

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRENDA HOOK,)
)
 Claimant,)
)
 v.)
)
 DURA MARK, INC.,)
)
 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
 Defendants.)
 _____)

IC 04-510540

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

Filed: December 8, 2006

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Idaho Falls, Idaho, on June 20, 2006. David M. Cannon of Blackfoot represented Claimant. Russell E. Webb of Idaho Falls represented Defendants. The parties submitted oral and documentary evidence. Two post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on October 5, 2006 and is now ready for decision.

ISSUES

Pursuant to the Notice of Hearing, and as agreed by the parties at hearing, the issues to be decided are:

1. Whether Claimant suffered an injury from an accident arising out of and in the course of her employment;

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. Determination of Claimant's average weekly wage; and
5. 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); and
 - D. Disability in excess of impairment.

In her post-hearing briefing, Claimant asserted, for the first time, a claim for attorney fees pursuant to Idaho Code § 72-804. The issue of attorney fees was neither noticed nor argued in a timely manner, and will not be considered by the Referee in these findings and conclusions.

CONTENTIONS OF THE PARTIES

Claimant asserts that on May 12, 2004 she was transporting refuse, including wooden pallets, to the local waste transfer station as part of her regular duties for Employer (Blackfoot Brass). Included with items for disposal that day was a concrete culvert. While trying to unload the culvert from the bed of the pickup, she slipped and fell, injuring her lumbar spine. Defendants deemed Claimant's injuries compensable, and provided statutory benefits including medical care and temporary total disability benefits. Claimant contends that Defendants underpaid her TTD benefits, because of an incorrect determination of her average weekly wage. In addition to back TTDs owed, Claimant asserts that she is entitled to disability of up to 69% inclusive of her undisputed 3% permanent partial impairment (PPI).

Defendants argue that Claimant has failed to prove that she was involved in an industrial accident, or that she sustained an injury from an industrial accident, so her claim is not compensable. Even if her claim were found to be compensable, Claimant's TTDs were properly calculated based on the wage rate included in the First Report of Injury or Illness. Claimant has failed to prove she is entitled to any disability in excess of her impairment rating.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Testimony of Claimant, Kathy Gammon and John R. Frischkorn, taken at hearing;
2. Claimant's Exhibits 1 through 20, admitted at hearing;
3. Defendants' Exhibits A through U, admitted at hearing;
4. Pre-hearing deposition of John R. Frischkorn; and,
5. Post-hearing depositions of Gary C. Walker, M.D., and Lori F. Gentillon, certified vocational evaluator.

Defendants' objection at page 53 of Ms. Gentillon's deposition is overruled. After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. At the time of hearing, Claimant was 48 years of age and resided in the Blackfoot area.

EDUCATION

2. Claimant attended high school, but left in the ninth grade. Claimant was a poor student, though not from a lack of ability. She got her GED in 1982. Claimant attended beauty school, but did not obtain licensure in any part of the cosmetology field. Claimant became a

licensed certified nurse assistant (CNA) in 1984 in conjunction with her employment at State Hospital South (SHS) in Blackfoot. Claimant also attended several short courses (two to three hours) offered through Idaho State University relating to entrepreneurial endeavors.

WORK HISTORY

3. In 1979, Claimant worked for a short period of time as a cosmetologist apprentice.

4. In 1979, Claimant was living in Washington, where she worked as a case aide in the state department of health and welfare, working with the developmentally disabled. She held this position until 1983.

5. From 1983 through 1993, Claimant was employed as a psychiatric aide at SHS in Blackfoot. Claimant's entry wage at SHS was \$6.15 per hour. When she left SHS in 1993, she was earning between \$9.00 and \$9.50 per hour.

6. Between 1994 and 1997, Claimant worked as a home health aide, earning \$9.50 per hour.

7. From 1997 to 1999, Claimant worked as a homemaker and as unpaid labor in a family-owned restaurant/bar.

8. Claimant returned to the work force in 1999, working briefly as a home health aide. In October 1999, she started working for Blackfoot Brass.

BLACKFOOT BRASS

9. Blackfoot Brass is a non-ferrous foundry that casts parts in bronze and aluminum. The operation includes both custom and automated foundries. Products produced include decorative knobs and oarlocks for drift boats. Blackfoot Brass creates its own patterns, and casts both sand and wax molds.

10. Claimant's position at Blackfoot Brass was as a foundry tech. Although her job duties changed during the four years that Claimant worked for Employer, her job title remained the same. When she was hired, Claimant worked grinding and dressing knobs. This work was eventually discontinued at the foundry and Claimant's primary functions changed to drilling and tapping knobs and working in the wax room making molds. In addition to her primary duties, Claimant performed janitorial work and other miscellaneous duties, including outdoor maintenance and hauling refuse to the transfer station for disposal in the landfill.

11. Claimant's earnings at Blackfoot Brass included a base pay rate for various duties, plus an incentive rate based on the number of pieces completed. Defendants' Ex. B, pp. 29-31 includes a breakdown of Claimant's gross earnings on a bi-weekly basis as well as month-to-date and quarter-to-date totals. Claimant's average weekly wage (her highest gross earnings in the four thirteen-week periods preceding her May 12, 2004 accident) was \$591.59 ($\$7,690.73 \div 13$).

ACCIDENT

12. On May 12, 2004, Claimant was asked to take a truckload of refuse, including wood pallets, to the transfer station. Claimant was permitted to salvage the pallets, which she dropped off at her home near the transfer station. After the pallets were removed, a large concrete culvert and pipe remained in the truck bed. John Frischkorn, an owner of Blackfoot Brass, had placed the culvert there with a tractor after removing it from his residence. Claimant drove to the transfer station where the truck was weighed. She then endeavored to unload the culvert. Claimant had difficulty unloading the culvert because of its weight and bulk. The metal bed of the pickup was slightly wet from rain, and in her effort to move the culvert, she slipped and fell, landing on her buttocks with her legs fully extended and with her torso flexed forward at

the waist. She immediately felt discomfort in her shoulders and upper back.

13. Claimant continued her efforts and eventually did get the culvert out of the truck bed. On the way out of the transfer station, the vehicle was weighed again, and the scale indicated that the culvert weighed approximately 250 pounds. Claimant returned to work, and immediately advised Frischkorn that she had trouble unloading the culvert and had hurt her upper back and shoulders in her efforts to accomplish her task.

14. Neither Claimant nor Frischkorn took the incident seriously at the outset. Claimant had some discomfort, but did not think she had done more than strain some shoulder muscles, and Frischkorn joked that he hadn't had any trouble getting the culvert *into* the pickup with his tractor. After performing several hours of her regular work, Claimant's back started to spasm. She filled out an accident report (Defendants' Ex. J, p. 337) that afternoon, and indicated that her supervisor was notified about the accident at 1:45 p.m. that day. Claimant finished out her workday.

15. On the morning of May 13, Claimant could barely move. She notified Blackfoot Brass that she was not coming to work and sought medical care at Blackfoot Medical Clinic (BMC).

MEDICAL CARE

16. On her first visit to BMC, she was seen and treated by Debra Erramouspe, physician's assistant. Claimant presented with complaints of upper back, neck, and shoulder pain. Erramouspe diagnosed upper back and shoulder strain, gave Claimant an injection of Toradol, and prescribed anti-inflammatories and muscle relaxants, and placed Claimant on light duty work for two weeks. Blackfoot Brass had no light duty work available, so Claimant remained off work.

17. Claimant returned to BMC on May 17, reporting additional symptoms, including numbness in her upper extremities and low back pain. On this visit, she was seen by Curtis L. Galke, M.D. He diagnosed back strain and prescribed continued use of the anti-inflammatory and muscle relaxant, continued her on light duty work, and recommended a physical therapy evaluation. Lumbar x-rays taken the same day showed mild scoliosis, hyperlordosis, and early degenerative changes but were otherwise unremarkable. Thoracic x-rays were normal but for mild degenerative changes. Claimant started physical therapy the same day.

18. On June 1, Dr. Galke extended Claimant's light duty restriction for an additional week and had her continue with physical therapy.

19. On June 7, Claimant was slightly improved with physical therapy. Dr. Galke released Claimant to return to work, light duty, with a 35-pound lifting restriction. Claimant returned to work on June 8 and worked eight hours and eight hours the following day.

20. On June 10, Claimant returned to BMC complaining that she had been improving but after returning to work, she again became symptomatic, with pain from her neck to her tailbone. Prescription analgesic and muscle relaxant provided no relief. Dr. Galke referred Claimant to Gary Walker, M.D., a physiatrist, for additional follow up.

21. Claimant first saw Dr. Walker on July 12. He diagnosed pain complaints related to her May 12 work accident, and opined that her complaints were consistent with a hyperflexion injury to her low back and hips with possible stretching of the thoracic, lumbar and hamstring areas. Dr. Walker released her to light duty work with a 20 pound lifting restriction, and ordered an aggressive physical therapy regimen. On July 28, Claimant reported no improvement. Dr. Walker ordered two more weeks of physical therapy and continued Claimant's light duty work and lifting restrictions. Blackfoot Brass terminated Claimant's

employment on August 2. On August 17, Claimant returned to Dr. Walker reporting slow progress. She remained tender to palpation over the midline at L3-4 and L4-5, and had slight pain with flexion and extension. Dr. Walker increased her lifting restriction to 35 pounds.

22. Claimant saw Philip McCowin, M.D., at Surety's request. Dr. McCowin's recommendations were consonant with Dr. Walker's, with the additional suggestion that a back brace might be helpful. Dr. McCowin opined that Claimant was not a candidate for narcotic pain intervention or surgery, and recommended she continue with her self-directed physical therapy and anti-inflammatory medications. Dr. McCowin agreed with Dr. Walker's 35-pound lifting restriction.

23. Dr. Walker saw Claimant again on August 31. Following her appointment, Dr. Walker responded to a letter he had received from the Industrial Commission Rehabilitation Division (ICRD) seeking information about Claimant's medical restrictions. According to Dr. Walker's response, signed and dated August 31, Claimant was permitted to:

- | | |
|---------------|---|
| Frequently: | Sit or stand
Perform repetitive hand/arm activity |
| Occasionally: | Lift up to 35 pounds
Bend and stoop
Kneel and crouch
Reach |

Dr. Walker characterized these limitations as temporary.

24. At the same time that Dr. Walker completed the letter from ICRD, he reviewed a job site evaluation (JSE) for Claimant's work at Blackfoot Brass. Defendants' Ex. N, pp. 395-396. Les Sorensen, an ICRD rehabilitation consultant, prepared the JSE in conjunction with Mr. Frischkorn and Claimant. Frischkorn approved the JSE on August 25, and Claimant on August 24. The JSE described the lifting requirements of Claimant's job as follows:

Continuously:	Bending/stooping Crouching Twisting Reaching below shoulder height
Frequently:	Reaching above shoulder Grasping Pushing/pulling (25 pounds effort)
Occasionally:	Lifting from 0 to 50 pounds Climbing Kneeling Fine manipulation
Rarely:	Lifting 51 to 75 pounds (per Claimant) Lifting 76 to 100 pounds (per Claimant)
Never:	Lifting 51 to 75 pounds (per Frischkorn) Lifting 76 to 100 pounds (per Frischkorn) Lifting of over 100 pounds

Dr. Walker signed off on the JSE August 31, marking the box labeled “Approved with Noted Modification,” with the noted modification being a 35-pound lifting restriction.

25. When Claimant saw Dr. Walker on September 22, she was only slightly improved and reported her low back pain as averaging seven out of ten. Dr. Walker noted:

Low back complaints back to May now. Most of this I think is originally related to the lumbar strain. However, given the persistent symptoms and the intermittent radiating leg symptoms, I think it is appropriate to go ahead and seek approval for an MRI scan of the lumbar spine.

Defendants’ Ex. L, p. 399.

26. As read by Dr. Walker, the MRI showed a small central bulge at L4-5. Dr. Walker was uncertain whether the bulge was the source of Claimant’s complaints, but noted nothing else out of the ordinary on the images. Dr. Walker offered Claimant the option of an epidural steroid injection (ESI) or being released from care. Claimant had an ESI on November 4 and was a no-show for a November 30 appointment. She returned to the office on December

15, and reported that the ESI had helped her lumbar pain. She continued to report pain in the sacral region, so Dr. Walker performed a caudal ESI.

27. On January 19, 2005, Dr. Walker determined that Claimant had reached maximum medical improvement. He noted that she had not responded well to appropriate conservative treatment, and was not a surgical candidate. Because of her continued pain complaints, he imposed a permanent 50-pound lifting restriction. Using the *AMA Guides to the Evaluation of Permanent Impairment*, (5th Ed.) (*AMA Guides*), Dr. Walker placed Claimant between DRE Category I and DRE Category II, and awarded a 3% whole person impairment rating for her lumbosacral strain and persistent pain. During his deposition, Dr. Walker clarified that in addition to the 50-pound lifting restriction, Claimant was subject to the other activity limitations that he had set out in his August 31, 2004 response to ICRD (summarized previously in paragraph 23, above).

28. Claimant returned to Dr. Galke on May 23, 2006 reporting continuing lumbosacral pain. Dr. Galke noted Dr. Walker's previous diagnosis of small central bulge at L4-5. Dr. Galke refilled Claimant's prescriptions and recommended follow up with Dr. Walker.

29. Pursuant to a request from Claimant's vocational consultant, Kathy Gammon, Dr. Galke prepared a physical ability assessment for Claimant, dated May 23, 2006. The assessment is summarized in pertinent part:

Frequently:	Climbing stairs Crouching Crawling
Occasionally:	Lifting up to 50 pounds Carrying up to 50 pounds Pushing/pulling up to 50 pounds Climbing ladder Bending (from sitting or standing position) Twisting

Rarely: Kneeling

Never: Stooping

Dr. Galke also included a limitation that Claimant was not to stand in one position for more than fifteen minutes.

Ms. Gammon also asked Dr. Galke whether Claimant could return to work as a personal caregiver, fry cook, or in food preparation, to which he responded in the negative.

30. In his post-hearing deposition, Dr. Walker stated that he did not disagree with any of the limitations expressed by Dr. Galke in the May 23, 2006 physical ability assessment with one exception—Dr. Walker believed that Claimant could stoop rarely.

VOCATIONAL EVIDENCE

Lori Gentillon

31. Defendants retained Lori Gentillon, Certified Vocational Evaluator, to prepare a report of labor market opportunities and employability of Claimant in light of her education, employment history, transferable skills, and physical restrictions. Ms. Gentillon's written report (Defendants' Ex. U) is dated July 14, 2006, and her post-hearing deposition is also a part of the record.

32. Ms. Gentillon holds a BS in psychology from Idaho State University. From the time of her graduation from ISU in 1978, she was employed by Development Workshop, Inc., of Idaho Falls. Since 1997 she has held the position of Vice-President of Rehabilitation Services. Her certifications include that of Vocational Evaluator through the Commission on Certification of Work Adjustment and Vocational Specialist, and Developmental Specialist through the State of Idaho, Department of Health and Welfare.

33. Ms. Gentillon did not meet with Claimant, but reviewed ICRD files, medical

records from Drs. Walker, McCowin, and Galke, the deposition testimony of Claimant and Mr. Frischkorn, job site information, the vocational analysis prepared by Kathy Gammon, and the transcript of the hearing held June 20, 2006. Ms. Gentillon utilized a software program called Valpar Pro to determine suitable occupations for Claimant taking into consideration her lifting and stooping limitations.

34. In her written report, Ms. Gentillon premised her analysis of Claimant's access to the labor market upon Dr. Walker's permanent 50-pound lifting restriction, which she believed was the only permanent restriction imposed on Claimant as a result of her industrial accident. On that basis, Ms. Gentillon opined that Claimant had not lost any access to the labor market, nor had she lost wage-earning capacity. Ms. Gentillon believed that Claimant could return to her time-of-injury employment at Blackfoot Brass, that there were a number of social service positions available for which she was qualified, and that she was also qualified for customer service and call center work—all of which included employment opportunities in the range of \$6.00 per hour to \$15.00 per hour.

Kathy Gammon

35. Claimant retained Kathy Gammon to prepare a vocational and earning capacity assessment for Claimant. Ms. Gammon's report appears as Claimant's Ex. 12. Ms. Gammon also presented testimony at the hearing on June 20, 2006.

36. Ms. Gammon holds a Master's degree in physical therapy (1975), and a Masters degree in vocational rehabilitation (1998). She is a registered physical therapist in Idaho, and has been a Certified Rehabilitation Counselor since 1998. Ms. Gammon worked as a physical therapist in California, Washington, Illinois, Utah and Idaho from 1976 until 1998. From 1998 until 2002, Ms. Gammon worked as a rehabilitation counselor and consultant for various entities,

including the Idaho Division of Vocational Rehabilitation and MGD Management, Inc. (Utah). In 2002 she started her own company, Rehab All, which provides physical therapy services as well as vocational services for individuals with injuries or disabilities.

37. Ms. Gammon met with Claimant and reviewed ICRD records, medical records, including those of Drs. Walker, McCowin and Galke, and tax records. She administered several vocational tests to Claimant, including the Wide Range Achievement Test (WRAT), a Short Employment Test for clerical aptitude, a vocational preference inventory, and work personality test. Ms. Gammon also administered a cursory physical therapy evaluation, and made additional contacts with Dr. Galke concerning Claimant's physical restrictions. Ms. Gammon used two different methodologies in reaching her ultimate vocational assessment. The Vocational Diagnosis and Assessment of Residual Employability utilizes information about an individual's history as filtered through standard occupational information, such as the Dictionary of Occupational Titles (DOT). The RAPEL method estimates an individual's **R**ehabilitation plan, **A**ccess to the labor market, **P**laceability, **E**arnings capacity and **L**abor force participation, by comparing an individual's functional capacity to his or her transferable skills to identify appropriate future employment options.

38. Ms. Gammon's written report is premised on the physical restrictions provided by Dr. Galke in his May 23, 2006 response to Ms. Gammon's letter. In her report, Ms. Gammon opined that Claimant had experienced a loss of earning capacity of between \$7.29 to \$9.02 per hour, or a percentage loss of between 48.5% and 60.1% of her pre-injury earning capacity. At hearing, Ms. Gammon noted that her initial computation of Claimant's pre-injury income was based on erroneous information, and was actually higher than the \$15.01 pre-injury hourly wage used in the report. Claimant's actual pre-injury wage was \$17.38 per hour, which increased her

percentage loss of earning capacity to between 55.5% and 65.5%. Additionally, Claimant's physical restrictions eliminated between 7.5% and 10% of the jobs in the Idaho Falls/Blackfoot/Pocatello labor market that were available to her pre-injury. Ms. Gammon did not offer an opinion on Claimant's total disability in excess of her impairment taking into consideration both her loss of access to the job market and her loss of earning capacity.

39. Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

ACCIDENT/INJURY

40. The burden of proof in an industrial accident case is on the claimant. *Neufeld v. Browning Ferris Industries*, 109 Idaho 899, 902, 712 P.2d 500, 603 (1985). 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, 918 P.2d 1192 (1996).

An "accident" means 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. An "injury" is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102(17).

Accident

41. Defendants contend that Claimant has failed to carry her burden of proving that she had an accident and injured herself while trying to unload a weighty and unwieldy concrete culvert from a pickup. They note both that the event was not witnessed, and that there is some conflicting testimony regarding the events that transpired later that same day. Defendants cite to

a recent decision of this Referee that turned on evidence that was in equipoise.¹ Neither argument withstands legal scrutiny: Defendants' reliance on *Douglas* is misplaced; and it has never been the law that a lack of witnesses is tantamount to a failure of proof.

Douglas is inapposite here because the evidence regarding whether or not an accident occurred is not in equipoise. The record is clear that Claimant was directed to take the pickup with pallets and the culvert to the transfer station. It is undisputed that the culvert was in the pickup, and was put there by Mr. Frischkorn with his tractor. Mr. Frischkorn stated that he had no reason to dispute Claimant's version of events. Both Claimant and Frischkorn testified that the subject of the culvert and the accident was discussed upon Claimant's return to the foundry—they just disagreed on the particulars. Further, Claimant filled out an accident report that same afternoon (Claimant's Ex. 1) that Mr. Frischkorn received the following day. Finally, it should be noted that this claim was accepted by Surety and benefits paid. It was not until Claimant filed a complaint seeking unpaid TTDs and disability in excess of impairment that Defendants put the matters of injury and accident at issue. Of course, initial acceptance of a workers' compensation claim does not preclude a later assertion that the matter was not compensable at the outset. However, where no new evidence has come to light to cast doubt on the initial determination of compensability, such reversal of position is disingenuous.

42. The Referee finds that Claimant has met her burden of proving that an accident occurred in the course of her employment, and Defendants have presented no substantial evidence to challenge Claimant's version of events as corroborated by the record.

¹ *Douglas v. Excel Transport, Inc., and State Insurance Fund*, 2005 IIC 0584 (Aug. 15, 2005).

Injury

43. In addition to proving that an accident occurred, a claimant carries the burden of proving that the accident caused the injuries for which benefits are sought.

The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proved by expert medical testimony.

Hart v. Kaman Bearing & Supply, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot*, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994).

44. Defendants assert that Claimant has failed to carry her burden of proving causation to a reasonable degree of medical probability because she has presented no expert testimony on the issue and the only other medical evidence of causation is Claimant's subjective reports to her treating physicians as recorded in their chart notes.

As addressed by Claimant in her reply brief, medical evidence is not limited to expert testimony offered at hearing or by post-hearing deposition. Medical records can satisfy the requirement, especially where there is no contrary medical evidence. *Jones v. Emmett Manor*, 134 Idaho 160, 164, 997 P.2d 621, 625 (2000). In the case at bar, Claimant consistently described her accident and mechanism of injury to her medical providers. Nothing in any of the medical records refutes, contradicts, or questions the causal connection between Claimant's accident and her L4-5 disc bulge. None of the medical professionals who treated Claimant

expressed doubt or skepticism regarding the *cause* of Claimant's bulging lumbar disc.² Neither is there any evidence in the record that Claimant's lumbar disc bulge was pre-existing.

45. The Referee finds that Claimant has carried her burden of proving to a reasonable medical probability that her L4-5 disc bulge was caused by her May 12, 2004 industrial accident.

MEDICAL CARE

46. Once a claimant has met his burden of proving a causal relationship between the injury for which benefits are sought and an industrial accident, then Idaho Code § 72-432 requires that the employer provide reasonable medical treatment, including medications and procedures. Defendants have paid for all of Claimant's medical costs to date. No treating physician has recommended additional treatment for Claimant's condition at this time, with the exception of prescription medications. Should Claimant require additional medical care in the future as a result of her injury she should seek authorization for such treatment from Surety.

AVERAGE WEEKLY WAGE

47. Idaho Code § 72-419(4)(a) sets out the method of calculating the average weekly wage for an employee whose wages are fixed by the day, hour, or the output of the employee:

. . . the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) his wages (not including overtime or premium pay) earned in the employ of the employer in the first, second, third or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks *immediately preceding the time of accident* or manifestation of the disease.

(Emphasis added.). In order to determine Claimant's average weekly wage consistent with the statutory provisions, it is necessary to establish four thirteen-week periods with the last 13-week

² Defendants suggest in their brief that Dr. Walker's uncertainty as to *why* Claimant's injury was causing her pain was both a challenge to Claimant's credibility and a challenge to medical causation. Neither assertion is borne out by the record. Dr. Walker never questioned that Claimant's lumbar disc bulge was the result of her accident, nor did he ever state or imply that Claimant was fabricating her symptoms.

period ending on May 11, 2004. When calculated in this manner, the thirteen-week period most favorable to Claimant is the one immediately preceding her accident, during which her gross wages were \$7,690.73. This works out to an average weekly wage of \$591.59 and a compensation rate of \$396.37. Claimant was entitled to TTD benefits from May 13, 2004 through January 19, 2005, a period of 36 weeks for a total of \$14,269.32. During the time Claimant was in a period of recovery, she earned \$174.75 for the work she performed June 8 and June 9, 2004. Deducting this amount from the total TTD entitlement leaves a balance of \$14,094.57. Defendants paid Claimant TTD benefits of \$10,750.63, resulting in an underpayment of \$3,343.94.

PPI

48. Although PPI was identified in the hearing notice as an issue, there is no dispute as to Claimant's 3% PPI rating awarded by Dr. Walker, and paid by Defendants.

PPD

49. The definition of "disability" under the Idaho workers' compensation law is:

. . . a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided in section 72-430, Idaho Code.

Idaho Code § 72-102 (10). 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. A 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. Idaho Code § 72-425. Among the pertinent nonmedical factors are the following: the nature of the physical

disablement; the cumulative effect of multiple injuries; the employee's occupation; the employee's age at the time of the accident; the employee's diminished ability to compete in the labor market within a reasonable geographic area; all the personal and economic circumstances of the employee; and other factors deemed relevant by the commission. Idaho Code § 72-430.

50. The burden of proof is on the claimant to prove disability in excess of impairment. Expert testimony is not required to prove disability. The test is not whether the claimant is able to work at some employment, but whether a physical impairment, together with non-medical factors, has reduced the claimant's capacity for gainful activity. *Seese v. Ideal of Idaho*, 110 Idaho 32, 714 P.2d. 1 (1986).

Loss of Earning Capacity

51. Claimant asserts an entitlement to disability in excess of her 3% impairment for loss of access to the labor market and loss of earning capacity resulting from her industrial accident. Based on Ms. Gammon's vocational analysis, Claimant asserts that she can reasonably expect a post-accident wage of between \$7.29 to \$9.02 per hour. Based on an hourly rate of \$14.79 (average weekly wage of \$591.59 ÷ 40) this represents a loss of between 39.01% and 50.71% of Claimant's earning capacity.³

In her deposition, Ms. Gentillon concluded that Claimant's post-accident earning capacity was between \$7.50 and \$8.00 per hour. Lori Gentillon Depo., p. 92. This represents a loss of between 45.91% and 49.29% of earning capacity.

³ In her briefing, Claimant used the percentage change in wages contained in Ms. Gammon's written report. In her testimony at hearing, Ms. Gammon revised those figures upward because she had used an incorrect average weekly wage.

Loss of Access to Labor Market

52. Much of the testimony at hearing and in post-hearing depositions was directed to ascertaining Claimant’s post-accident physical restrictions. Although it appeared at the outset that there was substantial disagreement on this matter, virtually all disputes were resolved as a result of Dr. Walker’s post-hearing deposition. Ultimately Dr. Walker and Dr. Galke agreed on every permanent restriction but one—the frequency that Claimant was permitted to stoop. Dr. Galke opined that Claimant should *never* stoop, and Dr. Walker believed that Claimant could stoop *occasionally*. This distinction, as applied to the case at bar, is a distinction without a difference.

53. Applying the marginally-less stringent restrictions set out by Dr. Walker, the Referee finds that Claimant could not return to her job at Blackfoot Brass. Ms. Gammon noted that Claimant’s time-of-injury job as a foundry tech was considered by the DOT to constitute “heavy” work. Imposition of the 50-pound lifting limitation alone placed Claimant at a “medium” exertion level as defined by the DOT, and precluded a return to her time-of-injury position at Blackfoot Brass. Further, Ms. Gammon noted, even assuming that Claimant’s job as a foundry tech did not require lifting in excess of 50 pounds, it was undisputed that the position required continuous bending, stooping, crouching, twisting and reaching below shoulder height—all of which exceeded her agreed-upon physical limitations.

54. Ms. Gentillon’s opinion that Claimant could return to her time-of-injury position is based on her belief that Claimant had not been performing “heavy” work as a foundry tech at Blackfoot Brass—rather, her work was more akin to that of a drill press operator, which the DOT defines as “medium” work. Ms. Gentillon’s opinion completely disregards the other restrictions imposed upon Claimant and the nature of her time-of-injury work as described by employer and

documented in the JSE.⁴

55. Ms. Gentillon opined in her written report that Claimant sustained no disability in excess of her impairment, yet she admitted during her deposition that Claimant's undisputed lifting restriction alone precluded Claimant from performing "heavy" work as defined by the Dictionary of Occupational Titles (DOT), with a resultant loss of 3% of the labor market.

Because her analysis of available jobs for which Claimant was qualified did not take into consideration all of Claimant's other physical restrictions, Ms. Gentillon's opinion that Claimant had access to approximately forty-six different jobs identified by the DOT is inherently unreliable.

56. Even though Ms. Gammon was also operating under some uncertainty regarding Claimant's actual physical restrictions at the time of her report, her analysis is entitled to substantial weight. It was based on Dr. Galke's restrictions, which, as noted previously, did not diverge in a substantive way from Dr. Walker's, and included limitations on lifting, twisting, crouching, stooping, bending, and standing in one position. Ms. Gammon determined that these restrictions precluded Claimant from all of her previous occupations except her work as a case aide. Other occupations for which Claimant had transferable skills that were within her existing restrictions included customer service representative, and front desk receptionist. Over all, Ms. Gammon opined that Claimant's restrictions combined with her transferable skills excluded between 7.5% and 10% of the Idaho Falls/Blackfoot/Pocatello labor market.

57. Considering Claimant's loss of earning capacity together with her loss of access

⁴ In defense of Ms. Gentillon, the Referee notes that at the time she prepared her written report she was unaware that virtually all disputes regarding Claimant's restrictions had been resolved by Dr. Walker's deposition testimony. Her post-hearing deposition, conducted subsequent to, but on the same day as Dr. Walker's, necessarily required some extemporaneous analysis to which Ms. Gentillon was clearly not accustomed.

to her local labor market, the Referee finds that Claimant has sustained disability inclusive of her impairment of 54%, and is entitled to disability benefits in the amount of \$74,893.50 (\$534.00 x .55 x 255 weeks).

CONCLUSIONS OF LAW

1. Claimant sustained an injury from an accident arising out of and in the course of her employment;
2. The lumbar condition for which Claimant seeks benefits was caused by the industrial accident;
3. Claimant's average weekly wage at the time of her injury was \$591.59;
4. Claimant is entitled to additional TTD benefits in the amount of \$3,343.94; and
5. Claimant has sustained disability of 54%, inclusive of her impairment, entitling her to payment of disability benefits in the amount of \$74,893.50.

RECOMMENDATION

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

DATED this 27 day of November, 2006.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of December, 2006 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

DAVID M CANNON
75 E JUDICIAL ST
BLACKFOOT ID 83221

RUSSELL E WEBB
PO BOX 51536
IDAHO FALLS ID 83405

djb

/s/ _____

4. Claimant is entitled to additional TTD benefits in the amount of \$3,343.94; and
5. Claimant is entitled to 3% whole person PPI. Defendants are entitled to credit for any amount paid.
6. Claimant has sustained disability of 54%, inclusive of her impairment, entitling her to payment of disability benefits in the amount of \$74,893.50.
7. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 8 day of December, 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 8 day of December, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

DAVID M CANNON
75 E JUDICIAL ST
BLACKFOOT ID 83221

RUSSELL E WEBB
ATTORNEY AT LAW
PO BOX 51536
IDAHO FALLS ID 83405

djb

/s/ _____