BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHRISTOPHER OWEN, Claimant, v. DEL MONTE FOODS, Employer, and ZURICH AMERICAN INSURANCE COMPANY, Surety, Defendants.	)	**IC 2008-004368** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed: November 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 Idaho Falls on March 26, 2010. Claimant, Christopher Owen, was present in person and represented by Dennis R. Petersen, of Idaho Falls. Defendant Employer, Del Monte Foods (Del Monte), and Defendant Surety, Zurich American Insurance Company, were represented by David P. Gardner, of Pocatello. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on August 2, 2010.

ISSUES

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

1. Whether, and to what extent, Claimant is entitled to Permanent Partial or Permanent Total Disability benefits, including whether Claimant is permanently and totally disabled pursuant to the odd-lot doctrine.

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

The issue of whether, and to what extent, Claimant is entitled to further medical care from March 18, 2010, forward is expressly reserved, and the Commission thus retains jurisdiction.

CONTENTIONS OF THE PARTIES

Claimant argues that he is totally and permanently disabled pursuant to the odd-lot doctrine due to his January 21, 2008, industrial accident. He relies upon the testimony of vocational expert Douglas Crum. Claimant also requests an award of attorney fees for Defendants' failure to pay at least 20% permanent disability based upon the opinion of Defendants' vocational expert, Kathy Gammon.

Employer and Surety assert that Claimant is not totally and permanently disabled, is capable of regular gainful employment, and is not entitled to any permanent disability in excess of his 8% permanent partial impairment. Defendants rely upon the opinion of Kathy Gammon. Furthermore, Employer and Surety assert that Claimant is not entitled to an award of attorney fees for Defendants' failure to pay any amount for permanent disability in excess of impairment because Defendants' vocational expert opined regarding Claimant's loss of job access rather than his loss of earning capacity.

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 December 14, 2009, admitted into evidence as Claimant's Exhibit 20;

3. The testimony of Claimant taken at the March 26, 2010 hearing;

4. Claimant's Exhibits 1 through 21 and Defendants' Exhibits 1 and 2, admitted at the hearing.

5. The post-hearing deposition of Tracy Becerra, taken by Claimant on April 20, 2010;

6. The post-hearing deposition of Colleen Baird, taken by Claimant on April 20, 2010;

7. The post-hearing deposition of Douglas N. Crum, CDMS, taken by Claimant on April 20, 2010;

8. The post-hearing deposition of Patrick Farrell, M.D., Ph.D., taken by Claimant on May 3, 2010; and

9. The post-hearing deposition of Kathy Gammon, M.S., CRC, MPT, taken by Defendants on May 4, 2010.

The objections posed during Tracy Becerra's deposition and Dr. Farrell's deposition are sustained. The objections posed during Kathy Gammon's deposition are overruled.

The objections posed during Douglas Crum's deposition are sustained except for Defendants' objection posed at page 64 thereof, which is overruled. Kathy Gammon's report was available to all parties prior to the hearing. J.R.P. 10(E)(4) expressly permits experts testifying post-hearing to base their opinion on exhibits admitted at hearing. Kathy Gammon's report was admitted at hearing as Defendants' Exhibit 1.

After considering 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. Claimant was born in 1972. He was 37 years old and lived in Idaho Falls at the time of the hearing. Claimant is deaf in his left ear. As a teenager he lived in various locations including California, where he worked at a golf course mowing lawns, fixing greens and sand traps, and fueling golf carts.

2. In 1990 Claimant moved to Idaho Falls, where he completed his junior and senior years of high school. During this time, he also attended technical classes in small engine repair, lathe operation, and welding. He graduated from high school in 1991. Claimant testified that he had dyslexia and only completed high school through special education classes. The record documents that he struggled with learning tasks that involved reading.

3. After high school, Claimant began working for a cabinet construction business spraying glue and laying Formica. His duties required carrying wood, glue, and rolls of Formica weighing from 25 to 40 pounds. He left after six months because he could not read a tape measure to the nearest one-quarter of an inch.

4. In 1993, Claimant worked for a curbing business laying custom curbing. His duties included mixing concrete, shoveling sand and gravel, and finishing concrete. He worked for approximately one year until the business went bankrupt.

5. From approximately 1993 through 1996 Claimant cared for his grandmother, who had broken her hip and needed assistance. He received room and board.

6. From approximately 1996 until 1998, Claimant worked at Valley Care Center as a nurse's aid. Certification was required. He advised Valley Care that he had dyslexia and a nurse read him all the questions of the certification exam. Claimant testified that he required four hours to complete the exam, but passed it successfully. At Valley Care, Claimant bathed, fed,

and changed residents. He was supervised by a registered nurse. The residents were able to transfer themselves. Claimant earned approximately $8.00 per hour.

7. In 1998, Claimant went back to caring for his grandmother in her home. He again received room and board. From 1999 until 2001, Claimant worked at his prior job at Valley Care Center. In 2001, he left his job to return to caring for his grandmother. He subsequently returned to work at Valley Care until 2005.

8. In September 2005, Claimant was hired at Del Monte as a laborer. He swept floors, drove forklift, welded, treated seed, bagged seed, stacked 50-pound bags on pallets, and cleaned up the premises. He was required to take an OSHA safety test in the use of fire extinguishers and various chemicals. He required five hours to complete the test, which was normally a two-hour test. Claimant earned $8.44 per hour and worked seasonally, from five to nine months per year. During annual lay-offs, he worked for a temporary employment agency where he was assigned construction and laborer jobs and earned from $6.00 to $9.00 per hour.

9. On January 21, 2008, Claimant was at work for Del Monte when a two-inch thick steel dock plate, weighing perhaps 7,000 pounds, fell across and crushed his right toes and part of his right foot, forcefully extruding the bones from three of his toes. Co-workers used a forklift to move the dock plate enough to extract Claimant's foot and then took him to the hospital. He was treated by Gregory West, M.D. After five surgeries, only part of Claimant's great toe could be salvaged. Dr. West amputated part of Claimant's great toe and all four of his lesser toes. Claimant returned to light-duty work at Del Monte on April 28, 2008, but had a post-traumatic stress episode and left after one day.

10. In July 2008, Dr. West pronounced Claimant medically stable. Dr. West determined that Claimant had reached maximum medical improvement and could return to work.

He rated Claimant's permanent impairment at 8% of the whole person. Dr. West imposed upon Claimant permanent restrictions of lifting no more than 35 pounds, with no standing or walking for more than two hours continuously. Dr. West told Claimant he needed a break of 35 to 45 minutes after two hours of walking or standing.

11. Commission rehabilitation consultant Ken Blanchard contacted Claimant on July 21, 2008, to assist in arrangements for Claimant to return to work at Del Monte. On July 30, 2008, Blanchard gave Claimant's work restrictions to Del Monte.

12. From approximately August 6 through at least August 21, 2008, Claimant attempted to return to work at Del Monte. Claimant testified that his work assignments were beyond his medical restrictions. When Claimant was not able to perform the usual variety of duties, a co-worker commented critically that Claimant did "not need to be here." Claimant quit. He also continued to suffer panic attacks, triggered by looking at some of his prior work areas at Del Monte. He was diagnosed with post-traumatic stress disorder and began treating with Mary Beth Ostrum, M.D.

13. On September 4, 2008, Blanchard met with Claimant at his appointment with Dr. West. In September 2008, Claimant underwent a functional capacity evaluation with Shari Sampson, who found that Claimant met the medium physical demands classification.

14. No later than October 7, 2008, Del Monte offered to extend work to Claimant within his permanent restrictions. Claimant declined.

15. Claimant continued to have extreme foot pain and Dr. West referred him to Holly Zoe, M.D., for pain control. Dr. Zoe provided several injections, but none controlled his foot pain. The Surety then directed Claimant to Patrick Farrell, M.D. On October 8, 2008, Dr. Farrell examined Claimant and diagnosed chronic regional pain syndrome (CRPS), type one. He

prescribed medications and, ultimately, trial of a spinal cord stimulator. Claimant initially reported 85% pain relief with use of the trial stimulator.

16. On February 13, 2009, Dr. Farrell implanted a spinal cord stimulator. After placement of the stimulator, Claimant reported about 60% pain relief. He activated the stimulator when his foot pain worsened and operated the stimulator for two to five hours at a time. The stimulator made his leg twitch, and he could only use the stimulator when lying or sitting down. Claimant had the stimulator reset 11 times by the manufacturer's representative to try to eliminate the leg twitching, but to no avail.

17. In approximately August 2009, Claimant lost his balance and fell, breaking the power box to the stimulator. On August 13, 2009, Dr. Farrell surgically implanted a new power box in his back. After the fall and reimplantation, the stimulator provided only approximately 40% pain relief. Dr. Farrell later testified that a spinal cord stimulator sometimes loses its effectiveness over time due to migration, scar tissue formation, or other causes.

18. Claimant stopped working with Ken Blanchard because he believed that Blanchard did nothing to assist him. The Idaho Division of Vocational Rehabilitation refused to work with Claimant.

19. After being released to return to work, Claimant sought work at the following businesses: Home Depot, Lowe's, Wal-Mart, Albertsons, Idaho Health & Rehab, Kmart, ShopKo, Target, and McDonald's. In each instance he obtained no employment, either because no position was available or because his lifting, standing, or reading capacity was inadequate.

20. In January 2010, Claimant obtained employment one day per week riding a horse and "chasing cattle" at the Idaho Livestock Auction for three or four hours. He earned $7.25 per hour. At the time of the hearing, Claimant was still so employed.

21. On March 5, 2010, Claimant was approved to receive Social Security Disability benefits and began receiving monthly benefits of $530.00.

22. At the time of the hearing, Claimant used the spinal cord stimulator from four to six times daily, but testified that it is no longer effective in reducing his pain and that he wanted it removed. He testified of continuous pain on the top and bottom of his right foot and his right great toe. He takes hydrocodone for his pain. The excruciating pain in his great toe and the bottom of his foot causes him problems in walking. Claimant falls regularly due to his foot pain and missing toes. He has trouble walking and often falls on flat surfaces. He has even greater difficulty on uneven surfaces and stairs. He now lives in the same apartment that he lived in before the accident and has fallen 50 to 60 times on his apartment stairs since the accident. He never fell on those stairs before the accident. Claimant estimated that he falls 10 to 15 times each month. He fell once at his apartment and knocked himself out for approximately one hour. He can tolerate standing for about two hours before he must sit down and elevate his foot for 30 to 60 minutes. Claimant can walk about one mile before he must stop and elevate his foot.

23. Claimant continues to suffer panic attacks triggered by loud crashing noises, slamming doors, and especially the sound of steel clashing on steel. Matthew Pontzer, D.O., prescribed Klonopin for Claimant's panic attacks. Claimant sees Dr. Pontzer every other month.

24. Since the 2009 surgery to implant the spinal cord stimulator, lifting causes Claimant back pain. Claimant testified that he could no longer lay curbing. He further testified that he could not perform his job at Del Monte because it requires too much lifting, standing, and sitting. He acknowledged that he may be able to perform his prior job at Valley Care if they worked with his restrictions.

25. Claimant has third grade reading skills, second grade mathematics skills, and second grade spelling skills. He has no typing skills. He uses a computer once or twice a week to search the internet, but otherwise has little computer expertise.

26. Claimant hunts ducks from 25 to 30 days each fall. He fishes and also went on two deer hunting trips last fall. After his accident, he bought a boat in order to be able to continue duck hunting. He has no driving limitations.

27. Having observed Claimant at hearing and compared his testimony to the other evidence of record, the Referee finds that Claimant is an articulate and credible witness.

DISCUSSION AND FURTHER FINDINGS

28. 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).

29. **Permanent disability**. The first 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. 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). Pursuant to Idaho Code § 72-422, "The proper date for disability analysis is the date that maximum medical improvement has been reached." Stoddard v. Hagadone Corp., 147 Idaho 186, 192, 207 P.3d 162, 168 (2009).

30. Dr. West found that Claimant achieved maximum medical improvement by July 2008. To evaluate Claimant's permanent disability, several items merit examination including his permanent impairment, the physical restrictions resulting from his permanent impairment, and his potential employment opportunities—particularly as identified by vocational rehabilitation experts.

31. Permanent impairment. All parties agree that Claimant suffers a permanent impairment of 8% of the whole person for the complete loss of four of his toes, the partial loss of his right great toe, and persisting right foot pain due to his industrial accident. Defendants have paid appropriate impairment benefits.

32. Work restrictions. Dr. West restricted Claimant to lifting no more than 35 pounds, with no standing or walking for more than two hours continuously. Dr. West also indicated that Claimant would need a break of 35-45 minutes after two hours of walking or standing. After a functional capacity evaluation, Shari Sampson found that Claimant met the medium physical demands classification.

33. Physical therapist Tracy Becerra performed a functional capacity evaluation of Claimant in June 2009. She concluded that Claimant was limited to sedentary to light work. She noted that Claimant had difficulty with activities requiring crouching, kneeling, deep squatting, stair-climbing, or ladder-climbing. She testified that Claimant reported altered spinal cord stimulator output with deeper squatting activities. Becerra's testing demonstrated that Claimant could lift a maximum of 10 pounds from floor to waist level, 30 pounds from waist to crown, and 40 pounds in a front carry. She recommended that Claimant have a total of four 15-minute breaks during an eight-hour work day and that he avoid wet, icy, and greasy floors due to his balance difficulties. Becerra opined that Claimant would not be able to stand or walk for more than two-thirds of a working day. She observed Claimant sit for 70 minutes without a break. Becerra's conclusions in regards to Claimant's physical capacity are the most detailed and persuasive in the record.

34. Employment opportunities. Vocational rehabilitation consultant Colleen Baird administered a variety of cognitive tests and concluded that Claimant's academic skills were very limited. He performed at the second grade level in spelling, fourth grade level in math, and fifth grade level in reading comprehension. She found Claimant's oral vocabulary average. Claimant reported dyslexia, and Baird noted that the difference between his oral and written vocabulary scores was consistent with a learning disability. She concluded that he would not likely be

successful in a formal training program. She also noted that Claimant could sit for four and one-half hours without signs of discomfort during testing. Baird believed there were jobs that Claimant could perform given his level of functioning. She opined that he could return to the work force.

35. Claimant's vocational rehabilitation expert, Douglas Crum, testified that Claimant's lifting restrictions limit him to the sedentary to light range of employments. Crum could not identify any skills Claimant possessed that could be applied to light or sedentary work and could not identify any full-time jobs Claimant could perform in his labor market. Crum testified that Claimant could not work as a waiter, parts clerk, salesperson, fast-food worker, car wash attendant, rental counter clerk, or central supply worker because each would require excessive standing. He further testified that Claimant lacks the literacy and mathematical and/or computer skills to be a telemarketer or merchant patroller and that a central supply position would exceed his lifting restrictions. Crum understood that Claimant was earning $11.44 per hour at the time of his accident and opined that Claimant had access to only 8.5% of the jobs in his local labor market prior to his injury. He opined that Claimant has no post-accident earning capacity and concluded that Claimant is totally and permanently disabled.

36. Employer/Surety's vocational expert, Kathy Gammon, is a certified rehabilitation vocational counselor and a registered physical therapist. Gammon performed a vocational diagnosis and assessment of Claimant's residual employability and concluded that Claimant is not totally and permanently disabled, but rather capable of gainful employment. Gammon noted that Claimant was employed for almost four years as a nurse's aide and testified that he must have been certified to have performed patient care for that length of time at that facility. Claimant testified, and also reported to Gammon, that he successfully completed a certification exam, which was read to him by a nurse. Gammon opined that Claimant had demonstrated the

capacity to learn and perform a new job. She noted that Claimant's academic test scores were consistently below average when written testing protocols were utilized, but that he performed in the average range when the tests were read to him. She noted that Claimant is likely dyslexic and this condition masks his true abilities and aptitudes. She concluded that with hands-on instruction, Claimant could learn at the semi-skilled level.

37. Gammon accepted Claimant's restrictions as imposed by Dr. West and Tracy Becerra and opined that Claimant could work in the sedentary and light exertional categories. She acknowledged that Claimant could no longer work as a certified nurse's aide because of his lifting restrictions. However, she identified at least 10 positions in the local labor market that Claimant could potentially perform. These included unskilled and very low semi-skilled positions and one semi-skilled position. Gammon did not consider skilled positions because of Claimant's reading disability. The positions included courier driver, night waiter at a truck stop, telemarketer, automatic car-wash attendant, salesperson, storage facility rental clerk, counter clerk, fast food worker, security guard, merchant patroller, and gate-keeper. Gammon testified that Claimant could be a salesperson at Sportsman's Warehouse. She noted that Claimant's success in obtaining CNA certification demonstrated that he had sufficient math skills for a salesperson position. She opined that he had, or could learn, sufficient computer skills to perform these positions. Gammon also noted that Del Monte offered to extend work to Claimant within his permanent restrictions in October 2008, but that Claimant declined.

38. Gammon testified that Claimant suffered a loss of access of 28-32% of the labor market, including the medium, heavy, and very heavy labor markets, due to his industrial accident. However, Gammon opined that Claimant could restore his wage earning capacity with other employment that he could perform within his restrictions.

39. Significantly, even Douglas Crum acknowledged that Claimant could work part-time in fast food or food preparation, but opined that he could not do so full-time because he could not tolerate the standing required. He also noted that the floors may be slick in many fast-food restaurants. Crum testified that Claimant might be a movie ticket taker, but expressed concern about Claimant's limited math ability. Crum noted that Claimant could do telemarketing or telesurveying work, but that he currently lacked computer skills that are commonly required in such work. Crum acknowledged that Claimant could possibly work as a security guard where his duties might include driving around and ensuring that buildings were securely locked. However, Crum was unaware of any such full-time security jobs and opined that any such position would likely be part-time.

40. Based upon written examinations, Claimant has third grade reading skills, second grade mathematics skills, and second grade spelling skills. He has no typing skills. However, he demonstrated strong oral skills at hearing. The record of his cognitive testing documents average ability when the testing was administered orally. Claimant is capable of significant activity. He hunts ducks 25 to 30 days each fall. He has no driving limitations. At the time of hearing, Claimant was working one day each week riding a horse at the Idaho Livestock Auction and earning $7.25 per hour. Claimant also acknowledged that he may be able to perform his prior CNA job at Valley Care if they worked with his restrictions. In light of Kathy Gammon's detailed analysis and testimony and Douglas Crum's acknowledgement of possible positions Claimant might perform, Crum's conclusion that Claimant is totally and permanently disabled from gainful employment is not persuasive.

41. Based on Claimant's impairment rating of 8% of the whole person, his permanent physical restrictions, especially but not limited to his standing, walking, and lifting restrictions,

and considering his non-medical factors including his age of 36 at the time of the accident, limited education, limited work experience, reading disability, limited reading and mathematics skills, and inability to return to most of his previous positions, Claimant's ability to engage in regular gainful activity has been reduced. The Referee concludes Claimant has established a permanent disability of 60%, inclusive of his 8% whole person impairment.

42. 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).

43. A claimant may satisfy his burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways:

1. By showing that he has attempted other types of employment without success;
2. By showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or
3. By showing that any efforts to find suitable work would be futile.

Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

44. In the present case, Claimant has testified of one failed work attempt at Del Monte since his industrial injury. This lone attempt does not sufficiently prove that he attempted other types of employment without success. Claimant has not presented evidence of a serious but unsuccessful work search. His testimony establishes that he sought work at approximately ten businesses and obtained part-time work at the livestock auction. He has also presented Douglas Crum's expert opinion that he is totally disabled, thus inferring that it would be futile for Claimant to look for work. However, as noted above, Crum's opinion is not persuasive. Claimant currently has employment, albeit part-time. Even assuming that Claimant had established a prima facie odd-lot case, Gammon persuasively testified that there were jobs available that Claimant could perform and for which he is competitive. Claimant has not proven that he is totally and permanently disabled pursuant to the odd-lot doctrine.

45. **Attorney fees**. The next issue is Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804. Claimant seeks attorney fees for Defendants' failure to pay permanent disability benefits of 20%, which Defendants' vocational expert allegedly opined were due.

46. Attorney's 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's 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).

47. Claimant is not entitled to an award of attorney fees for Defendants' failure to pay any amount for permanent disability in excess of impairment because Defendants' vocational expert opined regarding Claimant's loss of job access, rather than his loss of earning capacity.

CONCLUSIONS OF LAW

1. Claimant has proven that he suffers permanent disability of 60%, inclusive of his 8% permanent impairment. He has not proven that he is totally and permanently disabled pursuant to the odd-lot doctrine.

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

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 19th day of October, 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 November, 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:

DENNIS R PETERSEN
PO BOX 1645
IDAHO FALLS ID 83403-1645

DAVID P GARDNER
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POCATELLO ID 83204-0817

sc _/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHRISTOPHER OWEN, Claimant, v. DEL MONTE FOODS, Employer, and ZURICH AMERICAN INSURANCE COMPANY, Surety, Defendants.	)	**IC 2008-004368** **ORDER** Filed: November 3, 2010

Pursuant to Idaho Code § 72-717, Referee Alan Taylor 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 proven that he suffers permanent disability of 60%, inclusive of his 8% permanent impairment. He has not proven that he is totally and permanently disabled pursuant to the odd-lot doctrine.

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

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

DATED this 3rd day of November, 2010.

INDUSTRIAL COMMISSION

_Participated but did not sign_____
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 November, 2010, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

DENNIS R PETERSEN
PO BOX 1645
IDAHO FALLS ID 83403-1645

DAVID P GARDNER
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sc _/s/_____