BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARLENE GRIFFITH, Claimant, v. FIRSTBANK NORTHWEST, Employer, and FREMONT COMPENSATION, Successor in Interest to Fremont Industrial Indemnity Company, Surety, and IDAHO INSURANCE GUARANTY ASSOCIATION, Party in Interest, Defendants.	**IC 1999-031588** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed: June 3, 2010

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 Lewiston on May 13, 2008. Claimant, Marlene Griffith, was present in person and represented by Christopher Caldwell of Lewiston. Defendant Employer, FirstBank Northwest (FirstBank), Defendant Surety, Fremont Compensation (Fremont), successor in interest to the Fremont Industrial Indemnity Company, and the Idaho Insurance Guaranty Association (the Association), a party in interest, were represented by Justin Aylsworth of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on November 9, 2009.

ISSUES

The issues to be decided by the Commission were narrowed at hearing and include:

1. Whether Claimant suffers from complex regional pain syndrome (CRPS) or regional sympathetic dystrophy (RSD) due to her industrial accident.

2. Claimant's entitlement to additional medical care.

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

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

5. Claimant's entitlement to attorney fees for delayed payment of permanent impairment benefits.

CONTENTIONS OF THE PARTIES

Claimant alleges she suffers active CRPS (formerly known as RSD and used interchangeably herein) of her dominant upper left extremity as a result of her July 10, 1998, industrial accident and three subsequent surgeries on her left wrist. She asserts permanent partial impairment of 27% of the whole person and total permanent disability pursuant to the odd-lot doctrine. She requests additional medical benefits for numerous past and future prescription medications and a trial of a spinal cord stimulator. Lastly, Claimant requests attorney fees for Defendants' unreasonable delay in payment of permanent partial impairment benefits.

Defendants acknowledge Claimant's industrial accident, wrist injury, and subsequent CRPS. They assert that Claimant has recovered from CRPS and is presently capable of returning to her time of injury employment. Defendants deny liability for additional prescription medications and trial of a spinal cord stimulator. Lastly, they assert that no attorney fees may be awarded or are justified against the Association.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition of Claimant taken July 8, 2005;
3. The pre-hearing deposition of Randy Griffith, Claimant's husband, taken April 25, 2008;
4. The testimony of Claimant, Lesa Ingram, Sandy Bunton, and Sara Griffith taken at the May 13, 2008, hearing;
5. Joint Exhibits 1 through 52 (with the exception of pages 1 and 2 of Exhibit 52) and 54 through 56, admitted at the hearing;
6. The post-hearing deposition of Carl Gann, taken June 3, 2008;
7. The post-hearing deposition of Scott Magnuson, M.D., taken June 25, 2008;
8. The post-hearing deposition of James Brinkman, M.D., taken August 29, 2008;
9. The post-hearing deposition of Robert Calhoun, Ph.D., taken November 20, 2008; and
10. The post-hearing deposition of Douglas Crum, CDMS, taken November 20, 2008.

All objections made during Dr. Magnuson's deposition are overruled except the objection at page 23 thereof, which is sustained. All objections made during Dr. Brinkman's deposition are overruled except the objections at pages 18, 108, 112, and 113 thereof, which are sustained. All objections made during Dr. Calhoun's deposition are overruled. All objections made during Carl Gann's deposition are overruled except the objection at page 73 thereof, which is sustained. All objections made during Doug Crum's deposition are overruled except the objection at page 94 thereof, which is sustained. All objections made during Randy Griffith's deposition, constituting Joint Exhibit 41, are overruled.

Defendants' Motion/Memorandum to Strike Claimant's Post-Hearing Reply Brief is denied. J.R.P. 11(A) limits each individual brief to 30 pages, absent prior Commission approval. Thus, for purposes of J.R.P. 11, the length of Claimant's 10-page reply brief is considered

separately from that of Claimant's 30-page opening brief. Claimants are allowed more briefing opportunity than defendants because claimants bear the burden of proof. Claimant's Motion to Strike Defendants' Motion/Memorandum to Strike Claimant's Post-Hearing Reply Brief is denied.

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

FINDINGS OF FACT

1. **Background**. Claimant was 50 years old and had just moved from Miles City, Montana, to Tok, Alaska, at the time of the hearing. She is left-hand dominant. She graduated from high school in 1976 and attended college for slightly more than one year. Claimant worked as a surveyor. She worked at K-mart as a cashier, service desk assistant, and sales floor associate. She managed the lady's wear department at a K-mart subsidiary. Thereafter Claimant worked at a credit bureau before taking employment at Loomis & Nettleton, where she began her banking career. Since 1980, Claimant has been involved in the banking and mortgage industry. Claimant has taken numerous financial institution classes and received certifications in banking training, including internal auditing and appraising. All of her banking jobs required bilateral dexterity for file handling and typing.

2. In approximately 1979, Claimant fell on the stairs while carrying her child and suffered low back pain. In approximately 1985, Claimant suffered a cervical whiplash injury from a motor vehicle accident. She developed chronic headaches and received chiropractic treatment from time to time thereafter.

3. In December 1992, Claimant started working at FirstBank in Lewiston, where she worked continuously until 1998. She was hired for compliance and quality control. She closed, underwrote, processed, marketed, and audited loans. She analyzed FirstBank's residential loan business and established best practices and procedures. Each month she audited a percentage of FirstBank's loans and ARM loan adjustments, checking for consistency with regulations and

bank policies. To accomplish her reviews, Claimant physically pulled files usually weighing between five and ten pounds from overhead shelves, reviewed banking manuals, and compiled and reviewed computer generated reports. She entered data with a computer keyboard for one-third to one-half of each work day. She used a 10-key machine with her right hand and also used a calculator with her left hand. She photocopied loan file exhibits, recalculated financial underwriting statements, and generally reviewed files for mistakes, inconsistencies, or omissions. She was seated and used both hands most of the day. Claimant drove to Moscow and Coeur d'Alene several times each month to audit files at FirstBank offices there. All her reviews were time sensitive and demanding. She described her position as a high stress job. Claimant earned $32,750.00 per year. She also received bonuses and participated in FirstBank's ESOP.

4. In 1994, Claimant suffered dizziness, headaches, and pain behind her left eye. She was diagnosed with acute labyrinthitis. Later in 1994, Claimant sought treatment for headaches, neck and back pain, and numbness in her feet and hands. Cervical and lumbar x-rays were considered normal. In November 1994, Claimant began physical therapy with Michael Ward, P.T., for longstanding cervical, thoracic, and lumbar injuries. Claimant reported pain with lifting her infant daughter, working at a computer for extended periods, and driving long distances. In early 1995, Claimant sought treatment for right shoulder pain without any injury and was diagnosed with bursitis. In August 1995, Claimant experienced an episode of severe neck stiffness and the temporary loss of use of her arm. After diagnostic scans, Ronald Soloniuk, M.D., opined that Claimant suffered a retrolisthesis and extension at C3-4. In January 1996, Claimant slipped on her deck and fell upon her back, suffering a thoracic strain. In April 1996, she sought treatment for weakness in her upper extremities, intense pain in her dominant left hand, and difficulty sleeping. N. Kirke White, M.D., diagnosed Claimant with myofascial pain, including neck, shoulder, and thoracic pain. She received several trigger point injections for her ongoing shoulder, neck, and upper back pain. Yard work aggravated her pain. Claimant regularly received physical therapy for

her chronic pain complaints. Michael Ward noted that Claimant's pain complaints increased with stress. In April 1997, Claimant slept wrong and awoke with left arm pain and numbness and increased neck pain. She received medical treatment five times in May 1997 for various pain complaints. In June 1997, Claimant experienced a near nervous breakdown due to family stresses. She took Paxil for four months thereafter and continued receiving physical therapy from time to time for pain and stiffness in her neck and back. In June 1998, Claimant suffered increased low back, neck, and upper shoulder pain after driving from Lewiston to Coeur d'Alene.

5. **Industrial accident and treatment**. On July 10, 1998, while working for FirstBank, Claimant fell on wet aggregate and landed on her left wrist. She was earning $16.29 per hour plus various benefits at the time of her accident. She sought medical treatment. X-rays were interpreted as normal, and she was treated for a left wrist sprain. Michael Ward provided physical therapy but her wrist pain did not resolve. She was ultimately referred to orthopedist Reagan Hansen, M.D.

6. On September 13, 1999, Dr. Hansen examined Claimant and diagnosed a probable central left triangular fibrocartilage complex (TFCC) tear and recommended diagnostic arthroscopy. On September 22, 1999, Dr. Hansen performed left wrist arthroscopy. He repaired the TFCC tear and also observed a depression fracture in the lunate. Claimant was off work for six weeks and was then released to light-duty part-time work. She began working part-time at FirstBank and using a TENS unit for pain management. Upon returning to FirstBank, Claimant's left hand was not fully functional and she worked to retrain it. Her dexterity was sufficiently limited that she enlisted a few close friends at work to help her with zippers and buttons. She noticed the temperature of her left hand was often cooler than that of her right hand. By November 1, 1999, Dr. Hansen was concerned that Claimant might be suffering early signs of RSD. Mr. Ward concurred.

7. On December 3, 1999, Gary Haas, M.D., administered a stellate ganglion block and diagnosed Claimant with left forearm CRPS. Dr. Haas thereafter provided several stellate

blocks and Claimant's left hand color, temperature, mobility, and hypersensitivity improved somewhat. On January 13, 2000, Craig Flinders, M.D., placed a cervical epidural catheter pain pump. The pain pump significantly reduced Claimant's symptoms and improved her left hand and wrist function. However, Claimant experienced complications with the catheter and it was removed after approximately 10 days.

8. Claimant continued to work part-time at FirstBank and noted that her left wrist and hand symptoms increased with increased stress at work. She continued receiving physical therapy and diligently sought to improve her left hand functionality. On March 21, 2000, Dr. Hansen examined Claimant and concluded she still had RSD, although her symptoms had improved. He opined that Claimant's RSD was related to her industrial accident. He noted that RSD usually runs its course within one year and largely resolves.

9. From April 17 through May 1, 2000, Claimant was treated in Seattle at the Virginia Mason Pain Program by Andrew Friedman, M.D., and psychologist James Moore, Ph.D. Dr. Friedman diagnosed probable RSD of the upper left extremity and prescription narcotic dependency. Dr. Moore diagnosed adjustment disorder with depressed mood, long-standing anxiety tendencies, and obsessive compulsive personality traits. Dr. Friedman and Dr. Moore noted that "It is clear that prior to the onset of her pain she was quite stressed and not very satisfied with her lifestyle which she saw as overly demanding. In that respect her current disability may provide her with some slight letup of the demands she previously experienced." Exhibit 25, pp. 5-6. Virginia Mason program staff noted that Claimant was critical of the occupational therapy program, but showed increasing function. Dr. Moore reported that Claimant displayed some obsessive-compulsive tendencies and experienced psychological stress from her own anxiety problems that greatly aggravated her pain level and hindered her return to work. He opined there was no physical reason Claimant could not return to her prior job, but noted that Claimant was very stressed and unhappy in her prior job and wanted to join her husband in

Colorado. Dr. Moore believed Claimant wanted to leave her time of injury job for psychosocial reasons, but planned to use her hand condition as an excuse to leave her job. Dr. Friedman noted that Claimant attained increased function and decreased pain, but was quite negative about the pain program and her capacity to function at home and in her work.

10. On May 16, 2000, the Virginia Mason providers concluded that Claimant continued to improve and could return to her pre-injury job with keyboarding for up to four hours per day and wrist stretching every two hours. Claimant was typing one and one-half hours per day by the time she finished the Virginia Mason program. By May 25, 2000, Claimant had returned to FirstBank and was working seven hours per day.

11. On June 7, 2000, Virginia Mason issued a discharge summary concluding that Claimant had progressed to sustaining a full day of sedentary level activity during the program, her medical condition was fixed and stable, and she needed no further directed treatment.

12. In early June 2000, Claimant began the process of selling her home so she could move to Colorado to join her husband, who had been transferred there with his work.

13. Dr. Hansen referred Claimant to hand surgeon Peter Jones, M.D., in Coeur d'Alene. On July 28, 2000, Dr. Jones examined Claimant and found significant intra-articular pathology of the left lunate and indications of cubital tunnel syndrome. He recommended a diagnostic left wrist arthroscopy.

14. In August 2000, Claimant voluntarily resigned her position with FirstBank, citing medical issues, and moved from Lewiston to Springfield, Colorado to join her husband. She worked for FirstBank part-time from her home in Colorado for a brief period, but concluded that she was not able to complete her duties in a timely fashion and again voluntarily resigned her employment with FirstBank. There is no indication that FirstBank was dissatisfied with her performance. Since that time she has not worked or attempted to work.

15. On October 3, 2000, Dr. Jones performed a diagnostic left wrist arthroscopy and observed post-traumatic degenerative changes of the lunate. A subsequent anterior and posterior interosseous nerve block was successful. On October 25, 2000, Dr. Jones performed another left wrist arthroscopy with anterior and posterior interosseous neurectomy. By November 15, 2000, Dr. Jones reported that Claimant's wrist looked good and she could return to light-duty work, including typing with her left hand no more than four hours per day.

16. On January 19, 2001, Claimant presented to Lawrence Varner, D.O., in Springfield, Colorado, seeking direction about the type and duration of work she could tolerate. Dr. Varner diagnosed post-surgical neuroma, three prior left wrist surgeries, and left wrist pain with a history of RSD. He noted that Claimant had not worked since August 2000, but nevertheless did typing, filing, and traveling. He directed her to use her left hand as much as possible.

17. On January 29, 2001, Claimant presented to Mitch Sipalay, M.D., in Springfield, Colorado. He diagnosed RSD and referred Claimant to a hand specialist. On March 28, 2001, Claimant presented to hand surgeon Thomas Mordick, M.D., of Denver, Colorado, who concluded that Claimant's left hand showed no physical manifestations of RSD. He opined that Claimant was at maximum medical improvement and no further intervention was indicated. On April 18, 2001, Claimant presented to Scott Hompland, D.O., of Englewood, Colorado. Dr. Hompland's impression included previously diagnosed CRPS, post-neurolysis left wrist, and adjustment disorder/psychological factors affecting Claimant's general condition. He opined that Claimant's RSD was stable and she was at maximum medical improvement. At his recommendation, Claimant underwent a functional capacity evaluation in May 2001 by certified hand specialist Mary Hubbel, M.S., at the Center for Hand Rehabilitation in which Claimant demonstrated the capacity to meet the physical demands of a light-duty job classification by lifting 23 pounds.

18. On June 1, 2001, Dr. Mordick rated Claimant's permanent impairment at 45% of the upper extremity (including 30% upper extremity impairment for Claimant's reports of pain),

which equates to 27% of the whole person. Considering Claimant's functional capacity evaluation, Dr. Mordick restricted Claimant from lifting more than 33 pounds occasionally and 23 pounds frequently. He opined that Claimant could return to her former occupation without restrictions.

19. On July 1, 2002, Claimant presented to Steven Wahl, M.D., in Tok, Alaska, who recorded that Claimant had recently moved from Springfield, Colorado, to Tok and her husband was with the B.L.M. Dr. Wahl performed no examination but assessed RSD of the left wrist. He prescribed refills of various medications.

20. On April 16, 2003, Shawn Hadley, M.D., of Anchorage, Alaska, examined Claimant at Defendants' request. Claimant reported to Dr. Hadley that she used her left arm for all activities and that she performed all housework except for heavy lifting. Dr. Hadley observed mild calluses at the tips of Claimant's left thumb and index finger, as expected with an upper dominant limb. He found her strength essentially normal in all limbs and observed no evidence of active RSD. He noted some contradiction in how Claimant presented in his office and her description of her activities at home, as contrasted with her professed inability to perform any employment.

21. In 2004, Claimant commenced treating with family practitioner Victor Bartling, D.O., in Fairbanks, Alaska. On March 30, 2005, Dr. Bartling noted that Claimant's left hand pain increased with painting or any activity beyond the activities of daily living. He reported that Claimant's left wrist was slightly swollen and diagnosed chronic RSD.

22. In August 2005, hand surgeon James Brinkman, M.D., neurologist Joseph Robin, M.D., and vascular surgeon Howard Kellogg, M.D., examined Claimant in Seattle at Defendants' request. They observed Claimant use her left hand normally to write, grasp, gesture, place her coat under her chair, and get on and off of the exam table. They found no motor weakness on detailed testing of the left hand and diagnosed possible RSD, transient, with no evidence of active RSD. They opined that Claimant was restricted from quickly and repetitively supinating her left hand, but otherwise was capable of normal activities including employment as a banking auditor.

23. On August 31, 2005, neurologist James Foelsch, M.D., examined Claimant in Fairbanks, Alaska. He performed EMG studies, which showed no neurological abnormalities in Claimant's upper left extremity. Dr. Foelsch reported no objective evidence of active CRPS. A September 2, 2005, MRA of Claimant's left thoracic outlet showed no abnormalities.

24. On September 14 and 15, 2005, Claimant underwent a functional capacity evaluation by Cathy Franciol, O.T., in Fairbanks. Claimant demonstrated left upper extremity range of motion within functional limits, grip and pinch strength in the 90th percentile for her age and gender, and a maximum lifting capacity in the light physical demand level, including the ability to lift from 20 to 30 pounds.

25. On September 22, 2005, Dr. Bartling opined that Claimant suffered from active RSD. He noted that she continued to have pain in her left hand and arm and opined that she was unable at that time to participate in full-time employment due to pain.

26. Claimant filed for Social Security Disability on the basis of her left upper extremity. On April 30, 2007, her claim was denied. After reconsideration, her claim was again denied because, upon independent review, a physician and a disability examiner concluded that she retained the ability to perform light-duty physical work, such as her prior bank compliance position.

27. On February 4, 2008, anesthesiologist Scott Magnuson, M.D., examined Claimant in Coeur d'Alene at her request and diagnosed CRPS related to her 1998 industrial accident. He based his diagnosis on prior medical records and did not personally observe any objective evidence of CRPS.

28. On February 6, 2008, Dr. Bartling examined Claimant in Tok, Alaska, and found full range of motion and no swelling in Claimant's left hand. He considered Claimant's RSD stable with no significant change in findings from her prior exams.

29. Claimant has moved repeatedly over the last five years to accompany her husband in pursuing changing job assignments to further his professional career. Claimant's husband earned over $100,000.00 in 2007.

30. **Condition at the time of hearing**. At the time of hearing in May 2008, Claimant was taking the following medications: Tramadol, Lyrica, and Catapres (clonidine) for pain, Cymbalta for pain and depression, Hydrochlorot and Toprol for hypertension, and Nexium for gastroesophageal reflux disease (GERD). She testified that clonidine caused dizziness and Lyrica and Cymbalta caused light-headedness and fatigue. Claimant also asserted that her medications caused sleeplessness. She affirmed that she has not slept well in nine years because of her pain. She believed her GERD and hypertension are related to her industrial accident.

31. At hearing, Claimant testified that she has daily left upper extremity pain, which decreases with rest. She testified that she still has temperature changes in her left hand and awakens every morning with her left fingers in a semi-closed position. She believes her physical pain is affected by the stress she feels. She alleges left hand hypersensitivity so acute that she cannot wear a wrist watch or wedding ring on her left hand, but she massages her left hand daily to reduce the hypersensitivity. She continues to perform physical therapy exercises.

32. **Credibility**. Having observed Claimant at hearing and compared her testimony to the medical records and other evidence, the Referee finds that Claimant is generally a credible witness; however, as noted in a number of medical records and evident at hearing, Claimant is conspicuously obsessed with her left upper extremity pain.

DISCUSSION AND FURTHER FINDINGS

33. The provisions of the 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).

34. **Current medical condition**. The first issue is whether Claimant currently suffers from CRPS due to her industrial accident.

35. Scott Magnuson, M.D., testified for Claimant. Dr. Magnuson is board certified by the American Board of Anesthesiology with a sub-specialty in pain management. He has treated hundreds of CRPS patients. Dr. Magnuson examined Claimant on February 4, 2008, at Claimant's request and diagnosed CRPS type 1 related to her 1998 industrial accident. Dr. Magnuson reported patchy sensory loss in Claimant's left upper extremity. He noted from reviewing past medical records that Claimant had a history of redness, swelling, hair growth changes, nail changes, allodynia, and hyperalgesia in her upper left extremity. He testified that many CRPS patients describe their affected limb as "looking dead." Claimant and some of her associates had so described Claimant's left arm. Dr. Magnuson opined that Claimant's symptoms were more consistent with a neuropathic constellation of symptoms seen with CRPS than with wrist degeneration. He acknowledged that his diagnosis of CRPS is based upon the records generated by Claimant's prior physicians and not upon any of his own observations at the time he examined Claimant in 2008. Dr. Magnuson testified that CRPS is a chronic diagnosis with an indefinite duration and that, while there are some reported cases of complete resolution, it is a chronic problem in the majority of CRPS patients.

36. Dr. Bartling, a family practitioner in Fairbanks, diagnosed Claimant with RSD in March 2005. However, Dr. Foelsch examined Claimant in August 2005 and found no objective evidence of active CRPS.

37. James Brinkman, M.D., testified for Defendants. Dr. Brinkman is board certified in both general and plastic surgery, with qualifications in hand surgery. His practice included approximately 50% hand surgeries, including reimplantation of partially or completely amputated

limbs and digits, from approximately 1972 until he retired in 2000. Dr. Brinkman has treated approximately 200 CRPS patients and surgically repaired approximately 30 or 40 TFCC tears.

38. In August 2005, Drs. Brinkman, Robin, and Kellogg examined Claimant and noted that she held her hands comfortably during the examination, had no muscle atrophy, no hand deformities, no hair growth or nail deformities, and her hands exhibited normal temperature and color. Dr. Brinkman found circumferential measurements of the upper extremities identical bilaterally and noted that thoracic outlet syndrome had been ruled out. He concluded Claimant did not have active CRPS, but had developed a suture granuloma, lunate chondromalacia, and a degenerative cyst on the carpal bones that caused her ongoing left wrist pain. Dr. Kellogg agreed. Dr. Brinkman later noted that Claimant's functional capacity evaluation in September 2005 demonstrated upper left extremity range of motion within functional limits, grip and pinch strength at the 90th percentile for her age and gender, lifting capacity of 20 to 30 pounds, and sedentary work capacity. Dr. Brinkman concluded that there had been no objective evidence of any ongoing RSD since approximately 2000.

39. Dr. Brinkman reviewed Dr. Magnuson's February 2008 examination report and testified that the objective findings recorded therein did not support a diagnosis of active CRPS according to the criteria in the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, and disclosed no objective findings of CRPS. Dr. Brinkman noted that it was unclear whether the wrist examination Dr. Magnuson performed included observation of Claimant's left wrist in a provoked flexed position. Dr. Brinkman opined that sensory abnormalities described with Von Vrey Hair testing might be the result of Claimant's prior neurectomies.

40. Dr. Brinkman observed that Claimant reported left upper extremity pain that worsened with activity and improved with rest. He noted that CRPS generally produces constant pain, even at rest. He testified that Claimant's reported burning sensation could be from neuromas which have formed from the stumps of the anterior and posterior interosseous nerves from her

prior neurectomy. He testified that neuromas are especially significant if near the wrist joint because wrist flexion or extension may aggravate them. Dr Brinkman also noted that Claimant has been diagnosed with lunate bone cysts and progressive chondromalacia of her left wrist, both of which could cause left wrist pain. He testified that Claimant had chronic pain syndrome due to her wrist and other factors, and that chronic pain syndrome is often confused with CRPS. Dr. Brinkman acknowledged that Claimant probably had RSD to some degree early on, but opined that she did not have it at the time he examined her. Dr. Brinkman acknowledged that CRPS can have phases when it is active, then inactive, then active again, but he had seldom seen that phenomenon and Claimant had shown no objective evidence of CRPS since approximately 2000.

41. Drs. Brinkman, Robin, Kellogg, Foelsch, and Calhoun have all concluded that Claimant does not have active CRPS. Dr. Brinkman's opinion of the etiology of Claimant's symptoms is consistent with the reported objective findings, explained in significant detail, and more persuasive than Dr. Magnuson's opinion.

42. The Referee finds that Claimant had active CRPS from approximately November 1999 through 2000, but has shown no significant objective evidence of CRPS since approximately January 1, 2001. Claimant has not proven that she currently has active CRPS due to her industrial accident.

43. **Additional medical benefits**. The next issue is Claimant's entitlement to additional medical benefits, including past and present prescription medications, doctor visits for the purpose of monitoring her medications, and trial of a spinal cord stimulator.

44. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee

may do so at the expense of the employer. The Idaho Supreme Court has held that Idaho Code § 72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable. The Court further held it was for the physician, not the Commission, to decide whether the treatment was required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989). For the purposes of Idaho Code § 72-432(1), medical treatment is reasonable if the employee's physician requires the treatment and it is for the physician to decide whether the treatment is required. Mulder v. Liberty Northwest Insurance Company, 135 Idaho 52, 58, 14 P.3d 372, 402, 408 (2000). Of course, the employer is only obligated to provide medical treatment necessitated by the industrial accident. The employer is not responsible for medical treatment unrelated to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997). Thus a claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

45. Alleged statutory limitations on the Association's liability. Claimant correctly asserts that Idaho Code § 41-3608(1)(a)(i) requires the Association to pay: "The full amount of a covered claim for benefits under a worker's compensation insurance coverage." However, the extent of a covered claim is statutorily defined. Defendants argue that Idaho Code § 41-3605 legislatively exempts the Association from liability for any amount due any other insurer, such as Claimant's private health insurer. That section provides in part:

> (7) "Covered claim" means an unpaid claim, … which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this act applies issued by an insurer, if such insurer becomes an insolvent insurer after the effective date of this act …
> ….

> "Covered claim" shall not include … any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries, reinsurance recoveries, contribution, indemnification or otherwise. No claim for any amount due any reinsurer, insurer, insurance pool or underwriting association may be asserted against a person insured under a policy issued by an insolvent insurer other than to the extent such claim exceeds the association obligation limitations set forth in section 41-3608, Idaho Code.

Idaho Code § 41-3605(7) (emphasis supplied). Defendants note that Claimant has never been without private health insurance since July 2, 2003, and assert that Claimant is not entitled to reimbursement for her past medical treatment, as these amounts have been covered by her private health insurance.

46. Defendants' assertion ignores one of the tenets of St. Alphonsus Regional Medical Center v. Edmundson, 130 Idaho 108, 937 P.2d 420 (1997), that Idaho Code § 72-432(1) does not require direct payment to a health care provider. "The Commission awarded benefits to the injured worker, not payment to the provider." Edmundson at 111, 937 P.2d at 423. In the present case, Claimant's private health insurer is not a party in this proceeding. Claimant—not Claimant's health care providers or private health insurer—is entitled to payment of medical benefits for medical expenses resulting from her industrial accident. Thus the provisions of Idaho Code § 41-3605(7) do not reduce Defendants' obligations for medical benefits otherwise due Claimant.

47. Defendants also assert that Claimant must exhaust coverage under any other applicable insurance policy, including her private health insurance policy, and that the Association's liability is reduced by that amount. Defendants rely upon Idaho Code § 41-3612 which provides in part:

> EXHAUSTION OF OTHER COVERAGE. (1) Any person having a claim against an insurer, whether or not the insurer is a member insurer, under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first his right under such policy. Any amount payable on a covered claim under this act shall be reduced by the amount of any recovery under such insurance policy.

48. Defendants' assertion ignores the fact that to the extent Claimant's medical expenses are the result of her industrial accident, she may very well have no viable claim for such expenses under her private health insurance coverage. The record is voluminous, but does not contain a copy of Claimant's private health insurance policy. Treatment for work-related injuries is commonly excluded under private health insurance policies. The record reveals that some of Claimant's medical expenses related to her industrial accident have been paid by her private health carrier and that in many instances her private health carrier has claimed a subrogation interest. The numerous references to the subrogation interest of Claimant's private health insurer in the record indicate that Claimant has no valid claim against her private health insurer for medical treatment related to her industrial accident; thus, the amount of medical benefits due Claimant from Defendants is not subject to reduction, pursuant to Idaho Code § 41-3612, by payments already made by Claimant's private health insurer subject to subrogation.

49. Prescriptions. Claimant requests medical benefits for past and current prescription medications for treatment of her CRPS. Defendants categorically deny responsibility for treatment of Claimant's depression or hypertension, asserting that these conditions are not related to her industrial injury. Dr. Calhoun testified that Claimant's industrial accident is not the predominant cause of her depression. He opined that Claimant's pre-existing history of anxiety, depression, chronic anger, and hostility predisposes her to chronic pain syndrome and hypertension. Dr. Bartling opined that Claimant's hypertension was not related to her RSD. Curiously, however, he deemed her prescription for Toprol, used for treatment of hypertension, related to her industrial accident. Dr. Magnuson did not relate Toprol to treatment of CRPS and testified that he had not used Toprol for treatment of CRPS. The Referee finds Claimant is not entitled to medical benefits, including reimbursement for prescriptions, for treatment of her depression or hypertension.

50. In their briefing, Defendants assert that other than the prescriptions discussed at the time of the hearing, Claimant is not entitled to further medical benefits. Claimant testified at hearing that she was taking the following prescription medications: Catapres-TTS (clonidine), Lyrica, and Tramadol for pain, Cymbalta for pain and depression, and Nexium for GERD. Dr. Magnuson testified that Cymbalta, an anti-depressant commonly used to treat CRPS, also helps modulate pain. Dr. Bartling opined that Nexium was necessary to treat Claimant's GERD, which resulted from her use of other medications prescribed for treatment of CRPS. Dr. Brinkman acknowledged that Claimant is entitled to pain and anti-inflammatory medications for her left wrist condition. Claimant has proven her entitlement to prescription medications for ongoing treatment of her industrial injury, including Catapres-TTS (clonidine), Cymbalta, Lyrica, Nexium, and Tramadol, or medications substantially equivalent thereto.

51. Dr. Magnuson testified that anti-depressant medications commonly used to treat CRPS include amitriptyline, Cymbalta, nortriptyline, trazodone, and Zoloft, which also help modulate pain and some of which have a beneficial effect on sleep architecture. He affirmed that Ambien is commonly used to help CRPS patients sleep. He testified that pain relieving medications and NSAIDs commonly used to treat CRPS include Catapres-TTS (clonidine), Celebrex, clonazepam, Endocet, hydrocodone, Lyrica, Meloxicam, Neurontin, Relafen, tramadol, and Ultram. He observed that multimodal analgesia is typically used to treat CRPS; hence several medications from different classes are prescribed to work in different areas of the pain process cycle.

52. Claimant specifically requests reimbursement for the prescription expenses listed in Exhibit 52, pp. 4-12 and 15, and those listed in Exhibit 56, pp. 1-5, all of which collectively total $6,108.12.

53. Exhibit 52 documents expenses totaling $5,055.16 for medications prescribed by Drs. Hansen, Sipalay, Haas, and Jones including Ambien, Amitriptyline, APAP/Codeine,

Cefadroxil, Celebrex, Clonazepam, Endocet, hydrocodone, methylprednisolone, Neurontin, Nortriptyline, Promethazine, Tebamide, Trazodone, Ultram, and Vioxx. These were prescribed from September 22, 1999, through April 17, 2001. This period includes all three of Claimant's wrist surgeries and subsequent recovery prior to her permanent impairment rating by Dr. Mordick. Dr. Magnuson testified that all of these medications are used to treat CRPS except Cefadroxil, Promethazine, and Tebamide, which were prescribed in relation to Claimant's October 2000 wrist arthroscopies, and methylprednisolone, an anti-inflammatory commonly used to treat arthritis (a condition from which Dr. Brinkman acknowledged Claimant suffers). Claimant has proven her entitlement to reimbursement of prescription expenses of $5,055.16 as set forth in Exhibit 52.

54. Exhibit 56 documents expenses for medications prescribed by Dr. Bartling and Joy Huber beginning July 11, 2006, and continuing through February 27, 2008, totaling $1,052.96. These medications include Catapres-TTS (clonidine), Celebrex, Cymbalta, Hydrochlorot, Lyrica, Meloxicam, Nexium, Toprol (metoprolol), and Tramadol. Except for Hydrochlorot and Toprol (metoprolol), Dr. Magnuson testified that all of these medications are used to treat CRPS. Hydrochlorot and Toprol (metoprolol) were prescribed for Claimant's hypertension. The cost of Hydrochlorot and Toprol (metoprolol) prescriptions contained in Exhibit 56 totals $146.57. Claimant has proven her entitlement to reimbursement of prescription expenses of $906.39 ($1,052.96 - $146.57), as set forth in Exhibit 56.

55. Claimant has proven her entitlement to medical benefits for past prescription medications in the amount of $5,961.55.

56. Doctors' visits. Dr. Magnuson opined that Claimant's ongoing medications would need to be monitored by a physician at least quarterly. Claimant is entitled to periodic monitoring by a physician of the prescription medications reasonably necessary for treatment of her industrial injury.

57. Spinal cord stimulator. Dr. Magnuson noted that periodic flare-ups are not uncommon in CRPS patients and may require physical therapy, stellate ganglion blocks, and/or counseling. However, with one exception, the record does not contain any current recommendation or request for such medical treatment. Claimant specifically requests medical benefits for a trial of a spinal cord stimulator. Dr. Magnuson opined that a spinal cord stimulator is a recognized treatment for CRPS and can be effective for pain relief. He believed Claimant could potentially benefit from a spinal cord stimulator. Dr. Bartling opined similarly. However, Dr. Brinkman persuasively opined that absent objective findings of active CRPS, a spinal cord stimulator is not indicated. As noted above, Claimant has not proven that she has active CRPS and thus has not proven her present entitlement to trial of a spinal cord stimulator.

58. **Permanent partial impairment**. The next issue is the extent of Claimant's permanent partial impairment. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

59. In the present case, two physicians have rated Claimant's permanent impairment due to her industrial accident. Dr. Mordick rated Claimant's permanent impairment at 45% of the left upper extremity, which equals 27% of the whole person. His rating is based upon various range of motion limitations of Claimant's left hand and includes 30% upper extremity

impairment for Claimant's reports of pain. Claimant asserts that Defendants acknowledged this rating, agreed to pay it, and are thus estopped from denying it. Joint Exhibit 45, pp. 1 and 14, show Defendants' agreement to pay the 27% permanent impairment rating. Defendants assert that this issue is moot because they have paid the 27% permanent impairment rating. Nevertheless, permanent disability remains at issue between the parties and Defendants argue that Claimant actually suffers only 2% permanent impairment.

60. Dr. Brinkman rated Claimant's permanent impairment at 5% of the left upper extremity, which equals 2% of the whole person, based upon range of motion limitations. He readily acknowledged that he did not consider pain in his impairment rating of Claimant. However, he testified that Claimant's reported burning sensation could be from neuromas that have formed from the stumps of the anterior and posterior interosseous nerves left by the prior neurectomy. Dr. Brinkman testified that neuromas are especially significant in the wrist if near the wrist joint because wrist flexion or extension may aggravate them. It is noteworthy that in 2001, Dr. Varner diagnosed a post-surgical mid-dorsum neuroma of Claimant's left wrist. Dr. Brinkman also noted that Claimant has been diagnosed with lunate bone cysts and progressive chondromalacia of her left wrist, both of which could cause left wrist pain. Pain can be a permanent impairment if it produces a functional loss. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

61. Dr. Brinkman's rating is materially incomplete in failing to recognize Claimant's legitimate pain caused by the lunate bone cysts and progressive chondromalacia of her left wrist. Dr. Mordick's rating is more persuasive. Claimant has proven she suffers a permanent impairment of 27% of the whole person due to her industrial accident.

62. **Permanent disability**. The next issue is the extent of Claimant's permanent disability, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine. "Permanent disability" or "under a permanent disability" results when the actual or

presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant.

63. 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).

64. To evaluate Claimant's permanent disability several items merit examination including the relevant labor market, physical restrictions resulting from her permanent impairment, and her potential employment opportunities.

65. Relevant labor market. A threshold inquiry is the appropriate labor market in which Claimant's disability must be evaluated. In Davaz v. Priest River Glass Company, Inc.,

125 Idaho 333, 870 P.2d 1292 (1994), the Idaho Supreme Court interpreted the phrase "reasonable geographic area" contained in Idaho Code § 72-430(1) as the area surrounding the claimant's home at the time of the hearing. However, the Court noted there may be instances where a market other than the claimant's residence at the time of the hearing is relevant in making an Idaho Code § 72-430(1) inquiry. In Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 565 P.2d 1360 (1977), the Court held that the Commission may consider the labor market within a reasonable distance of the claimant's home both at the time of the injury and the time of the hearing to determine a claimant's post-injury employability. The Court declared: "a claimant should not be permitted to achieve permanent disability by changing his place of residence." Lyons, 98 Idaho at 407 n. 3, 565 P.2d at 1364 n. 3.

66. In the present case, Claimant worked in the Lewiston area labor market at the time of her 1998 industrial accident. She subsequently moved to Colorado, Alaska, Montana, and finally to Tok, Alaska, where she resided at the time of the hearing. Tok is a smaller labor market than Lewiston; thus, under the circumstances of this case, Lewiston is the appropriate labor market within which to evaluate Claimant's permanent disability.

67. Physical restrictions. Claimant asserts that physical activity of any kind aggravates her left hand pain, which can spread to her wrist, arm and shoulder. She testified she has pain with heavy lifting, extended grasping, repetitive grasping, and fine manipulation. She asserts that she develops tremors in her left hand with overactivity and may drop glasses and forks. She testified that two plates from the dishwasher are too much for her to grasp. However, she demonstrated in two functional capacity evaluations the ability to lift over 20 pounds. She testified that opening pop bottles and pill bottles is very hard and sometimes impossible and that her left hand gets hypersensitive from extended periods of steering while driving. Nevertheless, Claimant demonstrated grip and pinch strength in the 90th percentile in her 2005 functional capacity evaluation and admitted she was able to drive alone from Lewiston to Springfield,

Colorado, and from Colorado to Alaska. At the time of hearing, Claimant asserted that she was significantly limited but acknowledged that her husband was away working for several weeks at a time and she cared for the house and the family's dogs.

68. Claimant does not believe she could perform her prior job at FirstBank and believes she is only capable of performing a single limb job. Filling out paperwork aggravates her pain. She testified that she has left hand tremors after three pages of typing; however, she admitted that she can write for about an hour. Claimant testified she can only keyboard for one hour before noticing pain; however, she admitted she can type for two hours per day. She alleged that she could not type for four hours per day and does not have stamina to work for eight hours per day. She does not know of a banking job she could perform and believes a job search would be futile.

69. Claimant's permanent physical restrictions from her injuries have been evaluated by several physicians. Dr. Magnuson noted that any activity generally increases pain in the CRPS affected extremity, but that the pain causes no harm. He encourages CRPS patients to "do as much as they possibly can." Magnuson Deposition, p. 22, ll. 16-17. However, he opined that if Claimant had significant pain with certain activities, it would not be advisable to perform them. Dr. Magnuson opined that Claimant could not perform meaningful full-time employment and that it would be very difficult for her to perform the fine motor left hand activities of her prior work. He imposed no specific physical restrictions.

70. Dr. Bartling opined in September 2005 that Claimant could not work full-time due to pain, but provided no specific restrictions. However, a functional capacity evaluation that same month demonstrated that Claimant had left upper extremity range of motion within functional limits, grip and pinch strength in the 90th percentile for her age and gender, and a maximum lifting capacity in the light physical demand level, including the ability to lift 20 pounds.

71. Dr. Mordick, the hand surgeon who rated Claimant's permanent impairment at 45% of the left upper extremity, released Claimant to return to her former position without restrictions

by June 2001. Considering Claimant's 2001 functional capacity evaluation, Dr. Mordick restricted Claimant from lifting more than 33 pounds occasionally and 23 pounds frequently.

72. Clinical psychologist Robert Calhoun, Ph.D., is the director of the St. Alphonsus Regional Medical Center's brain injury treatment program and specializes in neuropsychology, behavioral medicine, and pain management. He has treated 250 to 300 CRPS patients and typically treats two to five each week. Dr. Calhoun testified that psychological factors influence the degree and perception of pain. Depressed or anxious individuals rate their pain higher than others.

73. On November 28, 2007, Dr. Calhoun interviewed Claimant and evaluated her. Claimant completed a number of objective psychological tests including the MMPI, Milan Clinical Multiaxial Inventory, and Pain Impairment Relationship Scale. Dr. Calhoun noted that Claimant had a documented medical history of right shoulder pain, neck pain, arm pain, low back pain, depression, and anxiety prior to her industrial accident. She had been involved in physical therapy for an extended period, continuing up to the time of her industrial accident. Claimant described her job at FirstBank as very stressful. She told Dr. Calhoun that she was a type A personality and that stress exacerbated her pain. She reported that her pain controlled her. After reviewing Claimant's test results, Dr. Calhoun concluded she would be overly responsive to pain and was at risk for somatizing stress, focusing on her pain when stressed, and predisposed to chronic pain syndrome. He explained:

> What was most notable certainly was her anxiety, frustration, anger and depression. Those symptoms combined with the personality characteristics of somatizing stress really put her at risk for pain flare-ups when under emotional stress.
>
> ….
>
> It also certainly is evident in the medical record that she had a long-term preexisting history of low back, head and neck pain. As I said previously, it didn't even seem like there was a break in her physical therapy between a preexisting pain problem and then the onset of her new pain. That is very consistent with somatoform pain tendencies.

Calhoun Deposition, p. 36, ll. 2-19. He noted that Claimant displayed obsessive-compulsive personality trends and showed a high state of anger. Dr. Calhoun testified that Claimant did not improve much with her three left wrist surgeries and "that is what we typically see in these individuals, that very precise medical interventions can be performed, but they have no positive impact on the patient." Calhoun Deposition, p. 38, ll. 16-20. He concluded that Claimant viewed herself as being completely disabled by her pain. Dr. Calhoun testified that Claimant's anxiety, depression, obsessive-compulsive personality trends, somatoform trends, anger, and hostility were established prior to her 1998 industrial accident and not caused thereby. Dr. Calhoun noted that his assessment fit almost exactly with Dr. Moore's assessment of Claimant's psychological state and challenges while treating at the Virginia Mason Clinic in 2000.

74. Dr. Calhoun opined that Claimant experiences some level of pain, but that the pre-existing factors he identified are the predominant cause of Claimant's chronic pain syndrome. Calhoun Deposition, p. 60. He testified that Claimant's industrial accident is not the predominant cause of her chronic pain syndrome.

75. Dr. Brinkman testified that Claimant's alleged fatigability was not related to her wrist mechanics because she did not have thoracic outlet syndrome, ulnar nerve entrapment at the cubital tunnel, or any anatomical atrophy or weakness in pinch or grip strength. He opined that Claimant's fatigability lies in her subjective pain and her psychosocial barriers to returning to employment and pre-existing psychological factors. He affirmed that Claimant's industrial injury and its consequences would not preclude Claimant from returning to her time of injury job at FirstBank, but that her many years of deconditioning from inactivity may be a significant obstacle. He testified that even though returning to work may cause Claimant pain, it would be unlikely to harm her left wrist or hand. Dr. Brinkman reviewed Dr. Calhoun's psychological evaluation of Claimant and concluded that psychological and behavioral factors impacted Claimant's pain problem and physical debilitation.

76. Dr. Robin and Dr. Kellogg restricted Claimant from extreme function involving repetitive supination of her left arm or hand quickly. Dr. Brinkman advised that Claimant could use a mouse and keyboard up to one-third of the work day with usual breaks. Dr. Kellogg and Dr. Brinkman concluded that Claimant could return to work. Dr. Brinkman, Dr. Moore, and Dr. Calhoun opined that Claimant could return to her pre-injury position.

77. Drs. Brinkman, Robin, Kellogg, Hadley, Mordick, Friedman, Calhoun, and Moore all concluded that Claimant could return to her time of injury work. The functional capacity evaluations of 2001 and 2005 both demonstrated that Claimant could work in the light physical demand category. The Social Security Disability evaluation concluded that Claimant was able to work in her prior job as a financial examiner. The weight of the evidence establishes that Claimant is capable of performing light-sedentary work and is restricted from extreme function involving quick, repetitive supination of her left hand and from keyboarding more than one-third of the work day.

78. Potential employment. Vocational rehabilitation counselor Carl Gann, CRC, CDMS, testified for Claimant. Gann met with Claimant on September 20, 2005, in Fairbanks, Alaska. Gann was aware of Claimant's impairment rating of 45% of her dominant left upper extremity. Gann's perception of Claimant's limitations to her dominant left hand is significantly greater than what her impairment rating establishes. Gann referred to Claimant as a "unilateral worker" and testified that there is no labor market for one-armed workers. He testified that Claimant's mortgage loan banking experience is now dated, since she has not worked for approximately eight years. Gann concluded that, relying on the opinions of Drs. Magnuson and Bartling, Claimant is not employable. He opined that Claimant has lost access to 96% of the labor market. Gann testified that Claimant's dominant left hand and wrist function limitations would severely limit her productivity in banking and similar positions and it would be futile for Claimant to seek work. Gann did not offer any opinions specifically about Claimant's

employability in other light or sedentary occupations that would be less hand-intensive. Gann testified that operating a computer mouse and a 10-key adding machine with her dominant left hand would aggravate Claimant's pain. However, at hearing Claimant testified that she was trained to operate a 10-key with her right hand and that was her standard procedure at FirstBank.

79. Gann was not familiar with the Lewiston labor market. He admitted visiting Lewiston perhaps once or twice in the distant past. He did not conduct any job site evaluations or inspections of any banking positions. Gann reviewed positions in Miles City, Montana, and Fairbanks, Alaska, and concluded that applying the physical restrictions imposed by Drs. Brinkman, Robin, and Kellogg, Claimant would suffer from 40% to 53% loss of earning capacity if she could be employed as a mortgage loan interviewer as opposed to her prior position as a banking auditor. Dr. Brinkman testified that Gann overstated the physical restrictions imposed by Dr. Brinkman himself. Dr. Brinkman did not consider Claimant to be a one-armed worker.

80. Vocational expert Douglas Crum, CDMS, testified for Defendants. Crum grew up in the Lewiston area. He worked at Idaho First National Bank as a management trainee, assistant branch manager, loan officer, and marketing specialist for five years in Coeur d'Alene, Pinehurst, and Boise. Crum has performed 10-12 surveys of the Lewiston labor market. He has consulted as a vocational rehabilitation specialist in the Lewiston labor market from eight to 12 times each year for the last three years.

81. Crum evaluated Claimant's vocational prospects based upon Dr. Brinkman's opinion that Claimant could keyboard and mouse up to one-third of the work day with usual breaks. Crum noted that Claimant is familiar with word processing, spreadsheets, adding machines, and various other financial calculators and office equipment. Crum performed an on-site inspection of the quality control auditor position that Claimant performed at the time of her accident. He observed the job for two and one-half hours and concluded that the position required lifting eight to 10 files, each weighing from one to four pounds. He observed that data

entry and typing was not more than 15% of the work day and writing was only 10 to 20% of the work day, interspersed throughout the day. Crum estimated that the position required typing short narratives, usually less than one-third of a page, and adding short columns of numbers with a calculator a few times each work day. He concluded that keyboarding was required much less than four hours per day and the job was a sedentary job. Crum further testified that the extreme function of quickly and repetitively supinating the hand was not part of the physical requirements of the position. Crum noted that Drs. Brinkman, Robin, Kellogg, Hadley, Mordick, Friedman, and Moore all concluded that Claimant could return to her time of injury work and that a functional capacity evaluation demonstrated that Claimant could work in the light physical demand category. Based upon his on-site inspection and observations, Crum concluded that Claimant could return to her pre-injury position. Crum noted that except for Dr. Bartling and Dr. Magnuson, all of the physicians who had treated or evaluated Claimant have concluded that she can return to her time of injury job.

82. Crum considered the restrictions imposed by Drs. Brinkman, Robin, Kellogg, Hadley, Mordick, Friedman, and Moore and analyzed Claimant's disability outside of the financial industry. He concluded that Claimant had lost access to approximately 50% of the non-financial industry jobs she might have been able to perform prior to her industrial accident.

83. Crum aknowledged that if the opinions of Drs. Bartling and Magnuson that Claimant was unable to work were applied, Claimant would be totally and permanently disabled. Absent the opinions of Drs. Bartling and Magnuson, he concluded that Claimant would suffer no loss of wage earning capacity and no disability in excess of her permanent impairment. Crum testified that he had helped dominant hand or arm amputees back to work and did not agree that dominant hand or arm injuries preclude the individual from finding work.

84. Crum testified that even assuming some limitations of her left arm, Claimant could work as a sales associate, cashier, receptionist, bookkeeper, mortgage auditor, hotel clerk,

home health aide, loan officer, bank teller, loan interviewer, insurance agency clerk, optician clerk, or pharmacy technician. He testified of a host of adaptive equipment available to assist individuals with dominant hand injuries, including palm pens, gripping aids, foot-operated computer mice, voice recognition software, split keyboards, one-handed keyboards, and software that adapts a regular keyboard to one-handed use.

85. Commission rehabilitation consultant Kenneth McKim completed a job site evaluation of Claimant's position and concluded that it required continuous fine manipulation and fingering.

86. Claimant was earning $16.29 per hour plus various benefits at the time of her industrial accident. Based on Claimant's impairment rating of 27% of the whole person, her permanent work restrictions limiting her to occasional lifting of no more than 33 pounds and frequent lifting of no more than 23 pounds, her inability to use her dominant left arm for quick, repetitive supination or keyboarding more than one-third of the work day, and considering her non-medical factors, including her age, high school education with approximately one year of college, transferable skills in sedentary and light occupations, prescription medication regime, and her questionable ability to sustain long-term very high volume bank auditing duties, Claimant's ability to engage in gainful activity has been significantly reduced. The Referee concludes that Claimant has established a permanent disability of 40% of the whole person, inclusive of her permanent impairment.

87. Odd-lot**.** A claimant who is not 100% permanently disabled may still prove total permanent disability by establishing that he is an odd-lot worker. An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market—absent a

business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status rests upon the claimant. Dumaw v. J. L. Norton Logging, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). A claimant may satisfy his burden of proof under the odd-lot doctrine by showing that he has attempted other types of employment without success, that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available, or that any efforts to find suitable work would be futile. Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

88. In the present case, Claimant has testified of two failed work attempts at FirstBank in her time-of-injury job. Claimant voluntarily resigned each time; the record indicates no dissatisfaction by FirstBank with her performance. These attempts do not sufficiently prove that she attempted other types of employment without success. Claimant has not presented evidence of a serious but unsuccessful work search. She applied for approximately six jobs in Fairbanks, Alaska, which she did not obtain. This minimal attempt does not sufficiently prove an unsuccessful work search. Claimant has presented Gann's expert opinion that she is totally disabled and it would be futile for her to search for work. However, Gann's opinion in this regard is not persuasive. Claimant has not established that she is an odd-lot worker.

89. **Attorney fees**. The final issue is Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804. Claimant seeks attorney fees for Defendants' delay in paying permanent partial impairment benefits, which Defendants acknowledged were due.

90. 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:

> *Attorney's fees - Punitive costs in certain cases.* - 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 a claimant 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).

91. Alleged statutory limitation on the Association's liability for attorney fees. Defendants herein note that "the Association is a creature of statute. It has only the powers and obligations given to it by the Legislature." Maguire, Ward, Maguire & Eldredge v. Idaho Insurance Guaranty Association, 112 Idaho 166, 167, 730 P.2d 1086, 1087 (Ct.App. 1986). Defendants assert that the Association is exempt from liability for attorney fees assessed pursuant to Idaho Code § 72-804, by operation of Idaho Code § 41-3605 which provides in part:

> (7) "Covered claim" means an unpaid claim, … which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this act applies issued by an insurer, if such insurer becomes an insolvent insurer after the effective date of this act ….
>
> ….
>
> "Covered claim" shall not include any amount awarded as punitive or exemplary damages ….

Idaho Code § 41-3605(7).

92. Claimant responds that the "punitive or exemplary damages" mentioned in the above section refer to punitive damages as discussed in Idaho Code § 6-1604 and not to punitive costs pursuant to Idaho Code § 72-804. Idaho Code § 6-1604 provides in part:

> LIMITATION ON PUNITIVE DAMAGES. (1) In any action seeking recovery of punitive damages, the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.
>
> (2) In all civil actions in which punitive damages are permitted, no claim for damages shall be filed containing a prayer for relief seeking punitive damages. However, a party may, pursuant to a pretrial motion and after hearing before the court, amend the pleadings to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the pleadings if, after weighing the evidence presented, the court concludes that, the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. ….

More to the point, Idaho Code § 6-1601(9) provides: "'Punitive damages' means damages awarded to a claimant, over and above what will compensate the claimant for actual personal injury and property damage, to serve the public policies of punishing a defendant for outrageous conduct and of deterring future like conduct."

93. It is noteworthy that none of the terms "damages," "punitive damages," or "exemplary damages" appear in Idaho Code § 72-804. "An award of attorney fees in a workers' compensation case must be deemed compensation to the injured employee and not as a penalty against the employer or surety." Dennis v. School District No. 91, 135 Idaho 94, 98, 15 P.3d 329, 333 (2000), citing Mayo v. Safeway Stores, Inc., 93 Idaho 161, 457 P.2d 400 (1969). Idaho Code § 41-3605(7) does not exempt the Association from Idaho Code § 72-804.

94. The question remains whether the Association qualifies as a "surety" pursuant to Idaho Code § 72-804. Idaho Code § 41-3608(1)(c) provides that the Association shall:

> (c) Be deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent including, but not limited to, the right to pursue and retain salvage and subrogation recoverable on paid covered claim obligations.

95. Thus the Association is deemed Claimant's insurer for purposes of Idaho Code § 72-804 and is not exempt from an award of attorney fees for unreasonable conduct. Inquiry must

be made into the Association's delay in payment of Claimant's permanent partial impairment benefits.

96. Reasonableness of delay. On June 26, 2001, Fremont provided both Claimant and the Industrial Commission a Notice of Claim Status explaining that Dr. Mordick had given Claimant a 27% whole person impairment rating, which equated to $33,858.00, and concluding: "You will receive $501.60 every fourteen days until this impairment is paid in full." Exhibit 54, p. 14. Fremont commenced payment of permanent partial impairment benefits and paid Claimant approximately $27,435.39 by June 29, 2003, whereupon payments ceased. On September 18, 2003, Claimant's counsel wrote Defendants inquiring about the unpaid balance of Claimant's permanent impairment benefits.

97. On October 27, 2003, the Commission granted the Association's motion to stay proceedings in the instant case pursuant to Idaho Code §41-3618. The stay and the Association's involvement herein resulted from the failure and liquidation of Fremont Compensation, successor in interest to Fremont Industrial Indemnity Company, the prior surety herein. On June 30, 2004, the stay expired.

98. On November 8, 2004, Claimant's counsel wrote Defendants, noting that the stay was lifted and requesting payment of the balance of the permanent partial impairment benefits still owing in the amount of $6,149.61. The record contains no response from Defendants. Claimant's counsel wrote Defendants again on November 23, 2004, December 21, 2004, and January 15, 2005, each time requesting payment of Claimant's permanent impairment benefits. The record contains no response from Defendants. On February 16, 2005, Claimant's counsel wrote Defendants requesting payment of Claimant's permanent impairment benefits and raising the issue of attorney fees for wrongful withholding thereof.

99. Finally, by letter of March 14, 2005, the Association provided Claimant's counsel a check for $4,243.21, which, pursuant to Fremont's ledger, constituted full payment of the

balance. By letter dated March 22, 2006, Claimant's counsel asserted that, contrary to Fremont's ledger, Claimant had not received checks of $501.60 on July 10, 2001, October 9, 2002, November 26, 2002, or June 24, 2003, and only received one check—not two—on June 29, 2003. Counsel suggested the Association obtain copies of the drafts in question. However, the Association could not obtain copies of any drafts from the insolvent insurer. Nevertheless, on April 19, 2005, the Association, in good faith, paid the remaining outstanding amount of $2,285.61 asserted by Claimant.

100. Undoubtedly, the liquidation of an insurer results in an administrative nightmare. Thus, the legislature wisely provided for a stay in proceedings under Idaho Code §41-3618. However, Claimant herein received no impairment benefit payments for nearly four months before the stay commenced. The stay remained in force for eight months, expiring on June 30, 2004. Thereafter, Claimant tolerated four months of non-payment before again expressly requesting that Defendants resume payments. Claimant contacted Defendants at least five times over the ensuing four months, each time requesting a resumption of payments. Defendants finally responded and acknowledged, eight months after expiration of the stay and four months after Claimant commenced her series of requests for payment of impairment benefits, that at least $4,243.21 remained owing. Defendants' conduct constitutes an unreasonable delay in payment of impairment benefits due.

101. Claimant has proven her entitlement to an award of attorney fees for Defendants' unreasonable delay in payment of the balance of permanent impairment benefits.

CONCLUSIONS OF LAW

1. Claimant has not proven that she suffers from active CRPS due to her industrial accident.

2. Claimant has proven that she is entitled to additional medical care, including $5,961.55 for past prescription expenses, reasonable ongoing prescription medications, and

doctor visits to monitor her medications. Claimant has not proven her entitlement to trial of a spinal cord stimulator.

3. Claimant has proven that she suffers permanent partial impairment of 27% of the whole person due to her industrial accident. Defendants are entitled to credit for full payment of these benefits.

4. Claimant has proven that she suffers permanent disability of 40%, inclusive of her permanent partial impairment. Claimant has not proven she is permanently and totally disabled pursuant to the odd-lot doctrine.

5. Claimant has proven her entitlement to attorney fees for Defendants' unreasonable delay in payment of the balance of her permanent impairment benefits.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 11th day of May, 2010.

INDUSTRIAL COMMISSION

_/s/_____
Alan Reed Taylor, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June, 2010, 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:

CHRISTOPHER CALDWELL
PO BOX 607
LEWISTON ID 83501

JUSTIN P AYLSWORTH
PO BOX 7426
BOISE ID 83707

sc _/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARLENE GRIFFITH, Claimant, v. FIRSTBANK NORTHWEST, Employer, and FREMONT COMPENSATION, Successor in Interest to Fremont Industrial Indemnity Company, Surety, and IDAHO INSURANCE GUARANTY ASSOCIATION, Party in Interest, Defendants.	**IC 1999-031588** **ORDER** Filed: June 3, 2010

Pursuant to Idaho Code § 72-717, Referee 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 recommendations 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 not proven that she suffers from active CRPS due to her industrial accident.

2. Claimant has proven that she is entitled to additional medical care, including $5,961.55 for past prescription expenses, reasonable ongoing prescription medications, and doctor visits to monitor her medications. Claimant has not proven her entitlement to trial of a spinal cord stimulator.

3. Claimant has proven that she suffers permanent partial impairment of 27% of the whole person due to her industrial accident. Defendants are entitled to credit for full payment of these benefits.

4. Claimant has proven that she suffers permanent disability of 40%, inclusive of her permanent partial impairment. Claimant has not proven she is permanently and totally disabled pursuant to the odd-lot doctrine.

5. Claimant has proven her entitlement to attorney fees for Defendants' unreasonable delay in payment of the balance of her permanent impairment benefits.

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

The Claimant is entitled to attorney fees as provided for by Idaho Code § 72-804. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits and an affidavit in support thereof. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to the time expended or the hourly charge claimed, or any other representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel files any memorandum in response to Claimant's memorandum,

Claimant's counsel may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney's fees.

DATED this 3rd day of June, 2010.

INDUSTRIAL COMMISSION

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

_/s/_____
Thomas E. Limbaugh, Commissioner

_/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June, 2010, 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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LEWISTON ID 83501

JUSTIN P AYLSWORTH
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BOISE ID 83707

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