BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JANEICE NIEBUHR, Claimant, v. AAPEX CONSTRUCTION, INC., a/k/a, ACI NORTHWEST, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 2006-513568** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed September 22, 2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Coeur d'Alene on October 15, 2010. Richard Whitehead represented Claimant. E. Scott Harmon represented Defendants. The parties presented oral and documentary evidence, took post-hearing depositions, and submitted briefs. The case came under advisement on March 15, 2011. 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 resolved according to the notice of hearing and by agreement of the parties at hearing are:

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 the following benefits:

    a. Temporary partial and/or temporary total disability benefits (TPD/TTD);

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

The parties withdrew an issue regarding whether an accident occurred in the course and scope of employment. The parties narrowed the question of benefits to Claimant's C-spine. Benefits for all other injuries have been accepted and paid.

CONTENTIONS OF THE PARTIES

Claimant contends that in addition to the injuries accepted by Defendants, Claimant injured her neck when a runaway horse bucked her off into a tree (the "Accident"). Her neck injury was masked initially by her rib injuries and pneumothorax suffered immediately with the Accident and later masked by a torn left rotator cuff suffered at the time of the Accident, but which did not seem significant until the rib pain subsided. A preexisting degenerative condition in her cervical spine ("C-spine") was made symptomatic by the Accident. She is entitled to medical care and TTDs during her recovery, as well as benefits for PPI and permanent disability. Defendants acted unreasonably regarding the C-spine aspect of this claim in conducting an insufficient investigation and denying liability for it.

Defendants contend that no benefits are due her as a result of her preexisting degenerative condition in her C-spine. All other benefits have been paid. Defendants acted reasonably at all times.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant and of her friends, Sandra Johnson and Loraine Gabriel;

2. Claimant's Exhibits 1 through 7;

3. Defendants' Exhibits A through L; and

4. Post-hearing deposition testimony of Jeffrey McDonald, M.D., Lawrence Gibbon, M.D., and Jeffrey Larson, M.D.

After having fully considered the above evidence and arguments of the parties, the Commission hereby issues its decision in this matter.

FINDINGS OF FACT

1. Employer employed Claimant as a horse trainer and general ranch hand. On June 15, 2006, Claimant was injured when a runaway horse bucked her off into a tree. The tree struck her left chest primarily.

Immediate Medical Care

2. On June 15, 2006, Claimant was taken to the Kootenai Medical Center ("KMC") emergency room. She denied "significant" headache and neck pain. She reported a history of fibromyalgia. X-rays and CT scans showed bruised lungs, multiple small spots of pneumothorax, and multiple fractures across six left ribs. Treating physician Lawrence Gibbon, M.D., described an X-ray as follows: "Her shoulder showed hypertrophic changes of the acromioclavicular joint and arthritis. No acute injury." She was admitted for treatment. Examination reported her neck "Supple. No Tenderness. No palpable soreness around the skull." Upon discharge on June 18, the discharge diagnoses included a left "probable" rotator cuff injury. Dr. Gibbon recommended physical therapy.

Prior Medical Care

3. Claimant's medical history is consistent with a woman who worked hard outdoors and who was not hesitant about visiting doctors for maladies both major and minor.

4. On July 22, 1990, Claimant was examined by Robin Shaw, M.D., at the KMC emergency room following a fall from a horse. Dr. Shaw diagnosed a cervical strain, right cheek scrape and bruise, and a right forearm bruise. X-rays noted some synovial fluid

in her neck joint at C1-2, but did not report any degenerative condition in her neck.

5. On November 3, 1991, Claimant was examined by S.J. Malek, M.D., at the KMC emergency room, having sprained her ankle at home.

6. On November 5, 1999, a bone scan showed arthritis in Claimant's left thumb three months after an injury. She had reported continuing pain, loss of grip and tingling.

7. On July 27, 2002, Claimant was examined by Michael Ettner, M.D., at the KMC emergency room after a fall from a horse. Dr. Ettner diagnosed bruised right ribs and shoulder.

8. Multiple visits to Dr. Gibbon between a 2002 accident (immediately above) and a 2004 motor vehicle accident (immediately below) included diagnoses of fibromyalgia, arthritis in hands and feet, depression and inadequate hormone control, but did not include diagnoses of a degenerative C-spine condition.

9. On August 22, 2004, Claimant was examined by David Barnes, M.D., at the KMC emergency room after a motor vehicle accident. She primarily complained of neck pain and, on examination, showed tenderness from her neck into her trapezius bilaterally. By history, rheumatoid arthritis and fibromyalgia were significant. X-rays showed degenerative changes at C5-6 and C6-7 without acute injury. Dr. Barnes diagnosed a cervical and lumbar strain. Follow-up notes by Dr. Gibbon indicate Claimant's neck complaints quickly resolved.

10. On August 16, 2005, Claimant visited Dr. Gibbon after being thrown by a horse. She complained of right shoulder pain, no neck pain.

Related Medical Care Following the Accident

11. Dr. Gibbon provided follow-up care after Claimant was discharged from KMC. He took her off work. Claimant visited Dr. Gibbon's office many times. Her healing progress was generally slower than expected.

12. In deposition, Dr. Gibbon identified an office note prepared by a Dr. Jacobson, a

partner of Dr Gibbon who examined Claimant in the emergency room immediately after the Accident. Based upon form and style consistencies, the office notes for March 4, 2004; June 5, July 5, and July 13, 2006; and February 21, 2008 were dictated by Dr. Jacobson. Across the notes, many entries pertaining to specific anatomical areas are identical, including "Neck - Supple, FROM, no LAD". At deposition, Dr. Gibbon was unable to state what the "F" meant or what the "LAD" meant in Dr. Jacobson's notes.

13. Claimant underwent physical therapy beginning in July 2006 as her ribs healed. She initially also reported back pain, but not shoulder or neck pain. The records show no evidence of shoulder complaints until September 2006. The physical therapist circled the treatment form at "shoulder" broadly enough to ambiguously include "neck" on one December 2006 (her 19th) visit and on one January 2007 visit, but without further identification of symptoms or treatment. Beginning February 2007 the treatment form clearly circles both "shoulder" and "neck" as well as other problem areas. Thereafter, these circles only intermittently include "neck." The progress reports do not mention neck symptoms or treatment but do specifically address left shoulder symptoms and treatment. Her March 16, 2007 visit is counted by the physical therapist as her 37th. It does not address Claimant's neck.

14. Claimant's left shoulder complaints to Dr. Gibbon begin September 22, 2006. Based upon her reported need to work, Dr. Gibbon released her to return to light duty effective October 30, 2006 – five hours per day – despite her continuing shoulder complaints. Full-time light-duty release was effective November 27, 2006. The few references to her neck do not indicate any problem or complaint through her visit on February 20, 2007.

15. Claimant's next visit to Dr. Gibbon is recorded on March 21, 2007. Dr. Gibbon notes, "Her neck is much less tender and there is marked decrease in tightness of her neck with

better ROM here as well." Dr. Gibbon does not indicate when these symptoms arose. He does not include any diagnosis related to a neck or C-spine condition. He released her to return to work without restriction.

16. On April 23, 2007, Claimant's next visit to Dr. Gibbon, he recorded reduced neck range of motion with "tightness and tension" in her posterior neck muscles. He recorded no cause or diagnosis for those symptoms.

17. On July 23, 2007, Dr. Gibbon rated Claimant's PPI at 30% based upon decreased range of motion in both shoulders and her neck. Claimant was obviously still in treatment, recovering from her injuries and not medically stable at that time.

18. On August 29, 2007, Claimant was evaluated by J. Craig Stevens, M.D., at Surety's request. Her primary complaint involved a "broad swath" of anatomy from her sternum to her left shoulder and around to the left side of her neck. On examination, she reported marked tenderness and trigger points throughout the areas. Her shoulder range of motion was inconsistent. Dr. Stevens opined her effort to be invalid. He opined her complaints of shoulder and neck pain were related to her preexisting fibromyalgia and were unrelated to the Accident. He opined some chronic chest pain was related to residual deformity following the rib fractures. He found her to be at MMI for all conditions related to the Accident. He considered healed rib fractures to be an unratable condition for PPI but allowed "reasonable apportioned impairment" of 1% for chronic costochondral pain following the Accident. He released her to return to work without restriction.

19. On January 15, 2008, an MRI showed a partial thickness tear of the supraspinatus tendon.

20. Dr. Gibbon's notes of Claimant's several visits to him do not mention neck

symptoms after the July 23, 2007 visit until the March 12, 2008 visit. (One intervening note dated February 21, 2008 is Dr. Jacobson's as explained above.)

21. On March 7, 2008 Claimant was examined by Mark Manteuffel, M.D., at the KMC emergency room. She complained of a numb sensation in the back of her scalp, the base of her neck and into her left trapezius. Dr. Manteuffel reported "some vague discomfort" in that area to palpation. Sensation to touch was normal, but she reported persistent paresthesias. He diagnosed post-traumatic neuropraxia. He attributed it to a change in body mechanics after the left shoulder injury, reassured her, prescribed medication, and sent her home. (In her deposition, Surety's adjustor, Teresa Nolen, referred to this event as occurring on March 8, 2008.)

22. Dr. Gibbon referred Claimant for consultation by Adam Olscamp, M.D. Dr. Olscamp first examined Claimant on March 13, 2008. A detailed examination of her neck revealed no objective abnormalities or subjective symptoms.

23. On March 12, 2008, Claimant was referred to physical therapy specifically to address a "cervical strain." The March 18, 2008 physical therapy visit is numbered by the physical therapist as Claimant's first visit. It contains the first description of a neck abnormality, "spasm" with possible neural involvement. Claimant reported "experiencing acute cervical pain which has been exacerbated over the last couple of weeks." Claimant made 11 physical therapy visits on this referral, the last occurring on May 5, 2008.

24. On April 4, 2008, Dr. Gibbon notes a diagnosis of "degenerative joint disease of her C-spine with radicular symptoms "all related to being thrown from horse." (Dr. Gibbon's use of all caps has been removed).

25. On May 2, 2008, an MRI showed mild degenerative changes in her C-spine.

26. On May 23, 2008, Claimant again visited Dr. Olscamp with complaints of

bilateral arm pain. On examination, he reported her neck was supple with good range of motion. He performed a left rotator cuff repair later that day.

27. On May 24, 2008, Claimant was examined by Warren Keene, M.D., at the KMC emergency room. He examined her upon her report of post surgical shoulder pain.

28. Claimant returned to physical therapy, this time for her shoulder, on June 10, 2008. She visited the physical therapist 42 times until her last visit on November 7, 2008. Once during the first 25 visits, Claimant mentioned that her neck continued to bother her. On visit 26, July 22, 2008, Claimant reported she fell backward over a vacuum and struck her right shoulder, head and neck. Neck complaints to the physical therapist gradually become more regular.

29. On July 28, 2008, Claimant returned to Dr. Gibbon. His working diagnosis was degenerative joint disease of the C-spine with trapezius myositis, and residual complaints following the rotator cuff surgery, radiculopathy. At the end of July he suggested a pain clinic evaluation.

30. On September 25, 2008, Claimant was evaluated by a panel consisting of Brian Tallerico, D.O., and Eugene Wong, M.D., at Surety's request. On examination, Claimant exhibited reduced range of motion upon her complaints of discomfort. Left shoulder motion was similarly reduced. Upon muscle strength testing of her hands, Claimant complained of neck pain. No evidence of reflex sympathetic dystrophy ("RSD") appeared. The panel opined her C-spine condition was degenerative and unrelated to the Accident. The panel did not opine about the cause of her left shoulder condition stating, "apparently administratively accepted as related to claim." The panel opined her shoulder was not at MMI. No restrictions were imposed, but, after eventual MMI, some left shoulder permanent restrictions were anticipated by

the panel. The panel opined her neck complaints were "somewhat out of proportion" to her MRI findings.

31. Although Dr. Olscamp examined Claimant on several visits following his repair of her rotator cuff, his first record of a complaint of neck pain in noted at an October 7, 2009 visit. On examination he found "nearly full ROM, but lacking about 30' [sic] active flexion" together with subjective symptoms.

32. Dr. Olscamp referred Claimant to R. Clinton Horan, M.D., for a neurology workup. On December 2, 2008, Dr. Horan reported that Claimant described neck pain since the date of the Accident. He performed an EMG and nerve conduction studies and found bilateral carpal tunnel syndrome but not likely cervical radiculopathy.

33. On January 28, 2009, Radiologist David Giles, M.D., compared Claimant's diagnostic imaging taken in August 2004 with that taken in May 2008. The 2008 MRI showed a mild degenerative condition in her C-spine with "likely" nerve root entrapment at C5-6, "unchanged to slightly progressive" from the 2004 X-rays. He opined that as between potential causes of preexisting degeneration versus the fall from the horse, "differentiation between these two possibilities is not possible." Regardless, disease progression would be expected at C5-6 and C6-7.

34. On March 12, 2009, Claimant was examined by Jeffrey McDonald, M.D. He reported no objective clinical anomalies in his examination and addressed the May 2008 MRI findings. He recommended conservative care, physical therapy, with possible further surgery. He prescribed a home cervical traction unit. He stated, "Her neck disability index is 70 percent."

35. Also on March 12, 2009, Claimant visited Jeffrey Larson, M.D., on referral from Dr. Gibbon. By history, Claimant reported having ongoing neck pain since the Accident.

On examination and diagnostic imaging, Dr. Larson diagnosed degenerative disc disease at C5-6 and C6-7. In an April 10, 2009 letter to Surety, Dr. Larson opined her C-spine condition preexisted the Accident. He conditionally opined her symptoms, if new since the Accident, represented an aggravation of a preexisting condition. He noted, "There are no permanent objective findings."

36. On May 1, 2009, Michael Ludwig, M.D., performed an epidural steroid injection. Claimant reported it reduced her C6 radicular pain, but did not reduce other symptoms.

37. On June 11, 2009, after a new MRI showed degeneration at C4 through C7, particularly at C5-6 and C6-7, Dr. McDonald recommended a C5-7 fusion.

38. On June 24, 2009, Dr. McDonald performed a diskectomy and fusion from C5 through C7. He found the disk spaces nearly completely collapsed with prominent bone spurs.

39. On July 7, 2009, Dr. Larson opined Claimant's neck surgery did not relate to the Accident.

40. On July 6, 2009, Dr. McDonald approved Claimant's request to return to work, but cautioned against lifting more than 10-15 pounds occasionally. On August 6, 2009, he suggested she avoid "too much range of motion extremes with her neck, and too much upper body repetitive motion." He did not mention other restrictions. On September 10, 2009, he recorded, "She has nothing that she would call neck pain or headaches. She has been working full time, full duty." He noted that post-surgical X-rays showed a satisfactory surgical result.

41. On January 20, 2010, Claimant was evaluated by John McNulty, M.D., at Claimant's request. She complained primarily of daily neck pain radiating into her trapezius. On examination, she reported tenderness in those areas and showed some mild decrease in range of motion of her neck. Dr. McNulty opined her at MMI regarding her ribs, pulmonary

contusion and left shoulder condition, with no PPI for her left shoulder. He opined her surgery was caused by the Accident. He opined Claimant was not at MMI regarding her C-spine condition, although he anticipated her PPI when stable would be rated at 25% whole person.

42. On March 4, 2010, Dr. McDonald checked a box indicating he agreed with Dr. McNulty's opinion about causation, MMI, and anticipated PPI of 25%. On March 15, 2010, he examined Claimant and opined her at MMI. He did not rate her for PPI then.

43. On April 19, 2010, Dr. Gibbon recorded his most recent chart note in the record. Claimant's neck symptoms were a minor feature of an extensive physical examination.

Medical Experts' Depositions

44. Dr. Gibbon has been Claimant's primary treating physician since 1991. He was the treating physician during her hospitalization after the June 15, 2006 Accident. He provided a substantial portion of her follow-up care. As a family practice physician, he made referrals to orthopedic and neurologic specialists when he felt appropriate. It is apparent that Dr. Gibbon firmly holds his opinion that Claimant's neck symptoms and need for treatment including surgery were related to the Accident. However, when questioned about this conclusion in deposition, he was unable to convincingly explain himself. He stated generally that Claimant's "complaints of pain and significant problems with her neck really seemed to escalate after her '06 injury." He has treated other patients with significant degenerative C-spine disease which has become painful as a result of weakening of structures or swelling following a traumatic event. He discounts fibromyalgia as the cause of her neck symptoms because usually it involves more than just the neck and does not limit range of motion. He opined that fibromyalgia and arthritis contributed to Claimant's neck symptoms.

45. Dr. McDonald, a neurosurgeon, agreed with Dr. McNulty's reasoning and opinion that Claimant's need for C-spine surgery was caused by the Accident. He acknowledged that

a degenerative C-spine condition could be aggravated in a "[m]ultitude of ways." He opined that diagnostic imaging is not predictive of an individual's need for surgery. In his records review, he found no evidence of radicular C-spine symptoms before Dr. Gibbon's note of April 4, 2008. Because Claimant insisted she return to work two weeks after surgery, Dr. McDonald did not impose specific restrictions. Generally after such a surgery, he would recommend no lifting over 10 pounds and no repetitive overhead or outstretched reaching for six weeks postoperatively; no contact sports or horse training for six to 12 weeks; and no restrictions after 12 weeks. He did not personally perform an exhaustive records review, but relied upon Dr. McNulty's review.

46. Dr. Larson, a neurosurgeon, opined that Claimant's 2008 MRI showed no change from her 2004 X-rays. He opined Claimant's paresthesia in her fingers in December 2008 was consistent with carpal tunnel syndrome or innervations at the C-8 nerve root, not at C-6. On April 10, 2009, he opined Claimant was MMI regarding any sprain/strain injury to her neck caused by the Accident. Her C-spine condition was back to its preexisting baseline based upon the 2004 X-rays. Although her C-spine condition after April 10, 2009 indicated surgery was reasonable, Dr. Larson considered it entirely elective and not caused by the Accident. Her degenerative C-spine condition would cause her symptoms to be intermittent. The degeneration seen in 2004 would be expected to progress.

Non-Medical Factors

47. Born August 8, 1956, Claimant was 54 on the date of hearing.

48. Claimant quit school in the 11th grade. She does not possess a GED.

49. Claimant has worked as a horse trainer and general ranch hand, as a cabinetmaker and as a housecleaner. She has given riding lessons and was a professional barrel racer.

50. Claimant is a hardworking outdoorswoman. She makes a good first impression and does not suffer from disfigurement or other factors which might hinder her ability to

compete for jobs. The Commission finds no reason to disturb the Referee's findings on credibility.

DISCUSSION AND FURTHER FINDINGS OF FACT

51. It is well settled in Idaho that the Workers' Compensation Law is to be liberally construed in favor of the claimant in order to effect the object of the law and to promote justice. *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, 910 P.2d 759 (1966). Although the workers' compensation law is to be liberally construed in favor of a claimant, conflicting evidence need not be. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 316, 834 P.2d 878 (1992).

52. Claimant sustained serious injuries in the Accident on June 15, 2006. Claimant denied having neck pain immediately after the accident. The record is silent about any neck complaints until the physical therapist's ambiguous circle in December 2006. By February 2007, the physical therapist's circles were unambiguous, sometimes including her neck as an identified problem area, sometimes not. The February 20, 2007 note of Dr. Gibbon's expressly denies any soreness along the C-spine. The next office note dated March 21, 2007 marks Dr. Gibbon's first mention of a neck complaint, but implies he was aware of a problem earlier where it states, "Her neck is much less tender, and there is marked decrease in tightness of her neck with better ROM here as well."

53. Claimant appears as a thoughtful, careful, and honest witness. However, her memory is occasionally inconsistent with her documented medical records about complaints both before and after the Accident. Where discrepancies arise between her memory and contemporaneously made medical records, the medical records are deemed more accurate.

Causation

54. A workers' compensation claimant has the burden of proving, by a preponderance of the evidence, all facts essential to recovery. *Evans v. Hara's, Inc.,* 123 Idaho 473, 849 P.2d 934 (1993); *Henderson v. McCain Foods, Inc.,* 142 Idaho 559, 130 P.3d 1097 (2006). An employee seeking compensation for medical care must prove that there is causal connection between the industrial accident and the need for medical care. See *Henderson v. McCain Foods, Inc., supra*. 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 claim for that compensation. See *Callantine v. Blue Ribbon Linen Supply*, 103 Idaho 734, 653 P.2d 455 (1982). In this regard, "probable" is defined as having more evidence for than against." See *Soto v. Simplot*, 126 Idaho 536, 887 P.2d 1043 (1994); *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 179 P.3d 288 (2008).

55. Here, although the record contains conflicting medical opinions on the question of the cause of Claimant's cervical spine complaints, the Commission is more persuaded by the opinions of Drs. Given, McDonald and McNulty that the subject accident caused or contributed to Claimant's cervical spine condition, such that she is entitled to Workers' Compensation benefits for the same.

56. A claimant is required to prove by a preponderance of the evidence that a claimed injury was caused by a compensable accident. *Henderson v. McCain Foods, Inc.,* 142 Idaho 559 at 563, 130 P.2d 1097 (2006).

57. The medical records are consistent with Claimant's testimony that her degenerative C-spine was asymptomatic before the Accident. She was treated briefly after a 2004 motor vehicle accident for a complaint of neck pain, but it quickly subsided without need

for additional medical care between that date and the June 15, 2006 Accident.

58. Defendants do not identify a subsequent intervening cause for her neck symptoms. The adjustor, Ms. Nolen, seemed to point to the March 8, 2008 emergency room visit as a basis for a subsequent, intervening cause for Claimant's neck symptoms. While there does seem to be a significant increase in her neck symptoms around this date, no "event" is described as a cause, and the record shows Claimant complained of neck symptoms for at least a full year prior to that date. Surety's cross-examination of Dr. McDonald referenced an episode of bronchitis which occurred in January 2007, but Dr. McDonald opined such coughing would not likely be a cause for the onset of neck symptoms. Moreover, just after the episode of bronchitis subsided, a February 20, 2007 note expressly reported, "Neck is supple. No soreness along cervical spine."

59. With no preexisting symptoms and no subsequent intervening cause, it seems the Commission is left with only two likely scenarios: Her C-spine continued to degenerate without any effect from the Accident, or, her degenerative C-spine condition was aggravated or accelerated by the Accident.

60. Dr. Gibbon has the advantage of having treated her both before and after the Accident. He treated her immediately after she was admitted to the hospital after the Accident. However, the medical records do not support a finding that she complained of neck symptoms for at least six months after the Accident. In deposition, he admitted he did not independently recall details of his treatment of her beyond his records.

61. Dr. McDonald's opinions and bases for them were well articulated, but he did not see Claimant until March 12, 2009 and he did not perform an independent records review. He relied upon the accuracy of Claimant's assertion that she had pain since the date of

accident and upon Dr. McNulty's opinions in 2010, which also were based, in part, upon Claimant's report –more than three years later – that she remembered her neck pain started just after the Accident. Claimant's memory on this point is not supported by the medical records and, where her neck is mentioned at all in that first six months following the Accident, is directly contradicted by them.

62. Did the Accident aggravate or accelerate her condition without symptoms worthy of mention in Claimant's mind until six months later? Careful review of Claimant's medical records shows she often did not mention chronic problems when she was visiting a medical professional for another unrelated problem. Thus, Claimant's predilection and the opinions of Drs. Gibbon, McDonald, and McNulty support this view.

63. Opinions of IME physicians, Drs. Stevens, Tallerico and Wong, support the proposition that the Accident had no effect upon Claimant's degenerative C-spine. However, Dr. Stevens' report indicates he did not believe Claimant's description of the location and extent of her pain or of her effort on testing. The panel's report was more gentle, but tended in the same direction. Claimant's physicians, including Drs. Gibbon, Olscamp, McDonald, and the physical therapists who examined and treated Claimant on multiple occasions over several months did not report any exaggeration or invalid effort on Claimant's part. To the contrary, she argued for a release to return to work only two weeks' after surgery, against Dr. McDonald's advice.

64. Dr. Giles opines merely that radiological evidence in 2004 and 2008 does not elucidate the probability of one possible cause over another.

65. Dr. Larson discussed the possibility that the Accident caused a strain or sprain

that temporarily aggravated her degenerative C-spine condition and subsided to baseline before surgery became indicated. While this theory would explain away any claim of neck pain immediately after the injury, the record does not support the presence of such neck pain. Dr. Larson did not address how such a sprain or strain would not arise for six months, then arise and subside before surgery was indicated. Dr. Larson's causation opinions are not well supported by other physicians and are weakened by the facts of the time-line before the Commission.

66. It is axiomatic that temporal coincidence does not prove causation. Conversely, the six-or-more-months' delay in recorded neck symptoms does not prove the absence of causation. The Commission is well familiar that physicians are often concerned about the possibility of future arthritis and other degenerative conditions which may arise or worsen remotely in time, caused by a physical trauma.

67. Here, the preponderance of the evidence for Accident causation establishes that Dr. Gibbon's firmly held opinion as a treating physician, joined by the consistent opinions of Drs. McDonald and McNulty, should be afforded greater weight than the one-visit opinions of Dr. Stevens and the panel. The opinions for Accident causation are more consistent with the entire record before the Commission. The opinions against Accident causation invite the Commission to impute to Claimant two instances of exaggeration which are inconsistent with her demeanor at hearing and essentially the entire medical record before it.

Medical Care

68. An employer is required to provide reasonable medical care for a reasonable time. Idaho Code § 72-432(1).

69. Claimant's worsening of her previously asymptomatic neck condition, having been aggravated or accelerated as a result of the Accident, was reasonably treated by the

physicians involved. Claimant is entitled to benefits for medical care given to treat all injuries caused by the Accident including her neck symptoms and the fusion surgery.

70. Moreover, Claimant is entitled to recover for the denied medical care in an amount equal to the amount billed. See *Neel v. Western Const., Inc.*, 147 Idaho 146, 206 P.3d 852 (2009). In *Neel, supra*, claimant brought a workers' compensation claim for what he claimed was a compensable accident/injury. Surety denied the claim. This denial forced claimant to enter into private contractual agreements with his medical providers, obligating him to pay the full amount billed. The court found that following surety's denial of the claim, providers were justified in assuming that they were not barred by any contractual adjustment or workers' compensation regulations from charging their usual and customary charges. The court ruled that in such circumstances, where the workers' compensation claim is subsequently found by the Commission to be compensable, employer/surety is responsible for the payment of medical expenses in the amount billed up until the date of the Commission's decision on compensability. Thereafter, surety is responsible for the payment of medical benefits per the Industrial Commission fee schedule.

71. This case differs from *Neel* in that there was no denial of the claim in toto by Employer/Surety. Rather, Employer/Surety acknowledged that a compensable accident had occurred, and that the majority of Claimant's injuries were causally related to said accident. Employer/Surety denied responsibility only for that portion of the claim relating to Claimant's cervical spine condition. Claimant claimed entitlement to medical and other benefits related to her cervical spine, contending that she had suffered a cervical spine injury as a consequence of the compensable accident. Following evaluation by Dr. Larson, employer denied responsibility for the cervical spine condition, contending that the medical evidence failed to establish a causal

relationship between the subject accident and the cervical spine condition. Following the denial by Employer/Surety, Claimant underwent surgical treatment of her multi-level cervical spine lesions by Dr. McDonald. The record does not disclose what type of agreement Claimant made with Dr. McDonald, or some third-party carrier, concerning the payment of medical expenses associated with the surgery. Regardless, based on Surety's denial, it is clear that payment of those medical expenses under the Workers' Compensation law was not contemplated by the parties at the time the expenses were incurred.

72. In all important respects, the Claimant in this case is in exactly the same situation as was the claimant in *Neel*, at least with regard to the surety's denial of responsibility for claimant's cervical spine injury. The rationale of *Neel* should apply to require Surety to pay 100% of the invoiced amount of the bills incurred by Claimant in connection with her cervical spine condition between the date of Surety's denial, and the date of this decision.

Temporary Disability

73. Temporary disability benefits are statutorily defined and calculated for the time when a claimant is in a period of recovery. Idaho Code § 72-408, *et. seq.* Upon medical stability, a claimant is no longer in the period of recovery. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617 (2001); *Hernandez v. Phillips*, 141 Idaho 779, 781, 118 P.3d 111 (2005).

74. Defendants' basis for denying the two weeks' TTDs following the surgery was based on the underlying presumption of a lack of causal relationship to the Accident. Claimant returned to work as a self-employed house cleaner upon Dr. McDonald's release. Industrial Commission Rehabilitation Department ("ICRD") consultant David Pafford recorded Claimant's time-of-injury wage as $9.00 per hour. Two weeks' TTDs should be calculated at that wage and paid.

Permanent Impairment

75. Permanent impairment is defined and evaluated by statute. Idaho Code § 72-422 and § 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*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

76. In July 2007, Dr. Gibbon very prematurely rated Claimant at 30% PPI for decreased range of motion in both shoulders and neck.

77. In August 2007, Dr. Stevens rated Claimant at 1% PPI for costochondral pain. That rating has been paid.

78. In January 2010, Dr. McNulty prematurely rated Claimant at 25% PPI for her C-spine condition and fusion. Oddly, he did not address permanent restrictions. Dr. McDonald opined he would not impose permanent restrictions given Claimant's condition. Defendants have not contested the use of *Guides* or the calculations underlying Dr. McNulty's rating.

79. The imposition of permanent restrictions is not a prerequisite for finding PPI. The *Guides* describe and rate PPI upon changes to one's anatomical condition, such as following a fusion surgery. Claimant having reached medical stability, Dr. McNulty's rating appears appropriate. It is not disputed. Claimant suffered 26% PPI as a result of all injuries caused by the accident.

Permanent Disability and Apportionment

80. 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). Wage loss is a factor, but not the only factor, to be considered in establishing permanent disability. *Baldner v. Bennet's, Inc.*, 103 Idaho 458, 649 P.2d 1214, (1982).

81. Here, the absence of medically imposed permanent restrictions implies that Claimant has suffered no diminution of her ability to engage in gainful activity as a consequence of the subject accident. Indeed, in briefing, Claimant relies almost solely upon her self-imposed limitations as a basis for asserting permanent disability in excess of PPI. While her reluctance to return to horse training and some ranch-hand work is understandable, she is not medically prohibited from performing this work. Her other self-imposed limitations are inconsistent with the weight of medical opinions of record.

82. Claimant's time-of-injury wage was $9.00 per hour. Claimant failed to show it likely that she will be disadvantaged in competing in her local labor market to obtain work to replace that wage.

83. Claimant's age, education, work history and other non-medical factors do not support a finding of disability greater than the 26% PPI rating. Considering all relevant medical and non-medical factors, Claimant failed to show it likely she has suffered a loss of access to the local labor market in excess of her rated PPI.

Attorney Fees

84. An award of attorney fees under Idaho Code § 72-804 is mandatory upon a finding that:

> surety contested a claim for compensation . . . without reasonable ground, or that . . . 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 that

> compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee.

85. The finding above that Claimant's C-spine condition was aggravated or accelerated by the Accident does not, by itself, establish that Defendants acted unreasonably. Indeed, the Commission took a long time and pored over this record repeatedly before arriving at such a finding. The Commission had the benefit of the full record in hindsight. Surety received new information as it arrived.

86. Here, Surety accepted and paid medical and PPI benefits for Claimant's broken ribs and collapsed lung. After reasonable investigation following Dr. Stevens' IME and opinion that any left shoulder problem was unrelated to the Accident, Surety paid for Claimant's left shoulder surgery and treatment.

87. The fact that the first ambiguous mention of Claimant's neck symptoms arose more than six months after the Accident was reason enough for Surety to question causation and investigate that aspect of the claim.

88. Claimant argues that the adjustor's investigation was unreasonably insufficient because she did not directly contact Dr. Gibbon and question him. The statute requires a surety to act reasonably, it does not require a surety to do every reasonable thing exhaustively. If that were the standard, it would be an unreasonable one. Here, the adjustor continued to monitor the medical records as they arrived. When issues arose, she investigated and sought outside expert opinions to assist that investigation. Surety overruled the opinion of Dr. Stevens and accepted the left rotator cuff injury. Surety's investigation and decision making was reasonable and timely throughout the process of this claim.

89. Claimant argues that the very act of seeking an IME when treatment had been

recommended was unreasonable. Idaho Workers' Compensation Law allows employers to require an injured worker to attend an exam by a physician of employer's choosing. Idaho Code § 72-433(1). When, one year after the Accident, Dr. Gibbon opined that Claimant had a 30% PPI rating which included neck symptoms, Surety sought an IME with Dr. Stevens. When Dr. Gibbon diagnosed the C-spine condition and recommended a pain clinic, Surety sought an IME with the panel Drs. Tallerico and Wong. After a question arose among the physicians about whether Claimant exhibited symptoms related to C-spine radiculopathy versus carpal tunnel syndrome, Surety sought a review of diagnostic imaging with Dr. Giles.

90. The Commission does not condone the practice of repeated § 72-733(1) exams without a showing of good cause. Historically, where claimants in litigation have sought, by motion, to avoid an additional IME after one has occurred, referees have carefully considered that motion and the defendants' reasons for requesting another IME. Indeed, if a surety used the practice of requiring repeated IMEs as a means to unreasonably delay or deny benefits, Idaho Code § 72-804 sanctions would apply. Here, however, the record shows a complicated claim involving multiple injuries, uncertain diagnoses, and inconsistent medical reports. The IMEs sought by Surety constituted a reasonable part of a reasonable investigation which continued as Claimant's condition and symptoms changed.

91. Claimant failed to show unreasonableness by Defendants. Sanctions under Idaho Code § 72-804 should not be awarded.

CONCLUSIONS OF LAW

1. Claimant suffered an aggravation or acceleration of a preexisting degenerative C-spine condition as a result of the June 15, 2006 Accident;

2. Claimant is entitled to recover 100% of the invoiced amount of medical bills incurred in connection with treatment for the Claimant's cervical spine condition between the

date of surety's denial, and the date of this decision;

3. Claimant is entitled to two weeks' additional TTDs while recovering from neck surgery;

4. Claimant is entitled to PPI rated at 26% of the whole person;

5. Claimant failed to show it likely she suffered permanent disability in excess of PPI;

6. Defendants acted reasonably for purposes of Idaho Code § 72-804 and attorney fees should not be awarded.

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ORDER

Based on the foregoing analysis, IT IS HEREBY ORDERED That:

1. Claimant suffered an aggravation or acceleration of a preexisting degenerative C-spine condition as a result of the June 15, 2006 Accident;

2. Claimant is entitled to recover 100% of the invoiced amount of medical bills incurred in connection with treatment for the Claimant's cervical spine condition between the date of surety's denial, and the date of this decision;

3. Claimant is entitled to two weeks' additional TTDs while recovering from neck surgery;

4. Claimant is entitled to PPI rated at 26% of the whole person;

5. Claimant failed to show it likely she suffered permanent disability in excess of PPI;

6. Defendants acted reasonably for purposes of Idaho Code § 72-804 and attorney fees should not be awarded.

IT IS SO ORDERED.

Dated this _23rd___ day of September, 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 __23rd_____ day of ____September_____, 2011, a true and correct copy of ***FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER*** *were served by regular United States Mail upon each of the following:*

RICHARD WHITEHEAD
P.O. BOX 1319
COEUR D'ALENE, ID 83816-1319

E. SCOTT HARMON
P.O. BOX 6358
BOISE, ID 83707

___/s/_____