BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BARBARA A. SWEENEY Claimant, v. NISSHA MEDICAL INTERNATIONAL, INC., Employer, and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Surety, Defendants.	**IC 2020-020910** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED** **SEP 03 2024** **INDUSTRIAL COMMISSION**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Sandpoint, Idaho, on November 16, 2023. Wes Larsen represented Claimant. W. Scott Wigle represented Defendants. The parties produced oral and documentary evidence at hearing and submitted post-hearing briefs. Three post-hearing depositions were taken. The matter came under advisement on July 22, 2024.

ISSUES

The parties agreed to the following issues for this adjudication:

1. Whether and to what extent Claimant is entitled to the following benefits:

    a. Medical Care;
    b. Temporary partial and/or temporary total disability (TPD/TTD);
    c. Disability based on medical factors, commonly known as permanent partial impairment (PPI);
    d. Permanent partial disability (PPD); and
    e. Attorney fees.

2. Whether apportionment for a preexisting condition pursuant to Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

Claimant tripped and fell on August 27, 2020, while working for Employer. She struck the right orbital area of her face during the fall, which resulted in a concussion, headaches, vision, balance, gait issues, and dizziness. Claimant maintains these conditions required significant treatment. While medical care and time loss benefits were initially covered by Defendants, her benefits were prematurely discontinued after Surety obtained an IME opinion in June of 2021, that Claimant's medical issues were not due to her work accident and she suffered no permanent impairment. Claimant has unpaid medical expenses which she is entitled to recover, and temporary disability benefits associated with time lost from work. She also is entitled to benefits for her permanent impairment and permanent disability. Attorney fees are warranted.

Defendants acknowledge Claimant suffered a work accident as described by Claimant. Her initial treatment was covered, as were her TTD benefits. Eventually, Claimant began to complain of problems with vision and balance which she treated for months. Her vision issues were resolved with prism glasses. Her balance issues improved with therapy. Even at the time of hearing, Claimant testified her medical complaints were improving. Claimant's prior medical conditions came to light over time, and past records evidence preexisting complaints with her ambulation, perhaps due to her neurological or genetic disorders. An IME physician determined Claimant was medically stable and needed no further medical treatment as the result of the industrial accident. Claimant also suffered no permanent disability. Defendants have paid all benefits to which Claimant is entitled. Attorney fees are not appropriate. When assessing this claim, it is important to note that Claimant was not completely honest and transparent with her

doctors, and is a convicted felon stemming from Medicare and Medicaid fraud in excess of one million dollars.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;

2. Joint exhibits (CE) 1 through 23 admitted at hearing; and

3. The post-hearing deposition transcripts of Donald Wylie, OD, Kenneth Brait, M.D., and Michael Ludwig, M.D., taken on January 12, March 4, and July 12, 2024, respectively.

All objections maintained through the depositions are overruled, including Defendants' continuing lack of foundation objections during the deposition of Dr. Wylie. The doctor is entitled to have opinions. The objections went more to the weight to be assigned those opinions, not their admissibility.

FINDINGS OF FACT

1. According to medical records, Claimant was born on September 19, 1951, making her 72 years old at the time of hearing. She lived in Noxon, Montana for all times relevant to these findings.

2. On August 27, 2020, while working for Employer, Claimant tripped and fell, striking her right orbital area against a chair. Swelling and bruising ensued, along with some minor bleeding. While Claimant continued to work her shift (after resting for over an hour), she became increasingly nauseated and was suffering from a headache.

3. The following day, Claimant sought treatment at Bonner General Health in Sandpoint, where she was seen by James Lathrop, NP.[1] She sported a black eye and complained of headache, nausea, and vomiting. Claimant was diagnosed with a concussion and right-sided facial contusion. She was taken off work through the end of that August, with a follow-up appointment scheduled for September 1 with Bonner General Occupational Health Department. Claimant was directed to physical and occupational therapy.

4. Claimant continued to complain of headaches and equilibrium/vision issues at her follow-up appointment. She was kept off work. She was given the diagnosis of post-concussion syndrome. For her vision issues she was referred to Donald Wylie, OD, in Spokane. NP Lathrop ordered an orbital CT scan and a brain MRI.

5. The MRI disclosed no significant or acute intercranial findings. The CT scan was likewise negative for fractures.

6. Therapy sessions did not eliminate Claimant's complaints, but she reported less severe headaches, but continued with ataxia (which is, as defined by Dr. Brait, an impairment of gait due to issues in the person's vestibular system) and instability when turning her head to the right.

7. Claimant remained off work through late October. NP Lathrop restricted her from driving but allowed her to return to work with restrictions as of October 27, 2020.

8. Claimant initially saw Dr. Wylie on November 9, 2020, for a post-concussive visual evaluation. At the time of her visit, Claimant complained of nausea and disorientation when

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[1] Noxon, MT is about an hour's drive from Sandpoint. Claimant was working for Employer and also for Burger King in Sandpoint at the time of her accident. She testified while working in Sandpoint, at times she would either sleep in her car during the work week or stay with a friend.

objects entered her peripheral vision, such as when driving. She also had balance issues where she tended to drift right when walking. Testing demonstrated bilateral "near point kinetic visual field constriction," or reduced peripheral vision. See, Wylie depo. p. 9. Claimant was fitted with two sets of prism glasses to "assist with sensory integration," and was prescribed home exercises.

9. Claimant's balance and peripheral vision improved with the glasses and exercises. By her last visit with Dr. Wylie on March 5, 2021, Claimant continued to get dizzy and nauseous when turning her head, even with her eyes closed. Dr. Wylie recommended further evaluation for potential vascular interference causing her dizziness.

10. Claimant was first evaluated by Michael Ludwig, M.D., an occupational medicine physician in northern Idaho, on January 28, 2021, at Defendants' request. He diagnosed Claimant with a closed head injury leading to post-concussional syndrome and persistent postural instability. She was still in a period of recovery in the doctor's opinion. He recommended a front wheel walker, occupational therapy, and progressive increase in modified work capacity in addition to her continued use of prism glasses. Dr. Ludwig felt Claimant would only be suitable for light/sedentary work, with a two-hour duration to start. She should not operate machinery or work from heights, including ladders. Dr. Ludwig's prognosis was favorable for an 8-to-12-week recovery time frame from the date of his evaluation.

11. Dr. Ludwig again evaluated Claimant on May 4, 2021. She presented with continued balance disturbances, headaches which worsened through the day and caused her to have increasing difficulty standing and walking. At times she experienced auras around objects when her headaches were severe. Claimant acknowledged radiographic studies of her head, and a carotid artery ultrasound, were essentially normal. Her vision was stable.

12. Dr. Ludwig's diagnosis that day was industrially-related "post-concussional syndrome status post closed head injury with persistent postural instability associated with migraine type headache of unclear etiology – not yet at MMI." JE 9, p. 367. Dr. Ludwig again suggested Claimant have a "neurology consultation with a headache specialist for evaluation of vestibular migraine." *Id.* He also recommended a repeat MRI of Claimant's brain to explore underlying conditions which might not be "wholly attributed to her industrial claim." *Id.* Dr. Ludwig felt Claimant was incapable of returning to her time of injury employment. Light duty, and sedentary work would be appropriate if such work was available.

13. Claimant continued to treat with NP Lathrop. In early February, he released Claimant to modified duty with restrictions similar to those suggested by Dr. Ludwig. By late February he rescinded the modified work release due to Claimant's continuing vertigo. He suggested she schedule an ENT evaluation. One month later, on March 24, 2021, NP Lathrop noted Claimant was at MMI regarding her vision issues, but still had other post-concussional symptoms. He suggested she see a neurologist, in addition to continuing physical therapy. NP Lathrop continued to advise against driving.

14. Claimant could not find a neurologist willing to take her as a patient despite NP Lathrop making two referrals. Apparently, part of their reluctance was due to the fact Claimant was involved in worker's compensation. With no "local" neurologist willing to examine Claimant, NP Lathrop determined as of his June 15, 2021 visit with Claimant that he had no further resources to help her.

15. One week later, on June 22, 2021, Dr. Ludwig authored another report to Surety after reviewing the repeat MRI. He noted there were no changes from the initial MRI, and no local neurologists would see Claimant. He had the same diagnosis as before, except he claimed

Claimant was at MMI as of the date of his report. Dr. Ludwig acknowledged attempts to have Claimant seen by a neurologist were unsuccessful at that time, and therefore he knew of no other treatment modalities available to Claimant.

16. Dr. Ludwig opined that Claimant could not return to her time of injury job, but he could not state "that this lack of employability is due to the claimed injury of 8/27/20 vs. manifestation of medical conditions presenting with vestibular dysfunction." JE 9, p. 371. He also opined that Claimant had suffered no permanent impairment.[2]

17. Claimant's attorney arranged for Claimant to be seen for an independent medical examination by Kenneth Brait, M.D., through ExamWorks. The examination took place on September 19, 2023.

18. Dr. Brait reviewed medical documents and took Claimant's history, which included a remote seizure disorder for which Claimant took Dilantin at the time but not for "many years." Claimant also had a history of neurofibromatosis involving her back and left leg which required surgeries to address.[3] Claimant also noted to Dr. Brait that her headaches had significantly improved to the point they were only occurring at the rate of about one per week for a few hours per headache. Claimant was still having difficulty walking when Dr. Brait examined her. Claimant was still wearing glasses to drive and had glasses for reading. Claimant was working full time as a hotel front desk clerk at the time of the IME.

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[2]As the result of Dr. Ludwig's June 22 report, Surety terminated Claimant's benefits. She than began a search for employment, which was ultimately successful. Her work history will be discussed hereinafter.

[3] Neurofibromatosis resulted in tumors on Claimant's spine and required surgical removal. The condition will be further addressed when discussing Dr. Brait's testimony, *infra.*

19. Dr. Brait summarized Claimant's medical records dating back to 1983, although the early records he examined were largely indecipherable. Records showed Claimant had brain MRIs in 1996 and 2000, and then again in 2020 and 2021, after the industrial accident in question.

20. After a physical examination, Dr. Brait answered questions posed to him in writing by Claimant's counsel. First, he was asked for his diagnoses, which included preexisting neurofibromatosis, with minimal neurological residual findings of left leg weakness. His second diagnosis was head trauma, specifically a mild cerebral concussion. Claimant was at MMI on these conditions.

21. Dr. Brait opined that Claimant had no permanent work restrictions for the job of hotel desk clerk. However, based on her "exaggerated and non-typical" responses to toe and heal and tandem gait, and probable "very minimal" residual vision issues related to her work injury, he assessed Claimant with a 5% whole person impairment rating. Permanent restrictions included working at heights and activities requiring balance. JE 10, pp. 382, 383.

DISCUSSION AND FURTHER FINDINGS

22. Claimant bears the burden of proving her entitlement to the various benefits she seeks. *Duncan v. Navajo Trucking,* 134 Idaho 202, 203, 998 P.2d 1115, 1116 (2000). Herein, she seeks medical, time loss, permanent impairment and disability, and attorney fees. Each of these claimed benefits will be addressed below.

CLAIMANT'S CREDIBILITY

23. Defendants raise an overarching argument that Claimant is a perjurer in this case, and a long-standing fraudster beyond this case, convicted in federal court for defrauding both the federal government and the Montana state government (through Medicare and Medicaid, respectively) out of a cumulative sum of money in excess

of one million dollars.[4] For this crime she pled guilty, was convicted and imprisoned. Defendants argue her subjective testimony must be carefully scrutinized, and when not supported by objective evidence, must be discarded, and physician opinions which rely on Claimant's subjective complaints should likewise be discarded. It should be noted, however, that at hearing Claimant testified in a forthright manner and her testimony and behavior at hearing certainly appeared credible from the subjective viewpoint of this Referee. This Referee does acknowledge her inconsistent testimony from her deposition to her hearing testimony. He did review her criminal file. (It was interesting that of the $1.1 million figure, over $900,000 from Medicaid went for her medical treatment.)

24. From their briefing, it appears Defendants' argument is that Claimant's dishonesty infects her entire case. As will become apparent, while Claimant's criminal history and inconsistent testimony, as well as her lack of transparency with physicians cannot be ignored, resolution of the issues herein do not hinge upon Claimant's testimony or credibility. Furthermore, every physician who testified knew of Claimant's medical history by the time their depositions concluded, if not earlier. Such knowledge did not change any physician's opinions, although it appeared Dr. Ludwig found her past medical condition shed some light on her current condition. Dr. Brait thought her medical background was irrelevant to his conclusions, and "absolutely" did not cause him to rethink his opinions.

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[4] While their written argument certainly did not make the accusations in such stark terms, and were almost apologetic in nature, even with kid gloves, the accusations were registered, and the argument made that Claimant "will do what's necessary to sustain herself, including misrepresenting facts to government agencies" which presumably includes, but is not limited to the Idaho Industrial Commission. See, Defendants' Responsive Brief, pp.4, 5, 14, 15.

MEDICAL CARE

25. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment as may be reasonably required by the employee's physician or needed immediately after an injury, and for a reasonable time thereafter. However, an employer is only obligated to provide medical treatment necessitated by an industrial accident and is not responsible for unrelated medical treatment. *Williamson v. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d 1365 (1997).

26. An injury is defined as "a personal injury caused by an accident arising out of and in the course of any employment covered by the worker's compensation law." Idaho Code § 72-102(18)(a). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

27. Claimant argues in briefing that Defendants "refused to pay benefits for past medical expenses and mileage reimbursement," and cites as authority for such proposition JE 13, which is a demand letter from her attorney to defense counsel dated July 28, 2022. Cl. Opening Brief, p. 25. When JE 13 is examined, it appears the only medical expense which arguably had not been fully paid by Surety was a pair of glasses prescribed by Dr. Wylie. Additionally, Claimant made a claim for mileage for each visit with a medical provider from August 28, 2020 through June 15, 2021. No mileage or medical expenses were demanded by Claimant after June 15, 2021. Claimant also argues she should be reimbursed for Dr. Brait's IME charges, and other treatment modalities which were recommended but not provided by Surety, and not independently sought by Claimant.

Mileage for Medical Visits

28. Defendants acknowledge that they did not pay Claimant for mileage for her covered medical treatments. However, they argue that Claimant failed to meet her burden of proof by simply citing to a demand letter. Furthermore, in a footnote, they imply that they will remedy this nonpayment after the fact, even if Claimant did not meet her burden of proof at hearing.

29. Worker's compensation proceedings are to be kept simple and summary to the extent possible. In the present case, there was some, albeit weak, evidence that Claimant was not paid for her mileage, that being its inclusion in a demand letter. Furthermore, mileage is a tangential component of medical treatment, authorized by statute. Defendants had to know (at least after they received the demand letter) that Claimant had a claim for unpaid mileage related to her medical treatment. Their assertion that they will work out this obligation after the decision herein is made notwithstanding, Defendants should have been working out their obligation no later than the date they received the demand letter claiming mileage.

30. Idaho Code § 72-432(13) provides for reimbursement of mileage for necessary travel to and from medical treatments related to the industrial accident. Claimant is entitled to mileage for necessary travel to and from her industrially-related medical appointments, including IMEs with Dr. Ludwig. These expenses were incurred during Claimant's period of recovery. It is up to the parties to determine the actual amount due and owing.[5]

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[5] Defendants argue it will be difficult to determine the amount owed, as the possibility exists that Claimant did not actually drive from Noxon, MT to Sandpoint for each medical visit; she might have been staying in town with her friend, or perhaps sleeping in her car on the date of, or immediately preceding, or following, any particular visit. While it might be difficult to ascertain the exact sum due and owing, Defendants have no one but themselves to blame for waiting so long to address Claimant's statutory right to mileage. Prudence would dictate that mileage be calculated and paid at the time of each medical visit. Defendants bear the risk of overpayment caused by their delay.

31. Claimant has proven by a preponderance of the evidence that she is entitled to benefits for any unpaid necessary mileage expenses as calculated in Idaho Code § 72-432(13) incurred when travelling to and from medical appointments causally related to her treatment for injuries suffered as the result of her work accident of August 27, 2020.

Prescription Eyeglasses

32. Surety's records show it paid $60 toward the cost of Claimant's eyeglasses. JE 18, P. 729. The records also show Walmart receipts totaling $355.40 for eyeglasses. JE 13, p. 567, 568. Claimant is entitled to reimbursement of her out-of-pocket expenses for prescription eyeglasses after deducting the amount paid by Surety toward those eyeglasses.

33. Claimant has proven by a preponderance of the evidence her right to reimbursement for out-of-pocket expenses for eyeglasses prescribed to her by Dr. Wylie to treat vision and balance issues stemming from her industrial accident in question.

Other Medical Claims

34. In briefing, Claimant also argues that she should be awarded invoiced/charged amounts for medical care "in the form of additional vestibular therapy, a neurology consult, an ENT consult, and treatment for Claimant's post-concussive migraine headaches." *Id.* However, there is no record of Claimant ever receiving any such therapy, consults, or treatments prior to hearing. By the time of hearing, all physicians, including the neurologist hired by Claimant, opined Claimant was at MMI with no need for any further treatment. The mere fact that during her period of recovery such treatment modalities and consults were recommended is irrelevant. Once Claimant reached MMI, any such treatment which might have been reasonable during her period of recovery ceased to be reasonable, as no physician opined Claimant was in need of further medical care.

35. Claimant has failed to prove by a preponderance of the evidence that she is entitled to further medical treatment after June 23, 2021.

Dr. Brait's IME Charges

36. Claimant argues she should be reimbursed for her expenses in hiring Dr. Brait to conduct her IME. She cites to no authority for such a proposition. Dr. Brait was not hired to provide any treatment, or to establish a physician-patient relationship with Claimant. The record is abundantly clear on this point. Dr. Brait's was *solely* a forensic examination. Costs incurred by Claimant to prepare her case are not recoverable under Idaho Code § 72-432. Claimant's unsupported statement that she is entitled to be reimbursed for such litigation cost is not persuasive.

37. Claimant has failed to prove by a preponderance of the evidence that she is entitled to be reimbursed for the cost associated with the forensic IME conducted on her behalf by Dr. Brait.

TEMPORARY DISABILITY

38. Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on Claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability.

39. As noted by Defendants, Claimant received total temporary disability payments through June 23, 2021, when Dr. Ludwig declared her at MMI. He had no other treatment modalities to offer her at that time.

40. After Surety discontinued TTD payments, Claimant sought employment, and found work as of December 2, 2021. Claimant argued in briefing that she is entitled to TTD benefits from June 24, 2021, through December 1, 2021.

41. Dr. Ludwig's pronouncement that Claimant became medically stable on June 23, 2021 is uncontradicted by any other physician. While Dr. Brait did acknowledge Claimant was medically stable and required no additional treatment when he saw her in 2023, he did not render an opinion that Claimant was not medically stable when Dr. Ludwig made his pronouncement in June 2021. Claimant's gradual improvement without additional treatment supports the fact that she was not in need of further medical treatment when she last saw Dr. Ludwig. If Claimant was at MMI as of June 23, 2021, she is not entitled to TTD benefits beyond that date, since temporary disability benefits only are available to Claimant when she is in a period of recovery.

42. Claimant argues she was not at MMI on June 23, 2021, because she needed a neurological consultation, as advised by Dr. Ludwig. However, that argument misses the point. One could be at maximum medical improvement and still have a recommendation for an additional medical consultation. The standard for MMI is not whether a claimant has any more medical appointments planned or recommended, but whether the "condition is not likely to progress significantly within the foreseeable future." *Snider v. Empro Employer Solutions, LLC*, IIC 2005-518246 (Nov 2013).

43. Claimant's other argument, that Claimant did not reach MMI until she found employment in early December, 2021, and thus she is entitled to total temporary disability benefits until she started working, is also flawed for the same reason as set out above. Whether or not Claimant found work has no bearing on whether she is at MMI.

44. There is no evidence in the record that Claimant's symptoms continued to progress after Dr. Ludwig declared her at MMI on June 23, 2021, or that her recovery was slowed by a lack of reasonable medical treatment. In fact, as noted by Dr. Brait in his deposition, Claimant was

stable through this time period. As he testified therein, "[a]t the time I saw her (in mid-September, 2023), she had the same degree of vestibular dysfunction that other doctors had found." In fact, Dr. Brait testified Claimant was slowly improving overall with the passage of time (which was consistent with Claimant's hearing testimony that with time she was getting less symptomatic). Brait depo. pp. 45, 46. *See* Tr. p. 96, 109.

45. Unless some physician set the date of MMI at a point different than that of Dr. Ludwig, his uncontradicted opinion on MMI serves as the proper date of MMI on the facts of this case. It also is consistent with Claimant's history, as testified to by Dr. Brait.

46. When the record as a whole is considered, Claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary disability benefits beyond June 23, 2021.

PERMANENT PARTIAL IMPAIRMENT

47. Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and a claimant's position is considered medically stable. *Henderson v. McCain Foods,* 142 Idaho 559, 567, 130 P.3d 1097, 1105 (2006). Idaho Code § 72-424 provides that the evaluation of permanent impairment is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and other activities. "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, 40 P.3d

91 (2002). The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989).

48. Dr. Ludwig assigned no permanent impairment to Claimant. Dr. Brait assigned a 5% whole person impairment rating for Claimant's vestibular disorders and minimal residual permanent affects from her work accident.

49. The weight of the evidence supports Dr. Brait's opinions. Claimant was experiencing ataxia, migraine-type headaches, vertigo, and nausea at the time of hearing, nearly 3.5 years post accident. Her condition was much better explained by Dr. Brait in his deposition testimony than Dr. Ludwig in his.[6] Dr. Brait's reasoning was sound and persuasive. Dr. Ludwig's testimony often came down to other conditions Claimant speculatively "may have." *See, e.g.,* Ludwig depo. pp 12, 13, 38. In the process of explaining Claimant's ongoing conditions Dr. Brait successfully discredited several of Dr. Ludwig's opinions. Dr. Brait's testimony on permanent impairment is afforded the greater weight.

50. When the record as a whole is considered, Claimant has proven by a preponderance of the evidence that she is entitled to permanent partial impairment benefits in the sum of 5% whole person impairment.

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[6] Confusion arose when Dr. Brait indicated in his IME report that Claimant's toe and heel walking, and tandem gait, were "exaggerated," which led Defendants and Dr. Ludwig to assume the term meant that Claimant was attempting to make her condition seem worse than it was, *i.e.* that *she* was exaggerating her symptom presentation. Dr. Brait cleared up this misconception in his deposition by explaining he did not mean she was exaggerating, but rather her presentation was worse than he would have expected prior to his examination. In his deposition, Dr. Ludwig testified on his misunderstanding, believing Dr. Brait meant Claimant's presentation was "inconsistent" with her closed head injury diagnosis, when in fact, Dr. Brait was saying no such thing. This misunderstanding of Dr. Brait's statement was used in Dr. Ludwig's critique of Dr. Brait's permanent impairment analysis. It is interesting to see defense counsel and Dr. Ludwig persist in misconstruing Dr. Brait's statement at the time of Dr. Ludwig's deposition and even in briefing, since Dr. Brait had clarified his position nearly three months prior to Dr. Ludwig's deposition. This purposeful misconstruction of Dr. Brait's statement, which ignored his sworn testimony clarifying the intent of the statement, negatively impacts the weight of Dr. Ludwig's opinion on impairment.

PERMANENT PARTIAL DISABILITY

51. 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. 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).

52. Dr. Ludwig assigned Claimant no permanent restrictions based on Claimant's industrial injury, although he felt she could not return to her time of injury job. He was not sure at the time of his June 2021 report if her condition was due to the work accident or some other medical or nonmedical factor. At his deposition, Dr. Ludwig felt Claimant's preexisting neurofibromatosis helped explain her ongoing clinical presentation, and she had no permanent restrictions related to her industrial accident.

53. Dr. Brait assigned Claimant permanent restrictions of no working at heights, and no activity requiring balance and attributed her restrictions predominately to her industrial accident. He did not apportion any of her restrictions to her preexisting neurofibromatosis, although he suspected the neurofibromatosis might contribute very slightly to her left leg weakness.

54. Dr. Brait was not asked why he chose not to apportion some percentage of Claimant's restrictions to her neurofibromatosis and resulting left leg weakness. From the record, it appears likely that the very minor left leg weakness which may have preexisted Claimant's work injury was such that it in no way impaired her immediately prior to her work accident

(certainly nothing in the record hints at such a finding), so that apportioning some percentage of her restrictions to the condition would be unwarranted. Claimant's ataxia created the impairment and need for work restrictions. As Dr. Brait testified, "could she walk better prior to the day she hit her head, and if she could and now she can't … then the answer is clearly the ataxia is due to the head trauma and not to any previous injury." Brait depo. p. 62.

55. In the present case, Claimant hired vocational rehabilitation expert Cali Eby. She reviewed records, interviewed Claimant, and did a thorough market analysis, considering Claimant's education, employment history, skill set and transferability of skills, as well as her employability and earning capacity. She authored a report dated October 25, 2023.

56. Utilizing Dr. Ludwig's opinion, Claimant would have no permanent disability, as she had no permanent impairment.

57. Dr. Brait's restrictions of no working at heights and no work requiring balance posed a perplexing issue for Ms. Eby. While she could determine that about 6% of jobs in Claimant's job market required working from heights, determining how many jobs required balance was more difficult. She noted Claimant lost a job at Burger King because management was afraid she might fall into the hot oil. Using a similar standard, where the employee would be near hazardous materials, or machinery where a fall or loss of balance could be dangerous, Ms. Eby calculated a 75% loss of labor market. While Claimant has no restrictions on hours she can work per week and used to work up to 70 hours per week before the accident, Ms. Eby felt Claimant would probably not return to working such long hours, and thus would incur a reduction in income of 31% from her pre-accident income. Averaging the two components resulted in a 53% permanent partial disability rating using Dr. Brait's restrictions.

58. Claimant's counsel prepared a "check the box" letter to Dr. Wylie, together with Dr. Brait's IME report, on October 30, 2023, which the doctor filled out and sent back. Therein, Dr. Wylie responded to a question regarding Claimant's proper work restrictions by stating Claimant should avoid work using ladders, or heights with narrow walkways, or near heavy machinery. Ms. Eby obtained a copy of Dr. Wylie's restrictions. Calculating Claimant's permanent disability using Dr. Wylie's restrictions, Ms. Eby determined Claimant suffered a 40% loss of market access and no loss of income potential. Using this analysis, Claimant suffered 20% permanent partial disability.

59. Dr. Brait's and Dr. Wylie's restrictions were quite similar. The distinction is that Dr. Wylie clarified specific work tasks to avoid, where Dr. Brait used more vague terms. By homing in on actual job scenarios Claimant should avoid, as set out in Dr. Wylie's restrictions, Ms. Eby came closer to accurately calculating the realistic job market loss Claimant suffered her work accident.

60. Defendants initially raise two "policy" points in rebuttal of Claimant's argument for permanent disability. The first, which can be quickly dispatched, is that Ms.Eby's reports were produced not long before hearing, and she was not deposed thereafter.

61. As defense counsel noted, the reports were admitted with no objection, and are properly considered by the Commission, which can give them the weight to which they are entitled. More interesting is the argument that Ms. Eby was not deposed post hearing, so her lack of defense of her reports should impact the weight to be given her opinions. It is enough to point out that defense counsel had the right and opportunity to depose Ms. Eby had he wanted to. He cannot waive his right to examine her and then claim her lack of testimony should be used against her.

62. Secondly, Defendants highlight Dr. Brait's statement that Claimant "probably has some very minimal residual left from the injury." JE 10, p. 383. Ergo, any award of permanent disability should be "very minimal" in line with Dr. Brait's assessment.

63. In addition to the preceding "policy" arguments, Defendants are also critical of the substance of Ms. Eby's reports. They point out her calculations for loss of job market using their interpretation of Dr. Brait's restrictions has no support in the real world. To calculate a 75% loss of market when Dr. Brait himself found only "very minimal" residual effects from Claimant's accident defies logic.

64. Defendants also point out that Ms. Eby's initial determination that Claimant had suffered a 31% income loss was not supportable, and further, when her supplemental report was prepared that loss of income evaporated.

65. The opinions of an expert are not binding upon the Industrial Commission but are advisory only. *Clark v. Truss,* 142 Idaho 404, 408, 128 P.3d 941, 945 (2006). It is the role of the Commission to determine the weight and credibility of expert testimony *Henderson,* 142 Idaho at 565, 130 P.3d at 1103. Expert opinions do not need to be accepted even if uncontradicted. "The opinion of an expert is not binding on the trial court, and, as long as it does not act arbitrarily, the trial court may reject expert testimony even when it is uncontradicted." *Miller v. Callear*, 140 Idaho 213, 218, 91 P.3d 1117, 1122 (2004). Specifically with regard to PPD analysis, the Commission considers all relevant medical and nonmedical factors and evaluates the *purely advisory opinions of vocational experts. See, e.g., Eacret v. Clearwater Forest Indus.,* 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund,* 130 Idaho 278, 939 P.2d 854 (1997). (Emphasis added.)

66. The evidence in this case shows that Claimant, once no longer receiving benefits on her work accident claim, sought employment at various businesses around the Sandpoint area. She testified that Burger King let her go for reasons related to her balance issues from her work accident. (Apparently, Burger King had no such concerns regarding Claimant's balance prior to the work accident, as she was working there at the time of her accident.) Other potential employers simply did not contact her after she applied. Her time of accident employer did not rehire her. She finally found a job as a front desk clerk at a local hotel. She is making more money at the hotel than she made working for Employer.

67. It is true Dr. Brait stated Claimant's permanent residual effects from her accident were "very minimal." He was not pressed on what exactly that meant to him or asked if very minimal residuals meant very minimal impact on her ability to find work, or very minimal restrictions, and if so, did he consider not working from heights or where balance was needed in her job as very minimal restrictions. In short, the term very minimal might or might not equate to a very minimal permanent disability rating.

68. Claimant's labor market is not extensive. Sandpoint Idaho is the largest town in her labor market. Claimant's skills are limited, as noted by Ms. Eby. Claimant undoubtedly lost some employment potential as the result of her accident. Even Dr. Ludwig acknowledged she could not return to her time of injury job, although he could not determine if her limitations were the result of her accident. Dr. Brait was confident that Claimant's limitations were accident related and that opinion carried the most weight in analysis.

69. When considering all the evidence, Ms. Eby's calculations on loss of job market of 40% and net permanent disability rating of 20% is reasonable. To ignore the analysis contained in her November 3, 2023 report, which is reasonable in substance, and to

substitute a lower figure based upon a vague statement that Claimant's residuals were "very minimal," would not, on the facts presented herein, be reasonable or necessary.

70. When the totality of the evidence is examined, Claimant has proven by a preponderance of the evidence that she is entitled to benefits for permanent partial disability in the sum of 20%, inclusive of her 5% impairment rating.

APPORTIONMENT

71. Idaho Code § 72-406 allows for a deduction for preexisting injuries in cases where a claimant has suffered less than total permanent disability, when the disability resulting from the industrial accident is increased or prolonged because of the preexisting physical impairment. In such cases, the defendants shall be liable only for the *additional* disability from the industrial injury. In the present case, Defendants requested the issue of apportionment, but did not brief the concept beyond a brief mention when discussing permanent disability, where such argument was rejected.

72. Defendants have failed to establish the appropriateness for apportionment of Claimant's permanent partial disability benefits as awarded herein.

ATTORNEY FEES

73. Idaho Code § 72-804 provides:

> 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.

74. Claimant contends the following conduct by Surety was unreasonable and allows for an award of attorney fees:

- Surety's reliance on the opinions of Dr. Ludwig to terminate benefits;
- Failing to provide additional vestibular therapy, neurological and ENT consults;
- Failing to provide any treatment for Claimant's post-concussive headaches; and
- Failing to pay for Claimant's mileage to/from medical appointments and the cost of her eyeglasses.

75. Defendants were not unreasonable in relying on Dr. Ludwig's opinions. He determined that because the repeat MRI showed no objective reason for Claimant's increasing complaints and the mild concussion diagnosis did not support her continuing complaints, she was at a point where further medical treatment for her work-related concussion symptoms would not improve her condition. In short, she was medically stable. While in his post-hearing deposition, Dr. Brait was quite critical of that analysis, and the need for a second MRI in general, Dr. Ludwig's opinion was not on its face so flawed that Surety should have disregarded it and continued to seek treatment for Claimant. After all, Dr. Ludwig's opinion on MMI was also shared by Claimant's treater, NP Lathrop.

76. Claimant has failed to prove by a preponderance of the evidence that she is entitled to an award of attorney fees for Defendants' reliance on Dr. Ludwig's report to terminate Claimant's benefits.

77. An issue which dovetails into the above discussion is whether Defendants were unreasonable for not making arrangements for Claimant to see an ENT and a neurologist, even if it meant leaving the Sandpoint area to find willing physicians. Defendants had an ongoing duty to provide reasonable medical care under Idaho Code § 72-432. That statute does not allow

Defendants to escape their duty when a local physician cannot be found. Defendants were unreasonable in not providing Claimant the ENT and neurology consultations requested by her treater.

78. Simply because Surety was unreasonable in not arranging for an ENT and neurology consult does not mean Claimant is entitled to attorney fees for such behavior. In *Salinas v. Bridgeview Estates,* 162 Idaho 9194, 394 P.3d 793, 796 (2017), the three-justice majority found that under Idaho Code § 72-804 "there must be payment that is justly due and owing to allow an award of attorney's fees, no matter how unreasonably an employer or surety acted." In the present case, Claimant did not seek an ENT and/or neurological consultation on her own or arrange for additional vestibular therapy. She simply lived with the fact that no such consultations or therapy would be forthcoming. Had she sought out these consultations or therapy, perhaps she could claim attorney fees if she prevailed on getting those medical expenses reimbursed in these proceedings. Here, similar to the majority position in *Salinas,* since Claimant expended no money on medical treatment for which she obtained reimbursement herein, Surety's unreasonable conduct results in no award of attorney fees for the transgression. After all, there was no expenditure of time or effort by her attorney to obtain the requested medical care, or reimbursement therefore, since she did not get the care and further, there is no right to reimbursement since Claimant incurred no cost for denied treatment. The same logic applies to Claimant's argument on headache treatment.

79. Claimant has failed to prove by a preponderance of the evidence that she is entitled to an award of attorney fees for Defendants' failure to arrange for an ENT and neurological consultations, vestibular therapy, or treatment for her post-concussive headaches.

80. Finally, Claimant argues for attorney fees for Surety's lack of payment for mileage and eyeglasses. Unlike the claim on medical treatment, Claimant did expend money which should have been reimbursed by Surety but was not. Claimant prevailed on her claim for these expenses. Surety's excuses for not paying are either weak or nonexistent. Its claim that it will settle out with Claimant at some future date is not relevant except to highlight the fact that Surety knows it owes Claimant for these expenses. Surety's behavior was unreasonable, as it knew of the claim, at the latest on July 28, 2022, more than two years before this decision. It was statutorily obligated to pay Claimant for her mileage and out-of-pocket expenses for prescription eyeglasses but did not do so. This is the very type of conduct addressed by Idaho Code § 72-804 when it states attorney fees shall be awarded for neglecting or refusing "within a reasonable time after receipt of a written claim for compensation to pay to the injured employee." Claimant's demand letter was the written claim triggering Surety to act or face a claim for attorney fees under Idaho Code § 72-804.

81. Claimant has proven by a preponderance of the evidence her entitlement to an award of attorney fees for Defendants' failure to reimburse Claimant for her statutorily-mandated expenses for mileage and eyeglasses within a reasonable time after receipt of a written claim for such compensation.

82. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof, with appropriate elaboration on *Hogaboom v. Economy Mattress,* 107 Idaho 13, 684 P.2d 990 (1984). The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees

in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to the time expended or the hourly charge claimed, or any other representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel files the above-referenced memorandum, Claimant's counsel may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

CONCLUSIONS OF LAW

1. Claimant has proven by a preponderance of the evidence that she is entitled to benefits for any unpaid necessary mileage expenses as calculated in Idaho Code § 72-432(13) incurred when travelling to and from medical appointments causally related to her treatment for injuries suffered as the result of her work accident of August 27, 2020.

2. Claimant has proven by a preponderance of the evidence her right to reimbursement for out-of-pocket expenses for eyeglasses prescribed to her by Dr. Wylie.

3. Claimant has failed to prove by a preponderance of the evidence that she is entitled to further medical treatment after June 23, 2021.

4. Claimant has failed to prove by a preponderance of the evidence that she is entitled to be reimbursed for the cost associated with the forensic IME conducted on her behalf by Dr. Brait.

5. Claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary disability benefits beyond June 23, 2021.

6. Claimant has proven by a preponderance of the evidence that she is entitled to permanent partial impairment benefits in the sum of 5% whole person impairment.

7. Claimant has proven by a preponderance of the evidence that she is entitled to benefits for permanent partial disability in the sum of 20%, inclusive of her 5% impairment rating.

8. Defendants have failed to establish the appropriateness for apportionment of Claimant's permanent partial disability benefits as awarded herein.

9. Claimant has failed to prove by a preponderance of the evidence that she is entitled to an award of attorney fees for Defendants' reliance on Dr. Ludwig's report to terminate Claimant's benefits.

10. Claimant has failed to prove by a preponderance of the evidence that she is entitled to an award of attorney fees for Defendants' failure to arrange for an ENT and neurological consultations, vestibular therapy, or treatment for her post-concussive headaches.

11. Claimant has proven by a preponderance of the evidence her entitlement to an award of attorney fees for Defendants' failure to reimburse Claimant for her statutorily-mandated expenses for mileage and eyeglasses within a reasonable time after receipt of a written claim for such compensation.

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 22nd day of August, 2024.

INDUSTRIAL COMMISSION

Brian Harper

Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September 2024, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW. AND RECOMMENDATION** was served by email transmission and regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BARBARA A. SWEENEY Claimant, v. NISSHA MEDICAL INTERNATIONAL, INC., Employer, and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Surety, Defendants.	**IC 2020-020910** **ORDER** FILED SEP 03 2024 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Brian Harper 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 this recommendation.

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, IT IS HEREBY ORDERED that:

1. Claimant has proven by a preponderance of the evidence that she is entitled to benefits for any unpaid necessary mileage expenses as calculated in Idaho Code § 72-432(13) incurred when travelling to and from medical appointments causally related to her treatment for injuries suffered as the result of her work accident of August 27, 2020.

2. Claimant has proven by a preponderance of the evidence her right to reimbursement for out-of-pocket expenses for eyeglasses prescribed to her by Dr. Wylie.

3. Claimant has failed to prove by a preponderance of the evidence that she is entitled to further medical treatment after June 23, 2021.

4. Claimant has failed to prove by a preponderance of the evidence that she is entitled to be reimbursed for the cost associated with the forensic IME conducted on her behalf by Dr. Brait.

5. Claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary disability benefits beyond June 23, 2021.

6. Claimant has proven by a preponderance of the evidence that she is entitled to permanent partial impairment benefits in the sum of 5% whole person impairment.

7. Claimant has proven by a preponderance of the evidence that she is entitled to benefits for permanent partial disability in the sum of 20%, inclusive of her 5% impairment rating.

8. Defendants have failed to establish the appropriateness for apportionment of Claimant's permanent partial disability benefits as awarded herein.

9. Claimant has failed to prove by a preponderance of the evidence that she is entitled to an award of attorney fees for Defendants' reliance on Dr. Ludwig's report to terminate Claimant's benefits.

10. Claimant has failed to prove by a preponderance of the evidence that she is entitled to an award of attorney fees for Defendants' failure to arrange for an ENT and neurological consultations, vestibular therapy, or treatment for her post-concussive headaches.

11. Claimant has proven by a preponderance of the evidence her entitlement to an award of attorney fees for Defendants' failure to reimburse Claimant for her statutorily-

mandated expenses for mileage and eyeglasses within a reasonable time after receipt of a written claim for such compensation.

12. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof, with appropriate elaboration on *Hogaboom v. Economy Mattress,* 107 Idaho 13, 684 P.2d 990 (1984). The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to the time expended or the hourly charge claimed, or any other representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel files the above-referenced memorandum, Claimant's counsel may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

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

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DATED this the 3rd day of September, 2024.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Claire Sharp, Commissioner

Aaron White, Commissioner

ATTEST:
Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September, 2024, a true and correct copy of the foregoing **ORDER** was served by email transmission and regular United States Mail upon each of the following:

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