

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

CYNTHIA L. WRIGHT, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 HAGADONE PHOTOGRAPHY, )  
 )  
 Employer, )  
 )  
 and )  
 )  
 LIBERTY NORTHWEST )  
 INSURANCE CORPORATION, )  
 )  
 Surety, )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 2004-507331**

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER**

filed July 16, 2010

Pursuant to Idaho Code § 72-506, the Commission assigned this matter to Referee Michael Powers. Subsequently, this case was reassigned to the Commissioners on January 11, 2010. The Commission conducted the January 14, 2010 hearing in Coeur d’Alene, Idaho. Louis Garbrecht represented Claimant. Kent Day represented Employer and Surety. The parties presented oral and documentary evidence at the hearing, and subsequently submitted post-hearing briefs. The case came under advisement on April 30, 2010. It is now ready for decision.

**ISSUES**

After due notice and by agreement of the parties at hearing the issues were:

1. Whether Claimant is entitled to permanent partial impairment (PPI) benefits, and the extent thereof;
2. Whether Claimant is entitled to permanent partial disability (PPD) benefits in excess of permanent impairment, and the extent thereof;

3. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine, or otherwise; and,

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

### **CONTENTIONS OF THE PARTIES**

Claimant argues that she is totally and permanently disabled under the odd-lot doctrine due to her chronic regional pain syndrome. Claimant injured her foot walking up the stairs on March 23, 2004. Initially, Claimant's injury seemed like a simple sprain. After Claimant began using crutches for her foot injury, she developed carpal tunnel syndrome. Claimant had surgery for her carpal tunnel syndrome in July and September of 2005. Subsequently, Claimant developed thoracic outlet syndrome bilaterally. Claimant developed chronic regional pain syndrome in her right dominant arm, and only has minimal use of her arm and shoulder. Claimant attempt to return to employment has been unsuccessful, despite Employer's generous accommodations.

Defendants contend that Claimant is not totally and permanently disabled under the odd-lot doctrine. Defendants argue that the credible medical evidence does not support this being an odd-lot total permanent disability case.

### **EVIDENCE CONSIDERED**

The Record in this instant case consists of the following:

1. Oral Testimony by at hearing from Claimant and Kassandra Wright.
2. The parties' joint Exhibits A through GG admitted at hearing.
3. The Commission's legal file.

After having fully considered the above evidence and arguments of the parties, the Commission hereby issues its decision in this matter.

### **FINDINGS OF FACTS**

1. Claimant was 41 years old at the time of hearing. Claimant's past work experience includes secretarial/personal assistant work, operating backhoes and survey equipment, certified nursing assisting, bookkeeping, sales, and running her own business in the auto rental industry. Claimant received her high school diploma and took several college courses. Claimant also obtained her certified nursing assistant (CNA) certificate.

2. Claimant performed general clerical work for Employer. Claimant was responsible for performing light cleaning tasks and moving files into boxes and appropriately archiving them. Claimant argues that she worked four ten-hour days for Employer and earned \$12.50/hr with medical benefits and a cafeteria dental plan.

3. Claimant's accident occurred on March 23, 2004, when she ran up Employer's stairs to retrieve some items for shipping. Claimant hit her left foot on the stair and heard a pop. Claimant continued to retrieve the items for shipping and then felt extreme burning sensation from her foot up her leg. Claimant elevated it and promptly notified her co-worker about the incident.

4. Claimant received medical treatment from North Idaho Family Physicians from Timothy Burns, M.D., on March 24, 2004. Dr. Burns did an x-ray of Claimant's foot, prescribed pain medication, and released Claimant back to work with crutches. Joint Exh. C. Claimant's condition worsened and she reported excruciating pain with significantly increased swelling. Dr. Burns was concerned about the swelling and discoloration of Claimant's foot. By April 5, 2004, Claimant was exhibiting symptoms of Reflex Sympathetic Dystrophy (RSD) or Complex

Regional Pain Syndrome (CRPS). Joint Exh. C., p. 12. Dr. Burns referred Claimant to Scott Magnuson, M.D., and ordered physical therapy. Justin Kane, North Idaho Physical Therapy and Medical Exercise, directed Claimant's physical therapy. Claimant had physical therapy from April 2004 through December 2007.

5. On April 20, 2004, Dr. Magnuson agreed with Dr. Burns that Claimant had symptoms consistent with CRPS. Dr. Magnuson ordered a series of lumbar sympathetic blocks.

6. On May 19, 2004, Dr. Burns released Claimant to two hours of work with several restrictions, including the need to keep her leg elevated and receiving transportation to and from work. Joint Exh. C., p. 22. Claimant returned to work and worked for two hours each day. On June 10, 2004, Dr. Burns increased her work release to four hours daily with several restrictions. Joint Exh. C., p. 23. On September 1, 2004, Dr. Burns noted that Claimant was having difficulties completing her work release hours. However, Dr. Burns considered Claimant medically stable and released her with restrictions and some follow-up care with physical therapy, acupuncture, pain medications, and the recommendation for a health club membership. Joint Exh. C., p. 27.

7. Between September 22, 2004 through October 20, 2004, Claimant received acupuncture treatment from Eric V. Boughton, D.C. Joint Exh. G, p. 219. After several acupuncture sessions, Claimant experienced a setback in pain conditions, and Mr. Boughton recommended a referral to William Britt, M.D. *Id.*

8. On November 17, 2004, Claimant reported new pain symptoms in her arm. Dr. Burns was concerned that her new symptoms indicated a systemic problem and put Claimant on off-work status. Joint Exh. C., p. 34. Dr. Britt concluded an evaluation of Claimant and recommended a referral to a high-level pain clinic. Joint Exh. H., p. 224.

9. Claimant began treatment at the University of Washington Pain Clinic on February 23, 2005. Joint Exh. I., p. 226. During intake, Claimant described experiencing a burning sensation below from her left knee to her foot, and occasionally pain up through her arms and shoulders. *Id.* Claimant's rehabilitation counselor recommended a structured pain program and coordination with a rehabilitation counselor for pain management and vocational counseling. Joint Exh. I., p. 247.

10. On March 18, 2005, Dr. Burns opined that Claimant's increased pain in her upper extremity was connected to her use of crutches for her work-injury, and arranged for Claimant to be evaluated for carpal tunnel syndrome. Joint Exh. C., p. 38. On April 29, 2005, Peter C. Jones, M.D., performed bilateral nerve conduction studies, which confirmed moderately advanced bilateral carpal tunnel syndrome. Joint Exh. K., p. 275. Dr. Jones performed carpal tunnel releases on Claimant's right hand on July 7, 2005, and on her left hand on September 7, 2005. Joint Exh. K., p. 279, 281. Claimant's upper extremity pain symptoms did not subside after her carpal tunnel release operations. Joint Exh. L., p. 283.

11. J. Craig Stevens, M.D., evaluated Claimant on November 7, 2005 for her upper extremity symptoms. Joint Exh. L., p. 283. After several evaluations, Dr. Stevens recommended Claimant treat with Stephen Murray, M.D., a vascular surgeon, for her thoracic outlet syndrome. Joint Exh. L., p. 288. Dr. Stevens concurred that Claimant's thoracic outlet syndrome was work-related, and onset by Claimant's use of crutches for her lower extremity RSD. *Id.* Dr. Murray Gregory K. Luna, M.D., performed a thoracic outlet release on November 30, 2006. Joint Exh. M., p. 298.

12. Around February 24, 2007, Claimant had a MRSA infection related to an insect bite. Joint Exh. C., p. 42.

13. On January 23, 2008, Claimant had an independent medical exam (IME) with Michael Weiss, M.D. Joint Exh. P., p. 318. Dr. Weiss found that Claimant had marked disability, per her Pain Disability Questionnaire, in excess of what one would reasonably expect. *Id.* at 321. Dr. Weiss recommended a functionally based rehabilitation program with aggressive vocational planning, such as the LifeFit program at Idaho Elks Rehabilitation Hospital. *Id.* In addition to a multidisciplinary pain program, Dr. Weiss thought a program with a psychological component would be helpful to hasten Claimant's return to work. In addition, Dr. Weiss opined that returning to work is actually associated with decreased symptoms of chronic pain. *Id.* After completion of the program, Dr. Weiss recommended a graduated return to work and that Claimant would be ready for an impairment rating. *Id.*

14. Claimant had a psychological evaluation with Dr. Michael H. McClay on March 19, 2008. Joint Exh. U. p. 380. Dr. McClay opined that Claimant's psychological profile was abnormal, suggesting conversion tendencies, probable symptom magnification, and motivation for secondary gain. *Id.* at 382. Still, Dr. McClay found that Claimant would be appropriate for the LifeFit program at the Idaho Elks Rehabilitation Hospital. *Id.* at 383.

15. Claimant was scheduled to begin the LifeFit program in February 2008, but deferred the program until March 17, 2008 to assist her daughter's high-risk pregnancy. On February 6, 2008, Surety stopped Claimant's time loss benefits effective February 2, 2008. These benefits were resumed when Claimant began the LifeFit program.

16. Claimant's first week at the LifeFit program was successful, and Claimant was fully compliant with her program. Claimant's baseline evaluation showed that Claimant could leg press 40 pounds, incline press 20 pounds, and row with 25 pounds. Joint Exh. J., p. 357. In addition, Claimant could carry 12.5 pounds, and move 12.5 pounds from desk-to-chair, 12.5

pounds desk-to-floor and 12.5 pounds above her shoulder. *Id.* at 358. Dr. Friedman counseled Claimant on her sleep issues. *Id.*

17. During Claimant's second week at LifeFit, she was able to maintain her time spent in the therapeutic pool, increase the time spent doing cardiovascular fitness, and the amount of weight she could lift during her exercises. Joint Exh. T., pp. 361-364. Claimant improved on all lifting and carrying measures. *Id.* Claimant's continued to have sleep problems, and was given "sleep hygiene techniques" and additional education on the subject. *Id.*

18. Claimant missed the first day of her third week at the LifeFit program and the Idaho Elks Rehabilitation Hospital in Boise, ID. Joint Exh. U., p. 369. Claimant continued at the LifeFit program, and the charts indicate that she was improving on all measurement areas—cardiovascular endurance and strength. *Id.* at 369-375. Dr. Friedman and Kelly Holmes found Claimant non-compliant in her rehabilitation program for failing to complete tasks as assigned, and self limiting her abilities in weight training and work simulation activities. *Id.* at 372. LifeFit staff did not observe Claimant dropping any items and encouraged her to perform *all* of her treatment program without modification. *Id.*

19. On April 3, 2008, Claimant was discharged from the LifeFit program. Joint Exh. U., p. 376. The parties disagree about the circumstances that led to Claimant's discharge. Claimant argues that she was making an extreme effort to comply with the program, but simply could not lift the amount of weights that she was asked to do. Hr.Tr., pp. 62-63. Claimant reports that she had difficulty staying awake throughout the day, and would fall asleep during her classes. Hr.Tr., p. 62. While there is documentation that Claimant received counseling for sleep issues, LifeFit records make no mention of Claimant falling asleep during the program. Instead, LifeFit staff found her compliant and able to fully participate for the first two weeks of the

program. *See*, Joint Exh. T-U. LifeFit staff found that Claimant was refusing to perform tasks, which she previously demonstrated the ability to do. Joint Exh. U., p. 376. After encouraging Claimant to perform the therapeutic activities, LifeFit staff reports that Claimant became upset and refused to complete the activities. Dr. Friedman requested that Claimant perform a urinalysis drug screen. Joint Exh. U., p. 376. LifeFit staff believed Claimant was stalling or refusing to provide a sample for drug testing, but Claimant maintains that she could not provide a sample. *Id.* at 376; Hr.Tr., p. 67. Claimant reports that she had to use her cell phone during a therapy session to speak with Dan Brownell from the Idaho Industrial Commission, but LifeFit staff reports Claimant saying she said she spoke with her workers' compensation adjuster. Joint Exh. U., p. 377; Hr.Tr., p. 64. LifeFit staff verified that Claimant's workers' compensation adjuster had not contacted Claimant on the day in question. Joint Exh. U., p. 377. Ultimately, Claimant was asked to leave the program. Joint Exh. U. Claimant testifies that her discharge from the program caused an angry uproar from the other rehabilitation patients at the unfairness of her situation. Hr.Tr., p. 67.

20. On April 10, 2008, Dr. Friedman opined that Claimant has reached maximum medical improvement. Joint Exh. V., p. 387. Because of Claimant's noncompliance with the LifeFit program, Dr. Friedman felt a successful rehabilitation outcome would be impossible. *Id.* Claimant was released to return to work and noted that Claimant was able to perform light-duty job tasks. *Id.* Given Claimant's CRPS diagnosis, Dr. Friedman opined that Claimant's pain symptoms would not resolve, but her symptoms would be best treated by resuming any and all activities without restrictions or limitations on a permanent basis. *Id.* Using the *AMA Guides to Permanent Impairment, 5<sup>th</sup> Edition*, Dr. Friedman opined that Claimant's upper extremity CRPS is best rated as type 1 under Table 16-10, resulting in a 5% whole person impairment. Dr.



Friedman noted that Claimant reported significant pain with sleep disturbances, without documented weakness or loss of range of motion. In addition, Claimant's left lower extremity for CRPS was rated under Table 13-15 for impairments in station and gait, giving Claimant an additional 5% in whole person impairment. *Id.* at 388. In total, Dr. Friedman gave Claimant a 10% whole person impairment rating. *Id.*

21. On February 9, 2009, Dr. Burns opined that Claimant was totally disabled, due to her RSD or CRPS and Bilateral Thoracic Outlet Syndrome, and would not be able to return to work. Joint Exh. C., p. 51. On April 19, 2009, Dr. Burns elaborated on Claimant's restrictions and her employability as follows:

She is unable to stand for any extended period of time. She is unable to sit for any extended period of time, and by extended, I mean less than an hour. In view of this, I feel that the patient is truly disabled and is not a person who is employable, particularly not at any type of activity that would require standing, walking, or use of her dominant right hand, which covers just about any job that I think would be available to her.

Joint Exh. C., p. 54.

22. Drs. Burns and Friedman disagree about the appropriate course of medical care for Claimant's CRPS condition. Dr. Friedman opined that Claimant's CRPS is best treated through increased activation and usage, rather than long-term opiate use. Joint Exh. V., p. 389. Dr. Friedman notes that there is no medical evidence that Claimant is damaging or worsening her tissue while performing her functional activities. *Id.* at 390.

23. On July 23, 2009, Claimant arranged for an IME evaluation with John M. McNulty, M.D. Dr. McNulty opined that Claimant was entitled 16% whole person PPI rating for her right upper extremity, and 15% whole person PPI rating for her left lower extremity. Joint Exh. W., pp. 397-398. Dr. McNulty found that Claimant was only able to stand or walk for 10

minutes at a time. Dr. McNulty opined that Claimant could only perform sedentary duty work which did not require repetitive use of either upper extremity for one to two hours per day.

24. Claimant applied for Social Security Disability benefits, and found not disabled on August 26, 2006. Joint Exh. GG., p. 618. Claimant filed a reconsideration of that decision on October 10, 2006. Joint Exh. GG., p. 621. Claimant received an additional Notice of Disapproved Claim on December 4, 2007. Joint Exh. GG., pp. 626-627. Claimant continued to pursue her claim for social security disability benefits. On October 20, 2009, Claimant was found entitled to social security disability benefits. Joint Exh. GG., pp. 869-873.

### **Vocational Testimony**

25. On February 12, 2009, Claimant had a hand function assessment with Virginia Taft at the Coeur d'Alene Hand Therapy Healing Center. Joint Exh. R. Claimant reported pain with increased activity and repetition. *Id.* at 335. Claimant demonstrated significant deficit limitations and endurance, sensation and function problems in her right hand and left leg. Claimant's pinch and grip strength were within normal limits. *Id.* at 335-337. Ms. Taft considered Claimant's upper extremity range of motion and tolerable range limited to a maximum reach from waist height to 90 degree shoulder flexion, and found Claimant's standing tolerance to be less than ten minutes. *Id.* Under these restrictions, Ms. Taft found Claimant's ability to work limited to part-time employment with flexible hours. *Id.* Ms. Taft suggested self-employment with assistant technology modifications. *Id.* at 337.

26. Dan Brownell, vocation rehabilitation counselor, testified on behalf of Claimant. Mr. Brownell opined that Claimant was not magnifying her symptoms or non-compliant at the LifeFit program. Brownell Depo., pp. 21-22, 39. Around August 2005, Mr. Brownell pursued self-employment options for Claimant, which were unsuccessful. Claimant's file was closed on

May 4, 2009, because Claimant reported that she was not physically capable of working in any capacity. Brownell Depo. Exh. 5. Ultimately, based on Dr. Burns' restrictions, Mr. Brownell opined that Claimant cannot return to work in her pre-injury capacity. *Id.* Mr. Brownell characterizes Claimant has only being able to compete for sedentary positions. *Id.* In the labor market of Coeur d'Alene, Post Falls and Hayden, Mr. Brownell finds that 10% of the jobs are classified as sedentary work. Mr. Brownell finds that Claimant would not be able to perform 90% of those jobs, due to hand limitations. Brownell Depo., pp. 30-32. Even if Claimant were able to use her arms occasionally, Mr. Brownell finds that the available jobs would still exceed Claimant's capabilities in the areas of sitting, standing, walking, lifting, and reaching. *Id.* at 32. Mr. Brownell opines that 70% of sedentary jobs require reaching on an occasional-to-frequent basis. *Id.* Under questioning, Mr. Brownell acknowledged that if Claimant could lift and/or carry 20 pounds and frequently lift and/or carry 10 pounds, Claimant would have access to light jobs. *Id.* at 73-74. Under the relevant labor market, 50% of the jobs are in the light category. *Id.* at 75. Mr. Brownell believes that Claimant is totally and permanently disabled.

27. On December 31, 2009, Mary Barros-Bailey conducted a disability evaluation. Joint Exh. JJ. Ms. Barros-Bailey reviewed Claimant's medical history and evaluated Claimant's disability on a variety of restrictions in the record. Claimant had a physical RFC from Disability Determination Services (DDS) on November 2, 2007, in connection with her application for social security disability benefits, which identified the following restrictions:

Occasionally lift 20 pounds; frequently lift 10 lbs; standing/walking with normal breaks about 6 hours in an 8-hour day; sit with normal break for a total of 6 hours in an 8-hour day; pushing and pulling is unlimited; frequently climbing ramps, stairs; occasionally ladders, ropes scaffolds; frequently balancing, stooping, kneeling, crouching and crawling; limited reaching in all directions, including overhead; limited handling; limited fingering and unlimited feeling. Claimant with CRPs RUE limited to occasional reaching, handling, fingering, left upper

extremity totally unlimited. Should avoid concentrated exposure to hazards, machineries, and heights.

Joint Exh. FF., p. 576; Joint Exh. GG., pp. 580-608.

Based on those restrictions, Ms. Barros-Bailey found her repetitive use of upper extremity significant, while her position restrictions would not be a significant limiting factor with respect to office occupations. Thus, Claimant would be able to obtain some entry level occupations, ranging in pay from \$7.25 to \$8.87 per hour. Claimant's disability would be 43%, inclusive of impairment.

28. Ms. Barros-Bailey evaluated Dr. Burns' restrictions given on April 27, 2009. Dr. Burns issued the following restrictions:

Unable to stand or walk for any extended period of time or remain sitting in a set position for an extended period of time, as this aggravates the pain in her leg. She is also unable to use the right arm on a repetitive basis for the very same reasons of increased pain in her arm.

Joint Exh. GG., p. 577.

Ms. Barros-Bailey found these restrictions very broad, and opined that further clarification from Dr. Burns would be helpful to determine whether Claimant would be permanently disabled.

29. After considering the results of Claimant's February 12, 2009 Hand Function Assessment, Ms. Barros-Bailey opined that Claimant could return to work on a part-time basis with support and has sustained a 66% disability, inclusive of impairment. Joint Exh. FF.

30. According to Dr. Friedman's letter to Liberty Mutual, there was no medical evidence to support that Claimant is unable to perform activities requested or required for employment. In addition, Claimant's symptoms would improve with increased utilization of her

upper extremity. Joint Exh. FF. Under this approach, Ms. Barros-Bailey opined that Claimant has suffered no disability. Joint Exh. FF.

31. As discussed above, Dr. McNulty identified significant restrictions, and Claimant would be unable to perform repetitive upper extremity exercises and can only stand or walk for ten minutes at a time. Ms. Barros-Bailey finds that Dr. McNulty's opinion places Claimant into the odd-lot category. Joint Exh. FF.

**Claimant's Pre-existing Conditions:**

32. In 1998, Claimant had a snowmobile accident and injured her right hand and left leg. Joint Exh. D., p. 61. Claimant's right hand was negative for acute bony fracture line or traumatic change. *Id.* Claimant's initial chart note from North Idaho Family Physicians indicates that "Claimant has had other joint problems, particularly developing what appears to be a cystic lesion on the PIP joint of the right, middle finger in the past." Joint Exh. C.

**Claimant's credibility**

33. Claimant made various assertions at hearing that were not well supported by the medical record, including that she gained seventy-five pounds, has difficulty gripping items, and has severe muscle atrophy. *See*, Hr. Tr., p. 52. The medical records do not substantiate that Claimant gained seventy-five pounds, and several indicate that Claimant had good grip strength. Claimant's purported muscle atrophy issues are not well-documented in the otherwise descriptive medical records. Still, there is medical evidence to support many of Claimant's assertions. The parties agree that Claimant has CRPS in her left leg and right arm. There is a significant divergence in the experts' appraisals of Claimant's true physical abilities, which is not uncommon in contested cases, and will be addressed below.

34. Claimant's experience at the LifeFit program casts doubt on Claimant's commitment to rehabilitation. Joint Exh. U. Notably, the LifeFit records show steady improvement in Claimant's condition, the ability to lift up to 16.25 pounds with her upper body, and even leg press up to 60 pounds. *Id.* at 373. Claimant denies that she was able to lift the amounts of weight that LifeFit staff requested. Claimant also argues that she would fall asleep during class, which is similarly undocumented by the records. However, it is apparent that Claimant had a conflict with her medical providers at the LifeFit program, and Claimant's abrupt discharge from the program is unusual.

35. Claimant's portrayal of her physical limitations at hearing may have been dramatic. In the end, the Commission finds that Claimant is a generally reliable historian and witness, but prone to exaggeration.

#### **Additional witness testimony**

36. Kassandra Wright, Claimant's daughter, also testified at hearing. Ms. Wright was a generally credible witness.

### **DISCUSSION**

#### **PPI**

37. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When

determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

38. The two PPI ratings in this case are from Dr. McNulty, who issued a 29% PPI rating, and Dr. Friedman, who issued a 10% rating. Claimant argues that Dr. McNulty's opinion on PPI is more persuasive, and she is entitled to a combined 29% PPI rating with significant restrictions and limitations to sedentary work should be adopted. Defendants argue that Dr. McNulty's did not consider Claimant's experience at the LifeFit program, or the opinions of the rehabilitations doctors, or the opinion of the doctors who evaluated Claimant for purposes of Social Security Disability benefits. Instead, Defendants argue that Claimant's residual functional capacity is at light-duty work, and that Dr. Friedman's impairment rating is more persuasive, because it is based on objective functional ability, and derived from three weeks of evaluation.

39. Dr. Friedman classified Claimant as having type-1 CRPS under the AMA Guides to Permanent Impairment, 5<sup>th</sup> Edition for her upper and left extremity. Dr. Friedman noted that Claimant did not have range of motion loss or functional loss to her right upper extremity. In addition, there was no weakness or range of motion loss for her upper extremity. As to Claimant's left extremity, Dr. Friedman noted impairments in station and gait disorder. Dr. McNulty classified Claimant as type-2 CRPS, due to Claimant's pain symptoms, and her limitation to walking on level surfaces. Dr. McNulty does not address Claimant's experience with the LifeFit program, other than to mention that Claimant was discharged for noncompliance. As such, the Commission is persuaded that Dr. Friedman's 10% PPI rating is appropriate.

40. Claimant has proven her entitlement to 10% PPI rating.

## **Odd-lot**

41. Even though Claimant has failed to prove she is totally and permanently disabled under the 100% method, she may still be able to establish such disability pursuant to the odd-lot doctrine. 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).

42. 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).

43. The last method to establish odd-lot status is by showing that any work search would be futile in that there are no jobs regularly and continuously available within his restrictions. It is therefore necessary to examine just what permanent physical restrictions have been assigned to Claimant for her industrial accident.



44. Dr. Burns opines that Claimant is unable to stand, walk, or remain in a set position for any extended period of time, and unable to use her right arm on a repetitive basis. *See, Joint Exh. GG., p. 577.* Dr. Burns' evaluation of Claimant's physical abilities is broad, and lacking the details necessary to specifically identify Claimant's restrictions and/or capabilities.

45. Dr. McNulty opined that Claimant was only able to stand or walk for ten minutes at a time, and that her ability to perform repetitive upper extremity exercises is quite limited secondary to the dysfunction in her dominant right upper extremity. *Joint Exh. W., p. 398.* However, Dr. McNulty did not address evidence that suggests Claimant may be self-limiting her abilities or magnifying her symptoms.

46. At the opposite end of the spectrum, Dr. Friedman opined that no restrictions would be necessary, as her symptoms would be best treated by resuming any and all activities without restrictions or limitations on a permanent basis.

47. The Commission is unpersuaded by these all-or-nothing opinions on Claimant's physical restrictions. Certainly, Claimant did not appear receptive to LifeFit rehabilitation program, and her psychological profile by Dr. McClay suggests potential symptom magnification. The Commission does not take lightly the suggestion of secondary gain issues. However, releasing Claimant without *any* restrictions seems disproportionately harsh, and discounts that Claimant's abilities have been limited by her industrial accident. Claimant has, at the very least, shown that some restrictions are appropriate.

48. Claimant's February 12, 2009 Hand Function Assessment, and her November 2, 2007 RFC from Disability Determination Services identify restrictions that would allow Claimant to return to employment, albeit not without a loss of wages or access to the labor market. Claimant's Hand Function Assessment found that Claimant had little ability to use her

hands or arms, especially on the right side, and that Claimant could not lift over her head. Still, Claimant could use adaptive technology to secure flexible part-time employment. Claimant's physical RFC from Disability Determination Services (DDS) on November 2, 2007, in connection with her application for social security disability benefits, reflected that Claimant has more capabilities than Drs. Burns and McNulty opined, but needed more restrictions than Dr. Friedman opined. Subsequently, Claimant challenged these physical RFC findings, because she thought they did not address the extent of her limitations. The RFC findings that Claimant could lift pounds occasionally and frequently lift 10 lbs are similar to Claimant's recorded capabilities in the LifeFit program, but perhaps too optimistic considering Claimant's subsequent clarification with DDS concerning her physical activities. Claimant's 2009 Hand Function restrictions for lifting capabilities are on the low end, considering Claimant's performance at the LifeFit program. The Commission finds the restrictions identified in Claimant's Hand Function Assessment and Claimant's November 2007 physical RFC from Disability Determination Services (DDS), more persuasive on Claimant's actual abilities.

49. Ms. Barros-Bailey opined that Claimant was employable under the restrictions identified by the Hand Function Assessment or the physical RFC from DDS. The Commission finds Ms. Barros-Bailey's opinion persuasive.

50. The Commission finds that Claimant has failed to prove that she is an odd-lot worker.

### **PPD**

51. The degree of an injured worker's permanent disability, and the cause or causes of a disability, are factual questions committed to the discretion of the Industrial Commission. A claimant has permanent disability 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 reasonably be expected. *See*, Idaho Code § 72-423. A permanent disability rating is the appraisal of the claimant's present and probable ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent non-medical factors as provided in Idaho Code § 72-430. Per Idaho Code § 72-425, the central focus of the disability evaluation is on the ability to engage in gainful activity. *See, Smith v. Payette County*, 105 Idaho 618, 671 P.2d 1081 (1983); *Baldner v. Bennett's, Inc.*, 103 Idaho 458, 649 P.2d 1214 (1982).

52. In assessing Claimant's permanent partial disability, it is first helpful to understand whether Claimant's permanent impairment has caused a loss of functional capacity which impacts her ability to engage in physical activity. Indeed, a loss of functional capacity figures prominently in all cases involving a determination an injured worker's disability in excess of physical impairment. Absent some functional loss, it is hard to conceive of a factual scenario that would support an award of disability over and above impairment; if the injured worker is physically capable of performing the same types of physical activities as he performed prior to the industrial accident, then neither wage loss nor loss of access to the labor market is implicated.

53. The basis for Claimant's permanent impairment is her type-1 CRPS, which the Commission concludes has caused functional loss. Claimant's relevant nonmedical factors include her age, educational level and past employment experience. Claimant is 40 years old, and has completed high school and some college courses. Joint Exh. CC. p. 454. Claimant received her CNA certification and has transferable skills in public relations, sales, transcription,

invoicing, accounts receivable/accounts payable, data entry, payroll, certified nursing assistant, and catering. Joint Exh. CC., p. 454.

54. There is some discrepancy between the parties on Claimant's wage loss. Claimant argues that she was earning \$12.50/hr, 40 hours at week with her time of injury Employer. Claimant's W-2 reports from 2002 and 2003, which Claimant has verified as being accurate, show she earned \$16,976 in 2002 and \$16,063 in 2003. Hr. Tr., p. 102. At the rate of pay of \$12.50/hour, Claimant reported earnings on her W-2s suggest she was working closer to 27 hours/week. Hr.Tr., p. 102. When confronted with these calculations, Claimant explains that she received a raise. Hr.Tr., p. 102. The Commission finds that Claimant's W-2 are more persuasive on her actual wage loss than Claimant's testimony at hearing.

55. The vocational experts in this case, Mr. Brownell and Ms. Barros-Bailey, offered opinions about the extent of Claimant's disability. Mr. Brownell opined that Claimant's restrictions render her totally unable to work. Ms. Barros-Bailey agreed with Mr. Brownell's position that Claimant would be totally disabled under the odd-lot theory, if the restrictions given by Drs. Burns and McNulty were accepted. As discussed above, the Commission is not persuaded by the restrictions issued by Drs. Burns and McNulty. The Commission is persuaded by the restrictions given in the 2009 Functional Hand Assessment, and the RFC restrictions from the DDS evaluation. Of those restrictions, Ms. Barros-Bailey opined the Functional Hand Assessment restrictions would result in a 66% disability, while the RFC restrictions from DDS would result in a 43% disability.

56. As discussed above, Claimant has disputed the RFC restrictions from her DDS evaluation, because she felt they were not unrealistic of her physical abilities. On the other hand, Claimant's performance in the LifeFit program suggests that the Functional Hand Assessment

restrictions do not capture everything that Claimant is able to perform. Considering Claimant's non-medical and medical factors as a whole, including the extent of her wage loss, Claimant has proven her entitlement to 60% disability, inclusive of impairment.

**Claimant's entitlement to TTDs and Attorney's Fees**

57. Claimant raises other issues in briefing that were not noticed issues at hearing. Employer objected. The Commission will not consider these issues at this time.

**ORDER**

Based on the foregoing analysis, IT IS HEREBY ORDERED That:

1. Claimant has proven that she is entitled to 10% PPI.
2. Claimant has not shown that she is totally disabled under an odd-lot theory.
3. Claimant has proven her entitlement to 60% PPD inclusive of impairment.
4. No apportionment is necessary.

IT IS SO ORDERED.

DATED this \_\_16th\_\_ day of July, 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 16th day of July, 2010 a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** was served by regular United States Mail upon:

LOUIS GARBRECHT  
1400 E SHERMAN AVE  
CŒUR D'ALENE ID 83814

KENT W DAY  
PO BOX 6358  
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cs-m/cjh

      /s/      \_\_\_\_\_