BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHELE C. SCHULER, Claimant, v. VALLEY VIEW NURSING CENTER, Employer, and OLD REPUBLIC INSURANCE CO. ICM, INC., Surety, Defendants.	**IC 2008-022319** **IC 2012-031046** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **February 3, 2014**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee LaDawn Marsters, who conducted a hearing in Boise on October 10, 2013. Claimant was present and represented by Hugh Mossman of Boise. Michael G. McPeek of Boise represented Employer (Valley View) and Surety (collectively, Defendants). The parties presented oral and documentary evidence. No post-hearing depositions were taken. Claimant and Defendants then each submitted post-hearing briefs, after which Claimant submitted a reply brief. This matter came under advisement on January 13, 2014.

ISSUES

By agreement of the parties, at the hearing the issues to be decided were identified as:

1. Whether the 2010 accident is compensable; and

2. Whether and to what extent Claimant is entitled to disability in excess of impairment with respect to the 2008 industrial injury.

In addition, the parties specifically reserved the issue of temporary disability benefits with respect to the 2010 event. However, no party argued the first issue in her/their briefing. Therefore, only the issue of disability in excess of impairment with respect to the 2008 industrial injury is addressed herein.

CONTENTIONS OF THE PARTIES

Claimant contends that, given her medical and non-medical factors, she has suffered permanent partial disability (PPD) of 50% due to her industrial low back injury and resultant microdiscectomy surgery in 2009 and spinal fusion surgery in 2011. Defendants counter that she has suffered only 15% PPD.

OBJECTIONS

No depositions were taken; all objections at the hearing were met with contemporaneous rulings. Therefore, there are no pending objections.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Testimony of Claimant and Ken Halcomb at the hearing.

2. Joint Exhibits (JE) 1 through 14 admitted at the hearing.

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

FINDINGS OF FACT

1. Claimant was 38 years of age at the time of the hearing and residing in Boise. She is the mother of five children, three of whom live with her in a studio apartment owned by her aunt.

2. Claimant graduated from high school in Boise in 1994, then worked in various fast food establishments. She also worked as a waitress and bartender. She earned $3.15 per hour plus tips. In 2000, Claimant obtained her certified nursing assistant (CNA) credential after successfully completing a six-week training course at Boise Samaritan Village. Claimant was certified through the Idaho Board of Nursing and began working as a CNA. When Claimant was hired by Valley View, her starting wage was $8.25 per hour. By December 2009, she was earning $11.31 per hour, and by October 2011 she was earning $12.51 per hour.

3. In order to keep her certification, Claimant was required to attend continuing education courses and maintain a valid CPR card, among other things. Claimant loved her job at Valley View, and always received more than the standard 3% raise. "I was one of those people that came in my days off, stayed late, pick [*sic*] up shifts. I always had a good evaluation. My last evaluation was really good. They had given me a significant raise from the last evaluation." Tr., p. 18.

4. Claimant articulated her job duties as a CNA:

> CNAs are the dirt that holds up the totem pole. We do all of the heavy lifting. We do stocking. We do all the feeding. All the transporting of patients. When you do home healthcare or hospice are it - - you go in independently. You do everything on your own. Most of the time - - most times these are people that live in their homes by themself [*sic*]. You go in, you take them out of bed, you shower them, it's all just you, there is no one there helping you. A nursing home is a little different. Sometimes it's heavier, though, because you have multiple patients. You know, they - - unfortunately they are not staffed normally like they should be. People call in, things happen, they - - whatever. So, you only have a certain amount of CNAs for however many residents. There are 47 residents,

> three CNAs. It's a lot of work. You have that - - sometimes you have shower aides, sometimes you don't. You do a lot of heavy lifting, a lot of transporting. You have an hour to get 20 people up, dressed, and teeth brushed, hair combed, dressed, in their chairs down to the dining room for breakfast. It's - - during the day it's a lot of up and down. Get them up. Breakfast. Put them back down. Get them back up for lunch. Put them back down. There is a lot of turning, changing their Depends while they are in bed. Transporting on and off the commode or to the toilet. Mostly you're doing that by yourself. You have a lot of work to do in a short amount of time.

Tr., pp. 20-21.

5. After she left Valley View, (as a result of her industrial injury) Claimant worked as a pants presser at a dry cleaning establishment. She also worked as a driver, and she has done light home health work in a start-up company founded by her friend. From August 2013 through the hearing date (and, presumably, beyond), Claimant worked as a waitress in a small restaurant, earning $3.55 per hour plus tips.

6. Claimant uses a computer to keep up with Facebook, but she has no typing skills or knowledge of office computer programs. She loves being a CNA and taking care of people, and she is hopeful that her friend's business will take off so that it will provide her with full-time work.

7. Findings with respect to Claimant's medical history follow. They help demonstrate the extent of Claimant's on-going pain and functional deficits, as well as her own efforts to overcome them. They are also telling for their lack of any documented doubts about the accuracy of Claimant's self-reports or the source of her motives.

LOW BACK INJURIES

8. **Pre-industrial injury.** In 2005, Claimant sustained a work-related low back injury while working for another employer. She continued working her regular duty job, without any time off or restrictions. Her symptoms resolved within a month or so.

9. **2008 industrial injury.** On June 26, 2008,[1] Claimant felt pain in her back after assisting in a difficult transfer of a 200+ pound patient from her wheelchair into her bed. On July 2, 2008, while she was at home, Claimant's right leg became numb and tingly and she felt a fiery pain in her back. Her leg gave out, and her husband[2] caught her. Claimant's husband took her to an emergent care facility, where she was diagnosed with a low back injury (possibly a herniated disc), prescribed medications, and referred for follow-up care.

10. On July 7, 2008, Claimant reported her injury to Valley View. She was referred to St. Alphonsus Medical Group, where she was diagnosed with right-sided low back pain and right-sided leg pain, likely due to radiculopathy. Lumber spine x-rays ruled out fracture. Pain and anti-inflammatory medications were prescribed, and Claimant was instructed to ice her back. She was also referred to the STAARS program for rehabilitation.

11. **2008 microdiscectomy.** Claimant's right-leg symptoms initially improved, but by July 28, 2008, her pain continued without abatement. Surety approved a surgical consultation with Michael Hajjar, M.D., a neurosurgeon. Dr. Hajjar diagnosed a right-sided herniated nucleus pulposus at L5-S1 affecting the S1 nerve root. He performed a right L5-S1 microdiscectomy on September 27, 2008. Claimant was discharged with prescriptions for Percocet and Soma.

12. On October 22, 2008, Claimant began physical therapy. She attended 15 sessions during the remainder of 2008, 36 sessions during the first half of 2009, and 10 sessions during the last half of 2009 (most in November).

13. On January 21, 2009 Claimant followed up with Dr. Hajjar. He wrote to Dr. Kammer, who had treated Claimant in the emergency department, that she had done very

[1] This is subject of Claimant's first claim consolidated herein (Case No. IC 2008-022319.)

[2] Claimant was no longer married at the time of the hearing.

well in physical therapy over the past few weeks, that her back pain was improved, and that she was working about six hours per day. He anticipated she would be able to return to full-time work in a couple of weeks. "I will see [Claimant] one more time in about six weeks to assess her progress and she will likely be ratable after she completes her physical therapy." JE-83. Dr. Hajjar extended Claimant's work restrictions until February 2, 2009.

14. On March 11, 2009, Dr. Hajjar again evaluated Claimant, noting that she was still in physical therapy. Based upon his findings, he opined Claimant had reached maximum medical improvement (MMI) and assessed 7% whole person permanent partial impairment (PPI) due to her low back condition. He was vague in terms of her functional capabilities and applicable restrictions, if any. "Ms. Simon[3] will continue with her present strategies and she will return to work at her present capacity. I will see her again in a routine follow up in a few months." JE-85. Apparently, Claimant was returned to full-duty work.

15. On May 7, 2009, the physical therapist noted that Claimant's pain had recently flared up when she re-aggravated her back while working in the dining hall. He believed Claimant would likely be able to be discharged to a gym program after the current flare calmed down, as her objective testing indicated no further call for therapy. However, Claimant was concerned about being released, so he recommended release to the transition program, in which Claimant would have independent use of the facility, with a few "just in case" visits. JE-149. Dr. Hajjar reviewed and approved the therapist's recommendations.

16. On May 13, 2009, Dr. Hajjar again evaluated Claimant. "She is doing alright, but she is still having some issues with her back pain as well as right sided hip pain which radiates to the mid thigh but not all the way down the leg." JE-86. Dr. Hajjar opined that Claimant had

[3] Claimant's last name was formerly Simon.

exhausted the benefits of physical therapy, but referred her to Sandra A. Thompson, M.D., a pain specialist, for pain management.

17. On June 10, 2009, Claimant was evaluated by Dr. Thompson. Claimant was still having significant low back and right lower extremity pain, despite medications and physical therapy. Claimant described her pain as "throbbing, sharp, burning and constant." JE-213. She also reported that it increased with work and activity.

18. On July 22, 2009, Claimant reported to Dr. Hajjar that she continued "to have moderate back pain as well as lower extremity pain which are affecting her more." JE-87. He also noted that Claimant had lost a substantial amount of weight and was participating in activities like cycling even though her pain was worsening. "Ms. Simon has not responded well to injections, but she is continuing with her physical therapy which does give her some relief but this is transient." *Id.*

19. Because Claimant's symptoms "have not improved and if anything have worsened despite all of her other improvements," Dr. Hajjar recommended a new MRI to rule out additional spine pathology. JE-87. A December 17, 2008 MRI demonstrated no recurrent or residual disc protrusion at L5-S1, but did demonstrate right-sided scarring surrounding the thecal sac and the right S1 nerve root, extending into the right neural foramen. For whatever reason, no repeat MRI was performed in 2009, despite Dr. Hajjar's request.

20. In August 2009, Claimant advised Dr. Thompson that she was pregnant. Her baby was due in late March 2010. Through early 2010, Dr. Thompson administered various pain injections, prescribed medications, and continued Claimant's physical therapy. Claimant's pregnancy required a conservative approach to her treatment, particularly during her first trimester.

21. On December 23, 2009, Dr. Thompson responded to an inquiry from Surety, opining that Claimant was still not medically stable following her June 26, 2008 industrial injury. She had recently undergone one epidural steroid injection with a good result, and had received a second injection on December 22. "She obtained significant improvement from the first, and the plan is to complete a series of three of which the third will be performed in another two weeks. Subsequent to that, I will reassess her…I do believe that she will be [at maximal medical improvement], however." JE-231.

22. **2010 industrial injury.** On January 10, 2010, Claimant again injured her back while transferring a patient. Chart notes indicate that she presented to St. Alphonsus Medical Group on January 12, 2010 with increased back pain and shooting pains down her right leg that she described as new since her 2008 spine surgery. At the hearing, she elaborated that it was the same kind of pain as she had experienced before. Claimant's pain was worse when she bent, twisted, or walked, and better when lying on her left side.

23. No radiologic imaging was taken due to Claimant's pregnancy. Claimant was diagnosed with right-sided radiculitis and low back pain. According to the chart note, Dr. Thompson was consulted and opined that these symptoms were "just a worsening of her previous symptoms." JE-38. The treating physician recommended modified duty with a 10-pound lifting restriction; no twisting, bending, or stooping; and no more than four hours per day. Dr. Thompson advised against physical therapy for at least seven days because she had undergone her third epidural steroid injection earlier that day.

24. Dr. Thompson's January 20, 2010 notes reflect that Claimant did not get much relief from her last epidural steroid injection. Dr. Thompson continued her work restrictions and prescriptions for Soma and Norco, as well as her physical therapy.

25. Claimant attended more than 50 physical therapy sessions from January 21, 2010 through December 21, 2010.

26. On February 3, 2010, Dr. Thompson responded to a request for information from Surety. She had diagnosed Claimant with back pain secondary to disc herniation and explained that the reason for Claimant's 4-hour per day work restriction was her persistent low back pain which had proven resistant to pain injections and narcotic pain medications. "There might be an additional effect from pregnancy but primarily due to [illegible] & work restrictions." JE-238. Dr. Thompson recommended physical therapy. As for Claimant's predicted medical stability date, Dr. Thompson advised that she would need to reevaluate Claimant following the delivery of her baby.

27. Claimant's delivery recovery was complicated by an abdominal hernia, for which she underwent repair surgery on or about April 19, 2010. On April 22, 2010, she reported to Dr. Thompson that her back spasms had worsened following the delivery of her daughter and subsequent herniorrhaphy. Dr. Thompson increased Claimant's Soma and was hopeful that her spasms would subside.

28. On June 2, 2010, Dr. Hajjar returned Claimant to work "at sedentary to light duties including lifting occasionally up to twenty pounds and intermittent stooping, crawling, crouching, twisting, bending and reaching. She is able to use her upper extremities for fine manipulation, pushing, pulling, grasping and keyboarding." JE-88. Apparently, Claimant had recently undergone bilateral carpal tunnel surgery. He reported to Dr. Thompson that Claimant had recently suffered a new injury trying to catch a falling patient. "She continues to have some moderate back and right sided pain which radiates down her right leg. However, the pain is not as severe as her original herniation but it is affecting her at work and is giving her difficulties

with prolonged sitting as well as activities." JE-89. Dr. Hajjar also related the findings from Claimant's May 26, 2010 MRI, including degeneration at L5-S1 (no worse than moderate), a small angular tear on the left side of the disc without any frank herniation, and normal post-surgical changes. He recommended continuing with her present strategies, a course of physical therapy, and a course of injections, including an epidural injection.

29. Also on June 2, 2010, Dr. Thompson concurred in Dr. Hajjar's recommendation for injections since Claimant was taking "a substantial amount of Norco," which Dr. Thompson intended to start weaning her off of soon. In addition, she believed that they may be more effective since Claimant was no longer pregnant. Dr. Thompson issued work restrictions, including occasional lifting up to 10 pounds; standing/walking up to one hour at a time; sitting up to two hours at a time; reaching up to 66% of the day; stooping, bending, crouching, crawling, kneeling, balancing, climbing, pushing, and pulling up to 33% of the day; and twisting no more than 5% of the day. She also limited Claimant's workday to four hours. She administered an injection on June 15, providing 40% relief for a couple of days, according to Claimant. She administered two other injections, on June 30 and July 14, which provided 50% relief. Claimant was still taking Norco and Soma, however, and was also using a pain patch.

30. On July 7, 2010, Dr. Hajjar adjusted Claimant's restrictions, through September 1, 2010, to no lifting over 25 pounds; no repetitive stooping, bending, or twisting; and no pushing or pulling wheelchairs over 300 pounds. He also increased her work hours to six hours per day. He wrote to Dr. Thompson the next day, conveying that Claimant still continued to have pain, and he had discussed several options with her. Claimant planned to have one more injection "which is helping her somewhat but not completely." JE-91. Following that injection, he

planned to determine whether further intervention, possibly including lumbar discography to further evaluate the L5-S1 disc, lumbar stabilization surgery, and/or a work hardening program.

31. Also on July 7, 2010, Claimant's physical therapist reported that Claimant was not progressing in physical therapy. "Michele reports no net improvement in her LBP and right radicular pain. She continues to have moderate to marked pain which is impairing her sleep, ability to work and perform ADLs." JE-251. However, Dr. Thompson noted on July 14, 2010, "Patient reports to me that PT is helping and wishes to continue." JE-252. This is probably due to Dr. Hajjar's recommendation for physical therapy twice per week in conjunction with increased restrictions at work as a kind of work hardening protocol. Dr. Thompson considered Claimant's options going forward, including medications only, repeat injections as appropriate, a spinal cord stimulator, and lumbar fusion surgery.

32. On September 1, 2010, Claimant's physical therapist noted that she had "turned the corner in PT." JE-256. "She notes that she is no longer having right radicular pain and that her LBP is mild to moderate based upon her work activities. She is able to tolerate 6 hours of work….Her strength needs currently meet her job requirements." *Id.* On September 8, Dr. Thompson noted Claimant was still doing well. She was back to work eight hours per day without restrictions, attending physical therapy two days per week, and both the physical therapy and pain medications were helping.

33. Also on September 1, 2010, Dr. Hajjar notified Surety, through a form letter, that Claimant was medically stable, with no additional PPI over his prior 7% assessment, and that she had no medical restrictions related to the June 26, 2008 industrial injury. He wrote to Dr. Thompson on the following day, reporting that Claimant was doing well, and medically stable, "with the aid of both physical therapy as well as other conservative therapies including

pain management strategies." JE-95. He recommended that Claimant continue with her treatment plan. He also opined that all of Claimant's 7% PPI was related to her industrial injury.

34. On September 3, 2010, Dr. Thompson notified Surety that she would evaluate Claimant for medical stability in a few weeks, when she had completed her physical therapy. She anticipated Claimant could be weaned off her medications in six to eight weeks.

35. On October 5, 2010, Dr. Thompson noted Claimant had a pain flare up that Claimant thought was due to her work schedule, which had increased to over 40 hours per week. Concurring in Claimant's request, Dr. Thompson recommended Claimant be put on the night shift "where the expectation for physical labor is considerably less" and that she be limited to 40 work hours per week. JE-260. Claimant's physical therapy chart note from October 6, 2010 is consistent with Dr. Thompson's note. On October 26, 2010, Dr. Thompson noted that Claimant was not put on the night shift, so she recommended that Claimant not work any overtime until she was medically stable while looking for a less physically demanding job. She also recommended a formal work hardening program in order to determine appropriate restrictions for Claimant.

36. By November 16, 2010, Claimant was working the night shift. Dr. Thompson opined that Claimant's back pain had stabilized and that she was medically stable. She recommended Claimant finish her remaining physical therapy sessions, referred her to massage therapy, and requested follow up in three to four months. Dr. Thompson advised Claimant to reduce her Norco intake as tolerated. She restricted Claimant to the night shift, with no other limitations.

37. Claimant continued to have pain, for which she took medication prescribed by Dr. Thompson. She was frustrated that nobody had been able to find the source of her pain.

38. Claimant attended seven physical therapy sessions during the first part of 2011.

39. On July 7, 2011, Claimant reported ongoing back and lower extremity pain with difficulties standing, walking, and working to Dr. Hajjar. He ordered a new MRI, which revealed no new herniations or stenosis. The imaging did demonstrate, however, degenerative findings at L5-S1 with a small angular tear, a slight disc bulge on the right side barely abutting the nerve root, and a "wide open" neuroforamen. JE-97. Dr. Hajjar discussed a spinal cord stimulator and additional lumbar surgery with Claimant, and recommended a lumbar discography, performed by Dr. Thompson. The discography demonstrated evidence of a discogenic source for Claimant's pain. On July 26, 2011, Claimant reported falling down a step and injuring her right arm because her right leg gave out. On August 23, 2011, Dr. Thompson increased Claimant's pain medication so that she could continue to work.

40. **2011 spinal fusion surgery.** On September 7, 2011, Dr. Hajjar recommended L5-S1 fusion surgery, which he performed on October 11, 2011. In recovery, Claimant spent several days in the hospital. She had trouble with vomiting and contracted thrush. She had to wear a back brace and ambulate with a walker. Claimant felt like her recovery took forever, and it was very painful. She developed flank pain in January 2012, apparently unrelated to her back condition. By the end of that month, her outlook was dim. She was sleeping in her recliner, was still not back at work, could not pick up her baby, and could not drive or perform other functions, all because of her back pain, even though she was taking both prescription and over-the-counter medications. She was depressed, similar to the post-partum depression she had previously experienced.

41. On December 13, 2011, Dr. Hajjar wrote to Surety, advising that Claimant would likely be able to return to work in late January or early February 2012. He opined that

Claimant's spinal fusion surgery "was related to the 2008 injury as a continuum of the findings related to the herniated disk and the progressive disk changes at the L5-S1 segment." JE-100.

42. Claimant attended seven physical therapy sessions during the last part of December 2011.

43. On January 24, 2012, Dr. Thompson evaluated Claimant and encouraged her to take advantage of state vocational rehabilitation services in finding a more suitable job. Claimant was taking a lot of Norco, so Dr. Thompson altered her pain medication prescription.

44. On February 4, 2012, Claimant still had not returned to work due to increased pain. Dr. Hajjar ordered blood work, which apparently ultimately ruled out an infection. On March 9, 2012, Claimant still had a sore spot on the right side of her spine, which Dr. Hajjar posited could be related to the facet area, the S1 joint, or the bone graft. He referred Claimant to Dr. Thompson for an injection, which she administered on April 11, 2012.

45. On May 8, 2012, Dr. Hajjar noted Claimant's pain "is not radiating but rather localized in the paraspinal region and extends to the upper part of the leg in a circumferential distribution." JE-103. On May 9, 2012, Claimant underwent a lumbar CT scan that identified, among other things, multiple intrarenal calcifications bilaterally and right inferior S1 joint sclerosis with a focal subchondral cystic change inferiorly. "[I]t is retrospectively present dating back to 8/05." JE-66. Claimant was unaware of any sclerosis diagnosis.

46. On May 31, 2012, Dr. Thompson again modified Claimant's pain medication prescription because she was getting poor relief. She also prescribed Lexapro. Dr. Thompson also noted that Claimant had been in physical therapy since her October 2011 surgery, that she was experiencing panic attacks, and that her kids noticed she was often in a bad mood. In June

2012, Dr. Thompson commented that Claimant's MRI was essentially unremarkable in terms of her low back symptoms.

47. Claimant attended approximately 60 physical therapy sessions from January 3, 2012 through August 10, 2012, after which it appears from the record that Surety denied further treatment.

48. On November 7, 2012, Dr. Hajjar noted, "Michele is clearly struggling." JE-104. She still had moderate back and lower extremity pain. A recent bone scan did not evidence any problems. "It appears that Michele is solidly fused at the L5-S1 level." *Id.* Dr. Hajjar opined Claimant was not a candidate for additional surgery, but perhaps additional pain management strategies were available.

49. Dr. Thompson's January 2, 2013 note relates that, at some point, Surety denied further benefits and Claimant was unable to get her pain medication refilled. She was also unable to finish out her physical therapy sessions. After some effort, Claimant was able to work with Dr. Thompson to taper her off her narcotic pain medications. At the time of the hearing, Claimant was taking aspirin, Tylenol and Ibuprofen for pain control. She also used her TENS unit and a gel ice pack. She rated her pain between 6 and 7 on a scale of 10 which was mostly tolerable for her. She believes her pain is permanent, so she is trying to get used to it.

INDEPENDENT MEDICAL EVALUATIONS

50. **Robert H. Friedman, M.D.** On July 9, 2012, Dr. Friedman, a physiatrist, prepared a report addressed to Surety detailing his opinions regarding Claimant's condition following a review of her medical records. He opined, among other things, that Claimant's spinal fusion was well-healed and related to her June 26, 2008 industrial injury and, perhaps, to her preexisting S1 joint problem identified on her CT scan. In addition, her ongoing symptoms

are related solely to the S1 joint problem, "which may be a preexisting condition." JE-339. Dr. Friedman also opined that Claimant had untreated depression and opiate dependency. He recommended that she undergo a full independent medical evaluation (IME).

51. Dr. Friedman assessed 7% whole person PPI and issued permanent medical restrictions including lifting limitations of 50 pounds occasionally and 25 pounds repetitively, and no twisting or torqueing of the low back.

52. On December 10, 2012, after reviewing additional records including Claimant's bone scan report and Dr. Hajjar's November 21, 2012 chart note, Dr. Friedman opined that reasonable follow-up for Claimant's fusion surgery includes physician visits and annual lumbar spine x-rays for two years post-surgery. He also opined that a TENS unit for pain relief is reasonable. He did not, however, believe that further narcotic pain medications were reasonable because they had proven ineffective in restoring Claimant's function or managing her pain. In addition, Dr. Friedman reaffirmed his medium-duty restrictions.

53. **Paul J. Montalbano, M.D.** On July 25, 2012, Dr. Montalbano, a neurosurgeon, conducted an IME at Surety's request. Dr. Montalbano reviewed Claimant's medical history and examined her. He ordered a bone scan to further investigate her "overwhelming low back pain." JE-350. On August 8, 2012, he wrote to Surety opining that the bone scan returned normal results, that Claimant's arthrodesis at L5-S1 is solid, that she required no further medical treatment, and that she was medically stable. He recommended annual x-rays and declined to provide an impairment rating, referring Surety to other physicians.

VOCATIONAL EVIDENCE

54. **Ken Halcomb.** Mr. Halcomb is a vocational field consultant, and also the Boise office supervisor, for the Industrial Commission Rehabilitation Division (ICRD). He assisted

Claimant in returning to work from January 9, 2012 through the closure of her file on May 16, 2013.

55. After interviewing Claimant and obtaining her medical and vocational information, Mr. Halcomb prepared a Job Site Evaluation (JSE) for Claimant's CNA job at Valley View. Among other things, her time-of-injury job required her to lift from 36 to over 100 pounds frequently. Mr. Halcomb provided the JSE to Dr. Hajjar, who opined on February 14, 2012 that Claimant could work as a CNA, but was unable to do any heavy lifting. As a result, Mr. Halcomb determined Claimant would not be able to return to her time-of-injury job and he encouraged her to develop some computer and typing skills.

56. By the end of 2012, Mr. Halcomb began encouraging Claimant to focus on currently available job opportunities. Claimant wanted to stay in the health care field, so he referred her to some area hospitals and a staffing agency. On April 10, 2013 Claimant began driving for WeDrive five days per week, seven to eight hours per shift, for $4 per hour plus tips, which worked out to about $8.50 per hour. She left within a month due to poor job conditions (she was driving drunk people home and her employer was paying her "under the table"). On May 15, 2013, Claimant started with Life Is Precious, her friend's start-up business, doing light caregiving and housekeeping tasks for $9 per hour. Unfortunately, that business has not gotten off the ground and Claimant got very few hours there before it completely stalled. Claimant hopes it will get off the ground so she can work there full-time.

57. Mr. Halcomb closed Claimant's file in May 2013 because she had returned to work for more than 30 days, was presently employed, and did not require further services at that time.

58. Utilizing OASYS software, Mr. Halcomb reviewed the general requirements for a nursing assistant and found that the strength requirements fall within the medium category, consistent with Claimant's restrictions assessed by Dr. Friedman. He acknowledged that such requirements will vary from employer to employer, with some offering lighter-duty nursing assistant jobs, and some offering heavier-duty positions. He also acknowledged that nursing assistants must transfer patients, and there may be greater risks associated with assisting patients who may react unpredictably than with lifting inanimate objects of the same weight. This is particularly relevant, given Dr. Friedman's restrictions on twisting and torqueing the lower back.

59. Mr. Halcomb opined that Claimant has suffered a loss of access to her local labor market, but he declined to quantify that loss, as rendering such an opinion would fall outside his approved duties as an ICRD consultant.

60. Claimant testified that she was offered employment as a CNA by Ashley Manor, but she declined the position because it paid only $8 per hour. She has applied for office work, but was unsuccessful due to her lack of computer skills. She has applied with hospitals, but was likewise unsuccessful. As mentioned above, at the time of the hearing Claimant was working as a waitress and hoping her friend's home care business will grow to provide her with full-time work.

CLAIMANT'S CREDIBILITY

61. After observing Claimant at the hearing and comparing her testimony with the remainder of the evidence in the record, the Referee finds her to be a credible witness.

DISCUSSION AND FURTHER FINDINGS

The provisions of the 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). However, the Commission is not required to construe facts 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).

PERMANENT DISABILITY

62. "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. *See*, *Smith v. Payette County*, 105 Idaho 618, 671 P.2d 1081 (1983); *Baldner v. Bennett's, Inc.*, 103 Idaho 458, 649 P.2d 1214 (1982).

63. The degree of an injured worker's permanent disability, and the cause or causes of a disability, are factual questions committed to the discretion of the Industrial Commission. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company,* 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambre*l, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

64. In assessing Claimant's permanent partial disability, it is first helpful to understand whether Claimant's permanent impairment has caused a loss of functional capacity.

A loss of functional capacity figures prominently in all cases involving a determination of an injured worker's disability in excess of physical impairment. For example, if the injured worker is physically capable of performing the same types of physical activities as he performed prior to the industrial accident, then neither wage loss nor loss of access to the labor market is implicated.

65. In this case, no vocational disability expert has opined as to the amount of disability Claimant has suffered, but Defendants do not dispute that she has, indeed, suffered some disability. Likewise, Ken Halcomb opined that Claimant has suffered some disability in excess of impairment.

66. **Time of disability determination.** The Idaho Supreme Court in *Brown v. The Home Depot,* WL 718795 (March 7, 2012), held that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing. Under Idaho Code § 72-425, a permanent disability rating is a measure of the injured worker's "present and probable future ability to engage in gainful activity." Therefore, the Court reasoned, in order to assess the injured worker's "present" ability to engage in gainful activity, it necessarily follows that the labor market, as it exists at the time of hearing, is the labor market which must be considered. The record divulges no reason why Claimant's ability to engage in gainful activity would be more accurately measured at any time other than the date of the hearing. Therefore, Claimant's disability will be determined as of the hearing date.

67. **Local labor market.** At the time of the industrial accidents in question and at the time of the hearing, Claimant resided in Boise, Idaho; therefore, her disability will be determined with respect to her employability in the Boise local labor market.

68. **Maximum medical improvement (MMI).** As a prerequisite to determining Claimant's PPI or PPD, the evidence must demonstrate that she is medically stable. To wit,

"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. The statute does not contemplate that a claimant must be returned to her original condition to be considered medically stable, but only that the condition is not likely to progress significantly within the foreseeable future. Another important consideration is that workers' compensation benefits are allocated based upon injuries stemming from specific workplace accidents and occupational diseases.

69. In this case, there is no dispute that Claimant is medically stable from her industrial injury, even though she has not been restored to her pre-injury condition. All opining physicians agree on this point. The Referee finds Claimant's industrial spine condition is medically stable.

70. **Permanent partial impairment.** There is also no dispute that Claimant has suffered 7% whole person PPI related to her industrial low back condition, nor that this assessment is supported by sufficient medical evidence in the record. Therefore, the Referee finds Claimant has satisfied her burden of establishing permanent impairment.

71. **Restrictions.** Claimant's most recent medical restrictions were reaffirmed by Dr. Friedman on December 10, 2012. They include lifting limitations of 50 pounds occasionally and 25 pounds repetitively, and no twisting or torqueing of the low back. In addition, Claimant persuasively testified that her pain worsens, further limiting her ability to function effectively, with prolonged work and activity.

72. **Non-medical factors.** 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 should also be 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. Idaho Code §§ 72-425, 72-430(1).

73. Claimant's non-medical factors that are either neutral or helpful in terms of her wage-earning ability include her age of 38; her local labor market of Boise, which offers a variety of vocational opportunities; the reviving state and national economies; her experience, training, and certification as a CNA; her documented history of good work evaluations and raises evidencing her good work ethic and competence; her food service experience; and her high school diploma. Non-medical factors that will hinder her earning ability include her lack of marketable computer or keyboarding skills and the likelihood that some employers will not hire her due to a negative inference regarding the cumulative history of her low back problems and perceived liability risks.

74. In spite of reasonable efforts, Claimant has been unable to secure suitable employment that pays more than $8.50 per hour since her October 2011 surgery. Although there are likely some CNA jobs in the Boise labor market that she can do, her restrictions and long history of back problems will likely prevent her from competing for a majority of CNA jobs. Claimant's options for unskilled work are also limited by her industrial restrictions. For example, even with her restaurant server experience, she would likely be unable to work at an establishment that requires her to serve food utilizing a large tray and jack due to her lifting, twisting and torqueing restrictions. Restaurant side-work often involves lifting, twisting and

torqueing, as well. As with her current employer, Claimant will likely need some accommodations in most restaurant server jobs. Claimant still has access to some retail jobs, but these are unlikely to replace her time-of-injury wage, and her lack of retail experience places her at a competitive disadvantage. She may be a good candidate for some cashiering jobs (for example, at convenience stores), or fast food work, but these jobs are unlikely to replace Claimant's time-of-injury wage.

75. Claimant would like to work as a phlebotomist, a position suggested by Mr. Halcomb. However, she lacks the required certification. This seems like a good option for Claimant. Given Claimant's age and presentation at the hearing, it is likely that she could successfully retrain and obtain gainful employment as a phlebotomist. Further, a phlebotomist's wage could potentially replace, or even exceed Claimant's time-of-injury income. Claimant does not seek retraining benefits, however, and there is insufficient evidence in the record from which to derive any meaningful conclusions regarding her potential from retraining in determining her industrial disability.

76. Claimant earned $11.01/hour at the time of her injury. Since leaving Employer, she has not earned more than approximately $8.50/hour. There are some CNA jobs in Claimant's geographic locale that she is physically capable of performing. It is unknown whether the type of CNA work which Claimant can currently perform would pay the same as the type of CNA job she performed at the time of injury. The Referee concludes that Claimant likely has suffered some wage loss as a result of the accident.

77. The record does not disclose that Claimant had any limitations/restrictions on a pre-injury basis. Even so, it does not appear from Claimant's employment history that she ever sought out employment at the highest exertional levels.

78. The evidence establishes that Claimant can still perform a number of CNA jobs that do not veer into a heavier job classification. However, Claimant's restrictions are such that it cannot be said with any certainty that she can perform every "medium" duty position, as defined by Mr. Halcomb.

79. Based on the Referee's review of the evidence, the Referee concludes that Claimant has reasonably suffered disability of 30% of the whole person, inclusive of PPI.

CONCLUSIONS OF LAW

1. Claimant proven that she has suffered disability inclusive of impairment of 30% as a result of her industrial injury.

2. The issue of temporary disability related to the 2010 accident is reserved.

RECOMMENDATION

Based on 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 __22nd_ day of January, 2014.

INDUSTRIAL COMMISSION

_/s/_____
LaDawn Marsters, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __3rd_____ day of _February_____, 2014, 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:

HUGH MOSSMAN
MOSSMAN LAW OFFICE
611 W HAYS STREET
BOISE ID 83702

MICHAEL MCPEEK
GARDNER LAW OFFICES
PO BOX 2528
BOISE ID 83701

sjw _/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHELE C. SCHULER, Claimant, v. VALLEY VIEW NURSING CENTER, Employer, and OLD REPUBLIC INSURANCE CO. ICM, INC., Surety, Defendants.	**IC 2008-022319** **IC 2012-031046** **ORDER** **February 3, 2014**

Pursuant to Idaho Code § 72-717, Referee LaDawn Marsters submitted the record in the above-entitled matter, together with her 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 proven that she has suffered disability of 30% as a result of her industrial injury.

2. The issue of temporary disability related to the 2010 accident is reserved.

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

DATED this __3rd____ day of ___February____, 2014.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Chairman

_____
R.D. Maynard, Commissioner

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __3rd____ day of ___February____, 2014, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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sjw _/s/_____