BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KAY BROCK, Claimant, v. PILOT TRAVEL CENTERS, Employer, and LIBERTY INSURANCE CORPORATION, Surety, Defendants.	**IC 2012-010234** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed July 2, 2015

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise, Idaho on June 25, 2014. Claimant, Kay Brock, was present in person and represented by Taylor Mossman-Fletcher, of Boise. Defendant Employer, Pilot Travel Centers (Pilot), and Defendant Surety, Liberty Insurance Corporation, were represented by Lea Kear, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The final brief, Claimant's Reply Brief, was filed on March 11, 2015. On March 20, 2015, Defendants filed their Motion to Strike and supporting affidavit. On March 27, 2015, Claimant filed her Response to Defendants' Motion to Strike. The matter is now ready for decision.

ISSUES

The issues to be addressed are:

1. Claimant's entitlement to additional medical benefits;

2. The extent of Claimant's permanent partial impairment; and
3. The extent of Claimant's permanent partial disability in excess of impairment, including whether Claimant is 100% totally and permanently disabled.

The issue of Claimant's entitlement to attorney fees was set forth in the Notice of Hearing filed March 21, 2014. Defendants have asked the Commission to strike Claimant's present assertion of her claim for attorney fees. Although this issue was previously noticed for hearing, during a pre-hearing telephone conference conducted by the Referee with all parties on May 19, 2014, Claimant's counsel expressly agreed that attorney fees would not be an issue for the June 25, 2014 hearing. Defendants' Motion to Strike is granted as to Claimant's present assertion of her claim for attorney fees.

CONTENTIONS OF THE PARTIES

All parties acknowledge that Claimant sustained industrial injuries while working for Pilot on March 5, 2012, when she fell while going up a flight of stairs. Defendants accepted responsibility for Claimant's medical care for right arm, rib, and lumbar injuries. Claimant was later released to modified duty work. Claimant now requests additional medical benefits for medications for her ongoing lumbar symptoms. She also requests permanent partial impairment and permanent disability, including 100% total permanent disability, benefits. Defendants have already paid 7% permanent impairment and deny responsibility for further benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Exhibits A through U, admitted at the hearing;
3. The testimony of Claimant taken at the June 25, 2014 hearing;

4. The post-hearing deposition of Nancy J. Collins, Ph.D., taken by Claimant on August 13, 2014;

5. The post-hearing deposition of Vivek "Vic" Kadyan, M.D., taken by Defendants on September 3, 2014; and

6. The post-hearing deposition of Mary Barros-Bailey, Ph.D., taken by Defendants on November 5, 2014.

All objections made during the depositions are overruled, except Defendants' objection recorded at page 25 of Dr. Collins' deposition which is sustained pursuant to JRP 10(E)(4).

Defendants have moved the Commission to strike Claimant's reference in briefing to Dr. Westbrook as her treating physician. Defendants have not acknowledged Dr. Westbrook as Claimant's treating physician for her industrial injuries, and Dr. Westbrook is not within the recognized chain of referral for treatment of Claimant's industrial injuries; nevertheless, the record establishes that Dr. Westbrook has for years been Claimant's family physician and has met with, examined, and treated Claimant more than any other physician of record for a variety of health concerns, including some symptoms of Claimant's alleged work-related injuries. Claimant's reference to Dr. Westbrook will therefore be allowed to stand. Defendants' motion to strike Claimant's reference to Dr. Westbrook as her treating physician is denied; however, Dr. Westbrook is not thereby recognized as Claimant's designated treating physician for her industrial accident.

After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was born in 1951. She is right-handed, five feet four inches tall, and weighs approximately 135 pounds. She was 63 years old and lived in Boise at the time of the hearing. Pilot is a business enterprise operating travel centers, comprised of gasoline and convenience stores, in Boise and numerous other locations.

2. **Background**. During high school Claimant worked as a hostess at several restaurants. She did well academically, particularly in math, and graduated from Boise High School in 1970. Approximately that same year she began smoking a pack of cigarettes per day, a practice she continued through the time of hearing.

3. After high school, Claimant obtained employment at Sears, answering telephones and working in the parts department. In approximately 1979, she commenced working as a teller at Idaho First National Bank where she waited on customers, balanced tills, and ran daily reports. Claimant took typing and accounting classes while working for the bank. In approximately 1984, she became a loan secretary and was responsible for preparing loan documents for three managers. She used computers to perform her duties.

4. In 1984, Claimant injured her left knee in an automobile accident and later underwent left knee surgery. Her knee improved and did not significantly restrict her work activities thereafter.

5. In 1989, Claimant left the bank and worked briefly as a payroll clerk for Harris, Inc. and as the office manager for Clean Tech. Her duties included shipping and receiving product, maintaining payroll, supervising two salespeople, and waiting on customers. She spent approximately half of her work shift standing and half sitting. She used a computer for much of her work.

6. From 1990 to 1995, Claimant worked as a waitress at Manley's Café. Her duties included waiting on customers and maintaining payroll. She was on her feet for most of her shift. From 1995 through 1996, she worked as a housekeeper at Life Care of Boise where she regularly lifted up to 30 pounds and was on her feet most of her shift.

7. In 1996, Claimant began working as a cashier for Flying J. She was quickly promoted to night manager where her duties included stocking, managing four other employees, and assisting customers. In October 1997, while working for Flying J, a coworker punched Claimant in the upper back. She suffered persisting pain and paraspinal muscle spasm and received medical treatment including physical therapy for several months thereafter. Her upper back pain gradually resolved after approximately one year. Thereafter, she noted only occasional mild upper back pain two or three times per month, which did not significantly limit her work activities.

8. Claimant subsequently moved to Oregon. In 1998, she returned to Boise and was hired back at Flying J as a cashier. After approximately nine months, she moved again to Oregon. She later moved back to Boise and worked again as a housekeeper at Life Care of Idaho cleaning dining rooms, offices, and residents' rooms. She regularly lifted 30 pounds and was on her feet most of her shift.

9. Claimant next returned to Flying J as a cashier. She cleaned the store, stocked products, and waited on customers. After approximately five years, she was promoted to the position of accounting manager. She continued to help stock the store and wait on customers at the fuel desk as needed. In addition, she balanced cashiers' tills and collected on bad checks. She used a computer regularly. Her duties required her to sit three or four hours each shift. Claimant's title was later changed to administrative assistant and she assumed responsibility for

supervising employees on the fuel desks. Claimant also interviewed prospective employees; however, she did not hire or fire.

10. Flying J subsequently became known as Pilot. Claimant was ultimately promoted to the position of shift manager and received added responsibility for payroll and maintaining the books. By March 2012, she was working full-time earning $13.51 per hour at Pilot and her typical shift required two hours of sitting and six hours of standing.

11. **Industrial accident and treatment.** On March 5, 2012, Claimant was working at Pilot when she tripped on torn carpeting and fell forward while ascending a flight of stairs. She landed forcefully on her right arm, shoulder, and chest. She noted immediate right arm, rib, and lower back pain. Claimant reported the accident to her general manager, dressed her right arm abrasion, and continued working through the rest of her shift. Claimant was 60 years old at the time of the accident. Her back became increasingly sore over the next several days.

12. On March 8, 2012, Claimant sought medical treatment at Primary Health where Darryl Barnes, P.A., diagnosed arm contusion, chest wall contusion, and back strain. X-rays revealed no fractures. Claimant received medications and physical therapy and came under the care of Stephen Martinez, M.D. Dr. Martinez released her to modified duty work with a five-pound lifting restriction. Pilot initially refused to honor Claimant's work restrictions until receiving a personal call from Dr. Martinez. By April 11, 2012, her right arm and chest wall contusions were nearly resolved and needed no further treatment; however, her low back pain worsened with physical therapy. She continued with prescription medications.

13. On May 22, 2012, Claimant underwent a lumbar spine MRI that revealed L5-S1 broad based disc bulge with superimposed central disc protrusion minimally contacting the traversing right S1 nerve root. A thoracic spine MRI that same day revealed exaggerated

thoracic kyphosis with mild degenerative anterior wedging of T7. Dr. Martinez referred Claimant to physiatrist Michael Sant, M.D. Claimant continued to work with lifting and standing restrictions. By June 6, 2012, Pilot again ignored Claimant's work restrictions by refusing to allow her to sit as needed.

14. On June 28, 2012, Dr. Sant examined Claimant, reviewed her lumbar MRI, and confirmed that it correlated with her symptoms. He prescribed an epidural steroid injection and continued Claimant on sedentary work. She subsequently received two epidural steroid injections with no lasting improvement.

15. On July 24, 2012, Pilot terminated Claimant's employment.

16. On September 10, 2012, Dr. Sant examined Claimant, noted her continued lumbosacral radiculitis, and referred her to neurosurgeon Paul Montalbano, M.D., for surgical consultation.

17. On September 11, 2012, Claimant presented to her family physician, Sharon Westbrook, M.D., who noted: "Pt with pain in low back, has herniated disc due to fall at work, has been seeing WC MD and Dr. Sant, had ESI X2 and they did not help." Exhibit A, p. 129.

18. On September 12, 2012, Claimant presented to Dr. Montalbano who recommended a bone scan and lumbosacral x-rays. On September 19, 2012, Claimant returned to Dr. Montalbano who concluded her x-rays revealed no instability and, after reviewing her MRI, did not recommend lumbar surgery. Dr. Montalbano recommended return to sedentary work four hours per day with a five-pound lifting restriction. He referred Claimant to Vivek "Vic" Kadyan, M.D.

19. From September through October, 2012, an Industrial Commission vocational rehabilitation consultant attempted to assist Claimant to find suitable work. However, Claimant did not maintain contact with the consultant and her file was eventually closed.

20. On October 5, 2012, Dr. Kadyan commenced treating Claimant. From October through November, 2012, Dr. Kadyan treated Claimant with prescription medications and right L3, L4, and L5 medial branch blocks. Claimant's low back pain continued.

21. On December 3, 2012, Dr. Kadyan examined Claimant at Defendants' request and rated the permanent impairment of her low back due to her industrial accident at 7% of the whole person. Dr. Kadyan restricted Claimant to lifting 25 pounds for one month, 30 pounds for an additional three weeks, and anticipated no restrictions thereafter. It does not appear that Claimant actively sought work after her release by Dr. Kadyan.

22. Claimant's low back pain continued. On April 30, 2013, Dr. Westbrook examined Claimant again and recorded her complaints of back muscle spasms and pain radiating to both legs. Claimant was not then exercising due to her persisting back pain.

23. On August 2, 2013, Robert Vestal, M.D., reviewed Claimant's medical records, including records from Drs. Sant and Montalbano, pursuant to a request from the Social Security Administration in connection with Claimant's claim for Social Security disability benefits. Dr. Vestal concluded Claimant had exertional limitations of lifting 10 pounds frequently and 20 pounds occasionally and that Claimant could sit about six hours or stand about six hours in an eight hour work day. Based upon Dr. Vestal's conclusions that Claimant was limited to light-duty work, she was awarded Social Security Disability benefits.

24. On November 20, 2013, Dr. Montalbano responded to an inquiry letter from Surety indicating he agreed with Dr. Kadyan's December 3, 2012 report. On November 26,

2013, Dr. Martinez responded to a letter from Surety indicating he agreed with Dr. Kadyan's December 3, 2012 report. On December 2, Dr. Sant responded to a letter from Surety indicating he agreed with Dr. Kadyan's December 3, 2012 report.

25. On May 7, 2014, Michael Weiss, M.D., examined Claimant and noted her chronic low back pain and L5/S1 disc herniation. He tested her functional capacity and concluded, based on isometric testing, she was limited to sedentary work, although her diagnosis would only limit her to light to medium work. Dr. Weiss rated Claimant's permanent impairment of her lumbar spine at 9% of the whole person, but noted that apportionment of impairments not related to her industrial injury, including thoracic kyphoscoliosis, osteoporosis, and COPD, may reduce this by 1-2%.

26. **Condition at the time of hearing.** At the time of hearing, Claimant experienced persisting back pain, worsened by activity. Prolonged sitting or standing aggravated her back pain. She continued to see Dr. Westbrook, her family physician, approximately every six months. Dr. Westbrook managed Claimant's medications for her chronic back pain, including Tramadol, Methocarbamol, and Gabapentin. Claimant lives in Boise with her 84 year old mother and two adult sons. Claimant's sons assist with more strenuous household tasks and she cares for her mother. Claimant testified that two or three times each week she experiences sharp pains going down both legs, the right more than the left. Exhibit O, pp. 32-33**.**

27. **Credibility.** Having observed Claimant and compared her testimony with other evidence in the record, the Referee finds that Claimant is generally a credible witness.

DISCUSSION AND FURTHER FINDINGS

28. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793

P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

29. **Additional medical benefits.** The first issue is whether Claimant is entitled to additional medical benefits due to her industrial accident. Idaho Code § 72–432(1) requires an employer to provide an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Of course an "employer cannot be held liable for medical expenses unrelated to any on-the-job accident or occupational disease." Henderson v. McCain Foods, Inc., 142 Idaho 559, 563, 130 P.3d 1097, 1102 (2006). Thus a claimant must provide medical testimony that supports his claim for compensation to a reasonable degree of medical probability, Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995), and "probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only plain and unequivocal testimony conveying a conviction that events are causally related. Jensen v. City of Pocatello, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001).

30. In the present case, Claimant filed her Complaint on November 19, 2013, expressly requesting continued medical care. Defendants promptly filed their Answer denying

further medical care. Claimant presently requests additional palliative medical care, specifically past and ongoing medications as prescribed by Dr. Westbrook, and pool therapy and anti-depressants, as suggested by Dr. Weiss.

31. Defendants note that Drs. Kadyan, Sant, Montalbano, and Martinez were Claimant's treating doctors and none of them prescribed medications or any other care for her industrial accident after December 3, 2012, when Dr. Kadyan found her medically stable. However, the record undisputedly documents Claimant's "MRI shows a disk bulge at L5-S1 that does contact the right S1 nerve root which correlates with her symptoms." Exhibit F, p. 278.

32. After Dr. Kadyan released Claimant on December 3, 2012, she resorted to her family physician, Dr. Westbrook, for medications for her back pain because Defendants stopped providing them. Dr. Westbrook's notes of February 19 and 26, 2013, indicate she knew that Claimant had sustained an industrial injury, been released by her workers' compensation doctor but still had back pain related to her injury, and needed Dr. Westbrook to manage her chronic back pain. Exhibit A, pp. 145-148. Dr. Westbrook prescribed Methocarbamol, Tramadol, and Gabapentin for Claimant's ongoing back pain. Dr. Westbrook continued to prescribe these medications through at least December 2013. Dr. Weiss recommended Claimant discontinue Gabapentin on May 7, 2014, because it was intended for chronic neurogenic pain—which Claimant did not suffer. Exhibit P, p. 482. Based upon his examination of Claimant in May 2014, Dr. Weiss also noted: "A pool exercise program through the Elks Rehabilitation Hospital or YMCA would be appropriate." Exhibit P, p. 482.

33. Dr. Kadyan testified that he would not anticipate Claimant would need prescription tramadol or methocarbamol two years post-accident and that pool therapy would not be reasonable treatment for Claimant's industrial accident. However, Dr. Kadyan has not

examined Claimant since December 3, 2012. Dr. Weiss's more recent examination documents Claimant's continuing need for palliative care to manage her chronic back pain and render his current recommendations more timely and persuasive.

34. Dr. Weiss's May 7, 2014 report also diagnosed depression and noted that Claimant's depressive symptoms may respond to antidepressant medication. However, Dr. Weiss did not conclude that her industrial accident was the predominant cause of her depression as compared to all other causes combined. Dr. Kadyan expressly testified that antidepressants would not be reasonable treatment for Claimant's industrial injuries. Claimant has not proven Defendants' liability for prescription antidepressants.

35. Claimant has proven Defendants' liability for additional medical benefits for past and ongoing palliative medical care including Methocarbamol and Tramadol, as prescribed by Dr. Westbrook, and a pool exercise program as suggested by Dr. Weiss.

36. **Permanent partial impairment.** The next issue is the extent of Claimant's permanent impairment. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Waters v. All Phase Construction, 156 Idaho 259, 262, 322

P.3d 992, 995 (2014), Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

37. In the present case, several physicians have rated Claimant's permanent impairment due to her industrial accident. On December 3, 2012, Dr. Kadyan rated Claimant's permanent impairment of her lumbar spine due to her industrial accident at 7% of the whole person, pursuant to the AMA Guides to the Evaluation of Permanent Impairment, (Guides) Sixth Edition. Nearly one year later, and without having seen Claimant for well over a year, Drs. Martinez, Sant, and Montalbano each checked a box in response to Defendants' correspondence, agreeing with Dr. Kadyan's rating.

38. On May 7, 2014, Dr. Weiss examined Claimant and, utilizing the AMA Guides Sixth Edition, rated Claimant's permanent impairment to her lumbar spine at 9% of the whole person. Dr. Weiss expressly noted that the rating may be reduced 1-2% if Claimant's non-industrial conditions were apportioned; leaving 7-8% impairment attributable to Claimant's industrial accident.

39. The physicians' impairment ratings are very similar and the Referee finds that Claimant suffers permanent impairment of 7% of the whole person attributable to her low back condition due to her industrial accident.

40. **Permanent disability**. The next issue is the extent of Claimant's permanent disability. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected

by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995). Wage loss may be a consideration. Baldner v. Bennett's Inc., 103 Idaho 458, 649 P.2d 1214 (1982). The proper date for disability analysis is the date of the hearing, not the date the injured worker reaches maximum medical improvement. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012). Work restrictions assigned by medical experts and suitable employment opportunities identified by vocational experts are particularly relevant in determining permanent disability.

41. Work restrictions. In the present case, the parties cite to work restrictions determined by Dr. Vestal, Dr. Kadyan, and Dr. Weiss as discussed below.

42. *Dr. Vestal.* Dr. Vestal reviewed Claimant's medical records, but did not examine her or test her physical capacity before concluding Claimant was restricted to light-duty work, specifically lifting up to 10 pounds frequently and 20 pounds occasionally. Dr. Vestal's conclusions appear to take into account additional conditions—including COPD—unrelated to

her industrial accident. However, the predominant condition, as noted in the favorable appeal of her Social Security Disability claim, was her back condition.

43. *Dr. Kadyan.* Dr. Kadyan acknowledged that Claimant came to him with a 10-pound lifting restriction and he placed her on a 10 or 20-pound lifting restriction. He offered medications and steroid injections, but Claimant continued with low back pain rated at 7 out of 10. He treated Claimant for less than 60 days before he declared her MMI on December 3, 2012 and imposed only temporary lifting restrictions for a total of six weeks. Kadyan Deposition, pp. 18-20. He then released her without restrictions.

44. Dr. Kadyan readily acknowledged that Claimant suffered a herniated lumbar disc from her work accident, and repeatedly recorded her reports of ongoing unresolved back pain. He nevertheless opined regarding work restrictions: "patient is cleared to work with 25 pounds lifting restriction for one month, then 30 pound lifting restriction for an additional three weeks. Subsequently no restrictions are anticipated after that." Exhibit J, p. 319. Although acknowledging Claimant's disc herniation and pain complaints, he noted the herniation did not affect her strength or reflexes, thus he "could not think of a physiological reason to put restrictions in place." Kadyan Deposition, p. 26, ll. 17-18.[1] Dr. Kadyan thus effectively approved Claimant's return to unlimited lifting and repetitive bending in spite of an MRI which "revealed a disc bulge and then a disc protrusion at L5-S1," Kadyan Deposition, p. 8, ll. 20-21, "that does contact the right S1 nerve root which correlates with her symptoms." Exhibit F, p. 278. Dr. Kadyan last examined Claimant on December 3, 2012. He never reexamined Claimant

[1] The Commission has expressly noted a significant purpose of physical restrictions: "we recognize that limitations/restrictions are ordinarily imposed not to define an injured worker's functional ability, as much as to protect the injured worker from further injury." Priest v. Valley Regional Transit, 2012 WL 1573585, at 26. See also Robinson v. Rocky Mountain Insulation, LLC, 2013 WL 5291506, at 7; Burrows v. FMC Corporation, 2001 WL 44119, at 3.

or followed up after releasing her to work without restrictions and did not know how she was tolerating full-duty work without restrictions. He justified his full work release and lack of follow-up stating: "I don't think she was planning on going back to work." Kadyan Deposition, p. 47, ll. 6-7.

45. Dr. Kadyan never tested Claimant's physical capacity and readily admitted that he did not have the necessary equipment to perform isometric testing as did Dr. Weiss. Dr. Kadyan acknowledged he could not discern what isometric tests Dr. Weiss performed and could not tell whether they correlated with Claimant's industrial injuries. Dr. Kadyan never reviewed any records from Dr. Vestal or Dr. Westbrook. Dr. Kadyan apparently reviewed no medical records after December 3, 2012, with the exception of Dr. Weiss's report.

46. The fact that Drs. Sant, Martinez, and Montalbano each checked the box of a form letter agreeing with Dr. Kadyan's opinion without examining Claimant for more than a year, evaluating Claimant's physical capacity, or following up to assess Claimant's tolerance for full-duty work, significantly undermines the persuasiveness of their concurring opinions.

47. *Dr. Weiss.* Dr. Weiss examined Claimant on May 7, 2014. Defendants allege Dr. Weiss's work restrictions do not indicate what portion is attributable solely to Claimant's work accident and what portion may be attributable to her non-industrial conditions such as thoracic compression fracture and kyphosis. Pre-injury diagnostic testing clearly revealed T7 anterior wedging and thoracic kyphosis. Noting Claimant's chronic back pain, Dr. Weiss examined her lumbar, thoracic, and cervical spine. While he observed her range of motion was limited in her thoracic spine, he recorded her chronic pain was centered in her low back. He noted Claimant's pre-existing thoracic spine injury and her May 2, 2012 lumbar MRI showing "disc bulge L5S1 with minimal contact right S1 nerve root" due to her industrial accident. Significantly, he tested

her physical capacity documenting "BLC [back-leg-chest] dynamometer 20 lbs limited by low back pain" and recorded her "pain diagram showing pain in the midline low back and anterior thighs, bilaterally." Exhibit P, pp. 479-480 (emphasis supplied). Dr. Weiss thus concluded: "Her functional capacity based on isometric testing is for sedentary work, although her diagnosis would only limit her to light to medium work." Exhibit P, pp. 482. The first clause of this entry identifies Claimant's actual documented capacity as sedentary, while the second clause comments on her estimated limitations, conditional upon her diagnosis. Dr. Weiss's notes sufficiently identify Claimant's low back as the source of her functional limitation as verified by isometric testing. No mention is made of her thoracic spine or any other condition as a functional limitation. Dr. Weiss's report taken as a whole reasonably indicates that this sedentary restriction is related to Claimant's low back pain, corresponding to the L5-S1 disc herniation caused by her industrial accident.

48. Furthermore, Dr. Weiss noted Dr. Vestal's Social Security evaluation is based on objectively substantiated medical evidence wherein he limited Claimant to sedentary to light work, which was less than the medium work she performed as a cashier, and therefore considered her disabled under Social Security criteria. Dr. Weiss expressly noted that even with effective treatment for her other non-industrial diagnoses, he would not expect this to change. Thus, Dr. Weiss ostensibly agreed that even without considering Claimant's non-industrial conditions, she would still be limited to sedentary to light work.[2]

49. Defendants speculate that Dr. Weiss may have used the terms "sedentary" and "light-duty," without knowing or intending the definitions of these terms as generally accepted in

[2] Sedentary work requires lifting up to 10 pounds and sitting most of the time. Light-duty work requires lifting up to 10 pounds frequently and 20 pounds occasionally. Work is also considered light-duty if significant walking and standing is required even if lifting does not exceed 10 pounds. Medium-duty work requires lifting up to 25 pounds frequently and 50 pounds occasionally. Claimant's time of injury position was medium-duty work. Exhibit Q, p. 494.

the vocational community. However, Dr. Weiss's report carefully and appropriately utilizes these terms in summarizing the reports of Drs. Kadyan, Vestal, and others who themselves utilized these terms consistent with the definitions accepted in the vocational community. Dr. Weiss's usage appears consistent with the usage of these same terms by other practitioners whose reports Dr. Weiss reviewed and summarized, including Dr. Kadyan, upon whose opinion Defendants rely.

50. Most significant is Dr. Weiss's functional capacity testing, wherein he recorded Claimant's testing demonstrated low back pain at 20 pounds, prompting Dr. Weiss to restrict her to sedentary work—i.e. lifting 10 pounds, rather than 20 pounds which had caused her low back pain during isometric testing. Dr. Weiss is an experienced practitioner. There is no persuasive indication he lacked understanding of the terms he used in his report.

51. Claimant was fully functional before her accident and performed a medium-duty, moderately strenuous physical job that required cleaning and frequent stocking of cases of beverages, oil, and other supplies. She had no difficulty performing her duties before the industrial accident. Every doctor examining Claimant since the accident has concurred that she sustained a herniated lumbar disc as a result of her fall at work. Dr. Kadyan rated her permanent impairment for the herniated lumbar disc at 7% of the whole person. Dr. Sant confirmed that Claimant's ongoing back pain is consistent with her lumbar MRI documenting disc herniation impacting the exiting L5-S1 nerve root. Claimant's testimony was unrefuted that she can no longer tolerate the strenuous work of stocking because it aggravates her low back pain.

52. Dr. Weiss was the only medical practitioner who not only examined Claimant and reviewed her diagnostic scans, but also actually tested her functional capacity before assigning work restrictions. The Referee finds the restrictions assigned by Dr. Weiss most persuasive and

concludes that Claimant is limited to sedentary work by her low back condition due to her industrial accident.

53. Vocational experts. Two vocational experts have addressed Claimant's permanent disability. Their conclusions are evaluated below.

54. *Nancy Collins, Ph.D.* Dr. Collins testified, at Claimant's request, regarding the extent of her permanent disability. Dr. Collins interviewed Claimant and reviewed her medical records, work history, and physical restrictions. Dr. Collins testified that Claimant's subjective complaints appeared consistent with Dr. Weiss's functional capacity testing. Dr. Collins noted that Claimant's Social Security Disability determination was based upon different standards and only considered Claimant's last 15 years of her work-life, during which she essentially had only one job. Collins Deposition, p. 27. In her evaluation, Dr. Collins considered Claimant's work within the past 20 years, and opined that her work experience more than 20 years ago was so remote that it would likely not impact her current employability. Dr. Collins also noted that it would be harder for Claimant to find work being 63 years old, with an antalgic gait, and unable to sit comfortably for an extended period.

55. Dr. Collins opined that, applying Dr. Kadyan's conclusion that Claimant had no physical restrictions, she would have no permanent disability.

56. Dr. Collins concluded that applying Dr. Vestal's restrictions of light-duty work with occasional climbing, balancing, stooping, kneeling, crouching, and crawling, Claimant would sustain a 40.7% loss of labor market access considering her transferrable skills and pre-injury unskilled occupations. Collins Deposition, pp. 17-18. Dr. Collins concluded that assuming such light-duty restrictions, Claimant would be able to perform jobs paying $8.00 to

$10.00 per hour and thus sustain a loss of earning capacity of 30% resulting in a permanent disability of 32.5%.

57. Dr. Collins testified that, based upon sedentary work restrictions as indicated by Dr. Weiss; Claimant would sustain a 94.9% loss of labor market access. This loss was based upon job titles in the national labor market according to the Skill TRAN program. Dr. Collins noted that applying sedentary restrictions, Claimant would still have access to a small labor market of positions including receptionist, bookkeeping clerk, and part-time retail worker. Assuming sedentary restrictions, Dr. Collins concluded that Claimant would be able to perform jobs paying $8.00 to $10.00 per hour and thus sustain a loss of earning capacity of 30% resulting in a permanent disability of 60%. Collins Deposition, pp. 21-22. Dr. Collins based her loss of earning capacity estimates on the most recent Idaho Occupational Wage and Employment Survey. Collins Deposition, p. 44.

58. Dr. Collins' report clearly details her analysis, including the positions she considered and her calculations. Dr. Collins could not fully comment on Dr. Barros-Bailey's conclusions in her report because: "I don't know what opinions she used, what assumptions she made, what jobs she considered, because they are never in her report." Collins Deposition, p. 28, ll. 4-6.

59. *Mary Barros-Bailey, Ph.D*. Dr. Barros-Bailey testified at Defendants' request. She interviewed Claimant, reviewed her medical records, and produced a brief report. Her report does not provide the number of positions or jobs she considered or any details of her calculations. Assuming medium duty work restrictions, she concluded that Claimant had no disability; assuming light-duty work restrictions, Claimant had lost access to 7% of the labor market, sustained a loss of wage earning capacity of 15%, and had a 12 to 14% permanent

disability inclusive of impairment; assuming sedentary restrictions, Claimant had lost access to 53% of the labor market, sustained a loss of wage earning capacity of 15%, and had a 37% permanent disability inclusive of impairment. In her post-hearing deposition, Dr. Barros-Bailey elaborated on her conclusions.

60. Dr. Barros-Bailey testified that she included 13,000 potential jobs in Claimant's labor market analysis that Dr. Collins did not include in her report. Dr. Barros-Bailey included 479 light-duty hostess positions, 6,745 light-duty office clerk positions, and 5,069 cashier positions in her calculations. From a close reading of Dr. Barros-Bailey's deposition and Dr. Collins' deposition, it appears that most cashier positions are light-duty rather than sedentary. Barros-Bailey Deposition, pp, 30-32; Collins Deposition, p. 46. During cross-examination, Dr. Barros-Bailey admitted she did not know how many of those positions were full-time and how many were part-time. Barros-Bailey Deposition, p. 70. Dr. Barros-Bailey thus may have included more than 12,000 light-duty positions in her analysis that Dr. Collins did not consider. However, such light-duty positions would have little bearing on determining disability under the sedentary work restrictions imposed by Dr. Weiss. Dr. Barros-Bailey also noted Claimant's computer skills, including her familiarity with Excel.

61. *Weighing the vocational opinions.* Claimant is restricted to sedentary work. Dr. Collins estimated Claimant's disability inclusive of impairment at 60%, assuming sedentary work restrictions. Dr. Barros-Bailey opined that Claimant sustained permanent disability inclusive of impairment of 37%, assuming sedentary restrictions. The bases for the vocational experts' disability opinions are contrasting in several respects.

62. Dr. Barros-Bailey testified that the differences between her conclusions and Dr. Collins' conclusions arise from two principal factors: first, Dr. Barros-Bailey's inclusion of

approximately 13,000 jobs omitted by Dr. Collins in loss of access calculations, and second, Dr. Collins' use of entry level wages instead of median level first quartile wages in loss of earnings calculations. Barros-Bailey Deposition, pp. 50-54. As noted above, more than 12,000 of the 13,000 jobs included by Dr. Barros-Bailey in her analysis are for light-duty positions that are irrelevant given Claimant's sedentary work restrictions. It is unclear whether Dr. Barros-Bailey may have considered some light-duty positions in her sedentary restriction analysis.

63. Dr. Barros-Bailey testified there are 3,308 sedentary bookkeeper positions in Claimant's labor market. Dr. Barros-Bailey did not know how many of those positions were full-time and how many were part-time. Barros-Bailey Deposition, p. 69. Dr. Collins apparently included at least a substantial number of these in her calculations as well. Dr. Collins explained in her deposition that jobs including bookkeeper/payroll clerk were included under bookkeeping clerk and cashier was included under retail sales. Thus most of these jobs not expressly listed in her report were actually included in other listed categories.

64. Dr. Barros-Bailey asserted that the positions of bank teller and loan secretary have not changed in more than 15 years and thus should be considered in Claimant's work history and present employment opportunities. Dr. Barros-Bailey therefore included 481 sedentary payroll clerk positions and 501 sedentary loan secretary/clerk positions that may not have been considered by Dr. Collins. Dr. Collins testified that she did not include loan secretary because Claimant's experience as a loan secretary is so remote that it is no longer a transferable option for Claimant. Collins Deposition, pp. 46-47. Claimant has not worked as a loan clerk for approximately 24 years and Dr. Collins' testimony is persuasive that this is not a transferable option for Claimant.

65. Dr. Barros-Bailey calculated a loss of wage earning capacity at 15% based upon the difference of Claimant's time of injury wage ($13.51) and her likely entry wages ranging from $10.47 to $12.52. Dr. Collins calculated Claimant's loss of wage earning capacity at 32% based upon the difference of Claimant's time of injury wage ($13.51) and her likely entry wages ranging from $8.00 to $10.00 per hour. Dr. Collins' conclusion is persuasive that Claimant at 63 years old, even with her greater work experience, will not likely be able to consistently command a significantly higher wage than a younger less experienced job candidate.

66. Dr. Barros-Bailey's analysis recognizes that Claimant has more computer experience in her prior positions and more computer skills than Claimant reported to Dr. Collins. Thus Dr. Collins' conclusions do not appear to fully consider sedentary positions requiring moderate computer skills.

67. Dr. Barros-Bailey's 37% disability rating significantly underestimates Claimant's disability by overestimating Claimant's viable employment opportunities given her sedentary work restrictions determined by Dr. Weiss. Dr. Collins' 60% disability rating more realistically assesses Claimant's loss of access and loss of wage earning capacity, although it does not fully consider her demonstrated computer skills.

68. Based on Claimant's permanent impairment of 7% of the whole person for her lumbar spine condition, her sedentary work restrictions determined by Dr. Weiss, and considering her non-medical factors including but not limited to her age of 60 at the time of the accident and 63 at the time of the hearing, high school education, demonstrated computer skills, experience in cashiering, waitressing, and other customer service positions, and her inability to competitively return to her time of injury employment, the Referee concludes that Claimant's ability to compete for regular gainful employment in the open labor market in her geographic

area has been reduced. Claimant has proven that she suffers permanent disability of 48%, in addition to her permanent impairment of 7% of the whole person.[3]

69. Total permanent disability. Claimant has alleged she is totally permanently disabled. Claimant expressly acknowledged prior to and at hearing that total permanent disability pursuant to the odd-lot doctrine is not an issue in the present case. Nevertheless, Claimant asserts she is 100% totally and permanently disabled. However, the record does not establish total permanent disability. No expert has opined she is 100% totally and permanently disabled. To the contrary, both Dr. Collins and Dr. Barros-Bailey testified that even assuming sedentary work restrictions, there are suitable jobs available in Claimant's labor market. Furthermore, there is no evidence of an unproductive job search. Claimant's file was closed by the Commission's rehabilitation consultant because Claimant did not follow through with recommendations and pursue potential employment opportunities. Claimant has not proven she is totally and permanently disabled.

CONCLUSIONS OF LAW

1. Claimant has proven Defendants' liability for additional medical benefits for past and ongoing palliative medical care including Methocarbamol and Tramadol, as prescribed by Dr. Westbrook, and a pool exercise program, as suggested by Dr. Weiss**.**

2. Claimant has proven she sustained permanent partial impairment of 7% of the whole person due to the industrial accident.

[3] Although permanent disability from both industrial and non-industrial causes is regularly determined first, after which disability from non-industrial causes is subtracted, leaving only work-related disability, the expert evidence herein does not clearly address disability from all causes, but rather disability related to the industrial accident. The parties did not request, and the Commission did not notice for hearing, the issue of apportionment of permanent disability pursuant to Idaho Code §72-406. Since Claimant is only entitled to recover for disability attributable to the industrial accident, to require Claimant to prove the extent of her overall disability before subtracting out her non-industrial disability imposes an additional burden upon Claimant that is unnecessary in determining the extent of her work-related disability herein.

3. Claimant has proven she sustained permanent disability of 48%, in addition to her 7% permanent partial impairment, due to the industrial accident.

4. Claimant has not proven she is totally and permanently disabled.

RECOMMENDATION

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

DATED this __24th__ day of June, 2015.

INDUSTRIAL COMMISSION

__/s/_____
Alan Reed Taylor, Referee

ATTEST:

____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __2nd__ day of _July_____, 2015, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

TAYLOR MOSSMAN-FLETCHER
611 WEST HAYS STREET
BOISE ID 83702

LEA KEAR
PO BOX 6358
BOISE ID 83707-6358

sc _/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KAY BROCK, Claimant, v. PILOT TRAVEL CENTERS, Employer, and LIBERTY INSURANCE CORPORATION, Surety, Defendants.	**IC 2012-010234** **ORDER** Filed July 2, 2015

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has proven Defendants' liability for additional medical benefits for past and ongoing palliative medical care including Methocarbamol and Tramadol, as prescribed by Dr. Westbrook, and a pool exercise program, as suggested by Dr. Weiss**.**

2. Claimant has proven she sustained permanent partial impairment of 7% of the whole person due to the industrial accident.

3. Claimant has proven she sustained permanent disability of 48%, in addition to her 7% permanent partial impairment, due to the industrial accident.

4. Claimant has not proven she is totally and permanently disabled.

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

DATED this __2nd___ day of __July_____, 2015.

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 ___2nd___ day of ____July_____, 2015, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

TAYLOR MOSSMAN-FLETCHER
611 WEST HAYS STREET
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LEA KEAR
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sc

___/s/_____