

JAMES ZOLLMAN, Claimant,

v.

JOPO, INC., dba ZIP TRIP, Employer,

and

IDAHO STATE INSURANCE FUND, Defendants.

No. IC 2004-512369

Idaho Workers Compensation

Before the Industrial Commission of the State of Idaho

October 10, 2008

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

James F. Kile, Chairman.

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Lewiston on February 20, 2008. Claimant, James Zollman, was present in person and represented by Michael Kessinger of Lewiston. Defendant Employer, Jopo, Inc., dba Zip Trip (Zip Trip), and Defendant Surety, Idaho State Insurance Fund, were represented by Paul Augustine of Boise. The parties presented oral and documentary evidence. This matter was continued for the taking of post-hearing depositions and the submission of briefs and came under advisement on July 7, 2008. It is now ready for decision.

ISSUES

The issues to be resolved are:

1. Claimant's entitlement to additional medical care;
2. Whether Claimant is entitled to temporary partial and/or temporary total disability benefits;
3. Whether and to what extent Claimant is entitled to disability in excess of impairment; and
4. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine.

ARGUMENTS OF THE PARTIES

Claimant argues that he is totally and permanently disabled due to the effects of injuries from his fall from a ladder at work on June 8, 2004. Claimant relies on the opinion of vocational expert, Douglas Crum.

Employer does not dispute that Claimant sustained significant injuries from his fall, but asserts Claimant suffers permanent disability less than total. Employer relies on the opinion of vocational expert, William Jordan. Employer asserts that Claimant's permanent partial disability is between 32 and 47% inclusive of his 25% whole person impairment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Vern Evans, Diane Zollman, and Doug Kircher taken at the February 20, 2008, hearing;
2. Joint Exhibits A through Z and AA through DD admitted at hearing;
3. The post-hearing deposition of Douglas Crum taken by Claimant on March 17, 2008;
4. The post-hearing deposition of William Jordan, taken by Defendants on March 17, 2008; and

5. The post-hearing deposition of Robert Friedman, M.D., taken by Defendants on April 23, 2008.

The objections posed during the post-hearing deposition of William Jordan are sustained.

After having considered all the above admitted 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 born in 1953 and was 54 years old at the time of the hearing.
2. Claimant earned average or below average grades and graduated from high school in 1972. He read well but had difficulty with spelling and higher level mathematics.
3. After graduating from high school Claimant worked briefly packing and guiding with horses in Oregon. He worked as a ranch hand before commencing work at a lumber mill in approximately 1973. He worked at lumber mills until about 1990 pulling green chain and running the barker, edger and forklift. Claimant eventually earned \$11 per hour. In 1990 Claimant worked for a Boise Cascade lumber mill in Oregon where he loaded box cars, pulled green chain, operated kilns, unloaded logging trucks, and fed logs into the mill.
4. The lumber mills eventually shut down, and in 1996 Claimant went to Lewis & Clark State College where he completed a two-year program in heating, air conditioning and appliance repair. In approximately 1997 he also completed pipe fitter's class and obtained a pipe fitter's certification. Claimant thereafter operated his own appliance repair business in Oregon for several months.
5. In 1998, Claimant began working for Zip Trip servicing and maintaining car washes, gas pumps, and heating and air conditioning systems in gas station convenience stores in Lewiston, Moscow, Clarkston, and Grangeville. He was laid off for several months, but returned to work at Zip Trip in 1999. Claimant occasionally supervised other employees in cleaning and striping parking lots and cleaning sidewalks. He frequently lifted salt, Freon bottles, compressors, fan motors, and his tool bag. These items weighed from 15 to 80 pounds. Claimant stood to perform most repairs. He climbed ladders daily and worked from 40 to 50 hours per week.
6. In 2003 Claimant's vision declined and he was diagnosed with diabetes. He was able to control his diabetes, his vision improved, and he resumed working.
7. Prior to 2004, Claimant suffered industrial accidents requiring medical care including broken ribs and a smashed finger. These injuries healed without residual problems.
8. On June 8, 2004, Claimant was preparing to repair a cooler at work when the ladder upon which he stood slipped and Claimant fell at least nine feet landing on his right side and back on the pavement. Claimant was 51 years old, resided in Lewiston, and was earning \$12.75 per hour, or approximately \$510 per week, at the time of his accident.
9. Claimant was taken by ambulance to the hospital where he was diagnosed with an L2 burst fracture with 50% loss of vertebral height and retropulsion of fracture fragments with motor nerve involvement. He was hospitalized for ten days. Orthopedic surgeon Greg Dietrich, M.D., performed corpectomy and L1-L3 fusion surgery with instrumentation. As Claimant's back improved he became aware of right shoulder pain. He was diagnosed with a massive retracted right rotator cuff tear and underwent open surgical repair by orthopedic surgeon Ned Schroeder, M.D., in January 2005. Dr. Dietrich later imposed an overall 30-pound lifting restriction due to Claimant's L2 burst fracture, and Dr. Schroeder imposed a 25-pound lifting restriction for Claimant's right arm due to his rotator cuff tear. Claimant sustained incisal and/or facial fractures to seven teeth, trauma induced abscess to another tooth, and damaged nine additional teeth, for a total of 17 teeth damaged in the fall. Jim Campbell, D.D.S., placed 10 crowns, performed at least three root canals, and completed core build-up procedures on eight of Claimant's teeth.
10. In July 2005, Claimant complained of headaches and memory loss. He was evaluated by neurologist Mark Keane, M.D., who noted that given Claimant's multiple tooth fractures at the time of his fall, he had likely sustained significant head trauma. A subsequent brain MRI was unremarkable except for one nonspecific white matter lesion in the left frontal white matter. Dr. Keane referred Claimant for neuropsychological evaluation.
11. In October 2005, Claimant returned to Zip Trip performing light-duty work. Another Zip Trip employee assisted Claimant by carrying and lifting items for him. Claimant was able to work with the aid of the assistant, but his back remained painful. The assistant prompted and helped Claimant remember work assignments and travel routes. Claimant took short breaks approximately every half hour to sit down and ease his back pain.

12. In October 2005, neuropsychologist Karen Karpman, Ph.D., performed a neuropsychological evaluation of Claimant. Claimant demonstrated variability on memory testing and evidenced cognitive inefficiency but no clear neurological dysfunction. Dr. Karpman concluded Claimant suffered mild reduction in cognitive functioning and mild to moderate memory dysfunction.

13. On November 12, 2005, physiatrist Robert Friedman, M.D., examined Claimant at Defendants' request. Claimant reported ongoing back and shoulder pain, as well as memory problems. Dr. Friedman restricted Claimant to lifting 50 pounds occasionally and 25 pounds frequently for both his back and shoulder, and no lifting of more than 20 pounds over the shoulder with his right arm. Dr. Friedman later testified that these restrictions were not necessarily identical to Claimant's physical capacity, but rather the level at which Claimant's risk of further injury was no greater than that of the general population.

14. In December 2005, Claimant presented to psychologist Craig Beaver, Ph.D., at Defendants' request. Claimant complained of attention and memory problems, and poor multitasking. Dr. Beaver performed extensive neuropsychological testing and concluded that Claimant's neurocognitive difficulties with attention and information processing leading to memory complaints were predominately a reflection of sleep disturbance, internal distractibility secondary to pain, and significant stress. He noted Claimant's depression likely exacerbated these difficulties. However, Dr. Beaver could not rule out a mild concussion from Claimant's fall. Dr. Beaver later reviewed the results of Dr. Karpman's neuropsychological evaluation of Claimant and opined that Dr. Karpman's report was generally consistent with and supportive of his opinions.

15. In March 2006, Claimant was terminated by Zip Trip when he chose to abide by the 30-pound lifting restriction imposed by his treating surgeons, rather than sign a document offered by Zip Trip acknowledging that he would lift 50 pounds according to Dr. Friedman's restrictions. Claimant had been advised by Dr. Schroeder, his shoulder surgeon, not to lift more than 25 pounds or he would likely re-tear his right rotator cuff rendering it irreparable. Claimant received unemployment benefits while he looked for work with help from his wife and consultants from the Industrial Commission and the Idaho Division of Vocational Rehabilitation (IDVR).

16. In March 2006, Claimant went ATV riding and coyote hunting with a friend for several days in Oregon.

17. In June 2006, Claimant was re-evaluated by Dr. Karpman. She concluded that Claimant continued to display residual deficits consistent with organic brain dysfunction, including impaired attention and concentration, mild/moderate impairment in new learning and intermediate recall of both verbal and visual materials, reduced mental efficiency, visual inattention, and mild deficits in planning and organization. She noted some improvement as compared to previous testing, but persisting deficits consistent with post-concussion syndrome. Dr. Karpman opined that while Claimant's general memory functioning had improved from moderately to mildly impaired, his cognitive and new learning deficits would likely persist. Dr. Karpman opined Claimant was disabled from pursuing competitive employment due to his reduced efficiency, new learning deficit, and memory disturbance. She opined Claimant may be capable of part-time employment at a routine job if he had adequate time to learn the required skills and procedures and was allowed to work at his own pace. She supported his application for Social Security disability but encouraged him to seek part-time employment. Dr. Karpman recommended cognitive retraining through Sally Johnson at a Washington State University program for brain-injured patients. Dr. Keane concurred in Dr. Karpman's assessment that Claimant suffered post-concussion syndrome and significant cognitive deficits from his industrial accident. Dr. Keane later referred Claimant to the Center for Brain Injury Patients at Washington State University.

18. In September 2006, with assistance from vocational consultants, Claimant was hired at Schweitzer Engineering Laboratory (Schweitzer) as an electronics assembler installing components in computer circuit boards. Claimant worked full-time and earned \$373 per week. He retrieved components from many bins, made occasional assembly errors, and had to redo some assemblies. His assembly work was reviewed by three co-workers before completion which allowed mistakes to be identified and corrected. He was able to sit or stand at his discretion while working but was required to bend on occasion while assembling parts and accessing lower bins. Claimant was assisted by a job coach for the first month of his employment. He worked some over-time for the first several months. Claimant's wife testified that all Claimant did while employed at Schweitzer was either work or rest in bed to recuperate from working so he could work his next shift.

19. In November 2006, Claimant presented to Dr. Dietrich complaining of increasing back pain. Dr. Dietrich reported Claimant had chronic pain from his back injury and recommended continued conservative care. Dr. Dietrich indicated that Claimant's back condition was a legitimate reason for his chronic pain and that it would be more tolerable for Claimant to only work three days per week. Claimant continued to work full-time but not overtime.

20. In January 2007 Claimant ceased employment at Schweitzer because he could no longer tolerate the

increasing back pain. Robin Hight, FNP, wrote of Claimant on January 4, 2007, "permanent disability due to medical condition." Exhibit N-62. Hight's notes from that day's visit record: "Presents for recheck chronic back and shoulder pain that persists even with decreasing to 8 hr shifts without overtime. Has also been on weight restriction. Increased pain is not relieved by rest. Has been taking medications. Very concerned about lack of improvement. Does not believe he is capable of continuing work. Affecting all areas of daily life." Exhibit N, p. 45. Claimant has not worked since.

21. In April 2007, Hight reiterated her conclusion that Claimant was totally permanently disabled and had not been released to work of any kind.

22. In May 2007, Claimant was treated by speech therapist Sally Johnson at the University of Washington. She noted Claimant reported his long-term memory was intact, but since his injury he could not retain new information. After testing, Johnson reported that Claimant's recent temporal memory was within functional limits, however his remote memory, recall of general information, and auditory processing and retention were mildly impaired. She also reported that Claimant's recent memory, problem solving, and reasoning were moderately impaired; and his immediate memory and spatial orientation were severely impaired. Johnson concluded that Claimant's cognitive deficits had a significant negative impact on his activities of daily living and placed him at risk for injury and forgetting important tasks and directions. She recommended he receive speech/language pathology services. Claimant treated with Johnson but without significant improvement.

23. In June and July 2007, Dr. Friedman and Dr. Beaver examined Claimant again at Defendants' request. Dr. Friedman found Claimant's condition very similar to his first examination, reaffirmed a 50-pound lifting restriction, and recommended Claimant participate in a multidisciplinary pain management program. Dr. Beaver re-tested Claimant's neuropsychological function. As compared to Claimant's test performance in November 2005, Dr. Beaver found decreased performance in several areas but noted that in several tests evaluating the reliability and validity of test performance, Claimant scored in the questionable or invalid range. Dr. Beaver concluded Claimant did not put forth maximum effort in his testing and advised caution in drawing conclusions from the results. Dr. Beaver indicated Claimant, though not yet stable, may eventually sustain a permanent impairment of 2 to 3% due to cognitive dysfunction from his industrial accident. Dr. Beaver concurred in the recommendation that Claimant complete a multidisciplinary pain management program.

24. In September 2007, Claimant underwent an independent medical evaluation by Robert Colburn, M.D., at Claimant's counsel's request. Dr. Colburn concluded Claimant had a 27% whole person impairment to his right shoulder and low back from his industrial accident. Dr. Colburn recommended permanent work restrictions of no lifting greater than 25 pounds with his right arm and no lifting of greater than 10 pounds with his right arm out away from his body. He also recommended a maximum lifting restriction of 35 pounds due to Claimant's back condition. Dr. Colburn encouraged standing for no more than 30 minutes and sitting for no more than 30 minutes at a time. Dr. Colburn believed it was reasonable for Claimant to work four hours per day initially and then increase his work hours depending on his response. He deferred to neuropsychologists the evaluation of cognitive issues.

25. In December 2007 and January 2008, Claimant was treated for six weeks in Seattle at the Rehabilitation Institute of Washington (pain clinic). His demonstrated physical capacity improved from sedentary to light-medium work however his back pain remained unchanged. Pain clinic physician David Heard, M.D., psychologist David Fordyce, Ph.D., and vocational rehabilitation counselor Tonya Seligman concluded that Claimant made excellent progress and was capable of returning to full-time light-duty work at the conclusion of the program. Claimant demonstrated the ability to lift 30 pounds occasionally and 25 pounds frequently. At the conclusion of the pain clinic program Claimant continued to hold a disability conviction that he could not work full-time. Dr. Heard rated Claimant's permanent impairment at 5% of the whole person for his back condition and 10% of the upper extremity for his right rotator cuff tear. The pain clinic team observed that Claimant participated with a positive motivated attitude and made consistent slow functional gains. He managed full treatment days and tolerated activities with reasonable stamina. The program allowed him to lie down or stretch as needed according to his back pain. Claimant was observed to sit as long as 50 minutes at a time. Dr. Fordyce considered the prior neuropsychological evaluations and concluded that Claimant suffered some mild cognitive impairment more reflective of his age, chronic sleep apnea, diabetes, and pain than any head trauma from his industrial accident.

26. Claimant camps using a camping trailer approximately twice a year. He also rides an ATV on logging roads during deer hunting season a few times each year.

27. Having met and observed Claimant at hearing and reviewed the evidence, the Referee finds that Claimant is generally a credible witness who has, and portrayed at hearing, a disability conviction.

DISCUSSION AND FURTHER FINDINGS

28. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

29. **Additional Medical Care.** The first noticed issue is Claimant's entitlement to additional medical care. Claimant acknowledged at hearing and in his briefing that as of the date of hearing, Defendants have paid for all medical care to which Claimant is entitled.

30. **Temporary Disability.** The second noticed issue is Claimant's entitlement to temporary partial and/or temporary total disability benefits. Claimant's briefing expressly recites this issue then states: "Mr. Zollman is totally and permanently disabled. Thus, Mr. Zollman is entitled to total and permanent disability benefits for all periods of time post injury in which he was not working." Claimant's Opening Brief, p. 10. Defendants do not address the issue of temporary disability in their brief. Claimant thus does not assert or argue his entitlement to any additional temporary disability benefits.

31. **Permanent Disability.** The next issue is the extent of Claimant's permanent disability. "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. Thus the foundation of permanent disability is impairment. "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 non-progressive at the time of 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 employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424.

32. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of 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. 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).

33. To evaluate Claimant's permanent disability several items merit examination including his permanent physical impairments, the physical restrictions resulting from his permanent impairments, and potential vocational opportunities.

34. *Permanent impairment.* Dr. Friedman rated Claimant's permanent impairments due to his lumbar and right shoulder injuries at 25% of the whole person. Dr. Colburn rated Claimant's permanent impairments from his lumbar and right shoulder injuries at 27% of the whole person. Dr. Heard rated Claimant's lumbar and shoulder impairments at 11% of the whole person according to the *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition. Defendants herein acknowledge and have paid permanent impairment benefits of 25% of the whole person. The 27% permanent impairment rating given by Dr. Colburn for Claimant's lumbar and right shoulder conditions is most consistent with the *AMA Guides to the Evaluation of Permanent Impairment*, Fifth Edition, DRE Lumbar Category IV, and examples therein, and Table 16-26 regarding shoulder instability, and is adopted.

35. In addition to his lumbar and right shoulder impairment, Claimant alleges permanent cognitive deficits due to his industrial accident. Dr. Karpman evaluated Claimant in October 2005 and July 2006. She did not render a permanent impairment rating but opined Claimant was disabled from full-time employment in the competitive labor market due to significant fixed cognitive deficits resulting from his accident. Dr. Karpman reported that Claimant would be capable of part-time work at a routine job if he had adequate time to learn the required skills. Dr. Keane concurred that Claimant suffered significant cognitive deficits due to his accident.

36. Dr. Beaver performed neuropsychological testing in December 2005 and July 2007. In the later testing,

Claimant did not put forth full effort and produced questionable or invalid test results. Nevertheless, Dr. Beaver indicated that due to the industrial accident Claimant may have a 2 to 3% permanent impairment for persisting cognitive deficits. Dr. Beaver recommended an interdisciplinary pain management program. Dr. Fordyce evaluated Claimant in January 2008 after he completed the pain clinic program and opined that Claimant had no psychological impairment due to his accident. However, he reported that Claimant occasionally lost his train of thought when participating in program activities, had a mild cognitive impairment, may take more time to learn new techniques and procedures, and may struggle in a rapid-paced changing environment. Dr. Fordyce expressly recognized Claimant's mild cognitive impairment but attributed it to his age, chronic sleep apnea, and pain rather than to his industrial accident.

37. Claimant testified he experiences ongoing memory problems since the accident. He testified that he regularly forgets what he went to the store to buy and where he parked his car. He regularly forgets recent telephone conversations. Claimant's wife testified that he had an excellent memory prior to his accident. She testified that since his accident she regularly receives credit card bills for items Claimant has ordered in response to television advertisements. However, Claimant cannot remember ordering the items. In contrast, Claimant's wife and co-worker testified Claimant had a very good memory before his accident and could often recall conversations nearly word for word and all the work orders from several Zip Trip stores for an entire day. The co-worker assigned as Claimant's assistant after the accident testified that Claimant had to fill out work orders prior to leaving each store or he could not remember what work he had completed and that Claimant could not remember which store he was going to next.

38. The Referee finds that Claimant suffers cognitive deficits. However, the opinion of Dr. Karpman appears to overstate the impact of Claimant's cognitive deficits on his employability. Claimant worked for four months at Schweitzer and also successfully completed the pain clinic program. Claimant has demonstrated that his cognitive deficits are not so severe as to preclude him from performing a full-time routine job when initially assisted by a job coach. Dr. Fordyce recognized Claimant's mild cognitive impairment but attributed it to factors other than his industrial accident. Given the credible evidence of Claimant's at least average memory prior to his accident contrasted with his poor memory after, and the fact that Claimant fractured seven teeth and damaged ten more teeth in his industrial accident, Dr. Fordyce's opinion that Claimant's mild cognitive impairment is due to factors other than the industrial accident is not persuasive. Dr. Beaver's preliminary opinion, that Claimant may suffer a cognitive permanent impairment of 2 to 3% due to the accident, is supported by the evidence and persuasive. Inasmuch as Claimant has completed a multidisciplinary pain clinic as Dr. Beaver recommended, and continues to show mild cognitive impairment as documented by the pain clinic, the Referee concludes that Claimant suffers a permanent impairment of 2% of the whole person for cognitive dysfunction due to his industrial accident.

39. *Restrictions.* Dr. Dietrich restricted Claimant to limited bending and lifting no more than 30 pounds due to his back condition. Dr. Schroeder restricted Claimant to lifting no more than 25 pounds with his right arm and no more than 10 pounds above the shoulder with his right arm. Dr. Colburn restricted Claimant to lifting no more than 35 pounds. Dr. Friedman opined that Claimant could lift up to 50 pounds occasionally and 25 pounds regularly, and should avoid twisting, and over the shoulder right arm lifting of more than 20 pounds. Dr. Heard opined Claimant could lift 25 pounds occasionally from the floor and 30 pounds occasionally from knee height. The Referee finds the weight restrictions of Dr. Dietrich and Dr. Schroeder, as Claimant's treating surgeons, most persuasive and concludes that Claimant is restricted to lifting 30 pounds occasionally and 25 pounds with his right arm, with no more than 10 pounds lifting above the shoulder with his right arm.

40. In addition to lifting restrictions, several medical practitioners have restricted Claimant's activities. Dr. Dietrich restricted Claimant to limited bending. Dr. Colburn recommended Claimant avoid repetitive bending and limit sitting and standing to 30 minutes at a time. The pain clinic recommended Claimant sit occasionally, which is construed as up to 33% of the work day; stand frequently; and walk occasionally to frequently.

41. Claimant's cognitive dysfunction manifests in memory and attention lapses. He is sometimes forgetful, occasionally loses his train of thought, requires more time to learn new techniques and procedures, and struggles in rapid-paced changing environments.

42. *Vocational opportunities.* William Jordan is a vocational rehabilitation consultant hired by Defendants to evaluate Claimant's permanent disability. Jordan testified that during his interview with Claimant in January 2008, Claimant lay down on the floor and put his feet up. Jordan later consulted Dr. Heard who considered this behaviorally mediated and associated with Claimant's disability conviction. Jordan noted that Claimant achieved a 3.75 GPA in his two year certificate program at Lewis & Clark State College prior to his accident, although this program in heating, air conditioning, and appliance repair did not require extensive reading or writing.

43. Jordan noted Claimant's various restrictions and considered both medium and light-duty jobs. Although

Dr. Friedman approved a number of medium-duty jobs, these require lifting in excess of the 30-pound restriction imposed by Dr. Dietrich which the Referee finds most persuasive. Dr. Friedman also approved light-duty jobs including sales representative, farm and garden sales representative, building equipment supply representative, gambling cashier, locksmith, apartment manager, pilot car driver, inventory clerk, messenger, solderer/welder, small products assembler, parts clerk, and parking attendant. Jordan investigated recent job opportunities representative of employment possibilities and reported that Claimant could perform the following jobs recently available in the Lewiston labor market: assembler, mattress sales, public transit driver, flagger, store merchandiser, operations associate, fuel clerk, and sales associate in building materials.

44. Considering Dr. Friedman's 50-pound lifting restriction, Jordan testified that Claimant would suffer a permanent disability of 32% inclusive of impairment. Considering a 30-pound lifting restriction, Jordan testified that Claimant would suffer a permanent disability of between 33% and 47%, inclusive of impairment.

45. Jordan's opinion of Claimant's disability is based in large measure upon the opinions of Dr. Friedman, Dr. Beaver, Dr. Heard, and Dr. Fordyce. The reports of Dr. Friedman, Dr. Beaver, Dr. Heard, and Dr. Fordyce do not reflect a full awareness of the extent of Claimant's tooth fractures from his industrial accident. As Dr. Keane noted, Claimant's multiple tooth fractures establish head trauma not initially recognized by emergency response personnel. Dr. Beaver's report notes an October 14, 2004, letter from Jim Campbell, D.D.S., that Claimant sustained "numerous fractured teeth" in the fall. Defendants' Exhibit B, p. 0007. Although Dr. Beaver's report accurately cites Dr. Campbell's letter, it is unclear whether Dr. Beaver understood the full extent of Claimant's injuries suggestive of head trauma. Dr. Campbell's notes collectively indicate Claimant fractured or damaged 17 teeth as a result of his fall. Considering that adult dentition consists of 32 permanent teeth, Claimant fractured or damaged over half of his teeth in the fall. This suggests significant head trauma. Dr. Fordyce conducted no neuropsychological testing to evaluate Claimant's cognitive functioning. While Dr. Fordyce's report indicates he reviewed the prior neuropsychological evaluations, his report does not reflect a thorough understanding of Claimant's likely head trauma from his fall as evidenced by the fracture or damage of over half of his teeth.

46. Jordan's analysis does not appear to take into account Dr. Dietrich's bending restrictions; Dr. Colburn's sitting, standing, and bending restrictions; Dr. Keane's, Dr. Karpman's, and Dr. Beaver's findings of cognitive deficits; or Dr. Schroeder's December 14, 2005, caution to Claimant against working beyond his right arm restrictions lest he disrupt his rotator cuff and render it irreparable. Thus Jordan's opinion does not fully consider Claimant's cognitive deficits and his sitting, standing, and bending restrictions.

47. After receiving Jordan's report in February 2008, Claimant investigated the job types listed therein. Among the recent light-duty jobs, Claimant followed up on the assembler job and found it was closed. Claimant followed up on the mattress sales job and found it required lifting mattresses and sofas which exceeded his weight restrictions. Claimant followed up on the public transit driver job and found it required potentially lifting individuals in wheelchairs which would exceed his weight restrictions. Claimant followed up on the flagger job and found it required extensive standing and flagger certification which Claimant does not possess. Jordan testified that a flagger certification course was offered regularly at Lewis & Clark State College.

48. Douglas Crum is a vocational rehabilitation consultant hired by Claimant. He testified that Claimant is 54, not a strong reader, and has poor mathematical skills, no significant supervisory experience, no significant customer service experience, no record-keeping experience, and no marketable computer skills. Crum reviewed the positions listed by Industrial Commission rehabilitation consultant Lynette Schlader in October 2006, including assembler, delivery driver, building facility foreman, auto parts clerk, and transit bus driver, and opined they were not suitable for Claimant given his physical restrictions, chronic pain, and cognitive deficits. Crum also reviewed the disability report authored by Jordan. Crum testified that Jordan did not take into account all of the restrictions noted in the functional capacity evaluation performed at the pain clinic in January 2008, including Claimant's restriction to only occasional sitting which is defined as up to one-third of the work-day. Crum noted that Dr. Colburn indicated Claimant should not sit or stand more than 30 minutes at a time. Crum testified that Jordan also largely ignored Claimant's cognitive dysfunction and chronic back pain which adversely impacted his employability. Crum indicated that many positions recommended by Jordan exceed Claimant's weight and/or activity restrictions as they require excessive lifting, bending, sitting, or standing.

49. Crum testified that considering only the lifting restrictions imposed by Dr. Dietrich and Dr. Schroeder, Claimant suffers a permanent disability of 29% inclusive of permanent impairment. However, Crum noted that Claimant has not only a light-duty physical work capacity but also additional restrictions limiting sitting, bending, and standing. Given the totality of Claimant's physical restrictions, chronic pain, cognitive deficits, and limited transferable skills, Crum opined that Claimant is not employable in the competitive labor market, and is totally and permanently disabled.

50. Dr. Friedman testified that from a medical perspective, Claimant is able to return to work. Dr. Heard and Dr. Fordyce opined that Claimant made excellent progress during the pain clinic program. Claimant's demonstrated physical capacities improved from sedentary to light-medium work. At the conclusion of the six-week program, the pain clinic team concluded that Claimant could perform full-time light-duty work, although they noted that Claimant continued to believe he could not work full-time. Dr. Heard indicated that electronic assembly at Schweitzer would be a good option for Claimant. Claimant expressed interest in returning to Schweitzer when he commenced the pain clinic program. Claimant expected the pain clinic program would help reduce his pain. However, upon completion of the pain clinic program Claimant's back pain was not improved so he did not attempt to return to work at Schweitzer.

51. Crum noted that IDVR subsidized Claimant's work at Schweitzer in 2006. IDVR paid Palouse Industries to place Claimant in the position and provide a job coach during his first month. IDVR also paid for Claimant's commute from his home in Lewiston to Schweitzer's location in Pullman during his first month. Schweitzer's records demonstrate Claimant's performance steadily improved during his first month of work. His attendance at Schweitzer was consistently good. However, Claimant's work at Schweitzer required bending to retrieve parts from lower bins and bending slightly at times as he assembled circuit boards. Claimant testified this aggravated his back pain. After four months Claimant could no longer tolerate his increasing back pain and entirely ceased working. All Claimant did during his employment at Schweitzer was work his assigned shift, return home, and rest in bed to recuperate sufficiently to work his next shift. Hight took Claimant off work from Schweitzer after his increasing pain was not improved by rest or medications.

52. Based on Claimant's total impairment rating of 29% of the whole person (27% lumbar and shoulder, and 2% cognitive dysfunction), his permanent lifting and activity restrictions, inability to return to his time of injury occupation, forgetfulness, difficulty learning new procedures, chronic back pain, and considering his non-medical factors including his age of 51 at the time of injury, limited formal education, absence of marketable computer skills, and limited transferable skills in sedentary and light-duty occupations, Claimant's ability to engage in gainful activity has been significantly reduced. The Referee finds that Claimant suffers a permanent disability of 70%, inclusive of his permanent impairment.

53. **Odd-lot.** A claimant who is not 100% permanently disabled may still prove total permanent disability by establishing he or she is an odd-lot worker. An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market - absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status rests upon the claimant. *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990).

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

1. By showing that he has attempted other types of employment without success;
2. By showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or
3. By showing that any efforts to find suitable work would be futile. *Lethrud v. Industrial Special Indemnity Fund*, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

55. *Attempted employment.* After his accident, Claimant herein returned to light-duty work at Zip Trip and worked with an assistant. He was successful in this work for several months until Zip Trip decided to expand his assignments to include medium-duty work. Claimant declined to attempt medium-duty work. Claimant characterizes this as a failed work attempt; however, it may be more accurately characterized as a failure to attempt work. In light of the light-duty work restrictions imposed by his surgeons, Claimant's failure to attempt medium-duty work was prudent, but does not constitute a failed work attempt. Thereafter Claimant worked at Schweitzer for four months. Claimant consistently reported to his physicians ongoing back pain only relieved by lying down or sitting in a recliner. Claimant was highly motivated when he commenced employment with Schweitzer. He sought and persevered in employment in spite of his back pain and in spite of Dr. Karpman's conclusions that he was disabled from competitive employment. Claimant's four month employment effort at Schweitzer was sufficient time to work through initial soreness arising from deconditioning. Claimant put forth an earnest sustained effort to succeed in his employment at Schweitzer but eventually was unable to tolerate the increasing back pain. This constitutes Claimant's only unsuccessful attempt at other employment.

56. The first *Lethrud* test is stated in the plural: "claimant has attempted other types of employment

without success." *Lethrud*, 126 Idaho at 563, 887 P.2d at 1070. Claimant's single failed work attempt is not sufficient to satisfy *Lethrud*.

57. *Work search*. Claimant has made a substantial showing under the second *Lethrud* test. Claimant, with assistance from others, has searched for work. From approximately March through September 2006, Claimant contacted and met regularly with Industrial Commission vocational rehabilitation consultant Lynette Schlader and applied for virtually every job she suggested, but without success. Claimant also contacted and met regularly with Idaho Division of Vocational Rehabilitation consultant Brian Brown who enlisted Palouse Industries to assist with placing Claimant. Claimant applied or inquired about work at Country Club, NAPA Auto Parts, McDonalds, Idaho County, Asotin County, WalMart, Quick Delivery, TCM Courier, Hellsgate Marina, Haun's Supply, Hughes Supply, Rouge Rifle, Early Bird Supply, Krueger's RV, Royal Plaza, Columbia Electric, and an assisted living facility, among others. After six months of searching, and with assistance from Schlader, Brown, and Palouse Industries, Claimant finally obtained employment at Schweitzer. However, as noted above, Claimant was not able to sustain employment at Schweitzer and left after four months due to increasing back pain.

58. After completing the pain clinic program in January 2008, Claimant again searched for work but received no positive responses. Claimant's work search in 2008 was conducted over a period of approximately two weeks and consisted of following up on approximately 15 generic positions which Jordan had identified in his report. Claimant contacted Lucky Acres, Mick McClure Honda, KLEW TV, N.W. Railroad, Sage, Nez Perce Tribal Housing Authority, Sears, Mattress Outlet, Home Depot, and others all without success. He found no employment within his restrictions. Jordan testified that Claimant's brief work search in 2008 was not an effective search because it did not extend over a sufficient period of time.

59. While Claimant's brief work search in 2008 is not sufficient in and of itself, when considered with his six-month work search in 2006, his personal contact of over 40 potential employers, and the assistance and searches by rehabilitation consultants at the Industrial Commission, IDVR, and Palouse Industries, Claimant's work search is sufficient under *Lethrud*. The only employment Claimant obtained after extensive searching was the assembler position at Schweitzer which he was only able to tolerate for four months.

60. *Futility*. There are conflicting opinions as to whether efforts to find suitable work for Claimant would be futile. Claimant demonstrated at the pain clinic that he is able to perform light-duty work. Based upon the opinions of Dr. Friedman, Dr. Beaver, Dr. Heard, and Dr. Fordyce, Bill Jordan opined that Claimant could perform full-time light-duty work and is employable in the competitive labor market. As noted previously, this conclusion does not fully consider Claimant's cognitive deficits and his restrictions regarding bending, sitting, and standing.

61. Dr. Karpman opined Claimant's cognitive deficits—which Dr. Keane and Dr. Beaver also confirmed—disable him from competitive employment, and he is only employable part-time in a routine job. It is significant that since the industrial accident Claimant has not demonstrated the ability to work without assistance. His light-duty work at Zip Trip after his accident was only possible with an assistant who not only performed the heavy lifting, but also prompted and reminded Claimant of job assignments and travel routes. The entire first month of Claimant's work at Schweitzer was assisted by a job coach. Thereafter Claimant's assembly errors were caught and often corrected by the other individuals of his work team. Only with this support was Claimant able to meet the cognitive demands of his employment at Schweitzer.

62. Dr. Dietrich indicated Claimant's back condition was a legitimate cause of chronic back pain and working only three days per week may be more tolerable. Dr. Colburn indicated Claimant could perform part-time light-duty work and progress thereafter as tolerated. Robin Hight opined Claimant was totally disabled from employment because of his back pain. Claimant's two positions since his accident largely confirm his inability to work full-time. Given an assistant at Zip Trip, Claimant was able to meet the cognitive demands of his job but had to take breaks approximately every half hour to rest his back. Given a job coach and team support at Schweitzer Claimant was able to meet the cognitive demands of the assembler position but was unable to tolerate the physical demands after four months.

63. Crum opined that Claimant is not likely to be employed regularly in any well-known branch of the relevant labor market and that it would be futile for Claimant to look for work. The Referee finds Crum's evaluation persuasive. Claimant has established a prima facie case that he is an odd-lot worker, totally and permanently disabled, pursuant to two of the tests enumerated in *Lethrud*.

64. *Actual job*. Once a claimant establishes a prima facie odd-lot case, the burden shifts to the defendant to show there is:

An actual job within a reasonable distance from [claimant's] home which [claimant] is able to perform or for which [claimant] can be trained. In addition, the [defendant] must show that [claimant] has a reasonable opportunity to be employed at that job. It is of no significance that there is a job [claimant] is capable of performing if he would in fact not be considered for the job

due to his injuries, lack of education, lack of training, or other reasons.

Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 407, 565 P.2d 1360, 1364 (1977).

65. In the present case, Jordan presented evidence of recent job openings representative of opportunities in the Lewiston labor market, however, Crum testified that Jordan's written report did not identify any actual job with an employer that Claimant could perform and has a reasonable opportunity to obtain. The only evidence Defendants have presented of an actual job within the relevant labor market for which Claimant would be considered and in which he has a reasonable opportunity to be employed is the electronic assembler position at Schweitzer—the very job which Claimant attempted and was not able to perform on a sustained basis. Claimant testified the bending required to access parts from lower bins aggravated his back pain. This aspect of the assembler position appears inconsistent with Claimant's repetitive bending restrictions.

66. Defendants have not overcome Claimant's prima facie case. Claimant has proven he is totally and permanently disabled under the odd-lot doctrine.

CONCLUSIONS OF LAW

1. Claimant has not proven his entitlement to any additional medical expenses as of the time of hearing.
2. Claimant has not proven his entitlement to any additional temporary disability benefits.
3. Claimant has proven he suffers permanent partial disability of 70% inclusive of his 29% permanent partial impairment. Defendants are entitled to credit for amounts previously paid for permanent partial impairment and/or permanent disability.
4. Claimant has proven he is totally and permanently disabled pursuant to the odd-lot doctrine.

RECOMMENDATION

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

INDUSTRIAL COMMISSION

Alan Reed Taylor Referee

ORDER

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has not proven his entitlement to any additional medical expenses as of the time of hearing.
2. Claimant has not proven his entitlement to any additional temporary disability benefits.
3. Claimant has proven he suffers permanent partial disability of 70% inclusive of his 29% permanent partial impairment. Defendants are entitled to credit for amounts previously paid for permanent partial impairment and/or permanent disability.
4. Claimant has proven he is totally and permanently disabled pursuant to the odd-lot doctrine.
5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

INDUSTRIAL COMMISSION

R.D. Maynard, Commissioner, Thomas E. Limbaugh, Commissioner