BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LORI L. STETZEL, Claimant, v. YELLOWSTONE TRUCKING, Employer, and INSURANCE COMPANY OF THE WEST, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2002-005827** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed April 15, 2010

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Coeur d'Alene on August 25, 2009.[1] Claimant was present and represented by Thomas B. Amberson of Coeur d'Alene. Thomas V. Munson of Boise represented Employer/Surety. Thomas W. Callery of Lewiston represented the State of Idaho, Industrial Special Indemnity Fund (ISIF). Oral and documentary evidence was presented and the record was left open for the taking of two post-

[1] A previous hearing was conducted on May 12, 2005, that resulted in the resolution of Claimant's entitlement to certain medical and PPI benefits as between Claimant and Employer/Surety ("First Decision"). The issue of Claimant's entitlement to disability above impairment was expressly reserved.

hearing depositions. The parties then submitted post-hearing briefs and this matter came under advisement on December 24, 2009.

ISSUES

The issues to be decided as a result of the hearing are:

1. Whether Claimant is entitled to medical benefits and the extent thereof;

2. Whether Claimant is entitled to permanent partial disability (PPD) benefits and the extent thereof;

3. Whether apportionment pursuant to Idaho Code § 72-406 is appropriate;

4. Whether Claimant is permanently and totally disabled pursuant to the odd-lot doctrine;

5. Whether ISIF is liable pursuant to Idaho Code § 72-332; and, if so,

6. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant contends that she is entitled to palliative pain medications to help alleviate her chronic low back pain that has been present since her failed lumbar fusion. She also contends that she is entitled to significant PPD above the awarded 20.5% whole person PPI she was awarded in the First Decision, in the event the Commission fails to find her an odd-lot worker. However, Claimant's primary argument is that she is, indeed, an odd-lot worker. Claimant lives in Superior, Montana, a community of about 800 people with limited employment opportunities. She attempted work by owning and operating a floral/gift shop for about two-and-a-half years until she sold it because she could no longer physically do the work required. Claimant retained a vocational rehabilitation counselor to assist her with vocational issues. The counselor was unable to locate employment for her in her labor market and concluded Claimant was

unemployable and any job search would be futile. Defendants have failed to rebut Claimant's *prima facie* odd-lot showing.

Regarding ISIF liability, Claimant points out that it was Employer/Surety, not her, who joined ISIF. Claimant's pre-existing conditions were never rated for PPI. Claimant was able to work as a truck driver with no problems up until her accident with Employer herein. Thus, ISIF's liability is "unclear."

Employer/Surety contends that Claimant is not entitled to reimbursement for medications indentified in Claimant's Exhibit 33, because she has never requested payment therefor and no physician has identified what most of the medications in that exhibit are for. Claimant has been treated for other medical problems unassociated with her accident and it is likely some or all of the medications listed in Claimant's Exhibit 33 were prescribed for those problems.

In addition, Employer/Surety asserts that it is Claimant's lack of motivation to return to the work force, not her physical restrictions, that is the most significant factor in her current unemployment situation. Because she is convinced that there are no jobs in Superior, Claimant has not even looked for work there. All of the medical evidence in the record demonstrates that Claimant can perform sedentary/light work, and her vocational expert agrees. No physician has opined that Claimant cannot work an eight-hour day. There are sedentary/light jobs available to Claimant within the Superior labor market, as well as in the Missoula labor market. Claimant has failed to satisfy any of the prongs necessary to establish odd-lot status under *Dumaw*. Nonetheless, should the Commission find Claimant to be an odd-lot worker, ISIF should be assigned its proportionate share of such permanent and total disability for her pre-existing conditions.

ISIF argues that Claimant has failed to prove she is permanently and totally disabled pursuant to the odd-lot doctrine or otherwise. Further, even if Claimant prevails under the odd-lot theory, Employer/Surety has, in any event, failed to prove that any pre-existing conditions have combined with her industrial accident to create that disability. While it is true that Claimant had a pre-existing back problem, she had fully recovered by the time she began employment with Employer, and no pre-existing condition constituted a hindrance or obstacle to employment and resulted in no PPI ratings. Further, no physical restrictions were imposed for any pre-existing condition(s). Claimant herself testified that no pre-existing condition prevented, or in any way hindered, her from driving truck for Employer.

Claimant responds by asserting that she should be awarded past, present, and future pain medications for her back pain as prescribed by her physicians. Further, as found by the Commission in its previous decision, Missoula is not within Claimant's labor market and there is no reason to change that finding. Also, it is Claimant's back pain, not her lack of motivation, which keeps her from working. Before the subject accident, Claimant worked continuously, sometimes at two jobs, while a single mother. After her back injury, she sincerely tried employment as a gift/flower shop owner until she was physically unable to continue and had to sell the business. Further, only 50% of the jobs identified by Employer/Surety's vocational expert in the Superior area were actually recruiting for open positions. Finally, the Commission should adopt the opinions expressed by Claimant's vocational expert over those of Employer/Surety's vocational expert, as Claimant's analysis and report are detailed and thorough and utilize Claimant's labor market of Superior, rather than Missoula. He also gave appropriate attention to Claimant's chronic low back pain, and his use of the internet to explore job opportunities is common practice in the vocational field.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file.

2. The testimony of Claimant presented at the hearing.

3. Claimant's Exhibits 1-50 admitted at the hearing.

4. Employer/Surety's Exhibits 1-4 admitted at the hearing.

5. ISIF's Exhibits 1-3 admitted at the hearing.

6. The post-hearing deposition of Douglas N. Crum, CDMS, taken by Claimant on August 27, 2009.

7. The post-hearing deposition of Mark Schwager, MS, CRC, LPC, taken by Employer/Surety on October 14, 2009.

The objections made during the course of taking the above-referenced depositions are overruled with the exception of Employer/Surety's objection at page 24 of Mr. Crum's deposition, which is sustained.

After having considered all the above evidence and the briefs 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 52 years of age and resided near Superior, Montana, at the time of both hearings. She was 44 years of age at the time of her March 28, 2002, industrial accident and injury. She worked as a long-haul truck driver for Employer, teaming with her husband.

2. On March 28, 2002, Claimant injured her lower back and right leg while placing supports in a curtain van trailer in Roanoke, Virginia. On August 6, 2002, Claimant underwent a

two-level lumbar fusion that ultimately failed. Claimant currently suffers from chronic back pain as the result of the failed surgery.

DISCUSSION AND FURTHER FINDINGS

Prescription reimbursement:

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). Palliative care is compensable so long as it is reasonably related to the original injury. *See, Hamilton v. Boise Cascade Corporation*, 84 Idaho 209, 370 P.2d 191(1962).

3. Claimant seeks reimbursement for medications listed in Claimant's Exhibits 33 and 34. Defendants concede that Claimant is entitled to medications prescribed to treat her condition. However, they argue that Claimant has never submitted the prescriptions for payment and it is impossible to discern from Exhibits 33 and 34 the condition or conditions for which the medications were prescribed. Claimant has failed to prove that she is entitled to reimbursement for the specific medications listed in Claimant's Exhibits 33 and 34.

PPD benefits:

4. Finding of Fact number 17 in the First Decision summarized Claimant's educational and work histories as follows:

> Claimant graduated from high school in 1974 and took some college courses in management (51 credits) but never received her degree. She did, however, receive a certificate as a legal secretary but never worked as such. Her work history can be summarized as follows: professional truck driver; cargo claims manager in the trucking industry; administrative assistant/claims investigator in the trucking industry; U.S. West Direct communication

> analyst/office administrator; owner/manager of a cargo claims investigation and package evaluation service; and, office manager/administrative assistant to the terminal manager for a trucking company. She has 16 years experience in virtually every aspect of the trucking industry. Claimant lists some of her qualifications in her resume (citation omitted) as: extensive experience in all aspects of office administration, office management, bookkeeping, and personnel. Demonstrated interpersonal and public relations skills with excellent oral and written communication abilities. Customer focused with experience in customer service using quality tools to improve processes, set priorities, and meet quality standards.

5. Claimant also owned and operated a flower/gift shop in Superior from April 2003 until December 2006. Although the business was never profitable, Claimant built up the business and sold it for $30,000, as she claims she was physically unable to continue its operation. Claimant has not worked for pay since, nor has she looked or applied for employment in Superior or anywhere else.

6. Claimant worked with Industrial Commission Rehabilitation Division (ICRD) consultant Dirk Darrow from May 2002 until he closed his file in July 2003. Mr. Darrow's case notes indicate that Claimant was motivated to return to work, but her physical limitations and anticipated medical procedures created the situation where the only option was to monitor Claimant's medical progress. Mr. Darrow also noted that Claimant's drive (even as a passenger) from Superior to Missoula to obtain medical treatment was difficult for her due to her back pain. On July 11, 2002, Mr. Darrow received a job site evaluation back from Claimant's treating physician, indicating that her time-of-injury position as a truck driver was not approved and that Claimant may be a surgical candidate.[2] Post-surgery, Claimant's treating physician would not assign physical restrictions, pending the outcome of a requested CT myelogram. There is no record of this test ever being performed. On July 3, 2003, Mr. Darrow was informed by Surety's

[2] Claimant underwent a two-level lumbar fusion on August 6, 2002. Surety paid for only one level based on medical advice that there was no pathology requiring surgery at the adjacent level. That issue was decided in Claimant's favor in the First Decision.

independent medical evaluator that Claimant could return to work as a truck driver with no repetitive lifting over 40 pounds. Based thereon, and the fact that Claimant had recently opened her flower/gift shop, Mr. Darrow closed his file (although he erroneously assumed that the flower/gift shop was providing Claimant with income comparable to her time-of-injury wage).

Vocational Experts

Douglas N. Crum, CDMS:

7. Claimant retained Mr. Crum, a vocational rehabilitation consultant in private practice in Boise, to assist her with vocational issues. His credentials are well known to the Commission and will not be repeated here. Mr. Crum authored a report and was deposed. Claimant retained Mr. Crum on April 15, 2008 and supplied him with medical records, three depositions of Claimant, the First Decision, copies of Employer/Surety's vocational expert's reports, ICRD notes, and Social Security and wage information. Mr. Crum personally met with Claimant on May 5, 2008.

8. In his deposition, Mr. Crum was asked to provide vocational opinions based on restrictions given by the different medical experts. Mr. Crum began his analysis by considering the physical restrictions assigned by John McNulty, M.D., an orthopedic surgeon, who conducted an IME at Claimant's request on May 19, 2003. Dr. McNulty's restrictions at that time were that she could perform sedentary work for only short periods of time, she would require frequent changes of position, and could lift ten pounds rarely. Claimant could not return to her time-of-injury truck driving duties. Based on Dr. McNulty's restrictions in conjunction with Claimant's education, skills, training, and the nature of her labor market, Mr. Crum concluded that Claimant is totally disabled.

9. Mr. Crum next discussed the restrictions assigned by Al H. Kuykendall, M.D., a retired neurosurgeon, and Richard Wilson, M.D., a neurologist, in an IME conducted May 28,

2002 at Employer/Surety's request. That panel concluded that Claimant could return to work as a truck driver but should enlist help if lifting over 50 pounds. Based thereon, Mr. Crum concluded that Claimant did not sustain any "significant" loss of access to her labor market or wage loss.

10. Mr. Crum then considered the physical restrictions assigned by Richard Day, M.D., Claimant's treating neurosurgeon. Because Mr. Crum could not determine from Dr. Day's records what was meant by "light work" in his comments, he did not reach any vocational conclusions based on Dr. Day's opinions.[3]

11. Mr. Crum next discussed a Physical Residual Functional Capacity (RFC) Assessment conducted by Paul Donaldson, M.D., in November 2004.[4] Mr. Crum testified that the RFC basically placed Claimant in the light-work category, insofar as lifting is concerned (about 20 pounds occasionally). Claimant can walk and stand for at least two hours in an eight-hour day. She should periodically alternate standing and sitting. Claimant can occasionally climb ramps, stairs, ladders, and scaffolds. She can also occasionally stoop, kneel, crouch, and crawl. Based on these limitations, Mr. Crum testified that Claimant would have a 75% loss of access to her pre-injury labor market and a 22.5% loss of wage-earning capacity. Mr. Crum opined that when considering Claimant's loss of access, age, labor market, and the difficulty in finding and maintaining employment, Claimant has incurred a 75% PPD inclusive of her PPI based on the RFC.

12. Mr. Crum was then asked to consider the restrictions imposed by Robert Parrott, M.D., Claimant's treating physician in March 2005. Dr. Parrott also prepared an RFC for Social

[3] Mr. Crum conceded on cross-examination that Dr. Day's remarks could be interpreted by the Commission to mean that Claimant could return to sedentary/light work; he simply does not know what Dr. Day meant.

[4] This was done in connection with Claimant's claim for Social Security Disability benefits, which she was awarded in June 2006.

Security disability purposes. Mr. Crum summarized Dr. Parrott's restrictions as follows: sit 15 minutes at a time; walk up to 50 feet at a time up to 15 minutes; stand for 30 minutes; sit or stand and walk for a total of two hours a day; use cane for standing and walking; lift 10 pounds occasionally; limited reaching, handling, and fingering; occasional use of arms overhead; avoid stooping; and can crouch for up to 10% of the day. She might be absent from work more than four times a month. Based on the foregoing limitations, Mr. Crum again opined that Claimant would be permanently and totally disabled.

13. Mr. Crum then considered the restrictions placed by Dr. Kuykendall in his May 2005 report that if Claimant limited her lifting to 30 pounds, she could return to her truck driving duties on a regular basis. Mr. Crum questioned that logic, as one cannot drive a truck with that lifting restriction.

14. Physical restrictions were also assigned by William Bozarth, M.D., a board "eligible" neurologist, who conducted an IME at Employer/Surety's request on November 14, 2008. Mr. Crum summarized those restrictions as follows: lift up to 18 pounds and up to 30 rarely; *ad lib* position changes; sit for 30 minutes but does not indicate how long Claimant can sit totally during the work day; stand up to 30 minutes, but again does not indicate how long she can stand totally during the work day; lay in a comfortable bed for 2-3 hours before having to get up;[5] walk on level ground for an hour before stopping, but does not mention how long she can walk totally during the work day; and drive for an hour before having to get out and walk around. Based on those restrictions, Mr. Crum again opined that Claimant would be permanently and totally disabled.

15. Mr. Crum described the Superior labor market this way:

[5] Mr. Crum sees no vocational relevance in this observation by Dr. Bozarth.

> Sure, first of all, Superior, Montana, is a relatively isolated community. It's about 58 miles or so from Missoula. It has a population of about 800. It's a county seat of Mineral County, Montana, and that county, based on records I was able to find, has about a population of about 3800 people.
>
> Based on some statistical stuff I found, it indicated that there were about 918 non-governmental jobs in the county and about 333 government-related jobs, so roughly a third - - or a quarter of the jobs in the county are government related, which makes sense because it sits in or on or on [sic] the margins of the Lolo National Forest, so the economy there is largely based on, you know, resources.
>
> The town does have a small hospital, Mineral County Hospital. It's my understanding that that hospital has one doctor, two nurses, and some administrative staff. There are some churches. There's a couple of building supply stores, two auto supply stores, two grocery stores, a drug store, some insurance agencies, a few bars and restaurants, an FM radio station but no AM station. There are also some other small retail businesses. There's a couple of hotels that are without national affiliation.
>
> So it's - - you know, it's a small labor market.

Crum Deposition, pp. 23-24.

16. Mr. Crum did a 60-day job search through the Montana State Job Service and there were no job openings for Mineral County during that time period. As of June 2009, the unemployment rate in Mineral County was 8.7%, making it the sixth highest unemployment rate of Montana's 56 counties.

17. Mr. Crum opined that it would be futile for Claimant to look for employment in Mineral County:

> It's my opinion that the job search would not be fruitful. It would fail. She just does not have the combination of education, skills, abilities, and physical capacities to find work in that particular labor market that's going to be permanent full-time or probably even part-time.
>
> As the report will indicate, she attempted a part-time - - well, she attempted self-employment, I should say, at a small flower shop that she had bought hoping that she could support herself that way. But even in that endeavor, she was unsuccessful. She had to take increasing amounts of time off. She had to have help with basic activities around the little shop that she had. She brought - - had help for lifting. She told me that she actually asked her customers for help from time to time. She, I believe at the end, was working only three days a week because she - - it took her a day to recover in between work days.

Crum Deposition, pp. 25-26.

18. On cross-examination, Mr. Crum agreed that if Claimant was able to *ad lib* change positions, she would be employable in a sedentary/light capacity. He also conceded that his job search did not include word-of-mouth, newspapers, or contacting employers regarding potential openings. He could not testify that there were no job openings during the 60-day time period, only that none were listed with the Montana Job Service.

Mark J. Schwager, MS, CRC, LPC:

19. Employer/Surety retained Mr. Schwager to assist them with vocational issues. Mr. Schwager is a certified vocational rehabilitation counselor with an office in Kalispell, Montana. He has a degree in psychology and a master's in rehabilitation counseling. He has been a rehabilitation counselor in Montana since 1985 and was certified in 1987. Mr. Schwager authored Employability Assessment Reports in 2005 and 2009 and was deposed.

20. In his 2005 employability assessment, Mr. Schwager concluded that Claimant had lost about a year's worth of income, but had been released to her time-of-injury truck driving position, was qualified for other positions, and, therefore, did not incur any wage or wage earnings capacity loss.

21. Since his 2005 report, Mr. Schwager has reviewed additional records, including the second hearing transcript and Mr. Crum's deposition testimony. In addition, he met with Claimant on July 31, 2009. At that time, Claimant was unemployed and only expressed an interest vocationally in working out of her home. Mr. Schwager described his understanding of Claimant's physical restrictions as follows:

> Q. (By Mr. Munson): As far as her physical restrictions, what did - - what was your understanding of her physical restrictions at the time you met with her in July of 2009?
>
> A. Well, the most current medical information regarding her work ability was an evaluation by Dr. William Bozarth of November 2008.

> And at that time, he indicated that she should refrain from lifting more than 30 pounds, and she would need to change positions for comfort. He noted that she could sit in a vehicle for an hour, could walk for an hour. And he noted that these were permanent work restrictions.
>
> Q. As far as putting her in a category of work activity, what category would those restrictions place her in?
>
> A. Sedentary and light.

Schwager Deposition, pp. 8-9.

22. Mr. Schwager lists the following transferrable skills that would enable Claimant to perform sedentary to light work: customer service skills, keyboarding and computer operation skills, retail sales skills, business operation skills, public relationship skills, claims investigation, office supervisory skills, administration skills, bookkeeping and accounting skills, and money handling and cashiering skills.

23. Mr. Schwager identified the following job titles that Claimant would be capable of performing: bookkeeping, administrative assistant, office administrator, and dispatcher.

24. Mr. Schwager conducted an "impromptu" job search in Superior on July 31, 2009 (the day he met with Claimant), a Friday afternoon.[6] He found one opening for an office/billing clerk position at the Mineral County Hospital. Mr. Schwager believed Claimant could perform the job based on her prior experience with bookkeeping and accounts receivable. The job paid $9.00 an hour. He also found an opening for a dispatcher position at the county sheriff's office. Claimant's experience in the trucking industry would qualify her for that job and would be

[6] Mr. Schwager testified that the significance of Friday afternoon is that the best time to look for work is Monday mornings and the worst time is Friday afternoons because the work week has been completed, some people take Friday afternoons off, and companies are gearing down for the weekend.

compatible with Dr. Bozarth's restrictions. The job paid up to $14.00 an hour. Mr. Schwager also located openings at local banks.

25. Aside from the Friday afternoon job search, Mr. Schwager located an opening as a motel clerk in St. Regis, 15 miles from Superior. Although there were no immediate openings, Mr. Schwager identified the following positions as available from time to time in Superior:

- Lolo National Forest Ranger District had hired a full-time clerical position earlier in the year;
- Two banks had a total of six teller positions;
- Seven clerical positions with Mineral County;
- A grocery store with three checker positions;
- A convenience store, a motel, and a local school that employed clerical support personnel.

26. Mr. Schwager disagreed with Mr. Crum regarding the futility of a job search on Claimant's part:

> Q. (By Mr. Munson): In Mr. Crum's deposition, he testified that he felt it would be futile for her to conduct a job search in Superior, Montana.
>
> Do you agree with that assessment?
>
> A. No.
>
> Q. Would you state your basis for the benefit of the Commission?
>
> A. Again, I disagree with that based upon my experience, in that on a Friday afternoon in about two hours I was able to identify a couple of job openings, picked up a couple of job applications.
>
> And so for someone to be living in the community where they're going to have greater familiarity with the people there and the businesses there than someone such as myself, that's - - no. It's - - it would not be futile to go out and look for work in Superior.
>
> And, you know, I - - when I'm doing job placement services with clients, I use the phrase, they need to network with people that they know; friends, relatives, those kind of things, to find out about job leads. Who's hiring, you know, who's not, those kind of things, and that just hasn't been done in this case.

Schwager Deposition, pp. 19-20.

27. Mr. Schwager also takes issue with Mr. Crum's opinion that Claimant is permanently and totally disabled:

> Q. (By Mr. Munson): Would you state your basis [for your disagreement] for the benefit of the Commission?
>
> A. Again, upon reviewing all of the medical information, there are doctors who have evaluated her and treated her that have indicated that she, you know, can work. I have not seen any records that reflect that - - where a doctor said she's totally precluded from work. And she has a work background that would lend itself to a number of different sedentary and light positions that I've referenced in my report. So given the available medical information, and then the person in this case - - Ms. Stetzel's work background and educational experience, I believe that, you know, she could find employment if she so desires.

Schwager Deposition, pp. 21-22.

100% method:

Claimant contends that she is permanently and totally disabled. There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment together with the relevant nonmedical factors totals 100%. If a claimant has met this burden, then permanent and total disability has been established.

28. As found in the First Decision, Claimant has incurred PPI of 20.5% of the whole person as a result of her industrial accident, which leaves 79.5% in non-medical factors to equal 100%. As explained more fully below, Claimant's non-medical factors do not equal 79.5%. Therefore, Claimant has failed to prove she is permanently and totally disabled by the first method.

Odd-Lot:

The second method is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. *Boley v. State Industrial*

Special Indemnity Fund, 130 Idaho 278, 281, 939P.2d 854, 857 (1997). 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 of Idaho*, *Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), citing *Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). 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), citing *Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

Although Claimant has failed to establish that she is totally and permanently disabled by the 100% method, she may still be able to establish such disability via the odd-lot doctrine. An injured worker may prove that he or she is an odd-lot worker in one of three ways: (1) by showing he or she has attempted other types of employment without success; (2) by showing that he or she or vocational counselors or employment agencies on his or her behalf have searched for other suitable work and such work is not available; or, (3) by showing that any effort to find suitable employment would be futile. *Hamilton v. Ted Beamis Logging and Construction,* 127 Idaho 221, 224, 899 P.2d 434, 437 (1995).

29. Claimant has not attempted employment and failed since her industrial accident. While she did attempt self-employment in her flower/gift shop, she made no money and her attempt, in this Referee's opinion, is not the type of "attempt" envisioned in *Hamilton*, *Id*. Moreover, Claimant testified that she "built the business up" to where she could sell it for $30,000. Therefore, the argument could be made that she was not all that unsuccessful in her

return-to-work attempt. In any event, the Referee finds that Claimant has not established odd-lot status by the first method. Further, Claimant has not looked for employment, nor has someone else on her behalf looked for employment since the sale of her flower/gift shop. The Referee finds that Claimant has failed to establish odd-lot status by the second method.

30. Claimant argues that to look for work in her limited labor market would be futile.[7] The Referee disagrees. As discussed above, Claimant's education, work history, and transferrable skills lend themselves favorably to a transition to sedentary and light work.

31. The "futility" argument is better suited to those cases where a claimant is severely injured and has medical support that he or she cannot return to any work, regardless of its availability. See, for example, *Hegel v. Kuhlman Bros., Inc*., 115 Idaho 855, 771 P.2d 519(1989). There, the claimant was 67 years of age, possessed only an 8th grade education, and was severely injured in two separate logging accidents. He was awarded PPI of 24% of the whole person. The Idaho Supreme Court upheld the Commission's finding of odd-lot status.[8] In that case, the Commission determined that, although the claimant had not attempted to obtain full-time work, "the combination of his relatively advanced age, his limited job experience, his particular physical impairments, both of his upper extremities and his lower back, render such attempts futile." Not mentioned was the claimant's 8th grade education. In the Commission case of *Swaim v. Scott Hurst Trucking*, 2005 IIC 0275(2005), the claimant was 51 years of age and had been a furniture mover for 26 years. Like Claimant here, the claimant suffered from chronic pain following failed back surgeries. Citing the extent of claimant's restrictions, education, work history, lack of transferrable skills, and the fact that the claimant looked much older than his

[7] In the First Decision, the Commission found Superior, Montana, not Missoula, to be Claimant's relevant labor market and nothing has been offered since then to warrant changing that finding.

[8] Interestingly, the Commission also found that Claimant's medical and non-medical factors equaled 100%, yet proceeded to find Claimant an odd-lot worker.

stated age, the ICRD consultant working with the claimant offered unrebutted testimony that it would be futile for him to look for employment, and the Commission so found. In *Dohl v. PSF Industries, Inc*., 127 Idaho 232, 899 P.2d., 445(1995), the claimant, a boilermaker/welder, had a series of back surgeries. His physician opined that the claimant was permanently disabled from any employment. Consequently, the Commission found that any work search by the claimant would be futile, and the Idaho Supreme Court affirmed. The Referee finds that Claimant's circumstances differ significantly from those experienced by the class of claimants found totally and permanently disabled by the "futility" prong of *Hamilton, Id*., in the above cited cases. As a result, Claimant has failed to prove odd-lot status by the "futility" method.

PPD:

Although Claimant has failed to prove permanent and total disability, she may still be entitled to disability above her impairment. "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 impairment and by pertinent non-medical 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 the 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, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

32. The Referee is persuaded that Claimant has incurred disability above her physical impairment as the result of her industrial accident, her failed back surgery, as well as her chronic pain. The physician-imposed physical limitations in this matter are not particularly helpful as they cover a broad range of restrictions, although most physicians place Claimant in the sedentary-to-light work categories. Of note, no physician has indicated that Claimant cannot work. The only disagreement among them focuses on the type of work she can perform within the constraints of her physical condition.

33. Mr. Schwager's reports and testimony are adopted over those of Mr. Crum. Mr. Schwager located a few openings in Superior on a Friday afternoon (illustrating the weakness of Claimant's "futility" argument). He took a more realistic view of the various physical limitations assigned by the various doctors. He also placed great weight (as does the Referee) on Claimant's education and transferrable work skills.

34. Claimant has been convinced since the time of the first hearing that there are no employment opportunities in Superior. She is receiving Social Security disability benefits and her husband is still driving long-haul trucks, so she may not feel the financial "pinch" to get out and hustle up a job. The Referee is left with the impression that Claimant is not particularly motivated to return to the workforce, perhaps driving her conviction that there are no jobs for her in her labor market.

35. Nevertheless, when considering those factors enumerated in Idaho Code § 72-430, as well as Claimant's transferrable skills, education, presentment,[9] and limited labor market, the Referee finds that Claimant has incurred PPD of 70% of the whole person inclusive of her 20.5% whole person PPI.

36. There is a dearth of evidence supporting the conclusion that Claimant's pre-existing impairments, if any, impacted her ability to engage in gainful activity. The Referee finds that apportionment pursuant to Idaho Code § 72-406 is not appropriate.

37. Based on the foregoing, ISIF bears no responsibility in this matter.

CONCLUSIONS OF LAW

1. Claimant has failed to prove her entitlement to reimbursement for the medication listed in Claimant's Exhibits 33 and 34.

2. Claimant has failed to prove she is permanently and totally disabled.

3. Claimant is entitled to PPD benefits equaling 70% of the whole person inclusive of her whole person PPI without apportionment.

4. The Complaint against ISIF should be dismissed with prejudice.

[9] The Referee was impressed with Claimant at both hearings regarding her ability to communicate in a straightforward, articulate manner.

RECOMMENDATION

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

DATED this __9th___ day of April, 2010.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __15th____ day of ___April_____, 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:

THOMAS B AMBERSON
PO BOX 1319
COEUR D'ALENE ID 83616-1319

THOMAS V MUNSON
200 N FOURTH STE 30
BOISE ID 83702

THOMAS W CALLERY
PO BOX 854
LEWISTON ID 83501

Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LORI L. STETZEL, Claimant, v. YELLOWSTONE TRUCKING, Employer, and INSURANCE COMPANY OF THE WEST, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2002-005827** **ORDER** Filed April 15, 2010

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers 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 recommendation of the Referee. The Commission concurs with this recommendation. 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 failed to prove her entitlement to reimbursement for the medications listed in Claimant's Exhibits 33 and 34.

2. Claimant has failed to prove she is permanently and totally disabled.

3. Claimant is entitled to permanent partial disability benefits equaling 70% of the whole person inclusive of her whole person permanent partial impairment without apportionment.

4. The Complaint against ISIF is dismissed with prejudice.

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

DATED this __15th___ day of ____April____, 2010.

INDUSTRIAL COMMISSION

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

___/s/_____
Thomas E. Limbaugh, Commissioner

__/s/_____
Thomas P. Baskin, Commissioner

ATTEST:
__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __15th____ day of __April____ 2010, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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