BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LUANN SHUBERT,

Claimant,

v.

MACY'S WEST, INC.,

Employer,

and

LIBERTY INSURANCE CORPORATION,

Surety,

Defendants.

IC 2006-522943

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

Filed June 19, 2013

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael Powers, who conducted a hearing in Boise, Idaho, on November 13, 2012. Claimant appeared *pro se*. Kent W. Day, of Boise, represented Macy's West, Inc. ("Employer") and Liberty Insurance Corporation ("Surety"), Defendants. Oral and documentary evidence was admitted. The parties filed post-hearing briefs. The matter came under advisement on January 24, 2013, and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant is entitled to reasonable and necessary medical care as

provided for by Idaho Code § 72-432, and the extent thereof;

2. Whether Claimant is entitled to temporary partial and/or temporary total disability (TPD/TTD) benefits, and the extent thereof; and

3. Whether Claimant is entitled to permanent partial disability (PPD) in excess of permanent impairment, and the extent thereof.

CONTENTIONS OF THE PARTIES

There is no dispute that Claimant sustained an industrial low back injury on May 1, 2006, nor that she is entitled to medical care benefits through November 21, 2007, the date on which Dr. Greenwald determined she was medically stable. There is also no dispute that Claimant is entitled to 5% whole person permanent partial impairment (PPI) (assessed by Dr. Greenwald) as a result of her industrial injury.

Claimant asserts she is additionally entitled to: 1) reasonable and necessary medical care following November 21, 2007, including reimbursement for out-of-pocket expenses paid by her and her personal health insurance carriers, 2) TTD or TPD benefits from the day she left her employment to the hearing date because, notwithstanding Dr. Greenwald's opinion, she remains in a period of recovery, and 3) PPD in an amount in excess of 5%.

Defendants assert, as per Dr. Greenwald, that Claimant was medically stable on and after November 21, 2007. Because it was Claimant's decision to see various doctors after having reached medical stability, Defendants are not responsible for payment for any such medical charges under Idaho Code § 72-432. Defendants also assert Claimant has failed to establish she is entitled to TTD or TPD benefits, since she continued to work at her same pay rate and number of hours from the date of her accident through the date she received her release from Dr. Greenwald. Lastly, Defendants deny Claimant is entitled to a whole

person PPD rating in excess of 5%.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and her husband, Rick Shubert, taken at hearing;

2. Claimant's Exhibits A, B, C, F, and H admitted at hearing. (Claimant's proposed Exhibits D, E, and G were excluded at hearing), and

3. Defendants' Exhibits A through M, admitted at hearing.

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

FINDINGS OF FACT

SUMMARY OF ACCIDENT AND PRE-ACCIDENT TREATMENT HISTORY

1. At the time of hearing, Claimant was 57 years of age and living in Nampa, Idaho with her husband and grandson.

2. Claimant has a 12th grade education, but did not graduate from high school. She has not obtained a GED.

3. On May 1, 2006, Claimant was employed as a sales associate by Macy's department store at the Boise Towne Square Mall. Her duties included filling in at various departments as needed. That day she had been assigned to work in the Woman's World department. An anti-fatigue mat was near the cash register in that department.

4. Claimant worked until the 9:00 p.m. closing time. Shortly after closing, the lights began to automatically shut down. As Claimant was wrapping up her duties, a fellow

employee was having trouble closing out her register. Claimant assisted her with the help of a manager. By the time this problem was corrected, it was getting dark in the store.

5. Claimant tripped over the mat near the register as she went to retrieve her purse. She fell forward onto the mat, with her left leg bent under her. She immediately felt pain in her "elbows, hands, feet, knees, hip, back, everything." Hearing Transcript, p. 28. Claimant managed to stand up (she was unsure she could). She then clocked out and went home.

6. The following day, Claimant reported the fall to a supervisor. Nobody followed up with her so, on May 16, 2006, Claimant asked a manager if the accident had been reported. Claimant was told to fill out an incident report, and she did so.

7. Claimant did not immediately seek treatment for her fall-related symptoms because a manager told her that such treatment probably would not be covered. Instead, she waited to see if she would get better on her own.

8. After approximately three months, Claimant was still experiencing pain in her low back and left hip and leg. She complained to Employer, who directed her to Primary Health for treatment. Claimant had not missed any work up to this point due to the injuries she sustained in the accident.

MEDICAL TREATMENT WITH EMPLOYER-PROVIDED DOCTORS

9. On August 31, 2006, Claimant presented for treatment. She underwent an X-ray which identified no acute abnormalities, together with a physical examination and patient history taken by Cory Huffine, N.P. Mr. Huffine diagnosed a low back strain and left hip pain, and restricted Claimant from lifting, pushing, or pulling more than 20 pounds. He attempted to prescribe anti-inflammatory medication, but Claimant refused because she

believed it would give her a urinary tract infection. Mr. Huffine recommended icing the area and following up with the occupational medicine department.

10. On September 6, 2006, Claimant was examined by Scott Lossman, M.D., at Primary Health's occupational medicine department. His post-examination impression was low back strain with sacroiliitis on the left and left leg sciatica, most likely due to piriformis strain. Dr. Lossman prescribed prednisone and Feldene, and referred Claimant for physical therapy.

11. Claimant started physical therapy and returned for follow-up with Dr. Lossman on October 11, 2006. Claimant reported only slight improvement, having gone from a previous pain level of 7/10 to a current 6/10, and that she had stopped taking her medications. On examination, Dr. Lossman found no midline tenderness of the L-spine, no paraspinous muscular tenderness, and full range of motion. Claimant's SI joint on the left was mildly tender to touch, and there was also minimal piriformis tenderness. Dr. Lossman continued to diagnose low back strain with sacroiliitis. He contemplated an MRI if Claimant did not improve in ten days.

12. The October 11, 2006 medical records of Dr. Lossman note that Claimant told the physical therapist she had chronic fibromyalgia. Corresponding physical therapy notes indicate Claimant discussed fibromyalgia with the therapist. However, Claimant repeatedly denied at hearing and in her briefing that she had fibromyalgia, and she disputes the accuracy of the records alleging she mentioned it. In any event, neither party argues Claimant sustained fibromyalgia as a result of the industrial accident, or that the symptoms she attributes to that event are due to fibromyalgia. Therefore, the Referee finds the

fibromyalgia notations in Claimant's medical records are irrelevant to the issues to be decided herein.

13. On October 18, 2006, Claimant called Primary Health complaining of increased pain in her ankle with physical therapy. She requested an appointment ASAP, and Dr. Lossman saw her the following day. Claimant reported she was doing much worse. She was still not taking her medications and she reported 10/10 pain level in her low back and SI area, worsened by physical therapy. Claimant noted a "hot poker" feeling at the lateral aspect of her left ankle which would come and go. Nevertheless she was still working her regular hours. On exam, Claimant was in no apparent distress. She sat comfortably on the examining table and did not "exhibit any pain behavior whatsoever." Defendants' Exhibit E, p. 62. Her gait was normal. Dr. Lossman maintained his diagnosis of low back strain with sacroiliitis, "worsening per patient report, improving per physical therapist." Dr. Lossman ordered an MRI, which showed an L4-L5 annular disc tear without any herniated nucleus pulposus or impingement on the nerve roots. On November 2, 2006, Dr. Lossman discussed the findings with Claimant. He related he had run out of treatment options; Claimant's condition was stagnant. He referred Claimant to Dr. Greenwald.

14. On December 11, 2006, Claimant was evaluated by Nancy Greenwald, M.D., a physiatrist, who took a detailed pre-and post-accident medical history. Claimant's post-accident medical complaints were largely unchanged. She reported she was not doing physical therapy because it exacerbated her leg pain, and that she had missed four hours of work due to pain. Dr. Greenwald refused to provide Claimant with a permission slip to miss work, but she did restrict Claimant's lifting to 30 pounds occasionally, 15 pounds

frequently, and 10 pounds continuously. Dr. Greenwald ordered an EMG and suggested an epidural injection into the SI joint. Claimant refused the injection due to fears over side effects she believed her mother and sister had experienced upon receiving such injections.

15. On January 9, 2007, Claimant underwent an EMG. The electrodiagnostic impression was reported as normal, although the clinical impressions listed a diagnosis of left L-5 radiculitis. Claimant was referred to physical therapy with Jody Thatcher and Lidoderm patches were prescribed.

16. Dr. Greenwald reviewed the EMG findings with Claimant on February 14, 2007. Claimant was still complaining of left buttock pain radiating down her left leg and into her left foot, worsening with time. She continued to work at Macy's. Claimant had not yet contacted Jody Thatcher. Dr. Greenwald stressed the importance of physical therapy to Claimant.

17. Claimant next saw Dr. Greenwald on March 12, 2007. She had begun physical therapy, as well as a home exercise regimen. Claimant would not engage in one particular exercise which she claimed aggravated her pain. Dr. Greenwald again recommended an epidural injection, which Claimant refused. Dr. Greenwald saw no improvement in Claimant's condition, but was hopeful she would nevertheless fully recover over time.

18. On April 11, 2007, Claimant presented to Dr. Greenwald with her persisting complaints, as well as a new one - a bilateral stabbing, nail-like pain in her anterior thighs. Claimant was still working her regular hours at Macy's with accommodations consistent with her lifting restrictions. Still seeing no improvement, Dr. Greenwald ordered a follow-up MRI (discussed below). She was still uncertain as to the etiology of Claimant's

condition. Dr. Greenwald acknowledged the annular tear as an issue, but she did not believe it was responsible for Claimant's symptomatology because most of the time patients recover fully from an annular tear with no permanent impairment.

19. On May 23, 2007, Claimant again followed-up with Dr. Greenwald. In addition to her established symptoms, Claimant complained of calf cramping, left foot swelling and poor sleep due to pain and cramping. She had completed her physical therapy without improvement. She lost her prescription for Neurontin and did not bother to call in for another. Her situation was puzzling and frustrating for Dr. Greenwald.

20. On May 24, 2007, Claimant underwent another MRI. It showed "degenerative spondylitic changes at L4-5 and L5-S1" together with a "broad based disk bulging associated with fissuring or tearing of the left foraminal/far lateral annular fibers. Broad based disk bulging results in mild bilateral neural foraminal narrowing and mild encroachment upon the lateral recesses bilaterally. No significant change in appearance of the L4-5 disk compared to October 25, 2006." Defendants' Exhibit D, p. 41. When discussing the findings of the L5-S-1 joint, the report noted "disk desiccation with a small central disk protrusion but no evidence of mass effect upon the adjacent neural structures." *Id., p. 42*. There was no evidence of a herniated disc or nerve root impingement.

21. Dr. Greenwald requested an IME, which was undertaken on August 9, 2007 by Kevin Krafft, M.D. Dr. Krafft diagnosed left SI joint dysfunction and possible L5 radiculitis. He recommended additional physical therapy, a neuropathic pain medication trial, and a steroid injection; even though he knew Claimant had previously refused these. Dr. Krafft cautioned against a work hardening program because he felt it would exacerbate Claimant's symptoms. He causally connected her condition to the industrial fall on May 1,

2006. He also opined Claimant evidenced symptom magnification based upon various tests administered during the exam.

22. In a follow-up letter dated August 13, 2007, Dr. Krafft elaborated on his earlier findings. Particularly he noted that while Claimant could possibly have L5 radiculitis, there was no mechanical impingement.

23. In early October, 2007 Claimant returned to Dr. Greenwald to discuss Dr. Krafft's suggestions and her ongoing symptoms. Claimant had new symptoms to discuss, including groin pain, in addition to the pain down her left leg. Claimant claimed the groin pain started in physical therapy and was now more constant. Claimant also noted it was difficult to even carry a gallon of milk, and bending and kneeling at work was becoming harder to do. Based upon the groin pain complaint, Dr. Greenwald elected to X-ray Claimant's pelvis and left hip region to rule out an insufficiency fracture of the SI joint. Again Dr. Greenwald offered, and Claimant refused, an SI joint injection. Dr. Greenwald suggested another round of physical therapy, this time with Breda Chow of Hands On Therapy. Claimant agreed. Dr. Greenwald again suggested a trial of Neurontin. Claimant agreed.

24. On November 1, 2007, Claimant again followed-up with Dr. Greenwald. Claimant complained of a new pain in her buttocks and left leg that she attributed to physical therapy, which she had attended eight times. Dr. Greenwald agreed to stop physical therapy, since it was not helping. Claimant also informed Dr. Greenwald that she stopped taking the Neurontin after about ten days. Dr. Greenwald stopped that prescription, and instead gave Claimant samples of Lyrica. Dr. Greenwald encouraged

Claimant to continue her home exercises and consider a piriformis injection on the next visit.

25. On November 21, 2007 Claimant visited Dr. Greenwald for the last time. Claimant tried Lyrica, but she stopped because she claimed it blistered her lips and made her incontinent. Claimant had not done home exercises because they hurt. Additionally, she had developed shingles. Claimant's pain was still at 6/10 subjectively, due to low back discomfort, burning pain to the left of the sacrum, muscle pain around the lateral portion of her buttock, constant pain in her left lateral ankle, and cramping in her lower leg which was worse by the end of the workday. She also had intermittent groin pain. Claimant requested another MRI or a CAT scan.

26. Dr. Greenwald discussed Claimant's condition with her in detail. She explained Claimant could possibly have radiculitis on the left side S1 distribution level, and suggested, yet again, a diagnostic epidural injection. Claimant again refused. Dr. Greenwald told Claimant she had reached her maximum medical improvement (MMI) and there was nothing further she could offer in terms of pain relief. Dr. Greenwald released Claimant from her care with a permanent medium-duty work restriction of no lifting greater than 35 pounds. Dr. Greenwald noted Claimant was taking Lidoderm but was unsure if it was working; Dr. Greenwald suggested she keep taking it for another six months. Claimant was also taking a pill Dr. Greenwald thought might be Darvocet, and suggested Claimant not take it for longer than three more months.

27. Dr. Greenwald assessed PPI of 5% of the whole person due to Claimant's difficulty with daily activities and work.

CLAIMANT'S POST-MMI MEDICAL TREATMENT

28. Dissatisfied with Dr. Greenwald's assessment, Claimant sought medical care on her own from various doctors.[1]

29. Claimant's billing records and hearing testimony establish that she saw Kevin Shea, M.D., regarding her hip, in early 2008. None of his records have been produced, but Claimant testified he, as well as "lots" of physicians who have examined/treated her since November 2007, have prescribed the exact same treatments as Dr. Greenwald; physical therapy and medication. Hearing Transcript, p. 34.

30. In late April 2008, Kelly Fakenbridge, N.P., ordered what appears to be a third MRI for Claimant's lumbar region. The radiology records discussing this MRI finding are not in evidence.

31. Claimant produced an office visit note from Roman Schwartzman, M.D., dated June 26, 2008. He opined the majority of her symptoms stemmed from her lumbar spine, specifically her annular tear. He recommended she see a surgeon to determine if she was a surgical candidate. He recommended R. Tyler Frizzell, M.D., a neurosurgeon.

32. Claimant met with Dr. Frizzell on July 31, 2008. He reviewed numerous medical documents and imaging studies related to Claimant's care for her low back symptoms. He opined "…on a more probable than not basis, that Ms. Shubert's ongoing left-sided low back, left hip and left leg symptoms are related to her fall on May 1, 2006." Claimant's Exhibit F. (Exhibit pages not numbered). He further opined that Claimant was not at MMI and referred her to Sandra Thompson, M.D., for a spinal stimulator trial.

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[1] From reviewing the medical billings compared to the medical records produced by Claimant at hearing, as well as Claimant's testimony at page 34 of the hearing transcript, it is apparent she saw more doctors than the medical records she produced at hearing indicate. Instead of providing all medical records from all treating physicians, Claimant simply included in her exhibits selected pages from certain providers.

33. In December, 2008, Dr. Thompson noted Claimant was still employed at Macy's. It appears the neurostimulator trial was conducted around mid-December, 2008. Dr. Thompson's records regarding the results of this procedure are not in evidence.

34. Dr. Frizzell wrote to Dr. Thompson, in a letter dated January 8, 2009, noting the stimulator actually hurt, and did not help Claimant's symptoms. He suggested a three level discogram to pinpoint the area of the spine causing Claimant's pain. No further records of Dr. Frizzell are in evidence.

35. Claimant also saw Thomas Manning, M.D., a neurosurgeon. In a letter dated October 14, 2009 to Dr. Thompson, Dr. Manning lists a host of complaints by Claimant, references a February (year unknown) MRI, and recommends yet another MRI, and more hip X-rays. No follow-up records are in evidence.

36. Claimant's most recent medical record, dated June 14, 2012, is a treatment plan from Advantage Chiropractic. It notes Claimant is suffering from subluxations of the lumbar, thoracic, and cervical spine and the goal is to decrease pain and increase function. The remaining pages of this record are copies of printed materials which discuss the spine, its function, and disc degeneration, and have nothing to do with medical observations, treatments, or prognoses of Claimant.

DISCUSSION AND FURTHER FINDINGS

MEDICAL BENEFITS

37. Claimant carries the burden of proving, to a reasonable degree of medical probability, that the injury for which benefits are claimed is causally related to an accident arising out of and in the course of employment. *Wichterman v. J.H. Kelley, Inc.,* 144 Idaho 138, 158 P.3d 301 (2007). To establish this proof there must be evidence of medical

opinion—by way of physician's testimony or written medical record—supporting the claim for compensation to a reasonable degree of medical probability. See, e.g. *Hart v. Kaman Bearing & Supply,* 130 Idaho 296, 939 P.2d 1375 (1997). In order to recover medical benefits, the injured worker must prove both that the need for medical care is causally related to the accident and that the medical care is "reasonable." See*, Henderson v. McCain Foods, Inc.,* 142 Idaho 559, 130 P.3d 1097 (2006).

Idaho Code § 72-432 requires the employer to provide an injured employee reasonable medical treatment, services and medicine as may be reasonably required by her physician for a reasonable time after the injury. It is up to the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment is reasonable. See*, Sprague v. Caldwell Transportation, Inc.,* 116 Idaho 720, 779 P.2d 395 (1989).

The Idaho Supreme Court has held that medical treatment is reasonable when three circumstances exist: 1) the claimant made gradual improvement from the treatment received; 2) the treatment was required by the claimant's physician; and 3) the treatment received was within the physician's standard of practice, and the charges were fair, reasonable and similar to charges in the same profession. *Id.*

38. Claimant seeks reimbursement of all charges for medical treatment she incurred after November 21, 2007, when she was released from Dr. Greenwald's care.[2] To determine whether the care required by these various physicians, or any of them, was "reasonable," the Commission must ascertain whether Claimant improved from the required care. [In other words, if, from the medical evidence adduced by Claimant, it

[2] Prior to November 21, 2007, Employer paid for Claimant's medical treatment related to her industrial injury.

appears more probable than not that the care she received from any particular physician improved her condition, then the care was "reasonable" and the corresponding charges are reimbursable, provided the dollar amount charged was also reasonable.]

Most of the medical charges Claimant submitted into evidence are not associated with *any* medical records or medical testimony regarding the nature and/or cause of the charge(s). Therefore Claimant cannot recover her sought-after medical benefits for any charge for which there is no explanation. There is no way to determine whether the requested reimbursement was for reasonable treatment related to Claimant's industrial injury.

39. Of the few physicians for whom some medical records or correspondence are in evidence, only one, Dr. Frizzell, attempted to causally relate Claimant's treatment to the industrial injury. Therefore, only Dr. Frizzell's recommendations need be further analyzed. Dr. Frizzell recommended a spinal cord stimulator trial, which Claimant underwent. This treatment not only failed to improve Claimant's condition but made it worse. As such, Claimant has failed to establish the first prong of *Sprague*.

40. Even looking prospectively at Dr. Frizzell's recommendation, the evidence of record establishes it was likely to fail. Dr. Greenwald provided thoughtful, diligent care over a significant period of time, much of which Claimant refused outright, or simply failed to follow through on. Dr. Greenwald declared Claimant medically stable because she believed no further treatment would improve her condition. Not only has Dr. Greenwald's opinion withstood the test of time, but Claimant has failed to provide a reason *why* a spinal cord stimulator was likely to improve her condition. Those records of Dr. Frizzell Claimant chose to introduce into evidence do not provide a well-reasoned analysis

that connects Claimant's accident to a specific injury and this specific injury to her pain, nor any medical rationale justifying his recommendation in light of Claimant's history. At best, Dr. Frizzell's statement causally connecting Claimant's complaints to the industrial accident is incomplete in its analysis; at worst it is simply an unsupported conclusion.

Claimant's decisions as to her medical treatment are appropriately made in consultation with her treating physicians without second-guessing by the Commission. However, to establish eligibility for benefits under the Idaho Worker's Compensation Law, Claimant was required to prove such treatment was reasonably medically necessary as a result of her industrial injury. She has failed to meet her burden of proof on this issue. Therefore, her claim for additional medical benefits is denied.

TEMPORARY DISABILITY BENEFITS

41. Pursuant to Idaho Code § 72-408, a claimant is entitled to income benefits for total and partial temporary disability during a period of recovery. Once a claimant reaches a point of medical stability, she is no longer in a period of recovery and the claimant's entitlement to temporary total or temporary partial disability benefits comes to an end. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001). Claimant contends that she has continued to be in a period of recovery following Dr. Greenwald's November 2007 pronouncement of medical stability.

The only medical records produced by Claimant after 2008 include a letter from Dr. Frizzell to Dr. Thompson requesting a discogram, a letter from Dr. Thomas Manning to Dr. Thompson wherein Dr. Manning indicates he wants to order another MRI, and the intake sheet from Advantage Walk In Chiropractic. None of these records are sufficient to challenge Dr. Greenwald's determination that Claimant reached a point of medical stability

as of November 21, 2007. Dr. Greenwald's records persuasively establish a November 2007 date of medical stability, and the piecemeal medical records provided by Claimant to illustrate the care she received after November 21, 2007 are only successful in suggesting that her complaints remained largely unchanged. These records bolster, not denigrate, Dr. Greenwald's conclusions concerning a November 21, 2007 date of medical stability.

PERMANENT PARTIAL IMPAIRMENT BENEFITS

42. Dr. Greenwald, in November, 2007, awarded Claimant a PPI rating using *The AMA Guides to the Evaluation of Permanent Impairment*, Fifth Ed., Lumbar Spine Category II, of 8% of the whole person, for Claimant's low back condition, apportioning 5% to her industrial injury and 3% to preexisting arthritis. Defendants paid, and Claimant accepted, the amount owed for this rating.

43. Dr. Greenwald was the only physician to assess a PPI rating – Claimant has produced no competing medical opinion from which any other assessment could be determined. The Referee adopts Dr. Greenwald's PPI assessment.

PERMANENT DISABILITY BENEFITS

44. Permanent disability results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. Evaluation (rating) of permanent disability is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent 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 the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988).

45. Claimant has the burden of establishing her claim for permanent disability benefits. Focusing on Claimant's own subjective testimony and that of her husband, Claimant asserts she can not even lift a gallon of milk without pain, can not drive without pain, and has to often change positions from sitting to standing. Walking causes pain. Stooping forward helps to relieve it. She does not do housework. She does, however, typically cook dinners. She used to sew and do crafts, but she does not often engage in these activities anymore.

46. In terms of non-medical factors, Claimant has a 12th grade education, but did not graduate from high school, was 51 years old at the time of the accident, and 57 at the time of hearing. Judging from her written briefing and her testimony in this case, she appears intelligent, articulate, and well organized. Her primary limiting factor is her claimed chronic pain.

47. Dr. Greenwald gave Claimant a permanent medium-duty work restriction with a lifting restriction of 35 pounds. Admittedly, Claimant has a job history of medium-duty work, but that fact alone does not preclude her from suffering a permanent disability under the restrictions Dr. Greenwald placed on her. Idaho Code § 72-425 requires the Commission to assess not just Claimant's present ability to engage in gainful activity, but also her probable future ability. If, in the future, Claimant is unable to find suitable medium-duty employment, then her limitations would be a significant detriment to her ability to engage in gainful activity. Claimant is denied a sizable portion of the pre-injury labor market due to the permanent limitations caused by her industrial accident coupled with her non-medical limitations as discussed above. In light of the fact Claimant can still perform many jobs for which she is best suited, but mindful of that portion of the potential job market from which she is excluded by her accident, the Referee concludes Claimant has proven she suffers permanent disability of 10%, inclusive of her permanent impairment.

CONCLUSIONS OF LAW

1. Claimant was medically stable on and after November 21, 2007 (MMI date).

2. Claimant is not entitled to additional medical benefits beyond the MMI date.

3. Claimant is not entitled to temporary disability benefits (TTD) or (TPD).

4. Claimant is entitled to a permanent partial impairment (PPI) rating of 5% of the whole person.

5. Claimant is entitled to a permanent partial disability rating of 10%, inclusive of her permanent impairment.

RECOMMENDATION

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

DATED this __4th___ day of __June___ 2013.

INDUSTRIAL COMMISSION

___/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __19th___ day of ___June_____, 2013, 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:

LUANN SHUBERT
16601 N TALLAMORE DR
NAMPA ID 83687

KENT W DAY
PO BOX 6358
BOISE ID 83707-6358

ge Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LUANN SHUBERT, Claimant, v. MACY'S WEST, INC., Employer, and LIBERTY INSURANCE CORPORATION, Surety, Defendants.	**IC 2006-522943** **ORDER** Filed June 19, 2013

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

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

1. Claimant was medically stable on and after November 21, 2007 (MMI date).
2. Claimant is not entitled to additional medical benefits beyond the MMI date.
3. Claimant is not entitled to temporary disability benefits (TTD) or (TPD).
4. Claimant is entitled to a permanent partial impairment (PPI) rating of 5% of

the whole person.

5. Claimant is entitled to a permanent partial disability rating of 10%, inclusive of her permanent impairment.

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

DATED this __19th___ day of __June___, 2013.

INDUSTRIAL COMMISSION

___/s/_____
Thomas P. Baskin, Chairman

__/s/_____
R. D. Maynard, Commissioner

__/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __19th___ day of ___June____ 2013, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

LUANN SHUBERT
16601 N TALLAMORE DR
NAMPA ID 83687

KENT W DAY
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BOISE ID 83707-6358

ge Gina Espinosa