

ISSUES

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

1. Whether Claimant's condition is due in whole or in part to a pre-existing injury or cause;
2. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof;
3. Determination of Claimant's average weekly wage;
4. Whether Claimant is entitled to temporary partial and/or temporary total disability (TPD/TTD) benefits, and the extent thereof;
5. Whether Claimant is entitled to permanent partial impairment (PPI), and the extent thereof;
6. Whether Claimant is entitled to permanent partial or permanent total disability (PPD/PTD) in excess of impairment, and the extent thereof;
7. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate;
8. Whether Claimant's condition is due in whole or in part to a subsequent injury or cause;
9. Whether apportionment is appropriate;
10. Whether Claimant is entitled to retraining benefits under Idaho Code § 72-450, and the extent thereof; and
11. Whether Claimant is entitled to attorney fees due to Employer/Surety's unreasonable denial of compensation as provided for by Idaho Code § 72-804.

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The issues of Claimant's average weekly wage, TPD/TTD benefits, subsequent injury and resulting apportionment, and retraining were not addressed by the parties in briefing and are deemed waived.

CONTENTIONS OF THE PARTIES

Claimant contends she is entitled to additional medical benefits, past due temporary income benefits, and a determination that she is totally and permanently disabled as a result of her February 14, 2000, industrial accident. Claimant submits that Defendants acknowledge an accident occurred when Claimant slipped and fell on ice while walking to the parking lot. Claimant's pre-existing stenosis was aggravated by her fall causing a spinal cord concussion or contusion. Following two fusion surgeries, Claimant's ability to lift, stand, walk, and reach are severely limited making it futile for her to look for work. Because Defendants paid for Claimant's first cervical fusion, but unreasonably denied authorization for a second fusion that was recommended by Claimant's treating physician, Dr. Dirks, Claimant also asserts entitlement to attorney fees.

Defendants do not dispute that a compensable accident occurred on February 14, 2000. However, Defendants argue that Claimant's injuries were minor and resolved quickly after the fall. Defendants contend that medical records prove Claimant's spinal problems existed years before her fall with Employer. It was Claimant's pre-existing problems that led to her need for surgery and resulting impairment. Although Defendants paid for Claimant's first surgery and 5% whole person PPI as determined by Dr. Adams, they maintain that they should not be required to pay for the unnecessary, failed second surgery or additional impairment or disability. Finally, Defendants claim that they did not act unreasonably by denying authorization for Claimant's second surgery because medical evidence supports the proposition that the surgery was unnecessary and unreasonable.

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Claimant responds that Defendants' entire case is based on the theory that Dr. Dirks is an incompetent neurosurgeon and that his testimony cannot be relied upon. Claimant emphasizes that Dr. Dirks was the only doctor of record who was present during Claimant's surgeries and, therefore, the doctor best qualified to assess whether Claimant did indeed suffer from a non-fusion or pseudarthrosis requiring the second surgery. Dr. Dirks' findings are supported by lucency evident on Claimant's flexion/extension x-rays. Claimant insists that a review of the medical and vocational evidence leads to a conclusion that she is totally and permanently disabled as a result of her accident and injury with Employer.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Oral testimony at hearing by Claimant; Raymond Brown, Claimant's husband; Rondallyn Eggers, Claimant's co-worker; Tai Komanec, Employer's Director of Operational Services; Frederick Cutler, vocational rehabilitation counselor and consultant; and Richard Hunter, Industrial Commission Rehabilitation Division (ICRD) Consultant.
2. Joint exhibits 1 through 16 and 18 through 100 admitted at hearing.
3. The post-hearing depositions of Bret A. Dirks, M.D., with Exhibit 1, taken by Claimant on July 19, 2003; John M. McNulty, M.D., with Exhibit 1, taken by Claimant on July 21, 2004; Tom Moreland, taken by Claimant on July 22, 2004; Ronald M. Klein, Ph.D., taken by Defendants on July 29, 2004; and Ronald Vincent, M.D., taken by Defendants on July 30, 2004.

All objections made during the above-referenced depositions are overruled.

On January 7, 2005, at 1:40 p.m., a Stipulation to File Brief in Excess of Thirty (30) Pages was filed with the Commission. Therein, the parties agreed that Defendants could file a brief in

excess of thirty pages, but not to exceed thirty-five pages in length. Shortly after the stipulation was received, at 4:57 p.m., Defendants filed a thirty-three page post-hearing brief. Rule 11(A), J.R.P., is clear: “No brief in excess of 30 pages, exclusive of any addendum or exhibit, shall be filed without the Commission’s prior approval.” A stipulation by the parties does not qualify as prior Commission approval. Because prior approval was not obtained, any brief pages filed in excess of thirty will not be considered.

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

FINDINGS OF FACT

1. Claimant was 65 years old at the time of hearing. She resides in Eastport, a rural North Idaho town located three miles from the Canadian border and forty miles from Bonners Ferry, Idaho. Claimant has worked predominantly as a shoe salesperson, bartender, grocery checker, and food service worker. Claimant reads at a fourth grade level and has a third grade level of spelling comprehension. Exhibit 56.

2. Claimant began working for Employer in August 1996 as a full time kitchen worker. Claimant’s job consisted of various forms of movement and lifting. She operated a dishwasher that required moving five gallon buckets of detergent, sanitizer, and rinse agent, and lifting them into place under the dishwasher. She was required to lift large pots and pans while preparing food. Claimant was also required to mop twice a day and unload freight as needed. During these tasks, Claimant would lift anywhere from 25 to 70 pounds.

3. A job description posted on Employer’s website indicates that a food service worker must be able to regularly lift and carry medium weight up to 50 pounds and be able to stand, walk,

and sit at will. The description specifically states that the position is not sedentary. Exhibit 32.

Prior Medical Treatment

4. Claimant suffered a compensable work injury to her left ankle and foot while working as a bartender in 1992. Claimant's foot problems have no relationship to the current claim.

5. In June 1997, Claimant presented to Dr. McCreight, her family doctor, and reported that she had been experiencing financial and family concerns that were causing irritability and sleep disturbance for the past several months. In addition, the doctor noted left shoulder and neck pain which was causing increased insomnia. Exhibit 6, p. 09001.

6. An esophagram performed in June 1998 revealed large anterior cervical osteophytes causing moderate impression upon the posterior cervical esophagus. However, no hiatal hernia or gastroesophageal reflux could be seen or elicited. Exhibit 9, p. 02002. Dr. McCreight noted the results of the esophagram in a July chart note. He recommended an esophagoscopy¹ and Prevacid. Exhibit 6, p. 09016.

7. Radiologic studies performed in December 1998 confirmed large bulky osteophytes at C3 through C6 with intervertebral narrowing at C3 through C7. There was mild bony encroachment upon the neuroforamina on the left at C5-6 and on the right at C4-5 and C5-6. Exhibit 11, p. 16001. The radiologist also noted degenerative disk disease and advanced secondary arthritis involving the C3 through C7 levels. *Id.*

8. Also in 1998, after experiencing right arm and hand pain, Claimant was seen by Dr. Dirks who suspected carpal tunnel syndrome (CTS) and ordered a cervical MRI. The MRI showed moderately severe spondylosis throughout Claimant's cervical spine, most notable at the C3 through

¹ Inspection of the interior of the esophagus by means of an endoscope.

C7 levels. Exhibit 11, p. 16004. The cervical portion of Claimant's spinal cord was noted as displaying normal signal intensity. *Id.*

9. Dr. Dirks referred Claimant to neurologist James Lea, M.D., who performed electrical studies in March 1999. The studies demonstrated bilateral carpal tunnel syndrome at the wrist, right greater than left. Exhibit 11, p. 16006. As a result, Claimant underwent carpal tunnel releases on both wrists. The treatment was billed through her private insurance. By June 1999, Dr. Dirks opined Claimant had recovered from her surgeries and he released her to return to work without restrictions. Exhibit 11, p. 16014.

Medical Treatment Following the February 2000 Industrial Accident

10. On February 14, 2000, Claimant was injured at work when she slipped and fell on ice while walking to her car. Claimant reported being dazed and experiencing instant numbness in both hands. Claimant had a severe headache and, upon finding blood in her hair, she reported to her family doctor, William H. McCreight, M.D. Dr. McCreight released Claimant from work for February 16 and 17 due to headache. Exhibit 6, p. 09038. He referred Claimant to Dr. Lea for consultation regarding her hand numbness. Exhibit 6, p. 09037.

11. Dr. Lea saw Claimant on February 28, 2000, and recorded that, after the fall at work, both of her hands went instantly numb. The doctor noted that Claimant continued to experience tingling in her hands for several days. She was also experiencing neck pain that radiated into her right shoulder blade and down her right arm. Claimant had limited neck movement with tenderness into the cervical paraspinal musculature and shoulder girdle. Dr. Lea's assessment was that of cervical strain, with "the possibility of cervical spinal stenosis with a spinal cord concussion as a result of this fall." Exhibit 13, p. 08009.

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12. An MRI was performed on March 2, 2000, which confirmed cervical spinal stenosis. As a result, Dr. Lea referred Claimant to Dr. Dirks indicating that he suspected “a cord concussion as a result of the trauma [on February 14] in the setting of cervical spinal stenosis.” Exhibit 13, p. 08015.

13. Dr. Dirks saw Claimant on March 10, 2000. She was complaining of numbness and tingling in her arms as well as neck pain. Exhibit 6, p. 09075. After reviewing the MRI, Dr. Dirks diagnosed a spinal cord compression with spinal contusion and recommended surgery. *Id.* at p. 09076. Dr. Dirks based his assessment on the severe stenosis around the spinal cord and Claimant’s reports of numbness and tingling in her arms and hands.

Basically, she was asymptomatic prior to her time with me in March of 2000. She was asymptomatic prior to her fall as far as having symptoms which were referable to a spinal cord contusion. She may have had neck pain in the past, but this was different. And she had numbness and tingling down into her arms. And this was consistent with a spinal cord contusion which she had not had previous to this.

Deposition of Dr. Dirks, p. 50. In addition, Dr. Dirks’ neurologic exam of Claimant demonstrated slightly hyper reflexive deep tender reflexes and one-to-two beat ankle clonus. He noted that these results were indications of a spinal cord contusion. *Id.* at p. 52.

14. Dr. Dirks performed an anterior cervical fusion with bone graft and plating from C3 to C7 on March 22, 2000. He found a large amount of stenosis surrounding the spinal cord secondary to arthritis or bone spurring. Dr. Dirks observed cord compression, but not a contusion. A spinal contusion is impossible to see during a fusion surgery because the spinal cord is protected by the dura. *Id.* at p. 79. He determined the disks were mobile and required fusion to prevent further compression of the spinal cord. *Id.* at p. 16. Dr. Dirks testified that the goal of Claimant’s surgery was different than most others:

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[W]e're not so much trying to - - not so much trying to get rid of the symptomology they might be having. In this case numbness or tingling. That we just have to kind of let time heal in most cases the spinal cord, but we're trying to prevent further compression of the spinal cord to prevent any further damage. If the spinal cord has been damaged one time like that one time, if they fall down again, if they slip on the ice, if they get in a little fender bender or whiplash injury, it can be devastating to these people. If we do a good job, we protect the neck and we take the mobility out of those segments then the likelihood that they'll have another injury there is less.

Id. at p. 17.

15. Claimant had several follow-up appointments. On May 8, 2000, Dr. Dirks noted that there was “the beginning of some fusion at the [sic] some of the levels; however, it is not completely fused up and down the spine like I would like to see it.” Exhibit 6, p. 09083. Claimant obtained flexion/extension x-rays and returned to Dr. Dirks on June 23. She was still experiencing pain in her neck. Dr. Dirks noted that the x-rays showed no evidence of instability, but there was still some question about the fusion at the C4-5 level. *Id.* at p. 09084.

16. On August 14, 2000, Dr. Dirks' advised Claimant to file for Social Security Disability benefits because of her inability to work. *Id.* at p. 09086. She was still experiencing pain in her neck that, at times, moved into her arms and legs. Dr. Dirks opined that she was medically stable, but unable to do any type of work because of her continued pain. He recommended an independent medical evaluation “to further delineate what possible activities she could do.” *Id.*

17. Warren Adams, M.D., Ph.D., examined Claimant on September 14, 2000. Dr. Adams noted Claimant's industrial accident and that she reported she continued to suffer from neck pain as a result of the injuries sustained. Exhibit 27, p. 14009. Upon review of Claimant's x-rays, Dr. Adams noted:

There is bony union between the vertebral bodies of C3 and C4. There is probably a bony union between the vertebral bodies of C4 and C5 of the

posterior margin of the vertebral bodies. There is a radiolucent line between the anterior three-quarters between the vertebral bodies of C4 and C5. There is a clearly lucent line between the vertebral bodies of C5 and C6. There is bony fusion between the vertebral bodies of C6 and C7.

Id. at p. 14018. Dr. Adams opined that Claimant was at maximum medical improvement and suffered from 5% whole person impairment as a direct result of the February 14, 2000, industrial accident. *Id.* He assessed permanent restrictions of no frequent movement of her head to the margins of motion. *Id.* at p. 14019.

18. Claimant returned to Dr. Dirks in October 2000. She reported having more symptoms since the independent medical evaluation. Dr. Dirks ordered repeat EMG/nerve conduction studies. Exhibit 6, p. 09087. On December 12, 2000, Dr. Dirks indicated Claimant should be cautious with any frequent vigorous or repetitive activities and it was his opinion she would not be able to pursue even a sedentary job. *Id.* at p. 09088. He advised Claimant that her pain and other symptomology would increase if she were to try to return to any type of employment. Deposition of Dr. Dirks, p. 38.

19. At the request of Dr. Dirks, James Strandy performed a physical capacity examination on May 30, 2001. Mr. Strandy's report indicated that Claimant was pleasant and cooperative, and the validity criteria testing reflected that she put forth fair effort and valid results were obtained. Exhibit 38, p. 05001. Mr. Strandy determined that Claimant could perform light duty work with a 16 to 20 pound lifting restriction. He then went on to conclude that she was capable of performing the demands of a food service worker. *Id.* at p. 05002.

20. On September 6, 2001, at the request of Defendants, Claimant was examined by Dr. Vincent. Her chief complaint was pain in her neck that radiated down her arms. Exhibit 42, p. 13002. Dr. Vincent's comparison of MRI's completed pre- and post-February 2000 "showed no

findings of any edema within the spinal cord.” *Id.* at p. 13009. He diagnosed that “cervical strain aggravating diagnosis #3 of cervical stenosis, and lumbar strain, was related to the injury; this may also be associated with a central spinal cord injury as well.” *Id.* at p. 13010. Dr. Vincent noted that Claimant had undergone an anterior cervical carpectomy of C5 and C6 with anterior cervical discectomy and fusion at C3-4 and C4-5, and bony arthrodesis C5 through C7, Synthes plate C3 to C7, related to the injury. *Id.* Dr. Vincent felt as though Claimant was exhibiting “abnormal pain behavior” which made it difficult to objectively choose a method of treatment for Claimant. *Id.* at p. 13010. Dr. Vincent concluded that Claimant did not require any treatment that would be curative, only palliative, and that the second surgery was most likely unwarranted. *Id.*

21. Claimant continued to complain of neck pain to Dr. Dirks. On September 21, he charted that he was waiting for the results of a recent MRI and the independent medical evaluation of Dr. Vincent before he could make further decisions about surgery. Exhibit 6, p. 09089. Dr. Dirks received the MRI results and, in October, noted that Claimant’s cervical spine MRI showed no evidence of any nerve root compression or spinal cord compression. However, Claimant was still continuing to experience “quite a bit of pain.” *Id.* at p. 09090.

22. Paul E. Berger, M.D., performed a medical records review at the request of Defendants. In a report dated October 23, 2001, he noted that he reviewed Claimant’s spine films from before and after the February 2000 industrial accident. He concluded that there was no evidence of any anatomical abnormalities which would be considered causally related to the accident. Exhibit 49, p. 15004.

23. Claimant continued to experience neck and arm pain. On March 8, 2002, Dr. Dirks noted that he believed Claimant had a pseudarthrosis in her neck that required surgery. Exhibit 6, p.

09091. In September 2002, the doctor documented that he was still considering surgery for the pseudarthrosis that he suspected. He noted that he would have to order a repeat MRI and plain film x-rays prior to performing surgery. *Id.* at p. 09092.

24. In October, Dr. Dirks opined that plain film x-rays confirmed a pseudarthrosis of C5-6 and C6-7. *Id.* at p. 09094. Based on these results, Claimant agreed to proceed with surgery. Dr. Dirks requested authorization from Surety to perform a second cervical fusion surgery. Surety denied the request. Despite Surety's denial, Dr. Dirks performed the second fusion surgery on December 4, 2002. The doctor found a fibrous nonunion when he examined Claimant's spine during the second surgery. Deposition of Dr. Dirks, p. 68. Dr. Dirks found the second surgery necessary in order to protect Claimant's spinal cord from further injury, up to and including possible paralysis. Deposition of Dr. Dirks, p. 77.

25. On July 2, 2003, following Claimant's second surgery, Mr. Strandy performed another physical capacity exam. This time at Defendants' request. Validity criteria demonstrated poor effort. Exhibit 38, p. 05005. Mr. Strandy determined Claimant could possibly perform sedentary to light duty work. *Id.* Mr. Strandy reported Claimant was capable of continuous sitting for 30 to 45 minutes, and possibly longer if the chair had adjustable features. *Id.* at p. 05006. He determined that Employer's position as Transportation Driver was within Claimant's restrictions, but he was unable to conclude whether she could perform the job on a full-time, ongoing basis. *Id.* at p. 05007.

26. At Defendants' request, Claimant underwent a second evaluation with Dr. Adams on February 6, 2004. William R. Bozarth, M.D. participated in the evaluation. Claimant pointed out during the exam that the second surgery improved her neck pain and her trapezius muscle pain, but

the discomfort in her upper extremities remained about the same. Exhibit 76, p. 21007. Contrary to his prior opinion, Dr. Adams opined that he could not relate Claimant's cervical surgery to the February 2000 industrial accident. *Id.* at p. 21088. Drs. Adams and Bozarth opined that there was no medical necessity for either the March 2000 or the December 2002 surgeries performed by Dr. Dirks. *Id.* at p. 21090. The doctors opined a 25% whole person impairment rating, but attributed the entire rating to Claimant's pre-existing spinal condition. *Id.*

27. As part of the evaluation, Dr. Adams noted that many different types of exams can be used to determine whether a pseudarthrosis exists. *Id.* at p. 21081-82. He identified plain x-rays, MRI's, or radio nucleotide bone studies of the cervical spine as good methods. Dr. Adams went on to explain how each of these methods has its flaws and may not demonstrate what it is the doctor is seeking. *Id.* at p. 21082. He added that the clinical evaluation of the patient was also "quite important." *Id.*

28. When deposed, Dr. Dirks admitted that Claimant had pre-existing stenosis, which he opined made a strong case for Claimant. Her pre-existing condition predisposed her to having a spinal cord injury. Deposition of Dr. Dirks, p. 83.

29. At Claimant's request, Dr. McNulty performed an IME on June 16, 2004. Based on Claimant's physical examination and a review of her medical records, Dr. McNulty determined to a reasonable degree of medical certainty that Claimant sustained a permanent aggravation of her pre-existing condition which necessitated the cervical spine surgery. Exhibit 83, p. 11008. The doctor opined that there was "substantial radiological evidence to confirm a pseudarthrosis [sic] at the C5-C6 level after the first surgical procedure," warranting the second surgery. *Id.* Dr. McNulty assessed that Claimant suffered from 25% whole person impairment related to her February 2000

industrial accident. *Id.* Dr. McNulty believed Claimant to be totally and permanently disabled. *Id.*

30. On June 24, 2004, Terry Andres performed a physical capacity exam. Mr. Andres noted that Claimant was still experiencing right neck and shoulder pain, and had not yet been released to return to work. Exhibit 87, p. 23006-7. During testing, Claimant's maximum voluntary effort was found to be consistent/valid, but her perception of symptoms was inconsistent. *Id.* at p. 23017. Mr. Andres determined that Claimant was capable of performing a maximum of four hours per day of combined sedentary and light duty work. *Id.* at p 23018. The permanent restrictions recommended by Mr. Andres include: occasional changes of posture throughout the day, maintaining a near neutral head/neck posture as much as possible throughout the day, and avoiding all reaching above shoulder level. *Id.* at p. 23019.

31. Tom Moreland was retained to assist Claimant with rehabilitation counseling. Mr. Moreland met with Claimant, reviewed her medical records, as well as the functional capacity evaluations performed by James Strandy and Terry Andres. Based on his review of the records, Mr. Moreland found that Claimant's limitations would not allow her to work in the food service or driver position available with Employer. Deposition of Tom Moreland, pp. 21, 23. Mr. Moreland testified that with her reaching, lifting, standing, and walking restrictions, it would be difficult for Claimant to find work she could perform on a reasonably continuous, sustained basis and, in his opinion, it would be futile for her to even look for work. Deposition of Tom Moreland, p. 27.

32. Richard Hunter, ICRD Consultant, testified that, because of a very limited labor market, there were no jobs locally that Claimant could perform. Unless Claimant could commute to Bonners Ferry (40 miles one way), it would be very difficult, if not impossible, for her to find work. Hearing transcript, p. 289.

33. Tai Komanec, Employer's Director of Operational Services, testified that, prior to February 14, 2000, Claimant did not appear to have any limitations or restrictions that affected her work activities. *Id.* at p. 173. Ms. Komanec reported that Claimant received good evaluations, had a good attitude about work, and was a valued employee. Claimant's co-worker, Rondallyn Eggers, also testified that Claimant had no problems performing her job prior to her February 2000 work injury. *Id.* at p. 38.

CONCLUSIONS OF LAW

34. **Pre-existing injury or cause.** Clearly, and by admission of both parties, Claimant suffered from pre-existing cervical spinal stenosis prior to her February 14, 2000, slip and fall. Her condition is confirmed by radiologic studies performed in December 1998 which revealed osteophytes at C3 through C6 with intervertebral narrowing at C3 through C7. The dispute between the parties revolves around what effect Claimant's pre-existing condition had on her medical treatment following the February 2000 industrial accident.

35. **Medical care.** 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 required by the employee's physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. Idaho Code § 72-432. The Idaho Supreme Court has held that for the purposes of Idaho Code § 72-432, medical treatment is reasonable if the employee's physician requires the treatment. Mulder v. Liberty Northwest Insurance Company, 135 Idaho 52, 14 P.3d 372 (2000).

36. In order to receive benefits, a claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *See* Langley v. State,

Industrial Special Indemnity Fund, 126 Idaho 781, 890 P.2d 732 (1995). Probable is defined as having more evidence for than against. *See Soto v. Simplot*, 126 Idaho 536, 887 P.2d 1043 (1994).

37. Dr. Dirks opined that both surgeries were medically necessary as a direct result of Claimant's February 2000 industrial accident. Dr. Dirks attributes his opinion to the fact that Claimant was asymptomatic prior to her accident, and could perform all of the functions of her food service worker job with Employer. Following the accident, Claimant experienced numbness and tingling down her arms into her hands and has been unable to return to work. In addition, Claimant demonstrated hyper reflexive deep tender reflexes and ankle clonus – indications of a spinal cord contusion.

38. Dr. Lea examined Claimant within weeks of her fall. He suspected cervical strain with the possibility of a spinal cord concussion as a result of her industrial accident. An MRI confirmed his suspicions. In September 2000, Dr. Adams agreed with Dr. Dirks' assessment, and believed Claimant's condition and need for surgery was a direct result of her industrial accident, although he later changed his opinion. Dr. McNulty determined to a reasonable degree of medical certainty that Claimant sustained a permanent aggravation of her pre-existing condition which necessitated both surgeries. Dr. Vincent admitted that Claimant's lumbar and cervical strain, which he related to the work injury, may also be associated with a central spinal cord injury.

39. Defendants have paid, and do not seek reimbursement, for the first surgery. However, they argue that they should not be required to pay for the unnecessary, failed second surgery. A careful review of the medical evidence reveals that, even doctors who did not agree that Claimant's first surgery was related to her accident considered the possibility of a spinal contusion, which was the reason Dr. Dirks performed the surgeries, i.e., to prevent further damage to

Claimant's spinal cord, not to eliminate Claimant's subjective symptoms.

40. As the doctor who performed the surgeries, Dr. Dirks was in the best position to confirm whether a concussion, and later pseudarthrosis, existed. Defendants argue that more tests could have been done to confirm pseudarthrosis prior to the second surgery being performed. Hindsight is always 20/20. Dr. Adams admitted that, although there are many tests that *could* confirm or rule out pseudarthrosis, each method has its flaws and might not provide the evidence needed. Dr. Dirks diagnosis of pseudarthrosis was confirmed when the second surgery revealed a fibrous nonunion.

41. The February 2000 work injury permanently aggravated/accelerated Claimant's pre-existing spinal stenosis. Claimant could perform all of the functions of her job prior to her fall. Now she is relegated to sedentary to light duty work with extreme lifting and moving restrictions. The first and second surgeries performed by Dr. Dirks were reasonable medical treatment reasonably recommended by Claimant's treating physician. Therefore, Claimant is entitled to the medical treatment provided as a result of both surgeries. Defendants are entitled to credit for benefits previously paid.

42. **PPI.** "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. An "evaluation 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, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment,

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

43. Dr. Adams originally opined a 5% whole person impairment, which Defendants have paid. Drs. Adams and Bozarth later opined Claimant suffers from 25% whole person PPI as a result of her pre-existing spinal condition. The panel did not attribute any impairment to Claimant's 2000 industrial accident. Dr. McNulty opined a 25% whole person PPI related directly to the work injury. Dr. Vincent opined Claimant had a 20% impairment rating related to her work injury. Deposition of Dr. Vincent, pp. 49-51. Therefore, the Commission finds Claimant suffers from 25% whole person impairment.

44. **PPD/PTD in excess of impairment.** "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no functional or marked change in the future can be reasonably expected. Idaho Code § 72-423. An "evaluation of permanent disability" is an appraisal of the claimant'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 non-medical factors provided for in Idaho Code § 72-430. Idaho Code § 72-425.

45. The burden of proof is on the claimant to prove the existence of any disability in excess of impairment. Seese v. Ideal of Idaho, Inc., 110 Idaho 32, 714 P.2d 1 (1986). The test for such determination is not whether the claimant is able to work at some employment, but whether the physical impairment, taken with non-medical factors, has reduced the claimant's capacity for gainful activity. Account should be taken of the nature of the physical disablement, disfigurement, the cumulative effect of multiple injuries, the occupation of the employee, his or her age at the time of

the accident, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographic area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. Idaho Code § 72-430(1).

46. Claimant was 65 years old at the time of hearing. She has primarily worked at what would be classified as medium and heavy-duty jobs. She has significantly limited reading and spelling abilities. In addition, she lives in a remote area of Northern Idaho with a small labor market. However, Sandpoint, where she worked for Employer, is 40 miles away and within her relevant job market. Following her injury, Claimant is limited to sedentary to light duty work.

47. Mr. Strandy's assessment that Claimant could return to her job with Employer as a food service worker or perform the job of transportation driver is not realistic. The functions required for a food service worker are not consistent with Mr. Strandy's determination that Claimant could only perform light duty work with a 20 pound lifting restriction. In addition, Claimant has limited neck range of motion and must be able to sit and stand ad lib. These restrictions are not consistent with the requirements for a driving position with Employer.

48. Tom Moreland did not believe Claimant was capable of performing the job of food service worker or transportation driver with Employer. He testified that, with her significant restrictions, it would be difficult for Claimant to find work that she could perform on a reasonably continuous basis and it would be futile for her to even look for work. Mr. Andres opined that Claimant was capable of performing a maximum of four hours per day of combined sedentary and light duty work. Mr. Hunter testified that, because of a very limited labor market, there were no jobs locally that Claimant could perform.

49. None of the vocational rehabilitation specialists searched for employment opportunities for Claimant in her relevant labor market taking into account her physical restrictions. Claimant did not attempt any meaningful, good faith effort in pursuing employment opportunities within her relevant labor market. The weight of medical opinion supports the proposition that Claimant could perform sedentary to light work. Consequently, Claimant has not proven that she is totally and permanently disabled.

50. Claimant, however, has a considerable disadvantage in competing for suitable work in her geographic area. Vocational Specialist Terry Andres opined that Claimant could perform a maximum of 4 hours of work per day. This equates to a 50% loss in wage earning capacity. Another 30% loss can be added based on the opinions of Drs. Dirks, Adams, Bozarth, and McNulty, as well as vocational specialists Strandy, Andres, Moreland, and Hunter. When considered in the aggregate, it becomes clear that Claimant is restricted to light and/or sedentary work. The opinions restrict Claimant's lifting ability, head movement and posture, vigorous activity, and reaching. After taking into consideration Claimant's non-medical factors of age, education, geographic area, and her ability to compete in the available labor market, in conjunction with her medical condition and physical restrictions, the Commission finds that Claimant has suffered permanent partial disability of 80%.

51. **Apportionment for a pre-existing condition.** Idaho Code § 72-406 (1) provides in pertinent part that in cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a pre-existing physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease. The Idaho Supreme Court has held that

apportionment under Idaho Code § 72-406 must be explained with sufficient rationale to enable it to review whether the apportionment is supported by substantial and competent evidence. Edwards v. Harold L. Harris Construction, 124 Idaho 59, 60, 856 P.2d 96, 97 (1993). The Court has also held that evidence is “substantial and competent” if a reasonable mind might accept such evidence as adequate to support a conclusion. Reiher v. American Fine Foods, 126 Idaho 58, 60, 878 P.2d 757, 759 (1994).

52. Drs. Adams and Bozarth opined that Claimant suffers from 25% whole person PPI as a result of her pre-existing spinal condition. Dr. McNulty opined a 25% whole person PPI related directly to her work injury. As was stated prior, Claimant’s February 14, 2000, industrial accident permanently aggravated/accelerated Claimant’s pre-existing spinal stenosis. However, Defendants should not be liable for Claimant’s degenerative condition that pre-existed her fall with Employer.

53. But for the existence of Claimant’s spinal stenosis, her fall might not have caused a spinal cord compression requiring surgery. However, an employer takes the worker as it finds him/her. The fact that Claimant could perform all of the functions of her job prior to her injury, but not after, supports the proposition that Claimant’s condition was permanently aggravated/accelerated as a result of her injury. Defendants are only responsible for the degree of disability resulting from the industrial accident. Therefore, the Commission finds that 30% of Claimant’s PPD is attributable to her pre-existing spinal condition. Thus, Claimant is entitled to 50% PPD, inclusive of PPI, as a direct result of her February 14, 2000, industrial injury.

54. **Attorney fees.** Idaho Code § 72-804 provides:

Attorney's fees - Punitive costs in certain cases. - If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a

deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

55. Attorney's fees are not granted to a claimant as matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804. The decision that grounds exist for awarding a claimant attorney's fees is a factual determination which rests with the commission. Troutner v. Traffic Control Company, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

56. Claimant seeks attorney fees because of Defendants' refusal to authorize the second surgery performed by Dr. Dirks. This was a difficult case consisting of considerable medical documentation and competing medical reports regarding Claimant's condition. Defendants' authorization of the first surgery and denial of the second, without more, does not make its actions unreasonable. Therefore, Claimant is not entitled to attorney fees.

ORDER

1. Claimant suffers from pre-existing cervical spinal stenosis.
2. Claimant is entitled to medical treatment associated with the first and second surgery and reasonably recommended by Claimant's treating physician, Dr. Dirks.
2. Claimant suffers from 25% whole person impairment.
3. Claimant failed to prove she is totally and permanently disabled.
5. Claimant suffers from 80% disability, with 30% attributable to her pre-existing condition. Claimant is entitled to 50% PPD, inclusive of impairment, as a direct result of her February 14, 2000, industrial injury.
6. Claimant is not entitled to attorney fees.
7. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this 11 day of April, 2005.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

_____/s/_____
James F. Kile, Commissioner

_____/s/_____
R.D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 11 day of April, 2005, 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:

CHARLES F. BEAN
2005 Ironwood Parkway, Ste 201
Coeur d'Alene, ID 83814

JON M. BAUMAN
P.O. Box 1539
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kas

/s/