BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ALTA RASMUSSEN, Claimant, v. WAL-MART STORES, INC., Employer, and AMERICAN HOME ASSURANCE COMPANY, Surety, Defendants.	)	**IC 2006-003826** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** March 25, 2010

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Susan Veltman, who conducted a hearing in Boise, Idaho, on July 21, 2009. Bradford S. Eidam represented Claimant and Alan K. Hull represented Defendants. The parties submitted oral and documentary evidence. Five post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on January 25, 2010 and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the sole issue to be decided is whether and to what extent Claimant is entitled to permanent partial or permanent total disability (PPD/PTD) in

excess of permanent impairment, including whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant sustained an industrial injury to her right ring finger and small finger on March 13, 2006 and that she has not returned to work since having surgery on May 21, 2007.

Claimant contends that she is totally and permanently disabled by virtue of the odd-lot doctrine. She relies primarily on the medical opinions of Dr. Esplin and the vocational opinions of Mr. Crum. Claimant asserts that it would be futile for her to make additional job search efforts and that Defendants have failed to establish that suitable work is regularly and continuously available to her. In the event that the Commission determines that Claimant is not totally and permanently disabled, she asserts that her PPD would be no less than 70%, based on medical and non-medical factors.

Defendants point out that there is a factual dispute as to the nature of Claimant's diagnoses and permanent restrictions. Defendants contend that Claimant demonstrated an ability to return to work following her injury when she was experiencing the same symptoms she reported at hearing. Defendants assert that Claimant failed to establish total permanent disability as an odd-lot worker because she failed to make significant job search efforts and could have returned to work for Employer or found alternate suitable work. Defendants rely primarily on the medical opinions of Dr. Lenzi and the vocational opinions of Mr. Jordan. Defendants contend that Claimant's PPD, inclusive of impairment, is in the range of 25% to 40%.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Joint Exhibits 1-3; 5-16; 20-21; 23-25; and pages 1 through 52 of Joint Exhibit 4; admitted at hearing. (Joint Exhibits 17, 18, 19, 22 and pages 53 through 59 of Joint Exhibit 4 were tendered at hearing but not offered into evidence);

2. Testimony from Claimant and Claimant's sister-in-law, Marie Smith, taken at hearing;

3. The post-hearing deposition of Employer's former safety director, Debra Lynne Hays, taken August 4, 2009;

4. The post-hearing deposition of orthopedic hand surgeon, Vermon Esplin, M.D., taken August 5, 2009, with one correction page dated September 11, 2009;

5. The post-hearing deposition of orthopedic consultant and former hand surgeon, William Lenzi, M.D., taken September 16, 2009, with three exhibits attached, identified as Joint Exhibits 26 through 28;

6. The post-hearing deposition of vocational expert, Douglas Crum, C.D.M.S., taken November 10, 2009, with one exhibit attached, identified as Joint Exhibit 22A;

7. Pages 53 through 59 of Joint Exhibit 4, Pages 12 through 57 of Joint Exhibit 17, Joint Exhibit 18 and Joint Exhibit 19 offered at Mr. Crum's deposition; [1]

8. The post-hearing deposition of vocational expert, William C. Jordan, M.A., C.R.C., C.D.M.S., taken November 10, 2009;

9. Pages 3 and 5 of Joint Exhibit 17 offered at Mr. Jordan's deposition; and

10. The Industrial Commission's legal file in this case.

[1] Defendants offered pages 53-58 of Joint Exhibit 4 and Claimant did not object. Although page 59 was not offered, this appears to have been inadvertent and all 59 pages of Joint Exhibit 4 were admitted for the purpose of having a complete record.

Judicial notice is taken of the 5th and 6th editions of the *AMA Guides to the Evaluation of Permanent Impairment* (*Guides*), consistent with the Commission's Order on Claimant's Motion for Admission of Rebuttal Exhibit, issued November 25, 2009.

Claimant's objection on page 24 of Ms. Hays' deposition is sustained, as is Defendants' objection on page 66. Claimant's objection on page 57 of Dr. Esplin's deposition is sustained. Claimant's objection on page 87 of Mr. Crum's deposition is sustained. Claimant's objection to pages 8 though 11 of Joint Exhibit 17 made on page 92 of Mr. Crum's deposition is sustained. Claimant's objection on page 136 of Mr. Jordan's deposition is sustained.

All other objections made during depositions are overruled.

Claimant's objection to Joint Exhibit 19 initially asserted at hearing and reiterated on pages 61-64 of Mr. Crum's deposition is overruled, but not on the basis argued by Defendants. Defendants' assertion that Joint Exhibit 19 is admissible because the Commission is required to take judicial notice of all documents in its files pertaining to a particular claimant and that such requirement obviates the need for the offering party to establish authenticity, relevance or an exception to the hearsay rule, is overly broad. In the present case, Defendants did not request that judicial notice be taken of anything other than the *Guides*. Rather, Defendants offered 92 pages of documents identified as "Claimant's Prior Workers' Compensation Claims" with no attempt to establish the source of the documents or the relevance of the documents to the current case. The documents in Joint Exhibit 19 are not included in the Commission's legal file pertaining to this case, with the exception of page 2.

Joint Exhibit 19 consists of documents including medical records, vocational reports and settlement agreements relating to the subject injury as well as previous industrial injuries sustained by Claimant. The information has probative value regarding Claimant's pre-existing

conditions and other factors that are properly considered when assessing permanent disability. There is no indication that the information is fraudulent or inherently unreliable. The documents constitute hearsay, as do most of the other documents admitted into evidence without objection. Joint Exhibit 19 is admitted consistent with Idaho Code § 72-708 regarding summary process and procedure and based on the duty of the Referee to develop a full record in accordance with Idaho Code § 72-714 (3). Claimant's objections regarding hearsay and the lack of foundation will be considered with regard to the weight given and credibility afforded to the documents. Additional legal analysis of Defendants' assertion that the Commission is required to admit Joint Exhibit 19 is deferred as moot because the exhibit is admitted in its entirety.

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

FINDINGS OF FACT

Background

1. Claimant was 65 years old and resided in Jerome, Idaho, at the time of hearing. She completed the 10th grade at Burley High School, but dropped out during the 11th grade and has not obtained a GED. Claimant is able to read and perform basic math skills. She has a computer at home and the skills necessary to type letters, navigate the internet and play games. In 1997, Claimant completed a three month program to learn how to use proprietary software utilized by Avis Car Rentals, where she worked at the time. She is right hand dominant.

2. Claimant's work experience includes waitressing, cashiering, deli-work and bussing tables in the food service industry; cashiering, stocking and janitorial work at a convenience store; housekeeping and front desk work at a hotel; and car rental agent.

3. Claimant began working for Employer as a cashier at its retail store in Nampa in February 2003. She subsequently transferred to Employer's retail store in Jerome where she worked as a cashier through the date of her injury. When Claimant worked at cashier stations with a belt, the customer would place items to be purchased on the belt that would move from her right to her left. She would usually scan the item with her right hand and use her left hand to place the item into a bag. When Claimant worked the express lane (20 items or less), customers would place the items on a small counter without a belt. Claimant would pick up an item, scan it and place it in a bag. Claimant's job included operating the cash register and giving back change. Items scanned by Claimant would include groceries, electronics, clothing, shoes and other household items sold by Employer. Claimant was expected to scan 500 items per hour.

4. Essential functions of Employer's cashier position include the ability to constantly scan and bag items, continuously lift items weighing less than 10 pounds and frequently lift items weighing more than 10 pounds.

Pre-Existing Medical Conditions

5. In March 1996 Claimant sustained a work-related slip and twist injury to her right knee. She underwent three surgeries and was awarded 4% PPI (the average of two ratings assigned) attributable to her right knee. Claimant was assigned permanent restrictions regarding kneeling, squatting and stair climbing. Her treating physician felt that she should avoid prolonged standing.

6. In October 2001, Claimant sustained a work-related trip and fall injury to her left knee. She was diagnosed with a nondisplaced fracture of the distal pole of the patella which did not require surgery. Claimant was assigned 3% PPI for her left knee condition but was not assigned permanent restrictions. She has not received treatment for her left knee since 2003.

7. Claimant reports being deaf in her left ear. There are no medical records to confirm a diagnosis and no PPI has been assigned for hearing loss.

Injury and Medical Treatment/Evaluation

8. On March 13, 2006, Claimant was working at an express lane when a customer approached and placed his items on the counter. One of the items was a glass bottle of Tabasco sauce which started to fall. Claimant reflexively reached with her right hand to grab the bottle. In doing so, she caught her right little finger on a screw that was protruding from the counter. Claimant felt immediate pain with nausea and dizziness.

9. What initially appeared to be a minor laceration of Claimant's right little finger and strain of her right ring finger was subsequently determined to be a more serious injury.

10. Claimant first sought medical treatment at Physician Center in Twin Falls on April 4, 2006. Claimant was assigned work restrictions and advised to "buddy tape" her little finger to her ring finger. X-rays revealed degenerative changes without signs of acute injury. Claimant's symptoms persisted and she continued treatment with Douglas Stagg, M.D., at Physician Center. In May 2006, Dr. Stagg diagnosed a new onset of right trigger finger associated with the industrial injury and performed a steroid injection. Dr. Stagg referred Claimant to orthopedist, Blake Johnson, M.D.

11. Claimant consulted with Dr. Johnson in June 2006 and he performed a right trigger finger release surgery in July 2006. Claimant continued to be symptomatic in her right little finger and did not benefit from additional steroid injections performed by Dr. Johnson. Dr. Johnson referred Claimant to hand surgeon, Vermon Esplin, M.D.

12. Dr. Esplin evaluated Claimant in December 2006. He recommended exploration and repair of Claimant's right collateral ligament. He performed surgery on May 21, 2007 at

which time he found that Claimant's radial collateral ligament had torn off the phalanx of her little finger. He reattached the ligament with the use of an anchor, wires and pins.

13. Claimant continued to be symptomatic following surgery and a course of physical therapy. In July 2007, Dr. Esplin ordered an MRI of Claimant's right hand to determine if Claimant had infection or an inflammatory condition that would be consistent with regional pain syndrome. In September 2007, lab work was performed to rule out infection to the bone. Lab work was normal and a referral to a pain specialist was considered. In October 2007, Dr. Esplin diagnosed chronic regional pain syndrome (CRPS), sometimes referred to as reflex sympathetic dystrophy (RSD). He based the diagnosis on inflammation shown on an MRI, temperature changes, swelling/redness and reports of pain with incidental contact.

14. In October 2007, Claimant was evaluated by hand specialist, William Lenzi, M.D., at the request of Surety. Dr. Lenzi determined that Claimant's sensitivity to touch, swelling, shininess of skin and lack of perspiration were consistent with RSD but that Claimant's reaction to touch was inconsistent and suggestive of volitional symptoms. He recommended that Claimant be evaluated by a pain specialist to confirm or rule out the diagnosis of RSD. He calculated 3% PPI based on range of motion deficits and pursuant to the 5th Edition of the *Guides*.

15. In November 2007, Claimant was evaluated by pain specialist, Pat Farrell, M.D., at the referral of Dr. Esplin. He noted allodynia, coolness and hyperesthesia upon examination and diagnosed RSD/CRPS, type 1, of Claimant's right upper extremity. Stellate ganglion block injections were performed but were unsuccessful.

16. Claimant continued with treatment at Dr. Esplin's direction during early 2008 and consistently reported pain with increasing numbness in her right hand/fingers. A repeat EMG in

March 2008 was negative for ulnar nerve problems but revealed mild right carpal tunnel syndrome (CTS), not attributable to her industrial injury.

17. Claimant returned to Dr. Lenzi in May 2008. He noted that RSD was highly suspected and was confirmed by the consulting physician. He diagnosed work related RSD with continued pain, swelling and loss of motion as well as non-work related Dupuytren's fasciitis of the right palm and right CTS. He determined that Claimant was medically stable with 5% PPI in accordance with the 5th Edition of the *Guides*.

18. In June 2008, Dr. Esplin felt that Claimant had reached maximum medical improvement (MMI) and released her from care. He felt that future contracture release surgery or amputation of the small finger may be required but did not anticipate improvement regarding pain or function. He assigned 8% PPI in accordance with the 5th Edition of the *Guides*, based on range of motion deficits

19. Dr. Esplin assigned a 5 to 7 pound lifting restriction to Claimant's right hand and indicated she had a limited ability to twist, grip, push or pull with her right upper extremity. He reported that Claimant had pain and difficulty with activities of daily living and did not anticipate that a splint would provide relief.

20. Claimant was treated a total of twelve times at Dr. Esplin's office. Dr. Esplin felt that Claimant's complaints of pain and ultra-sensitivity were consistent and truthful.

21. Claimant returned to Dr. Lenzi on July 1, 2009, for a third evaluation. He performed a repeat impairment rating evaluation and reduced his prior rating from 5% PPI to 4% PPI based on Claimant's improved motion. He noted that Claimant's restriction of motion was inconsistent. He disagreed with Dr. Esplin that Claimant may be a future surgical candidate. He indicated that Claimant's non-work related Dupuytren's fasciitis was bilateral and worsening.

Claimant also demonstrated non-work related osteoarthritis in all digits of her right hand. Dr. Lenzi felt that it was essential for Claimant to have an ulnar gutter splint to allow her the use of the rest of her hand and to minimize pain to the ulnar area of her right hand.

22. During his deposition testimony, Dr. Lenzi explained that he assumed at the time of his second examination of Claimant that the diagnosis of RSD had been confirmed by Dr. Farrell. Dr. Farrell noted a lack of a sympathetic component to Claimant's condition based on the ineffectiveness of the stellate ganglion block, but he concluded in his report that RSD is Claimant's diagnosis. On direct examination, Dr. Lenzi stated that he did not have Dr. Farrell's report for review at the time he performed his second and third evaluations of Claimant. In retrospect, Dr. Lenzi concluded that Claimant did not have RSD at the time he last evaluated her. During cross-examination, it was made clear that Dr. Lenzi had Dr. Farrell's report by the time he performed his second evaluation of Claimant.

23. The opinions of Dr. Esplin regarding the existence of RSD/CRPS are adopted over those of Dr. Lenzi. Dr. Lenzi's change of opinion during his post-hearing deposition was not well explained in light of the fact that Dr. Lenzi had access to Dr. Farrell's report when he initially agreed that Claimant had work related RSD/CRPS.

24. Dr. Lenzi suggested restrictions attributable to Claimant's injury of no lifting over 20 pounds and avoidance of exposure to vibration. He determined that Claimant could return to work as a cashier with use of a well padded ulnar gutter splint, but that Claimant would need to obtain a new type of employment if that was not possible.

25. Dr. Lenzi felt that Claimant's reports of pain and limitation were not truthful. He explained that he attempted to give Claimant the benefit of the doubt when drafting his reports

but that Claimant's varied responses to range of motion testing, depending on the positioning of her hand and from evaluation to evaluation, reflected a lack of truthfulness.

Post Injury Employment

26. Employer has a temporary alternative duty (TAD) program and attempts to provide workers with temporary modified work from the time he or she loses two weeks from work following an industrial injury until MMI is reached. Employer determines what types of duties to assign an employee on TAD based on physician restrictions and/or physician approval of a specific position. Generally, TAD does not last beyond 90 days, but it can be extended on a case by case basis.

27. Claimant was able to continue in her cashier position, with accommodations, for four months following her injury. Some accommodations were impromptu and others were based on physician limitations. Claimant wore a splint, "buddy taped" her fingers and attempted to avoid lifting heavier merchandise.

28. Claimant was off work from June 19, 2006 through August 16, 2006, following her trigger release surgery performed by Dr. Johnson.

29. Claimant was on TAD from August 17, 2006 through May 20, 2007, until her surgery performed by Dr. Esplin. As part of her TAD, Claimant performed duties of people greeter, fitting room monitor and phone answerer.

30. Claimant described difficulty in performing some of the tasks included in her TAD assignments. As a people greeter, she would also maintain the entrance area by mopping and sweeping. When the alarm was triggered by an unremoved sensor, Claimant would use a hand held wand device to locate the item. She would then write down various information

including a description of the item and register/cashier who processed the sale. Claimant also mentioned difficulty with pushing carts and hanging up items in the fitting room.

31. Ms. Hays testified that Claimant would have been able to obtain assistance with sweeping or mopping and that accommodations could have been made for difficulties Claimant experienced placing clothing on hangers.

32. Following Claimant's May 2007 surgery, Employer made offers of additional TAD in August 2007 and March 2008. Soon after the August 2007 offer, Claimant was again taken off work by Dr. Esplin and kept in an off-work status through May 2008. Dr. Esplin's off-work slips contradict a check-the-box letter he completed in January 2008, indicating that Claimant could return to half-day modified duty work in accordance with Dr. Lenzi's restrictions.

33. Ms. Hays testified that once an employee reaches MMI that he or she would not qualify for TAD, but that Employer continues to make efforts to work with their employees on returning them to work and complies with laws under the Americans with Disabilities Act (ADA). Claimant's current employment status from Employer's perspective is "leave of absence" and she is eligible to come back and work for Employer. No formal offer of employment was made to Claimant after she reached MMI. The nature of accommodations available to her would depend on what jobs were available for hire at the time she inquires. Requests for accommodations would be reviewed by the regional human resources office and would not be determined at the store.

34. In November 2008, Claimant was referred to the Industrial Commission Rehabilitation Division (ICRD) and Greg Taylor was assigned as her consultant.

35. In December 2008, Claimant was in contact with ICRD and reported that she applied for work at multiple places in Jerome but was told they were not hiring. These businesses included Personnel Plus, The Movie Gallery, McDonald's, Chevron-Twin Stop and Auto Zone. A cashier position was available at Family Dollar Store, but Claimant was told that cashiers assisted in unloading freight and needed to be able to lift up to 40 pounds. Claimant applied for at job at Burger King but did not hear back from them.

36. ICRD identified potential jobs for Claimant as barista, retail salesperson, laundry worker, motel desk clerk, fast food restaurant cook and restaurant hostess. It was noted that some of the above jobs may not be within the Claimant's capabilities and that she would need to have a job that focused on the customer service aspects rather than stocking, lifting, operating a commercial ironing machine, cleaning rooms, clearing dishes or handling a high volume of customers.

37. In early 2009, Claimant inquired about cashier jobs at K-Mart, Sears and J.C. Penny. The only available jobs involved working in the electronics department and she did not have the appropriate experience.

38. ICRD closed Claimant's file in June 2009 because Claimant stopped looking for work. The ICRD consultant acknowledged difficulty at finding compatible employment in the area but felt that Claimant was physically capable of performing some type of employment. This would require Claimant to use her non-dominant left hand to lift and her right hand as a helper hand.

Expert Vocational Opinions

Douglas Crum, C.D.M.S.

39. Mr. Crum is a vocational expert hired by Claimant to evaluate factors related to permanent disability. He reviewed medical records, vocational records and information regarding Claimant's prior industrial injuries. He considered permanent restrictions assigned by both Drs. Esplin and Lenzi. He interviewed Claimant and utilized statistics available through the Department of Labor.

40. Mr. Crum determined that Claimant is limited to sedentary employment with limited use of her right hand, that precludes keyboard work or data entry. Based on evaluation of labor market access and wage earning capacity, he concluded that Claimant would not be able to find work on either a full or part-time basis and that she is totally and permanently disabled. He felt that further attempts at finding employment would be futile.

41. Based on Claimant's ability to work for Employer on a pre-injury basis, Mr. Crum did not believe that restrictions related to Claimant's prior knee injuries impacted her labor market access.

42. Mr. Crum considered Jerome County and Twin Falls County to be Claimant's labor market. He is familiar with vocational opportunities in that market.

43. Between the time of his February 2009 report and his deposition, Mr. Crum reviewed additional information including Claimant's deposition, the hearing transcript, Mr. Jordan's report and the post-hearing depositions of Ms. Hays, Dr. Esplin and Dr. Lenzi. The additional information did not alter his opinions.

44. Mr. Crum determined that, on a pre-injury basis, Claimant had access to 14% of the labor market which translated to 7,000 jobs. As a result of her right-hand injury, Claimant does not have access to any jobs.

45. Claimant cannot return to her previous employment or jobs suggested by ICRD/Mr. Jordan because: cashier work at a convenience store would likely require lifting greater than five to seven pounds; car rental agent work would require data entry; delicatessen work would require repetitive use of the hands; front desk clerk at hotel would require data entry as well as possible lifting and housekeeping duties; efficiently manipulating money and change from a cash drawer would be difficult; most cashier jobs include some type of stocking; hostess jobs often require bussing tables or other upper extremity work; flagger work often involves other tasks such as arranging cones and barriers; flagging work in cold temperatures would be painful to Claimant; Claimant's condition prevents her from being a safe driver; people greeters also move carts and sweep or mop in inclement weather; and because fitting room associate is usually not a stand-alone job and also includes cashiering or stocking.

46. Mr. Crum based his conclusions on Claimant's physical restrictions, age, education, labor market and work history. Claimant's appearance and presentation do not enhance her ability to compete for customer service work.

William C. Jordan, M.A., C.R.C., C.D.M.S.

47. Mr. Jordan is a vocational expert hired by Defendants to evaluate Claimant's employability. Mr. Jordan reviewed medical and vocational information regarding Claimant and observed Claimant's March 2009 deposition. He spoke with Dr. Esplin and met with Dr. Lenzi regarding appropriateness of various jobs for Claimant. He spoke with Ms. Hays and reviewed Employer's job descriptions.

48. Mr. Jordan utilized job descriptions from Employer for cashier, people greeter, fitting room associate and sales associate. Based on Claimant's transferable skills he identified other potential job titles for Claimant by through a Dictionary of Occupational Titles (DOT) database. Mr. Jordon acknowledges that the DOT has not been updated for several years, but believes it is still the best source of information available to identify potential jobs. DOT descriptions are general and not intended to describe specific available jobs in any given market.

49. Based on his conversation with Ms. Hays, Mr. Jordan understood that Claimant continued to be eligible for employment with Employer and that Employer would make accommodations consistent with physician restrictions. He conveyed that to both Drs. Esplin and Lenzi.

50. Job descriptions approved, without accommodation, by both Drs. Esplin and Lenzi, were people greeter, fitting room associate, jewelry sales, construction flagger, parking lot cashier and ticket taker. Job descriptions that were ruled out or would require modification according to either Dr. Esplin or Dr. Lenzi were cashier, telemarketer, demonstrator, domestic companion, receptionist, escort vehicle driver, hotel clerk, and restaurant hostess. Both Drs. Esplin and Lenzi relied to some extent on supplemental information provided by Mr. Jordan during their discussions about the jobs. Dr. Esplin was under the impression that actual job openings existed for the positions described.

51. Mr. Jordan agreed with Mr. Crum on various issues including that Claimant's pre-existing knee condition did not limit her employment; that the Jerome/Twin Falls area is the applicable labor market; and that Claimant's age and education are relevant non-medical factors in assessing Claimant's employment.

52. Mr. Jordan believes that Claimant is employable but that she has PPD as a result of her industrial injury. Based on Dr. Esplin's opinions, Claimant's PPD would be 35% to 40%, inclusive of her permanent impairment. Based on Dr. Lenzi's opinions, Claimant's PPD would be 25% to 30%, inclusive of her permanent impairment.

53. Mr. Jordan feels that Claimant's best option for employment is with Employer and he does not understand why she did not return to work for Employer.

54. Mr. Jordan calculated Claimant's PPD using his own methodology. He assigned 3% attributable to Claimant's age; 2% for education; 10% for loss of wages; 10% for loss of access to the labor market; and PPI ranging from 4% to 8%. Mr. Jordan considers the factors identified as well as previous decisions of the Commission regarding PPD to determine percentages.

DISCUSSION AND FURTHER FINDINGS

Permanent Total Disability

55. A claimant may establish that he or she is totally and permanently disabled by either of two methodologies: First, a claimant may prove total and permanent disability if his or her medical impairment together with nonmedical factors total 100%. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho, at 281, 939 P.2d at 857. When a claimant cannot make the showing required for 100% disability, then a second methodology is available:

> The odd-lot category is for those workers who are so injured that they can perform no services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.

Jarvis v. Rexburg Nursing Center, 136 Idaho 579, 584 38 P.3d 617, 622 (2001), citing *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 565 P.2d 1360 (1977). The worker need not be physically unable to perform any work:

> They are simply not regularly employable in any well-known branch of the labor market absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part.

Id., 136 Idaho at 584, 38 P.3d at 622.

56. If the evidence of the medical and nonmedical factors places a claimant *prima facie* in the odd-lot category, the burden is then on the employer to show that some kind of suitable work is regularly and continuously available to the claimant. *Id*. A claimant can establish a *prima facie* case for odd-lot status by showing: (1) that he or she had attempted other types of employment without success; (2) that he or she, or vocational counselors or employment agencies on his her behalf, have searched for other work and other work is not available; or (3) that any efforts to find suitable work would be futile. *Fowble v. Snoline Express, Inc*., 146 Idaho 70, 190 P.3d 889 (2008).

100% Method

57. Claimant's pre-injury PPI totaled 7% and PPI attributable to the current injury does not exceed 8%. There are significant non-medical factors that impact Claimant's permanent disability including age and education. However, Claimant failed to establish that she is permanently and totally disabled based on the 100% method.

Odd-Lot Doctrine

58. Claimant has presented credible and persuasive evidence that job search efforts would be futile. This assertion is supported by of Dr. Esplin's testimony, taken as a whole, and by the opinions of Douglas Crum.

59. Defendants' assertion that Claimant simply needs to seek employment with Employer in order to become gainfully employed fails to establish that Claimant is regularly employable absent a sympathetic employer, business boom, super-human effort or temporary

good luck. Defendants established that Claimant failed to fully avail herself of TAD offered by Employer between the time of her March 2007 surgery and when she reached MMI and that Claimant could have performed the position of people greeter, with various accommodations. Although Employer was willing to make such a position available to Claimant, the evidence established that TAD is offered only until a worker reaches MMI related to an industrial injury and that such positions are, by definition, temporary in nature. In the event that this case involved a determination regarding *temporary* benefits, Claimant's failure to fully embrace her options pursuant to Employer's TAD program would be cause to reduce or suspend Claimant's benefits. However, various modified duty assignments that would be appropriate for Claimant were not made available on a permanent basis and any employer who was willing to provide such employment would likely be characterized as a sympathetic employer. Testimony of Ms. Hays that Claimant remained eligible for employment with Employer but that actual employment would depend on what positions were open and that accommodations would be reviewed by the regional human resources department fails to establish that Claimant would be regularly employable.

60. Job titles and descriptions identified by Mr. Jordan represented possible options for Claimant but did not constitute evidence that such jobs existed in Claimant's labor market for which she could successfully compete.

61. Defendants have failed to establish that suitable work is regularly and continuously available to Claimant.

62. The evidence establishes that Claimant is physically capable of performing some types of work either in a limited capacity or with accommodations. However, Claimant is not regularly employable in her labor market absent a business boom, temporary good luck and/or a

sympathetic employer. Accordingly, Claimant is properly characterized as an odd-lot worker and has established permanent total disability.

63. Because Claimant met her burden of proof to establish permanent total disability, it is not necessary to perform an analysis regarding PPD.

CONCLUSION OF LAW

Claimant is totally and permanently disabled by virtue of the odd-lot doctrine.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusion of law and issue an appropriate final order.

DATED this __24____ day of _____February_____ 2010.

INDUSTRIAL COMMISSION

_/s/_____
Susan Veltman, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __25___ day of ___March_____, 2010 a true and correct copy of **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

BRADFORD S EIDAM
P O BOX 1677
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ALAN HULL
P O BOX 7426
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jkc _/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ALTA RASMUSSEN, Claimant, v. WAL-MART STORES, INC., Employer, AMERICAN HOME ASSURANCE COMPANY, Surety, Defendants.	)	**IC 2006-003826** **ORDER AND DISSENTING OPINION** March 25, 2010

Pursuant to Idaho Code § 72-717, Referee Susan Veltman submitted the record in the above-entitled matter, together with her proposed 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 is totally and permanently disabled by virtue of the odd-lot doctrine.

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

DATED this _25____ day of _March_____, 2010.

INDUSTRIAL COMMISSION

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

_/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

Commissioner Thomas E. Limbaugh dissenting.

After reviewing the record in this case, I respectfully dissent from the majority decision finding Claimant totally and permanently disabled by virtue of the odd-lot doctrine. In my opinion, Claimant, though suffering from a considerable amount of disability, is able to be regularly employed, and it would not be futile for her to search for work. In particular, the facts show that it is likely Claimant could obtain employment by performing the most basic work search, simply asking her time of injury Employer if she can return to work.

On March 13, 2006, Claimant's little finger caught a rounded screw on the edge of the counter causing the finger to bleed. Claimant experienced great pain but continued to work and finished her shift. Approximately three weeks later Claimant sought treatment for her injured finger. From the time Claimant was injured until her trigger finger release surgery in July 2006, she continued working as a cashier. Claimant was off work for 30 days after her July 2006 surgery and then returned to light duty work. On May 21, 2007, Dr. Esplin performed surgery on Claimant to reattach the ligament that had torn off the phalanx of her little finger. In October 2007, Dr. Esplin diagnosed Claimant with chronic pain syndrome (CRPS). Dr. Esplin opined that future surgery may be necessary but he did not anticipate improvement regarding pain or function. He assigned a 5 to 7 pound lifting restriction to Claimant's right hand and indicated she had a limited ability to twist, grip, push or pull with her right upper extremity. Dr. Lenzi performed three evaluations of Claimant. Ultimately, he opined that Claimant's reports of pain and limitation were not truthful.

The odd-lot category is for those workers who are so injured that they can perform no services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 584 38 P.3d 617, 622 (2001), citing *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 565 P.2d 1360 (1977). There are three methods of proving odd-lot status: (1) attempts at other types of employment were unsuccessful; (2) the worker, vocational counselors, employment agencies or other job service agencies have unsuccessfully searched for work for the worker; or (3) that any efforts of the employee to find suitable employment would be futile. *Fowble v. Snoline Express, Inc*., 146 Idaho 70, 190 P.3d 889 (2008).

The majority concludes that Claimant is an odd-lot worker because any effort to find suitable employment would be futile. This is an extremely onerous burden and one that should not be taken lightly. Arguably, futility is the most difficult prong of the odd-lot doctrine.

Claimant was on Employer's temporary alternative duty (TAD) program from August 17, 2006 through May 20, 2007, until her surgery performed by Dr. Esplin. As part of her TAD, Claimant performed duties of greeter, fitting room attendant, and phone answerer for 35-40 hours per week. All of which are standard positions, not make-work created to merely keep Claimant occupied. At hearing, Claimant testified that many of these tasks caused pain in her finger, but she made no reports to Employer of problems. Claimant worked for 9 months without requesting accommodation for the positions she filled.

Whether Claimant is now able to adequately perform the work of a greeter or dressing room attendant is a question that has no answer. Claimant's pain and limitations by all admissions were similar if not the same prior to her last surgery and after. Prior to the last surgery, Claimant worked for 9 months as a greeter, with a couple days spent as a fitting room attendant, with no contemporaneous complaints to Employer. A logical conclusion would find

that a similar situation after the last surgery would leave Claimant again able to work as a greeter or fitting room attendant.

Admittedly, Claimant worked as a greeter while in the TAD program and it is not known if Employer had an open greeter position at the time of hearing. But Employer's representative, Ms. Hays, testified that the position of greeter is available to employees no longer on TAD and employees that have permanent work restrictions from a work injury. Hays depo., p. 73. Ms. Hays confirmed that the position of dressing room attendant would also be available to employees no longer on TAD. Claimant's completion of her TAD work does not preclude her from being placed into positions she worked while in the TAD program. In fact, the TAD program would have given her experience and training in those specific positions.

Unfortunately Claimant never made an attempt to fill those positions after being declared stable. I acknowledge the possibility exists that Claimant would not have been able to perform the tasks necessary to work as a greeter or dressing room attendant, but those facts are not before us. Claimant made no attempt, thus we are left to discuss whether it would have been futile for her to attempt. On this point, the fact that she filled the role of greeter for 9 months with similar pain and restrictions is more than enough to establish that it would not be futile for Claimant to search for work.

Although Claimant's industrial injury has significantly reduced her labor market access, the credible evidence fails to establish that Claimant's efforts to find suitable employment would be futile. There is no indication that Claimant lost her job with Employer. Further there is every reason to believe that an act as simple as asking Employer for a job would lead to employment and, at the very least, demonstrate that it is not futile for Claimant to search for work.

For the foregoing reasons, it is my opinion Claimant is not totally and permanently disabled. Claimant undoubtedly suffers some amount of permanent partial disability, but she has

not proven that she fits within the futility prong of the odd lot doctrine. I respectfully dissent from the majority decision.

DATED this __25_____ day of March, 2010.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __25___ day of _March_____, 2010, a true and correct copy of the foregoing **Order and Dissenting Opinion** was served by regular United States Mail upon each of the following persons:

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jkc/cjh _/s/_____