues associated with her lung injury, Mr. Crum was not aware of any formal physical restrictions assigned for that condition. Mr. Crum understands Dr. Krafft's restrictions as:

> Okay. On November 20, 2009, Dr. Krafft, after reviewing a Functional Capacity Evaluation that was performed earlier that month, said that her restrictions were a 25-pound lifting restriction on an occasional basis, avoid low-frequency vibration,[8] limit sitting to five hours a day in 45-minute intervals, standing to four hours a day in 20-minute intervals, and walking two hours a day at moderate frequent distances.

Crum Deposition, p. 13.

25. Mr. Crum testified that Claimant's restrictions preclude her from performing any of her previous employment: "In particular, the restrictions to 20-minute intervals of standing and 45-minute intervals of sitting for only five hours a day total are just not going to work for her, given her skill set, her location, her labor market." *Id.*, p. 14.

26. Regarding Claimant's labor market, Mr. Crum testified:

> Well, let's talk about her labor market first. She lives in Bliss. It's a small community, and it's about 45 to 40 miles from Twin Falls, which puts it somewhat outside most of the labor market in Twin Falls. There's [sic] no shortcuts to Twin Falls, really, from there.
>
> And then the rest of her labor market is largely agricultural small businesses, some manufacturing primarily in Gooding and Jerome. Some transportation in those communities, but, you know - - and then you have, obviously, city, state, governmental agencies and that sort of thing, school districts.
>
> I just don't think that there's a place for her to land, given her skill set and restrictions, in that labor market.

Id., p. 15.

27. Mr. Crum identified Claimant's skill set as follows:

[8] Mr. Crum's understanding of "low frequency vibration" is that brought on by driving heavy trucks, heavy equipment, and construction equipment, but primarily semi trucks.

> Essentially - - and I put this in my report - - she has experience doing customer service work and has done some cashiering work, particularly in an auto parts store setting. She has experience pulling orders, experience of maintaining some inventory records.
>
> She has experience operating heavy trucks and farm trucks as well as farm tractors and other farm equipment.
>
> She has experience - - well. She can perform math, she's literate. She has had some modest computer training, but does have some basic computer skills and has some basic computer - - or basic keyboarding skills.

Id., p. 16.

28. Mr. Crum reviewed the report prepared by Defendants' vocational expert, William Jordan. Mr. Crum was aware that Mr. Jordan submitted Dictionary of Occupational Titles (DOT) listings to Dr. Krafft for his approval/disapproval. Mr. Crum described such listings as merely outdated averages of what certain positions require, but do not deal with real jobs in a given labor market at any given time, or with real employers. Mr. Crum opined that a better way to educate a physician on potential jobs is to submit the specific job description for approval/disapproval. Mr. Crum reviewed the lists of DOT jobs Mr. Jordan and Dr. Krafft believe Claimant could perform and disagreed that Claimant could perform them or compete for them, other than periodic part-time work that she now has as a substitute mail carrier.

29. Under cross-examination from Surety's counsel, Mr. Crum acknowledged that he had not spoken to Claimant for at least two years from the time of his February 2, 2012 deposition. He was not retained to find or look for work for Claimant. Mr. Crum testified that Claimant was well-known in her community and had a strong work history. He was aware of Claimant's inhalation injury but testified, "Well, it's my opinion that the 2008 industrial injury by itself, with the restrictions and limitations that are associated with it, are sufficient to consider her to be totally and permanently disabled even without the preexisting respiratory issues." *Id.*, p. 27. At the time he prepared his report in February 2010, Mr. Crum did not believe that Claimant's respiratory injury was a major factor in her employability and held to that opinion two years later. However, Mr. Crum conceded that the lung injury did, in fact, take Claimant out of some jobs in her labor market and, in hindsight, is a "significant vocational consequence." *Id.*, p. 34.

30. Mr. Crum testified that no medical record he reviewed indicated that Claimant could not work. He was also familiar with Claimant's testimony that if the Walker Center job became available she would be able to perform it; and he agrees that she probably could. Regarding Claimant's low back fusion, Mr. Crum testified that because she was given no restrictions and continued doing heavy labor thereafter, the fusion was not particularly relevant vocationally.

31. Mr. Crum agreed with ICRD consultant, Dave Duhaime, that Claimant could perform such jobs as receptionist, information clerk, secretary, administrative assistant and support jobs before her last accident. However, due to the restrictions imposed, as well as her narcotic medication use for her significant pain problem, and resultant fatigue, Claimant can no longer do those jobs.

32. Mr. Crum testified that if Dr. Rogers' opinion that Claimant's last accident did not result in any physical restrictions different from what would have been assigned after her back surgeries is accepted, then Claimant would have no disability as a result of the last accident. Finally, Mr. Crum did not consider ITD to have been a sympathetic employer just because they accommodated Claimant with help with heavy lifting and the avoidance of certain cleaning chemicals.

William C. Jordan, MA, CRC, CDMS

33. Employer/Surety retained Mr. Jordan to prepare a vocational evaluation and disability report. Mr. Jordan's qualifications are well known to the Commission and will not be repeated here. His curriculum vitae is found at Exhibit 1 to his deposition. Mr. Jordan met with Claimant on February 4, 2010. He reviewed pertinent records and authored an employability report dated September 28, 2011 (Defendants' Exhibit 1). He was also present at Mr. Crum's deposition.

34. Mr. Jordan was not aware of any formal, detailed physical restrictions stemming from Claimant's lumbar fusion, other than to be careful. Mr. Jordan was aware of Dr. Rogers' IME wherein she indicated that the restrictions after Claimant's last accident were very similar to those assigned after her lumbar fusion, thus bringing Claimant back to baseline. Mr. Jordan testified that if the Commission accepts Dr. Rogers' opinion in that regard, then Claimant would have incurred no additional disability.

35. Mr. Jordan was aware of Dr. Krafft's 3% whole person PPI rating for Claimant's last accident. It was Mr. Jordan's understanding that, in arriving at the 3%, Dr. Krafft relied on Claimant's statement to him that she had been pain-free since recovering from her lumbar fusion.

36. Mr. Jordan testified that that the ITD accommodated Claimant by having her avoid certain cleaning chemicals and providing help with heavy lifting. Even so, ITD would not re-hire Claimant unless she could lift up to 50 pounds. Dr. Kraftt assigned some additional restrictions identified in finding number 15 above, after he and Mr. Jordan spoke. These new restrictions did not impact Dr. Krafft's prior approval of the following DOT job titles, as well as Claimant's transferrable skills and her work and educational history: hotel/motel clerk, retail sales clerk, scale clerk, auto rental agent, cashier, bill collector, loan clerk, customer service representative, survey worker, phone work, data entry clerk, hospital admittance clerk, and receptionist.

37. Mr. Jordan was aware that Dr. Dille testified that Claimant could work if she could find work that would allow her to do things necessary for her pain. Mr. Jordan placed some of the jobs he identified for Claimant in that category. Further, most of the office occupation type of positions would also conform to Dr. Krafft's restrictions regarding standing, sitting, and breaks. While acknowledging that the job market is "tight" in Claimant's labor market, Mr. Jordan opined that Claimant could find suitable work if she was looking for it.[9]

38. Mr. Jordan believes that Claimant has incurred permanent partial disability of 30% inclusive of her 3% whole person PPI as the result of her March 2008 industrial accident, considering Dr. Krafft's restrictions. Mr. Jordan did not address the apportionment issue.

39. Under cross-examination from ISIF's counsel, Mr. Jordan testified that Claimant's limited job search was not realistic. She did not register with Job Service or engage other entities to try and find her a job. He testified that the employment possibilities he identified are regularly available in Claimant's labor market, which includes Twin Falls.

[9] Mr. Jordan testified that Claimant applied for 11 jobs over a seven-day period in November of 2011.

40. Under cross-examination from Claimant's counsel, Mr. Jordan testified that he does about 10% claimant's work and 40% defense work in his forensic/litigation practice. Mr. Jordan was not hired to find Claimant a job. Regarding Claimant's testimony that the Gabapentin[10] she takes makes her sleepy and that she had to take naps thereafter, Mr. Jordan testified that that is something she needs to ". . . learn to deal with as best as possible" in the employment setting. Jordan Deposition, p. 41.

41. Mr. Jordan has determined that Claimant has lost access to 21% of her pre-last injury labor market. According to Mr. Jordan, Claimant may be expected to earn an hourly starting salary of $12.94 on his list of potential jobs. Mr. Jordan explained how he arrived at a 30% PPD figure as follows:

> That is a combination of the wage loss, loss of labor market. So we do a little more math, the 21 percent plus the 16 percent. And then that's divided by two, because the Commission has told us that we need to look at labor market and wage loss and divide those, and that equals 19 percent.
>
> Also, when I originally figured it, I figured the medium duty area, so I backed that out. And also considered that she had to travel some because she lives in Bliss. Also looked at the unemployment rate. So it bumped it up to 27 percent and then 3 percent. The other 3 percent is the PPI, so it equals 30 percent PPD.

Mr. Jordan Deposition, pp. 60-61.

42. Mr. Jordan conceded that asking for accommodations might affect her competiveness in obtaining employment, but overall she will bring to the table strong, marketable skills in that she has performed a variety of jobs requiring a lot of different skills. Claimant's taking of medications that make her drowsy may also affect her competitiveness, as might her sensitiveness to perfumes, diesel fuel, and other chemicals. Even so, Mr. Jordan believes Claimant is competitive in the office occupations area of her labor market.

43. Claimant's vocational expert, Mr. Crum, did not place a numerical percentage to Claimant's alleged PPD above PPI. Rather, he opined that Claimant is an odd-lot worker. Mr. Jordan, on the other hand, opined that Claimant has incurred a 30% disability inclusive of PPI. The Referee finds Mr. Jordan's opinion provides substantial

[10] Gabapentin is a seizure or antiepileptic medication used for neuropathic pain, with drowsiness as a known side effect. *See,* Dr. Dille Deposition, p. 13.

evidence that Claimant's PPD including medical and non-medical factors does not total 100%.

ANALYSIS

Odd-lot

Claimant does not contend, and the Referee finds, that Claimant is not totally and permanently disabled by the 100% method. She does contend, however, that she is an odd-lot worker due to the combination of her prior back condition, her chronic bronchitis, and her last industrial accident. Although Claimant has failed to establish that she is totally and permanently disabled by the 100% method, she may still be able to establish such disability via the odd-lot doctrine. An injured worker may prove that he or she is an odd-lot worker in one of three ways: 1) by showing he or she has attempted other types of employment without success; 2) by showing that he or she or vocational counselors or employment agencies on his or her behalf have searched for other suitable work and such work is not available; or, 3) by showing that any effort to find suitable employment would be futile. *Hamilton v. Ted Beamis Logging and Construction,* 127 Idaho 221, 224, 899 P.2d 434, 437 (1995).

Work attempts

44. Claimant attempted to return to work at the auto parts store where she incurred her respiratory injury; however, irritants from certain chemicals and smells forced her to quit. Further, Claimant attempted work at a cheese factory, but asthma attacks prevented her from continuing. She attempted work in the parts department at a trucking company, but was let go for reasons apparently involving her prescribed use of morphine and resultant safety issues. She inquired about returning to work at ITD, but was informed that she needed to be able to lift fifty pounds and sit in a truck. Other than helping her ex-husband on his ranch and her part-time mail route job, Claimant has not worked since her March 2008 injury.

Job search

45. The Referee is not convinced that Claimant has conducted a reasonable and meaningful job search in October and November of 2011. While Claimant has some physical restrictions, she also has an employment history that demonstrates a strong work ethic and skill set. Claimant demonstrated intelligence and the ability to communicate at

the hearing. Claimant has certain restrictions common to back injuries and must avoid certain chemicals; situations she had successfully avoided in the past.

46. Claimant testified that she has looked for work at the following establishments:

> I looked around in Bliss. I have applied at the Stinker Station, I've applied at Ziggy's. I looked in Gooding again at NAPA. There's a Hub City Auto in Wendell that I applied. The Gooding Hospital, I applied when they opened a new hospital. I applied at St. Luke's online. I have applied for Flying J, I have applied - - I don't know. I have a whole list of them.
>
> Q. What types of work are you applying for?
>
> A. Clerk jobs, or purchasing jobs, something that I thought I could do. We don't have a whole bunch around. The other thing is, I don't have an outfit to drive. I'm driving Ray's.
>
> Q. Have you applied for any clerical type work?
>
> A. Yes. Gooding, they just sent a letter back, they hired somebody. But at the Gooding City Office I applied. There was a couple of clerical jobs here in Twin that I applied for. Have not heard back from them. Five or six. I went through the Idaho Labor thing down here, and I've applied online. I wrote every one of them down, and Keith has them.
>
> * * *
>
> Q. Have you contacted the Idaho Transportation Department of regarding potential openings there?
>
> A. Yes, I have. I talked to Joyce Shaw. She works in the Shoshone office, and I ask her all the time, but I also go out on the ITD website and I look all the time to see what's out there.
>
> Q. Is there a job at Idaho Transportation Department you think you could do?
>
> A. In the office, I could probably do the front desk office, if they ever had an opening. I have applied for one or two of them, but if you want to relocate, and I don't want to relocate.

Hearing Transcript, pp. 48-49.

47. Claimant testified that she believed she could presently perform the full-time "housemaid" job she had at the Walker Center. She applied for a part-time position there, but they hired someone else. Claimant does not believe she can work eight hours a day, five days a week, although no physician has prohibited Claimant from so working.

48. The Referee finds that Claimant's job search was not reasonable or meaningful given her circumstances. She failed to follow through with any leads derived from her working with ICRD. She has failed to register with Job Service or other

employment agencies to assist her in her job search. By her own admission, Claimant never followed-up with any of the employers with which she left applications or otherwise applied. Again, by her own admission, there are jobs she believes she can perform (Walker Center and IDT clerical) and there are no doubt similar jobs in her labor market. While she testified that she had to "borrow" her ex-husband's truck for transportation, she did not indicate that transportation was unavailable to her. With legitimate effort, the Referee is convinced that Claimant will be able to locate employment compatible with her skill set and physical restrictions. While she has some memory issues she attributes to her narcotics usage, all of her treating physicians, with the exception of Dr. Dille, have opined that she needs to be weaned from those medications. The Referee was impressed at hearing that Claimant presented in a forthright and personable manner that would be an asset to any employer. Whether Claimant would be competitive in obtaining employment is speculative, but whether she is or is not competitive cannot be known without Claimant's sincere effort in obtaining employment.

Futility

49. Claimant argues, with support from Mr. Crum, that a job search beyond that already conducted by Claimant would be futile. For the reasons outlined above, the Referee disagrees.

PPD

50. Even though Claimant has failed to establish that she is an odd-lot worker, she may, nonetheless, have incurred PPD above her PPI. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the

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

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

51. As previously indicated, Claimant's vocational expert, Mr. Crum, has opined that Claimant is an odd-lot worker. Defendants' vocational expert, Mr. Jordan, has opined (and Mr. Crum agrees) that if the Commission finds that Claimant's restrictions were the same both before and after the railroad tie lifting incident, then there would be no disability above impairment. Defendants further allege that Dr. Krafft's restrictions and 3% whole person PPI were based on the erroneous assumption that Claimant had no back problems between the time she recovered from her 1997 fusion until the time of the railroad tie lifting incident.

52. Defendant's argument that Claimant has failed to prove that her last accident has created any disability is compelling. Claimant's lifting of the railroad tie was insignificant enough that when she finally sought medical care, she initially failed to mention that event as the precipitating cause of her back pain. Further, her comment to Dr. Floyd that she had experienced increasing back pain over the past year or two is contrary to her testimony regarding her complete recovery from her earlier fusion. Significantly, Dr. Floyd does not know what is causing Claimant's back pain. Finally,

the only physician currently treating Claimant, Dr. Dille, testified that he was treating her for facet arthritis but was unable to testify to a reasonable degree of medical probability to what extent the prior fusion played in the development of that arthritis versus the railroad tie lifting incident.

53. The Referee finds that Claimant may have suffered a temporary flare-up of back pain in the railroad tie lifting incident. Post-accident x-rays and a lumbar MRI were essentially normal. There is no credible medical evidence establishing that that incident created any permanent disability above the 3% PPI rating assigned by Dr. Krafft based on the erroneous assumption that Claimant was pain-free between her recovery from her previous lumbar fusion and the railroad tie lifting incident. Even Dr. Krafft's assignment of a 3% impairment rating referable to the subject accident is called into question by virtue of the inaccurate history upon which he evidently relied in formulating his opinion. The restrictions imposed by Dr. Krafft do not vary significantly from restrictions that would have been imposed post-lumbar fusion by Claimant's treating surgeon. Further, neither the restrictions imposed by Dr. Krafft nor the FCE itself specifically relate the need for those restrictions to have arisen from Claimant's March 2008 accident and injury.

54. The Referee finds that Claimant has failed to prove she has suffered any disability above impairment as a result of her March 2008 accident and injury.

55. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that she is an odd-lot worker.

2. Claimant has failed to prove that she suffered any disability above her impairment as a result of her March 2008 accident and injury.

3. All other issues are moot.

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 __13th___ day of September, 2012.

INDUSTRIAL COMMISSION

___/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the ___26th____ day of ___September___, 2012, 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:

KEITH E HUTCHINSON
PO BOX 207
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NEIL D MCFEELEY
PO BOX 1368
BOISE ID 83701-1368

ANTHONY M VALDEZ
2217 ADDISON AVE E
TWIN FALLS ID 83301-5744

ge Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROSALIE FAULKNER, Claimant, v. IDAHO TRANSPORTATION DEPARTMENT, Employer, and STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2008-011081** **ORDER** Filed September 26, 2012

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

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

1. Claimant has failed to prove that she is an odd-lot worker.

2. Claimant has failed to prove that she suffered any disability above her impairment as a result of her March 2008 accident and injury.

3. All other issues are moot.

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

DATED this __26th___ day of ___September____, 2012.

INDUSTRIAL COMMISSION

__/s/_____
Thomas E. Limbaugh, Chairman

__/s/_____
Thomas P. Baskin, Commissioner

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

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __26th___ day of __September____ 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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ge _/s/_____