

2. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;
3. Whether and to what extent Claimant is entitled to the following benefits:
 - a. Temporary partial and/or temporary total disability benefits (TPD/TTD);
 - b. Permanent partial impairment (PPI);
 - c. Disability in excess of impairment;
 - d. Medical care; and
 - e. Attorney fees; and
4. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine.

CONTENTIONS OF THE PARTIES

Claimant contends she suffered a left ankle, right knee, and cervical spine injury as the result of her November 25, 2002, industrial accident. She argues that she was able to work 60 hours a week performing labor-intensive tasks prior to her work injury. She is now limited to sedentary employment. Claimant claims entitlement to 7% PPI as the result of her ankle condition, 1% PPI as the result of her knee condition, and 25% PPI as the result of her cervical spine condition. She maintains that she should be classified as an odd-lot worker, or, alternatively, be found to have sustained 95% disability as the result of her age, education, available labor market and other pertinent factors. Finally, Claimant asserts entitlement to attorney fees for Defendants' unreasonable denial of medical treatment for her right knee and cervical spine conditions.

Defendants do not dispute that the entirety of Claimant's left ankle condition is the result of her November 2002 industrial accident. However, they claim that 4% PPI is the appropriate impairment for an ankle fusion completed at the optimum angle. While Defendants agree that 25% PPI is appropriate for a multi-level cervical fusion, they argue that some, if not all, of Claimant's

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cervical problems predated her industrial accident. Likewise, Claimant's right knee condition is unrelated to the November accident. They contend that Claimant had a pre-existing history of joint instability and right knee problems. In addition, she made no immediate complaints of right knee pain following the fall. Defendants argue that, due to the pre-existing nature of several of Claimant's conditions, and her apparent lack of motivation to find work, Claimant does not meet the criteria for odd-lot and, in fact, suffers no more than 38% disability inclusive of impairment. Finally, Defendants submit that their denial of medical treatment for Claimant's right knee and cervical spine was not unreasonable based on the nature and extent of Claimant's pre-existing medical treatment regarding those conditions.

Claimant replies that the condition of her cervical spine and right knee did not restrict her ability to perform medium to heavy duty work prior to the 2002 industrial accident. She reiterates that prior to the industrial accident she was working up to 60 hours a week in a physically demanding capacity. Claimant contends that her current substantial physical restrictions, in conjunction with her limited education, age, and lack of transferable skills, renders her, at best, 95% totally and permanently disabled, and, at worst, totally and permanently disabled pursuant to the odd-lot doctrine. Claimant asserts the argument that her cervical spine and right knee conditions predated her November 2002 fall is unsubstantiated, thus entitling Claimant to attorney fees.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Oral testimony by Claimant, Robert LaFleur (Claimant's spouse), and Steven R. Hamman (vocational rehabilitation consultant) taken at hearing.
2. Claimant's Exhibits A through S admitted at hearing.

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3. Defendants' Exhibits 1 through 26 admitted at hearing.
5. The pre-hearing deposition of Claimant, with Exhibit 1, taken by Defendants on May 10, 2005.
6. The post-hearing depositions of Warren J. Adams, M.D., Ph.D., with Exhibit 1, taken by Defendants on August 29, 2005; John McNulty, M.D., with Exhibit 1, taken by Claimant on August 30, 2005; Douglas N. Crum, CDMS, with Exhibit 1, taken by Defendants on September 9, 2005; and Holly Setzer, with Exhibits 1 through 8, taken by Claimant on September 9, 2005.

All objections made during the course of the taking of the above-referenced depositions are overruled. 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 dropped out of high school in the tenth grade. For approximately 13 years she was a stay-at-home mother and not employed outside the home. Thereafter, she began working for Daniel's Tire Service. During her 20 years with the company, she ascended from a part-time general office worker position to a full-time executive assistant. Claimant terminated her employment to move from California to Idaho with her family.

2. Claimant began working for Employer in late 1997 as a part-time employee. She was later promoted to assistant manager, and then full-time store manager. As the store manager, Claimant was required to work a minimum of 45 hours a week. Her duties included typical managerial tasks such as the hiring and firing of employees, creation of work schedules, daily paperwork, bank deposits, and payroll. In addition, Claimant was required to unload freight, stock store shelves with merchandise, and, because the store did not employ janitorial staff, clean

bathrooms, vacuum floors, and scrub counters. A six-foot ladder was used to access higher store shelves and stockroom shelves.

Medical Treatment Rendered Prior to November 25, 2002

3. Claimant was involved in a motor vehicle accident on July 9, 1991. Her vehicle was struck broadside by another vehicle. The doctor noted minimal tenderness to the posterior cervical muscles. Claimant's right lower extremities were essentially atraumatic. The left lower extremity showed a superficial laceration to the left knee. The emergency room doctor assessed acute cervical strain secondary to the motor vehicle accident. X-rays of Claimant's cervical spine revealed degenerative changes at C5-6 and C6-7 with no evidence of fracture. By the time Claimant was released from the hospital on July 12, the doctor noted that her cervical spine strain was stable.

4. Claimant was involved in another motor vehicle accident in August 1994. She was hit from the rear and reported pain in her neck and back to her chiropractor. X-rays of Claimant's cervical spine revealed straightening of the cervical spine, consistent with underlying muscle spasm. Multilevel spondylosis and degenerative disc disease were observed. Spurs were present anteriorly at C5, C6 and C7 with loss of disc space at C5-6 and C6-7. Claimant was diagnosed with cervical hyperextension/hyperflexion sprain/strain injury with attendant cervicalgia, cervical paravertebral myofascitis, cervical radiculopathy, cervicocranial syndrome and reversal of cervical cord. She suffered similar injury to her lumbar spine as well. Chiropractic treatment was recommended. By October 1994 Lucia S. Thompson, D.C., was noting Claimant's primary complaint as left hip pain. He documented that her condition otherwise appeared to be resolving. The doctor continued to note some cervical hypertonicity and tenderness through November.

5. In April 1996 Glen P. Volyn, M.D., diagnosed Claimant with degenerative discs and

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hypertrophic joint changes at C5-6 and C6-7 after reviewing x-rays of her cervical spine. In December 1996 Dr. Volyn noted upper extremity symptoms (numbness and tingling in arms and hands) and diagnosed probable radiculopathy given the abnormal x-rays of her cervical spine taken in April. Dr. Volyn noted in August 1997 that Claimant's hands seemed to be doing quite well following carpal tunnel syndrome (CTS) repair of her right hand by Douglas G. Norquist, M.D. Later, in 1999, Claimant was diagnosed and treated for CTS in her left hand.

6. While Claimant was undergoing a carpal tunnel release on her left hand, the doctor also performed arthroscopic surgery on Claimant's left knee. A small tear on the posterior horn of the medial meniscus of Claimant's left knee was found. Claimant was released back to full duty work following these procedures by mid-April 1999.

7. Radiographic studies were taken of Claimant's right knee on March 8, 2001, after complaints of knee pain. The findings showed no evidence of recent or old trauma. The bony and soft tissue structures of the right knee were intact and no significant abnormalities were noted. Claimant's Exhibit A.

8. Claimant reported muscular pain to Dr. Volyn in July 2002. He notes, "She does work quite hard in the toy store and sometimes has to unload trucks and so on, but I think that her muscle pain could possibly be from her Lipitor therapy." Claimant's Exhibit H. Claimant's muscle tenderness seemed to be around the base of her neck, but she still appeared to have good range of motion. *Id.* On November 15, 2002, Dr. Volyn noted that Claimant had been experiencing low back and hip area pain. He diagnosed a lumbar strain with radiated hip pain and ordered an x-ray of Claimant's lumbosacral spine.

9. Claimant's chiropractic records prior to November 2002 reflect ongoing treatment for

all levels of her spine including her neck as well as her hips.

Medical Treatment Rendered After Claimant's November 25, 2002, Industrial Accident

10. Following Claimant's fall from the second to top rung of a six-foot ladder, she was diagnosed with a fracture dislocation of the left tibiotalar joint, with the distal tibia and fibula displaced anterior to the talus. Claimant's Exhibit A. As a result, Adam J. Olscamp, M.D., performed an open reduction internal fixation of her fibula "with removal of a number of intraarticular fragments as well as a small fragment off the medial aspect of her talus and distal tibia." Claimant's Exhibit B. The emergency room admission records reflect that Claimant noted mild vague discomfort diffusely throughout her left upper extremity, but she denied any other complaint. The ER doctor found no cervical spine or paraspinal tenderness upon examination, and did not note any right lower extremity tenderness. Dr. Olscamp's initial evaluation of Claimant noted that Claimant experienced some minor tingling in her upper extremities initially after the fall, but that it had resolved. Claimant's Exhibit J.

11. Claimant saw physician's assistant (PA) Nat Biondo on December 3, 2002, for follow-up. Claimant reported decreased pain and swelling in her left ankle. PA Biondo noted that Claimant was non-weight bearing and arrived in a wheelchair. He documented that "[s]he has been given a prescription for a walker as well as a wheelchair times four weeks. The patient should remain non-weight bearing during that time." Claimant's Exhibit B. On December 11, 2002, Claimant's cast was removed and she was put in a walker boot. Claimant returned to PA Biondo on December 27 for a four week follow-up appointment. It was noted that she continued to be non-weight bearing and was ambulating with a walker in her cast boot. PA Biondo requested another follow-up in 3 weeks and speculated that "[a]t that time I imagine we will start her gradually weight

bearing in her cast boot over a two to three week period.” Claimant’s Exhibit B.

12. Her follow-up took place on January 17, 2003. PA Biondo noted Claimant reported that she had remained non-weight bearing on her left foot. She reported minor pain and difficulty sleeping. PA Biondo gave Claimant instructions to begin gradually increasing weight bearing from 25 pounds the first few days to 50 pounds by the end of the first week. Claimant’s Exhibit B. By February 18, PA Biondo noted that Claimant had been fully weight bearing in her walking boot for several days. Additionally, Claimant reported that she had been experiencing gradually increasing pain in her right knee since the work accident. She was hoping that the problem would go away, but she reported that the pain has significantly increased lately. Upon evaluation of the right knee, PA Biondo assessed a medial meniscal tear. Claimant’s Exhibit B. An MRI was ordered and confirmed the diagnosis. Dr. Olscamp recommended arthroscopic surgery to repair the tear.

13. Upon referral by Dr. Olscamp, Claimant was evaluated by Bret A. Dirks, M.D., on March 13, 2003, specifically for her complaints of bilateral arm pain and numbness. Claimant relayed to Dr. Dirks that at the time she fell she experienced numbness down both arms, radiating into her fourth and fifth fingers. She reported that the numbness improved over the next few days following the accident. Upon examination, Dr. Dirks noted no tenderness in the cervical, lumbar or sacroiliac joint area. Dr. Dirks expressed the need for a cervical MRI as well as plain spine films. He also ordered EMG/nerve conduction studies to distinguish whether Claimant was experiencing cervical radiculopathy or traumatic peripheral neuropathy.

14. On March 18, 2003, in response to a letter from Surety, Dr. Olscamp drafted a letter opining that the right knee MRI findings suggest Claimant “has a focal meniscal capsular separation and I believe that this is probably a traumatic injury associated with her fall on 11/25/02, as this is

when the pain started and this is clearly the area of pain in her knee. I think that it is unlikely that this would be a congenital or degenerative issue.” Claimant’s Exhibit B.

15. Warren J. Adams, M.D., Ph.D., performed an evaluation of Claimant on April 22, 2003, at the request of Surety. Claimant’s current complaints were noted as left ankle, right knee, bilateral upper extremities and neck. Defendants’ Exhibit 5. Claimant reported that, as a result of her fall from the ladder, the bone was sticking out of her left ankle and upper extremity numbness began immediately. She reported the right knee symptoms started two to three weeks after the accident. Claimant admitted to treating with a chiropractor about every six to eight weeks prior to the work accident to reduce stress and tension.

16. Dr. Adams opined that the etiology of Claimant’s upper extremity complaints were unknown. He found no evidence of cervical radiculopathy and found her range of motion in the neck normal. Although the doctor opined that there were no findings in her history to indicate a tear of the right medial meniscus, he nonetheless determined that “past medical records do not relate an injury to the right knee due to the incident of 11/25/02.” Defendants’ Exhibit 5. Dr. Adams opined that she was ready to return to work in relation to the fractured ankle and that no additional treatment for the ankle was needed. His only restriction for the left ankle was no frequent stair climbing. He assessed 2% left lower extremity impairment for decreased extension of the left ankle.

17. In May 2003, Dr. Volyn noted that Claimant’s frustrations with obtaining treatment for her alleged industrial injuries were causing her stress and anxiety. Claimant’s Exhibit H.

18. Claimant presented for a re-evaluation of her left ankle with PA Biondo on May 28, 2003. She reported significant discomfort and an inability to walk or stand for more than a couple of hours. Claimant’s Exhibit B. PA Biondo determined that Claimant was clearly not at full function

and potential of her left ankle. He referred her back to physical therapy. Claimant also reported continued discomfort in her right knee. It was noted that repair of the medial meniscal tear “was not pursued by her insurance/workers comp group due to their confusion whether this was associated with her work injury.” *Id.* PA Biondo reiterated his opinion that it was in Claimant’s best interest to undergo surgery to repair her medial meniscal tear “which she incurred on her injury in November of 2002.” *Id.*

19. Also on May 28, Dr. Dirks responded to a letter from Surety. He noted that after falling from a ladder Claimant developed pain in her neck and down into her arms. Dr. Dirks described these complaints as “new symptomatology.” Claimant’s Exhibit C. “She states that on occasion she had gone to the chiropractor in the past, but at that time she never had, prior to this accident however, arm symptoms at all. I believe that all of these symptoms she is currently having are new and related to the industrial accident on November 25, 2002.” *Id.*

20. Claimant underwent a cervical spine MRI in June 2003 to try to determine the cause of her neck pain and bilateral hand numbness. Claimant’s Exhibit A. Prominent degenerative changes were noted at C5-6 and C6-7 with prominent anterior vertebral osteophytes and joint space narrowing. The MRI was interpreted to reveal prominent disk space height narrowing with a prominent, diffuse, circumferential disc bulge with cord impingement at C5-6 and marked space height narrowing with prominent, diffuse, circumferential disc bulge and prominent bilateral joint of Luschka osteophytes at C6-7. Claimant’s Exhibit A. EMG/nerve conduction studies were also completed to determine the cause of Claimant’s complaints of persisting lower cervical/upper thoracic distribution numbness. Claimant’s Exhibit A. The findings were consistent with a chronic or old right C8-T1 radiculopathy or nerve injury.

21. Claimant underwent arthroscopic surgery to repair her right knee on July 8, 2003. By August 19 Dr. Olscamp noted Claimant was making significant improvement with regard to her knee and reported a dramatic decrease in her overall pain level. The doctor noted that Claimant was going to have her neck fused by Dr. Dirks, and that if her ankle continued to bother her after the fusion he might have to perform an arthroscopic exam and debridement of the anterior soft tissue in her left ankle.

22. Claimant's cervical fusion was performed by Dr. Dirks on September 4, 2003. The operation consisted of an anterior cervical discectomy and fusion at C5-6 and C6-7 with Synthes Plates and allograft. Claimant's Exhibit C. On September 12 Dr. Dirks noted that AP and lateral cervical spine x-rays revealed good placement of the plate and screws with no change in alignment. No complications or instability were noted.

23. Flexion and extension x-rays taken on October 17 revealed that Claimant's cervical spine had not completely fused at the operative levels.

24. On October 31, Dr. Olscamp noted that while Claimant's back fusion and knee surgery appeared successful, her left ankle was still bothering her. X-rays demonstrated some significant change including evidence of avascular necrosis and "probable small area of collapse." Claimant's Exhibit B. Dr. Olscamp ordered a CT and discussed with Claimant her options regarding treatment of her ankle, including the possibility of a fusion.

25. A CT of Claimant's left ankle was accomplished on November 14, 2003. The CT showed tibiotalar joint space narrowing and marked sclerotic cystic change of the medial talus, with depression of the bony surface. There were small bone fragments noted along the posterior medial margin of the fibula. Based on the results of a CT, Claimant agreed to undergo fusion of her left

ankle joint. The surgery was performed on January 19, 2004.

26. A follow-up exam on January 30 demonstrated that the screw placement was excellent with three percutaneous screws through the distal tibia and talar joint. Claimant began bearing weight at Dr. Olscamp's instruction in March, and by April was ambulating in a walking boot without assistive devices. The doctor noted very little complaints of pain, but mild effusion that would make it difficult for Claimant to stand or walk long distances without discomfort.

27. New flexion and extension x-rays of Claimant's cervical spine were accomplished on November 20. The films showed potential pseudoarthrosis at both C5-6 and C6-7 with some instability. Follow-up x-rays taken on January 22, 2004, showed fusion at C5-6 and questionable fusion at C6-7. No hardware complications or instability patterns were noted. By April 2004, Dr. Dirks noted that Claimant had made good progress and he released her to return only on an as needed basis. July 2004 flexion and extension x-rays showed good evidence of fusion at both the C5-6 and C6-7 levels.

28. At a June 2004 follow-up appointment for Claimant's ankle fusion, PA Biondo noted Claimant was experiencing pain with mobilization, weight bearing, and climbing stairs. He wrote a final prescription for Lortab and expressed a desire to wean Claimant off narcotics and continue her on anti-inflammatories for pain control. PA Biondo noted that he referred Claimant to D. Cooper Wester, M.D., because she had started developing increased issues of anxiety and depression.

29. By August 2004, Claimant reported doing significantly better. She reported that antidepressant medication as well as hypertension control medication both seemed to have helped to significantly decrease her overall pain level. X-rays taken in September demonstrated a completely fused tibial talar joint. Dr. Olscamp opined that Claimant had, by this point, more or less reached

maximum medical improvement. As a result, he released her to light duty work on September 14, 2004.

30. On October 21, 2004, Dr. Olscamp opined in a letter to Surety that Claimant appeared to have reached maximum medical improvement and was ready for an impairment rating. He opined 7% whole person impairment for a mild antalgic limp and 6% whole person impairment for decreased ankle motion due to the fusion.

31. Dr. McNulty performed an independent medical evaluation (IME) on January 3, 2005. He noted that Claimant denied any problems with her right knee, neck or left ankle prior to the November 2002 work accident. Regarding Claimant's right knee, the doctor noted that Dr. Olscamp's operative findings noted a complexly torn posterior medial meniscus. "The type of pathology encountered during surgery is more consistent with an acute injury (11/25/02) than a preexisting problem on a more probable than not basis." Claimant's Exhibit E. He also documented that he was unaware of any medical records that reflected prior problems with Claimant's cervical spine.

32. For these reasons, Dr. McNulty opined that both Claimant's cervical spine injury and her right knee injury were the direct result of her work accident on a more probable than not basis. He opined 25% whole person impairment for Claimant's cervical spine and 1% whole person impairment for her right knee. Dr. McNulty also assessed 7% whole person impairment for Claimant's ankle as a direct result of her November 2002 work accident. He came up with 31% total whole person impairment when using the Combined Values Chart of the *AMA Guides*. Claimant's Exhibit E. Dr. McNulty opined Claimant able to work in a sedentary job category with limited walking and standing and a 10 pound lifting restriction. "She is most suited to work predominantly

in a seated position.” *Id.*

33. Claimant attended a functional capacity evaluation (FCE) on January 27, 2005. Claimant’s Exhibit F. The evaluator determined that Claimant was able to work in a sedentary capacity for an eight hour day. Claimant should limit overhead tasks and grasp/pinch with her left hand and should not squat. She cannot tolerate standing/walking for more than 45 minutes at one time. Her reliability testing suggested that she provided fair effort and valid results could be obtained.

34. Claimant was scheduled to attend an IME with Dr. Adams at the request of Surety on June 3, 2005, but was involved in a car accident and unable to attend. Dr. Adams instead performed a detailed records review and documented his conclusions. Defendants’ Exhibit 24. Dr. Adams opined that he could not relate Claimant’s cervical surgery to the work accident. He determined that there were no findings to indicate a surgical procedure on her neck would be beneficial and, on physical examination, there were no findings of a cervical radiculopathy. He also noted that past medical records noted a long history of ongoing neck pain.

35. Dr. Adams did not relate Claimant’s right knee condition to the work accident because she only began complaining of pain in February 2003 – nearly 3 months after the accident. He deemed that if she had a torn meniscus in her right knee, she certainly would have been symptomatic prior to February.

I cannot relate a right knee condition to an incident that occurred almost three months prior with the initial symptoms of her right knee occurring three months after the incident. The medical record of 12/27/02 notes she had been non-weight bearing on the left using a walker. This means that she was putting full weight on her right lower extremity. The medical records prior to 02/18/03 do not identify any injury to her right knee or pain complaints of her right knee.

Defendants' Exhibit 24. Dr. Adams opined 4% whole person PPI as the result of Claimant's ankle fusion.

36. In response to a July 12, 2005, letter from Claimant's attorney, Dr. Olscamp opined that Claimant's right knee meniscal tear was causally related to the November 2002 industrial accident on a more probable than not basis. Dr. Olscamp agreed with Dr. McNulty's 7% whole person impairment rating for Claimant's ankle and 1% whole person impairment rating for her knee. Dr. Olscamp also agreed with Dr. McNulty that Claimant was unable to work from November 25, 2002, to January 3, 2005. Claimant's Exhibit B.

37. Dr. Dirks, also responding to a letter from Claimant's attorney, opined that Claimant's neck pain radiating down her arms was causally related to the November 2002 industrial accident on a more probable than not basis. Dr. Dirks concurred with Dr. McNulty's 25% whole person impairment rating for Claimant's cervical spine injury and assessment that Claimant was unable to work from November 25, 2002, to January 3, 2005, as a result of the industrial accident.

38. ICRD consultant Steve Hamman testified at hearing that Claimant was limited to sedentary employment and had lost 95% of her available labor market. He noted that Claimant possessed limited transferable skills and, in his experience, unskilled sedentary positions were hard to find.

39. Vocational rehabilitation consultant Douglas Crum agreed that Claimant is restricted to sedentary employment. He noted that while Claimant had a 10 pound lifting restriction and restrictions on walking and standing, she was not given a restriction on sitting by any medical professional. Mr. Crum determined that, when considering Dr. McNulty's restrictions, Claimant had lost 80% of her labor market, but when considering Dr. Olscamp's restrictions, Claimant had only

lost 35% of her labor market. Mr. Crum's disability analysis with Dr. Olscamp's restrictions assume that a notation made in the doctor's file in September 2004 regarding light duty meant the vocational equivalent of light duty – as opposed to a release by the doctor for any amount of work since she had not been released for any work since the November 2002 accident. Defendants' Exhibit 23. Mr. Crum clarified that all of his disability assessments were inclusive of any impairment.

40. Claimant obtained her GED in September 2004 in hopes that it would improve her employability. She was 59 years old at the time of hearing.

DISCUSSION AND CONCLUSIONS

41. **Causation.** The Idaho Workers' Compensation Law defines injury as a personal injury caused by an accident arising out of and in the course of employment. An accident is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. Idaho Code § 72-102(17).

42. A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient. *Beardsley v. Idaho Forest Indus.*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Indus. Special Indem. Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Co.*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

Left ankle

43. Defendants do not dispute that Claimant's ankle injury was caused solely by her fall from a ladder at work on November 25, 2002.

Right knee

44. Following the fall and repair of her left ankle, Claimant was primarily wheelchair bound. Medical records reflect that Claimant remained fully non-weight bearing until at least some time in late December. Although she had a walker available, Claimant primarily used her wheelchair for ambulating for about the first six weeks. Hearing Transcript, p. 82.

45. On February 18, 2003, Claimant reported gradually increasing pain in her right knee since the fall at work. PA Biondo suspected a medial meniscal tear which was confirmed by MRI. Arthroscopic surgery was recommended to repair the tear. Surety requested information from Dr. Olscamp regarding Claimant's knee condition. Dr. Olscamp opined that the medial meniscal tear was probably associated with her November 25 fall. He found it unlikely that the tear was congenital or degenerative in nature.

46. Surety sought the opinion of Dr. Adams in April. Although Dr. Adams acknowledged finding nothing in Claimant's history to indicate a tear of the right medial meniscus, he would not relate the knee injury to her November 25 fall because of her delay in reporting symptoms.

47. Claimant presented to PA Biondo in May for a re-evaluation of her left ankle. He reiterated that Claimant's medial meniscal tear was incurred during her fall in November 2002 and arthroscopic surgery was warranted. Surety refused to authorize surgery based on the report of Dr. Adams. Despite Surety's refusal to pay, Claimant underwent arthroscopic surgery to repair her right knee on July 8, 2003.

48. Claimant argues that given the severity of her ankle injury, her confinement to a wheelchair, and her use of pain medication, the fact that her knee did not rise to a pain level to complain of it until February should not be viewed as unusual. She maintains that if her right knee condition had pre-existed the November 25 fall she would not have been able to perform her daily work tasks.

49. Although extensive medical documentation exists prior to November 2002, the only medical evidence that recites any complaint, much less injury, to Claimant's right knee, is a radiographic study performed in March 2001 which revealed no evidence of recent or old trauma. Defendants assert Claimant received treatment for "right knee problems" a month prior to her work accident. On the contrary, Claimant was receiving treatment from a chiropractor for malalignment in her back. She neither complained of, nor received treatment for, "problems" with her right knee. Further, Dr. McNulty noted on a more probable than not basis that the pathology encountered by Dr. Olscamp during surgery was more consistent with an acute injury than a pre-existing problem. Based on the foregoing, the Commission finds that the medial meniscal tear in Claimant's right knee resulted from her accident and arose out of and in the course of her employment on November 25, 2002.

Cervical spine

50. As early as 1991 Claimant was diagnosed with degenerative changes at C5-6 and C6-7. After her 1994 motor vehicle accident, x-rays revealed spurs present anteriorly at C5, C6 and C7 with loss of disc space at C5-6 and C6-7. In 1996, Dr. Volyn diagnosed probable radiculopathy that seemed to resolve after carpal tunnel surgery was performed.

51. Immediately after her fall from the ladder Claimant complained of tingling in her

upper extremities that was noted in Dr. Olscamp's medical records. Claimant testified that she used the wheelchair more than the walker to ambulate following her ankle surgery because using the walker exacerbated her arm and hand symptoms. In March 2003, Dr. Olscamp referred Claimant to Dr. Dirks for her continued complaints of bilateral arm pain and numbness. Dr. Dirks ordered testing to confirm his suspicion of radiculopathy.

52. An MRI revealed that the prior disc space height narrowing present before the accident was now accompanied by prominent, diffuse, circumferential disc bulge with cord impingement at C5-6 and prominent, diffuse, circumferential disc bulge at C6-7. Thereafter, Dr. Dirks related Claimant's cervical condition and symptomatology to the November accident. Dr. McNulty also opined that Claimant's cervical spine condition was the direct result of her November 2002 work accident. Although Dr. McNulty was not aware of treatment Claimant had received for her cervical spine prior to the work accident, he noted that she was performing heavy labor without difficulty prior to November 2002 and she is now limited to sedentary employment.

53. Dr. Adams found no evidence in Claimant's post-accident medical records of cervical radiculopathy and no indications that a surgical procedure on her neck would be beneficial.

54. The fact that Claimant's spine may have been weak and predisposed to an injury does not prevent an award since "our compensation law does not limit awards to workmen who, prior to injury, were in sound condition and perfect health. Rather, an employer takes an employee as he finds him." *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 104, 666 P.2d 629, 631 (1983). "A pre-existing infirmity does not eliminate the opportunity for a worker's compensation claim provided the employment aggravated or accelerated the injury for which compensation is sought." *Page v. McCain Foods, Inc.*, 141 Idaho 342, ___, 109 P.3d 1084, 1089 (2005). Claimant had pre-existing

degenerative disc disease, but prominent, diffuse, circumferential disc bulges at C5-6 and C6-7 were not present until after the November 25 fall. As a result, the Commission finds that Claimant's cervical spine condition, and subsequent need for fusion, arose out of and in the course of her industrial accident on November 25, 2002.

55. **TPD/TTD benefits.** Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees during the period of recovery. The burden is on the claimant to present evidence of the extent and duration of the disability in order to recover income benefits for such disability. *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 605 P.2d 939 (1980).

56. Once a claimant establishes by medical evidence that he is within the period of recovery from his original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light-duty work and that: (1) his former employer has made a reasonable and legitimate offer of employment which he is capable of performing under the terms of his release and which employment is likely to continue throughout his period of recovery, or (2) there is employment available in the general labor market which Claimant has a reasonable opportunity of securing, which employment is consistent with the terms of his light-duty work release. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1219 (1986).

57. Claimant maintains that she is entitled to TTD benefits from November 25, 2002, through January 3, 2005. Defendants assert that they have paid all TTD benefits to which Claimant is entitled.

58. Dr. Adams opined in April 2003 that Claimant was ready to return to work in relation

to her fractured ankle and no additional treatment for the ankle was needed. However, in May 2003 PA Biondo opined that Claimant was clearly not at full function regarding her left ankle. In addition, the medial meniscal tear had still not been repaired. Claimant's right knee surgery occurred in July 2003 and later, in September of that year, Claimant underwent cervical fusion.

59. By late October 2003, Dr. Olscamp noted Claimant's back fusion and knee surgery appeared successful, but her left ankle was still problematic. Fusion of Claimant's left ankle was accomplished in January 2004, and Claimant was released by Dr. Olscamp to light duty work on September 14. Unfortunately, Employer had since terminated her employment and made no attempt to establish that work was available in the general labor market that was consistent with her light duty release. Thereafter, no doctor opined stability until Dr. McNulty examined Claimant and determined she had reached maximum medical improvement as of the date of his examination on January 3, 2005. Dr. Olscamp and Dr. Dirks agreed with Dr. McNulty.

60. Based on the foregoing, the Commission finds that the great weight of medical evidence supports a determination that Claimant was in a period of recovery and entitled to TTD/TPD benefits from November 25, 2002, through January 3, 2005. Even without taking into account the treatment and recovery for Claimant's right knee and cervical spine, Claimant's left ankle was never stable after the initial surgery and eventually required fusion. Claimant was not released to full duty following the ankle fusion until January 3, 2005.

61. **PPI benefits.** "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).

62. Dr. McNulty assessed 7% whole person PPI for Claimant's left ankle, 25% whole person PPI for her cervical spine, and 1% whole person PPI for her right knee. He opined 31% total whole person PPI when utilizing the Combined Values Chart of the *AMA Guides*. Dr. McNulty related Claimant's entire impairment to her work accident.

63. Dr. Olscamp agreed with Dr. McNulty's assessment of 7% whole person PPI for Claimant's left ankle and 1% whole person PPI for her right knee. Dr. Dirks concurred with Dr. McNulty's 25% whole person PPI rating for Claimant's cervical spine.

64. Dr. Adams refused to relate Claimant's right knee or cervical spine injuries to her work accident. Dr. Adams opined 4% whole person impairment based on the *AMA Guides* for an ankle fused in a neutral position. Dr. Adams acknowledged, however, that there is no reference in the x-rays to permit an assessment of the actual position of Claimant's left foot to her left tibia post-fusion.

65. The opinions of Dr. McNulty, Dr. Olscamp, and Dr. Dirks are persuasive. Additionally, the ratings for Claimant's right knee and cervical spine are uncontroverted. Dr. Adams' opinion regarding the impairment of Claimant's left ankle is not reasonable absent imaging studies that reveal Claimant's ankle was indeed fused in a neutral position. In this situation, the doctor who performed the surgery (Dr. Olscamp) is best able to accurately rate impairment regarding

the success of fusion of the left ankle. Accordingly, Claimant is entitled to 7% whole person PPI for her left ankle fusion, 1% whole person PPI for her right knee condition, and 25% whole person PPI for her cervical condition, including fusion. Utilizing the Combined Values Chart of the *AMA Guides*, the Commission finds that Claimant is entitled to 31% whole person PPI.

66. **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.

67. 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).

68. Clearly Claimant has lost some ability to compete in an open labor market. Prior to

the industrial accident she was capable of heavy duty work. She regularly unloaded and stocked merchandise for Employer and performed manual labor in the form of cleaning, both at home and at work. No doctor has opined that she would be capable of returning to similar employment due to the combined effects of her multiple injuries.

69. The doctors have limited Claimant to no lifting greater than 10 pounds with limited walking and standing. Although the vocational rehabilitation consultants disagree on the percentage of the labor market Claimant has lost, they all agree that Claimant is only capable of sedentary work. Several jobs were identified that appeared to fit within Claimant's restrictions. However, after Claimant observed the positions she determined that she would not be able to perform the required tasks.

70. Although Claimant has a limited work history that consists primarily of her work with Daniel's Tire Service in California and her work in Idaho with Employer, she was obviously a valued asset to both companies. She possesses strong interpersonal and office skills. Claimant is personable, mentally alert, articulate, and well-groomed, with a strong work ethic. She has a history of starting at an entry-level position, learning the business, and advancing in her responsibilities and leadership within the organization.

71. Based on Claimant's extensive physical restrictions resulting from her multiple injuries, Claimant has sustained a substantial loss of labor market for future employment. However, non-medical factors as described above should enable Claimant to become employed in at least a sedentary job environment. Therefore, the Commission finds Claimant is entitled to 75% PPD, inclusive of impairment.

72. Claimant neither searched for work, nor proved that efforts to find suitable

employment would be futile. Quite to the contrary, vocational consultants identified available positions within the doctors' restrictions. *Lethrud v. State, Industrial Special Indem. Fund*, 126 Idaho 560, 887 P.2d 1067 (1995). Claimant determined, without so much as a trial run, that she could not perform the work involved. As a result, Claimant does not meet the criteria for "odd-lot" disability.

73. **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).

74. Based on the earlier finding that Claimant's left ankle, right knee and cervical spine injuries were the result of her November 25, 2002, accident, the Commission finds that Claimant is entitled to all medical care reasonably related to her fractured (and fused) left ankle, medial meniscal tear of the right knee, and cervical spine fusion.

75. **Attorney fees.** Attorney 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).

76. Defendants immediately paid benefits for Claimant's obvious work injury – the left

ankle fracture. Benefits were not denied until several months later when Claimant reported right knee pain. Defendants requested the treating physician's opinion regarding causation of the right knee condition and, when they did not agree with the causation opinion, sought an IME opinion. Defendants, thereafter, based their denial of benefits for Claimant's right knee and cervical spine on the opinion of Dr. Adams. Defendants are entitled to seek additional/alternative medical opinions. Their reliance on Dr. Adams' report was not unreasonable. Therefore, the Commission finds that attorney fees in this case are not warranted.

ORDER

Based upon the foregoing analysis, the Commission issues the following order:

1. Claimant suffered injury to her left ankle, right knee and cervical spine in the course and scope of her employment on November 25, 2002.

2. Claimant was in a period of recovery and, thus, entitled to temporary partial and/or temporary total disability benefits from November 25, 2002, through January 3, 2005.

Defendants are entitled to credit for any TTD/TPD benefits previously paid.

3. Claimant is entitled to 31% whole person permanent partial impairment. Defendants are entitled to credit for any PPI benefits previously paid.

4. Claimant is entitled to 75% permanent partial disability inclusive of impairment.

5. Claimant is entitled to all medical care reasonably related to her fractured/fused left ankle, medial meniscal tear of the right knee, and cervical spine fusion.

6. Claimant is not entitled to attorney fees.

7. Claimant has not proven entitlement to permanent total disability pursuant to the odd-

lot doctrine.

8. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this 17th day of February, 2006.

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 17th day of February, 2006, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS AND ORDER** was served by regular United States Mail upon each of the following:

RICHARD WHITEHEAD
P.O. BOX 1319
COEUR D'ALENE, ID 83816-1319

ERIC S. BAILEY
P.O. BOX 1007
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kas

/s/ _____