BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TAMARA LYNN WRIGHT, Claimant, v. SWIFT TRANSPORTION CO. INC., Employer, and ACE AMERICAN INSURANCE COMPANY, Surety, Defendants.	**IC 2019-034358** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED SEP 15 2023 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Sonnet Robinson, who conducted a hearing on February 8, 2023. Claimant, Tamara Wright, was present in person and represented by Matthew Andrew of Boise. Emma Wilson of Boise represented Defendants. The parties presented oral and documentary evidence. Post-hearing depositions were taken. The matter came under advisement on July 13, 2023 and is ready for decision.

ISSUES

The issues[1] to be decided are:

1. Whether the conditions for which Claimant seeks benefits were caused by the industrial accident;

[1] TPD/TTD and mileage reimbursement were noticed, but not argued by Claimant, and are deemed waived.

2. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate;
3. Whether Claimant is entitled to:
    a. Medical care;
    b. Permanent partial impairment (PPI);
    c. Permanent partial disability (PPD);
    d. Attorney's fees.

CONTENTIONS OF THE PARTIES

Claimant argues she suffered a compression fracture and SI joint dysfunction as a result of the industrial accident. Claimant contends that she is significantly disabled per Dr. Williams' restrictions, whose opinion is more credible that Dr. Friedman's opinion. Apportionment is not appropriate because neither physician has apportioned Claimant's impairment rating. Defendants have refused to pay the averaged impairment ratings for Claimant's compression fracture and SI joint dysfunction and are liable for attorney's fees for their unreasonable refusal to follow IDAPA 17.01.01.402 and 17.01.01.403.

Defendants contend Claimant has failed to prove she suffered SI joint dysfunction as a result of the accident; Defendants appropriately paid the 12% permanent impairment rating for Claimant's compression fracture. Claimant has no disability in excess of impairment because all her restrictions stem from her pre-existing degenerative condition per Dr. Friedman's opinion. Defendants did not accept Claimant's claim of SI joint dysfunction and acted in accordance with the declaratory ruling *Damien v. Big Wood Roofing*, issued October 3, 2022, and the Commission's guidance memo on the same topic in declining to average and pay Claimant's impairment for SI joint dysfunction. Accordingly, Claimant is not entitled to attorney's fees.

Claimant responds that there is more than enough evidence to prove that Claimant suffered SI joint dysfunction as a result of the accident. Claimant suffered significant disability and Dr. Friedman's opinions should be rejected.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Joint Exhibits (JE) 1-20;
3. The testimony of Claimant, Tamara Wright, and Lisa Wright, taken at hearing;
4. The post-hearing depositions of:
    a. Mark Williams, DO, and Sara Statz, taken by Claimant;
    b. Robert Friedman, MD, and Barbara Nelson, taken by Defendants.

All outstanding objections are OVERRULED.

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

FINDINGS OF FACT

1. Claimant was born on August 30, 1961, in Ontario, Oregon and was 61 years old at the time of hearing. Tr. 10:15-22; JE 17:816.

2. Claimant had a work-related low back injury on June 14, 1992. JE 12:734. Claimant described that a long-term care facility resident "threw herself backward" and took Claimant with her; Claimant's injury resolved with physical therapy. Tr. 85:5-19.

3. On December 18, 2013, Pamela Bruce, MD, examined Claimant; Claimant reported chronic back pain "secondary to a ruptured disks [sic]." JE 2:123.

4. On May 22, 2014, Claimant presented to the ER for a headache that had lasted 10 days and was associated with back pain and chronic neck pain. JE 2:134. Claimant was prescribed Augmentin and discharged. *Id.* at 139.

5. On July 23, 2014, Claimant presented to the ER with chest pain which radiated into her back; Claimant was diagnosed with acute back pain, nonspecific chest pain, tobacco abuse and was discharged. JE 2: 142, 147.

6. On April 5, 2016, Claimant presented to Mark Christenson, MD. JE 4:513. Claimant was having pain on the right side of her chest and back and reported that it hurt to breathe; coughing was non-productive. *Id.* Dr. Christenson instructed Claimant to go the ER immediately for a CT scan because based on her history, he was concerned she had pulmonary emboli; Claimant's CT scan showed multiple acute pulmonary emboli. *Id.* at 515-520.

7. At follow-up, on April 19, 2016, Claimant reported her leg and back still hurt, but her chest pain was gone. *Id.* at 521. Dr. Christenson's assessment was acute pulmonary embolism, noting Claimant needed to take her Warfarin daily for three to six months. *Id.* at 523.

8. On January 14, 2019, Claimant presented to Caleb Patee, DO, with lower extremity pain in her left foot at the ankle; Dr. Patee recorded Claimant had "a silver dollar sized tactile paresthesia on the lateral aspect of the foot." JE 1:17. Dr. Patee wrote: "reports increased pain in her legs with partial paranesthesia [that has] been present for a while. It seems to be getting worse. Was off her medications for a while. Was using Coumadin intermittently during this time 2/2/ [sic – due to] insurance." *Id.* Claimant was worried the numbness was due to a blood clot. *Id.* Claimant also had lesions all over her arms, elbows, legs, and knees. *Id.* Dr. Patee diagnosed psoriasis and noted Claimant's history of blood clots, her current noncompliance with her blood clot medication,

but noted Claimant was still safe to work because there were no acute findings associated with her disease progressing. *Id.* at 21. Claimant specifically denied back pain at this visit. *Id.* at 20.

9. On June 4, 2019, Claimant reported back pain associated with a urinary tract infection: "uti sx. reports h/o prior septic uricemia. reports sx consistent with prior infection. starts as low back pain with pain and dysuria." JE 1:25. Claimant was prescribed antibiotics. *Id.* at 28.

10. On December 1, 2019, Claimant was at the Coke facility in Fruitland to pick up a load. Tr. 37:25-38:8. She was putting her chains on her tires, when she slipped on ice and fell; later, when she was taking her chains off, she fell again, and this time felt much worse. *Id.* at 38:1-25; 43:15-19. Claimant called and told dispatch she had fallen and that she could not continue working. *Id.* at 43:3-6

11. On December 2, 2019, Claimant presented to Lawrence Sladich, MD, with complaints of back and right arm pain after falling twice at work while putting on chains. JE 6:607. Claimant reported a prior back injury, but that it hadn't bothered her in 10 years; Claimant's pain was mostly in her lower right back, radiating into her buttocks. *Id.* at 608. Dr. Sladich prescribed medication, physical therapy, and took Claimant off work; he diagnosed sprain of the lumbar spine and right shoulder joint. *Id.* at 609.

12. On December 6, 2019, Claimant presented to Emma Nelson, PT, DPT, for a physical therapy evaluation. JE 7:654. Claimant reported pain in her left gluteal and low back; PT Nelson noted effusion without visible bruising on Claimant's left gluteal. *Id.* at 655-656.

13. At follow-up on December 9, 2019, Claimant reported her shoulder pain had mostly resolved, but her lower back was still bothering her. Dr. Sladich kept her off work. JE 6:613. On December 16, Claimant reported her pain was at 0 out of 10, but that she still had some lower back stiffness. *Id.* at 617. Dr. Sladich released Claimant back to work but recommended she continue

physical therapy. JE 6:618. On December 30, Claimant again reported she was doing better with 0 out of 10 pain, but that when she had returned to work she had increased tailbone pain; Claimant had not returned to physical therapy. *Id.* at 621.

14. On February 20, 2020, Claimant presented to Dr. Patee with complaints of back pain. JE 1:34, 38. Dr. Patee ordered a CT scan of Claimant's pelvis, which showed a superior endplate compression fracture of the L1 with approximately 33% height loss, and a zone of lucency and sclerosis around the fracture. JE 8:684.

15. Claimant returned to Dr. Sladich on March 2, 2020 complaining of increasing left sided back pain; Claimant reported increasing pain with driving and that Dr. Patee had ordered a CT scan that showed a compression fracture. Dr. Sladich prescribed physical therapy and took her off work pending a lumbar MRI. JE 6:625.

16. Claimant underwent the lumbar MRI on March 24, 2020, which showed a stable L1 compression deformity consistent with a subacute fracture. JE 8:686.

17. On March 26, Claimant reported physical therapy was unhelpful so she discharged after three visits; Claimant had not filled her prescriptions. Dr. Sladich read her MRI as showing a subacute compression fracture and wrote that there were not a lot of treatment options other than rest. *Id.* at 633. Dr. Sladich issued restrictions of no lifting, pushing, pulling over 10 pounds, and no commercial driving. *Id.* at 634.

18. On April 7, 2020, Dr. Sladich responded to a letter from Surety clarifying that Claimant's compression fracture was related to the work accident, that she was not at medical stability, and that her weight and smoking would prolong recovery. JE 6:636. On April 27, Dr. Sladich examined Claimant and noted she was progressing slowly; he wanted her to eventually restart physical therapy and recommended an IME. *Id.* at 639.

19. On June 1, 2020, Claimant underwent a repeat lumbar MRI to assess how her fracture was healing; the MRI showed a "stable L1 vertebral compression deformity with interval decrease in extent of marrow edema. Stable spondylotic changes, neural foraminal stenoses as detailed above." JE 8:687.

20. On June 3, 2020, Robert Friedman, MD, issued his IME report at Defendants' request. JE 9. Dr. Friedman reviewed extensive[2] records, examined Claimant, and took a history of the injury from Claimant. *Id.* Dr. Friedman's impressions in relevant part were: (1) a temporary exacerbation of preexisting low back pain secondary to the work accident with myofascial pain without radiculopathy; (2) preexisting low back pain; (3) 30% L1 endplate compression fracture related to the injury; (4) preexisting psoriasis. JE 9:698. Dr. Friedman noted that Claimant had pre-existing degenerative disease and psoriasis: "the medical records confirm leg pain, ankle/foot pain in January 2019 consistent with her psoriasis. Based on this, she has preexisting degenerative disease." *Id.* at 699. Claimant's physical exam showed no tenderness along the SI joints. *Id.* at 698.

21. Dr. Friedman opined that her treatment to date had been reasonable and appropriate, and if her recent MRI was stable from her previous MRI, she was at MMI. *Id.* However, Dr. Friedman noted that at the time of his examination "she had not returned to baseline," but that she would return to baseline if she was compliant with her home exercise program. Dr. Friedman recommended a single physical therapy visit to instruct on an appropriate home exercise program and that her primary care physician should consider nonsteroidal anti-inflammatories, but that medical care would be related to her preexisting degenerative disease. *Id.* at 700. Dr. Friedman added that Claimant could return to work immediately with medium duty restrictions with no

[2] At deposition, Dr. Friedman agreed he mistyped dates in his record review; record no. 29 is listed as dated 9/14/2016 when the text is from an 4/19/2016 visit. Friedman Depo. 47:15-16.

twisting or torquing to her low back, related to her pre-existing degenerative disease, and there were no restrictions related to her compression fracture. *Id.* Dr. Friedman rated Claimant's compression fracture at 12% whole person impairment, without apportionment, with no rating for Claimant's pre-existing degenerative disease. *Id.*

22. On September 8, 2020, Claimant reported stabbing pain in her back which was slightly higher than her fracture and which congregated around a small lipoma. JE 1:40.

23. On November 6, 2020, Dr. Sladich responded to another letter from Surety wherein he indicated that he agreed with Dr. Friedman that Claimant was medically stable, agreed with his impairment rating, and agreed that Claimant had no work restrictions related to her industrial injury. JE 6:646.

24. On November 11, 2020, Mark Williams, DO, examined Claimant for an IME at her request. JE 10:720. Dr. Williams reviewed treatment records, but no pre-existing medical records, examined Claimant, and took a history from her. *Id.* Dr. Williams' impressions were (1) L1 compression fracture, work related; (2) degenerative disc of the lumbar spine, acute exacerbation, resolved; (3) sacroiliac dysfunction, work related. *Id.* at 723. Dr. Williams rated Claimant at 12% whole person impairment for her compression fracture, without apportionment, and 2% for her SI joint dysfunction, without apportionment. *Id.* at 724.

25. Dr. Williams wrote that Claimant did have pre-existing degenerative discs, but "those were not affected by the work injuries and remain stable." *Id.* Claimant was stable with regard to her injuries, but she could need further treatment in the future for her SI joint dysfunction. *Id.* Regarding restrictions, Dr. Williams wrote "her current restrictions are related to her 12/1/19 injuries due to the compression damage seen on the CT scan. Her pre-existing conditions did not previously, nor do they currently, hinder her ability work, lift, sit, etc. The pre-existing conditions

are unchanged, what has change[d] is the L1 compression fracture." *Id.* Dr. Williams issued medium duty restrictions related to the compression fracture, positional restrictions limiting Claimant to standing to 20% of the day, sitting to 80% of the day, and walking to 10% of the day, rarely crawling, and occasionally stooping, kneeling, crouching, and reaching. *Id.* at 725.

26. On March 22, 2021, Dr. Friedman issued a response to Dr. Williams' IME. JE 9:713. Dr. Friedman wrote that Claimant had no evidence of SI dysfunction when he examined her, and that there was no rating for SI dysfunction because even if she had it, it was unrelated to the work accident. *Id.*

27. On July 19, 2021, Michael Hoilien, DO, examined Claimant. JE 1:60. Claimant's lumbar spine was tender, and she had mild pain with motion; Dr. Hoilien prescribed methocarbamol and recommended Claimant ice her back for 20 minutes three time daily. *Id.* at 63.

28. On August 12, 2021, Claimant presented to Dr. Patee and reported left leg numbness and low back pain. JE 1:72. Dr. Patee prescribed gabapentin in conjunction with a muscle relaxant. *Id.* at 76. Claimant underwent an MRI of her lumbar spine, which showed no change from her June 1, 2020 MRI. *Id.* at 78.

29. On November 2, 2021, Dr. Patee referred Claimant for pain management for her chronic low back pain. JE 1:95.

30. On March 9, 2022, Claimant presented to Dr. Patee with severe back pain which radiated down her legs, which got progressively worse at the end of the day; Claimant asked about work restrictions. JE 1:103. Claimant reported leaving her 12-hour shift early and that bending, twisting, and climbing was what caused the most pain. *Id.* at 105.

31. On April 7, 2022, Claimant underwent another lumbar MRI, which showed: (1) old L1 compression fracture with stable mild height loss compared to prior exams with no retropulsion

or adjacent canal stenosis; (2) no new or acute fracture; (3) mild multilevel lumbar spondylosis without significant canal or foraminal stenosis. JE 1:107.

32. On November 28, 2022, Claimant reported that after working four hours she started to get increased pain. JE 1:115. Claimant's physical exam revealed discomfort primarily at the L4-L5 region. *Id.* at 117.

33. Claimant testified she had re-started physical therapy in January 2023. JE 20:937. Claimant was still in physical therapy at the time of hearing. Tr. 73:2-8.

34. Dr. Williams was deposed on March 10, 2023. Dr. Williams noted the biggest issue with a compression fracture was: "it's really not something that can be fixed…most of the time, people have longstanding, chronic, consistent back pain." Williams Depo. 12:2-13. Dr. Williams explained that, with a compression fracture, usually sitting caused the most pain, but that standing and walking could also reproduce the pain; anything that added compression, including lifting heavier weights, would increase discomfort. *Id.* at 13:3-12. Dr. Williams opined that there really was no treatment available for a compression fracture other than time, and that for some people the pain never really went away, especially for older patients such as Claimant. *Id.* at 14:22-15:22. Physical therapy could help with a compression fracture, but not gaining weight and modification of activities were the most significant for symptom management. *Id.* at 15:23-16:12.

35. Regarding SI joint dysfunction, treatment could include injections and physical therapy. *Id.* 16:17-25. Dr. Williams explained that a compression fracture and SI joint dysfunction are often seen together because the mechanism of injury is the same: a direct fall onto the buttocks. *Id.* at 17:21-18:4. Dr. Williams explained the number one sign of SI joint dysfunction was pain, sometimes pain radiating into the buttocks; the way to identify SI joint dysfunction was deep palpitation to the SI joint area and the FABER test. *Id.* at 18:11-19:18. Dr. Williams noted there

was not a lot of difference between the effects of a compression fracture and SI joint dysfunction; the main difference was where the pain manifested. *Id.* at 20:1-16.

36. Dr. Williams reiterated his opinion that apportionment for his injuries was inappropriate because she had been performing a physical job without restrictions or pain prior to the injury and although her spine had arthritic changes, she did not have any signs or symptoms of permanently injuring or aggravating her pre-existing condition. *Id.* at 21:6-24. Regarding restrictions, Dr. Williams noted his were assigned to both prevent injury and prevent an increase in pain. *Id.* at 24:18-25:3.

37. On cross-examination, Dr. Williams was asked about Claimant's testimony at hearing that standing was more comfortable for her than sitting; Dr. Williams responded that patients with compression fractures usually do find one position more comfortable than the other and he could see where his restrictions would need to be adjusted. Williams Depo. 28:25-29:15. Dr. Williams explained that SI joint dysfunction would sometimes show up on MRI imaging, and occasionally a bone scan. *Id.* at 30:19-31:1. Dr. Williams agreed that someone with a compression fracture would need frequent positional changes and that the patient would determine what positional changes were most comfortable. *Id.* at 32:16-33:11.

38. Dr. Friedman was deposed on March 29, 2023. Dr. Friedman explained a compression fracture is like any bone break, with immediate pain, and healing beginning at four to six weeks. Friedman Depo. 12:9-21. Dr. Friedman reached his diagnosis of pre-existing low back pain based on her records; Dr. Friedman specifically noted "she let us know she got worse when she fell." *Id.* a 14:11-24. Dr. Friedman explained he diagnosed a temporary exacerbation of her pre-existing low back pain because she had previous low back pain. *Id.* at 16:11-17. Dr. Friedman noted her MRIs showed degenerative disease of her facet joints and that psoriasis

can cause patients to develop psoriatic arthritis. Friedman Depo. 17:15-24. Dr. Friedman clarified that in his report, he noted she was not back to baseline because she had not complied with her exercise program, but that she was still medically stable at that time. *Id.* at 19:9-19. Dr. Friedman explained that his restrictions were to limit risks for future injuries, not for symptom management. *Id.* at 20:14-25. Dr. Friedman noted the restriction against twisting and torquing was because it would most likely cause her underlying condition to worsen, namely her arthritic spine joints. *Id.* at 22:8-13.

39. Dr. Friedman disagreed with Dr. Williams' diagnosis of SI joint dysfunction because when he examined her, she did not have tenderness along her SI joints and that SI joint dysfunction was something Dr. Friedman specifically looks for when examining for low back pain and in patients with psoriasis. *Id.* at 24:5-24. Dr. Friedman would not limit her standing, sitting, and walking because that would be for symptom management; limiting her stooping, kneeling, and crouching was reasonable, but these restrictions would be unrelated to her industrial injury. *Id.* at 25:8-26:20.

40. On cross-examination, Dr. Friedman explained that surgical intervention for a compression fracture would be due to instability from the fracture and that any intervention must be done within the first couple of weeks because if not, the healing process has already begun; this is why it is important to find and identify these fractures early. *Id.* at 29:8-30:5. Dr. Friedman did not recall when Claimant's compression fracture was identified; he thought it was an X-ray done three or four weeks out from her injury. *Id.* at 30:9-14. Dr. Friedman agreed that SI joint dysfunction could present as buttock and low back pain, but more so buttock pain; sitting, standing, and stairs would make someone with SI joint dysfunction more symptomatic. *Id.* at 38:7-23. Dr. Friedman agreed that SI joint dysfunction could be caused by a car accident or "falling down."

Friedman Depo. 40:5-7. Dr. Friedman agreed that Claimant reported buttock pain to him in her pain diagram. *Id.* at 41:3-20.

41. Dr. Friedman also agreed he was the first physician to diagnose Claimant with lumbar degenerative disease. *Id.* at 43:16-44:10. In reviewing the pre-existing records, Dr. Friedman agreed the January 2019 record he relied upon in his report showed Claimant denied back pain at that visit; Dr. Friedman admitted it was his interpretation that the foot pain report was "secondary to" the diagnosis of blood clots. *Id.* at 45:21-46:21; JE 1:21. Regarding the 2016 report of back pain, Dr. Friedman agreed that the medical record was for follow-up for a hospitalization related to a pulmonary embolus. *Id.* at 47:17-48:9. Dr. Friedman agreed Claimant reported to him that: "she did have a few back injuries many years ago, but she has not had any problems with her back in the last ten years." *Id.* at 49:4-9. Dr. Friedman did not review any other records which supported his diagnosis of degenerative disease other than the MRIs and those three reports. *Id.* at 49:9-19.

42. Dr. Friedman explained that the exercise program that Claimant did not follow-through on would have strengthened her core. *Id.* at 50:2-25. If Claimant had been doing physical activities pretty regularly, it might have been of benefit, but: "it might put you at higher risk, because 25 pounds, [Claimant] might not be in a condition to do that." *Id.* at 51:10-53:11.

43. **Vocational History.** Claimant did not graduate high school and dropped out because she was pregnant. JE 17:817. Claimant started her career working at restaurants: cooking, bussing, and dishwashing. Claimant then moved into CNA work all over eastern Oregon. *Id.* at 818-820. Thereafter, Claimant worked in wood mills, until she was laid off from Brightwood and took advantage of a program to earn her GED. Tr. 14:2-8. Claimant also worked intermittently in fruit and vegetable packing, briefly at a convenience store, and also at a worm factory, inspecting

and buying worms. JE 17:817-822. Claimant received a certificate in industrial safety and welding from TVCC, and studied criminal justice for approximately two years but could not finish her degree due to the math requirements. JE 17:822; Tr. 14:16-22. Claimant then went to trucking school in Utah, received her CDL, and began working for Employer. Tr. 15:12-17. After the injury, Claimant did not work for about a year and a half. See Tr. 60:8-20.

44. Claimant applied to Amazon in July of 2021 and worked in quality control/counting pods. JE 20:934. Claimant moved into SIOC after about a month, which means "Ship In Own Container" where Claimant would determine whether a product needed additional packaging besides its own container. *Id.* at 935. Claimant was moved to SIOC when her supervisor saw her struggling in her previous role. *Id.* After Amazon did away with SIOC, Claimant was moved to packaging; Claimant only worked in packaging for about a month before she was put on medical leave because she was unable to bend. *Id.* at 936. Claimant noted Dr. Patee had "filled out the papers," but had not taken her off for her back. *Id.* Claimant did not feel she could do any of other positions at Amazon because they all required bending. *Id.* Claimant later clarified that she had asked Amazon to accommodate only bending for four hours of her 12-hour shift, which Amazon was unable to accommodate. *Id.* at 939. Claimant stopped working at Amazon in approximately August of 2022. Tr. 64:8-10. Claimant testified she had not applied to any jobs since she left Amazon. Tr. 83:4-10.

45. On February 16, 2021, Sara Satz issued a vocational report on Claimant's behalf. Ms. Satz reviewed records and interviewed Claimant in person. JE 18:845. Claimant described working for Swift as mostly "no touch" loads, and that she would only to use chains to get in and out situations. *Id.* at 849. Claimant reported only being able to sit for about 60 to 90 minutes at a time and that driving aggravated her back. *Id.* at 861.

46. Ms. Satz opined that based on Claimant's vocational history and lack of prior restrictions, she had access to approximately 12.09% of the labor market, pre-injury. If Dr. Friedman's opinion was adopted, Claimant would have no loss of labor market access attributable to her injury. If Dr. Williams' opinion was adopted, Claimant's labor market access would be reduced to 2.21% of her pre-injury labor market; there were no jobs that Claimant could secure without training, and approximately 187 jobs Claimant could secure with some training. These jobs included escort vehicle driver, document preparer, yard clerk, routing clerk, and assignment clerk. Claimant had lost 97.79% of her labor market. *Id.* at 863-864.

47. Regarding wage loss, if Dr. Friedman's opinion was adopted, Claimant had no wage loss. If Dr. Williams' opinion was adopted, Claimant would suffer 100% wage loss because her labor market access had been reduced so significantly. Ms. Satz opined that Claimant could be regarded as an "odd lot" worker. *Id.* at 864.

48. Ms. Satz listed a number of factors that would affect Claimant's ability to secure a sedentary job. Claimant's lack of higher education would be a hinderance in finding a sedentary job, as would her lack of computer skills. *Id.* at 865. Claimant's semi-rural location would also be a hinderance in finding an appropriate job. *Id.* at 866. It was Ms. Satz's opinion that Claimant would need to work on her attitude and appearance if she wanted to secure a sedentary, customer-oriented position. *Id.* at 867. Claimant's age was also a concern as Claimant was almost 60 years old. *Id.* Ms. Satz reiterated her opinion that at that time, Claimant was an odd lot worker. *Id.*

49. On January 19, 2023, Ms. Satz issued an updated report after reviewing additional records and interviewing Claimant again. Claimant reported she had worked at Amazon but was on medical leave at the time of the second interview because they had run out of light-duty assignments. *Id.* at 899. Claimant reported she frequently left work early due to pain. *Id.* at 900.

It was Ms. Satz's opinion that Amazon was a sympathetic employer as her supervisor had granted her significant accommodations; when her supervisor changed, she was returned to regular job duties, which she could not tolerate. JE 18:901. Ms. Satz did not issue updated labor market numbers for 2023.

50. Ms. Satz was deposed on March 14, 2023. Ms. Satz maintained her opinion that Claimant was an odd lot worker who would require a business boom, sympathetic employer, or super-human effort to return to the work force. Satz Depo. 12:25-13:23. Ms. Satz opined that Claimant could not return to work as a truck driver because of her limitations against bending down (chaining tires) and that the weight of the chains could exceed her medium duty restrictions. *Id.* at 16:1-13. Similarly, Claimant could not return to sawmill work due to weight restrictions and the need to walk and stand frequently, same with jobs as a CNA. *Id.* at 16:15-17:18. Ms. Satz noted Claimant had struggled to get her GED and most sedentary jobs required more education that a GED. *Id.* at 18:5-19:6. Claimant's immediate area (Vale) was small, without much of a labor market. *Id.* at 20:3-5. Ms. Satz reiterated that Claimant's supervisor at Amazon was extremely accommodating, outside the norm for Amazon. *Id.* at 21:12-23:9. Ms. Satz testified that Claimant's failed return to work at Amazon strengthened her opinion that Claimant was an odd-lot worker because she could not retain that job. *Id.* at 23:10-24:11. Claimant's lack of computer skills, coupled with her sedentary restrictions, and her age, would make her an unattractive hire for the most part; further, she struggled to keep and find work despite being willing to commute up to an hour each way. *Id.* at 24:13-26:24. Ms. Satz found Claimant's presentation to be poor, "rough around the edges," and that part of the reason Claimant was able to secure a job at Amazon was that there was no interview, only an online application and drug test. *Id.* at 27:4-29:2. Ms. Satz

specifically disagreed with Ms. Nelson's written assessment of Claimant as forthright and open. *Id.*

51. On cross-examination, Ms. Satz agreed she had only looked at sedentary positions per her understanding of Dr. Williams' restrictions. Satz Depo. 32:11-33:2. Ms. Satz clarified that Claimant's prior work was almost exclusively unskilled, and that although prior experience may be an advantage in applying to similar work, it was not the same as "skilled work" or gaining true transferable skills. *Id.* at 33:3-35:22. Ms. Satz did not believe Claimant had customer service skills. *Id.* at 35:23-25. If Claimant did return to CNA work, she would need her license and the salary would be about half of what it was at Employer. *Id.* at 38:2-39:15.

52. On July 28, 2021, Barbara Nelson issued a vocational report on behalf of Defendants. Ms. Nelson reviewed records and interviewed Claimant. JE 19:906. Ms. Nelson observed that some of Claimant's reports were contradictory: for example, she reported she could barely spell and had a hard time reading, but she had been able to secure her GED. Another example, that she struggled with using the computer but had been able to apply to jobs online. *Id.* at 906. However, Ms. Nelson found Claimant to be fairly good historian. *Id.* at 918.

53. Ms. Nelson found the factors discussed below relevant to Claimant's ability to secure another position. Claimant's age was somewhat of an employment detractor; she would be 60 the month after the evaluation. Claimant was not completely devoid of computer skills but could not type by touch and had a difficult time with email and applying for jobs online. Claimant had secured her GED, so met the minimum qualifications for most employers. Claimant's skills included driving, following instructions, learning basic procedures, keeping basic records, deal with the sick, elderly, or disabled, and deal with the public with tact and courtesy. *Id.* at 922. Ms. Nelson opined Claimant's labor market was favorable, with low unemployment rates. *Id.*

54. Ms. Nelson noted Claimant had worked without modifications or restrictions for many years and that Dr. Williams' and Dr. Friedman's restrictions were fairly similar. The only difference being that Dr. Williams addressed positional restrictions and that Dr. Friedman attributed all her work restrictions to pre-existing conditions. JE 19:923. If utilizing Dr. Friedman's opinion, Claimant would have no disability related to the industrial accident. Following Dr. Williams' opinion, Claimant had a "relatively high" disability rating, but was not totally and permanently disabled. Claimant could still secure work as a truck driver, caretaker, sawmill jobs, packing shed work, convenience store work, and restaurant work. She would also be able to work in light delivery and security guard work. *Id.* at 924. Ms. Nelson listed five jobs that were available in Claimant's job market in 2021: auto parts deliverer, two positions as a school bus driver, driver's license examiner, and behavioral health assistant. *Id.*

55. Utilizing Dr. Williams' restrictions, Claimant had lost access to 70% of her labor market and suffered wage loss of 52%, which would combine into a disability rating of 61%. Ms. Nelson then went on to make an interesting observation:

> I think that most vocational forensic consultants would agree that it is difficult to evaluate a case in which pre-injury restrictions did not change after the subject accident to what they were before (or should have been before), yet there is a big difference in the subjective complaints of the evaluee. In this case, the Commission may look at the fact that Ms. Wright maybe should have had pre-injury restrictions, but that she was not given any, and she continued to work in an unrestricted manner for many years. She was not experiencing back symptoms to a major degree before her injury in 2019, but she is at least subjectively worse after the 2019 accident. The Commission may consider resolving this conundrum by attributing the restrictions Dr. Friedman outlines for Ms. Wright after her 2019 industrial injury solely to that injury.

JE 19:925-926. Ms. Nelson opined that attributing Dr. Friedman's restrictions to her industrial injury would result in a labor market access loss of 30% and zero wage loss, for a disability rating of 15%, inclusive of the 12% rating she had been assigned.

56. On January 16, 2023, Ms. Nelson issued an updated report after reviewing additional records, including Claimant's January 2023 deposition. JE 19:927. However, Ms. Nelson's opinions remained the same as Claimant's restrictions had not changed since her last evaluation. *Id.* at 928. Ms. Nelson did not issue updated labor market numbers for 2023.

57. Ms. Nelson was deposed on May 22, 2023. Ms. Nelson noted that Claimant did initially present as standoffish, but warmed up as the interview progressed and was "polite and cooperative," although her grammar was poor. Nelson Depo. 8:5-9:4. Ms. Nelson reiterated that Claimant's self-reported academic abilities did not necessarily jive with her ability to get a GED and almost an associate degree; however, it was Ms. Nelson's opinion she probably was not a great reader based on her grammar, but she did meet most jobs minimum degree requirements by possessing a GED. *Id.* at 10:6-12:10. Similarly, Claimant described herself as essentially computer illiterate although she had done some online job applications, worked with a trucking computer program, and was able to use a smart phone. *Id.* at 12:11-13:11. Ms. Nelson disagreed with Ms. Satz that Claimant's prior work was unskilled, but instead low skilled. *Id.* at 15:18-16:25. Ms. Nelson had looked at recent unemployment numbers for Claimant's labor market area and noted unemployment was down in all the counties she considered from the date of her original report, which would make it easier for Claimant to secure a job. *Id.* at 17:10-18:6. Ms. Nelson clarified the jobs she listed in her original report that Claimant could secure were all found in the same day, which indicated a good labor market. *Id.* at 19:24-20:16. Ms. Nelson testified regarding Claimant's work at Amazon:

> Well, a couple of things: I think right off the bat, it was probably more physically demanding than a 61-year-old woman with back problems, from whatever cause, who hadn't worked for a number of years could probably do. It was 12-hour shifts primarily working on concrete. So it didn't surprise me that she wasn't successful in doing it 12 hours a day. But what it did show was that she was able to drive over to Nampa and drive back every day - - so that's two hours right there - - and that

> she generally worked about six hours before she had to go home. So that's - - it's pretty hard work. And so that does show, you know, that she probably has the capacity to work eight hours in a more physically compatible job.

Nelson Depo. 24:20-25:10. Ms. Nelson also opined that working at Amazon probably increased Claimant's computer proficiency. *Id.* at 25:17-22.

58. Regarding Dr. Williams' updated deposition opinion, Ms. Nelson opined that Claimant had access to more jobs if she was not limited to 80% sitting. *Id.* at 26:22-27:5. Ms. Nelson understood where Ms. Satz was coming from in her original report limiting Claimant to sedentary work based on Dr. Williams original restrictions; however, Ms. Nelson's original report also looked at primarily sedentary/sitting positions based on Dr. Williams' original restrictions and found compatible jobs. *Id.* at 28:7-24. Ms. Nelson did think Claimant had customer service skills based on her prior experience working at a convenience store and as a CNA. *Id.* at 29:2-9. Ms. Nelson did agree that Claimant's age at 61 was not an "employment enhancer" but that because of high demand, employers were more willing to hire older jobseekers currently. *Id.* at 30:2-14. Ms. Nelson "strongly disagree[d]" that Claimant was an odd-lot worker because she (Ms. Nelson) had been able to find five jobs in one day that fit with Claimant's skills and abilities; Claimant's chances of finding a job were not "a needle in a haystack," but in fact readily available. *Id.* at 30:15-31:10. Ms. Nelson did not believe Amazon was a sympathetic employer, merely meeting its obligation under the ADA to accommodate Claimant's difficulties in performing her job. *Id.* at 31:15-33:1.

59. On cross-examination, Ms. Nelson agreed that Caldwell, Idaho was at the outer limits of what one would expect for a commute for a job. *Id.* at 47:13-17. Ms. Nelson also agreed that Claimant's prior wages as a CNA and in seasonal produce packaging were "not even close" to what she was making at Employer. *Id.* at 48:6-21. Two of the five jobs Ms. Nelson had identified

were school bus driver jobs, and Ms. Nelson acknowledged that bus drivers required a CDL with a passenger endorsement and that certain weight requirements for lifting children off a bus in case of an emergency, which sometimes would exceed 50 pounds. *Id.* at 50:9-52:4.

60. **Credibility.** Claimant testified credibly. Lisa Wright testified credibly.

61. **Condition at Hearing.** Claimant was still in pain at the time of hearing; her back hurt and she could not sit "flat down." Tr. 91:16-92:4. Every day was different, but walking was easier than lifting, bending, or standing in one place. See Tr. 57-63. Claimant stood for most of her testimony and sat for no more than 40 minutes at a time before needing to stand up again.

DISCUSSION AND FURTHER FINDINGS

62. 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). A worker's compensation claimant has the burden of proving, by a preponderance of the evidence, all the facts essential to recovery. *Evans v. Hara's, Inc.*, 123 Idaho 473, 479, 849 P.2d 934 (1993).

63. 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 contention. *Dean v. Dravo Corporation*, 95 Idaho 958, 560-61, 511 P.2d 1334, 1336-37 (1973). No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest*

Industries, Inc., 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). While a temporal relationship is always required to support a finding of causation between an accident and the injury, the existence of a temporal relationship alone, in the absence of substantive medical evidence establishing causation, is insufficient to satisfy Claimant's burden of proof. *Swain v. Data Dispatch, Inc.* IIC 2005-528388 (February 24, 2012). The Industrial Commission, as the fact finder, is free to determine the weight to be given to the testimony of a medical expert. *Rivas v. K.C. Loggin*g, 134 Idaho 603, 608, 7 P.3d 212, 217 (2000). "When deciding the weight to be given an expert opinion, the Commission can certainly consider whether the expert's reasoning and methodology has been sufficiently disclosed and whether or not the opinion takes into consideration all relevant facts." *Eacret v. Clearwater Forest Industries,* 136 Idaho 733, 737, 40 P.3d 91, 95 (2002).

64. **Causation - Compression Fracture/Pre-Existing Degeneration.** Both parties agree that Claimant suffered a compression fracture in the course and scope of her employment and is entitled to 12% whole person impairment (WPI) for that injury. Both parties agree Claimant has degenerative disc disease. The true disagreement regarding Claimant's injuries is whether her current restrictions stem from her pre-existing degeneration (Dr. Friedman's opinion) or her compression fracture (Dr. Williams).

65. Claimant has proven her restrictions stem from her compression fracture and not her pre-existing degenerative condition. Dr. Williams well-explained that Claimant's compression fracture causes chronic pain and that her restrictions are to prevent further injury at the level of compression fracture, in addition to managing her pain levels. Dr. Williams' opinions more closely match Claimant's level of function pre- and post-accident, the accident-produced medical records, and Claimant's consistent reports. Dr. Williams relied on Claimant's credible reports that she was performing her job without accommodation or pain prior to the injury but was now unable to

perform the same duties. Claimant's imaging showed a compression fracture, which was not identified until more than three months after the accident; Dr. Friedman explained that identifying a compression fracture in early in treatment was important, because the healing process had already begun by four to six weeks. Dr. Williams did agree that Claimant had pre-existing degeneration, but explained there was no evidence it was permanently aggravated by the accident or the cause of her current restrictions or pain versus her compression fracture.

66. Dr. Williams' opinions are not perfect: he did not have Claimant's pre-existing medical records, namely the 2016 and 2019 reports Dr. Friedman relied on, which will be addressed below. Dr. Williams' opinion regarding Claimant's positional restrictions changed at deposition based on new information, and now more closely align with Claimant's reported abilities. However, Dr. Williams did testify that sitting usually is the most difficult for patients with a compression fracture, which closely matches Claimant's reports, both at the time of hearing and immediately after the accident wherein she complained of "tailbone" pain upon her return to work. Dr. Williams' opinions also more closely track with Dr. Sladich's initial opinions; Dr. Sladich related Claimant's compression fracture to her accident and restricted Claimant from lifting more than 10 pounds and specifically limited her from commercial driving. Dr. Sladich limited Claimant because of her compression fracture alone and while her compression fracture was already stable per Dr. Friedman's and Dr. Williams' opinion. While Dr. Sladich did eventually agree with Dr. Friedman's opinions in November 2020, he never reviewed the records Dr. Friedman relied on, so his agreement with Dr. Friedman that her restrictions are due to pre-existing degeneration is given almost no weight. Dr. Williams' opinion is well-reasoned, is supported by the imaging and the records, and Claimant's subjective reports.

67. Dr. Friedman's opinions are unsupported by the records he ostensibly relied on in

forming his opinions. In his report, Dr. Freidman makes a diagnosis of pre-existing back pain based on a 2019 record. The record itself specifically notes "lower extremity pain in the left foot at the ankle." Her primary care physician related this pain to her blood clots. Further, Claimant specifically denied back pain at that visit.

68. Then at deposition Dr. Friedman changes the basis for his opinion to a 2016 record. The report that Dr. Friedman is now relying on to support a diagnosis of pre-existing back pain was in the context of acute pulmonary embolus; Claimant was not specifically treating for back problems at that visit, despite Dr. Friedman's assertion. Then, Dr. Friedman, also at deposition, asserted she herself reported her back pain was worse after the accident when his actual report reads the opposite: "she has not had any problems with her back in the last ten years." Dr. Friedman did not recall he relied on the 2019 record in his report at deposition, did not know or recall that Claimant's compression fracture was not identified until four months after the accident, which he himself admitted was "important," and did not adequately explain or address Dr. Williams' opinions regarding chronic pain from compression fractures.

69. Claimant reported chronic low back pain in 2013. However, Dr. Friedman does not rely on that report, and Claimant did not have ongoing treatment. In 2014, Claimant reported back pain associated with a headache and was diagnosed with back pain when she presented with chest pain; again, neither of these records were relied on by Dr. Friedman and Claimant did not have ongoing treatment. Claimant does have a diagnosis of degenerative disc disease, both Dr. Williams and Dr. Friedman agree that she suffers from this condition. Dr. Williams' explanation that Claimant's restrictions stem from her accident-related compression fracture and that she suffered an acute exacerbation of her degenerative disc disease which resolved is more credible than Dr. Friedman's opinion that all her restrictions are related to her degenerative condition, which has

not been symptomatic since 2014 and for which no imaging or treatment was recommended at the time.

70. Dr. Friedman's opinion is further undercut by his lack of explanation for Claimant's functioning prior to this injury. Claimant lifted tire chains and attached them to her vehicle without any reported difficulty prior to this accident for many years. It is difficult to imagine Claimant performing her job duties, even the simple "drop and hook" driving, with the restrictions as assigned by Dr. Friedman to her pre-existing condition. Dr. Friedman does not adequately address or explain how Claimant was able to perform her job duties if she was so restricted prior to the industrial injury. In sum, Dr. Friedman's opinion is unsupported by the evidence, and rejected.

71. **Causation - SI Joint Dysfunction.** It is a much closer question whether Claimant has proven she suffered SI joint dysfunction as a result of the accident. Claimant did have pain in her buttocks when Dr. Friedman examined her. Dr. Friedman did not conduct a FABER test per his IME report, which Dr. Williams did perform and found positive. Dr. Williams convincingly described that the mechanism for injury for SI joint dysfunction and a compression fracture are the same: a direct fall on the buttocks. Claimant's difficultly with sitting matches both her compression fracture diagnosis and an SI joint dysfunction diagnosis per Dr. Williams' testimony.

72. However, Dr. Friedman palpitated Claimant's SI joints at his IME and found no tenderness. Dr. Williams agreed that palpitating the SI joints is how a diagnosis of SI joint dysfunction is made, in addition to the FABER test. None of Claimant's other physicians, namely Dr. Sladich, Dr. Patee, or Dr. Hoilien, have diagnosed Claimant with SI joint dysfunction. Dr. Williams commented that SI joint dysfunction "may" show up on MRIs and bone scans; however, Claimant's MRIs showed nothing at her SI joint and Claimant did not undergo a bone scan. Claimant's buttock pain has manifested most often as pain with sitting, which Dr. Willliams

explained is also a symptom of her compression fracture.

73. Claimant's report of buttock pain to Dr. Friedman and Dr. Williams' later diagnosis is not enough to prove SI joint dysfunction. Claimant's buttock pain is also a symptom of her compression fracture per Dr. Williams. Dr. Friedman's examination was closer in time to the accident, and he palpated her SI joints during her examination with no pain. Dr. Williams' examination was further in time from the accident and that she may have then suffered from SI joint dysfunction at that time does not mean it was caused by the accident. Further, Dr. Friedman opined that Claimant's SI joint dysfunction could be caused by her degenerative condition, an alternative explanation that more closely fits the facts and timeline of the case. Claimant has not proven she has SI joint dysfunction caused by the industrial accident on a more probable than not basis.

74. **Medical Care.** Idaho Code § 72–432(1) requires an employer to provide 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. Post-recovery palliative care is a recognized benefit where reasonable and may be awarded. *Rish v Home Depot*, 161 Idaho 702, 390 P.3d 428 (2017).

75. Dr. Williams and Dr. Friedman both agree that there is no medical treatment for a compression fracture other than time. Dr. Williams added that the most important treatment for a compression fracture was not gaining weight and observing activity modifications, however, physical therapy could be helpful. Dr. Friedman agreed physical therapy, at least one session, would be helpful to Claimant but would be unrelated to her compression fracture, but to her pre-existing degenerative condition. Claimant was undergoing physical therapy at the time of

hearing, but it is unclear if that physical therapy was related to her compression fracture or her alleged SI joint dysfunction. To the extent that Claimant requires physical therapy related to her compression fracture and not her SI joint dysfunction, it is compensable and related to the accident. Per Dr. Williams, this physical therapy appears palliative in nature, and not curative, but is nevertheless compensable under the specific facts of this case.

76. **Permanent Partial Impairment.** "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation. Idaho Code § 72-422.

77. Claimant has proven she suffered 12% WPI related to the industrial accident. Claimant has not proven she suffered SI joint dysfunction as a result of the accident and is not entitled to the 2% WPI assigned by Dr. Williams.

78. **Permanent Partial Disability.**[3] 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 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 cumulative effect of multiple injuries, the age and occupation of the employee at the time of the accident

[3] Although Ms. Satz opined Claimant was an odd-lot worker and totally and permanently disabled, Claimant did not adopt this position in briefing and asserted her disability was 75% inclusive of impairment. Further, Defendants correctly observed that total and permanent disability was not noticed for hearing per Idaho Code § 72-713.

causing the injury, consideration being given to the diminished ability of the employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995). Generally, the proper date for disability analysis is the date of the hearing. *Brown v. Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012). 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, *Id.* at 136 Idaho 733, 40 P.3d 91; *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). Pain may be considered as a medical factor, a non-medical factor, or both, but it must be considered. *Funes v. Aardema Dairy*, 150 Idaho 7, 11, 244 P.3d 151, 155 (2010).

79. The main issue with deciding permanent disability from Claimant's injuries are that Dr. Williams' written restrictions are not reflective of Claimant's abilities. Both vocational experts utilized his written restrictions in coming to their conclusions, but at deposition, Dr. Williams essentially updated his restrictions to ad lib positional changes based on what was most comfortable for Claimant. Both Ms. Nelson's and Ms. Satz's opinions are based on a sedentary set of restrictions which are not reflective of Claimant's physical abilities.

80. Regarding the restrictions themselves, it does appear that the restrictions assigned by Dr. Williams are for Claimant's compression fracture and not her SI joint dysfunction, based on both his written report and his deposition testimony. Dr. Williams did testify that her pain and symptoms are related to both conditions, but whenever he was specifically asked about restrictions, he referred only to the compression fracture.

81. Regarding whether the restrictions are for symptom management or to prevent

injury, Defendants argue that Claimant's positional restrictions are for "symptom management" and not to prevent injury per Dr. Friedman's opinion. However, Dr. Williams was asked repeatedly whether the restrictions were for symptom management and consistently testified they were to prevent injury, although they would also manage her pain and symptoms. Pain is a component of disability, either as a medical or non-medical factor. Regardless, per Dr. Williams' opinion symptom management is a side effect, and not the purpose of his restrictions.

82. Claimant has medium duty lifting restrictions, restrictions against stooping, kneeling, crouching, and reaching on a more than occasional basis, and ad lib positional changes. Claimant consistently testified and her medical records show that sitting is the most difficult for her. Claimant testified she could stand, but if she stood for a long time her back started to hurt. Claimant testified that walking was actually easiest for her, noting at Amazon she would walk up to four hours a day.

83. Claimant lives in a small rural community at present but is willing to commute up to an hour each way; nevertheless, her geographic labor market is more limited per Ms. Nelson's opinion and largely agricultural. Caldwell was the outer limit of her labor market at 49 miles away.

84. Claimant was 61 years old at the time of hearing. Although the labor market is tight right now for employers per both vocational experts, even Ms. Nelson agreed that Claimant's age was not an "employment enhancer." Claimant is at a disadvantage in applying for the same job as a younger candidate, even if all else was equal.

85. Claimant's work history is varied. She has worked in restaurants, seasonal packing, wood mills, very briefly as a convenience store clerk and worm inspector/buyer, as a CNA/caregiver, and most recently as a truck driver in her time of injury position.

86. Claimant no longer has her CDL and testified that when she called to renew it,

Dr. Sladich would not approve her for a CDL license because "he knew what I could and couldn't do." Tr. 84:14-85:2. It is unclear when this conversation occurred because Dr. Sladich did restrict Claimant from commercial driving for some time when he was treating her for injury. Regardless, Claimant no longer possesses her CDL and would be unable to return to long-haul driving due to her inability to sit for 10 hours a day. Claimant no longer has her CNA license. Therefore, Claimant is no longer able to work in the position which paid her the most she had ever made in her working life.

87. Ms. Nelson's opinion regarding Claimant's skills and presentation are more credible than Ms. Satz's opinion. Claimant's work was low-skilled, but not "no skill" and Claimant did possess customer service skills from her work as a CNA, and in her remote work in restaurants and as a convenience store clerk. Claimant's computer skills are not proficient; she testified she was not familiar enough with Excel or Word to work with those programs, but she could check her email and knew how to use the Amazon program for testing products; Claimant cannot type by touch. Claimant is capable of becoming familiar with and using computers and their programs. However, she could not easily transition into a secretarial style job with her existing skill set. Ms. Nelson wrote in her report that older workers with less computer proficiency struggled and took longer to find positions. Claimant's other skills, as noted by Ms. Nelson, essentially match low skill positions: able to follow instructions, maintain basic records, learn simple procedures, follow safety rules, work with her hands, drive, and measure precisely.

88. Ms. Nelson identified a number of positions which she believed Claimant could secure within the written restrictions identified by Dr. Williams; there were even more positions possible with his updated restrictions. Ms. Nelson explained that work as an auto parts delivery driver did not require a CDL and was readily available within almost all labor markets. Ms. Nelson

opined Claimant could work as a school bus driver because that position did not require sitting the entire time. However, upon further questioning, Ms. Nelson's explanation revealed this was not an appropriate position: school bus drivers are supposed to be able to lift a child to safety, which would potentially be beyond Claimant's restrictions, and required a CDL with a passenger endorsement which Claimant does not have. At least one of the other positions Ms. Nelson identified, a behavioral health assistant, is compatible with Claimant's updated restrictions. It is less clear whether the driving examiner position or auto part deliverer are compatible due to Claimant's need to change positions frequently, but both seem to require short stints sitting while driving.

89. In consideration of Claimant's age, geographic location, skill set and work history, lack of CDL, and available jobs within her restrictions at a lower wage than her time-of-injury Employer, Claimant's disability is 55% inclusive of impairment. Claimant is an older worker, in a rural area, with limited computer proficiency and basic skill set. Claimant, even with her updated restrictions, is likely to still suffer wage loss of 50% based on her time-of-injury wages versus what is available to her in her residual labor market. Although Claimant is likely to have more positions available to her with her updated positional restrictions, Claimant is essentially unable to work in mostly sedentary positions due to her inability to sit for hours at a time. Her labor market loss is not the 70% estimated by Ms. Nelson, nor the 97.8% estimated by Ms. Satz as both utilized an 80% sitting limitation, but closer to a 60% loss given her updated restrictions which would include more positions with alternating sitting/standing/walking such as the behavioral health assistant position identified by Ms. Nelson. Claimant's permanent partial disability inclusive of impairment is 55%.

90. **Apportionment.** Where a claimant's disability from an industrial accident is

increased or prolonged by a pre-existing impairment, Idaho Code § 72-406 anticipates that employer may only be held responsible for accident caused disability. That section provides: "(1) In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease." In assessing apportionment of disability, a two-step process is employed: (1) evaluating the claimant's permanent disability in light of all of his physical impairments, resulting from the industrial accident and any pre-existing conditions, existing at the time of the evaluation; and (2) apportioning the amount of the permanent disability attributable to the industrial accident." *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008); *Horton v. Garrett Freightliners, Inc.*, 115 Idaho 312, 772 P.2d 119 (1989).

91. Apportionment of disability is not implicated under these facts. Defendants have not proven any portion of Claimant's disability is related to pre-existing conditions, namely her degenerative disc disease. Dr. Williams did not assign any restrictions related to this condition and Dr. Friedman's restrictions for Claimant's degenerative disc disease are medium duty strength restrictions, which are inclusive of Dr. Williams' medium duty strength restrictions for the compression fracture. There is no evidence that Claimant has other restrictions related to other conditions which increase her disability. Claimant has proven her compression fracture was caused by the accident and that her present disability is related to that injury only.

92. **Attorney's Fees.** Attorney fees are not granted as a matter of right under the Idaho Workers Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804 which provides:

> 72-804. ATTORNEY'S FEES — PUNITIVE COSTS IN CERTAIN CASES. If the commission or any court before whom any proceedings are brought under this

> law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding attorney fees is a factual determination which rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133(1976).

93. Claimant argues that she is entitled to attorney's fees for Defendants failure to average impairment ratings per IDAPA 17.01.01.400 for her SI joint dysfunction and compression fracture. IDAPA 17.01.01.402 reads:

> 1. Converting Single Rating of Body Part to Whole Person Rating. Impairment ratings shall be converted in accordance with the Industrial Commission Schedule, Section 72-428, Idaho Code, with the base of five hundred (500) weeks for the whole man.
> 02. Averaging Multiple Ratings. Where more than one (1) evaluating physician has given such ratings, these shall be similarly converted to the statutory percentage of the whole man, and an average obtained for the applicable rating.
> 03. Correcting Manifest Injustice. In the event that the Commission deems a manifest injustice would result from the above ruling, it may at its discretion take steps necessary to correct such injustice.

94. The first problem with this argument is that Claimant's impairment ratings are for two different body parts and conditions. The rule is intended for when two physicians assign impairments to the same body part: "The obligation to average impairment ratings, and pay the average, appears to arise in any situation in which two different impairment ratings for the same injury have been proposed by two or more physicians." *Damien v. Big Wood Roofing*, IIC 2019-001166, (October 3, 2022). Dr. Williams' impairment rating is for a wholly new condition, which

Defendants denied was related to the industrial accident.

95. The second problem with Claimant's argument is that *Damien* makes clear that the averaging rule has no application in a case where Defendants contest the claimed injury in its entirety: "While it is clear that the Averaging Rule should apply to accepted claims that involve a dispute over the extent and degree of impairment, it is equally clear that it should not apply to claims that have been denied for one reason or another on matters of threshold compensability." This is such a case. Defendants have never accepted that Claimant's claimed SI joint dysfunction is related to the accident and have contested it from the time when Dr. Williams first identified it.

96. Lastly, Claimant did not prevail in proving her SI joint dysfunction was related to the accident. However, even if she had, Defendants would not be liable for attorney's fees due to the discussion above and the ruling in *Damien*.

CONCLUSIONS OF LAW

1. Claimant has proven her compression fracture was caused by the industrial accident and is the cause of her current work-related restrictions;

2. Claimant has not proven her SI joint dysfunction was caused by the industrial accident;

3. Claimant is entitled to physical therapy to the extent is related to and treating for her compression fracture;

4. Claimant has proven she is entitled to 12% permanent partial impairment for her compression fracture;

5. Claimant has not proven her entitlement to 2% permanent partial impairment for her SI joint dysfunction;

6. Claimant is entitled to 55% permanent partial disability inclusive of her

impairment;

7. Apportionment of disability per Idaho Code § 72-406 is not appropriate in this case;

8. Claimant is not entitled to attorney's fees.

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 7th day of September, 2023.

INDUSTRIAL COMMISSION

Sonnet Robinson

Sonnet Robinson, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 2023, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by *E-mail transmission* and by regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TAMARA LYNN WRIGHT, Claimant, v. SWIFT TRANSPORTION CO. INC., Employer, and ACE AMERICAN INSURANCE COMPANY, Surety, Defendants.	**IC 2019-034358** **ORDER** FILED SEP 15 2023 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Sonnet Robinson submitted the record in the above-entitled matter, together with her 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 has proven her compression fracture was caused by the industrial accident and is the cause of her current work-related restrictions.

2. Claimant has not proven her SI joint dysfunction was caused by the industrial accident.

3. Claimant is entitled to physical therapy to the extent is related to and treating for her compression fracture.

4. Claimant has proven she is entitled to 12% permanent partial impairment for her compression fracture.

5. Claimant has not proven her entitlement to 2% permanent partial impairment for his SI joint dysfunction.

6. Claimant is entitled to 55% permanent partial disability inclusive of her impairment.

7. Apportionment of disability per Idaho Code § 72-406 is not appropriate in this case.

8. Claimant is not entitled to attorney's fees.

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

DATED this 15th day of September, 2023.

INDUSTRIAL COMMISSION

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Aaron White, Commissioner

ATTEST:
Christina Nelson
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 2023, a true and correct copy of the foregoing **ORDER** was served by *E-mail transmission* and by regular United States Mail upon each of the following:

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