BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DONNA GILBERT, Claimant, v. MARQUIS COMPANIES, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2010-015897** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed September 3, 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. He conducted a hearing in Boise on October 2, 2013. Clinton M. Miner represented Claimant. Joseph M. Wager represented Defendants Employer and Surety. The parties presented oral and documentary evidence. The parties took post-hearing depositions and later submitted briefs. The case came under advisement on June 24, 2014. This matter is now ready for decision.

The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

The following issues were agreed upon by the parties at hearing:

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

2. Whether and to what extent Claimant is entitled to benefits for:

    a) Temporary disability;

b) Permanent partial impairment (PPI);
c) Permanent disability in excess of disability;
d) Medical care; and
e) Attorney fees.

Attorney fees were not addressed by Claimant in either of her briefs and will not be discussed at length herein.

CONTENTIONS OF THE PARTIES

Claimant contends an industrial accident on June 28, 2010 resulted in chronic low back pain. Her treating physician prematurely declared her to be at maximum medical improvement (MMI). Claimant's self-procured post-MMI medical treatment succeeded in reducing her pain symptoms and is thus compensable. Her medical benefits should include hospital charges for a manic episode as a compensable consequence of medications prescribed to treat her injury. Claimant is also entitled to temporary disability benefits during the time she was released from work. Claimant's PPI was "under rated" and should be adjusted upward. She also suffered permanent disability in excess of PPI.

Defendants contend Claimant reached MMI in December 2010. She impermissibly sought further medical care on her own thereafter. Her manic episode is unrelated to her industrial accident. Her PPI benefits were properly paid; she suffered no disability in excess of her impairment. Claimant is not entitled to any additional benefits.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Claimant's testimony at hearing;

2. Claimant's exhibits 1 through 16, admitted at hearing;

3. Defendants' exhibits A through K M; and

4. Posthearing deposition transcripts of surgeon Richard Radnovich, D.O., and physiatrist Christian Gussner, M.D.

The Commission, having evaluated all evidence of records, submits the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On June 28, 2010 Claimant was employed full time as a certified nursing assistant (CNA) for Employer. While attempting to keep a resident patient from falling, Claimant felt a pop in her lower back. As the workday wore on, Claimant began to experience back pain on her right, below her beltline and into her gluteus.

2. Claimant informed her supervisor of the injury and filled out an incident report. Claimant worked the remainder of her shift.

Dr. Heiner

3. The following day, at Employer's direction, Claimant saw Cody Heiner, M.D. Claimant was by that time complaining of pain at level seven on a pain scale of one to ten (7/10). She complained of pain with bending to the right and crossing her legs. She denied any pain radiating into her lower extremities. Her gait was normal, including heel and toe walking, and she had a normal lumbar range of motion. Claimant could squat and rise easily, had a negative straight-leg raise, and was not tender to palpation. Dr. Heiner diagnosed a mild acute lumbar strain. He recommended over-the-counter pain medication, gentle stretching, and ice. He restricted Claimant to lifting no more than thirty pounds, with no repetitive stooping, bending, or twisting. Follow up examination was scheduled for the following week.

4. On July 8, 2010 Claimant presented for her one-week follow-up examination. Her reported pain levels had decreased to around 4/10. The pain was still limited to her right lower back and buttock. She was doing home exercise and light-duty work with Employer. Piriformis stretch was positive. Dr. Heiner noted she was improving, although still tender in

her right gluteal muscles. He encouraged continuing home exercises, use of heat or ice, and pain medication as needed. Dr. Heiner advanced her work restrictions, and suggested she try full-duty work in one week's time, with a two-week follow-up visit.

5. On July 22, 2010 Claimant visited Jamie Ricks, D.C.

6. Claimant returned to Dr. Heiner on July 23, 2010. Her pain had increased. Her pain was worse with sitting or crossing her legs, better with standing, walking, or stretching. Claimant remained tender over her right gluteal muscles with positive piriformis stretch and weakness of the right gluteus medius. Her lumbar motion remained normal in all directions. Dr. Heiner released her to full-work activities on her request. He suggested she report back if the full release did not go well. He encouraged her to continue home exercises, ice, and pain medication as needed and scheduled a two-week follow-up visit.

7. Dr. Heiner encouraged continuation of chiropractic visits to see if they might prove beneficial. Those chiropractic treatments and massage from Dr. Ricks provided only temporary relief. By early October 2010 Claimant stopped seeing him.

8. On August 8, 2010 Claimant was no longer using pain medication; full-duty work was going well. Claimant was still doing home exercises and chiropractic treatment with Dr. Ricks at that time. Although she reported a spike in her pain the previous day due to dancing to a video game, her piriformis and straight-leg testing was negative. She was but mildly tender over her right gluteal muscles. Dr. Heiner felt her pain was essentially resolved; he was optimistic he would be discharging Claimant at her next visit.

9. On her August 24, 2010 follow-up visit, Claimant complained of recurring low back pain. Reportedly, Claimant had been asked to undertake more-strenuous-than-usual work duties for two consecutive days. Her back pain had returned. Chiropractic treatments

provided some relief, but the tenderness in her right gluteal muscles was worse; piriformis and Faber testing was again positive. Dr. Heiner initiated physical therapy in addition to prescribing Naproxen twice daily and Flexeril as needed. Claimant felt she could avoid the strenuous tasks at work and declined any work restrictions at that time.

10. On August 27, 2010 Claimant returned to Dr. Heiner's office complaining of increased pain (8.5/10) brought on by physical therapy. Dr. Heiner assured her the increased pain was not abnormal for one beginning P/T. He restricted Claimant's work activity to forty pounds lifting and no repetitive stooping, bending, or twisting.

11. At her regularly-scheduled follow-up appointment, Claimant reported no significant change from her previous visit. She reported pain and tenderness over the right gluteal muscles. Piriformis and Faber testing was positive. Her physical exam was otherwise normal. Dr. Heiner diagnosed subacute right low back pain coming from the piriformis and/or SI regions. Noting that Claimant had failed conservative treatment, he referred her to Christian Gussner, M.D. He kept her on physical therapy and unchanged work restrictions.

Dr. Gussner

12. On September 16, 2010 Claimant visited Dr. Gussner. She continued to complain of right lumbosacral and buttock pain. She acknowledged some relief with time, but was concerned her recovery had plateaued.

13. On examination, Dr. Gussner found tenderness at the right LS junction and posterior iliac spine ligament and more severe discomfort about the right SI joint. Claimant also showed a bruise on her right buttock from deep tissue mobilization by the physical therapist. Otherwise, she had normal lumbar and hip motion, normal motor strength and lower limb reflexes, and symmetrical gait. She could walk heel and toe with normal balance.

14. Noting Claimant had failed to fully improve with therapy, exercise, and time, Dr. Gussner performed a SI steroid injection, and recommended physical therapy. He restricted Claimant to frequent lifting of twenty pounds, occasional lifting of thirty-five pounds, and limited bending, twisting, or stooping.

15. A lumbar MRI showed "[m]ild to moderate spondylitic change in the mid to lower lumbar spine…without evidence of overall spinal canal stenosis or significant foraminal narrowing." Dr. Gussner described the MRI findings as "primarily age-related degenerative changes." Dr. Gussner opined Claimant's degenerative spine condition was not "directly" related to the accident.

16. On October 14, 2010 Dr. Gussner performed a right SI joint steroid injection.

17. On November 3, 2010 Claimant reported no continuing relief from the steroid injection, from physical therapy, or from an SI joint belt she had begun to wear. Dr. Gussner felt the lack of relief from the injection and SI belt ruled out Claimant's SI joint as the origin of her continuing pain. He considered other possibilities including a ligamentous or lumbosacral strain or discogenic pain. He recommended, and on December 9, 2010 he performed an epidural steroid injection.

18. On December 22, 2010 Claimant reported resolution of her right lateral buttocks pain, but with continuing residual right lumbosacral ache. Dr. Gussner declared Claimant to be at MMI. Using the *AMA Guides*, *sixth edition*, he assigned Claimant a two percent whole person impairment without apportionment. Based upon Claimant's pre-existing low back findings, he imposed permanent restrictions of medium-duty activities, including lifting limits of fifty pounds occasionally, twenty-five pounds frequently, with limited bending, twisting, and stooping, and position changes as needed.

Claimant's post-MMI treatments

19. In March 2011 Claimant began treating with Barry Sherwood, D.C., for continuing low back pain. His treatments provided only limited, temporary relief.

20. Next, Claimant saw Timothy Johans, M.D., for a surgical opinion. Doctor Johans noted Claimant had no pain, numbness, tingling, or weakness down either leg. He reviewed her previous MRI which he described as showing nothing surgical and only very minimal spondylitic changes. He ordered X-rays which showed no acute abnormalities. Dr. Johans opined Claimant was not a surgical candidate.

21. On August 23, 2011 Claimant saw Richard Radnovich, D.O. She complained of right sided low back and buttock pain. She was still working as a CNA. Dr. Radnovich took Claimant off work and began treating with anti-inflammatory medications and muscle relaxers.

22. On September 1, 2011 Claimant was still doing light-duty work for Employer. Dr. Radnovich added Cymbalta to her medication regimen. He also performed a facet-joint anesthetic and steroid injection on Claimant's low back.

23. Claimant asked Surety to re-open her file. Surety sent Claimant back to Dr. Heiner to evaluate her pursuant to this request. At the appointment on September 6 Claimant confronted the doctor about the fact he was a "work comp" doctor whom she could not trust, and that she had been "living in hell" since the industrial accident. Claimant would not let Dr. Heiner explain his position, nor would she answer his questions. Claimant refused to leave the doctor's property until he delivered a handwritten note summarizing the visit.

24. On September 8, 2011 Claimant returned to Dr. Radnovich. He noted Claimant was "exuberant" to report that her pain was nearly resolved. She also noted she had a confrontation with Dr. Heiner at his office.

25. On September 14, 2011 Claimant was involuntarily committed to St. Alphonsus' psychiatric inpatient department for twelve days. The diagnosis was new onset mania. Claimant had for years suffered from depression, for which she took medication. At the time of commitment, Claimant had multiple other stressors ongoing in her life.

26. In deposition, Dr. Radnovich opined that Claimant's manic episode, as well as her behavior in his office in early September, was likely a reaction to the Cymbalta. He testified Cymbalta can trigger such a reaction in bipolar individuals. Although Claimant had not previously been diagnosed as bipolar, the hospital discharge records characterized her as such. Dr. Radnovich suggested Claimant's "exuberant" behavior in his office might have been related more to her manic episode and less to his treatment than previously thought.

27. On October 17, 2011 after her release from St. Al's, Claimant returned to Dr. Radnovich. She was sad and severely anxious; her low back pain was worse. Dr. Radnovich opined Claimant was not psychologically stable. He recommended she get more psychiatric care and discontinued treating her.

28. Claimant next saw, and was continuing to see as of the date of hearing, Kevin Hearon, D.C. Claimant experienced temporary relief from her low back pain with his treatments. Dr. Hearon's notes show Claimant's pain radiating into her legs. He was also treating her for neck and right shoulder pain.

Claimant's work history

29. In her adult life, Claimant has worked mostly as a bookkeeper, both for family businesses and third-party employers. She earned between $10 and $20 per hour in this occupation.

30. In 2009 Claimant obtained her CNA credential from College of Western Idaho. She did her clinical hours with Employer, and then was hired on full time. Claimant's base salary with Employer was $10.25 per hour, with incentives for good attendance which, when earned, boosted her hourly wage to $10.75.

31. Claimant was fired by Employer in September 2011. Thereafter she worked as an independent contractor from October into December 2011 providing in-home care to an incapacitated woman in Horseshoe Bend. She grossed $20 per hour, and worked two or three twelve-hour shifts per week at this job.

32. Claimant next tried working at Rosewood, an assisted-living facility. Although told there was no lifting in this job, Claimant found herself having to lift patients. Claimant quit during her third week of employment there because of the lifting demands.

33. As of the date of hearing, Claimant was working part time for a medical office, where she schedules appointments and does filing. Her hours are flexible to accommodate her travel schedule. She is paid $10 per hour.

34. Claimant travels with her husband to various trade shows throughout the western U.S. where he sells flagpoles and infrared goggles. She assists him with sales, does demonstrations, and makes sales pitches. She is not specifically paid for her services.

35. Claimant is content with her current employment arrangement. She is not interested in full-time work at the moment; she would rather assist her husband with his business and work part time when she is not on the road.

DISCUSSION AND FURTHER FINDINGS OF FACT

36. 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).

Medical benefits and TTD

37. Idaho Code § 72-432(1) requires that an employer provide reasonable medical care for a reasonable time. When medical treatment is denied, a claimant may seek such treatment at Employer's expense. Idaho Code § 72-432(1). However, where medical treatment has not been denied, Claimant is not free to pursue such unauthorized care as he may choose. Instead, if he wishes different care he must request a change of physician pursuant to Idaho Code § 72-432(4).

38. On January 19, 2011, Surety generated a Notice of Change of Status in which it advised Claimant that she had been found medically stable, and that payment of Dr. Gussner's 2% PPI rating would commence as of December 22, 2010. Notably, the Notice of Change of Status did not apprise Claimant of any change in Surety's position concerning Claimant's entitlement to medical benefits pursuant to Idaho Code § 72-432. In other words, Claimant was not advised that Surety denied responsibility for further care. Even so, following Claimant's evaluation by Dr. Gussner, Claimant sought medical care from providers outside the chain of referral. Claimant asks that the Commission authorize this care pursuant to Idaho Code § 72-432(4). Under that section, an injured worker must give written notice of her desire to change physicians. This affords Surety the opportunity to fulfill its obligation to Claimant. Where Surety declines to authorize the change, Idaho Code § 72-432(4) anticipates an expedited hearing before the Commission to determine whether or not Claimant is entitled to a change of physician. J.R.P. 20 describes the particulars of the expedited hearing process. However, that rule also specifies that the procedures set forth at Rule 20 are not exclusive, and that an employee may

pursue her request for change of physician as part of the normal hearing process. *See Quintero v. Pillsbury Co.*, 119 Idaho 918, 811 P.2d 843 (1991). Nothing in Idaho Code § 72-432 prohibits a post-treatment petition for change of physician.

39. Under Idaho Code § 72-432(4)(a), the Commission may grant a petition for change of physician where a claimant demonstrates that "reasonable grounds" exist to support the change. Although *Sprague v. Caldwell Transp., Inc.*, 116 Idaho 720, 779 P.2d 395 (1989) did not involve a request to change physicians, the test developed in that case to evaluate whether the care provided by a physician is "reasonable", is instructive here. In *Sprague*, the court recognized that it is for the claimant's physician to determine what care is required, and it is up to the Commission to determine whether the required care is reasonable. Among the factors considered by the Commission in making the determination as to whether the required care is reasonable is whether claimant's condition improved as a result of the treatment in question. Here, Claimant testified that her pain levels wax and wane on a day-to-day basis. Certain modalities improve her pain temporarily and some activities increase her pain temporarily. However, there is no persuasive evidence of record that any treatment performed on Claimant after her MMI date has done anything to improve her condition beyond the daily variation in her pain levels. Therefore, we conclude that reasonable grounds do not exist to authorize the care sought by Claimant after her MMI date.

40. Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." Claimant continued to work for Employer up through and beyond her period of recovery. Claimant failed to show that Defendants had failed to pay any temporary disability benefits due her during her

recovery period. Defendants are not liable for temporary disability benefits after December 22, 2010.

PPI

41. Permanent impairment is an anatomic or functional abnormality or loss after MMI has been achieved. *Henderson v. McCain Foods,* 142 Idaho 559, 567, 130 P.3d 1097, 1105 (2006).

42. After a brief examination on February 15, 2012, Dr. Radnovich gave Claimant a PPI rating of 7% using the *AMA Guides*, *fifth edition*. Using the sixth edition, Dr. Radnovich would assign Claimant a two percent whole person PPI if rated "for just the facet arthrosis and spondylosis … more of a sprain-strain…" and a five percent PPI if rated "for the annular tears with the facets…." Dr. Gussner assigned Claimant a PPI rating of 2% whole person related to the industrial accident.

43. Having reviewed the opinions of Drs. Radnovich and Gussner, the Commission finds Dr. Gussner's opinion to be well reasoned and consistent with his treatment notes. Claimant is entitled to a 2% PPI rating, which has previously been paid in full by Defendants.

Permanent Disability

44. 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. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). The burden of establishing permanent disability

is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986). Generally, the extent of disability is assessed as of the date of hearing. *Brown v. The Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012).

45. Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the purely advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Indus.,* 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund,* 130 Idaho 278, 939 P.2d 854 (1997). In this case, neither party presented any vocational expert testimony.

46. Drs. Gussner and Radnovich imposed permanent lifting restrictions which place Claimant in the medium-duty category. They disagree about whether these restrictions are related to the accident or to her degenerative condition. Claimant cannot return to her time-of-injury employment. However, she can do the filing job she currently holds, can do bookkeeping jobs which do not require constant sitting, and can work as an in-house caregiver for those who do not need assistance with lifting. Claimant's job market access includes medium-duty work within her lifting and motion restrictions. Claimant has done light- to medium-duty jobs for the majority of her career, including at the present. Claimant has suffered a mild loss of market access and a *de minimus* loss of earning capacity as the result of her accident and injury. Considering Claimant's physical impairment, and all medical and non-medical factors, Claimant has suffered an 8% permanent partial disability, exclusive of PPI.

CONCLUSIONS

1. Claimant reached MMI on December 22, 2010.

2. Claimant is not entitled to medical benefits or reimbursement of medical charges

incurred after the date of her medical stability, December 22, 2010.

3. Claimant failed to show she is entitled to temporary disability benefits.

4. Claimant is entitled to PPI benefits rated at 2% of the whole person, with credit for such impairment benefits paid to date.

5. Claimant is entitled to permanent disability benefits in the amount of 8% whole person, exclusive of PPI.

6. Claimant is not entitled to attorney fees.

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

DATED this ___3rd___ day of September, 2014.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Chairman

_/s/_____
R.D. Maynard, Commissioner

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __3rd_____ day of __September_____, 2014, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** were served by regular United States Mail upon each of the following:

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