

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MELISSA ROSCOE,)
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 Claimant,)
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 v.)
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 PROLEASE,)
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 Employer,)
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 and)
)
 LIBERTY NORTHWEST INSURANCE)
 CORPORATION,)
)
 Surety,)
)
 Defendants.)
)
 _____)

IC 2002-525812

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

Filed: April 28, 2010

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on June 16, 2009. Claimant, Melissa Roscoe, was present in person and represented by Richard S. Owen of Nampa. Defendant Employer, Prolease, and Defendant Surety, Liberty Northwest Insurance Corporation, were represented by Kent Day of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on November 18, 2009.

ISSUES

The issues to be decided were narrowed at hearing and include:

1. Claimant’s entitlement to additional medical care, including whether the condition for which she seeks additional care is due in whole or in part to a pre-existing and/or subsequent injury/condition.

2. The extent of Claimant's permanent impairment.
3. The extent of Claimant's permanent disability, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise.
4. Claimant's entitlement to temporary disability benefits.

CONTENTIONS OF THE PARTIES

Claimant argues she is totally and permanently disabled due to the effects of her December 4, 2002 industrial accident, when a horse kicked her in the head. She also claims additional medical and temporary disability benefits for a subsequent cervical fusion.

Employer and Surety acknowledge Claimant's industrial accident, but assert that she is not totally and permanently disabled and is capable of regular gainful employment. Employer and Surety also maintain that Claimant is entitled to no further medical care or temporary disability benefits because her cervical surgery was the result of pre-existing conditions, rather than her industrial accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony of Claimant, taken at the June 16, 2009 hearing;
3. Joint Exhibits A through U, admitted at the hearing;
4. Claimant's Supplemental Exhibits 1 through 5, admitted at the hearing;
5. The post-hearing deposition of Danny Bartel, M.D., taken July 15, 2009;
6. The post-hearing deposition of Rodney N. Isom, Ph.D., taken July 16, 2009;
7. The post-hearing deposition of Jack G. Dial, Ph.D., taken July 16, 2009;
8. The post-hearing deposition of Nancy E. Greenwald, M.D., taken August 17, 2009;
9. The post-hearing deposition of Craig W. Beaver, Ph.D., taken August 18, 2009;

10. The post-hearing deposition of Mary Barros-Bailey, Ph.D., taken August 19, 2009; and
11. Joint Exhibit V, submitted at the June 16, 2009 hearing and admitted into evidence pursuant to the Commission's Order Admitting Exhibit Into Evidence entered on June 24, 2009.

Claimant's objections posed during the deposition of Dr. Bartel are overruled. Claimant's objections posed during the depositions of Dr. Greenwald and Dr. Beaver are sustained. Defendants' objection posed during Dr. Barros-Bailey's deposition is overruled.

After considering the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was born in 1965 and raised in Texas, where she completed the 11th grade. In 1981, she obtained her GED. In 1984, Claimant received her CNA certification and thereafter worked at a nursing home. Claimant subsequently worked as a cashier at a convenience store. Over the following four years she progressed to the position of manager. In approximately 1986, she moved with her husband to Gooding, Idaho. From 1986 to 1987, Claimant was employed as a long haul team driver with her husband for D&B Trucking. There is no indication that she had driving limitations of any kind. In approximately 1989, Claimant began feeding calves at a large dairy. In 1994, Claimant began working at North Valley Veterinary Clinic in Gooding, where she assisted four veterinarians. Her duties included ordering, inventory control, dehorning calves, vaccinating cattle, taking x-rays, starting IVs, and assisting with surgeries. Claimant enjoyed the work and became highly proficient.

2. In 1995, while working at the clinic, Claimant sustained a needle stick accident while vaccinating cattle for Brucellosis. She immediately sought medical treatment and was started on medication the same day, but subsequently developed symptoms of fatigue, low grade

fevers, generalized aches and pains, and some headaches. Blood tests confirmed the presence of the Brucellosis strain introduced in the needle stick accident and Claimant underwent several prolonged courses of antibiotics after which her symptoms subsided. Claimant has had at least four relapses of active Brucellosis since her initial exposure. Each results in flu-like symptoms and requires medical treatment.

3. In approximately 1997, Claimant fell from a horse. For nearly one year thereafter she reported paresthesia in both arms and hands. Those symptoms then resolved.

4. Claimant experienced episodes of depression from time to time for which she obtained medical treatment, including prescription medications. Some of these episodes followed her divorce.

5. On December 4, 2002, Claimant was at work helping a veterinarian when a horse reared up and, as it descended, kicked Claimant on the left side of her forehead, just above her left eye, with one of its front hooves, lacerating her forehead and bruising her left cheek. Claimant was dizzy and leaned against a wall but did not collapse. She was taken immediately to the emergency room where the laceration was sutured and she was sent home with instructions to watch for symptoms of a concussion. Claimant was earning \$10.50 per hour at the time of her accident. During the following two days at home, Claimant developed nausea, vomiting, dizziness, blurred vision, headaches, and neck pain. She returned for additional medical treatment but her symptoms persisted.

6. On December 12, 2002, she began treating with neurologist Kenneth Brait, M.D., who recorded her complaints of cervical pain, dizziness, nausea, and severe headaches. He diagnosed a concussion, kept Claimant off work, and prescribed medications. Claimant's headaches and dizziness continued. She noticed memory problems and was largely unable to keep her balance sufficiently to walk without assistance. Dr. Brait referred her for physical therapy for her neck symptoms; however, Claimant was only able to attend a few therapy sessions because of

vertigo and vomiting during the sessions. Her neck pain persisted. A cervical MRI taken January 11, 2003, revealed a mild broad-based disc bulge at C4-5, a central disc protrusion at C5-6, and a right paracentral disc protrusion at C6-7. Bright light triggered migraine headaches and Claimant became photophobic. On April 11, 2003, Dr. Brait wrote that Claimant “has sustained a major traumatic injury to her head and neck. She is going to be out of work for the foreseeable future. I would anticipate a minimum of six months, but perhaps longer.” Exhibit G, p. 591.

7. Claimant attempted to return to her prior work at the clinic in the late spring of 2003. However, she lasted only half of a day. She had difficulty walking due to continuing vertigo. Furthermore, she had difficulty keeping the vaccines straight. Even though the vaccines were color-coded, Claimant “would forget which color was for what vaccine.” Transcript, p. 34, ll. 15-16. This posed a serious risk of harm to the animals being vaccinated. Claimant advised her supervisor of her difficulties and he promptly sent her home. She has not worked since.

8. In June 2003, Claimant presented to neurologist Nancy Greenwald, M.D., at Defendants’ request. Dr. Greenwald reported that Claimant was isolating herself at home and needed an intensive brain injury rehabilitation program. Claimant continued to notice memory problems and began experiencing panic attacks. She noticed bilateral arm numbness and often fell due to her vertigo. In late June or July 2003, Claimant moved to Texas where her parents resided and could assist her.

9. On August 12, 2003, Claimant presented to Milton Thomas, M.D., at the Baylor Institute for Rehabilitation in Dallas, Texas. At that time Claimant continued to suffer migraine headaches approximately five times per week. Dr. Thomas diagnosed dizziness, cognitive deficits, severe migraine headaches, and post-traumatic brain injury with concussion. He became Claimant’s treating physician and actively managed her medications. The frequency of Claimant’s headaches decreased to approximately three migraines per week. However, her vertigo and cognitive deficits persisted.

10. On March 29, 2004, at Defendants' direction, Claimant was admitted to the inpatient brain injury rehabilitation program at the Elks Rehabilitation Hospital in Boise. Her treatment was supervised by Dr. Greenwald and neuropsychologist Craig Beaver, Ph.D. Claimant received intensive physical, speech, occupational, and general rehabilitation therapy. Her balance problems persisted but she enjoyed aquatic therapy and was able to exercise effectively because she did not fear falling in the water. Dr. Greenwald took Claimant off the medication that had kept her Brucellosis dormant and it became active, requiring further treatment. Claimant continued to suffer neck pain, vertigo, nausea, and some vomiting. She experienced continuing frequent migraine headaches throughout her treatment at the Elks. A cervical MRI taken during the program was interpreted to show minimal disc irregularities at C4-5, C5-6, and C6-7. Claimant suffered at least two documented episodes of hypertension that Dr. Greenwald surmised were related to pain from her migraine headaches.

11. On April 14, 2004, Elks Rehabilitation staff evaluated Claimant's driving abilities. Claimant had not driven since her industrial accident, and she had extreme difficulty keeping the car in the proper lane. The evaluator verbally cued Claimant and also had to physically grab the steering wheel to keep the vehicle from hitting the curb or objects on the right side of the roadway. The evaluator concluded that Claimant was not capable of driving. Exhibit K, p. 720. On April 15, 2004, Claimant underwent extensive EMG testing at the Elks. The VNG evaluation showed abnormal tracking and saccades at decreased latency and velocity. Bilateral caloric testing showed 8% right unilateral weakness and 8% right direction preponderance. Exhibit K, p. 772. A central lesion was suggested by both a sinusoidal tracking problem and delayed latency for saccades.

12. On April 23, 2004, Dr. Greenwald and Dr. Beaver found Claimant medically stable and discharged her from the brain injury rehabilitation program. The discharge conference notes, signed by Dr. Beaver and Dr. Greenwald, acknowledged Claimant's ongoing headaches

and constant issues of loss of balance. Dr. Greenwald rated Claimant's permanent impairment at 5% impairment for her migraine headaches, 5% for vertigo, and 5% for mild traumatic brain injury, including mental status and emotional/behavioral disorder. The discharge report indicated that Claimant could resume light-duty part-time employment. The report also acknowledged Claimant's primary area of difficulty with high level attention and concentration. She was encouraged to challenge herself in everyday activities, maintain an exercise program, lessen distractions in the kitchen, resume money management activities with someone to double check her accuracy, take structured rest breaks, and not drive a vehicle. Exhibit K, p. 790. The report noted Claimant's visual acuity problems and pronounced tunnel vision of unknown etiology. Dr. Greenwald concluded that Claimant's inability to drive was not related to her industrial brain injury.

13. Therapists at the Elks encouraged Claimant to adopt a number of practices to compensate for her short-term memory loss: specifically, to establish a very structured daily and weekly routine, take a 30 minute rest mid-morning and a 30 minute rest mid-afternoon, do one task at a time to completion, consider automatic shut-offs on appliances, use a medication keeper, keep a message pad by her telephone, use a day planner, maintain daily and weekly checklists, consider a programmable wrist watch, and keep her home well organized. Claimant was also given bilateral vestibular loss exercises and progressive eye-head exercises to perform three times per day. Dr. Greenwald approved a six-month battery of medications for Claimant, noting that any need for medication thereafter would not be related to Claimant's industrial accident.

14. After her discharge from the Elks, Claimant continued treatment with Dr. Thomas at the Baylor Institute for Rehabilitation. Claimant continued to experience extreme headaches an average of five days per week. Headaches forced her to report to the emergency room approximately every other week for injections of medications. On June 15, 2004, Dr. Thomas recorded: "She continues to be unable to work due to the inconsistency of the headaches and

other problems. Of note, return to work was not really dealt with while she was at the Elk's Rehabilitation Hospital in Boise, Idaho." Exhibit M, p. 841.

15. On August 18, 2004, Claimant began treating with neurologist Danny Bartel, M.D. He noted: "She has nystagmus on right gaze that is gaze-evoked and direction dependent. This is aggravated by Hallpike maneuvers." Exhibit N, p. 861. Dr. Bartel noted evidence of post-concussive attention-concentration defects, labyrinthine symptoms, vascular headaches, and positional vertigo. He concluded that Claimant most likely had a left labyrinthine injury. Dr. Bartel also noted that Claimant had cervical disk disease at two levels based on MRI. He altered Claimant's medications, and her headaches and dizziness improved sufficiently that she was able to go outside unassisted. Claimant reported migraine headaches only two or three times per week. By September 2004, Dr. Bartel wrote that Claimant had evidence of total brain injury with memory defects and inner ear disturbance. He reported that Claimant needed comprehensive therapy, including chronic pain management, gait training, and balance retraining.

16. In late November 2004, Claimant ran out of several prescription medications when Defendants, relying on Dr. Greenwald's report, denied payment for some medications. Claimant's condition worsened. Her vertigo increased, and she experienced migraine headaches an average of four times per week. Thereafter Claimant's parents began paying for many of her medications and doctor visits. Claimant continued to suffer chronic migraine headaches and vertigo.

17. In February 2006, Dr. Bartel recorded that repeat MRI and EMG testing revealed chronic right C7 radiculitis and bilateral carpal tunnel syndrome. He noted that Claimant was disabled from gainful employment. From March through June 2006, Dr. Bartel provided Claimant three epidural steroid injections for her cervical pain.

18. In August 2006, Claimant stumbled and fell due to dizziness and wrenched her back. She developed low back pain, and Dr. Bartel provided lumbar epidural steroid injections. In September 2006, Dr. Bartel provided cervical nerve block injections. Dr. Bartel opined that

Claimant's C6-7 disk protrusion resulting from her December 2002 industrial accident deteriorated into a right paracentral disk herniation with spinal stenosis, which he opined required surgical correction. Exhibit N, p. 881.

19. On October 30, 2007, neurosurgeon P. Langham Gleason, M.D., performed a C6-7 anterior microdiscectomy and fusion with bone allograft and anterior cervical instrumentation. Claimant's cervical symptoms thereafter resolved. Unfortunately, in January 2008 Claimant lost her balance, fell backwards, and hit the back of her head. She developed cervical symptoms. Diagnostic scans revealed her cervical fusion was intact; however, a cervical MRI showed spinal cord contusion.

20. In March 2008, Claimant presented again to Dr. Bartel. Her headaches had worsened because she was unable to afford her prescription medications. Dr. Bartel noted that she was still able to walk with assistance.

21. At the time of the hearing, Claimant continued to reside in Alvord, Texas, approximately 45 miles from Dallas, in a home provided by her parents. Her 28 year old son and 17 year old daughter reside with her and assist with household chores. Claimant is unable to vacuum or mop. Dr. Bartel manages her treatment and prescription medications. Claimant has migraine headaches from one to three days per week. Her migraines are accompanied by nausea and often by vomiting and may last from several hours to as much as two days. When suffering a migraine, Claimant must retire to a dark room and lie down. Dr. Bartel has instructed her to go to the local emergency room for injectable medications when her migraines persist more than two days. Claimant reports to the emergency room approximately once or twice each month for treatment of her most persistent migraines.

22. Claimant continues to have difficulty walking without assistance. Since her industrial accident, she has fallen frequently due to vertigo and has been unable to drive. She experiences ongoing short-term memory deficits. Claimant maintains a weekly schedule of tasks

and records her completion of each one. She organizes her days and uses her cell phone to remind her of appointments. She lies down and rests for 30 minutes each day. Claimant uses appliances with an automatic shut-off because she forgets to turn off appliances. Her mother does her bills and maintains her checkbook. Claimant attempted to manage her own bill payment, but was unsuccessful.

23. Having observed Claimant at hearing, and compared her testimony to other evidence in the record, the Referee finds that Claimant is generally a credible witness, although she has on occasion overstated the extent of her unconsciousness immediately after her industrial accident.¹

DISCUSSION AND FURTHER FINDINGS

24. 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).

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

¹ Not surprisingly, one suffering a traumatic brain injury is often unable to provide a reliable account of their loss of consciousness.

72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable. The Court further held that it was for the physician, not the Commission, to decide whether the treatment was required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989). For the purposes of Idaho Code § 72-432(1), medical treatment is reasonable if the employee's physician requires the treatment and it is for the physician to decide whether the treatment is required. Mulder v. Liberty Northwest Insurance Company, 135 Idaho 52, 58, 14 P.3d 372, 402, 408 (2000). Of course, the employer is only obligated to provide medical treatment necessitated by the industrial accident. The employer is not responsible for medical treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997). Thus a claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

26. Cervical surgery. Claimant requests medical benefits for her 2007 cervical surgery. Defendants maintain that Claimant's need for cervical surgery was due to her fall from a horse in 1997 and the natural progression of that injury, rather than her industrial accident in 2002. Dr. Greenwald testified that when she examined Claimant in August 2006, she did not believe that Claimant's progressing cervical symptoms—which Dr. Greenwald indentified as arthritis—were a result of the 2002 industrial accident. Dr. Greenwald testified that a radiologist, Dr. Giles, reviewed the sequence of MRIs from January 2003 through 2006, and concluded that the MRIs showed progression of degenerative joint disease that was difficult to relate to Claimant's 2002 industrial accident. Dr. Greenwald noted that although Claimant complained of cervical pain during her brain injury treatment program in 2004, a cervical MRI

taken at that time did not show any cause for her cervical complaints. Thus Dr. Greenwald did not relate Claimant's cervical condition to her industrial accident.

27. Dr. Bartel testified that a torque to the head, either downward or backward, can rupture cervical disks. Claimant was kicked in the head by a rearing horse. Dr. Bartel testified that Claimant's 2002 accident caused her cervical disc herniations, which required steroid injections and ultimately cervical surgery by Dr. Gleason in 2007. Dr. Bartel specifically considered Claimant's fall from a horse in 1997, followed by one year of paresthesia in both her arms and hands, and Claimant's December 2002 industrial accident. He then reviewed the MRI scan reports and testified:

After you injure a disk, it takes about a year for the arthritic changes to develop afterwards. So in this, this scan of January of 2003, it reported the disk bulges, but they're specifically not reporting osteophytic or degenerative changes, which means these things have to be fresh. These two bulges, C5/6, have to be fresh. '97 apparently did not leave any arthritic print behind. That sounds more like a cord contusion rather than a disk injury in '97. You can bruise the spinal cord by hyperflexion without rupturing the disk. You come along in December '02, get hurt[,] January '03 they're not reporting any arthritis in here, they're reporting disk bulges.

Bartel Deposition, p. 42, ll. 7-19. He noted that the 2004 scans done at the Elks showed the expected progression of arthritic changes from cervical disk injuries sustained in Claimant's December 2002 industrial injury.

28. It is inconsistent that the 1997 fall from a horse, producing bilateral upper extremity symptoms for approximately one year, caused cervical disc injury that produced no expected arthritic changes by January 2003. The most plausible explanation is that offered by Dr. Bartel: that the cervical disk abnormalities shown on the January 2003 MRI resulted from the industrial accident. The 1997 fall caused a spinal cord contusion that produced bilateral upper extremity symptoms for a year until it fully resolved, leaving no arthritic imprint because it caused no disk injury.

29. Dr. Bartel also responded to concerns that Claimant's initially reported upper extremity issues after her industrial accident did not correlate with focal showing on diagnostic testing as relating to any radiculopathy. He explained that Claimant's bibrachial symptoms of numbness in her hands and arms can be from the rapid acceleration injury to the head resulting from being kicked in the head, producing a contusion of the spinal cord and not just the brain. He testified: "In that case you'll have bibrachial weakness and numbness that's not focal." Bartel Deposition, p. 48, ll. 5-6.

30. Dr. Bartel's opinion is well explained, consistent with the 2003, 2004, and 2006 MRI scan reports, and persuasive. Claimant has proven that her need for cervical treatment, including cervical surgery, is due to her 2002 industrial accident. She is entitled to reasonable medical treatment therefor.

31. Ongoing treatment including prescriptions. Dr. Greenwald found Claimant medically stable on April 23, 2004, and prescribed medications for her until six months after her discharge from the Elks brain injury rehabilitation program. Dr. Greenwald did not believe that Claimant's treatment for depression thereafter was related to the industrial accident. Nevertheless, Dr. Greenwald rated Claimant's permanent impairment due to her industrial injury at 5% of the whole person due to vertigo and 5% of the whole person due to migraine headaches. Dr. Greenwald testified that none of Claimant's currently prescribed medications are related to her industrial accident except her prescription for Topamax.

32. Dr. Thomas and Dr. Bartel treated Claimant for her brain injury after her discharge from the Elks. Dr. Bartel continues to treat Claimant for depression, headaches, and dizziness, all of which he relates to her industrial accident. As to the assertion that Claimant's migraine headaches may be attributable to her pre-existing chronic brucellosis, Dr. Bartel opined: "I wondered if the horse's name that kicked the patient in the head was named Brucellosis; this is the only connection I can see between an animal-borne illness and her current symptoms." Exhibit N,

p. 882. Dr. Bartel explained that 70% of mildly brain-injured patients' symptoms have cleared after the first year, but the remaining 30% do not. He testified that Claimant's brain injury produced an aggravation of Claimant's pre-injury depressive condition, making her depression more difficult to treat and likely producing a depressive condition that cannot be treated. He opined that Claimant was more likely to need chronic treatment because of her brain injury. Dr. Beaver acknowledged that depression was a common result of a head injury.

33. The permanent nature of Claimant's post-accident vertigo and migraine headaches, as readily acknowledged by Dr. Greenwald, supports ongoing medical management, including prescription medications, as provided by Dr. Thomas and Dr. Bartel. Claimant's condition has improved as a result of this medical treatment. Pursuant to Idaho Code § 72-432 and Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989), Claimant is entitled to additional medical benefits for treatment by Dr. Thomas and Dr. Bartel, including prescription medications.

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

35. Cervical injury. Claimant alleges permanent impairment of 16% of the whole person due to her cervical condition. Dr. Bartel rated the permanent impairment of her cervical

condition at 16% of the whole person. As noted above, Defendants maintain that Claimant's cervical condition is not related to her industrial accident. However, Dr. Bartel's well-explained testimony persuasively relates Claimant's cervical condition to her industrial accident. Claimant has proven she suffers a permanent impairment of 16% of the whole person due to her cervical condition caused by her industrial accident.

36. Brain injury. Claimant alleges permanent impairment of 17 to 18% of the whole person due to her brain injury. Defendants acknowledge that Claimant sustained 10% permanent impairment of the whole person due to the brain injury caused by her industrial accident.

37. Dr. Greenwald, board certified in physical medicine and rehabilitation and the medical director of the brain injury rehabilitation program at the Elks Rehabilitation Hospital in Boise, testified for Defendants. After treating Claimant for nearly four weeks at the Elks in April 2004, Dr. Greenwald rated Claimant's vertigo at 5% permanent impairment of the whole person and her traumatic brain injury at 5% permanent impairment of the whole person. Under the category of traumatic brain injury, Dr. Greenwald testified that Claimant qualified for a permanent impairment rating of 5% for her mental status and 5% for emotional/behavioral disorder, but that the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, directs that only the larger of the two values is selected for rating the traumatic brain injury. Dr. Greenwald also reported that Claimant "fulfills the criteria in the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition on page 586 on pain. She does fulfill the class II of moderate pain syndrome." Exhibit E, p. 547. However, Dr. Greenwald assigned no additional amount of permanent impairment rating for this condition. Similarly, Dr. Greenwald gave Claimant no impairment rating for depression, attributing the persistence of Claimant's depression after treatment at the Elks to her pre-accident tendency to depression. Dr. Greenwald thus rated Claimant's permanent impairment due to the industrial accident at 10% of the whole person.

38. Dr. Beaver, a clinical neuropsychologist and director of neuropsychological services at the Elks Rehabilitation Hospital, testified for Defendants. He assisted with Claimant's care during her rehabilitation at the Elks in April 2004. He testified that from Claimant's excellent recall of the circumstances of her accident, she apparently did not lose consciousness after being kicked by the horse. He noted that the absence of a loss of consciousness does not preclude the occurrence of a brain injury, but indicates that the expectation for full recovery from a brain injury is excellent. Dr. Beaver agreed with Dr. Greenwald's 5% permanent impairment rating for Claimant's change in cognitive function or emotional behavioral change secondary to neurological injury and 5% permanent impairment for migraine headaches, for a total impairment of 10% of the whole person.

39. Dr. Beaver evaluated Claimant again in August 2006, at Defendants' request. He noted that brain injury patients typically improve over time, but that Claimant's test scores had declined. He opined that her presentation showed a very strong emotional component. He believed that the psychological component reflected Claimant's psychological development over time, her pre-existing depression, and post-accident opiate addiction. He also concluded that the regularity of her headaches after leaving the Elks program suggested rebound headaches from short-acting prescription narcotics. Dr. Beaver testified that Claimant ambulated around his office area and in the parking lot without signs of imbalance. He concluded that Claimant's reported symptoms in August 2006 were equal to, or more severe than, her symptoms in April 2004. Dr. Beaver also administered the MMPI to Claimant in April 2004 and August 2006. He testified that Claimant's MMPI scores in 2006 revealed a number of invalid and inconsistent results suggesting less than best effort. Dr. Beaver reaffirmed his earlier impairment rating of 10% of the whole person.

40. Dr. Bartel, a board certified neurologist with a subspecialty in neurophysiology, testified for Claimant. He commenced treating Claimant on August 18, 2004, and continued to

treat her through the time of the hearing. Dr. Bartel diagnosed total brain injury, concluding that Claimant sustained an injury to some degree to her whole brain that produced a constellation of symptoms rather than just a focal area of brain injury. He testified that Claimant demonstrates the classic triad of post-concussive syndrome characteristics, namely, migraine style headaches, vertigo with reproducible nystagmus, and attention/concentration deficits. Reproducible nystagmus with head movement confirms identifiable labyrinth or inner ear injury. Dr. Bartel's testing of Claimant induced nystagmus to the right, revealing that Claimant's left inner ear was not functioning and suggesting inner ear, or possible brain stem, injury. He ultimately concluded that Claimant had sustained significant brain stem injury.

41. Dr. Bartel readily acknowledged that he had not reviewed Claimant's medical records from Idaho, but opined that whether Claimant suffered some degree of pre-accident depression did not change his opinion that her industrial accident caused her current attention/concentration and memory defects. He explained that he has treated Claimant's depression and it has improved somewhat over time, while her attention/concentration and memory deficits have remained unchanged. He observed that Claimant's elevated McGill scores, which typically suggest symptom magnification, were the product of Claimant's depression and essential hypertension and not evidence that Claimant was voluntarily exaggerating her symptoms.

42. Dr. Bartel noted that Claimant's positional vertigo and migraine headaches have improved somewhat over time, but that the delay in obtaining more aggressive medical care from December 2002 until March 2004, decreased the probability of a greater recovery. Dr. Beaver and Dr. Greenwald acknowledged that 80% of recovery from a head injury occurs within the first 12 months, with some additional healing occurring between approximately 12 and 18 months post-injury. Claimant attended the Elks brain injury rehabilitation program over 15 months after her industrial accident.

43. Dr. Bartel opined that Claimant suffered a permanent impairment of approximately 15% due to her depression and anxiety, which was sufficiently severe to wreck her marriage and interpersonal relationships. He testified that traumatic brain injury causes depression and nearly always makes any pre-existing depression more difficult, if not impossible, to effectively treat. He estimated Claimant's neurologic impairment from her traumatic brain injury to be 17 to 18% of the whole person. Bartel Deposition, p. 36.

44. Dr. Dial, a nationally-known neuropsychologist, testified for Claimant. Dr. Dial, together with Larry McCarron, developed the McCarron-Dial System, a nationally-recognized battery of testing protocols that have become standardized in the neuropsychological field. The McCarron-Dial System provides functional information of an individual's cognitive, sensory, and motor abilities and emotional coping functions that indicate the individual's ability to work and the presence or absence of brain dysfunction.

45. Dr. Dial examined Claimant in December 2006, reviewed her records, and administered extensive tests measuring intelligence, achievement, cognitive abilities, and sensory, motor, and emotional coping functions. He diagnosed cognitive disorder not otherwise specified, adjustment disorder with anxiety related to the industrial accident, and traumatic brain injury. He testified that Claimant had mild difficulty attending to tasks and required the examiner to repeat testing instructions more often than for the average patient. He noted that Claimant was photophobic and suffered vertigo, frequent migraines, and memory difficulties. Dr. Dial observed that Claimant was slow getting up and down during the examination and was unable to perform the balance test.

46. To assess validity, Dr. Dial compared Claimant's 2006 test scores with those administered by Dr. Beaver in 2004 and found only minimal variations. Claimant's IQ scores showed general consistency between 2004 and 2006. Dr. Dial testified that Claimant's testing revealed significantly impaired verbal contextual memory, borderline impaired rote verbal

memory, and significantly impaired immediate visual spatial memory. He noted that Claimant's visual and spatial impairments were a consistent pattern across a variety of measurements and that Claimant's reports of inadvertently leaving pots on the stove or water running cross-validate her test results, which "demonstrated deficits in her cognitive motor speed and her ability to switch from one problem solving strategy to another." Dial Deposition, p. 22, ll. 19-21. Dr. Dial opined that the validity of MMPI testing is limited in cases of truly disabled patients:

[W]ith a physically disabled person some of the more traditional interpretations of MMPIs kind of go out the window.

For example, most all of the individuals with chronic severe physical limitation, individuals who are double amputees or who have blindness or severe back injuries or severe head injuries will present a scale that makes them look like they're faking bad because of items on the F scale, which will typically be elevated, also reflect physical symptoms in part, many of which they have. So you have to – the clinician has to be careful to understand and overlay that in their interpretation.

Dial Deposition, p. 40, l. 16-p. 41, l. 2.

47. Dr. Dial explained that Claimant's testing patterns and relationships among test scores, including her high average performance in some areas and her verbal contextual memory and rote verbal learning scores, satisfied him that Claimant was not malingering in her performance. He noted that Claimant's physical testing of speed, strength, and coordination, even when adjusted for left versus right-hand dominance, suggested brain dysfunction in general. He noted that the relationship between Claimant's various test scores were consistent with an individual giving their best effort and that areas of testing that most people identify as opportunities to perform fictitiously did not suggest malingering.

48. Dr. Dial acknowledged that most mild brain injuries heal within one year but that he had seen many exceptions to the general anticipated response and that even clinically mild post-concussive disorder can produce functionally serious problems. He testified that vomiting is usually a fairly significant indicator of a serious concussion. Claimant quickly developed

frequent and persistent vomiting after her accident. Dr. Dial testified that his testing results provide evidence that Claimant's injury was more than just a concussion, but rather resulted in changes in the function of Claimant's brain.

49. Defendants make much of Dr Bartel's statement that, within certain parameters, the length of unconsciousness Claimant suffered is important in that if Claimant did not have any loss of consciousness, then there would not be much claim that she suffered a brain injury. While Claimant herself may not be in the best position to evaluate the extent of any loss of consciousness, the weight of the medical evidence suggests she was dazed but did not collapse. However, all of the medical experts, including Defendants' experts, readily acknowledge that Claimant suffered a concussion and traumatic brain injury.

50. Dr. Bartel's rating of Claimant's traumatic brain injury is the most persuasive as it derives from his greater expertise in neurological issues and his greater opportunity to observe Claimant over time and identify more fully her motor, cognitive, and emotional functioning affected by the industrial injury. Claimant has proven she suffers permanent impairment of 33% of the whole person due to her industrial accident, including 16% impairment for her cervical condition and 17% impairment for her traumatic brain injury.

51. **Permanent disability.** The next issue is the extent of Claimant's permanent disability, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that

in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant.

52. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is “whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant’s capacity for gainful employment.” Graybill v. Swift & Company, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant’s ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

53. There are two relevant methods by which a claimant can demonstrate total and permanent disability. First, a claimant may prove total and permanent disability if her medical impairment together with pertinent nonmedical factors totals 100%. If the claimant fails to prove 100% disability, she can still demonstrate total disability by meeting the definition of an odd-lot worker. Boley v. State, Industrial Special Indemnity Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997). Claimant herein asserts that she is 100% disabled, or alternatively, an odd-lot worker. To evaluate Claimant’s permanent disability, several factors merit examination including the relevant labor market, physical restrictions resulting from her permanent impairment, and her potential employment opportunities.

54. Relevant labor market. A threshold inquiry is the appropriate labor market in which Claimant’s disability must be evaluated. In Davaz v. Priest River Glass Company, Inc.,

125 Idaho 333, 870 P.2d 1292 (1994), the Idaho Supreme Court interpreted the phrase “reasonable geographic area” contained in Idaho Code § 72-430(1) as the area surrounding the claimant’s home at the time of the hearing. However, the Court noted that there may be instances where a market other than the claimant’s residence at the time of the hearing is relevant in making an Idaho Code § 72-430(1) inquiry. In Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 565 P.2d 1360 (1977), the Court held that the Commission may consider the labor market within a reasonable distance of the claimant’s home both at the time of the injury and the time of the hearing to determine a claimant’s post-injury employability. The Court declared: “a claimant should not be permitted to achieve permanent disability by changing his place of residence.” Lyons, 98 Idaho at 407 n. 3, 565 P.2d at 1364 n. 3.

55. In the present case, Claimant worked in the Gooding area labor market at the time of her 2002 industrial accident. In June or July 2003, she moved to Alvord, Texas. Under the circumstances of this case, it is appropriate to look at both the Gooding and Alvord, Texas labor markets in evaluating Claimant’s disability.

56. Physical restrictions. Claimant’s permanent physical restrictions from her injuries have been evaluated by several physicians. Dr. Greenwald restricted Claimant from working at unprotected heights due to her vertigo. She provided no other restrictions, though she acknowledged that Claimant could not drive. (Dr. Greenwald opined that this was not due to the industrial accident.) Significantly, from 1986 to 1987, Claimant was employed as a team driver with her husband for D&B Trucking. There is no indication that she had driving difficulties or limitations of any kind prior to her accident. All the medical experts agree that Claimant suffers chronic vertigo caused by her industrial accident. She has been unable to drive since her accident, which suggests that her present inability to drive arises from her accident—contrary to Dr. Greenwald’s conclusion.

57. Dr. Bartel opined that as a result of the cervical impairment from the industrial accident Claimant is permanently restricted from lifting more than 40 pounds and from any

repetitive lifting above shoulder level. Due to her traumatic brain injury, he opined that Claimant is restricted from working at unprotected heights, counting money, bookkeeping, accounting, and ledger keeping. Dr. Bartel testified that multi-tasking, going back to school, or learning any new skill would be very difficult for Claimant.

58. Dr. Greenwald's restrictions do not account for Claimant's cervical condition. The restrictions imposed by Dr. Bartel are more persuasive because they comprehensively recognize Claimant's cervical impairment and the ramifications of her traumatic brain injury.

59. Potential employment. Dr. Greenwald and Dr. Beaver opined that Claimant should attempt a return to work part-time and progress as tolerated. Dr. Beaver admitted that he was not aware that Claimant attempted to return to work at her prior job and was sent home after half a day because she became confused and could not remember which of several vaccines to use, thus posing a serious risk of harm to herself and the animals she was assigned to vaccinate.

60. Dr. Bartel, who has recently examined Claimant, testified that Claimant still has nystagmus and vertigo and he could not see how she could work with her positional vertigo which causes her to lose her balance, stumble, and fall. Bartel Deposition, p. 29.

61. Dr. Dial opined that the neuropsychological evidence of Claimant's head injury, including difficulties with cognitive flexibility, verbal contextual memory, rote verbal memory, visual and spatial memory, and motor deficits, could have very significant impacts on her ability to learn or perform new tasks in the workplace. He testified that the most significant deficits preventing Claimant from working were her visual and spatial memory deficits, inability to shift from one problem solving strategy to another, pain symptoms, and significant motor problems, including static balance difficulties, bilateral upper body coordination, and hand strength. Significantly decreased bilateral grip strength is often correlated with head injury. Dr. Dial's experience and the research in general establish that individuals with similar circumstances have a harder time accomplishing vocational rehabilitation. Dr. Dial concluded that Claimant could

not work at the time he saw her. He testified that mild brain injuries play out their course within about two years and that Claimant would not likely achieve further recovery. Although he had not seen Claimant for nearly three years, he opined that her present state was probably consistent and that she would not see much change.

62. Rodney Isom, Ph.D., Claimant's vocational rehabilitation expert, is a certified rehabilitation counselor, certified disability management specialist, a commissioner of the Commission on Rehabilitation Counselor Certification, and current president of the International Association of Rehabilitation Professionals. He has published extensively on rehabilitation, return to work, and brain injuries. He noted that labeling a brain injury as "mild" or "minor" has more to do with the loss of brain tissue and less to do with the resulting cognitive defects. Dr. Isom testified that the majority of those suffering brain injuries do not return to work. In 1998, Dr. Isom published in the Journal of Job Placement and Development a review of all the literature published in the field with long-term follow-up of brain-injured individuals and their return to work. He concluded that only approximately half of brain-injured people returned to work at all, and only 25 to 30% of those who returned to work were still working after three or four years. Thus only approximately 12.5% to 15% of brain injured people are working three to four years after their injury. He concluded: "the outlook for people who suffered brain injury vocationally speaking going back to work and keeping a job is very, very poor." Isom Deposition, p. 20, ll. 19-21.

63. Dr. Isom met with and evaluated Claimant in December 2006. He reviewed Dr. Dial's and Dr. Beaver's reports and opined that Claimant cannot work around heights, machinery, or anything dangerous. He concluded that Claimant cannot work. Isom Deposition, p. 25.

64. Mary Barros-Bailey, Ph.D., Defendants' vocational expert, is a certified rehabilitation counselor and certified disability management and life care planning specialist. She evaluated the labor market within 25 miles of Claimant's residence in Alvord, Texas and investigated similar positions and wages in south and south-central Idaho. Applying Dr.

Greenwald's and Dr. Beaver's restrictions, Dr. Barros-Bailey opined that Claimant retained transferable skills from her prior work as a convenience store cashier, CNA, long haul truck driver, and veterinarian assistant to care for humans and animals in acute and long term care facilities, use basic diagnostic assessment principles, read and chart notes, apply appropriate billing codes, develop and monitor a schedule, and use the phone. Dr. Barros-Bailey concluded that Claimant sustained a negligible labor market loss and suffered only a 12.5% permanent disability, inclusive of 10% permanent impairment, due to her industrial accident. Dr. Barros-Bailey also opined that, applying Dr. Greenwald's and Dr. Beaver's restrictions and assuming Claimant's cervical condition was related to her industrial accident with a resulting 40-pound lifting restriction and a restriction from repetitive lifting above shoulder level, Claimant would suffer a permanent disability of between 25 and 50%.

65. Dr. Isom has performed many transferable skills analyses and taught others to perform them. He testified that Dr. Barros-Bailey's analysis fails to take into account issues other than Claimant's restriction to avoid heights. Dr. Isom testified that when evaluating mental issues and cognitive disorders, this analysis is inadequate.

66. Dr. Barros-Bailey acknowledged that Dr. Greenwald and Dr. Beaver rated Claimant's permanent impairment due to her migraine headaches at 5% and that if Claimant has migraine headaches three times per week which force her to retire to a dark room, this would significantly affect her employability. Dr. Barros-Bailey was not specifically aware of the extent of Claimant's impairment rating for vertigo or that Dr. Beaver gave Claimant a 5% permanent impairment rating for impaired cognitive abilities due to the industrial accident.

67. Dr. Barros-Bailey acknowledged that if Dr. Dial's conclusions regarding Claimant's cognitive limitations were applied, Claimant would suffer a total loss of labor market access and it would be futile for her to look for a job.

68. The conclusions of Dr. Bartel, Dr. Dial, and Dr. Isom as to the extent and practical impact of Claimant's brain injury from her industrial accident are more persuasive than the conclusions of Dr. Greenwald and Dr. Beaver. Claimant's cognitive deficits, chronic positional vertigo, and multiple weekly migraine headaches—all of which Dr. Greenwald and Dr. Beaver have repeatedly acknowledged constitute permanent impairments—render Claimant unable to compete in the open labor market in either Gooding or Alvord. Claimant has proven that she is 100% totally and permanently disabled as of April 23, 2004. Claimant has also proven that it would be futile for her to seek employment.

69. **Additional temporary disability benefits.** The final issue is whether Claimant is entitled to additional temporary disability benefits. Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees “during the period of recovery.” The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980).

70. In the present case, Claimant requests temporary disability benefits during her recovery from her October 2007 cervical surgery. Due to the finding that Claimant is totally and permanently disabled as of April 23, 2004, this issue is moot.

CONCLUSIONS OF LAW

1. Claimant is entitled to additional medical benefits, including cervical surgery and treatment by her physicians in Texas as a result of her industrial accident.

2. Claimant has proven that she suffers permanent partial impairment of 33% of the whole person due to her industrial accident, including 17% due to her traumatic brain injury and 16% due to her cervical injury.

3. Claimant has proven that she was totally and permanently disabled as of April 23, 2004.

4. Claimant's request for additional temporary disability benefits is 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 this 25th day of March, 2010.

INDUSTRIAL COMMISSION

/s/
Alan Reed Taylor, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of April, 2010, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

RICHARD S OWEN
PO BOX 278
NAMPA ID 83653

KENT W DAY
PO BOX 6358
BOISE ID 83707

sc

/s/

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MELISSA ROSCOE,)
)
 Claimant,)
)
 v.)
)
 PROLEASE,)
)
 Employer,)
)
 and)
)
 LIBERTY NORTHWEST INSURANCE)
 CORPORATION,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2002-525812

ORDER

Filed: April 28, 2010

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

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

1. Claimant is entitled to additional medical benefits, including cervical surgery and treatment by her physicians in Texas as a result of her industrial accident.
2. Claimant has proven that she suffers permanent partial impairment of 33% of the whole person due to her industrial accident, including 17% due to her traumatic brain injury and 16% due to her cervical injury.

3. Claimant has proven that she was totally and permanently disabled as of April 23, 2004.
4. Claimant's request for additional temporary disability benefits is moot.
5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 28th day of April, 2010.

INDUSTRIAL COMMISSION

/s/ _____
R.D. Maynard, Chairman

Participated but did not sign _____
Thomas E. Limbaugh, Commissioner

/s/ _____
Thomas P. Baskin, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of April, 2010, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

RICHARD S OWEN
PO BOX 278
NAMPA ID 83653

KENT W DAY
PO BOX 6358
BOISE ID 83707

sc

/s/ _____