

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KATHLEEN PUYLEART,

Claimant,

v.

STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND

Defendant.

IC 2005-521004

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

February 16, 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 Coeur d'Alene, Idaho, on July 30, 2009. Richard Whitehead represented Claimant. Thomas W. Callery represented Defendant. The parties submitted oral and documentary evidence. One post-hearing deposition was taken and the parties submitted post-hearing briefs. The matter came under advisement on January 14, 2010 and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether the Industrial Special Indemnity Fund (ISIF) is liable pursuant to Idaho Code § 72-332; and
2. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant sustained an industrial injury to her neck and right shoulder while working for Idaho Department of Health and Welfare (Employer) on September 14, 2005 (last injury) and that Employer maintained a workers' compensation insurance policy through State Insurance Fund (Surety). Claimant reached a settlement with Employer and Surety prior to hearing and those defendants were dismissed from the case.

The parties agree that Claimant's pre-existing medical conditions included irritable bowel syndrome (IBS), restless leg syndrome (RLS), sleep apnea, depression, migraine headaches, thyroid cancer, degenerative disc disease, left knee injury, parasitic intestinal infection, polycythemia vera and fatigue. Claimant's treatment related to her last injury includes cervical surgery performed in January 2006. Subsequent to her last injury, Claimant underwent an unrelated left total knee replacement (TKR). It is further undisputed that Claimant was totally and permanently disabled at the time of hearing. The issues in dispute pertain to the date on which Claimant became totally and permanently disabled and the cause(s) of such disablement.

Claimant admits that she had multiple pre-existing health issues and impairment, but contends that she was able to overcome her health conditions and demonstrate exemplary work performance until her last injury. Claimant was able to maintain employment until the limitations surrounding her cervical surgery and right shoulder injury combined with her pre-existing impairment to preclude continued employment.

ISIF contends that Employer made significant accommodations to allow Claimant's continued pre-injury employment and that Claimant was totally and permanently disabled prior to her last injury by virtue of the odd-lot doctrine. ISIF points out that Claimant returned to work for fourteen months after her cervical surgery and that she did not stop working until her TKR in

June 2007. ISIF asserts that restrictions attributable to Claimant's last injury do not combine with her pre-existing impairment to render her totally and permanently disabled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Exhibits A1 through A33 and B through D admitted at hearing;
2. Employer's Exhibits A through II admitted at hearing;¹
3. ISIF's Exhibits A through D admitted at hearing;
4. Testimony taken at hearing from Claimant, Claimant's husband Thomas Puyleart, Claimant's neighbor Linda Rigney, Claimant's previous co-worker Cynthia Kiebert, and Defendant's vocational expert Nancy Collins, Ph.D.;
5. The post-hearing deposition of Claimant's vocational expert Douglas N. Crum taken October 1, 2009, with one exhibit attached; and
6. The Industrial Commission's legal file.

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

Background

1. Claimant was 57 years old and resided in Naples, Idaho, at the time of hearing. Naples is approximately 10 miles south of Bonners Ferry and 28 miles north of Sandpoint. Claimant has been married since 1972, but her husband maintains a separate residence in Montana because of his employment.

¹ Although Employer was not a party at hearing, Claimant offered exhibits that were previously identified by Employer and were admitted without objection. Those exhibits will continue to be denoted as "Employer's Exhibits" for the purpose of consistency and to eliminate the need for either party to re-mark the exhibits.

2. Claimant was born in Wisconsin and graduated from high school in Green Bay. She relocated to Idaho in 1974. Claimant received on-the-job training as a dental assistant and worked in that field during the 1970s. Her work place had ventilation issues and she could not tolerate working in an environment with fumes associated with latex, mercury, creosote and formaldehyde. During the 1980s, Claimant earned an Associate's Degree in accounting through a vocational retraining program. She worked in multiple sedentary jobs including drafting, accounting and as a receptionist.

3. Claimant began working for Employer in 1990 as an eligibility examiner. She was promoted to the position of self-reliance specialist in 1996 and maintained that position until 2007 when she stopped working. Claimant is computer literate. She is right hand dominant.

Pre-Existing Conditions and Impairment

4. Claimant has suffered from migraine headaches, allergies, asthma and hypertension for several years. Claimant was assigned 2% permanent partial impairment (PPI) for hypertension.

5. Claimant has a genetic blood disease called polycythemia vera for which she receives treatment at the cancer center in Spokane. She requires phlebotomies and experiences fatigue as a result of the condition and its treatment. She has a related diagnosis of erythromelalgia which causes blood to pool in her hands and feet. She is able to reduce symptoms by elevating her hands and/or feet. Claimant was assigned 1% PPI for her blood disorder.

6. Claimant has had irritable bowel syndrome (IBS) for all of her adult life which causes frequent diarrhea. Claimant is prone to bacterial infections that exacerbate her IBS and

cause explosive diarrhea. Claimant manages her condition by restricting her diet, timing her meals so that she has restroom availability and routinely carrying a change of clothing. When her condition is at its worst, she uses Depends. No PPI was assigned for Claimant's IBS.

7. In 1997, Claimant sustained a work-related injury to her left knee which required two surgeries and prolonged rehabilitation. Her left knee condition made it difficult to get up and down from a chair, but did not prevent her from completing her work. Claimant was assigned 15% PPI for her left knee condition.

8. In 2000, a growth was discovered on Claimant's thyroid. In January 2006, she had her thyroid removed and was diagnosed with thyroid cancer. Claimant was cancer-free at the time of hearing. Claimant was assigned 2% PPI for thyroid carcinoma.

9. In 2001, Claimant filed a claim for an occupational disease related to an allergic reaction to fumes associated with new carpet, copy machines and printers. No PPI has been assigned related to Claimant's allergies, asthma or chemical sensitivity.

10. Since at least 2001, Claimant has had restless leg syndrome (RLS) which is related to low levels of iron and is exacerbated when she undergoes phlebotomies. The RLS causes her to lose sleep and increases her fatigue. The severity of her RLS has fluctuated and her response to medication has been inconsistent. No PPI was assigned for Claimant's RLS.

11. In 2003, Claimant filed a repetitive trauma claim for pain to her upper back and right side of her neck due to phone interviews without the use of a headset and use of a file cabinet that was difficult to open. The claim was denied and Claimant did not pursue it. Claimant was assigned between 10% and 14% PPI for pre-existing cervical impairment. A 12.5% rating is adopted based on a post-last injury cervical rating of 25% PPI with half apportioned as pre-existing.

12. Claimant was diagnosed with sleep apnea in 2004 and uses a CPAP when she sleeps. No PPI was assigned for Claimant's sleep apnea.

13. Claimant was reported to have had minor strokes in 2002 and 2005, but did not have a confirmed diagnosis of stroke or transitory ischemic attack (TIA). No PPI was assigned for stroke or TIA.

14. Claimant had additional pre-existing health issues, but those were transitory and not assigned a rating for permanent impairment. Claimant's total pre-existing PPI is 32.5%. All pre-existing PPI ratings were calculated retroactively by Michael Carraher, M.D., and are not in dispute. Employer's Exhibit HH.

Work Status Prior to Last Injury

15. Prior to her last injury, Claimant's need for work-restrictions and accommodations from Employer included a need to have her work station near a restroom; to have access to a shower and area to change clothing; to have a cot in her office to nap during lunch and breaks; to work in an environment free of fumes from a copy machine and with use of an air filter; short-term ability to work a flexible schedule to accommodate appointments for medical treatment and medication schedule; advance notice of use of paints and chemical cleaners in the work place and use of specific lighting and a non-glare computer monitor.

16. By all accounts, Claimant was good at the work she performed and it was noted on more than one occasion that her performance exceeded expectations. Claimant's absenteeism was intermittently an issue with Employer. During a twelve month period spanning early 1998 to early 1999, Claimant missed two months in sick and vacation time which required Employer to shift Claimant's responsibilities to other employees.

17. In 2001, Claimant experienced an allergic reaction to new carpet installed in the Sandpoint office where she regularly worked and was permitted to relocate to the Bonners Ferry office for at least six months. She took intermittent periods of medical leave in 2001 and 2002 related to her allergies.

18. Claimant began a period of extended medical leave on October 4, 2004 and returned to part-time work on December 22, 2004. In early 2005, Claimant worked 20-30 hours per week and utilized sick pay as well as time off without pay. By March 2005, Claimant was released to work 40 hours per week but requested a flexible schedule, in accordance with physician recommendation, to allow her to spread her work over seven days per week to prevent working more than six hours per day. The medical reasons for Claimant's time off from work in late 2004 and early 2005 were issues associated with her blood disorder, bowel incontinence, RLS, depression, deteriorating ability to concentrate and the need to attend medical appointments for her various conditions.

19. Employer was unwilling to accommodate Claimant in a manner that permitted her to work outside of the agency's regular business hours on a long-term basis. Employer's temporary accommodation (90 days) was scheduled to expire on March 21, 2005 by which time Claimant would be required to either discontinue working or provide a release to return to full-duty work. There was some degree of conflict between Claimant and Employer regarding this situation and Claimant felt that she should be permitted to have an additional period of an altered work schedule based on her disability. Employer adhered to its policy that Claimant would have to be able to return to full-time work for two weeks before having the option of taking additional medical leave. Claimant obtained a full-duty release to return to work without restrictions in mid-March 2005.

Last Injury and Treatment

20. On September 14, 2005, Claimant was assisting in transferring cardboard files from the Sandpoint office to the Bonners Ferry office. She was attempting to retrieve one of two stacks of files from the top of a file cabinet when one stack fell onto her chest and right arm while she was holding the other stack in her right arm and attempting to open a file drawer. She experienced immediate pain radiating from her back to her rib cage. Claimant was taken to the emergency room by a co-worker.

21. A cervical MRI performed on November 14, 2005 revealed severe spondylosis and discogenic degenerative changes at C5-6 with severe central canal stenosis, ventral deformity of the spinal cord and moderate bilateral neuroforaminal stenosis. It is undisputed that Claimant's MRI findings pre-existed her last injury to at least some extent, but that the last injury aggravated Claimant's condition.

22. On January 23, 2006, Claimant had an anterior cervical discectomy and fusion at C5-6 performed by William F. Gantz, M.D. Post-surgical diagnostic studies revealed a solid fusion with good alignment. Claimant underwent post-surgical medical care without complications.

23. In December 2006, Dr. Ganz released Claimant to return to regular duty employment working 24 to 40 hours per week, without restrictions.

24. On March 30, 2007, Claimant was evaluated by Dr. Friedman at the request of Surety. Dr. Friedman assigned a 20% PPI rating with 50% of the rating attributable to Claimant's pre-existing conditions. He determined that Claimant's right shoulder symptoms were no longer related to her last injury and were possibly related to use of a cane due to unrelated knee problems and fibromyalgia. With regard to Claimant's cervical spine, he felt that

permanent medium duty work restrictions were appropriate with occasional lifting up to 50 pounds; repetitive lifting up to 25 pounds; limited repetitive shoulder activity no greater than 20 pounds and no repetitive neck rotation, flexion, or extension.

25. In April 2007, Dr. Ganz reviewed Dr. Friedman's report and expressed his agreement with the findings.

Employment Subsequent to Last Injury

26. Claimant returned to her pre-injury job in March 2006, approximately two months after her cervical surgery, and worked essentially full-time until June 2007.

27. Although Claimant was not assigned restrictions from Dr. Ganz, she requested and received additional accommodations in the form of an ergonomic keyboard and chair. Her file cabinets were re-located to allow easier access.

28. Claimant testified that a temporary worker had been hired during her absence and that the employee continued to work and share Claimant's job responsibilities.

Subsequent Non-Occupational Medical Treatment

29. Claimant was diagnosed in July 2006 with fibromyalgia for which she takes tramadol. The diagnosis was not attributed to Claimant's last injury.

30. In June 2007, Claimant took a leave of absence from work because of multiple health issues and so that she could undergo a left TKR. Claimant experienced complications a couple of days after her surgery when her intestine perforated and she required a colostomy. Claimant had an allergic reaction to adhesive used in the colostomy and developed infection. The colostomy was reversed in November 2007.

31. Claimant required a revision surgery to her left knee in December 2008 to remove her knee prosthesis because of infection.

32. Results of the TKR and coloscopy reversal surgery were not optimal and Claimant continues to experience significant problems with her left knee and digestive system.

33. Claimant has not returned to work since June 2007. She receives disability payments from Social Security and Public Employee Retirement System (PERSI).

Non-medical Factors

34. Claimant resides in a rural area with limited employment opportunities. Her labor market includes Bonners Ferry and Sandpoint.

35. Claimant has transferrable skills in sedentary employment.

36. Claimant's age of 57 is somewhat of a hindrance.

Lay Witness Testimony

Linda Rigney

37. Ms. Rigney lives a half-mile away from Claimant and they have been friends for the past thirteen years. Over the years, Ms. Rigney has participated in various activities with Claimant including fishing, entertaining, snowshoeing and berry picking.

38. Ms. Rigney has seen Claimant's medical condition and physical abilities deteriorate. Claimant used to be strong and athletic but is no longer able to engage in many of her past activities such as pottery, gardening, swimming, decorating the house for holiday and throwing Frisbees for her dogs. Ms. Rigney attributes Claimant's deterioration to the last injury and believes it was the straw that broke the camel's back. Ms. Rigney was aware of most of Claimant's medical issues both prior to and following her last injury, but was not clear on the exact chronology or dates that any specific condition(s) flared up.

Cynthia Kiebert

39. Ms. Kiebert was Claimant's co-worker with Employer from 1990-1996 and also considers Claimant a close family friend. During the time she worked with Claimant, Claimant was able to manage her caseload and received good performance reviews in spite of health issues.

40. Ms. Kiebert has seen Claimant's physical abilities deteriorate to the point that Claimant needs the assistance of friends to perform basic household duties. Claimant used to be active in outdoor activities and crafts. Ms. Kiebert attributes Claimant's change in activity level to her cervical and shoulder injury.

Thomas Puyleart

41. Mr. Puyleart married Claimant in 1972. They moved to Idaho in 1974 and have raised two boys. Mr. Puyleart worked for 19 years as a journeyman operator for a hydroelectric plant for the City of Bonner's Ferry. He then went to work for Avista Corporation in Noxon, Montana, where he was employed at the time of hearing.

42. Claimant experienced medical and personal obstacles from 2000 through 2005, but Mr. Puyleart observed that she was able to maintain her ability to participate in recreational activities and household obligations until her last injury. Claimant continued working with difficulty following her cervical surgery and her shoulder was constantly inflamed during the last fourteen months that she worked.

Vocational Opinions

Nancy Collins, Ph.D.

43. Dr. Collins is a vocational expert hired by ISIF to perform an assessment of Claimant and provide an opinion about her employability and future disability. She reviewed

Claimant's medical records, vocational records, deposition transcript and interviewed Claimant. Dr. Collins prepared a report and provided testimony at hearing.

44. In her report, Dr. Collins discussed the difficulties that Claimant experienced in maintaining employment prior to her last injury. She summarized the report generated by Claimant's mental health counselor less than a year before Claimant's last injury who stated that Claimant:

is incredibly creative at juggling daily living issues in order to keep herself in the work place in spite of medical issues...[Claimant's] medical professionals needed to realize the extent to which she had gone to maintain employment. She had missed extensive hours of work due to her multiple illnesses and for the last three years, had been working most weekends to make up for time she had to take off during the week. She required special air filters and someone else to do the copying. She was taking medication for her RLS that resulted in her not being alert and she had been in two car accidents. She had been juggling her medication so that she could continue work. She was sleeping during her lunch time and an additional 20-35 minutes later in the day. She would not eat until late in the day as she had severe diarrhea with her irritable bowel syndrome. She would have to be ready to interrupt any task or interview and run for the bathroom. As a result of dealing with these multiple illnesses, she was reporting an inability to focus and concentrate.

ISIF's Exhibit B, p.108 (quoting from Claimant's Exhibit A-26).

45. Dr. Collins determined that Employer made many accommodations for Claimant prior to her last injury and that there was a very low likelihood that Claimant would have been able to work in another regularly available job in the labor market without superhuman effort or a similarly sympathetic employer. She felt that Claimant would have required a flexible schedule, a restricted work environment, additional time off, work that did not require her to be "sharp" and a work place where she had access to a shower or place to change clothes. Based on Claimant's pre-existing physical limitations, Claimant would not have been able to engage in general employment to a substantial degree and would not have been regularly employable in any well known branch of the labor market.

46. Dr. Collins testified that Claimant's testimony at hearing was very different from what is reflected in the medical records and what information she obtained from interviewing Claimant. Claimant's testimony at hearing was that most of her pre-existing conditions resolved by late 2004. This assertion is contrary to information Dr. Collins previously reviewed and obtained.

47. In spite of the fact that Claimant felt her limitations from the last injury impacted her ability to perform her job duties for Employer, Dr. Collins concluded that the medical restrictions given following Claimant's neck surgery would have had very little, if any, impact on Claimant's ability to perform her regular job duties.

Douglas Crum, C.D.M.S.

48. Mr. Crum is a vocational expert originally hired by Employer/Surety to perform an assessment of Claimant and provide an opinion about her employability and future disability. He reviewed Claimant's medical records, vocational records, deposition transcript, report of Dr. Collins and interviewed Claimant. Mr. Crum prepared a report and provided a post-hearing deposition at the request of Claimant. Prior to his post-hearing deposition, he reviewed the hearing transcript.

49. Mr. Crum summarized Claimant's work history and medical records. He analyzed Claimant's employability both prior to and following her last injury. With regard to Claimant's condition following her last injury, Mr. Crum performed two separate analyses- one based on the medical records and one based on Claimant's subjective complaints.

50. In his report, Mr. Crum concluded that, at the time of Claimant's last injury, there were few if any employers that would have knowingly hired her if she had attempted to look for work in the competitive market place. Mr. Crum stated that it was the role of the Commission to

determine whether Employer was a sympathetic employer prior to Claimant's last injury and that if such a finding were made, he would conclude that Claimant was totally and permanently disabled prior to her last injury.

51. When asked during his post-hearing deposition, Mr. Crum concluded that Employer was not a sympathetic employer because they were merely accommodating Claimant in accordance with their business needs and policies. Mr. Crum suggested that any agency of the State of Idaho would not be properly characterized as a sympathetic employer because the State of Idaho requires production from all of its workers and does not hold its employees in a sympathetic manner.

52. Mr. Crum's total permanent disability analysis based on the medical records (Option 1) reflected that restrictions given following Claimant's last injury would not significantly impact Claimant's ability to perform her time-of-injury clerical job. Claimant's job duties were sedentary to light in nature and did not require significant overhead work or repetitive neck movement.

53. Based on Option 1, Claimant's total and permanent disability would not be on the basis of restrictions for her last injury and the last injury would not combine with her pre-existing conditions to render her totally and permanently disabled.

54. Considering Claimant's opinions about the impact of her last injury (Option 2), it was the last injury that caused a downward spiral in her overall medical picture and resulted in her total permanent disability. Following the last injury, Claimant experienced increased difficulty in household activities, driving, sleeping, writing with her right hand, and with activities that required mental accuracy such as bill paying. Claimant expressed multiple

examples of decreased functioning and inability to use her right upper extremity following her last injury.

55. Based on Option 2, Claimant was gainfully employed prior to her last injury and it was the last injury that combined with Claimant's pre-existing conditions to cause total permanent disability.

56. In his report, Mr. Crum presented the issue of sympathetic employer characterization, Option 1 and Option 2 as various scenarios that the Commission might adopt. At the time of his deposition, he concluded that Option 2 was a more accurate assessment based on the medical records and Claimant's testimony at hearing.

DISCUSSION AND FURTHER FINDINGS

ISIF Liability

57. A party seeking to establish liability against the ISIF pursuant to Idaho Code § 72-332 carries the burden of proof. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). ISIF liability is triggered only upon a finding of total permanent disability of the claimant. Once an injured worker establishes total permanent disability, he or she must prove four additional conditions to establish ISIF liability under the statute:

1. That there was a preexisting impairment;
2. That the impairment was manifest;
3. That the impairment was a subjective hindrance; and
4. That the impairment combines in some way, causing total permanent disability.

Dumaw v. J. L. Norton Logging, 118 Idaho 150, 155, 795 P.2d 312, 317 (1990).

58. In the present case, it is undisputed that Claimant had pre-existing impairment that was manifest and a subjective hindrance. Issues in dispute involve the cause(s) and timing of Claimant's total permanent disability.

Total Permanent Disability

59. As noted above, a finding of total permanent disability is a threshold determination to establish ISIF liability. A claimant may establish that he or she is totally and permanently disabled by using either of the two methodologies available to establish total permanent disability:

First, a claimant may prove a total and permanent disability if his or her medical impairment together with the nonmedical factors total 100%. If the Commission finds that a claimant has met his or her burden of proving 100% disability via the claimant's medical impairment and pertinent nonmedical factors, there is no need for the Commission to continue. The total and permanent disability has been established at that stage. *See Hegel v. Kuhlman Bros., Inc.*, 115 Idaho 855, 857, 771 P.2d 519, 521 (1989) (Bakes, J., specially concurring) ("Once 100% disability is found by the Commission on the merits of a claimant's case, claimant has proved his entitlement to 100% disability benefits, and there is no need to employ the burden-shifting odd lot doctrine").

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.

When Did Claimant Become Totally and Permanently Disabled?

60. Based on the 100% method, Claimant was not totally and permanently disabled either before or immediately following her last injury. Claimant's pre-existing impairment totaled 32.5% and her last injury increased her total permanent impairment to 45%. Claimant's non-medical factors of age and rural area of residence increase her disability, but not to a level of 100%.

61. The issue of whether Claimant was an odd-lot worker prior to her last injury on September 15, 2005 is complex because Claimant had both pre-existing permanent impairment and other medical conditions with symptoms that waxed and waned. Although Claimant did not receive an impairment rating for her IBS/explosive diarrhea or her multi-chemical sensitivity, it was those conditions that significantly contributed to her need for accommodation at work and to her previous periods of extended medical leave.

62. Claimant demonstrated superhuman motivation and effort to remain employed until she reached an early retirement age of 55 years old. She complied with Employer's disability and sick-leave guidelines to maximize her ability to retain employment in spite of a significant amount of sick leave, disability leave and time-off without pay.

63. A factual dispute exists as to whether Employer should be characterized as a "sympathetic employer" prior to Claimant's last injury. Defendant points out that Claimant required frequent bathroom breaks, proximity to a bathroom facility, access to a shower due to bowel accidents and a cot in her office for naps due to fatigue. Claimant also required temporary

relocation to the Bonners Ferry office and periods of altered work schedule due to her pre-existing disabilities.

64. As a legal term of art, “sympathetic employer” has been defined as an employer that is willing to make accommodations that are out of the ordinary in order to obtain an employee’s beneficial services. *Christensen v. S.L. Start & Associates, Inc.*, 147 Idaho 289, 207 P.3d 1020,1024 (2009). In the present case, Employer permitted Claimant’s absences from work and made accommodations for her various disabilities in accordance with their own policies and consistent with the Americans with Disabilities Act (ADA). Claimant was able to meet the essential functions of her job when she was well enough to work, but could only do so with accommodations. Claimant’s regular job duties were sedentary and not physically demanding. The nature of accommodations made by Employer did not extend beyond the terms of Employer’s own policies. Nonetheless, the accommodations were out of the ordinary in that Claimant’s ability to recline or nap in the workplace and her ability to shower on Employer’s premises are not options available for most office workers. For a period of at least 90 days, Employer allowed Claimant to work shortened shifts and make up hours during the weekends which was not consistent with Employer’s business needs. The fact that Employer’s motivation to provide accommodations was, in part, related to efforts to comply with their own policies as well as state and/or federal law does not negate the fact that the accommodations were out of the ordinary and made to retain Claimant’s services.

65. Mr. Crum’s assertion in his post-hearing deposition that the State of Idaho, as an employer, requires a certain level of performance and production out of its employees and does not hold employees in a sympathetic way is rejected as an overly broad conclusion. In fact, the claimant in *Bybee v. State Industrial Special Indemnity Fund* was a state employee of the

Department of Parks and Recreation who was determined to be an odd-lot worker prior to her last industrial injury, thus negating the “combined with” criteria. 129 Idaho 76, 921 P.2d 1200 (1996). In that case, the State of Idaho permitted Ms. Bybee to continue in a job classified as medium-duty when her actual abilities and performance were less than the stated job requirements and the State of Idaho was characterized as a “sympathetic employer.” *Id.*

66. In the present case, Employer is properly characterized as a “sympathetic employer”.

67. Moreover, the evidence also establishes that Claimant was totally and permanently disabled as an odd-lot worker prior to her last injury based on the fact that it required superhuman effort by Claimant for her to remain employed until she reached 55 years of age. Claimant’s multiple pre-existing health issues prevented her from being regularly employable in the absence of superhuman effort and various accommodations.

68. Claimant argues that her offer of employment from Montana Health and Welfare after her last injury, but prior to cervical surgery, negates the possibility of being classified as an odd-lot worker until after cervical surgery was performed. This argument was considered and rejected because the fact that Claimant was able to obtain an interview and job offer in spite of her limitations fails to establish that Claimant could sustain that position on a regular and continuous basis. Further, there is no evidence that Montana Health and Welfare was aware of Claimant’s various disabilities and restrictions at the time it extended a job offer to her. The Montana job would have required Claimant to either commute 70 miles each way to work or move into her husband’s work house in Montana to lessen the commute to 25 miles each way. Claimant’s ability to obtain a job offer is an example of her strong motivation to remain employed but falls short of demonstrating an ability to be regularly and continuously employed.

in the regular labor market.

69. Pursuant to the legal framework established in *Bybee*, the Claimant established that she was working regularly for Employer at the time of her last injury. Defendant has succeeded in showing that Claimant's actual employment was due to unusual circumstance, primarily superhuman effort by Claimant, and that there was not otherwise employment regularly and continuously available to her. *Bybee*, 129 Idaho at 82. This conclusion is supported by the vocational opinions of Dr. Collins.

Combined With

70. To satisfy the "combined effects" requirement in I.C. § 72-332(1), a claimant must show that but for the pre-existing impairments, he or she would not have been totally disabled. *Garcia v. J.R. Simplot Co.*, 115 Idaho 966, 772 P. 2d 1973 (1989). The fact that Claimant was an odd-lot worker prior to her last injury is sufficient to negate the "combined with" criteria and relieve Defendant's liability for benefits. See *Hamilton v. Ted Beamis Logging & Construction*, 127 Idaho 221, 889 P.2d 434 (1995).

71. Assuming, *arguendo*, that Claimant was not totally and permanently disabled by virtue of the odd-lot doctrine prior to her last injury, she still failed to meet the "combined with" test necessary to establish ISIF liability. Claimant's condition was relatively stable following her cervical surgery and she continued working for 14 months. Claimant was not under medical restrictions for her last injury that impacted her ability to perform her pre-injury job at the time she stopped working in June 2007. Claimant's subsequent TKR and other medical complications prevented Claimant from returning to work.

72. Claimant testified that she was able to tolerate working during the 14 months following her cervical surgery with great difficulty and only managed to keep her job because of

the hiring of a temporary employee with whom she shared duties. Claimant contends that she was not doing her job full-time even though her hours may reflect full-time status. Essentially, Claimant argues that Employer was not a “sympathetic employer” prior to her cervical surgery but became a “sympathetic employer” following the surgery. This argument is rejected in favor of the medical records and opinions of Dr. Collins which indicate that Claimant’s restrictions attributable to her last injury would not have prevented her from performing her regular job duties.

73. Claimant has failed to establish that her pre-existing impairment combined with impairment from her last injury to cause total permanent disability and failed to meet her burden of proof to establish ISIF liability pursuant to Idaho Code § 72-332.

74. The issue of apportionment pursuant to the *Carey* formula is not applicable because Claimant failed to establish ISIF liability. See *Hamilton*, 127 Idaho at 224.

CONCLUSIONS OF LAW

1. The Industrial Special Indemnity Fund (ISIF) is not liable for benefits pursuant to Idaho Code § 72-332.

2. The issue of apportionment is moot.

RECOMMENDATION

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

DATED this 3 day of February 2010.

INDUSTRIAL COMMISSION

 /s/
Susan Veltman, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 16 day of February a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

RICHARD WHITEHEAD
P O BOX 1319
COEUR D'ALENE ID 83814-1319

THOMAS W CALLERY
P O BOX 854
LEWISTON ID 83501

jkc

/s/