

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LINDA MAYER,

Claimant,

v.

STERLING JEWELERS,

Employer,

and

XL SPECIALTY INSURANCE COMPANY,

Surety,
Defendants.

IC 2015-015759

ORDER

FILED

APR - 4 2022
INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee John Hummel 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. To the extent that they are still unpaid, Defendants are liable for Claimant's medical bills in the amount of \$9,262.67.
2. Claimant has sustained a PPD in the amount of 68.3%, inclusive of impairment.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 1st day of April, 2022.


INDUSTRIAL COMMISSION




Aaron White, Chairman


Thomas P. Baskin, Commissioner

ATTEST:


Commission Secretary

For the following reasons, I respectfully dissent.

I respectfully dissent from the majority's conclusion that Claimant has sustained a PPD of 68.3%. Notwithstanding the Referee's observations and reasoning, I cannot support the adoption of Mr. Porter's report for several reasons. In adopting Mr. Porter's finding that Claimant has sustained a PPD of 68.3%, the majority relies upon the testimony and reasoning of vocational expert, Douglas Crum, taken from the case of *Walker v. Clear Springs Food Company*, IC 2004-515150 (Idaho Ind. Comm. September 9, 2016). However, that case is wholly distinct from the current case at hand. In *Walker*, the claimant was found to be totally and permanently disabled under the odd-lot doctrine. Mr. Crum determined that the claimant had lost access to 100% of the jobs in her labor market and reported, "[i]t is my opinion she does not have access to any jobs in her labor market based on those FCE results, combined with her age, education, work experience, skills, that sort of thing, in that labor market." *Walker*, at 8.

The testimony of Mr. Crum cited in the majority opinion emphasizes the need for adjustment when there is a large disparity between the loss of labor market access and loss of

wage-earning capacity and also highlights the limitations involved in using the straight averaging method to determine a claimant's PPD. Nevertheless, his reasoning is misguidedly applied in this case. In the past, the Commission has found that a simple/straight average of the two factors (labor market loss and wage loss) does not always accurately reflect the permanent partial disability sustained by a person as a result of his or her industrial injuries and subsequent impairments and work restrictions. The Commission has held, "the averaging method has its limitations as the two measures averaged are not entirely independent. Complete loss of labor market access produces complete expected wage loss. As loss of labor market access becomes more substantial, the expected wage loss is less significant in predicting actual disability." *Kaye Warner v. Plexus*, IC 2016-003316, (Idaho Ind. Comm. November 30, 2018) at 10.

The Commission has further explained the limitations of the straight averaging method in the case of *Deon*. The Commission found as follows:

Rating an injured worker's permanent disability by averaging her estimated loss of labor market access and expected wage loss, as Drs. Collins and Barros-Bailey have done in the instant case, can provide a useful point of reference. However, the averaging method itself is not without conceptual and actual limitations. As the loss of labor market access becomes substantial, and the expected wage loss negligible, the results of the averaging method become less reliable in predicting actual disability. For illustration, as judged by the averaging method, a hypothetical minimum wage earner injured sufficiently to lose access to 99% of the labor market may theoretically suffer no expected wage loss if she can still perform any minimum wage job. Calculation of such a worker's disability according to the averaging method would produce a permanent disability rating of only 49.5% ($[99\% + 0\%] \div 2$) even though her actual probability of obtaining employment in the remaining 1% of an intensely competitive labor market may be as remote as winning the lottery. The averaging method fails to fully account for the reality that the two factors are not fully independent.

Trudy Deon v. H&J, INC., D/B/A Best Western Coeur d'Alene Inn & Conference Center, IC 2007-005950 (Idaho Ind. Comm. May 3, 2013), at 11. While certain circumstances could exist that would justify making an adjustment to the straight average, those particular circumstances

are not present in this case.

In her deposition, Dr. Collins discussed how she has made up for extreme differences in labor market access and wage capacity loss in the past, and why she did not feel it was appropriate to do so in the instant case:

Now I do know that – and I have in the past given additional weight to one or the other if there is a significant difference. I don't do that unless the – like, for instance, the loss of access is above 85 percent, 90 percent and there is a very low loss of earning capacity, but I will do it at that point. But it also depends on how many jobs are remaining for that individual. In Ms. Mayer's case, there was [sic] 1700 jobs still remaining after we adjusted for her restrictions; so I didn't give additional weight to one or the other. I averaged the two and felt like that was a fair analysis.

Collins Dep., 16:11-23. In the case at hand, Mr. Porter's updated analysis for labor market access found that Claimant had access to 11,700 jobs pre-injury, and 2,815 jobs post-injury. This resulted in total labor market access loss of 75.9%. Ex. 21 at 607. Dr. Collins found a similar number, and determined Claimant had suffered a 73% loss of access to the labor market." Ex. 22 at 631. Likewise, both vocational experts came up with similar numbers regarding Claimant's wage capacity loss. Dr. Collins did not anticipate any loss of earning capacity, and Mr. Porter determined, "any wage loss would be minimal in this case based upon her past wages." Porter Dep., 16:17-19.

Both vocational experts calculated wage capacity loss to be 0.0%. The only substantial difference between the two vocational experts is that Mr. Porter modified his final calculation for Claimant's PPD by an undescribed and unquantified amount, resulting in a PPD of 68.3%. It appears as though Mr. Porter weighted Claimant's loss of labor market access by a factor of 1.8, yet how exactly a factor of 1.8 was arrived at is unexplained. In addition, he has not shown there to be a need for extra weight to be given to the loss of labor market access. As Dr. Collins

suggests, there is only the need for additional weighting when the disparity is extremely high (85% - 90%+) whereas in this case the disparity is only approximately 73% – 76%.

In this case, Dr. Collins determined that despite Claimant's work profile and restrictions, she still had access to a significant number of jobs, 1,929 jobs. Ex. 22 at 631. Mr. Porter determined Claimant still had access to an even greater number, 2,815 jobs. Ex. 21 at 607. As a result, one must conclude that Claimant's probability of obtaining employment is not infinitesimal. Nor does her labor market access vary in such a significant number from Claimant's wage loss to warrant additional weight.

While Mr. Porter tried to explain the factors he took into account in weighting Claimant's loss of labor market access by 1.8, his lack of clarity and elaboration leads one to infer that his ultimate conclusion is flawed. In his deposition, Mr. Porter expressed the following:

So in looking at this case, there is [sic] several factors that I considered before I determined to weight that labor market access loss. The first one was a high labor market loss, the 75.9 percent. So 76 percent loss. In other words, she can't return to 76 out of the 100 of the jobs that she was qualified to perform prior to the accident. So that's a substantial loss right there.

In her particular situation, I also considered her current age. I considered her perception of disability, her presentation as a disabled individual, and her **educational background** in deciding that – you know, the jobs that are out there are going to be very competitive, and I don't think that she has got the skill set currently that would facilitate an easy transition into work.

Porter Dep., 17:10-25 (emphasis added). As Dr. Collins acknowledged in her deposition, it is not unheard of to increase a claimant's disability rating if age is determined to be a significant non-medical factor. Collins Dep., 25:8-10. It is also foreseeable that a claimant's disability rating would be increased based on other non-medical factors that are not picked up in the straight averaging method. However, apparently one of the factors that Mr. Porter considered when he determined to weight the labor market loss higher was Claimant's educational background. This

is a factor that is normally already included in the straight averaging method, as acknowledged by Mr. Porter. Claimant's attorney attempted to walk Mr. Porter through each factor in order to determine why it was appropriate to consider when weighting Claimant's loss of labor market access:

Q. Okay. Let's take those a step at a time. What about her age made you believe that weighting was appropriate?

A. Age discrimination is illegal and happens every day.

[...]

Q. Same question with regard to high school diploma?

A. That in of itself is a factor.

Q. Okay. So you pick that up when – in the – in a straight average?

A. Correct.

Porter Dep., 20:25 – 21:5.

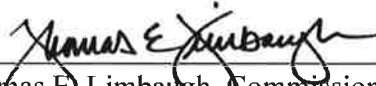
It appears that in his formulaic calculation of Claimant's pre and post injury access to the labor market, Mr. Porter included such factors as the objective restrictions identified in the FCE report, Claimant's past education and experience, and various other factors. Therefore, Claimant's educational background appears to have been taken into account in the straight calculation of Claimant's loss of access to the labor market; her educational level was a factor which was relied upon to predict which jobs she was qualified to perform both before and after the subject accident. Thus, it would be improper to make the subjective judgement to consider her educational background a second time to modify the initial findings. Unfortunately, there is no way to ascertain what additional weight he gave individual factors such as Claimant's age, functional age, disabled appearance, her educational background, or other pertinent

circumstances in deciding that labor market access loss should be weighted by the additional factor of 1.8. The end result is that Claimant's disability rating increased by approximately 30.3%, without being able to attribute how much each factor weighs into that final calculation. The Commission has entertained percentages being added to the total calculation of a claimant's disability rating for non-medical factors such as age, or presentation in the past. Yet, weighting the labor market access loss by an amorphous factor like 1.8 leads to more questions than answers.

The Commission is not privy to all of the calculations that take place in the programs of the vocational experts, and based on the foregoing I cannot endorse the disability rating as proposed by Mr. Porter. Because both vocational experts came to relatively similar numbers regarding Claimant's loss of labor market access and Claimant's expected wage loss, I would support the number offered by Dr. Collins and award Claimant a permanent partial disability rating of 36.5% inclusive of impairment. Dr. Collins determined this to be a fair analysis, and the evidence supports her findings. Therefore, based on the reasons discussed above, I respectfully dissent.

DATED this the 1st day of April, 2022.

INDUSTRIAL COMMISSION



Thomas E. Limbaugh, Commissioner

ATTEST:



Commission Secretary

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CERTIFICATE OF SERVICE

I hereby certify that on the ~~1st~~^{4th} day of April, 2022, 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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**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

FILED

APRIL 4, 2022

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John Hummel, who conducted a hearing via Zoom teleconference on March 3, 2021. Patrick N. George, of Pocatello, represented Claimant, Linda Mayer, who was present in person. Michael E. Kelly, of Boise, represented Defendant Employer, Sterling Jewelers, and Defendant Surety, XL Specialty Insurance Company. The parties presented oral and documentary evidence. The parties also took post-hearing depositions and later submitted briefs. The matter came under advisement on August 25, 2021.

ISSUES

The issues to be decided by the Commission as the result of the hearing are as follows:

1. Whether, and to what extent, Claimant is entitled to the following benefits:
 - a. Medical care; and
 - b. Permanent partial disability (PPD).

CONTENTIONS OF THE PARTIES

On May 9, 2015, Claimant was working for Employer when a security gate struck her neck and head. This was an accepted claim and Claimant had cervical fusion surgery at Defendants' expense. The only disagreement between the parties is the amount of permanent partial disability (PPD) attributable to Claimant as a result of the industrial accident and her cervical injury. Claimant's vocational expert Delyn Porter opined that Claimant has sustained a PPD in the amount of 68.3%. This was based upon weighting loss of labor market access by a factor of 1.8. Defendants assert that Claimant has sustained PPD of 36.5%, based upon their expert Dr. Nancy Collins' opinion that loss of labor market access should be averaged with no wage capacity loss, without any weight given to labor market loss. Thus, the parties agree that Claimant is entitled to PPD, but they disagree about the amount.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Joint Exhibits 1 through 24, admitted at the hearing.
3. The transcript of the hearing held on March 3, 2021.
4. The post hearing deposition testimony of Justin M. Dazley, MD, taken on April 2, 2021 by Claimant.
5. The post hearing deposition testimony of Delyn D. Porter, MA, CRC, CIWCS, taken on May 12, 2021 by Claimant.
6. The post hearing deposition testimony of Nancy J. Collins, Ph. D., taken May 12, 2021 by Defendants.

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

FINDINGS OF FACT

1. **Claimant's Background.** At the time of hearing, Claimant resided in Jerome, Idaho with her family. *Tr.*, 14:7-12. Her date of birth was May 5, 1956 and she was 64 years of age at the time of hearing. *Id.*, at 14:21-22. She had two adult children and grandchildren. *Id.* at 14:25-15:11.

2. Claimant attended but did not graduate from Polytechnic High School in Long Beach, California. *Id.* at 15:14-25. She left Long Beach when she turned 18 in 1974. She did not get a G.E.D. nor did she attend college. She attended West Valley Occupational Center in Woodland Hills, California, for a year and a half, and obtained a hair stylists' certificate, but she did not take the state board examination for cosmetology. *Id.* at 16:1-16. She has not worked professionally in cosmetology. *Id.* at 17:3-5.

3. **Employment History.**¹ In 2008, Claimant was working at Macy's Department Store as a specialist in the intimate apparel department. She had to take a class to become certified in bra fittings. She performed data entry in the computer, rang up sales, and ordered items that were not in stock for customers. She was required to lift store product, stock the supply room, and stock the display shelves. Boxes weighed 25 pounds or more. Claimant also did store closings, trained new employees, changed the figures on mannequins, and changed displays. *Id.* at 17:8-19:5.

4. Claimant believed that she could no longer perform the Macy's job, post-injury, because she "could not bend or lift my left arm and that over my head to place them

¹ This history of Claimant's employment begins in 2008, because that was what was provided at hearing.

[merchandise] on any of the racks for displays. I couldn't carry the mannequins. I could not put the boxes out." Tr., 19:6-12.

5. Claimant worked at Macy's for three years from 2008 until 2011. *Id.* at 19:16-19. She earned \$10.40 per hour at Macy's. *Id.* at 20:15-17.

6. Claimant next worked at Motherhood, a maternity store, first as the assistant manager and then as the manager. *Id.* at 19:21-25. Motherhood was located in the Magic Valley Mall. Claimant's duties were hiring, firing, training, banking, stocking, reordering, shipping out stock, helping customers, changing the floor set including the mannequins, changing hardware on the walls, and moving display racks around. Motherhood changed the floor sales set once a month and Claimant was responsible for that. *Id.* at 20:6-11.

7. Claimant earned \$10.00 per hour at Motherhood. *Id.* at 20:18-20.

8. Claimant next worked for Samuels Jewelers from 2011 to 2012. She put out stock in the display cabinets, displayed the jewelry for customers, performed computer work, and returned the jewelry stock to the back room at the end of the workday. *Id.* at 20:21-21:7. Claimant was required to lift multiple trays of jewelry out of bins to put items in the display case, then reverse the process at the end of the day. If a jewelry item needed polishing, she used a polishing machine. *Id.* at 21:15-23. She does not believe she could perform the lifting tasks today, post-injury, because she couldn't carry the jewelry in the bins "and you can't carry one piece at a time, because you have approximately three to five thousand different items." *Id.* at 21:24-22:5.

9. Claimant earned \$8.50 per hour plus commissions on sales for Samuels Jewelers, which averaged out to \$12.00 per hour. *Id.* at 21:8-14.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 4

10. After Samuels Jewelers, Claimant next worked at Tuxedos Now, an apparel store, beginning in or about 2012. Tr., 24:13-15. At Tuxedos Now, her duties were to make sure the tuxedos, prom dresses, etc. were in each bag, that they were ironed, and checked in. She was responsible to hang the bags, and then take the items out and put them in a dressing room for the customer to help them get dressed, and then re-bag the item and give to the customer if it fit properly. *Id.* at 25:3-11.

11. Claimant made \$10.00 per hour at Tuxedos Now. *Id.* at 25:15-16.

12. **Subject Employment.** Claimant next worked at Kay Jewelers, which is a wholly owned subsidiary of the same company as Sterling Jewelers, so the next employer she worked for is Employer in this matter. *Id.* at 25:17-26:3.

13. Claimant's duties for Employer included stocking and restocking jewelry merchandise in display cases and shelves, checking in the merchandise, transferring merchandise from the safe, training other employees, working on the computer (which included transacting a sale, looking up items, and designing a custom piece of jewelry). Claimant "did everything in management" because she was the third manager in the store. *Id.* at 26:8-19.

14. Claimant earned \$10 per hour plus commissions, which worked out to \$12.50 per hour. *Id.* at 26:20-24.

15. **Retail Sales Career.** Claimant agreed with the statement that "pretty much your whole life in – has been spent in retail sales." *Id.* at 26:25-27:2.

16. **Industrial Accident.** On May 8, 2015, Claimant and "Tony," the store manager closed the store. They got halfway down the mall when Tony realized he had left his game box in the store. Store rules require two employees to be together in the store at any one time, so Claimant accompanied Tony back to the store. Claimant was following behind Tony when he

pulled the gate down. Claimant was underneath the gate and it fell, slipping from Tony's hand, hitting her head and she flew back about six feet. She did not know whether she lost consciousness but does recall Tony standing over her asking her if she was O.K. An ambulance was not called. Claimant threw up at her car and then drove home to her apartment. Her houseguest took her immediately to the emergency room. Tr., 31:10-32:14; Ex. 1:2.

17. **Medical Care.** At St. Luke's Magic Valley Medical Center emergency room, Eric S. Cassidy, M.D., examined Claimant. He noted in pertinent part as follows regarding the accident: "This is a 59 year old patient who works at Kay's Jewelers. Her boss went to pull down the metal door of the jewelry store and the door came down and struck her in the head." Claimant denied loss of consciousness but complained of a severe headache. She had some limited imaging that was inconclusive. Dr. Cassidy administered pain medication, instructed Claimant to ice the affected areas, and discharged her home with instructions to follow up with occupational health. Ex. 8:230-231.

18. Claimant presented on May 11, 2015 to Saint Luke's Clinic, LLC – Occupational Medicine. Douglas Stagg, M.D., examined her. Claimant complained of a headache and thought that her thought process, memory and speech were a little slow. Dr. Stagg noted that she was driving. Her head showed no hematoma. Her neck showed 50% range of motion in all planes. Dr. Stagg diagnosed Claimant with a closed head injury and neck strain. He also placed her on a do not lift, push or pull over 10 pounds, modified duty. He also prescribed pain medication. Ex. 9:265-267.

19. Claimant continued to treat with Dr. Stagg with no improvement. On May 13, 2015, Claimant reported that "work was tough on her," having to complete 8 hour shifts

with a painful neck and headache. Her most difficulty was with her neck. Dr. Stagg limited Claimant to 4-hour work shifts in addition to continuing the previous restrictions. Ex. 9:268-270.

20. On June 23, 2015, Dr. Stagg examined Claimant again. This time her head symptoms were gone but she was still complaining of persistent, diffuse neck pain. Dr. Stagg sent her to physical therapy for three visits. Ex. 9:272-274.

21. Claimant continued to treat with Dr. Stagg. On May 23, 2016, Claimant was referred to Justin M. Dazley, M.D., an orthopedic surgeon with Saint Luke's. Ex. 9:286; Ex. 7:146.

22. Dr. Dazley first saw Claimant as a patient on May 23, 2016. He noted her persistent neck pain and ordered an MRI of the cervical spine. Ex. 7:146-149.

23. The MRI of Claimant's cervical spine took place on June 20, 2016. Ex. 7:158-159. On July 6, 2016, Dr. Dazley took Claimant off work due to her condition. Ex. 7:160.

24. On July 19, 2016, Dr. Dazley wrote a letter to Surety explaining Claimant's then current condition, including the results of the MRI. In pertinent part, Dr. Dazley wrote as follows: "Her diagnosis is cervical stenosis with myelopathy, as evidenced by her physical examination, which consists of long track signs, and she also has complaints consistent with myelopathy; such as hand coordination problems. The etiology and causation of the diagnosis is the cervical disc herniation at C5-C7. I feel more likely than not that this diagnosis is related to the industrial injury." Ex. 7:165. Dr. Dazley further explained that Claimant had a "serious medical condition that requires timely medical attention. The options are essentially limited to surgery for the diagnosis of cervical stenosis with myelopathy, which she has." *Id.*

25. As of August 16, 2016, Claimant was still having significant symptoms, despite conservative treatment. Dr. Dazley recommended surgery to include anterior cervical discectomy

and fusion at C6-C7. Ex. 7:170. Dr. Dazley performed such surgery on August 16, 2016. The diagnosis was cervical radiculopathy and neck pain. The operation performed was an anterior cervical fusion C6-C7, application of intervertebral device C6-C7, anterior instrumentation C6-C7. Claimant tolerated the procedure well. Ex. 7:171-173.

26. Following surgery, Dr. Dazley ordered imaging of Claimant's cervical spine which demonstrated, according to his note dated August 22, 2016, "maintained alignment, well positioned hardware and evidence of graft in the intervertebral disc space." Ex. 7:185. Claimant's pain scale was a 6/10 in her neck, but she did not take her pain medication that morning. Dr. Dazley noted that Claimant was doing well since he saw her last. Claimant was to continue restrictions of no bending, lifting or twisting, with use of a cervical collar per Claimant's discretion. Ex. 7:186-187.

27. Claimant continued to treat with Dr. Dazley and the staff of his clinic. On September 25, 2016, Dr. Dazley noted that Claimant "has been doing well since I saw her last. Her neck seems to be somewhat improved. Her left arm still has parathesis, but the pain has improved, and she has no noted change in coordination of the upper extremity." Ex. 7:194.

28. On October 24, 2016, Claimant continued to complain of pain and numbness, with her headaches being the most bothersome for her. Claimant felt that her symptoms were unchanged from the last visit. Ex. 7:197. Dr. Dazley continued to order that Claimant remain off work. Ex. 7:199.

29. In a follow-up visit with Dr. Dazley's clinic with Phillip E. Stevenson, PA-C, on November 21, 2016, Claimant was still having pain in her neck and lots of headaches. She also had several dizziness episodes because of which she elected not to drive and to live with a friend to avoid further falls. Ex. 7:208. Claimant's physical therapy was continued. Ex. 7:219.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 8

30. Upon referral, Claimant presented to Nancy E. Greenwald, M.D., a physiatrist with Idaho Physical Medicine & Rehabilitation, on December 20, 2016. Claimant saw Dr. Greenwald for the problem of “intractable headaches” following her industrial injury. Dr. Greenwald reviewed Claimant’s medical records. Dr. Greenwald assessed Claimant as follows: 1. Concussion, without loss of consciousness, subsequent encounter; 2. Intractable chronic post-traumatic headaches; 3. Dizziness; 4. Cervical vertebral fusion; and 5. Sleep-wake 24 cycle disruption. Dr. Greenwald recommended as follows: “Clearly has mechanism for concussion and needs treatment for concussion. Because of the time past and chronicity, I recommend a full course of treatment in an intensive outpatient program. I recommend 2-3 weeks 5 days a week program... SLP for cognition. OT for left arm and ADLs. PT for her dizziness and PT for exercise program, and a neuropsych test in the beginning.” Ex. 14:423-428.

31. On January 18, 2017, Claimant returned to Dr. Greenwald for headache management. Dr. Greenwald reviewed an MRI of the brain which revealed the following finding: “mild flattening of the pituitary gland within sella turcica along with tortuosity of the optic sheaths bilaterally. This raises suspicion for increased intracranial pressures... Otherwise, normal brain MRI no evidence of acute or chronic intracranial injury.” *Id.* at 435-438.

32. On January 25, 2017, Claimant received a referral to physical therapy at Saint Luke’s. Ex. 7:203.

33. On February 22, 2017, Claimant followed up with Dr. Greenwald, who noted that Claimant did not enroll in a concussion outpatient treatment program. She prescribed Fluoxetine for the concussion and noted that anxiety can overlap dizziness. Dr. Greenwald further recommended continuing a home exercise program for Claimant’s neck. For sleep, she prescribed Nortriptyline. Ex. 14:439-441.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 9

34. On February 27, 2017, Claimant followed up with Dr. Dazley's clinic. She denied any neck pain but stated that she still had problems with headaches and dizziness and had been consulting a neurologist for those problems. Claimant's symptoms in her left arm were unchanged. Ex. 7:220.

35. Claimant made an emergency room visit to Saint Luke's on March 17, 2017, after falling in the shower. She reported she had been having an increased number of such falls after her industrial accident. Ex. 10:290.

36. Upon referral from Dr. Greenwald, James H. Herrold, M.D., a neurologist with Les Bois Neurology in Boise, evaluated Claimant on March 21, 2017. Claimant continued to complain of headaches, dizziness, and confusion. Dr. Herrold recommended in pertinent part as follows:

In light of the evaluation results, it will be important to educate Ms. Mayer on the nature of her current cognitive functioning and the recovery progress she has made since her concussion. She should be reassured, that she has returned to essentially normal cognitive functioning for her and that it is no longer an impediment to her engaging in activities meaningful for everyday functioning. This would include work, driving, and leisure pursuits.

Ex. 17:460.

37. Claimant returned to Dr. Greenwald on March 21, 2017. Dr. Greenwald noted that Claimant had an abnormal HCT not related to the accident. Claimant was still complaining of significant sleep problems, dizziness "all the time," poor memory, left shoulder numbness as well as left thumb and left index finger, and use of pain medications (oxycodone and hydrocodone). Claimant had finished a program for her concussion. Dr. Greenwald assigned Claimant a 12% whole person impairment, based upon the 6th Edition of the *Guides*, for her cervical vertebral fusion. Ex. 14:442-445.

38. Claimant received a referral to Stephen Hansen, M.D., of Idaho Sports and Spine located in Pocatello. He saw Claimant for the first time on October 3, 2017. Claimant stated that although her surgery was performed without complication, it did not accomplish her objectives, as none of her symptoms had improved. Dr. Hansen performed a physical examination and reviewed imaging studies. Dr. Hansen diagnosed cervical spondylosis, cervicgia, cervical disc protrusion, s/p acdf, cervical degenerative disc disease, and neck trauma causing cervical strain. He recommended massage therapy and physical therapy. Ex. 12:338-342.

39. Claimant returned to Dr. Hansen on January 23, 2018. On this occasion, she underwent a cervical medial branch blocks procedure administered by Dr. Hansen. Ex. 12:345-348.

40. Claimant returned to Dr. Hanssen on April 24, 2018 for administration of a second round of cervical medial branch blocks. Ex. 12:349-354.

41. Claimant returned to Dr. Hansen's clinic on May 15, 2018, and reported she had some resolution of her symptoms following the RFA (radiofrequency ablation). Claimant reported still having a constant level of pain. The clinic stated, "We are going to give this a few more weeks, course of PT with St. Luke's in Twin Falls for fall prevention." Ex. 12:355-359.

42. Claimant returned to Dr. Hansen's clinic on September 20, 2018. Dr. Hansen noted that Claimant fell at home and historically presented after RFA. She stated her pain continued in the left neck and shoulder. She had been attending PT with good results. He further noted that Claimant has received little relief following her surgery, and while the RFA helped "some," but not completely. Ex. 12:360-364.

43. At their last visit on September 20, 2018, Dr. Hansen performed an impairment rating for Claimant for her cervical injury, rating it as a 12% whole body impairment.² Ex. 12:363.

44. **Functional Capacity Evaluations.** *Workwell Systems, Inc.* Therapist Kevin Cherry of Workwell Systems, Inc. in Twin Falls performed a functional capacity exam (FCE) of Claimant on September 25, 2018. Ex. 19:546. The purpose of the FCE was to determine Claimant's physical abilities. *Id.* at 547. The test lasted one day. *Id.*

45. For cooperation and effort, Mr. Cherry noted Claimant's "patterns of movement and physiological responses were consistent with maximum effort." *Id.* He further concluded that Claimant gave maximal effort on all test items. *Id.*

46. For a pain report, Mr. Cherry noted that Claimant reported discomfort in the cervical area during waist to floor and forward bending-standing activity. *Id.*

47. "Abilities and Strengths" were noted as follows 1.) LE strength within functional limits; and 2.) Good hand dexterity. Ex. 19:547.

48. "Limitations" were as follows: 1.) decreased cervical ROM in all ranges; 2.) decreased standing balance; 3.) unsteady gait pattern if not using an assistive device (single point cane); and 4.) decreased cervical strength. *Id.*

49. Additionally, Mr. Cherry noted that Claimant had decreased sensation at the first through third fingers of the left hand or C6-C7 distribution. Ex. 19:555.

50. Mr. Cherry recommended that Claimant not lift more than 5 pounds waist to crown frequently and nothing from the floor to waist. Ex. 19:549. It was recommended that Claimant not lift more than 10 to 15 pounds ever. Furthermore, Claimant should rarely use stairs,

² Claimant acknowledges that Defendants have fully paid her impairment. *See*, Claimant's Brief at 6.

and, as far as standing, she is limited to using a cane and should avoid uneven surfaces. Ex. 19:550.

51. *Mayes Physical Therapy*. D. Dean Mayes, P.T., DBT, MHS, performed an FCE of Claimant on December 4, 2019. His primary conclusions were summarized as follows:

Find enclosed my evaluation on Linda Mayer. In the evaluation I tried to address her present physical condition and how that affects her ability to do things physically and functionally. I spent quite a bit of time on her unsteadiness and lack of balance. This greatly affects her ability to function physically; productively and with safety. She shows to be a medium to high risk of falling (which she has done already several times). Her cognitive, sensory and diminished LUE physical function make her ability to function even more limited. In my opinion she is not employable at this time and I do not feel she will be employable the near of distant future. I found Linda to be cooperative and compliant with the evaluation process. I did not detect any obvious signs of symptom magnification or malingering.

Ex. 20:567.

52. Mr. Mayes' specific restrictions included the following: Claimant needed to use a cane and her gait was slow, cautious, and unsure of herself. Ex. 20:569. Mr. Mayes also noted that Claimant's range of motion in her cervical spine was limited by at least 10-15 degrees and that her sensation in her left hand had less touch sensation. Ex. 20:569. Her left hand had seven pounds of grip strength compared to her right hand at 54 pounds. Ex. 20:570. Falling tests put her at a medium to high risk of falling. Ex. 20:570. Claimant was limited to lifting only very light items that weighed 5 pound or less. Ex. 20:571.

53. Dr. Dazley reviewed both FCEs and concluded as follows: "I have reviewed these records in detail, and I do agree with the restrictions in general, as well as the specific limitations regarding weight, the duration of lifting, and frequency of lifting. Moreover, I think it is clear on a more probable than not basis that these limitations stem both from her original workplace accident, as well as the subsequent necessary treatment." Ex. 18:543.

54. Dr. Hansen reviewed the WorkWell FCE and stated as follows: "It is my medical opinion that the restrictions stated in the Functional Capacity Examination are appropriate relative to the work-related accident and I adopt the same." Ex. 19:545.

55. **Claimant's Condition at Hearing.** When asked whether she could perform any of her previous jobs listed in the record, Claimant replied as follows:

A. No.

Q. Why not?

A. Because you are constantly bending and lifting and carrying and a lot of computer work, which I'm no longer able to do anymore.

Q. Are you – do you go grocery shopping?

A. I do.

Q. How do you go grocery shopping?

A. You call it in and make an order and, then, you go to the place and they take it and they put it in your trunk and you tell them thank you and you leave. And if I go inside I go inside and I use the cart as a walker and then, I get what I need to get and then, they will put it in the cart for me and put it in my car.

Q. Okay... but let's say for a second that you went into a store and you were going to buy some milk, how would you – how would you deal with that?

A. Well, I use my right side for almost anything – everything. I – the left side is not very good anymore.. And put it in and, then, I have them do the rest.

Q. Okay. You said your right side – you would use your right side. Your left side isn't very good anymore... What do you mean your left side isn't very good anymore?

A. I can't lift and I can't carry and I had no strength in it and I can't use it over my – put it up like groceries in the top shelf or reach a top shelf and I can't bend into the cart to get all this stuff out with my neck and, then, putting it back up there it's difficult.

Q. Why is that? Is it numbness? Is it – what is going on with your left hand and arm that makes it difficult to do these tasks?

A. On the left hand it is still numb. On the fingers and thumb --- part of the hand there and, then, I have no strength on that side and, then, in my neck, just to move it up and down and side to side is extremely painful. I will move it, but anytime I do it is extremely painful.

.....
Q. Okay. You probably do some housework.

A. Very little.

Q. What housework do you do?

A. I can wash the dishes in the sink and I can do that with no assistance. I can pick up my clothes, put them in the basket with no assistance. When I'm with Theresa we have someone who comes in and cleans, so I can't physically do it. So, Theresa or the person that we pay to come in will do it.

Q. Okay. Are – are you able to take you clothes – take them into the washing machine and put them in the washing machine?

A. I do do that.

Q. Okay.

A. And it is painful, but you have to have clean clothes.

Tr., 27:27-28:10; 28:12-29:13; 29:22-30:12.

56. **Claimant's Attempts at Reemployment.** Claimant returned to attempt employment with Employer following her recovery from cervical surgery, in or about 2018. Her attempt to do the job was not successful because due to her physical limitations, she could not satisfy the minimum requirements of the position. *Id.*, at 59:3-22. Since that time, Claimant has not attempted to become re-employed and has had no further employers. *Id.* at 59:223-25.

57. **Social Security Disability.** At the time of hearing Claimant was a current recipient of Social Security Disability benefits. She had been a recipient for approximately two years. *Id.*, 58:25-59:2; Ex. 23.

58. **Vocational Experts.** *Delyn D. Porter, M.A., CRC, CIWICS.* Claimant commissioned Delyn Porter to prepare a vocational evaluation report. His report is dated October 29, 2018. The Commission is familiar with the qualifications of Mr. Porter. Ex. 21.

59. To prepare his report, Mr. Porter first met with Claimant in an in-person interview on September 20, 2018. *Id.* at 581. He then reviewed all relevant medical information, including but not limited to the records of Dr. Dazley and the FCEs. *Id.* at 582. He also consulted various standard vocational treatises, such as the *Dictionary of Occupational Titles*. *Id.*

60. After listing Claimant's educational background and social history, Mr. Porter noted as follows: "Ms. Mayer has spent the majority of her adult working life in retail sales. The majority of her transferable skills also center around the retail sales industry." *Id.* at 588.

61. Claimant reported to Mr. Porter that she was not referred to the Industrial Commission Rehabilitation Division, nor has she sought job seeking help from the Idaho Division of Vocational Rehabilitation. *Id.*

62. In addition to the work history already outlined above, Claimant reported to Mr. Porter that she had worked as an account manager, office manager, and assistant to CEO. Ex. 21:589.

63. Claimant reported the following functional capacity to Mr. Porter:

Standing	Reports increased dizziness with standing. Has to use a cane for balance and support. Is only able to stand for a maximum of approximately 15 minutes.
Walking	Reports that she must use a cane for assistance while walking. Is able to walk a maximum of 10-15 minutes on flat surfaces using the cane. Avoids walking on uneven terrain.
Sitting	Reports increased neck pain while extended sitting. Has limited range of motion that makes it difficult to twist her neck while sitting.
Lifting/Carrying	Reports left side weakness. Is only able to lift a maximum of 5-10 pounds has to primarily use her right arm for most lifting and carrying activities.
Pushing/Pulling	Has difficulty pushing/pulling. Has to lean on her cane for support when pushing/pulling.
Kneeling	Reports poor balance and an inability to kneel. She reports that she falls if she attempts to kneel.
Bending/Stooping	Is able to bend at the waist but has to hold onto a stationary item for support when bending over due to balance problems. Unable to perform repetitive or rapid bending.
Twisting	Has a cervical fusion making twisting her neck difficult. She will

	typically turn her whole body.
Forward Reaching	Reports left arm weakness with forward reaching. Unable to perform repetitive or frequent forward reaching using the left arm.
Overhead Reaching	Reports left arm weakness with overhead reaching. Unable to perform repetitive or frequent overhead reaching with the left arm.
Climbing	Reports difficulty bending her head when going down the stairs. She has to use the handrail and go very, very slowly.
Gripping	Is right hand dominant. Reports poor grip strength in her left hand.
Fine Fingered Handling	Reports numbness in the fingers of her left hand that impacts her fine motor skills in the left upper extremity.
Feeling	Reports daily average chronic pain of 7/10. Reports worsening pain with activity and weather changes. Also reports frequent debilitating headaches. Reports that her pain will occasionally keep her bed-ridden for up to three days when the pain is bad.
Vision	Has to wear glasses to drive.
Sleeping	Reports poor sleep patterns. Tosses and turns throughout the night. Will typically only sleep a maximum of 5-6 hours per night. Will take occasional daytime naps.
Driving	Is able to drive safely for local driving only. Has difficulty in turning to look out windows and mirrors. Relies on others for most driving/travel. Does not drive at night due to extreme light sensitivity from the headlights.
Other	Is independent in her activities of daily living but has significant problems completing her ADLs. She frequently falls in the shower. She has to sit to get dressed. She is

	<p>living with her daughter who takes care of the household chores and yardwork. Is able to help with some cooking and cleaning but only for a few minutes at a time.</p> <p>Reports ongoing problems with poor balance, dizziness, etc. Has to use a cane for support when walking. Also reports some short-term and long-term memory loss. Acknowledges some situational depression and anxiousness related to her loss of function and loss of employment.</p>
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Ex. 21:590-591.

64. Consulting the *Dictionary of Occupational Titles*, Mr. Porter found that the following job titles were applicable to Claimant's work career: Salesperson, Jewelry; Garment Fitter (retail trade); Manager, Department; Salesperson, Women's Apparel and Accessories; Sales Clerk; Clerk, General; Administrative Assistant. *Id.* at 591-594.

65. For a transferable skills analysis, Mr. Porter determined that Claimant had previously worked in occupations ranging from semi-skilled to skilled employment. Her work history includes jobs with a Specific Vocational Preparation (SVP) of 3 up to 7. *Id.* at 594.

66. For General Educational Development, Mr. Porter placed Claimant at Level 3, high school education with a less demanding curriculum. *Id.* at 597.

67. Based upon Claimant's work history, Mr. Porter placed her Overall Experience GED at level 4, successful work experience in organized technology. *Id.* at 598.

68. Mr. Porter determined that based upon the results of the Wright FCE, Claimant was limited to LIMITED-SEDENTARY physical demand employment, and therefore does not qualify to return to her time-of-injury employment. *Id.*

69. For purposes of defining Claimant's job market, Mr. Porter considered a 50-mile radius from her residence in Buhl, Idaho. This includes the South-Central Idaho labor market as defined by the Idaho Department of Labor. Ex. 21:599.

70. Mr. Porter observed that Claimant's "vocational profile is based upon her limited educational background, her past work history and transferable skills, and her assigned permanent work restrictions." *Id.* He further noted that Claimant "has a long history of successful employment in the retail sales and management industry. Her transferable skills center primarily around retail sales." *Id.*

71. Mr. Porter observed as follows: "Based upon the objective results of the FCE, Ms. Mayer is restricted to no more than SEDENTARY physical demand work post-injury. The noted restrictions are not compatible with the required physical demands of the time of injury job." *Id.*

72. Mr. Porter noted that "To her credit, Ms. Mayer attempted to return to work following her industrial accident and cervical fusion but was unable to perform the essential functions of the job and was ultimately terminated in March 2017." *Id.*

73. Mr. Porter concluded as follows: "Based on the noted restrictions identified in the FCE, Ms. Mayer has sustained a very significant loss of labor market access post-injury. She lacks the educational background and skill set typically required to seek and maintain employment that would be compatible with the noted restrictions." *Id.*

74. For a pre-injury labor market analysis, Mr. Porter determined that Claimant had access to approximately 11,700 jobs in her labor market. When the restrictions from the FCE were applied to her situation, Claimant would only have access to 705 jobs, post-injury. This resulted in a 94.05% loss of labor market access. Ex. 21:600-601.

75. For a wage capacity loss analysis, Mr. Porter used Claimant's pre-injury wage of \$12.02 per hour (\$10.00 plus commissions). He then compared this to the three occupations she could still pursue with her restrictions, which had an average wage of \$10.38 per hour. This resulted in a wage capacity loss of 13.63%. Ex. 21:601-602.

76. At the request of Claimant's counsel, Mr. Porter prepared an Addendum to his Vocational Evaluation Report, dated March 12, 2020. *Id.* at 605. The purpose of the Addendum was to specifically address Permanent Partial Disability (PPD). *Id.* at 602-603.

77. Mr. Porter's updated analysis for labor market access found that Claimant had access to 11,700 jobs pre-injury, and 2,815 jobs post-injury. This resulted in total labor market access loss of 75.9%. *Id.* at 607.

78. Once again, Mr. Porter stated Claimant's pre-injury wage at \$12.02 per hour. Based upon a survey of available jobs to Claimant post-injury, Mr. Porter found an average wage of \$13.18 per hour. This means that her calculated net earning capacity loss is 0%. *Id.* at 607-608.

79. Mr. Porter calculated PPD weighting labor market loss heavier than wage capacity by a factor of 1.8. This resulted in a Permanent Partial Disability (PPD) for Claimant of 68.3%. *Id.* at 608-609.

80. ***Porter Deposition.*** Claimant took the deposition of Mr. Porter on May 12, 2021. Porter Dep., 2:1-5.

81. Mr. Porter described Claimant as follows: Claimant "is an obese individual who walked with a very significant limp. She had a cane when she walked in. Appears old and disabled is the way I would describe it." *Id.* at 6:19-22.

82. Claimant appeared “unsteady” walking in and out of the conference room where she met with Mr. Porter. Porter Dep., 7:10-14.

83. Based upon his interview with Claimant, noting that Claimant dropped out of high school in 1975, Mr. Porter observed that Claimant had “dyslexia and was in special education in school and did not do well.” *Id.* at 8:15-17. Claimant did not achieve a GED. *Id.* at 8:18-25.

84. Regarding Claimant’s work career, Mr. Porter observed as follows: “Most of her work experience is in the retail industry. She’s got years of experience as a sales clerk, a store manager, a fitter, sales clerk; so most of it is in that retail industry. Those jobs typically are lower paying jobs. And what – in my line of work, we refer to as those as entry level jobs as well. Unless you get into management, there is really not a career track in retail.” *Id.* at 9:4-12.

85. In commenting on the Workwell FCE, Mr. Porter noted that “5 pounds lifting occasionally falls below sedentary work capacity even.” *Id.* at 12:18-19.

86. Besides weight, Claimant was significantly restricted in posture flexibility ambulation, based upon the FCEs, according to Mr. Porter. Thus, “she is restricted to occasional elevated work unweighted, so no weight involved with that; occasional bending and standing; occasional standing with use of a single point cane. Again, that becomes problematic with ability issues, and then rarely ambulating stairs.” *Id.* at 13:1-6.

87. Mr. Porter further noted that the FCEs found that Claimant may not reach her pre-injury level of function with regard to hand coordination and balance, and she had issues with cervical range of motion as well. *Id.* at 13:13-18.

88. Typing becomes problematic for Claimant, according to Mr. Porter, when one considers her numbness and tingling in her left hand, combined with her restricted cervical range of motion. “She is only going to be able to do that [typing] for a short period of time followed by

a rest period then followed by additional work for a short period of time, but she is going to require more than normal breaks in a competitive work setting.” Porter Dep., 13:23-14:7.

89. Mr. Porter’s first report “took into consideration all of the balance issues and everything else and being limited to a limited sedentary, and at that point I had her [Claimant] at at least a 94 percent labor market loss.” But in Mr. Porter’s Addendum, Claimant’s attorney asked him to ignore Claimant’s headaches and light sensitivity. *Id.* at 14:12-23. This changed his final figure on labor market access loss to 75.9%, meaning that Claimant could perform 24 out of 100 jobs she previously could perform. *Id.* at 14:24-15:5. This was based upon 11,700 jobs in her job market that she could do pre-injury, applying the restriction to sedentary to limited light capacity, which would leave Claimant with access, post-injury, to 2,815 jobs, resulting in a labor market loss of 75.9%. *Id.* at 15:6-16:6.

90. Mr. Porter found no wage capacity loss for Claimant because “any wage loss would be minimal in this case based upon her past wages.” *Id.* at 16:17-19.

91. Whereas Dr. Collins simply averaged the two factors of labor market access and wage capacity, Mr. Porter weighted labor market access loss more heavily by a factor of 1.8. His considerations in doing so were first, the high labor market access loss of 75.9%. He also considered her current age, perception of disability, presentation as an individual with a disability, and educational background (no high school diploma) in deciding to weight labor market access loss more heavily than wage loss. *Id.* at 16:20-17:25.

92. Based upon a weighted (1.8) 75.9% loss of labor market access, averaged by 0% wage capacity loss, Mr. Porter calculated Claimant’s Permanent Partial Disability at 68.3%. *Id.* at 24:25-25:3.

93. *Nancy J. Collins, PhD.* Defendants commissioned Nancy J. Collins, PhD to undertake a vocational evaluation of Claimant. She delivered her report on August 30, 2019. Ex. 22:618. The Commission is familiar with Dr. Collins' credentials.

94. The methodology Dr. Collins employed included reviewing relevant medical records and reports; conducting a diagnostic interview of Claimant; assessing her medical restrictions; assessing her functional capacities; determining her age and educational levels; determining her current level of aptitude functioning and prior specific vocational preparation; obtaining an employment history; conducting a transferable skills analysis; and determining labor market accessibility and wage rate data. *Id.*

95. In addition to reviewing medical records, Dr. Collins consulted standard vocational treatises such as the *Idaho Occupational Employment and Wage Survey*. *Id.* at 619.

96. Based upon their interview, Dr. Collins found Claimant's subjective complaints to be consistent over time and with her diagnosis. There is nothing in the records which alludes to any malingering, secondary gain, or functional overlay in Dr. Collins' opinion. *Id.* at 22:624.

97. Claimant described in her interview "having a very different life" following her industrial accident to Dr. Collins. She described herself as being a very active person before the accident, and now she felt she cannot participate in many of the activities of daily living, recreational pursuits, or working. Claimant told Dr. Collins that she limits many of her activities due to fear of falling. She has both a cane and walker, which she does not use all the time. She also described to Dr. Collins a discomfort with being around crowds, light or noise stimulation, or moving objects. *Id.*

98. Dr. Collins noted as follows: “Her neck pain is described as constant and achy, and goes from her neck to the middle of her back. She continues to have numbness in the pointer finger and thumb on the left hand. She is right handed.” Ex. 22:624.

99. Dr. Collins noted that Claimant still has headaches that wake her up most nights. Claimant has good days and bad days, which makes planning difficult. Claimant uses two pairs of sunglasses when going outdoors or using a computer. *Id.*

100. Claimant informed Dr. Collins that she had no preexisting medical conditions which would limit the kind of work she could perform. Dr. Collins did not have any medical records prior to the industrial accident. *Id.* at 625.

101. Claimant reported the following subjective functional capacity limitations to Dr. Collins:

Positional Limitations

Sitting	Able to sit for an hour before she needs to move around.
Standing	Shakes on the left.
Walking	Walks with a cane or walker; has to sit after a block and a half.
Driving	Able to drive locally but does get dizzy when exiting the car/does not drive alone
Sleeping	Gets headaches while sleeping; not enough rest.

Lifting & Carrying

- Feels she can lift 5 pounds with the left hand; typically uses the right hand to carry.

Postural Limitations

Bending/Stooping	Causes her to get dizzy.
Twisting	Turning head causes dizziness.
Kneeling/Crouching	Able to perform but has some difficulty rising.
Climbing Stairs	Is difficult and she is afraid of

	falling.
Climbing a Ladder	Would not be safe.

Manipulative Limitations

Reaching all directions, including overhead	No limitations.
Handling Objects (gross manipulation)	Has some difficulty using the left hand because of numbness.
Fingering (fine manipulation)	Used to be able to write with both hands; now only uses the right hand.
Pushing/Pulling	Able to push a grocery cart if she can hold onto the handle.
Working with Hand Tools	Does not use hand tools.

Ex. 22:625.

102. Consulting the *Dictionary of Occupational Titles*, Dr. Collins found that the following job titles were accurate for Claimant's working career: sales clerk (retail trade); salesperson, jewelry; waiter/waitress, informal; manager, office; and customer service representative supervisor. *Id.* at 627-628.

103. For skill level of work, Dr. Collins observed as follows: "Ms. Mayer has performed work at the semi-skilled to skilled categories. Her skills were attained on the job, with the exception of cosmetology. She has shown historically that she can learn through demonstration and work at a skilled work level. She does not appear to have any limitation for skill acquisition on the job, but at the age of 63, a return to school in a formal setting is not probable." *Id.* at 628.

104. For physical exertion level, Dr. Collins noted that all of Claimant's past jobs were at the sedentary to light physical exertion levels. *Id.* at 629.

105. In her transferable skills analysis, Dr. Collins observed that Claimant's "primary skill sets are as an office worker and in retail sales." *Id.*

106. For pre and post labor market access, Dr. Collins consulted various databases and arrived at the figure of 7,203 total jobs that were applicable to Claimant's work profile, of which 1,929 were sedentary. Ex. 22:631.

107. Considering the FCE, Dr. Collins stated that Claimant had "limitations for standing and walking and her lifting capacity is between a sedentary and light physical exertion level. Because of her stand/walk limitations, the most probable return to work options will be in the sedentary category. Assuming a sedentary restriction, Ms. Mayer has suffered a 73% loss of access to the labor market." *Id.*

108. Regarding Claimant's wage-earning capacity, Dr. Collins opined as follows: "Over the past few years, Ms. Mayer has not been a high wage earner. Her work in retail paid around \$10.00 per hour. The median wage in the Twin Falls labor market for retail sales is \$11.56 per hour. If one assumes she has the functional capacity identified in the FCE, she will be working in a clerical position. The medial wage for a receptionist is \$14.07 per hour. Customer service positions pay a medium wage of \$15.19 per hour. I do not anticipate a loss of earning capacity." *Id.* at 633-634.

109. Dr. Collins concluded her report as follows: "If the FCE findings are utilized, she can still perform sedentary work. My analysis found that she would have a 73% loss of labor market access, but no loss of earning capacity. If these two vocational factors are given equal weight, I suggest a permanent partial disability rating of 36.5%. This is inclusive of impairment." *Id.* at 634.

110. ***Dr. Collins Deposition.*** Defendants took the deposition of Dr. Collins on May 12, 2021. Collins Dep., 2:1-4.

111. Regarding loss of labor market access and wage capacity loss, Dr. Collins responded as follows:

Q. What number did you ultimately calculate with the loss of labor market access, though?

A. Well, with – assuming a light restriction – I mean, a sedentary restriction, she has a 73 percent loss of access to the labor market. And that’s interesting because Mr. Porter, in doing his second analysis, came up with, I think, 75 percent something; so, I mean, it was really close. And we looked at very similar jobs. So I think that does give a fairly true picture of what her loss is.

Q. You also looked at her earning capacity, is that correct?

A. That’s correct.

Q. What did that entail – your analysis regarding earning capacity?

A. Well, she – like I said earlier, she kind of moved from the clerical profession into retail, and retail is one of the lowest wages for earning capacity that we have. There are a lot of jobs in retail and – but sometimes they are part-time. They often don’t pay benefits, and they are a lower wage.

She was making around \$10 an hour, I think, when she was working for the jewelry store. And the – actually she was making below the median, which was 11.56 at the time. And then the median wage for reception, which is kind of lower semi-skilled office occupation, was 14.07. Customer service jobs pay 15.19. So I didn’t feel like she had any loss of earning capacity.

Collins Dep., 14:20-15:23.

112. Dr. Collins explained her basis for her ultimate PPD calculation as follows:

You know, over the last 30 years of doing these, it’s kind of evolved into the commission kind of averaging those two vocational factors; so many times that the number we come up with, is an average of the loss of earning capacity and the loss of [labor market] access.

And in her case, because she didn’t have any loss of earning capacity, her permanent partial disability rating was 36.5 percent.

Now I know that – and I have in the past given additional weight to one or the other if there is a significant difference. I don’t do that unless the – like, for instance, the loss of access is above 85 percent, 90 percent and there is a very low loss of earning capacity, but I will do it at that point. But it also depends upon how many jobs are remaining for that individual.

In Ms. Mayer’s case, there was 1700 jobs still remaining after we adjusted for her restrictions, so I didn’t give additional weight to one or the other. I averaged the two and felt like that was a fair analysis.

Id. at 16:2-23.

113. Dr. Collins admitted that a vocational expert would increase the disability rating if he or she felt like age was a significant non-medical factor. Collins Dep., 25:8-10.

114. **Dr. Dazley Deposition.** Claimant took the deposition of Justin M. Dazley, M.D., on April 2, 2021. Dazley Dep., 2:1-3.

115. Dr. Dazley practices orthopedic surgery in Twin Falls, Idaho. *Id.* at 5:6-8. Dr. Dazley graduated with a degree in biology in 2002 from Southern Utah University. He obtained his medical degree from Drexel University College of Medicine in Philadelphia in 2006. He completed his medical residency at the State University of New York at Stony Brook and a fellowship in spinal surgery at Harvard University. He is licensed to practice medicine in Wyoming and Idaho. He specializes in spinal surgery. *Id.* at 7:5-8:23. He is part of a group practice that contracts with Saint Luke's Regional Medical Center. *Id.* at 9:5-7.

116. Dr. Dazley explained that performing cervical compression surgery, more often than not, is about stopping the progression of the disease process rather than "making things go away, making things better. Frequently we are able to get symptoms – as spine surgeons, we are able to get some improvement, but it's not necessarily the expectation." *Id.* at 13:13-24.

117. Dr. Dazley performed cervical fusion surgery on Claimant on August 16, 2016. Dazley Dep., 14:1-3. The surgery went well. *Id.* at 15:2-3.

118. In office visits following the surgery, Claimant continued to complain of symptoms of paresthesia and upper extremity problems with her left hand, arm, numbness, etc. Dr. Dazley explained that the reason for these continuing complaints was that "it's the nature of the problem that she was suffering from originally – myelopathy and the symptoms that attend that – and sort of their tendency to be irreversible, or minimally reversible, because of the physiology of the spinal cord." *Id.* at 16:1-16.

119. Dr. Dazley stood by his opinion expressed in a letter to Surety dated 02/03/2020 that he agreed with the restrictions placed on Claimant in the two FCEs. Dazley Dep., 18:8-19.

120. Dr. Dazley explained the fact that he had earlier stated in chart notes that Claimant had no restrictions as follows:

So the way that I – the way that I kind of interact with my patients, especially those who are recovering from an injury or surgery, is they go through a formal restriction period where they're prohibited from doing certain activities or lifting certain weights and, during that period of time, I'm not allowing them to do these activities. And so then – after they have completed that period of time of restrictions, then I get – then I tell them they have no restrictions, and it's essentially serving as permission to allow them to try any activities that they would like, and then they'll progress in their function as they tolerate. And so in Ms. Mayer's case, she was given that permission and allowed by me to participate in any activities without restriction, but it was going to be at her discretion and the discretion of the individuals performing the functional capacity evaluations to what extent she's actually able to perform those allowed restrictions – or those allowed activities, I should say.

Id. at 19:18-20:14.

121. **Credibility.** Claimant testified credibly at hearing. The Referee finds, in particular, that Claimant testified credibly about her physical limitations as a result of the industrial accident. In turn, these limitations are in line with the findings of the two FCEs, which were credible. The Referee also agrees with the remark of Mr. Porter that Claimant appears disabled and walks with a cane. Claimant walked with a cane at the hearing.

DISCUSSION AND FURTHER FINDINGS

122. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however,

need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

123. **Medical Benefits.** In their Response Brief, Defendants “acknowledge the medical bills for injections and radiofrequency ablation performed by Dr. Hansen and do not dispute the reasonableness of said bills.” Defendants’ Responsive Brief at 9. Thus, there is no longer any dispute concerning Claimant’s outstanding medical bills reproduced in Ex. 17 in the amount of \$9,262.67, and Defendants are liable for the same.

124. **Disability.** “Permanent disability” or “under a permanent disability” results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. “Evaluation (rating) of permanent disability” is an appraisal of the injured employee’s present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425.

125. The test for determining whether Claimant has suffered a permanent disability greater than permanent impairment is “whether the physical impairment, taken in conjunction with nonmedical factors, has reduced 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 Claimant’s ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

126. Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Industries*, 136 Idaho 733, 40

P.3d 91 (2002); *Boley v. State of Idaho, Industrial Special Indemnity Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

127. The parties have presented a PPD case with two choices, the one proposed by Mr. Porter (68.3%), Ex. 21:608-609, and the one proposed by Dr. Collins (36.5%), Ex. 22:634. Here the two vocational experts arrived at nearly identical losses of labor market access (Mr. Porter reached 75.9% and Dr. Collins arrived at 73%) with identical loss of wage capacity access at 0%. The only difference is how they averaged these two vocational factors; Mr. Porter weighted loss of labor market access by 1.8 whereas Dr. Collins did not weight either factor.

128. Mr. Porter's method of weighting the labor market access factor higher than wage capacity is entitled to greater consideration in these findings. First, there is such a disparity between the two vocational factors, 75.9% for labor market access and 0% for wage capacity, that it behooves the vocational analysis to make some provision in form of weighting to avoid an unjust result. This remedies the situation where, as here, Claimant is close to a minimum wage earner and thus has no appreciable wage capacity loss but rather has a large to very large loss of labor market access.³

129. Second, as Mr. Porter explained in his deposition, Porter Dep., 16:20-17:25, Claimant's age (64 years old at hearing), her self-perception as a person with a disability, her presentation as a person with a disability (walks with a cane), and educational background (no

³ See, Douglas Crum's (a vocational expert) testimony in *Walker v. Clear Springs Food Company*, IC 2004-515150, 2016 WL 77975631 (2016). "Mr. Crum discussed his concerns regarding the "averaging method" where an individual's decrease in wage earning capacity is averaged with his loss of labor market access:

I start getting concerned about averaging them when there is a huge disparity between the loss of access in particular and loss of wage-earning capacity. For instance, a minimum wage earner, if they could return to work, probably would have no wage loss. But might have a very extensive loss of access to the labor market. And in the past I have proposed disability that is pretty straight average. Typically, in that case I would increase my recommendation. And I know the commission... [and they have done it.] 2016 WL 797531.9.

high school diploma) all argue in favor of weighting labor market access higher than wage capacity loss.

130. Third, the Referee's perception of Claimant at hearing reinforces a finding that she is significantly disabled, and not by merely 36.5% as Dr. Collins found, but rather the higher PPD of 68.3%, as found by Mr. Porter. Claimant presents as disabled, walking slowly with a cane. She described numerous instances of activities of daily living that have been impacted by her disability. This makes her re-employment unlikely. It is going to be difficult for Claimant to be reemployed, if at all, and the amount of PPD awarded should reflect that fact.

131. By weighting the labor market access loss of 75.9% higher by a factor of 1.8, and averaging it with 0% wage capacity loss, Claimant's PPD is 68.3%. This significant level of disability is supported by all the medical and nonmedical factors in the record, as will be shown below.

132. Both Dr. Dazley, Claimant's treating surgeon, and Dr. Hansen adopted the FCEs as reflective of accurate physical limitations on Claimant's functioning. The FCEs detailed how Claimant has decreased balance, an unsteady gait, the need for a cane, and diminished cervical strength and endurance. Furthermore, Claimant had diminished sensation/numbness in her first through third fingers of the left hand. The FCEs recommended that Claimant lift no more than five pounds from waist to crown,⁴ that she was not to lift more than ten to fifteen pounds ever, and she should only rarely use stairs. Her cervical range of motion was limited. Her left-hand strength was approximately one-half that of her right hand. She was at a medium to high risk for falling.

⁴ Mr. Porter characterized the ability to lift only five pounds as less than sedentary capacity. Porter Dep., 12:18-19.

133. As to the non-medical factors, Claimant's age, education, and appearance as a person with a disability have already been discussed. What has not been discussed is the impact of the industrial injury on Claimant's career. Prior to her injury, Claimant basically had a career in retail sales. That career is over. For example, she could not lift the trays of jewelry that would be required of her by Employer. She cannot stand for the lengthier periods of time required by retail sales. Her attempt at returning to the employment of Employer was unsuccessful due to her physical limitations. Any work setting that requires exceeding sedentary-limited is incompatible for Claimant.

134. In conclusion, Claimant has sustained a PPD of 68.3%, inclusive of impairment. This finding is supported by the medical and nonmedical factors in the record.

CONCLUSIONS OF LAW

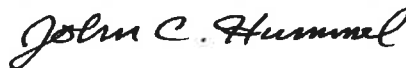
1. To the extent that they are still unpaid, Defendants are liable for Claimant's medical bills in the amount of \$9,262.67.
2. Claimant has sustained a PPD in the amount of 68.3%, inclusive of impairment.

RECOMMENDATION

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


DATED this 1st day of April, 2022.

INDUSTRIAL COMMISSION



John C. Hummel, Referee

ATTEST:


Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of April, 2022, 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:

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