

2. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;

3. Whether and to what extent Claimant is entitled to the following benefits:

- a. Medical care;
- b. Temporary partial and/or temporary total disability benefits (TPD/TTD);
- c. Permanent partial impairment (PPI);
- d. Retraining;
- e. Disability in excess of impairment (PPD); and
- f. Attorney fees; and

4. Whether apportionment for a pre-existing or subsequent condition pursuant to Idaho Code § 72-406 is appropriate.

Defendants' withdrew their notice and statute of limitations defenses at the outset of the hearing. Findings on these issues are included only insofar as necessary to address the attorney fee issue.

CONTENTIONS OF THE PARTIES

Claimant asserts that she sustained an injury to her thoracic spine while working for Employer cleaning powder storage bunkers. Despite her prompt report of the injury and its industrial nature, Defendant Employer failed to file the appropriate notice of injury with Surety and the Commission for nearly a year, at which time Surety denied her claim. Claimant has undergone substantial medical treatment for her industrial injury at her own expense, but remains unable to work. She claims entitlement to reimbursement for medical care, time loss, PPI, PPD, retraining, and attorney fees for Defendants' unreasonable handling of her claim.

Defendants contend that Claimant's claim is not compensable because the flare-up of thoracic pain that is the basis of her claim does not comply with the statutory definitions of "injury" and "accident" as set out in Idaho Code §§72-102(17)(b) and (c). Rather, Claimant's workplace was merely where she was when she noted an onset of her intermittent and long-

standing thoracic spine condition. Claimant's thoracic spine pain recurred frequently for any number of reasons, and on occasion, for no discernable reason. Even if Claimant's thoracic complaint was compensable, Defendants are only liable for reasonable medical care and time loss benefits until she was determined to be medically stable.

Defendants next assert that even if Claimant can establish a compensable claim for medical care and time loss, she is not entitled to any PPI or PPD because her physical condition did not change as a result of the flare-up. At most, Claimant would be entitled to minimal PPI apportioned primarily to her well-documented pre-existing thoracic spine condition, and no PPD.

Finally, Defendants argue that they did not act unreasonably in denying the claim, and Employer's failure to file a workers' compensation notice of injury was at most an understandable mistake and neither circumstance supports an award of attorney fees against Defendants.

Defendants also note that Claimant identified retraining as an issue at hearing, but did not address the issue in any substantive way and provided no evidence that there was a retraining program suitable for Claimant that would restore her wage-earning capacity. Thus, Defendants assert that Claimant has waived the retraining issue.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's exhibits 1 through 14 admitted at hearing;
2. Defendants' exhibits 1 through 27 admitted at hearing;
3. The testimony of Claimant, April Smith, Anne Mushlitz, and Judy Burns taken at hearing;
4. The post-hearing depositions of John McNulty, M.D., taken November 7, 2008,

and Rodde Cox, M.D., taken November 10, 2008.

All objections made during the depositions of Drs. McNulty and Cox are 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. Claimant was 52 years of age at the time of hearing, and resided in Lewiston with her husband. Claimant graduated from high school in 1974. Subsequently, she enrolled in beauty school, but did not complete the course. Sometime later she enrolled at Lewis and Clark State College for one semester.

EMPLOYMENT HISTORY

2. After beauty school, Claimant worked for a telephone answering service, then at a picture frame outlet in Lewiston. Her duties at the frame outlet store included reception, clerical, and taking orders. Claimant then went to work for Potlatch in their tree nursery. The work was seasonal labor and involved planting new trees from seed and watering and caring for the seedlings until they were packed for shipment. Claimant remained at Potlatch for approximately five years.

3. After leaving Potlatch, Claimant went to work as a temporary worker on the primer assembly line for Employer. Claimant eventually quit because she did not enjoy working with her co-workers. About six months later, Employer contacted Claimant because there was a night janitor job available that Employer thought might interest Claimant.

4. Claimant returned to Employer full-time in September 1999 as a janitor in Employer's spinning facility. The spinning facility is large (about the length of a football field) and divided into three bays. Each bay houses production lines and associated facilities.

Claimant worked three twelve-hour overnight shifts per week (Friday, Saturday, and Sunday) cleaning one bay each night. Claimant performed the same work from September 1999 until just days before the incident that gave rise to this proceeding.

PRIOR MEDICAL HISTORY

5. In 1974, at the age of 19, Claimant was involved in a motor vehicle accident in which she was ejected from the vehicle. She sustained serious injuries and was hospitalized four or five months, during most of which time she had no feeling below her rib cage.

6. As a result of her injuries, Claimant continued to experience pain in her thoracic spine at intervals throughout the years leading up to the present. Clearwater Medical Clinic (CMC) staff provided the majority of Claimant's medical care in the years leading up to and following Claimant's industrial injury. CMC medical records from 1996 through 1999 created by R.N.P. Pia Mopper document a history of thoracic pain dating back to the 1974 accident. The pain was located in the mid-back where Claimant's bra band fastened. Initially, Claimant experienced thoracic pain requiring medical care about once a year. By 1996, Claimant was experiencing approximately six episodes of thoracic pain per year. By 1998, Claimant's thoracic complaints were resulting in significant time loss from her work. These same medical records document that sometimes the onset of her pain was linked to specific activities, and sometimes it came on without apparent cause. Medical and pharmacy records dating back to 1999 indicate that Claimant was taking hydrocodone and Soma on a regular basis for her thoracic spine complaints, and Valium for anxiety.

7. By 2001, Claimant was being treated for chronic thoracic pain by R.N.P. Doris Ziegeldorf (Ziegeldorf) at CMC. In January 2003, Ziegeldorf took Claimant off work for a month due to worsening chronic thoracic pain. Physical therapy notes state that there was

“nothing out of the ordinary” related to the onset. Defendants’ Ex. 5, pp. 144-145. In November of the same year, Claimant was again off work for a month due to her chronic thoracic pain.

8. In late December 2003, Claimant saw Dr. Boyea, an orthopedic surgeon. Dr. Boyea’s chart note describes chronic thoracic pain that had become more frequent and more severe over the years. Claimant reported that now when she had episodes of thoracic pain, they would have her bedridden for about thirty days. She noted that physical therapy and chiropractic care had helped in the past, but were less effective as time went on. Dr. Boyea’s assessment was upper thoracic spine injuries with possible degenerative disc disease and scoliosis. He referred Claimant to Jeremy Ostermiller, P.A., for further evaluation and a possible pain clinic referral or referral to a spine surgeon.

9. Claimant saw P. A. Ostermiller in early March 2004. Chart notes document a history consistent with prior medical records, and records particularly:

Over the last five years, the pain has gotten to the point that it is pretty much constant and she doesn’t seem to be able to relieve it with the chiropractor adjustments or physical therapy. . . . She states her pain is 7 days a week, 24 hours a day, usually worse first thing in the morning and better in the afternoon and then worse again in the evenings.

Id., at pp. 3-4. P. A. Ostermiller opined that Claimant had scoliosis of the thoracic spine and multi-level degenerative disc disease. He referred Claimant for a bone scan, which revealed mild degenerative changes in Claimant’s thoracic spine. Ostermiller then referred Claimant to a pain clinic for diagnostic blocks.

10. Claimant next saw Dr. Haas at the pain clinic. His history recapitulates the earlier histories. He performed a thoracic epidural injection with good, but uncharacteristic, result. Dr. Haas subsequently performed three additional injections that did not result in significant improvement. In June 2004, Dr. Haas performed a radio-frequency thermocoagulation of the

bilateral medial branches at T5-T10. Later that month, Claimant returned to the pain clinic with complaints of continued severe mid-thoracic pain. The clinic had nothing further to offer, but referred her to Howard King, M.D., for a second opinion.

11. Claimant saw Dr. King on July 29, 2004. His assessment was atypical back pain, and he recommended additional imaging and lab tests to rule out inflammatory spine disease. Claimant underwent MRIs on September 1 and 3. The MRIs showed mild degenerative disc changes at multiple levels of the thoracic spine with the spinal cord mildly indented at T3-4 and T7-8, and mild scoliosis centered at T3-4. Dr. King wrote Ziegeldorf advising that the MRI results were not compatible with the cause of Claimant's back pain and lab studies were essentially normal. Dr. King's letter concluded:

At this point [Claimant] does not appear to have a spondyloarthropathy and does not have an obvious cause for her back pain and symptoms. Unfortunately, I don't see an obvious situation where surgery would prove beneficial to her. At this point her best opportunity would be to get involved with a conditioning program, a pain management program and even working with a psychologist if necessary to help manage her overall symptomatology.

Defendants' Ex. 5, p. 39.

12. In late September 2004, Claimant returned to Ziegeldorf with continued thoracic pain complaints. A review of her prescriptions showed that Claimant was regularly taking hydrocodone, Soma, and Valium. Ziegeldorf also noted a prescription for Vioxx, but there is no indication it was ever filled. Ziegeldorf wrote new prescriptions for physical therapy and a TENS unit, and Claimant was released to return to work (she had been off work since July 25). Claimant attended thirteen sessions of physical therapy between October 1 and November 11, at which time she told her physical therapist that she continued to have mid-thoracic back pain related to her activity level at work.

13. On March 1, 2005, Claimant sought care at Nimiipuu Clinic, the Nez Perce Tribal

health clinic. She reported chronic back pain related to her 1974 motor vehicle accident. Claimant returned to Nimiipuu again on March 8 with complaints of constant nagging thoracic spine pain. Claimant had acupuncture treatments at Nimiipuu on March 8, 9, 16, and 30, 2005.

14. Ziegeldorf took Claimant off work on April 20, 2005 due to her thoracic back pain and she remained off work through April 27, 2005. On May 31, Claimant strained her mid-back while lifting her grandchild. From May 31 to June 23, 2005, Claimant was off work and essentially bedridden except for physical therapy and basic activities of daily living. Claimant was released to return to work on June 24, 2005.

15. Claimant had also been diagnosed with hepatitis C.

TIME-OF- INJURY POSITION

16. In mid-November 2005, Claimant's work schedule changed from three overnight shifts on weekends to a Monday through Thursday schedule from 8:00 p.m. until 5:30 a.m. About that same time, Employer started operating its production lines twenty-four hours per day, seven days per week. This made it impossible for janitors to clean the lines when they were down. Claimant was advised that her job would be eliminated, but that she would be offered an assembly job. Before that happened, however, Employer assigned Claimant to clean the bunkers where priming mix was stored.

17. Because of the volatile nature of priming mix, it is stored in rubber containers on shelves in bunkers that are partially underground. The bunkers are maintained at a high level of humidity to further inhibit the possibility of ignition. Cleaning the bunkers involved scrubbing the ceiling and walls to remove the mold that had flourished in the damp environment. Claimant

worked cleaning the first bunker on November 20-21.¹

NOVEMBER 22, 2005 INCIDENT

18. On her second shift cleaning bunkers, November 21-22, Claimant started on the second bunker. At approximately 1:30 or 2:00 on the morning of November 22, Claimant was on a ladder reaching over the racks of priming mix to clean a corner of the ceiling when she experienced a “searing pain” between her shoulder blades. Tr., p. 152. Claimant got off the ladder, gathered her equipment, and informed a floor supervisor that she had hurt herself and could not finish cleaning the second bunker.

POST-INCIDENT MEDICAL CARE

19. On November 22, 2005, Claimant presented at the Clearwater Medical Clinic. She told Ziegeldorf that her back was out again, that it had happened at work, and that she wanted a release from work. On exam, Ziegeldorf noted “t-spine pain with muscle spasms, interfering with ADL’s, work restriction.” Defendants’ Ex. 5, p. 64. This was the same assessment that Ziegeldorf had made on June 3, 2005, Claimant’s last major flare-up before the incident at issue. Ziegeldorf gave Claimant a one-week work release and told her to return for a recheck at the end of that week. The same day, Claimant presented at Nimiipuu clinic reporting that she had been injured at work, and was having constant and severe thoracic back pain. She was treated with various modalities and referred to Chip Wahlberg, P. T. (Wahlberg), for physical therapy.

20. Claimant saw Wahlberg for the first time on December 22, 2005. She told him

¹ Employer’s timekeeping practice is to use the date at the beginning of a shift to reference everything that occurs during that shift, regardless of when events actually occur. Thus, though there is little question that Claimant’s incident actually occurred in the early morning hours of November 22, Employer’s records will reflect that the incident occurred on November 21, the date that Claimant’s overnight shift began.

that her 1974 motor vehicle accident had “predisposed [her] to problems when doing overhead activities.” Defendants’ Ex. 4, p. 067. Claimant also told Wahlberg that her thoracic pain was under fairly good control with intermittent treatment and managed activities.

21. In a progress report dated January 26, 2006, Wahlberg advised Ziegeldorf that Claimant had attended eight sessions of physical therapy since December 22 to treat her chronic neck and upper back pathology. The progress report noted that Claimant stated she had experienced about one major flare-up of her thoracic pain per year since her 1974 injury, but that in the last year the frequency of flare-ups had increased to six per year. Wahlberg documented some cervical range of motion deficits on the left and trigger point tenderness in the right rhomboid involving Claimant’s scapula. Wahlberg concluded his report by stating:

I think that [Claimant] is not ready to return to work. I am not sure if she will ever be ready to return to medium heavy physical demand level work. It is my guess she will be functional at a light medium or possibly medium physical demand level.

Id., at p. 64. He concluded by recommending that therapy continue for at least eight more sessions (two per week for four weeks) and then reevaluate Claimant’s condition.

22. A progress report dated March 21, 2006 advised Ziegeldorf that Claimant had not attended physical therapy since February 10, 2006. Claimant had gone on vacation, and then wanted to wait until she had seen Ziegeldorf before continuing physical therapy. The progress report noted that Claimant advised Wahlberg that she was experiencing an exacerbation of symptoms near T8 through T10, and “that 6 weeks ago when she had her last visit here she felt significantly better than she does today.” *Id.*, at p. 61. Wahlberg concluded that Claimant had experienced good results from her physical therapy and that her symptoms were worsened as a result of being off physical therapy for six weeks.

23. In his May 23, 2006 progress report, Wahlberg reported that Claimant was

cleaning her car and aggravated her mid-back, resulting in inflammation and an increase in her pain. He recommended that Claimant continue physical therapy at least once a week, but not more than twice a week, for another four weeks.

24. On July 6, 2006, Wahlberg reported that Claimant had been attending physical therapy about three times per month. She had started taking medication to treat her hepatitis C, and it was causing some nausea. He further noted:

She is still having constant thoracic pain. She reports that after therapy it reduces significantly to a 1-3/10. She reports that she is at about a 60% level of function. Most of the pain is in the T9 area and does improve or increase with use of upper extremities.

Id., at p. 80. Wahlberg went on to state that Claimant's thoracic range of motion had improved, but was still somewhat limited on the right.

25. Claimant returned to the Clearwater Medical Clinic on August 21, 2006. Ziegeldorf opined that she did not foresee much change in Claimant's condition, and that the kind of work Claimant had been doing for Employer was likely to aggravate her condition.

26. Claimant continued treating with Wahlberg through the rest of 2006. Chart notes do not reflect much change, and certainly little improvement, through this four-month period. Of note, Wahlberg's chart note from September 26, 2006 is informative:

[Claimant] reports that she was in a really bad accident when she was a baby. She actually lived in the hospital for a few months receiving physical therapy twice a day. She says this is the basic reason why she is having the problem she is having.

Id., at p. 76. Although this statement is consistent with Claimant's reports to numerous other medical professionals (with the exception of her age at the time of the accident), Claimant denied that she had provided this information to Wahlberg.

27. On November 9, 2006, just short of a year from the date of the work accident,

Claimant was terminated by Employer pursuant to its policy regarding unexcused leave.

28. In late December 2006, Wahlberg provided an update on Claimant's condition to Claimant's counsel. Wahlberg described Claimant's lifestyle as "very sedentary to light" as a result of her thoracic pain and complications from her treatment for hepatitis C. *Id.*, at p. 73. He opined that the continuing physical therapy was keeping Claimant functional and that without it, her condition would deteriorate.

29. Claimant only attended four physical therapy sessions between the first of January 2007 and April 5, 2007. According to Wahlberg, Claimant had a thyroid condition that made it difficult for her to follow through on her physical therapy. Wahlberg continued to assure Ziegeldorf that the therapy was helping Claimant, and recommended that Claimant continue at least one day a week for another four weeks. It appears that Claimant had one more session on April 6, and then did not return to physical therapy until January, 2008.

30. On November 9, 2007, Claimant was examined by Dr. Cox, an independent medical evaluator, at the request of Defendants. Dr. Cox diagnosed chronic thoracic pain, and concluded that Claimant's post-accident pain complaints were no different from her pre-existing pain complaints. He found no causal relationship between her on-going complaints and her alleged work injury of November 22, 2005. Dr. Cox further opined that Claimant had reached maximum medical improvement in February of 2006.

31. In his deposition, taken November 10, 2008, Dr. Cox elaborated on his earlier report:

It was my opinion that she had a longstanding history of chronic thoracic spine pain. It appeared that her complaints of her thoracic spine pain were consistent with thoracic spine pain complaints that she'd had prior to the injury of record. *There was also no objective data to support that she had a new or material injury or worsening.*

Dr. Cox Depo., p. 15 (emphasis added.)

32. On cross-examination by Claimant's counsel, Dr. Cox conceded that Claimant likely had a temporary exacerbation of her pre-existing thoracic spine condition as a result of her bunker cleaning activities. He further noted that such an exacerbation was consistent with Claimant's history of thoracic pain flare-ups and was also consistent with the mechanism of injury described by Claimant. Dr. Cox maintained, however, that Claimant should have reached medical stability within a few months of the incident, and continued to assert that she did reach medical stability in early 2006, as evidenced by her six-week hiatus from physical therapy.

33. Dr. Cox also maintained the opinion set out in his initial report that Claimant sustained no permanent impairment or permanent disability as a result of the injury at issue.

34. In May 2008, Ziegeldorf referred Claimant to Linda Saki, M.D., a rheumatologist.

Dr. Saki opined:

The patient is a 52 year-old Caucasian female complaining of worsening musculoskeletal pain over the last few years. *She definitely has fibromyalgia syndrome with 14/18 classic tender points and nonrestorative sleep.* However, she may also have some degenerative arthritis starting out in the knees, hands, C-spine, T-spine. However, I have no x-rays on this patient.

Defendant's Ex. 14, p. 04 (emphasis added.) Dr. Saki wanted to put Claimant on Lyrica, the only FDA-approved drug for treatment of fibromyalgia, but Claimant balked at the cost. Instead Dr. Saki prescribed gabapentin with several dosing suggestions. She also provided prescriptions for meloxicam for her osteoarthritis and Tramadol for pain, reserving the hydrocodone for breakthrough pain. Dr. Saki ordered x-rays of Claimant's hands, elbows, knees, C-spine, and T-spine to rule out degenerative arthritis. The x-rays showed only mild arthritis-related findings, and were unchanged from imaging done in 2004. Dr. Saki concluded that the cause of Claimant's pain was fibromyalgia and directed Claimant to return to Clearwater Medical Clinic

so that her personal care provider could take over treatment of her fibromyalgia.

35. The Referee was unable to locate any medical records from Clearwater Medical Clinic subsequent to Claimant's visit to Dr. Saki. However, a letter dated September 23, 2008 (Claimant's Ex. 6, p. 1) includes an opinion on the cause of Claimant's thoracic spine complaints, imposes permanent restrictions, and discusses permanent partial impairment. The document is signed by Ziegeldorf and Celso Chavez, M.D. Another document, dated September 25, and signed by Dr. Chavez, rates Claimant's PPI at 40%.

36. On September 25, 2008, at the request of her attorney, Dr. McNulty conducted an independent medical evaluation of Claimant. Dr. McNulty reviewed medical records dating back to 1998, primarily from Clearwater Medical Clinic, but also including some imaging, and some of her consultation visits with spine specialists. Claimant advised Dr. McNulty of her visit to Dr. Saki, but there is no indication that Dr. McNulty was aware of Dr. Saki's diagnosis. On exam, Dr. McNulty noted reproducible tenderness at T-7 and mild muscle spasm in the adjacent paraspinal muscles. He also noted her scoliosis. Dr. McNulty diagnosed chronic thoracic strain, in part attributable to her November 22, 2005 work injury. He found that Claimant was at maximum medical improvement at the time of his report, but did not offer an opinion as to when she reached medical stability. Using the *AMA Guides to the Evaluation of Permanent Impairment*, 5th Ed. (*AMA Guides*), Dr. McNulty determined that Claimant had sustained PPI of 5% of the whole person, of which 3% was pre-existing and 2% attributable to her work accident.

WORKERS' COMPENSATION FILING

37. During the early stages of this proceeding, Defendants had interposed an affirmative defense that they had not been notified of Claimant's alleged work injury within the time provided by statute. In response to that affirmative defense, Claimant raised the issue that

Employer had failed to file a first report of injury or occupational disease “first report” as required by Idaho Code § 72-602(1), thus tolling the running of the Claimant’s notice requirements. At the outset of the hearing, Defendants withdrew their notice defense.

38. Despite the withdrawal of the notice defense, Claimant called three witnesses who testified on the issue of notice. Based on the written records of Employer, and the testimony of April Smith, Anne Mushlitz, and Judy Burns, the Referee makes the following findings:

39. Claimant provided timely notice to Employer regarding a work-related thoracic injury, including when the injury occurred, where it occurred, and what she was doing at the time it occurred. This information was transmitted to Employer within a day or two of the incident.

40. Employer did not file a first report as required by Idaho Code § 72-602, and instead processed Claimant’s claim under her short-term disability policy.

41. Employer did not prepare or file a first report until mid-October, 2006.

42. Willful failure to file a first report is a misdemeanor pursuant to Idaho Code § 72-602.

43. Employer’s failure to file a first report has no bearing on any of the compensability issues before the Commission in this proceeding with the possible exception of whether Claimant is entitled to an award of attorney fees.

DISCUSSION AND FURTHER FINDINGS

ACCIDENT/INJURY

44. As used in the Idaho workers’ compensation system, the terms “injury” and “accident” have particularized meanings. Idaho Code § 72-102(17)(b) defines “accident” 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.

“Injury” is defined by Idaho Code § 72-102(17)(a) and (c):

(a) “Injury” means a personal injury caused by an accident arising out of and in the course of any employment covered by worker’s [sic] compensation law.

* * *

(c) “Injury” and “personal injury” shall be construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. The terms shall in no case be construed to include an occupational disease and only such nonoccupational diseases as result directly from an injury.

A claimant in a workers’ compensation case has the burden of proving entitlement to benefits. The claimant must prove not only that she was injured, but also that her injury was the result of an accident arising out of and in the course of her employment. Her proof must establish a probable not merely a possible connection between cause and effect to support her contention that she suffered an accident. *Neufeld v. Browning Ferris Industries*, 109 Idaho 899, 902, 712 P.2d 500, 603 (1985). “The words ‘out of’ have been held to refer to the origin and cause of the accident and the words ‘in the course of’ refer to the time place and the circumstances under which the accident occurred.” *Dinius v. Loving Care and More, Inc.*, 133 Idaho 572, 574, 990 P2d 738, 740 (1999). Whether an injury arises “out of and in the course of employment” is a question of fact to be decided by the Commission. *Id.* “If there is doubt surrounding whether the accident in question arose out of and in the course of employment, the matter will be resolved in favor of the employee.” *Dinius*, 133 Idaho at 547, 990 P.2d at 740.

Accident

45. Defendants assert that there was no unexpected, undesigned mishap or untoward event ‘arising out of and in the course of’ Claimant’s employment because the workplace was merely her location when her chronic condition flared. Claimant’s recitation of events on the morning of November 22, 2005 describe an unexpected, undesigned mishap or untoward event

that is reasonably located as to the time when and place where it occurred. While it is true that Claimant related instances where her thoracic spine pain came on for no apparent reason, working with her arms over her head was an identifiable cause of flare-ups. In this particular instance, Claimant was engaged in strenuous overhead work when she experienced the onset of pain. Claimant was directed by Employer to clean the ceilings and walls of the powder bunkers. The tools she had available to her included a ladder, a mop, a scrub brush, and a bucket. Claimant could only accomplish her assigned task by reaching overhead and across powder storage racks to vigorously scrape and scrub the thick mold that had grown in the humid bunkers. Certainly Claimant was pre-disposed to thoracic injury, but “[a]n employer takes an employee as it finds him or her; a preexisting infirmity does not eliminate the opportunity for a workers’ compensation claim provided the employment aggravated or accelerated the injury for which compensation is sought.” *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 104, 666 P., 2d 629, 631 (1983).

46. The Referee finds that Claimant has met her burden of proving an industrial accident, as defined by Idaho Code §§ 72-102(17)(a) and (b), occurred on November 22, 2005.

Injury

47. Whether Claimant sustained an injury as the result of her accident is a closer question. Clearly, Claimant had a thirty-year history of thoracic spine complaints that were remarkably similar to her complaints both before and after the accident. Ziegeldorf, Claimant’s primary caregiver, along with Drs. Chavez and McNulty, all opined that Claimant did sustain some undefined injury to her thoracic spine as a result of her accident. Claimant’s thoracic spine complaints both before and after the accident were primarily subjective in nature. While there were clearly pre-existing structural changes in her thoracic spine, they could not be correlated

with her pain complaints. The diagnosis given Claimant by virtually every medical professional she saw both before and after the accident was chronic thoracic strain. This is not a diagnosis that can necessarily be verified by objective means. Dr. Chavez never saw Claimant. His involvement was limited to supervisory review of Ziegeldorf's notes, so his opinion weighs lightly on the scale. Ziegeldorf's treatment of Claimant was marked by its passivity. Claimant's complaints changed only in the frequency with which they were made over the years she saw Ziegeldorf, and her diagnosis and treatment changed not at all. In her role as Claimant's primary medical provider, Ziegeldorf's advocacy of Claimant's cause is implicit, but her opinion, too, weighs lightly on the scale.

48. Dr. McNulty opined that Claimant sustained an injury, but he did so primarily based on Claimant's subjective reporting, which tended to minimize the frequency and severity of her bouts of thoracic spine pain. Dr. McNulty did not have the opportunity to compare the pre-accident spinal images with the post-accident spinal images to see that Claimant's physiology had not, in fact, changed as a result of her industrial accident.

49. It is Dr. Cox's deposition testimony that tips the weight of evidence of an injury in Claimant's favor. Dr. Cox, who was retained by Surety to perform an independent medical evaluation, stated in his deposition:

Q. [by Mr. Tait] And does it follow from that, then, that it's your opinion that something happened, an aggravation, exacerbation, injury, in what we're calling the bunker incident in November, 2005, to [Claimant]?

A. I believe that something happened, that she likely had a temporary exacerbation of a preexisting condition.

Dr. Cox Depo., p. 25. A less-than-careful reading of Dr. Cox's original report might lead to the notion that Dr. Cox's deposition testimony represents a spectacular flip-flop from his initial opinion that there was no causal relationship between the Claimant's "current complaints and the

reported injury.” Defendants’ Ex. 17, p. 10. However, the first time that Dr. Cox addressed the question of an injury was during his deposition. His initial report focused only on Claimant’s complaints *at the time he examined her*, and that report offered no opinion as to her physical condition immediately following the industrial accident.

50. The Referee finds that Claimant has carried her burden of proving that she sustained an injury as a result of her November 22, 2005 industrial accident.

CAUSATION

51. Having overcome the initial hurdle of proving that she had an industrial accident that resulted in an injury of some sort, Claimant must still prove that there is a causal relationship between her November 2005 injury and the workers’ compensation benefits she seeks.

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).

52. There is insufficient objective medical evidence in the record to support Claimant’s contention that the thoracic problems she was experiencing at the time of hearing were caused by her November 2005 injury. A comparison of images taken prior to Claimant’s industrial injury with images taken some three years after her injury showed no acute injury or medically significant structural changes, *i.e.*, no further deterioration, to her thoracic spine. Dr. Saki’s diagnosis of fibromyalgia (after ruling out osteoarthritis and degenerative conditions) accounts for Claimant’s symptomatology. And, finally, Claimant’s reported pain complaints

were the same both before and after the 2005 accident:

- During frequent medical visits in 2004 and 2005, Claimant variously reported that her thoracic pain was “constant,” “nagging,” “severe,” and left her essentially “bedridden.”
- Immediately following the accident, she described her thoracic pain as “constant and severe.” Defendants’ Ex. 6, p. 21.
- Two years after the accident, she told Dr. Cox that her pain was located in the center of her back about where her bra fastened, was “constant,” and worsened by activity. Defendants’ Ex. 17, p. 5.
- In September 2008, Claimant told Dr. McNulty that she had a constant ache in her back at the level where the band of her bra rests, and that the pain ranges from 4-6/10. She stated that the pain worsens with activity and sometimes requires to her “lay in bed for a day or two.” Claimant’s Ex. 7, p. 1.

53. What the record does establish is that Claimant’s accident caused a temporary exacerbation of her pre-existing thoracic condition. The effects of the injury were minimal and short-lived, and ultimately did not result in an increase or an acceleration of her pre-existing condition.

MEDICAL CARE

54. 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. An employee is entitled to continuing medical care when such care is *reasonable and prescribed by a physician*. Such medical care is reasonable when: "(1) the claimant made gradual improvement from the treatment received; (2) the treatment was required by the

claimant's physician; and (3) the treatment received was within the physician's standard of practice and the charges for the treatment were fair, reasonable, and similar to charges in the same profession." *Jarvis v. Rexburg Nursing Ctr.*, 136 Idaho 579, 585, 38 P.3d 617, 623 (2001) (citations omitted).

55. Clearly, Claimant's treatment was required by her primary care provider. Post-accident, Ziegeldorf continued to see Claimant for her thoracic back complaints. Ziegeldorf continued to fill prescriptions intended to relieve Claimant's thoracic pain. She continued to make referrals in an effort to effectively treat the root cause of Claimant's thoracic pain, and she continued to reauthorize physical therapy because it provided at least some short-term relief. It has not been suggested that the prescribed treatment was outside the standard of care, or that charges were unreasonable.

56. The issue of continued gradual improvement is a more difficult question. As discussed previously, the medical records prior to, immediately following, and several years after the accident are virtually indistinguishable as to Claimant's complaints and the efficacy of her treatment. It is difficult to discern any trend of gradual improvement following Claimant's accident, yet Claimant testified that her post-accident pain was different from her pre-accident chronic pain.² Ultimately, the Referee relies on the deposition testimony of Dr. Cox to find that the treatment Claimant received in the first months following her accident was reasonable. Dr. Cox opined that the thoracic strain that temporarily exacerbated Claimant's pre-existing condition should have resolved and Claimant would have returned to baseline within two to three

² In fact, apparently the changed nature of her pain was not entirely clear to Claimant, since records documenting Claimant's conversations with Employer after the accident include statements from Claimant that her onset of back pain was just a flare-up of her chronic condition. The Referee does not question the sincerity of Claimant's belief and testimony, but it is evident from the record that Claimant's recollections consistently minimize her pre-accident condition as compared to her post-accident condition.

months. Dr. Cox Depo., p. 17. More specifically, Dr. Cox testified that he believed that Claimant reached maximum medical improvement about the time that she discontinued her physical therapy for a time, about February 10, 2006. Dr. McNulty opined that Claimant was MMI when he saw her in September 2008, but offered no opinion in his report or his deposition testimony as to when she might actually have reached MMI. Thus, Dr. Cox provides the only persuasive medical opinion as to when Claimant reached MMI. The Referee accepts Dr. Cox's opinion regarding maximum medical improvement and finds that Claimant was medically stable as of February 10, 2006. Claimant is entitled to reimbursement for the medical care she received from November 22, 2005 through February 10, 2006 that is directly related to her thoracic spine.

TTDs

57. Pursuant to Idaho Code § 72-408, a claimant is entitled to income benefits for total and partial disability during a period of recovery. The burden of proof is on the claimant to present expert medical evidence to establish periods of disability in order to recover income benefits. *Sykes v. C.P. Clare & Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980). The period of recovery is co-terminus with the date that a claimant is declared medically stable. In addition to its relevance in determining the reasonableness of medical care, medical stability is also the bright line that marks the change in benefit calculations from temporary disability to calculation of permanent impairment and permanent disability. In their brief, Defendants concede that if Claimant has a compensable claim, she is entitled to temporary disability benefits from the date of her accident to the date she was medically stable, which the Referee has determined is February 10, 2006.

PPI

58. "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 the evaluation. Idaho Code § 72-422. “Evaluation (rating) of permanent impairment” is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker’s personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

59. Opinions regarding the amount of Claimant’s impairment resulting from her industrial accident vary wildly. Dr. Cox opined that Claimant sustained no impairment as a result of her industrial accident. Dr. McNulty opined that Claimant had 2% whole person impairment as a result of the accident on top of a pre-existing whole person impairment of 3%. Finally, Dr. Chavez opined that Claimant’s impairment from the accident was 40%.

60. Dr. Chavez’s impairment opinion is entirely without support. There is nothing to indicate what physical data he used as the basis of his opinion. There is nothing to explain the methodology he used to translate the raw data into an impairment rating. There is no discussion regarding what portion of the 40% disability was pre-existing. The Referee disregards Dr. Chavez’s impairment opinion in its entirety.

61. Dr. McNulty’s impairment rating is well-considered, well-documented, and is based on the *AMA Guides*. If one takes Dr. McNulty’s position that Claimant sustained a *new* thoracic injury as a result of her industrial accident *leaving her worse off* than she was before the accident, then Dr. McNulty’s 2% impairment rating is an accurate reflection of Claimant’s

permanent impairment.

62. If one takes the position, as did Dr. Cox, that Claimant sustained only a *temporary exacerbation* of her underlying thoracic condition and returned to her pre-accident condition within a few months after the injury, then Dr. Cox correctly determined that Claimant sustained no PPI.

63. The Referee finds Dr. Cox the more persuasive of the experts regarding the nature of Claimant's pre-injury condition as compared with her post-injury condition. Dr. McNulty testified during his deposition that he relied on Claimant's subjective history in reaching his causation opinion and his impairment rating. Claimant's subjective history significantly minimized the frequency of her thoracic pain flare-ups as well as the amount of time loss she sustained as a result. Dr. McNulty was unaware that Claimant was off work for three weeks in June 2005, and that Claimant had testified that she was virtually bedridden during that period. Neither did Dr. McNulty have an opportunity to compare pre-injury and post-injury imaging to observe that there was no change in Claimant's thoracic spine during the four-year interval. Finally, Dr. McNulty was unaware of Dr. Saki's intervening diagnosis of fibromyalgia, a fact that clearly bears consideration. On the other hand, Dr. Cox had access to more of the medical records, and did have an opportunity to compare the pre- and post-injury imaging. The medical records provide more than ample evidence that Claimant's condition two months after the accident was no different than her condition the day before the accident. Claimant has failed to carry her burden of proving that she sustained any PPI as a result of her accident.

PPD

64. 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. It is well-settled law that without permanent impairment, there can be no permanent disability. *Urry*, 115 Idaho 750, 769 P.2d 1122 (1989). These findings make it unnecessary for the Commission to address the opinions of Douglas N. Crum, C.D.M.S., regarding the amount of Claimant's disability.

RETRAINING

65. Claimant identified retraining as an issue early in this proceeding. At hearing, no evidence was tendered regarding any retraining plan or program. Retraining was not discussed in Claimant's opening brief. Yet, when Defendants asserted in their post-hearing briefing that Claimant had waived the issue, Claimant's response was vehement and to the contrary.

66. The burden of proof on the issue of retraining is squarely on the Claimant. The record provides little evidence that Claimant was amenable to retraining. The record is entirely devoid of information identifying a particular retraining program, its cost, time to complete, and whether it would provide Claimant with marketable skills. The Referee finds no basis on which to determine that Claimant is either amenable to retraining, or would benefit from a retraining program.

ATTORNEY FEES

67. Attorney fees are not granted to a claimant as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in

Idaho Code § 72-804, which provides for an award of attorney fees only when a claim has been unreasonably contested, compensation was untimely, or compensation was discontinued without reasonable grounds. The determination that grounds exist for awarding a claimant attorney fees is a factual determination that rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

68. The case at bar turns fundamentally on the threshold issue of whether Claimant presents a compensable workers' compensation claim. The determination as to compensability is an extremely close call on the facts of this case. Defendants cannot be found to have unreasonably denied the claim in such a close case. Having had reasonable grounds for denying the claim, Defendants cannot be assessed attorney fees either for untimely payment or for discontinuing payment.

69. Claimant asserts that she should be entitled to attorney fees because Defendants failed to file a first notice of injury or illness as required by law. Although it is true that Employer did not cause Employer's first report to be filed as required by Idaho Code § 72-602, and although it is true that Claimant's injury was one for which such a report should have been completed, the penalty for Employer's failure to file the requisite report is the tolling of any applicable statute of limitation. (*See*, I.C. 72-604.) In order to ascertain whether Employer's failure to comply with the provisions of Idaho Code § 72-602 justifies an award of attorney fees under Idaho Code § 72-804, some judgment must be made as to whether or not the Employer's failure is the equivalent of contesting or denying responsibility for Claimant's injuries without reasonable grounds. Here, it is undisputed that Claimant's immediate supervisor was immediately apprised of Claimant's contention that she had injured herself while cleaning the bunker. As well, the testimony establishes that April Smith was also aware of Claimant's

contention that she (Claimant) had suffered injury as a result of her work activity. The testimony further establishes that in accordance with company policy, Claimant was next referred to health manager Anita Grimm, who was vested with the authority and responsibility to make the decision as to whether or not an Employer's first report should be filed. The record reflects that she conferred with Claimant about the onset of her upper extremity difficulty and made a determination (a faulty determination as it turns out) that Claimant's injury was not one that should be pursued as a work related condition. However, as set forth in Ms. Grimm's written notation concerning her November 23, 2005 meeting with Claimant, it appears that her decision was made in good faith, and without any untoward motive to deny Claimant access to the workers' compensation system. Although Ms. Grimm was ultimately proven wrong in her decision, her actions, and her reasoning, do not justify an award of attorney's fees under Idaho Code § 72-804.

CONCLUSIONS OF LAW

1. Claimant suffered a temporary exacerbation of a pre-existing condition as the result of an accident arising out of and in the course of her employment.
2. The condition for which Claimant seeks benefits was caused by the industrial accident, but resolved by February 10, 2006.
3. Claimant is entitled to reasonable medical care from November 22, 2005 through February 10, 2006.
4. Claimant is entitled to TTD benefits at the statutory rate from November 22, 2005 through February 10, 2006.
5. Claimant sustained no permanent impairment as a result of her industrial injury.
6. Claimant is not entitled to retraining benefits.

7. Claimant is not entitled to attorney fees.
8. All other issues are moot.

RECOMMENDATION

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

DATED this 13 day of May, 2009.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

3. Claimant is entitled to reasonable medical care from November 22, 2005 through February 10, 2006.

4. Claimant is entitled to TTD benefits at the statutory rate from November 22, 2005 through February 10, 2006.

5. Claimant sustained no permanent impairment as a result of her industrial injury.

6. Claimant is not entitled to retraining benefits.

7. Claimant is not entitled to attorney fees.

8. All other issues are moot.

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

DATED this 29 day of May, 2009.

INDUSTRIAL COMMISSION

/s/ _____
R.D. Maynard, Chairman

/s/ _____
Thomas E. Limbaugh, Commissioner

/s/ _____
Thomas P. Baskin, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 29 day of May, 2009, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**, and **ORDER** were served by regular United States Mail upon each of the following persons:

JOHN R TAIT
PO DRAWER E
LEWISTON ID 83501

BENTLEY G STROMBERG
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LEWISTON ID 83501-1510

djb

/s/ _____