BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARLENE HINCKLEY, Claimant, v. J.C. PENNEY COMPANY, INC., Employer, and AMERICAN HOME ASSURANCE COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2004-007185** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed June 19, 2012**

INTRODUCTION

Pursuant to *Idaho Code § 72-506*, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue, who conducted a hearing in Idaho Falls on May 13, 2010. Claimant was present in person and was represented by Jay Kohler. Employer and Surety were represented by Alan Hull. Industrial Special Indemnity Fund (ISIF) was represented by Paul Rippel. The parties presented oral and documentary evidence. After a delay in obtaining post-hearing depositions, the parties submitted briefs. Claimant declined to submit the allowed post-hearing reply brief. The case came under advisement on November 14, 2011. 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 by the Commission as the result of the hearing are:

1. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;

2. Whether apportionment for a pre-existing condition pursuant to *Idaho Code § 72-406* is appropriate;

3. Whether and to what extent Claimant is entitled to:

    a. Permanent partial impairment (PPI);
    b. Permanent disability in excess of impairment, including total permanent disability; and
    c. Attorney fees;

4. Whether Claimant is entitled to permanent total disability under the odd-lot doctrine;

5. Whether ISIF is liable under *Idaho Code § 72-332* liability; and

6. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant contends she broke her right arm and injured her right shoulder on June 19, 2004 when a customer – a suspected shoplifter – knocked her down as she hurriedly left the store. After recovery, she has been able to work no more than part-time, about 9 to 12 hours per week. Employer's offer of post-accident work shows Employer is a "sympathetic employer" for purposes of odd-lot analysis. Claimant suffers from a number of injuries and conditions which pre-existed this industrial accident and which combine with the injuries from this industrial accident to render her totally and permanently disabled, thus imposing liability on ISIF also. Alternatively, if her permanent disability is deemed less than total, on a pro-rata basis, Claimant's permanent disability should be apportioned on an 85%/15% basis, with 15% being related to this industrial accident.

Employer and Surety contend Claimant recovered from her injuries related to this industrial accident. She suffered no permanent disability beyond the PPI ratings she

received from physicians. She is not totally and permanently disabled, nor an odd-lot worker. Claimant's subjective assessment of her condition and disability is inconsistent with objective medical findings and opinions. In the alternative, if some permanent disability in excess of PPI is found, it is entirely apportionable to her pre-existing injuries and conditions. In the final alternative, if Claimant is deemed totally and permanently disabled, Employer and Surety, under the *Carey* formula, would be liable for 27% or 135 weeks of disability, the remainder being the responsibility of ISIF.

ISIF contends it bears no liability under relevant statutes. Claimant is not totally and permanently disabled. Alternatively, no pre-existing PPI was ever established, except by way of some speculative hindsight. Such speculation should be disregarded in the absence of contemporaneously documented continuing complaints by Claimant that such injuries and conditions were symptomatic in a way that impaired her daily function. Further, required elements of Section 332 have not been established by Claimant.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. The legal file of the Commission;

2. The hearing testimony of Claimant;

3. Joint exhibits 1-42, including exhibits 38A and 41A, admitted at hearing;

4. Post-hearing depositions of treating orthopedist Gene Griffiths, M.D., of physiatrist Rodde Cox, M.D., of orthopedic surgeon Paul Collins, M.D., and of vocational expert Douglas Crum, C.D.M.S.

Some exhibits are illegible; some are incomplete. For example, exhibit 17, page 49, clearly indicates additional notations were made on the back of the original paper. The back side and its notations were not included in the record. No speculation is made about

what such lost entries might have said.

Objections are overruled in all depositions, EXCEPT as follows: Dr. Cox depo., p. 81 is sustained; Mr. Crum depo., p. 70 is sustained.

FINDINGS OF FACT

1. Claimant worked as a retail clerk for Employer on June 19, 2004. She began working for Employer three years earlier, July 9, 2001. In 2000, Claimant took an early retirement from her career of 25 years; she had worked at Idaho Nuclear Engineering Laboratory (the "Site") for various contractors where she performed cost estimating and budget reporting.

2. On June 19, 2004, Claimant was struck by an alleged shoplifter as she hurriedly left Employer's premises (the "Store"). Claimant was knocked to the floor. Claimant's proximal humerus suffered a comminuted fracture.

3. For two weeks before this industrial accident, Claimant was receiving ongoing physical therapy for a workers' compensation claim following an incident at work which had occurred on May 25, 2004. She felt pain while moving a clothing display fixture. The incident involved her left neck, scapula, and back. The June 19, 2004 accident, and resulting hospitalization, interrupted the physical therapy regimen associated with the earlier incident.

Medical Care

Acute Medical Care after the Store Accident: June 19 – December 2004

4. Claimant was first seen by ER physician Paul Allen, M.D. She initially reported right shoulder pain. X-rays showed a dislocated right shoulder and fractured humerus. Orthopedic surgeon Gene Griffiths, M.D., was brought in for consult. A CT

scan following attempts to reduce the dislocation showed bone fragments with three larger pieces of bone and a traumatic rotation of the humerus; this was later referred to as a "head split" injury, referring to the proximal head of the humerus. Of note was the prior surgical removal of a portion of her right clavicle in 1985.

5. Surgery to reset the fractured humerus was not immediately possible because Claimant was taking Plavix, an anticoagulant. Shawn Speirs, D.O., provided some treatment in consultation with Dr. Griffiths. Dr. Speirs examined her occasionally for this and other conditions in the following months.

6. On June 22 Claimant was sent home, her arm in a sling. Home health care was prescribed. Claimant was instructed to continue her physical therapy exercises.

7. Dr. Griffiths monitored Claimant's condition in follow-up until surgery could be performed on July 2, 2004. The surgery required a prosthetic replacement of the humeral head. The remainder of her hospital course was uneventful; she was monitored for possible cardiovascular difficulties as a result of the discontinuance of her Plavix, but no such difficulties arose. Claimant was discharged on July 7. Her right arm being temporarily incapacitated by the surgery. Home health care was again prescribed.

8. Claimant received home health care beginning June 23 through August 2. She previously had begun receiving home health care on May 13, two weeks before the lifting incident. She had reported feeling some pain after moving a fixture at work.

9. Dr. Griffiths continued with follow-up visits. By August 27, Claimant's range of motion was full, but with pain at the extremes. She had discontinued narcotic analgesics and was taking only Tylenol, despite her reports of continued pain in her right shoulder.

10. By November, some left wrist symptoms had developed from overuse. Also, she reported a return of some bilateral lower extremity symptoms. She reported the return of her left neck and shoulder symptoms as well.

11. On November 17, Dr. Griffiths allowed a limited return to work, left-handed only, but ambiguously stated, [she] "is unable to return to work due to the weakness and pain at the shoulder and also issues of knee pain and foot pain and neck pain." He prescribed continuing physical therapy—a work hardening regimen.

12. On a December 13 visit, Claimant and/or Employer had difficulty with the work release – whether it said 2 pounds or 21 pounds – and whether she should be off work because of a left inguinal hernia which, she stated, another doctor had related to the work-hardening program. Dr. Griffiths recommended she return to work with a 2-pound, minimal-hand-use restriction.

13. On December 22, Claimant reported difficulty performing the three-hour work blocks she had been assigned. Dr. Griffiths recommended she continue working two to three hours per day, with hourly breaks if needed, and no lifting over two to three pounds with her right hand. The examination on that date was more directed at Claimant's left wrist, previously diagnosed as DeQuervain's tenosynovitis.

Potential Heart Attack: January 7, 2005

14. Claimant presented for hospital admission through the ER on January 7, 2005. She had been brushing snow off of her car when she felt chest pain radiating into her left arm. As she provided a history, Claimant reported she had decreased her activity because of arthritis.

15. Cardiologist Kenneth Krell, M.D., ordered an EKG and diagnosed "acute

coronary syndrome," but not a myocardial infarction. Consultant Douglas Blank, M.D., recommended cardiac catheterization. John Chambers, M.D., performed the procedure. Despite ambiguous indications, including elevated enzymes, he did not diagnose a myocardial infarction. Dr. Krell's discharge diagnosis on January 9 was "minimal" coronary disease.

16. Later, during a bout of fever and cough on January 27, chest X-rays showed negative for acute cardiopulmonary disease.

Left Inguinal Hernia Repair: January 21, 2005

17. On January 19, Dr. Griffiths released Claimant to light duty, with significant limitations. He made this release dependent upon the surgeon's "OK" after her upcoming hernia repair.

18. Dr. Speirs examined her occasionally for this and other conditions in the following months.

Continuing Medical Care: January 23 - April 14, 2005

19. Eric Baird, M.D., repaired a left inguinal hernia which he suggested was aggravated by physical therapy. By February 7 he released Claimant from his care and expected no further difficulty related to the hernia or its repair. He released her to full work effective February 21.

20. Between February 7 and 21, Claimant suffered a bout of pneumonia.

21. On February 23, Dr. Griffiths recommended Claimant undergo an epidural steroid injection. The injection was performed on March 21. Because of the difficulty in maintaining Claimant's physical therapy and work-hardening regimen, Dr. Griffiths continued Claimant's temporary work restrictions.

Hospital Admission: April 15, 2005

22. Claimant appeared at the ER with complaints of chest pain. After being admitted for three days, no new cardiopulmonary condition was noted. A C-spine MRI showed mild degeneration from C4 through C7 of a quality that would be expected to be symptomatic.

Continuing Medical Care to MMI: April 18 - June 29, 2005

23. On April 18, Dr. Griffiths examined Claimant's right upper extremity and left wrist. He noted her progress continued slowly. He mentioned that "sporadic" attendance at physical therapy and intervening unrelated hospitalizations prolonged Claimant's recovery.

24. On May 16, Dr. Griffiths examined Claimant. He concurred with the physical therapist that despite symptomatic complaints, Claimant had reached medical stability concerning her right arm and shoulder injury.

25. On May 18, Claimant visited Dr. Griffiths for hurt left ring and little fingers after she banged her hand on a cash register. X-rays revealed no fracture.

26. On May 27, Dr. Griffiths' PA allowed Claimant a couple days' release from work because she claimed pain from undergoing a PPI examination.

27. On June 29, Dr. Griffiths examined Claimant and rated her PPI at 39% of the upper extremity, based largely upon Claimant's demonstration of loss of range of motion and upon her subjective reports of inability to perform specific functions at work. This translated to a 23% whole-person PPI. Dr. Griffiths did not include a description of permanent restrictions.

28. Subsequent notes imply that Claimant's original temporary restrictions of

no lifting more than three pounds with her right hand, work only two to three hours per day, etc., had become permanent. However, in June of 2006, Dr. Griffiths allowed that Claimant could gradually increase her hours to four to six per day as tolerated. In August 2006, Dr. Griffiths told Claimant no further treatment could likely help her; she needed to live with the pain and/or adjust her activity to tolerance. In a July 5, 2007 letter to Claimant's attorney, Dr. Griffiths revisited his PPI rating. On the same bases he used in 2005, Dr. Griffiths rated Claimant's PPI at 38% of the upper extremity, which he opined translated to a 14% whole-person PPI.

Continued Medical Care Post-MMI: June 29, 2005 – hearing date

29. Claimant next contacted Dr. Griffiths' office on July 14, 2005. She reported neck, shoulder, and arm pain arising at work, which prevented her from sleeping at night. She was seeking a retroactively approved release from work. Without Dr. Griffiths being present to authorize this release, his office would not issue one. On July 18, 2005, a release from work on July 14, 2005 was issued.

30. On July 21, 2005, David Simon, M.D., performed an IME at Defendants' request. He noted exaggerated pain behavior on examination. He noted that she gave inconsistent effort in various testing. He noted her perceived disability was 100%; this perception was inconsistent with his objective findings upon examination. He opined that surgery for the humerus and shoulder was necessary and related to the Store accident. He opined that a causal relationship did not exist between the Store accident and her then-current neck symptoms. He opined that neither her cardiac condition nor the hernia and its repair were caused by the Store accident or physical therapy. He opined she had reached MMI and rated her PPI at 14% as a result of the Store accident.

31. On August 31, 2005, Claimant visited Dr. Griffiths with multiple complaints, but primarily about a resumption of her left neck pain for which she was receiving physical therapy at the time of the June 19, 2004 industrial accident. Care for Claimant's degenerative left neck and shoulder symptoms continued.

32. In December 2005, a colonoscopy for a symptomatic nonindustrial condition was performed.

33. In March of 2006, Dr. Speirs became concerned with progressive osteoporosis. He noted Claimant's body was not absorbing calcium sufficiently. He and Dr. Liljenquist also treated her for a whiplash injury following an automobile accident.

34. April 2006 saw a return to Dr. Griffiths with complaints of right upper extremity pain. Dr. Griffiths diagnosed degenerative disc disease of the C-spine with radiculopathy into the right upper extremity. He also noted a cyst in her left wrist.

35. On June 12, 2006, Dr. Griffiths refused to issue a release from work.

36. A July 2006 right shoulder arthrogram found no rotator cuff tear although it suggested the presence of synovitis. Claimant continued to visit Dr. Griffiths with pain complaints. In November 2006, Dr. Griffiths suggested a pain management program and referred Claimant to Shawn Speirs, D.O.

37. In December 2006, Claimant visited an urgent care clinic for low back pain. She reported she hurt it lifting something at work. Diagnostic imaging showed no acute abnormalities or injuries, only some early degenerative joint disease.

38. In May 2007, Dr. Griffiths noted he was moving out of the area and referred Claimant's care to his partners for orthopedic concerns, and to Dr. Speirs for pain management.

39. Claimant underwent conservative pain management involving a TENS unit and medication.

40. On February 26, 2008, Mark Parent, M.D., evaluated Claimant's cardiovascular system at Defendants' request. He opined that before the Store accident, Claimant suffered a PPI of 5% of the whole person as a result of her non-industrially related coronary artery disease.

41. On February 27, 2008, Paul Collins, M.D., examined Claimant at Defendants' request. On examination, he noted inconsistencies of effort. He opined she was at MMI and rated her PPI at 10% of the whole person. He recommended right-handed lifting restrictions caused by the Store accident to be 10-20 pounds to mid-chest, 5 pounds above that. He did not recommend any lifting limits for her left upper extremity.

42. On May 25, 2008, Rodde Cox, M.D., examined Claimant at Defendants' request. As did Dr. Simon, Dr. Cox noted non-physiologic subjective symptoms upon examination. He noted her upper extremities showed no atrophy. He opined Claimant over-perceives her disability. He stressed his opinion that her symptom magnification syndrome did not discredit the possibility of actual pain and/or some disability, that it should not be interpreted as intentional misrepresentation, and that it likely represented a learned pattern of behavior. Dr. Cox agreed with Dr. Simon's PPI assessment of 14% of the whole person. He opined her condition caused by the Store accident would not restrict her from working an 8-hour day. He recommended a lifting restriction of 10-15 pounds using her right shoulder.

Expert Medical Opinions

43. In post-hearing deposition, Dr. Griffiths clarified that he did not restrict

Claimant's left-handed lifting. He did restrict her right-handed and bilateral lifting. Contrary to Claimant's assertions, Dr. Griffiths never gave Claimant *carte blanche* with regard to issuing notes releasing her from work. Dr. Griffiths opined that generally, Claimant was capable of doing more than she claimed or demonstrated in his office.

44. In post-hearing deposition, Dr. Paul Collins opined that the June 19, 2004 industrial accident caused the humeral head fracture which required surgery; it also probably aggravated her pre-existing degeneration in her lumbar and cervical spine on a temporary, not permanent, basis. He opined she suffered PPI rated at 10% of the whole person as a result of this accident. He opined she should be restricted from right-hand and/or bilateral lifting of more than 10 to 20 pounds to mid-chest, 5 pounds above that level. He recognized she lifted 27.5 pounds during a physical capacity evaluation in December 2004, but considered this weight to be an upper limit. He opined that these restrictions are not significantly different from the pre-existing restrictions imposed after her clavicle resection and development of osteoporosis. (Findings of fact hereinbelow establish that Claimant was given temporary, not permanent, lifting restrictions after the clavicle resection; the original, permanent, 10-pound lifting restriction imposed by a Site doctor occurred in 1991, after a C5-6 disc herniation was discovered following a 1989 neck injury). Dr. Collins would impose no limit on left-hand-only lifting. He would not limit her hours of work.

45. A repeat physical capacity evaluation by the same facility in May 2005 resulted in a 15.5 pound maximum with little other change. Dr. Collins related this difference to Claimant's intervening health problems which had caused her to be less active in the interim. To Dr. Collins, Claimant demonstrated an inconsistency in which

her perceived ability to function was significantly less than her actual ability to function. For Dr. Collins, this discrepancy was most salient when testing Claimant's grip strength. It is interesting that among the physicians who offered expert opinions, Dr. Paul Collins recommended somewhat more restrictive lifting limits, but rated Claimant's PPI lower at 10% versus the 14% more generally agreed upon.

46. In post-hearing deposition, Dr. Cox opined Claimant suffered an injury to her right arm and shoulder which was caused by the June 19, 2004 industrial accident. He opined her inguinal hernia was possibly caused by therapy relating to the industrial accident and injury. He opined she was medically stable from all industrially related injuries and conditions when he examined her and rated her PPI at 14% of the whole person. He additionally rated her pre-existing or otherwise nonindustrial PPI: C-spine 18%; cardiopulmonary condition 30%; and knee condition 1% each knee. Dr. Cox noted Claimant had been previously restricted to lifting up to 20 pounds for her osteoporosis and up to 25 pounds for her clavicle resection; using the combined values chart, Dr. Cox arrived at a pre-existing PPI rating of 44% whole person. Although her pre-existing conditions resulted in her hours being restricted to "no overtime" while at the Site, Dr. Cox opined that, at the time of his evaluation, she could work full eight-hour days. He opined her right-hand and/or bilateral lifting should be restricted to 10 to 15 pounds. He noted this restriction was more severe than what the results of physical capacity testing showed necessary, but which in actual pounds was an insignificant difference.

Prior Medical Care

47. Claimant had incurred a number of injuries, diseases, and conditions before the date of the subject accident. Her medical history is well documented for the

time she worked at the Site. The findings in this section address only those conditions which, to a significant possibility, resulted in some permanent impairment and/or permanent restrictions.

48. Claimant suffered bilateral knee injuries in 1983. She underwent arthroscopic surgeries. Post-surgically, she reported nonanatomic dysesthesia and other subjective complaints which were not objectively supported upon examination. Examinations repeatedly showed no muscle atrophy, a finding inconsistent with her reports of decreased function. She was released to return to work without restrictions in January 1984 with a PPI rating of 4% of the lower extremity for her right knee. After continued treatment, in May 1984 Dr. Rheim Jones adjusted his rating to 2% of the lower extremity. Knee problems, particularly her right, were readdressed for several months and occasionally through the years. A 1991 right knee MRI showed no abnormality. The records show that Claimant's reports of functionality demonstrate she over-reported her disability until that litigation concluded.

49. Claimant suffered a broken right collarbone and sternum in 1985. After surgery and complications, she was left with a shortened clavicle. No permanent restrictions were imposed.

50. She was diagnosed with mild depression on various occasions beginning as early as 1985, usually coincident with unusual temporary stressors.

51. Her cholesterol levels have been high since 1988. She takes Plavix for it.

52. Claimant suffered a neck injury in 1989. MRI revealed a herniated C5-6 disc. A December 1989 EMG revealed "very minor" nondiagnostic slowing in her right brachioplexus. On July 1, 1991, permanent restrictions included limited right arm

use, no lifting over 10 pounds, and no overhead work. After a 1992 annual physical, the restriction from overhead work was not marked. The lifting restriction was designated at 25 pounds. This 25-pound limit was reiterated at various physical examinations thereafter.

53. She suffered multiple episodes of dizziness or syncope, never definitively diagnosed, which have been ameliorated coincident with the use of Plavix.

54. In 1994 Claimant was hospitalized after an occurrence of chest pain. X-ray and other diagnostic studies showed some blockage; an angioplasty was performed. During her hospital stay, peptic ulcer disease was also identified. Pulmonary function tests were performed upon a complaint of dyspnea; these were essentially negative. Eight weeks post-angioplasty, she was allowed to return to work with no cardiopulmonary restrictions. After a reoccurrence of chest pain and a hospitalization, her symptoms were considered likely due to a duodenal ulcer or GERD. She was again returned to work without any new permanent restrictions.

55. In 1997 Claimant fell. She strained her shoulder, and bruised both knees and hands. She was released to return to work with no new restrictions, although her prior 25-pound lifting restriction was noted. More than three months later, Claimant reported continuing bilateral hand and arm symptoms which she related to that fall. Doctors were baffled. Ultimately Dr. Stagg called it an "overuse syndrome."

56. In 1998 she fell again. She bruised her right hip. No restrictions were imposed.

57. In June 1999, she reported a right foot injury which she reported had happened in October 1998. An automatic door at a WalMart had struck her foot. No restrictions were imposed.

58. In February 2000, a Site doctor recommended a permanent 20-pound lifting restrictions following a diagnosis of osteoporosis.

59. Also in February 2000, a "no overtime" restriction was permanently imposed following treatment for a gastric ulcer and pyloric stenosis. Nevertheless, she was encouraged to work "as much as possible."

60. In March 2000, Claimant again bruised her left knee. She still had some redness and subjective complaints in February 2001 when a Site doctor deemed it "an incidental finding not affecting her work."

61. In January 2001, Claimant fell again as she caught the bus for work. Contusions and muscle stiffness did not keep her off work.

62. A podiatrist performed surgery on her left foot in October 2002. She requested right foot surgery also. That surgery was performed in November 2002. In January 2003, she returned to work without permanent restrictions being imposed. In 2005, the neuromas for which surgery had been performed had returned. Orthotics were prescribed.

63. Also in 2002, Claimant visited The Sleep Institute. Her presenting complaint was "changed jobs." She was diagnosed with fibromyalgia and sleep apnea with hypoxia. She was noncompliant with recommendations but continued attending follow-up visits after the Store accident. No permanent restrictions were imposed.

64. In 2003 Claimant was evaluated for syncopal episodes. Plavix was prescribed.

65. On May 28, 2004, just three weeks before the Store accident, Claimant visited an urgent care clinic and reported neck, shoulder and arm symptoms which she related to moving a fixture at work on May 25. She sought a release from work.

The physician noted she was "in animated pain." X-rays showed prominent degenerative disease as C5-6 and C6-7 without acute changes. He provided a release from work through June 2, temporary light work thereafter, and prescribed physical therapy.

Vocational Factors

66. Born June 12, 1942, Claimant was 69 years of age at the date of the hearing.

67. She has been a widow since May 4, 2000. Her children are grown and independent. After the Store accident, she lived with a son at his home nearby; she did keep her primary residence as well. She had raised at least one grandchild as well; he is grown and independent.

68. At the date of injury, Claimant earned $7.47 per hour on a full-time basis. At the Site, she earned $11.00 per hour. In late 2006, after her return to work for Employer, she earned $8.26 per hour.

69. Claimant graduated from high school. After an educational hiatus while married, in 1975 she completed a course in business, comprising about 18 months, through Glenn E. Clark Business College. In 1985, she also completed some computer training classes at Eastern Idaho Technical School (I-Tech). She received significant on-the-job training, particularly while working at the Site.

70. She has performed general office and clerical work, has proofread spreadsheets for an accounting firm, and, for 25 years, has performed cost estimating, budget reporting, and general clerical tasks at the Site. She took an early retirement incentive offered at the Site a few months after her husband passed away.

71. Claimant began working for Employer, J.C. Penney, on July 9, 2001, performing sales and customer service primarily in the lingerie and cosmetics departments.

She was hired on a full-time—no less than 35 hours per week—basis.

72. Her earnings records show that, before the accident, her average work week comprised about 25 hours. This average does not include hours or days lost to illness or other medical conditions.

Vocational Experts

73. Doug Crum, CDMS, performed a forensic evaluation of Claimant's vocational potential at Defendants' request. He opined that some physicians' restrictions would result in permanent partial disability and others would not. If Claimant's subjective restrictions were accepted, she would be totally and permanently disabled, and would have been before the accident occurred. However, in Mr. Crum's opinion, more likely than not, where physicians' restrictions are based upon objective examination findings, those restrictions would not render Claimant with any permanent partial disability beyond her PPI. Claimant's loss of access to the labor market available to her before the accident is negligible. Her potential wage loss as a result of the accident is essentially nil.

74. Nancy Collins similarly evaluated Claimant's vocational potential at Claimant's request. Using software analysis, then making expert adjustments, she opined Claimant suffered a 90% loss of access and 60% loss of earning capacity, resulting in a 75% overall disability if Dr. Griffiths' restrictions were adopted. If she were found able to work full-time, her disability would be 50%.

DISCUSSION AND FURTHER FINDINGS OF FACT

75. 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).

PPI and Permanent Disability

76. Permanent impairment is defined and evaluated by statute. *Idaho Code* §§ 72-422 and 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*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

A near-consensus of medical experts, Drs. Griffiths, Simon and Cox, establishes that Claimant suffered a 14% PPI related to the accident. Dr. Griffiths' initial rating of 23% PPI, which he adjusted down to 14% on July 5, 2007, is thought to be a typographical error. Dr. Paul Collins issued a 10% whole person PPI rating.

77. Permanent disability is defined and evaluated by statute. *Idaho Code* §§ 72-423 and 72-425 *et. seq*. Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See*, *Eacret v, Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

78. In considering the issue of disability in excess of impairment, it is first helpful to identify Claimant's permanent limitations/restrictions. Several of Claimant's providers/ evaluators have addressed this issue. On December 8, 2004, Dr. Griffiths' initial restrictions for

Claimant were stringent—limited, light-duty work, with no lifting over two pounds. Claimant was to work 2-3 hours/day, twice a week, then increase as tolerated. (Hr. Ex. 17, p. 48). Dr. Griffiths reduced Claimant's restrictions as her condition improved. By June 12, 2006, Dr. Griffiths increased Claimant's restrictions to 4-6 hours of work/day.

79. On February 27, 2008, Dr. Paul Collins examined Claimant. Dr. Paul Collins recommended right-handed lifting restrictions referable to the Store accident of 10-20 pounds lifting to mid-chest, and lifting of 5 pounds overhead. He did not recommend any lifting limits for the left upper extremity.

80. On May 25, 2008, Dr. Cox defined Claimant's limitations/restrictions as no lifting over 10-15 pounds on the right shoulder. He opined that the Store accident would not restrict her from working an 8-hour day.

81. Claimant retained Nancy Collins, Ph.D., to perform a vocational assessment in furtherance of her claim for disability benefits. To defend against the claim for disability benefits Defendants retained the services of Doug Crum, who also performed a vocational assessment. The assessments vary in the ultimate opinion rendered on the extent and degree of Claimant's disability in excess of impairment.

82. Each party has critiqued the others' vocational expert. Claimant argued that Mr. Crum understated the impact of the industrial accident on Claimant's employability, because Claimant only performs her current job with significant accommodations. Defendants argued that Dr. Collins did not have the benefits of reviewing all of Claimant's medical history and the subsequent reports of Drs. Simon, Paul Collins, Parent and Cox. Further, Dr. Collins' reliance on Dr. Griffiths' report is flawed, given the over-reliance on highly subjective factors.

83. Defendants' criticism of Claimant's vocational report is better taken. Dr. Collins

authored her report in April 2006, and relied on restrictions from Dr. Griffiths that changed subsequent to the date of Dr. Collins' report. Claimant's diagnosis of pain magnification syndrome suggests that Claimant's subjective beliefs about her pain and capabilities, however genuine, do not match the objective findings. To determine whether Claimant suffered permanent partial disability in excess of PPI as a result of the Store accident, more weight is assigned to restrictions based upon objective examinations than to Claimant's subjective and occasionally non-anatomic symptoms.

84. For these reasons, the Commission finds that the opinion of Mr. Crum is more helpful in assessing the extent and degree of Claimant's disability referable to the subject accident. Mr. Crum provided an extensive review of Claimant's pre-injury medical history, as well as an examination of her post-injury treatment. He also analyzed Claimant's job history and earning capacity over the years.

85. After having considered the evidence on loss of access to the labor market and wage loss, as developed in the competing opinions of Dr. Collins and Mr. Crum, we conclude that Claimant has disability inclusive of impairment of 72% of the whole person.

86. Claimant is not 100% totally and permanently disabled.

87. **Odd-lot.** If a claimant is able to perform only services so limited in quality, quantity, or dependability that no reasonably stable market for those services exists, he or she is to be considered totally and permanently disabled. *Boley*, *supra.* Such is the definition of an odd-lot worker. *Reifsteck v. Lantern Motel & Cafe*, 101 Idaho 699, 700, 619 P.2d 1152, 1153 (1980). *Taken from*, *Fowble v. Snowline Express*, 146 Idaho 70, 190 P.3d 889 (2008). Odd-lot presumption arises upon showing that a claimant has attempted other types of employment without success, by showing that he or she or

vocational counselors or employment agencies on his or her behalf have searched for other work and other work is not available, or by showing that any efforts to find suitable work would be futile. *Boley*, *supra.*; *Dehlbom v. ISIF*, 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997).

88. Claimant returned to work for Employer. Since the Store accident, and probably even before, Employer has made accommodations for her various health problems. These accommodations do not demonstrate that Employer is a "sympathetic employer" as that term is used in odd-lot analysis. Rather, it demonstrates that Claimant is a good employee, one to be retained. She is personable. She has skills in working with customers. The Referee found her demeanor at hearing showed she is likely effective at attracting and serving customers. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

89. Claimant asserts she wants to work more hours, but there is insufficient objective evidence to support this claim. Claimant receives Social Security retirement benefits. By use of sick leave, she was averaging fewer than full-time hours before the accident. She has not sought other work. She has not enlisted others to perform a work search for her. Claimant failed to show it likely that a job search would be futile.

90. Claimant failed to establish it likely that she qualifies as an odd-lot worker.

91. Having established Claimant's disability from all causes, the Commission must next consider whether some part of Claimant's disability is apportionable to a pre-existing impairment under *Idaho Code* § 72-406. Defendants ask the Commission to apply Idaho Code § 72-406, and find that Claimant has no disability referable to her industrial accident. That section provides:

> 72-406. Deductions for preexisting injuries and infirmities. (1) In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.
>
> (2) Any income benefits previously paid an injured workman for permanent disability to any member or part of his body shall be deducted from the amount of income benefits provided for the permanent disability to the same member or part of his body caused by a change in his physical condition or by a subsequent injury or occupational disease.

92. The Commission believes that the issue of apportionment is always before the Industrial Commission where a claim for disability benefits is made, simply because the Claimant is only entitled to recover for disability which is causally related to the industrial accident. In this regard, it is worth reviewing the recent case of *Page v. McCain Foods, Inc.,* 145 Idaho 302, 179 P.3d 265 (2008). In *Page, supra,* one of the issues before the Industrial Commission was whether Claimant had suffered disability in excess of physical impairment, and, specifically, whether Claimant was an "odd lot" worker. In connection with the issue of Claimant's disability, the Commission speculated that although there was no evidence which would allow apportionment of Claimant's disability to a pre-existing condition, it was likely that most of Claimant's disability was related to pre-existing factors. Ultimately, the Commission made only a small award of disability to Claimant for her industrial injury. On appeal Claimant asserted that it was Employer, not Claimant, who bore the burden of putting on proof that some portion of Claimant's disability was referable to a pre-existing impairment under *Idaho Code* §72-406. In rejecting this assertion, the Court stated:

> There is no support for the proposition that apportionment is an affirmative defense. It is a statutory dictate that an employer is only liable for the disability attributable to the industrial injury or occupational disease when the permanent disability is less than total. I.C. § 72-406(1). Therefore, the statute calls upon the claimant to produce evidence to persuade the Commission as to the percentage of permanent disability, if any.

Page v. McCain Foods, Inc., 145 Idaho at 309, fn. 2.

In keeping with the Supreme Court's direction that Claimant always bears the burden of proving the extent and degree of his accident-produced disability, it follows that Defendants need not raise *Idaho Code* § 72-406 as an affirmative defense in order for the Commission to consider whether Claimant's proven disability is wholly, or only partly, related to the subject accident. However, from the Court's discussion, it clearly does not follow that Defendants have no responsibility to come forward with evidence on the issue of apportionment. What is anticipated is that Claimant bears the burden of persuasion on the issue of whether he has suffered disability referable to the subject accident. However, once Claimant makes a *prima facie* showing in this regard, the burden of going forward with evidence that some portion of Claimant's disability is, in fact, referable to a pre-existing condition, shifts to Defendants. *See Albright v. MGM Construction, Inc., 102* Idaho 269, 629 P.2d 665 (1981); *Keenan v. Brooks,* 100 Idaho 823, 606 P.2d 473 (1980) (Bistline, J., and Donaldson, J., specially concurring). Here, Claimant made a *prima facie* showing that her disability is referable to the subject accident. Thereafter, the burden of going forward with evidence on the issue of apportionment shifted to Defendants.

93. At various times prior to the subject industrial accident, Claimant has sustained injuries and been assigned temporary and permanent restrictions. As detailed above, Claimant's medical history reflects various ailments—cervical injury in 1973, sternum fracture in 1975, a slip-and-fall injury to her left arm, buttocks, low back, and left shoulder in 1980, left knee surgery in 1984, hysterectomy procedure in 1984, three clavicular surgeries in 1989, herniated disc at C5-6 in 1989, chest pain in 1994, right foot injury in 1998, cervical spine disc rupture in 2000, left knee contusion, osteoporosis in 2001, slip and fall injury in 2001, gastric ulcer disease and pyloric stenosis in 2001. The Commission is persuaded that Claimant suffered from a

number of impairments prior to the subject accident. However, the only contemporaneously rendered pre-accident PPI rating came in 1984 for Claimant's right knee. Claimant received a 4% rating that was adjusted downward to 2% based upon later examination and demonstrated function.

94. To determine Claimant's additional pre-existing impairments and restrictions, the Commission relies on Dr. Cox's analysis. While Dr. Cox's is admittedly a hindsight view of Claimant's previous conditions, his report establishes that Claimant's pre-existing impairment for her cervical spine with herniated discs warranted an 18% whole person impairment, and her cardiac and respiratory components warranted a 30% PPI, in addition to the 2% whole person impairment for her knee. Thereafter, Dr. Cox used the combined values chart to find that Claimant's preexisting impairment was 44% PPI.

95. In considering whether Claimant's various pre-existing impairments increased or prolonged her disability from the subject accident, it is important to understand something about the nature of the limitations/restrictions related to those pre-existing impairments. The record reflects that Claimant was given restrictions prior to her Store accident of 10-pounds lifting in 1990, limited use of the right arm above shoulder level in 1991, no lifting or carrying greater than 25 pounds in 1992, reaffirmed in 1993, 1994, and 1997. Claimant's initial 10-pound lifting restriction was adjusted as early as 1992, presumably as her function improved. In 2000, Dr. Bush recommended a permanent 20-pound lifting restriction. Thus, Claimant's pre-existing permanent restrictions include no lifting over 20-pounds, and limited use of her right arm above shoulder level.

At the present time, Claimant has lifting restrictions of 10-20 pounds with the right upper extremity, no restrictions on lifting with the left upper extremity, and no lifting over 5 pounds

above the mid-chest level, referable to the Store accident. Because the Commission considers Claimant's 1990 10-pound lifting restriction temporary, Claimant's restrictions have changed from 20 pounds to 10-20 pounds and no lifting over 5 pounds above the mid-chest level. Claimant's current restrictions are not substantially more onerous than the restrictions imposed before the Store accident. Therefore, it is clear that Claimant's pre-existing impairments are significant contributors to her current disability.

96. There remains the issue of exactly what form the apportionment should take. Dr. Nancy Collins simply assigned disability ranging from 50% to 75% to the Store accident without much consideration of apportionment. Mr. Crum opined that Claimant's disability due to the Store accident ranges from 0% inclusive of impairment per the opinions of Drs. Paul Collins and Cox, to 18% inclusive of impairment per the opinion of Dr. Griffiths.

97. While Claimant has a reduced physical capacity from the Store accident, she is vocationally trained for and capable of most sedentary and some light work. She has not demonstrated a significant reduction in either labor market access or wage-earning capacity, as a result of the additional limitations stemming from the Store accident. Mr. Crum found that Claimant's additional Store accident restrictions have a nominal impact on her disability.

98. Considering all medical and non-medical factors, we conclude that Claimant's disability from all causes of 72% should be apportioned as follows: Claimant has 47% disability referable to her pre-existing impairment. Claimant has disability of 25% inclusive of impairment, referable to the Store Accident. Therefore, Claimant is entitled to an award of disability of 11% over her PPI award.

Attorney Fees

99. Attorney fees are awardable where the defendants have unreasonably denied or delayed payment of benefits due a claimant. *Idaho Code § 72-804*.

100. Clamant failed to show a likely basis for the imposition of attorney fees.

ISIF Liability and *Carey* Formula

101. Claimant is neither 100% totally and permanently disabled, nor does she qualify as an odd-lot worker. ISIF incurs no liability and therefore apportionment under *Carey* is moot.

CONCLUSIONS

1. Claimant suffered permanent partial disability, attributable entirely to the Store accident, rated at 11% of the whole person, in addition to 14% PPI;

2. Defendants have shown that Claimant's disability from all causes of 72% should be apportioned.

3. Claimant is not 100% totally and permanently disabled; she is not an odd-lot worker;

4. Claimant failed to show a likely basis for an award of attorney fees pursuant to *Idaho Code § 72-804*;

5. ISIF bears no liability under *Idaho Code §72-332*; and

6. The issue of *Carey* formula apportionment is moot.

ORDER

Based upon the foregoing, the Commission hereby ORDERS:

1. Claimant suffered permanent partial disability, attributable entirely to the

Store accident, rated at 11% of the whole person, in addition to 14% PPI;

2. Defendants have shown that Claimant's disability from all causes of 72% should be apportioned.

3. Claimant is not 100% totally and permanently disabled; she is not an odd-lot worker;

4. Claimant failed to show a likely basis for an award of attorney fees pursuant to *Idaho Code § 72-804*;

5. ISIF bears no liability under *Idaho Code §72-332*; and

6. The issue of *Carey* formula apportionment is moot.

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

DATED this ___19th_____ day of June, 2012.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

_Participated but did not sign_____
R. D. Maynard, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __19th_____ day of __June_____, 2012, 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:

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cs-m/amw _/s/_____