BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARIA GONZALEZ, Claimant, v. CONAGRA FOODS, INC., Self-Insured Employer, Defendant.	**IC 2008-013533** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **June 2, 2014**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Idaho Falls, Idaho on May 14, 2013. Claimant, Maria Gonzalez, was present in person and represented by Matthew Romrell, of Idaho Falls. Defendant self-insured Employer, ConAgra Foods, Inc., was represented by Nathan Gamel, of Boise. The parties presented oral and documentary evidence. Chris Horton interpreted Claimant's testimony at hearing. Post-hearing depositions were taken and briefs were later submitted by Michael McBride, of Idaho Falls, for Claimant and Eric Bailey, of Boise, for Defendant. The matter came under advisement on February 18, 2014.

ISSUES

The issues to be decided are:

1. Claimant's entitlement to additional medical care;
2. Claimant's entitlement to additional temporary disability benefits;
3. Claimant's entitlement to permanent partial impairment benefits;
4. Claimant's entitlement to permanent partial disability benefits;

5. Apportionment pursuant to Idaho Code § 72-406; and
6. Claimant's entitlement to an award of attorney fees.

CONTENTIONS OF THE PARTIES

The parties agree that Claimant suffered an accident at work on March 27, 2008. She asserts entitlement to additional medical benefits, temporary and permanent disability benefits up to and including total permanent disability benefits, and an award of attorney fees for Defendant's unreasonable denial of permanent partial impairment benefits.

Defendant asserts that Claimant has received adequate medical treatment for her industrial accident, has recovered without permanent impairment, and is entitled to no permanent disability benefits or attorney fees. Defendant maintains that Claimant's continuing symptoms are not related to her work accident, and denial of further benefits is justified.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant's Exhibits 1 through 15, and Defendant's Exhibits 1 through 26, admitted at the hearing;
3. The testimony of Claimant and Jose Gonzalez taken at the May 14, 2013 hearing;
4. The post-hearing deposition of Anthony Joseph, M.D., taken by Claimant on June 24, 2013;
5. The post-hearing deposition of Gary Walker, M.D., taken by Defendant on September 5, 2013; and
6. The Stipulation of Facts filed by the parties on December 23, 2013.

All objections posed during the depositions are overruled. After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. **Background.** Claimant was born in Mexico on April 20, 1962. She is right-handed. She was 51 years old and resided in American Falls at the time of the hearing. She attended public school through the second grade in Mexico. She has received no further formal education. She speaks and understands very little English and testified at hearing only through an interpreter. She speaks Spanish fluently, but has difficulty reading Spanish. At hearing Claimant had difficulty spelling her last name in Spanish and needed assistance from the interpreter. Transcript, p.10.

2. In 1986, Claimant came to the United States. In 1999, she became a permanent U.S. resident. She worked for approximately 20 different employers in Idaho as a general laborer, cutting and cleaning potatoes, cleaning sugar beets and wheat, and picking rock from fields. Her work was largely seasonal and her pay ranged from $3.35 to nearly $12.00 per hour.

3. In 2001, Claimant began working at ConAgra (formerly known as Lamb-Weston). Claimant's job duties included general labor, cutting, sorting, cleaning, and inspecting potatoes. She worked full-time and nearly year-round. Her final wage at ConAgra was $12.28 per hour.

4. On July 9, 2003, Claimant slipped and fell on the slick floor while working at ConAgra and landed on her buttocks and back. She sought treatment at Harms Memorial Hospital where she reported tailbone, low back, and hip pain. She was given medications, including Tylenol, for her injuries. She resumed working.

5. On June 10, 2005, Claimant fell down the steps while working at ConAgra and thereafter noted a burning sensation in her left arm and shoulder. She sought medical treatment and was examined by James Collet, M.D., at Portneuf Medical Center. He noted she had severe tenderness in her left shoulder, elbow, and triceps and referred her to physical therapy. Several days after her June 10, 2005 fall, Claimant fell again at ConAgra and struck her head and neck on a conveyor belt frame. Dr. Collet continued treating Claimant in September 2005, for neck, shoulder, and low back pain. In October 2005, Dr. Collet referred Claimant to Anthony Joseph, M.D., for continued treatment of her injuries. Claimant underwent x-rays, but ConAgra refused payment therefore. Dr. Joseph released her to return to work without restrictions in early 2006. Thus, prior to March 2008, Claimant had injuries from three prior falls at ConAgra. She recovered from those injuries sufficiently to return to full duty work without restriction.

6. **Industrial accident and treatment.** On March 27, 2008, Claimant fell and was injured at work. She was walking through the work area to notify a supervisor that a conveyor belt had stopped when she slipped on frozen diced potatoes on the floor and fell backwards, striking her back, shoulder, and head. She notified her line operator of her accident and then presented to a nurse at the ConAgra plant. Claimant continued working but sought additional medical care several days later. She was earning at least $11.69 per hour at the time of her fall.

7. On April 2, 2008, Claimant may have fallen again while on the job at ConAgra.[1] She continued working.

8. On April 18, 2008, Claimant presented to Physician's Immediate Care Center, as directed by ConAgra, where she was examined by Randy Vawdrey, NP-C. Mr. Vawdrey recorded her report of neck pain radiating into her right shoulder and arm, and observed palpable

[1] There is speculation that records mentioning an April 2, 2008 fall are erroneous references to Claimant's March 27, 2008 fall. There is no dispute that she fell and was injured at work on March 27, 2008.

knots in her trapezius muscles. He referred her to physical therapy. Claimant underwent physical therapy for shoulder strain, cervical sprain/strain, and lumber sprain/strain and her condition improved. She worked within light-duty restrictions. On August 27, 2008, Mr. Vawdrey recorded that Claimant had ongoing trapezius muscle tightness extending into her neck, but had been pain-free for eight days. He concluded Claimant had attained maximum medical improvement and released her to work without restrictions. Claimant returned to full work duty and noted increasing neck, shoulder, back, and arm pain. She needed assistance with heavier tasks and had difficulty with sustained activity. Her coworkers helped her by performing some of the harder tasks for her.

9. On February 15, 2009, Claimant presented to Bowman Chiropractic and was diagnosed with decreased range of motion, muscle splinting, and inflammation due to thoracic and lumbar strain/sprain. On March 1, and March 30, 2009, Claimant again presented to Bowman Chiropractic and both times was diagnosed with muscle splinting and inflammation due to thoracic and lumbar strain/sprain. She received chiropractic manipulation and was able to continue working. Claimant paid for this treatment out of her own pocket.

10. On April 13, 2009, Claimant requested that her workers' compensation claim in the instant case be reopened so she could obtain further medical treatment of her ongoing symptoms. Defendant denied her request. Claimant continued working and her symptoms persisted.

11. On March 8, 2010, Claimant presented to Bowman Chiropractic and was diagnosed with decreased range of motion, muscle splinting, and inflammation due to cervical and thoracic strain/sprain. She was treated with chiropractic manipulation and continued working. Again, Claimant paid for this treatment out of her own pocket.

12. On April 8, 2010, Richard Knoebel, M.D., examined Claimant at Defendant's request. Dr. Knoebel found Claimant medically stable as of August 27, 2008, and without any permanent impairment related to her industrial accident. He concluded she could work without restrictions.

13. Claimant continued working and her symptoms persisted. On June 28, 2010, she sought treatment from Dr. Joseph. He ordered a cervical MRI and restricted Claimant to no more than two hours per day of sitting, standing, or looking down. Claimant notified ConAgra of these restrictions; however, ConAgra refused to honor her restrictions. She was forced to continue working full duty or lose her job. She continued working full duty.

14. On July 8, 2010, Claimant underwent a cervical MRI that revealed C2-3 and C3-4 disc desiccation, shallow C5-6 disc protrusion slightly impressing the ventral thecal sac, shallow C6-7 disc bulge, and loss of cervical lordosis. On July 21, 2010, Dr. Joseph reviewed Claimant's cervical MRI, noted her C2-3 and C3-4 disc desiccation, and authored a letter commenting:

> This loss of water in this area is typically seen from trauma or work related problems, not from aging. This is also exacerbated by a head forward position, such as working and looking down. It would be my recommendation that accommodation for work should be given, where she does not have to do a lot of looking down or a lot of movements with her neck. This would be greatly appreciated and helpful for this patient's pain.

Defendant's Exhibit 6, p. 78.

15. On September 1, 2010, Claimant hand-delivered Dr. Joseph's July 21, 2010 letter to ConAgra. ConAgra then advised Claimant that it had no work available to accommodate her work restrictions and that ConAgra would not allow Claimant to return to work until she was released by her doctor to work without restrictions. Claimant has not worked since that time.

16. On October 6, 2010, Dr. Joseph released Claimant from work and prescribed physical therapy. Claimant attended multiple physical therapy sessions throughout the fall of 2010. Dr. Joseph also treated Claimant with trigger point injections, prescription medications, and acupuncture. On November 18, 2010, and December 14, 2010, Claimant received C7-T1 interlaminar epidural steroid injections from Patrick Farrell, M.D.

17. On December 16, 2010, Claimant was examined by Craig Lords, D.C. He opined that Claimant suffered discogenic pain related to her bulging cervical discs as documented by her July 8, 2010 cervical MRI. Dr. Lords found Claimant medically stable and rated her permanent impairment due to her industrial accident at 10% of the whole person pursuant to the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, based on her radicular symptoms and imaging study showing a herniated cervical disc at the same level associated with the radiculopathy. Defendant's Exhibit 10, p. 119. On January 6, 2011, Dr. Lords assigned Claimant permanent sitting, standing, and walking restrictions. He also restricted Claimant to lifting no more than 10 pounds frequently and 20 pounds occasionally. Defendant's Exhibit 10, pp. 121-122.

18. On February 28, 2011, Claimant visited ConAgra to arrange for her return to work. She presented ConAgra with the work restrictions imposed by Dr. Lords. ConAgra again refused to allow Claimant to work unless she provided a release from her doctor approving her return to work without restrictions. That same day Claimant filed her Complaint in the instant case.

19. On March 10, 2011, Claimant began working with Industrial Commission Rehabilitation Consultant Judy Brinser searching for employment. When consultant Brinser contacted ConAgra on March 10, 2011, she was advised that ConAgra could not accommodate

Claimant's work restrictions. Claimant applied for several jobs without success. Chris Horton, a bilingual Industrial Commission Rehabilitation Consultant, took over Claimant's case and continued to assist her in searching for employment.

20. On April 15, 2011, Defendant deposed Claimant and was informed that some medical records that Defendant had obtained pertaining to a Maria Gonzalez, did not relate to Claimant. Specifically, records of Dr. Esplin from July 2006 commenting on a cervical MRI showing a broad based significant disc bulge at C5-6, records of Dr. Marano for bilateral wrist, arm, and neck pain including reference to carpal tunnel surgery and cervical disc bulging, and records of Dr. Timothy McTigue for lumbar spine diagnostic evaluation, all pertained to another individual named Maria Gonzales, and not to Claimant herein.[2]

21. On February 16, 2012, Dr. Joseph found Claimant medically stable. He rated her permanent impairment at 5-8% of the whole person due to cervical disc-related changes as documented by her cervical MRI.

22. In December 2012, Claimant began receiving Social Security Disability benefits.

23. On January 7, 2013, Douglas Crum, C.D.M.S., interviewed Claimant at her counsel's request and subsequently issued a report evaluating Claimant's permanent disability.

24. On March 22, 2013, Justin Poole, PA-C, examined Claimant and noted muscular neck pain, myofascial myalgia or myositis cervicalgia, and shoulder impingement. Dr. Joseph concurred. Dr. Joseph prescribed Flexeril, Tramadol, acupuncture, and periodic cervical trigger point steroid injections. He noted that Claimant obtained from two to four weeks of pain relief with trigger point injections.

[2] Claimant testified that there were at least two other individuals named Maria Gonzalez that worked at ConAgra while she was employed there.

25. On April 8, 2013, Gary Walker, M.D., examined Claimant at Defendant's request. Defendant provided Dr. Walker records from Dr. Stephen Marano dated March 23, 2007 and April 20, 2007 (describing a C5-6 disc herniation and C6-7 disc protrusion shown on MRI), and records from Dr. Vermon Esplin, dated July 19, 2006 (describing C5-6 disc bulge shown on MRI). Dr. Walker's report expressly comments on "Dr. Marano's notes and description of the previous MRI and CT myelogram from 2007 that pre-dates this injury." Defendant's Exhibit 16, p. 207. The parties later stipulated that records by Dr. Marano pertain to another individual named Maria Gonzalez—not to Claimant herein—and that Claimant never had a cervical MRI prior to July 8, 2010. Stipulation of Facts, December 23, 2013. Dr. Walker recorded Claimant's report that she could sit for an hour at home. He observed her sit for a total of at least 50 minutes at his office. He also observed her gesture freely with both hands and turn her neck and head repeatedly during the evaluation. Dr. Walker rated Claimant's permanent impairment at 3% of the whole person for her cervical sprain/strain injury. He apportioned 2% of this rating to her industrial accident and 1% to her pre-existing condition because: "she clearly has a pre-existing history of neck complaints as well as cervical disc pathology." Defendant's Exhibit 16, p. 209.

26. At hearing, Claimant testified that she continues to suffer frequent pinching and burning pain in her neck, head, shoulders, and back. Her head pain is aggravated by movement. Even when taking prescription medication her neck and shoulder pain are almost always present.

27. Claimant's daily life has been affected by her industrial injury. Housework increases her pain significantly. Vacuuming, mopping, cleaning windows, and cooking are difficult. Her family helps her with most of the housework. Around home she limits her lifting to approximately 10 pounds. She cannot lift her grandchildren. Her pain significantly disturbs her sleep. If she takes medication she can sleep through the night.

28. At the time of hearing, Claimant was still treating with Dr. Joseph, who gives her periodic cervical trigger point injections and encourages a home exercise routine, which she performs. She was still under work restrictions imposed by Dr. Joseph, including no lifting more than 10 pounds, no sitting or standing more than two hours, no looking down with her head more than two hours, and no repetitive pushing, pulling, or reaching above shoulder level. Claimant wants employment and has worked with Industrial Commission rehabilitation consultant Chris Horton to find another job. However, she has not obtained another job and doubts there are jobs in the open labor market that she can safely perform and for which she is competitive**.**

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

DISCUSSION AND FURTHER FINDINGS

30. 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. ConAgra, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

31. **Medical care.** The first issue is Claimant's entitlement to additional medical care. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may

do so at the expense of the employer. Of course an employer is only obligated to provide medical treatment necessitated by the industrial accident, and is not responsible for medical treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Thus a claimant must establish that the condition for which she seeks benefits was caused by the industrial accident and not by a pre-existing or subsequent injury or condition.

32. Claimant herein alleges that her March 27, 2008 industrial accident caused her need for additional medical treatment after August 27, 2008. Defendant admits that Claimant suffered a work accident on March 27, 2008, but asserts she fully recovered therefrom by August 27, 2008. Several medical experts have opined regarding the causation of Claimant's complaints after August 27, 2008. Their opinions are examined below.

33. Dr. Lords. Chiropractor Craig Lords examined Claimant on December 16, 2010, and opined that she suffered ongoing discogenic pain related to her bulging cervical discs, as documented by her July 8, 2010 cervical MRI. Dr. Lords was unsure of what future medical treatment might be needed but he clearly attributed Claimant's persisting cervical disc condition to her industrial accident.

34. Dr. Walker. Dr. Gary Walker is board certified in physical medicine and rehabilitation. He examined Claimant on April 8, 2013, and relied in part on records Defendant provided from Dr. Marano and Dr. Esplin (describing a pre-existing cervical disc pathology

documented by MRI). As already noted, these records pertain to another individual named Maria Gonzalez—not to Claimant herein. Not surprisingly, Dr. Walker concluded that Claimant's cervical disc pathology pre-existed her 2008 industrial accident. Dr. Walker's report comments on "Dr. Marano's notes and description of the previous MRI and CT myelogram from 2007 that pre-dates this injury." Defendant's Exhibit 16, p. 207.

35. Dr. Walker also mistakenly believed there was a gap in Claimant's medical care from September 2008 until the summer of 2010. Believing that Claimant went two years without seeking further treatment, Dr. Walker concluded Claimant needed no further medical treatment after August 2008 due to her industrial accident. In fact, Claimant treated three times at Bowman Chiropractic in February and March 2009, and requested that Defendant reopen her claim in April 2009, so she could obtain further medical treatment. In March 2010, she treated again at Bowman Chiropractic. When Dr. Knoebel examined her in April 2010 and recommended no further medical treatment without ordering a diagnostic MRI, Claimant promptly sought an evaluation by Dr. Joseph. Dr. Walker's conclusions are not persuasive as they arise from reliance on medical records pertaining to another individual—not Claimant—with significant pre-existing disc pathology and upon an incomplete understanding of medical records which do pertain to Claimant**.**

36. Dr. Knoebel. Dr. Knoebel evaluated Claimant on April 8, 2010, and did not have the benefit of her July 2010 cervical MRI which documented her post-accident C5-6 and C6-7 disc pathology. He opined she was medically stable and needed no further medical treatment. Dr. Knoebel later reviewed Dr. Walker's report which cited and relied upon medical records not pertaining to Claimant. Dr. Knoebel reaffirmed his prior opinion. Dr. Knoebel's conclusions are

unpersuasive as they arise from an incomplete understanding of Claimant's medical records and are influenced by Dr. Walker's report discussing medical records that do not pertain to Claimant.

37. Dr. Joseph. Dr. Joseph is an orthopedic surgeon and Claimant's treating doctor. He commenced treating Claimant for her industrial injuries on June 28, 2010. Dr. Joseph released Claimant from work on October 6, 2010, and treated her with physical therapy, prescription medications, acupuncture, and periodic trigger point injections. He found Claimant medically stable on February 16, 2012. Dr. Joseph opined that Claimant's 2008 industrial accident caused her C5-6 disc protrusion and persisting cervical and trapezius muscle spasm. He confirmed that Claimant's ongoing complaints persisting after August 27, 2008, arise from muscular tenderness in the cervical paraspinal and trapezius muscles due to her industrial accident.

38. Defendant asserts there is no objective evidence of any injury from Claimant's 2008 industrial accident persisting after August 27, 2008. However, Claimant's July 8, 2010 cervical MRI documented a small disc herniation at C5-6, C6-7 disc bulge, and loss of cervical lordosis. Dr. Joseph testified that: "loss of the normal curvature of the spine is typically related to increased muscle spasm so the spine becomes more of a column shape instead of having a normal curve …. So—so it tells us that the muscle has a lot of muscle spasm." Joseph Deposition, p. 20, ll. 1-6. He opined:

> Q. (by Mr. McBride) I mean, it is your opinion that she does have myofascial neck pain caused by this accident in March of 2008, correct?
>
> A. (by Dr. Joseph) She does have objective muscle spasm, but—yes.
>
> Q. And that is an objective finding, you're seeing the spasm?
>
> A. That is correct.

Joseph Deposition, p. 52, ll. 1-8.

39. The opinions of Dr. Joseph and Dr. Lords affirm that Claimant's March 27, 2008, industrial accident caused persisting cervical and right shoulder injury. Dr. Walker opined that her accident caused soft tissue cervical strain in spite of being provided erroneous medical records of pre-existing cervical conditions. The opinions of Dr. Joseph and Dr. Lords are supported by the medical evidence and are more persuasive than the opinion of Dr. Knoebel.

40. Defendants rely heavily upon Mr. Vawdrey's assessment that Claimant reached maximum medical improvement by August 27, 2008. On August 18, 2008 Richard Lemon, P.T., recorded "Patient reports that she continues with soreness and pain in the right suboccipital area and upper trapezius." Defendant's Exhibit 3, p. 62. On August 20, 2008, Mr. Lemon recorded: "Pain level 1/10. However, she has not been working much the past 2 days." Defendant's Exhibit 3, p. 62. On August 27, 2008, the day Mr. Vawdrey concluded Claimant attained maximum medical improvement, he recorded that she had been pain-free for eight days but had ongoing trapezius muscle tightness extending into her neck. His notes indicate: "ASSESSMENT: Neck pain with radiating symptoms into the right shoulder, trapezius, and her arm-today we are going to consider those resolved and close this work comp case. MMI has been attained." Defendant's Exhibit 2, p. 37. Mr. Vawdrey released Claimant to full work without restrictions but did not follow up further to assess her condition after she resumed her full work duties. Thereafter, Claimant experienced increasing neck, shoulder, back, and arm pain which prompted her to ask that her claim be reopened and to seek additional medical care from Bowman Chiropractic and Dr. Joseph. Given the return and persistence of Claimant's symptoms after she resumed full work duties, Dr. Joseph accurately observed that Mr. Vawdrey's assessment that Claimant reached maximum medical improvement by August 27,

2008, before resuming her full work duties and after only eight days without pain when she had previously had pain for six months, was premature. Joseph Deposition, p. 56.

41. Claimant has proven that her March 27, 2008 industrial accident caused cervical and right upper extremity injury persisting beyond August 27, 2008, and thus has proven her entitlement to reasonable medical care therefore.

42. Claimant treated with Bowman Chiropractic commencing in February 2009. She received some relief from these treatments to the extent that she was able to continue working at ConAgra. Dr. Joseph treated Claimant commencing in June 2010. He provided or prescribed medications, acupuncture, and physical therapy. He also provided periodic trigger point steroid injections which controlled Claimant's muscular pain for approximately one month each time. Dr. Joseph affirmed that the treatment he provided or prescribed for Claimant was due to her industrial accident and was reasonable. Defendant's Exhibit 6, p. 100(j).

43. ConAgra has not paid Dr. Joseph's bills for Claimant's treatment. Defendant's Exhibit C documents $4,984.00 in bills for Dr. Joseph's treatment which Claimant paid for herself. At the time of hearing, she continued to treat with Dr. Joseph. In addition, Claimant has paid approximately $700 for treatment at Bowman Chiropractic out of her own pocket.

44. Claimant has proven her entitlement to additional medical care for her cervical and right upper extremity injury sustained in her March 27, 2008 industrial accident, including medical care recommended and provided by Dr. Joseph and Bowman Chiropractic after August 27, 2008.

45. **Temporary disability.** The next issue is Claimant's entitlement to temporary disability benefits. Idaho Code § 72-102 (11) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due

to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980). Additionally:

> [O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986).

46. In the present case, Claimant has proven that her back, neck, and right arm complaints were caused by her industrial accident and thus has proven her entitlement to benefits for temporary disability resulting therefrom. She requests temporary disability benefits from October 6, 2010, when Dr. Joseph released her from working, through February 16, 2012, when he found her condition medically stable.

47. The record establishes that Dr. Joseph recommended work accommodations for Claimant on July 21, 2010. Claimant requested, but ConAgra refused to provide work within those restrictions. Claimant believed that work at ConAgra on the potato flake inspection line would have been suitable and within her restrictions, however ConAgra did not offer her any such work. Dr. Joseph then released Claimant from work on October 6, 2010. He continued to

treat Claimant with trigger point injections which improved her symptoms for approximately one month. On November 3, 2010, Dr. Joseph referred Claimant to Pat Ferrell, M.D., for epidural steroid injections in her neck. On January 7, 2011, Dr. Joseph recorded that Claimant's neck pain persisted even after two epidural steroid injections by Dr. Ferrell. Dr. Joseph then treated Claimant with acupuncture which improved her neck pain for a time such that by February 8, 2011, Claimant hoped to return to work in March 2011, and visited with ConAgra about her return. Unfortunately, she did not improve with further acupuncture treatments and by April 7, 2011, was not sufficiently improved to return to work. Dr. Joseph continued her on light-duty restrictions. He evaluated her medications and prescribed Flexeril that proved beneficial. Dr. Joseph treated Claimant with trigger point injections on July 11, 2011, and August 1, 2011. On August 24, 2011, he referred Claimant to Elizabeth Gerard, M.D. Dr. Joseph provided additional trigger point injections on November 1, 2011 and January 4, 2012. He rated Claimant's permanent impairment on February 6, 2012.

48. Dr. Walker and Dr. Knoebel found Claimant capable of working without restriction as of August 27, 2008, the date of medical stability as determined by Randy Vawdrey. However, as already noted, their opinions arise from a review of incomplete medical records and/or medical records pertaining to another individual, and are unpersuasive.

49. Dr. Lords found Claimant medically stable on December 16, 2010, rated her permanent impairment, and subsequently assigned permanent work restrictions. However, Dr. Lords expressly stated that he did not know what further medical treatment might be needed. Thus his stability date is less persuasive. Dr. Joseph continued to treat Claimant thereafter and found her condition medically stable on February 6, 2012.

50. Dr. Joseph's determination that Claimant reached maximum medical

improvement by February 6, 2012, is most persuasive because he had a complete and accurate knowledge of Claimant's condition and history, and multiple opportunities to evaluate her progress in response to treatment.

51. The record does not establish that ConAgra made a reasonable and legitimate offer of employment to Claimant which she was capable of performing within the terms of her work restrictions and which employment was likely to continue throughout her period of recovery. Pursuant to Idaho Code § 72-408 and Malueg, Claimant is entitled to temporary disability benefits during her period of recovery from October 6, 2010, until February 6, 2012.

52. **Permanent impairment.** The next issue is Claimant's entitlement to permanent impairment. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

53. Claimant herein alleges permanent impairment of 5-8% based upon the rating of Dr. Joseph. Defendant asserts Claimant suffers no permanent impairment based upon Dr. Knoebel's report. The impairment opinions of the medical experts are discussed below.

54. Dr. Knoebel. Dr. Knoebel examined Claimant on April 8, 2010, at Defendant's request. He diagnosed nonspecific pain complaints without significant objective findings. Dr. Knoebel found Claimant's presentation not credible in that her subjective complaints outweighed objective findings. He concluded she sustained temporary industrial contusions without permanent impairment due to her industrial accident. In forming his opinion, Dr. Knoebel did not have available for review Claimant's July 2010 cervical MRI scan which documented loss of cervical lordosis and cervical disc pathology. On May 2, 2013, Dr. Knoebel reviewed Dr. Walker's report, which cited and relied on medical records describing pre-existing cervical disc pathology in another individual—not Claimant. Dr. Knoebel then reaffirmed his prior conclusions.

55. Dr. Walker. Dr. Walker evaluated Claimant at Defendant's request in April 2013. He relied on records from Dr. Marano and Dr. Esplin, describing cervical disc pathology in another individual—not Claimant herein. Dr. Walker concluded that Claimant sustained only a soft tissue cervical sprain secondary to her industrial injury. He rated Claimant's permanent impairment pursuant to the AMA Guides to the Evaluation of Permanent Impairment, 6th Edition, at 3% of the whole person with 2% attributable to chronic soft tissue cervical strain due to her industrial accident and 1% attributable to her pre-existing condition because: "she clearly has a pre-existing history of neck complaints as well as cervical disc pathology." Defendant's Exhibit 16, p. 209. Dr. Walker's conclusions are influenced by the medical records provided for his review from Dr. Marano and Dr. Esplin, which Defendant later stipulated do not pertain to Claimant herein.

56. Dr. Lords. Dr. Lords examined Claimant in December 2010, and opined that she suffered discogenic pain related to her bulging cervical discs as documented by her July 2010

cervical MRI. He rated her permanent impairment due to her industrial accident at 10% of the whole person based on her radicular symptoms and imaging study showing a herniated disc at the same level associated with the radiculopathy. Defendant's Exhibit 10, p. 119.

57. Dr. Joseph. Dr. Joseph rated Claimant's impairment in February 2012, at 5-8% of the whole person pursuant to the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, due to cervical disc-related changes as documented by her post-accident cervical MRI. When closely questioned at his deposition, Dr. Joseph indicated that Claimant's chronic pain was most likely of muscular origin and that he would place Claimant's permanent impairment at 5% of the whole person. Joseph Deposition, p. 49.

58. Dr. Joseph and Dr. Lords are the only medical experts whose opinions are based on all the applicable evidence and are not influenced by evidence of pre-existing cervical disc pathology appearing in medical records not pertaining to Claimant. Contrary to Dr. Lord's opinion that Claimant suffers cervical radiculopathy, both Drs. Joseph and Walker opined that while she may experience some cervical discogenic pain, diagnostic testing reveals no ongoing cervical radiculopathy. Dr. Walker agreed with Dr. Joseph that Claimant's ongoing pain of her upper shoulders and lower cervical spine is predominately muscular and that some non-radicular discogenic pain may also be present. As an orthopedic surgeon, Dr. Joseph has substantial medical expertise and as Claimant's treating physician has had extensive opportunity to observe her. His impairment opinion is well supported by Claimant's cervical MRI documenting not only C5-6 and C6-7 disc pathology, but also loss of cervical lordosis and chronic cervical muscle spasm. Dr. Joseph's opinion is the most persuasive.

59. Claimant has proven that she suffers permanent physical impairment of 5% of the whole person due to her 2008 industrial accident.

60. **Permanent disability**. The next issue is the extent of Claimant's permanent disability. Claimant alleges she is entitled to substantial permanent disability, up to and including total permanent disability. Defendant asserts Claimant has no permanent disability.

61. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995). The proper date for disability analysis is the date of the hearing, not the date that maximum medical improvement has been reached. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012).

62. Physical restrictions. To evaluate permanent disability, permanent physical restrictions resulting from the industrial accident merit particular consideration.

63. *Dr. Knoebel.* Dr. Knoebel placed no restrictions on Claimant's work activities due to her industrial accident. However, as already noted, his initial opinion was rendered prior to Claimant's 2008 cervical MRI which showed cervical disc pathology. Dr. Knoebel later reaffirmed his initial opinion, after reviewing Dr. Walker's report which relied in part upon medical records documenting pre-existing cervical disc pathology in a different individual—not Claimant.

64. *Dr. Walker.* Dr. Walker placed no restrictions on Claimant's work activities due to her industrial accident. He recorded Claimant's report that she could sit for an hour at home. He observed her sit for at least 50 minutes at his office. He also observed her gesture freely with both hands and turn her neck and head repeatedly during his evaluation. Dr. Walker opined that a sitting restriction of 30 minutes per day was very extreme. He opined that Claimant sustained only a soft tissue cervical sprain secondary to her industrial injury. Dr. Walker's opinion was rendered under the mistaken assumption that medical records from Drs. Esplin and Marano, describing pre-existing cervical disc herniations, pertained to Claimant when they do not. Dr. Walker attributed part of Claimant's permanent impairment to this supposed pre-existing cervical disc pathology.

65. *Dr. Lords.* Dr. Lords placed significant restrictions on Claimant due to her work injury. On January 6, 2011, he assigned permanent work restrictions including sitting four to six hours per day, standing four to six hours per day, and walking two to four hours per day. He restricted Claimant to light work consisting of lifting no more than 10 pounds frequently and 20 pounds occasionally, and from pushing and pulling more than 10 pounds with either hand. Dr. Lords limited her to occasional stooping, crouching, bending and kneeling, and entirely restricted

her from all climbing and all overhead reaching. He did not restrict Claimant's grasping or fine manipulation. Defendant's Exhibit 10, pp. 121-122.

66. *Dr. Joseph*. Dr. Joseph placed substantial physical restrictions on Claimant on June 18, 2012, due to her work injuries. Defendant's Exhibit 6, pp. 100(c)-(i). He restricted Claimant from lifting more than 10 pounds below shoulder level and entirely restricted her from all lifting above shoulder level and from any cervical rotation or ladder climbing. He limited her to occasional pushing and pulling, occasional light grasping, and up to 30 minutes each of standing, walking, and sitting.

67. On April 30, 2013, Dr. Joseph again placed physical restrictions on Claimant. Defendant's Exhibit 6, pp. 100(w)-(x). He restricted Claimant from lifting more than 10 pounds and limited her to standing two hours per day, sitting two hours per day, and walking for a total of two hours per day. He restricted her from all pushing and pulling, reaching above shoulder level and from fine manipulation because it would require looking downward. Dr. Joseph released her to very limited restricted work for a total of one to three hours per day.

68. Claimant demonstrated the ability to sit for nearly an hour during her evaluation with Dr. Walker. Claimant's attendance at hearing demonstrated she has the capacity to sit for more than a total of two hours per day. She further demonstrated cervical rotation ability by turning her head from side to side during casual conversation while waiting in Dr. Walker's office. While this conduct does not necessarily demonstrate the capacity to sustain these activities day after day as may be required in an employment setting, it merits consideration. No functional capacity evaluation was performed in this case.

69. Dr. Joseph imposed restrictions in large part according to Claimant's physical complaints, yet he clearly recognized the challenge of the language barrier and the practical limitations inherent in the complaints attributed to Claimant by a family member interpreter:

> A. (by Dr. Joseph) But, again, that language barrier became a real—always is—that's the hardest thing with this case is that, how am I going to relay that, you know, to somebody. They've got to have a command, much more so than even I do of Spanish, and command and get that across. And it's hard with her. I mean, that's—that's the—one of the compounding—biggest compounding factors in her case.
>
> Q. (by Mr. Bailey) And—and just to give her the benefit, I know that when we did her deposition we had an interpreter that apparently—a Spanish gentleman who was interpreting it wrong, and her son jumped in a lot. …. You indicated that approximately ninety percent of the visits, the [Claimant's] daughter was here. Was the daughter able to speak fluid [sic] English?
>
> A. Yes, very much so. Yes.
>
> Q. Did it appear that the daughter and the patient were conversing and things were getting across, and then even though there's an intermediary, it's then getting relayed to you in some reasonable manner?
>
> A. Yes. But I know from my medical training that the reliability of a family member as an interpreter is not as objective as you want it to be. So I take everything with a grain of salt. I mean, we're not supposed to use a family member as an interpreter in complicated cases because of that, so ….
>
> Q. And by that statement, I assume you mean that there's a tendency, I would gather, for the family member interpreting to maybe magnify the symptoms as related to you?
>
> A. Yes. Or change them based on their interpretation of what's going on, you know.

Joseph Deposition, p. 39, l. 24 through p. 41, l. 12.

70. Dr. Joseph imposed one set of work restrictions in June 2012, and a similar but less onerous set of restrictions in April 2013. His restrictions are not entirely persuasive because Claimant has actually demonstrated her capacity to exceed some of them in her sitting and cervical rotation tolerances.

71. The Referee finds the restrictions imposed by Dr. Lords to be most reliable and persuasive because they recognize that Claimant has significant actual work limitations. This is corroborated by the record. Upon returning to full work duty at ConAgra after her industrial accident, Claimant required assistance from her coworkers to perform heavier tasks. She continued to work but her pain increased until she sought further medical care—even though she had to pay for it repeatedly out of her own pocket. Additionally, Claimant bought a home in 2002 that appraised for $160,000.00 in 2009. Claimant lost her home to foreclosure in 2010 because she could not continue to work to make her mortgage payments. ConAgra refused to allow her to return to work until she could present a doctor's release to work without restrictions. Both Drs. Knoebel and Walker concluded she had no restrictions due to her industrial accident and could return to her work at ConAgra. However, Claimant simply could not tolerate the work at ConAgra and so lost her home. Dr. Lords' restrictions are most supported by the record as a whole.

72. Ability to compete in the open labor market. Having determined appropriate permanent work restrictions, Claimant's ability to compete for employment in the open labor market as demonstrated by her work search and the opinions of vocational experts must be examined.

73. Claimant attempted more than once to return to work at ConAgra but was refused and told that she could not return until she had a doctor's release to work without restrictions. Claimant testified at hearing that she did not believe she could return to her pre-accident full work duties at ConAgra. Claimant sought unsuccessfully to apply for other jobs at Aberdeen, Pleasant Valley, Idaho Select, and Driscoll Potatoes. Because of her illiteracy, she submitted

work applications only with assistance from her son or daughter. Claimant did not make written application anywhere else**.**

74. Four vocational experts have considered Claimant's ability to compete in her labor market. Their conclusions are examined below.

75. *Chris Horton.* Industrial Commission rehabilitation consultant Chris Horton assisted Claimant in searching for work after her industrial accident. He was unable to find employment for her. In his report and recommendations of January 11, 2012, Mr. Horton noted that Claimant had a second grade education which she obtained in Mexico, with no other formal education or specialized training. He reported that Claimant desired to return to work and had conducted a job search within her customary occupation without success. Mr. Horton observed that Claimant needed and desired to develop greater English proficiency. However, as of the date of the hearing, she had not been successful in doing so.

76. On January 25, 2012, Mr. Horton issued an Amended Labor Market Report in which he considered work restrictions from Dr. Lords as well as the conclusions of Drs. Knoebel and Joseph. Mr. Horton noted that Dr. Lords' restrictions would not allow Claimant to return to her prior work at ConAgra, but would allow her to perform light duty work, defined as lifting up to 20 pounds occasionally. He reported that light-medium work (requiring lifting up to 50 pounds occasionally) in food processing would provide wages from $8.00 to $12.00 per hour. However, Mr. Horton observed that:

> [S]trictly abiding by the work restrictions issued by Dr. Lords, the claimant has incurred some labor market loss as a result of her industrial injury. This loss may prove to be significant as she is likely to be restricted from a major portion of jobs within her transferable skills and labor market. Some employers within this industry are able to accommodate an employee's work restrictions by altering his or her job duties or through a different job assignment. However, an unemployed job seeker has a disadvantage as many employers are less willing to hire an individual with work restrictions that prevent him or her from performing some of

> the major functions of the job. Many jobs primarily requiring sorting duties are seasonal, lasting up to two months a year, and pay significantly less than the claimant's pre-injury wage.

Defendant's Exhibit 22, pp. 282-283 (emphasis supplied).

77. Mr. Horton concluded that "the work release from Dr. Lords may only allow the claimant to return to the occupation of Agricultural Produce Sorter, which is seasonal" paying an hourly wage of $7.87. Claimant's Exhibit 9, p. 286. He noted that Claimant's education and English proficiency limit her vocational opportunities. Mr. Horton opined that Claimant "is likely to continue to experience difficulty in her job search if she follows the work restrictions issued by Dr. Lords." Defendant's Exhibit 22, pp. 286-287.

78. *Richard Taylor.* Richard Taylor, Ph.D., interviewed Claimant on April 23, 2012, at Claimant's counsel's request and issued a report on April 27, 2012, regarding her loss of earning capacity due to her industrial accident. Dr. Taylor recorded that Claimant commenced a community education class to learn English in January 2012, but as of the date of the interview nearly four months later, needed two interpreters to assist her in his interview. Dr. Taylor found Claimant's pre-injury labor market access to unskilled jobs in the sedentary, light, and medium work categories in Idaho totaled 77,465 jobs. He noted that all of Claimant's pre-injury work experience was in unskilled positions. Utilizing the work restrictions imposed by Dr. Lords which limited Claimant to unskilled sedentary or light work with limitations in climbing, stooping, crouching, bending and kneeling, Dr. Taylor concluded:

> Taking her occupational disability into consideration, a second analysis reveals that she retains the ability to perform 3.60%, or 2,788 jobs in the unskilled category existing in her local labor market defined as the State of Idaho. Therefore, her loss of labor market access in that category is in a range of 91% to 100%.
>
> These analyses also do not take into consideration the possible negative impact of her disability history, future problems associated with her disability, her lack of

> English speaking, reading, and writing skills, her 3rd grade education level, her classification as a person approaching advanced age on her potential to find and keep employment, or the reaching restrictions as stated above.
>
> In addition, when occupational numbers are viewed from the standpoint of spreading them across the entire state, the occurrences of jobs in the local markets are even less significant, making finding a job for which to apply very difficult, and actually securing and keeping the position even more difficult. It is important to keep in mind that the numbers referred to in this report represent numbers of jobs in the state economy, not job openings.

Defendant's Exhibit 24, pp. 351-352 (emphasis in original). Dr. Taylor thus evaluated Claimant's loss of labor market access at 91 to 100%, but did not otherwise expressly quantify the extent of Claimant's likely loss of earnings.

79. *Douglas Crum*. On January 7, 2013, Douglas Crum, C.D.M.S., interviewed Claimant at her counsel's request to evaluate Claimant's permanent disability. He reviewed Claimant's work history, educational history, and physical restrictions. On February 21, 2013, Mr. Crum reviewed reports from Dr. Knoebel, Dr. Joseph, and Dr. Lords. Mr. Crum noted that Claimant has no computer or math skills, can read very little Spanish and cannot read or speak English. He recognized that she is hampered in her ability to learn English because she cannot read Spanish. Mr. Crum noted that Claimant was earning $12.25 and had health and dental insurance at the time of her accident. He opined that Claimant had pre-injury access to 7.3% of the labor market. He concluded she would have no permanent disability based upon Dr. Knoebel's IME report. However, utilizing Dr. Joseph's work restrictions, Mr. Crum concluded that as a result of Claimant's industrial accident she would not be able to return to work, would be totally and permanently disabled, and any attempted job search would be futile. He offered no opinion as to Claimant's permanent disability based upon the work restrictions imposed by Dr. Lords. Defendant's Exhibit 15. Mr. Crum mistakenly reported Claimant was 61 years old at the time of his assessment, when she was in fact 51. Claimant's Exhibit 13, p. 201. It is unclear

whether this is simply a typographical error in his report, or whether Mr. Crum evaluated Claimant's disability based upon the mistaken assumption that she was then 61 years old.

80. *Nancy Collins*. Vocational expert Nancy Collins, Ph.D., is a certified rehabilitation counselor, forensic vocational expert, and certified life care planner. She was retained by Defendant to evaluate Claimant's vocational disability. In her June 25, 2012 report Dr. Collins opined that Claimant would suffer no disability based upon Dr. Knoebel's assessment that she had no work restrictions. Dr. Collins did not expressly address Claimant's disability based upon the April 7, 2011 temporary work restrictions, the June 2012 or April 2013 restrictions imposed by Dr. Joseph. Defendant's Exhibit 25. Dr. Collins reviewed Dr. Lords' restrictions of standing four to six hours per day, lifting 10 pounds frequently and 20 pounds occasionally, bending, squatting, and kneeling occasionally, and no reaching overhead. She considered Claimant's second grade education in Mexico and her prior unskilled employments as a general laborer for nine years at ConAgra, and many years working in the fields and sorting potatoes. Dr. Collins opined that Claimant is an unskilled worker, but that considering both unskilled and semi-skilled positions, Claimant had lost access to 48% of the labor market based upon the restrictions imposed by Dr. Lords and had lost earning capacity amounting to 31%. Dr. Collins acknowledged: "This underestimates her loss as I cannot adjust for overhead reaching." Defendant's Exhibit 25, p. 359. Dr. Collins concluded that Claimant would sustain 38% permanent disability utilizing Dr. Lords' restrictions.

81. A close review of Dr. Collins' report prompts several observations. Dr. Collins reported that utilizing Dr. Lords' restrictions, Claimant had lost access to 42% of job titles based upon Dr. Collins' *SkillTran* program analysis. Dr. Collins then reviewed actual quarterly job numbers for inspectors, graders, sorters, farmworkers, laborers, agricultural workers, packers and

packagers from the Pocatello labor market and concluded that Claimant had lost access to 218 out of a total of 450 actual jobs, or 48%. Interestingly, Dr. Collins then listed three additional categories of unskilled jobs that Claimant could consider, including maids and housekeepers, child care attendants, and dishwashers, collectively totalling 1001 jobs in the Pocatello labor market. Of those 1001 jobs, only 351 were sedentary or light duty, the remaining 650 were heavier duty and beyond Dr. Lords' restrictions. Thus utilizing Dr. Lords' restrictions and combining the Pocatello job data presented in Dr. Collins' report indicates that Claimant has lost access to 60% ([218+650] out of [450+1001]) of the jobs in her labor market. This again underestimates Claimant's loss as it does not consider Dr. Lords' restriction on overhead reaching.

82. *Further analysis of the vocational opinions.* The most credible work restrictions are those imposed by Dr. Lords. Chris Horton, Dr. Taylor, and Dr. Collins evaluated Claimant's disability utilizing Dr. Lords' restrictions. Mr. Horton opined that Claimant would likely be restricted from a "major portion of jobs" within her labor market and would "likely experience difficulty in her job search." Defendant's Exhibit 22. Claimant's job search was in fact unsuccessful but also quite limited. Mr. Horton's job search on her behalf was similarly unsuccessful but relatively brief.

83. Dr. Taylor's assessment of Claimant's loss of labor market access (91-100%) is approximately twice that estimated by Dr. Collins (42-48%); however, as noted, Dr. Collins' own report data actually establish a 60% loss of labor market access without considering overhead reaching restrictions. The disparity may be due to Dr. Collins' consideration of both unskilled and semiskilled light duty jobs, whereas Dr. Taylor considered only unskilled light duty jobs. Dr. Collins assumed Claimant would be competitive for semi-skilled positions.

84. By definition, semi-skilled positions typically require from one month to two years to learn. Defendants' Exhibit 25, p. 358. Dr. Collins acknowledged that Claimant has no history of semi-skilled work. Claimant has only a second grade education in Mexico. She speaks almost no English and cannot read or write English or Spanish. Dr. Collins' report correctly observes that Claimant is an unskilled worker and would need a Spanish speaking trainer to attempt to learn any semi-skilled position. Without any prior semi-skilled employment experience, the likelihood that Claimant would be competitive for a semi-skilled position and would be able to learn and master a semi-skilled position promptly enough to satisfy a potential employer is subject to serious question.

85. Vocational experts often evaluate permanent disability by averaging both loss of labor market access and expected wage loss, as did Dr. Collins in the present case. However, the two measures are not entirely independent. As the loss of labor market access becomes more substantial, the expected wage loss is less significant in predicting actual disability. Complete loss of labor market access produces complete expected wage loss.[3] Thus Dr. Taylor's silence as to estimated loss of earnings does not render his opinion unpersuasive.

---

[3] In Deon v. H&J, Inc., 2013 WL 3133646 (Idaho Ind. Com. May 3, 2013), the Commission observed:

> 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%] ÷ 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.
>
> As the residual labor market becomes increasingly small, the disability rating obtained by the averaging method becomes increasingly skewed, especially in labor markets with high unemployment rates where competition for the remaining portion of suitable jobs will be fierce.

86. Dr. Collins reported that Claimant earned $12.28 per hour at ConAgra. Applying Dr. Lords' restrictions, Dr. Collins assumed Claimant could find new employment and that the "average wage for unskilled work appears to be around $8.50 per hour." Defendant's Exhibit 25, p. 361. However, Chris Horton reported that applying Dr. Lords' restrictions, Claimant would likely find employment at $7.87 per hour, but that "many jobs primarily requiring sorting duties are seasonal, lasting up to two months a year." Defendant's Exhibit 22, p. 283. Dr. Collins' opinion generally overestimates Claimant's residual labor market access and expected earning capacity.

87. Based on Claimant's permanent impairment of 5% of the whole person, her permanent physical restrictions as assessed by Dr. Lords, and considering all of her medical and non-medical factors, including her age of 46 at the time of the industrial accident and 51 at the time of the hearing, second grade education in Mexico, lack of any other formal education, absence of English fluency, inability to read or write English or Spanish, absence of any computer skills, inability to return to her previous position at ConAgra, and lack of transferable skills, Claimant's ability to compete in the open labor market and engage in regular gainful activity after her 2008 industrial accident has been greatly reduced. The Referee concludes that Claimant has established a permanent disability of 80%, inclusive of her 5% whole person impairment.

88. **Odd lot.** Claimant alleges she is totally and permanently disabled. A claimant who is not 100% permanently disabled may prove total permanent disability by establishing she is an odd-lot worker. An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho

76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market - absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status rests upon the claimant. Dumaw v. J. L. Norton Logging, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). A claimant may satisfy her burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways:

1. By showing that she has attempted other types of employment without success;
2. By showing that she or vocational counselors or employment agencies on her behalf have searched for other work and other work is not available; or
3. By showing that any efforts to find suitable work would be futile.

Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

89. In the present case, Claimant has presented no evidence of any failed attempts at other types of employment. She has presented evidence of a very limited unsuccessful work search. Mr. Horton also conducted a relatively brief unsuccessful work search on her behalf. These efforts collectively do not constitute a sufficient work search to satisfy the second prong of the Lethrud test.

90. Doug Crum opined that a work search would be futile based upon Dr. Joseph's restrictions. However, as noted, Dr. Joseph's restrictions are not entirely persuasive because Claimant has demonstrated her ability to exceed some of those restrictions. Mr. Crum did not offer any opinion about Claimant's employability based upon Dr. Lords' restrictions. Dr. Collins opined Claimant would be employable based upon Dr. Lords' restrictions, but her analysis assumed Claimant would be competitive for semi-skilled work. As previously noted, the record

does not indicate Claimant has ever performed semi-skilled work or would likely be competitive now for semi-skilled work. While Dr. Taylor's report suggests Claimant has lost access to at least 91% of her labor market statewide, Mr. Horton's and Dr. Collins' reports indicate Claimant may still perform some light duty unskilled jobs in her local labor market. Dr. Taylor and Chris Horton opined it would be difficult for Claimant to find employment based upon Dr. Lords' restrictions. However, they did not opine an employment search would be futile.

91. Claimant has not established a prima facie case that she is an odd-lot worker, totally and permanently disabled, under the Lethrud test.

92. **Idaho Code § 72-406(1) apportionment**. The next issue is whether apportionment is appropriate. Idaho Code § 72-406(1) provides:

> In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

93. In the present case, the only medical expert opining that Claimant suffered permanent impairment prior to her 2008 industrial accident was Dr. Walker and he did so in reliance upon erroneous medical records Defendant provided and which Defendant later stipulated did not pertain to Claimant. Claimant testified that she worked without limitations or restrictions prior to her accident. The record establishes that she worked without restriction for nearly two years after her 2005 fall at ConAgra, before her 2008 industrial accident. No apportionment pursuant to Idaho Code § 72-406 is appropriate.

94. **Attorney fees**. The final issue is Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804. Attorney fees are not granted as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in

Idaho Code § 72-804 which provides:

> If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding attorney fees is a factual determination which rests with the Commission. Troutner v. Traffic Control Company, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

95. Defendant herein contested Claimant's entitlement to permanent partial impairment due to her March 27, 2008 accident. Claimant asserts that because Defendant failed to pay 2% permanent partial impairment benefits as found by Dr. Walker, to whom Defendant sent Claimant for an IME, Defendant has unreasonably denied permanent impairment benefits. Defendant counters that Dr. Knoebel opined Claimant's accident caused her no permanent impairment, thus Defendant's assertion that Claimant suffered no permanent impairment from her industrial accident was not unreasonable. Defendant's argument would be more convincing if Dr. Knoebel's opinion rested upon complete and accurate information.

96. Dr. Knoebel examined Claimant in April 2010 and, without the benefit of an MRI, concluded she overstated her symptoms and had no permanent impairment. Claimant's July 2010 cervical MRI documented C2-3 and C3-4 desiccation, shallow C5-6 disc protrusion slightly impressing the ventral thecal sac, shallow C6-7 disc bulge, and loss of cervical lordosis. Dr. Knoebel's initial opinion was based upon incomplete information.

97. Defendant requested another opinion from Dr. Knoebel in May 2013. Defendant provided Dr. Knoebel a report by Dr. Walker who examined Claimant in April 2013. Defendant provided Dr. Walker records from Dr. Stephen Marano dated March 23, 2007 and April 20, 2007 (describing a C5-6 disc herniation and C6-7 disc protrusion shown on MRI), and records from Dr. Vermon Esplin, dated July 19, 2006 (describing C5-6 disc bulge shown on MRI). Dr. Walker's report expressly comments on "Dr. Marano's notes and description of the previous MRI and CT myelogram from 2007 that pre-dates this injury." Defendant's Exhibit 16, p. 207. Defendant had actually been on notice for two years that the medical records of Drs. Marano and Esplin did not pertain to Claimant.

98. On April 15, 2011, Defendant deposed Claimant and the following exchanges ensued:

> Q. (by Mr. Bailey) Do you remember going to Texas and getting some films shot of your low back in 2009?
>
> A. (by Claimant) Which doctor did you tell me? No, I've never gone to Texas.
>
> ….
>
> Mr. McBride: They have the wrong person, don't they?
>
> Mr. Bailey: Yeah.
>
> Mr. McBride: Mistaken identity is my guess.
>
> ….
>
> Q. (by Mr. Bailey) Going back in time, I've got some [medical records] from Dr. Tony Joseph, and Dr. Marano. Do you remember him?
>
> A. (by Claimant) Marano, no. I don't think so.
>
> Q. Somebody looked at your neck. Do you remember that?
>
> Mr. McBride: Stephen Marano.

….

Q. (by Mr. Bailey) Does that name ring a bell?

A. No.

….

The Interpreter: She doesn't remember a Marano.

Q. (by Mr. Bailey:) Okay. Have you ever had a surgery on your wrist?

A. No.

Mr. Bailey: Okay. I'm wondering if we're getting the wrong Maria Gonzalez again.

Mr. Gonzalez (Claimant's son): I think you're getting the wrong information.

Q. (by Mr. Bailey:) Okay. Have you ever seen a doctor named Esplin in Pocatello?

A. No.

Q. No?

A. No.

….

Q. (by Mr. Bailey:) I'm going to ask you about some other doctors going back in time and realizing that they may not be—it may not be you that we have the records on. It may be somebody else named Maria Gonzalez. Do you recall ever getting any treatment at Bingham Community Hospital?

A. No.

Q. Have you ever been to any doctors in Blackfoot?

A. No.

….

Q. Okay. And maybe this might be easy to clear up. Do you remember your Social Security Number?

…. [Claimant provided her Social Security Number.]

Q. (by Mr. Bailey:) Okay. That's going to make this thing a lot easier.

….

Q. (by Mr. Bailey:) Just out of curiosity, while you were working at ConAgra, are there any other Maria Gonzalezes out there?

A. Yes.

….

Q. Okay. And to your memory, would any of these other women, the other Maria Gonzalezes, would any of them be about your age?

A. About two of them, more or less, they are.

Defendant's Exhibit 23, p. 39, l. 10 through p. 46, l. 2.

99. Defendant thus knew Dr. Marano's and Dr. Esplin's medical records for a Maria Gonzalez likely did not pertain to Claimant herein from the date of her pre-hearing deposition on April 15, 2011. Nevertheless, Defendant provided these medical records to Dr. Walker in April 2013 and then provided Dr. Walker's opinion based upon these medical records to Dr. Knoebel. Dr. Walker expressly relied on these erroneous records during his post-hearing deposition in September 2013. See Walker Deposition, p. 15. The opinions of Drs. Knoebel and Walker relying upon these erroneous medical records were then relied upon by some of the vocational experts in their reports evaluating Claimant's permanent disability. Only after hearing and after all post-hearing depositions were completed did Defendant finally stipulate that:

2. Any "Maria Gonzalez" mentioned in a report prepared by Stephen Marano, M.D. is not the Maria Gonzalez who is the Claimant in this action.

3. The medical records from Stephen Marano, M.D. reviewed by Gary Walker, M.D. in his reports (Defendant's Ex. 16) are not related to the Maria Gonzalez, Claimant in this action.

4. Claimant Maria Gonzalez never had a cervical MRI until July 8, 2010, as requested by Anthony Joseph, M.D.

Stipulation of Facts, filed December 23, 2013 (emphasis in original).

100. In spite of this stipulation, Defendant's subsequent briefing urged acceptance of Dr. Knoebel's and Dr. Walker's opinions without ever addressing their reliance on erroneous medical records of pre-existing cervical disc pathology.

101. It is unreasonable for Defendant to continue to refuse to pay any permanent impairment in reliance on Dr. Knoebel's opinion when Claimant subsequently had a cervical MRI that showed cervical disc pathology and Defendant provided erroneous medical records to Dr. Walker and then provided Dr. Walker's report based upon those erroneous medical records to Dr. Knoebel.

102. Claimant has proven her entitlement to an award of attorney fees for Defendants' unreasonable denial of permanent partial impairment benefits.

CONCLUSIONS OF LAW

1. Claimant has proven her entitlement to additional medical care for her cervical and right upper extremity injuries sustained in her March 27, 2008 industrial accident, including medical care recommended and provided by Dr. Joseph and Bowman Chiropractic after August 27, 2008.

2. Claimant has proven she is entitled to temporary total disability benefits from October 6, 2010, through February 6, 2012, the date she became medically stable.

3. Claimant has proven she suffers a permanent impairment of 5% of the whole person.

4. Claimant has proven she suffers a permanent disability of 80%, including her permanent impairment. She has not proven that she is an odd-lot worker.

5. No apportionment pursuant to Idaho Code § 72-406 is appropriate.

6. Claimant has proven she is entitled to an award of attorney fees for Defendants' unreasonable denial of permanent partial impairment benefits.

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 27th day of May, 2014.

INDUSTRIAL COMMISSION

_____/s/_____
Alan Reed Taylor, Referee

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June, 2014, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

MATTHEW ROMRELL
1495 EAST 17TH STREET
IDAHO FALLS ID 83404

NATHAN GAMEL
PO BOX 1007
BOISE ID 83701

mg ___/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARIA GONZALEZ, Claimant, v. CONAGRA FOODS, INC., Self-Insured Employer, Defendant.	**IC 2008-013533** **ORDER** June 2, 2014

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

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

1. Claimant has proven her entitlement to additional medical care for her cervical and right upper extremity injuries sustained in her March 27, 2008 industrial accident, including medical care recommended and provided by Dr. Joseph and Bowman Chiropractic after August 27, 2008.

2. Claimant has proven she is entitled to temporary total disability benefits from October 6, 2010, through February 6, 2012, the date she became medically stable.

3. Claimant has proven she suffers a permanent impairment of 5% of the whole person.

4. Claimant has proven she suffers a permanent disability of 80%, including her permanent impairment. She has not proven that she is an odd-lot worker.

5. No apportionment pursuant to Idaho Code § 72-406 is appropriate.

6. Claimant has proven she is entitled to an award of attorney fees for Defendants' unreasonable denial of permanent partial impairment benefits. Claimant is entitled to attorney fees pursuant to Idaho Code §72-804. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, plus an affidavit in support thereof. In particular, the parties must discuss the factors set forth by the Idaho Supreme Court *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984). The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after Defendants' response, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

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

DATED this 2nd day of June, 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 2nd day of June, 2014, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

MATTHEW ROMRELL
1495 EAST 17TH STREET
IDAHO FALLS ID 83404

NATHAN GAMEL
PO BOX 1007
BOISE ID 83701

mg __/s/_____