BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ANGELA MANWELL, Claimant, v. COSTCO WHOLESALE, Self-Insured Employer, Defendant.	**IC 2021-001199** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED May 23, 2025** **IDAHO INDUSTRIAL COMMISSION**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Sonnet Robinson. A hearing was conducted on July 3, 2024. Claimant, Angela Manwell, was represented by Patrick George of Twin Falls. Matthew Pappas of Boise represented Defendant. The parties presented oral and documentary evidence and took post-hearing depositions. The matter came under advisement on March 28, 2025, and is ready for decision.

ISSUES

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

2. Whether Claimant is entitled to:

    a. Medical care;

    b. Temporary partial or temporary total disability (TPD/TTD);

    c. Permanent partial impairment (PPI);

    d. Permanent partial disability (PPD);

3. The extent, if any, that Claimant's conditions were caused by pre-existing conditions or subsequent intervening events.

CONTENTIONS OF THE PARTIES

Claimant contends that her low back condition was asymptomatic prior to the subject injury. Defendant is responsible for her disc replacement surgery at the *Neel* rate for her low back injury and for associated TTDs. Defendant is also responsible for PPD of 28% due to Claimant's permanent restrictions.

Defendant responds that Claimant's low back injury resulted in no objective changes to her spine and that her entire condition is pre-existing. Specifically, Claimant suffered a significant low back injury in 2001 working as an aerialist. Claimant's surgery fixed longstanding, pre-existing issues that are not Defendant's responsibility. If Claimant's condition is found related to the work accident, her disability is minimal per Ms. Layton's opinion.

Claimant replies that Dr. Johnson's surgery was reasonable, necessary, and related to the work injury.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Joint exhibits (JE) 1-36;
3. The post-hearing depositions of Delyn Porter, MA, and Benjamin Blair, MD, taken by Claimant;
4. The post-hearing deposition of Lynn Stromberg, MD, and Kourtney Layton, MA, taken by Defendant.

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

FINDINGS OF FACT

1. Claimant was born on June 1, 1980, and was 44 years old at the time of hearing. HT 17:4. Claimant was an active child and adult, riding dirt bikes, snowboarding, performing gymnastics, and diving. See HT and JE 35.

2. **Pre-Injury.** Claimant suffered a significant back injury[1] when she was 20 years old in 2000 while working as an aerialist for the circus: "I got blinded mid-flip and over-rotated on one of my tricks, and because of that, it kind of sling-shotted me off of the trampoline and I landed on my head and knocked myself out." HT 19:10-23. Claimant was taken to the hospital, given a CAT scan, and released. *Id.* at 81:3-8. Claimant returned to work the next day, but after five or six months of shows, Claimant had issues with her low back and neck, and began treating with a chiropractor. *Id.* at 20:5-25; JE 35:746. Eventually, a workers compensation doctor recommended a low back fusion because of herniations, but Claimant elected conservative treatment. HT 21:6-17; JE 35:747. After about a year of conservative treatment, Claimant was released with no restrictions and Claimant "was able to go back to normal life," which included snowboarding and working as a waitress and bartender. *Id.* at 21:18-22:2.

3. Claimant began working for Costco in Salt Lake City in 2011 and moved to Idaho Falls in 2020 to open their new store. JE 8:17-18. Claimant has worked in several roles and departments for Employer, but noted the most physically demanding was being a meat manager, where she had to move 100-pound cases of meat daily. HT 35:25-36:3.

4. Around 2017, Claimant was suffering from low back pain and saw Dr. McIntrye.

[1] No claim or medical records from this accident were entered into evidence because the parties were not able to find those records. HT 80:14-20.

JE 35:755. Claimant recalled:

> I started seeing him for low back pain and he found that I actually had SI dysfunction where my SI wasn't working properly and would cause my hip to rotate out, which was what was causing some low back pain at that time. But he would do physical manipulation help me get my hip back into place … so I found it wasn't actually back problems I was having it was actually SI dysfunction and hip problems that I was having.

Id. Claimant recalled she only saw him a few times "off and on" and probably saw him last in 2019 before moving to Idaho in June of 2020. *Id.* at 756-757. He recommended an SI brace, which Claimant began to wear occasionally as a precautionary measure and to treat any potential hip malalignment. HT 95:24-98:16.

5. On September 9, 2020, Claimant suffered a low back strain while lifting a couch with a coworker. HT 22:21-23:2. She assumed it was a minor strain, and didn't report it until two days later. *Id*; JE 36:832.

6. Claimant saw Benjamin Leishman, DO, at Redicare on September 11, 2020. JE 36:833; JE 27A:154. Claimant's lumbar x-rays showed "disc height loss at L5/S1 with osteophytosis. Mild disc height loss is present at L4/L5. Disc heights are otherwise fairly well maintained. Small osteophytes are present at a few levels…." The overall impression was mild degenerative disc disease of the lower spine. JE 27A:154. Claimant was returned to work with no restrictions on September 18, 2020. JE 36:848.

7. **Subject Injury** – On January 8, 2021, Claimant was stocking freezer items. She had just finished stocking 60-pound boxes of raw chicken, when she moved to stocking 30-pound boxes of Dino Bites. Claimant described stocking the boxes through the display window by physically stepping over the opening to door, ducking, and then rotating the box to get it into the proper place. HT 39:21-40:14. As she was turning to set one case down, she felt an "explosion" in her back, with pain radiating down her leg and into the side of her lower back. She assumed it was

similar to her injury in September and kept working carefully. Once she finished stocking, she could not stand up and reported the injury. HT 40:15-41:20.

8. Claimant went to Redicare that day and saw Karla Patterson, NP. JE 27D:225. Claimant described the accident and reported a history of SI joint pain. *Id.* Claimant's x-rays were read as follows: "no spondylolisthesis is evident. The intravertebral disc spaces demonstrate moderate marginal spurring throughout the lumbar spine with moderate narrowing at the L4/5 and L5/S1 levels and more mild narrowing at the other levels;" the overall impression was multilevel degenerative disc changes most severe at the L4/5 and L5/S1 levels. JE 27A:157. Claimant was prescribed muscle relaxants and given work restrictions and eventually referred to physical therapy. JE 27D:257; JE 27C. At her follow-up appointment on January 21, Claimant was referred to Gary Walker, MD. *Id.* at 176.

9. Claimant saw Dr. Walker on January 25, 2021. JE 28:377. Claimant reported her 2000 and 2020 injuries and also reported a "history of chronic sacroiliac joint pains and has been treated for that." *Id.* Dr. Walker recorded Claimant typically wore a sacroiliac joint belt and was wearing one the day of the injury. *Id*. Dr. Walker wrote he suspected most of her pain was coming from her L5/S1 disc, but that given her numbness and tingling a disc protrusion was also possible. *Id.* at 378.

10. Dr. Walker ordered an MRI which was performed on February 13, 2021. JE 27A:163. The radiologist's impressions were: (1) mild degenerative disc and facet disease of the low lumbar spine without significant spinal canal narrowing; (2) moderate neural foraminal narrowing bilaterally at L5-S1 with mild bilateral neural foraminal narrowing at L4-L5; (3) small central disc extrusion at L4-L5. *Id.*

11. On March 4, 2021, Claimant received an epidural steroid injection (ESI) at her right L5-S1 levels. JE 28:382. On March 23, Claimant reported the ESI had helped but she was having minor recurrent pains; Dr. Walker scheduled her for a repeat ESI, which occurred on April 1, 2021. *Id*. at 385; JE 27E:331.

12. On April 30, 2021, Claimant returned to Dr. Walker after her second ESI and noted it had worn off and she was back to having pain daily. JE 28:389. Dr. Walker assessed "pre-existing but previously asymptomatic degenerative changes of the L5-S1 facets and L5-S1 disc." Dr. Walker wrote that Claimant was only getting short-term relief with ESI shots and that "it may be that much of her problem is going to be surgical." Prior to referring her for surgery, Dr. Walker wanted to try a facet medial branch block to see if that helped with her pain. *Id.*

13. On May 6, 2021, Claimant underwent a facet block at her left and right medial branch nerves at L4-L5. JE 27E:340.

14. Claimant saw Robert Johnson, DO, on May 17, 2021. JE 29:400. Dr. Johnson recorded that Claimant presented with an acute exacerbation of chronic low back pain: "she reports having a history of chronic low back pain, but states that [unreadable] exacerbated her previous symptoms significantly to the point where she is unable to bend, twist, or lift any significant amount." Dr. Johnson reviewed her MRI and x-rays, conducted a physical exam, took a history of her present course of treatment, and assessed: (1) lumbar degenerative disc disease with Modic changes, severe, L4-5, L5-S1; (2) lumbar spondylolisthesis grade 1 – stable, L4-L5, L5-S1; (3) low back pain. Dr. Johnson discussed fusion, basivertebral nerve ablation (BVNA), and disc replacement as possible treatment options, but noted that disc replacement was what he recommended due to her age and because her pain indicated an anterior pathology. *Id.* at 401-402. Claimant elected to proceed with the disc replacement. *Id.*

15. On June 21, 2021, Claimant reported to Dr. Walker that the medial branch block trial did not help at all, and that Dr. Johnson recommended an ablation or artificial disc replacement. JE 28:395. Dr. Walker reviewed the EMG results which showed no "radicular process." Dr. Walker observed that Claimant was six months post-injury and still not doing well, and wrote: "It is unclear why based on the fact that there is really no evidence at all of any underlying new disc herniation. What is present on imaging is degenerative disc disease and degenerative facet joints." Dr. Walker wrote she had been unresponsive to all treatment modalities he had tried and "she simply needs to continue with a home exercise program." *Id.*

16. On June 22, 2021, Claimant returned to Dr. Johnson. JE 29:404. Dr. Johnson noted her EMG and bone scan results were normal, and they were just waiting to hear from workers' compensation to proceed with the surgery. *Id.* After Dr. Stromberg's independent medical exam (IME) on July 15, 2021, (discussed below) Defendant denied the surgery, declared Claimant had reached maximum medical improvement (MMI), and stopped paying TTDs effective September 1, 2022. JE 34a:730; JE 12. Claimant went on short-term disability through Costco. JE 35:762.

17. On January 26, 2022, Claimant underwent disc replacement surgery by Dr. Johnson. Claimant took a loan on her house to pay for the surgery as she was not able to get it approved through her private health insurance. HT 49:10-15; JE 29:423; JE 35:766. Claimant recovered well and at hearing called her results "magnificent." JE 29:429-463. Claimant returned to work with Costco on June 6, 2022, and was promoted to food court supervisor that autumn. JE 35:763.

18. At her year follow-up with Dr. Johnson, Claimant reported "all her pre-operative backpain" was completely resolved, but she felt like her "right SI joint" was flaring up due to standing more. JE 29:459. At her two-year follow-up, Claimant again reported that the surgery

was 100% successful; she was still having some SI joint discomfort, but reported it felt completely different from the pain that the surgery fixed. *Id.* at 462.

19. **Medical Opinions.** On July 15, 2021, Claimant attended an IME at Defendant's request with Lynn Stromberg, MD. JE 12:29. Dr. Stromberg took a history of the injury, reviewed medical records and imaging, conducted a physical exam, and wrote a report. Dr. Stromberg noted that there was no evidence of radiculopathy, that her toe numbness was in a nonanatomic pattern, and that she was "unreasonable in her manifestations of her physical examination." *Id.* at 32. Dr. Stromberg wrote that Dr. Walker's treatment was reasonable, but that she had a lumbar strain which should have resolved with or without treatment within a few weeks. He rated her at 0% under the AMA Guides for a lumbar strain: "she has continued complaints, but I find these complaints unreasonable." *Id.* He wrote she had no restrictions related to the injury and did not need further treatment. However, he opined she may require treatment for her chronic degenerative condition. *Id.*

20. On August 2, 2021, Dr. Walker reviewed Dr. Stromberg's IME and wrote "I don't find any disagreement with his findings. So I will sign off with him." JE 14:36.

21. On August 24, 2021, Dr. Johnson reviewed Dr. Stromberg's report. JE 15. Dr. Johnson noted that the physical exam and history Dr. Stromberg reported was consistent with his findings, but that Dr. Johnson disagreed with the report as follows: "although the patient doesn't demonstrate any dynamic instability and is therefore "structurally sound," she does demonstrate advanced disc collapse with Modic changes consistent with an anterior column disease clearly visible on imaging." Dr. Johnson also offered his rationale for BVNA followed by artificial disc replacement as more cost effective than a fusion and then re-fusion long-term. *Id.* at 37.

22. On January 18, 2023, after the disc replacement surgery, Benjamin Blair, MD, conducted an IME at Claimant's request. JE 21:52. Dr. Blair took a history of the injury, reviewed medical records and imaging, conducted a physical exam, and wrote a report. Dr. Blair wrote that Claimant had a work-related injury 20 years ago, but that she had been operating at a high function since then. Her current symptoms included occasional SI joint pain, but this pain was the same as it was before the injury and was a "distinctly different" pain than her pain from the work injury. *Id.*

23. Dr. Blair opined that Claimant suffered an aggravation of an asymptomatic pre-existing condition. His rationale was that she had been asymptomatic prior to the injury and although Claimant did have degeneration at her L4-5 and L5-S1 prior to the injury, but for the injury, she would not have become symptomatic and required the level of medical care she eventually obtained. JE 21:58. Dr. Blair rated her PPI at 7% un-apportioned, and explained as follows:

> the above is directly based on the fact that Ms. Manwell had undergone 2-level lumbar disc arthroplasty at L4-5, L5-S1. Had it not been for the 01/08/21 work-related injury, I do not believe she would have necessitated the 2-level arthroplasty. As the above rating is directly related to the arthroplasty, I believe, again, there is no apportionment to the above rating to pre-existing conditions.

Id. at 59. Dr. Blair also issued restrictions: no lifting greater than 50 pounds on a rare basis, 35 pounds on occasional basis, 25 pounds on a frequent basis, and no repetitive bending or twisting. *Id.*

24. On October 5, 2023, Dr. Stromberg issued an addendum to his report. JE 23. He reviewed additional medical records and offered clarification and more opinions. *Id.* Dr. Stromberg reaffirmed his opinion that Claimant's sensory complaints did not make sense as there was no compression in her spine. She was hypersensitive to light touch and her presentation

was "not credible." JE 23:97. There was no objective evidence of acute injury, only long-standing chronic issues. *Id.* at 98. Claimant's low back injury 20 years ago and more recently in September 2020 show a "long history of problems with her back" and her x-rays from her 2020 injury are identical to her x-rays after her 2021 injury. Dr. Blair's impairment rating is flawed because her physical exam was perfectly normal; further, apportionment was appropriate given her history of back injuries. Lastly, Dr. Blair's report did not cite risk as a factor and therefore restrictions were inappropriate. *Id.* at 97.

25. On October 25, 2023, Dr. Blair responded to Dr. Stromberg's addendum. JE 24. Dr. Blair reiterated his opinion that although Claimant did have significant pre-existing degeneration, she was asymptomatic until the accident, which was why he believed the accident caused a significant aggravation of her pre-existing condition. JE 24:100. He added that most people with Claimant's pre-existing condition do not end up needing surgery, which further supported his opinion that the injury led to the need for surgery. *Id.* Regarding Dr. Stromberg's critique of his impairment rating, Dr. Blair wrote that: "a 2-level arthroplasty is, by definition, a 7% whole person impairment," and because the surgery was necessitated by the industrial injury, not the pre-existing condition, apportionment was not appropriate. *Id.* at 101. Regarding Dr. Stromberg's critique of his restrictions, he wrote that Claimant was more at risk for injury after a 2-level arthroplasty and that was why restrictions on her activity were appropriate, to prevent further injury. *Id.*

26. On December 8, 2023, Claimant's counsel wrote to Dr. Johnson and enclosed Dr. Blair's two reports dated January 18, 2023, and October 25, 2023. JE 25. The letter summarized Dr. Blair's opinions and queried whether Dr. Johnson agreed with Dr. Blair's findings. On February 9, 2024, Dr. Johnson faxed back his agreement with Dr. Blair's findings in

a check-the-box format. JE 25:151.

27. On May 15, 2024, Dr. Blair reviewed additional x-rays and opined that comparing the pre-injury and post-injury x-rays showed "significant progression of the degenerative changes at the L5-S1 level and to some extent, L4-L5." JE 21B:62a. Dr. Blair wrote this indicated a significant exacerbation of Claimant's pre-existing degenerative changes. *Id.*

28. Dr. Blair was deposed on October 14, 2024. The Commission is familiar with Dr. Blair's qualifications, and he is competent to testify as an expert. Dr. Blair confirmed he had reviewed imaging which showed progression of her degeneration and "narrowing around the spinal nerves." Blair Depo. 12:2-17. The imaging and her description of her accident correlated with her symptoms and underlying diagnosis. *Id.* Dr. Blair agreed that Claimant "definitely had a preexisting problem" at L4-L5 and L5-S1. *Id.* at 14:15-21. Dr. Blair was aware of both her 2020 strain and 2000 injury. *Id.* at 9:24-10:13. Dr. Blair issued restrictions to protect the implanted discs and to prevent injury to other parts of her back. *Id.* at 16:12-22.

29. On cross-examination, Dr. Blair explained he had not reviewed the hearing transcript or Claimant's deposition. Blair Depo. 19:1-6. Dr. Blair did not have independent recollection of her 2000 circus injury, just that she had an injury, treated conservatively, and was asymptomatic afterwards. *Id.* at 21:8-16. Dr. Blair explained that considering the prior 2000 injury was important, but more details regarding the injury did not change his opinion because he already knew that she had pre-existing issues with her spine. *Id.* at 23:5-25. Dr. Blair equivocated on whether Claimant's surgery was necessary:

> Q: [Mr. Pappas] Do you have an opinion whether it was necessary at the time it was done?
>
> A: I have my same answer as you have to define necessary.
>
> Q: Okay. If you had been seeing this patient for this reason up to that point,

would you have recommended surgery?

A: I would have given the option of her having surgery.

Id. at 27:4-12.

30. Regarding the choice between arthroplasties and fusions, Dr. Blair explained that any patient of his that was in Claimant's situation would be offered both options, but he would refer out for any arthroplasties as he does not perform them. ("I wasn't doing enough of them.") Blair Depo. 28:23-30:18. A fusion is considered the "gold standard" surgery because it has been around longer than spinal arthroplasties and there are no studies yet on spinal arthroplasties' efficacy 20 to 25 years after implantation. *Id.* at 30:20-31:9. The risk with arthroplasties over fusions was wear and tear of the implant, loosening of the implant, or a reaction to the implant; whereas fusions have the risk of wear and tear on either side of the fusion. *Id.* at 33:24-34:18. Dr. Blair clarified there were no additional restrictions or limitations due to the choice of arthroplasty over fusion. *Id.* at 36:16-24.

31. Dr. Stromberg was deposed on December 10, 2024. The Commission is familiar with Dr. Stromberg's qualifications, and he is competent to testify as an expert. Dr. Stromberg did not recall Claimant or his examination of her. Stromberg Depo. 8:16-24. Dr. Stromberg explained her physical exam was normal, showing no evidence of radiculopathy or abnormal function. *Id.* at 10:10-18. However, Claimant did have pain with axial compression (when he pressed lightly on her head), and with axial rotation (when her hips were rotated). Dr. Stromberg explained neither compression nor rotation should produce back pain, but both did during her exam. *Id.* at 9:16-10:4; JE 12:32. Dr. Stromberg then reiterated his overall opinion that Claimant did not have evidence of an acute injury, only chronic progressive changes. *Id.* at 15:5-11.

32. Dr. Stromberg does perform spinal arthroplasties and explained that cervical

replacements are much more common than lumbar replacements. Stromberg Depo. 19:24-20:18. Prior prosthetics for the spine had disastrous results, but the technology has advanced, and modern devices are more "predictable and much preferred." *Id.* at 20:11-24. However, insurance companies are still reluctant to pay for them because "we're not 20 years out on these things yet…they say they are investigational and technically, I guess they are not incorrect." *Id.* Dr. Johnson was the only surgeon Dr. Stromberg knew of that would operate at two levels for an arthroplasty. "I don't know how I would ever get a two-level arthroplasty authorized here. I wouldn't try." *Id.* at 22:10-23. The indications for two-level arthroplasty are narrow, but it can be more desirable than a fusion for maintaining mobility. *Id.* at 22:16-23:7. Regarding Claimant's choice to proceed with this surgery specifically, Dr. Stromberg observed: "if she felt that she had symptoms that warranted intervention, then I don't think it is unreasonable to offer surgery." *Id.* at 23:15-18.

33. Regarding Dr. Blair's report, Dr. Stromberg took issue with Dr. Blair's opinion that the reason for surgery was spondylosis with radiculopathy because there was no documented radiculopathy in: the EMG, or in Dr. Johnson's notes, or during Dr. Stromberg's exam. Stromberg Depo. 24:12-25:4. Dr. Stromberg disagreed with Dr. Blair's impairment rating because Dr. Blair did not assign any impairment to her pre-existing conditions, despite those pre-existing degenerative conditions being the only documented, objective findings on imaging: "the findings were grossly apparent, without evidence of structural injury, and to attribute it all to a subjective set of complaints didn't seem reasonable." *Id.* at 25:5-20. Dr. Stromberg knew Claimant wore an SI belt, but he was unfamiliar with them and had never seen one. He noted he had seen nothing wrong with her SI joints on x-ray or her MRI scan. *Id.* at 26:16-27:5.

34. On cross-examination, Dr. Stromberg testified that if Claimant was lifting 50

pounds regularly after her surgery then the surgery was "very successful." Stromberg Depo. 31:18-23.

35. **Vocational Background and Opinions.** Prior to her work with Employer, Claimant worked in customer service, waitressing, groundskeeping, and bartending. At Employer's, Claimant started as a front-end assistant and has been promoted to many different supervisor and management positions, most recently the food court supervisor. JE 8. Claimant has a high school diploma and completed one semester of post-secondary education.

36. **Delyn Porter's Report**. On April 25, 2023, Delyn Porter authored a vocational report at Claimant's request. Mr. Porter reviewed records, interviewed Claimant, and reviewed her employment history. JE 22. Mr. Porter noted that Claimant had worked at a sedentary level all the way up to the heavy physical demand level and was able to meet all the physical demands of her many positions at Costco prior to the injury. *Id.* at 83. Claimant's specific vocational preparation (i.e., her skill level based on her prior jobs) ranged from unskilled to skilled. Specifically, Claimant had transferable skills in retail sales, customer service, and retail management/supervision. *Id.* at 80.

37. Per Dr. Stromberg's opinion, Mr. Porter opined Claimant had no PPD because Dr. Stromberg did not assign any impairment or restrictions. Per Dr. Blair's opinion, Claimant was restricted to a limited light-medium duty, and therefore lost approximately 55.8% of her labor market. As Claimant was making more now than she was at the time of the injury for the same Employer, Claimant's wage loss was zero. Mr. Porter predicted that if Claimant left her position at Costco, she would struggle to make the same wage and predicted a 48.3% wage loss based upon other employment. In conclusion, Claimant suffered 27.9% PPD based on her current position and 52.1% PPD based on other employment. *Id.* at 88.

38. **Kourtney Layton's report.** On November 30, 2023, Kourtney Layton authored a vocational report at Defendant's request. Ms. Layton reviewed records, attended Claimant's deposition, and reviewed her employment history. JE 25. Ms. Layton did not conduct a transferable skills analysis. *Id.* at 138.

39. Ms. Layton calculated a 23% loss of labor market with Dr. Blair's restrictions and no labor market loss with Dr. Stromberg's restrictions. Ms. Layton noted Claimant suffered no wage loss under either physician's restrictions as she made more money now than she did at the time of the injury. *Id.* at 140-142. Based on these calculations, Ms. Layton calculated Claimant's PPD at 12% with Dr. Blair's restrictions. *Id.*

40. **Porter's Deposition**. Delyn Porter was deposed on October 14, 2024. Mr. Porter elaborated on his wage loss numbers, explaining that Claimant had access to 11,027 jobs prior to her injury and based on Dr. Blair's restrictions, now has access to 4,877 jobs, for a loss of 55.8%. Porter Depo. 10:12-11:10. Mr. Porter explained he did not weight her job loss heavier than her wage loss in calculating her PPD because Claimant had a history of "skilled employment jobs, which are more easily transferable." *Id.* at 11:19-12:7.

41. Mr. Porter explained his job market numbers were different from Ms. Layton's because they used different datasets. Mr. Porter used a dataset which breaks down the job set by strength category (sedentary, light, medium, heavy, very heavy) and also based on skill (unskilled, semi-skilled, skilled), whereas the dataset Ms. Layton used requires one "to calculate out percentages of jobs that fall within that category, [But with Mr. Porter's method] … the Occupational Employment Quarterly …[provides the percentages] so you don't have to assume." *Id.* at 12:14-13:18. For example, Ms. Layton's labor market summary assumes no loss of market for positions as a waitress and bartender despite Claimant's restrictions against repetitive bending

or twisting. In other words, Ms. Layton's post-injury labor market numbers are larger than they should be due to her selection of dataset.

42. Mr. Porter was also critical of Ms. Layton's choice not to include "closely related" occupations in Claimant's labor market pool; Mr. Porter noted for example that Claimant's experience as a retail manager means she has experience with customer service, cashiering, and other retail skills, but some retail positions were not included in Ms. Layton's labor market calculations.

43. Lastly, Mr. Porter pointed out Ms. Layton used 2022 data, not 2023 data in her analysis. *Id.* at 16:15-18.

44. On cross-examination, Mr. Porter testified he was unaware of her circus employment. But, he was aware she had a low back injury 20 years ago from which she recovered fully. Porter Depo. 19:17-21:2. Mr. Porter clarified that he did not consider any of Claimant's subjective limitations in calculating her disability, only Dr. Blair's restrictions. *Id.* at 31:21-32:5.

45. **Layton's Deposition.** Ms. Layton was deposed on January 23, 2025. She responded to Mr. Porter's criticism of her dataset. "And I think my critiques of Delyn's use of the US Publishing Data are probably going to echo a lot of what he said about my use of the [Bureau of Labor Statistics] data." Layton Depo. 24:2-5. Specifically, Ms. Layton explained that the reason Mr. Porter uses US Publishing Data (because he does not have to calculate out the specific percentage of jobs) is precisely why Ms. Layton does <u>not</u> use it. "[T]he calculations are already done, and so it increases the error rate significantly." *Id.* at 24:16-18. The problem put succinctly is that jobs with specific skill sets, which Claimant does not have, are being included in her pre-injury labor market by using this data. The example Ms. Layton used to clarify this point was retail salesperson skills. Mr. Porter's report assumes Claimant has access to all 46 job titles within the

classification of retail salesperson. Ms. Layton sees this as incorrect because a car salesperson would fall into that category yet Claimant has never done that job previously. *Id.* at 26:7-27:24. Ms. Layton did agree that this was due to Mr. Porter's inclusion of closely related professions which she thought provided inflated numbers. *Id.* at 28:1-11.

46. **Credibility.** Claimant testified credibly.

DISCUSSION

47. 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).

48. **Medical Causation.** 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, 849 P.2d 934 (1993). Claimant must adduce medical proof in support of his claim, and he must prove his claim to a reasonable degree of medical probability. *Dean v. Dravo Corporation*, 95 Idaho 558, 511 P.2d 1334 (1973). The permanent aggravation of a pre-existing condition is compensable. *Bowman v. Twin Falls Construction Company, Inc.*, 99 Idaho 312, 581 P.2d 770 (1978). 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).

49. Drs. Stromberg, Blair, Johnson, and Walker all issued opinions regarding causation. All four doctors agree that Claimant had pre-existing degeneration at L4-L5, L5-S1. All four were aware she had prior low back issues but was relatively asymptomatic.

50. Dr. Blair was aware of Claimant's 2000 and 2020 low back injuries. But he relied on the fact that she was asymptomatic and "functioning at a high level" prior to the industrial accident to reach his conclusion that Claimant suffered a permanent aggravation of her pre-existing condition. Dr. Blair compared a pre-injury x-ray with the four x-rays and MRI taken after the industrial accident. Dr. Blair opined that there was "significant progression" of the degenerative changes at L5-S1 and to some extent at L4-L5, which he opined represented a "significant exacerbation" of her pre-existing condition caused by the industrial injury. Notably, Dr. Blair did not consider it an "acute" injury, but rather a faster progression of her pre-existing degenerative condition. Dr. Blair opined that but for the industrial accident, Claimant would likely not have required surgery despite her pre-existing condition. "I think she had degenerative changes there, but I think -- given my review of her records, I don't think there was a serious problem there beforehand." JE 21:58; Blair Depo. 15:22-24. Unfortunately, Dr. Blair did not examine Claimant until after her surgery, so his physical exam findings and observations regarding symptomatology cannot be compared to Drs. Stromberg's or Johnson's findings.

51. Dr. Stromberg had multiple issues with Claimant's presentation at the time he authored his original report: Claimant's physical exam was normal, her toe numbness was in a non-anatomic pattern, she was tender to very light touch, and her axial compression and axial rotation tests were positive. He opined that her complaints were unreasonable. By the time of deposition, Dr. Stromberg did not remember Claimant. But he explained his notes meant that Claimant was very talkative ("loquacious and apparently in good spirits" Stromberg Depo. 9:5-6)

when she was reporting a high amount of pain and that she complained of radiculopathy-like symptoms but had negative EMG results and non-anatomic numbness.

52. Dr. Stromberg also strongly felt there was no acute injury on imaging; Claimant's pre-existing condition was strictly chronic and degenerative. Although surgery may be reasonable for that condition, there was no "new injury." Stromberg Depo. 16:14-15. Regarding the fact that Claimant was asymptomatic prior to this injury, Dr. Stromberg disagreed, noting her injury in 2000 and her lumbar strain on September 11, 2020, showed a "long history" of problems with her back.

53. Dr. Stromberg was critical of Dr. Blair's diagnosis of radiculopathy, pointing out that he offered no explanation for Claimant's non-anatomic sensory results, and merely relied on the fact that her sensory complaints were resolved by the surgery. Dr. Stromberg vehemently disagreed with Dr. Blair's opinion regarding the x-rays; his opinion was that the September 2020 x-rays and the January 2021 x-rays were "identical." JE 23:97.

54. On April 30, 2021, Dr. Walker observed Claimant was seeing him for an aggravation of a pre-existing condition and she may need surgery to correct her condition. He referred her to Dr. Johnson. JE 28:389. However, on June 21, 2021, at Dr. Walker's final appointment with Claimant, he wrote it was "unclear why" she continued to have low back pain when there were only degenerative findings on imaging. JE 28:395. Dr. Walker agreed with Dr. Stromberg's first IME report.[2]

55. Dr. Johnson reviewed Dr. Stromberg's first IME and found Dr. Stromberg's exam and history consistent with Dr. Johnson's own exam findings and the history Claimant provided to him. He also agreed with Dr. Stromberg that she was "structurally sound" with no dynamic

[2] Unfortunately, Dr. Walker passed away before he could offer additional expertise or opinion.

instability. However, Dr. Johnson explained that she had a clearly desiccated disc with Modic changes which, coupled with her symptoms, required surgery.

56. Dr. Johnson was aware Claimant had prior injuries and symptoms. This awareness came from both from her reports to him, and from a review of Dr. Stromberg's and Dr. Blair's reports, which also detail her prior medical history. When asked directly by Claimant's counsel via letter, Dr. Johnson agreed Claimant suffered a permanent aggravation of her pre-existing condition in the industrial accident.

57. The medical evidence and opinion show it is more likely than not that Claimant's condition was caused by her industrial accident. Drs. Blair and Johnson offer better reasoning for their opinions on the crucial question of whether Claimant suffered an aggravation of her pre-existing condition. Claimant had worked in heavy and very heavy positions at Costco for years without injury or need for accommodation. Despite her pre-existing degenerative condition at L4-L5, L5-S1, Claimant was able to work as a meat manager lifting cases of up to 100 pounds. On the morning of the accident, she was even able to lift 60 pounds cases without incident or injury. The evidence supports Dr. Blair and Dr. Johnson's opinions that she was functioning at a very high level despite this pre-existing condition and that the accident caused a permanent aggravation of her pre-existing condition.

58. Nevertheless, Dr. Stromberg asserted that Claimant had a "long history" of back problems to explain why he did not support an aggravation/exacerbation diagnosis. Dr. Stromberg's "long history" includes two events: her 20-year-old circus injury and her lumbar sprain in September of 2020. Dr. Stromberg did not elaborate further and focused more on the lack of objective injury and symptom magnification to support his opinion. This is troublesome as two incidents *could* be sufficient to demonstrate a long history of low back problems under different

facts and with more explanation. However, in this case the incidents in question are either quite minor (a strain in 2020 which resolved quickly and exactly as Dr. Stromberg described strains should resolve in his deposition) or quite old (a 20-year-old injury from which Claimant completely recovered, going back to snowboarding and heavy duty jobs). There is more evidence supporting Dr. Blair's opinion that Claimant was functioning at a very high level through her demonstrated work performance than there is evidence supporting Dr. Stromberg's opinion that Claimant had a long history of low back problems.

59. Dr. Blair and Dr. Stromberg both agree there is no "acute" injury on imaging. Where they differ is whether Claimant's x-rays post-injury show a natural progression of her degeneration or an acceleration of her degeneration. Dr. Stromberg compared the September 2020 and January 2021 x-rays and opined they were identical. Dr. Blair compared x-rays from prior to the injury, the day of injury, and five months later on June 16, 2021[3]. He maintained they showed accelerated degeneration at L5-S1 and, to a lesser extent, at L4-L5.

60. The descriptions by the radiologists do not clearly favor either doctors' interpretation of the x-rays other than to say that there is progression of her degeneration (mild to severe). See JE 27A. Dr. Blair's opinion is slightly more convincing on this point. He examined all the imaging at the same time (vs. just pre-injury and day of injury). He looked at the films themselves. And his opinion is congruent with - although not identical to - the descriptions from the original radiologists.[4]

[3] The other x-rays Dr. Blair reviewed were post-surgery showing the position of the implants.

[4] It is not clear from Dr. Stromberg's deposition or reports whether he viewed the plain films or just the radiologists' reports in forming his opinions.

61. Furthermore, Dr. Stromberg's opinions are not corroborated by other provider-generated facts in the case. First, his criticisms of Claimant's presentation during the exam are not consistent with Dr. Johnson's notes, or Dr. Walker's notes until his final appointment with her where he expressed puzzlement. Their opinions on her presentation carry more weight because Claimant was Dr. Walker's patient for six months and Dr. Johnson's for two and a half years. Finally, Dr. Blair observed Claimant post-surgery, and noted all her symptoms were resolved by the surgery supporting his opinion that she had an aggravation of a pre-existing condition. Dr. Stromberg's concerns are not without merit, but they are outweighed by the rest of the medical records and opinions.

62. **Medical Care.** Idaho Code § 72-432 provides that the employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, 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. What constitutes reasonable medical care is to be determined by a totality of the circumstances approach. *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015).

63. Dr. Johnson was Claimant's treating physician and found a two-level arthroplasty to be reasonably required and necessary to treat her condition.

64. Dr. Stromberg gave a very nuanced opinion at deposition. He explained that the parameters for a two-level arthroplasty are narrow and expressed confidence in the new generation of prosthetic discs. Regarding insurance companies' reluctance to pay for spinal arthroplasties, Dr. Stromberg offered "we're not 20 years out on these things yet…they say they are investigational and technically, I guess they are not incorrect." He did not think Claimant's

decision to proceed with the surgery was unreasonable if she felt her symptoms warranted it and opined that the surgery was "very successful" based on her return to work at a medium-duty level job. However, he maintained his opinion that the surgery was only to treat subjective complaints, not an objective new injury.

65. Dr. Blair also offered a nuanced opinion. Dr. Blair did not think the surgery was unreasonable, and he agreed surgery was the correct course, but he did not opine the arthroplasty was necessary. Dr. Blair does not explicitly state a fusion was his preferred course of treatment, but his deposition testimony read as a whole does leave the reader with that impression.

66. After careful consideration, the totality of the circumstances supports the conclusion that the two-level arthroplasty was reasonable and necessary medical treatment for the aggravation of Claimant's pre-existing condition. Dr. Johnson was Claimant's treating physician and required it for her condition. He opined it was reasonable and necessary. Claimant's symptoms were resolved by the surgery. The choice of arthroplasty over fusion maintained Claimant's mobility and was Dr. Johnson's choice for this reason. The argument that the arthroplasty was unreasonable because it is "investigational" and/or that fusion would have been a better choice for that reason is not persuasive in light of her results ("magnificent"), Dr. Stromberg's testimony, and Dr. Johnson's written opinions.

67. **TTDs.** Once a claimant establishes by medical evidence that she is within the period of recovery from the original industrial accident, she is entitled to total temporary disability benefits under Idaho Code § 72-408.

68. Claimant's TTDs ceased on September 1, 2021.[5] JE 34a:730. Claimant is owed TTDs from September 1, 2021 until her return to work on June 6, 2022.

69. **PPI.** 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. *See* Idaho Code § 72-422; *Henderson v. McCain Foods*, 142 Idaho 559, 567, 130 P.3d 1097, 1105 (2006).

70. Dr. Blair assigned Claimant a 7% PPI rating, with which Dr. Johnson agreed. Dr. Stomberg was critical of Dr. Blair's impairment rating because there was no apportionment for pre-existing conditions. Dr. Blair does agree that Claimant had pre-existing pathology, however, per Dr. Blair: "a 2-level arthroplasty is, by definition, a 7% whole person impairment." JE 24:101. Dr. Stromberg did not address Dr. Blair's response regarding the arthroplasty itself being the basis for the rating, just that there was no new injury to rate, only degenerative findings and subjective complaints. Dr. Stromberg is correct that the objective findings on imaging were pre-existing, but the only reason that condition required surgery was the accident per Dr. Blair's accepted opinion. Claimant is entitled to a 7% impairment rating, un-apportioned.

71. **PPD**. Permanent disability results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. Evaluation (rating) of permanent disability is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-

[5] Joint exhibit 34 is a ledger entitled "TTDs Owing" which begins with January 26, 2022, when Claimant had her surgery; it is not clear why the ledger's timeframe doesn't begin when Claimant was cut off benefits, but still within a period of recovery. JE:34.

430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). The claimant bears the burden of establishing permanent disability. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986). Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997).

72. Claimant has work experience as a performer, waitress, bartender, groundskeeper, restaurant manager, retail and rental customer service representative, and since 2011 has worked at Costco. See JE 8. Claimant has worked in multiple departments, in multiple roles, most often as a supervisor or manager. *Id.*

73. Based on Dr. Blair's restrictions, Mr. Porter's conclusion was that Claimant suffered PPD of approximately 27.9%. Ms. Layton's concluded Claimant suffered PPD of approximately 12%. Both vocational experts explained at deposition that the differences in their

results were due to utilizing different datasets and assumptions to calculate Claimant's pre-injury market. Mr. Porter identified about 11,000 jobs. Ms. Layton identified 8,000. It is unclear how much of the difference in these figures can be attributed to the different datasets vs. the different professional assumptions used to calculate her pre-injury market.[6]

74. Two relevant professional assumptions appear to account for some differences in the vocational experts' results. First, there is the fact that Mr. Porter included closely related jobs in his dataset. For example, Mr. Porter included fast food worker as a potential position because Claimant has experience in food preparation and retail even though she has never actually worked as a fast-food worker. JE 22:75. Ms. Layton did not include any closely related jobs, only jobs Claimant had prior experience in within her analysis. Second, Mr. Porter excluded more jobs than Ms. Layton from his post-injury labor market based on Dr. Blair's positional restriction against repetitive twisting and bending. Ms. Layton opined that Claimant still had access to all the same waitressing and bartending jobs post-injury despite this restriction which Mr. Porter was critical of in his deposition.

75. Mr. Porter's inclusion of closely related jobs makes sense in this factual scenario. If Claimant was qualified for, and physically capable of, performing the job prior to her injury, it makes sense to include that job in her pre and post injury labor market comparisons. Ms. Layton's criticism in general of this practice is valid; there are certainly ways to abuse and inflate pre-injury market numbers using "closely" related jobs. However, here the jobs Mr. Porter included as closely related make more sense to include in her labor market than to exclude; especially because some

[6] For example, Ms. Layton estimated 2,500 counter attendant jobs in Idaho Falls vs. 192 estimated by Mr. Porter. Compare with food managers, for which Ms. Layton estimated 40 jobs vs. Mr. Porter's estimated 331 jobs.

of Claimant's skills (retail sales, customer services, and retail management/supervision) are highly transferable.

76. Mr. Porter's analysis regarding her positional restrictions makes sense as well. Ms. Layton appears to have only used strength restrictions and no positional restrictions in analyzing Claimant's labor market. Mr. Porter explained that this is apparent in comparing their numbers for waitressing and bartending jobs because Ms. Layton saw no reduction in labor market access to those positions, but Mr. Porter did.[7]

77. At 44, Claimant is relatively young. She is highly skilled in management and retail, and lives in a geographic area with a favorable labor market. However, Claimant lost access to very heavy and heavy employment, which she was previously qualified to perform. Both vocational experts offered excellent reasoning and were very close in their conclusions. However, the slight differences in assumptions and analysis favor Claimant's expert's conclusions over Defendant's expert's conclusions. Claimant is entitled to 27.9% PPD considering her geographic area and her personal and economic circumstances.

CONCLUSIONS OF LAW

1. Claimant has proven she suffered an aggravation of her pre-existing condition;

2. Claimant is entitled to reimbursement at the *Neel*[8] rate for all past denied medical care;

3. Claimant is entitled to temporary disability benefits from the time her claim was denied until she reached maximum medical improvement;

4. Claimant is entitled to 7% permanent partial impairment;

[7] Ms. Layton did <u>not</u> testify that bartending and waitressing positions typically do not require repetitive bending and twisting. Def's Brief, p. 26.

[8] *Neel v. Western Construction Inc.*, 147 Idaho 146, 206 P.3d 852 (2009).

5. Claimant is entitled to 27.9% permanent partial disability inclusive of impairment;

6. All other issues are moot.

RECOMMENDATION

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

DATED this 5th day of May, 2025.

INDUSTRIAL COMMISSION

Sonnet Robinson

Sonnet Robinson, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the _23rd_____ day of __May_____, 2025, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ANGELA MANWELL, Claimant, v. COSTCO WHOLESALE, Self-Insured Employer, Defendant.	**IC 2021-001199** **ORDER** **FILED May 23, 2025** **IDAHO 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 she suffered an aggravation of her pre-existing condition;

2. Claimant is entitled to reimbursement at the *Neel*[1] rate for all past denied medical care;

3. Claimant is entitled to temporary disability benefits from the time her claim was denied until she reached maximum medical improvement;

4. Claimant is entitled to 7% permanent partial impairment;

5. Claimant is entitled to 27.9% permanent partial disability;

[1] *Neel v. Western Construction Inc.*, 147 Idaho 146, 206 P.3d 852 (2009).

6. All other issues are moot.

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

DATED this __23rd____ day of __May_____, 2025.

INDUSTRIAL COMMISSION

Claire Sharp

Claire Sharp, Chair

Aaron White, Commissioner

_Participated but declined to sign_____
Thomas E. Limbaugh, Commissioner

ATTEST:
Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of _May__ 2025, 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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