BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JAZMIN JUAREZ, Claimant, vs. HIGH DESERT MILK, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 2008-028468** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** February 11, 2011

Pursuant to Idaho Code § 72-506, the above entitled matter was assigned to Referee LaDawn Marsters who attended a hearing on April 6, 2010, in Twin Falls, Idaho, conducted by Referee Douglas Donohue. Claimant was present in person and was represented by James C. Arnold. Defendants, Employer and Surety, were represented by Kimberly A. Doyle. Oral and documentary evidence was admitted, and post-hearing depositions were taken. The matter was briefed and came under advisement on January 11, 2011.

ISSUES

The issues, stipulated by the parties in their briefing, are as follows:

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

2. Whether and to what extent Claimant is entitled to permanent partial

impairment (PPI);

3. Whether and to what extent Claimant is entitled to permanent partial disability (PPD); and

4. Whether apportionment for a preexisting condition under Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

Claimant contends she suffers chronic pain in her neck and right upper extremity (RUE) as a result of her August 25, 2008 industrial accident in which she was thrown several feet from a floor buffer, landing on her head and right side. As a result, she is entitled to a whole person PPI rating of 5% and a PPD rating of 25%, with no apportionment because she has no other relevant medical conditions. She relies upon the opinions of Dr. Hicks and Dr. Barros-Bailey to support her position.

Defendants argue that Claimant is not a credible witness. They point to evidence that Claimant could not have been "thrown" several feet from the floor buffer and that she has exaggerated her pain symptomatology to her medical care providers. Defendants rely upon the opinions of Dr. Jensen and Dr. Barros-Bailey, as well as several lay witnesses, to assert that Claimant's current pain condition, if any, is not related to her industrial accident and, in any event, that she is entitled to neither PPI nor PPD.

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 February 16, 2010;

3. Joint Exhibits A through O admitted at the hearing;

4. The testimony of Claimant taken at the hearing;

5. The testimony of Shawn Burton taken at the hearing;

6. The testimony of Tammy Mallory taken at the hearing;

7. The testimony of Marlene Perry taken at the hearing;

8. The testimony of Monica Berg taken at the hearing;

9. The post-hearing deposition testimony of Laurence V. Hicks, D.O., taken July 1, 2010;

10. The post-hearing deposition testimony of David Jensen, D.O., taken August 24, 2010; and

11. The post-hearing deposition testimony of Mary Barros-Bailey, Ph.D., taken September 7, 2010.

OBJECTIONS

No objections were pending at the time the Referee took the case under advisement.

FINDINGS OF FACT

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.

1. Claimant was 30 years of age at the time of the hearing and residing in Burley. She is right hand-dominant.

2. A legal resident of the United States, Claimant was born in Mexico. Spanish is her primary language, and she participated in the hearing and at her deposition through an interpreter.

3. Claimant finished the seventh grade in Mexico. She has almost no experience working outside the home. Her only jobs prior to working for Employer were a temporary position sorting potatoes and a janitorial position, both of which she started and ended in 2008.

4. Claimant had no known medical conditions at the time of the hearing, other than

those she attributes to her accident at Employer's. This is her first claim for worker's compensation benefits.

Accident

1. At Employer's, Claimant worked on a clean-up crew. She had been working there for approximately three weeks when, on August 25, 2008, she fell to the floor while trying to operate a floor buffer.

2. Claimant landed on her right side and hit her head. Esther Cardenas, a coworker, was the only individual who witnessed the accident, and she did not testify. Other coworkers turned their attention to Claimant after she landed on the floor. They laughed. Claimant was embarrassed and she laughed, too.

3. At her deposition, Claimant testified that she suffered injuries to her neck and RUE after being thrown nine feet. At the hearing, she demonstrated how far she was thrown, and the distance was measured to be fourteen feet. Claimant explained that it was impossible to know exactly how far she was thrown.

4. Shaun Merrill Burton, production manager for Employer, has experience operating a floor buffer. He explained that the floor buffer Claimant used is a 19-inch model, shaped like a top hat, with a three horse power motor sitting on top of a wider buffer pad. An adjustable handle extends from the place where the motor and the buffer pad meet. The machine is standard electric, utilizing a cord and wall plug for power, and is equipped with safety features, such as a safety button that must be depressed simultaneously while pulling one of two triggers to start the motor and operate the machine, and an automatic (within approximately one second) shut-off once the trigger is released. Tammy Mallory, quality and safety manager, also has experience operating a floor buffer. Mr. Burton and Ms. Mallory agreed that it seemed impossible for the accident to have occurred the

way Claimant described it.

5. Monica Berg, a coworker, testified that she was working in the same area as Claimant when she fell. Although she did not see Claimant fall, she saw her soon afterward. Claimant was lying on her right side, inches away from the floor buffer. Ms. Cardenas assisted her up. Ms. Berg also has experience running a floor buffer. She believes it is possible to slip and, presumably, to fall while operating a floor buffer, but she does not believe it is possible to be thrown for several feet.

6. Claimant reported her injury to someone named "Dave". Dave sent her to Mr. Burton who confirmed that, about 15 minutes after the accident, he saw a red area on Claimant's arm and dirt on her shoulder. Mr. Burton and Ms. Mallory took Claimant to Cassia Regional Medical Center (CRMC) for treatment.

Medical Treatment

7. Within an hour of the accident, Claimant was seen in the emergency department by Lanny F. Campbell, M.D., who communicated with Claimant through a hospital staff interpreter. The history he recorded confirms Claimant was there due to a workplace mishap with a floor buffer. Claimant reported falling and landing on her right shoulder, right side of her head and right forearm, with no loss of consciousness. Claimant also reported discomfort in her right ear area.

8. Claimant did not appear toxic or in acute distress. She had tenderness at the base of her skull, in her cervical spine area and around her right ear, along with muscle tenderness between her shoulder blades and in the thoracic spine area. A small abrasion on Claimant's right distal forearm was noted, along with "very minimal" distal wrist discomfort and no anatomic snuff box tenderness. Joint Exh. H, p. 43. Claimant's right arm examination was otherwise unremarkable. X-rays of Claimant's cervical spine, right wrist and right forearm were all negative for acute fractures.

9. Dr. Campbell diagnosed a right arm contusion and a cervical neck sprain. He placed Claimant's right wrist in a splint, administered a Toradol injection, prescribed Ibuprofen for pain, and restricted her from lifting more than ten pounds, using her right wrist and right arm, and working above shoulder level.

10. Dr. Campbell instructed Claimant to follow-up in ten days; however, she returned on August 29, 2008, with increased neck pain, increased thoracic and lumbar area pain and continuing right arm pain, notwithstanding Ibuprofen. Claimant again spoke through an interpreter. She reported that Employer had provided light duty work and that she was adhering to her work restrictions. Claimant jumped off the table when Dr. Campbell touched her right arm. Likewise, mild palpation all down her back caused Claimant to writhe about. In addition, she displayed significant discomfort on supination and pronation of her right wrist. Thoracic and lumbar spine x-rays were normal. Dr. Campbell diagnosed cervical neck strain, back strain and right arm contusion/pain. He prescribed Ibuprofen and Flexeril, continued Claimant's restrictions, referred her for physical therapy and recommended follow-up in ten days.

11. On September 12 and 19, 2008, Claimant again followed up at the CRMC Emergency Department, this time with David C. McClain, M.D. Humorously, the corresponding chart notes indicate Claimant had been hit by a cow. This is a reporting error, apparently due to interpretation problems; Claimant had not sustained any new trauma since her industrial accident.

12. On September 12, Claimant reported she had attended two physical therapy appointments and still was not doing much better. On examination, Dr. McClain identified spasms to palpation in the paraspinal cervical region, pain with rightward rotation, tenderness to palpation along the trapezius muscle, and spasms in the paraspinal thoracic region. He also found tenderness to palpation and pain with abduction and internal rotation in her right shoulder. Bilateral shoulder x-

rays (both weight-bearing and non-weight-bearing) were unremarkable on the right. X-rays of Claimant's ribs were normal. Dr. McClain diagnosed cervical strain with associated tension headaches, right shoulder strain and right wrist sprain, all related to Claimant's workplace accident. He administered a Toradol injection and prescribed Ibuprofen and Flexeril, a right-side sling and cervical collar, wrist splint and physical therapy. He imposed restrictions of no lifting over ten pounds and no use of the right wrist or right shoulder, and recommended follow-up in one week.

13. On September 19, 2008, Claimant complained of headache and pain in her neck, right ribs and right hip. Dr. McClain's physical examination revealed no paraspinal muscle spasms or rib tenderness on palpation and was otherwise unremarkable. A CT scan of Claimant's brain was normal. Dr. McClain diagnosed cervical strain with associated tension headaches, administered a Toradol injection, continued Claimant's physical therapy and prescribed Ibuprofen. He also returned her to regular duty without restrictions, recommending follow-up in one week, due to the absence of objective findings and his assessment that she should already be healed. Claimant reluctantly agreed to the plan.

14. Also on September 19, 2008, Employer laid Claimant off because she still was not able to return to full duty.

15. On September 26, 2008, Claimant again followed up at the CRMC Emergency Department, this time with Jeremy B. Haymore, M.D., through an interpreter. Dr. Haymore recorded an accurate history of Claimant's care related to her industrial injury and noted that Claimant now reported temporary improvement after physical therapy but not much overall improvement. She was frustrated that she was not getting any better. Dr. Haymore's examination of Claimant's neck revealed right trapezius and right midline pain, worse with right and left motion; full range of motion (ROM) with pain; normal ROM on flexion and extension; and a positive Spurling

maneuver with associated pain and numbness down to her right hand. Dr. Haymore diagnosed cervical strain and tension headaches. He ordered an MRI of Claimant's cervical spine, prescribed Norco, continued her physical therapy, returned her to work without restrictions and recommended follow up on October 3.

16. On October 1, 2008, Dr. Haymore faxed a request for authorization to perform an MRI to Lynn Green at Surety's. Surety had not approved the request by October 3, when Claimant was next seen, this time by Dr. McClain. At this visit, Claimant reported minimal improvement with physical therapy, Ibuprofen and Norco, but still complained of no significant improvement, citing residual numbness and tingling down her right arm into her hand.

17. Physical examination revealed posterior cervical paraspinal muscle spasms, neck pain with abduction of the shoulder on the right and full ROM. Dr. McClain again diagnosed cervical strain and recommended rest. He continued her physical therapy and Ibuprofen. He also restored her restrictions (which he had previously removed), including no lifting over ten pounds; no twisting, bending or stooping; and no working above shoulder level for one week, pending approval for an MRI and related follow up.

18. This was Claimant's final relevant physician visit. After obtaining Dr. Jensen's report on October 20, 2008 (see below), Surety denied further benefits and Claimant was unable to afford any out-of-pocket medical expenses.

Physical Therapy

19. From September 8, 2008 until October 20, 2008, Claimant attended 18 physical therapy sessions at CRMC with either Brent Lee McMillan, P.T. or Troy Michael Anderson, P.T. She was initially treated for ROM in her neck and pain and weakness in her right wrist and shoulder. Headaches and back pain were also noted. On her initial visit, Mr. McMillan identified positive

responses on Spurling's Test and upper limb tension test in addition to limited ROM and pain with movement. He treated Claimant with traction, massage and other methods, and provided her with a home exercise regimen.

20. On September 10, Claimant reported some improvement but she still had significant shoulder pain. Mr. McMillan noted Claimant's complaints were consistent with an AC sprain. He reported, "I relieve [sic] believe it would be a first degree sprain." Joint Exh. G, p. 25. Claimant reported no significant changes on September 12, though she did acknowledge some improvements in headache intensity, and additional back and hip pain.

21. On September 15, Claimant reported increased headache and neck pain. She was placed in a cervical collar shortly following her previous physical therapy session and had not engaged in any neck movement or home exercises since then. Concerned that Claimant's pain on movement and headaches had increased since she obtained the cervical collar, Mr. McMillan concluded that it was contributing to her symptoms. He instructed Claimant to remove the collar at least three times per day and move through a complete ROM and made it a goal to graduate her out of the collar.

22. On September 17, Claimant was still in the collar and had a headache. She had pain in her right shoulder, elbow, ulnar bone and wrist, as well as in her neck, upper trapezius and right rhomboid. Claimant reported feeling better on September 19, but still not a lot of change. Mr. McMillan, in consultation with Dr. Haymore[1], learned that Claimant was being released back to work because, notwithstanding her pain complaints, at three weeks post-injury Claimant's shoulder should be healed.

23. On September 22, 2008, Claimant's main complaint involved hand pain and right arm

weakness. Dynamometer testing produced scores of 44, 35 and 40 on the left, and 8, 5 and 6 on the right. Mr. McMillan surmised, "…she just lets the pain get to her." Joint Exh. G, p. 30. Claimant reported some improvement in neck pain.

24. Claimant continued to report RUE and back pain, not always in the same places, on the next few visits. Not seeing much improvement, Mr. McMillan administered another grip test on October 3, 2008. Claimant registered 4, 7, 5 on the right and 40, 45, 35 on the left. She attributed the difference to her right shoulder pain. Mr. McMillan reported to Claimant's physician that she had good ROM in her neck, but that her shoulder pain had not changed.

25. On October 6, Claimant's main complaints were headache and right shoulder area pain. On October 8, she reported some improvement in back pain but no change in her right shoulder or hand pain. On October 10, Mr. Anderson conducted Spurling, upper limb tension and distraction tests, all of which were slightly positive. He noted concern about radiculopathy but hesitated because most of Claimant's complaints involved the shoulder as opposed to the hand.

26. On October 13, Claimant reported improvement in her neck but continuing pain into her right shoulder. On October 15 she reported 7/10 pain, and on October 17 she reported 5/10 pain in her right shoulder and neck. On October 20, during Claimant's final physical therapy session, she reported mid-back pain and weakness in her arms, her right arm in particular. Mr. McMillan performed another grip strength test, yielding results of 5, 4, 5 on the right and 29, 43, 35 on the left. He noted that Claimant was much stronger in her back and neck, but that her right arm strength was unchanged.

IME: David Jensen, D.O.

27. Before determining whether to approve Dr. Haymore's request for an MRI, Surety

---

1 Mr. McMillan's note references only "the doctor in ER" but other records in evidence identify Dr. Haymore.

opted to send Claimant to David Jensen, D.O. for an IME.

28. Dr. Jensen reviewed Claimant's relevant medical and physical therapy records and the statements of her coworkers. Some of these statements indicated the machine was off when Claimant fell or that she may have tripped over the cord. None of these witnesses testified, so their statements are less persuasive than the testimony of the witnesses who provided sworn testimony in these proceedings.

29. Dr. Jensen communicated with Claimant through an interpreter. She reported disabling neck pain, right arm pain and weakness and, according to Dr. Jensen's report, a somewhat different course of events before and during the accident than she reported before[2]. She also reported all activities increase her pain, specifically including sitting, standing, walking, coughing and sneezing. She rated her pain at 8/10 and reported that she could only lift 2-5 pounds, that she could not lift her children or groceries, and that she had low back symptoms when she sits as well as severe headaches. She stated she feels like her back is coming apart.

30. On examination, Claimant was in no acute distress. She complained of increased pain upon cervical flexion at 30 degrees, and on cervical extension at 20 degrees. Lateral rotation to 85 degrees, left and right, was not painful. Right shoulder flexion to 130 degrees and abduction to 90 degrees were difficult, but achievable. Claimant's reflexes were present and symmetrical. She had diffuse weakness throughout her RUE, with 5/5 muscles in both upper extremities. External rotation with the elbow at the side was 5/5 on the left and 4/5 on the right. She had normal sensation to pinprick, with Dynamometer grip strength of 35, 20, 20, 30, 20 on the left and 0, 5, 0, 0, 0 on the right.

31. Evidence of pain exaggeration, according to Dr. Jensen, exists in Claimant's right grip

2 Given Claimant's otherwise consistent reports about the events leading to her accident and injury, these

strength testing showing no grip strength in combination with her two-point sensation test, which was normal.

32. Dr. Jensen confirmed that Claimant reported no preexisting conditions, and he identified none.

33. Based upon "troubling" aspects of Claimant's history, including the differing coworker reports about the accident, her short time at Employer's prior to the accident, her self-report that she is totally disabled and surveillance[3] of her doing things that she said she cannot do, Dr. Jensen diagnosed arm pain of unknown etiology. He opined that Claimant's right side condition(s) are not related to her industrial accident and that she could return to work without restrictions. He recommended no further treatment, commenting that her course of physical therapy had been appropriate.

34. According to Dr. Jensen, Claimant reached maximum medical improvement (MMI) as of October 20, 2008 and her condition warranted a 0% impairment rating.

35. On February 23, 2010, Laurence Hicks, D.O., retained by Claimant, prepared another IME report. After reviewing Dr. Hicks's report, Dr. Jensen notified Surety, on or about March 23, 2010, that he disagreed with Dr. Hicks's restrictions and impairment rating. He noted that he believed the differences in their opinions were due to opposing conclusions as to Claimant's credibility.

IME: Laurence Hicks, D.O.

36. On February 8, 2010, Dr. Hicks performed an IME at Claimant's behest, with the aid

---

differences are most likely due to the translation process.

[3]Dr. Jensen relied upon "surveillance" evidence of Claimant lifting her children and bags of groceries, which he did not further identify or explain, as evidence that Claimant's abilities were greater than she reported.

of an interpreter. Like Dr. Jensen, Dr. Hicks reviewed Claimant's relevant medical records, as well as employee statements concerning the accident. His report, in the form of a letter to Claimant's counsel dated February 23, 2010, states a history of Claimant's accident and injury consistent with the initial treatment records and Claimant's testimony.

37. Upon examination, Dr. Hicks's subjective findings included chronic headaches, persistent neck, right shoulder and wrist pain, and limitations in activities of daily living involving reaching, lifting and pushing. Claimant reported 8/10 pain that was only minimally relieved by Ibuprofen. Objective findings included cervical pain with right and left rotation and left side bending, palpable tenderness in Claimant's neck, right shoulder and right forearm, a positive Codman's sign and mildly diminished right grip strength. In addition, Dr. Hicks found "ropiness" in Claimant's musculature and "triggers", or thickening in the underlying tissues where tenderness is present, consistent with chronic pain. Hicks Dep., p. 34.

38. Dr. Hicks did not measure Claimant's grip strength with a Dynamometer. He acknowledged such testing would be reasonable to determine if Claimant was malingering, but he only administered his usual manual test, where he has the patient grip two of his fingers with each hand while repeatedly encouraging him or her to grip harder until he is satisfied that the patient is giving full effort. Dr. Hicks generally described how he determines relative grip strength:

> …if they're gripping less on the involved side I give them the benefit of the doubt, because I keep them there long enough that I should, you know, make them kind of tired to the point that they squeeze all the blood out of my hand, and I'm kind of tired of having them squeeze my hand.

Hicks Dep., p. 47.

39. Dr. Hicks looked for, but did not find, signs of malingering, somatization disorder or depression. He questioned Claimant's high pain self-rating of 8/10, noting that he did not have

enough information to determine whether Claimant may be exaggerating her symptoms. He also surmised, however, that just because Claimant rated her pain as "severe" she wasn't necessarily embellishing her symptoms:

> …in our pain scale dialog we usually say if you have mile [sic] pain that's 3 or 4; moderate, 5 or 6; severe, 7 or 8. 9 would be so severe it would bring you to tears, and certainly there were no tears. And 10 is so bad, it hardly ever happens, but you need sedation it's so bad. And she still said "8."
>
> So there might have been a little amplification, and that can happen when you hurt for a long time. It may, in fact, be that it's really not as bad a hurt, maybe it's a 5, but because it's there every day and it's grinding on you, you give it more of a rating than it really is.

Hicks Dep., p. 20.

40. Dr. Hicks specifically ruled out chronic arachnoiditis, Complex Regional Pain Syndrome and fibromyalgia. He diagnosed persistent neck, right shoulder and right wrist myofascial pain syndrome and cephalgia secondary to chronic cervical sprain, all due to the industrial accident. He explained:

> The mechanism of injury in this case is consistent with the symptoms of the patient and the clinical findings upon evaluation. A small percentage of cases, less than 20%, probably about 5%, persist [sic] longer than a year. This young lady appears to be one of those unfortunate individuals.

Joint Exh. J, p. 80.

41. In addition, Dr. Hicks testified that Claimant would not harm herself further by using her affected limb or by moving her neck, even though it hurts her to do so. He ventured to guess that her mobility would not improve, although it is possible that she could, at some point in the future, learn to function more fully in spite of her pain. He opined that Claimant has permanent limitations due to pain in her neck and RUE and deconditioning, in reaching overhead, grip strength, and lifting.

42. Dr. Hicks prescribed Naprosyn and Flexeril. When Claimant followed up on February 18, 2010, she indicated that these medications had improved her symptoms, but that she could not afford to keep taking them.

43. Dr. Hicks found Claimant to be at MMI, reasoning that since her condition had persisted for more than one year, neither additional time nor further treatment would likely improve her condition. However, he also opined that Claimant would continue to require pain medication.

44. Generally citing the *AMA Guides* and implying that he may have incorporated some undisclosed Ohio rules into the basis for his determination, Dr. Hicks assessed a whole person PPI rating of 5% in consideration of Claimant's cervical and RUE pain. Claimant demonstrated ROM limitations in at least three planes involving 5 vertebrae (C1, C2 and C5-T1), so Dr. Hicks assessed 1% whole person PPI for each affected vertebrae.

Disability Evaluation: Mary Barros-Bailey, Ph.D.

45. Mary Barros-Bailey, Ph.D., bilingual rehabilitation counselor, prepared a disability evaluation at the request of both Defendants and Claimant. Prior to preparing her report, Dr. Barros-Bailey reviewed Claimant's relevant medical records, the IME reports, and other pertinent records. She also interviewed Claimant, in Spanish. Prior to her deposition, she reviewed transcripts of the hearing and the depositions of Dr. Jensen and Dr. Hicks.

46. Given Claimant's limited education and work history, Dr. Barros-Bailey determined that Claimant has no transferable skills. However, Claimant does have the ability to access other, unskilled, work. Dr. Barros-Bailey did not quantify the availability of such work to Claimant, but testified that "unskilled work" includes positions in which one can become proficient within 30 days. Because Claimant is only qualified to do minimum wage types of employment, Dr. Barros-Bailey opined that she had not suffered any loss in her ability to work at her pre-accident wage level.

47. Based upon Dr. Jensen's opinion that Claimant suffered no PPI as a result of her industrial accident, Dr. Barros-Bailey found no grounds upon which to assess a PPD rating.

48. Given Dr. Hicks's opinion, that Claimant suffered 5% PPI of the whole person, Dr. Barros-Bailey opined that Claimant has suffered 25% PPD inclusive of PPI. She based her opinion that Claimant has lost access to 25% of her pre-injury job pool on Dr. Hicks's permanent limitations of no overhead reaching with her RUE and no lifting over ten pounds, which she treated as permanent restrictions. Even with these limitations, Claimant could do, for example, assembly jobs that do not require overhead reaching. Dr. Barros-Bailey provided some examples of jobs Claimant could still perform, but no data to support her opinion.

49. Dr. Barros-Bailey testified that she questioned Claimant's pain level during her interview of Claimant because she observed Claimant twist at the neck in ways in which she claimed not to be able to move. Nevertheless, she deferred to the medical opinions of Dr. Jensen and Dr. Hicks in formulating her opinions. The Referee allocates little weight to Dr. Barros-Bailey's observation. Without more detail than the record provides, the Referee is incapable of properly evaluating her conclusory statement, even though this may be a proper topic for lay witness testimony.

Claimant's Credibility

50. A claimant's credibility is generally at issue in a workers' compensation proceeding. Here, the scrutiny is heightened because the record indicates that Claimant's reports of her pain and the accident may be exaggerated and, therefore, unreliable. The Referee finds Claimant's testimony is generally credible, but addresses some relevant issues, below.

51. **Symptom amplification and accident exaggeration.** There is persuasive evidence in the record that Claimant repeatedly provided inadequate effort on Dynamometer testing,

administered by various physicians, resulting in exaggerated grip strength limitations. In addition, Claimant's insistence that she was thrown between nine and fourteen feet from the floor buffer are unsupported by the evidence in the record. There are other occasional instances, such as when Claimant jumped off the examination table when Dr. Campbell touched her right arm on August 29, 2008, that also demonstrate Claimant may have been exaggerating her symptoms. On the other hand, chart notes from a number of medical and physical therapy examinations lack any indicia that Claimant was amplifying her symptoms, and Dr. Hicks believed Claimant gave adequate effort on manual grip testing.

52. The *AMA Guides, Sixth Ed.* cautions physicians against being automatically dismissive when evaluating the impact of aberrant pain behaviors, noting:

> The appearance of symptom exaggeration can be created by fear or by having learned that certain actions or positions provoke pain…Excessive or exaggerated pain behaviors can be a response to feeling discounted or mistrusted, so that one must emphasize symptoms to persuade the physician of their reality. Anyone might dramatize a problem in an effort to have it taken seriously. Thus, symptom magnification can be an iatrogenic phenomenon that occurs when patients feel mistrusted or poorly cared for.

AMA Guides, 6th Ed., p. 39. Claimant's language skills made it necessary for her to communicate, at all relevant times, through an interpreter. The interpretation process, alone, places an unnatural emphasis on communication that could lead to responses that would seem atypical in these proceedings. Further, all communicants are at the mercy of the interpreter to make their meanings clear, introducing an element of distrust. As a result, the communication barrier, alone, could account for why Claimant may have dramatized her symptoms or the details of her accident at any given time. Further, by the time Dr. Jensen examined Claimant she had been through a significant amount of treatment, all through an interpreter, without yet obtaining full relief from her pain. Given these considerations, Claimant cannot necessarily be faulted for being overly demonstrative in trying

to get her point across.

53. The objective findings on examination recorded by Dr. Hicks and Claimant's treating physicians tend to support Claimant's subjective pain reports. These reports are consistent with the mechanism of injury (a fall) and are sufficiently steady over time.

54. The Referee finds inadequate evidence to establish that any of Claimant's exaggerated pain behaviors, or her reports of the distance of her fall, were intentionally deceptive. Even so, the Referee finds Claimant's self-reports as to her pain level at any given time may be exaggerated and, therefore, not credible with respect to her actual pain level. The Referee further finds that Claimant's testimony about being thrown from nine to fourteen feet from the floor buffer is contrary to the weight of the evidence and, accordingly, will be afforded no weight to the extent that it bears upon the issues surrounding the severity of her injuries.

55. **Mr. Burton's allegations.** Further along these lines, Mr. Burton testified that he became suspicious of Claimant's motives early on, when she came out of the CRMC emergency room in a cervical collar on the day of her accident, since he believed she had only hurt her arm. In addition, Mr. Burton testified that he saw Claimant at a local store parking lot, within a few weeks after her accident, lifting "kids out of carts" into her car. Tr., p. 62. She was smiling and jovial, and Mr. Burton implied deceit because she had not been that way at work. In addition, she was not wearing a neck brace at the time.

56. The Referee finds this testimony unpersuasive for the following reasons. First, Claimant was not issued a cervical collar until September 12, 2008, so Mr. Burton's recollection as to the time when he first saw her in the device is inaccurate, even though his testimony on this point seems quite detailed and certain. Second, Mr. Burton's concern that Claimant appeared more jovial while off-work from her janitorial job is more probative of whether Mr. Burton's suspicion had

reached an excessive level than Claimant's credibility. Third, it is difficult, based upon Mr. Burton's testimony, to picture why or how Claimant was taking multiple children out of multiple carts. This, combined with his inability to pinpoint the incident in time, makes his testimony on this point too speculative to outweigh Claimant's testimony that she could not lift more than approximately ten pounds after her industrial accident. Finally, Claimant first obtained her cervical collar two to three weeks after her accident; so, it is not probative of any relevant fact that she was not wearing it, given Mr. Burton could not pinpoint the date he saw her in the parking lot.

57. **Documented information vs. memory.** Claimant's recollection of dates was occasionally inconsistent with information in the record from contemporaneously maintained documents. The Referee finds that such instances do not demonstrate dishonesty or ill intentions on Claimant's part. Nevertheless, where Claimant's testimony as to the date on which a relevant event occurred conflicts with information in an otherwise reliable contemporaneously made document, the Referee will adopt the date referenced in the document as being more reliable.

DISCUSSION AND FURTHER FINDINGS

The provisions of the 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).

Causation

The Idaho Workers' Compensation Act places an emphasis on the element of causation in determining whether a worker is entitled to compensation. In order to obtain workers' compensation

benefits, a claimant's disability must result from an injury caused by an accident arising out of and in the course of employment. *Green v. Columbia Foods, Inc.*, 104 Idaho 204, 657 P.2d 1072 (1983); *Tipton v. Jannson*, 91 Idaho 904, 435 P.2d 244 (1967). An employer is not liable for medical treatment that is not causally related to an industrial accident. *Sweeney v. Great West Transp.,* 110 Idaho 7, 714 P.2d 36 (1986); *Williamson v. Whitman Corp./Pet, Inc.,* 130 Idaho 602, 944 P.2d 1365 (1997).

The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973). See also *Callantine*, *Id*.

The Idaho Supreme Court has held that no special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993).

58. The specific causation issue to be determined is whether Claimant suffers a residual, chronic, pain condition as a result of her industrial accident. Claimant has reported pain in her neck and RUE persisting since the accident. Claimant's treating physicians and physical therapists at CRMC consistently found objective signs, including muscle spasms and other positive test results, that supported Claimant's pain complaints. And Dr. Hicks found objective evidence on examination to support Claimant's chronic pain complaints as of February 2010.

59. Dr. Jensen found Claimant's pain complaints to be "over the top." Jensen Dep., p. 12-13. Dr. Jensen explained that the difference between his and Dr. Hicks's opinions is that Dr. Hicks believed Claimant and Dr. Jensen did not. Given the objective findings in the record, the Referee finds this to be an over-simplistic assessment. There is no compelling evidence to discredit Dr. Hicks's testimony that, in February 2010, Claimant evidenced a chronic myofascial pain condition through "ropiness" in her musculature and "triggers" underlying tender tissues. Dr. Jensen's failure to find objective support for Claimant's pain complaints must yield to the affirmative evidence in the record establishing such findings.

60. As a result, the Referee finds Claimant has proven, by a preponderance of the evidence, that her chronic neck and RUE pain was caused by the industrial accident.

MMI

61. The parties agree that Claimant is at MMI. The record establishes that Claimant's pain condition has remained stable since October 20, 2008 and that further treatment would not likely improve it. As a result, the Referee finds Claimant reached MMI as of October 20, 2008.

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 on 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).

62. Claimant's residual neck and RUE pain were found, above, to be related to her August 25, 2008 industrial injury. These conditions reached MMI as of October 20, 2008.

63. Dr. Jensen opined that Claimant suffered no permanent impairment as a result of her industrial injury. Dr. Hicks opined that she suffered 5% PPI of the whole person for residual pain. He calculated his rating by assessing 1% for each vertebrae corresponding to a distinct area in which Claimant's residual pain is located. He could not recall which edition of the *AMA Guides* he had consulted prior to forming his opinion and indicated he may have been influenced by some Ohio rules.

64. Dr. Hicks opined that Claimant suffered permanent limitations due to pain in overhead reaching, grip strength and her ability to lift more than 10 pounds. Further, Claimant's testimony that her ability to function has been diminished by her chronic pain from her industrial injury is persuasive. The Referee finds Claimant's residual pain in her neck and RUE constitute a functional abnormality warranting a PPI rating.

65. Dr. Hicks arrived at his PPI rating by applying principles sometimes used to assess musculoskeletal disorders; however, the record does not establish that Claimant suffered a related musculoskeletal disorder after she reached MMI. The Referee finds the guidance found in the *AMA Guides, 6th Ed.,* regarding the rating of pain-related impairment, most authoritative as a basis on which to evaluate this case. It provides that a "pain-related impairment" may be rated, from 0%-3%, when a Claimant has reached MMI and his or her condition has a reasonable medical basis, creates a major problem for the person and cannot be otherwise rated under the principles described in the *AMA Guides, 6th Ed. Id., p. 40.* The Referee, after considering the totality of evidence in the record,

finds Claimant has established she has residual pain in the low-moderate range and is, therefore, entitled to a 1% whole person PPI rating.

PPD

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). 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). Pain may result in functional loss and, therefore, may reduce a claimant's ability to engage in gainful activity. *Urry v. Walker & Fox Masonry Contractors,* 115 Idaho 750, 769 P.2d 1122 (1989).

Permanent disability is defined and evaluated by statute. Idaho Code § 72-423 and 72-425 *et. seq*. Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See*, Eacret v, Clearwater Forest Indus., 136 Idaho 733, 40 P.3d 91 (2002); Boley v. State, Industrial Special Indem. Fund, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. Seese v. Idaho of Idaho, Inc., 110 Idaho 32, 714 P.2d 1 (1986).

66. Claimant has no preexisting medical conditions that functionally limit her ability to engage in gainful activity (employment).

67. Claimant reported to Dr. Barros-Bailey a number of functions she feels are limited by her residual pain from her industrial injury. Dr. Barros-Bailey, however, relied upon Claimant's limitations as assessed by Dr. Hicks in forming her opinion. She assumed that Dr. Hicks's limitations are equivalent to permanent restrictions; however, the Referee declines to make the same

assumption. Dr. Hicks testified that Claimant could engage in activities that bring on her neck and RUE pain without suffering any additional anatomic injury. So, there is a qualitative difference between a permanent restriction assessed by a physician to protect an individual from further anatomic injury and a pain-induced limitation. Claimant may choose whether to engage in activities outside her limitations and deal with the pain without risking further injury or disablement; whereas, an individual with permanent restrictions acts against medical advice designed to protect her from additional harm when she participates in a restricted activity.

68. Claimant's ability to work is also limited by non-medical factors including her 7th grade education level, her limited work history and her inability to speak English. She has no transferrable skills, but could perform unskilled work within her limitations. Dr. Barros-Bailey identifies agricultural work, primarily food processing, and janitorial work as primary fields in which Claimant could be employable; however, she provides no specific data from which to calculate Claimant's loss of access to the relevant job markets.

69. The jobs Claimant could expect to be hired for generally require full use of the dominant arm, which Claimant has, but with limiting pain. As a result, she has suffered a loss of access to the job market. She has not suffered any wage loss, since the jobs she qualifies for, both pre- and post-industrial injury, are all within the same pay range.

70. Dr. Barros-Bailey recommended a 0% PPD rating based upon Dr. Jensen's opinion of no PPI, and 25% based upon Dr. Hicks's opinion of 5%.

71. The Referee finds Claimant's pain limitations are significantly less detrimental to future employment than equivalent permanent restrictions. Further, the evidence establishes Claimant's pain level to be somewhere in the low-moderate range. The evidence in the record supports a PPD rating of 10% inclusive of impairment.

Apportionment

72. Idaho Code § 72-406 provides for apportionment of benefits where a Claimant's industrial injury was worsened by a pre-existing or subsequent condition. There is inadequate evidence of any such relevant condition in the record. Therefore, the issue of apportionment is moot.

CONCLUSIONS OF LAW

1. Claimant has proven her cervical strain and RUE strains and contusions, as well as her residual neck and RUE pain, were caused by the industrial accident of August 25, 2008.

2. Claimant has proven that she is entitled to 1% PPI for her residual neck and RUE pain, with no apportionment for preexisting or subsequent conditions.

3. Claimant has proven that she is entitled to 10% PPD inclusive of impairment based upon her relevant medical and nonmedical factors, with no apportionment.

4. All other issues are moot.

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 in Boise, Idaho, on ____3____ day of __February_____, 2011.

INDUSTRIAL COMMISSION

_/s/_____
LaDawn Marsters, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JAZMIN JUAREZ, Claimant, v. HIGH DESERT MILK, Employer, LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 2008-028468** **ORDER** February 11, 2011

Pursuant to Idaho Code § 72-717, Referee LaDawn Marsters submitted the record in the above-entitled matter, together with her proposed 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 cervical strain and RUE strains and contusions, as well as her residual neck and RUE pain, were caused by the industrial accident of August 25, 2008.

2. Claimant has proven that she is entitled to 1% PPI for her residual neck and RUE pain, with no apportionment for preexisting or subsequent conditions.

3. Claimant has proven that she is entitled to 10% PPD inclusive of impairment based upon her relevant medical and nonmedical factors, with no apportionment.

4. All other issues are moot.

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

DATED this __11___ day of ___February_____, 2011.

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 __11___ day of __February_____, 2011, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

JAMES ARNOLD
P O BOX 1645
IDAHO FALLS ID 83403-1645

KIMBERLY A DOYLE
LAW OFFICES OF HARMON & DAY
P O BOX 6358
BOISE ID 83707-6358

jkc _/s/_____