BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHRISTOPHER GLENN, Claimant, v. IDAHO STATE POLICE, Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2006-530833** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed August 30, 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 Boise, Idaho on October 11 and 19, 2012. Claimant, Christopher Glenn, was present in person and represented by Ellen Smith and Joseph Horras of Boise, Idaho. Defendant Employer, Idaho State Police (ISP) and Surety, State Insurance Fund, were represented by Paul Augustine of Boise, Idaho. The parties presented oral and documentary evidence. No post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on January 10, 2013. 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.

ISSUES

The issues to be decided are:

1. Whether Claimant is permanently and totally disabled pursuant to Idaho Code § 72-407.

2. Whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

All parties acknowledge that Claimant was shot in the line of duty as an ISP trooper and is now paraplegic as a result of his industrial accident. Defendants contend that they have refuted the statutory presumption of Idaho Code § 72-407 that Claimant is totally and permanently disabled because he has been employed full-time by the ISP for the last four years. Claimant asserts that he is an odd-lot worker, not competitively employable in the open labor market, that ISP is a sympathetic employer, and that he maintains employment at ISP through a superhuman effort. Claimant also argues that Defendants have unreasonably contested his statutory total permanent disability.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant's Exhibits 1-23, 25-26, 28-29, and 33-36, admitted at hearing;
3. Defendants' Exhibits 1-12, admitted at hearing;
4. The testimony of Claimant, Vernon Hancock, David Duhaime, Alisha Glenn, Maria Horn, Kedrick Wills, William Jordan, and Nancy Collins, taken at the hearing.

All objections posed during the pre-hearing depositions contained in the admitted exhibits are overruled.

FINDINGS OF FACT

1. Claimant was born in 1972 and is right-handed. He lived in Nampa at the time of the hearing. Claimant graduated from Kimberly High School in 1991. He attended the College of Southern Idaho and then transferred to the University of Idaho where he obtained a bachelor's degree in education. He then taught American government at Kimberly High School for three years, where he also coached basketball and football.

2. In 2002, Claimant was hired by the Idaho State Police (ISP). He completed POST Academy training and after intensive preparation and testing became an ISP trooper. He was assigned to the Jerome area. He became a field training officer with a passion for training new recruits. Claimant demonstrated leadership capabilities and began preparing himself to become a patrol sergeant. He had no physical limitations and took no medications prior to December 2006. When off-duty, Claimant ran, worked out, or played city league basketball or softball with his wife. By December 2006, he was earning $19.00 per hour.

3. While on duty early on the morning of December 20, 2006, Claimant stopped a vehicle driven by an armed robbery suspect. As Claimant approached the driver's side of the vehicle, the suspect shot Claimant through the neck, slightly above his clavicle and just left of midline. Claimant sustained immediate loss of all feeling below the xiphoid process, including all feeling and control of his legs. He was taken to Magic Valley Regional Medical Center in Twin Falls where diagnostic scans revealed bullet fragment shrapnel in his neck and T2 comminuted fracture with bullet track adjacent to the right common carotid artery, traversing the trachea, tangentially grazing the esophagus, transecting the spinal canal and spinal cord at T2-3, and exiting at T3. Claimant was subsequently taken from Magic Valley Regional Medical Center via Life Flight to St. Alphonsus Regional Medical Center in Boise. There he underwent

surgical repair of his through-and-through trachea injury and tangential esophagus injury, followed by T1-4 posterior fusion with pedicle screws and rod instrumentation. Claimant remained hospitalized until February 2007. During his hospital stay, he was visited by numerous ISP personnel and by the governor and governor elect. Claimant and his wife were reassured by ISP personnel that they need not worry about his continued employment at ISP.

4. After his discharge from the hospital, Claimant underwent approximately five weeks of extensive outpatient rehabilitation and life skill training. Claimant's wife attended all training with him. Claimant then attended St. Alphonsus' STARS rehabilitation program.

5. The community built Claimant a wheelchair-compatible home in Kimberly.

6. Claimant and his wife subsequently met with ISP personnel including Colonel Jerry Russell, Major Ralph Powell, then-Captain Kedrick Wills, POST director Jeff Black, and human resource director Tim O'Leary to discuss Claimant's return to work at ISP. At this meeting, Claimant and his wife were assured that although Claimant would no longer be able to fill a traditional law enforcement position, ISP would always have a job for him to keep him busy and productive.

7. In June 2007, Claimant and ISP began actively preparing for Claimant's return to work at ISP in the Twin Falls area. Initially, there was no existing position that he could perform. ISP worked with occupational therapist Kim Warner to identify and resolve barriers, including access barriers, to Claimant's return to work. Warner recommended ISP install automatic door openers and an adjustable height desk at their Jerome facility. ISP did so. ISP's Jerome facility also underwent some renovation, repaving, and installation of ADA compliant ramps.

8. In July 2007, Claimant returned to work at ISP's Jerome facility as an intelligence analyst. This position had not previously existed. Initially, Claimant worked from about 1:00 until 3:00 each afternoon. He drove his own vehicle to work and accessed his assigned work area via wheelchair. No other ISP troopers drove their own vehicles to work. During the first several months, Claimant's actual work assignments were very limited. He was tasked with locating and reviewing officers' reports and later monitoring field training reports. As his stamina gradually increased, his responsibilities and work hours increased until he was consistently working approximately six hours per day.

9. On February 18, 2008, Claimant was found medically stable by Rodde Cox, M.D., who rated Claimant's total combined permanent impairment at 96% of the whole person. Dr. Cox included whole person impairments for Claimant's diminished bilateral hand dexterity (15%), swallowing difficulty (5%), thoracic dysfunction (28%), bowel dysfunction (50%), bladder dysfunction (60%), sexual dysfunction (20%), and loss of ambulation (60%).

10. Claimant worked from July 2007 until August 2008 in the intelligence analyst position in Jerome. During this time he received his full salary. The intelligence analyst position had no potential for promotion. Claimant's superior officers, Captain Wills and Lieutenant Thornton, were aware of Claimant's desire for additional challenge and responsibility.

11. In 2008, Sergeant Matlock informed Claimant of a Training Specialist/Fleet Manager position located in Meridian that was about to be announced agency-wide, and encouraged Claimant to test for the position. Prior to this time, the Training Specialist and Fleet Manager positions were always separate positions. The Fleet Manager had previously always been a sergeant.

12. The Training Specialist/Fleet Manager position was subsequently announced and included responsibility for providing training for new recruits, continuing education for experienced troopers, and managing all aspects of ordering, equipping, and maintaining ISP's statewide fleet of approximately 300 vehicles. Claimant and one other ISP trooper applied for the position. Claimant had no prior car management experience. Sergeant Matlock was one of the three-member panel that tested Claimant and the other applicant for the position. Claimant was selected because he had a stronger educational background. He moved from Kimberly to the Meridian area to accept the position. No one replaced Claimant as an intelligence analyst in Jerome.

13. In August 2008, Claimant began serving as Training Specialist/Fleet Manager at the ISP facility in Meridian. His direct supervisor was Lieutenant Vernon Hancock. By the time of hearing, Claimant had served in this position for four years. He works full-time and earns $29.00 per hour. He must occasionally travel in his current position. For travel spanning three days or longer, his wife must accompany him to help him with his multiple required care routines. All witnesses testified that Claimant does an excellent job in his current position at ISP.

14. Approximately 10% of Claimant's current job involves training other officers. He earned certification to teach a number of subjects. He helps teach one or two 14-week POST Academies per year. He teaches classroom courses in DUI, drug recognition, radar operation, and speed measuring. He has been a range firearms instructor. During each POST Academy, he usually teaches several days in succession.

15. Approximately 90% of Claimant's job is vehicle fleet management. He researches vehicles and equipment, issues vehicles to officers, arranges for installation of special

equipment in vehicles, and oversees all vehicle maintenance and repair. He does not physically get in or drive vehicles. These duties are performed by two part-time assistants whom Claimant supervises.

16. The fleet manager before Claimant was a sergeant who had one assistant. The prior fleet manager's duties were limited to managing the fleet; he was not also a training specialist. The prior manager was also required to patrol one day per week as needed.

17. At hearing Claimant described in detail the effects of his injury. Due to his injury, he is a T2 paraplegic. He has no movement except for involuntary muscle spasms from mid-chest, approximately the nipple level, downward. Claimant has no voluntary control of his lower extremities. He uses a wheelchair for mobility and body positioning. He has involuntary muscle spasms in his legs, neck, torso, and back. Leg spasms regularly cause his legs to bounce from his wheelchair foot supports, repeatedly striking the underside of his desk or table. This can be disruptive when he is attending meetings. Back and core spasms involuntarily straighten out his torso, causing pain, breathing difficulty, and briefly preventing him from speaking. Such spasms occur multiple times each day and last from 30 to 40 seconds.

18. Claimant has no bladder control and must wear adult diapers at all times. He must catheterize to relieve his bladder at least every four hours day and night. He must catheterize regularly to limit bladder retention. Failure to do so results in urinary incontinence and increased risk of urinary tract and bladder infections and kidney disease. He carries the necessary catheter equipment and medications at all times. Claimant's prescription medications help reduce, but do not entirely prevent urinary incontinence. In spite of all these measures, he experiences urinary incontinence two to four days each week and is prone to urinary tract infections.

19. Claimant has no voluntary bowel function and must follow a strict bowel management regime. To prevent blockage and bowel obstruction, he must digitally empty his lower bowel daily, a process requiring from one to five hours. Approximately once each month, he has an episode of uncontrolled diarrhea that commences without warning. Each episode continues for two to six hours. If at work, he is forced to go home immediately.

20. Claimant's legs are constantly swelling and shrinking. He wears compression stockings to reduce the swelling. Due to involuntary spasms, his feet occasionally slip off his wheelchair supports and catch on desks, door jams, etc. He is prone to developing pressure sores on his back, buttocks, legs, and feet. To reduce the risk of pressure sores, his wife must turn him periodically after he retires at night. At the time of hearing, Claimant had a sore on the back of his right heel, approximately the size of a $.50 piece, and had been treating at St. Alphonsus Wound Care Center for three weeks to promote healing. Based upon prior experience, he estimated that such treatment would probably continue for another two or three months to achieve complete healing.

21. Claimant tries to avoid falling from his wheelchair, however, given regular involuntary leg, back, and torso spasms, falling is sometimes entirely unavoidable. Claimant has fallen from his wheelchair approximately every other month since stabilizing from his injury. After a fall, he must have assistance to get back into his wheelchair.

22. Claimant's esophagus injury causes residual problems swallowing. Food becomes stuck in his throat. He chokes on food several times a week and has learned to always have water with him.

23. Because of his level of spinal cord injury, Claimant does not have full lung capacity and is often short of breath. He also has severe sleep apnea and must use a CPAP

machine to sleep. Prior to being diagnosed with severe sleep apnea in January 2011, Claimant was always fatigued and fell asleep in his wheelchair at work approximately once each week. Lieutenant Hancock would awaken Claimant and check to make sure he was all right. Since his sleep apnea diagnosis and CPAP machine use, Claimant's alertness has improved and he has had no further incidents of falling asleep at work.

24. Claimant perspires only through his head; the rest of his body is no longer capable of perspiring and he can become physically ill from heat. Consequently, he usually stays inside when it is very hot. Because of his poor circulation, he is also vulnerable to frostbite in cold weather.

25. Claimant's shoulders are not directly affected by his spinal cord injury; however, they are repeatedly stressed by regular wheelchair transfers and by propelling his wheelchair across grass, gravel, and other irregular surfaces. Claimant's right shoulder has become symptomatic. His medical providers have advised him that shoulder overuse injuries are increasingly likely given his paraplegia.

26. Claimant's arms function adequately; however, because of the level of his spinal cord injury, his triceps are weakened. Furthermore, he sometimes experiences difficulty sustaining his grip. His right hand has developed some symptoms consistent with carpal tunnel syndrome. His medical providers have advised him that his grip strength will continue to weaken with time.

27. Due to the loss of use of his lower extremities, Claimant's level of activity has dramatically diminished and his exercise options are significantly limited. He has gained approximately 80 pounds since his injury.

28. At the time of hearing, Claimant took the following prescription medications to manage the residual effects of his injury: Methadone (a narcotic) three time daily for primary long term pain control, Gabapentin (a narcotic) three times daily for nerve pain control, Hydrocodone (a narcotic) for breakthrough pain control, Detrol LA twice daily for incontinence, NephrAmine nightly for incontinence at night, and Baclofen daily for spasm control. These medications will likely be needed on an ongoing basis.

29. Having observed Claimant, Alisha Glenn, Maria Horn, Lieutenant Vernon Hancock, Major Kedrick Wills, David Duhaime, William Jordan, and Nancy Collins at hearing, and compared their testimony with other evidence in the record, the Referee found that all were credible witnesses. The Commission finds no reason to disturb the Referee's findings and observations on presentation or credibility

DISCUSSION AND FURTHER FINDINGS

30. 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).

31. **Total permanent disability.** The first issue is whether Claimant is totally and permanently disabled pursuant to Idaho Code § 72-407.

32. "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. "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 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.

33. In the present case, all parties acknowledge Claimant has sustained permanent impairment of 96% of the whole person for diminished bilateral hand dexterity, swallowing difficulty, thoracic dysfunction, bowel dysfunction, bladder dysfunction, sexual dysfunction, and loss of ambulation. Defendants have stipulated that Claimant meets the criteria of Idaho Code § 72-407 which provides in pertinent part:

> In case of the following injuries, if the employer disputes that the claimant is totally and permanently disabled, the burden of proof shall be on the employer to prove by clear and convincing evidence that the claimant is not permanently and totally disabled.
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> ….
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> (5) An injury to the spine resulting in permanent and complete paralysis of both legs or arms or of one (1) leg and one (1) arm.

Thus, a presumption of total and permanent disability is statutorily provided. Total and permanent disability is established if medical impairment together with pertinent nonmedical factors total 100% permanent disability. Additionally, permanent disability less than 100% may still be deemed total and permanent pursuant to the odd-lot doctrine. Boley v. State, Industrial Special Indemnity Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997). Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain." State v. Kimball, 145 Idaho 542, 546, 181 P.3d 468, 472 (2008).

34. Defendants herein contend that they have rebutted the statutory presumption with clear and convincing evidence that Claimant is not totally and permanently disabled because he has been employed by the ISP as the Training Specialist/Fleet Manager for more than four years since his injury. Defendants further argue that even were Claimant to leave his current position with ISP, he would be employable in the open labor market.

35. In the present case, a presumption that Claimant is 100% totally and permanently disabled is clearly and convincingly rebutted by the showing that Claimant has capably performed a very demanding position at ISP as a Training Specialist/Fleet Manager for the past four years. This, however, is not the end of the inquiry, inasmuch as Idaho Code § 72-407 also applies to the determination of whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine.[1]

36. Odd-lot total permanent disability. "The odd-lot category is for those workers who are so injured that they can perform no services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." Jarvis v. Rexburg Nursing Center, 136 Idaho 579, 584, 38 P.3d 617, 622 (2001). "Such workers need not be physically unable to perform any work at all. They are simply 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." Gooby v. Lake Shore Management Co., 136 Idaho 79, 83, 29 P.3d 390, 394 (2001). "Whether a claimant is an odd-lot worker is a factual determination." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 82, 921 P.2d 1200, 1206 (1996).

[1] Even if Idaho Code § 72-407 were not construed to provide such a presumption, Dr. Collins' testimony amply establishes a prima facie case that Claimant is an odd-lot worker.

37. Defendants acknowledge that their "burden in this case is identical to that of an employer seeking to rebut a presumption of total and permanent disability under the odd lot doctrine as enunciated by the Idaho Supreme Court." Defendants' Opening Hearing Brief, p. 16. The Court has held that once a prima facie odd-lot case is made, 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). This requires Defendants prove that 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). Idaho Code § 72-407 would require such proof by clear and convincing evidence. Defendants herein argue that Claimant's current job at ISP also rebuts the presumption that he is totally and permanently disabled pursuant to the odd-lot doctrine.

38. Sympathetic employer. It is undisputed that Claimant is ably performing a valuable service as Training Specialist/Fleet Manager (TS/FM) at ISP. Claimant asserts that ISP is a sympathetic employer because it is significantly more willing to accommodate his limitations than the average employer in the open labor market. Defendants counter that ISP provided no more than the ADA-required reasonable accommodations necessary to permit Claimant to perform the essential functions of his current job at ISP; therefore, ISP is not a sympathetic employer.

39. To address Defendants' arguments the Commission must first determine whether it has the authority to consider the requirements of the ADA in this Idaho workers' compensation

case. Per Idaho Code § 72-707, "[a]ll questions arising under [the workers' compensation laws of this state], if not settled by agreement or stipulation of the interested parties with the approval of the commission, except as otherwise herein provided, shall be determined by the commission." The issue of whether Employer is a sympathetic employer necessarily requires of the Commission that it consider the argument that an employer cannot be regarded as "sympathetic" if it is only doing what it must do in order to comply with federal law. This in turn requires the Commission to evaluate whether the accommodations offered by Employer are required by the ADA. Therefore, to discharge its obligation to determine whether Claimant is totally and permanently disabled but for the existence of a sympathetic employer, the Commission must consider the impact of the ADA on employer's operations. The ADA does not supplant the workers' compensation laws of this state, but it may impose obligations on Employer that impact the question of whether Employer is acting out of sympathy. An analogous situation was before the Court in Hernandez v. Triple Ell Transport, Inc., 145 Idaho 37, 175 P3d, 199 (2007).

40. Hernandez entered into a lease agreement with Triple Ell Transport to lease his tractor to Triple Ell to haul and unload materials. Hernandez suffered an injury while performing this work, and the threshold question before the Industrial Commission was whether Hernandez was an employee of Triple Ell, versus an independent contractor. Certain provisions of the lease, and certain other elements of the relationship between Hernandez and Triple Ell, suggested the existence of a principle/independent contractor relationship. However, certain other elements of the relationship between Hernandez and Triple Ell suggested the existence of an employer/employee relationship. For example, Hernandez's vehicle carried Triple Ell's insignia, a fact that might imply that Hernandez was subject to the direction and control of Triple Ell.

However, this action was undertaken only because federal regulation required it. Because this, and other actions, were required by federal law, the Referee declined to consider these factors as evidence of the existence of an employer/employee relationship. Other factors considered by the Referee clearly suggested the existence of a principle/independent contractor relationship, and the Referee ultimately ruled that Hernandez was an independent contractor.

41. On appeal, Hernandez argued that the Referee improperly applied federal law by using it to supplant the right to control test utilized by the Industrial Commission to determine the nature of the work relationship. The Court rejected this argument but did note that the federal regulations necessarily affected the application of the right to control test. Because Triple Ell had no choice concerning the placement of its emblem on Hernandez's truck, the fact that the emblem was placed on the truck was not evidence that Triple Ell intended to direct the activities of Hernandez. It was the federal government, not Triple Ell, that exerted control over Hernandez.

42. Similarly, it could be argued that if the accommodations offered by the ISP are only those required under federal law, it cannot be said that these accommodations are evidence that the ISP is a sympathetic employer. All that can be concluded is that the ISP is complying with the mandate of applicable federal law.

43. Analogizing to Hernandez, we conclude that it is appropriate for the Commission to consider the impact of applicable federal law on the question of whether or not the ISP is a "sympathetic employer", as that term is used in Idaho workers' compensation law.

44. Two questions are implicated in Defendants' argument: (1) Must an employer's accommodations exceed the Americans with Disabilities Act (ADA) requirements to establish it is a sympathetic employer under Idaho Workers' Compensation Law, and if, so (2) Do ISP's

accommodations for Claimant's condition exceed ADA requirements such that it is a sympathetic employer? These matters have been addressed, at least tangentially, in several recent Idaho Supreme Court and Industrial Commission cases.

45. In Christensen v. S. L. Start & Associates, Inc., 147 Idaho 489, 207 P.3d 1020 (2009), Christensen suffered from a preexisting right foot condition which limited her to sedentary work. Even so, she was able to find part time work which she was able to perform so long as she got frequent breaks and was able to observe her physician's sedentary restrictions. In 2001, Christensen's treating physician increased her limitations/restrictions, limiting her to working only one day per week for no more than eight to twelve hours. In November of 2002, Christensen began working for S. L. Start & Associates. Her job involved helping disabled persons learn social and basic living skills. On December 5, 2002, she was assisting co-workers in transferring a client from his wheelchair to a seat on employer's bus. When the client began to fall Christensen grabbed his gait belt. In so doing she experienced pain in her shoulders, neck, mid and low back. Christensen underwent a number of surgeries before being declared medically stable from her work related injuries in October of 2005. Thereafter, she filed complaints against both her employer and the ISIF, arguing, *inter alia*, that the combined effects of her work accident and preexisting condition left her totally and permanently disabled. The Commission concluded that although Christensen was totally and permanently disabled, she had reached a point of total and permanent disability prior to the subject work accident. Important to the Commission's conclusion in this regard was its finding that Christensen's limitation/restrictions following the subject accident were not significantly different than those from which she suffered prior to the work accident.

46. On appeal, Christensen argued that the fact that her preexisting condition had not kept her from being employed in the years immediately prior to the 2002 accident was proof that she was not totally and permanently disabled prior to that accident. Further, Christensen argued that there was no evidence that she had enjoyed employment prior to the subject accident only due to a business boom, the sympathy of a particular employer, temporary good luck or super human effort on her part. In this regard, the Commission offered certain observations on the question of whether any of Christensen's pre-injury employers could be said to be "sympathetic":

> Despite the difficulties that her CMT and triple arthrodesis posed, Claimant was able to find some work in her field in the subsequent years because she wanted to work, was dogged in her efforts, had excellent skills to offer, had the good luck to find start-up medical practices or temporary fill-in work, and just possibly, because some employers were willing to make accommodations in order to have the benefits of her skills. Did that make them "sympathetic employers"? Possibly. But being a sympathetic employer does not mean that the employee is pathetic or in need of charity, merely that the employer is willing to make accommodations that are out of the ordinary in order to obtain an employee's beneficial services.
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> Those who hired Claimant certainly got the benefit of their bargain. But, as evidenced by her employment history in the years leading up to her work for Employer, the services she could offer an employer were so limited that even the most well-disposed employers had few positions that were suitable. Claimant is the odd-lot worker personified.
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> Christensen v. S.L. Start & Associates, Inc., 147 Idaho 289, 207 P.3d 1020 (2009).

However, in upholding the Commission's decision that Christensen was in fact totally and permanently disabled prior to the subject accident, the Court said only this:

> The evidence shows that prior to her 2002 injuries, Claimant could perform no services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. The Commission's finding that Claimant was totally and permanently disabled prior to her 2002 injuries is supported by substantial and competent evidence.
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> Christensen v. S.L. Start & Associates, Inc., supra.

Per Christensen, in determining whether an employer is a "sympathetic employer", the question is not whether the employer has a charitable purpose at heart, but rather whether the accommodations it offered claimant are "out of the ordinary" in order that it might obtain claimant's beneficial services.

47. Although the ADA was not mentioned in Christensen, it did figure in the next Commission decision to consider what it means to be a sympathetic employer. In Puyleart v. State of Idaho Industrial Special Indemnity Fund, 2020 IIC 0118 (2010), Puyleart began working for employer in 1990. The accident giving rise to her claim against employer occurred in September of 2005. Prior to the 2005 accident, she suffered from a number of preexisting physical ailments which impacted her ability to work, including irritable bowel syndrome, restless leg syndrome, sleep apnea, depression, migraine headaches, degenerative disc disease, polycythemia vera, and fatigue. Prior to the 2005 accident, Puyleart required a number of accommodations in order to do her job, including the following: her work station had to be located near a bathroom; she required access to a shower and area to change clothing; she needed a cot in her office on which to nap during lunch and breaks; she required an environment free of fumes; and she needed the ability to work a flexible schedule on short notice to accommodate appointments for medical treatment and medication. Shortly before the 2005 accident, she requested a flexible work schedule to allow her to perform 40 hours of work per week over seven days in order to keep from working more than six hours per day. Employer was only willing to accommodate this request on a temporary basis. The evidence demonstrated that as of the date of the 2005 accident, Puyleart was working a normal work schedule.

48. Employer settled with Puyleart, leaving her to pursue her claim against the ISIF at hearing. Although the ISIF did not contest that Puyleart was totally and permanently disabled as

of the date of hearing, it contended that she was actually totally and permanently disabled as the result of her preexisting conditions, notwithstanding that she had maintained employment with employer prior to the subject accident. Specifically, the ISIF contended that Puyleart was able to maintain her employment with employer only because of her own super human effort, and because her employer could only be characterized as sympathetic. Therefore, the fact that Puyleart was actually employed at the time of the subject accident should be discounted. Addressing the ISIF's argument that employer should be characterized as a "sympathetic employer" the Commission stated:

> A factual dispute exists as to whether Employer should be characterized as a "sympathetic employer" prior to Claimant's last injury. Defendant points out that Claimant required frequent bathroom breaks, proximity to a bathroom facility, access to a shower due to bowel accidents and a cot in her office for naps due to fatigue. Claimant also required temporary relocation to the Bonners Ferry office and periods of altered work schedule due to her preexisting disabilities.
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> As a legal term of art, "sympathetic employer" has been defined as an employer that is willing to make accommodations that are out of the ordinary in order to obtain an employee's beneficial services. Christensen v. S. L. Start & Associates, Inc., 147 Idaho 289, 207 P.3d 1020, 1024 (2009). In the present case, Employer permitted Claimant's absences from work and made accommodations for her various disabilities in accordance with their own policies and consistent with the Americans with Disabilities Act (ADA). Claimant was able to meet the essential functions of her job when she was well enough to work, but could only do so with accommodations. Claimant's regular job duties were sedentary and not physically demanding. The nature of accommodations made by Employer did not extend beyond the terms of Employer's own policies. Nonetheless, the accommodations were out of the ordinary in that Claimant's ability to recline or nap in the workplace and her ability to shower on Employer's premises are not options available for most office workers. For a period of at least 90 days, Employer allowed Claimant to work shortened shifts and make up hours during the weekends which was not consistent with Employer's business needs. The fact that Employer's motivation to provide accommodations was, in part, related to efforts to comply with their own policies as well as state and/or federal law does not negate the fact that the accommodations were out of the ordinary and made to retain Claimant's services.
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> Puyleart v. ISIF, 2010 IIC 0118 (Feb. 16, 2010).

49. Although the Commission concluded that employer was properly characterized as a sympathetic employer, it appears that what figured most prominently in the Commission's decision that Puyleart's pre-injury employment should be discounted was the fact that she was able to perform her pre-injury work only as the result of a super human effort on her part. Nevertheless, the quoted excerpt is worthy of additional scrutiny, since it may suggest that an employer can fairly be characterized as a sympathetic employer even if the accommodations it offers to a disabled worker are only those required as a result of its efforts to comply with federal law. In other words, the quoted language is at least susceptible to an interpretation that an accommodation may be "out of the ordinary" even though it is one that may be required under the ADA. However, we believe that a careful reading of the decision dispels the notion that it should be so interpreted. Just because the accommodations offered to Puyleart did not extend beyond the terms of employer's own policies does not mean that those accommodations did not exceed those legally required under the ADA. Indeed, the statement that one of the accommodations offered to Puyleart by employer "was not consistent with employer's business needs" suggests that the proffered accommodation may have been one which caused employer an "undue hardship" as that term is used in the ADA. Under the ADA, an employer is not required to provide a requested accommodation to an employee if providing the same would cause employer to suffer an undue hardship. Finally, the decision appears to recognize that the accommodations offered to Puyleart were offered only "in part" to comply with employer's policies and the requirements of federal law, suggesting that the accommodations offered to Puyleart went above and beyond what would have been required of employer under other applicable law.

50. This reading of Puyleart finds additional support in Bittick v. Jess Hennis, Inc., 2010 IIC 0342 (2010). In Bittick, as in Puyleart, there was no real dispute that Bittick was totally and permanently disabled at the time of hearing. The dispute centered on whether Bittick was totally and permanently disabled prior to the subject industrial accident, thus relieving ISIF of liability in the case. ISIF argued, *inter alia*, that the fact that Bittick was employed immediately prior to the last industrial injury should be discounted due to the fact that such employment was sympathetic. Addressing this argument the Commission stated;

> In a world where the Americans with Disabilities Act holds sway, the mere fact that an employer has made accommodations does not indicate the employer was "sympathetic" for purposes of odd-lot analysis. Here, Employer's accommodations are not out of the ordinary. They represent reasonable and perhaps legally required accommodations made for an employee whose core work was real and valued.

Bittick v. Jess Jennis, Inc., 2010 IIC 0342 (2010).

This language suggests that where an accommodation provided by an employer is legally required under other applicable law, it is not "out of the ordinary". Accord, Lukasik v. Western Specialties, Inc., 2011 IIC 0024 (2011).

51. Arredondo v. State of Idaho Industrial Special Indemnity Fund, 2012 IIC 0064 (2012), employed a slightly different analysis to determine whether or not an employer could be said to be "sympathetic". In Arredondo, the following factors were thought to be important in evaluating whether the claimant was employed by a sympathetic employer: (1) the claimant's relationship to his employer; (2) the claimant's ability to perform his job duties in the job to which he was assigned; (3) whether the claimant's job was a "real job"; and, (4) the extent of any special accommodations afforded to the claimant to enable him to do his job. In Arredondo, it was argued that the claimant's friendship with his immediate supervisor was the real explanation for his employment by Employer. However, it was demonstrated that this friendship did not

extend beyond the workplace, and that Arrendondo's immediate supervisor did not have authority to hire him. Rather, hiring authority lay with the employer's owner who testified that he hired Arrendondo merely because he was a hard and reliable worker.

52. Based on the case law discussed above, the Commission concludes that where it is demonstrated that an accommodation is offered to an injured worker by an employer to satisfy the employer's obligation to comply with the ADA or other applicable law, such accommodation does not support a finding that the employer is a "sympathetic employer" as that term is used in our case law.

53. Next, it must be determined whether ISP's accommodations for Claimant's condition exceed those employer is required to offer under the ADA. The ADA prohibits covered entities from discriminating against a qualified individual on the basis of a disability. 42 USC § 12111(2). The ADA defines "qualified individual" as an individual who with or without reasonable accommodation can perform the essential functions of the employment position that such individual holds or desires. 42 USC § 12111(8). The "essential functions" of a job are the fundamental job duties of the employment position the individual with the disability holds or desires. The term "reasonable accommodation" means modifications or adjustments to the work environment, or to the manner or circumstances under which the position held is customarily performed, that enable an individual with a disability to perform the essential functions of that position. Reasonable accommodation may include, but is not limited to: (1) making existing facilities used by employees readily accessible to and usable by individuals with disabilities, and (2) job restructuring; part time modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; appropriate adjustments or modifications of examinations, training materials or policies; the provision of qualified readers or interpreters; or

other similar accommodations for individuals with disabilities. Job restructuring may involve reallocating or redistributing the marginal functions of one or more jobs. However, an employer is not required to reallocate essential functions of a job as a reasonable accommodation. Job restructuring is frequently accomplished by exchanging marginal functions of a job that cannot be performed by a person with a disability for marginal functions performed by one or more other employees in other jobs.

54. An employer is not required to make a reasonable accommodation if it would impose an undue hardship on the operation of the employer's business. An undue hardship is an action that requires significant difficulty or expense in relation to the size of the employer, the resources available and the nature of the operation. The concept of undue hardship includes any action that is: unduly costly, extensive, substantial, disruptive or which would fundamentally alter the nature or operation of the business.

55. In evaluating whether Defendants have met their burden of proof, we will first examine the nature of the two positions held by Claimant following the subject accident, the intelligence analyst position at the Fusion Center, and the Training Specialist/Fleet Manager position he currently holds.

56. It is not argued that Claimant could perform the essential functions of the job of Trooper even with reasonable accommodation. Therefore, in order for Claimant to remain with the ISP, he has necessarily assumed a new position with Employer. The ADA anticipates that an employer may be required, as part of a reasonable accommodation process, to assign a qualified individual with a disability to a vacant position, the essential functions of which he can perform with or without a reasonable accommodation. Also, as noted above, an employer may be

required as part of the reasonable accommodation process to modify or restructure an existing job or jobs in order to accommodate the injured worker's disability

57. Here, it is argued that the Intelligence Analyst position is a job which did not exist in the ISP prior to the subject accident, and was one which was created specifically for Claimant in order to keep him in the employ of the ISP. However, there is some evidence suggesting that the Intelligence Analyst position was serendipitously created at or around the time of Claimant's accident as part of the ISP's designs upon opening a "Fusion Center" at the Jerome facility. The Intelligence Analyst position did not exist prior to Claimant's injury, although it was in the planning process at or around the time of the shooting. Transcript, p. 285, ll. 2-19; Nance deposition, pp. 12-13, ll. 6-1. It was an experimental position intended to support the Fusion Center at the Jerome facility. It was deemed to be a "good fit" for Claimant even though the essential functions of the job were generically described as those of a detective position (Nance deposition, pp. 17-18, ll. 17-7. However, no one but Claimant has performed the Intelligence Analyst position. The position was not filled by another ISP employee after Claimant left the job in August of 2008 to assume his new responsibilities as a Training Specialist/Fleet Manager. To the extent that the Intelligence Analyst job functions are performed today, they are performed by non-ISP employees at the Fusion Center.

58. According to Claimant, he started work as an Intelligence Analyst some time in July of 2007. Initially, he worked only two hours per day, usually in the afternoon, three days per week. Claimant testified that initially he did little, if anything, in this job, but that over time his responsibilities increased:

> The first couple of months I didn't do anything. I just sat and looked at the Internet most the time. After the first couple of months, they started giving me some chores here and there. Most of it was just basic looking up information that the secretaries usually did. They started having me do that, and then I got a little

> bit of training and they started doing some other things, but it wasn't enough to keep me busy, so then talking with Captain Wills and Lieutenant Thornton, they found some other tasks for me to do and I don't know how far into it was, but they had me look at officers' reports, that kind of thing, and then right before I got the current position, they had me administer the field training officer stuff. We had two new guys that had been assigned to that region and so I administered that for a few months, so it was just kind of over time stuff just slowly built up, but it wasn't all investigations. I mean, there was a mix of patrol duties as well as investigations assisting.

Claimant also testified that while his 2008 performance evaluation identifies a number of essential job functions associated with that position, he actually "didn't do any of that stuff". Transcript, p. 138, ll. 10-22.

59. The evidence does not altogether dispel the suspicion that the Intelligence Analyst job was a "make work" job created for Claimant as part of the ISP's promise to provide Claimant a job as long as he wanted one. No one with first-hand knowledge of the creation of the Fusion Center testified. The evidence of what constituted the "essential functions" of that job is muddied. Claimant disavowed that he was ever asked to perform the functions identified in his 2008 performance evaluation. He testified that for the first few months in this job he did little, if anything. Although his testimony also establishes that he took on more job responsibilities as time passed, it is still clear that in its inception, the Employer's offer of the Intelligence Analyst position to Claimant may have gone beyond what was required of Employer under the ADA.

60. In August of 2008, Claimant applied for the new position of Training Specialist/Fleet Manager, and was offered this job at the end of a competitive interview process. One other ISP employee applied for the position but Claimant received the job offer because of his educational background and teaching experience. Defendants allege that the TS/FM position, though new, was not a position created with Claimant in mind. Claimant testified that he has no first-hand knowledge of whether the Training Specialist/Fleet Manager position was specifically

created for him. However, he noted that the Fleet Manager position had traditionally been filled by an ISP Sergeant, a promotion he had not obtained. He also noted that ten days before the position was first advertised he was contacted by Sergeant Matlock about the job. Transcript, p. 86, ll. 11-10. It is also notable that although Defendants contend that the position was not created specifically for Claimant, no one with first hand knowledge concerning the reason for creating the combined position testified in these proceedings. Transcript, pp. 159-160, ll. 22-4.

61. Prior to August of 2008, the Fleet Manager and Training Specialist positions were separate and distinct positions. The Fleet Manager position was filled by an ISP Sergeant, John Burke, who supervised one part-time employee. At some point in time prior to August of 2008, ISP identified a need to move the Sergeant's position from Fleet Manager to the Fusion Center. Coincidentally, at around this time, John Burke requested a transfer back to the road as a patrol officer. This created a vacancy in the Fleet Manager position. At around the same time, a vacancy arose for a Training Specialist. Lieutenant Hancock surmised that the decision to combine these two positions was reached independent of Claimant's injury as part of a cost saving measure, although he acknowledged he has no first hand knowledge of how or why that decision was reached.

62. There is ample testimony establishing that Claimant is able to perform the essential functions of the new combined position, with a number of accommodations, although he may not have been able to perform the essential functions of either the Fleet Manager job as performed by John Burke, or the separate Training Specialist job, even with accommodation. The combined TS/FM position described essential functions which Claimant was capable of performing with reasonable accommodation. If that position was created with Claimant in mind, it is quite possible that certain previously essential job functions of the Training Specialist and

Fleet Manager positions were abandoned in favor of relaxed essential job functions which Claimant could perform with a reasonable accommodation. On the other hand, it is possible that the job functions which were abandoned could fairly be characterized as marginal job functions, which could be redistributed as part of an ADA authorized job restructuring process. Although abandonment or transfer of essential job functions of a job is not required by the ADA, redistribution of marginal job functions may be. Therefore, and assuming that the TS/FM position was created with Claimant in mind as part of a job restructuring process, it is important to understand whether the job functions that were abandoned or redistributed from the original Training Specialist and Fleet Manager positions were essential to the job, or only marginal. Unfortunately, there is little to no testimony which would allow the Commission to make these distinctions.

63. For example when he worked as a Fleet Manager, Sergeant Burke was required, as part of his job responsibilities, to operate ISP patrol vehicles. He was issued a patrol vehicle, and was subject to performing law enforcement duties on his way to and from work. He was also subject to being "called out" on patrol and other law enforcement activities. Transcript, pp. 194-195, ll. 7-5. Similar expectations were imposed on training specialists. As a Fleet Manager, Sergeant Burke was also expected to operate patrol vehicles in the course of discharging his specific responsibilities as a Fleet Manager. Of course, Claimant is incapable of operating any vehicle that is not equipped with hand controls. If the combined position was specifically created for Claimant as an accommodation, the record leaves us unable to conclude whether the redistribution or abandonment of these job functions represents the redistribution or abandonment of essential versus marginal job functions.

64. Of course, Defendants argue that the combined position was not created with Claimant in mind, but was a new position created as part of a cost-saving measure. They further point out that Claimant was required to apply for this job, and to compete for it against another applicant. Essentially, Defendants argue that it is coincidental that the combined position does not include certain functions that Claimant would not have been able to perform, even with reasonable accommodation. Even if we accept Defendants' assertions as true, it is nevertheless clear that Claimant still required significant accommodations in order to perform the essential functions of this vacant position. Whether or not each of the accommodations was required by federal law is, again, unclear. For example, Claimant was excused from the requirement that he operate a patrol vehicle while going to and coming from work. Further, he was excused from being subject to "call out." However, had the other applicant for the combined position been awarded the job he would have been required to perform these functions. Transcript, pp. 210-211, ll. 18-9. The record does not unambiguously reflect whether such patrol and law enforcement functions are marginal or essential functions of the combined position. Transcript, pp. 178-179, ll. 25-22. The testimony of Lieutenant Hancock reflects, on the one hand, that such functions are not essential for the Training Specialist position, yet on the other hand, that it is an expectation of all ISP employees that they assist in law enforcement activities while going to and coming from work.

65. In his combined TS/FM position Claimant is also excused from performing certain tasks performed by other training specialists at the academy. In his combined position, Claimant is not required to oversee, or provide, physical training to trainees. Instead, Claimant provides classroom and other training to trainees that are more consistent with his limitations/restrictions. This necessarily shifts more physically demanding training work to other

training specialists. Hours at the academy run long, beyond the limits of Claimant's stamina. He is not required to stay as long as other trainers and is free to leave when he needs to. Again, it is unclear whether these accommodations involve the modification of essential versus marginal job functions. It is also unclear whether the reallocation of certain physically demanding job functions to other training specialists could be said to constitute an undue hardship.

66. Undoubtedly, some of the accommodations that Claimant requires in the combined position would be required under the ADA. For example, the record establishes that Claimant required certain modifications to his work station and work environment in order to perform the requirements of his job. Employer would ordinarily be required to provide these under the ADA. Claimant requires a flexible work schedule, and this is specifically included among the reasonable accommodations that an employer may be required to provide under the ADA. Under the ADA, Claimant's use of a service dog would be recognized as a reasonable accommodation, although if he required a human assistant to perform certain essential functions of his job, this would be an accommodation that exceeded what is required under the ADA. Much is made of the fact that before Claimant was diagnosed as suffering from sleep apnea, he fell asleep at his desk once every couple of weeks or so. Lieutenant Hancock testified that on at least one occasion he came into Claimant's office and found Claimant asleep at his desk. Ordinarily, sleeping on the job is not allowed at the ISP, and officers would be subject to corrective action if found asleep at their post. However, it is possible that tolerance of some amount of dozing off on the job is an accommodation that an employer would be expected to make under the ADA, so long as the employee is still capable of performing the essential functions of his job. The flexibility given by Employer to Claimant to deal with bowel control

issues and self-catheterization would almost certainly be required as a reasonable accommodation under the ADA.

67. If the combined position was a vacant position created as a cost-saving measure, without consideration of Claimant's situation, it is possible that in modifying that job to accommodate Claimant, Employer has done nothing more than what would have been required of it under federal law. However, Defendants have the burden of proving that Claimant's employment was not sympathetic by clear and convincing evidence as required by Idaho Code § 72-407. We are not persuaded that Defendants have met this higher burden of proof. The record does not demonstrate whether the job functions that were abandoned were essential or marginal. Nor does the record reflect whether the job modifications posed an undue hardship on employer. The evidence does not clearly and convincingly establish that the accommodations offered to Claimant were only those regulated by the ADA.

68. With respect to the Intelligence Analyst position, it seems clear that regardless of whether the job was created with Claimant in mind, or was merely a vacant position to which he was reassigned, Claimant was not able, initially, to perform any of the requirements of that job, and probably never performed all of the essential functions of the job. With respect to the TS/FM combined position, even if we accept that the position was a vacant job for which Claimant competed, we are unable to say that the evidence clearly and convincingly establishes that Employer did not offer accommodations that went above and beyond those required under other applicable law. In summary, we find that Defendants have failed to adduce evidence sufficient to allow us to conclude that his post injury employment is not the result of a sympathetic employer.

69. In drawing this conclusion, we think it important to recall what transpired in the days immediately following the shooting. While in the hospital, Claimant was visited by ISP and other state officials, who assured both Claimant and his wife that Claimant would always have a job with the ISP as long as he wanted one. In Arredondo v. State of Idaho Industrial Special Indemnity Fund, *supra*, the Commission ruled that one of the factors important to determining whether a Claimant is employed only as the result of a sympathetic employer is understanding something about the nature of the relationship between the Claimant and the Employer. In Arredondo, it was argued that because Claimant was friendly with his immediate supervisor, this somehow demonstrated that the employment was sympathetic. However, in that case, it was demonstrated that the individual hiring with authority only hired Claimant because he was a hard and reliable worker. Contrast the facts of Arredondo with those at bar. Claimant is a member of an elite fraternity that takes care of its own. From several witnesses we heard that once you are a trooper you are always a trooper. In view of the sacrifice made by Claimant in performing service to his community, it is not in the least surprising that while lying in his hospital bed Claimant would be promised by his superiors that he had nothing to worry about, and that he would always have a job with the ISP as long as he wanted to work. Notwithstanding that many of the accommodations provided by Employer were probably consistent with those required under applicable federal law, we are still led to the conclusion that the facts of the case fail to demonstrate that Claimant's employment is not sympathetic.

70. Finally, there is a different type of assistance that Claimant requires in order to perform his job that Employer has not provided, and probably could not be required to provide under the ADA. Claimant described in some detail the exhausting schedule he must adhere to each day in order to retain his ability to perform his current job at the ISP. It is a daunting list of

procedures he must follow, both tedious and distasteful, in order to get to work every day at a reasonable time. In these every day tasks of physical maintenance, he relies extensively on the assistance of his wife, Alisha. Alisha is employed by St. Luke's, and has had the good fortune to be able to take advantage of her employer's work-at-home program. She testified, convincingly, that Claimant could not cope without her assistance, and that she would not be able to provide the care he requires if she was required to work away from home.

71. Nancy Collins has noted the importance of Alisha's assistance in Claimant's vocational performance. Dr. Collins testified that Claimant would not be able to perform his current job without the assistance of his wife. Without his wife, Claimant would require an in-home caregiver in order to be vocationally competitive. The assistance that Claimant receives from his wife is a service that Employer would not be required to provide Claimant as a reasonable accommodation. Nevertheless, absent this assistance, Claimant would not be able to perform his current, or probably any, job. It is simply Claimant's and Employer's good fortune that Claimant's wife is in a position to assist him in performing the daily physical maintenance that is central to his employability. If Alisha were no longer able to assist Claimant, Employer would not be required to provide the live-in assistance currently provided by Claimant's wife.

72. Superhuman effort. Even if we were to conclude that Employer is not a sympathetic employer, there is another basis on which we conclude that Employer has failed to rebut the Idaho Code Section 72-407 presumption; it is clear to us that Claimant is able to maintain his employment only through a superhuman effort.

73. Claimant described the daily routine he must follow in order to work at ISP. His usual day begins at 5:30 a.m. He arises and catheterizes. His wife then stretches his legs for 15 minutes, a process which usually provokes involuntary muscle spasms but is necessary to

maintain lower extremity joint mobility. Claimant's wife then helps him begin dressing. He cleans his catheter equipment, finishes dressing, and feeds and grooms his certified service dog while his wife readies their minor son for school. Claimant has a customized pickup truck with a power swiveling driver's seat, hand controls to accelerate and brake, and a small crane to load his wheelchair. He takes his certified service dog to work each day. He usually gets to work between 8:30 and 9:00 a.m. However, sometimes he arrives at 10:00 or even 11:00 a.m. If he has bowel issues late the prior night, he alerts his sergeant that he will be late.

74. At work Claimant takes his medications and then responds to emails, evaluates and orders vehicles and equipment, talks to ISP officers and purchasing agents, conducts and attends meetings, and makes all arrangements necessary to keep ISP's fleet of approximately 300 vehicles well maintained, adequately equipped, and functioning safely. He must catheterize and then clean the necessary equipment three times during each work day: at approximately 11:00 or 11:30, 2:00 or 2:30, and 4:30. Claimant works through lunch when he comes in late, which is most of the time. He works eight hours per day, five days per week. Throughout each work day, Claimant endures multiple unpredictable leg, back, and core spasms which may cause his legs to repeatedly strike the underside of tables during meetings or straighten his torso and prevent him from speaking for 30 to 40 seconds at a time. The core spasms are especially painful and disruptive of his work.

75. Claimant arrives home around 6:00 p.m. He takes his minor son to practice and then returns home. After returning with his son from practice, Claimant catheterizes and starts his bowel care program which may take one to three or even five hours. After cleaning up from bowel care he usually does not get to bed until midnight. He catheterizes at 3:00 a.m. and then

sleeps again until his alarm awakens him at 5:30 a.m. to prepare for his next day of full-time work.

76. Claimant consistently received excellent performance evaluations at ISP prior and subsequent to his accident. All witnesses questioned about Claimant's work ethic testified that he is a very hard worker, reliable and honest. Claimant's wife affirmed that he gives 110% even when it is detrimental to his own health. Claimant's superior, Major Wills, testified: "I've never seen him give less than 100 percent from the day I met him in whatever it was he did …. It's a quality of character he has." Transcript, p. 297, ll. 18-21. Major Wills further explained:

> Q. [Mr. Augustine] Is it ISP's intention as far as you know that as long as he has something to give the agency and can do the job that he's got a job with ISP?
>
> A. [Major Wills] That's correct, but I want to make sure that it's understood, it's not just he has something to give. He is an outstanding employee and has been since the day he came through the doors and that didn't change after the shooting. He's very dedicated and does an excellent job.

Transcript, p. 291, ll. 4-12.

> Q. [Mr. Horras] Would [you] agree that he's a hero?
>
> A. [Major Wills] Yes, but not because of what [he's] been through, but how he's dealt with it.
>
> Q. Can you explain that to me?
>
> A. Yes, I'd be happy to. It's not what happened to him that makes him a hero. It's how he's functioned since then and the inspiration he has been to every person that wears a uniform, because, again, the type of character that he has and he possesses, the never-give-up attitude.

Transcript, p. 299, ll. 4-13.

77. Defendants argue that Claimant has not proven he maintains employment by a superhuman effort because the bladder and bowel care routine required by Claimant's injury would be necessary whether or not he was working. It may well not require superhuman effort

for Claimant to complete his daily bowel and bladder care routines. However, Claimant has worked for four years at a very demanding full-time job at ISP in spite of his bladder and bowel incontinence; one to five hours of bowel care routine each night; daily unpredictable leg, back, and core spasms; mobility limitations; reduced bilateral hand dexterity; and recurring pressure sores, all while sleeping less than five and a half hours each night—never more than three hours consecutively.

78. Defendants assert that superhuman effort should be construed to mean that the effort required to maintain employment exceeds what a reasonable person with similar injuries could perform. At hearing, Defendants' vocational expert, Bill Jordan, identified three other wheelchair-bound individuals who are employed full-time. Defendants argue this establishes that a superhuman effort is not needed for Claimant to work. However, Mr. Jordan's testimony does not prove Claimant expends any less effort maintaining his employment with ISP, only that he is perhaps not the only individual in Idaho maintaining employment through superhuman efforts.

79. Dr. Collins acknowledged that Claimant would still have to do the same bowel care and bladder care whether he worked or not, but that it takes a superhuman effort for Claimant to return to work and work a full-time schedule. She compared the extent of Claimant's efforts to maintain his employment to the efforts of all other injured individuals returning to work that she had observed over a 30 year period. Dr. Collins summarized her conclusions thus:

> I think it's truly a combination of superhuman effort on Chris's part and the assistance of his wife, the accommodations that the police department make[s] for him and then the whole culture of the police department. You know, the testimony about, you know, if you want to work, we will have a job for you is very telling. Everybody has talked about it being a close-knit family environment where they take care of their own, and I think it's really a combination of that. I

> think Chris tries very hard, you know, at the detriment to his family and his social life and anything outside of that. I think he thinks it's very important to go to work, but it takes superhuman effort, certainly more effort than 99.9 percent of the people I've ever worked with over the last 30 years who have returned to work.

Transcript, pp. 350-350, ll. 12-1. (emphasis supplied). Dr. Collins' conclusions are well explained, amply supported by the record as a whole, and highly persuasive.

80. The totality of the evidence establishes that ISP is a wise employer with an extraordinary commitment to Claimant as its employee, and that Claimant is an exemplary employee with an extraordinary commitment to ISP as his employer. The Commission finds that ISP is a sympathetic employer and that Claimant makes a superhuman effort to maintain his employment at ISP.

81. Competing in the open labor market. Finally, Defendants contend that they have rebutted the statutory presumption of Claimant's total permanent disability by clear and convincing evidence that he could successfully compete for jobs in the open labor market if he were to leave ISP employment.

82. The record establishes that Claimant is not independent in his activities of daily living. His wife assists him in cooking, dressing, cleaning up, and treating his recurring pressure sores. Claimant would be forced to obtain this assistance from another if his wife were unable to provide it. Surety pays Claimant's wife $280 per month to assist Claimant with his activities of daily living. Claimant's wife expressed concern that he would not be employable except with ISP.

83. Defendants' vocational expert, William Jordan, and Claimant's vocational expert, Nancy Collins, have opined regarding Claimant's ability to compete in the open labor market. Their conclusions are examined below.

84. *William Jordan*. Mr. Jordan met with Claimant and reviewed employment options if Claimant were to seek employment elsewhere. Mr. Jordan noted that Claimant's work background is varied and he has a college degree which allows him to access a wider job market. Mr. Jordan considered Claimant a skilled worker. Mr. Jordan affirmed that ISP helped Claimant get back to work and that his current job is a highly skilled, responsible position of managing ISP's fleet of approximately 300 vehicles. Mr. Jordan testified that Claimant is a role model and although he may have no intention of leaving ISP, he has a number of other options in the open labor market.

85. Mr. Jordan's written report does not mention Claimant's diminished bilateral dexterity which Dr. Cox rated at 15% of the whole person impairment. The report does not mention Claimant's unpredictable diarrhea episodes which Mr. Jordan conceded at hearing could be problematic to employment. The report does not mention Claimant's recurring back and torso spasms which briefly but regularly prevent him from speaking. Mr. Jordan acknowledged that accommodations would be needed for Claimant to function above sedentary employment. Mr. Jordan further acknowledged that the ADA does not apply to every employer, and that even under the ADA, accommodation is only required after hiring.

86. Mr. Jordan talked to potential Boise and Nampa area employers about employing a wheelchair-bound individual. He did not advise any of the potential employers that the wheelchair-bound individual must also catheterize regularly during the work day and also has periodic bladder and bowel incontinence episodes which require him occasionally to leave work immediately. There is no indication that Mr. Jordan advised any potential employer that the wheelchair-bound individual would frequently be late to work, would require very flexible work

hours, takes three different prescription narcotics daily, and suffers multiple unpredictable torso spasms daily which prevent him from speaking for 30 to 40 seconds at a time.

87. Based upon his review and contacts, Mr. Jordan reported that Claimant could work as a high school teacher, parole hearing officer, investigator, IDVR consultant, or intelligence analyst. Mr. Jordan did not address how Claimant would be able to abide a high school class teaching schedule given his unpredictable bowel and bladder issues. Mr. Jordan acknowledged that a flex schedule may not work for a school teacher although Mr. Jordan did not believe that involuntary leg, back, or core spasms would be disruptive to students if Claimant were attempting to teach. Mr. Jordan also admitted that Claimant's regular use of three prescription narcotics, including Methadone (a Schedule 2 narcotic), may be an obstacle to employment in some positions. Mr. Jordan acknowledged that the vocational rehabilitation position may require travel, including overnight travel, which would be problematic for Claimant. Mr. Jordan confirmed that the investigator position with the Attorney General's office would occasionally require making arrests, which would be problematic for Claimant.

88. *Nancy Collins*. Vocational expert Nancy Collins, Ph.D., is a certified life care planner trained to evaluate a given injury and project an individual's needs throughout their life. She interviewed Claimant and reviewed his work history, medical records, physical conditions, and ongoing need for medical support and assistance. Dr. Collins noted that, in addition to his lower extremity paralysis, Claimant's T2 injury causes core strength and breathing issues. She noted that lumbar spine injuries resulting in paralysis are less debilitating than upper thoracic injuries resulting in paralysis, such as Claimant sustained.

89. Dr. Collins testified that traditional light-duty work is beyond Claimant's physical capacity and opined that Claimant would need multiple accommodations in order to work at any

job. She considered the positions recommended by Bill Jordan and noted that Claimant would not be successful in any of those pursuits. Dr. Collins observed that teaching requires adherence to regular class schedules, and that sales positions require a unique personality to be successful. She testified that the positions recommended by Mr. Jordan are appropriate given Claimant's education and experience, but that the only disability Mr. Jordan discussed with potential employers was that Claimant was wheelchair-bound, not that he also had bowel and bladder incontinence, regular involuntary back and core spasms, and additional issues that hinder working. Dr. Collins observed that the accommodations necessary for his mobility issues are minor when compared to all of the accommodations required by Claimant's breathing, bowel, bladder, and other issues. She noted that Claimant receives great assistance from his wife, who actually needs accommodation from her employer in order to sufficiently assist Claimant with his personal care so that he can work at ISP. Dr. Collins concluded that when all of Claimant's limitations were disclosed, only a sympathetic employer would accommodate them. Dr. Collins testified that it would take a sympathetic employer and a continued superhuman effort by Claimant for him to continue working. She opined that Claimant's best job is where he is currently employed at ISP, and that other employers would not make the same extraordinary accommodations.

90. Dr. Collins also testified that, from a life care planner's perspective, spinal cord injured individuals require more and more assistance over time. She noted that spinal cord injuries result in progressive limitations including obesity, deteriorating bowel and bladder function, and bladder and kidney infections. Over time, wheelchair transfers damage shoulders, elbows, and wrists producing overuse injuries that often require surgery. Dr. Collins observed that Claimant's current physical limitations will worsen with time as a result of the natural

progression of his spinal injury and paralysis. She noted that his shoulders are already showing symptoms of wear from the frequent stress of transferring himself to and from his wheelchair. Dr. Collins indicated that Claimant will ultimately end up in a power wheelchair. He is as functional now as he will ever be. It will become increasingly difficult for him to sustain the pace and maintain the functionality he now demonstrates.

91. Dr. Collins' opinion is well supported by the record and persuasive. Claimant would need a sympathetic employer to accommodate all of his limitations and allow him to work.

92. Claimant's permanent impairments total 96% of the whole person. His actual job at ISP arises from a sympathetic employer and is sustained by Claimant's superhuman efforts. Defendants have not shown that there is an actual job regularly and continuously available in the open labor market which Claimant can perform and at which he has a reasonable opportunity to be employed absent a superhuman effort on his part. Defendants have not rebutted the statutory presumption with clear and convincing evidence. Claimant is totally and permanently disabled pursuant to Idaho Code § 72-407 and the odd-lot doctrine.

93. **Attorney fees**. The final issue is Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804. Attorney fees are not granted as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804 which provides:

> If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer

> shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding attorney fees is a factual determination which rests with the Commission. Troutner v. Traffic Control Company, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

94. Defendants herein have contested Claimant's total permanent disability in reliance on the opinion of vocational expert William Jordan and Claimant's four-year work history in his current position as Training Specialist/Fleet Manager at ISP. Mr. Jordan's conclusions after contacting potential employers are not persuasive, as they do not consider all of Claimant's impediments to employment including his bowel and bladder incontinence, loss of manual dexterity, and other limitations. Defendants have not rebutted the statutory presumption of disability by clear and convincing evidence. However, Defendants were not unreasonable in relying upon Mr. Jordan's opinion and Claimant's successful four-year work history post-accident in a very demanding and responsible position at ISP.

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CONCLUSIONS OF LAW AND ORDER

Based on the foregoing, the Commissioners hereby **ORDER** the following:

1. Claimant is permanently and totally disabled due to his 2006 industrial accident pursuant to Idaho Code § 72-407 and the odd-lot doctrine.

2. Claimant has not proven his entitlement to an award of attorney fees.

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

DATED this 30th day of August 2013.

INDUSTRIAL COMMISSION

__/s/_____
Thomas P. Baskin, Chairman

__/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

Concurring Opinion of R.D. Maynard, Commissioner

While I concur with the conclusions of the majority, I do not believe that the Commission should consider the requirements of the ADA in connection with this case. Defendants were unable to rebut the Idaho Code § 72-407 presumption that Claimant is totally and permanently disabled because the evidence clearly establishes that Claimant is an odd-lot worker. "The odd-lot category is for those workers who are so injured that they can perform no services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." Jarvis v. Rexburg Nursing Center, 136 Idaho 579, 585, 38 P.3d 617, 622 (2001). "Such workers need not be physically unable to perform any work at all. They are simply 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." Tarbet v. J.R. Simplot Co., 151 Idaho 755, 760, 264 P.3d 394, 399 (2011) (citing

Gooby v. Lake Shore Management Co., 136 Idaho 79, 83, 29 P.3d 390, 394 (2001)) (emphasis added).

Here, the majority concludes, and I agree, that Claimant is able to maintain his employment through superhuman effort. His odd-lot status being thus established, the Commission need not consider whether Claimant also maintains employment through a business boom, a sympathetic employer, or temporary good luck. Indeed, the majority does not make any conclusions as to whether Claimant has benefited from a business boom or temporary good luck.

The majority does, however, engage in a lengthy analysis about whether Employer is sympathetic. This analysis includes consideration of Employer's obligations under the ADA. I agree with the majority that the Commission, in exercising its duties under Title 72, must sometimes consider areas of law outside Title 72, but I disagree that this case is one of those times. The majority states that the "issue of whether Employer is a sympathetic employer necessarily requires [that the Commission] evaluate whether the accommodations offered by Employer are required by the ADA." See ¶ 39 above. Yet the Commission is not required to make this evaluation, because the conclusion that Claimant is an odd-lot worker does not require a finding that Employer is sympathetic. The finding on Claimant's superhuman effort is sufficient.

I make this point because I believe that the Commission, as a quasi-judicial agency with limited jurisdiction, should exercise caution in considering law outside our area of expertise. While it might be necessary in some cases, it is not necessary to reach our conclusions here.

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

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August 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:

JOSEPH T HORRAS
PO BOX 140857
BOISE ID 83714

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701

kh __/s/_____