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## Deon v. H&J Clerk's Record v. 1 Dckt. 41593

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#### BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

	LAW CLERK
TRUDY DEON,	)
	)
Claimant/Appellant,	) SUPREME COURT NO. 41593
	)
V.	) AGENCY'S RECORD
HALDIG 1/1/ DEGE WEGGEDNI GOELD	)
H&J, INC., d/b/a, BEST WESTERN, COEUR	)
D'ALENE INN & CONFERENCE CENTER,	)
Employer, and LIBERTY NORTHWEST	)
INSURANCE CORPORATION, Surety, and	)
STATE OF IDAHO, INDUSTRIAL SPECIAL	)
INDEMNITY FUND,	)
	)
Defendants/Respondents.	)

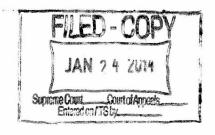
#### BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Attorney for Claimant/Appellant:

Stephen J. Nemec 1626 Lincoln Way Coeur d'Alene, ID 83814

Attorney for Employer/Surety Respondent:

Joseph M. Wager PO Box 6358 Boise, ID 83707-6358



Attorney for Industrial Special Indemnity Fund/Respondent:

Thomas W. Callery PO Box 854 Lewiston, ID 83501

41593



#### BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

TRUDY DEON,	)
Claimant/Appellant,	SUPREME COURT NO. 41593
v.	) AGENCY'S RECORD
H&J, INC., d/b/a, BEST WESTERN, COEUR D'ALENE INN & CONFERENCE CENTER, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL	) ) ) )
INDEMNITY FUND,  Defendants/Respondents.	) ) )

#### BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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Stephen J. Nemec 1626 Lincoln Way Coeur d'Alene, ID 83814

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## TABLE OF CONTENTS

EXHIBIT LIST	. j
WORKERS' COMPENSATION COMPLAINT, IC 2008-032836, Filed January 18, 2011	. 1
WORKERS' COMPENSATION COMPLAINT, IC 2007-005950, Filed March 29, 2011	.5
ANSWER TO COMPLAINT, IC 2008-032836, Filed January 28, 2011	. 0
ANSWER TO COMPLAINT, IC 2007-005950, Filed April 12, 2011	.2
WORKERS' COMPENSATION COMPLAINT AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND (ISIF), Filed June 9, 2011	. 4
ANSWER TO COMPLAINT (ISIF), Filed June 17, 2011	1
ORDER TO CONSOLIDATE, Filed July 1, 2011	:4
NOTICE OF HEARING AND NOTICE OF PRE-HEARING TELEPHONE CONFERENCE, Filed January 12, 20122	:6
CLAIMANT'S PRE-HEARING NOTICE OF WITNESSES, EXHIBITS AND POST-HEARING DEPOSITIONS, Filed October 2, 20122	9
DEFENDANTS' (EMPLOYER/SURETY) JOINT SUPPLEMENTAL NOTICE OF WITNESSES, EXHIBITS, AND POST-HEARING DEPOSITIONS, Filed October 5, 2012	3
ISIF'S EXCHANGE OF EXHIBITS AND DISCLOSURE PURSUANT TO RULE 10, Filed October 9, 20123	6
STIPULATION AND AGREEMENT OF LUMP SUM DISCHARGE AND ORDER OF APPROVAL AND DISCHARGE, Filed November 8, 2012	9
REFEREE'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION Dated April 8, 20135	
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER Filed May 3, 20138	1
NOTICE OF RECONSIDERATION, Filed May 3, 201311	2
CLAIMANT'S MOTION FOR MODIFICATION OF ISIF SETTLEMENT AGREEMENT PURSUANT TO I.C. §72-719(3), Filed July 26, 201312	7

CLAIMANT'S AFFIDAVIT IN SUPPORT OF MOTION TO MODIFY ISIF SETTLEMEN AGREEMENT PURSUANT TO I.C. §72-719(3), Filed July 26, 2013	
DEFENDANTS' (EMPLOYER/SURETY) RESPONSE TO CLAIMANT'S MOTION FOR MODIFICATION OF ISIF SETTLEMENT AGREEMENT, Filed August 8, 2013	
DEFENDANT'S (ISIF) RESPONSE TO CLAIMANT'S MOTION TO MODIFY LUMP SU AGREEMENT, Filed August 9, 2013	
CLAIMANT'S REPLY BRIEF IN SUPPORT OF MOTION FOR MODIFICATION OF ISID SETTLEMENT PURSUANT TO I.C. §72-719(3), Filed August 14, 2013	
ORDER DENYING MOTION FOR MODIFICATION OF ISIF SETTLEMENT, Filed September 27, 2013	.161
ORDER ON RECONSIDERATION, Filed November 4, 2013	.166
NOTICE OF APPEAL, Filed November 14, 2013.	.186
CERTIFICATE OF APPEAL, Dated November 15, 2013	.191
CERTIFICATION, Dated November 15, 2013	.193
FIRST AMENDED NOTICE OF APPEAL, Filed November 22, 2013	.194
AMENDED CERTIFICATE OF APPEAL, Dated November 26, 2013	.199
CERTIFICATION FOR AMENDED APPEAL, Dated November 26, 2013	.201
CERTIFICATION OF RECORD, dated December 20, 2013	.202
NOTICE OF COMPLETION, dated December 20, 2013	.203

## **INDEX**

AMENDED CERTIFICATE OF APPEAL, Dated November 26, 2013	199
ANSWER TO COMPLAINT, IC 2008-032836, Filed January 28, 2011	10
ANSWER TO COMPLAINT, IC 2007-005950, Filed April 12, 2011	12
ANSWER TO COMPLAINT (ISIF), Filed June 17, 2011	21
CERTIFICATE OF APPEAL, Dated November 15, 2013	191
CERTIFICATION, Dated November 15, 2013	193
CERTIFICATION FOR AMENDED APPEAL, Dated November 26, 2013	201
CERTIFICATION OF RECORD, dated December 20, 2013	202
CLAIMANT'S AFFIDAVIT IN SUPPORT OF MOTION TO MODIFY ISIF SETTLEMEN AGREEMENT PURSUANT TO I.C. §72-719(3), Filed July 26, 2013	
CLAIMANT'S MOTION FOR MODIFICATION OF ISIF SETTLEMENT AGREEMENT PURSUANT TO I.C. §72-719(3), Filed July 26, 2013	
CLAIMANT'S PRE-HEARING NOTICE OF WITNESSES, EXHIBITS AND POST-HEARING DEPOSITIONS, Filed October 2, 2012	29
CLAIMANT'S REPLY BRIEF IN SUPPORT OF MOTION FOR MODIFICATION OF ISI SETTLEMENT PURSUANT TO I.C. §72-719(3), Filed August 14, 2013	
DEFENDANTS' (EMPLOYER/SURETY) JOINT SUPPLEMENTAL NOTICE OF WITNESSES, EXHIBITS, AND POST-HEARING DEPOSITIONS, Filed October 5, 2012	33
DEFENDANTS' (EMPLOYER/SURETY) RESPONSE TO CLAIMANT'S MOTION FOR MODIFICATION OF ISIF SETTLEMENT AGREEMENT, Filed August 8, 2013	
DEFENDANT'S (ISIF) RESPONSE TO CLAIMANT'S MOTION TO MODIFY LUMP SU	

EXHIBIT LIST	i
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER Filed May 3, 2013	81
FIRST AMENDED NOTICE OF APPEAL, Filed November 22, 2013	194
ISIF'S EXCHANGE OF EXHIBITS AND DISCLOSURE PURSUANT TO RULE 10, Filed October 9, 2012	36
NOTICE OF APPEAL, Filed November 14, 2013	186
NOTICE OF COMPLETION, dated December 20, 2013	203
NOTICE OF HEARING AND NOTICE OF PRE-HEARING TELEPHONE CONFERENC Filed January 12, 2012	-
NOTICE OF RECONSIDERATION, Filed May 3, 2013	112
ORDER DENYING MOTION FOR MODIFICATION OF ISIF SETTLEMENT, Filed September 27, 2013	161
ORDER ON RECONSIDERATION, Filed November 4, 2013	166
ORDER TO CONSOLIDATE, Filed July 1, 2011	24
REFEREE'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATI Dated April 8, 2013	
STIPULATION AND AGREEMENT OF LUMP SUM DISCHARGE AND ORDER OF APPROVAL AND DISCHARGE, Filed November 8, 2012	39
WORKERS' COMPENSATION COMPLAINT, IC 2008-032836, Filed January 18, 2011	1
WORKERS' COMPENSATION COMPLAINT, IC 2007-005950, Filed March 29, 2011	5
WORKERS' COMPENSATION COMPLAINT AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND (ISIF). Filed June 9, 2011	14

#### **EXHIBITS LIST**

#### REPORTER'S TRANSCRIPTS:

Reporter's Transcript taken October 16, 2012 will be lodged with the Supreme Court.

#### Claimant's Exhibits:

- 1. ICRD File (12/5/08-12/07/09)
- 2. SSA Earnings History with SSD Benefit Information (7/28/11)
- 3. Liberty Northwest Indemnity and Medical Ledgers (2/18/11)
- 4. SSA Judicial Decision (5/13/10)
- 5. SSA Physical Residual Functional Capacity Assessment (4/29/09)
- 6. Report of Vocational Expert Dan Brownell (5/28/12)
- 7. Report of Vocational Expert Nancy Collins (9/4/12)
- 8. Report of Vocational Expert Mary Barros (7/31/12 & 10/31/11)
- 9. Deposition Transcript of Jeff Mills (3/29/12)
- 10. Deposition Transcript of Trudy Deon (10/6/11)
- 11. IME Report of Dr. McNulty (9/13/12)
- 12. CDA Hand Therapy FCE (9/4/12 & 9/16/11)
- 13. North Idaho MRI Imaging Reports (11/3/08 & 12/4/08)
- 14. Dr. Stevens IME (11/18/09) and EMG & NCS (8/19/09)
- 15. Rivers Edge Orthopedics Dr. Greendyke (6/5/06-10/28/09)
- 16. Northwest Orthopaidic Specialists Dr. Sestero (3/19/09)
- 17. Dr. Patrick Mullen (11/13/08-7/30/09)
- 18. IME Report of Dr. Kerr (4/17/09)
- 19. North Idaho Hand Rehabilitation (1/1/09-6/25/09)
- 20. North Idaho Physical Therapy (8/4/09-10/28/09)
- 21. Kootenai Medical Center Records (10/4/08-12/30/08)
- 22. North Idaho Medical Care Center (4/26/06-10/16/08)
- 23. North Idaho Eye Institutes (5/25/01-8/1/11)
- 24. Rottweiler Attack Records (DRs. Shaw, Quinn, Witham) (2/12/06-7/29/09)
- 25. Various Prior Industrial Commission Records and LSSA (1/15/94)

#### Defendants' Exhibits:

- 26. Idaho Workers' Compensation First Report of Injury or Illness
- 27. Liberty Northwest summary of benefits paid
- 28. Claimant's Personnel file

#### Additional Documents:

- 1. Claimant's Opening Brief, Filed November 27, 2012
- 2. Defendants' Response Brief, Filed December 17, 2012
- 3. Claimant's Reply Brief, Filed December 24, 2012
- 4. Defendants' Opening Brief: Impact of IC Approval of ISIF Settlement Agreement Upon the May 3, 2013 IC Decision and Motion for Reconsideration, Filed June 27, 2013
- 5. Claimant's Opening Brief Following Notice of Reconsideration, Filed June 28, 2013
- 6. Defendants' Reply Brief: Impact of IC Approval of ISIF Settlement Agreement Upon the May 3, 2013 IC Decision and Motion for Reconsideration, Filed July 18, 2013
- 7. Claimant's Reply Brief Following Notice of Reconsideration, Filed July 19, 2013

## SEND ORIGINAL TO: INDUSTRIA DIMINISION, JUDICIAL DIVISION, P.O. BO 720, BOISE, IDAHO 83720-0041

#### WORKERS' COMPENSATION **COMPLAINT**

CLAIMANT'S (INJURED WORKER) NAME AND ADDRESS	CLAIMANT'S ATTORNEY'S NAME, ADDRESS, AND TELEPHONE NUMBER	
Trudy Deon 211 W. Haycraft Coeur d'Alene, ID 83814  TELEPHONE NUMBER: 208-667-0683	STEPHEN NEMEC JAMES, VERNON & WEEKS, P.A. 1626 Lincoln Way Coeur d'Alene, ID 83814 TELEPHONE NUMBER: 208-667-0683	
EMPLOYER'S NAME AND ADDRESS (at time of injury)  Hagadone Hospitality c/o Sara LaPresta (Personnel Manager) PO Box 6200 Coeur d'Alene, ID 83814	workers' compensation insurance carrier's (not adjustor's) name and address  Liberty Northwest 6213 N. Cloverdale Rd. P.O. Box 7507 Boise, ID 38707	
CLAIMANT'S SOCIAL SECURITY NO. CLAIMANT'S BIRTH DATE	Date of injury or manifestation of occupational disease $10/4/08$	
STATE AND COUNTY IN WHICH INJURY OCCURRED	WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE	
Idaho, Kootenai County	OF: \$ Unknown PURSUANT TO IDAHO CODE § 72-419	
DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED)		
Injured hand when electric snake wrapped around Claimant's gl	ove and arm causing injury and tip hit her eye.	
NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE		
Hand injury and H. simplex keratitis in eye.		
what workers' compensation benefits are you claiming at this time?  Medical for eye, TPD, PPI, and PPD benefits		
DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER  10/4/10	TO WHOM NOTICE WAS GIVEN Russel Kizzer, manager	
HOW NOTICE WAS GIVEN:   ORAL  OTHER, PLEASE SPECIFY		
ISSUE OR ISSUES INVOLVED		
<ol> <li>What medical benefits Claimant is entitled to;</li> <li>The amount of permanent partial impairment to which Claimant is entitled;</li> <li>Whether Claimant has disability in excess of impairment; and</li> <li>Whether Claimant is totally and permanently disabled.</li> </ol>		
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? YES NO IF SO, PLEASE STATE WHY.		
NOTICE: COMPLAINTS AGAINST THE INDUSTRIAL SPECIAL DIDENBUTY FUND MUST BE DI ACCORDANCE WITH ID ALIC		

(COMPLETE OTHER SIDE) IC1001 (Rev. 3/1/2008)

CODE § 72-334 AND FILED ON FORM I.C. 1002

Complaint - Page 1 of 3

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ALDRESS)	See attached	
1		
I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PART	TIES AGREE. X YES NO	
DATE 1/12/11 SIGNATURE OF CLAIMANT	OR ATTORNEY: SPEPHEN J. NEMEC	
PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW ONLY IF CLAIM IS MADE FOR DEATH BENEFITS		
NAME AND SOCIAL SECURITY NUMBER OF PARTY FILING COMPLAINT	RELATION TO DECEASED CLAIMANT	
WAS FILING PARTY DEPENDENT ON DECEASED? ☐ YES ☐ NO	DID FILING PARTY LIVE WITH DECEASED AT TIME OF ACCIDENT?  YES NO	
CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE FORM		
CERTIFICATE	E OF SERVICE	
I hereby certify that on the 3 day of, 20, I caused to	be served a true and correct copy of the foregoing Complaint upon:	
EMPLOYER'S NAME AND ADDRESS	SURETY'S NAME AND ADDRESS	
Hagadone Hospitality c/o Sara LaPresta (Personnel Manager) PO Box 6200 Coeur d'Alene, ID 83814	Liberty Northwest 6213 N. Cloverdale Rd. P.O. Box 7507 Boise, ID 38707 Attn: Chanel Holland 208-327-7518	
X U.S. Mail Fax	U.S. Mail X Fax	
	Signature	

NOTICE: An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing to avoid default. If no answer is filed, a Default Award may be entered!

Further information may be obtained from: Industrial Commission, Judicial Division, P.O. Box 83720, Boise, Idaho 83720-0041 (208) 334-6000.

(COMPLETE MEDICAL RELEASE FORM ON PAGE 3)

Birth Date: Address: Phone Number: 208-818-2119    Medical Record Number:	Patient Name:	nn Deon	
Phone Number:  SSN or Case Number:    Coloration   Colora	Birth Date:		
Phone Number:  SSN or Case Number:    AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION	Address:	211 W. Havcraft, 83814	
AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION  I hereby authorize  AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION  To:  Insurance Company/Third Party Administrator/Self Insured Employer/ISIF, their attorneys or patient's atterney  Street Address  City State Zip Cride  Purpose of need for data:  (e.g. Worker's Compensation Claim)  Information to be disclosed:  Discharge Summary  History & Physical Exam  Consultation Reports  Operative Reports  Lab  Pathology  Radiology Reports  Entire Record  Other: Specify  I understand that the disclosure may include information relating to (check if applicable):  AIDS or HIV  Psychiatric or Mental Health information  Drug/Alcohol Abuse Information to be released may include material that is protected by the deferal regulations. Understand that the information may be subject to redisclosure by the recipient and no longer be protected by the deferal regulations understand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization vent apply to information already released in response to this authorization. Jundess otherwise revoked, this authorization will expire upon resolution of worker's compensation claim. Provider, its employees, officers, copy errore contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the abouthorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be elieved to the privacy officer of the Provider specified above.	Phone Number:		
AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION  I hereby authorize  Provider Name - must be specific for each provider  To:  Insurance Company/Third Parry Administrator/Scif Insured Employer/ISIF, their attorneys or patient's attorney  Street Address  City State Zip Code  Purpose of need for data:  (e.g. Worker's Compensation Claim)  Information to be disclosed:  Discharge Summary  History & Physical Exam  Consultation Reports  Coperative Reports  Lub  Pathology  Reatiology Reports  Entire Record  Other: Specify  I understand that the disclosure may include information relating to (check if applicable):  AIDS or HIV  Psychiatric or Mental Health Information  Dong/Alcohol Abuse Information  understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and rhat the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that the information aready released in response to this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the reprovider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. Highes otherwise revoked, this authorization will expire upon resolution of worker's compensation claim.  Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above normation to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy, My signature eleve authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.	SSN or Case Number:		☐ Mail Copies
To:    Insurance Company/Third Parry Administrator/Sciff insured Employer/ISIF, their attorneys or patient's attorney   Street Address			ID Confirmed by:
Provider Name – must be specific for each provider  To:  Insurance Company/Third Party Administrator/Self Insured Employer/ISIF, their attorneys or patient's attorney  Street Address  Cry State Zip Code  Purpose of need for data:  (e.g. Worker's Compensation Claim)  Information to be disclosed:  Discharge Summany  History & Physical Exam  Consultation Reports  Operative Reports  Lab  Pathology  Raddology Reports  Entire Record  Other. Specify  I understand that the disclosure may include information relating to (check if applicable):  AIDS or HIV  Psychiatric or Mental Health Information  Drug/Alcohol Abase Information  Drug/Alcohol Abase Information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. Inderstand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the provider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. Underst otherwise veroked, this authorization will expire upon resolution of worker's compensation claim. Provider, its employees, officers, copy enrolled information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.		AUTHORIZATION FOR DISCLOSURE OF HEAL	TH INFORMATION
To:  Insurance Company/Third Party Administrator/Self Insured Employer/ISIF, their attorneys or patient's attorney  Street Address  City State Zip Code  Purpose of need for data:  (e.g. Worker's Compensation Claim)  Information to be disclosed:  Discharge Summary  History & Physical Exam  Consultation Reports  Operative Reports  Lab  Pathology  Radiology Reports  Entire Record  Other: Specify  I understand that the disclosure may include information relating to (check if applicable):  AIDS or HIV  Psychiatric or Mental Health Information  Drug/Alcohol Abase Information  Drug/Alcohol Abase Information  Drug/Alcohol Abase Information may be exubject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that the information may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. *Indess atherwise *evoked, this authorization will expire upon resolution of worker's compensation claim. *Provider, its employees, officers, corp service contractor, and physicians are hereby released from any legal responsibility of lability for lability for lability for lability for lability for lability for privacy. My signature evolved untorizes release of all information specified in this authorization. *Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.  Signature of Patient	I hereby authorize	Drough Now worth and G. Carroth would	to disclose health information as specified:
Insurance Company/Third Parry Administrator/Self Insured Employer/ISIF, their attorneys or patient's attorney  Street Address  City State Zip Code  Purpose of need for data:  (e.g. Worker's Compensation Cluim)  Information to be disclosed: Discharge Summary  History & Physical Exam Consultation Reports Operative Reports Operative Reports Interest Record Other: Specify  I understand that the disclosure may include information relating to (check if applicable): AIDS or HIV Psychiatric or Mental Health Information Drug/Alcohol Abuse Information Understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisclosure by the reciplent and no longer be protected by the federal regulations. Inderstand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. Undersat of that the vision of the authorization won't apply to information already released in response to this authorization. Purpose officer, except will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. Unless otherwise veroked, this authorization will expire upon resolution of worker's compensation claim. Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy. My signature selow authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.		Provider Name – must be specific for each provider	
City State Zip Code  Purpose of need for data:  (e.g. Worker's Compensation Claim) Information to be disclosed: Discharge Summary  History & Physical Exam  Consultation Reports  Operative Reports  Entire Record  Other. Specify  Lunderstand that the disclosure may include information relating to (check if applicable): AIDS or HIV  Psychiatric or Mental Health Information  Drug/Alcohol Abuse Information  understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisciosure by the recipient and no longer be protected by the federal regulations. Inderstand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization word: apply to information already released in response to this authorization. Junderstand that the provider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. Junless otherwise revoked, this authorization will expire upon resolution of worker's compensation claim. Provider, its employees, officers, copy revoked without screen and authorized by me on this form and as outlined in the Notice of Privacy. My signature elow authorizates release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.			
Purpose of need for data:  (e.g. Worker's Compensation Claim)  Information to be disclosed:  Discharge Summary  History & Physical Exam  Consultation Reports  Operative Reports  Lab  Pathology  Radiology Reports  Entire Record  Other: Specify  Lunderstand that the disclosure may include information relating to (check if applicable):  AIDS or HIV  Psychiatric or Mental Health Information  Understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. Inderstand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. Lunderstand that the provider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. <i>Networker's compensation claim</i> . Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy. My signature sellow authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.	Ins	surance Company/Third Party Administrator/Self Insured Employer/I	SIF, their attorneys or patient's attorney
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Purpose of need for data:  (e.g. Worker's Compensation Claim)  Information to be disclosed:  Discharge Summary  History & Physical Exam  Consultation Reports  Date(s) of Hospitalization/Care:  Pathology  Radiology Reports  Entire Record  Other: Specify  I understand that the disclosure may include information relating to (check if applicable):  AIDS or HIV  Psychiatric or Mental Health Information  Drug/Alcohol Abuse Information  understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the provider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. However, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above normation to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy, My signature pelow authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.		Street Address	
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Signature of Patient  Date			stions that I have regarding disclosure may be
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Signature of Legal Representative & Relationship to Patient Authority to Act Date	Signature of Patient		- Date
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	Signature of Legal Keph	eschause & Relaboliship io ranche Authority	to ACI Liate
Signature of Witness Title Date	Signature of Witness	Tile	Date

	North Idaho Physical Therapy	1917 N. Lakewood Dr.	
		Coeur d'Alene, ID	
	North Idaho Eye Institute	1814 Lincoln Way	
		Coeur d'Alene, ID 83814	
ů.	Kootenai Family Care	750 Syringa Dr.	
		Post Falls, ID 83854	
		16760 N. Hwy 41	
		Rathdrum, ID 83858	· .
4	Northwest Orthopedic Clinic	601 W. 5th Ave.	
•		Spokane, WA 99204	·
	North Idaho Hand Rehabilitation	943 Ironwood, #100	
		Coeur d'Alene, ID 83814	
	Kootenai Medical Center	2003 Lincoln Way	
•		Coeur d'Alene, ID 83814	
	River Edge Orthopedics	1300 E. Mullan,#1300	
		Post Falls, ID 83854	
	Kootenai MRI	2003 Lincoln Way	
		Coeur d'Alene, ID 83814	

2086641 4

#### SEND ORIGINAL TO: INDUSTRIAL COMMISSION, JUDICIAL DIVISION, P.O. BOX 83720, BOISE, IDAHO 83720-0041

#### WORKERS' COMPENSATION COMPLAINT

CLAIMANT'S (INJURED WORKER) NAME AND ADDRESS	CLAIMANT'S ATTORNEY'S NAME, ADDRESS, AND TELEPHONE NUMBER	
Trudy Deon 211 W. Haycraft	STEPHEN NEMEC JAMES, VERNON & WEEKS, P.A.	
Coeur d'Alene, ID 83814	1626 Lincoln Way	
TELEPHONE NUMBER: 208-667-0683	Coeur d'AJene, ID 83814 TELEPHONE NUMBER: 208-667-0683	
EMPLOYER'S NAME AND ADDRESS (at time of injury)	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUGTOR'S) NAME AND ADDRESS	
Hagadone Hospitality	Liberty Northwest	
c/o Sara LaPresta (Personnel Manager) P.O. Box 6200	6213 N. Cloverdale Rd.	
Coeur d'Alene, ID 83814	P.O. Box 7507 Boise, ID 38707	
CLAIMANT'S SOCIAL SECURITY NO. CLAIMANT'S BIRTH DATE		
CLANGEN STATE OF THE STATE OF T	DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE 2/9/07	
STATE AND COUNTY IN WHICH INJURY OCCURRED	WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE	
Idaho, Kootenai County	OF: \$\$9.35/hr PURSUANT TO IDAHO CODE § 72-419	
DESCRIBE HOW INITIRY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED)		
Putting ice melt on sidewalk and talking to boss, feet slipped ou	nt from under me.	
NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPAT	ional disease	
Fall injuring hips, shoulder, and back.		
WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME?		
N/A: Claimant files this Complaint to avoid any I.C. § 72-406 apportionment defenses which the defendants have raised in their Answers to Discovery in I.C. 2008-032836.		
DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER	TO WHOM NOTICE WAS GIVEN	
2/9/07	Immediate Supervisor	
HOW NOTICE WAS GIVEN:   ORAL OTHER, PLEASE SPECIFY		
ISSUE OR ISSUES INVOLVED		
). What medical benefits Claimant is entitled to; and		
2. The amount of permanent partial impairment to which Claimant is entitled.  INDUSTRIAL COMMISSION		
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? 🔲 YES 🗵 NO. IF SO, PLEASE STATE WHY,		
NOTICE: COMPLAINTS AGAINST THE <i>INDUSTRIAL SPECIAL INDEMNITY FUND</i> MUST BE IN ACCORDANCE WITH IDAHO CODE § 72-334 AND FILED ON FORM I.C. 1002		

IC1001 (Rev. 3/1/2008)

(COMPLETE OTHER SIDE)

Complaint - Page 1 of 3

SEND ORIGINAL TO: INDUSTRIA OMMISSION, JUDICIAL DIVISION, P.O. BC 3720, BOISE, IDAHO 83720-0041

#### WORKERS' COMPENSATION **COMPLAINT**

CLAIMANT'S (INJURED WORKER) NAME AND ADDRESS	CLAIMANT'S ATTORNEY'S NAME, ADDRESS, AND TELEPHONE NUMBER	
Trudy Deon 211 W. Haycraft Coeur d'Alene, ID 83814	STEPHEN NEMEC JAMES, VERNON & WEEKS, P.A. 1626 Lincoln Way Coeur d'Alene, ID 83814	
TELEPHONE NUMBER: 208-667-0683	TELEPHONE NUMBER: 208-667-0683	
EMPLOYER'S NAME AND ADDRESS (at time of injury)	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS	
Hagadone Hospitality c/o Sara LaPresta (Personnel Manager) P.O. Box 6200 Coeur d'Alene, ID 83814	Liberty Northwest 6213 N. Cloverdale Rd. P.O. Box 7507 Boise, ID 38707	
CLAIMANT'S SOCIAL SECURITY NO. CLAIMANT'S BIRTH DATE	date of injury or manifestation of occupational disease $2/9/07$	
STATE AND COUNTY IN WHICH INJURY OCCURRED	WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE	
Idaho, Kootenai County	OF: \$	
DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED)		
Putting ice melt on sidewalk and talking to boss, feet slipped ou	at from under me.	
NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATION	IONAL DISEASE	
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DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER	TO WHOM NOTICE WAS GIVEN	
2/9/07	Immediate Supervisor	
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ISSUE OR ISSUES INVOLVED		
1. What medical benefits Claimant is entitled to; and		
2. The amount of permanent partial impairment to which Claimant is entitled.		
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS?   YES  NO IF SO, PLEASE STATE WHY.		
NOTICE: COMPLAINTS AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND MUST BE IN ACCORDANCE WITH IDAHO		

IC1001 (Rev. 3/1/2008)

CODE § 72-334 AND FILED ON FORM I.C. 1002

(COMPLETE OTHER SIDE)

Complaint - Page 1 of 3

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS):  See Attached Appendix				
I AM INTERESTED IN MEDIATING THIS CLA	IM, IF THE OTHER PART	TIES AGREE.	YES□ NO	
DATE 3/28///	SIGNATURE OF CLAIMANT OR ATTORNEY:  STEPHEN J. NEMEC			
	_	VESTIONS IMMEDI E FOR DEATH BEN		
NAME AND SOCIAL SECURITY NUMBER OF PARTY FILING COMPLAINT	DATE OF DEATH		RELATION TO DECEASED CLAIMANT	
WAS FILING PARTY DEPENDENT ON DECEASED? ☐ YES ☐ NO		DID FILING PARTY LIVE WI ☐ YES ☐ NO	TH DECEASED AT TIME OF ACCIDENT?	
CLAIMANT MUST COMPL	ETE, SIGN AND DAT	E THE ATTACHED	MEDICAL RELEASE FORM	
	CERTIFICATE	OF SERVICE		
hereby certify that on the $\frac{29}{9}$ day of $\frac{1}{100}$	, 20 <u> </u> ], I caused to	be served a true and co	rrect copy of the foregoing Complaint upon:	
EMPLOYER'S NAME AND	ADDRESS	SURETY'S NA	ME AND ADDRESS	
Hagadone Hospitality c/o Sara LaPresta (Personnel Manager) P.O. Box 6200 Coeur d'Alene, ID 83814		Liberty Northwes 6213 N. Cloverda P.O. Box 7507 Boise, ID 38707 Attn: Chanel Hol 208-327-7518	ale Rd.	
X U.S. Mail Fax		U.S. Mail X Fax		
		Signature		
NOTICE: An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing to avoid default. If no answer is filed, a Default Award may be entered!				

(COMPLETE MEDICAL RELEASE FORM ON PAGE 3)

Further information may be obtained from: Industrial Commission, Judicial Division, P.O. Box 83720, Boise, Idaho

83720-0041 (208) 334-6000.

North Idaho Physical Therapy	1917 N. Lakewood Dr.
, , , , , , , , , , , , , , , , , , , ,	Coeur d'Alene, ID
North Idaho Eye Institute	1814 Lincoln Way
·	Coeur d'Alene, ID 83814
Kootenai Family Care	750 Syringa Dr.
	Post Falls, ID 83854
	16760 N. Hwy 41
	Rathdrum, ID 83858
No other and College	
Northwest Orthopedic Clinic	601 W. 5th Ave.
	Spokane, WA 99204
North Idaho Hand Rehabilitation	943 Ironwood, #100
	Coeur d'Alene, ID 83814
Kootenai Medical Center	2003 Lincoln Way
	Coeur d'Alene, ID 83814
River Edge Orthopedics	1300 E. Mullan,#1300
	Post Falls, ID 83854
Kootenai MRI	2003 Lincoln Way
	Coeur d'Alene, ID 83814

Patient Name:	Trud Inn Deon		
Birth Date:			
Address:	211 W. Haycraft, 83	814	(Provider Use Only) Medical Record Number:
Phone Number:	208-818-2119		☐ Pick up Copies ☐ Fax Copies #
SSN or Case Number:			☐ Mail Copies ID Confirmed by:
	- Control of the second		
** 4 4 .	AUTHORIZATION FOR I	DISCLOSURE OF HEAL	
I hereby authorize	Provider Name – must be	specific for each provider	to disclose health information as specified:
<b>T</b>	<b>E</b> 1		
To:			/ISIF, their attorneys or patient's attorney
шз	urance Company/Third Farty Administ	rator/sen hisured Employer/	/ISIF, their attorneys or patient's attorney
		Street Address	
City	***************************************	Ctata	7 in Code
City		State	Zip Code
Purpose of need for data:			
Information to be disclosed:	(e.g. W	Vorker's Compensation Clain Date(s) of Hospitalization	
Discharge Summary		Date(s) of Hospitalization	JI/Care.
History & Physical Exam			
Consultation Reports			
Operative Reports			
Lab			
Pathology			
Radiology Reports			
Entire Record			
Other: Specify			
	e may include information relating to (	check if applicable):	
AIDS or HIV	sat viet in the control of the contr		
Psychiatric or Mental Hea			
Drug/Alcohol Abuse Infor			(45,050,000,000,000,000,000,000,000,000,0
that the information may be understand that this authoriz the authorization won't apply will not condition treatment, revoked, this authorization w	subject to redisclosure by the ation may be revoked in writing to information already release payment, enrollment, or eligible expire upon resolution of well as the subject of the subjec	e recipient and no long ng at any time by noting ed in response to this polity for benefits on my corker's compensation	preceded by Federal Law (45 CFR Part 164) and ger be protected by the federal regulations. I fying the privacy officer, except that revoking authorization. I understand that the provider by signing this authorization. <i>Unless otherwise</i> claim. Provider, its employees, officers, copy ibility or liability for disclosure of the above
information to the extent ind below authorizes release of al	licated and authorized by me	on this form and as ou authorization. Any que	utlined in the Notice of Privacy. My signature estions that I have regarding disclosure may be
Trudy An	<u>n Dem</u>		June 15/2010
Signature of Patient			Date /
Signature of Legal Repre	esentative & Relationship	to Patient/Authority	to Act Date
Signature of Witness	and the second s	Title	Date

SEND ORIGINAL TO: INDUSTRIAL COMMISSION, JUDICIAL DIVISION, 700 S.CLEARWATER LN, BOISE, IDAHO 83712

## **ANSWER TO COMPLAINT**

## I. C. NO. 2008-032836

## **ALLEGED INJURY DATE: October 4, 2008**

CLAIMANT'S NAME AND ADDRESS  Ms. Trudy Deon	claimant's attorney's name and address Mr. Stephen J. Nemec Esq.
211 W Haycraft	James, Vernon & Weeks
Coeur d'Alene, ID 83814	1626 Lincoln Way
	Coeur d'Alene, ID 83814
EMPLOYER'S NAME AND ADDRES	WORKERS' COMPENSATION INSURANCE <u>CARRIER'S</u> (NOT ADJUSTOR'S) NAME AND ADDRESS
Hagadone Hospitality (H & J Inc.)	Liberty Northwest Insurance Corp.
PO Box 6200	P. O. Box 7507
Coeur d'Alene, ID 83816	Boise, Idaho 83707
ATTORNEY REPRESENTING EMPLOYER OR EMPLOYER/SURETY (NAME AND ADDRESS)	ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS)
Kimberly A. Doyle	
Law Offices of Harmon & Day	
P. O. Box 6358	
Boise, ID 83707-6358	

The above-named employer or employer/surety responds to Claimant's Complaint by stating:
The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

	The muus	trial Special Indemnity Fund responds to the Complaint against the ISIF by Stating:
IT IS: (Ch	neck One)	
Admitted	Denied	
x		That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
×		2. That the employer/employee relationship existed.
x		3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
x		That the condition for which benefits are claimed was caused partly <u>x</u> entirely <u>by an accident arising out of and in the course of Claimant's employment. </u>
N/A	N/A	<ol> <li>That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.</li> </ol>
x		6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
N/A	N/A	7. That, if an occupational disease is alleged, notice of such was given to the employer within five months after the employment had ceased in which it is claimed the disease was contracted.
	х	That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419: \$ 388.00
х		That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.
10. What bene	efits, if any, do	you concede are due Claimant? NONE

10

Answer--Page 1 of 2

#### (Continued from front)

- 11. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.
- A. Defendants deny all allegations of the Complaint not admitted herein.
- B. Whether Claimant's current condition is causally related to the 10/04/2008 alleged accident or is a pre-existing or subsequent condition;
- C. Whether Claimant is entitled to additional medical benefits;
- D. Whether Claimant is entitled to additional TTD/TPD benefits;
- E. Whether Claimant has an additional permanent partial impairment and/or permanent partial disability arising out of the 10/04/2008 incident, and if so, appropriate apportionment; and
- F. Whether Claimant is totally and permanently disabled.
- G. Defendants reserve the right to amend this Answer since discovery in this matter has only just begun.

Under the Commission rules, you have twenty-one (21) days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule III(D), Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C. 1002.

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF SO, PLEASE STATE.				
		No		
Amo	unt of Compensation Paid to	Date	Dated	Signature of Defendant or Attorney
PPD	TTD/TPD	Medical	11/2-/11	Q: Val. () ora (
\$2,039.40 (PPI)	\$14,209.30	\$19,318.56	7/2////	Kimbellyson
		CERTIFICATE OF SERV	ICE	

CLAIMANT'S ATTORNEY:

Mr. Stephen J. Nemec Esq. James, Vernon & Weeks 1626 Lincoln Way Coeur d'Alene, ID 83814

via: \_\_\_\_\_ personal service of process regular U.S. Mail

Signature

#### SEND ORIGINAL TO: INDUSTRIAL COMMISSION, JUDICIAL DIVISION, 700 S.CLEARWATER LN, BOISE, IDAHO 83712

#### **ANSWER TO COMPLAINT**

#### I. C. NO. 2007-005950

10. What benefits, if any, do you concede are due Claimant?

IC1003

#### ALLEGED INJURY DATE: February 9, 2007

claimant's name and address  Ms. Trudy Deon	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS Mr. Stephen J. Nemec Esq.	
211 W Haycraft Coeur d'Alene, ID 83814	James, Vernon & Weeks 1626 Lincoln Way	
Coedi d'Alerie, ID 63614	Coeur d'Alene, ID 83814	
EMPLOYER'S NAME AND ADDRES  Best Western Coeur D' Alene Inn	WORKERS' COMPENSATION INSURANCE <u>CARRIER'S</u> (NOT ADJUSTOR'S) NAME AND ADDRESS	
414 W. Appleway Ave.	Liberty Northwest Ins. Co. P. O. Box 7507	
Coeur d'Alene, ID 83814	Boise, Idaho 83707	
ATTORNEY REPRESENTING EMPLOYER OR EMPLOYER/SURETY (NAME AND ADDRESS)  Kimberly A. Doyle	ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS)	
Law Offices of Harmon & Day	gu â	
P. O. Box 6358	<u>₹</u> 5	
Boise, ID 83707-6358		

The above-named employer or employer/surety responds to Claimant's Complaint by stating:
The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

IT IS: (Ch	eck One)	
Admitted	Denied	
x		That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
х		2. That the employer/employee relationship existed.
х		3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
×		That the condition for which benefits are claimed was caused partly <u>x</u> entirely <u>by an accident arising out of and in the course of Claimant's employment.</u>
N/A	N/A	5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
х		6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
N/A	N/A	7. That, if an occupational disease is alleged, notice of such was given to the employer within five months after the employment had ceased in which it is claimed the disease was contracted.
	х	8. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419: \$ unknown at this time
x		That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

NONE

Answer-Page 1 of 2

#### (Continued from front)

- 11. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.
- A. Defendants deny all allegations of the Complaint not admitted herein.
- B. Whether Claimant's current condition is causally related to the industrial accident or is related to a pre-existing or subsequent injury or condition;
- C. Whether Claimant is entitled to additional medical benefits (Claimant's 2/22/07 North Idaho Medical Care Center chart note states "no return visit necessary");
- D. Whether Claimant has a permanent partial impairment arising out of the industrial incident and, if so, appropriate apportionment.
- E. Defendants reserve the right to amend this Answer since discovery in this matter has only just begun.

Under the Commission rules, you have twenty-one (21) days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule III(D), Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C. 1002.

I AM INTER	ESTED IN MEDIATING THIS	CLAIM, IF THE OTHER F	PARTIES AGRE	EYESNO
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF SO, PLEASE STATE.				
No				
Amo	ount of Compensation Paid to I	Date	Dated	Signature of Defendant or Attorney
PPD/PPI	TTD/TPD	Medical	./ [	0.010
\$0.00 (surety is not aware of any PPI or permanent restrictions given on this claim)	\$0.00	\$678.20	4/11/11	Linkallyragle

PLEASE COMPLETE

CERTIFICATE OF SERVICE

#### CLAIMANT'S ATTORNEY:

Mr. Stephen J. Nemec Esq. James, Vernon & Weeks 1626 Lincoln Way Coeur d'Alene, ID 83814

via: \_\_\_\_ personal service of process regular U.S. Mail

13



LIGINAL TO: INDUSTRIAL COMMISSION, JUDICIAL DIVISION, P.O. BOX 83720, BOISE, IDAHO 83720-0041

# WORKERS' COMPENSATION COMPLAINT AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND (ISIF)

CLAIMANT'S NAME AND ADDRESS	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS
Ms. Trudy Deon	STEPHEN J. NEMEC
211 W. Haycraft	James, Vernon & Weeks, P.A.
Coeur d'Alene, ID 83814	1626 Lincoln Way
	Coeur d'Alene, ID 83814
EMPLOYER'S NAME AND ADDRESS	EMPLOYER'S ATTORNEY'S NAME AND ADDRESS
Hagadone Hospitality (H & J Inc.)	Kimberly Doyle
P.O. Box 6200	Liberty Northwest
Coeur d'Alene, ID 83816	P.O. Box 6358
	Boise, ID 83707-6358
I.C. NUMBER OF CURRENT CLAIM	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTERS) NAME AND ADDRESS
2008-032836	T The state of
DATE OF INJURY	Liberty Northwest
10/4/2008	PO Box 7507 Boise, ID 83707-1507

#### NATURE AND CAUSE OF PRE-EXISTING PHYSICAL IMPAIRMENT, CURRENT INJURY, OR OCCUPATIONAL DISEASE

Claimant was attacked by dogs on February 16, 2006 suffering a variety of injuries to both lower extremities; fibromyalgia; arthritis; head injury as a child. See also attached documentation.

#### STATE WHY YOU BELIEVE THAT THE CLAIMANT IS TOTALLY AND PERMANENTLY DISABLED:

Claimant had a pre-existing "permanent physical impairment" that was manifest prior to the current injuries, that constituted a "subjective" hindrance or obstacle to obtaining employment or re-employment, that a work related injury occurred, and by reason of the "combined effects" of both the pre-existing permanent partial impairments and the subsequent back injury that also resulted in permanent impairment, or by reason of the work-related aggravations and acceleration of the pre-existing permanent partial impairments, Claimant now suffers total and permanent disability.

FILED

JUN - 9 2011

INDUSTRIAL COMMISSION

DATE May 27, 2011

SIGNATURE OF PARTY OR ATTORNEY

COMPLAINT AGAINST ISIF



# WORKERS' COMPENSATION COMPLAINT AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND (ISIF)

CLAIMANT'S NAME AND ADDRESS	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS
Ms. Trudy Deon	STEPHEN J. NEMEC
211 W. Haycraft	James, Vernon & Weeks, P.A.
Coeur d'Alene, ID 83814	1626 Lincoln Way
	Coeur d'Alene, ID 83814
EMPLOYER'S NAME AND ADDRESS	EMPLOYER'S ATTORNEY'S NAME AND ADDRESS
Hagadone Hospitality (H & J Inc.)	Kimberly Doyle
P.O. Box 6200	Liberty Northwest
Coeur d'Alene, ID 83816	P.O. Box 6358
	Boise, ID 83707-6358
I.C. NUMBER OF CURRENT CLAIM	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTERS) NAME AND ADDRESS
2008-032836	
DATE OF INJURY	Liberty Northwest
10/4/2009	PO Box 7507
10/4/2008	Boise, ID 83707-1507

NATURE AND CAUSE OF PRE-EXISTING PHYSICAL IMPAIRMENT, CURRENT INJURY, OR OCCUPATIONAL DISEASE

Claimant was attacked by dogs on February 16, 2006 suffering a variety of injuries to both lower extremities; fibromyalgia; arthritis; head injury as a child. See also attached documentation.

#### STATE WHY YOU BELIEVE THAT THE CLAIMANT IS TOTALLY AND PERMANENTLY DISABLED:

Claimant had a pre-existing "permanent physical impairment" that was manifest prior to the current injuries, that constituted a "subjective" hindrance or obstacle to obtaining employment or re-employment, that a work related injury occurred, and by reason of the "combined effects" of both the pre-existing permanent partial impairments and the subsequent back injury that also resulted in permanent impairment, or by reason of the work-related aggravations and acceleration of the pre-existing permanent partial impairments, Claimant now suffers total and permanent disability.

DATE May 27, 2011

SIGNATURE OF PARTY OR ATTORNEY

#### Certificate of Service

I certify that on <u>2711</u>, I served a true and correct copy of the foregoing Complaint upon:

	Claimant's Address
Industrial Special Indemnity Fund	
Department of Administration	Ms. Trudy Deon
P.O. Box 83720	211 W. Haycraft
Boise, ID 83720-7901	Coeur d'Alene, ID 83814
Employer's Attorney's Name and Address	Surety's Name and Address
Fax: 800-972-3213	Fax: 208-327-7518
Kimberly Doyle	Liberty Northwest
Liberty Northwest	P.O. Box 7507
P.O. Box 6358	Boise, ID 83707
Boise, ID 83707-6358	



NOTICE: Pursuant to the provisions of Idaho Code §72-334, a notice of claim must first be filed with the Manager of ISIF not less than 60 days prior to the filling of a complaint against ISIF.

You must attach a copy of Form IC 1001 Workers' Compensation Complaint, to this document.

An Answer must be filed on Form IC 1003 within 21 days of service in order to avoid default.

#### SEND ORIGINAL TO: INDUSTRL

## MMISSION, JUDICIAL DIVISION, P.O. BC

720, BOISE, IDAHO 83720-0041

## WORKERS' COMPENSATION COMPLAINT

CLAIMANT'S (INJURED WORKER) NAME AND ADDRESS	CLAIMANT'S ATTORNEY'S NAME, ADDRESS, AND TELEPHONE NUMBER		
Trudy Deon 211 W. Haycraft Coeur d'Alene, ID 83814  TELEPHONE NUMBER: 208-667-0683	STEPHEN NEMEC JAMES, VERNON & WEEKS, P.A. 1626 Lincoln Way Coeur d'Alene, ID 83814 TELEPHONE NUMBER: 208-667-0683		
EMPLOYER'S NAME AND ADDRESS (at time of injury)	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS		
Hagadone Hospitality c/o Sara LaPresta (Personnel Manager) PO Box 6200 Coeur d'Alene, ID 83814	Liberty Northwest 6213 N. Cloverdale Rd. P.O. Box 7507 Boise, ID 38707		
CLAIMANT'S SOCIAL SECURITY NO. CLAIMANT'S BIRTH DATE	date of injury or manifestation of occupational disease $10/4/08$		
STATE AND COUNTY IN WHICH INJURY OCCURRED	WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE		
Idaho, Kootenai County	OF: \$ Unknown , PURSUANT TO IDAHO CODE § 72-419		
DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED)	)		
Injured hand when electric snake wrapped around Claimant's g	love and arm causing injury and tip hit her eye.		
NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPAT	TIONAL DISEASE		
Hand injury and H. simplex keratitis in eye.	· · · · · · · · · · · · · · · · · · ·		
WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME?	Harris de la companya del companya de la companya del companya de la companya de		
Medical for eye, TPD, PPI, and PPD benefits			
DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER	TO WHOM NOTICE WAS GIVEN		
10/4/10	Russel Kizzer, manager		
HOW NOTICE WAS GIVEN: ☑ ORAL ☐ WRITTEN ☐ OTHER, PLEASE SPECIFY			
ISSUE OR ISSUES INVOLVED	·		
<ol> <li>What medical benefits Claimant is entitled to;</li> <li>The amount of permanent partial impairment to which Claimant is entitled;</li> <li>Whether Claimant has disability in excess of impairment; and</li> <li>Whether Claimant is totally and permanently disabled.</li> </ol>			
3. Whether Claimant has disability in excess of impairment;			
3. Whether Claimant has disability in excess of impairment;	; and		

IC1001 (Rev. 3/1/2008)

(COMPLETE OTHER SIDE)

Complaint - Page 1 of 3

	<u></u>
PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS)	See attached
I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PAR	TIES AGREE. X YES NO
DATE 1/12/11 SIGNATURE OF CLAIMANT	OR ATTORNEY: SPEPHEN J. NEMEC
<del></del>	UESTIONS IMMEDIATELY BELOW E FOR DEATH BENEFITS
NAME AND SOCIAL SECURITY NUMBER OF PARTY FILING COMPLAINT	RELATION TO DECEASED CLAIMANT
was filing party dependent on deceased?  yes no	DID FILING PARTY LIVE WITH DECEASED AT TIME OF ACCIDENT?
CLAIMANT MUST COMPLETE, SIGN AND DAT	TE THE ATTACHED MEDICAL RELEASE FORM
CERTIFICATI	E OF SERVICE
I hereby certify that on the 3 day of, 20, I caused to	be served a true and correct copy of the foregoing Complaint upon:
EMPLOYER'S NAME AND ADDRESS	SURETY'S NAME AND ADDRESS
Hagadone Hospitality c/o Sara LaPresta (Personnel Manager) PO Box 6200 Coeur d'Alene, ID 83814	Liberty Northwest 6213 N. Cloverdale Rd. P.O. Box 7507 Boise, ID 38707 Attn: Chanel Holland 208-327-7518
X U.S. Mail Fax	U.S. Mail X Fax
NOTICE: An Employer on Inguinous Company sowed wit	Signature  Signature  For IC 1002 - ide

NOTICE: An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing to avoid default. If no answer is filed, a Default Award may be entered!

Further information may be obtained from: Industrial Commission, Judicial Division, P.O. Box 83720, Boise, Idaho 83720-0041 (208) 334-6000.

	Patient Name:	Trud nn Deon	<u> </u>
	Birth Date:	Trad	
	Address:	211 W. Haycraft, 83814	(Provider Use Only)
	Phone Number:	208-818-2119	Medical Record Number:
•	SSN or Case Number:	200-010-2117	☐ Mail Copies
			ID Confirmed by:
		AUTHORIZATION FOR DISCLOSURE OF HEA	ALTH INFORMATION
	I hereby authorize		to disclose health information as specified:
		Provider Name - must be specific for each provider	
	To: ·		
	Ins	urance Company/Third Party Administrator/Self Insured Employe	er/ISIF, their attorneys or patient's attorney
		Street Address	***************************************
		A	7: 0 :
	. City	State	Zip Code
	Purpose of need for data:		
		(e.g. Worker's Compensation Cla	
. 1	Information to be disclosed:	Date(s) of Hospitaliza	ition/Care:
İ	Discharge Summary		
1	History & Physical Exam		
	Consultation Reports		
	Operative Reports		·
l	Lab		
	Pathology		
	Radiology Reports		
l	Entire Record		•
l	Other: Specify		
	I understand that the disclosur	re may include information relating to (check if applicable):	
	AIDS or HIV		
	Psychiatric or Mental Hea	lth Information	•
	Drug/Alcohol Abuse Info	rmation	
		ation to be released may include material that is p	· · · · · · · · · · · · · · · · · · ·
	•	subject to redisclosure by the recipient and no for ration may be revoked in writing at any time by no	
		y to information already released in response to this	- · · · · · · · · · · · · · · · · · · ·
will ı	not condition treatment,	payment, enrollment, or eligibility for benefits on	my signing this authorization. <u>Unless otherwise</u>
		vill expire upon resolution of worker's compensation	
	• •	sicians are hereby released from any legal respor dicated and authorized by me on this form and as	•
		II information specified in this authorization. Any qu	
dired	cted to the privacy officer	of the Provider specified above.	
المراجعة المراجعة	and the second	1 -	a otems
	Luga sto	<u> 4 Desp</u>	<u> </u>
Si	gnature of Patient		Date
	and the state of t	6.13.1	
Si	gnature of Legal Repri	esentative & Relationship to Patient/Authori	ty to Act Date
~·		To I	Pota
311	enature of Witness	Title	Date

1917 N. Lakewood Dr.
Coeur d'Alene, ID
1814 Lincoln Way
Coeur d'Alene, ID 83814
750 Syringa Dr.
Post Falls, ID 83854
16760 N. Hwy 41
Rathdrum, ID 83858
601 W. 5th Ave.
Spokane, WA 99204
943 Ironwood, #100
Coeur d'Alene, ID 83814
2003 Lincoln Way
Coeur d'Alene, ID 83814
1300 E. Mullan,#1300
Post Falls, ID 83854
2003 Lincoln Way
Coeur d'Alene, ID 83814

#### ANSWER TO COMPLAINT

I.C. NO.: 08-032836

INJURY DATE: 10/04/2008

Claimant's Name and Address:  TRUDY DEON  211 W. HAYCRAFT  COEUR D'ALENE, ID 83814	Claimant's Attorney's Name and Address:  STEPHEN J. NEMEC  JAMES, VERNON & WEEKS, P.A.  1626 LINCOLN WAY  COEUR D'ALENE, ID 83814
Employer's Name and Address:  HAGADONE HOSPITALITY (H & J, INC.)  P.O. BOX 6200  COEUR D'ALENE, ID 83816	Worker's Compensation Insurance Carrier's (Not Adjuster's) Name and Address: LIBERTY NORTHWEST P.O. BOX 7507 BOISE, ID 83707-1507
Attorney Representing Employer or Employer/Surety (Name and Address)  KIMBERLY DOYLE  LIBERTY NORTHWEST  P.O. BOX 6358  BOISE, ID 83707-6358	Attorney Representing Industrial Special Indemnity Fund (Name and Address)  THOMAS W. CALLERY  JONES, BROWER & CALIERY  POBOX 854  LEWISTON ID 83501

The above-named em	ploye	er or empl	loyer/surety	responds to	Claimant's C	omplaint by	y stating

X The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

#### IT IS: (Check One) DENIED ADMITTED

	17 August State Control of the Contr
	1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
	2. That the employer/employee relationship existed.
	3. That the parties were subject to the provisions of the Idaho Worker's Compensation Act.
	4. That the condition for which benefits are claimed was caused partly or entirely by an accident arising out of and in the course of Claimant's employment
N/A	5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment
	6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
N/A	7. That, if an occupational disease is alleged, notice of such was given to the employer within five months after the employment had ceased in which it is claimed the disease was contracted.
Unknown to ISIF	8. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419:
	9. That the alleged employer was insured or permissibly self insured under the Idaho worker's Compensation Act.
	N/A Unknown to

10. What Benefits, if any, do you concede are due Claimant?

#### NONE FROM ISIF

11. State	e with specificity	what matters ar	re in dispute and you	r reason for denying liabi	lity, together with any affirmative defenses.
	PL			HED HERETO AND IN THOUGH SET FORT	CORPORATED HEREIN H IN FULL
your Ansv personal s claimant, due shoul	wer must be maile service of process as well as yourse ld not be withheld	ed to the Comm . Unless you d lf, the expense because a Con	nission and a copy mueny liability, you sho of hearing. All compuplaint has been filed	ust be served on all partie buld pay immediately the pensation which is conced l. Rule 111(D), Judicial I	the Complaint to answer the Complaint. A copy of sortheir attorneys by regular U. S. mail or by compensation required by law, and not cause the ledly due and accrued should be paid. Payments Rules of Practice and Procedure under the Idaho nity Fund must be filed on Form 1.C.1002.
I am inte	erested in mediat	ing this claim,	if the other parties	agreeY	esNo
Do you b	elieve this Claim	presents a new	question of law or a	complicated set of facts?	If so, please state.
No					
	Amount	of Compensatio	on Paid to Date		
PPD	TTD	Medical	Dated	Signature of Defendant	or Attorney
			6/15/11	772	
Please Co	-	/			
hereby co	ertify that on the	day of	f June, 2011, I caused	d to be served a true and o	correct copy of the foregoing Answer upon:
Claimant's Name and Address:  TRUDY DEON  OO STEPHEN J. NEMEC  OCOEUR D'ALENE, ID 83814		Name an KIMBER LIBERT P.O. BO	r and Surety's ad Address RLY DOYLE Y NORTHWEST X 6358 ID 83707-6358	Industrial Special Indemnity Fund (If Applicable)	
via:X	Personal Servio		via:	Personal Service of Proc_regular U. S. Mail	ess via: Personal Service of Process regular U. S. Mail

THOMAS W. CALLERY

# EXHIBIT 'A' AFFIRMATIVE DEFENSES

- 1. The Industrial Special Indemnity Fund recently received the Workers' Compensation Complaint against the Industrial Special Indemnity Fund and contemplates the initiation of formal discovery. The Fund has limited medical records available and is unable at this time to accurately either admit or deny portions of the Complaint and reserves the right to amend this Answer as necessary and warranted by subsequent discovery.
- 2. Claimant is not totally and permanently disabled.
- 3. Claimant did not suffer from a known manifest, pre-existing, permanent physical impairment within the meaning of Idaho Code Section 72-332(2).
- 4. Any permanent physical impairment suffered by the Claimant was not a hindrance or obstacle to Claimant's employment or re-employment.
- 5. If Claimant is totally disabled, it is not due to the aggravation and acceleration of a pre-existing condition nor due to the combined affects of pre and post injury conditions.
- 6. Claimant is capable of retraining for employment suitable to Claimant's alleged limitations but has either failed to pursue suitable employment or to cooperate in retraining for such employment.

IC1003 Answer - Page 3 of 2 2.3

#### BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRUDY DEON,	
Claimant,	
v.  H & J, INC., d/b/a BEST WESTERN  COEUR D'ALENE INN & CONFERENCE )  CENTER,	IC 2007-005950 IC 2008-032836
Employer,	ORDER TO CONSOLIDATE
and )	
LIBERTY NORTHWEST INSURANCE (CORPORATION, )	
Surety,	
and )	INDUSTRIAL COMMISSION
STATE OF IDAHO, INDUSTRIAL ) SPECIAL INDEMNITY FUND, )	는 아마리아 도로 됩니다. 그 그는 아르웨어 보는 테스크를 보고 됩니다. 그 그는 아마리아 프로그램에 됩니다. 그 그는 아마리아 보고 됩니다. 그 그는 이 보고 됩니다. 그 그는 이 보고 됩니다.
Defendants. )	

Pursuant to the Motion to Consolidate filed by Defendants on April 12, 2011, and the response of the Industrial Special Indemnity Fund (ISIF) filed on June 29, 2011, stating that the ISIF has no objection to consolidation, and seeing no other response or objection thereto,

The Industrial Commission of the State of Idaho hereby ORDERS that those claims presently pending before the Commission known as IC Numbers 2007-005950 and 2008-032836 are consolidated into a single proceeding. Future pleadings require reference to the two IC numbers listed above, but only a single document need be filed with the Commission.

DATED this jst day of July, 2011.

INDUSTRIAL COMMISSION

Alan Reed Taylor, Referee



#### **CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_ist\_\_ day of July, 2011, a true and correct copy of the foregoing **ORDER TO CONSOLIDATE** was served by regular United States mail upon each of the following persons:

STEPHEN J NEMEC 1626 LINCOLN WAY COEUR D'ALENE ID 83814-2435

KIMBERLY A DOYLE PO BOX 6358 BOISE ID 83707-6358

THOMAS W CALLERY PO BOX 854 LEWISTON ID 83501-0854

sc

Stephenie Christense

#### BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRUDY DEON,	
Claimant,	) )
v.  H & J, INC., d/b/a BEST WESTERN  COEUR D'ALENE INN & CONFERENCE  CENTER,	IC 2007-005950 IC 2008-032836
Employer,	NOTICE OF HEARING AND NOTICE OF PRE-HEARING TELEPHONE CONFERENCE
LIBERTY NORTHWEST INSURANCE CORPORATION,	) TELEFHONE CONFERENCE
Surety,	FILED
and	JAN 1 2 2012
STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,	NDUSTRIAL COMMISSION
Defendants.	

NOTICE IS HEREBY GIVEN that a hearing will be held in the above-entitled matter on October 16, 2012, at 9:00 a.m. (PDT), for one half day in the Industrial Commission Field Office, 1111 Ironwood Dr., Suite A, in the City of Coeur d'Alene, County of Kootenai, State of Idaho, on the following issues:

- 1. Whether, and to what extent, Claimant is entitled to the following benefits:
  - a. Medical care;
  - b. Temporary Partial and/or Temporary Total Disability benefits (TPD/TTD);
  - c. Permanent Partial Impairment (PPI);
  - d. Disability in excess of impairment; and
  - e. Attorney fees

NOTICE OF HEARING AND NOTICE OF PRE-HEARING TELEPHONE CONFERENCE - 1

- 2. Whether the condition for which Claimant seeks benefits was caused by the industrial accident.
- 3. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition.
- 4. Whether apportionment for a pre-existing or subsequent condition pursuant to Idaho Code § 72-406 is appropriate.
- 5. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine or otherwise.
- 6. Whether the Industrial Special Indemnity Fund is liable under Idaho Code § 72-332.
- 7. Apportionment under the *Carey* Formula.

NOTICE IS HEREBY GIVEN that a *telephone conference* will be held in the above matter on **September 24, 2012, at 10:00 a.m. (MDT).** The Referee will initiate the calls. All parties shall be prepared to discuss the status of the hearing set above.

DATED this  $13^{+2}$  day of January, 2012.

INDUSTRIAL COMMISSION

Alan Reed Taylor, Referee

# CERTIFICATE OF SERVICE

I hereby certify that on the \_\_/2<sup>+/-</sup> day of January, 2012, a true and correct copy of the foregoing **NOTICE OF HEARING AND NOTICE OF PRE-HEARING TELEPHONE CONFERENCE** was served by United States Certified Mail upon each of the following:

STEPHEN J NEMEC 1626 LINCOLN WAY COEUR D'ALENE ID 83814-2435

ROGER L BROWN PO BOX 6358 BOISE ID 83707-6358

THOMAS W CALLERY PO BOX 854 LEWISTON ID 83501-0854

and by regular United States mail to:

M&M COURT REPORTING SERVICES 816 E SHERMAN AVE STE 7 COEUR D ALENE ID 83814-4921

and by e-mail to:

THE INDUSTRIAL COMMISSION FIELD OFFICE - COEUR D'ALENE

sb

NOTICE OF HEARING AND NOTICE OF PRE-HEARING TELEPHONE CONFERENCE - 3

JAMES & VERNON & WEEKS, P.A. Attorneys at Law 1626 Lincoln Way Cocur d'Alene, ID 83814 Telephone: (208) 667-0683 Facsimile: (208)-664-1684

Stephen J. Nemec, ISB # 7591 Attorneys for Claimant

# BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRUDY DEON,

Claimant,

V\$.

HAGADONE HOSPITALITY,

Employer,

and

LIBERTY NORTHWEST INSURANCE CO.,

Surety,

and

STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND

Defendants.

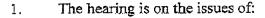
CASE NO.: 2007-005950 2008-032836

CLAIMANT'S PRE-HEARING NOTICE OF WITNESSES, EXHIBITS AND POST-HEARING DEPOSITIONS

NDUSTRIAL COMMISSION

COMES NOW, Claimant, by and through her attorney of record, Stephen J. Nemec of the firm James, Vernon & Weeks, P.A. and pursuant to Rule X of the Judicial Rules of Practice and Procedure of the Industrial Commission of the State of Idaho states as follows:





- Whether and to what extent, Claimant is entitled to the following benefits: A.
  - Medical Care; a.
  - Temporary Partial and/or Temporary Total Disability benefits b. (TPD/TTD):
  - Permanent Partial Impairment; Ċ.
  - Disability in Excess of Impairment; and đ.
  - e. Attorney Fees
- Whether the condition for which Claimant seeks benefits was caused by B. the industrial accident;
- C. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition;
- Whether apportionment for a pre-existing or subsequent condition D. pursuant to Idaho Code §72-406 is appropriate:
- Whether Claimant is entitled to permanent total disability pursuant to the E. odd-lot doctrine or otherwise;
- Whether the Industrial Special Indemnity Fund is liable under Idaho Code F. §72-332;
- Apportionment under the Carey Formula. G.
- 2. It is unknown whether this case will settle prior to hearing.
- Claimant will rely on exhibits listed in Defendant Liberty Northwest and 3. Defendant ISIF Prehearing Notice of Exhibits and will also introduce the following exhibits:
  - 1. ICRD File (12/5/08-12/07/09)
  - 2. SSA Earnings History with SSD Benefit Information (7/28/11)
  - 3. Liberty Northwest Indemnity and Medical Ledgers (2/18/11)

CLAIMANT'S PREHEARING NOTICE OF WITNESSES, EXHIBITS, AND POST-HEARING DEPOSITIONS-2

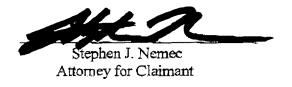
- 4. SSA Judicial Decision (5/13/10)
- 5. SSA Physical Residual Functional Capacity Assessment (4/29/09)
- 6. Report of Vocational Expert Dan Brownell (5/28/12)
- 7. Report of Vocational Expert Nancy Collins (9/4/12)
- 8. Report of Vocational Expert Mary Barros (7/31/12 & 10/31/11)
- 9. Deposition Transcript of Jeff Mills (3/29/12)
- 10. Deposition Transcript of Trudy Deon (10/6/11)
- 11. IME Report of Dr. McNulty (9/13/12)
- 12. CDA Hand Therapy FCE (9/4/12 & 9/16/11)
- 13. North Idaho MRI Imaging Reports (11/3/08 & 12/4/08)
- 14. Dr. Stevens IME (11/18/09) and EMG & NCS (8/19/09)
- 15. RiversEdge Orthopedics-Dr. Greendyke (6/5/06-10/28/09)
- 16. Northwest Orthopaedic Specialists-Dr. Sestero (3/19/09)
- 17. Dr. Patrick Mullen (11/13/08-7/30/09)
- 18. IME Report of Dr. Kerr (4/17/09)
- 19. North Idaho Hand Rehabilitation (1/1/09-6/25/09)
- 20. North Idaho Physical Therapy (8/4/09-10/28/09)
- 21. Kootenai Medical Center Records (10/4/08-12/30/08)
- 22. North Idaho Medical Care Center (4/26/06-10/16/08)
- 23. North Idaho Eye Institute (5/25/01-8/1/11)
- 24. Rottweiler Attack Records (Drs. Shaw, Quinn, Witham) (2/12/06-7/29/09)
- 25. Various Prior Industrial Commission Records and LSSA (1/15/94)

Claimant reserves the right to supplement the above exhibit listing.

4. It is expected that the Claimant will testify live at hearing along with laywitnesses Arvada Schumacher, Martha Burtis, Rodney Burtis, Kristina Veentjer. It is also expected that Dr. McNulty and Dan Brownell may testify via post-hearing deposition or at hearing as their schedule permits. Claimant reserves the right to depose additional treating physicians as needed.

DATED this 2<sup>nd</sup> day of October, 2012.

. JAMES, VERNON & WEEKS, P.A.



### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the \_\_\_\_2<sup>nd</sup> \_\_ day of \_\_\_\_ October and correct copy of the foregoing document was served upon the following individuals by the method indicated below:

Fax: 800-972-3213	Fax: 208-746-9553		
Roger Brown	Thomas W. Callery		
Harmon & Day	Jones, Brower & Callery		
P.O. Box 6358	P.O. Box 854		
3505 E. Overland Rd.	Lewiston, ID 83501		
Meridian, ID 83642	208-743-3591		
208-327-7561	tcallery@lewiston.com		
Roger.Brown@LibertyMutual.com	Atty. for ISIF		
Atty. for H & J & Liberty NW			
X Mailed	X Mailed		
By Hand	By Hand		
Overnight Mail	Overnight Mail		
Fax	Fax		





Roger L. Brown (ISB 5504)
LAW OFFICES OF HARMON & DAY
P.O. Box 6358
Boise, ID 83707-6358
Telephone (208) 895-2583
Fax (800) 972-3213
Employees of the Liberty Mutual Group
Attorney for Defendants Employer /Surety

### BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Trudy Deon,	) I. C. No.: 2008-032836
	) 2007-005950
Claimant,	)
V.	) DEFENDANT, H & J
	) HOSPITALITY, INC., D/B/A
H & J Hospitality, Inc., d/b/a Best Western	) BEST WESTERN COEUR
Coeur d'Alene Inn, Employer, and	) D'ALENE INN'S JOINT
Liberty Northwest Insurance Corp., Surety,	) SUPPLEMENTAL NOTICE
and Idaho Industrial Special Indemnity Fund,	) OF WITNESSES, EXHIBITS,
•	) AND POST-HEARING
Defendants.	DEPOSITIONS

COMES NOW Defendants, Best Western Coeur d'Alene Inn, Employer, and Liberty Northwest Insurance Corporation, Surety, by and through their attorney of record, Roger L. Brown, and certify to the Industrial Commission in accord with Industrial Commission Judicial Rules of Practice and Procedure, Rule VIII and Rule X, the following:

- 1. The following joint supplemental exhibits may be introduced by Defendants at hearing:
  - 26. First report of injury dated 10/4/08;
  - 27. Liberty NW Summary of benefits paid;
  - 28. Claimant's personnel file;

Defendants reserve the right to supplement the above exhibit list.

NOUSTRIAL COMMISSION

1 - DEFENDANT, H & J HOSPITALITY, INC., D/B/A BEST WESTERN COEUR D'ALENE INN'S JOINT SUPPLEMENTAL NOTICE OF WITNESSES, EXHIBITS, AND POST-HEARING DEPOSITIONS

Roger L. Brown (ISB 5504)
LAW OFFICES OF HARMON & DAY
P.O. Box 6358
Boise, ID 83707-6358
Telephone (208) 895-2583
Fax (800) 972-3213
Employees of the Liberty Mutual Group
Attorney for Defendants Employer /Surety

# BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Trudy Deon,	) I. C. No.: 2008-032836
	2007-005950
Claimant,	)
V.	) DEFENDANT, H & J
	) HOSPITALITY, INC., D/B/A
H & J Hospitality, Inc., d/b/a Best Western	) BEST WESTERN COEUR
Coeur d'Alene Inn, Employer, and	D'ALENE INN'S JOINT
Liberty Northwest Insurance Corp., Surety,	SUPPLEMENTAL NOTICE
and Idaho Industrial Special Indemnity Fund,	) OF WITNESSES, EXHIBITS,
	AND POST-HEARING
Defendants.	DEPOSITIONS

COMES NOW Defendants, Best Western Coeur d'Alene Inn, Employer, and Liberty Northwest Insurance Corporation, Surety, by and through their attorney of record, Roger L. Brown, and certify to the Industrial Commission in accord with Industrial Commission Judicial Rules of Practice and Procedure, Rule VIII and Rule X, the following:

- 1. The following joint supplemental exhibits may be introduced by Defendants at hearing:
  - 26. First report of injury dated 10/4/08;
  - 27. Liberty NW Summary of benefits paid;
  - 28. Claimant's personnel file;

Defendants reserve the right to supplement the above exhibit list.

1 – DEFENDANT, H & J HOSPITALITY, INC., D/B/A BEST WESTERN COEUR D'ALENE INN'S JOINT SUPPLEMENTAL NOTICE OF WITNESSES, EXHIBITS, AND POST-HEARING DEPOSITIONS

- 2. Defendants intend to call Claimant as a witness at the hearing and may call Mary Barros-Bailey and J. Craig Stevens, M.D., depending upon their schedules and availability.
- 3. Defendants have tentatively scheduled the post-hearing deposition of Mary Barros-Bailey and J. Craig Stevens, M.D., (should they be unavailable to testify at hearing), and reserve the right to supplement this disclosure should a determination be made to schedule any additional post-hearing depositions.

DATED this 5th day of October, 2012.

LAW OFFICES OF HARMON & DAY

Roger L. Brown, Attorney for Defendants

# **CERTIFICATE OF SERVICE**

I hereby certify that on October 5th, 2012, I caused to be served a true and correct copy, via facsimile of the foregoing document, upon:

Stephen J. Nemec, Esq. 1626 Lincoln Way Coeur d'Alene, ID 83814

Via Facsimile: (208) 664-1684

Roger L. Brown

<sup>2 -</sup> DEFENDANT, H & J HOSPITALITY, INC., D/B/A BEST WESTERN COEUR D'ALENE INN'S JOINT SUPPLEMENTAL NOTICE OF WITNESSES, EXHIBITS, AND POST-HEARING DEPOSITIONS

Thomas W. Callery, ISBN 2292 JONES, BROWER & CALLERY, P.L.L.C. 1304 Idaho Street P. O. Box 854 Lewiston, Idaho 83501 (208) 743-3591 Facsimile: (208) 746-9553 tcallery@lewiston.com

# BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRUDY DEON,	) Case No.: I. C. 2007-005950 I. C. 2008-032836			
Claimant,	1. C. 2006-032830			
vs.				
HAGADONE HOSPITALITY,	EXCHANGE OF EXHIBITS AND DISCLOSURE PURSUANT TO RULE 10			
Employer, ) and	DISCLOSURE FURSUANT TO RULE TO			
LIBERTY NORTHWEST INSURANCE CO.,)				
and				
STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND,				
Defendant.				
	no to augustus. No cons <sup>2</sup> programajo			

COMES NOW the State of Idaho Industrial Special Indemnity Fund, by and through its Attorney of Record, THOMAS W. CALLERY, of the firm of Jones, Brower & Callery, P.L.L.C., and pursuant to Rule 10 of the Judicial Rules of Practice and Procedure of the Industrial Commission of the State of Idaho hereby states as follows:

- 1. The Defendant State of Idaho, Industrial Special Indemnity Fund hereby adopts the Claimant's Exhibits 1 through 25 contained in the Claimant's Rule 10 compliance.
- 2. The following additional exhibits are being offered by the Defendant State of Idaho, Industrial Special Indemnity Fund:

1.	Claimant's prior Industrial Commission records for I.C. 88-619272	
2.	Claimant's prior Industrial Commission records for I.C. 90-704093	

3. Pursuant to Rule 10 (E), the following post-hearing depositions are scheduled by the ISIF for evidentiary purposes:

Dr. Nancy Collins, Ph.D.

DATED this 4<sup>th</sup> day of October, 2012.

Thomas W. Callery

Attorney for Defendant ISIF

# CERTIFICATE OF SERVICE

I certify that on the 4<sup>th</sup> day of October, 2012, a true and correct copy of the *Exchange of Exhibits and Disclosure Pursuant to Rule 10* was served by the method indicated below and addressed upon the following:

STEPHEN J. NEMEC JAMES, VERNON & WEEKS, P.A. 1626 LINCOLN WAY COEUR D'ALENE, ID 83814		U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Facsimile transmission to:
ROGER BROWN HARMON & DAY P.O. BOX 6358 BOISE, ID 83707-6358	×	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Facsimile transmission to:

THOMAS W. CALLERY

Thomas W. Callery, ISBN 2292
JONES, BROWER & CALLERY, P.L.L.C.
1304 Idaho Street
P. O. Box 854
Lewiston, Idaho 83501
(208) 743-3591
Facsimile: (208) 746-9553

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FILED NOV 0 8 2012

INDUSTRAL SOMESSION

INDUSTRIAL COMMISSION

tcallery@lewiston.com

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRUDY DEON,

Plaintiff.

Case No. I.C. 07-005950 I.C. 08-032836

HAGADONE HOSPITALITY,

Employer,

LIBERTY NORTHWEST INSURANCE CO.,

Surety,

and

vs.

STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,

Defendants.

STIPULATION AND AGREEMENT OF LUMP SUM DISCHARGE AND ORDER OF APPROVAL AND DISCHARGE

#### WITNESSETH:

WHEREAS, Claimant has filed a claim for benefits under the Worker's Compensation laws of the State of Idaho, being Case Nos. I.C. 07-005950 and I.C. 08-032836.

WHEREAS, said case includes a claim against the Fund filed by the Claimant contending that prior physical impairments consisting of a cervical spine injury and a left lower extremity injury that existed prior to October 4, 2008, when the Claimant was injured when her right glove got caught in an auger, resulting in a twisting injury to her right hand and wrist, which said injuries combined resulting in Claimant being totally and permanently disabled.

WHEREAS, it is the desire of the Claimant and the Fund to finally compromise and settle the dispute between the Fund and Claimant, subject to the approval of the Commission.

WHEREAS, the Claimant suffered from a cervical spine injury and a left lower extremity injury prior to the industrial accident that occurred on October 4, 2008.

WHEREAS, the Claimant incurred her left lower extremity injury secondary to a dog bite in 2006. According to Dr. McNulty, the Claimant suffered a 7% whole person impairment for loss of the plantar flexion strength in her lower left extremity.

WHEREAS, the Claimant entered into a lump sum agreement in a previous claim for benefits under the Worker's Compensation laws of the State of Idaho, being Case No. I.C. 88-619272 and Case No. I.C. 90-704093, awarding the Claimant a 6% whole person impairment for her industrial accidents of 1988 and 1990 based on an independent medical evaluation. Other medical providers, however, including Dr. Steven Sears, M.D., indicated that the Claimant could return to work with no restrictions and had no ratable impairment for her cervical condition.

WHEREAS, the Claimant was treated conservatively for the injury to her ring and little finger consistent with a pip chronic joint sprain of the right hand. The Claimant continues to suffer from chronic right hand pain and dysfunction. She received a 6% impairment of the ring finger, and a 6% impairment of the little finger, which converts to a 3% upper extremity impairment and further converts to a 2% whole person impairment for the injury of October 4, 2008 from Dr. John McNulty, M.D.

WHEREAS, the Claimant underwent an independent medical evaluation by Dr. J. Craig Stevens, M.D., on November 18, 2009, at the request of the Surety. Dr. Stevens was of the opinion the Claimant suffered a 2% upper extremity impairment apportioned to the injury of October 4, 2008, which converts to a 1% whole person impairment.

WHEREAS, the Claimant is currently 57 years of age with a date of birth of

and is currently a resident of Coeur d'Alene, Idaho.

WHEREAS, the Claimant has been employed as a forest service worker, short order relief cook, certified nurse assistant, personal care attendant, draftsperson, and an HVAC technician during her lifetime.

WHEREAS, the Claimant is a high school graduate. She has an Associate's Degree in drafting from North Idaho College, as well as a certificate in HVAC work from North Idaho College.

WHEREAS, the Fund and the Claimant stipulate and agree that Claimant is totally and permanently disabled based upon the combined effects of the Claimant's pre-existing cervical spine injury and left lower extremity injury, combining with the injury to her right hand and wrist.

WHEREAS, based upon the medical records, the Claimant and the Fund stipulate that a 60/40 Carey Formula apportionment with the Fund being responsible for 60% of the Claimant's total and permanent disability is appropriate in this case. This Carey Formula apportionment is based upon the impairment for Claimant's cervical spine injury and left lower extremity, and the significant impairment to Claimant's right hand and wrist as a result of the October 4, 2008, accident. It further takes into account the conflicting evidence concerning the Claimant's cervical impairment and her ability to return to medium level work as an HVAC technician after her cervical injury and lower extremity injury.

WHEREAS, the Claimant was deemed to be at maximum medical improvement in November 2009.

WHEREAS, it is in the best interest of justice and of each and all the parties hereto that the above claim be fully, finally and forever settled, satisfied and discharged upon a lump sum payment to the Claimant in the sum of Seventy Thousand and no/100 Dollars (\$70,000.00) to be paid by the Fund.

WHEREAS, the parties acknowledge and agree that the \$70,000.00 lump sum to be paid to Claimant under the terms of this agreement constitutes compensation on a claim of total and permanent disability that will affect Claimant for the rest of her life.

WHEREAS, the Claimant has financial needs that currently exist that would be satisfied by a lump sum payment as opposed to statutory monthly payments.

WHEREAS, the Claimant has had a compromised health condition, including a cervical spine injury, left lower extremity injury and right hand and wrist injury, it is reasonable for the Claimant to forego statutory annuity payments at this time in exchange for the certainty of a lump sum payment.

WHEREAS, the Claimant is accepting the \$70,000.00 cash lump sum settlement due to her personal circumstances rather than a monthly annuity. This decision is based upon the Claimant's current age of 57 years. Further, the Claimant's date of stability being November 2009 would result in Claimant not being entitled to full statutory benefits from the Fund based on a 60/40 Carey apportionment until November 2013, at which time, the Claimant would be 58 years of age.

WHEREAS, the decision to accept a lump sum, as opposed to a monthly annuity, has been made after consultation by Claimant with her legal counsel, including consideration of the Claimant's needs for immediate cash and that monthly annuity payments cease upon death without survivor benefits.

WHEREAS, by law, the Fund would have no liability unless the Claimant was totally and permanently disabled.

WHEREAS, the Fund and the Claimant admit and agree that the Claimant is totally and permanently disabled.

WHEREAS, it is the desire of the parties hereto to fully and finally compromise and settle said dispute subject to the approval of the Commission.

NOW THEREFORE, for the reasons hereinabove stated, and in consideration of the mutual covenants and conditions contained herein, IT IS AGREED by and between the parties hereto as follows:

1. It is in the best interests of justice and of each and all of the parties hereto that the above-entitled claim be fully, finally and forever settled, satisfied and discharged upon a lump sum payment to Claimant in the sum of \$70,000.00, to be paid by the Fund.

2. In consideration of the \$70,000.00 payment by the Fund, the Claimant fully releases the Fund from any further liability of any kind for past injuries and conditions, relinquishing any right to, in the future, again make claim against the Fund as a result of past, present and future accidents, injuries, illnesses, diseases, or conditions of any kind.

3. It is agreed that all damages, disability, loss, expense and injury in any way resulting from or related to the industrial accident involved in this matter, foreseen and recognized or not, and whether the same have accrued or may hereafter accrue, are included in the above-captioned claim and are encompassed in and fully and finally settled and discharged by this agreement.

4. The parties stipulate that the Commission shall, on and by approval hereof, be deemed to adjudicate said accident, and resultant impairment industrial in nature or origin under covered employment by Employer, as provided by the Workers' Compensation laws of the State of Idaho.

5. Claimant does indemnify and agree to save the Fund harmless from and against any further claim or loss of any and every kind arising out of or related to said industrial accident and any resultant loss, damage or injury, including any and all claims in any way related to Claimant's condition.

6. It is specifically understood and agreed that the Fund is fully, finally and forever released of and from any and all liability or claims of any nature whatever, whether now existing or hereafter discovered, in any way relating to Claimant's condition or the treatment thereof or any disability resulting therefrom.

7. Claimant is represented herein and has been counseled by STEPHEN J. NEMEC, whose name shall be included as a payee on any settlement draft, same to be delivered to said attorney by the Fund.

8. Claimant's obligations to pay attorney fees and reimburse her attorney for costs advanced arise from a written Contingent Fee Agreement. From the lump sum payment to be paid pursuant to this Agreement, the Claimant and her attorney represent that the sum of \$20,262.71 shall be paid to Claimant's attorney as fees and costs in accordance with their agreement, and that the Claimant, after deduction of attorney fees and costs of litigation, shall receive the net sum of \$49,737.29.

9. The parties acknowledge and agree that the \$70,000.00 lump sum to be paid to Claimant under the terms of this agreement constitutes compensation for total and permanent disability that will affect Claimant the rest of her life. Claimant's remaining life expectancy is 27 years or 324 months according to the 2007 Social Security Actuarial Life Table.

Therefore, even though paid in a lump sum, the Claimant's net benefits after deduction of attorney fees in the amount of \$17,500.00 and costs in the amount of \$2,762.61 shall be considered to be \$153.51 a month for 324 months beginning December 1, 2012.

10. Upon the Commission approving this agreement and excepting only payment of said Lump Sum by the Fund as aforesaid, the Fund shall be, and by these presents is fully, finally and forever discharged and released of and from any and all liability on account of the alleged industrial accident of Claimant.

11. The terms of this agreement shall be binding upon all of the above parties, their heirs, representatives, successors and assigns.

12. All parties waive the right of appeal or to re-open these proceedings as a part of the consideration of and for this Agreement. The parties hereby specifically and expressly agree, as a part of the consideration herein, that all parties waive the right to reconsideration of an award otherwise provided under the Workers' Compensation Laws of Idaho, §72-718, Idaho Code.

13. All portions of this instrument constitute binding covenants of the parties, and no portion is a mere recital.

Order of Discharge pursuant hereto, and the Fund does join in said petition and stipulates that it should be granted. Claimant acknowledges that she has, with the assistance of her counsel, carefully read this Agreement and legal instrument in its entirety, understands its contents and has executed the same knowing that this agreement forever concludes and fully and finally disposes of any and all claims of every kind and character she has or may have against the Fund on account of the industrial accident. Claimant further understands that this agreement forever precludes Claimant from filing any future claims against the Fund on account of any future accidents, injuries or diseases and that these proceedings are concluded and forever closed by reason hereof, subject only to Commission approval and Order, as aforesaid.

15. Acceptance of this Agreement by Claimant according to the terms and conditions stated herein, shall fully and completely discharge the Fund from liability for any claims forever, regardless of whether such claims arise from the industrial accident which is the subject of this cause, or any accidents, injuries, diseases, impairments, disabilities or infirmities existing prior hereto, or hereafter arising.

DATED this  $\frac{19}{2}$  day of  $\frac{1}{2}$  day of  $\frac{1}{2}$ 

APPROVED:

Judy Anr Dear

JAMES F. KILE, Manager Industrial Special Indemnity Fund STEPHEN J. NEMEC, Attorney for Claimant

THOMAS W. CALLERY, Attorney for Industrial Special Indemnity Fund

# ORDER OF APPROVAL AND OF DISCHARGE UPON LUMP SUM PAYMENT

The foregoing Stipulation and Agreement having duly and regularly come before this Commission, and it appearing that the interests of justice and the Claimant, TRUDY DEON, are and will be served by approving said Agreement and granting the Order of Discharge as prayed for,

NOW THEREFORE, said foregoing Stipulation and Agreement shall be, and the same is, hereby APPROVED.

Further, said Petition shall be and hereby is GRANTED, and the above-entitled proceedings are DISMISSED WITH PREJUDICE.

DATED this 8 day of NUCTURE, 2012.

INDUSTRIAL COMMISSION

\_\_\_\_

Member

Member

individual controllary

# CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the	<u>රි</u>	day of NUUS 108, 2012, I caused a true and co	orrect copy
of the foregoing to be served upon:			•

THOMAS W. CALLERY JONES, BROWER & CALLERY, P.L.L.C. P.O. BOX 854 LEWISTON, ID 83501		U. S. Mail Hand Delivered Facsimile
STEPHEN J. NEMEC JAMES, VERNON & WEEKS, P.A. 1626 LINCOLN WAY COEUR D'ALENE, ID 83814		U.S. Mail, Postage Prepaid Hand Delivered Facsimile
JAMES F. KILE INDUSTRIAL SPECIAL INDEMNITY FUND P.O. BOX 83720 BOISE, ID 83720-7901	0	U.S. Mail Hand Delivered Facsimile

by depositing the same in the United States mail, postage prepaid, addressed to the above-named, the last known address as set forth above.

#### BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRUDY DEON,

Claimant,

IC 2007-005950 IC 2008-032836

v.

H & J, INC., d/b/a BEST WESTERN COEUR D'ALENE INN & CONFERENCE CENTER,

Employer,

and

LIBERTY NORTHWEST INSURANCE CORPORATION,

Surety, Defendants. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

### 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 Coeur d'Alene, Idaho on October 16, 2012. Claimant, Trudy Deon, was present in person and represented by Steven Nemec, of Coeur d'Alene, Idaho. Defendant Employer, H & J, Inc., d/b/a Best Western Coeur d'Alene Inn & Conference Center (H&J) and Surety, Liberty Northwest Insurance Corporation, were represented by Roger Brown, of Boise, Idaho. Claimant settled with State of Idaho, Industrial Special Indemnity Fund (ISIF), prior to hearing. The parties presented oral and documentary evidence. No post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on December 24, 2012.

#### **ISSUES**

The issues to be decided are:1

- 1. The extent of Claimant's permanent partial impairment.
- 2. The extent of Claimant's permanent disability, including whether Claimant is permanently and totally disabled pursuant to the odd-lot doctrine or otherwise.
- 3. Whether apportionment for a pre-existing or subsequent condition pursuant to Idaho Code § 72-406 is appropriate.
  - 4. Apportionment under the <u>Carey</u> formula.
  - 5. Claimant's entitlement to additional medical benefits.

### CONTENTIONS OF THE PARTIES

Claimant alleges that she is totally and permanently disabled pursuant to the odd-lot doctrine solely as a result of her 2008 industrial accident at the Coeur d'Alene Inn and resulting injury to her dominant right hand. She also asserts entitlement to medical benefits for a functional capacity evaluation performed September 16, 2011. Defendants readily acknowledge Claimant's 2008 industrial accident and have provided extensive medical and temporary disability benefits. However, Defendants contend that Claimant is employable and suffers no permanent disability beyond 2% upper extremity impairment or in the alternative, that Claimant's permanent disability is minimal.

#### EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

<sup>&</sup>lt;sup>1</sup> The issue of Claimant's entitlement to an award of attorney fees was noticed for hearing. However, as Defendants correctly note, Claimant argues no claim for attorney fees in her briefing. This issue is therefore deemed abandoned.

- 2. Claimant's Exhibits 1-25, admitted at hearing;
- 3. Defendants' Exhibits 26-28, admitted at hearing;
- 4. The testimony of Claimant, Daniel Brownell, and Mary Barros-Bailey, taken at the October 16, 2012 hearing.

All objections posed during the pre-hearing depositions are overruled.

After having considered the above evidence and the arguments 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 1955 and is right-handed. She was five feet five inches tall, 57 years old, and resided in Coeur d'Alene at the time of the hearing. She graduated from high school in Montana in 1974, but had trouble with reading and spelling. She worked as a dishwasher and cook at a café during the summer while in high school. From 1975 to 1976, she worked for the school district as a rehabilitation technician for disabled children. In that capacity, Claimant worked directly under the supervision of a licensed physical therapist. From approximately 1976 until 1986, Claimant worked seasonally for the U.S. Forest Service, planting trees and maintaining campgrounds. From 1979 to 1980, she pursued nurse's training but had difficulty with reading and spelling. She ultimately obtained a CNA certification but never worked as a CNA. From approximately 1984 to 1988 she worked as a dishwasher and cook at a café.
- 2. From 1988 until 1993, Claimant worked for Alpha Health Services as a rehabilitation technician caring for disabled children and adults. On two occasions Claimant was assaulted by a patient while working. The most severe assault occurred in 1990, when Claimant was driving a car. A patient riding in the front passenger seat became agitated, grabbed

Claimant's head, and violently forced it underneath the car's dashboard, injuring her neck and shoulders. Claimant subsequently underwent cervical and bilateral first rib resection surgeries. She was compelled to change occupations and later received a 6% whole person permanent impairment rating for her neck and shoulder injuries. She obtained a two-year associates degree in drafting.

- 3. From 1997 until 2002, Claimant worked for Boeing as a drafting technician. She performed hand and computerized drafting. She earned a 3-D drafting certificate while working at Boeing. In 2002, Claimant was laid off at Boeing. Thereafter she obtained an HVAC certificate from North Idaho College. She worked at a furniture factory, building and sanding furniture while she earned her certificate.
- 4. In 2003, Claimant began working full-time as a maintenance technician for Employer H&J at the Coeur d'Alene Inn, a 150-bed motel. Her duties included all aspects of room and kitchen maintenance and repair except removing and replacing carpets. She also maintained the pool and removed snow. She walked 80% of her work day and regularly lifted 50 pounds.
- 5. In February 2006, Claimant was at home feeding four Rottweiler dogs in a fenced area when one of the dogs pulled her down. Three of the Rottweilers attacked her, lacerating her scalp and left arm, and very seriously lacerating both of her legs. She managed to escape from the fenced area and a friend transported her to a hospital emergency room. Claimant was hospitalized for two weeks and underwent extensive suturing and surgeries, including skin grafting on both of her legs. She was off work for several months, and then gradually returned to work part-time. After approximately one year she resumed full-time work at the Coeur d'Alene

Inn. She was later rated with a 7% whole person permanent impairment due to her lower extremity injuries, including nerve damage, sustained in the Rottweiler attack.

- 6. By October 2008, Claimant was earning \$9.75 per hour and working 40 hours per week. H&J also provided health insurance and an IRA account as part of her compensation.
- 7. On October 4, 2008, Claimant was called into the kitchen at the Coeur d'Alene Inn to clean out the drain. She used a small power auger or electric snake. During Claimant's efforts to clear the drain, the auger caught Claimant's right glove and right hand. Another employee had previously removed the safety shut-off switch from the auger and Claimant was unable to free her hand or shut off the auger. The electric snake encircled, twisted, and crushed her right hand and wrist until another employee responded to Claimant's shouts and unplugged the auger. The electric snake also struck Claimant's right eye or eyelid. Claimant was taken by ambulance to the emergency room at the Kootenai Medical Center. She was diagnosed with right hand sprain, right fourth and fifth finger sprain, and contusion.
- 8. Approximately one week after the accident, Claimant developed irritation and blurry vision in her right eye. She presented to North Idaho Immediate Care and was diagnosed with pink eye. However, Patrick Mullen, M.D., later diagnosed herpes simplex keratitis in Claimant's right eye, but opined it was not related to her industrial accident. No medical evidence relates Claimant's right eye condition to her industrial accident.
- 9. In November 2008, Claimant underwent a right hand MRI. Michael Ludwig, M.D., reviewed the MRI, examined Claimant's right hand, and diagnosed disruption of the A2 pulley system of the fourth digit with palmar bowing of the flexor tendon, partial disruption of the A2 pulley system of the fifth digit with palmar bowing of the flexor tendon, and non-displaced fracture of the distal aspect of the proximal phalanx of the fifth digit. Dr. Ludwig

referred Claimant to Dr. Mullen, a hand surgeon. Dr. Mullen noted collateral ligament tears at the PIP joints of Claimant's right ring and little fingers. He suspected right wrist injuries and ordered a right wrist MRI which was read as normal. Claimant wore a cast on her right hand for approximately six weeks. Dr. Mullen prescribed physical therapy and braces. He referred Claimant to Anthony Sestero, M.D., who prescribed further physical therapy.

- 10. In December 2008, Claimant began utilizing the services of Industrial Commission rehabilitation consultant Beth Grigg.
- 11. On April 28, 2009, Claimant commenced light-duty work part-time using her right hand for repetitive motion no more than four hours per day. She continued to experience debilitating right hand and wrist pain.
- 12. On June 3, 2009, Claimant's supervisor reported to Ms. Grigg that although Claimant had a release to full-time work on that date, he did not believe Claimant was physically capable of performing all of her pre-injury job duties.
- 13. In August 2009, Claimant came under the care of Spencer Greendyke, M.D. On August 12, 2009, Dr. Greendyke released Claimant for full-time work but restricted her to lifting no more than five pounds with her right hand. He also ordered EMG testing. On August 19, 2009, Craig Stevens, M.D., performed EMG testing and wrote:

The study reveals ulnar neuropathy at the right elbow with involvement of both the dorsal cutaneous branch as well as the origin of the ulnar sensory fibers adjacent to the canal of Guyon. .... This <u>ulnar neuropathy is moderate in severity</u> but certainly appears consistent with her symptoms. The study does reveal some persisting ulnar sensory nerve function but definite evidence that an injury has occurred.

Exhibit 14, p. 155 (emphasis supplied).

14. On October 28, 2009, Dr. Greendyke found Claimant had reached maximum medical improvement.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 6

- 15. No later than November 6, 2009, Claimant's light-duty employment at Coeur d'Alene Inn was terminated. H&J had no available work within her restrictions.
- 16. On November 18, 2009, Dr. Stevens performed an independent medical examination of Claimant at Defendants' request. Dr. Stevens found Claimant medically stable and rated her permanent impairment at 2% of the upper extremity due to her EMG-documented ulnar neuropathy and upper extremity collateral ligament injuries. He declined to impose any work restrictions and opined Claimant should be released to full-duty work without restriction.
- 17. After being terminated from her employment at Coeur d'Alene Inn, Claimant filed for unemployment benefits and registered with the Idaho Department of Labor, looking for work. Claimant also continued meeting with rehabilitation consultant Beth Grigg, who assisted Claimant in her employment search. Ms. Grigg recorded Claimant's report that she was not able to grip a phone for long, turn a screwdriver, type on a keyboard, lift dishes, carry groceries, wring out wash rags, or perform fine finger manipulation with her right hand.
- 18. In December 2009, Ms. Grigg closed Claimant's file because she had not followed up on any of the job leads Grigg provided. Claimant told Ms. Grigg that she did not know what work she could physically perform.
- 19. On May 13, 2010, Claimant was adjudged disabled by the Social Security Administration due to her industrial right hand injury and residual dog attack injuries.
- 20. Claimant ultimately applied for a "couple dozen" jobs, including drafting positions and jobs at Lowes and Home Depot. She received no job offers.
- 21. On September 16, 2011, Claimant underwent a hand functional assessment by Virginia Taft, P.T., at the Coeur d'Alene Hand Therapy & Healing Center. The assessment concluded that Claimant would need to have primarily left-handed work and that she was

restricted to lifting five pounds with her right hand, 20 pounds with both hands, and minimal repetition. Her range of motion was noted to be minimally limited but with pain on finger extension and gripping or twisting movements. Finger manipulation of common objects showed minimal to severe limitation with decreased speed. Ms. Taft concluded that retraining was a questionable option due to Claimant's hand, vision, and age limitations.

- 22. On September 4, 2012, Ms. Taft authored an addendum to her September 16, 2011 functional capacity evaluation. She reported that Claimant's hand function had not improved since her September 2011 assessment. Taft noted that Claimant had sensation deficits of numbness and tingling with activity, which increased with sustained gripping or twisting. Taft reported that Claimant's sensory loss interfered with her right hand coordination and speed and that Claimant showed severe limitation in speed of movement when repeatedly lifting as little as one pound. Taft also noted that Claimant "used her right hand as an assist rather than as her dominant hand. She modified as possible using right index/middle fingers and thumb rather than full grip, her left hand or she used 2 hands, for example, to lift a coffee cup." Exhibit 12, p. 144. Taft concluded that Claimant could not return to her previous job or to a cashiering position as such would require sustained repetitive movement and lifting.
- On September 13, 2012, John McNulty, M.D., examined Claimant and diagnosed chronic right wrist, ring, and little finger sprain, weak grip, and ulnar sensory loss at the right wrist and hand. He opined that she suffered permanent impairments of 1% of the whole person due to her chronic right ring finger PIP joint sprain, 1% of the whole person due to her chronic right little finger PIP joint sprain, and 2% of the whole person due to her right ulnar sensory nerve injury due to her 2008 industrial accident. Dr. McNulty also found Claimant suffered

permanent impairments of 6% of the whole person secondary to her pre-existing cervical spine injury and 7% of the whole person secondary to her pre-existing lower extremity condition.

- 24. At the time of hearing, Claimant was receiving approximately \$1,004.00 per month in Social Security Disability benefits.
- 25. At hearing, Claimant testified that she performs home exercises and used hot paraffin, a TENS unit, and over-the-counter medication to manage the pain in her right hand and wrist. She wears a wrist brace when doing any right-handed activities. Although she is right-handed, she does not use her right hand to operate her cell phone, load the dishwasher, lift her clothes basket, comb her hair, brush her teeth, operate her TV remote, or button the buttons on her clothing. All of these activities she performs only with her non-dominant left hand. Claimant can no longer pick up a gallon of milk with her right hand. She no longer paints, knits, crochets, sews, gardens or remodels her home because of her right hand condition. She cannot type or keyboard with her right hand because she cannot repetitively stretch her fingers to reach the upper row of keys. Claimant testified that she suffers constant right hand pain which increases with activity and that her right hand condition is her greatest limitation.
- 26. At hearing, Claimant testified that standing and walking cause leg pain as a result of the Rottweiler attack. She walks with a shuffling gait and is limited by leg pain to walking no more than half a mile.
- 27. Claimant's right eye herpes infection significantly impairs her vision and requires ongoing medication and avoidance of bright light irritation. She has adequate vision in her left eye to qualify for a driver's license. With a brace on her right hand, she is able to operate a manual transmission.

28. Having observed Claimant at hearing, and compared her testimony with other evidence in the record, the Referee finds that Claimant is a credible witness.

## DISCUSSION AND FURTHER FINDINGS

- 29. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. <u>Haldiman v. American Fine Foods</u>, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. <u>Ogden v. Thompson</u>, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. <u>Aldrich v.</u> Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).
- 30. **Permanent 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. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. <u>Urry v. Walker & Fox Masonry</u> Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).
- 31. Claimant herein alleges permanent impairments to her neck, legs, and right hand. On September 13, 2012, Dr. McNulty opined that Claimant suffered permanent impairments of 6% of the whole person due to her pre-existing cervical spine injury and 7% of the whole person

due to her pre-existing lower extremity condition secondary to the Rottweiler attack. The record establishes, and Defendants do not contest, these impairment ratings.

- 32. The parties dispute the extent of Claimant's permanent impairment due to her right hand condition. On August 19, 2009, Dr. Stevens performed EMG testing of Claimant's upper right extremity and concluded Claimant's "ulnar neuropathy is moderate in severity" and "certainly appears consistent with her symptoms." Exhibit 14, p. 155 (emphasis supplied). However, on November 18, 2009, Dr. Stevens performed an independent medical examination at Defendants' request and noted that Claimant had presented for EMG testing on August 19, 2009, and that he had then "determined that she exhibited features of a very mild ulnar neuropathy." Exhibit 14, p. 162 (emphasis supplied). Dr. Stevens found Claimant medically stable on November 18, 2009, and characterizing her ulnar sensory deficit as very mild, rated her permanent impairment at 2% of the upper extremity due to her ulnar neuropathy and upper extremity collateral ligament injuries. He declined to impose any work restrictions and opined Claimant should be released to full duty without restriction.
- 33. On September 13, 2012, Dr. McNulty examined Claimant and opined that she suffered permanent impairments of 1% of the whole person from her chronic right ring finger PIP joint sprain, 1% of the whole person from her chronic right little finger PIP joint sprain, and 2% of the whole person from her right ulnar sensory nerve injury—all due to her 2008 industrial accident. Dr. McNulty's impairment rating is more persuasive that Dr. Stevens' as it is supported by the MRI findings documenting A2 pulley disruption of the PIP joints of Claimant's right ring and little fingers and is further supported by Dr. Stevens' August 19, 2009 EMG testing wherein he found ulnar neuropathy of moderate severity.
  - 34. Claimant has proven that she suffers permanent physical impairments of 6% of

the whole person due to her pre-existing cervical condition, 7% of the whole person due to her pre-existing lower extremity condition and 4% of the whole person due to her right hand condition. Claimant has proven she suffers whole person permanent impairments of 17%, including 4% whole person impairment due to her 2008 industrial accident.

35. Permanent disability. The next issue is the extent of Claimant's permanent disability, including whether she is totally and permanently disabled pursuant to the odd-lot doctrine. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of 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 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 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). Pursuant to Idaho Code § 72-422, the proper date for disability analysis of a claimant's labor market

access is the date of hearing, and not the date that maximum medical improvement has been reached. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012).

- 36. Claimant asserts that her 2008 industrial accident at Coeur d'Alene Inn renders her totally and permanently disabled. Her permanent disability must be evaluated based upon her medical factors, including the physical restrictions arising from her permanent impairments, and non-medical factors, including Claimant's capacity for gainful activity and ability to compete in the open labor market within her geographical area.
- 37. <u>Physical restrictions</u>. In November 2009, Dr. Stevens opined that Claimant had no physical restrictions due to her 2008 industrial accident. He explained that although objective diagnostic medical testing disclosed persisting abnormalities, Claimant would not further injure herself by working without restrictions. Dr. Stevens' opinion is premised in part on his November 2009 conclusion that Claimant's industrial accident caused very mild ulnar neuropathy of her upper right extremity, contradicting his conclusion after EMG testing in August 2009 that her accident caused ulnar neuropathy of moderate severity.
- 38. Claimant's September 2011 hand functional capacity evaluation by Virginia Taft at the Coeur d'Alene Hand Therapy & Healing Center concluded that Claimant would need to have primarily left-handed work and that she was restricted to lifting five pounds with her right hand, 20 pounds with both hands, and minimal repetition. Taft's 2012 addendum noted that Claimant "used her right hand as an assist rather than as her dominant hand" and concluded that Claimant could not return to her previous job or to a cashiering position. Exhibit 12, p. 144. Dr. McNulty agreed with Ms. Taft's evaluation and restricted Claimant from lifting more than 20 pounds and from repetitive lifting and grabbing with her right hand. He further noted that Claimant's pre-existing lower extremity impairment limited her ability to climb stairs or ladders.

- 39. Claimant's supervisor at H&J reported that after Claimant's release to full-duty work in 2009, she was not able to perform all of her pre-injury duties. Her employment at Coeur d'Alene Inn was terminated for this very reason.
- 40. The Referee finds Ms. Taft's and Dr. McNulty's opinions regarding Claimant's restrictions more consistent, accurate, and persuasive than Dr. Stevens' opinion.
- 41. <u>Ability to compete in the open labor market</u>. Three vocational experts have opined regarding Claimant's ability to compete in her labor market, Nancy Collins, Mary Barros-Bailey, and Daniel Brownell. The conclusions of each are examined below.
- 42. *Nancy Collins*. Vocational expert Nancy Collins, Ph.D., interviewed Claimant and reviewed her work history, medical records, and physical restrictions. On September 4, 2012, Dr. Collins authored a report on behalf of ISIF, who later settled with Claimant prior to hearing. In her report, Dr. Collins concluded that Claimant was not totally disabled but opined:

Considering the opinion of Dr. Stevens, Ms. Deon has no disability in excess of impairment. Considering restrictions that limit her to some light and sedentary jobs that do not require repetitive use of her right dominant hand, she will experience a 90% loss of access to the labor market. In my opinion, she will not experience a significant earnings loss. Based on a wage of \$9.70 per hour in her time of injury job and an \$8.50 return to work wage, she will experience a 12% loss of earning capacity. Ms. Deon is 56 years of age and I do think her age should be considered in her disability rating. In my opinion, Ms. Deon's disability inclusive of impairment is 56% based on restrictions from Dr. Dickey, Dr. Greendyke and the hand assessment. .... This analysis assumes equal value is given to the two vocational factors of earning capacity and labor market access.

# Exhibit 7, pp. 64-65.

43. Dr. Collins' report does not demonstrate extensive familiarity with the degree of competition present in Claimant's current labor market. Additionally, in reaching her conclusions, Dr. Collins did not have the benefit of Virginia Taft's September 4, 2012 addendum to the functional capacity evaluation, or Dr. McNulty's September 13, 2012 report in which he

agreed with Ms. Taft's conclusions. Nevertheless, Dr. Collins found 56% permanent disability by equally weighting Claimant's loss of labor market access (90%) and her estimated wage loss based on the difference between her time of injury wage and her likely post-accident wage (12%). Thus  $90\% + 12\% = 102\% \div 2 = 51\%$  to which Dr. Collins apparently added 5% for Claimant's age to reach her disability rating of 56%.

- 44. Dr. Collins' calculations did not take into account Claimant's full compensation package at the time of her 2008 accident, including IRA and health insurance benefits through H&J which Dan Brownell testified effectively increased her compensation by as much as 30%. Brownell testified that most jobs in Claimant's labor market do not provide these benefits. If Dr. Collins had calculated Claimant's wage loss based on a time of injury wage of \$9.75 per hour, plus 30% benefits, thus totaling \$12.68, versus a likely post-injury wage of \$8.50, Claimant's wage loss would equal: (\$12.68 \$8.50) ÷ \$12.68 or 33%. The calculation would then be: (90% + 33%) ÷ 2 = 62%. Adding 5% for Claimant's age would then yield a 67% permanent disability rating. Furthermore, Dr. Collins reported that her disability rating considered only the disability attributable to Claimant's right upper extremity injury and no other condition. Thus Dr. Collins' calculations did not include Claimant's pre-existing 6% cervical impairment or her pre-existing 7% bilateral lower extremity impairment or any permanent disability attributable thereto. Were these acknowledged impairments to be added, the result would approximate 80% (67% + 13%) permanent disability.
- 45. *Mary Barros-Bailey*. Vocational expert Mary Barros-Bailey, Ph.D., testified in behalf of Defendants. She has 22 years of experience in vocational rehabilitation, including 19 years in Idaho. Dr. Barros-Bailey has evaluated disability cases from Alaska to Idaho to Brazil.

She met with Claimant in 2011 and reviewed her medical records. On October 11, 2011, Dr. Barros-Bailey issued her vocational report concluding that Claimant:

has substantially reduced ability to access the labor market to the level of a 73% loss of access. She would still be able to access a variety of jobs, however, that do not require regular bilateral work and pay within \$1 of her wage at injury (e.g. cashiers at median wages of \$9.01 per hour per the 2011 Idaho Occupational Employment and Wage Survey), thus resulting in a slight wage of [sic] earning capacity. ....

For Ms. Deon, age is a factor in that her functional age combined with all her medical conditions is probably greater than her chronological age and should be considered in disability. Consequently, considering Trudy's age, work and education histories, transferable skills, functional restrictions associated with the industrial injury, and other non-medical factors, I believe she has sustained a 45% disability inclusive of impairment. Note that given no functional assumptions available in previous Industrial Commission records, there is no basis upon which to apportion this disability opinion.

Exhibit 8, pp. 82-83. Dr. Barros-Bailey's report does not demonstrate extensive familiarity with the degree of competition present in Claimant's current north Idaho labor market.

- 46. In July 2012, Dr. Barros-Bailey issued a supplemental report criticizing Dan Brownell's finding that Claimant suffered 85% permanent disability. Dr. Barros-Bailey indicated that Claimant was earning only \$9.70 per hour at the time of her industrial accident and that even a minimum wage job would result in only a 25% reduction in Claimant's wages.
- 47. At hearing, Dr. Barros-Bailey testified that she uses the average of an injured worker's loss of labor market access and estimated wage loss as the starting point to determine permanent disability. She testified that in evaluating Claimant's permanent disability, she added Claimant's loss of labor market access (73%) and her estimated wage loss based on the difference between her time of injury wage and her likely post-accident wage of \$9.01 per hour as a cashier, equaling 7%. Thus  $73\% + 7\% = 80\% \div 2 = 40\%$ . Dr. Barros-Bailey then adjusted the average upward by adding 5% for Claimant's age, to arrive at a final disability rating of 45%.

48. Significantly, Dr. Barros-Bailey apparently misread the September 16, 2011 Hand Function Assessment by Virginia Taft who concluded that if Claimant were: "to return to work, she would need to have primarily left handed work with a weight load on the <u>right</u> of less than 5# lifting, up to 20# with both hands, minimum repetition, and self paced." Exhibit 12, p. 147 (emphasis supplied). Instead, Dr. Barros-Bailey stated in her report:

The second [medical] opinion is the 9/16/11 functional capacity evaluation that estimates Trudy to lift no more than 5# with her <u>left</u> hand and to lift no more than 20# bilaterally. <u>Note that Trudy is right hand dominant and there were no limitations or restrictions indicated to the dominant upper extremity.</u> She would also need to have minimal repetition and self pacing on the left upper extremity.

Exhibit 8, p. 82 (emphasis supplied).

- 49. In addition to misunderstanding Taft's September 16, 2011 evaluation, Dr. Barros-Bailey was not provided, and thus did not consider, the functional capacity evaluation addendum authored by Ms. Taft on September 4, 2012. Therein Ms. Taft concluded that Claimant could not return to "her previous job or to a cashiering position which would require sustained repetitive movement and lifting." Exhibit 12, p. 144. Hence, Dr. Barros-Bailey did not fully consider Claimant's right hand lifting restriction or her restriction against repetitively using her right hand. Dr. Barros-Bailey was not provided, and thus did not consider Dr. McNulty's September 13, 2012 report wherein he agreed with Ms. Taft's conclusions.
- 50. Dr. Barros-Bailey acknowledged that her calculations did not take into account Claimant's full compensation package at the time of her accident, including IRA and medical benefits through H&J which are not provided by most employers in her labor market and which effectively increased her compensation by as much as 30%.
- 51. Dr. Barros-Bailey also acknowledged that her disability rating considered only the disability attributable to Claimant's right upper extremity injury and no other condition. Thus

Dr. Barros-Bailey's calculations did not include Claimant's pre-existing 6% cervical impairment or her pre-existing 7% bilateral lower extremity impairment or any permanent disability attributable thereto.

- 52. Daniel Brownell. Claimant called Daniel Brownell to testify at hearing. Mr. Brownell served as a vocational rehabilitation consultant for the Industrial Commission for 29 years in Coeur d'Alene, retiring in 2010. He is intimately familiar with the labor market in the Coeur d'Alene area, has performed thousands of job site evaluations, and has placed numerous individuals in jobs within that area. Brownell testified that as of August 12, 2012, there were 6,531 unemployed workers in Kootenai County and that shortly prior to hearing Verizon had laid off another 200 employees.
- Mr. Brownell testified that H&J is the fifth or sixth largest employer in Claimant's labor market and employs literally "hundreds and hundreds of employees and lots of facilities, lots of diversified work" including parking lot attendants. Transcript, p. 76, ll. 6-7. Yet Claimant was laid off due to lack of work as H&J had no work available for Claimant within her medical restrictions. Brownell also testified that Claimant's time of injury wage of \$9.75 per hour plus benefits should be evaluated with the understanding that her benefits at H&J added 20-30% to her compensation and that most jobs in her labor market do not provide those benefits. He affirmed that if those benefits were considered, her hourly wage would total \$12.00 to \$13.00 per hour. Transcript pp. 88-89.
- 54. Mr. Brownell met with Claimant several times commencing in September 2011. He familiarized himself with her medical records, work history, educational background, injuries and resulting work limitations. He noted that Claimant struggled with reading and spelling in high school and in her attempt to complete a nursing program. She needed a special tutor to help

her obtain her associates degree in drafting at North Idaho College because she was only reading at an eighth grade level. Brownell testified that Claimant's drafting and HVAC training are now outdated and not marketable. He opined that Claimant's extended period of unemployment subsequent to her 2008 industrial accident was a significant factor diminishing the likelihood of acquiring future employment. Brownell considered Dr. McNulty's opinion the most recent and up to date physician's opinion of Claimant's condition and restrictions. Brownell also relied upon the functional capacity evaluation performed in September 2011 by Virginia Taft and the September 2012 addendum to that evaluation. He opined that Claimant's most significant physical limitation was her restriction from repetitively using her dominant right hand. Mr. Brownell opined that Claimant could not return to any of her prior occupations and that very rarely are there jobs in her labor market that would be regularly available and compatible with her physical limitations.

55. Mr. Brownell reviewed Dr. Barros Bailey's report and did not agree with Dr. Barros-Bailey's conclusion that Claimant could work as a cashier. Rather, Brownell cited Dr. McNulty's and Virginia Taft's conclusions and opined that Claimant could not work competitively as a cashier due to her 2008 industrial injury. He also opined that Claimant would not be competitive for work as a parking lot attendant or ticket taker due to her right hand limitations. Brownell concluded:

Based upon the claimant's entire case profile inclusive of age, education, work skills and current physical capabilities, there are extremely limited work opportunities. Also considered is the fact that these positions are filled and a competitive unemployed labor force of hundreds await the competition for a new job opening. Ms. Deon would also require a sympathetic employer who would accommodate all her physical limitations.

Exhibit 6, p. 49.

56. Mr. Brownell opined that Claimant suffers permanent disability of 85 to 90% or

greater, inclusive of permanent impairment. He opined that none of this disability was attributable to her cervical, shoulder, bilateral leg or right eye conditions. Brownell testified that he considered all of Claimant's permanent impairments in arriving at his permanent disability rating; however none of the pre-existing impairments were included in his rating, only Claimant's right hand and wrist injury. Transcript p. 108. He testified that Claimant had lost access to 90% of the labor market and that the 10% of the labor market which she could still potentially access was comprised of unskilled sedentary jobs for which she would have to compete with 6,500 other job-seekers to obtain. Brownell demonstrated keen familiarity with the extent of competition in Claimant's labor market. He concluded that Claimant was "barely" employable and needed "definitely a sympathetic employer" in order to return to work. Transcript p. 95, Il. 10-11.

- 57. Further analysis of the vocational opinions. All of the vocational experts' disability rating opinions are helpful. However, none is entirely persuasive and without limitation.
- 58. Dr. Barros-Bailey's disability rating of 45% is unpersuasive because it arises from failure to consider Claimant's full compensation (including her IRA and health insurance) at H&J, a material misreading of Virginia Taft's 2011 hand functional capacity evaluation, failure to consider the 2012 addendum to that evaluation, failure to consider Dr. McNulty's 2012 report, and the erroneous assumption that Claimant could work competitively as a cashier.<sup>2</sup>
- 59. Dr. Collins' disability rating of 56% is not entirely persuasive because it fails to consider Claimant's full compensation package (including her IRA and health insurance) at H&J. Nor does it consider the permanent disability arising from Claimant's pre-existing

<sup>&</sup>lt;sup>2</sup> As previously noted, Dr. Barros-Bailey was never provided these 2012 reports.

permanent impairments of 13%. As noted above, were these items to be considered, the result would approximate a permanent disability rating of 80%.

- 60. Rating an injured worker's permanent disability by averaging her estimated loss of labor market access and expected wage loss, as Drs. Collins and Barros-Bailey have done in the instant case, can provide a useful point of reference. However, the averaging method itself is not without conceptual and actual limitations. As the loss of labor market access becomes substantial, and the expected wage loss negligible, the results of the averaging method become less reliable in predicting actual disability. For illustration, as judged by the averaging method, a hypothetical minimum wage earner injured sufficiently to lose access to 99% of the labor market may theoretically suffer no expected wage loss if she can still perform any minimum wage job. Calculation of such a worker's disability according to the averaging method would produce a permanent disability rating of only 49.5% ([99% + 0%] ÷ 2) even though her actual probability of obtaining employment in the remaining 1% of an intensely competitive labor market may be as remote as winning the lottery. The averaging method fails to fully account for the reality that the two factors are not fully independent.
- 61. As the residual labor market becomes increasingly small, the disability rating obtained by the averaging method becomes increasingly skewed, especially in labor markets with high unemployment rates where competition for the remaining portion of suitable jobs will be fierce. This is exactly Claimant's situation herein. All of the vocational experts acknowledged that Claimant has lost access to a substantial portion of her labor market. Dr. Barros-Bailey noted that Claimant suffered only a minimal expected wage loss. Mr. Brownell testified that Claimant must compete with over 6,500 unemployed workers who are seeking jobs in Claimant's labor market.

- 62. Mr. Brownell's disability rating is less persuasive because it overstates Claimant's permanent disability on its face. Brownell testified that Claimant suffers an 85-90% or greater permanent disability rating entirely due to her right upper extremity limitations. This rating does not consider the permanent disability arising from Claimant's pre-existing permanent impairments of 13%. Under Brownell's evaluation, were these impairments to be considered also, the sum would produce a permanent disability rating exceeding 100% (90% + 13%)—intuitively excessive.
- 63. Having considered all of the vocational experts' permanent disability ratings, the Referee declines to fully adopt any of the offered ratings. The Commission is the ultimate evaluator of disability.
- 64. Claimant has unsuccessfully looked for work in the Coeur d'Alene area on her own and through the unemployment office. She did not fully avail herself of Beth Grigg's assistance and failed to follow-up on job leads Grigg provided. Claimant's own job search, which she testified included submitting a "couple dozen" applications, is not consistent with a diligent and earnest effort to find employment. There is no indication that Brownell performed an independent job search specifically on Claimant's behalf. However, Brownell's conclusion—that Claimant would need a sympathetic employer to accommodate all of her limitations such that she could find employment—is amply supported by the record as a whole. Brownell testified that Claimant would not be competitive for ticket taker positions, parking lot attendant positions, or the like. He also persuasively testified that Claimant's time of injury Employer is the fifth or sixth largest employer in North Idaho, employing literally hundreds of workers, and that if H&J could not accommodate Claimant's limitations, Claimant was unlikely to find an employer that would—except for a sympathetic employer.

- 65. Based on Claimant's permanent impairments totaling 17% of the whole person, her permanent physical restrictions, particularly those to her dominant right upper extremity, and considering all of her medical and non-medical factors, including her age of 56 at the time of the industrial accident, limited formal education, reading challenges, inability to return to previous positions, outdated specialized training, and limited transferable skills, Claimant's ability to compete in the open labor market and engage in regular gainful activity after her 2008 industrial accident has been greatly reduced. The Referee concludes that Claimant has established a permanent disability of 85%, inclusive of her 17% whole person impairment.
- 66. Odd-lot. A claimant who is not 100% permanently disabled may prove total permanent disability by establishing he 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). A claimant may satisfy his burden of proof and 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. <u>Lethrud v. Industrial Special</u> <u>Indemnity Fund</u>, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

- 67. In the present case, Defendants assert that Claimant is employable and not an odd-lot worker. Claimant has not demonstrated that she unsuccessfully attempted other types of employment. As noted above, Claimant has testified she submitted a "couple dozen" applications and has been registered with job service for approximately four years. This suggests a modest unsuccessful work search. However, far more persuasive, is Mr. Brownell's testimony that it would require a sympathetic employer to accommodate Claimant's limitations in order for her to obtain employment. As concluded above, Brownell's opinion in this regard is persuasive and tantamount to a showing that efforts to find suitable work regularly and continuously available in the open labor market would be futile. Claimant has established a prima facie case that she is an odd-lot worker, totally and permanently disabled, under the Lethrud test.
- 68. Once a claimant establishes a prima facie odd-lot case, the burden shifts to defendants "to show that some kind of suitable work is regularly and continuously available to the claimant." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). Defendants must prove 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 [defendants] 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).

69. In the present case, Defendants through Dr. Barros-Bailey identified only one type of job—cashier—that she believed was suitable for Claimant given her physical restrictions.

Mr. Brownell testified convincingly that Claimant is not competitive for a cashier position given the restrictions enumerated by Virginia Taft and agreed upon by Dr. McNulty.

- 70. Defendants have not shown that there is an actual job regularly and continuously available which Claimant can perform and at which she has a reasonable opportunity to be employed. Claimant has proven that she is totally and permanently disabled pursuant to the odd-lot doctrine commencing November 18, 2009, the date Dr. Stevens found her medically stable from her 2008 industrial injuries.
- 71. **Idaho Code § 72-406(1) apportionment.** Inasmuch as Claimant is totally and permanently disabled, the issue of apportionment pursuant to Idaho Code § 72-406(1) is moot.
- 72. <u>Carey</u> apportionment. The next issue is apportionment pursuant to the <u>Carey</u> formula. Although Claimant settled with ISIF prior to hearing, a determination of ISIF's liability pursuant to Idaho Code § 72-332 must be made before the extent of Defendants' liability can be determined pursuant to <u>Carey v. Clearwater County Road Department</u>, 107 Idaho 109, 686 P.2d 54, (1984).
- 73. Idaho Code § 72-332(1) provides in pertinent part that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his income benefits out of the ISIF account.
- 74. Idaho Code § 72-332(2) further provides that "permanent physical impairment" is as defined in Idaho Code § 72-422, provided, however, as used in this section such impairment

must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the claimant should become unemployed. This shall be interpreted subjectively as to the particular employee involved; however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

- 75. In <u>Dumaw v. J. L. Norton Logging</u>, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court identified four requirements a claimant must meet to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was indeed a pre-existing impairment; (2) whether that impairment was manifest; (3) whether the impairment was a subjective hindrance to employment; and (4) whether the impairment in any way combined with the subsequent injury to cause total disability. <u>Dumaw</u>, 118 Idaho at 155, 795 P.2d at 317.
- 76. Pre-existing, manifest impairments. The pre-existing physical impairments at issue herein are those to Claimant's neck and shoulders (6%), and legs (7%), prior to her 2008 industrial accident. There is no dispute that her neck and shoulder, and her leg conditions existed and were manifest in 1990 and 2006 respectively. Claimant's neck, shoulder, and leg impairments constitute pre-existing conditions for purposes of Idaho Code § 72-332 because each preexisted and was manifest prior to her 2008 industrial accident. The first and second prongs of the Dumaw test have been met.
- 77. <u>Hindrance or obstacle</u>. The third prong of the <u>Dumaw</u> test considers "whether or not the pre-existing condition constituted a hindrance or obstacle to employment for the

particular claimant." Archer v. Bonners Ferry Datsun, 117 Idaho 166, 172, 786 P.2d 557, 563 (1990).

- 78. Claimant underwent cervical and bilateral first rib resection surgeries shortly after suffering her 1990 assault injury. Thereafter she changed employment, obtained drafting training, and commenced working in a lighter industry. Mr. Brownell acknowledged that Claimant's job change was necessitated by her cervical limitations. Her pre-existing cervical condition thus constituted a hindrance or obstacle to employment.
- 79. Claimant's pre-existing leg condition limited her walking ability. She testified that even after recovering from the Rottweiler attack, she could only walk approximately one-half mile due to the pain in her legs. Dr. McNulty opined that her leg condition limited her ladder and stair climbing ability.
- 80. The Referee finds that Claimant's pre-existing neck, shoulder, and leg impairments constituted a hindrance to her employment. The third prong of the <u>Dumaw</u> test is met.
- 81. <u>Combination</u>. Finally, to satisfy the "combines" element, the test is whether, but for the industrial injury, the worker would have been totally and permanently disabled immediately following the occurrence of that injury. This test "encompasses both the combination scenario where each element contributes to the total disability, and the case where the subsequent injury accelerates and aggravates the pre-existing impairment." <u>Bybee v. State</u>, <u>Industrial Special Indemnity Fund</u>, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Significantly, ISIF is not liable where the last industrial injury, itself, renders a worker totally and permanently disabled. <u>Selzler v. State of Idaho, Industrial Special Indemnity Fund</u>, 124 Idaho 144, 857 P.2d 623 (1993).

- 82. The record in the instant case does not establish that Claimant's pre-existing cervical and shoulder condition combines with her 2008 injuries to render her totally and permanently disabled. To the contrary, the upper extremity restrictions arising from Claimant's 2008 industrial accident entirely supersede those resulting from her cervical and shoulder condition.
- 83. The record contains some evidence that Claimant's pre-existing leg impairment contributes to her total and permanent disability. As noted, her pre-existing leg condition limited her standing and walking tolerances and Dr. McNulty opined that her leg condition precluded her from working on ladders or frequently using stairs. However, Mr. Brownell persuasively testified that Claimant's right upper extremity condition alone precluded her from competing in the open labor market and relegated her to employment only by a sympathetic employer. Dr. Barros-Bailey acknowledged that upper extremity limitations are among the most disabling conditions. Neither Dr. Collins nor Dr. Barros-Bailey opined that Claimant's pre-existing leg condition combined with her upper extremity condition to produce disability.
- 84. The record does not establish that Claimant's pre-existing leg condition combined with her 2008 industrial accident to render her totally and permanently disabled. Rather, Claimant's right upper extremity condition alone renders her totally and permanently disabled. Thus apportionment pursuant to <u>Carey v. Clearwater County Road Department</u>, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984), is not appropriate.
- 85. **Medical care.** The final issue is Claimant's entitlement to medical care. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician

or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Of course an employer is only obligated to provide medical treatment necessitated by the industrial accident, and is not responsible for medical treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995).

- 86. Claimant herein requests medical benefits for reimbursement for a functional capacity evaluation recommended by Dr. Greendyke and performed September 16, 2011, by Virginia Taft. When Defendants refused to provide the evaluation, Claimant, at the recommendation of her attorney, had the evaluation performed at her own expense. Defendants in their briefing do not expressly contest Claimant's request for reimbursement. The evaluation was recommended by her then treating physician and is compensable.
- 87. Claimant has proven her entitlement to reimbursement for her functional capacity evaluation by Virginia Taft.

# **CONCLUSIONS OF LAW**

- 1. Claimant has proven she suffers whole person permanent impairment of 17%, including 4% whole person impairment due to her 2008 industrial accident.
- 2. Claimant has proven she suffers permanent disability of 85% inclusive of impairment, and has proven that she is an odd-lot worker, totally and permanently disabled under the Lethrud test.
  - 3. Apportionment pursuant to Idaho Code 72-406 is moot.

- 4. Apportionment pursuant to <u>Carey v. Clearwater County Road Department</u>, 107 Idaho 109, 686 P.2d 54 (1984), is not appropriate.
- 5. Claimant has proven her entitlement to reimbursement for her functional capacity evaluation by Virginia Taft.

# RECOMMENDATION

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

DATED this 2 day of April, 2013.

INDUSTRIAL COMMISSION

Alan Reed Taylor, Referee

ASSISTANT Commission Secretary

# CERTIFICATE OF SERVICE

I hereby certify that	t on the d	ay of	, 2012	2, a true and correc
copy of the foregoing	FINDINGS OF	FACT,	CONCLUSIONS	OF LAW, AND
<b>RECOMMENDATION</b> w	as served by regul	ar United	States Mail upon eac	h of the following:
STEVEN J NEMEC				
1626 LINCOLN WAY				
COEUR D'ALENE ID 838	314			
E SCOTT HARMON				
PO BOX 6358				
BOISE ID 83707-6358				
kh				

#### BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRUDY DEON,

v.

Claimant.

Ciuminan

H & J, INC., d/b/a BEST WESTERN COEUR D'ALENE INN & CONFERENCE CENTER,

Employer,

and

LIBERTY NORTHWEST INSURANCE CORPORATION,

Surety, Defendants. IC 2007-005950 IC 2008-032836

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FILED

MAY - 3 2013

INDUSTRIAL COMMISSION

### 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 Coeur d'Alene, Idaho on October 16, 2012. Claimant, Trudy Deon, was present in person and represented by Steven Nemec, of Coeur d'Alene, Idaho. Defendant Employer, H & J, Inc., d/b/a Best Western Coeur d'Alene Inn & Conference Center (H&J) and Surety, Liberty Northwest Insurance Corporation, were represented by Roger Brown, of Boise, Idaho. Claimant settled with State of Idaho, Industrial Special Indemnity Fund (ISIF), prior to hearing. The parties presented oral and documentary evidence. No post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on December 24, 2012.

# **ISSUES**

The issues to be decided are:<sup>1</sup>

- 1. The extent of Claimant's permanent partial impairment.
- 2. The extent of Claimant's permanent disability, including whether Claimant is permanently and totally disabled pursuant to the odd-lot doctrine or otherwise.
- 3. Whether apportionment for a pre-existing or subsequent condition pursuant to Idaho Code § 72-406 is appropriate.
  - 4. Apportionment under the <u>Carey</u> formula.
  - 5. Claimant's entitlement to additional medical benefits.

#### CONTENTIONS OF THE PARTIES

Claimant alleges that she is totally and permanently disabled pursuant to the odd-lot doctrine solely as a result of her 2008 industrial accident at the Coeur d'Alene Inn and resulting injury to her dominant right hand. She also asserts entitlement to medical benefits for a functional capacity evaluation performed September 16, 2011. Defendants readily acknowledge Claimant's 2008 industrial accident and have provided extensive medical and temporary disability benefits. However, Defendants contend that Claimant is employable and suffers no permanent disability beyond 2% upper extremity impairment or in the alternative, that Claimant's permanent disability is minimal.

#### EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

<sup>&</sup>lt;sup>1</sup> The issue of Claimant's entitlement to an award of attorney fees was noticed for hearing. However, as Defendants correctly note, Claimant argues no claim for attorney fees in her briefing. This issue is therefore deemed abandoned.

- 2. Claimant's Exhibits 1-25, admitted at hearing;
- 3. Defendants' Exhibits 26-28, admitted at hearing;
- 4. The testimony of Claimant, Daniel Brownell, and Mary Barros-Bailey, taken at the October 16, 2012 hearing.

All objections posed during the pre-hearing depositions are overruled.

The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

#### FINDINGS OF FACT

- 1. Claimant was born in 1955 and is right-handed. She was five feet five inches tall, 57 years old, and resided in Coeur d'Alene at the time of the hearing. She graduated from high school in Montana in 1974, but had trouble with reading and spelling. She worked as a dishwasher and cook at a café during the summer while in high school. From 1975 to 1976, she worked for the school district as a rehabilitation technician for disabled children. In that capacity, Claimant worked directly under the supervision of a licensed physical therapist. From approximately 1976 until 1986, Claimant worked seasonally for the U.S. Forest Service, planting trees and maintaining campgrounds. From 1979 to 1980, she pursued nurse's training but had difficulty with reading and spelling. She ultimately obtained a CNA certification but never worked as a CNA. From approximately 1984 to 1988 she worked as a dishwasher and cook at a café.
- 2. From 1988 until 1993, Claimant worked for Alpha Health Services as a rehabilitation technician caring for disabled children and adults. On two occasions Claimant was assaulted by a patient while working. The most severe assault occurred in 1990, when Claimant was driving a car. A patient riding in the front passenger seat became agitated, grabbed

Claimant's head, and violently forced it underneath the car's dashboard, injuring her neck and shoulders. Claimant subsequently underwent cervical and bilateral first rib resection surgeries. She was compelled to change occupations and later received a 6% whole person permanent impairment rating for her neck and shoulder injuries. She obtained a two-year associates degree in drafting.

- 3. From 1997 until 2002, Claimant worked for Boeing as a drafting technician. She performed hand and computerized drafting. She earned a 3-D drafting certificate while working at Boeing. In 2002, Claimant was laid off at Boeing. Thereafter she obtained an HVAC certificate from North Idaho College. She worked at a furniture factory, building and sanding furniture while she earned her certificate.
- 4. In 2003, Claimant began working full-time as a maintenance technician for Employer H&J at the Coeur d'Alene Inn, a 150-bed motel. Her duties included all aspects of room and kitchen maintenance and repair except removing and replacing carpets. She also maintained the pool and removed snow. She walked 80% of her work day and regularly lifted 50 pounds.
- 5. In February 2006, Claimant was at home feeding four Rottweiler dogs in a fenced area when one of the dogs pulled her down. Three of the Rottweilers attacked her, lacerating her scalp and left arm, and very seriously lacerating both of her legs. She managed to escape from the fenced area and a friend transported her to a hospital emergency room. Claimant was hospitalized for two weeks and underwent extensive suturing and surgeries, including skin grafting on both of her legs. She was off work for several months, and then gradually returned to work part-time. After approximately one year she resumed full-time work at the Coeur d'Alene

Inn. She was later rated with a 7% whole person permanent impairment due to her lower extremity injuries, including nerve damage, sustained in the Rottweiler attack.

- 6. By October 2008, Claimant was earning \$9.75 per hour and working 40 hours per week. H&J also provided health insurance and an IRA account as part of her compensation.
- 7. On October 4, 2008, Claimant was called into the kitchen at the Coeur d'Alene Inn to clean out the drain. She used a small power auger or electric snake. During Claimant's efforts to clear the drain, the auger caught Claimant's right glove and right hand. Another employee had previously removed the safety shut-off switch from the auger and Claimant was unable to free her hand or shut off the auger. The electric snake encircled, twisted, and crushed her right hand and wrist until another employee responded to Claimant's shouts and unplugged the auger. The electric snake also struck Claimant's right eye or eyelid. Claimant was taken by ambulance to the emergency room at the Kootenai Medical Center. She was diagnosed with right hand sprain, right fourth and fifth finger sprain, and contusion.
- 8. Approximately one week after the accident, Claimant developed irritation and blurry vision in her right eye. She presented to North Idaho Immediate Care and was diagnosed with pink eye. However, Patrick Mullen, M.D., later diagnosed herpes simplex keratitis in Claimant's right eye, but opined it was not related to her industrial accident. No medical evidence relates Claimant's right eye condition to her industrial accident.
- 9. In November 2008, Claimant underwent a right hand MRI. Michael Ludwig, M.D., reviewed the MRI, examined Claimant's right hand, and diagnosed disruption of the A2 pulley system of the fourth digit with palmar bowing of the flexor tendon, partial disruption of the A2 pulley system of the fifth digit with palmar bowing of the flexor tendon, and non-displaced fracture of the distal aspect of the proximal phalanx of the fifth digit. Dr. Ludwig

referred Claimant to Dr. Mullen, a hand surgeon. Dr. Mullen noted collateral ligament tears at the PIP joints of Claimant's right ring and little fingers. He suspected right wrist injuries and ordered a right wrist MRI which was read as normal. Claimant wore a cast on her right hand for approximately six weeks. Dr. Mullen prescribed physical therapy and braces. He referred Claimant to Anthony Sestero, M.D., who prescribed further physical therapy.

- 10. In December 2008, Claimant began utilizing the services of Industrial Commission rehabilitation consultant Beth Grigg.
- 11. On April 28, 2009, Claimant commenced light-duty work part-time using her right hand for repetitive motion no more than four hours per day. She continued to experience debilitating right hand and wrist pain.
- 12. On June 3, 2009, Claimant's supervisor reported to Ms. Grigg that although Claimant had a release to full-time work on that date, he did not believe Claimant was physically capable of performing all of her pre-injury job duties.
- 13. In August 2009, Claimant came under the care of Spencer Greendyke, M.D. On August 12, 2009, Dr. Greendyke released Claimant for full-time work but restricted her to lifting no more than five pounds with her right hand. He also ordered EMG testing. On August 19, 2009, Craig Stevens, M.D., performed EMG testing and wrote:

The study reveals ulnar neuropathy at the right elbow with involvement of both the dorsal cutaneous branch as well as the origin of the ulnar sensory fibers adjacent to the canal of Guyon. .... This <u>ulnar neuropathy is moderate in severity</u> but certainly appears consistent with her symptoms. The study does reveal some persisting ulnar sensory nerve function but definite evidence that an injury has occurred.

Exhibit 14, p. 155 (emphasis supplied).

14. On October 28, 2009, Dr. Greendyke found Claimant had reached maximum medical improvement.

- 15. No later than November 6, 2009, Claimant's light-duty employment at Coeur d'Alene Inn was terminated. H&J had no available work within her restrictions.
- 16. On November 18, 2009, Dr. Stevens performed an independent medical examination of Claimant at Defendants' request. Dr. Stevens found Claimant medically stable and rated her permanent impairment at 2% of the upper extremity due to her EMG-documented ulnar neuropathy and upper extremity collateral ligament injuries. He declined to impose any work restrictions and opined Claimant should be released to full-duty work without restriction.
- 17. After being terminated from her employment at Coeur d'Alene Inn, Claimant filed for unemployment benefits and registered with the Idaho Department of Labor, looking for work. Claimant also continued meeting with rehabilitation consultant Beth Grigg, who assisted Claimant in her employment search. Ms. Grigg recorded Claimant's report that she was not able to grip a phone for long, turn a screwdriver, type on a keyboard, lift dishes, carry groceries, wring out wash rags, or perform fine finger manipulation with her right hand.
- 18. In December 2009, Ms. Grigg closed Claimant's file because she had not followed up on any of the job leads Grigg provided. Claimant told Ms. Grigg that she did not know what work she could physically perform.
- 19. On May 13, 2010, Claimant was adjudged disabled by the Social Security Administration due to her industrial right hand injury and residual dog attack injuries.
- 20. Claimant ultimately applied for a "couple dozen" jobs, including drafting positions and jobs at Lowes and Home Depot. She received no job offers.
- 21. On September 16, 2011, Claimant underwent a hand functional assessment by Virginia Taft, P.T., at the Coeur d'Alene Hand Therapy & Healing Center. The assessment concluded that Claimant would need to have primarily left-handed work and that she was

restricted to lifting five pounds with her right hand, 20 pounds with both hands, and minimal repetition. Her range of motion was noted to be minimally limited but with pain on finger extension and gripping or twisting movements. Finger manipulation of common objects showed minimal to severe limitation with decreased speed. Ms. Taft concluded that retraining was a questionable option due to Claimant's hand, vision, and age limitations.

- 22. On September 4, 2012, Ms. Taft authored an addendum to her September 16, 2011 functional capacity evaluation. She reported that Claimant's hand function had not improved since her September 2011 assessment. Taft noted that Claimant had sensation deficits of numbness and tingling with activity, which increased with sustained gripping or twisting. Taft reported that Claimant's sensory loss interfered with her right hand coordination and speed and that Claimant showed severe limitation in speed of movement when repeatedly lifting as little as one pound. Taft also noted that Claimant "used her right hand as an assist rather than as her dominant hand. She modified as possible using right index/middle fingers and thumb rather than full grip, her left hand or she used 2 hands, for example, to lift a coffee cup." Exhibit 12, p. 144. Taft concluded that Claimant could not return to her previous job or to a cashiering position as such would require sustained repetitive movement and lifting.
- 23. On September 13, 2012, John McNulty, M.D., examined Claimant and diagnosed chronic right wrist, ring, and little finger sprain, weak grip, and ulnar sensory loss at the right wrist and hand. He opined that she suffered permanent impairments of 1% of the whole person due to her chronic right ring finger PIP joint sprain, 1% of the whole person due to her chronic right little finger PIP joint sprain, and 2% of the whole person due to her right ulnar sensory nerve injury due to her 2008 industrial accident. Dr. McNulty also found Claimant suffered

permanent impairments of 6% of the whole person secondary to her pre-existing cervical spine injury and 7% of the whole person secondary to her pre-existing lower extremity condition.

- 24. At the time of hearing, Claimant was receiving approximately \$1,004.00 per month in Social Security Disability benefits.
- 25. At hearing, Claimant testified that she performs home exercises and used hot paraffin, a TENS unit, and over-the-counter medication to manage the pain in her right hand and wrist. She wears a wrist brace when doing any right-handed activities. Although she is right-handed, she does not use her right hand to operate her cell phone, load the dishwasher, lift her clothes basket, comb her hair, brush her teeth, operate her TV remote, or button the buttons on her clothing. All of these activities she performs only with her non-dominant left hand. Claimant can no longer pick up a gallon of milk with her right hand. She no longer paints, knits, crochets, sews, gardens or remodels her home because of her right hand condition. She cannot type or keyboard with her right hand because she cannot repetitively stretch her fingers to reach the upper row of keys. Claimant testified that she suffers constant right hand pain which increases with activity and that her right hand condition is her greatest limitation.
- 26. At hearing, Claimant testified that standing and walking cause leg pain as a result of the Rottweiler attack. She walks with a shuffling gait and is limited by leg pain to walking no more than half a mile.
- 27. Claimant's right eye herpes infection significantly impairs her vision and requires ongoing medication and avoidance of bright light irritation. She has adequate vision in her left eye to qualify for a driver's license. With a brace on her right hand, she is able to operate a manual transmission.

28. Having observed Claimant at hearing, and compared her testimony with other evidence in the record, the Referee found that Claimant is a credible witness. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

# **DISCUSSION AND FURTHER FINDINGS**

- 29. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. <u>Haldiman v. American Fine Foods</u>, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. <u>Ogden v. Thompson</u>, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. <u>Aldrich v.</u> Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).
- 30. **Permanent 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. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. <u>Urry v. Walker & Fox Masonry</u> Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).
- 31. Claimant herein alleges permanent impairments to her neck, legs, and right hand.

  On September 13, 2012, Dr. McNulty opined that Claimant suffered permanent impairments of

6% of the whole person due to her pre-existing cervical spine injury and 7% of the whole person due to her pre-existing lower extremity condition secondary to the Rottweiler attack. The record establishes, and Defendants do not contest, these impairment ratings.

- 32. The parties dispute the extent of Claimant's permanent impairment due to her right hand condition. On August 19, 2009, Dr. Stevens performed EMG testing of Claimant's upper right extremity and concluded Claimant's "ulnar neuropathy is moderate in severity" and "certainly appears consistent with her symptoms." Exhibit 14, p. 155 (emphasis supplied). However, on November 18, 2009, Dr. Stevens performed an independent medical examination at Defendants' request and noted that Claimant had presented for EMG testing on August 19, 2009, and that he had then "determined that she exhibited features of a very mild ulnar neuropathy." Exhibit 14, p. 162 (emphasis supplied). Dr. Stevens found Claimant medically stable on November 18, 2009, and characterizing her ulnar sensory deficit as very mild, rated her permanent impairment at 2% of the upper extremity due to her ulnar neuropathy and upper extremity collateral ligament injuries. He declined to impose any work restrictions and opined Claimant should be released to full duty without restriction.
- 33. On September 13, 2012, Dr. McNulty examined Claimant and opined that she suffered permanent impairments of 1% of the whole person from her chronic right ring finger PIP joint sprain, 1% of the whole person from her chronic right little finger PIP joint sprain, and 2% of the whole person from her right ulnar sensory nerve injury—all due to her 2008 industrial accident. Dr. McNulty's impairment rating is more persuasive that Dr. Stevens' as it is supported by the MRI findings documenting A2 pulley disruption of the PIP joints of Claimant's right ring and little fingers and is further supported by Dr. Stevens' August 19, 2009 EMG testing wherein he found ulnar neuropathy of moderate severity.

- 34. Claimant has proven that she suffers permanent physical impairments of 6% of the whole person due to her pre-existing cervical condition, 7% of the whole person due to her pre-existing lower extremity condition and 4% of the whole person due to her right hand condition. Claimant has proven she suffers whole person permanent impairments of 17%, including 4% whole person impairment due to her 2008 industrial accident.
- Permanent disability. The next issue is the extent of Claimant's permanent 35. disability, including whether she is totally and permanently disabled pursuant to the odd-lot doctrine. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of 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 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 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). Pursuant

to Idaho Code § 72-422, the proper date for disability analysis of a claimant's labor market access is the date of hearing, and not the date that maximum medical improvement has been reached. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012).

- 36. Claimant asserts that her 2008 industrial accident at Coeur d'Alene Inn renders her totally and permanently disabled. Her permanent disability must be evaluated based upon her medical factors, including the physical restrictions arising from her permanent impairments, and non-medical factors, including Claimant's capacity for gainful activity and ability to compete in the open labor market within her geographical area.
- 37. <u>Physical restrictions</u>. In November 2009, Dr. Stevens opined that Claimant had no physical restrictions due to her 2008 industrial accident. He explained that although objective diagnostic medical testing disclosed persisting abnormalities, Claimant would not further injure herself by working without restrictions. Dr. Stevens' opinion is premised in part on his November 2009 conclusion that Claimant's industrial accident caused very mild ulnar neuropathy of her upper right extremity, contradicting his conclusion after EMG testing in August 2009 that her accident caused ulnar neuropathy of moderate severity.
- 38. Claimant's September 2011 hand functional capacity evaluation by Virginia Taft at the Coeur d'Alene Hand Therapy & Healing Center concluded that Claimant would need to have primarily left-handed work and that she was restricted to lifting five pounds with her right hand, 20 pounds with both hands, and minimal repetition. Taft's 2012 addendum noted that Claimant "used her right hand as an assist rather than as her dominant hand" and concluded that Claimant could not return to her previous job or to a cashiering position. Exhibit 12, p. 144. Dr. McNulty agreed with Ms. Taft's evaluation and restricted Claimant from lifting more than 20

pounds and from repetitive lifting and grabbing with her right hand. He further noted that Claimant's pre-existing lower extremity impairment limited her ability to climb stairs or ladders.

- 39. Claimant's supervisor at H&J reported that after Claimant's release to full-duty work in 2009, she was not able to perform all of her pre-injury duties. Her employment at Coeur d'Alene Inn was terminated for this very reason.
- 40. The Referee found Ms. Taft's and Dr. McNulty's opinions regarding Claimant's restrictions more consistent, accurate, and persuasive than Dr. Stevens' opinion. The Commission finds no reason to disturb the Referee's findings and observations on Ms. Taft's and Dr. McNulty's credibility.
- 41. <u>Ability to compete in the open labor market</u>. Three vocational experts have opined regarding Claimant's ability to compete in her labor market, Nancy Collins, Mary Barros-Bailey, and Daniel Brownell. The conclusions of each are examined below.
- 42. *Nancy Collins*. Vocational expert Nancy Collins, Ph.D., interviewed Claimant and reviewed her work history, medical records, and physical restrictions. On September 4, 2012, Dr. Collins authored a report on behalf of ISIF, who later settled with Claimant prior to hearing. In her report, Dr. Collins concluded that Claimant was not totally disabled but opined:

Considering the opinion of Dr. Stevens, Ms. Deon has no disability in excess of impairment. Considering restrictions that limit her to some light and sedentary jobs that do not require repetitive use of her right dominant hand, she will experience a 90% loss of access to the labor market. In my opinion, she will not experience a significant earnings loss. Based on a wage of \$9.70 per hour in her time of injury job and an \$8.50 return to work wage, she will experience a 12% loss of earning capacity. Ms. Deon is 56 years of age and I do think her age should be considered in her disability rating. In my opinion, Ms. Deon's disability inclusive of impairment is 56% based on restrictions from Dr. Dickey, Dr. Greendyke and the hand assessment. .... This analysis assumes equal value is given to the two vocational factors of earning capacity and labor market access.

Exhibit 7, pp. 64-65.

- 43. Dr. Collins' report does not demonstrate extensive familiarity with the degree of competition present in Claimant's current labor market. Additionally, in reaching her conclusions, Dr. Collins did not have the benefit of Virginia Taft's September 4, 2012 addendum to the functional capacity evaluation, or Dr. McNulty's September 13, 2012 report in which he agreed with Ms. Taft's conclusions. Nevertheless, Dr. Collins found 56% permanent disability by equally weighting Claimant's loss of labor market access (90%) and her estimated wage loss based on the difference between her time of injury wage and her likely post-accident wage (12%). Thus  $90\% + 12\% = 102\% \div 2 = 51\%$  to which Dr. Collins apparently added 5% for Claimant's age to reach her disability rating of 56%.
- Dr. Collins' calculations did not take into account Claimant's full compensation package at the time of her 2008 accident, including IRA and health insurance benefits through H&J which Dan Brownell testified effectively increased her compensation by as much as 30%. Brownell testified that most jobs in Claimant's labor market do not provide these benefits. If Dr. Collins had calculated Claimant's wage loss based on a time of injury wage of \$9.75 per hour, plus 30% benefits, thus totaling \$12.68, versus a likely post-injury wage of \$8.50, Claimant's wage loss would equal:  $($12.68 $8.50) \div $12.68$  or 33%. The calculation would then be:  $(90\% + 33\%) \div 2 = 62\%$ . Adding 5% for Claimant's age would then yield a 67% permanent disability rating.
- 45. *Mary Barros-Bailey*. Vocational expert Mary Barros-Bailey, Ph.D., testified in behalf of Defendants. She has 22 years of experience in vocational rehabilitation, including 19 years in Idaho. Dr. Barros-Bailey has evaluated disability cases from Alaska to Idaho to Brazil. She met with Claimant in 2011 and reviewed her medical records. On October 11, 2011, Dr. Barros-Bailey issued her vocational report concluding that Claimant:

has substantially reduced ability to access the labor market to the level of a 73% loss of access. She would still be able to access a variety of jobs, however, that do not require regular bilateral work and pay within \$1 of her wage at injury (e.g. cashiers at median wages of \$9.01 per hour per the 2011 Idaho Occupational Employment and Wage Survey), thus resulting in a slight wage of [sic] earning capacity. ....

For Ms. Deon, age is a factor in that her functional age combined with all her medical conditions is probably greater than her chronological age and should be considered in disability. Consequently, considering Trudy's age, work and education histories, transferable skills, functional restrictions associated with the industrial injury, and other non-medical factors, I believe she has sustained a 45% disability inclusive of impairment. Note that given no functional assumptions available in previous Industrial Commission records, there is no basis upon which to apportion this disability opinion.

Exhibit 8, pp. 82-83. Dr. Barros-Bailey's report does not demonstrate extensive familiarity with the degree of competition present in Claimant's current north Idaho labor market.

- 46. In July 2012, Dr. Barros-Bailey issued a supplemental report criticizing Dan Brownell's finding that Claimant suffered 85% permanent disability. Dr. Barros-Bailey indicated that Claimant was earning only \$9.70 per hour at the time of her industrial accident and that even a minimum wage job would result in only a 25% reduction in Claimant's wages.
- 47. At hearing, Dr. Barros-Bailey testified that she uses the average of an injured worker's loss of labor market access and estimated wage loss as the starting point to determine permanent disability. She testified that in evaluating Claimant's permanent disability, she added Claimant's loss of labor market access (73%) and her estimated wage loss based on the difference between her time of injury wage and her likely post-accident wage of \$9.01 per hour as a cashier, equaling 7%. Thus  $73\% + 7\% = 80\% \div 2 = 40\%$ . Dr. Barros-Bailey then adjusted the average upward by adding 5% for Claimant's age, to arrive at a final disability rating of 45%.
- 48. Significantly, Dr. Barros-Bailey apparently misread the September 16, 2011 Hand Function Assessment by Virginia Taft who concluded that if Claimant were: "to return to work,

she would need to have primarily left handed work with a weight load on the <u>right</u> of less than 5# lifting, up to 20# with both hands, minimum repetition, and self paced." Exhibit 12, p. 147 (emphasis supplied). Instead, Dr. Barros-Bailey stated in her report:

The second [medical] opinion is the 9/16/11 functional capacity evaluation that estimates Trudy to lift no more than 5# with her <u>left</u> hand and to lift no more than 20# bilaterally. <u>Note that Trudy is right hand dominant and there were no limitations or restrictions indicated to the dominant upper extremity.</u> She would also need to have minimal repetition and self pacing on the left upper extremity.

Exhibit 8, p. 82 (emphasis supplied).

- 49. In addition to misunderstanding Taft's September 16, 2011 evaluation, Dr. Barros-Bailey was not provided, and thus did not consider, the functional capacity evaluation addendum authored by Ms. Taft on September 4, 2012. Therein Ms. Taft concluded that Claimant could not return to "her previous job or to a cashiering position which would require sustained repetitive movement and lifting." Exhibit 12, p. 144. Hence, Dr. Barros-Bailey did not fully consider Claimant's right hand lifting restriction or her restriction against repetitively using her right hand. Dr. Barros-Bailey was not provided, and thus did not consider Dr. McNulty's September 13, 2012 report wherein he agreed with Ms. Taft's conclusions.
- 50. Dr. Barros-Bailey acknowledged that her calculations did not take into account Claimant's full compensation package at the time of her accident, including IRA and medical benefits through H&J which are not provided by most employers in her labor market and which effectively increased her compensation by as much as 30%.
- 51. Daniel Brownell. Claimant called Daniel Brownell to testify at hearing. Mr. Brownell served as a vocational rehabilitation consultant for the Industrial Commission for 29 years in Coeur d'Alene, retiring in 2010. He is intimately familiar with the labor market in the Coeur d'Alene area, has performed thousands of job site evaluations, and has placed numerous

individuals in jobs within that area. Brownell testified that as of August 12, 2012, there were 6,531 unemployed workers in Kootenai County and that shortly prior to hearing Verizon had laid off another 200 employees.

- 52. Mr. Brownell testified that H&J is the fifth or sixth largest employer in Claimant's labor market and employs literally "hundreds and hundreds of employees and lots of facilities, lots of diversified work" including parking lot attendants. Transcript, p. 76, ll. 6-7. Yet Claimant was laid off due to lack of work as H&J had no work available for Claimant within her medical restrictions. Brownell also testified that Claimant's time of injury wage of \$9.75 per hour plus benefits should be evaluated with the understanding that her benefits at H&J added 20-30% to her compensation and that most jobs in her labor market do not provide those benefits. He affirmed that if those benefits were considered, her hourly wage would total \$12.00 to \$13.00 per hour. Transcript pp. 88-89.
- Mr. Brownell met with Claimant several times commencing in September 2011. He familiarized himself with her medical records, work history, educational background, injuries and resulting work limitations. He noted that Claimant struggled with reading and spelling in high school and in her attempt to complete a nursing program. She needed a special tutor to help her obtain her associates degree in drafting at North Idaho College because she was only reading at an eighth grade level. Brownell testified that Claimant's drafting and HVAC training are now outdated and not marketable. He opined that Claimant's extended period of unemployment subsequent to her 2008 industrial accident was a significant factor diminishing the likelihood of acquiring future employment. Brownell considered Dr. McNulty's opinion the most recent and up to date physician's opinion of Claimant's condition and restrictions. Brownell also relied upon the functional capacity evaluation performed in September 2011 by Virginia Taft and the

September 2012 addendum to that evaluation. He opined that Claimant's most significant physical limitation was her restriction from repetitively using her dominant right hand. Mr. Brownell opined that Claimant could not return to any of her prior occupations and that very rarely are there jobs in her labor market that would be regularly available and compatible with her physical limitations.

54. Mr. Brownell reviewed Dr. Barros Bailey's report and did not agree with Dr. Barros-Bailey's conclusion that Claimant could work as a cashier. Rather, Brownell cited Dr. McNulty's and Virginia Taft's conclusions and opined that Claimant could not work competitively as a cashier due to her 2008 industrial injury. He also opined that Claimant would not be competitive for work as a parking lot attendant or ticket taker due to her right hand limitations. Brownell concluded:

Based upon the claimant's entire case profile inclusive of age, education, work skills and current physical capabilities, there are extremely limited work opportunities. Also considered is the fact that these positions are filled and a competitive unemployed labor force of hundreds await the competition for a new job opening. Ms. Deon would also require a sympathetic employer who would accommodate all her physical limitations.

# Exhibit 6, p. 49.

55. Mr. Brownell opined that Claimant suffers permanent disability of 85 to 90% or greater, inclusive of permanent impairment. He opined that none of this disability was attributable to her cervical, shoulder, bilateral leg or right eye conditions. Transcript p. 108. He testified that Claimant had lost access to 90% of the labor market and that the 10% of the labor market which she could still potentially access was comprised of unskilled sedentary jobs for which she would have to compete with 6,500 other job-seekers to obtain. Brownell demonstrated keen familiarity with the extent of competition in Claimant's labor market. He concluded that Claimant was "barely" employable and needed "definitely a sympathetic

employer" in order to return to work. Transcript p. 95, ll. 10-11.

- 56. Further analysis of the vocational opinions. All of the vocational experts' disability rating opinions are helpful. However, none is entirely persuasive and without limitation.
- 57. Dr. Barros-Bailey's disability rating of 45% is unpersuasive because it arises from failure to consider Claimant's full compensation (including her IRA and health insurance) at H&J, a material misreading of Virginia Taft's 2011 hand functional capacity evaluation, failure to consider the 2012 addendum to that evaluation, failure to consider Dr. McNulty's 2012 report, and the erroneous assumption that Claimant could work competitively as a cashier.<sup>2</sup>
- 58. Dr. Collins' disability rating of 56% is not entirely persuasive because it fails to consider Claimant's full compensation package (including her IRA and health insurance) at H&J.
- 59. Rating an injured worker's permanent disability by averaging her estimated loss of labor market access and expected wage loss, as Drs. Collins and Barros-Bailey have done in the instant case, can provide a useful point of reference. However, the averaging method itself is not without conceptual and actual limitations. As the loss of labor market access becomes substantial, and the expected wage loss negligible, the results of the averaging method become less reliable in predicting actual disability. For illustration, as judged by the averaging method, a hypothetical minimum wage earner injured sufficiently to lose access to 99% of the labor market may theoretically suffer no expected wage loss if she can still perform any minimum wage job. Calculation of such a worker's disability according to the averaging method would produce a permanent disability rating of only 49.5% ([99% + 0%] ÷ 2) even though her actual probability

<sup>&</sup>lt;sup>2</sup> As previously noted, Dr. Barros-Bailey was never provided these 2012 reports.

of obtaining employment in the remaining 1% of an intensely competitive labor market may be as remote as winning the lottery. The averaging method fails to fully account for the reality that the two factors are not fully independent.

- 60. As the residual labor market becomes increasingly small, the disability rating obtained by the averaging method becomes increasingly skewed, especially in labor markets with high unemployment rates where competition for the remaining portion of suitable jobs will be fierce. This is exactly Claimant's situation herein. All of the vocational experts acknowledged that Claimant has lost access to a substantial portion of her labor market. Dr. Barros-Bailey noted that Claimant suffered only a minimal expected wage loss. Mr. Brownell testified that Claimant must compete with over 6,500 unemployed workers who are seeking jobs in Claimant's labor market.
- 61. Finally, neither Dr. Collins, Dr. Barros-Bailey, nor Mr. Brownell included the limitations/restrictions related to Claimant's preexisting impairments, totaling 13%, in calculating Claimant's disability. In Mr. Brownell's case, he specifically testified that in performing his evaluation he considered Claimant's preexisting impairments, but concluded that none of Claimant's 85% 90% disability is attributable to those preexisting impairments. (Transcript 107/15 108/22)
- 62. Similarly, Dr. Collins was aware of Claimant's prior injuries, noting in her report that Claimant's pre-existing impairments did limit Claimant in some activities. (See Claimant's exhibit 7 at 61). However, when it came to evaluating Claimant's disability, it appears that Dr. Collins considered only those limitations/restrictions related to the subject accident. It is unclear whether Dr. Collins felt that Claimant's pre-existing impairments and related limitations were vocationally significant in light of the limitations stemming from the subject accident.

- 63. Like Dr. Collins, Dr. Barros-Bailey was aware of Claimant's pre-existing impairments as well as the fact that these impairments permanently affected Claimant's function to some extent. However, in evaluating Claimant's disability, it appears that Dr. Barros-Bailey considered only the limitations/restrictions stemming from the subject accident. (See Claimant's exhibit 8). At hearing she explained that she did not include consideration of pre-existing limitations in her report because those limitations were never quantified. (See transcript 130-131, 135).
- 64. Having considered all of the vocational experts' permanent disability ratings, the Commission declines to fully adopt any of the offered ratings. The Commission is the ultimate evaluator of disability.
- 65. Claimant has unsuccessfully looked for work in the Coeur d'Alene area on herown and through the unemployment office. She did not fully avail herself of Beth Grigg's assistance and failed to follow-up on job leads Grigg provided. Claimant's own job search, which she testified included submitting a "couple dozen" applications, is not consistent with a diligent and earnest effort to find employment. There is no indication that Brownell performed an independent job search specifically on Claimant's behalf. However, Brownell's conclusion—that Claimant would need a sympathetic employer to accommodate all of her limitations such that she could find employment—is amply supported by the record as a whole. Brownell testified that Claimant would not be competitive for ticket taker positions, parking lot attendant positions, or the like. He also persuasively testified that Claimant's time of injury Employer is the fifth or sixth largest employer in North Idaho, employing literally hundreds of workers, and that if H&J could not accommodate Claimant's limitations, Claimant was unlikely to find an employer that would—except for a sympathetic employer.

- 66. Based on Claimant's permanent impairments totaling 17% of the whole person, her permanent physical restrictions, particularly those to her dominant right upper extremity, and considering all of her medical and non-medical factors, including her age of 56 at the time of the industrial accident, limited formal education, reading challenges, inability to return to previous positions, outdated specialized training, and limited transferable skills, Claimant's ability to compete in the open labor market and engage in regular gainful activity after her 2008 industrial accident has been greatly reduced. The Commission concludes that Claimant has established a permanent disability of 85%, inclusive of her 17% whole person impairment.
- 67. Odd-lot. A claimant who is not 100% permanently disabled may prove total permanent disability by establishing he 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). A claimant may satisfy his burden of proof and 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. <u>Lethrud v. Industrial Special Indemnity Fund</u>, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

- 68. In the present case, Defendants assert that Claimant is employable and not an odd-lot worker. Claimant has not demonstrated that she unsuccessfully attempted other types of employment. As noted above, Claimant has testified she submitted a "couple dozen" applications and has been registered with job service for approximately four years. This suggests a modest unsuccessful work search. However, far more persuasive, is Mr. Brownell's testimony that it would require a sympathetic employer to accommodate Claimant's limitations in order for her to obtain employment. As concluded above, Brownell's opinion in this regard is persuasive and tantamount to a showing that efforts to find suitable work regularly and continuously available in the open labor market would be futile. Claimant has established a prima facie case that she is an odd-lot worker, totally and permanently disabled, under the Lethrud test.
- 69. Once a claimant establishes a prima facie odd-lot case, the burden shifts to defendants "to show that some kind of suitable work is regularly and continuously available to the claimant." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). Defendants must prove 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 [defendants] 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).

70. In the present case, Defendants through Dr. Barros-Bailey identified only one type of job—cashier—that she believed was suitable for Claimant given her physical restrictions.

Mr. Brownell testified convincingly that Claimant is not competitive for a cashier position given the restrictions enumerated by Virginia Taft and agreed upon by Dr. McNulty.

- 71. Defendants have not shown that there is an actual job regularly and continuously available which Claimant can perform and at which she has a reasonable opportunity to be employed. Claimant has proven that she is totally and permanently disabled pursuant to the odd-lot doctrine commencing November 18, 2009, the date Dr. Stevens found her medically stable from her 2008 industrial injuries.
- 72. **Idaho Code § 72-406(1) apportionment.** Inasmuch as Claimant is totally and permanently disabled, the issue of apportionment pursuant to Idaho Code § 72-406(1) is moot.
- 73. <u>Carey</u> apportionment. The next issue is apportionment pursuant to the <u>Carey</u> formula. Although Claimant settled with ISIF prior to hearing, a determination of ISIF's liability pursuant to Idaho Code § 72-332 must be made before the extent of Defendants' liability can be determined pursuant to <u>Carey v. Clearwater County Road Department</u>, 107 Idaho 109, 686 P.2d 54, (1984).
- 74. Idaho Code § 72-332(1) provides in pertinent part that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his income benefits out of the ISIF account.
- 75. Idaho Code § 72-332(2) further provides that "permanent physical impairment" is as defined in Idaho Code § 72-422, provided, however, as used in this section such impairment

must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the claimant should become unemployed. This shall be interpreted subjectively as to the particular employee involved; however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

- 76. In <u>Dumaw v. J. L. Norton Logging</u>, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court identified four requirements a claimant must meet to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was indeed a pre-existing impairment; (2) whether that impairment was manifest; (3) whether the impairment was a subjective hindrance to employment; and (4) whether the impairment in any way combined with the subsequent injury to cause total disability. <u>Dumaw</u>, 118 Idaho at 155, 795 P.2d at 317.
- 77. Pre-existing, manifest impairments. The pre-existing physical impairments at issue herein are those to Claimant's neck and shoulders (6%), and legs (7%), prior to her 2008 industrial accident. There is no dispute that her neck and shoulder, and her leg conditions existed and were manifest in 1990 and 2006 respectively. Claimant's neck, shoulder, and leg impairments constitute pre-existing conditions for purposes of Idaho Code § 72-332 because each preexisted and was manifest prior to her 2008 industrial accident. The first and second prongs of the Dumaw test have been met.
- 78. <u>Hindrance or obstacle</u>. The third prong of the <u>Dumaw</u> test considers "whether or not the pre-existing condition constituted a hindrance or obstacle to employment for the

particular claimant." Archer v. Bonners Ferry Datsun, 117 Idaho 166, 172, 786 P.2d 557, 563 (1990).

- 79. Claimant underwent cervical and bilateral first rib resection surgeries shortly after suffering her 1990 assault injury. Thereafter she changed employment, obtained drafting training, and commenced working in a lighter industry. Mr. Brownell acknowledged that Claimant's job change was necessitated by her cervical limitations. Her pre-existing cervical condition thus constituted a hindrance or obstacle to employment.
- 80. Claimant's pre-existing leg condition limited her walking ability. She testified that even after recovering from the Rottweiler attack, she could only walk approximately one-half mile due to the pain in her legs. Dr. McNulty opined that her leg condition limited her ladder and stair climbing ability.
- 81. The Commission finds that Claimant's pre-existing neck, shoulder, and leg impairments constituted a hindrance to her employment. The third prong of the <u>Dumaw</u> test is met.
- 623 (1993). Significantly, to satisfy the "combines" element, the test is whether, but for the industrial injury, the worker would have been totally and permanently disabled immediately following the occurrence of that injury. This test "encompasses both the combination scenario where each element contributes to the total disability, and the case where the subsequent injury accelerates and aggravates the pre-existing impairment." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Significantly, ISIF is not liable where the last industrial injury, itself, renders a worker totally and permanently disabled. Selzler v. State of Idaho, Industrial Special Indemnity Fund, 124 Idaho 144, 857 P.2d 623 (1993).

- 83. The record in the instant case does not establish that Claimant's pre-existing cervical and shoulder condition combines with her 2008 injuries to render her totally and permanently disabled. To the contrary, the upper extremity restrictions arising from Claimant's 2008 industrial accident entirely supersede those resulting from her cervical and shoulder condition.
- 84. The record contains some evidence that Claimant's pre-existing leg impairment contributes to her total and permanent disability. As noted, her pre-existing leg condition limited her standing and walking tolerances and Dr. McNulty opined that her leg condition precluded her from working on ladders or frequently using stairs. However, Mr. Brownell persuasively testified that Claimant's right upper extremity condition alone precluded her from competing in the open labor market and relegated her to employment only by a sympathetic employer. Dr. Barros-Bailey acknowledged that upper extremity limitations are among the most disabling conditions. Neither Dr. Collins nor Dr. Barros-Bailey opined that Claimant's pre-existing leg condition combined with her upper extremity condition to produce disability.
- 85. The record does not establish that Claimant's pre-existing leg condition combined with her 2008 industrial accident to render her totally and permanently disabled. Rather, Claimant's right upper extremity condition alone renders her totally and permanently disabled. Thus apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984), is not appropriate.
- 86. **Medical care.** The final issue is Claimant's entitlement to medical care. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician

or needed immediately after an injury or manifestation of an occupational disease, and for a

reasonable time thereafter. If the employer fails to provide the same, the injured employee may

do so at the expense of the employer. Of course an employer is only obligated to provide

medical treatment necessitated by the industrial accident, and is not responsible for medical

treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130

Idaho 602, 944 P.2d 1365 (1997). A claimant must provide medical testimony that supports a

claim for compensation to a reasonable degree of medical probability. Langley v. State,

Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995).

87. Claimant herein requests medical benefits for reimbursement for a functional

capacity evaluation recommended by Dr. Greendyke and performed September 16, 2011, by

Virginia Taft. When Defendants refused to provide the evaluation, Claimant, at the

recommendation of her attorney, had the evaluation performed at her own expense. Defendants

in their briefing do not expressly contest Claimant's request for reimbursement. The evaluation

was recommended by her then treating physician and is compensable.

88. Claimant has proven her entitlement to reimbursement for her functional capacity

evaluation by Virginia Taft.

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### CONCLUSIONS OF LAW AND ORDER

- 1. Claimant has proven she suffers whole person permanent impairment of 17%, including 4% whole person impairment due to her 2008 industrial accident.
- 2. Claimant has proven she suffers permanent disability of 85% inclusive of impairment, and has proven that she is an odd-lot worker, totally and permanently disabled under the <u>Lethrud</u> test.
  - 3. Apportionment pursuant to Idaho Code 72-406 is moot.
- 4. Apportionment pursuant to <u>Carey v. Clearwater County Road Department</u>, 107 Idaho 109, 686 P.2d 54 (1984), is not appropriate.
- 5. Claimant has proven her entitlement to reimbursement for her functional capacity evaluation by Virginia Taft.
- 6. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 3rd day of May, 2013.

INDUSTRIAL COMMISSION

Thomas P. Baskin, Chairman

R.D. Maynard, Commissioner

Participated but did not sign

Thomas E. Limbaugh, Commissioner

ATTEST:

Assistant Commission Secretar

### CERTIFICATE OF SERVICE

I hereby certify that on the 3<sup>rd</sup> day of Wou, 2013, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

STEVEN J NEMEC 1626 LINCOLN WAY COEUR D'ALENE ID 83814

E SCOTT HARMON PO BOX 6358 BOISE ID 83707-6358

Kenna andrus

#### BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRUDY DEON,

Claimant,

v.

H & J, INC., d/b/a BEST WESTERN COEUR D'ALENE INN & CONFERENCE CENTER,

Employer,

and

LIBERTY NORTHWEST INSURANCE CORPORATION,

Surety, Defendants. IC 2007-005950 IC 2008-032836

### NOTICE OF RECONSIDERATION

FILED

MAY - 3 :

INDUSTRIAL COMMISSION

The Commission hereby notifies the parties of its decision to reconsider, on its own motion, the Findings of Fact, Conclusions of Law and Order, per the provisions of I.C. § 72-718. By way of background, on or about May 3, 2013, the Commission issued its Findings of Fact, Conclusions of Law and Order in this matter. The decision, as originally drafted and proposed by Referee Taylor was not adopted in its entirety by the Commission due to the Referee's treatment of the vocational opinions offered by Nancy Collins, Mary Barros-Bailey and Dan Brownell. The Commission revised the proposed opinion to give different treatment to how Claimant's pre-existing permanent physical impairment of 13% of the whole person affected his permanent disability. However, the Commission adopted Referee Taylor's ultimate conclusion that Claimant is totally and permanently disabled as a result of the subject accident alone, and that Employer therefore bears full responsibility for Claimant's total and permanent disability.

As of the date of hearing, Referee Taylor was aware that Claimant had reached an independent settlement with the ISIF, which settlement had been approved by the Industrial Commission. However, it does not appear that Referee Taylor was aware of the substance of that settlement and a copy of the settlement was not made an exhibit to the proceeding against Employer/Surety. Nor do we have any reason to believe that Employer/Surety has any independent knowledge of the terms and conditions of Claimant's settlement with the ISIF.

However, having reviewed and approved the Claimant's settlement with the ISIF, as guided by the court's recent decision in Wernecke v. St. Maries Joint School Dist. No. 401, 147 Idaho 277, 207 P.3d 1008 (2009), the Commission is aware of the terms and conditions of that The conclusions reached in connection with Claimant's claim against settlement. Employer/Surety implicate the need to consider the impact of the settlement with the ISIF on the award made against Employer/Surety. Essentially, the question is how or whether Claimant's settlement with the ISIF, a copy of which is attached hereto as exhibit A, affects Employer/Surety's obligation to pay total and permanent disability benefits to Claimant as anticipated by the Findings of Fact, Conclusions of Law and Order. Does Claimant's settlement with the ISIF have some collateral estoppel effect against Claimant? See, e.g., Jackman v. State Industrial Special Indemnity Fund, 129 Idaho 689, 931 P.2d 1207 (1997). In particular, we note that the subject lump sum settlement agreement specifies that the parties to that agreement stipulated to a Carey apportionment of 60/40, with ISIF accepting 60% responsibility for Claimant's total and permanent disability for purposes of the settlement. Of course, Employer/Surety is not a party to that settlement agreement, so it cannot be bound by that stipulation. However, the question that interests the Commission is whether the stipulation binds Claimant in connection with her prosecution of the claim against Employer/Surety.

Under Idaho Code § 72-718, a decision of the Commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated; provided, within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision. In any such event, the decision shall be final upon denial of a motion for rehearing or reconsideration, or the filing of the decision on rehearing or reconsideration.

The Commission may reverse its decision upon a motion for reconsideration, or rehearing of the decision in question, based on the arguments presented, or upon its own motion provided that it acts within the time frame established in Idaho Code § 72-718. *See*, *Dennis v. School District No. 91*, 135 Idaho 94, 15 P.3d 329 (2000) (*citing Kindred v. Amalgamated Sugar Co.*, 114 Idaho 284, 756 P.2d 410 (1988)). However, in taking this action, it is not our intention to foreclose either of the parties from themselves pursuing a motion for reconsideration under I.C. § 72-718 for any other issues they believe need to be reconsidered by the Commission.

Because the issue that is of concern to us could not ripen in the absence of a particular outcome in Claimant's case against Employer/Surety, and since the issue is not among those originally noticed for hearing, the Commission invites the parties to submit additional briefing on the issue for the Commission to consider before determining whether the Findings of Fact, Conclusions of Law and Order should be reconsidered based on the approved lump sum settlement agreement between Claimant and the ISIF. The Commission will set a telephone conference in the immediate future to discuss with the parties how best to proceed.

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## **ORDER**

Within ten (10) days, the parties are directed to submit available dates and times for such				
conference.				
DATED this 3rd day of May	, 2013.			
	INDUSTRIAL COMMISSION			
	Thomas P. Baskin, Chairman			
	R.D. Maynard, Commissioner			
	Thomas E. Limbaugh, Commissioner			
ATTEST: COMMISSION Secretary				
CERTIFICATE O	F SERVICE			
I hereby certify that on the 3 <sup>fd</sup> day of copy of the foregoing <b>NOTICE OF RECONSI</b> ! States mail upon each of the following:	May , 2013, a true and correct <b>DERATION</b> was served by regular United			
STEVEN J NEMEC 1626 LINCOLN WAY COEUR D'ALENE ID 83814				
E SCOTT HARMON PO BOX 6358 BOISE ID 83707-6358				

Kenna andrus

Thomas W. Callery, ISBN 2292
JONES, BROWER & CALLERY, P.L.L.C.
1304 Idaho Street
P. O. Box 854
Lewiston, Idaho 83501
(208) 743-3591
Facsimile: (208) 746-9553

RECEIVED INDUSTRIAL COMMISSION

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INDUSTRIAL COMMISSION

raesimie. (208) 740-3333

tcallery@lewiston.com

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRUDY DEON,

Plaintiff.

vs.

HAGADONE HOSPITALITY,

Employer,

LIBERTY NORTHWEST INSURANCE CO.,

Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,

Defendants.

Case No. I.C. 07-005950 I.C. 08-032836

STIPULATION AND AGREEMENT OF LUMP SUM DISCHARGE AND ORDER OF APPROVAL AND DISCHARGE

by and between TRUDY DEON, hereinafter referred to as Claimant, and THE STATE OF

IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, hereinafter referred to as the Fund;

#### WITNESSETH:

WHEREAS, Claimant has filed a claim for benefits under the Worker's Compensation laws of the State of Idaho, being Case Nos. I.C. 07-005950 and I.C. 08-032836.

WHEREAS, said case includes a claim against the Fund filed by the Claimant contending that prior physical impairments consisting of a cervical spine injury and a left lower extremity injury that existed prior to October 4, 2008, when the Claimant was injured when her right glove got caught in an auger, resulting in a twisting injury to her right hand and wrist, which said injuries combined resulting in Claimant being totally and permanently disabled.

WHEREAS, it is the desire of the Claimant and the Fund to finally compromise and settle the dispute between the Fund and Claimant, subject to the approval of the Commission.

WHEREAS, the Claimant suffered from a cervical spine injury and a left lower extremity injury prior to the industrial accident that occurred on October 4, 2008.

WHEREAS, the Claimant incurred her left lower extremity injury secondary to a dog bite in 2006. According to Dr. McNulty, the Claimant suffered a 7% whole person impairment for loss of the plantar flexion strength in her lower left extremity.

WHEREAS, the Claimant entered into a lump sum agreement in a previous claim for benefits under the Worker's Compensation laws of the State of Idaho, being Case No. I.C. 88-619272 and Case No. I.C. 90-704093, awarding the Claimant a 6% whole person impairment for her industrial accidents of 1988 and 1990 based on an independent medical evaluation. Other medical providers, however, including Dr. Steven Sears, M.D., indicated that the Claimant could return to work with no restrictions and had no ratable impairment for her cervical condition.

WHEREAS, the Claimant was treated conservatively for the injury to her ring and little finger consistent with a pip chronic joint sprain of the right hand. The Claimant continues to suffer from chronic right hand pain and dysfunction. She received a 6% impairment of the ring finger, and a 6% impairment of the little finger, which converts to a 3% upper extremity impairment and further converts to a 2% whole person impairment for the injury of October 4, 2008 from Dr. John McNulty, M.D.

WHEREAS, the Claimant underwent an independent medical evaluation by Dr. J. Craig Stevens, M.D., on November 18, 2009, at the request of the Surety. Dr. Stevens was of the opinion the Claimant suffered a 2% upper extremity impairment apportioned to the injury of October 4, 2008, which converts to a 1% whole person impairment.

WHEREAS, the Claimant is currently 57 years of age with a date of birth of September 9, 1955, and is currently a resident of Coeur d'Alene, Idaho.

WHEREAS, the Claimant has been employed as a forest service worker, short order relief cook, certified nurse assistant, personal care attendant, draftsperson, and an HVAC technician during her lifetime.

WHEREAS, the Claimant is a high school graduate. She has an Associate's Degree in drafting from North Idaho College, as well as a certificate in HVAC work from North Idaho College.

WHEREAS, the Fund and the Claimant stipulate and agree that Claimant is totally and permanently disabled based upon the combined effects of the Claimant's pre-existing cervical spine injury and left lower extremity injury, combining with the injury to her right hand and wrist.

WHEREAS, based upon the medical records, the Claimant and the Fund stipulate that a 60/40 Carey Formula apportionment with the Fund being responsible for 60% of the Claimant's total and permanent disability is appropriate in this case. This Carey Formula apportionment is based upon the impairment for Claimant's cervical spine injury and left lower extremity, and the significant impairment to Claimant's right hand and wrist as a result of the October 4, 2008, accident. It further takes into account the conflicting evidence concerning the Claimant's cervical impairment and her ability to return to medium level work as an HVAC technician after her cervical injury and lower extremity injury.

WHEREAS, the Claimant was deemed to be at maximum medical improvement in November 2009.

WHEREAS, it is in the best interest of justice and of each and all the parties hereto that the above claim be fully, finally and forever settled, satisfied and discharged upon a lump sum payment to the Claimant in the sum of Seventy Thousand and no/100 Dollars (\$70,000.00) to be paid by the Fund.

WHEREAS, the parties acknowledge and agree that the \$70,000.00 lump sum to be paid to Claimant under the terms of this agreement constitutes compensation on a claim of total and permanent disability that will affect Claimant for the rest of her life.

WHEREAS, the Claimant has financial needs that currently exist that would be satisfied by a lump sum payment as opposed to statutory monthly payments.

WHEREAS, the Claimant has had a compromised health condition, including a cervical spine injury, left lower extremity injury and right hand and wrist injury, it is reasonable for the Claimant to forego statutory annuity payments at this time in exchange for the certainty of a lump sum payment.

WHEREAS, the Claimant is accepting the \$70,000.00 cash lump sum settlement due to her personal circumstances rather than a monthly annuity. This decision is based upon the Claimant's current age of 57 years. Further, the Claimant's date of stability being November 2009 would result in Claimant not being entitled to full statutory benefits from the Fund based on a 60/40 Carey apportionment until November 2013, at which time, the Claimant would be 58 years of age.

WHEREAS, the decision to accept a lump sum, as opposed to a monthly annuity, has been made after consultation by Claimant with her legal counsel, including consideration of the Claimant's needs for immediate cash and that monthly annuity payments cease upon death without survivor benefits.

WHEREAS, by law, the Fund would have no liability unless the Claimant was totally and permanently disabled.

WHEREAS, the Fund and the Claimant admit and agree that the Claimant is totally and permanently disabled.

WHEREAS, it is the desire of the parties hereto to fully and finally compromise and settle said dispute subject to the approval of the Commission.

NOW THEREFORE, for the reasons hereinabove stated, and in consideration of the mutual covenants and conditions contained herein, IT IS AGREED by and between the parties hereto as follows:

1. It is in the best interests of justice and of each and all of the parties hereto that the above-entitled claim be fully, finally and forever settled, satisfied and discharged upon a lump sum payment to Claimant in the sum of \$70,000.00, to be paid by the Fund.

2. In consideration of the \$70,000.00 payment by the Fund, the Claimant fully releases the Fund from any further liability of any kind for past injuries and conditions, relinquishing any right to, in the future, again make claim against the Fund as a result of past, present and future accidents, injuries, illnesses, diseases, or conditions of any kind.

3. It is agreed that all damages, disability, loss, expense and injury in any way resulting from or related to the industrial accident involved in this matter, foreseen and recognized or not, and whether the same have accrued or may hereafter accrue, are included in the above-captioned claim and are encompassed in and fully and finally settled and discharged by this agreement.

4. The parties stipulate that the Commission shall, on and by approval hereof, be deemed to adjudicate said accident, and resultant impairment industrial in nature or origin under covered employment by Employer, as provided by the Workers' Compensation laws of the State of Idaho.

5. Claimant does indemnify and agree to save the Fund harmless from and against any further claim or loss of any and every kind arising out of or related to said industrial accident and any resultant loss, damage or injury, including any and all claims in any way related to Claimant's condition.

6. It is specifically understood and agreed that the Fund is fully, finally and forever released of and from any and all liability or claims of any nature whatever, whether now existing or hereafter discovered, in any way relating to Claimant's condition or the treatment thereof or any disability resulting therefrom.

7. Claimant is represented herein and has been counseled by STEPHEN J. NEMEC, whose name shall be included as a payee on any settlement draft, same to be delivered to said attorney by the Fund.

8. Claimant's obligations to pay attorney fees and reimburse her attorney for costs advanced arise from a written Contingent Fee Agreement. From the lump sum payment to be paid pursuant to this Agreement, the Claimant and her attorney represent that the sum of \$20,262.71 shall be paid to Claimant's attorney as fees and costs in accordance with their agreement, and that the Claimant, after deduction of attorney fees and costs of litigation, shall receive the net sum of \$49,737.29.

9. The parties acknowledge and agree that the \$70,000.00 lump sum to be paid to Claimant under the terms of this agreement constitutes compensation for total and permanent disability that will affect Claimant the rest of her life. Claimant's remaining life expectancy is 27 years or 324 months according to the 2007 Social Security Actuarial Life Table.

Therefore, even though paid in a lump sum, the Claimant's net benefits after deduction of attorney fees in the amount of \$17,500.00 and costs in the amount of \$2,762.61 shall be considered to be \$153.51 a month for 324 months beginning December 1, 2012.

10. Upon the Commission approving this agreement and excepting only payment of said Lump Sum by the Fund as aforesaid, the Fund shall be, and by these presents is fully, finally and forever discharged and released of and from any and all liability on account of the alleged industrial accident of Claimant.

11. The terms of this agreement shall be binding upon all of the above parties, their heirs, representatives, successors and assigns.

- 12. All parties waive the right of appeal or to re-open these proceedings as a part of the consideration of and for this Agreement. The parties hereby specifically and expressly agree, as a part of the consideration herein, that all parties waive the right to reconsideration of an award otherwise provided under the Workers' Compensation Laws of Idaho, §72-718, Idaho Code.
- 13. All portions of this instrument constitute binding covenants of the parties, and no portion is a mere recital.
- Order of Discharge pursuant hereto, and the Fund does join in said petition and stipulates that it should be granted. Claimant acknowledges that she has, with the assistance of her counsel, carefully read this Agreement and legal instrument in its entirety, understands its contents and has executed the same knowing that this agreement forever concludes and fully and finally disposes of any and all claims of every kind and character she has or may have against the Fund on account of the industrial accident. Claimant further understands that this agreement forever precludes Claimant from filing any future claims against the Fund on account of any future accidents, injuries or diseases and that these proceedings are concluded and forever closed by reason hereof, subject only to Commission approval and Order, as aforesaid.
- 15. Acceptance of this Agreement by Claimant according to the terms and conditions stated herein, shall fully and completely discharge the Fund from liability for any claims forever, regardless of whether such claims arise from the industrial accident which is the subject of this cause, or any accidents, injuries, diseases, impairments, disabilities or infirmities existing prior hereto, or hereafter arising.

DATED this <u>/9</u> day of <u>Oct</u>, 2012.

APPROVED:

TRUDY/DEON, Claimant

JAMES F. KILE, Manager Industrial Special Indemnity Fund STEPHEN J. NEMEC, Attorney for Claimant

THOMAS W. CALLERY, Attorney for Industrial Special Indemnity Fund

# ORDER OF APPROVAL AND OF DISCHARGE UPON LUMP SUM PAYMENT

The foregoing Stipulation and Agreement having duly and regularly come before this Commission, and it appearing that the interests of justice and the Claimant, TRUDY DEON, are and will be served by approving said Agreement and granting the Order of Discharge as prayed for,

NOW THEREFORE, said foregoing Stipulation and Agreement shall be, and the same is, hereby APPROVED.

Further, said Petition shall be and hereby is GRANTED, and the above-entitled proceedings are DISMISSED WITH PREJUDICE.

DATED this 6 day of NUSTING 2012.

INDUSTRIAL COMMISSION

Member

Member

Assistant Secre

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8 day of NUCLOS, 2012, I caused a true and correct copy of the foregoing to be served upon:

THOMAS W. CALLERY	4	U. S. Mail
JONES, BROWER & CALLERY, P.L.L.C.		Hand Delivered
P.O. BOX 854.		Facsimile
LEWISTON, ID 83501	*	·
STEPHEN J. NEMEC JAMES, VERNON & WEEKS, P.A. 1626 LINCOLN WAY COEUR D'ALENE, ID 83814	0	U.S. Mail, Postage Prepaid Hand Delivered Facsimile
JAMES F. KILE INDUSTRIAL SPECIAL INDEMNITY FUND P.O. BOX 83720 BOISE, ID 83720-7901		U.S. Mail Hand Delivered Facsimile

by depositing the same in the United States mail, postage prepaid, addressed to the above-named, the last known address as set forth above.

JAMES, VERNON & WEEKS, P.A. 1626 Lincoln Way
Coeur d'Alene, ID 83814
Telephone No. 208-667-0683
Facsimile No. 208-664-1684

Stephen J. Nemec ISBA # 7591 Attorney for Claimant

## BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Claimant,
vs.

H&J INC., d/b/a BEST WESTERN COEUR
D' ALENE INN & CONFERENCE
CENTER,

Employer,
and

LIBERTY NORTHWEST INSURANCE
CO.,

Surety,

Defendants.

CASE NO.: 2007-005950 2008-032836

MOTION FOR MODIFICATION OF ISIF SETTLEMENT AGREEMENT PURSUANT TO I.C. §72-719(3)

COMES NOW, Claimant, by and through her attorney of record, Stephen J. Nemec of the firm James, Vernon & Weeks, P.A. and hereby requests that the ISIF settlement agreement approved by the Commission on November 8, 2012 be modified pursuant to I.C. §72-719(3) on the grounds of manifest injustice.

MOTION FOR MODIFICATION OF ISIF SETTLEMENT AGREEMENT PURSUANT TO I.C. §72-719(3) -1



JAMES, VERNON & WEEKS, P.A. 1626 Lincoln Way Coeur d'Alene, ID 83814 Telephone No. 208-667-0683 Facsimile No. 208-664-1684

Stephen J. Nemec ISBA # 7591 Attorney for Claimant ZOI3 JUL 29 P 12: 22
INDUSTRIAL COMMISSION

## BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRUDY DEON,

Claimant,

VS.

H&J INC., d/b/a BEST WESTERN COEUR D' ALENE INN & CONFERENCE CENTER,

Employer,

and

LIBERTY NORTHWEST INSURANCE CO.,

Surety,

Defendants.

CASE NO.: 2007-005950 2008-032836

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#### I. SUMMARY

On May 3, 2013 the Industrial Commission concluded that the Claimant was totally and permanently disabled under the *Lethrud* test. The Commission further stated that apportionment pursuant to I.C. §72-406 and the *Carey* formula was inappropriate which in turn rendered the employer and surety ("defendants") 100% liable for the Claimant's benefits. On May 3, 2013, the Commission also entered a notice of reconsideration which appeared to implicate the affirmative defense of collateral estoppel. Following a teleconference on May 29, 2013 setting a briefing schedule, both parties submitted opening and reply briefs in June and July of 2013 respectively.

In reviewing the defendants' briefing following the notice of reconsideration, it would appear that the defendants seek to profit from the Claimant's settlement with the ISIF and pay the Claimant a small fraction of her damages stemming from the industrial accident. As neither the ISIF nor the Claimant intended the ISIF settlement to have any collateral estoppel effect with respect to the defendants, the Commission is free to modify the ISIF settlement in the interests of correcting a manifest injustice should the Commission be inclined to accept the defendants arguments. Modifying the ISIF settlement agreement will render the prior briefing following the notice of reconsideration moot.

## II. <u>DISCUSSION</u>

# A. THE ISIF SETTLEMENT AGREEMENT IS SUBJECT TO MODIFICATION PURSUANT TO I.C. §72-719(3) TO CORRECT A MANIFEST INJUSTICE

Idaho Code provides for the modification of a settlement agreement approved by the Industrial Commission by means of I.C. §72-719(3). *See Sines v. Appel*, 103 Idaho, 9, 12, 644 P. 2d 331, 334 (1982). Specifically, I.C. §72-719(3) states as follows:

The commission, on its own motion at any time within five (5) years of the date of accident causing the injury or date of first manifestation of an occupational disease, may review a case in order to correct a manifest injustice. *Id.* 

"Manifest" has been defined to mean: capable of being easily understood or recognized at once by the mind; not obscure; obvious. Webster's Third New International Dictionary, 1967. Sines v. Appel, 103 Idaho, 9, 13, 644 P. 2d 331, 335 (1982). "Injustice" has been defined to mean: absence of justice, violation of right or of the rights of another; iniquity, unfairness; an unjust act or deed; wrong. Webster's Third New International Dictionary, 1967. Id. The Court has held that the Commission may review any order to correct a manifest injustice, even when a purported manifest injustice is brought to the Commission's attention by either party or a third party. Page v. McCain Foods, Inc., 145 Idaho 302, 179 P.3d 265 (2008).

In this case, the defendants will owe the Claimant approximately \$56,086.26 in total permanent disability benefits for the period of time from November 18, 2009 thru August 31, 2013. (See Torelli Report, pg. 3). From September 1, 2013 through the remainder of Claimant's life expectancy in February 28, 2039, Claimant will be entitled to approximately \$587,923.08 in future total permanent disability benefits. *Id.* at 6. If the Commission determines that the ISIF settlement agreement has a collateral estoppel impact limiting the amount the defendants owe, the result will be a profit of over \$500,000.00 to the defendants.

The defendants have not provided any consideration to the Claimant for this windfall they seek to obtain. Should the Commission accept the untimely affirmative defenses now being raised for the first time following an adjudication on the merits, the Claimant will be left to spend the rest of her life subsisting on a net income of **\$820.40/month** in Social Security benefits. (Cl. Ex. 2, pg. 26). This is precisely the type of situation I.C. §72-719(3) was created to remedy.

### III. CONCLUSION

To prevent a manifest injustice the ISIF settlement agreement should be modified to delete any reference to the *Carey* formula and add a paragraph stating that:

The Industrial Commission recognizes that the purpose of this settlement agreement is to resolve a disputed claim between the Claimant and the ISIF. This Order is not intended to have res judicata or collateral estoppel effect benefiting the employer or surety.

In *Red Lion Motor Inn Riverside v. Industrial Special Indemnity Fund*, 122 Idaho 464, 466, 835 P.2d 1275, 1277 (1992) an agreement with similar language was approved by the Commission, and should be approved here as well. Modifying the ISIF settlement agreement in this fashion will allow liability to rest with the defendants where it belongs. Should the Commission determine that additional language be added/redacted to the ISIF settlement agreement to prevent a manifest injustice, the Commission is urged to do so.

DATED this 26<sup>th</sup> day of July, 2013.

JAMES, VERNON & WEEKS, P.A.

Stephen J. Nemec Attorney for Claimant

## CERTIFICATE OF SERVICE

	I HE	EREB	Y CER	ΓΙFY that o	on the2	26 <sup>th</sup>	day o	of	J	uly	,	2013	a	true
and	correct	copy	of the	foregoing	document	was	served	upon	the	following	indiv	viduals	by	the
met	hod indi	cated	below:											

Fax	: 800-972-3213	
	eph Wager	
B)	rmon & Day	
B.	). Box 6358	
Boi	se, ID 83707	
	Mailed	Mailed
	By Hand	By Hand
	Overnight Mail	Overnight Mail
X	Fax	Fax

2086642

JAMES, VERNON & WEEKS, P.A. 1626 Lincoln Way Coeur d'Alene, ID 83814 Phone: 208-667-0683

Fax: 208-664-1684

Stephen Nemec ISB # 7591 Attorney for Claimant

## BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRUDY DEON,
Claimant, vs.
H&J INC., d/b/a BEST WESTERN COEUR D ALENE INN & CONFERENCE CENTER,
Employer, and
LIBERTY NORTHWEST INSURANCE CO.,
Surety,
Defendants.

CASE NO.: 2007-005950 2008-032836

AFFIDAVIT IN SUPPORT OF MOTION TO MODIFY ISIF SETTLEMENT AGREEMENT PURSUANT TO I.C. §72-719(3)

> JUL 2 6 2013 INDUSTRIAL COMMISSION

County of Kootenai	)
	) s:
State of Idaho	)

- I, Stephen J. Nemec, being first duly sworn under oath, deposes and says:
- 1.) I am the Attorney of Record for the above-named Claimant and have personal knowledge of the facts stated in this Affidavit.
- 2.) Attached hereto as Exhibit 1 is a true and correct copy of the report of Dr. Torelli examining the time loss benefits owed to the Claimant.
- 3.) Further your affiant sayeth naught.

AFFIDAVIT IN SUPPORT OF MOTION TO MODIFY ISIF SETTLEMENT PURSUANT TO I.C. \$72-719(3)-1



JAMES, VERNON & WEEKS, P.A.

1626 Lincoln Way

Coeur d'Alene, ID 83814 Phone: 208-667-0683

Fax: 208-664-1684

County of Kootenai

State of Idaho

Stephen Nemec ISB # 7591 Attorney for Claimant 2013 JUL 29 P 12: 22

RECEIVED INDUSTRIAL COMMISSION

## BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRUDY DEON,
Claimant,
VS.
H&J INC., d/b/a BEST WESTERN COEUR D' ALENE INN & CONFERENCE CENTER,
Employer,
anu
LIBERTY NORTHWEST INSURANCE CO.,
Surety,
Defendants.

) ss

CASE NO.: 2007-005950 2008-032836

AFFIDAVIT IN SUPPORT OF MOTION TO MODIFY ISIF SETTLEMENT AGREEMENT PURSUANT TO I.C. §72-719(3)

- I, Stephen J. Nemec, being first duly sworn under oath, deposes and says:
- 1.) I am the Attorney of Record for the above-named Claimant and have personal knowledge of the facts stated in this Affidavit.
- 2.) Attached hereto as Exhibit 1 is a true and correct copy of the report of Dr. Torelli examining the time loss benefits owed to the Claimant.
- 3.) Further your affiant sayeth naught.

DATED this 26<sup>th</sup> day of July, 2013.

JAMES, VERNON & WEEKS, P.A.

Stephen J. Nemec Attorney for Claimant

SUBSCRIBED AND SWORN to before me on this 26<sup>th</sup> day of July, 2013.

10

KORREI KRUGER NOTARY PUBLIC STATE OF IDAHO

Koun	Crizer
Notary Public for	Idaho;
Residing at: <u>Coc</u>	wrd'Alene
Commission Expir	res: <u>3.23.18</u>

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the  $26^{th}$  day of July , 2013 a true and correct copy of the foregoing document was served upon the following individuals by the method indicated below:

Fa	x: 800-972-3213	
Jos	seph Wager	
На	rmon & Day	
P.0	D. Box 6358	
Во	ise, ID 83707	
	Mailed	Mailed
	By Hand	By Hand
	Overnight Mail	Overnight Mail
X	Fax	Fax
		111 M
		that I bown



Dr. Paul A. Torelli Chief Economist Quantitative Social Science 2600 2<sup>nd</sup> Avenue, Suite 2204 Seattle WA 98121

Mr. Steve Nemec Attorney-at-Law James, Vernon & Weeks 1626 Lincoln Way Coeur D'Alene ID 83814

July 22<sup>nd</sup>, 2013

## Time Loss Benefits to Trudy Deon of Idaho State

Dear Mr. Nemec.

You have requested an analysis of the value of Ms. Trudy Deon's time loss benefits from 2009 through her life expectancy. I received two files from your offices: the Idaho Workers' Compensation Benefits Table, which shows the Average State Wage (ASW) from 2000 to 2013, and the Findings of Fact, Conclusions of Law, and Order given by the Idaho Industrial Commission in this matter, dated May 3, 2013. In performing this analysis, I utilized publicly available information listed in footnotes. I reserve the right to update this analysis if additional information becomes available in the future.

#### My Qualifications and Background

I am Chief Economist at Quantitative Social Science LLC (QSS), a Seattle-based consulting firm that provides objective expert economic and statistical analysis for complex litigation and public policy debates. I received my B.A. magna cum laude with distinction in Economics and Pure Mathematics from the University of California at Berkeley, graduating as the top student in the Department of Economics. Later I completed M.A. and Ph.D. degrees in Economics from Harvard University on a National Science Foundation Graduate Fellowship. My background as a professional economist has focused on the empirical measurement of social forces using the techniques of econometrics and statistics, and in the past, I have provided economic analyses in a wide variety of litigation matters, including damages calculations and liability determinations.

EXHIBIT /

<sup>&</sup>lt;sup>1</sup> I.C. 2007-005950 and I.C. 2008-032836.



### **Discounting to Present Value**

Any present day award can be prudently invested in essentially risk-free securities that yield a positive rate of return, so future economic loss should be deflated (or discounted) according to current risk-free interest rates. I base discount rates on United States Treasury Inflation-Protected Securities (TIPS), which provide a real (or inflation-adjusted) rate of return that is fixed at the time of auction. The advantages of TIPS as a safe vehicle for long-term savings that provides protection from inflation risk are summarized in a recent study by prominent financial economists:

"Because expected inflation varies over time, long-term nominal Treasury bonds are not safe in real terms; and because short-term real interest rates vary over time, Treasury bills are not safe assets for long-term investors. Inflation-indexed bonds fill this gap by offering a truly riskless long-term investment."

Panel A of Exhibit 1 displays real interest rates, yields, and prices at auction for longer-term TIPS (of at least nine years) during US Treasury auctions in 2012 and 2013. Panel B shows average rates on these TIPS by term of security.<sup>3</sup> Panel C, as a comparison, displays average real returns on US Treasury Bonds in the post-World War II period.<sup>4</sup>

The recent average real rate during 2012 and 2013 among TIPS of at least a nine year maturity at auction is 0.3%. However, as Exhibit 1 clearly shows, these bonds have been selling at well above par in 2012 and 2013. While the fixed real rate does not reflect the fact that each dollar of longer-term TIPS bonds has been selling for significantly more than one dollar, the yield does incorporate the above-par sales price. Accordingly, I utilize the average yield of -0.1% among long-term term TIPS, shown in Panel B, to discount future income streams to present value. Based on an assumed 2013 hearing date, discounting commences in 2014. Furthermore, I assume a future expected inflation rate of 2.3%, as according to the most recent Philadelphia Federal Reserve Survey of Professional Forecasters. Since, by definition, the total (or nominal) discount rate is equal to the real discount rate

<sup>&</sup>lt;sup>2</sup> Page 1 of Campbell, John, Shiller, Robert, and Luis Viceira, "Understanding Inflation-Indexed Bond Markets," *Brookings Papers on Economic Activity*, Spring 2009. Campbell is Professor of Economics at Harvard, Shiller is Professor of Economics at Yale, and Viceira is Professor at the Harvard Business School.

<sup>&</sup>lt;sup>3</sup> Data on TIPS auctions are available at http://www.treasurydirect.gov/RI/OFAuctions?form=histQuery, last accessed May 7, 2013.

<sup>&</sup>lt;sup>4</sup> From Table 1-2 of Siegel, Jeremy, *Stocks for the Long Run*, New York City: McGraw-Hill, 4<sup>th</sup> Edition, 2008, a well respected reference volume for investors. Siegel is Professor of Finance at the Wharton School of the University of Pennsylvania. Long-term bonds, which averaged a real return of 1.6%, are comparable to the TIPS notes and bonds shown in Panels A and B.

<sup>&</sup>lt;sup>5</sup> In other words, based on current market rates at auction, I assume that the award is invested in a bundle of long-term TIPS notes and bonds that will yield a future real return of -0.1%.

<sup>&</sup>lt;sup>6</sup> No prejudgment interest is included.

<sup>&</sup>lt;sup>7</sup> See http://www.philadelphiafed.org/research-and-data/real-time-center/survey-of-professional-forecasters/2013/survq113.cfm, last accessed May 7, 2013.



plus expected inflation, I therefore assume a total discount rate of -0.1% + 2.3% = 2.2% below.

#### Value of Past and Future Time Loss Benefits

Ms. Trudy Deon was born on According to the most recent Social Security Administration (SSA) Actuarial Life Tables for 2007, 57 year old American females can expect to live another 26.53 years on average, indicating a natural life span through age 57 + 26.53 = 83.53. Thus, Ms. Deon's life expectancy extends approximately through the end of February 2039.

My understanding is that Ms. Deon is owed time loss benefits at 45% of the ASW during two distinct time periods. The first period is from November 18, 2009 through August 31, 2013; in addition, there is a mitigation amount of \$2,039.40 that should be subtracted from the total payment. Exhibit 2 presents her time loss benefits over the first period. The benefits value in column six is equal to column four multiplied by column five. The net value from 2009 to 2013 comes to \$56,086.26.

The second period is from September 1, 2013 to her life expectancy, which extends through February 28, 2039. Exhibit 3 displays her time loss benefits over the second period. From 2000 to 2013, the ASW has grown by 2.8% each year on average; after 2013, I assume that the ASW will continue to grow by 2.8% each year. As in Exhibit 2, the Exhibit 3 column six benefits value is equal to column four multiplied by column five. In column seven, the present discounted value (PDV) of the benefits value is calculated under a 2.2% discount rate. From September 1, 2013 through February 28, 2039, Ms. Deon's benefits total \$435,281.28 in present discounted value.

If there are any questions regarding this report, I can be reached by telephone at (206) 384-7072 or via email at torelli@quantitativesocialscience.com.

Dr. Paul A. Torelli

Quantitative Science LLC

Seattle, Washington July 22<sup>nd</sup>, 2013

<sup>9</sup> The calculation is  $(\$674.00 / \$471.00) \land (1 / 13) = 1.02795$ .

<sup>&</sup>lt;sup>8</sup> The SSA tables are available at http://www.ssa.gov/oact/STATS/table4c6.html, last accessed May 7, 2013.

Exhibit 1: Treasury Inflation-Protected Securities (TIPS) of At Least 9 Year Term, 2012 and 2013

Panel A: TIPS At Auction

Year	Туре	Term	Auction Date	Issue Date	Interest Rate %	Yield %	Price Per \$100
2013	Note	9 Year 10 Month	3/21/13	3/28/13	0.125	-0.60	\$107.0580
2013	Note	10 Year	1/24/13	1/31/13	0.125	-0.63	\$107.5059
2012	Note	9 Year 8 Month	11/21/12	11/30/12	0.125	-0.72	\$109.1019
2012	Note	9 Year 10 Month	9/20/12	9/28/12	0.125	-0.75	\$108.5228
2012	Note	10 year	7/19/12	7/31/12	0.125	-0.64	\$107.7797
2012	Note	9 Year 8 Month	5/17/12	5/31/12	0.125	-0.39	\$106.4586
2012	Note	9 Year 10 Month	3/22/12	3/30/12	0.125	-0.09	\$102.2260
2012	Note	10 Year	1/19/12	1/31/12	0.125	-0.05	\$101.6618
2013	Bond	30 Year	2/21/13	2/28/13	0.625	0.64	\$99.4942
2012	Bond	29 Year 4 Month	10/18/12	10/31/12	0.75	0.48	\$109.4780
2012	Bond	29 Year 8 Month	6/21/12	6/29/12	0.75	0.52	\$108.2268
2012	Bond	30 Year	2/16/12	2/29/12	0.75	0.77	\$99.3473

Panel B: Average Rates on TIPS At Auction

Type	Term	Period	Average Interest Rate %	Average Yield %	Average Price Per \$100
Note	About 10 Years	2012 & 2013	0.1	-0.5	\$106.29
Bond	20 or 30 Years	2012 & 2013	0.7	0.6	\$104.14
All	10, 20, or 30 Years	2012 & 2013	0.3	-0.1	\$105.57

Panel C: Average Real Returns on US Bonds Since World War II

Average Real Rate of Return on Short-Term US Government Bonds, 1946-2006:	0.6
Average Real Rate of Return on Long-Term US Government Bonds, 1946-2006:	1.6

Note: Data on TIPS at auction is from the US Treasury web site at http://www.treasurydirect.gov/RI/OFAuctions?form=histQuery. Yield may be below interest rates because the price at auction may be above par (at \$100). The average real return on government bonds during 1946-2006 is taken from Table 1-2 of *Stocks for the Long Run* by Professor Jeremy Siegel of the University of Pennsylvania (4th Edition, 2008).

# **Exhibit 2: Past Time Loss Benefits to Trudy Deon**

- Loss Period from November 18, 2009 through August 31, 2013 - No Prejudgment Interest Included -

<u>Year</u>	<u>Age</u>
2009	54
2010	55
2011	56
2012	57
2013	58

Period Start	Period End	Period Days	Period Weeks	45% of ASW (Weekly)	Benefits
(1)	(2)	(3)	(4)	(5)	(6)
11/18/2009	12/31/2009	44	6.29	\$286.20	\$1,798.97
1/1/2010	12/31/2010	365	52.14	\$289.35	\$15,087.54
1/1/2011	12/31/2011	365	52.14	\$290.70	\$15,157.93
1/1/2012	12/31/2012	366	52.29	\$297.45	\$15,552.39
1/1/2013	8/31/2013	243	34.71	\$303.30	\$10,528.84

Total: Deduction:

\$58,125.66

Net:

\$2,039.40 \$56,086.26

Note: ASW taken from Idaho Workers' Compensation Benefits Table.

**Exhibit 3: Future Time Loss Benefits to Trudy Deon** 

- Loss Period from September 1, 2013 through February 28, 2039 - Discount Rate of 2.2% -

	[	Period Start	Period End	Period Days	Period Weeks	45% of ASW (Weekly)	Benefits	PDV of Benefits
Year	<u>Age</u>	(1)	(2)	(3)	(4)	(5)	(6)	(7)
2013	58	9/1/2013	12/31/2013	122	17.43	\$303.30	\$5,286.09	\$5,286.09
2014	59	1/1/2014	12/31/2014	365	52.14	\$311.78	\$16,256.96	\$15,907.01
2015	60	1/1/2015	12/31/2015	365	52.14	\$320.49	\$16,711.36	\$15,999.63
2016	61	1/1/2016	12/31/2016	366	52.29	\$329.45	\$17,225.51	\$16,136.88
2017	62	1/1/2017	12/31/2017	365	52.14	\$338.66	\$17,658.60	\$16,186.49
2018	63	1/1/2018	12/31/2018	365	52.14	\$348.12	\$18,152.16	\$16,280.73
2019	64	1/1/2019	12/31/2019	365	52.14	\$357.85	\$18,659.53	\$16,375.53
2020	65	1/1/2020	12/31/2020	366	52.29	\$367.86	\$19,233.62	\$16,516.00
2021	66	1/1/2021	12/31/2021	365	52.14	\$378.14	\$19,717.19	\$16,566.77
2022	67	1/1/2022	12/31/2022	365	52.14	\$388.71	\$20,268.30	\$16,663.23
2023	68	1/1/2023	12/31/2023	365	52.14	\$399.57	\$20,834.81	\$16,760.25
2024	69	1/1/2024	12/31/2024	366	52.29	\$410.74	\$21,475.83	\$16,904.03
2025	70	1/1/2025	12/31/2025	365	52.14	\$422.22	\$22,015.78	\$16,955.99
2026	71	1/1/2026	12/31/2026	365	52.14	\$434.02	\$22,631.13	\$17,054.72
2027	72	1/1/2027	12/31/2027	365	52.14	\$446.15	\$23,263.68	\$17,154.02
2028	73	1/1/2028	12/31/2028	366	52.29	\$458.62	\$23,979.43	\$17,301.17
2029	74	1/1/2029	12/31/2029	365	52.14	\$471.44	\$24,582.32	\$17,354.36
2030	75	1/1/2030	12/31/2030	365	52.14	\$484.62	\$25,269.41	\$17,455.40
2031	76	1/1/2031	12/31/2031	365	52.14	\$498.16	\$25,975.71	\$17,557.04
2032	77	1/1/2032	12/31/2032	366	52.29	\$512.09	\$26,774.90	\$17,707.64
2033	78	1/1/2033	12/31/2033	365	52.14	\$526.40	\$27,448.07	\$17,762.08
2034	79	1/1/2034	12/31/2034	365	52.14	\$541.11	\$28,215.26	\$17,865.50
2035	80	1/1/2035	12/31/2035	365	52.14	\$556.24	\$29,003.89	\$17,969.52
2036	81	1/1/2036	12/31/2036	366	52.29	\$571.79	\$29,896.25	\$18,123.67
2037	82	1/1/2037	12/31/2037	365	52.14	\$587.77	\$30,647.90	\$18,179.39
2038	83	1/1/2038	12/31/2038	365	52.14	\$604.20	\$31,504.53	\$18,285.24
2039	84	1/1/2039	2/28/2039	59	8.43	\$621.08	\$5,234.85	\$2,972.91

Total:

\$587,923.08

\$435,281.28

Note: ASW is assumed to grow by 2.795% each year after 2013. 'PDV' stands for present discounted value. Discounting begins in 2014 based on 2013 hearing date.

Joseph M. Wager (ISB 8445) LAW OFFICES OF KENT W. DAY P.O. Box 6358 Boise, ID 83707-6358 Telephone (208) 895-2583 Fax (800) 972-3213 Employees of the Liberty Mutual Group Attorneys for Defendants

# BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Trudy Deon,	) I. C. No.: 2008-032836 ) I. C. No.: 2007-005950
Claimant,	) DEFENDANTS' RESPONSE
V.	) TO CLAIMANT'S MOTION ) FOR MODIFICATION OF ISIF
H & J Hospitality, Inc., d/b/a Best Western Coeur d'Alene Inn,	) SETTLEMENT AGREEMENT
Employer,	)
and	
Liberty Northwest Insurance Corp.,	
Surety,	
Defendants.	

COME NOW Defendants, H & J Hospitality, Inc., d/b/a Best Western Coeur d'Alene Inn, Employer, and Liberty Northwest Insurance Corporation, Surety, by and through their attorney of record, Joseph M. Wager, and respectfully submit Defendants' Response To Claimant's Motion For Modification Of ISIF Settlement Agreement in the above-referenced matter.

<sup>1 –</sup> DEFENDANTS' RESPONSE TO CLAIMANT'S MOTION FOR MODIFICATION OF ISIF SETTLEMENT AGREEMENT

1.

#### INTRODUCTION

In response to the Commission's invitation, Defendants and Claimant submitted opening and reply briefs on the impact of the LSA between Claimant and ISIF on the Commission's Findings of Fact and Conclusions of Law rendered May 3, 2013. By Order of the Commission all briefing was to be completed by July 19, 2013. Subsequent to the Commission's briefing deadline, however, Claimant filed her Motion For Modification Of ISIF Settlement Agreement Pursuant To I.C. §72-719(3), (hereinafter "Claimant's Motion to Modify"), on July 26, 2013, asserting that the LSA entered into between ISIF and Claimant on October 19, 2012, and approved by the Commission on November 8, 2012, should now be modified on the grounds of "manifest injustice." Specifically, Claimant contends that Defendants "seek to profit from the Claimant's settlement with the ISIF and pay the Claimant a small fraction of her damages stemming from the industrial accident." *Claimant's Motion To Modify: p. 2.* For the reasons discussed below, Defendants object to Claimant's Motion for Modification and respectfully request that said Motion be stricken from the record.

II.

#### **ARGUMENT**

A. Under the plain language of I. C. § 72-719 (3), the discretionary review of an agreement to correct a manifest injustice is to be raised by motion of the Industrial Commission

Claimant filed a Motion For Modification Of ISIF Settlement Agreement Pursuant To I.C. §72-719 (3). Idaho Code provides for the review of an award or agreement to determine the existence of a manifest injustice. If such issue is raised, the plain

<sup>2 –</sup> DEFENDANTS' RESPONSE TO CLAIMANT'S MOTION FOR MODIFICATION OF ISIF SETTLEMENT AGREEMENT

language of the statute is clear that it is to be done upon motion made by the Commission. I. C. §72-719 (3) states:

The commission, on its own motion at any time within five (5) years of the date of the accident causing the injury or date of first manifestation of an occupational disease may review a case in order to correct a manifest injustice.

Idaho Code, Section §72-719(3). (Emphasis added). In contrast however, the statutory opportunity for a party in interest, such as Claimant, to make application to the Commission for review of an award or agreement, is governed by I.C. §72-719(1), which provides:

On application made by a party in interest filed with the commission at any time within five (5) years of the date of the accident causing the injury or date of first manifestation of an occupational disease, on the ground of a change in conditions, the commission may, but not oftener than once in six (6) months, review any order, agreement or award upon any of the following grounds:

- (a) Change in the nature or extent of the employee's injury or disablement; or
- (b) Fraud.

Idaho Code, Section §72-719(1). (Emphasis added).

In the instant case, Claimant alleges neither a change in the nature or extent of her injury/disablement nor the existence of fraud. Rather, Claimant requests modification of the LSA on the grounds of *manifest injustice*. *Claimant's Motion To Modify*, *p.1*, (emphasis added). Based upon the plain language of the statute, however, the legislature has not authorized Claimant to raise this issue. As Claimant has filed a motion for which she clearly has no standing, it appears Claimant's "motion" is actually an attempt to submit additional evidence and arguments beyond the briefing previously ordered by the Commission.

While the Commission itself is not precluded from raising this issue upon being brought to its attention, the statutory language clearly articulates that the only available procedural process for so doing is for the Commission to raise the issue *sua sponte*. *Banzhaf v. Carnation Co.*, 104 Idaho 700, 703, 662 P.2d 1144, 1147 (1983). Accordingly, Defendants respectfully request that Claimant's Motion to Modify be stricken from the record in the absence of the Commission raising this issue upon its own motion.

# B. Should the Commission ultimately decide to review the LSA *sua sponte*, ISIF must be afforded notice and an opportunity to be heard.

In the event that the Commission determines that the LSA requires review for manifest injustice, it should be noted that ISIF has thus far been silent on the issue. The Commission's Notice of Reconsideration and accompanying invitation for briefing was directed only to Claimant and Employer/Surety. *Notice of Reconsideration*, *p. 1*. However, the issue now raised by Claimant in her Motion to Modify concerns Claimant's request to modify the approved LSA between Claimant and *ISIF*. *Claimant's Motion to Modify*, *p. 1*. As a party to the LSA, ISIF must be afforded notice of and an opportunity to brief and be heard on the issue now raised by the Claimant. As stated by the Idaho Supreme Court in an appeal taken from an order of the Industrial Commission denying employment benefits:

Right to procedural due process guaranteed under State and United States Constitutions requires that a person involved in the judicial process by given meaningful notice and meaningful opportunity to be heard.

Van Heukelom v. Pine Crest Psychiatric Center and State of Idaho, Department of Employment, 106 Idaho, 898, 900, 684 P.2d 300, 302 (1984), (quoting Rudd v. Rudd, 105 Idaho 112, 113, 666 P.2d 639, 642 (1983). Should the Commission determine that

<sup>4 –</sup> DEFENDANTS' RESPONSE TO CLAIMANT'S MOTION FOR MODIFICATION OF ISIF SETTLEMENT AGREEMENT

the LSA requires review and raise such issue on it's own motion, such review should not be undertaken until ISIF, a party to the agreement under review, has been afforded the same such rights that have been afforded to Claimant and Employer/Surety.

C. Should the Commission ultimately decide to review the LSA sua sponte, Claimant's suggested modification represents a manifest injustice by enabling Claimant to side step the well established doctrine of collateral estoppel.

It is undisputed that the Idaho Supreme Court has articulated the broad construction and definition for which a manifest injustice is measured:

"Manifest" has been defined to mean: capable of being easily understood or recognized at once by the mind; not obscure; obvious. ... "Injustice" has been defined to mean: absence of justice; violation of right or of the rights of another; iniquity; unfairness; an unjust act or deed; wrong. Sines v. Appel, 103 Idaho 9, 13, 644 P.2d 331, 335 (1982)

Claimant makes the argument that it is manifest injustice to hold her to the allegations and stipulated apportionments that she made willfully while inducing the ISIF into a lump sum settlement. Claimant seeks to retroactively introduce terms into a settlement contract that will enable her to argue conflicting apportionments for the same set of circumstances without regard to the doctrine of collateral estoppel. Claimant has provided you with a highly technical explanation as to the value of the total permanent benefit. See Torelli Report. However, the fact remains that the Claimant deliberately and purposefully alleged that her total permanent disability was due to the combined result of her industrial accident and her pre-existing conditions. See LSA. Claimant agreed to settled 60% of her total disability award for a lump sum payment of \$70,000. See LSA. The Commission is tasked determined that the medical evidence substantiate the resolution reached before approving an LSA with the ISIF. Wernecke v.

5 – DEFENDANTS' RESPONSE TO CLAIMANT'S MOTION FOR MODIFICATION OF ISIF SETTLEMENT AGREEMENT

St. Maries Joint School District #401, 147 Idaho 277, 286, 207 P.3d 1008, 1017 (2009).

Claimant now brings the argument that to hold her to that agreement would be manifest injustice. Claimant has made no allegation that she intends to rectify the unjust enrichment that would be created by allowing her to retroactively modify the terms of there lump sump agreement with the ISIF. See Claimant's Motion for Modification of ISIF Settlement Pursuant to I.C. 72-719(3). Claimant does not allege fraud that induced her into accepting the award nor that she was fraudulently induced into the stipulated apportionment of ISIF liability. See Claimant's Motion for Modification of ISIF Settlement Pursuant to I.C. 72-719(3).

Claimant is now asking you to find manifest injustice in the face of being held to a lump sum agreement that was bargained for and resolved upon her own allegations and that of her counsel. The true manifest injustice is to enable the Claimant to merely side step the long standing principle of collateral estoppel in the absence of any clear injustice.

III.

#### CONCLUSION

Employer/Surety asks for the Commission to strike Claimant's Motion from the record as being an additional briefing in volition of the Order Setting Briefing dated May 30, 2013.

If the Commission raises this issue of manifest injustice upon its own motion in accordance with I.C. 72-719(3), all parties should receive the benefit of proper notice and the benefit of a briefing schedule.

Lastly, in the event the Commission acts on Claimant's motion, the

Employer/Surety argues that the true manifest manifest injustice is created to the extent Claimant's Motion for Modification is for the sole purpose of assuring her own unjust enrichment, rather than correcting a clear miscarriage of justice.

DATED this 14 day of August, 2013.

LAW OFFICES OF KENT W. DAY

Joseph VI. Wager Attorney for Defendants

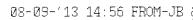
### **CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_\_\_ day of August, 2013, I caused a copy of the foregoing document to be served upon the following by first class mail, postage prepaid:

Stephen J. Nemec James, Vernon & Weeks 1626 Lincoln Way Coeur d'Alene, ID 83814

Thomas W. Callery Jones, Brower & Callery P.O. Box 854 Lewiston, ID 83501

Joseph M. Wager





Thomas W. Callery, ISBN 2292 JONES, BROWER & CALLERY, P.L.L.C. 1304 Idaho Street P. O. Box 854 Lewiston, Idaho 83501 (208) 743-3591 Facsimile: (208) 746-9553 tcallery@lewiston.com

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRUDY DEON,	) Cogo No + I C 2007 005050		
Claimant,	) Case No.: I. C. 2007-005950 I. C. 2008-032836		
v\$.			
HAGADONE HOSPITALITY,	) ) ) DECROSICE TO CLAIMANTED ROSSONS		
Employer,	) RESPONSE TO CLAIMANT'S MOTE ) TO MODIFY LUMP SUM AGREEME		
LIBERTY NORTHWEST INSURANCE CO.,	FILED		
Surety, and	AUG - 9 2013		
STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND,	INDUSTRIAL COMMISSION		
Defendants.	)		

Comes now the Defendant, STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, by and through its attorney of record, THOMAS W. CALLERY of Jones, Brower and Callery, P.L.L.C. and hereby responds to the Claimant's motion for modification of ISIF Settlement Agreement pursuant to Idaho Code § 72-719(3) to correct a manifest injustice and responds as follows.

RESPONSE TO CLAIMANT'S MOTION TO MODIFY LUMP SUM AGREEMENT

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#### BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRUDY DEON,	) Com No. 1 C 2007 005050
Claimant,	Case No.: I. C. 2007-005950 I. C. 2008-032836
vs.	
HAGADONE HOSPITALITY,	) ) ) RESPONSE TO CLAIMANT'S MOTION
Employer,	TO MODIFY LUMP SUM AGREEMENT
LIBERTY NORTHWEST INSURANCE CO.,	
Surety, and	5 3 5 3
STATE OF IDAHO INDUSTRIAL SPECIAL ) INDEMNITY FUND,	
Defendants.	
	\$10 

Comes now the Defendant, STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, by and through its attorney of record, THOMAS W. CALLERY of Jones, Brower and Callery, P.L.L.C. and hereby responds to the Claimant's motion for modification of ISIF Settlement Agreement pursuant to Idaho Code § 72-719(3) to correct a manifest injustice and responds as follows.

RESPONSE TO CLAIMANT'S MOTION TO MODIFY LUMP SUM AGREEMENT

# 1. IDAHO CODE § 72-719 DOES NOT APPLY TO LUMP SUM AGREEMENTS.

The Claimant is requesting modification of the Lump Sum Agreement with the State of Idaho Industrial Special Indemnity Fund based upon Idaho Code § 72-719 which allows the Commission, within five (5) years of the date of the accident, to review a case in order to correct a manifest injustice. Idaho Code 72-719 states:

72-719. Modification of awards and agreements -- Grounds -- Time within which made. (1) On application made by a party in interest filed with the commission at any time within five (5) years of the date of the accident causing the injury or date of first manifestation of an occupational disease, on the ground of a change in conditions, the commission may, but not oftener than once in six (6) months, review any order, agreement or award upon any of the following grounds:

- (a) Change in the nature or extent of the employee's injury or disablement; or
- (b) Fraud.
- (2) The commission on such review may make an award ending, diminishing or increasing the compensation previously agreed upon or awarded, subject to the maximum and minimum provided in this law, and shall make its findings of fact, rulings of law and order or award, file the same in the office of the commission, and immediately send a copy thereof to the parties.
- (3) The commission, on its own motion at any time within five (5) years of the date of the accident causing the injury or date of first manifestation of an occupational disease, may review a case in order to correct a manifest injustice.
- (4) This section shall not apply to a commutation of payments under section 72-404[, Idaho Code].

#### Emphasis added.

Idaho Code § 72-404 authorizes lump sum payments and discharge of liability pursuant thereto. Idaho Code § 72-719 by its explicit terms cannot be used as a basis to modify a Lump Sum Agreement. The terms of the Lump Sum Agreement in the present case cannot be modified pursuant to Idaho Code § 72-719(3).

The Idaho Supreme Court has recognized that an approved Lump Sum Agreement is final and may not be modified absent proof of fraud:

However, once a lump sum compensation agreement is approved by the commission, that agreement becomes an award and is final and may not be reopened or set aside absent allegations and proof of fraud. I.C. Sec. 72-718; Fountain v. T.Y. & Jim Hom, 92 Idaho 928, 453 P.2d 577 (1969); Vogt v. Western Geneal Dairies, 110 Idaho 782, 718 P.2d 1220 (1986).

Since, in the present case, the compensation award was made by means of a lump sum agreement, the commission correctly held that Harmons' allegations of manifest injustice were insufficient, even if proven, to permit the commission to set aside the agreement. Thus, we find claimant's arguments on appeal that the commission erred in so holding to be without merit.

Harmon v. Lute's Const. Co., Inc., 112 Idaho 291 (1986).

#### 2. A MANIFEST INJUSTICE DID NOT OCCURR.

This case involved a claim by the Claimant, Trudy Deon, against both her employer and the State of Idaho Industrial Special Indemnity Fund. After the initial complaint against the employer and surety was filed, the Claimant added a claim against the Idaho Special Indemnity Fund contending that a prior cervical spine injury and a left lower extremity injury combined with her 2008 right hand and wrist injury rendering her totally and permanently disabled. By filing her complaint against the Fund, the Claimant alleged she was totally and permanently disabled based on a combination of pre-existing impairments and her 2008 accident.

The Claimant requested a mediation which was conducted by Industrial Commission Mediator, Dennis Burks. At the mediation the Claimant and the ISIF agreed to enter into a Lump Sum Settlement for \$70,000.00. The Claimant did not settle with employer and surety and ultimately that claim went to Hearing. Prior to any decision on the employer/surety case, the Lump Sum Agreement was signed by all parties and approved by the Idaho Industrial Commission with the signature of two Commissioners. The Lump Sum Agreement was filed with the Commission on November 8, 2012 and the claimant received the \$70,000.00 cash settlement shortly thereafter.

The Lump Sum Agreement included specific language required by *Wernecke v. St. Maries Joint School District*, 147 Idaho 277. The Lump Sum Agreement noted that the Claimant had prior physical impairments, including a seven percent whole person impairment for her lower extremity injury and a six percent whole person impairment for her cervical injury.

Further, the Lump Sum Agreement stated that the Claimant was totally and permanently disabled based upon the combined effect of Claimant's pre-existing cervical spine injury and her left lower leg injury combined with her 2008 right hand and wrist injury. The Agreement also expressly stipulated a 60/40 CAREY apportionment between the ISIF and the employer.

The Industrial Commission ultimately found after Hearing that the Claimant was totally and permanently disabled solely as a result of the last accident involving the employer which directly contradicts the Lump Sum Agreement.

The Claimant now argues that the Lump Sum Agreement should not have res judicata or collateral estoppel effect so as to impact or reduce the Claimant's right to the total disability benefits from the employer and surety based on the Industrial Commission's authority to correct a manifest injustice.

"Manifest has been defined to mean: capable of being easily understood or recognized at once by the mind; not obscure; obvious. *Sines v. Appel*, 103 Idaho 9, 13, 644 P.2d 331, 335 (1982). "Injustice" has been defined to mean: absence of justice; violation of right or of the rights of another; iniquity, unfairness; an unjust act or deed; wrong. *Id.* Therefore, a decision that results in manifest injustice would be a decision that is obviously unfair or unjust, one that deprives a party of a legal right or remedy to which he or she is entitled. In the context of workers' compensation, an example of a manifestly unjust decision would be one that deprives a claimant of benefits that she is obviously entitled to receive.

Troutwine v. Alliant Tech Systems, (2010) IIC 0351.

In the Lump Sum Agreement, the Claimant agreed to accept a cash settlement in exchange for giving up her right to a monthly lifetime annuity and the Agreement was specifically drafted to reflect that desire:

WHEREAS, the parties acknowledge and agree that the \$70,000.00 lump sum to be paid to Claimant under the terms of this agreement constitutes compensation on a claim of total and permanently disability that will affect Claimant for the rest of her life.

WHEREAS, the Claimant has financial needs that currently exist that would be satisfied by a lump sum payment as opposed to statutory monthly payments.

Stipulation and Agreement of Lump Sum Discharge and Order of Approval and Discharge, p. 4.

The decision to accept a cash payment was made by the Claimant in consultation with her legal counsel.

WHEREAS, the decision to accept a lump sum, as opposed to a monthly annuity, has been made after consulting by Claimant with her legal counsel, including consideration of the Claimant's need for immediate cash and that monthly annuity payments cease upon death without survivor benefits.

Stipulation and Agreement of Lump Sum Discharge and Order of Approval and Discharge, p. 5.

Finally the claimant was well aware that she had a remaining statistical average life expectancy of approximately 27 years.

9. The parties acknowledge and agree that the \$70,000.00 lump sum to be paid to Claimant under the terms of this agreement constitutes compensation for total and permanent disability that will affect Claimant the rest of her life. Claimant's remaining life expectancy is 27 years or 324 months according to the 2007 Social Security Actuarial Life Table.

Stipulation and Agreement of Lump Sum Discharge and Order of Approval and Discharge, p. 7.

It is clear that under the facts of this case the Claimant has not suffered a manifest injustice. Quite the contrary, she obtained a cash settlement knowing full well that she was compromising her right to a potential lifetime monthly annuity if she was found totally disabled

in exchange for the certainty and benefit of receiving immediate cash. There is nothing unfair or unjust about the Agreement.

Without knowing the potential social security offset issues involved, the Claimant's need for immediate cash, and Claimant's actual life span as opposed to a statistical average life span, it was and remains in all likelihood, in her best interest to have taken the lump sum as opposed to a monthly annuity.

If a manifest injustice exists it is the Industrial Special Indemnity Fund that is the injured party under the peculiar facts of this case.

#### SUMMARY

Idaho Code § 72-719 cannot be used as a basis to modify or amend a lump sum agreement approved by the Idaho Industrial Commission as the section specifically excludes lump sum agreements from the reach of Idaho Code § 72-719. The Idaho Supreme Court has held on more than one occasion that a lump sum agreement approved by the Commission is a final award that may not be reopened or set aside absent allegation and proof of fraud. In *Harmon supra* the Idaho Supreme Court specifically recognized that manifest injustice cannot be used as a basis to set aside a lump sum agreement.

Even if the Commission were to address the issue of manifest injustice, under the facts of this case there simply is none. The Claimant filed a complaint against the Industrial Special Indemnity Fund alleging that pre-existing impairments combined with her last injury of record to render her totally disabled. It was the Claimant herself who chose to add the Industrial Special Indemnity Fund as a defendant in the case and the Claimant herself who determined, in consultation with her attorney, to accept a cash settlement and waive her right to a monthly annuity. The Lump Sum Agreement is neither unfair nor inequitable or unjust in any way to the

Claimant. The Claimant received the cash benefit which she, with the advice of counsel, determined was in her best interest.

The Commission should deny the Claimant's request to modify the Lump Sum Agreement.

DATED this \_\_\_\_\_\_\_ day of August, 2013.

JONES, BROWER & CALLERY, P.L.L.C.

THOMAS W. CALLERY Attorney for Defendant ISIF

## CERTIFICATE OF SERVICE

I certify that on the \_\_\_\_\_\_ day of August, 2013, a true and correct copy of the foregoing was served by the method indicated below and addressed upon each of the following:

STEPHEN J. NEMEC JAMES, VERNON & WEEKS, P.A. 1626 LINCOLN WAY COEUR D'ALENE, ID 83814 □ U.S. Mail, Postage Prepaid□ Hand Delivered

Overnight Mail
Facsimile to: 1-2

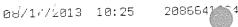
Facsimile to: 1-208-664-1684

JOSEPH WAGER HARMON & DAY P.O. BOX 6358 BOISE, ID 83707-6358 □ U.S. Mail, Postage Prepaid□ Hand Delivered

Hand Delivered
Overnight Mail

Facsimile to: 1-800-972-3213

THOMAS W. CALLERY



JAMES, VERNON & WEEKS, P.A. 1626 Lincoln Way Coeur d'Alene, ID 83814 Telephone No. 208-667-0683 Facsimile No. 208-664-1684

Stephen J. Nemec ISBA # 7591 Attorney for Claimant

### BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRUDY DEON.

Claimant,

VS.

H&J INC., d/b/a BEST WESTERN COEUR D' ALENE INN & CONFERENCE CENTER,

Employer,

and

LIBERTY NORTHWEST INSURANCE CO.,

Surety,

Defendants.

CASE NO.: 2007-005950 2008-032836

REPLY BRIEF IN SUPPORT OF MOTION FOR MODIFICATION OF ISIF SETTLEMENT PURSUANT TO I.C. §72-719(3)

FILED

AUG 1 4 2013

INDUSTRIAL COMMISSION

COMES NOW, Claimant, by and through her attorney of record, Stephen J. Nemec of the firm James, Vernon & Weeks, P.A. and hereby responds to the employer, surety, and ISIF arguments in opposition to modify the ISIF settlement agreement as follows:



JAMES, VERNON & WEEKS, P.A. 1626 Lincoln Way Coeur d'Alene, ID 83814 Telephone No. 208-667-0683 Facsimile No. 208-664-1684

Stephen J. Nemec ISBA # 7591 Attorney for Claimant

# BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRUDY DEON,

Claimant,

vs.

H&J INC., d/b/a BEST WESTERN COEUR D' ALENE INN & CONFERENCE CENTER,

Employer,

and

LIBERTY NORTHWEST INSURANCE CO.,

Surety,

Defendants.

CASE NO.: 2007-005950 2008-032836

REPLY BRIEF IN SUPPORT OF MOTION FOR MODIFICATION OF ISIF SETTLEMENT PURSUANT TO I.C. §72-719(3)

COMES NOW, Claimant, by and through her attorney of record, Stephen J. Nemec of the firm James, Vernon & Weeks, P.A. and hereby responds to the employer, surety, and ISIF arguments in opposition to modify the ISIF settlement agreement as follows:

# I. THE ISIF SETTLEMENT AGREEMENT IS SUBJECT TO MODIFICATION PURSUANT TO I.C. §72-719(3) TO CORRECT A MANIFEST INJUSTICE

The Supreme Court cases holding that Commission approved settlement agreements may be modified to correct manifest injustice are too numerous to list. *See in part, Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008); *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995); *Matthews v. Department of Corrections*, 121 Idaho 680, 827 P.2d 693, (1992); *Sines v. Appel*, 103 Idaho, 9, 644 P. 2d 331 (1982); *Banzhaf v. Carnation Co.* 104 Idaho 700, 662 P.2d 1144 (1983). It is telling that between the two briefs submitted in opposition to the motion to modify the ISIF settlement, the closest Supreme Court case cited in support of the defendants' proposition that a settlement cannot be modified is *Harmon v. Lute's Const. Co. Inc.*, 112 Idaho 291, 732 P.2d 260 (1987) which discussed a motion made under a different statute.<sup>1</sup>

In *Banzhaf* as in the case currently before the Commission, the Claimant had settled with defendants prior to a hearing on the merits and subsequently attempted to modify the settlement agreement. Following a hearing on the motion to modify, the Commission determined that the Claimant was 100% disabled at the time the settlement agreement was signed and thus could make no showing of "fraud or a change in condition" to justify modifying the settlement. *Id.* at 703. The Supreme Court reversed the Commission's decision and noted that I.C. §72-719(3) over-rides the concept of *res judicata* and permitted the Commission to modify the prior settlement agreement if necessary to prevent a **manifest injustice**. In the context of workers' compensation, an example of a manifestly unjust decision would be one that deprives a claimant of benefits that she is obviously entitled to receive. *See Troutwine v. Alliant Tech Systems*, (2010) IIC 0351.

<sup>&</sup>lt;sup>1</sup> Claimant's motion for modification of the ISIF settlement award is made under I.C. §72-719(3), not I.C. §72-718 as discussed in Harmon.

#### II. CONCLUSION

To prevent a manifest injustice the ISIF settlement agreement should be modified to delete any reference to the *Carey* formula and add a paragraph stating that:

The Industrial Commission recognizes that the purpose of this settlement agreement is to resolve a disputed claim between the Claimant and the ISIF. This Order is not intended to have res judicata or collateral estoppel effect benefiting the employer or surety.

Applying the doctrine of *res judicata* in the form of collateral estoppel to a settlement not fully adjudicated is contrary to the express purpose of the worker's compensation system to provide "sure and certain relief for injured workmen." I.C. §72-701. Defendants' arguments to the contrary should be rejected and the employer/surety should be ordered to commence payment of total permanent disability benefits immediately.

DATED this 14<sup>th</sup> day of August, 2013.

JAMES, VERNON & WEEKS, P.A.

Stephen J. Nemec Attorney for Claimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the  $\underline{14^{th}}$  day of  $\underline{\underline{August}}$ , 2013 a true and correct copy of the foregoing document was served upon the following individuals by the method indicated below:

Fax:	800-972-3213	Fax:	Fax: 208-746-9553		
Jose	ph Wager	Tho	Thomas W. Callery		
Law	Offices of Kent Day	Jone	Jones, Brower & Callery		
P.O.	Box 6358	P.O.	P.O. Box 854		
Bois	Boise, ID 83707		Lewiston, ID 83501		
	Mailed		Mailed		
	By Hand		By Hand		
	Overnight Mail		Overnight Mail		
X	Fax	X	Fax		

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### BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRUDY DEON,

Claimant,

IC 2007-005950 IC 2008-032836

v.

HAGADONE HOSPITALITY,

Employer,

Employer,

and

LIBERTY NORTHWEST INSURANCE CORPORATION,

Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,

ORDER DENYING MOTION FOR MODIFICATION OF ISIF SETTLEMENT

FILED

SEP 27 2013

INDUSTRIAL COMMISSION

Defendants.

The current motion before the Commission is Claimant's Motion for Modification of ISIF Settlement Agreement Pursuant to I.C. § 72-719(3) and Affidavit in Support. Defendant, Industrial Special Indemnity Fund (ISIF), filed a Response to Claimant's Motion to Modify Lump Sum Agreement. Claimant also filed a reply.

This case has its genesis in complaints filed against Employer and ISIF in the above entitled case. Claimant resolved her claim with ISIF by way of a lump sum settlement agreement which was approved by the Industrial Commission on November 8, 2012.

On May 3, 2013, the Commission issued its Findings of Fact, Conclusions of Law and Order in this case dealing with the complaint against Employer. The Commission concluded that

Claimant is totally and permanently disabled as a result of the subject accident alone, and that Employer therefore bears full responsibility for Claimant's total and permanent disability.

Having reviewed and approved the Claimant's settlement with the ISIF, as guided by the Idaho Supreme Court's recent decision in *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 207 P.3d 1008 (2009), the Commission is aware of the terms and conditions of that settlement. The conclusions reached in connection with Claimant's claim against Employer/Surety implicate the need to consider the impact of the settlement with the ISIF on the award made against Employer/Surety. Essentially, the question the Commission is concerned with is how or whether Claimant's settlement with the ISIF affects Employer/Surety's obligation to pay total and permanent disability benefits to Claimant as anticipated by the Findings of Fact, Conclusions of Law and Order. Does Claimant's settlement with the ISIF have some collateral estoppel effect against Claimant? *See*, *e.g.*, *Jackman v. State Industrial Special Indemnity Fund*, 129 Idaho 689, 931 P.2d 1207 (1997).

Claimant now seeks to have the settlement with ISIF modified pursuant to Idaho Code § 72-719(3) to correct a manifest injustice. Claimant argues that the lump sum settlement must be subject to modification because if left as currently written, and if collateral estoppel applies to the issues between Claimant and Employer, then Employer/Surety will profit by over \$500,000. Therefore, Claimant asks the Commission to add a paragraph to the settlement stating that the settlement is not intended to have res judicata or collateral estoppel effect benefiting the employer or surety.

ISIF argues that Idaho Code § 72-719 does not apply to settlements as set forth in Idaho Code § 72-719(4). Further, ISIF contends that even if the Commission were to address the issue of manifest injustice, under the facts of this case there simply is none.

Idaho Code § 72-719 is set forth in full below.

Modification of awards and agreements -- Grounds -- Time within which made. (1) On application made by a party in interest filed with the commission at any time within five (5) years of the date of the accident causing the injury or date of first manifestation of an occupational disease, on the ground of a change in conditions, the commission may, but not oftener than once in six (6) months, review any order, agreement or award upon any of the following grounds:

- (a) Change in the nature or extent of the employee's injury or disablement; or
- (b) Fraud.
- (2) The commission on such review may make an award ending, diminishing or increasing the compensation previously agreed upon or awarded, subject to the maximum and minimum provided in this law, and shall make its findings of fact, rulings of law and order or award, file the same in the office of the commission, and immediately send a copy thereof to the parties.
- (3) The commission, on its own motion at any time within five (5) years of the date of the accident causing the injury or date of first manifestation of an occupational disease, may review a case in order to correct a manifest injustice.
- (4) This section shall not apply to a commutation of payments under section 72-404.

Emphasis added.

Subsection 4 unambiguously states that Idaho Code § 72-719 does not apply to lump sum settlement agreements. A lump sum settlement is a final award of the Commission, and cannot be set aside absent a showing of fraud once the appeal time has expired. *Harmon v. Lute's Const. Co., Inc.,* 112 Idaho 291, 732 P.2d 260 (1986). Although certain awards may be modified subsequent to the entry on the basis of manifest injustice, no such remedy is available to the Commission where a dispute has been resolved through a lump sum settlement. Idaho Code § 72-719(4).

Claimant cites several cases in which the Idaho Supreme Court has discussed whether a settlement agreement can be modified to correct a manifest injustice. The Commission agrees

that those cases exist but in the cases cited by Claimant the Court did not discuss subsection 4 of Idaho Code § 72-719. The Commission must apply the statute as it plainly reads. Thus, Claimant's Motion to Modify the ISIF Settlement Agreement pursuant to Idaho Code § 72-719(3) is DENIED.

IT IS SO ORDERED.

DATED this 27th day of September, 2013.

INDUSTRIAL COMMISSION

Thomas P. Baskin, Chairman

R.D. Maynard, Commissioner

Thomas E. Limbaugh, Commissioner

ATTEST:

Assistant Commission Secretary

### CERTIFICATE OF SERVICE

I hereby certify that on the Alth day of Sufficient, 2013, a true and correct copy of the foregoing ORDER DENYING MOTION FOR MODIFICATION OF ISIF SETTLEMENT was served by regular United States Mail upon each of the following:

STEVEN J NEMEC 1626 LINCOLN WAY COEUR D'ALENE, ID 83814

THOMAS W. CALLERY PO BOX 854 LEWISTON, ID 83501

Linna andrus

#### BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRUDY DEON,

Claimant.

IC 2007-005950 IC 2008-032836

v.

ORDER ON RECONSIDERATION

H & J, INC., d/b/a BEST WESTERN COEUR D'ALENE INN & CONFERENCE CENTER.

Employer,

and

LIBERTY NORTHWEST INSURANCE CORPORATION.

Surety, Defendants. FILED

NOV - 4 2013

INDUSTRIAL COMMISSION

This matter came before the Commission on the Commission's Notice of Reconsideration pursuant to I.C. § 72-718, filed May 3, 2013. Following a telephone conference with the parties, a briefing schedule was set. Both parties filed opening briefs and reply briefs. At issue is the question of the collateral estoppel effect, if any, of that lump sum settlement agreement between Claimant and the Industrial Special Indemnity Fund (ISIF) approved by the Commission and filed on November 8, 2012. Being fully advised in the law and in the premises, the Commission enters this Order on Reconsideration.

#### INTRODUCTION

Claimant suffered the subject industrial accident on or about February 9, 2007. She filed her complaint against Employer/Surety on March 29, 2011. On or about June 9, 2011, Claimant filed her complaint against ISIF, alleging that she was totally and permanently disabled as a

consequence of the combined effects of the subject accident, and certain pre-existing impairments. The two complaints were consolidated by order of the Industrial Commission dated July 1, 2011. The case was set for hearing by order dated January 12, 2012. The noticed issues included, *inter alia*, whether Claimant was totally and permanently disabled, whether the ISIF bore some responsibility for Claimant's total and permanent disability and if so, how that liability should be apportioned between Employer and the ISIF under the *Carey* formula. On or about October 2, 2012, Claimant reached a tentative settlement with the ISIF at mediation. Claimant's claim against Employer/Surety went to hearing as scheduled on October 16, 2012. As of the date of hearing, the proposed lump sum settlement between Claimant and ISIF had not been executed by the parties. That settlement was eventually executed and submitted to the Commission for review and approval. The Commission approved the lump sum between Claimant and ISIF on or about November 8, 2012. That document is worthy of further review.

The settlement identifies two pre-existing conditions, a left lower extremity injury and a cervical spine injury. The settlement specifies that Claimant was given a 7% PPI rating for the pre-existing lower extremity injury. The settlement reflects some ambiguity, however, concerning the extent and degree of Claimant's impairment from her pre-existing cervical spine condition: Following an independent medical evaluation Claimant was awarded a 6% PPI rating for her cervical spine condition. However, the settlement also specifies that other medical providers, notably Dr. Sears, determined that Claimant suffered no ratable impairment for her cervical spine condition. Concerning Claimant's ratable impairment for the subject accident, the settlement agreement reflects that Claimant was given two independent ratings for her right upper extremity injury. Dr. McNaulty gave Claimant a 2% PPI rating while Dr. Stevens awarded Claimant a 1% PPI rating. At first blush, the settlement agreement appears to leave unresolved

the question of whether Claimant is entitled to a 6% or 0% impairment rating for her pre-existing cervical spine condition. However, other portions of the agreement clearly reflect that the parties ultimately agreed that Claimant was entitled to an impairment rating of some type for her cervical spine condition:

WHEREAS, the Fund and the Claimant stipulate and agree that Claimant is totally and permanently disabled based upon the combined effects of the Claimant's pre-existing cervical spine injury and left lower extremity injury, combining with the injury to her right hand and wrist.

The quoted language strongly suggests that the parties stipulated and agreed that Claimant is entitled to an impairment rating for her cervical spine condition, otherwise, there would be no basis to include that condition among the pre-existing conditions which contributed to Claimant's total and permanent disability. With respect to Claimant's accident produced impairment, the agreement does not reflect whether the parties stipulated to whether Claimant was entitled to a 2% versus 1% impairment rating, although it does reflect the parties agreement that Claimant did suffer impairment of some type as a consequence of the accident.

As noted, the agreement reflects the parties stipulation and agreement that Claimant is totally and permanently disabled as the result of the combined effects of her pre-existing cervical and lower extremity conditions and her accident produced right upper extremity condition. Let it be assumed, for the sake of discussion, that Claimant suffered a 6% PPI rating for her cervical spine, and a 2% PPI rating for her accident caused condition. With these assumptions in mind, it is possible to calculate how responsibility for Claimant's total and permanent disability should be apportioned between Employer and the ISIF using the *Carey* formula;

$$2/15 \times 85 = 11.5 + 2 = 13.05\%$$

$$13/15 \times 85 = 73.95 + 13 = 86.95\%$$
.

Therefore Employer would be responsible for the payment of disability in the amount of 13.05% of the whole person before ISIF would assume responsibility for the balance of total and permanent disability benefits for the rest of Claimant's life.

Interestingly, however, the parties to the lump sum settlement reached an agreement concerning the apportionment of Claimant's total and permanent disability that is apparently unrelated to the *Carey* apportionment arrived at by using the PPI ratings referenced in the lump sum settlement. The agreement specifies that responsibility between employer and the ISIF shall be apportioned as follows:

WHEREAS, based upon the medical records, the Claimant and the Fund stipulate that a 60/40 Carey Formula apportionment with the Fund being responsible for 60% of the Claimant's total and permanent disability is appropriate in this case. This Carey Formula apportionment is based upon the impairment for Claimant's cervical spine injury and left lower extremity, and the significant impairment to Claimant's right hand and wrist as a result of the October 4, 2008, accident. It further takes into account the conflicting evidence concerning the Claimant's cervical impairment and her ability to return to medium level work as an HVAC technician after her cervical injury and lower extremity injury.

By the language of the agreement this "Carey apportionment" is a compromise which recognizes the fact that there is a dispute over the extent and degree of Claimant's cervical spine impairment, and the extent to which the pre-existing impairments affected her ability to engage in remunerative activities prior to the subject accident. However, even if one redacts the cervical spine condition from the Carey calculation, the apportionment yielded by that analysis does not resemble the 60/40 split referenced above:

$$2/9 \times 91 = 20.02 + 2 = 22.02\%$$

$$7/9 \times 91 = 70.98 + 7 = 77.98\%$$
.

Simply, there is no way to juggle the various impairment numbers referenced in the lump sum to produce any type of *Carey* apportionment that comes close to the 60/40 split referenced in the agreement.

While acknowledging that Claimant is totally and permanently disabled as a result of the combined effects of the work accident and her pre-existing conditions, the parties to the lump sum agreement asked the Commission to approve an order commuting the ISIF's liability by the payment of a lump sum of \$70,000.00. Essentially, the parties asked of the Commission to approve the payment of a lump sum amount in lieu of Claimant receiving weekly statutory total and permanent disability benefits for the rest of her life. The Industrial Commission accepted the averments of the parties that Claimant is totally and permanently disabled, and that her total and permanent disability arose as the result of the combined effects of the pre-existing lower extremity and cervical spine conditions and the accident produced right wrist injury. The Commission further found that the facts of the case warranted the commutation of Claimant's entitlement to life time permanent and total disability benefits by the lump sum payment of \$70,000.00. The Commission approved the lump sum settlement agreement on or about November 8, 2012.

As noted, the claim against the Employer/Surety went to hearing on October 16, 2012. The transcript of hearing reveals that all parties were aware that the Claimant and ISIF had reached a tentative settlement of Claimant's claim against the ISIF, but that the proposed settlement had not been executed by Claimant. The matter went to hearing on remaining noticed issues, including issues relating to ISIF liability. Even though the ISIF had reached a tentative settlement with Claimant, Employer/Surety retained the right to argue that should Claimant be

found to be totally and permanently disabled, some portion of her total and permanent disability should be assigned to the ISIF.

The Commission entered its Findings of Fact, Conclusions of Law and Order on May 3, 2013 and determined, on the basis of the evidence adduced at hearing, that Claimant was totally and permanently disabled, but that Employer was entirely responsible for Claimant's total and permanent disability. Specifically, the Commission found that Claimant's October 4, 2008 industrial accident was the sole cause of her total and permanent disability and that the pre-existing impairments to her cervical spine and lower extremity did not combine with the effects of the work accident to contribute to Claimant's total and permanent disability.

Neither the parties, nor the Commission, appreciated that impact of the lump sum settlement agreement on the claim against Employer/Surety and, indeed, it was only as a result of the Commission decision placing full responsibility on the shoulders of Employer that the issue assumed some significance. The Commission can perhaps be criticized for not recognizing (or remembering) its approval of the lump sum settlement while drafting the decision in the case against Employer/Surety. However, the Commission necessarily relies on the parties to identify the issues that bear on the resolution of a case. Regardless, it is critical to the resolution of this matter that the Commission's decision regarding the liability of Employer/Surety be reconciled in some fashion with the Commission's approval of the lump sum settlement which recognized that some portion of Employer's liability is appropriately assigned to the ISIF. Pursuant to the authority granted it under I.C. § 72-718 to sua sponte reconsider its decision, the Commission notified the parties of its intention to reconsider the case and invited briefing on the question of whether, or to what extent, Claimant is collaterally estopped by the lump sum settlement

agreement from asserting that Employer is solely liable for Claimant's total and permanent disability.

Essentially, Claimant argues that Defendants' failure to raise collateral estoppel as an affirmative defense at any time during these proceedings constitutes a waiver of that defense by Defendants. Further, Claimant contends that collateral estoppel does not apply to the lump sum settlement at issue since that settlement does not constitute a prior adjudication on the merits.

For their part, Defendants argue that the lump sum settlement agreement is a final judgment, and that Claimant would be unjustly enriched if Employer/Surety was held solely responsible for Claimant's total and permanent disability where Claimant has already received a substantial lump sum settlement to commute the ISIF's shared responsibility for Claimant's total and permanent disability. Defendants argue that the lump sum settlement estops Claimant from now asserting that Employer should be held responsible for 100% of Claimant's total and permanent disability. Employer/Surety asks of the Commission that it revise its decision to be consistent with its previous order approving the sixty-forty apportionment of responsibility between Employer and the ISIF.

#### **DISCUSSION**

Under I.C. § 72-718, a decision of the Commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated; provided, within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision. In any such event, the decision shall be final upon denial of a motion for rehearing or reconsideration, or the filing of the decision on rehearing or reconsideration.

The Commission may reverse its decision upon a motion for reconsideration, or rehearing of the decision in question, based on the arguments presented, or upon its own motion, provided

that it acts within the time frame established in I.C. § 72-718. See, *Dennis v. School District No.* 91, 135 Idaho 94, 15 P.3d 329 (2000) (citing *Kindred v. Amalgamated Sugar, Co.*, 114 Idaho 284, 756 P.2d 410 (1988)).

The Commission's Notice of Reconsideration was timely filed on May 3, 2013. As stated in that notice, the Commission's Notice of Reconsideration was not intended to foreclose the parties from themselves pursuing motions for reconsideration under I.C. § 72-718 on any other issues they believed appropriate for reconsideration. Neither party has filed such a motion.

On one important point there is no disagreement between the lump sum settlement and the Commission's decision in the subsequent case: Claimant is totally and permanently disabled. The issues before the Commission on reconsideration are as follows: (1) Is Employer entitled to rely on the doctrine of collateral estoppel to prevent Claimant from arguing that Employer bears responsibility for 100% of Claimant's total and permanent disability; and (2) If so, is Claimant estopped from relitigating the issue of how responsibility between Employer/Surety and the ISIF should be apportioned?

I. Is Employer entitled to rely on the doctrine of collateral estoppel to prevent

Claimant from arguing that Employer bears responsibility for 100% of

Claimant's total and permanent disability?

Res judicata is comprised of claim preclusion (true res judicata) and issue preclusion (collateral estoppel). Res judicata, or claim preclusion, bars a subsequent action between the same parties upon the same claim or upon claims relating to the same cause of action. *Ticor Title Company, v. Stanion*, 144 Idaho 119, 157 P.3d 613 (2007). As between Claimant and Employer/Surety the doctrine of res judicata is inapplicable inasmuch as Employer/Surety was not a party to the lump sum settlement agreement between Claimant and the ISIF. Although the

ISIF would have participated in the hearing had it not reached a settlement with Claimant, the claim against the ISIF was the subject of a separate complaint, which was consolidated with Claimant's complaint against Employer/Surety for the purposes of hearing only. The doctrine of res judicata is inapplicable to the resolution of this matter.

The doctrine of collateral estoppel exists to prevent the relitigation of an issue previously determined. The doctrine applies to prevent the relitigation of an issue decided in a previous case when the following elements are satisfied:

(1) Did the party "against whom the earlier decision is asserted ... have a 'full and fair opportunity to litigate that issue in the earlier case?' "(2) Was the issue decided in the prior litigation "identical with the one presented in the action in question?" (3) Was the issue actually decided in the prior litigation? This may be dependent on whether deciding the issue was "necessary to [the prior] judgment." (4) "Was there a final judgment on the merits?" (5) "Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?"

See Magic Valley Radiology, PA v. Kolouch, 123 Idaho 434, 849 P.2d 107 (1993); Stoddard v. Haggadone Corp., 147 Idaho 186, 207 P.3d 162 (2009).

On the question of whether or not Claimant is barred from relitigating the issue of whether ISIF liability has been established, it is clear that the elements essential to the application of the doctrine of collateral estoppel have been satisfied.

First, Claimant had a full and fair opportunity to litigate this issue in the prior case against the ISIF. Necessarily, before the ISIF could be found liable in that case, Claimant bore the burden of demonstrating that she was totally and permanently disabled, and that all elements of ISIF liability were met. Claimant could not prevail against the ISIF without meeting her burden of proof in this regard. The previous claim against the ISIF afforded Claimant a full and fair opportunity to litigate these issues.

Next, the issue decided in the previous case is identical to the issue before the Commission in Claimant's claim against Employer/Surety. As demonstrated in the Commission's Findings of Fact, Conclusions of Law and Order, among the issues before the Commission are whether Claimant is totally and permanently disabled, and if so, whether apportionment is appropriate under the *Carey* formula. The issue of *Carey* apportionment would not arise except for a finding that all elements of ISIF liability had been met. Whether the elements of ISIF liability had been satisfied was argued by the parties and addressed by the Commission.

As noted above, Claimant's primary objection to the application of the doctrine rests on her assertion that the lump sum settlement does not constitute the litigation of any issue on the merits and that she therefore had no opportunity, much less a full and fair one, to litigate the issue of ISIF liability until the October 16, 2012 hearing before the Industrial Commission. The issue of whether or not a lump sum settlement constitutes a decision on the merits received extensive treatment in the case of *Jackman v. State Industrial Special Indemnity Fund*, 129 Idaho 689, 931 P.2d 1207 (1997). That case, which bears many similarities to the case at bar, warrants closer review.

As in the instant matter, *Jackman* involved separate complaints against employer/surety and the ISIF. Prior to the August 13, 1986 industrial accident Jackman suffered from long-standing problems with his hip. He had undergone a 1997 hip replacement surgery and a 1983 revision surgery. The evidence established that prior to the 1986 industrial accident claimant had significant limitations as a result of his hip condition. In August of 1986 claimant suffered a slip and fall which caused further injury to his hip. He underwent a second total hip revision surgery in 1987, and thereafter underwent a back surgery for unrelenting back pain. In 1989 claimant

was given a 33% impairment rating for his hip condition. Importantly, the impairment included consideration of the multiple surgeries on claimant's hip. In 1990 Jackman and employer/surety entered into a lump sum settlement. That agreement referenced the payment of a 33% impairment rating for claimant's right hip and low back condition by employer. The lump sum settlement did not reference any apportionment of that impairment rating between the work accident and claimant's documented pre-existing condition.

In 1994, claimant filed a complaint against the ISIF alleging, inter alia, that the combined effects of his pre-existing right hip condition and the subject accident left him totally and permanently disabled. The Commission found that claimant was totally and permanently disabled, and that the ISIF shared responsibility with employer for claimant's total and permanently disability. The ISIF appealed the Commission's decision to the Idaho Supreme Court. On appeal the ISIF argued that Jackman's claim against it was barred by the doctrine of collateral estoppel. Jackman argued that although the lump sum settlement agreement reflected the 33% impairment rating, that agreement did not address the issue of apportionment of that rating between pre-existing and accident produced conditions. Jackman argued that the evidence would show that claimant had a 13% impairment rating referable to his pre-existing hip condition and a 20% impairment rating referable to the 1986 accident. The Court rejected this argument, ruling that Jackman was collaterally estopped from arguing that the 33% impairment rating referenced in the lump sum (and paid by employer/surety) could later be apportioned between the subject accident and claimant's pre-existing condition in order to support a claim against the ISIF. In this regard the Court stated:

Jackman cannot rely upon the same percentage impairment rating in order to attain further benefits from ISIF. Jackman must present additional evidence of impairment in order to increase his impairment rating. The issue presented in the proceeding against SIF and SHS, compensating Jackman for his impairment

rating of 33% whole person, is identical to the issue Jackman presently raises: whether ISIF must compensate Jackman for a portion of the same 33% whole person impairment.

The Jackman Court also addressed Jackman's argument that the lump sum settlement did not constitute a final judgment on the merits. Citing *Davidson v. H. H. Keim Company*, 110 Idaho 758, 718 P.2d 1196 (1986), the Court ruled that a lump sum agreement approved by the Commission under I.C. § 72-404 constitutes a final decision of the Commission and is therefore a final judgment on the merits.

We believe that *Jackman* is controlling in the instant matter and that the lump sum settlement between Claimant and the ISIF estops Claimant from asserting that Employer bears 100% of the liability for Claimant's total and permanent disability.

In *Jackman*, the lump sum settlement specified that all of claimant's 33% impairment was apportioned to employer. This actually litigated the question of apportionment, and precluded claimant from asserting an apportionment scheme in subsequent litigation different from the apportionment reflected in the lump sum. Similarly, the lump sum in the instant matter specifically reflects the parties' agreement that Claimant is totally and permanently disabled, and that she suffered from certain pre-existing conditions which combined with the work accident to result in total and permanent disability. Therefore, this issue was actually litigated in the settlement. This is made even more clear by the recent case of *Wernecke v. St. Maries Joint School District No. 401*, 147 Idaho 277, 207 P.3d 1008 (2009). In that case, the Court made it clear that the Industrial Commission does not even have jurisdiction to consider a proposed lump sum settlement between an injured worker and the ISIF absent the Commission's threshold determination that the injured worker is indeed totally and permanently disabled and that all elements of ISIF liability have been satisfied. In this regard the Court stated:

Section 72-318(2) sets out the State's policy that agreements purporting to waive an employee's rights to compensation under the Act are void. Section 72-332 provides a narrow exception for cases that meet the requirements therein specified. ISIF's liability may only be invoked when the conditions specified in the statute, as defined in *Garcia*, are present. That requires findings by the Commission. Unless the Commission finds that the requisite elements exist, it may not approve a lump sum settlement agreement involving ISIF. Such findings are for the benefit of both the claimant - - to protect him or her from himself or herself - - and of ISIF - - to keep it from making unwarranted payments when there are no findings establishing ISIF's liability. In this regard, the Commission plays a gatekeeper role and must scrupulously perform that function. The requisite findings may be made by the Commission upon a hearing on the merits or upon a stipulation of the parties considered and approved by the Commission.

ISIF's liability under section 72-332 is not invoked unless the four elements requisite to such a claim are found by the Commission to be present. If the Commission does not make the requisite findings, it has no authority or jurisdiction to hold ISIF liable on a claim.

Here the parties stipulated that Claimant was totally and permanently disabled and that the liability of the ISIF was established because Claimant's pre-existing cervical spine and lower extremity impairments combined with her accident caused impairment to cause total and permanent disability. The Commission necessarily found the stipulated facts to be true in order to consider whether it was appropriate, under the facts of the case, for Claimant to commute her right to statutory life time benefits by the payment of the lump sum of \$70,000.00. Therefore, as a prerequisite to the Commission's approval of the lump sum, the question of whether the ISIF bore responsibility for some portion of Claimant's total and permanent disability was actually and necessarily adjudicated.

Next, per *Jackman*, Supra, it is clear that the order approving the lump sum settlement does constitute a "final judgment on the merits".

Finally, the party against whom the doctrine of collateral estoppel is to be applied was a party to the previous action. Claimant was a party to the action against the ISIF and in that action alleged that the ISIF bore responsibility for her total and permanent disability. Claimant is

also a party to the action against Employer/Surety, and in that case, argues that 100% of the liability for her total and permanent disability should be born by Employer.

Based on the foregoing, the Commission concludes that the doctrine of collateral estoppel prohibits Claimant from relitigating the issue of whether the ISIF bears responsibility for some portion of Claimant's total and permanent disability. Claimant is estopped from asserting that Employer is entirely responsible for her total and permanent disability. Claimant is bound by the Commission's order approving the lump sum settlement, an order which establishes that some portion of Claimant's total and permanent disability must be born by the ISIF.

# II. Is Claimant estopped from relitigating the issue of how responsibility for Claimant's total and permanent disability should be apportioned between Employer and the ISIF?

The next question before the Commission is whether the doctrine of collateral estoppel bars Claimant from relitigating how responsibility should be apportioned between the ISIF and Employer/Surety. First, it is worth noting that this is an issue that is different from the question of whether the ISIF bears some responsibility for Claimant's total and permanent disability. To say that the ISIF bears some responsibility for Claimant's total and permanent disability does not answer the more particularized inquiry of how that responsibility should be apportioned between the Employer and the ISIF. Indeed, disputes over the issue of apportionment are among the issues that are typically resolved in a lump sum settlement between an injured worker and the ISIF. See Havens State of Idaho Industrial Special Indemnity http://www.iic.idaho.gov/decisions/2009/09 09/havens v state of idaho.pdf (Sept. 21, 2009). Although the parties to a case may stipulate that the ISIF bears some responsibility for an injured worker's total and permanent disability, the parties may dispute the particular impairment ratings

which attach to the work related injury or claimant's pre-existing conditions. Identifying these impairment ratings is important to the application of the *Carey* formula for assigning responsibility between Employer/Surety and the ISIF in a total and permanent disability case. In *Jackman*, the evidence established that the issue of how an impairment rating should be apportioned was addressed in the lump sum settlement, and that Claimant could not argue for a different apportionment in a subsequent proceeding. In this regard, the *Jackman* Court stated:

Jackman cannot rely upon the same percentage impairment rating in order to attain further benefits from ISIF. Jackman must present additional evidence of impairment in order to increase his impairment rating. The issue presented in the proceeding against SIF and SHS, compensating Jackman for his impairment rating of 33% whole person, is identical to the issue Jackman presently raises: whether ISIF must compensate Jackman for a portion of the same 33% whole person impairment.

The lump sum settlement in this case, too, addresses the issue of the apportionment of responsibility for Claimant's total and permanent disability between the ISIF and Employer/Surety. However, as developed above, it is difficult, if not impossible, to reconcile the stipulated 60/40 split with the various impairment ratings which are also referenced in the lump sum settlement. As well, the settlement does not purport to specify which of the conflicting impairment ratings the Commission should adopt in approving the lump sum. The language of the lump sum strongly suggests that the 60/40 apportionment referenced in the document represents a compromise of the apportionment issue which recognizes that the parties disputed certain facts which impacted how much of Claimant's total and permanent disability should be apportioned to the ISIF:

WHEREAS, based upon the medical records, the Claimant and the Fund stipulate that a 60/40 Carey Formula apportionment with the Fund being responsible for 60% of the Claimant's total and permanent disability is appropriate in this case. This Carey Formula apportionment is based upon the impairment for Claimant's cervical spine injury and left lower extremity, and the significant impairment to Claimant's right hand and wrist as a result of the

October 4, 2008, accident. It further takes into account the conflicting evidence concerning the Claimant's cervical impairment and her ability to return to medium level work as an HVAC technician after her cervical injury and lower extremity injury.

Emphasis added.

Unlike the uncontested recital of how the 33% impairment rating should be apportioned in Jackman, Supra, the sixty-forty apportionment referenced in the instant lump sum settlement agreement is not consistent with recitals made in other parts of that document, and appears to represent a compromise of the disputed issue of apportionment. As such, we do not regard the issue of how responsibility should be apportioned between the Employer and the ISIF to have been "actually litigated" in the lump sum settlement. Nor do we believe that deciding the issue of apportionment was necessary to our approval of the lump sum settlement. See Brown v. State of Idaho Industrial Special Indemnity Fund, 138 Idaho 493, 65 P.3d 515 (2003). In addition to disputed Carey apportionment the Commission determined that other facts supported its decision to approve the commutation of Claimant's right to lifetime benefits. Among these were Claimant's expressed need for immediate cash, and the fact that she wanted the peace of mind of a lump sum rather than statutory benefits; upon Claimant's death statutory benefits cease, leaving her survivors with no ongoing income stream. In summary we do no regard the issue of Carev apportionment to have been actually litigated by the lump sum settlement, nor necessary to our approval of the settlement.

For these reasons, we conclude that the lump sum settlement agreement does not bar litigation of the question of how responsibility for Claimant's total and permanent disability should be apportioned between the ISIF and Employer/Surety. Moreover, we do not believe that the doctrine of collateral estoppel would allow Employer/Surety, a non-party to the lump sum

settlement, to be bound by that document's recitation that Employer/Surety should be held responsible for 40% of Claimant's total and permanent disability.

Since we have found that the lump sum settlement does not bar litigation of the issue of apportionment, we are free to apportion responsibility between Employer and ISIF on the basis of the facts adduced at hearing. Again, the lump sum settlement agreement clearly anticipates that Claimant's total and permanent disability is a result of the combined effects of the pre-existing cervical spine and lower extremity impairments and the impairment from the subject accident. With this stipulation in mind, it is possible to ascertain how responsibility should be apportioned between Employer/Surety and the ISIF using the Commission's findings on impairment and the *Carey* formula. Under the *Carey* formula, the relative responsibilities of Employer/Surety and the ISIF are calculated as follows:

$$4/17 \times 83 = 19.92 + 4 = 23.92$$

$$13/17 \times 83 = 63.08 + 13 = 76.08$$
.

Therefore, Employer is responsibility for disability of 23.92%, with credit for impairment paid to date.<sup>1</sup> The responsibility of the ISIF was settled by way of the aforementioned lump sum settlement agreement.

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<sup>&</sup>lt;sup>1</sup> We recognize that Employer has only asked of the Commission that Claimant be required to honor the 60/40 split referenced in the lump sum settlement, while our decision obligates Employer to pay a substantially smaller portion of Claimant's total and permanent disability. However, Employer's position in this regard necessarily follows from its argument that the doctrine of collateral estoppel prevents relitigation of the issue of how disability should be apportioned. Because we have determined that the doctrine does not bar relitigation of that issue we do not feel bound by what might otherwise be regarded as Employer's waiver of a more favorable apportionment scheme.

#### CONCLUSIONS AND ORDER ON RECONSIDERATION

In accordance with this decision on reconsideration, the Commission enters these revised conclusions of law and Order.

- 1. Claimant has proven that she suffers whole person impairment of 17% of the whole person referable to her pre-existing conditions, and a 4% whole person impairment referable to her 2008 industrial accident.
- 2. Claimant has proven that she suffers permanent disability of 85% inclusive of impairment, and has further proven that she is an odd-lot worker, totally and permanently disabled under the *Lethrud* test.
- 3. Claimant is estopped from asserting that 100% of Claimant's total and permanent disability should be born by Employer/Surety, and is bound by the prior lump sum settlement in which she stipulated and agreed that the ISIF bears some responsibility for her total and permanent disability on account of pre-existing cervical spine and lower extremity impairments.
- 4. The lump sum settlement agreement does not collaterally estop Claimant from adjudicating, in this proceeding, how Claimant's total and permanent disability should be apportioned between the ISIF and Employer.
- 5. Employer's responsibility for Claimant's total and permanent disability is calculated as follows under *Carey*, Supra:

$$4/17 \times 83 = 19.92 + 4 = 23.92$$

Employer is responsible for the payment of disability equaling 23.92%, with credit for impairment paid to date. The liability of the ISIF was previously compromised and commuted by the aforementioned November 8, 2012 lump sum settlement agreement.

6.	Pursuant to I.C.	§ 72-718,	this	decision	is fina	l and	conclusive	as to	all	matters
adjudicated.										
	11170			h .						

DATED this 4th day of No vehiller, 2013.

INDUSTRIAL COMMISSION

Thomas P. Baskin, Chairman

Participated but did not sign

R.D. Maynard, Commissioner

Thomas E. Limbaugh, Commissione

ATTEST:

#### CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of November, 2013, a true and correct copy of the foregoing ORDER ON RECONSIDERATION was served by regular United States Mail upon each of the following:

STEVEN J NEMEC 1626 LINCOLN WAY COEUR D'ALENE ID 83814

JOSEPH M WAGER PO BOX 6358 BOISE ID 83707-6358

Kenna andrus

JAMES, VERNON & WEEKS, P.A. 1626 Lincoln Way Coeur d'Alene, ID 83814 Telephone No. 208-667-0683 Facsimile No. 208-664-1684 snemec@jvwlaw.net

Stephen J. Nemec ISBA # 7591 Attorney for Appellant/Claimant

### BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRUDY DEON.

Claimant-Appellant,

CASE NO.: 2007-005950

2008-032836

VS.

H&J INC., d/b/a BEST WESTERN COEUR D' ALENE INN & CONFERENCE CENTER, Employer, LIBERTY NORTHWEST INSURANCE CO., Surety,

NOTICE OF APPEAL

Defendants-Respondents,

and

STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND,

Defendant.

Filing Fee: \$109.00

TO: THE ABOVE NAMED RESPONDENTS, H&J INC. d/b/a BEST WESTERN COEUR D' ALENE INN & CONFERENCE CENTER and LIBERTY NORTHWEST INSURANCE COMPANY and Respondents' attorney JOSEPH WAGER and the CLERK OF THE IDAHO INDUSTRIAL COMMISSION

#### NOTICE IS HEREBY GIVEN THAT:

- 1. The above-named Claimant-Appellant, Trudy Deon, appeals against the above-named Respondents, to the Idaho Supreme Court from the order on reconsideration entered in the matter on November 4, 2013, Commissioner Thomas Baskin, Commissioner R.D. Maynard, and Commissioner Thomas Limbaugh, presiding.
- 2. Appellant has a right to appeal to the Idaho Supreme Court and the order described in Paragraph 1 is an appealable order under and pursuant to Idaho Appellate Rule 11(a)(1).
- 3. A preliminary statement of the issues on appeal which the Appellant then intends to assert in the appeal; provided, such list of issues on appeal shall not prevent the Appellant from asserting other issues on appeal:
  - (a) Did the Commission err in raising the affirmative defense of collateral estoppel *sua sponte* on reconsideration to deny payment of total permanent disability benefits to the Claimant?
  - (b) Did the Commission violate the Claimant's right to due process?
  - (c) Did the Commission correctly find that the elements of the collateral estoppel test as set forth in *Stoddard v Hagadone Corp*, 147 Idaho 186, 207 P.3d 162 (2009) were met?
  - (d) Is the ISIF settlement void as a matter of law thereby rendering collateral estoppel inapplicable?
  - (e) Did the Commission err in refusing to modify the ISIF settlement agreement pursuant to I.C. §72-719(3)?

- (f) Can the Commission's conclusions of law be supported in light of the Commission's findings of fact?
- 4. No order has been entered sealing all or any portion of the record.
- 5. The Appellant requests the preparation of the following portions of the reporter's transcript:
  - a. No additional preparation of the transcript is necessary as court reporter Neil Cooley previously filed a complete and accurate transcript of the hearing (163 pages) that occurred on October 16, 2012 in which Referee Alan Reed Taylor presided with the Idaho Industrial Commission on October 30, 2012.
- 6. The Appellant requests the following documents to be included in the Clerk's record in addition to those automatically included under Idaho Appellate Rule 28:

a.)	01/18/11	Complaint to Employer/Surety for October 4, 2008 Injury
b.)	01/27/11	Defendant Employer/Surety Answer for October 4, 2008 Injury
c.)	03/31/11	Complaint to Employer/Surety for February 9, 2007 Injury
d.)	04/11/11	Defendant Employer/Surety Answer for February 9, 2007 Injury
e.)	06/14/11	Complaint to ISIF
f.)	06/16/11	Defendant ISIF Answer to Complaint
g.)	07/01/11	Order to Consolidate 2007-005950 and 2008-032836
h.)	01/12/12	Notice of Hearing and Notice of Pre-Hearing Telephone
•		Conference
i.)	10/02/12	Claimant's Pre-Hearing Notice of Witnesses, Exhibits, and
		Post-Hearing Depositions
j.)	10/04/12	Defendant ISIF Notice of Exchange of Exhibits and Disclosure
		Pursuant to Rule 10
k.)	10/05/12	Defendant Employer/Surety Joint Supplemental Notice of
		Witnesses, Exhibits, and Post-Hearing Depositions
1.)	10/30/12	Transcript of October 16, 2012 Hearing
m.)	11/08/12	Stipulation and Agreement of Lump Sum Discharge and Order of
		Approval and Discharge (ISIF)
n.)	11/27/12	Claimant's Opening Brief
o.)	12/17/12	Defendant Employer/Surety Response Brief
p.)	12/21/12	Claimant's Reply Brief
q.)	04/08/13	Referee's Recommendation Opinion
r.)	05/03/13	Commission's Findings of Fact, Conclusions of Law and Order
s.)	05/03/13	Commission's Notice of Reconsideration
t.)	06/26/13	Defendant Employer/Surety Opening Brief: Impact of IC

		Approval of ISIF Settlement Agreement upon the May 3, 2013 IC
		Decision and Motion for Reconsideration
u.)	06/28/13	Claimant's Opening Brief Following Notice of Reconsideration
v.)	07/17/13	Defendant Employer/Surety Reply Brief: Impact of IC Approval
•		of ISIF Settlement Agreement upon the May 3, 2013 IC Decision
		and Motion for Reconsideration
w.)	07/19/13	Claimant's Reply Brief Following Notice of Reconsideration
x.)	07/26/13	Claimant's Motion for Modification of ISIF Settlement Agreement
•		Pursuant to I.C. §72-719(3)
y.)	07/26/13	Claimant's Attorney Affidavit in Support of Motion to Modify
,		ISIF Settlement Agreement Pursuant to I.C. §72-719(3)
z.)	08/07/13	Defendant Employer/Surety Response to Claimant's Motion for
ĺ		Modification of ISIF Settlement Agreement
aa.)	08/09/13	Defendant ISIF Response to Claimant's Motion to Modify Lump
•		Sum Settlement
bb.)	08/14/13	Claimant's Reply Brief in Support of Motion for Modification of
ŕ		ISIF Settlement Pursuant to I.C. §72-719(3)
cc.)	09/27/13	Order Denying Motion for Modification of ISIF Settlement
dd.)	11/04/13	Order on Reconsideration

# 7. I certify:

- (a) That the estimated fee of \$100 for preparation of the agency's records has been paid.
- (b) The appellate filing fee has been paid.
- (c) Service has been made upon all the parties required to be served pursuant to Idaho Appellate Rule 20.

DATED this 12<sup>th</sup> day of November, 2013.

JAMES, VERNON & WEEKS, P.A.

Stephen J. Nemec Attorney for Appellant

# **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 12<sup>th</sup> day of November, 2013 a true and correct copy of the foregoing document was served upon the following individuals by the method indicated below:

Joseph Wager		Thomas W. Callery		
Law Offices of Kent Day		Jones, Brower & Callery		
P.O. Box 6358		P.O. Box 854		
Boise, ID 83707		Lewiston, ID 83501		
Atte	Attorney for Employer & Surety		Attorney for I.S.I.F.	
	Mailed		Mailed	
	By Hand		By Hand	
	Overnight Mail		Overnight Mail	
X	Fax: (800)-972-3213	X	Fax: (208)-746-9553	

Agol Home

# BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

TRUDY DEON,  Claimant/Appellant  v.  H&J, INC., d/b/a, BEST WESTERN, COI D'ALENE INN & CONFERENCE CENT Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety,  Defendants/Respon	CERTIFICATE OF APPEAL  CERTIFICATE OF APPEAL  CER,  CER,  CER,  CONTROL OF APPEAL
Appeal From:	Industrial Commission, Thomas P. Baskin, Chairman presiding
Case Numbers:	IC 2007-005950 & IC 2008-032836
Order Appealed from:	Findings of Fact, Conclusions of Law, and Order, filed May 3, 2013, and Order on Reconsideration, filed November 4, 2013.
Attorney for Appellant:	Stephen J. Nemec 1626 Lincoln Way Coeur D'Alene ID 83814
Attorney for Respondents:	Joseph M. Wager Po Box 6358 Boise Id 83707-6358
Appealed By:	Trudy Deon, Claimant/Appellant
Appealed Against:	H&J, Inc., d/b/a Best Western Coeur d'Alene Inn & Conference Center, and Liberty Northwest Insurance Corporation, Defendants/Respondents,
Notice of Appeal Filed:	November 14, 2013

# CERTIFICATE OF APPEAL FOR TRUDY DEON - 1

Appellate Fee Paid:

\$109.00 to Supreme Court and \$100.00 to Industrial Commission

Checks were received.

Name of Reporter:

Neil Cooley, M&M Court Reporting Service, Inc.

Transcript Requested:

Standard transcript has been requested. Transcript has been prepared and filed with the Commission.

Dated:

November 15, 2013

#### **CERTIFICATION**

I, the undersigned Assistant Commission Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing is a true and correct photocopy of the Notice of Appeal; Findings of Fact, Conclusions of Law, and Order; and Order On Reconsideration, and the whole thereof, in IC case numbers 2007-005950 & 2008-032836 for Trudy Deon.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 15th day of November, 2012.

JAMES, VERNON & WEEKS, P.A. 1626 Lincoln Way
Coeur d'Alene, ID 83814
Telephone No. 208-667-0683
Facsimile No. 208-664-1684
<a href="mailto:snemec@jvwlaw.net">snemec@jvwlaw.net</a>

Stephen J. Nemec ISBA # 7591 Attorney for Appellant/Claimant

# BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRUDY DEON,

Claimant-Appellant,

VS.

H&J INC., d/b/a BEST WESTERN COEUR D' ALENE INN & CONFERENCE CENTER, Employer, LIBERTY NORTHWEST INSURANCE CO., Surety, STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND,

Defendants-Respondents,

CASE NO.: 2007-005950 2008-032836

FIRST AMENDED NOTICE OF APPEAL

SUPREME COURT NO. 41596

Filing Fee: None

FILED

NOV 2 2 2013

INDUSTRIAL COMMISSION

TO: THE ABOVE NAMED RESPONDENTS, H&J INC. d/b/a BEST WESTERN COEUR D' ALENE INN & CONFERENCE CENTER and LIBERTY NORTHWEST INSURANCE COMPANY and Respondents' attorney JOSEPH WAGER and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND and Respondent's attorney THOMAS CALLERY and the CLERK OF THE IDAHO INDUSTRIAL COMMISSION

#### NOTICE IS HEREBY GIVEN THAT:

- 1. The above-named Claimant-Appellant, Trudy Deon, appeals against the above-named Respondents, to the Idaho Supreme Court from the order on reconsideration entered in the matter on November 4, 2013, Commissioner Thomas Baskin, Commissioner R.D. Maynard, and Commissioner Thomas Limbaugh, presiding.
- 2. Appellant has a right to appeal to the Idaho Supreme Court and the order described in Paragraph 1 is an appealable order under and pursuant to Idaho Appellate Rule 11(a)(1).
- 3. A preliminary statement of the issues on appeal which the Appellant then intends to assert in the appeal; provided, such list of issues on appeal shall not prevent the Appellant from asserting other issues on appeal:
  - (a) Did the Commission err in raising the affirmative defense of collateral estoppel sua sponte on reconsideration to deny payment of total permanent disability benefits to the Claimant?
  - (b) Did the Commission violate the Claimant's right to due process?
  - (c) Did the Commission correctly find that the elements of the collateral estoppel test as set forth in *Stoddard v Hagadone Corp*, 147 Idaho 186, 207 P.3d 162 (2009) were met?
  - (d) Is the ISIF settlement void as a matter of law thereby rendering collateral estoppel inapplicable?
  - (e) Did the Commission err in refusing to modify the ISIF settlement agreement pursuant to I.C. §72-719(3)?

- (f) Can the Commission's conclusions of law be supported in light of the Commission's findings of fact?
- 4. No order has been entered sealing all or any portion of the record.
- 5. The Appellant requests the preparation of the following portions of the reporter's transcript:
  - a. No additional preparation of the transcript is necessary as court reporter Neil Cooley previously filed a complete and accurate transcript of the hearing (163 pages) that occurred on October 16, 2012 in which Referee Alan Reed Taylor presided with the Idaho Industrial Commission on October 30, 2012.
- 6. The Appellant requests the following documents to be included in the Clerk's record in addition to those automatically included under Idaho Appellate Rule 28:

a.)	01/18/11	Complaint to Employer/Surety for October 4, 2008 Injury
b.)	01/27/11	Defendant Employer/Surety Answer for October 4, 2008 Injury
c.)	03/31/11	Complaint to Employer/Surety for February 9, 2007 Injury
d.)	04/11/11	Defendant Employer/Surety Answer for February 9, 2007 Injury
e.)	06/14/11	Complaint to ISIF
f.)	06/16/11	Defendant ISIF Answer to Complaint
g.)	07/01/11	Order to Consolidate 2007-005950 and 2008-032836
h.)	01/12/12	Notice of Hearing and Notice of Pre-Hearing Telephone
		Conference
i.)	10/02/12	Claimant's Pre-Hearing Notice of Witnesses, Exhibits, and
		Post-Hearing Depositions
j.)	10/04/12	Defendant ISIF Notice of Exchange of Exhibits and Disclosure
		Pursuant to Rule 10
k.)	10/05/12	Defendant Employer/Surety Joint Supplemental Notice of
		Witnesses, Exhibits, and Post-Hearing Depositions
l.)	10/30/12	Transcript of October 16, 2012 Hearing
m.)	11/08/12	Stipulation and Agreement of Lump Sum Discharge and Order of
		Approval and Discharge (ISIF)
n.)	11/27/12	Claimant's Opening Brief
0.)	12/17/12	Defendant Employer/Surety Response Brief
p.)	12/21/12	Claimant's Reply Brief
q.)	04/08/13	Referee's Recommendation Opinion
r.)	05/03/13	Commission's Findings of Fact, Conclusions of Law and Order
s.)	05/03/13	Commission's Notice of Reconsideration
t.)	06/26/13	Defendant Employer/Surety Opening Brief: Impact of IC

		Approval of ISIF Settlement Agreement upon the May 3, 2013 IC Decision and Motion for Reconsideration
u.)	06/28/13	Claimant's Opening Brief Following Notice of Reconsideration
v.)	07/17/13	Defendant Employer/Surety Reply Brief: Impact of IC Approval of ISIF Settlement Agreement upon the May 3, 2013 IC Decision and Motion for Reconsideration
w.)	07/19/13	Claimant's Reply Brief Following Notice of Reconsideration
x.)	07/26/13	Claimant's Motion for Modification of ISIF Settlement Agreement
,		Pursuant to I.C. §72-719(3)
y.)	07/26/13	Claimant's Attorney Affidavit in Support of Motion to Modify
• /		ISIF Settlement Agreement Pursuant to I.C. §72-719(3)
z.)	08/07/13	Defendant Employer/Surety Response to Claimant's Motion for
		Modification of ISIF Settlement Agreement
aa.)	08/09/13	Defendant ISIF Response to Claimant's Motion to Modify Lump
		Sum Settlement
bb.)	08/14/13	Claimant's Reply Brief in Support of Motion for Modification of
•		ISIF Settlement Pursuant to I.C. §72-719(3)
cc.)	09/27/13	Order Denying Motion for Modification of ISIF Settlement
đđ.)	11/04/13	Order on Reconsideration
•		

#### I certify: 7.

- That the estimated fee of \$100 for preparation of the agency's records has (a) been paid.
- The appellate filing fee has been paid. (b)
- Service has been made upon all the parties required to be served pursuant (c) to Idaho Appellate Rule 20.

DATED this 22<sup>nd</sup> day of November, 2013.

JAMES, VERNON & WEEKS, P.A.

Attorney for Appellant

# **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 22<sup>nd</sup> day of November, 2013 a true and correct copy of the foregoing document was served upon the following individuals by the method indicated below:

Joseph Wager		Thomas W. Callery		
Law Offices of Kent Day		Jones, Brower & Callery		
P.O. Box 6358		P.O. Box 854		
Boise, ID 83707		Lewiston, ID 83501		
Atte	Attorney for Employer & Surety		Attorney for I.S.I.F.	
	Mailed		Mailed	
	By Hand		By Hand	
	Overnight Mail		Overnight Mail	
X	Fax: (800)-972-3213	X	Fax: (208)-746-9553	

At More

# BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

TRUDY DEON,  Claimant/Appellan	SUPREME COURT NO. 41593
v.  H&J, INC., d/b/a, BEST WESTERN, COD'ALENE INN & CONFERENCE CEN'Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, STATE OF IDAHO, INDUSTRIAL SPEINDEMNITY FUND,  Defendants/Respondered.	TER, ) and ) CIAL )
Appeal From:	Industrial Commission, Thomas P. Baskin, Chairman presiding
Case Numbers:	IC 2007-005950 & IC 2008-032836
Order Appealed from:	Findings of Fact, Conclusions of Law, and Order, filed May 3, 2013, and Order on Reconsideration, filed November 4, 2013.
Attorney for Appellant:	Stephen J. Nemec 1626 Lincoln Way Coeur D'Alene ID 83814
Attorney for Respondents Coeur d'Alene Inn & Liberty Northwest Insurance:	Joseph M. Wager PO Box 6358 Boise ID 83707-6358
Attorney for Respondent State of Idaho, Industrial Special Indemnity Fund:	Thomas W. Callery PO Box 854 Lewiston, ID 83501
Appealed By:	Trudy Deon, Claimant/Appellant

AMENDED CERTIFICATE OF APPEAL FOR TRUDY DEON, #41593 - 1

Appealed Against:

H&J, Inc., d/b/a Best Western Coeur d'Alene Inn &

Conference Center, and Liberty Northwest

Insurance Corporation, and State of Idaho Industrial Special Indemnity Fund, Defendants/Respondents,

Notice of Appeal Filed:

November 14, 2013

First Amended Notice of

November 22, 2013

Appeal Filed:

Appellate Fee Paid:

\$109.00 to Supreme Court and

\$100.00 to Industrial Commission

Checks were received.

Name of Reporter:

Neil Cooley, M&M Court Reporting Service, Inc.

Transcript Requested:

Standard transcript has been requested. Transcript has been prepared and filed with the Commission.

November 26, 2013

Dated:

# CERTIFICATION

I, the undersigned Assistant Commission Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing is a true and correct photocopy of the First Amended Notice of Appeal, and the whole thereof, in IC case numbers 2007-005950 & 2008-032836 for Trudy Deon.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 26th day of November, 2013.

#### **CERTIFICATION OF RECORD**

I, Kenna Andrus, the undersigned Assistant Commission Secretary of the Industrial Commission, do hereby certify that the foregoing record contains true and correct copies of all pleadings, documents, and papers designated to be included in the Agency's Record Supreme Court No. 41593 on appeal by Rule 28(b)(3) of the Idaho Appellate Rules and by the Notice of Appeal, pursuant to the provisions of Rule 28(b).

I further certify that all exhibits offered or admitted in this proceeding, if any, are correctly listed in the List of Exhibits. Said exhibits will be lodged with the Supreme Court upon settlement of the Reporter's Transcript and Agency's Record herein.

DATED this 20th day of December, 2013.

#### BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

TRUDY DEON,	)
	) SUPREME COURT NO. 41593
Claimant/Appellant,	)
	) NOTICE OF COMPLETION
V.	)
	)
H&J, INC., d/b/a, BEST WESTERN, COEUR	)
D'ALENE INN & CONFERENCE CENTER,	)
Employer, and LIBERTY NORTHWEST	)
INSURANCE CORPORATION, Surety, and	)
STATE OF IDAHO, INDUSTRIAL SPECIAL	)
INDEMNITY FUND,	)
	)
Defendants/Respondents.	)
	)

TO: STEPHEN KENYON, Clerk of the Courts; and Stephen J. Nemec, for the Claimant/Appellant; and Joseph M. Wager, for the Defendants/Respondents Employer & Surety; and Thomas W. Callery, for the Defendant/Respondent ISIF.

YOU ARE HEREBY NOTIFIED that the Agency's Record was completed on this date, and, pursuant to Rule 24(a) and Rule 27(a), Idaho Appellate Rules, copies of the same have been served by regular U.S. mail upon each of the following:

STEPHEN NEMEC 1626 LINCOLN WAY COEUR D'ALENE ID 83814

JOSEPH M WAGER PO BOX 6358 BOISE ID 83707-6358

THOMAS W CALLERY PO BOX 854 LEWISTON ID 83501

NOTICE OF COMPLETION - TRUDY DEON, #41593 - 1

YOU ARE FURTHER NOTIFIED that, pursuant to Rule 29(a), Idaho Appellate Rules, all parties have twenty-eight days from this date in which to file objections to the Agency's Record, including requests for corrections, additions or deletions. In the event no objections to the Agency's Record are filed within the twenty-eight day period, the Reporter's Transcript and Agency's Record shall be deemed settled.

DATED this 20th day of <u>Occurber</u>, 2013.