BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

VANESSA HAMILTON, Claimant, v. COSTCO WHOLESALE CORPORATION, Self-Insured Employer, Defendant.	**IC 2009-007587** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **Filed October 10, 2014**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Coeur d'Alene on March 19, 2014. Claimant testified by video conference from Ringgold, Georgia, where she currently resides and works.[1] Stephen J. Nemec of Coeur d'Alene represented Claimant. Self-insured Costco was represented by James A. Ford of Boise. Oral and documentary evidence was presented. The record remained open for the taking of five post-hearing depositions. The parties then submitted post-hearing briefs and this matter came under advisement on August 8, 2014.

ISSUES

Pursuant to agreement by the parties, the following issues are to be decided:

1. Whether and to what extent Claimant is entitled to the following benefits:

    a. Medical;

[1] Claimant's and Costco's attorneys, as well as the Referee, participated from the Coeur d'Alene field office.

b. Temporary total /partial disability (TTD/TPD);

c. Permanent partial impairment (PPI); and

d. Permanent partial disability (PPD) in excess of her PPI.

2. Whether Claimant's condition is the result of pre-existing or subsequent injury or disease not work-related;

3. Whether apportionment is appropriate under Idaho Code § 72-406;

4. Whether Claimant is entitled to an award of attorney fees under Idaho Code § 72-408; and

5. Whether the Commission should retain jurisdiction of this matter.

CONTENTIONS OF THE PARTIES

Claimant contends that, as a result of a back injury and subsequent fusion, she is entitled to reimbursement for medical expenses she has incurred after she was declared at MMI by her treating physicians and an IME panel. Further, she is entitled to an orthopedic/neurosurgical referral made by her current treating physician and the Commission should retain jurisdiction pending the results of that referral. She also claims entitlement to disability of 62% above her 7% PPI. Finally, Claimant requests an award of attorney fees for Defendant's failure to honor the orthopedic referral without any medical basis.

Costco counters that because Claimant is making more money now than she was at the time of her injury, Costco's vocational expert has opined that she is entitled to no more than 3% PPD above her 7% PPI. She was able to secure sedentary employment at Costco's Fort Oglethorpe, Georgia, facility and is a valuable employee who has no plans to leave her employment. Also, Claimant's vocational expert failed to consider any physician-imposed

physical restrictions that did not support his theory of disability. Further, Claimant has failed to prove that she is entitled to any medical benefits other than those paid until she was declared at MMI or that any treatment she received post-MMI was related to her industrial injury. For the same reason, Claimant is not entitled to an award of attorney fees and has failed to provide any reason to retain her case beyond the statue of limitations.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Exhibits (CE) 1-22 admitted at the hearing.

2. Defendant's Exhibits (DE) 1-51 admitted at the hearing.

3. The post-hearing depositions of: Dan Brownell, taken by Costco on April 8, 2014; Michael Ludwig, M.D., taken by Costco on April 9, 2014; Nancy Collins, Ph.D., taken by Costco on April 15, 2014; Jonathon Kerley, D.O., taken by Claimant on April 30, 2014; and Bob Palermo taken by Costco on May 28, 2014.

All objections raised during the taking of the above depositions are overruled.

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

FINDINGS OF FACT

Background

1. Claimant was 53 years of age and residing in Ringgold, Georgia, with her 18-year-old daughter at the time of the hearing. Ringgold is near Chattanooga, Tennessee. She has resided in Georgia for the past two years, having moved there from Coeur d'Alene in December of 2012. Claimant attended high school but did not graduate; however, she

has her GED. Prior to her employment with Costco, Claimant worked in the hospitality industry for around 25 years. She was trained in banquet and beverage management and she described that work as very physically demanding.

2. Claimant left the hospitality business to join Costco's Coeur d'Alene store in April 2004. She was informed by her mentor in the hospitality business that Costco was "one of the best companies you can work for that will watch over you and take care of you and ensure that you succeed." HT, p. 27. Claimant's pre-injury jobs at Costco included working in the food court, stocking dry good lines, working in the bakery, and working in the gas/tire shop. Claimant was then promoted to her time-of-injury job of stocking freight in the hard lines and cashiering and assisting other cashiers.

The accident

3. On March 13, 2009, Claimant was helping a cashier when another cashier accidently hit Claimant in her left hip with a shopping cart. Claimant experienced immediate pain but thought it would work itself out. Because she was nearing the end of her shift, Claimant went home. The next morning, Claimant felt pain going down her left leg. She notified Costco later that day and continued with her regular work.

Post-accident medical treatment

4. On March 16, 2009, Claimant presented to an emergent care center complaining of pain in her left buttock down the back of her left leg into her left foot. She was diagnosed with an acute left low back strain with sciatica. Claimant was prescribed Flexeril, Vicodin and physical therapy which she attended the next four months about two times a week.

5. On May 13, 2009, Claimant presented to **Michael Ludwig, M.D.,** a physiatrist, on referral from an "urgent care system." Her chief complaint at that time was low back pain and left leg radicular pain. Dr. Ludwig assessed:

> At that point I mention that it could possibly be a left L4 radicular pain. But I even state at that time, "Exactly how this occurred by being struck in the anterior hip with a shopping cart is somewhat unclear."
>
> * * *
>
> Meaning that the mechanism that she described seemed like a trivial event that would not be, in my experience, consistent with something that would cause a lumbar disc herniation or radiculopathy to be manifest.

Dr. Ludwig Deposition, pp. 11-12.

6. Dr. Ludwig continued Claimant's physical therapy, returned her to light-duty work, and ordered a lumbar MRI. Claimant followed up on May 20, 2009 to review the results of the MRI, which was interpreted to reveal a left forward L4-L5 protrusion with annular tear at the L4-L5 level and mild encroachment upon the left L4-L5 foramen. Dr. Ludwig noted that Claimant had plateaued with medications and physical therapy; he recommended a trial of epidural steroid injections (ESIs) which was accomplished.

7. Claimant returned to Dr. Ludwig on July 13, 2009 at which time he noted, "The patient was initially making good progress, but her recent return of pain, back to its original intensity has her very emotionally distraught. She is requesting for something else to be done." DE 9, p. 20. Dr. Ludwig recommended a neurosurgical consultation.

8. Claimant first saw **Jeffrey Larson, M.D.**, a neurosurgeon, on July 20, 2009 with her chief complaint being lower back and left buttock pain. Dr. Larson noted:

> She has been participating in physical therapy and has had injections by Dr. Ludwig. Initially she had pain going down her leg and that has been alleviated by the injection with Dr. Ludwig. The lower back pain and now the left buttock pain seems to be re-aggravated by activities including work with any twisting. She has made some accommodations at work to help her with her lower back pain.

DE 15, p. 3.

9. Dr. Larson diagnosed degenerative disc disease at L4-5; left disc protrusion at L4-5; and left L4-5 radiculopathy. He recommended another lumbar MRI to further evaluate the disc herniation.

10. Dr. Larson saw Claimant in follow-up on August 11, 2009 to review the results of the MRI, which revealed an annular tear at L4-5 with a left-sided protrusion. He recommended a lumbar fusion at that level.

11. On September 28, 2009, Dr. Larson performed an anterior lumbar fusion at L4-5 and a posterior lumbar fusion at the same level with facet screw instrumentation. Claimant began physical therapy in October and continued through February 2010. Claimant generally improved post-surgery and was back at her time-of-injury job by November 2009.

12. Claimant returned to Dr. Larson's PA-C on March 24, 2010 at which time she noted that Claimant was doing quite well at 6 months post-surgery. She reported no numbness, tingling or weakness in her lower extremities. Claimant was exercising regularly and had not taken any pain medication or muscle relaxers since November of 2009. The PA-C indicated that Claimant was at MMI and was back to her usual activities without restrictions.

13. On June 28, 2010, Claimant presented to her family physician, **Bryce Gilman, M.D.**, complaining of chronic back pain after becoming overheated following doing some roofing the previous weekend. Dr. Gilman prescribed a topical anti-inflammatory to provide localized pain relief without stomach side effects.

14. Claimant returned to Dr. Larson on August 3, 2010 complaining of ". . . bilateral back pain that she relates to increased activity at work. The symptoms started approximately in [sic] a month ago. She gets some pain radiating posteriorly down her lower extremities. The pain is different than her lower back pain she had prior to surgery." DE 15, p. 32. There was no evidence of a recent injury. Dr. Larson noted, "Ms. Hamilton seems to have irritated her SI joints. X-ray shows that her L4-5 fusion has healed well. She does not have any of her preoperative back pain." *Id.*, p. 33. Dr. Larson recommended Claimant have bilateral SI joint injections with Dr. Ludwig.

15. Claimant returned to Dr. Larson on September 28, 2010 complaining of "intolerable buttock pain" since early July 2010. DE 15, p. 35. She attributed her pain to an increase in her activity level at work. Dr. Larson noted, "She is very emotional about the pain and says that she had none of the symptoms prior to her work injury that lead to surgery at L4-5. When I evaluated her on August 3, 2010 I did not identify any objective findings." *Id*. X-rays revealed a solid fusion. Dr. Larson concluded:

> Ms. Hamilton has subjective complaints not substantiated by any objective findings. At this point it is hard for her to distinguish between her current pain complaints and her preoperative lower back complaints. They seem different and she noted at her last appointment that this pain is different than her preoperative pain. She thinks it relates to the same injury. I would like to refer her to Dr. Ludwig for consultation [to] determine whether there is anything outside of her lumbar injury and would need to be addressed. If he has no further recommendations then I think that she is at maximum medical improvement for her injury.

DE 15, p. 36.

16. On April 6, 2010, Dr. Larson responded to a letter from a claims examiner by indicating Claimant was at MMI as of March 24, 2010 (the last time he saw her) and assigned a 7% whole person PPI rating without apportionment.

17. On December 22, 2010, Costco arranged for an **IME** with George Harper, M.D., an orthopedic surgeon and Ronald L. Vincent, M.D., a neurosurgeon (the panel). Claimant's chief complaint on that date was: "On her pain diagram, she indicates that she has aching discomfort across her low back and then pain around the left sacroiliac joint, which is a stabbing pain that extends up into the left paravertebral muscles." DE 27, p. 5.

18. The panel reviewed Claimant's pertinent medical records and examined her. The panel noted that Claimant ". . . presents herself in a rather dramatic and hyperactive fashion." *Id.*, p. 8. There was no evidence of a failed fusion. Claimant's neurological exam was normal. She was again at MMI and the panel saw no reason to change the 7% whole person PPI rating without apportionment originally assigned in March 2010.[2]

19. The panel determined that no additional therapeutic or diagnostic medical care was necessary.

20. The panel recommended that Claimant be permanently restricted from repetitive bending, reaching, and lifting 25 to 30 pounds occasionally.

21. Of interest, the panel noted, "On our examination, these examiners found the examinee to have a very high disability conviction. She had dramatic complaints of discomfort. Her subjective complaints greatly outweigh her objective findings." DE 27, p. 11. The Referee observed similar behavior during Claimant's testimony at hearing; for example, she interrupted Costco's counsel's opening statement: "Excuse me. Excuse me for a moment. Gentlemen, what I'd like to have for my medical is I want it fixed. I want it fixed. That's all I'm asking." HT, p. 22.

[2] Both Drs. Larson and Ludwig agree with the 7% rating.

22. On January 21, 2011, Costco held a job assessment meeting and determined that they could not accommodate the restrictions assigned to Claimant by the panel. She was placed on a one-year leave of absence and collected both short- and long-term disability. Eventually, a position was found for her at Costco's Fort Oglethorpe, Georgia store.

23. Claimant began her employment at the Fort Oglethorpe store in December 2011 as a part-time Member Service position making $19.30 an hour. According to the store manager, there are no physical requirements in performing this position. In October 2012, Claimant was promoted to her present position of telephone solicitation and outside marketing earning $22.50 an hour. There are also no physical requirements for this position. Claimant described this job as "perfect" and she has no intention of leaving. The store manager testified that Claimant is the most "pro-Costco" employee he has ever seen and "could sell ice to an Eskimo." Palermo Deposition, p. 15.

24. Claimant's pain complaints were initially entirely left-sided. On April 19, 2012, Claimant first sought medical treatment after moving to Georgia. Although Claimant visited doctors multiple times after April 2012, it was not until she saw a chiropractor in January 2013 that she reported that her flank pain was right, rather than left-sided. It was not until June 2013 that Claimant complained of low back pain. See generally CE 18.

DISCUSSION AND FURTHER FINDINGS

Medical care

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following

an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). 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, 890 P.2d 732 (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). No "magic" words are necessary where a physician plainly and unequivocally conveys his or her conviction that events are causally related. *Paulson v. Idaho Forest Industries, Inc*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). A physician's oral testimony is not required in every case, but his or her medical records may be utilized to provide "medical testimony." *Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

25. Claimant seeks an award of continuing medical benefits for treatment she has received after she has been declared medical stable effective April 6, 2010 (Dr. Larson). However, the Referee finds that Claimant has failed to prove any medical treatment she received after the panel and Dr. Larson found her to be at MMI is/was related to her industrial injury. Dr. Ludwig credibly testified that Claimant's fusion was stable and that she needed no more treatment based on her subjective complaints.

26. Dr. Ludwig was asked the following question by Costco's counsel:

> Q. (By Mr. Ford): In your medical opinion, would you expect a left-sided disc protrusion that was treated with a L4-5 fusion, as [sic-was] done in her case, would lead to right-sided pain complaints of numbness, tingling, pain in the lower extremity on the right side?
>
> A. No. That would not be an anticipated result of treatment of the L4-5 level.

Q. Why not?

A. Well, the L4-5 level with fusion is - - basically alleviated any disc that can cause compression on the alternate side. In addition, there's no crossing of the nerves. When you get to that level of your body, there's - - would be no reason why she would develop contralateral leg pain associated with it.

* * *

Q. Again, those - - assuming those are symptoms she would have been experiencing when she prepared this document[3] in January, I believe, of 2013, would any of that be, in your medical opinion, the results of either the disc protrusion that she - - that was found by MRI soon after the March 2009 accident or something that would be a complication from the surgery that was performed?

A. No. Absolutely not. It is on the other side of the body and well beyond the expected distribution of her pathology.

* * *

Q. As I reviewed the medical record here - - and those exhibits are before the Commission - - I see health care providers noting left-sided radicular complaints maybe in October of 2013 after not having seen those kind of complaints in these records for a number of years. You know, for a long time we're dealing with this right-handed stuff that I've been showing you.

If Ms. Hamilton is complaining of left-sided radicular pain at this time, in your medical opinion can those, with a reasonable degree of medical probability, be related to her injuries of March 2009 and treatment she had for those injuries?

A. That would be a leap of faith. At that time she had more of a sensory radicular pain. She did not have neurologic insult or compression of the nerve. So it would be unexpected that that would cause latent symptoms years after. It appears she had relatively good results of the left leg pain by the time I had stopped seeing her but it was her back pain that was persistent.

Dr. Ludwig Deposition, pp. 42-44, and 47.

27. The Referee finds, based on the persuasive testimony of Dr. Ludwig that Claimant has failed to prove her entitlement to continuing medical benefits.

[3] Counsel is referring to a pain diagram filled out by Claimant showing right-sided pain from her chest down to her toes.

Gabapentin

28. Regarding the need for Claimant's gabapentin, a drug used to treat nerve pain (also called Neurontin and Lyrica) and her industrial accident, Dr. Ludwig testified:

> Q. (By Mr. Nemec): So in relation to this particular case, do you believe a [sic] gabapentin is reasonably necessary treatment in relation to managing her symptoms?
>
> A. It depends [sic-on] what symptoms we're treating. I can't say that they're specific to her injury of 2009 because it appears that she had multiple other nerve complaints, including right-sided complaints since. So the question would be what is she actually being treated for with the Neurontin.
>
> Q. And, again, I'll represent to you that she has testified that she has had left-sided pain since the date of the accident. So if Neurontin is treating that left-sided pain, would that be reasonable medical treatment for those symptoms on the left side?
>
> A. I think it's important to differentiate between axial left-sided pain versus radicular components of pain which extend into the distal extremity. It appears she has had left-sided back pain which is not - - not uncommon. People can have that persistent [sic-pain] after a fusion. But it appears for radicular events. I mean, that can extend well beyond. She did not have left leg radicular complaints necessarily at the last visits that I had with her.
>
> So, if you're treating radicular pain, that may correlate with her right-sided complaints which extended into the limb. I can't say that it's from treatment for axial back pain, because I usually don't use gabapentin or Lyrica to treat back pain.

Id., pp. 51-52.

29. The Referee finds that based on Dr. Ludwig's testimony above, as well as Dr. Larson and the panel finding that Claimant needed no more medical treatment after she was declared at MMI, Claimant is not entitled to payment or reimbursement for gabapentin after December 22, 2010.[4]

[4] Dr. Larson opined that Claimant had reached MMI as of April 6, 2010. The panel concurred on December 22, 2010. Because Costco uses the December 22 date as the date Claimant reached MMI, the Referee will also use that date.

Ortho/neuro consultation

30. Claimant is requesting that she be allowed to see an orthopedist or neurosurgeon to determine whether she is in need of further medical treatment as the same may be related to her industrial accident and, if not, the date of the consultation should be used as the date of MMI. However, Claimant has produced no credible medical evidence that the need for the consultation is related to her accident. As indicated above, the opinions of Drs. Larson and Ludwig (who has seen Claimant both before and after her fusion) as well as the panel are persuasive and unrebutted that Claimant needs no further treatment, including diagnostics.

31. The Referee finds that Claimant has failed to prove that an orthopedic or neurosurgical referral is related to her industrial accident.

TTDs

Idaho Code § 72-408 provides for income benefits for total and partial disability during an injured worker's period of recovery. "In workmen's compensation cases, the burden is on the claimant to present expert medical opinion 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, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant is medically stable, he or she is no longer in the period of recovery, and total temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001) (citations omitted).

32. As indicated above, the persuasive medical evidence establishes that Claimant was at MMI by December 22, 2010. Claimant has failed to rebut that evidence and has, therefore, failed to prove she is entitled to any further TTD benefits.

PPI

"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 nonprogressive at the time of the 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 worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized 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).

33. The Referee finds that Claimant has failed to prove she has incurred any PPI above the 7% whole person rating assigned by Dr. Larson and agreed to by Dr. Ludwig and the panel. There is no contrary medical evidence of record.

PPD

"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 impairment and by pertinent non-medical 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 the 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, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

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 non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

FCE

34. On December 9, 2010, John Pratt, DPT, conducted a Functional Capacity Evaluation (FCE) at Dr. Ludwig's request. See DE 26. Mr. Pratt indicated that Claimant

gave full effort during the testing. Mr. Pratt concluded that Claimant could lift "waist to floor" up to 20 pounds occasionally; could "front carry" up to 20 pounds frequently and 40 pounds occasionally; and "waist to crown" up to 25 pounds occasionally. Mr. Pratt placed Claimant in the light physical demand work category.

The vocational experts

35. Costco retained **Nancy Collins, PhD.**, to assist them with vocational issues. Dr. Collins' credentials are well-known to the Commission and will not be repeated here. She attended Claimant's four-hour deposition and reviewed pertinent vocationally relevant medical records as well as the FCE. She prepared a report dated April 10, 2010 (before Claimant's promotion) wherein she opined that Claimant fit within the light-to-medium work category. Dr. Collins considered all of Claimant's physical restrictions including her subjective restrictions and those of the panel, Dr. Ludwig, and the FCE. Claimant's restrictions from all sources are cited at page two of her report.

36. Dr. Collins concluded that Claimant has incurred a 30% loss of access to her pre-injury labor market as a result of her industrial accident. Because Claimant was earning more at the time of the hearing than she was at the time of her injury, there is no loss of earning capacity. Dr. Collins opined that if one is to give equal weight to the vocational factors of labor market access and earning capacity, Claimant's PPD is 15% inclusive of her 7% PPI.

37. Subsequent to the preparation of her initial report, Dr. Collins learned that Claimant had been promoted to the full-time position of outside marketer (a skilled

position) making $21.50[5] an hour. As such, Claimant has gained new transferrable skills that will improve her labor market access and earning capacity:

> As a result of her improved labor market access, her disability rating should be reduced somewhat. I estimate her labor has improved by 10%, therefore her loss of access is now 20%. Again, if one assumes equal weight is given to labor market access and earning capacity, her disability rating is 10%.

DE 36, p. 12. 27.

38. Claimant retained **Dan Brownell** to assist her with vocational issues. While it is true that Mr. Brownell does not have a college degree and any of the certifications that require such a degree, nonetheless, Mr. Brownell has extensive knowledge of the vocational rehabilitation process in general and the North Idaho labor market in particular. He is eminently qualified to testify as an expert in this matter.

39. Mr. Brownell interviewed Claimant by phone, observed Claimant's hearing testimony, and reviewed pertinent vocationally relevant medical and vocational records including Dr. Collins' two reports. Mr. Brownell authored a two-page report dated February 23, 2014 wherein he concluded, without much elaboration, that Claimant's PPD is 62% above her 7% PPI.

40. The Referee places more weight on the opinions expressed by Dr. Collins than those expressed by Mr. Brownell. Dr. Collins utilized <u>all</u> the restrictions imposed on Claimant by Drs. Ludwig and Larson as well as the FCE. Mr. Brownell testified that he did not consider the physician-imposed restrictions because Dr. Collins already had done so and he did not want to be redundant. This testimony is not persuasive and suggests that Mr. Brownell agrees with Dr. Collins' analysis with respect to those restrictions. In any

[5] The store manager testified that Claimant was earning $22.50 an hour.

event, Mr. Brownell comes across as an advocate for Claimant by only using the FCE which is more favorable to Claimant than the physician-imposed restrictions. The physicians, especially Drs. Larson and Ludwig spent much more time with Claimant than did Mr. Pratt. Mr. Brownell made no attempt to contact the physicians to determine the bases for their assigned restrictions. Further, Claimant has not presented evidence that the physician-imposed restrictions are in any way unreasonable.

41. While both Mr. Brownell and Dr. Collins utilized the Coeur d'Alene/Spokane labor market, Claimant has the burden of establishing PPD. While the populations of the Coeur d'Alene/Spokane labor market and the Chattanooga area labor market may be similar, the labor markets are not the same. Costco's store manger testified that the economy in the Chattanooga area is "literally booming." Mr. Palermo Deposition, p. 7. Claimant testified that she loves her job and has no intention of returning to Coeur d'Alene. Mr. Palermo testified that Claimant is an excellent employee that Costco would definitely like to keep. It would be sheer speculation to attempt to determine how Claimant could compete in the Chattanooga area labor marker should she lose her job at Costco or whether or not she would suffer any wage loss. The Referee points this out only to demonstrate that Claimant's actual PPD cannot precisely be determined.

42. The Referee finds that Claimant has incurred PPD of 3% **exclusive of** her PPI.[6]

[6] The Referee is aware that, at times, the "averaging method" can produce a skewed result, especially when there is a large loss of access and no wage loss; however, the Referee does not find that to be the case here and 3% above impairment is a realistic appraisal of Claimant's actual PPD.

Attorney fees

Idaho Code § 72-804 provides for an award of attorney fees in the event an employer or its surety unreasonably denies a claim or neglected or refused to pay an injured employee compensation within a reasonable time.

43. Claimant seeks an award of attorney fees for Costco's failing to honor a referral to determine whether her current problems are related to her industrial accident: "The most current medical evidence of record from Fast Access in Georgia demonstrates that Vanessa is in chronic pain and requires additional medical treatment to access her condition in relation to the industrial accident." Claimant's Opening Brief, p. 12. The Referee has found above that Claimant reached MMI by at least December 22, 2010 and Claimant has presented no persuasive medical evidence to the contrary. Consequently, Costco needed no additional medical evidence to justify its denial of the referral and no attorney fees are awarded.

Retention of Jurisdiction

The Commission has retained jurisdiction in cases where "there is a probability that medical factors will produce additional physical impairment in the future." *Horton v. Garrett Freightlines, Inc.*, 106 Idaho 895, 897, 684 P.2d 297, 298 (1984).

44. Here, Claimant has failed to prove that any additional industrially related medical factors will produce additional disability and retention of jurisdiction is not warranted.

CONCLUSIONS OF LAW

1. Claimant has failed to prove her entitlement to further medical care.

2. Claimant has failed to prove her entitlement to additional TTD/TPD benefits.

3. Claimant has failed to prove her entitlement to PPI benefits exceeding 7% whole person.

4. Claimant has proven her entitlement to PPD benefits equaling 3% **in addition to** her PPI.

5. Apportionment under Idaho Code § 72-406 is not appropriate.

6. Because it has been determined that future medical care is not compensable beyond December 22, 2010, Costco's denial of an ortho/neuro referral was not unreasonable; therefore, attorney fees are not awarded.

7. Claimant has failed to prove that retention of jurisdiction is warranted.

RECOMMENDATION

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

DATED this __29th___ day of September, 2014.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __10th___ day of __October__, 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:

STEPHEN J NEMEC
1626 LINCOLN WAY
COEUR D'ALENE ID 83814

JAMES A FORD
PO BOX 1539
BOISE ID 83701

ge Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

VANESSA HAMILTON, Claimant, v. COSTCO WHOLESALE CORPORATION, Self-Insured Employer, Defendant.	**IC 2009-007587** **ORDER** **Filed October 10, 2014**

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers 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 recommendation of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

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

1. Claimant has failed to prove her entitlement to further medical care.

2. Claimant has failed to prove her entitlement to additional TTD/TPD benefits.

3. Claimant has failed to prove her entitlement to PPI benefits exceeding 7% whole person.

4. Claimant has proven her entitlement to PPD benefits equaling 3% **in addition to** her PPI.

5. Apportionment under Idaho Code § 72-406 is not appropriate.

6. Because it has been determined that future medical care is not compensable beyond December 22, 2010, Costco's denial of an ortho/neuro referral was not unreasonable; therefore, attorney fees are not awarded.

7. Claimant has failed to prove that retention of jurisdiction is warranted.

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

DATED this _10th_ day of __October___, 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 _10th_ day of _October_ 2014, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

STEPHEN J NEMEC
1626 LINCOLN WAY
COEUR D'ALENE ID 83814

JAMES A FORD
PO BOX 1539
BOISE ID 83701

ge

____/s/_____