

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SUNNY BOGAR,

Claimant,

v.

SODEXO, INC.,

Employer,

and

NEW HAMPSHIRE INSURANCE COMPANY,

Surety,
Defendants.

IC 2009-018467

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

Filed 12/11/2012

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 Lewiston, Idaho on March 14, 2012. Claimant, Sunny Bogar, was present in person and represented by Anthony C. Anegon, of Lewiston, Idaho. Defendant Employer, Sodexo, Inc., and Defendant Surety, New Hampshire Insurance Company, were represented by W. Scott Wigle, of Boise, Idaho. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on July 31, 2012. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

The issues to be decided are:

1. Whether, and to what extent, Claimant is entitled to medical care;
2. Whether Claimant is entitled to temporary disability benefits;

3. Whether Claimant is entitled to permanent partial impairment;
4. Whether Claimant is entitled to permanent partial disability;
5. Apportionment pursuant to Idaho Code § 72-406; and
6. Whether Claimant is entitled to attorney fees.

CONTENTIONS OF THE PARTIES

All parties acknowledge that Claimant suffered an industrial accident on February 17, 2009. Defendants paid benefits until April 2010 and then denied further benefits. Claimant subsequently underwent lumbar surgery and now seeks medical benefits for her surgery, temporary disability benefits during her period of recovery from surgery, permanent partial impairment benefits of 10% of the whole person, and permanent disability benefits of 14% in excess of impairment. Claimant also requests attorney fees for Defendants' denial of benefits after April 2010.

Defendants assert that Claimant returned to baseline after her industrial accident and the need for her subsequent surgery relates to the natural progression of her pre-existing condition. Defendants deny any permanent impairment or disability due to the industrial accident. They note that the medical evidence of causation is conflicting and assert no attorney fees are warranted.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition testimony of Claimant, taken August 19, 2011;
3. The testimony of Claimant taken at the March 14, 2012 hearing;

4. Claimant's Exhibits 1-14 and Defendants' Exhibits 1-8¹, admitted at the hearing.
5. The post-hearing deposition of Bret A. Dirks, M.D., taken by Claimant on April 26, 2012; and
6. The post-hearing deposition of Larry W. Hammond, D.C., taken by Defendants on June 14, 2012.

FINDINGS OF FACT

1. Claimant was born in 1939. She was 72 years old and had resided mostly in Deary, Idaho for 45 years at the time of the hearing. She graduated from high school and received no further formal education. She has worked for many years as a bartender, waitress and cashier. Claimant has been on Social Security since she was 60 years old.

2. In 1997, Claimant began working as a cashier for Sodexo's predecessor at the University of Idaho campus in Moscow. Her duties included making coffee, stocking, serving breakfast, and cashiering. Claimant became well recognized as the most productive cashier on her shift.

3. On June 30, 2006, Claimant sought medical treatment from her primary care physician, Francis Spain, M.D. Dr. Spain recorded Claimant's report of a backache, noting that Claimant had been having "quite a bit of lower back pain" for several weeks. Defendants' Exhibit 1, p. 33. Her worst pain came from stepping off of a curb wrong. Dr. Spain diagnosed somatic dysfunction, thoracic-lumbar-sacral spine and treated Claimant with manipulation, after which Claimant's pain and function improved. He noted that Claimant was to return in two

¹ After hearing, it was discovered that page 4 of the December 17, 2011 IME report of Dr. Robert Friedman had been unintentionally omitted from Defendants' Exhibit 6. Said page was provided by Defendants in briefing and is admitted in evidence and hereby identified as Defendants' Exhibit 6, p. 10a.

weeks to see if the manipulations held. Dr. Spain recorded that Claimant had negative straight leg raising test. Claimant did not return to Dr. Spain in two weeks.

4. On July 24, 2006, Claimant presented to Larry Hammond, D.C., who recorded that her symptoms began when she stepped off a curb, twisted, and hurt her left hip. Dr. Hammond recorded a positive straight leg raising test—potentially indicative of sacroiliac or even disk involvement. X-rays revealed a grade four spondylolisthesis of L4 on L5. Dr. Hammond testified this finding was of longstanding duration. He concluded that Claimant’s left SI joint was the source of her pain. He treated Claimant with chiropractic manipulation. Dr. Hammond treated Claimant with additional chiropractic manipulation on July 26 and 31, 2006.

5. Claimant testified at hearing that she sought medical treatment because she experienced left hip pain after stepping in a gutter, but that after about three weeks of treatment, she was fine. She missed no time from work in June or July 2006. Claimant sought no further treatment for her back or hip. She felt fine and continued her usual work and other activities from July 31, 2006, through February 2009.

6. On February 17, 2009, Claimant completed her cashiering shift at Sodexo and went upstairs to count her till. She sat on a swivel chair, which either broke or slid out from under her, and fell to the cement floor, landing on her right buttock. Two co-workers saw her fall and helped her up. She noted immediate pain and took several ibuprofen so she could tolerate driving home. Over the ensuing weekend, she laid on a heating pad. She returned to work after the weekend, but testified at hearing: “the only way I could work would be to put my foot on the garbage can to relieve that side, but they didn’t want me to take time off. I made too

much money.” Transcript, p. 28, l. 24 through p. 29, l. 2. Claimant timely reported her accident. At the time of the accident, Claimant was working full-time and earning \$8.50 per hour.

7. Claimant continued to work her usual duties in spite of her discomfort, taking ibuprofen for her pain. She testified at hearing that she delayed seeking medical attention for her back pain because her supervisor did not want her to do so. She had no further accidents at work or at home.

8. On August 6, 2009, Claimant presented to Dr. Spain complaining of back pain after a fall from a chair at work. Dr. Spain recorded: “Here today with c/o low back and right leg pain, since Feb, she is now having numbness in her leg. She fell off of a chair (that broke), and landed on her right hip. DOI 2-17-09 at U of I food court. No problems before the injury. [S]he reported to the supervisors and they did not report.” Defendants’ Exhibit 1, p. 55. Dr. Spain diagnosed low back strain and SI joint strain, restricted Claimant’s work, and prescribed physical therapy. Claimant attended three sessions of physical therapy. She reported to the therapist that she was not able to stand on her right leg without upper body support. Claimant’s condition improved somewhat with physical therapy. Although she was not fully recovered and the therapist recommended continuing physical therapy one to two times per week, Claimant was released to a home exercise program. She continued working restricted hours at Sodexo. Dr. Spain saw Claimant in follow-up in September and November 2009. Her back pain persisted and she reported pain and difficulty with sweeping, mopping, or lifting more than 15 pounds. She continued with restricted work hours.

9. On March 10, 2010, Dr. Spain responded to an inquiry from Defendants’ adjustor and opined that Claimant’s need for medical treatment was related to her industrial accident. Defendants paid Claimant workers’ compensation benefits.

10. On March 16, 2010, Claimant presented to Carrie Collins, LPN, reporting right knee pain and stating “the pain radiates down the leg as well.” Defendants’ Exhibit 1, p. 74. Her right knee was swollen and she was diagnosed with synovitis/arthritis of the right knee and given a neoprene sleeve and ibuprofen. Her knee pain improved.

11. Claimant believed her employment with Sodexo ended on April 5, 2010. Sodexo representatives apparently anticipated calling Claimant back to work.

12. On April 17, 2010, Robert Friedman, M.D., examined Claimant at Defendants’ request. Dr. Friedman opined that Claimant’s industrial accident caused only a temporary aggravation of her pre-existing condition and concluded that she needed no further treatment for her industrial accident. Thereafter, Defendants denied further payment of medical or other benefits.

13. In approximately July 2010, Claimant noted further worsening of her back and right leg symptoms.

14. On September 1, 2010, Claimant presented to Dr. Spain, again reporting ongoing chronic low back pain with right leg tingling. Dr. Spain assessed low back pain with sciatica and ordered x-rays and an MRI. On October 27, 2010, Claimant underwent a lumbar MRI that revealed extremely severe facet osteoarthritis at L4-5 with anterolisthesis of L4 on L5 measuring 7 mm, resulting in severe intervertebral disk space narrowing and suspected impingement of L4 nerve roots, disc bulging at L4-5, and mild disc bulging at L3-4 and L5-S1. Dr. Spain referred Claimant to neurosurgeon Bret Dirks, M.D.

15. On November 30, 2010, Dr. Dirks examined Claimant and recorded her complaints of low back and right leg pain and numbness since her fall at work in February 2009. He noted that Claimant had clearly injured herself working on the job. On December 22, 2010,

Dr. Dirks performed a lumbar laminectomy at L3, L4, and L5, bilateral foraminotomies at L3-4 and L4-5, and fusion of L3-L5. Claimant's condition improved following surgery. On December 1, 2011, Dr. Dirks released Claimant from his care.

16. On December 17, 2011, Dr. Friedman examined Claimant again at Defendants' request. He reaffirmed his prior opinion and concluded that Claimant's surgery was not related to her industrial accident.

17. On December 19, 2011, Dr. Dirks opined that Claimant's need for surgery was caused by her industrial accident, noting that although she had pre-existing degenerative changes in her spine, she was asymptomatic before her accident.

18. On January 15, 2012, Dr. Dirks opined that Claimant's accident aggravated and accelerated her pre-existing back condition. Dr. Dirks rated Claimant's permanent partial impairment at 14% of the whole person, attributing 4% impairment to her pre-existing condition and 10% to her industrial accident. Dr. Dirks restricted Claimant to lifting no more than 50 pounds.

19. Claimant has not returned to work since being released by Dr. Dirks. She has looked for work but has been extensively involved in handling her mother's estate. At hearing, Claimant testified that she limits her sitting and standing to approximately 15 to 20 minutes due to her back symptoms. Claimant believed that her prior position at Sodexo would require more standing than she could tolerate.

20. Having observed Claimant at hearing and compared her testimony with other evidence in the record, the Referee found that Claimant is a credible witness. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

DISCUSSION AND FURTHER FINDINGS

21. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

22. **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).

23. A claimant must prove not only that he suffered an injury, but also that the injury was the result of an accident arising out of and in the course of employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). 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).

24. Causation. In the present case, Claimant relies upon the causation opinion of her treating surgeon, Dr. Dirks. Defendants rely upon the opinion of Dr. Friedman.

25. Dr. Friedman examined Claimant on April 17, 2010, at Defendants’ request. Dr. Friedman recorded Claimant’s complaints of back and right knee pain and of losing use of her right leg. Claimant reported “pain in her right low back going down the outside of her back to her knee, and down to her foot.” Defendants’ Exhibit 6, p. 2. Dr. Friedman opined that Claimant sustained a right glutei and low back contusion due to her industrial accident. He concluded:

The medical records confirm that in June of 2006, she had nearly similar findings with identical treatment by Dr. Spain. It is my medical opinion that her present condition is as a result of the normal natural history and progression from the low back and somatic dysfunctions identified by Dr. Spain in June 2006. Though her injury of 2/17/09 did cause an exacerbation, it is my opinion that she has returned to her baseline.

Defendants’ Exhibit 6, p. 4. In arriving at these conclusions, Dr. Friedman apparently neither took nor reviewed any x-rays of Claimant’s back.

26. Dr. Friedman examined Claimant again on December 17, 2011. He reaffirmed his prior conclusions and continued to opine that Claimant’s industrial accident caused only a temporary aggravation of her pre-existing condition. Dr. Friedman further opined that Claimant’s need for lumbar fusion surgery was related to her pre-existing degenerative disease and L4-5 spondylolisthesis, not her industrial accident.

27. In evaluating Dr. Friedman’s conclusions that Claimant returned to her baseline after the 2009 accident, it is significant to note that Dr. Hammond, who treated Claimant in 2006,

expressly opined that all of Claimant's pain in 2006 originated from her left SI joint. This pain resolved with Dr. Hammond's treatment, and thereafter Claimant worked for nearly three more years, performing her regular duties and shift assignments at Sodexo without limitation or complaint before her 2009 accident which resulted in low back and right leg pain. The record indicates that Claimant's "baseline" before her industrial accident was that of an energetic, pain-free, leading cashier at Sodexo.

28. Dr. Spain is Claimant's primary care physician. On March 10, 2010, he opined that Claimant's continuing need for medical treatment for her back was related to her industrial accident.

29. Dr. Dirks is Claimant's treating neurosurgeon. He examined Claimant repeatedly. Dr. Dirks concluded that Claimant's 2009 industrial accident aggravated and accelerated her lumbar pathology and caused her need for lumbar surgery. He noted that Claimant did not have pain prior to the injury, and then developed the symptomatology following her work injury. During his deposition, Dr. Dirks explained the probable mechanism of the onset of her symptomatology:

Q. (By Mr. Wigle) As I read your notes, and please correct me if I'm wrong, it looks to me as though the big problem here was the spondylolisthesis at 4-5, which was causing some—what you termed severe encroachment.

A. That's par—

Q. Am I—

A. That's partially—

Q. Am I reading that accurately?

A. That's partially correct. But if you actually think about it, her falling on the ground probably did not cause her spondylolisthesis. She did not have pain prior to her fall, at least as she's told me, and I believe she's probably testified to you.

But we don't know about the disk bulging, and clearly something happened when she fell, and you have to remember, in the neuroforamina, there is the overlying bony overgrowth from the spondylolisthesis and the facet hypertrophy or enlargement, but also from the disk bulging, which causes a circumferential compression onto the nerve roots. And basically when you think of that—I'm talking slower so that our stenographer can get it all down, sorry—but that causes a circumferential compression on the nerve root at those levels.

So yes, she had a spondylolisthesis. I don't think I would argue that or anybody would argue that, that she probably had that. It did not look traumatic. However, we don't know about the disk bulging. She clearly was not symptomatic; she became symptomatic.

So on a more-probable-than-not basis you can say that she—even if she had some disk bulging prior to the accident, it probably exacerbated that and created the critical stenosis, which then ultimately caused her to have the pain and symptomatology.

Dirks Deposition, p. 26, l. 19 through p. 28, l. 2. Dr. Dirks also noted that Claimant may have had some back pain related to her pre-existing spondylolisthesis prior to her accident; however she functioned without limitation.

30. In commenting on the Claimant's low back condition, and the cause thereof, Dr. Dirks acknowledged that Claimant's L4-5 spondylolisthesis predated the subject accident. He was less certain about the genesis of Claimant's significant L4-5 disk bulge. (Dirks Deposition, p. 16, l. 20 through p. 17, l. 13). He conceded that there is no way to tell, on the basis of objective medical evidence alone, whether the subject accident contributed to Claimant's low back condition. (Dirks Deposition, p. 27, l. 1 through p. 28, l. 11). In the absence of objective evidence identifying the accident as a causal factor, Dr. Dirks relied on the history given by Claimant concerning the accident and the development of her symptomatology in determining whether the accident played a part in causing or contributing to her low back injury. Dr. Dirks ultimately concluded that the subject accident did cause or contribute to Claimant's low back injury, and as Defendants have noted, this conclusion is based upon two assumptions

made by Dr. Dirks about Claimant's history before and after the subject accident. First, Dr. Dirks assumed that Claimant had no previous history of back pain or leg pain. Second, he assumed that Claimant developed right lower extremity pain as a result of the accident "which became apparent immediately after her fall." (See Dirks Deposition, p. 28, ll. 13-20). Defendants argue that the factual assumptions underlying Dr. Dirks' opinion on causation are erroneous and that these erroneous assumptions fatally undermine his ultimate conclusions on causation. However, as developed below, the Commission finds that assumptions made by Dr. Dirks in formulating his opinion on causation do find support in the record.

31. First, with respect to Dr. Dirks' assumption that Claimant had no history of low back or lower extremity discomfort prior to the subject accident, the record clearly establishes that although Claimant did have a brief episode of low back/left hip pain during the summer of 2006, there is no evidence of record denigrating Claimant's testimony that this was a brief and self-limiting episode, and that she was symptom free between approximately July 2006 and February 2009. Moreover, Dr. Dirks noted that even if Claimant did have some low back pain on a pre-injury basis (which would not surprise him in view of her pre-existing spondylolisthesis), it was much more significant to him that Claimant's right-sided radiculopathy was a new onset immediately following the subject accident.

32. With respect to Dr. Dirks' assumption that the onset of right-sided radiculopathy was a new symptom occurring immediately after the subject accident, the record clearly reveals that at the time of her initial medical evaluation by Dr. Spain on August 6, 2009, Claimant gave a history of having developed right leg pain in February 2009 following the subject accident: "Here today with c/o low back and right leg pain, since Feb, she is now having numbness in her leg." Defendants' Exhibit 1, p. 55. Dr. Spain recorded repeated reports of right leg pain and

numbness during Claimant's visits. Claimant also reported right leg pain that "radiates down the leg" to Carrie Collins, LPN, on March 16, 2010. Defendants' Exhibit 1, p. 74. As noted above, when Claimant presented to Dr. Friedman on April 17, 2010, she reported losing the use of her right leg and noting pain in her right low back going down to her foot. These medical records corroborate Claimant's testimony of low back and right leg symptoms continuing from the time of her accident and persuasively support Dr. Dirks' conclusion that Claimant's accident aggravated and accelerated her need for lumbar surgery.

33. While it is undisputed that Claimant suffered degenerative spondylolisthesis prior to her industrial accident, it is well settled that "an employer takes an employee as it finds him or her; a preexisting infirmity does not eliminate the opportunity for a worker's [sic] compensation claim provided the employment aggravated or accelerated the injury for which compensation is sought." Spivey v. Novartis Seed Inc., 137 Idaho 29, 34, 43 P.3d 788, 793 (2002), citing Wynn v. J. R. Simplot Co., 105 Idaho 102, 104, 666 P.2d 629, 631 (1983). In the Commission decision of Van Sickle, 1987 IIC 0241, the Commission applied the axiom that if an industrial accident hastens the need for surgery, the surgery is compensable. Van Sickle injured her knees in an industrial accident in December 1983. She underwent arthroscopic knee surgery in March 1984, and a total knee replacement in November 1985. The Commission found her claim for medical benefits compensable, noting that while Van Sickle's pre-existing arthritis likely would have necessitated a total knee replacement at some future time, the industrial accident accelerated the progression of her arthritis and thus was the cause of her surgery at the time it was performed. See also Smith, 1989 IIC 0626.

34. In the present case, the opinion of Dr. Dirks is well-explained, supported by the record, and persuasive. Claimant's pre-existing spondylolisthesis may have ultimately

necessitated lumbar surgery at a future time; however, her industrial accident aggravated and accelerated her condition and was the cause of her 2010 surgery. Claimant has proven that her need for lumbar surgery is related to her industrial accident, and thus she is entitled to reasonable medical benefits therefor, including but not limited to further treatment as provided and ordered by Dr. Spain and lumbar surgery and post-surgical care as provided or ordered by Dr. Dirks in 2010.

35. Full invoice billing. Claimant expressly requests medical benefits in the amount of \$104,965.11, constituting the full invoiced amount of her medical billings for her surgery and other medical expenses related to her industrial accident and for which Defendants have denied payment. Defendants acknowledge that Claimant's request accurately calculates the full invoiced amount of her medical billings. However, Defendants note that Claimant has incurred no out-of-pocket medical expenses—her medical costs having been covered by Medicare and by a supplemental insurance carrier. Defendants note that Claimant's hospital bill of \$70,713.57 was satisfied by payment of \$19,494.47 from Medicare and \$1,078.17 from the supplemental insurer. Thus, Defendants assert that Claimant stands to receive a windfall of approximately \$50,000.00 in the resolution of her hospital bill if Defendants are required to pay the full invoiced amount. Defendants invite the Commission to reconsider its recent holding in Aspiazu v. Homedale Tire, 212 IIC 0004 (2012), which considered the application of the Supreme Court's holding in Neel v. Western Construction, Inc., 147 Idaho 146, 206 P.3d 852 (2009), to a case in which denied medical bills are satisfied for something less than the full invoiced amount by a non-occupational health insurer under terms which protect the injured worker from balance billing by the provider of medical services. In such a situation, the injured workers' only obligation may be to reimburse the non-occupational insurer for what it paid to satisfy the bills,

yet the injured worker receives 100% of the invoiced amount of the denied bills. In Aspiazu, the Commission concluded that a careful review of the Supreme Court's decision in Neel, supra, demonstrated that the Court was well aware that non-occupational group health providers typically pay much less than the invoiced amount of medical bills due to certain contractual adjustments that such carriers make with providers. The Court was also clearly aware that these contractual adjustments typically protect the insured individual from balance billing. Even so, the Neel court drew no distinction between the case of the injured worker whose lack of health insurance exposes him to liability for 100% of the full invoiced amount of a bill for medical services, and the injured worker with non-occupational health coverage who has no such onerous exposure for the payment of the full invoiced amount of a bill for medical services. The Court's decision makes it clear that in both cases a surety that has been proven wrong in denying responsibility for medical care is obligated, after a finding against it on the issue of compensability, to pay to the injured worker 100% of the invoiced amount of the denied bills.

36. As we noted in Aspiazu, supra, and as is made clear by the facts of this case, the application of the rule of Neel has the potential to create a benefit to Claimant that is greater than what Claimant owes to her medical providers. Here, the "full invoiced amount" of Claimant's hospital bills was \$70,713.57. These bills were satisfied by Medicare's payment of \$19,494.47 and a Medicare supplemental insurer's payment of \$1,078.17. Claimant has no obligation to her medical providers for the difference between the invoiced amount and what her insurers' paid, although, of course, she must satisfy Medicare's claim for reimbursement of conditional payments made on her behalf. Defendants argue that this will leave Claimant with approximately \$50,000.00 ($\$70,713.57 - \$19,494.47 - \$1,078.17 = \$50,140.93$), since she is protected from balance billing by her providers under the terms of the providers' agreement with

Medicare and the supplemental insurer. In all actuality, Claimant will probably be left with less than \$50,000.00, since she must still pay her attorney for obtaining this recovery. Still, assuming a 30% attorney fee, Claimant will be left with nearly \$29,000.00 after satisfying the claims of her subrogated insurers and paying her attorney. While we understand Defendants' position on this issue, nevertheless, the Court gave its unambiguous direction concerning the payment of the "full invoiced amount" of medical bills incurred during a period of denial, noting that these bills "fall outside the workers' compensation regulatory scheme." The outcome represented by these facts was thought by the Court to be a "middle-ground resolution" that would, in the "interest of fairness . . . avoid awarding unearned incentives or windfalls to sureties *or* claimants." Neel, 147 Idaho at 149, 206 P.3d at 855 (emphasis added). We are obligated to follow the Court's direction in this regard.

37. Claimant has proven her entitlement to additional medical benefits for treatment related to her industrial accident at full invoiced amounts totaling \$104,965.11, pursuant to Neel v. Western Construction, Inc., 147 Idaho 206 P.3d 852 (2009).

38. **Temporary disability.** The next issue is Claimant's entitlement to temporary disability benefits. Idaho Code § 72-102 (10) 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).

39. In Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20

(1986), the Supreme Court noted:

[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. (Emphasis added).

40. In the present case, Claimant has proven that her need for lumbar surgery was caused by her industrial accident and thus she is entitled to temporary disability benefits during her recovery therefrom. The record establishes that Claimant was in a period of recovery from the time of her lumbar surgery on December 22, 2010, through December 1, 2011, when she was released by Dr. Dirks. Claimant asserts entitlement to temporary disability benefits during this period in the total amount of \$13,007.05. Defendants acknowledge Claimant's calculations are accurate in the event Claimant's surgery is found compensable.

41. Claimant has proven her entitlement to temporary disability benefits from December 22, 2010, through December 1, 2011, in the amount of \$13,007.05.

42. **Permanent partial impairment.** Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss is considered stable at the time of evaluation. Idaho Code § 72-422. 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).

43. In the present case, Dr. Dirks rated Claimant's permanent impairment at 14% of the whole person, with 4% attributable to her pre-existing condition and 10% attributable to her industrial accident. Claimant has proven she suffers permanent impairment due to her industrial accident of 10% of the whole person.

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

45. To evaluate permanent disability, permanent physical restrictions resulting from the industrial accident merit particular consideration. In the present case, Dr. Dirks restricted Claimant to lifting no more than 50 pounds due to her lumbar condition after her fusion surgery. He imposed no further limitations. Claimant testified that she can tolerate sitting or standing only for relatively short periods; however, no medical expert imposed such restrictions, let alone opined that such restrictions resulted from her industrial accident.

46. Claimant testified she weighed approximately 102 pounds at the time of the hearing. The medical records repeatedly refer to her thin stature. Given her age of 72 at the time of hearing, and her weight of 102 pounds, it is unlikely that potential employers would consider Claimant competitive for jobs requiring lifting in excess of 50 pounds. The Commission finds that Claimant's 50-pound lifting restriction resulting from her industrial accident is not a significant factor in determining her ability to compete in the open labor market. She has no other medical restriction resulting from her industrial accident.

47. Based on Claimant's permanent impairment, her permanent 50-pound lifting restriction, and considering her non-medical factors including but not limited to her age of 69 at the time of the accident, high school education, and pre-injury work experience, the Commission concludes that Claimant's ability to engage in regular gainful activity in the open labor market in her geographic area has not been reduced beyond the extent of her permanent impairment. Claimant has not proven she suffers permanent disability in excess of her permanent impairment.

48. **Apportionment.** Apportionment pursuant to Idaho Code § 72-406 is moot.

49. **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.

50. The decision that grounds exist for awarding a claimant 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).

51. Claimant herein has proven her entitlement to medical, temporary disability, permanent partial impairment and permanent partial disability benefits relating to her industrial accident. She requests attorney fees for Defendants' refusal to pay for lumbar surgery as recommended and performed by Dr. Dirks. However, Defendants reasonably contested Claimant's assertions in reliance upon the opinion of Dr. Friedman that Claimant's need for surgery was due to the natural progression of her pre-existing condition. Given these facts, Defendants' denial was not unreasonable. Claimant has not proven she is entitled to an award of attorney fees.

CONCLUSIONS OF LAW

1. Claimant has proven her entitlement to additional medical benefits for treatment related to her industrial accident at full invoiced amounts totaling \$104,965.11, pursuant to Neel v. Western Construction, Inc., 147 Idaho 206 P.3d 852 (2009).

2. Claimant has proven her entitlement to temporary disability benefits from

December 22, 2010, through December 1, 2011, in the amount of \$13,007.05.

3. Claimant has proven she suffers permanent impairment due to her industrial accident of 10% of the whole person.

4. Claimant has not proven she suffers permanent disability in excess of her permanent impairment.

5. Apportionment pursuant to Idaho Code § 72-406 is moot.

6. Claimant has not proven she is entitled to an award of attorney fees.

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

DATED this 11th day of December, 2012.

INDUSTRIAL COMMISSION

/s/ _____
Thomas E. Limbaugh, Chairman

/s/ _____
Thomas P. Baskin, Commissioner

/s/ _____
R.D. Maynard, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of December, 2012, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

ANTHONY C ANEGON
PO DRAWER 698
LEWISTON ID 83501-0698

W SCOTT WIGLE
PO BOX 1007
BOISE ID 83701-1007

/s/ _____