

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHERI ROWE,

Claimant,

v.

ADVANTAGE MARKETING & SALES,

Employer,

and

HARTFORD INSURANCE CO.
OF THE MIDWEST,

Surety,

and

STATE OF IDAHO,
INDUSTRIAL SPECIAL INDEMNITY FUND,

Defendants.

IC 2012-014427

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

Filed 7/24/18

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Pocatello, Idaho, on July 20, 2015. Albert Matsuura, of Pocatello, represented Claimant. Eric Bailey, of Boise, represented Defendants Employer and Surety. Paul Rippel, of Idaho Falls, represented Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF). There was some delay post-hearing as Claimant underwent additional medical treatment. Eventually the matter came under advisement on May 3, 2018, after the parties briefed the issues

and obtained post-hearing depositions.

ISSUES

The issues agreed upon at hearing by the parties were:

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident of May 31, 2012;
2. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury or condition;
3. Whether and to what extent Claimant is entitled to the following benefits:
 - a. Medical Care;
 - b. Temporary partial and/or temporary total disability (TPD/TTD);
 - c. Permanent Partial Impairment (PPI);
 - d. Permanent Partial Disability (PPD) in excess of impairment, up to and including Total Permanent Disability (TPD) pursuant to the odd-lot doctrine; and
 - e. Attorney Fees;
4. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate.
5. Whether ISIF is liable under Idaho Code § 72-332, and if so;
6. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant argues she sustained a permanent aggravation to her low back as the result of an accepted industrial accident which occurred on May 31, 2012. She is entitled to medical benefits, past denied and future anticipated, temporary disability, PPI, and permanent disability. Her injury, coupled with her prior medical impairments, rendered her an odd-lot worker, entitled to total permanent disability benefits. ISIF is liable for a portion of those benefits.

Defendants Employer and Surety (hereinafter Defendants) argue Claimant's significant prior low back injuries and chronic pain were not negatively impacted by the industrial accident,

which caused only some temporary bruising. Claimant returned to baseline shortly after the accident, and the medical records are more reliable than her subjective testimony. No further medical treatment related to the industrial accident was needed thereafter. Claimant's additional treatment, including surgery, was not related to her work accident; furthermore such treatment did little to improve her chronic, pre-existing low back condition. The bruising caused no permanent injury, resulted in no permanent impairment, and caused no disability. Claimant's failure to return to work is due to non-industrial factors and her personal choice.

Defendant State of Idaho, Industrial Special Indemnity Fund (hereinafter ISIF) asserts that Claimant is not totally and permanently disabled. Claimant's prior permanent physical impairments were not a subjective hindrance to employment before her work accident. There is no proof that Claimant's work injury was permanent. Finally, there is no proof that Claimant's prior physical impairments combined with her (temporary) injury from the work accident to render her totally and permanently disabled. There is no basis for ISIF liability in this case.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Kent Rowe, taken at hearing;
2. Claimant's exhibits (CE) A through X, admitted at hearing;
3. Defendants' exhibits (DE) 1 through 6, admitted at hearing;
4. ISIF's exhibits (IE) 1 and 2, admitted at hearing subject to later objection which was not pursued by any party;
5. Claimant's exhibit Y, admitted by stipulation post-hearing; and
6. The post-hearing deposition transcripts of Benjamin Blair, M.D., taken on April 12, 2017; Delyn Porter, taken on May 17, 2017; Timothy Doerr, M.D.,

taken on August 24, 2017; David Simon, taken on September 14, 2017; William Jordan, taken on November 2, 2017; and Douglas Crum, taken on November 2, 2017.

Any objection preserved during the depositions is overruled.

FINDINGS OF FACTS

1. At the time of hearing Claimant was a 60 year old married woman living in Pocatello with her husband. She is a high school graduate with one year of college general studies.

Pre-Accident Employment

2. Claimant's past work history includes hotel maid, a coder for Farmer's Insurance (which involved checking insurance codes on applications for accuracy), a file clerk, some older computer work utilizing punch cards for Associated Foods, and food prep and cashier for Saga Education Food Service (at ISU). Claimant also ran a food vendor shop at Pine Ridge Mall where she not only prepared food but also hired and fired workers, set schedules, placed and received orders, did the accounting, and made deposits. Claimant next opened a restaurant with her husband and mother. Her duties there varied from food preparation and waiting tables to managerial. She worked seven days a week, up to nine hours per day. During the time she was working at the mall and in her restaurant she was under a permanent lifting restriction of 50 pounds due to prior back surgery. Claimant's restaurant closed in 2004.

3. Claimant's next employment began in 2011, when she was hired to maintain the greeting card display at Ridley's, which took her about three hours per week. Claimant quit that job shortly after going to work for Employer demonstrating food products at various stores in the Pocatello area.

Pre-Accident Medical History

Low Back

4. Claimant's relevant pre-existing low back condition analysis begins, for the purpose of this litigation, in 1998 when she was referred to Benjamin Blair, M.D., an orthopedic surgeon in Pocatello for long-standing (at least to 1975) low back complaints. She was diagnosed with mild degenerative disc disease at L5-S1. Conservative care ensued and was not helpful.

5. MRIs in 1998 and 1999 showed no disc herniations, no nerve root entrapment, and normal canal size at L5-S1. In spite of the relatively benign findings, Claimant continued to complain of intractable severe pain impacting her activities of daily living. She decided to undergo surgery knowing her chance of obtaining relief from the surgery was less than 65%.

6. On July 14, 1999, Claimant underwent a posterior lumbar fusion with cage, pedicle screw instrumentation, and iliac crest bone graft. Thereafter Claimant did reasonably well, albeit with periodic pain flare ups, until late 2003 when she fell down some stairs. Imaging studies showed stenosis directly above the level of her previous surgery.

7. On May 5, 2004, Claimant underwent a laminectomy and fusion at L4-5 with Dr. Blair.

8. After her second surgery, Claimant continued with various symptoms, treated primarily with pain medication. Over time Claimant's pain medication usage increased.

9. By February 2009, Dr. Blair felt it was appropriate for Claimant to seek pain management through a specialist.

10. In March 2009 Claimant came under the care of Michael Garbarini, M.D., at Idaho Pain Group. He diagnosed Claimant with failed back syndrome, along with bipolar

disorder and depression by history. Claimant had a trial morphine intrathecal pain pump implanted in July 2009.

11. In spite of the relief provided by the pump, Claimant was unhappy with her care at Idaho Pain Group so she transferred to Portneuf Pain Specialists in August for further treatment. In February 2010 she had a permanent pump installed.

12. Claimant again transferred her care to Zoe Interventional Pain Management Center in the fall of 2010. She was seen there by various providers. While there, her morphine pump dosage was increased on several occasions throughout 2010 and 2011. Claimant was also prescribed opioids for her knee condition, which is discussed below.

13. Claimant received a right SI joint injection on September 9, 2011, and two others in November of that year. On December 5, 2011 Claimant had her pain pump dosage increased yet again. Throughout this time frame (late 2011 into 2012) Claimant was complaining of bilateral low back pain and numbness/tingling in both lower extremities. Her pain was not sufficiently controlled by her pump. She described her pain at various times as ranging between 5/10 and 10/10, aggravated by walking, standing, lifting, and lying down on her back, and relieved with rest. However, Claimant indicated she was able to work part or full time.

14. One month prior to subject accident, medical records show that Claimant's last morphine was of "mild benefit" and her physician contemplated a 5% increase in morphine dosage. The records do not indicate if the increase was implemented prior to the industrial accident.

Bilateral Knees

15. Claimant first suffered a right knee injury in 1983. After several knee surgeries and continuing complaints, Claimant underwent total right knee replacement surgery in April 2011.

16. Claimant had her left knee replaced in January 2008 after a series of mishaps and related surgeries.

Psychological Issues

17. Claimant has suffered from major depression with anxiety attacks and suicidal tendencies and attempts. She has been admitted to Portneuf Medical Center Behavioral Health Unit on numerous occasions for her self-destructive inclinations, both before and since her industrial accident. She dated the start of her psychological problems to about 1999. Claimant takes various medications for her psychological/emotional issues.

18. Claimant received electroconvulsive therapy (ECT) treatments for her depression. She also was diagnosed with bi-polar disorder. Claimant testified that the ECT and her bi-polar disorder negatively affect her memory. The Referee likewise finds Claimant to be a fair historian at best, and when her testimony is inconsistent with medical or other records, the records will be afforded greater weight unless otherwise noted.

Subject Accident

19. Claimant began working for Employer part time (less than 30 hours per week) as an Event Specialist/Demonstrator in late 2011. Her duties included food and product demonstrations at local stores like Walmart. She was paid \$11.25 per hour.

20. On May 31, 2012, Claimant was at a Walmart store for a scheduled demonstration. Her supplies were in a storage room, but she could not reach them because a box

containing metal shelving was blocking her access. She attempted to have Walmart staff move the box for her, as she was prohibited by Employer from moving store materials. Although she asked for , none promptly came and Claimant finally decided she would have to move the box herself or risk being late to her demonstration.

21. Claimant testified that the box was about 6' high, 3' wide, and 6'' deep, and heavy. She attempted to move it by tipping the box forward and "walking" (rocking and pulling) it across the floor. As she was proceeding, a corner of the box caught in a floor drain and the box tipped forward against Claimant, striking against her right arm and chest/stomach and sliding down her legs, coming to rest on her toes. The impact knocked Claimant into a wall which was behind her. Just then, two Walmart employees came into the room and removed the box from Claimant's feet.

22. Claimant testified she felt immediate pain after this accident and so informed the Walmart employees. A few minutes later Claimant spoke with her supervisor Shawn Owen.¹ She informed him that she had gotten hurt in the accident, but he stated he did not have time to deal with the problem that day. Claimant was unable to perform her demonstration that day. In spite of her significant pain, Claimant was eventually able to walk out of the store and drive herself home. Claimant ascertained she was supposed to go to Physician Immediate Care if she needed care. They were too busy for Claimant to get in that day, so she went on June 2, 2012.

Post-Accident Medical Care

23. When Claimant first presented at Physician Immediate Care she complained of pain in her tail bone, back bone, and right arm. Claimant rated her tailbone pain at 8/10,

¹ In her deposition Claimant testified Mr. Owen called her, apparently after being informed of the incident by Walmart employees. At hearing Claimant stated that she called him.

compared to pre-accident at 2/10 with Claimant's pain pump. Claimant felt the post-accident pain was "different" than pain she had experienced in the past. She also had periodic numbness or radiating pain in her inner right leg. She had a positive right straight leg raise test and complaints consistent with an S2 distribution. She was diagnosed with contusions, (faint, small bruise on right arm, no visible bruising noted on leg or tailbone), and exacerbation of chronic low back pain. Claimant was given modified-duty work restrictions and told to follow up in one week, or sooner if she encountered new problems or concerns.

24. On her return visit, Claimant indicated her back and tailbone pain was worsening, with continuing numbness down her inner right leg into her big toe. Her arm contusion was improved. Claimant was referred to Dr. Blair. Her work restrictions were continued.

25. Claimant saw Dr. Blair on June 27, 2012. At that time Claimant continued to complain of back pain radiating into the tailbone and right lower extremity. Claimant had not worked since the accident. Claimant stressed to Dr. Blair that her ongoing pain was "markedly different" from her previous low back pain, and the new pain was "tailbone pain" which radiated into her right leg and foot and was "associated with weakness". CE C, p. 156.

26. Dr. Blair's examination found Claimant's gait was within normal limits, with a full range of motion in her hips with no pain. Claimant was not tender over her lumbar spine, but was significantly tender over her sacrum. Straight leg raise and crossed straight leg raise tests were negative. Lower extremity motor function and reflexes were normal. X-rays of the lumbar spine showed no traumatic injury; AP pelvis x-rays were unremarkable.

27. Dr. Blair was not sure of Claimant's symptom etiology. He ordered a CT scan to rule out an occult fracture.

28. The lumbar spine CT scan showed, in addition to Claimant's prior fusions at L-4 through S-1, a "moderate to large circumferential bulge and facet arthropathy with ligamentum flavum thickening at L3-4, leading to moderate central canal and bilateral neuroforaminal stenosis." CE C, p. 161. No acute fractures were identified. The pelvic CT scan showed osteoarthritis of the bilateral SI joints and pubic symphysis with mild bilateral hip joint space narrowing. No acute fractures of the sacrum, pelvis or hips noted. (Old healed fractures of the right superior and inferior pubic rami were seen.)

29. Upon review of these findings, Dr. Blair suggested epidural steroid injections for the non-acute herniated disc, which Claimant approved. Dr. Blair held Claimant off work, and referred her for injections with Zoe Interventional Pain Management Center which was overseeing Claimant's pain pump management.

30. When Claimant arrived at Zoe Interventional on June 28, 2012, she was complaining of right side lower back pain, worse over last month, and numbness/tingling radiating into lower limb. Her medical assessment was identical to her last pre-accident visit, and included post fusion back pain syndrome, sacroiliac syndrome, low back pain, and knee osteoarthritis. Her morphine was titrated upward and Claimant was prescribed Lidoderm patches for the affected area.

31. On her July 9, 2012 appointment at Zoe Interventional, Claimant complained of tail bone pain, which she attributed to the industrial accident. Pain levels were as high as 10/10. She was diagnosed with post fusion back pain syndrome and coccydynia (tail bone pain). The morphine increase had no positive effect on Claimant's tail bone pain. Claimant's morphine was increased again, and a ganglion block was recommended, but not provided due to Surety's refusal to authorize.

32. The injections prescribed by Dr. Blair in July were provided during Claimant's August 22, 2012 visit. Claimant was still complaining of tail bone pain. She was injected in the sacro/coccyx area (sacral hiatus). The injection led to a 100% elimination of lumbosacral pain for four days, then pain returned to baseline.

33. On Claimant's September 19, 2012 visit with Zoe Interventional she continued to complain of tail bone pain radiating into right medial thigh, ranging from 6/10 to 10/10. She had been prescribed Gralise (gabapentin) for the radiating thigh pain, which helped, but also increased her depression, so it was stopped. Claimant was prescribed Hydrocodone for the tailbone pain.

34. Claimant had an injection at L3-4 in December 2012, with no permanent improvement in her condition.

35. After the injections over the fall and winter of 2012 provided only temporary relief, Claimant returned on January 3, 2013 to Dr. Blair who presented her with the option of continued conservative care or surgical intervention for her L-3 spinal stenosis. Claimant chose conservative care at that time. Dr. Blair declared Claimant at MMI on that date, and suggested she undergo a functional capacity evaluation (FCE) to determine her permanent restrictions.

36. On March 6, 2013, Dr. Blair, after review of the FCE results, suggested the following permanent restrictions: no crouching or ladder climbing, only occasional stair climbing, no sitting for longer than 30 minutes without rest, and no lifting greater than 20 pounds continuously and 30 pounds occasionally.

37. Claimant continued to have tailbone pain in spite of ongoing narcotic usage to combat this condition. Claimant's lumbar spine pain was relieved with the morphine pump.

38. In April 2014 Claimant underwent bilateral SI joint injections. The injections eliminated over 80% of Claimant's tailbone pain for a week, then pain began returning toward baseline. The results were used to recommend nerve ablation. Claimant was able to reduce her narcotic pain medications by half after the injections, at least for some unspecified period of time.

39. Unfortunately the medical records from Zoe Interventional stop with the April, 28 2014 visit, so it is not possible to determine the nature and extent of Claimant's further treatment by that provider.

40. Claimant returned to Dr. Blair in June 2014 complaining of worsening back pain. She felt the permanent restrictions given by Dr. Blair previously were too lenient. Dr. Blair ordered a new FCE.

41. Claimant attended the FCE in July 2014, but the results were deemed invalid due to Claimant self-limiting her effort. She was given a second chance to perform to her true capabilities in August, and those results were deemed valid. It was noted Claimant needed "cues" to complete her tasks.

42. Dr. Blair agreed with the latest FCE findings of lifting up to 30 pounds floor to waist rarely, 25 pounds occasionally, and 10 pounds frequently; 15 pounds from waist to crown rarely, 10 pounds occasionally, and 5 pounds frequently, with front carry up to 35 pounds rarely, 30 pounds occasionally, and 10 pounds frequently were appropriate as permanent restrictions.

43. Dr. Blair at that time (2014) assigned Claimant a 12% WP impairment rating related to her L3-4 stenosis and related her condition 100% to the industrial accident. He subsequently changed his opinion, as discussed below.

44. Dr. Blair next saw Claimant on May 18, 2016 (after the hearing in this matter) for complaints of progressively worsening low back pain over the past two years with pain into her right leg and foot, despite her unabated narcotic regimen, pain pump, and epidural injections. X-rays showed further degenerative changes at L3-4. An MRI showed disc protrusion at that level and degenerative changes resulting in high-grade narrowing of the central spinal canal and bilateral encroachment into the neural foramen.

45. Dr. Blair performed an L3-4 laminectomy, partial facetectomy, and foraminotomy and decompression surgery on Claimant on June 21, 2016. His records show Claimant was progressing “fairly well” post surgery, and he declared her at MMI from this surgery as of September 21, 2016.

46. After Dr. Blair was provided records from Zoe Interventional he modified his previous PPI rating and apportionment. He opined that Claimant’s L3 stenosis correlated to a 12% WP PPI, apportioned 75% (9% WP) to pre-existing, and 25% (3% WP) to Claimant’s industrial accident. If Claimant’s prior back fusions were considered in addition to her L3 stenosis, his PPI rating for Claimant would be 24% WP PPI, with Claimant’s prior back surgeries rated at 19% WP PPI, and Claimant’s L3 stenosis rated at 5% PPI. Dr. Blair felt that 75% of Claimant’s 5% PPI for L3 stenosis was pre-existing, and 25% (1.25% WP PPI) was related to Claimant’s industrial accident.

Defense IMEs

47. Throughout the course of this case Defendants and ISIF submitted Claimant to several independent medical examinations (IME). Each of them will be analyzed below.

Dr. Tallerico

48. In October 2012 Surety sought an IME from Brian Tallerico, DO. Dr. Tallerico determined Claimant sustained sacral and right arm contusions (both resolved) as the result of her industrial accident. He noted Claimant had significant pre-existing lumbar spine pathology, including two surgeries and an indwelling pain pump for her lumbar spine. Dr. Tallerico felt Claimant did not aggravate her lumbar spine in the industrial accident. He opined the discovery of Claimant's herniated nucleus pulposus at L3-4 was an incidental finding on the CT scan which was ordered to rule out a sacral fracture.

49. Dr. Tallerico felt Claimant's disability present at the time of her examination was a natural progression of her underlying disease process. He did not believe Claimant's accident, where she hit her buttocks and sacral area into the wall from a distance of less than two feet away, would result in a herniated disc at L3-4. A more likely explanation was progression of Claimant's pre-existing lumbar spine fusions at adjacent levels. He opined that Claimant had no permanent disability from her sacral contusion, and was medically stable.

Dr. Doerr

50. Defendants sent Claimant for an IME with Timothy Doerr, M.D., who prepared a report on July 2, 2015. Dr. Doerr undertook a detailed and thorough medical record review (21 pages of single-spaced, small-font type), interviewed the Claimant, and answered questions from the Surety.

51. To a medically-more-probable-than-not, Dr. Doerr opined that Claimant sustained contusions to her right arm, right leg, and sacral area in her May 31, 2012 industrial accident. Her arm and leg contusions resolved within a few weeks, and her sacral injury was medically

stable by the time she saw Dr. Tallerico in October 2012. None of her injuries resulted in permanent impairment or restrictions.

52. When asked if Claimant's low back pain with right leg radiculopathy was related to her industrial accident, Dr. Doerr pointed out that one month before this accident Claimant was complaining to her pain management physician of bilateral low back pain with pain radiation into her right lower extremity. Dr. Doerr felt Claimant's history up to the time of her work accident suggested Claimant's ongoing low back pain was the result of her pre-existing lumbar condition, and not related to any degree with her industrial accident.

53. Dr. Doerr assigned Claimant 7% WP permanent impairment for her low back/right leg pain as the result of her L3-4 stenosis, 100% attributed to Claimant's pre-existing lumbar condition. He rated her bilateral knee replacements at 15% WP PPI.

54. Dr. Doerr suggested the following permanent work restrictions; 30 pounds frequent and 50 pounds occasional lifting for her lumbar fusion and symptomatic stenosis. These restrictions were apportioned 100% to Claimant's pre-existing lumbar status. Dr. Doerr opined that Claimant could return to her time-of-injury job based upon a review of the ICRD job description and his evaluation of Claimant during the IME.

Dr. Simon

55. ISIF hired David Simon, M.D., to examine Claimant and prepare a report. The examination took place on July 30, 2015. In addition to reviewing medical records from April 1998 through just prior to the time of his IME, Dr. Simon examined Claimant and asked her to fill out a pain inventory and questionnaire.

56. Dr. Simon assessed right arm, right leg, low back, and tailbone contusions resulting from Claimant's work accident. He felt she suffered no permanent injuries in

the accident, nor did it aggravate or accelerate any prior medical conditions, most notably her lumbar spine. He pointed out that Claimant did not catch the falling box, or attempt to lift it thereafter, so he was able to rule out a strain injury. Dr. Simon saw no connection between Claimant's accident and her subsequent L3-4 findings.

57. Dr. Simon rated Claimant's permanent impairment at 19% WP for her multiple-level fusions, in no way connected to her industrial accident. He felt Claimant should avoid lifting greater than 35 pounds, and should only bend or stoop occasionally due to her lumbar spine condition.

58. Dr. Simon disagreed with Dr. Blair's opinion that Claimant's stenosis at L3-4 was caused by the accident of May 31, 2012. Dr. Simon noted the facet arthropathy and ligamentum flavum thickening seen on the CT scan of July 17, 2012 were "clearly chronic" and indisputably could not have been caused by an accident which happened a mere seven weeks earlier. IE 2, p. 10. He felt the disc bulge was likewise chronic. He explained that the diffuse bulging of the disc would result in a decrease in the height of the disc, which would then increase the stress on the facet joints, which would in turn lead to arthropathy and thickening of the ligamentum flavum.

59. Dr. Simon was also critical of Dr. Blair's argument that proof the L3-4 disc bulge was new (and related to the industrial accident) can be found in the fact that Claimant complained of right leg symptoms after the accident, and such a complaint cannot be explained by a simple contusion. While Dr. Simon agreed that a contusion would not cause the right leg pain, he pointed out that Claimant had right leg symptoms prior to her accident, which he asserted confirmed his opinion that her L3-4 stenosis was pre-existing.

Physician Depositions

60. Drs. Blair, Doerr, and Simon were deposed post-hearing.

Dr. Blair

61. At his deposition, Dr. Blair acknowledged that he has treated Claimant since 1998 when she first presented with spinal stenosis of her lumbar spine. Dr. Blair testified that he had fused Claimant's spine from L4 through S1 by mid-2004. In 2005, a CT myelogram showed arthritic changes in Claimant's lumbar spine, specifically neural foraminal stenosis on the left at L3-4, which supported her complaints of worsening pain. Dr. Blair eventually referred Claimant to a pain clinic in 2009 due to her unrelenting pain and narcotic use.

62. Dr. Blair noted that when he next saw Claimant in late June 2012 she was complaining of pain from her low back into her tailbone and right leg. Claimant told Dr. Blair this pain began with an industrial accident on May 31 of that year. Diagnostic studies revealed a bulging disc and foraminal stenosis at L3-4.

63. In deposition testimony, Dr. Blair testified that he felt Claimant "had an aggravation of her spinal stenosis and changes in spinal stenosis at L3-4, the area above the surgery" as a result of her work accident. Blair Depo. p.17. He was asked to explain why his opinion had changed from the accident "causing" the herniated disc (rendered on or about November 29, 2012) to "permanently aggravating" her disc condition as stated at his deposition. Dr. Blair indicated that when he was treating Claimant in 2012 he was under the incorrect impression that Claimant's pain level had been "pretty steady" with pain management and these complaints represented a major change in her overall symptoms. *Id.* at 18, 19. After reviewing the pain management records, Dr. Blair had to modify his previous opinion on causation

as noted above. He continued to opine that the need for Claimant's third lumbar surgery was causally related to her industrial accident.

64. Dr. Blair formed his opinion of a permanent aggravation "purely by [Claimant's] history that she was worse...." *Id* at 21. He formed his opinion on causation for the surgery based on Claimant telling him that her symptoms had worsened to the point where she needed surgery at that time, but had not needed it prior. *See*, Blair Depo., p. 22.

65. After Dr. Blair stated his opinion on causation at his deposition, he was provided with several examples he agreed would be consistent with a permanent aggravation of Claimant's L3-4 stenosis, including Claimant's testimony that she used to golf before the accident but not after, that she had Norco added to her medication regimen for back pain after the accident, and that she was limited in daily activities at her house after her work accident.

66. Dr. Blair clarified that Claimant had two separate MMI dates; one in 2013 and another one after the 2016 surgery. Although Claimant reached MMI within a few months post surgery in 2016, Dr. Blair felt that surgery did not help her much. As such, he felt the medical restrictions he gave Claimant in 2014 were still valid after the 2016 surgery.

Dr. Doerr

67. In his deposition, Dr. Doerr went through his report findings and added detail to various entries contained therein. He noted how Claimant had presented with several "non-organic symptoms" (those with no physical or anatomic basis) as exposed in her responses to Waddell testing. He testified that between her Waddell test results and the FCE where Claimant chose not to give full effort, it was difficult to get a handle on her true limitations, or assign restrictions. Instead, he assigned Claimant a "standard" set of restrictions

for someone with previous lumbar surgery, which was 30 pound frequent and 50 pound occasional lifting restrictions. These restrictions were given for Claimant's pre-existing lumbar condition.

68. Dr. Doerr reiterated his belief that Claimant suffered no permanent injury, and thus no impairment, in her May 2012 industrial accident. He disagreed with Dr. Blair's opinion that Claimant permanently aggravated her L3-4 stenosis in her work accident, to the extent that 25% of Claimant's impairment was caused by the accident. Dr. Doerr noted that Claimant had "virtually identical" symptoms a month before the work accident, and thus he assigned 100% of Claimant's impairment to her pre-existing condition. Doerr Depo. p. 17.

69. During cross examination, Dr. Doerr explained that his opinion on causation was based on Claimant's documented ten-year history of chronic low back pain after two fusion surgeries with an escalating need for pain medication, her presentation one month prior to the industrial accident wherein she presented with what Dr. Doerr felt were the exact same symptoms as she complained of post-accident, and Claimant's complaint to her physiatrist two days before the industrial accident that she felt she might need to cut back on her work hours due to her low back issues.² Dr. Doerr pointed out that if there had been an objective analysis of "before and after" diagnostic films, or physical examination by the same physician with notable objective differences in findings, his opinion might be different. However, since neither of those situations took place in this case, Dr. Doerr relied on the medical records as they existed, and gave little weight to Claimant's subjective assertions. *Id* at 25, 26.

² Claimant noted that her hours had been increasing and were approaching 30 hours per week, which was more than her "standard" 25 hours per week that she testified to at hearing, or her average of all hours since she was hired, which calculated out to just under 19 hours per week. It is not clear if Claimant was expressing a desire to return to her 25 hour per week routine, or decrease her hours even more. However, the statement is relevant for the fact that her back pain was sufficient that she felt she needed to discuss her work limitations, and the fact that 30 hours per week might be more than she felt she could handle, given her back pain.

Dr. Simon

70. Dr. Simon's deposition testimony was consistent with his reports. He did note that Claimant's mechanics of injury – being backed into the wall by the tipping box of shelving – would more likely produce bruising than spine injury. He felt a spine injury from such an event was not impossible, but was unlikely.

Witness Testimony

71. Claimant's husband, Daniel "Kent" Rowe, testified at hearing. No attorney requested witness sequestration, so he was present to hear his wife's testimony. (He also attended Claimant's pre-hearing deposition.) His testimony was consistent with Claimant's. He discussed Claimant's inability to do many things around the house, the pain that certain activities cause her, and the fact the two can not do many of the leisure activities, such as travel, golf, and gardening, they did before the industrial accident.

Vocational Rehabilitation Experts

72. All parties retained vocational rehabilitation experts who prepared reports, reached conclusions consistent with the position of the party hiring them, and were deposed. In a general sense, the experts were asked to opine on Claimant's post-accident employability or lack thereof, in an effort to assist in determining her permanent impairment. However, given the disposition of this matter as contained herein, a point-by-point review of their reports, opinions, and deposition testimony adds nothing to the determination of the threshold and dispositive issue of causation, and will not be undertaken.

DISCUSSION AND FURTHER FINDINGS

73. Claimant has the burden of proving, by a preponderance of the evidence, all facts essential to recovery on her claims. *Evans v. Hara's, Inc.*, 123 Idaho 473, 849

P.2d 934, (1993). Claimant must provide medical testimony that supports a 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). To prove that a causal relationship is medically probable requires Claimant to demonstrate that there is more medical evidence for the proposition than against it. *Jensen v. City of Pocatello*, 135 Idaho 406, 18 P.3d 211 (2000). The Industrial Commission, as the factfinder, determines the weight to be given to the testimony of a medical expert. *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 737, 40 P.3d 91, 95 (2002).

74. The first issue for resolution is whether Claimant's low back condition is causally related to her industrial accident of May 31, 2012. Unless Claimant's L3-4 stenosis and associated complications requiring medical intervention were caused at least in part by her work accident in question, she cannot recover her medical care and time loss benefits associated with her L3-4 condition, including surgery. *See, e.g., Sweeney v. Great West Transp.*, 110 Idaho 67, 71, 714 P.2d 36, 40 (1986). Likewise, if Claimant's permanent impairment and permanent disability from such condition is not causally related to her industrial accident she cannot recover those respective benefits. *Accord, Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982).

Causation

75. The parties rely on competing medical records and expert analysis and opinions to support their respective positions on the issue of causation.

Claimant's Position Synopsis

76. Claimant argues the nature and severity of her low back and right lower extremity changed immediately after her industrial accident. She points out that medical records

support her testimony, and document how the accident led to new right leg symptoms, extending all the way down her leg to her big toe, which significantly decreased her ability to perform everyday activities such as chores, riding in cars, lifting, shopping, gardening and golfing. Her claims are also bolstered by her husband's testimony. Claimant was able to work prior to the industrial accident but has not been able to work since.

77. Claimant asserts that prior to the accident her low back pain was controlled by her pain pump, but thereafter the pump (even when titrated up by 5%) could not control her increased pain. Caudal epidural injections did not help. Oral narcotics were used in addition to her pump to try and stem her pain.

78. Dr. Blair's final conclusion was that the accident permanently aggravated Claimant's pre-existing lumbar condition. He supported his conclusion by noting Claimant felt her post-accident pain was different and worse than before the accident. Dr. Blair conceded the majority of Claimant's need for lumbar surgery in 2016 was attributable to her pre-existing condition, but some (25%) of the reason Claimant came to surgery in 2016 was due to her industrial accident, which, in Dr. Blair's opinion, accelerated her need for surgery at L-3.

Defendants' Position Synopsis³

79. Defendants note that Dr. Blair has rendered more than one opinion in this case. First he opined that Claimant's need for surgery was 100% the result of her industrial accident. Confronted with medical records which tended to cast doubt on such opinion, Dr. Blair changed his position on the percentage of causation, but continued to advocate for his patient by attributing some percentage of causation to the work accident. However, even his modified

³ To the extent ISIF made causation arguments, those are incorporated into this section, but not distinguished from the arguments of Employer and Surety.

opinion relied on Claimant's testimony as opposed to any objective record. Defendants point out that simply reiterating the Claimant's history does not create a valid medical opinion on causation.

80. Contrary to Claimant's statements to the IME physicians and at hearing, Claimant's low back pain was not adequately controlled with her pain pump. Over the course of years from its installation, the records show a history of Claimant complaining of increasing pain, only to have the pump titrated upward, supplying her more and more morphine in an attempt to control her pain. She was never "pain free" as she attempted to suggest on direct examination at hearing; a claim she had to abandon during cross examination.

81. Three physicians testified in this case that the more probable explanation for Claimant's continuing low back and lower extremity pain, and 2016 surgery, was her pre-existing and degenerative lumbar condition which, prior to the work accident, had required two surgeries and an implanted morphine pump to address. Even then Claimant continued to complain of increasing pain, with pain noted on a continuing basis both before and after the work accident. The nature of the pain, other than a temporary complaint of tail bone pain immediately after the accident, was consistent throughout the records.

Causation Analysis

82. Claimant relies on her and her husband's subjective testimony, together with the medical opinion of Dr. Blair and selective medical records, to support her claim on causation.

83. The problem confronting Claimant is that she, (consciously or otherwise), has demonstrated a consistent pattern of attempting to manipulate the outcome of this case to her benefit, and/or to dramatize the extent of her injury and/or disability. Striking examples include the fact that, during her IME with Dr. Tallerico, she scored a 5/5 on her Waddell's

testing, designed to ferret out feigned responses and complaints, as well as providing inconsistent non-neurological findings and “give-away” weakness on several tests with Dr. Simon. Claimant also failed to put forth adequate effort in her FCE, leading to a conclusion by the tester that Claimant’s results designed to show her physical limitations were invalid. Even in her second attempt at the FCE, she had to be coaxed into giving a full effort.

84. Claimant was less than candid with Dr. Blair, leading him to believe her 2012 industrial accident was the sole reason for her then-current back complaints (telling him she had excellent results from her pain pump when the records conclusively refute that assertion). Dr. Blair was forced to make major modifications to his causation and impairment opinions when confronted with medical records which were seriously at odds with what he had been led to believe. At hearing, Claimant professed she was without pain and doing great before the accident in question (*e.g.* HT, p. 63, ll. 14-17). She likewise advised Dr. Simon that she was pain free prior to the accident. All of these statements are admittedly (through cross examination) inaccurate.

85. When viewed as a whole, the records in this case project a woman who was having continuous issues with her low back, resulting in multiple surgeries, narcotic prescriptions, and ultimately an indwelling morphine pump supplying her with a steady stream of pain killer to address her lumbar spine issues. While there was a time when she did not need oral narcotics and the morphine pump simultaneously, hers is a degenerative condition that was bound to worsen over time, as described by Dr. Simon. He noted the objective evidence present at Claimant’s L-3 level as shown in diagnostic films was indicative of a long-progressing, chronic condition, not an acute finding. That fact is undisputed in the record.

86. The records discuss right leg pain prior to the accident. The fact that it was worse at some point after the accident does not prove the worsening pain was caused by the work accident as opposed to an ongoing degenerative progression of Claimant's disc disease. While surgery was discussed as an option not long after her work accident, the fact remains Claimant waited four years to undergo surgery, as the pain and limitations increased. That history is consistent with a progressive degenerative disc condition.

87. The weight of the post-accident records and medical testimony establishes the fact that Claimant was primarily complaining of tailbone pain immediately after the accident. She was clear on that point in several medical documents. Dr. Tallerico pointed out that the fact that increasing her morphine did nothing to alleviate her tailbone pain was consistent with the fact that it was Claimant's tailbone, not her low back, that was the source of her acute pain in the weeks post-accident.

88. There was no mention in the weeks after her industrial accident regarding the theory that perhaps Claimant's low back was responsible for transferred pain to her tailbone region. In fact, the only reference to "referred pain" was from Claimant's pain management physician, who thought (incorrectly) that maybe Claimant's tailbone pain was somehow due to an abdominal condition.

89. As noted by Dr. Tallerico, Claimant's L-3 did not even enter into the medical discussions until Dr. Blair discovered the herniation on a CT scan performed to rule out a pelvic fracture.

90. When the entire record as a whole is examined, the opinions of Drs. Tallerico, Doerr, and Simon carry more weight than that of Dr. Blair. Particularly, Dr. Tallerico's report made several important observations, as discussed above, which were

not adequately rebutted by the record or the opinions and testimony of Dr. Blair. Also, Dr. Simon likewise was persuasive in his deposition testimony, pointing out the more likely scenario to explain Claimant's L-3 surgery, given the lack of any objective acute findings and the presence of degenerative conditions at L-3, was a natural progression of the previously degenerative condition found therein.

91. To the contrary, Dr. Blair's opinions are primarily based on the subjective complaints and representations made to him by Claimant. He points to no evidence to support his conclusion on causation other than the fact Claimant's reported pain was worse, and different after the accident than it was before the event.

92. While it is possible Claimant's accident of May 31, 2012 permanently aggravated her L-3 disc, and accelerated her need for another lumbar surgery, the record as a whole does not support that conclusion on a more-probable-than not basis. There is certainly not more evidence for a causal link between Claimant's low back condition and her industrial accident than there is against such proposition. Claimant's medical history, both pre-existing and post-accident, suggests the absence of a causal link based upon the weight of the evidence, including the reports and testimony of Drs. Simon and Doerr, and the report of Dr. Tallerico. Dr. Blair's testimony and written reports were not persuasive in light of the totality of the record.

93. Claimant has failed to prove her low back condition for which she seeks benefits was caused by the industrial accident of May 31, 2012.

Other Claims

94. Claimant's industrial injuries causally related to her industrial accident were limited to temporary contusions of the right arm, right leg, and sacral area.

Claimant reached MMI from her industrial contusion injuries on or before October 26, 2012.

95. Claimant has failed to prove she is entitled to medical benefits beyond those paid previously by Surety.

96. Claimant argues she is entitled to temporary disability benefits for the period of time from November 1, 2012 (when Surety terminated such benefits) to September 21, 2016, when Dr. Blair declared Claimant medically stable after her most recent lumbar surgery. The holding herein rejects Claimant's view of the duration of her period of recovery, concluding Claimant reached medical stability prior to November 1, 2012.

97. Claimant has failed to prove she is entitled to any temporary disability benefits over those paid previously by Surety.

98. Claimant has failed to prove she suffered a permanent injury as a result of her industrial accident. Without a permanent injury, there are no permanent impairment benefits available to Claimant.

99. Claimant has failed to prove she suffered a permanent partial impairment as a result of her industrial accident.

100. There can be no permanent disability without permanent impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 753, 769 P.2d 1122, 1125 (1989). As such Claimant is not entitled to permanent partial disability benefits as a result of her industrial accident.

101. Claimant prevailed on none of her claims, and as such is not entitled to an award of attorney fees.

102. The issues of apportionment and ISIF liability are moot in light of the holding herein.

CONCLUSIONS OF LAW

1. Claimant has failed to prove the low back condition for which she seeks benefits was caused by the industrial accident of May 31, 2012.

2. Claimant has failed to prove she is entitled to medical benefits beyond those paid previously by Surety.

3. Claimant has failed to prove she is entitled to any temporary disability benefits over those paid previously by Surety.

4. Claimant has failed to prove she suffered a permanent partial impairment as a result of her industrial accident.

5. Claimant has failed to prove she suffered any permanent partial disability as a result of her industrial accident.

6. Claimant has failed to prove she is entitled to an award of attorney fees.

7. The remaining issues are moot.

RECOMMENDATION

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

DATED this 10th day of July, 2018.

INDUSTRIAL COMMISSION

/s/
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of July, 2018, 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:

ALBERT MATSUURA
PO BOX 2196
POCATELLO ID 83206

ERIC BAILEY
PO BOX 1007
BOISE ID 83701

PAUL RIPPEL
428 PARK AVE
IDAHO FALLS ID 83402

jsk _____
/s/

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHERI ROWE,

Claimant,

v.

ADVANTAGE MARKETING & SALES,

Employer,

and

HARTFORD INSURANCE CO.
OF THE MIDWEST,

Surety,

and

STATE OF IDAHO,
INDUSTRIAL SPECIAL INDEMNITY FUND,

Defendants.

IC 2012-014427

ORDER

Filed 7/24/18

Pursuant to Idaho Code § 72-717, Referee Brian Harper 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 failed to prove the low back condition for which she seeks benefits was caused by the industrial accident of May 31, 2012.

2. Claimant has failed to prove she is entitled to medical benefits beyond those paid previously by Surety.

3. Claimant has failed to prove she is entitled to any temporary disability benefits over those paid previously by Surety.

4. Claimant has failed to prove she suffered a permanent partial impairment as a result of her industrial accident.

5. Claimant has failed to prove she suffered any permanent partial disability as a result of her industrial accident.

6. Claimant has failed to prove she is entitled to an award of attorney fees.

7. The remaining issues are moot.

DATED this 24th day of July, 2018.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

/s/
Thomas P. Baskin, Commissioner

/s/
Aaron White, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of July, 2018, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

ALBERT MATSUURA
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/s/