BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LORI KEELE, Claimant, v. CITIBANK, Employer, and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Surety, Defendants.	**IC 2013-034253** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED JANUARY 20, 2026 IDAHO INDUSTRIAL COMMISSION**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John Hummel, who conducted a hearing in Boise on November 7, 2024. Claimant, Lori Keele, was present in person; Taylor Mossman-Fletcher, of Boise, represented her. Mark D. Sebastian, of Boise, represented Defendant Employer, CitiBank, and Defendant Surety, Insurance Company of the State of Pennsylvania. The parties presented oral and documentary evidence, took post-hearing depositions and later submitted briefs. The matter came under advisement on December 12, 2025.

PROCEDUDAL HISTORY

As Claimant notes, the procedural history of this case is "extensive and complex" and comprises litigation over a period of nine years. The original injury date was December 22, 2013. Ex. 1:1. Surety approved the claim and several years of medical treatment, including a cervical surgery by Dr. Montalbano, ensued. Claimant filed a Complaint on September 23, 2016.

Extensive discovery proceedings then ensued. The first hearing was held on August 18, 2017 and was continued on December 20, 2017. Several post-hearing depositions of experts were then taken. Before the matter came under advisement, however, Claimant moved on January 28, 2020, to reopen the record for additional medical evidence and post hearing depositions, or in the alternative, to establish a briefing schedule. Defendants responded to this motion by agreeing to have parties engage in continued discovery and obtain additional expert opinions. On May 10, 2022, Claimant requested an emergency hearing on a bifurcated basis on the sole issue of whether Claimant was entitled to Dr. Montalbano's second recommended cervical surgery. The Referee granted an emergency hearing on this issue, which was held on July 12, 2022. Following this emergency hearing additional post-hearing depositions took place, and the matter came under advisement on January 4, 2023. On February 24, 2023, Referee Hummel issued a Findings of Fact, Conclusion of Law and Recommendation which the Commission adopted on the same date. The decision held that Claimant was entitled to coverage of the additional cervical surgery. Additional discovery and post hearing depositions ensued. The matter came to hearing again on November 7, 2024, on all remaining issues.

The record in this case is voluminous. The 71 exhibits, as supplemented, comprise some 18 volumes, amounting to thousands of pages of records. The record includes transcripts of four different hearing dates. The record also includes 17 depositions, including the depositions of Claimant and her husband and numerous expert witnesses.

ISSUES

The issues to be resolved as a result of the hearing are as follows:

1. Whether Claimant sustained an injury from an accident arising out of and in the course of employment;

2. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;
3. Whether Claimant's condition is due in whole or in part to a preexisting injury/condition.
4. Whether and to what extend Claimant is entitled to the following benefits:
    a. Medical care;
    b. Temporary partial and/or temporary total disability benefits (TPD/TTD);
    c. Permanent partial impairment (PPI);
    d. Permanent partial disability (PPD);
5. Whether Claimant is entitled to permanent total disability pursuant to the Odd Lot Doctrine or otherwise;
6. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804;
7. Whether Claimant's depression and/or anxiety is compensable pursuant to Idaho Code § 72-451.

CONTENTIONS OF THE PARTIES

Claimant contends that she suffered an industrial accident on December 22, 2013, a slip and fall accident in Employer's parking lot which resulted in injury to her cervical spine and consequential mental health injuries. She claims medical benefits for unpaid medical bills related to her cervical spine and mental health. She also claims medical benefits for future medical treatment to her cervical spine and for her mental health. She further claims temporary disability benefits beyond those already paid by Surety. She claims that coverage of her cervical spine treatment and benefits and mental health treatment and benefits is due without regard to any apportionment to preexisting conditions. Claimant claims additional permanent partial impairment (PPI) benefits. Claimant claims she is totally and permanently disabled due to the

industrial accident and thus claims benefits for total disability. Finally, Claimant claims she is entitled to attorney fees due to unreasonable denial of her workers' compensation benefits. *See*, Claimant's Opening Brief.

Employer and Surety covered Claimant's initial cervical surgery and accompanying medical treatment up to MMI, however they aver that Claimant suffered neck pain ever since she was in high school and college and that apportionment is appropriate. Defendants deny that the industrial injury was the predominant cause of her mental health injuries in the form of depression and anxiety and that Claimant's mental health issues both predated her industrial accident and were caused by other factors subsequent to the industrial accident that are unrelated to the accident. Defendants aver that the industrial accident only temporarily exacerbated Claimant's mental health condition and that the condition resolved by 2017 and that coverage for her mental health condition is attributable to preexisting and subsequent conditions. Defendants deny liability for additional medical benefits and temporary disability benefits. Defendants deny liability for additional permanent partial impairment (PPI) benefits. Defendants deny that Claimant is totally and permanently disabled as a result of the industrial accident, but Defendants aver that Claimant has a permanent partial disability (PPD) in the amount of 0% Finally, Defendants deny liability for attorney fees. *See*, Defendants' Responsive Brief.

Claimant replies that Defendants' Responsive Brief fails to refute the core arguments Claimant has made. In particular, most of Defendants' argument relies on apportionment which the Referee already rejected in the previous decision.[1] Claimant argues that her psychological injuries are recoverable pursuant to a reasonable reading of Idaho Code § 72-451. *See*, Claimant's Reply Brief.

[1] Nevertheless, in response to Defendants' due process concerns, these findings contain an independent

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony taken at the hearings dated August 18, 2017, December 20, 2017, July 12, 2022, and November 7, 2024;
3. Joint Exhibits 1- 71 as supplemented;
4. The deposition testimony of Claimant taken on April 10 and 11, 2017;
5. The deposition testimony of Eric Gabiola (Claimant's Husband), taken on February 14, 2017;
6. The deposition testimony of Robert H. Friedman, M.D., taken on February 14, 2018;
7. The deposition testimony of Olurotimi Ashaye, taken on February 26, 2018;
8. The deposition testimony of Rodde D. Cox, M.D., taken on April 18, 2018;
9. The deposition testimony of Craig W. Beaver, Ph.D., taken on April 19, 2018;
10. The deposition testimony of Paul Montalbano, M.D., taken on May 23, 2018;
11. The deposition testimony of Paul J. Montalbano, M.D., taken on July 19, 2022;
12. The deposition testimony of Michael V. Hajjar, MD, taken on September 7, 2022;
13. The deposition testimony of Robert H. Friedman, taken on January 29, 2025;
14. The deposition testimony of Delyn D. Porter, MA, CRC, CIWCS, taken on March 5, 2025;
15. The deposition testimony of Rodde Cox, M.D., taken on June 16, 2025;
16. The deposition testimony of Craig Beaver, Ph.D., taken on June 18, 2025; and

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analysis as to why apportionment is not appropriate.

17. The deposition testimony of Kourtney Layton, MRC, CRC, LVRC, ABVE/D, IPEC, CLCP, CIWCS-A, taken on July 15, 2025.

All objections stated in the post-hearing depositions are overruled.

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.

PREVIOUS FINDINGS OF FACT AND CONCLUSION OF LAW

This case was the subject of previous Findings of Fact, Conclusion of Law and Recommendation, filed February 24, 2023, and adopted by the Industrial Commission by its Order filed February 24, 2023. Accordingly, the previous findings of fact no. 1 through 92 and conclusion of law no. 1 through 2 are hereby incorporated by reference in this decision as though set forth in full. A copy of the February 24, 2023 Findings of Fact, Conclusion of Law and Recommendation and the Commission's Order are attached to this decision.

FINDINGS OF FACT

1. **Medical Treatment for Cervical and Mental Health Issues Prior to the Industrial Accident**. ***Cervical Issues.*** Claimant saw Dr. Stephen Marano for neck and shoulder pain on June 12 1995. Ex. 2:3-4. Claimant told Dr. Marano that she had had a gradual onset of the pain over the previous seven to eight years. Dr. Marano reviewed an MRI which a moderate sized disc rupture at C5-6, slightly more to the right. Ex. 2:3-4.

2. On July 31, 1995, Dr. Marano performed a fusion surgery on Claimant's neck, consisting of a C5-6 anterior discectomy and fusion. Ex.2:5.

3. In 1998, Claimant saw Dr. Sturkie at Urgent Care, St. Luke's Meridian, for pain in the interior part of her neck on the left side. Claimant reported taking Advil for occasional neck pain "but that really has not been bothering her." Ex. 4:219-220.

4. On December 13, 2006, Claimant reported some neck arthralgia which she attributed to her previous C5-6 fusion. Ex. 6:401.

5. Dr. Amy Baruch, M.D., treated Claimant on October 21, 2010 at Urgent Care, St. Luke's Meridian, for neck pain and weakness in her upper extremities. Ex. 4:221; Ex. 5:23. Claimant reported that she had been doing well until a month prior when she was at Disneyland, went on multiple rides, and began experiencing neck discomfort as well as heavy feeling in bilateral arms. Dr. Baruch discussed Claimant's case with Dr. Montalbano, the neurosurgeon on call, who thought there might be possible nerve irritation at C5-6. Ex. 4:221. X-rays indicated degenerative disc disease and disc space narrowing at C5-6. *Id*. at 222.

6. On August 2, 2011, Dr. James Weiss, M.D. noted that Claimant had neck pain for which she had a 16-year history. He referred Claimant to physical therapy. Ex. 3:22-24.

7. ***Mental Health Issues.*** On February 12, 1999, Claimant was treated in St. Luke's Emergency Room. Claimant reported a history of depression several years ago. Claimant was diagnosed with an atypical migraine. Ex. 5:233-234.

8. Claimant contacted her OB-GYN doctor on November 27, 2002. She asked whether there were any antidepressants she could take and indicated that she was seeing a mental health counselor. Ex. 6:384.

9. At an OB-GYN appointment on September 24, 2003, Claimant reported "acute

anxiety and insomnia." Ex. 6:388. It was noted that Claimant had divorced and had significant discord with her ex-husband and suffered "significant problems with insomnia, lack of energy, and acute anxiety exacerbations on a daily basis." Ex. 6:388.

10. On January 5, 2009, Claimant was treated in the St. Luke's Emergency Department for complaints of a heart flutter. Claimant admitted to having increased stress. Ex. 11:575-576.

11. **Industrial Accident**. Claimant suffered a slip and fall accident in Employer's parking lost on December 22, 2013, which is described in findings no. 15 and 16 in the previous Findings of Fact.

12. **Medical Care Following the Industrial Accident**. These findings will not repeat the findings from the previous Findings of Fact concerning Claimant's initial treatment for cervical issues following the industrial accident, including the treatment and surgery by Dr. Montalbano, which are described in Findings no. 17 through 48. Surety covered Claimant's initial fusion surgery performed by Dr. Montalbano but denied coverage of Dr. Montalbano's proposed second surgery. The previous decision held that Claimant was entitled to receive Dr. Montalbano's proposed second surgery.

13. ***Cervical Issues***. Claimant's recovery from her first cervical surgery with Dr. Montalbano appears to have been unremarkable. Claimant returned to light duty status for four hours per day with Employer on October 20, 2014, which was increased to eight hours per day on November 5, 2014. Ex. 15:712.

14. Upon referral from Dr. Montalbano, Dr. Rodde Cox, M.D., a physiatrist, evaluated Claimant on November 5, 2014. Ex. 22:920. Noting continuing cervical pain, Dr. Cox referred Claimant to physical therapy. Dr. Cox also recommended that Claimant wean herself off

of Norco, however when she returned to Dr. Cox on December 3, 2014, she had not reduced her use of narcotic medication. Ex. 22:925.

15. Dr. Montalbano noted that Claimant had reached medical stability concerning her cervical condition on December 3, 2015. Ex. 15:718. He returned her to work without restrictions on December 18, 2014. Ex. 15:717.

16. At a January 9, 2015 office visit with Dr. Cox, Claimant reported significant improvement in her neck pain but also reported that she was still taking narcotics. Ex. 22:928. Dr. Cox opined that Claimant no longer needed narcotics for her neck pain, but she might need it for her acid reflux. Ex. 22:928.

17. In an office visit with Dr. Cox on February 4, 2015, Dr. Cox noted that Claimant was doing reasonably well and that she was approaching medical stability from the standpoint of her neck. Ex. 22:932. Dr. Cox further noted that Claimant was undergoing Botox injections for her headaches but that this was not related to her industrial accident. *Id.*

18. Dr. Cox followed up with Claimant on April 7, 2015 for an impairment rating. Dr. Cox determined that Claimant was medically stable as to her neck. Ex. 22:933. He rated her as having a 15% whole person impairment as to her neck and could lift up to 35 pounds on an occasional basis but should avoid repetitive head turning. *Id*. Dr. Cox opined that Claimant's headache pain was not industrially related. Ex. 22:934. He apportioned 40% of her condition (6% WPI) as attributable to her 1995 neck fusion. Ex. 22:935.

19. Surety paid Claimant's impairment, as apportioned for preexisting conditions, as found by Dr. Cox. Ex. 47.

20. Claimant underwent an independent medical examination with Dr. Robert Friedman, M.D., at her request, on May 13, 2016. *See*, Ex. 18:847-853. As a result of the IME,

Dr. Friedman found that Claimant had sustained a 9% whole person impairment for her cervical spine attributable to the industrial accident, but that she had a 6% WPI due to her 1994 preexisting cervical fusion. *Id*. at 851. Dr. Friedman found that Claimant had significant mood and depression issues that predated her industrial accident. *Id*. at 852. He found that she had a 6% whole person impairment for mental health issues and apportioned 50% of this condition to preexisting her industrial accident. *Id*. at 851-852. Using the combining tables, this came to a total of 12% whole person impairment attributable to the industrial accident. Ex. 18:852.

21. For the period August 21, 2018 to November 20, 2018, refer to findings of fact 40 through 42, for Claimant's treatment by Dr. Montalbano of her cervical spine. Dr. Montalbano proposed another cervical fusion that would include removal of her prior anterior cervical buttress plate and extension of her fusion to levels C2-3, C3-4, and C45.

22. Surety denied coverage of Dr. Montalbano's proposed surgery. Ex. 46.

23. On April 17, 2023, Claimant underwent surgery extending her prior fusions performed by Dr. Montalbano and as authorized by the previous workers' compensation decision. Ex. 17-B:B83.

24. On May 10, 2023, three weeks post-surgery, Dr. Montalbano observed that Claimant was neurologically intact and had done quite well. Ex. 15-B:B21.

25. Claimant had an FCE at Intermountain Physical Therapy on September 25, 2023. Ex. 16-B:B59-82. Physical Therapist Peterson concluded that Claimant did not give her full effort, invalidating the results; Mr. Peterson believed that Claimant could perform better than she demonstrated in testing. Ex. 16-B:B63-64.

26. Dr. Montalbano reviewed the FCE results on September 27, 2023 and observed that a "valid effort was not identified." Dr. Montalbano referred Claimant to Dr. Cox for

permanent work restrictions and an impairment rating. Ex. 15-B:B31.

27. Upon referral from Dr. Montalbano, Dr. Cox performed an independent medical examination (IME) of Claimant on January 8, 2024. Ex. 22-B:B102-186. Dr. Cox reviewed Claimant's medical records and medical history. Ex. 22-B:B103-171. Dr. Cox concluded that Claimant was at MMI. Ex. 22-B:B176. Due to her additional neck fusion surgery, Dr. Cox concluded that she had a 17% whole person impairment for the neck, however the 6% whole person impairment attributable to Claimant's 1995 neck surgery remained the same. *Id.* Dr. Cox assigned Claimant permanent work restrictions of no lifting more than 25 pounds and avoiding repetitive head turning. Ex. 22-B:B177. The restrictions were apportioned equally between Claimant's 1995 neck surgery, her C5-7 fusion surgery, and the natural progression of degenerative changes in Claimant's cervical spine. *Id*.

28. ***Mental Health Issues.*** Claimant began mental health counseling at Words of Wisdom Counseling Center on February 10, 2014. Ex. 50:2305.

29. On March 11, 2014, Claimant's counselor at Words of Wisdom noted that Claimant was having "emotional distress because of the relationship problems she was having with her daughter and ex-husband, which further exacerbated her depression." *Id*.

30. Claimant was admitted to St. Luke's Emergency Department on December 29, 2014 for a migraine headache. Claimant reported that she had been "under tremendous stress." Ex. 5:330.

31. On January 2, 2015, Claimant was admitted to Safe Haven Hospital. Ex. 26:965-968. She was brought to the hospital by police due to suicidality. Her initial psychiatric assessment indicated that her psychiatric issues were related to her gastroesophageal issues and inability to obtain a refill of her Norco prescription. The doctor at Primary Health would not

refill her Norco prescription, so Claimant started catastrophizing and broke down. She told the Primary Health physician, "I might as well put a gun to my head." Ex. 26:965. Claimant's psychiatric history noted at Safe Haven indicated that she was seeing a therapist at Words of Wisdom, she had a history of being on SSRI medication after the birth of her daughter, and she started Citalopram "before she went on the Cymbalta after her daughter got raped." Ex. 26:966. Claimant denied a history of anxiety although she had been treated for it since 2003. *Id*. Claimant was diagnosed with major recurrent depressive disorder. Ex. 26:967.

32. Janet Strong at Omega Mental Health evaluated Claimant on January 20, 2015. Ms. Strong noted that Claimant had been at Safe Haven due to suicidality associated with pain because her Norco prescription had not been refilled. Ex. 27:1009. Ms. Strong further noted that Claimant's 14-year-old daughter had been raped the prior year and had attempted suicide; Claimant's ex-husband had filed in family court for custody of their daughter; and that Claimant's father, whom she had been caring for, died in June from cancer. *Id*. Claimant expressed feelings of guilt about parenting. *Id*. Ms. Strong diagnosed Claimant with chronic pain and major depressive disorder. Ex. 27:1011.

33. Dr. Ashaye saw Claimant on February 3, 2015, concerning her headaches. He noted ongoing esophageal issues, including ulcers. Ex. 24:955. He reported that because of her ongoing pain and the death of her father in June 2014, Claimant reported suicidal ideation for which she was briefly hospitalized. *Id*. Dr. Asher's diagnosis was that Claimant suffered from multifactorial depression with recent suicidality and nonspecific headache disorder, possibly migraine. *Id*. at 956.

34. In a follow-up appointment at Omega Mental Health on February 17, 2015, Claimant expressed feelings of giving up, that she would like to be with her father in heaven, and

that she was mad at God for "breaking" her. Ex. 27:1015.

35. Omega Mental Health noted on March 19, 2015 that Claimant had gone to Lucky Peak Reservoir to jump off the bridge. Claimant stated that she could deal with the pain from her stomach issues but that her sinus pain was unbearable. Ex. 27:1019. She also reported she had recently traveled to Spokane to care for her sister who was ill. *Id*.

36. Claimant reported to Midvalley Healthcare on March 26, 2015 for pain management. It was noted in pertinent part as follows:

> Ms. Keele reports that the last year has been a hard year for her. She reports that she loves her job of 17 years and has no complaints about it. She reports February of last year her 14-year-old daughter was raped. In April of 2014, her father who was her mentor and rock of life passed away. She was battling her ex over custody of their daughter which was very stressful. Her daughter wanted to live with her dad but she was able to negotiate some safety plans for her. September of 2014, she underwent her first surgery. After her father died, she became severely depressed.

Ex. 29:1033. It was further noted that Claimant had just gotten back from a three week stay with her sister in Washington who was dying of cancer and kidney failure and had been given only one week to live. *Id*. Claimant further reported that she had been diagnosed with post-partum depression after the birth of her youngest daughter, started on anti-depressant medication at that time, and had been attending counseling the prior year. *Id*. Claimant's daughter had attempted suicide by cutting her wrists. Ex. 29:1034. Claimant was positive for anxiety and depression. Ex. 29:1035. Claimant was to begin group therapy. *Id*.

37. On March 31, 2015, Claimant reported to Omega Mental Health that her sister had died. Ex. 27:1021. Her feelings of sadness and worthlessness had increased. *Id*. Her diagnosis was major depressive disorder. Ex. 27:2021.

38. On April 20, 2015, Claimant told her counselor at Midvalley Health that she had been depressed for a long period of time due to chronic pain in her neck and sinus, and that her

suicidal ideations the prior year were when her father died. Ex. 29:1053.

39. On May 4, 2015, Claimant reported to Midvalley Health that she had sat in the shower with a gun contemplating suicide. She requested antianxiety medication. Ex. 29:1066.

40. Omega Mental Health noted on June 1, 2015, that "Midvalley has helped," and that Claimant was in counseling. Ex. 27:1023.

41. Claimant told her counselor at Midvalley Health on June 3, 2015 that it was the one-year anniversary of her father's death and that she was struggling to cope with that situation. Ex. 29:1120.

42. On June 19, 2015, Claimant contacted Midvalley Health and requested that she be put back on Suboxone. Dr. Ashaye put her back on Suboxone. Ex. 29:1130.

43. Claimant in an office visit with Omega Mental Health on July 7, 2015 stated that she had had a setback. Her depressive symptoms were chronically present and her anxiety symptoms had increased. Ex. 31:1437-1438.

44. Claimant reported to Midvalley Health on August 7, 2015 that her pain doctor had fired her because she broke her pain contract and started taking Suboxone. Ex. 29:1157.

45. Claimant reported to the emergency room of Saint Alphonsus Hospital on August 31, 2015 because of an episode of serious vomiting. Ex. 10:496.

46. On September 12, 2015, Claimant reported to Midvalley Health that she was stressed out about her older daughter's upcoming wedding, so she restarted her Ativan. Ex. 29:1175.

47. NP Regina Theisen noted on October 5, 2015 that Claimant "continues to struggle with depression as a result of her physical complaints," adding that: "She takes Cymbalta on a regular basis. She participates in weekly counseling therapy as well as a local support group. She

feels that all of this is helpful, but she feels that ultimately surgery with a full Nissen fundoplication is what will be beneficial for her." Ex. 20:882.

48. Dr. Ashaye saw Claimant on December 2, 2015, for an "urgent appointment" because Claimant's cat of 12 years had died. Dr. Ashaye advised Claimant to take her Ativan on an as-needed basis. Ex. 29:1203.

49. Claimant reported to Midvalley Healthcare on January 12, 2016 that her depression and anxiety had lately increased; she had to put her dog to sleep and was having thoughts about her father and sister. Ex. 29:1211.

50. On January 22, 2016, Claimant reported to Dr. Ashaye that she was struggling with Seasonal Affective Disorder which had increased her depressive symptoms. Ex. 29:1214. Dr. Ashaye prescribed Wellbutrin but also continued her on Cymbalta, Suboxone and Ativan at an increased dosage. Ex. 29:1214.

51. On February 12, 2016, Claimant reported to Dr. Ashaye that she was having a lot of anxiety about returning to work full-time. Dr. Ashaye recommended that she work no more than 20 hours per week for at least the next 3 to 6 months. Ex. 29:1222.

52. A therapy note from March 2, 2016 indicated that the focus of the session was Claimant's emotions concerning her father-in-law dying and emotions about her own father's death. Ex. 29:1226. These were also issues at her March 16, 2016 therapy session. Ex. 29:1235.

53. Records from Midvalley Health indicate that on March 29, 2016 Claimant was struggling with her 16-year-old daughter's behaviors, suicidal ideation and depression as well as her father-in-law's death which brought back memories of her father's death. Ex. 29:1238.

54. On July 6, 2016, Claimant's therapy session was focused on Claimant's older daughter and struggling to help her accept treatment. Ex. 29:1256. Claimant continued to report

stress about her daughter at her July 19, August 3, August 11, August 31, and September 1, 2016 sessions. Ex. 29:1260-1275.

55. Claimant reported stress due to menopause to Dr. Ashaye on October 10, 2016. He was going to put her on a trial of Adderall. Ex. 29:1284.

56. Claimant reported continued stress due to menopause and her daughter at her appointments with Dr. Ashaye on October 20 and 24, 2016. Ex. 29:1290-1291.

57. At her January 23, 2017 appointment with Dr. Ashaye, Claimant reported still struggling with depressive symptoms which she thought was due to her menopause. Ex. 29:1318.

58. On May 2, 2017, Claimant reported to her counselor at Midvalley Healthcare that the onset of her depression was after her daughter was born, at which time she started taking Prozac and saw a counselor for a short period of time. She had also had some mental health counseling during her divorce. Claimant indicated that her depression had increased after her industrial accident but also that her father had passed away in June 2014 and her sister died in March 2015. Ex. 29:1358.

59. Claimant underwent an independent neuropsychology examination with Dr. Craig Beaver, PhD, on April 19, April 20, and May 4, 2017, at the request of Defendants. Dr. Beaver produced a report dated May 17, 2017. Ex. 36:1604. Based upon his examination and her medical history, Dr. Beaver opined that Claimant suffered from the following diagnoses: major depressive syndrome, recurrent; somatic symptom disorder, severe; and cluster B personality issues. Ex. 36:1642-1644. Although Claimant did not consider herself depressed prior to the industrial accident, Dr. Beaver found that she reported symptoms of major depression back to 2002, well before her industrial accident. Ex. 36:1642. Dr. Beaver opined that the December 2013 industrial accident was not the predominant cause of her psychological conditions and that

"other events, including the deaths of her father, father-in-law, and sister contributed to her emotional distress." Ex. 36:1644. Dr. Beaver determined that Claimant's work accident was only responsible for a third of her psychological impairment – a 5% whole person impairment – with the remaining 10% unattributable to the industrial accident. Ex. 36:1645. Although Dr. Beaver opined that Claimant required additional mental health treatment, he opined that she was at MMI as to the industrial accident and that any future mental health treatment was unrelated to the industrial accident. *Id*. Furthermore, Dr. Beaver noted that Claimant was able to tolerate a full day of interviewing and testing which indicated that she could return to her work on a full-time basis; Claimant had no restrictions from returning to her full, 40-hour per week job schedule based upon her psychological or neuropsychological conditions. Ex. 36:1646.

60. On July 10, 2017, Dr. Ashaye told Claimant that psychiatrically she was discharged from treatment and was probably able to go back to work. Ex. 29:1407.

61. Claimant underwent another neuropsychological independent examination at her own request with Dr. Jason Gage, PhD, who issued a report on July 25, 2017. Ex. 37:1656. Dr. Gage found that Claimant had a pre-accident history of some depressive and anxiety episodes consistent with the medical record, and that pre-accident and post-accident stressors include the infidelity and divorce from her husband; deaths of family members including her father, father-in-law, and sister; and difficulties with her daughter which included rape and self-harm. Ex. 37:1657. Dr. Gage found it questionable that Claimant had major depressive disorder prior to the December 2013 industrial accident, nevertheless he acknowledged that she "met the criteria for a mild depressive disorder with peripartum onset prior to the industrial accident." Ex. 37:1666. Dr. Gage found that Claimant had only once threatened self-harm and that she denied paranoia "other than possible suspicions about mistreatment at work." Ex. 37:1670. Dr. Gage found that

Claimant was at MMI as to her psychological issues resulting from the December 22, 2013 industrial accident. Ex. 37:1669. He assigned her a 6% whole person impairment as a result of the industrial accident with no permanent restrictions. *Id*.

62. On November 6, 2017, Claimant told Dr. Ashaye that her daughter had relapsed on heroin, which made her feel more anxious. Ex. 29-A:A299.

63. On November 20, 2017, Dr. Ashaye released Claimant to return to work part time with no restrictions for the next 6 months. Ex. 29-A, A300.

64. On December 18, 2017, Claimant told Dr. Ashaye that psychiatrically she was as stable as can be but was ready to put her workers' compensation proceeding behind her. Ex. 29A:A303.

65. Claimant told Dr. Ashaye on July 31, 2019 that she was having marital difficulties because she found out that her husband was in an "emotional relationship." She and her husband were undergoing couples' counseling. Ex. 29-A:A338.

66. On August 13, 2019, Claimant told Dr. Ashaye that she had increased suicidal ideation and had contemplated suicide with a handgun. Ex. 29-A:A340.

67. Claimant was then admitted to Intermountain Hospital due to her suicidal ideation. Ex. 56:2378. Intake records indicated that Claimant was depressed and anxious due to marital stress. *Id*. The Intermountain Hospital assessment indicated that she had hypothyroidism, osteoarthritis, GERD, opiate use disorder, radial neuropathy, depression and anxiety, and attention deficit disorder. Ex. 56:2380.

68. Dr. Ashaye's August 14, 2019 psychiatric evaluation found that Claimant had struggled with depression for several years, that she had recently learned that her husband was cheating on her, that she had work difficulties, and that she had tried to commit suicide. Ex.

56:2384. Dr. Ashaye observed that Claimant had a strong biogenetic disposition to psychiatric illnesses. Ex. 56:2385.

69. On January 21, 2020, Claimant reported increased depressive symptoms to Dr. Ashaye. He noted that her depression "could be due to her thyroid." Ex. 29-A:A349.

70. Claimant told Dr. Ashaye on June 16, 2020 that she had been struggling since the death of her dog on the prior week. Ex. 29-A:A357. At their June 30, 2020 appointment, Claimant repeated to Dr. Ashaye that she was still struggling due to the death of her dog. Ex. 29-A:358.

71. Claimant told Dr. Ashaye on July 14, 2020 that she had anxiety related to the coronavirus pandemic. Ex. 29-A:A359.

72. On July 28, 2020, Claimant told Dr. Ashaye that her mother's passing had been extremely difficult for her. Ex. 29-A:A360.

73. Claimant told Dr. Ashaye on November 9, 2020 that she was still having anxiety due to the coronavirus pandemic. Ex. 29-A:A366.

74. **Social Security Decision.** On November 4, 2021, a Social Security Administrative Law Judge ruled on Claimant's application for SSD benefits, awarding her benefits based upon the following impairments: lumbar degenerative disease, cervical degenerative disc disease status post-fusion, left thumb joint arthroplasty, bilateral hand osteoarthritis, obesity, and peripheral neuropathy. Ex. 67-B:B339. The decision noted that Claimant had not engaged in substantial gainful activity (employment) since August 3, 2019. *Id*. The ALJ found that Claimant's primary impairment was her cervical degenerative disc disease. *Id*. at B340. The ALJ further found that "the Claimant's neck fusion with anterior approach has caused speech/voice deficits." *Id.* The ALJ further found that the "demands of the claimant's past

relevant work exceed the residual functional capacity due primarily to an ability to speak only occasionally." Ex. 67-B:B341. Claimant was determined to have been under a disability as defined by the Social Security Act since August 3, 2019. *Id.*

75. **Vocational Assessments.** ***Delyn D. Porter, M.A., CRC, CIWCS***. Delyn D. Porter issued an initial vocational assessment and disability evaluation on May 30, 2017, at the request of Claimant. Ex. 44:1859. Mr. Porter's credentials are known to the Industrial Commission. His curriculum vitae may be found in the record at Ex. 44:1856-1858.

76. Mr. Porter conducted an intake interview with Claimant on May 16, 2017. Ex. 44:1859. Claimant was 49 years old at the time of interview and weighed approximately 140 pounds, 5 foot 4 inches tall. She acknowledged a history of mental health issues and suicide attempts. She continued to suffer from chronic pain in part related to her cervical spine. Mr. Porter observed Claimant to have "some emotional instability" as Claimant became tearful at times during the interview. Mr. Porter noted that Claimant was a good historian and that there did not appear to be any evidence of malingering or secondary gain. Claimant's current employment with Employer was classified as sedentary. Claimant reported some difficulties in performing the essential functions of her job with Employer, especially as it came to head turning to view her computer screens. At the time of the interview, Claimant was restricted to 20 hours per week of work by Dr. Ashaye, however she was on short-term disability leave. Claimant reported struggling with chronic pain and depression. Ex. 44:1881-1883.

77. As part of his initial review, Mr. Porter reviewed medical records dating from June 12, 1995 to May 13, 2016. Ex. 44:1861-1878.

78. Claimant's educational history consists of graduating from high school at Hoover High School in Fresno, California, in 1996, followed by one year of college at Fresno State

University from 1996 to 1997. Ex. 44:1879.

79. Mr. Porter observed that Claimant had a significant history of mental health issues that were exacerbated by the industrial accident. At the time of the vocational evaluation, Claimant was receiving mental health treatment through Mid Valley Health Care and Omega Mental Health. Dr. Ashaye was Claimant's treating physician for mental health. *Id*. at 1880.

80. Claimant denied any previous industrial accidents to Mr. Porter, however she did report a history of prior neck injury and surgery in 1995. *Id.*

81. Mr. Porter assigned the following occupational titles to Claimant's employment history: customer service representative (financial); salesclerk (retail trade); hotel clerk; and fast-food worker. *Id*. at 1884-1885.

82. Mr. Porter determined that Claimant had worked in occupations ranging from unskilled to skilled employment. Her then-current employment with Employer was skilled. *Id*. at 1886.

83. As for assigned permanent partial impairment/permanent work restrictions, Mr. Porter noted that Dr. Cox on April 7, 2015 assigned Claimant a 15% whole person impairment with no apportionment. He assigned permanent work restrictions of up to 35 pounds occasional lifting and avoiding repetitive head turning. In response to a letter from Surety, Dr. Cox changed his opinion on apportionment and assigned 6% of the 15% impairment rating to preexisting conditions and 9% due to the industrial accident. Ex.44:1887.

84. Mr. Porter further noted that on September 2, 2015, Dr. Ashaye released Claimant to work part-time, 20 hours per week. Dr. Ashaye recommended that Claimant continue working part-time. Ex. 44:1888.

85. Mr. Porter further noted that Dr. Friedman agreed with Dr. Cox's 9% whole

person impairment rating for the cervical injury due to the industrial accident. He also noted that Dr. Friedman opined that Claimant's reflux condition was not related to the industrial accident. Mr. Porter further noted that Dr. Friedman assigned a 6% whole person impairment for depression with 50% apportioned to preexisting conditions and 50% attributed to the industrial accident. Overall, therefore, Dr. Friedman opined a 12% whole person impairment attributable to the industrial accident. Mr. Porter further noted that Dr. Friedman opined that Claimant may continue to work with light duty restrictions to include lifting 35 pounds occasionally and 20 pounds repetitively; no repetitive head turning; and limit over the shoulder activities to no greater than 20 pounds. Mr. Porter noted that Dr. Friedman deferred to Dr. Ashaye regarding psychiatric medical restrictions. Ex. 44:1888.

86. Mr. Porter identified a 50-mile radius from Boise, Claimant's place of residence, as her labor market. *Id*. at 1891.

87. Mr. Porter opined that prior to the industrial accident, Claimant was capable of all of the essential functions of her job with Employer and was capable of working full-time without difficulty. *Id*.

88. Based upon his labor market analysis, Mr. Porter determined that Claimant, on a pre-injury basis, had access to and was qualified for approximately 15.75% of the total jobs in her labor market. *Id*. at 1892.

89. Based upon the work restrictions identified by Dr. Friedman and Dr. Ashaye, Mr. Porter opined that Claimant was restricted to LIGHT-MEDIUM physical demand employment. *Id*.

90. Mr. Porter opined that Claimant's time of injury position required frequent repetitive head turning using the telephone system and two computer monitors at her

workstation. Based upon this information, Mr. Porter opined that Claimant was unable to continue in her time of injury position without accommodation or work modifications. Ex. 44:1893.

91. Based upon the assigned work restrictions from Dr. Friedman and Dr. Ashaye, Mr. Porter opined that Claimant would continue to have access to 9.25% of the total jobs in her labor market. This would result in a 39.7% loss of labor market access post-injury for Claimant. *Id*.

92. Mr. Porter concluded that Claimant's calculated pre-injury wage-earning capacity was $34,513.70 annually. *Id*.

93. Because Claimant was restricted to working 20 hours per week by Dr. Ashaye, she has been restricted to part-time employment since October 2015. Based upon a 20-hour work week, Mr. Porter concluded that Claimant now had current earnings of $18,418.40 annually. *Id*. at 1894.

94. Mr. Porter concluded that Claimant had sustained a post-injury wage earning capacity loss of 65.7%. This was based upon the difference between the calculated pre-injury wage-earning capacity and Claimant's current wage-earning capacity doing part-time work. Mr. Porter further concluded that Claimant's overall post injury wage earning capacity loss is calculated to range from 46.6% to 65.7%. *Id*.

95. Mr. Porter noted that Claimant has been assigned permanent work restrictions by Dr. Friedman and Dr. Ashaye which has resulted in restrictions to part-time, light, medium, medium physical demand employment. This has resulted in a loss of labor market access and wage-earning capacity for Claimant. *Id*. at 1896.

96. Based upon Mr. Porter's calculations, Claimant has sustained a 39.7% of labor

market access post-injury and a 45.6% wage earning capacity loss. Using the medical opinions of Dr. Friedman and Dr. Ashaye, Mr. Porter concluded that Claimant has thus sustained a permanent partial disability (PPD) of 43.2%, inclusive of impairment. *Id.* On the other hand, using the calculated wage-earning capacity loss for other employment in the Boise area, Mr. Porter determined that Claimant had sustained a permanent partial disability (PPD) of 52.7%, inclusive of impairment. Ex. 44:1896.

97. On May 15, 2024, Mr. Porter authored an addendum vocational evaluation report based upon circumstances and medical records since his initial evaluation. *See*, Ex. 44B:B249.

98. Mr. Porter reviewed additional medical records generated between February 20, 2017 and February 1, 2024. Ex. 44B:B250-267.

99. Mr. Porter also reviewed Claimant's Social Security Administrative Notice of Award Letter (November 13, 2021); Social Security Administration exhibits; the vocational evaluation report issued by Douglas Crum, CDMS, dated August 3, 2017; and the vocational evaluation report authored by Kourtney Layton on February 14, 2024. *Id*. at B250.

100. Mr. Porter noted that Claimant had participated in additional medical restoration services since his prior opinion. Based upon the updated opinions of Dr. Cox, Mr. Porter determined that Claimant was limited post-injury to LIMITED LIGHT-MEDIUM physical demand work. He further noted that Dr. Montalbano restricted Claimant to LIGHT physical demand work. Using the restrictions outlined in the FCE report, Claimant was limited to SEDENTARY physical demand work. Using the work assessments of Dr. Ashaye and Laci Bauer, FNP-C, Claimant would be limited to LIMITED SEDENTARY work capacity. *Id*. at B269-B270.

101. Mr. Porter concluded that Claimant had access, pre-injury, to approximately

26,386 jobs in her labor market area. Excluding those jobs that were identified as noncompatible with her work restrictions by Dr. Cox, Claimant had, post-injury, access to approximately 17,475 jobs in her labor market area. This resulted in a labor market loss of 33.8% post injury. Ex. 44:B271.

102. Mr. Porter noted that Dr. Montalbano referred Claimant for completion of an FCE, however the results of the FCE were invalid due to Claimant's lack of effort. The FCE therapist concluded that Claimant was capable of LIGHT duty employment based upon her ability to lift 15 pounds floor to waist. Using the overall restrictions identified in the FCE report, Claimant would be limited to SEDENTARY physical demand employment. *Id.* at B271.

103. Excluding those jobs from the pre-injury analysis that are not compatible with the restrictions identified in the FCE report, Mr. Porter concluded that Claimant had a post-injury labor market of approximately 4,228 jobs. This has resulted in a labor market access loss of 84%. *Id.*

104. Based upon the restrictions and limitations identified in Dr. Ashaye's Mental Residual Functional Capacity Assessment and Medical Assessment of Ability to Do Work-Related Activities (Physical) of Laci Bauer, FNP-C, Mr. Porter concluded that Claimant would be restricted from almost all competitive work settings, rendering her totally and permanently disabled under the odd lot doctrine. *Id.* at B273.

105. Using the median wages identified by Ms. Layton, Mr. Porter concluded that Claimant had sustained a post-injury partial wage-earning capacity loss of 19.6%. *Id*.

106. Mr. Porter noted in pertinent part as follows: "Ultimately, Ms. Keele continues to struggle with documented, chronic, severe neck pain and ongoing mental health issues that would make a return to competitive full-time employment difficult, if not impossible." *Id*. at

B277.

107. Based upon the medical opinions and comprehensive assigned restrictions from Dr. Cox, Mr. Porter concluded that Claimant has sustained a calculated 33.8% labor market loss and her wage-earning capacity loss using the average median post-injury wage is 19.6%. *Id*.

108. Mr. Porter concluded that using Claimant's vocational profile and the medical opinions of Dr. Cox, and giving equal weight to loss of labor market access and wage-earning capacity loss, Claimant has sustained a Permanent Partial Disability (PPD) of 26.7%, inclusive of impairment. *Id.*

109. Considering the restrictions outlined in the FCE, Mr. Porter concluded that Claimant has sustained a labor market loss of 84%. This means that she is unable to return to work in 84 out of every 100 jobs that she qualified for prior to the industrial accident in 2013. *Id*.

110. Mr. Porter noted that Claimant has had minimal work experience since the 2013 industrial accident. She attempted to return to work for Employer but because of her ongoing residual difficulties and ongoing medical and mental health care, her return to work was unsuccessful. Claimant was now 56 years old and considered an "older worker" who would face job discrimination in any job search. Because of ongoing medical and mental health treatment, Claimant would have difficulty maintaining attendance for competitive work settings. *Id*. at B278.

111. Per the FCE, Mr. Porter concluded his supplemental report by noting that when Claimant's present functional levels and residual deficits, combined with her non-medical factors including her absence from the workforce for 13 years, her current age, and her inability to sit and work at a computer for long periods of time, are considered, Claimant's actual opportunities to return to successful employment within her vocational profile would be minimal to

nonexistent. Based upon this, and the additional medical and other records reviewed, Mr. Porter concluded that Claimant meets the definition of total and permanent disability under the Odd-Lot Doctrine. Ex. 44:B279.

112. ***Kourtney Layton Vocational Assessment.*** At the request of Defendants, Kourtney Layton, MRC, CRC, LVRC, ABVE/D, IPEC, CLCP, CIWSC-A, delivered a Vocational Evaluation, Transferable Skills Analysis, and Labor Market Access Report concerning Claimant on February 14, 2024. Ex. 71:05298. Ms. Layton's credentials are known to the Industrial Commission. Her curriculum vitae can be found in the record at Ex. 71:5292-5297.

113. An intake interview with Claimant was conducted on January 22, 2024. Ex. 71:5300.

114. Ms. Layton's methodology used to conduct the vocational assessment was the RAPEL methodology. *Id*. at 5301-5302.

115. Ms. Layton reviewed Claimant's medical records from December 20, 1997 through February 3, 2023. *Id*. at 5304-5305.

116. Ms. Layton reviewed various expert reports including those of Dr. Cox, Dr. Beaver, Dr. Gage, Dr. Hajar, Dr. Garabedian, Dr. Rubery, and Dr. Andersen. *Id*. at 5305.

117. Ms. Layton reviewed various documents from Claimant's claim, including transcripts of hearing, answers to discovery, depositions of various experts, and the February 24, 2023 Findings of Fact, Conclusion of Law and Recommendation and Order. *Id*. at 5306.

118. The report of Ms. Layton considered Claimant's vocational history, which was described as occurring in light exertional level employment ranging from skilled to semi-skilled to unskilled. Id. at 5307.

119. The bulk of Ms. Layton's report summarized Claimant's relevant health care from

December 20, 1997 to January 8, 2024. Ex. 71:5309-5428.

120. As part of Ms. Keele's Residual Functional Capacity analysis, Ms. Layton reviewed impairment ratings and work restrictions assigned by Dr. Cox, Dr. Friedman, Dr. Beaver, Dr. Gage, Dr. Hajar, and Dr. Montalbano. Id. at 5429-5433.

121. Ms. Layton conducted a Transferable Skills Analysis. *See*, *Id*. at 5434-5438. Pursuant to this analysis, Ms. Layton considered Claimant to have access to approximately 18,900 jobs in her relevant labor market prior to the subject injury. Post injury, Claimant had access to 18,829 jobs, a loss of .38%. *Id*. at 5436.

122. Ms. Layton considered Claimant's wage potential. She was determined to have earned $17.90 per hour in her time of injury occupation with Employer. Post-injury, Claimant would have access to jobs paying in the range of $11.32 per hour to $19.55 per hour. As such, Ms. Layton determined that Claimant did not have a loss of earning capacity. *Id*. at 5438.

123. Ms. Layton discussed Claimant's losses as follows: She does not have a loss of earnings capacity. "Scenario I: Dr. Friedman, May 13, 2016; Dr. Cox, April 22, 2015 and January 8, 2014. Claimant would have access to approximately 18,900 jobs, pre-injury, and 18,829 jobs, post injury. Under this scenario, Claimant would have a 0.19% Disability. Scenario II: Dr. Beaver on May 17, 2017; Dr. Gage on July 25, 2017; Dr. Hajjar on February 5, 2019; and Dr. Montalbano on February 22, 2022. Claimant would have access to approximately 18,900 jobs in her labor market, pre-injury and access to the same number of jobs, post-injury. Under this scenario, Claimant would have a 0% Disability. Considering these scenarios jointly, Claimant's loss of labor market x earnings capacity loss is in the range from 0% to 0.19%, inclusive of impairment. If rounded down, the 0.19% figure is equivalent to 0%." Ex.71:5439.

124. **Expert Depositions**. ***Robert H. Friedman, M.D., February 14, 2018.*** The

deposition of Dr. Friedman was taken on behalf of Claimant on February 14, 2018. Friedman Dep. (2/14/18) at 2. The Commission is familiar with Dr. Friedman's credentials. At the time of deposition Dr. Friedman was the director of the Idaho Elks Rehabilitation Hospital and practiced medicine as a physiatrist. *Id*. at 5.

125. At Claimant's request, Dr. Friedman conducted an independent medical evaluation (IME) of Claimant dated May 13, 2016. *Id*. at 8:15-17.

126. In Claimant's case, Dr. Cox had already issued an impairment rating of 15% whole person. *Id*. at 13:24-25. Dr. Friedman "didn't relate any of the symptoms I was seeing her at that time [during the IME exam] from the previous fusion." *Id*. at 15:9-10.

127. Dr. Friedman explained his rationale for giving Claimant an impairment rating relating to her depression as follows: "Well, depression is a common problem with patients who have chronic disease processes, especially chronic pain. I do a lot of chronic pain management. It's my expectation that my chronic pain patients should be depressed." *Id*. at 16:18-22.

128. Dr. Friedman apportioned Claimant's depression impairment based upon preexisting conditions. *Id*. at 21:1-4. He further testified that he thought Claimant had always had some underlying depression. *Id*. at 21:14-15.

129. Dr. Friedman opined that some of the headaches Claimant had experienced since the industrial accident were related to the accident and some were not. "She's had headaches for a long time, and she clearly has had headaches that were worsened as a result of the industrial accident." *Id*. at 22:22-23:1. He testified that she has had two types of headaches as follows: "tension headaches and those as a result of the industrial injury." Friedman Dep. (1/14/19), 23:4-6.

130. Dr. Friedman testified that the radiofrequency ablations that Claimant received

were industrially related. Friedman Dep. (2/14/18) at 25:1.

131. In his report, Dr. Friedman stated that future reasonable medical treatment for Claimant may include radiofrequency ablations. *Id*. at 28:25.

132. Dr. Friedman testified that Claimant was at a higher risk for the need for multilevel fusions to her cervical spine. *Id*. at 29:15.

133. Dr. Friedman testified that due to the lack of significant medical records concerning treatment for Claimant's neck after 1995 fusion and up to her 2013 accident, that it "suggests that her initial surgery was completely curative or more likely – and her records show improved her sufficiently that her symptoms at that time were acceptable and she did not seek additional medical care." *Id*. at 32:16-20. Claimant's cervical symptoms after the industrial accident would be attributable to her industrial injury. *Id*. at 32:22-23.

134. Dr. Friedman testified that future pain management, including radiofrequency ablations, would be reasonable and medically related to the industrial accident. *Id*. at 33:1-4.

135. Dr. Friedman's opinion on Claimant's impairment for mental health issues was that it was 50% preexisting and 50% her industrial disc injury. *Id*. at 38:9-12.

136. Dr. Friedman testified that since her time of injury job with Employer did not require any lifting as part of her job requirements that his lifting restriction didn't matter to her. *Id*. at 43:11-17.

137. Dr. Friedman deferred to Dr. Ashaye as to a 4 hour per day limitation for Claimant. *Id*. at 43:21-44:4. He would not give her time restrictions due to her physical issues related to the cervical spine. *Id*. at 44:10-11.

138. Dr. Friedman reviewed a report from Dr. Beaver. *Id*. at 49:14-16.

139. ***Deposition of Dr. Friedman taken January 29, 2025.*** Dr. Friedman's deposition

was taken a second time at the request of Claimant on January 29, 2025. Friedman Dep. (1/29/2025) at 2.

140. Dr. Friedman had not seen Claimant since his IME of May 13, 2016, over eight years prior to his January 29, 2015 deposition. *Id*. at 11:19-23. Nevertheless, he received and reviewed updated medical records related to Claimant since his IME. *Id*. at 12:1. Dr. Friedman testified that he felt he had a good insight on the medical treatment that Claimant has received since his IME. *Id.* at 13:3-6.

141. Dr. Friedman testified that Claimant's mechanism of injury in the industrial accident would have caused her neck/headache problems. *Id*. at 19:2-3.

142. Dr. Friedman testified that in the medical records he reviewed, "don't talk about symptoms in her neck until after the injury." *Id*. at 21:5-8.

143. Dr. Friedman testified that Claimant medically required her C6-7 fusion performed by Dr. Montalbano after the industrial accident. *Id*. at 21:19-20. Nevertheless, the surgery was also required because her previous fusion by Dr. Marano in 1995 hadn't fused. *Id*. at 21:24-25.

144. After Dr. Montalbano performed the C5-C7 fusion on Claimant's neck in 2014, Claimant remained symptomatic, reflecting degenerative-disease type pain, with some improvement due to radiofrequency ablation. Dr. Friedman did not identify an ongoing radicular complaint for Claimant. *Id*. at 24:17-23. Dr. Friedman associated those symptoms with Claimant's 2013 injury and the 2014 fusion. Friedman Dep. (1/29/2025) at 24:24-25:1.

145. Dr. Friedman related the need and recommendation for radiofrequency ablations to the 2013 industrial injury and 2014 fusion. *Id*. at 26:13-16.

146. Claimant received other treatments besides radiofrequency ablations, including

other injections, physical therapy and pain management, including medication. Dr. Friedman related those treatments to the 2013 industrial injury and 2014 fusion. Friedman Dep. (1/29/2025) at 26:20-27:3.

147. Dr. Friedman related the treatment that Claimant received from Dr. Binegar and Dr. Marsh for pain management to the 2013 industrial injury and 2014 fusion. *Id*. at 27:4-12.

148. Dr. Friedman would expect Claimant to require long-term ongoing pain management treatment related to the 2013 industrial injury and 2014 fusion. *Id*. at 27:18-21.

149. Dr. Friedman agreed with Dr. Montalbano's recommendation for an additional level fusion performed in 2023. *Id*. at 29:8-10.

150. Dr. Friedman was "absolutely" of the opinion that Claimant needed Dr. Montalbano's 2023 fusion surgery. *Id*. at 30:3-4. He agreed with Dr. Montalbano that not only was that surgery medically necessary but that it was related to the 2013 industrial injury and 2014 fusion. *Id*. at 30:24-31:3.

151. Dr. Friedman related Claimant's radicular symptoms into her left upper extremity to her cervical fusion. *Id*. at 32:9-12.

152. Dr. Friedman opined that the C4 to C7 fusion that Dr. Montalbano performed in April 2023 was reasonable and related to the 2013 industrial injury. *Id*. at 33:10-15.

153. In her follow-up appointments with Dr. Montalbano, Claimant reported symptom relief after her 2023 surgery, which would confirm Dr. Friedman's opinion as to the need for that surgery. *Id*. at 33:16-34:4.

154. Dr. Friedman agreed with Dr. Montalbano that Claimant was at MMI on October 17, 2023. *Id*. at 34:5-10.

155. Dr. Friedman agreed with Dr. Cox in his 2024 IME that added another 2% whole

person impairment following Dr. Montalbano's 2023 fusion surgery. Friedman Dep. (1/29/2025) at 37:11-23.

156. Dr. Friedman agreed with Dr. Cox's work restrictions of lifting up to 25 pounds on an occasional basis and to avoid repetitive head turning. *Id*. at 38:4-6. Dr. Friedman would add a restriction of no repetitive over-shoulder activity greater than 20 pounds. *Id*. at 38:9-10.

157. Dr. Friedman opined that the multiple computer monitors used at Claimant's time-of-injury job would be inconsistent with the head turning restriction. *Id*. at 41:21-23.

158. Dr. Friedman, at the time of his 2016 report, opined that the causation of Claimant's psychiatric condition was aggravated by her industrial accident. *Id*. at 42:18-20. Nevertheless, Dr. Friedman deferred to Dr. Ashaye regarding work restrictions related to her psychiatric symptoms. *Id*. at 42:21-22.

159. Dr. Friedman opined that it was reasonable and necessary for Claimant to seek treatment from Dr. Ashaye for her psychiatric symptoms. *Id*. at 44:18-21.

160. Dr. Friedman agreed with Dr. Ashaye's opinion that Claimant's psychiatric treatment was related to the 2013 industrial injury. *Id*. at 45:3-6.

161. Dr. Friedman opined that Claimant would require future medical treatment related to her industrial injury on both a physical and mental standpoint. *Id*. at 45:22-25. She would also require future interventional pain management. *Id*. at 47:1-6.

162. Dr. Friedman opined that Claimant was at risk for future segment failure related to her fusions. Friedman Dep. (1/29/25), 47:7-9.

163. Dr. Friedman opined that Claimant would have problems with absenteeism at work due to her chronic pain related to the industrial injury. *Id*. at 51:9-14.

164. Dr. Friedman did not find any evidence of malingering or secondary gain as it

pertains to Claimant. Friedman Dep. (1/29/25). at 51:19-22.

165. Dr. Friedman opined that Claimant's objective findings support her subjective complaints. *Id*. at 52:1-3.

166. Dr. Friedman testified that giving Claimant light-duty restrictions, in light of the medical record as a whole, is appropriate. *Id*. at 68:8-9.

167. ***Deposition of Olurotimi Ashaye, M.D., February 26, 2018.*** The deposition of Dr. Ashaye was taken on behalf of Claimant on February 26, 2018. Ashaye Dep. at 2. Dr. Ashaye's curriculum vitae is attached to the deposition transcript as Exhibit 1. Dr. Ashaye is a psychiatrist licensed to practice medicine in Idaho.

168. At the time of deposition, Dr. Ashaye had been treating Claimant for a couple of years, since approximately 2015. Ashaye Dep. at 5:19-20. The diagnoses he had been treating her for were major depressive disorder, recurrent and severe, and opiate use disorder. *Id*. at 5:23-24.

169. Dr. Ashaye prescribed medicines for Claimant, including Cymbalta, to treat depression and pain and Suboxone for opiate use, and Adderall for ADHD. *Id*. at 6:7-8.

170. Dr. Ashaye opined that Claimant's chronic continued pain was a component of her major depressive order. *Id*. at 6:12-16. "And it's just been treatment of her pain that has been the main stressor for her." *Id*. at 7:8-9. The pain was coming from "an injury or chronic injury to her neck. And I think she's had a couple of surgeries on it." Ashaye Dep., 7:18-20.

171. Claimant had been hospitalized due to suicidality, which she attributed to pain, "that she can't continue to live with this pain, or she'd rather kill herself than live with this pain." *Id*. at 8:7-10. Dr. Ashaye began treatment of Claimant six months after her hospitalization. *Id*. at 8:11-14.

172. At a certain point, Dr. Ashaye recommended that Claimant work a modified work schedule of part-time. His reason for doing that was because "she continued to complain of her pain. I think she said the longer she sat, it caused her problems making her feel more depressed." Ashaye Dep., at 20-23.

173. For future medication and psychotherapy needs, Dr. Ashaye opined that Claimant would need, for the foreseeable future, treatment on antidepressants and "she would benefit from continued psychotherapy." *Id*. at 10:13-15.

174. Dr. Ashaye distinguished Claimant's pre-injury diagnosis of post-partum depression associated with the birth of child from her current major depression related to pain. *Id*. at 12:8-25.

175. Dr. Ashaye was unaware that Claimant had threatened suicide because she could not get opioids to treat her GERD for which she was scheduled to have a Nissen fundoplication. *Id*. at15:7-15.

176. In response to questioning about other stressors in Claimant's life, such as the death of her father, Dr. Ashaye reiterated that Claimant's "pain has been her major concern in her life that seems to be bothering her." *Id*. at 22:7-8.

177. ***Deposition of Craig W. Beaver, Ph.D., April 19, 2018***. Dr. Beaver's deposition was taken on behalf of Defendants on April 19, 2018. Beaver Dep. at 2. Dr. Beaver's credentials are known to the Industrial Commission. His curriculum vitae is attached to the deposition transcript as Exhibit A. Dr. Beaver is a neuropsychologist. *Id*. at 5:17-19.

178. At Defendants' request, Dr. Beaver performed an independent medical examination (IME) of Claimant in April and May of 2017. *Id*. at 6:23-7:1.

179. As part of his IME, Dr. Beaver reviewed a large number of medical records

concerning Claimant and conducted neuropsychological tests. Dr. Beaver personally reviewed the medical records and summarized them in his IME. Beaver Dep. at 7:2-17.

180. Dr. Beaver noted that Claimant had a "very long and complex medical history," including a history of psychological distress, depression, anxiety, related to "both situational issues, such as with her daughter, her former spouse, death of family members. And a history of being in treatment for those difficulties. Either on medications for those emotional difficulties and/or in counseling." *Id*. at 8:4-25.

181. Dr. Beaver concluded that Claimant was in the habit of "catastrophizing" medical conditions she thought she had been diagnosed with. *Id*. at 9:18-19.

182. In his neuropsychological testing of Claimant, Dr. Beaver noted that Claimant showed symptom magnification. She reported severe levels of depression. Dr. Beaver had concerns that Claimant was exaggerating or overstating neurological symptoms. *Id*. at 23:3-24:3.

183. Based upon his review of medical records and neuropsychological testing of Claimant, Dr. Beaver felt that Claimant had normal intellectual or cognitive function but also a lot of emotional issues both in the immediate and long-term. *Id*. at 27:1-4. Dr. Beaver gave Claimant a diagnosis of major depressive disorder severe recurring with anxious distress. Also, Dr. Beaver opined that Claimant showed symptoms of somatic symptom disorder, severe, which reflected her preoccupation with all of her medical problems. Dr. Beaver also had concerns about personality issues, that Claimant demonstrated signs of Cluster B personality disorder issues, which were of a long-standing nature. *Id*. at 27:7-30:9. For Claimant, "everything is a crisis. Everything is dramatic." *Id*. at 30:23-24. Dr. Beaver opined that Claimant's personality disorder was formed during her childhood. *Id*. at 31:17-18.

184. Dr. Beaver opined that the psychological disorders Claimant demonstrated were

not predominantly caused by her industrial injury but rather that they preexisted it. The industrial injury exacerbated the underlying depression and somatic symptom disorder. Beaver Dep. at 32:9-33:2.

185. Dr. Beaver assigned Claimant an impairment rating of 15% whole person with two-thirds of that unrelated to the work accident. 5% whole person was attributable to the work accident and 10% to other factors. *Id*. at 33:13-22.

186. Dr. Beaver opined that Claimant was capable of returning to work because "the psychological difficulties that she is dealing with have always been there" but from a neuropsychological standpoint, Claimant was not capable of returning to work. *Id*. at 35:15-19.

187. Dr. Beaver opined that Claimant is "somebody that should always be in treatment." *Id*. at 35:23-24.

188. Dr. Beaver, at the time of his deposition, had not reviewed any medical records since he authored his report dated May 17, 2017. *Id*. at 8:12-15.

189. Dr. Beaver opined that Claimant had a significant history of preexisting depression because it "is both in the record and what she talks about." *Id*. at 40:23-24. Claimant talked about depression relating to her time of divorce in November 2002. She was tried on medications for depression from 2002 to 2003. On February 24, 2003, Claimant was still on Wellbutrin for depression. In September of 2003 "due to anxiety, insomnia, divorce, marital discord, she is on Wellbutrin. They talk about adding Paxil, Xanax. She reports having panic-like attacks." *Id*. at 41:21-25.

190. Dr. Beaver did not find evidence of suicidal ideation in Claimant prior to the industrial accident. *Id*. at 57:14-16.

191. Dr. Beaver testified in pertinent part as follows: "The fall incident in December

2013 would not be a catalyst for major recurrent depression severe. Nor for cluster B personality features. Those are longstanding. They occur within a complex context. And would not occur from a single event." Beaver Dep., 60-:17-21.

192. ***Deposition of Delyn D. Porter, MA, CRC, CIWCS, March 5, 2025.*** Mr. Porter's deposition was taken on behalf of Claimant on March 5, 2025. Porter Dep., 2. Mr. Porter's credentials are known to the Commission, and they are described in the deposition at 6:8-8:9.

193. As part of his evaluation process of Claimant, Mr. Porter personally interviewed her. *Id*., 13:21-14:5. He met her on May 16, 2017. *Id*., 15-18. He found her to be credible. *Id*., 17:10-11. He found her to be a good historian. *Id*., 18:14-15.

194. Mr. Porter consults the Dictionary of Occupational Titles, the U.S. Bureau of Labor Statistics, and the Idaho Department of Labor for relevant statistical information involved in his vocational evaluations. Porter Dep., 15:21-16:11.

195. Mr. Porter believed that he reviewed an accurate and complete set of medical records pertaining to Claimant and her industrial injury. *Id*., 19:4-8.

196. Mr. Porter found it significant that Claimant worked for the same employer, Employer, for a long period of time, since 1997, as a customer service representative. "Given her longevity with the time-of-injury employer, certainly most of those other jobs were in the distant past compared to the customer service representative job that she was doing at the time of the accident." *Id*., 20:7-11. Her early career jobs, which were entry-level employment, would have minimal transferable skills compared to her customer service representative position. *Id*., 20:20-23.

197. Mr. Porter opined that Claimant had a "strong work ethic." *Id*., 22:5.

198. Given that Claimant had a cervical fusion in 1995, Mr. Porter did not find any

evidence of work restrictions that were in place prior to her 2013 industrial accident. Porter Dep., 22:99-16.

199. Mr. Porter did not find any evidence that the 1995 cervical fusion limited Claimant's work or work capacity in any way. In fact, Claimant worked a heavy physical demand job at the time of the 1995 fusion. *Id*. 22:23-23:6.

200. In his 2017 report, Mr. Porter estimated that Claimant had approximately 15.75% access to the Boise area labor market. Using the restrictions identified by Dr. Friedman and Dr. Ashaye, he determined that she would still have access to approximately 9.25% of jobs in the labor market, resulting in a 39.7% loss of labor market access. *Id*. at 24:2-25.

201. Mr. Porter updated his 2017 report in 2024 because Claimant had participated in significant additional medical recovery services. There was a 7-year period between the reports. Claimant also had additional surgery on her neck during that time. She continued to have ongoing issues with anxiety and depression and continued to see Dr. Ashaye for mental health services. And there were differing opinions on impairment given during that period of time. Dr. Hajjar gave her a 6% whole person impairment. Dr. Beaver gave her a 15% whole person impairment rating and concluded that there were no restrictions for her returning to work. Dr. Gage gave her a 6% whole person impairment rating. Dr. Hajjar concluded that 100% of Claimant's condition was related to preexisting conditions. Dr. Ashaye's Mental Residual Functional Capacity Assessment determined that Claimant was markedly limited or moderately limited in most areas tested. NP Laci Bauer's medical assessment was that Claimant could work up to 4 hours per day, but that she would be expected to miss up to 15 days per month. There was also a functional capacity examination in 2023 that found that Claimant was capable of lifting up to 15 pounds from floor to waist on an occasional basis but was limited to lifting no

more than 10 pounds from waist to shoulder on an occasional basis. Additional restrictions included occasional crouching, kneeling, climbing stairs, crawling, pushing, pulling, reaching above the shoulder, and reaching overhead. Dr. Cox also opined that Claimant had a 15% whole person impairment and assigned work restrictions of 25 pounds on an occasional basis and avoiding repetitive head turning. All of these medical opinions necessitated updating the 2017 report. Porter Dep., 25:1-27:24.

202. Mr. Porter's opinion, based upon Dr. Ashaye's restrictions, NP Bauer's restrictions, and the functional capacity examination, was that Claimant was essentially unemployable and would be considered totally and permanently disabled according to the Odd Lot Doctrine. Porter Dep., 28:1-9.

203. According to Mr. Porter, Claimant's reported subjective limitations coincided with the objective limitations identified by Dr. Ashaye and the FCE. *Id*., 30:17-21.

204. Mr. Porter opined, given Claimant's medical history, that there had been a progressive worsening in her physical abilities over an extended period of time. *Id*., 31:17-32:2.

205. Age was a factor in Mr. Porter's vocational evaluation of Claimant because Claimant was now 56 years old and at a distinct disadvantage for employability. *Id*., 33:25-34:4.

206. Mr. Porter determined that Claimant's unsuccessful attempts at returning to her time-of-injury occupation demonstrated that she was permanently disabled, because she was physically unable to do the work that was required. *Id*. 34:24-35.

207. Mr. Porter determined that Claimant lacked transferable skills outside of customer service due to her being in the same job since 1997 and then having limited job time after the industrial injury in 2013. *Id*., 35:8-15.

208. In order for her to return on a limited basis to her time-of-injury job, Employer

had to make significant accommodation for her, including reducing the number of hours she work, Mr. Porter found. Porter Dep.,35:1636:4.

209. Mr. Porter did not find any evidence of secondary gain or malingering in Claimant's case. *Id*. at 36:25-37:13.

210. Mr. Porter determined that the FCE placed Claimant into the sedentary classification of employment. *Id*., 38:4-39:8.

211. According to Mr. Porter, Claimant's educational history consisting of a high school diploma and one year of college limited her job opportunities. *Id*., 39:9-25.

212. Mr. Porter opined that the job restriction of avoiding repetitive head turning, as per Dr. Friedman and Dr. Cox, precluded Claimant from most customer service representative positions because of the need to turn the head from computer screen to computer screen and reference materials. Porter Dep., 41:2-7.

213. Vertical alignment of Claimant's computer monitors, as opposed to side by side, would not assist Claimant, in Mr. Porter's opinion. *Id*., 41:8-1.

214. Claimant's radiculopathy would inhibit her need to type on a keyboard, according to Mr. Porter. *Id*., 43:223-25.

215. Dr. Ashaye's limitation to 20 hours per week is significant because a standard work week is 40 hours and this halves Claimant's earning capacity, according to Mr. Porter. *Id*., 44:1-11.

216. According to Mr. Porter, Claimant's significant limitations in activities of daily living impact her vocational profile because it limits her ability to get ready and be ready for work and to work on time as well. *Id*., 46:10-15.

217. Considering the opinions of Dr. Ashay, NP Bauer, and the FCE, and the work

restrictions identified by Dr. Cox and Dr. Friedman, Claimant meets the definition of an odd-lot worker in Idaho law, according to Mr. Porter. Porter Dep., 46:16-21.

218. In Mr. Porter's opinion, it would require a sympathetic employer to allow Claimant to return to the workplace. *Id*. at 47:2-20.

219. In Claimant's case, it would be futile for her to seek employment due to her significant limitations of missing up to 15 days of work per month, significant absenteeism, according to Mr. Porter. *Id*., 47:21-48:16.

220. In Mr. Porter's opinion, Kourtney Layton's vocational assessment is deficient because it omits Dr. Cox's restriction of avoiding repetitive head turning. Porter Dep., 49:1-20.

221. If Claimant had stayed continuously employed with Employer after the industrial accident, Mr. Porter would expect that she would be making significantly more now than at the time of accident, resulting in a significant loss of income. Porter Dep., 51:3-12.

222. Mr. Porter determined that Claimant was permanently and totally disabled, summarizing his opinion as follows:

> So, she worked in the same job since 1997, as a customer service representative. Prior to the accident, she did have cervical fusion surgery but based upon my review of the records she was never assigned any permanent restrictions. I imposed a restriction to probably medium physical demand work just based upon my experience and review of the records, but I'm not a medical doctor and it's not my job to assign restrictions.
>
> She was able to perform all of the essential functions of the job prior to her injury. When you look at the progression of her neck pain, the additional surgeries, the continued chronic pain, the exacerbation of her anxiety and depression, and the emotional upheaval from all of this, and you consider her current physical demand functioning and capacity to work at this point, she's functioning below sedentary level, and this would, essentially, make her unemployable in a competitive labor market.

Id., 51:20-52:13.

223. Mr. Porter had not interviewed Claimant since May 16, 2017. *Id*., 53:10-14.

224. Mr. Porter considered Dr. Ashaye's opinion regarding work restrictions but did not consider Dr. Beaver's opinion that Claimant had no restrictions for returning to full time work. Porter Dep., 58:23-59:18.

225. Claimant's PPD as calculated by Mr. Porter assumes that, at the first calculation of 43.2%, that she returns to her permanent modified employment with Employer, while the second calculation of 52.7% PPD is based upon Claimant having to go out and look for other part-time work with a new employer in the Boise labor market. *Id*., 656:22-66:8. The change is in wage earning capacity. Porter Dep., 66:9-12.

226. Mr. Porter did not recalculate his PPD number in his 2024 addendum report. *Id*., 68:11-12.

227. Mr. Porter did not consider any of the apportionments identified by various doctors, including Dr. Beaver. *Id.,* 71:15-25.

228. Mr. Porter combined the opinions of Dr. Friedman and Dr. Ashaye in his 2024 report. *Id*., 75:11-15.

229. Mr. Porter gave considerable weight to Dr. Ashaye's opinion because he "was the only one who provided restrictions related to mental or emotional disability. And the fact that I didn't take that into consideration, if – if Dr. Friedman says there's no restrictions, then there's no labor market loss, there's no disability." *Id*., 76:1-6.

230. Mr. Porter admitted that the FCE included findings that Claimant had not given best efforts resulting in invalid results. *Id*. at 89:15-18.

231. ***Deposition of Kourtney Layton, July 15, 2025***. Ms. Layton's deposition was taken on July 15, 2025, at the request of Defendants. Layton Dep., 2. Ms. Layton's credentials are known to the Commission. Ms. Layton is a vocational rehabilitation counselor, vocational

analyst and certified life planner, and a professor at Utah State University. Layton Dep., 5:4-6.

232. Ms. Layton prepared a vocational report concerning Claimant dated February 14, 2024. For that report she reviewed prior records from December 1997 through October 2013, and then beginning in October 2013 all records through the date of the report in 2024. Those included treatment records as well as expert reports. She also reviewed vocational reports from Mr. Porter and Mr. Crum. She also reviewed employment records and multiple depositions, including those of Claimant and experts. Claimant was interviewed on January 22, 2024. She also reviewed hearing transcripts. Layton Dep., 9:7-11:2.

233. Ms. Layton relied upon the opinions of Dr. Cox, Dr. Friedman, Dr. Beaver, Dr. Gage, Dr. Hajjar, and Dr. Montalbano in preparing her report. Based upon those, she identified the ability of Claimant to return to work. *Id*. at 14:10-15:2.

234. Ms. Layton determined that age was "not necessarily a huge factor," primarily because "she [Claimant] still has skill sets that would transfer, as well as computer skills that would allow direct entry depending upon residual functional capacity." *Id*. at 16:6-13.

235. Ms. Layton considered Claimant's time-of-injury job with Employer to be sedentary. *Id*. at 16:L24-25.

236. Ms. Layton considered two scenarios, one from Dr. Friedman and Dr. Cox, which resulted in a job market access loss of approximately 0.38%. And the second scenario she considered were the combined opinions on restrictions of Dr. Beaver, Dr. Gage, Dr. Hajjar and Dr. Montalbano which resulted in 0% reduction in labor market access with 18,900 jobs available pre-injury. *Id*. at 20:6-23.

237. As to Claimant's wage-earning potential, Ms. Layton looked at data from the Bureau of Labor Statistics and found four jobs as her past work classifications. Claimant was

earning $17.90 per hour at the time of the industrial injury but had access to jobs in the range of $11.32 per hour to $19.55 per hour. Considering the top end, according to Ms. Layton, Claimant would not have a loss of earning capacity. Layton Dep., 21:3-14.

238. Based upon her findings, Ms. Layton concluded that Claimant could probably return to her time-of-injury job. *Id*. 22:3-8.

239. Unlike Mr. Porter, Ms. Layton concluded that Claimant was not limited to only sedentary or limited sedentary work. Layton Dep., 25:1-3. Instead, relying on Dr. Friedman and Dr. Cox, Ms. Layton determined that Claimant was at a limited range of medium, considering the limitation on head turning. Looking at the FCE, however, which Ms. Layton considered troublesome because of the invalid results, Claimant would have access to a limited range of light work. *Id*., 25:17-26:2.

240. Ms. Layton disagreed with Mr. Porter's conclusion that Claimant had sustained a labor market loss of approximately 84% because it was based primarily on the FCE. She disagreed with the 52.7% labor market loss as well as wage loss from Mr. Porter's 2017 report because it was based primarily on part-time employment. *Id*., 27:16-28:2.

241. Rounding down, Ms. Layton's 0.38% labor market loss would round to 0%. *Id*. at 28:20-29:2.

242. Assuming Dr. Ashaye's restrictions which would limit Claimant to "markedly limited areas as far as her residual functional capacity," Ms. Layton would opine that Claimant would not be capable of work in any setting. Nevertheless, that does not consider apportionment. *Id*., 29:7-24.

243. Ms. Layton did not personally conduct the intake interview of Claimant. Her associate, Michelle Little, did that. *Id*., 32:9-15.

244. Ms. Layton agreed that a substantial portion of the medical treatment that Claimant received after the industrial injury in 2013 was her mental health treatment primarily with Dr. Ashaye. *Id*., 33:13-16. She also agreed that the medical records prior to 2013 indicated that Claimant had very minimal mental health treatment. Layton Dep., 33:17-24.

245. Ms. Layton's staff compiled the summary of medical records contained in her report. She reviewed the records herself. Layton Dep., 34:8-16.

246. Ms. Layton opined that one to two absences per month up to three are the cutoff for general employment tolerance; three per month is work preclusive, unless the employer is highly accommodating or benevolent. *Id*. 37:2-8.

247. Ms. Layton gave more weight to medical and psychological opinion expert reports than treating physicians' reports. *Id*., 38:18-22.Ms. Layton opined that if Dr. Ashaye's mental residual functional capacity questionnaire were considered, that would equate to a determination that Claimant had a 100% loss of access and loss of earning capacity, rendering her unable to return to the labor market in any capacity. Nevertheless, looking at the other opinions in the file, particularly those of Dr. Beaver, Dr. Gage, Dr. Hajjar and Dr. Montalbano, there would be a 0% loss of access and 0% loss of earning capacity. *Id*., 48:15-49:3.Ms. Layton did consider the hoarseness of Claimant's voice but wasn't provided with limitations or restrictions that allowed her to fully account for that in her analysis. *Id*., 51:7-11.

248. **Total Temporary and Partial Disability Benefits.** Information in the record concerning payment of temporary disability benefits is contained in Exhibit 54, Claimant's Claim File Records by Surety's TPA in Handling this Claim, as supplemented in the exhibits produced in the hearing November 7, 2024. For purposes of these findings, however, the Referee has relied upon the summary of TTD/TPD benefits provided by counsel in briefing.

249. Immediately following the industrial injury, Claimant was off work and Defendants paid TTD and TPD benefits until February 16, 2016.

250. From February 17, 2016 through July of 2017, Claimant's average hours per work varied. She was not paid TPD benefits during this time.

251. Between August 4, 2017 and November 27, 2017, Claimant was off work and receiving treatment through Midvalley Health Care for psychiatric treatment. She was not paid TTD/TPD benefits during this period.

252. At the end of November 2017, Claimant was released to return to work part-time, 20 hours per week. From January 19, 2018 through September 15, 2018, Claimant remained off work related to her cervical spine. She sought pain management treatment during this time. She was not paid TTD benefits during this period.

253. Claimant worked full-time from September 28, 2018 through March 16, 2019. She does not seek TTD/TPD benefits for this period of time.

254. From March 17, 2019 until November 29, 2019, Claimant worked part-time hours. She did not receive TPD benefits for this time.

255. From December 1, 2019 through her April 17, 2023 surgery, Claimant was completely off work. She claims TTD benefits for this period of time, although she was declared eligible for SSD benefits during this time period.

256. Defendants paid Claimant TTD benefits following her April 17, 2023 surgery from April 18, 2023 until October 17, 2023, when Dr. Montalbano declared her at MMI.

257. **Medical Care.** Documents relating to Claimant's medical care and the amounts paid are contained in Exhibit 48, Medical Bills, Invoices, and Subrogation Statements, as supplemented in the November 2024 hearing by additional documents. For purposes of these

findings, however, the Referee will rely upon the summaries provided by counsel in briefing.

258. Claimant incurred $5,441.86 in medical expenses from Albertson's and Save-On Pharmacies from December 26, 2013 through June 9, 2014. This includes prescriptions from Dr. Montalbano, Dr. Cox, and Dr. Ashaye. *Id*. Defendants claim that Claimant should not be entitled to recover for these medications unless they are specifically related to her neck.

259. Claimant incurred $8,777.37 in medical bills from Intermountain Imaging from November 8, 2016 through February 17, 2020. Defendants claim that Claimant should not be entitled to recover these expenses unless they are specifically related to her cervical issues.

260. Claimant incurred $439.00 in medical bills from Primary Health Group from February 28, 2014 through July 23, 2018. Defendants claim that some of these bills were non-industrially related such as gastric surgery, and furthermore, should be apportioned based upon preexisting conditions.

261. Claimant incurred $728.00 in medical bills at Idaho Physical Medicine and Rehabilitation from August 12, 2014 through August 27, 2014. These included medical expenses for trigger point injections related to her cervical spine. Defendants claim these bills should be apportioned based upon preexisting conditions.

262. Claimant incurred $3,531.00 in medical bills from Neuroscience Associates from September 8, 2014. This reflects assist charges from Dr. Montalbano's assistant. Defendants claim this bill should be apportioned for preexisting conditions.

263. Claimant incurred $24,691.01 in medical bills from Kroeger's Pharmacy from November 26, 2016 through April 23, 2018 and again from April 7, 2021 through June 10, 2022. These included prescriptions for Suboxone and Buprenomorphine and Lorazapam and Rexulti prescribed by Dr. Ashaye. Defendants claim that these bills should be apportioned for pre-

existing conditions.

264. Claimant incurred $49,769.00 in medical bills from Midvalley Health Care. These bills reflect her mental health treatment by Dr. Ashaye. Defendants claim that they are responsible for only $4,391.67 of these bills.

265. Claimant incurred $2,079.00 in medical bills from The Pain Center from April 29, 2015 through July 8, 2015. These bills reflect treatment for neck pain. Defendants claim that these bills should be apportioned based upon preexisting conditions.

266. Claimant underwent pain management with Dr. Binegar of Pain Care of Boise from May 18 2015 through February 21, 2020 in the amount of $84,027.01. This includes pain treatment for both her head and neck. Defendants claim that these bills should be apportioned based upon preexisting conditions.

267. Claimant incurred $1,174.00 in medical bills from Daniel Marsh/Exodus Pain Clinic from February 20, 2017 through May 6, 2019. This was for treatment of head and neck pain. Defendants claim that these bills are for an IME and thus not reimbursable. They further claim that they should be apportioned to preexisting conditions.

268. Claimant incurred $5,042.24 in medical bills from St. Luke's Regional Medical Center on February 16, 2021. This was for a bone scan ordered by Alicia Henrich, PA-C. Defendants claim that this bill is subject to apportionment for preexisting conditions.

269. Claimant incurred $470.00 from St. Luke's Spine Care from June 18, 2020 through August 26, 2020. This was for treatment by Laci Bauer, NP, related to her cervical spine. Defendants claim that these bills should be apportioned to preexisting conditions.

270. Claimant incurred $1,027.00 from St. Luke's Neurosurgery from January 28, 2020 through February 20, 2020. This bill was related to Claimant's cervical spine. Defendants

claim that this bill should be apportioned to preexisting conditions.

271. Claimant incurred $215.00 from Dr. Bruce Anderson on January 21, 2017. This was a bill for a second opinion on Claimant's need for cervical spine surgery. Defendants claim that this bill should be apportioned to preexisting conditions.

272. Claimant incurred $2,061.00 at the Spine Institute of Idaho from February 1, 2021 through March 15, 2021. These bills were related to Claimant's cervical spine. Defendants claim that this bill should be apportioned to preexisting conditions.

273. **Claimant's Condition at the Final Hearing.** Claimant complains of shooting pains all the way down into her right hand, as well as numbness and tingling. As a result, she can no longer use a mouse or type on a computer keyboard. Tr. (11/7/24), 23:7-22.

274. Claimant cannot grip anything hard with her right hand. *Id*., 24:4-9.

275. Claimant's pain in her neck is always present, and she quantifies it as a level 4 pain. *Id*., 25:9-17.

276. Claimant's range of motion in her neck is limited due to three fusion surgeries. Claimant can still drive but has to rely on her side mirrors and back-up camera to be safe. *Id*., 26:1-8.

277. Claimant is no longer employed and spends her days "laying" for up to six to eight hours at a time. She uses a recliner to sleep. She cannot sit for too long and estimates she can sit in one place for up to one hour. Her husband has taken over usual household chores like laundry. *Id*., 27:2-28:6.

278. Claimant can do the dishes, but it takes longer. She goes grocery shopping with her husband who does the driving and lifting of heavy grocery items. Claimant's husband now does the cooking. *Id*. at 29:3-10; 20-30:9; 30:10-11.

279. Claimant's social life has dropped off due to her disabilities. Tr. (11/7/24), 30:20-31:11.

280. Claimant believes her hoarseness has increased following her last fusion surgery. *Id*., 31:13-22. If she talks for a long time, her voice becomes "froggy." *Id*., 33:2.

281. Claimant has not sought work since 2021 because of her condition. *Id*., 39:20-22.

282. **Claimant's Credibility.** Claimant testified credibly at all hearings. Based upon the Referee's review of the same, Claimant also testified credibly in her two days of deposition.

DISCUSSION AND FURTHER FINDINGS

283. The provisions of the Idaho 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).

284. **Accident Arising Out of and in the Course of Employment.** Neither party briefed this issue, however it was one of the issues for the hearing. I.C. § 72-102(17)(a) defines an "injury" for purposes of Idaho Workers' Compensation Law as a "personal injury caused by an accident arising out of and in the course of employment covered by the workers' compensation law."

285. The record is clear that Claimant sustained a personal injury caused by an accident arising out of and in the course of her employment. On December 13, 2013, Claimant suffered a slip and fall accident in Employer's parking lot in which she sustained injuries to her head and neck. Ex. 1.

286. **Causation.** Claimant bears the burden of proving that the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). There must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his contention. *Dean v. Dravo Corporation*, 95 Idaho 958, 560-61, 511 P.2d 1334, 1336-37 (1973).

287. The compensable consequences doctrine is recognized in Idaho. A subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if there is a demonstrable causal connection between the compensation sought and the work-connected injury. *Sharp v. Thomas Brothers Plumbing*, 510 P.3d 1136 (2022). The permanent aggravation of a preexisting condition or disease is compensable. *Bowman v. Twin Falls Construction Company, Inc*., 99 Idaho 312, 581 P.2d 770 (1978).

288. No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). While a temporal relationship is always required to support a finding of causation between an accident and the injury, the existence of a temporal relationship alone, in the absence of substantive medical evidence establishing causation, is insufficient to satisfy Claimant's burden of proof. *Swain v. Data Dispatch, Inc.* IIC 2005-528388 (February 24, 2012).

289. 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).

290. ***Cervical Injuries.*** Although Defendants in their briefing appear to want to relitigate this issue as it pertains to apportionment because the previous decision held that the parties did not brief or argue apportionment, there is no dispute that the industrial accident caused Claimant's cervical injuries and that her two fusion surgeries performed by Dr. Montalbano are related to the industrial accident. Workers' compensation benefits are payable to Claimant for her cervical injuries, including her headaches.

291. Dr. Friedman opined that Claimant had two types of headaches and that one of them was industrially-related and the other was not. Dr. Cox did not relate Claimant's headaches to the industrial accident. The Referee agrees with Dr. Friedman that Claimant's headaches were industrially-related, but cannot support a finding, per Dr. Friedman's suggestion, that there were two types of headaches. Based upon the record as a whole, headaches are headaches and they are industrially-related.

292. ***Mental Health Injuries.*** Claimant seeks recovery of workers' compensation benefits for her mental health issues following the 2013 industrial accident. *See*, Claimant's Opening Brief at 13. Nevertheless, there is a specific statute in the Idaho Workers' Compensation Law regarding recovery of mental health injuries. Psychological injuries, disorders, or conditions are not compensated under workers compensation unless the elements of Idaho Code § 72-451 are met. Idaho Code § 72-451 provides:

> (1) Psychological injuries, disorders or conditions shall not be compensated under this title, unless the following conditions are met:
>
> (a) Such injuries of any kind or nature emanating from the workplace shall be compensated only if caused by accident and physical injury as defined in section 72-102(17)(a) through (17)(c), Idaho Code, or only if accompanying an occupational disease

with resultant physical injury, except that a psychological mishap or event may constitute an accident where:

(i) It results in resultant physical injury as long as the psychological mishap or event meets the other criteria of this section;(ii) It is readily recognized and identifiable as having occurred in the workplace; and

(iii) It must be the product of a sudden and extraordinary event;

(b) No compensation shall be paid for such injuries arising from conditions generally inherent in every working situation or from a personnel-related action including, but not limited to, disciplinary action, changes in duty, job evaluation or employment termination;

(c) **Such accident and injury must be the predominant cause as compared to all other causes combined of any consequence for which benefits are claimed under this section**;

(d) Where psychological causes or injuries are recognized by this section, such causes or injuries must exist in a real and objective sense;

(e) Any permanent impairment or permanent disability for psychological injury recognizable under the Idaho worker's compensation law must be based on a condition sufficient to constitute a diagnosis using the terminology and criteria of the American psychiatric association's diagnostic and statistical manual of mental disorders, third edition revised, or any successor manual promulgated by the American psychiatric association, and **must be made by a psychologist or psychiatrist duly licensed to practice in the jurisdiction in which treatment is rendered**; and

(f) **Clear and convincing evidence that the psychological injuries arose out of and in the course of the employment from an accident or occupational disease as contemplated in this section is required.** (emphasis supplied).

293. Claimant relates the mental health issues she faced following the industrial accident to the industrial accident. Nevertheless, Idaho Code § 72-451(c) requires that those injuries must be the predominant cause of Claimant's mental health issues, as opposed to all other causes. Furthermore, the injuries must be determined by a licensed psychologist or psychiatrist. Idaho Code § 72-451(e). Dr. Friedman's impairment on psychological injuries must therefore be discounted because he is a physiatrist, not a psychiatrist or psychologist. And clear and convincing evidence must be shown that the psychological injuries arose from the industrial

accident. Idaho Code § 72-451(f). Dr. Gage's and Dr. Ashaye's opinions on relatedness to the industrial accident are not accepted.

294. Claimant's claim for psychological injuries fails the test of Idaho Code § 72-451. As the foregoing findings show, Claimant's psychological injuries were multifactorial. Although the industrial injury causing cervical injuries was one of the causes, the record shows that Claimant was suffering from multiple other stressors that caused her psychological injuries, including but not limited to, her concerns about family issues, including the deaths of her father, stepfather and sister; the troubles of her adult daughter; her concerns about COVID; menopause; and related concerns.

295. Furthermore, the Referee concurs with the opinion of Dr. Beaver who concluded in his IME that Claimant's psychological injuries were not predominantly caused by the industrial accident.

296. Accordingly, Claimant cannot recover workers' compensation benefits for her psychological injuries.

297. **Apportionment.** Defendants claim that Claimant's cervical injuries should be apportioned to her 1995 cervical fusion with Dr. Marano. *See*, Defendants' Responsive Brief at 49. Apportionment under Idaho's Workers' Compensation Law is governed by statute, as follows:

> Idaho Code § 72-406. Deductions for Preexisting Injuries and Infirmities. (1) In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable for the additional disability from the industrial injury or occupational disease.
> (2) Any income benefits previously paid to an injured workman for permanent disability to any member or part of his body shall be deducted from the amount of income benefits provided for the permanent disability to the same member or

body part of his body caused by as change to his physical condition or by a subsequent injury or occupational disease.

298. The Idaho Supreme Court has held that the Commission must provide an analysis as to why disability should be apportioned. *Henderson v. McCain Foods, Inc.,* 142 Idaho 559, 567, 130 P.3d 1097, 1105 (2006).

299. Here, the issue of apportionment of Claimant's cervical injuries is *res judicata* per the Commission's previous findings. Nevertheless, Defendants claim that the issue was not decided in the prior decision and that they would be deprived of due process if the Referee did not issue findings.

300. An independent review of the record, regardless of the previous decision, indicates that apportionment pursuant to Idaho Code § 72–406(1) is not appropriate. Claimant's 1995 cervical fusion surgery with Dr. Marano did not result in any scheduled impairments to which apportionment could be applied. Furthermore, the medical record between 1995 and 2013, when the industrial accident occurred, indicates only a meager number of medical visits in which Claimant's neck was mildly at issue.

301. For the foregoing reasons, apportionment under Idaho Code § 72–406(1) will not be required for the 1995 cervical fusion surgery with Dr. Marano.

302. **Medical Care.** Medical care is governed by statute in Idaho Code § 72–432 which provides in pertinent part 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 apparatuses, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to do the same, the injured employee may do so at the expense of the employer." Idaho Code § 72-432(1).

303. Defendants are liable for the full invoiced amounts of a worker's medical bills where (1) the defendants denied a claim and (2) that claim is subsequently deemed compensable by the Industrial Commission. *See, e.g., Millard v. ABCO Constr., Inc.*, 161 Idaho 194, 196, 384 P.3d 958, 960 (2016). *See also*, *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009).

304. The record is clear that Defendants denied payment of medical expenses deemed necessary and reasonable by Claimant's physicians. Thus, according to *Millard*, *Id*., and *Neel*, *Id*., Claimant is entitled to recover the full invoiced amounts of the denied medical expenses.

305. Claimant incurred $5,441.86 in medical expenses from Albertson's and Save-On Pharmacies from December 26, 2013 through June 9, 2014. This includes prescriptions from Dr. Montalbano, Dr. Cox, and Dr. Ashaye. The expenses are recoverable by Claimant to the extent that they represent prescriptions for Claimant's cervical condition. Claimant is not entitled to reimbursement for mental health expenses, thus the prescriptions by Dr. Ashaye and similar prescriptions are non-reimbursable.

306. Claimant incurred $8,777.37 in medical bills from Intermountain Imaging from November 8, 2016 through February 17, 2020. These bills related to Claimant's cervical condition and thus are reimbursable.

307. Claimant incurred $439.00 in medical bills from Primary Health Group from February 28, 2014 through July 23, 2018. Claimant's bills from Primary Health Group are reimbursable to the extent that they were prescribed to treat Claimant's cervical injuries. Bills for other conditions, such as Claimant's gastric condition, are not reimbursable.

308. Claimant incurred $728.00 in medical bills at Idaho Physical Medicine and Rehabilitation from August 12, 2014 through August 27, 2014. These expenses were incurred to

treat Claimant's cervical injuries and are thus reimbursable.

309. Claimant incurred $728.00 in medical bills at Idaho Physical Medicine and Rehabilitation from August 12, 2014 through August 27, 2014. These included medical expenses for trigger point injections related to her cervical spine and, as such, are reimbursable.

310. Claimant incurred $3,531.00 in medical bills from Neuroscience Associates from September 8, 2014. This reflects assist charges from Dr. Montalbano's assistant. This is related to Claimant's cervical spine and thus is reimbursable.

311. Claimant incurred $24,691.01 in medical bills from Kroeger's Pharmacy from November 26, 2016 through April 23, 2018 and again from April 7, 2021 through June 10, 2022. These included prescriptions for Suboxone and Buprenomorphine and Lorazapam and Rexulti prescribed by Dr. Ashaye. These expenses are for Claimant's mental health treatment and thus are not reimbursable.

312. Claimant incurred $49,769.00 in medical bills from Midvalley Health Care. These bills reflect her mental health treatment by Dr. Ashaye. Defendants admit that they are responsible for $4,391.67 of these bills, but otherwise, these bills are not allowable because they are for mental health related issues.

313. Claimant incurred $2,079.00 in medical bills from The Pain Center from April 29, 2015 through July 8, 2015. These bills reflect treatment for neck pain and, as such, are reimbursable.

314. Claimant incurred $2,079.00 in medical bills from The Pain Center from April 29, 2015 through July 8, 2015. These bills reflect treatment for neck pain and, as such, are reimbursable.

315. Claimant underwent pain management with Dr. Binegar of Pain Care of Boise

from May 18 2015 through February 21, 2020 in the amount of $84,027.01. This includes pain treatment for both her head and neck. As these expenses are related to her cervical condition, they are reimbursable.

316. Claimant incurred $1,174.00 in medical bills from Daniel Marsh/Exodus Pain Clinic from February 20, 2017 through May 6, 2019. This was for treatment of head and neck pain. As they are related to Claimant's cervical condition, they are reimbursable, however if the expense was incurred for an IME, it is not reimbursable.

317. Claimant incurred $5,042.24 in medical bills from St. Luke's Regional Medical Center on February 16, 2021. This was for a bone scan ordered by Alicia Henrich, PA-C. As this was related to Claimant's cervical injury, it is reimbursable.

318. Claimant incurred $215.00 from Dr. Bruce Anderson on January 21, 2017. This was a bill for a second opinion on Claimant's need for cervical spine surgery. As such, it is reimbursable.

319. Claimant incurred $2,061.00 at the Spine Institute of Idaho from February 1, 2021 through March 15, 2021. These bills were related to Claimant's cervical spine, and, as such, are reimbursable.

320. From December 1, 2019 through her April 17, 2023 surgery, Claimant was off work and still in a process of recovery. She is entitled to recovery of medical bills for this period.

321. None of the unpaid medical bills are subject to apportionment.

322. ***Future Medical Care***. Claimant is entitled to such future medical care related to her cervical injuries, for example, further radiofrequency ablations, fusion surgeries due to next segment degeneration, and pain management including medications for cervical pain per the opinion of Dr. Friedman.

323. **Temporary Disability Benefits.** Income benefits for total and partial disability are governed by Idaho Code § 72-408, which provides in pertinent part as follows: "Income benefits for total and partial disability during the period of recovery, and thereafter in case of total and permanent disability, shall be paid to the disabled employee subject to deduction on account of waiting period and subject to the maximum and minimum limits as set forth in section 72-409."

324. This section entitles Claimant to recover income benefits for total and partial disability during the period of recovery. *See, e.g., Reese v. V-1 Oil Company*, 141 Idaho 630, 635, 115 P.3d 721, 726 (2005). In *Reese, Id*., the Idaho Supreme Court held that the entitlement to income benefits is not dependent upon the employee complying with Idaho Code § 72–432(4)(a). Claimant in *Reese*, therefore, was entitled to recover temporary disability benefits during his period of recovery from surgery. *Id*.

325. Thus, as long as Claimant is in a period of recovery, she is entitled to recover income benefits for total and partial disability.

326. Immediately following the industrial injury, Claimant was off work and Defendants paid TTD and TPD benefits until February 16, 2016. Claimant was in a period of recovery during this timeframe, and thus temporary disability benefits were proper.

327. From February 17, 2016 through July of 2017, Claimant's average hours per work varied. She was not paid TPD benefits during this time. Treatment records indicate that Claimant's cervical pain was "unbearable" during this timeframe, thus she was still in a period of recovery and temporary disability benefits are owed.

328. Between August 4, 2017 and November 27, 2017, Claimant was off work and receiving treatment through Midvalley Health Care for psychiatric treatment. She was not paid

TTD/TPD benefits during this period. As this timeframe was related to un-reimbursable mental health conditions, Claimant is not entitled to temporary disability benefits for this period.

329. At the end of November 2017, Claimant was released to return to work part-time, 20 hours per week. From January 19, 2018 through September 15, 2018, Claimant remained off work related to her cervical spine. She sought pain management treatment during this time. She was not paid TTD benefits during this period. As she was still in a period of recovery, she is owed temporary disability benefits for this timeframe.

330. Claimant worked full-time from September 28, 2018 through March 16, 2019. She does not seek TTD/TPD benefits for this period of time.

331. From December 1, 2019 through her April 17, 2023 surgery, Claimant was completely off work. She claims TTD benefits for this period of time, although she was declared eligible for SSD benefits during this time period. She was in a period of recovery and is thus entitled to recover temporary disability benefits for this time period.

332. Defendants paid Claimant TTD benefits following her April 17, 2023 surgery from April 18, 2023 until October 17, 2023, when Dr. Montalbano declared her at MMI. She was in a period of recovery during this time period, thus temporary disability benefits were properly owed.

333. **Permanent Partial Impairment.** "Permanent impairment" is any anatomic or functional abnormality or loss after maximum rehabilitation has been achieved and which abnormality, or loss, medically is considered stable or nonprogressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures,

ambulation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424.

334. A "permanent disability rating need not be greater than the impairment rating if, after consideration of the non-medical factors in Idaho Code § 72-425, Claimant's "probable future ability to engage in gainful activity' is accurately reflected by the impairment rating. *Graybill v. Swift & Co.,* 115 Idaho 293, 295, 766 P.2d 763, 765 (1988). In *Graybill*, *Id*., the claimant's treating physician diagnosed him with a 10% whole person impairment based primarily upon his subjective complaints of pain. *Id*., 115 Idaho at 293, 766 P.2d at 764. "The primary purpose of an award of permanent disability is to compensate the claimant for a reduction in the claimant's capacity for gainful activity. I.C. § 72–425." 115 Idaho at 294, 766 P.2d at 764.

335. In this case, both Dr. Cox and Dr. Friedman awarded Claimant a whole person impairment of 15% due to her cervical spine, with a 6% apportionment for preexisting conditions. Defendants thus paid Claimant 9% whole person impairment, as apportioned. Because these findings have held that Claimant's claim for benefits is not subject to apportionment, it is appropriate to award Claimant the full 15% whole person impairment, thus Claimant is entitled to an additional 6% whole person impairment.

336. Claimant is not entitled to any of the impairments awarded by Dr. Friedman or Dr. Gage for psychological issues.

337. Claimant is entitled to an additional 6% whole person impairment.

338. **Disability.** "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of

the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425.

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

340. Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Industries,* 136 Idaho 733, 40 P.3d 91 (2002); *and Boley v. State of Idaho, Industrial Special Indemnity Fund,* 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon Claimant. *Seese v. Ideal of Idaho, Inc*., 110 Idaho 32, 714 P.2d 1 (1986).

341. Total permanent disability may be established under the 100% method or the Odd-Lot Doctrine. Under the 100% method, Claimant must show his medical impairment and nonmedical factors combine to demonstrate that Claimant is 100% disabled. Under the Odd-Lot Doctrine, Claimant must show he was so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, absent business boom, the sympathy of the employer, temporary good luck, or a superhuman effort on Claimant's part. *See, e.g. Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984).

342. The first requirement for determining whether Claimant has sustained disability in excess of impairment is to establish that Claimant has a permanent partial impairment. *See Urry*, 115 Idaho 750, 769 P2d 1122. Claimant has met the *Urr*y bar. She is entitled to a 15% PPI, as found above.

343. Claimant argues that she is totally and permanently disabled as a result of the December 2013 industrial injury. *See*, Claimant's Brief at 11. Defendants argue that Claimant is not totally and permanently disabled as result of the industrial accident. *See*, Defendant's Responsive Brief at 51. Rather, relying on Kourtney Layton's expert opinion, Defendants submit that Claimant has sustained 0% PPD. In the alternative, Defendants suggest that if Claimant is determined to be totally and permanently disabled, it is due to factors other than the industrial accident, thus they owe Claimant no PPD benefits. Defendants' Responsive Brief at 64.

344. This is a complex case and Claimant's treatment history spans some 29 years, from 1995-2024. Claimant had numerous medical providers and an unusual number of medical experts have opined as to work restrictions and permanent partial impairment. The choice for the Referee is between two competing vocational experts, Mr. Porter and Ms. Layton. There was another vocational evaluation undertaken by Douglas Crum as requested by Defendants, however it is not summarized above and does not factor into this disability analysis because it is redundant and the Referee does not agree with Mr. Crum's conclusions, which were not well-explained.

345. Mr. Porter has opined that Claimant meets the definition of an odd lot worker and is thus entitled to permanent and total disability benefits. Ms. Layton has opined that Claimant's disability is 0%. The Referee cannot rely upon Mr. Porter's opinion because it is fatally flawed by considering Claimant's disability resulting from psychological reasons per Dr. Ashaye. As

these findings have held, above, Claimant's predominant cause of disability was not her psychological injuries, thus a disability finding based in part on psychological injuries does not avail.

346. On the other hand, Ms. Layton's opinion that Claimant suffered no disability as a result of his cervical spine injury as a result of the 2013 accident goes too far. The Referee finds that Claimant is permanently and totally disabled due to multifactorial reasons, including her cervical injuries sustained in the industrial accident. This coincides with the Social Security Administration's ALJ findings, which the Referee finds reasonable. The Referee disagrees with Ms. Layton's conclusion that Claimant's cervical condition does not merit consideration for disability purposes.

347. The Referee agrees with the work restrictions as opined by Dr. Friedman and Dr. Cox, and agrees that they support an award of disability benefits because the restrictions are related to Claimant's cervical condition. There are other disability opinions from other medical experts but they are not helpful because they either are based upon Claimant's psychological damages, which are not allowed, or because they conflict with the *res judicata* findings from the previous decision that Claimant's cervical injuries were caused by the industrial accident and that the two fusion surgeries by Dr. Montalbano were industrially-related.

348. The record shows that Claimant was impaired by the industrial accident due to her cervical spine in the amount of 15% whole person impairment. The record is replete with Claimant's complaints of pain due to her neck. She cannot return to her time-of-injury job due to permanent work restrictions as found by Dr. Friedman and Dr. Cox that include no repetitive head turning, which rules out Claimant's workstation at Employer with its multiple computer screens. Further, although not relevant for her time of injury job, Claimant is limited to lifting 25

pounds, another factor affecting her disability.

349. Claimant's age at the time of hearing is a non-medical factor that must be considered in this disability analysis. Claimant had reached older worker status by the time of the final hearing and that restricts her access to the job market. The Referee agrees with Mr. Porter that age is a relevant factor and disagrees with Ms. Layton on this issue.

350. Given that the Referee has not adopted either Mr. Porter's vocational assessment or Ms. Layton's vocational assessment, some accounting for Claimant's disability due to her cervical condition must be made. She cannot return to even part-time employment, as concluded by Mr. Porter, however she does not meet the definition of an Odd Lot Worker due to her cervical spine alone pursuant to *Carey.*, 107 Idaho 109, 112, 686 P.2d 54, 57.

351. How, then, to account for Claimant's disability related to her cervical spine? It is reasonable to find, from the record as a whole, that approximately one fourth of Claimant's permanent disability is due to her cervical spine. This equates to a 25% permanent partial disability, inclusive of the 15% impairment.

352. **Attorney Fees.** Idaho Code § 72-804 provides as follows:

> 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.

353. Defendants do not owe attorney fees based upon their contesting Claimant's entitlement to a second fusion surgery by Dr. Montalbano. Defendants had reasonable grounds to contest the same due to competing expert opinions that held otherwise.

354. The same cannot be said of Defendants' unreasonable and unjustified delays and denials in reimbursing Claimant for medical expenses and for temporary disability benefits. As Claimant notes, "Ms. Keele has now endured three hearings, covering four separate dates, two depositions, painful injections and ablations, multiple IMEs and countless medical visits. A bird's eye view of this case reveals a record consisting of thousands of pages of records, all pointing to a compensable industrial injury – yet the Defendants' denial was clearly based upon a flawed rationale." Claimant's Opening Brief at 28.

355. Because Defendants unreasonably delayed and denied payment of Claimant's proper medical expenses and temporary disability benefits which were clearly related to her cervical spine injury, Claimant is entitled to collect attorney fees pursuant to Idaho Code § 72-804.

CONCLUSIONS OF LAW

1. Claimant sustained an injury arising from an accident in the employ of Employer.
2. Causation has been established for Claimant's cervical injuries due to the industrial accident.
3. Causation has not been established with regard to Claimant's claim for psychological injuries relating to the industrial accident. Pursuant to Idaho Code § 72-451, Claimant's industrial injury was not the predominant cause of her psychological injuries.
4. Apportionment pursuant to Idaho Code § 72-406, apportionment for preexisting conditions is not appropriate. Claimant is entitled to the full award of 15% whole person impairment, without deduction for apportionment, from Defendants. Claimant is thus entitled to an additional 6% whole person impairment.
5. Claimant is owed additional temporary disability benefits for the following periods:

a. February 17, 2016 through July of 2017;

b. January 19, 2018 through September 15, 2018; and

c. March 17, 2019 until November 29, 2019.

6. Claimant is owed reimbursement for the following medical expenses:

a. Claimant incurred $5,441.86 in medical expenses from Albertson's and Save-On Pharmacies from December 26, 2013 through June 9, 2014. To the extent that the prescriptions were for treatment of her cervical injuries, these expenses are reimbursable.

b. Claimant is not entitled to recover expenses relating to psychological treatment by Dr. Ashaye or other psychiatric providers, thus, to the extent that the Albertson's and Save-On Pharmacies' prescriptions are related to psychiatric medications, they are not reimbursable.

c. Claimant incurred $8,777.37 in medical bills from Intermountain Imaging from November 8, 2016 through February 17, 2020. These expenses related to her cervical spine and are recoverable.

d. Claimant incurred $439.00 in medical bills from Primary Health Group from February 28, 2014 through July 23, 2018. Claimant's bills from Primary Health Group are reimbursable to the extent that they were prescribed to treat Claimant's cervical injuries. Bills for other conditions, such as Claimant's gastric condition, are not reimbursable.

e. Claimant incurred $728.00 in medical bills at Idaho Physical Medicine and Rehabilitation from August 12, 2014 through August 27, 2014. These expenses were incurred to treat Claimant's cervical injuries and are thus

reimbursable.

f. Claimant incurred $3,531.00 in medical bills from Neuroscience Associates from September 8, 2014. This reflects assist charges from Dr. Montalbano's assistant. It is related to Claimant's cervical spine and is thus recoverable.

g. Claimant incurred $49,769.00 in medical bills from Midvalley Health Care. These bills reflect her mental health treatment by Dr. Ashaye. Defendants admit that they are responsible for $4,391.67 of these bills, but otherwise, these bills are not allowable because they are for mental health related issues.

h. Claimant incurred $2,079.00 in medical bills from The Pain Center from April 29, 2015 through July 8, 2015. These bills reflect treatment for neck pain and, as such, are reimbursable.

i. Claimant underwent pain management with Dr. Binegar of Pain Care of Boise from May 18 2015 through February 21, 2020 in the amount of $84,027.01. This includes pain treatment for both her head and neck. As these expenses are related to her cervical condition and the industrial accident, they are reimbursable.

j. Claimant incurred $1,174.00 in medical bills from Daniel Marsh/Exodus Pain Clinic from February 20, 2017 through May 6, 2019. This was for treatment of head and neck pain. As they are related to Claimant's cervical condition, they are reimbursable, however if the expense was incurred for an IME, it is not reimbursable.

k. Claimant incurred $5,042.24 in medical bills from St. Luke's Regional Medical Center on February 16, 2021. This was for a bone scan ordered by Alicia Henrich, PA-C. As this was related to Claimant's cervical injury, it is reimbursable.

l. Claimant incurred $215.00 from Dr. Bruce Anderson on January 21, 2017. This was a bill for a second opinion on Claimant's need for cervical spine surgery. As such, it is reimbursable.

m. Claimant incurred $2,061.00 at the Spine Institute of Idaho from February 1, 2021 through March 15, 2021. These bills were related to Claimant's cervical spine, and, as such, are reimbursable.

7. Claimant is entitled to reimbursement of her medical expenses at the full invoiced rate, per *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009).
8. Claimant is entitled to such reasonable and necessary future medical care related to her cervical spine, such as further fusion surgeries, radiofrequency ablations, and pain management for her cervical spine and headaches related to the industrial injury, including medications for pain.
9. Claimant is entitled to a 25% permanent partial disability (PPD), inclusive of the 15% impairment as found by Dr. Friedman and Dr. Cox.
10. Claimant is entitled to attorney fees.

RECOMMENDATION

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

DATED this 16th day of December, 2025.

INDUSTRIAL COMMISSION

John C. Hummel

John C. Hummel, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the _20th_____ day of __January___, 2026, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail and Electronic Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LORI KEELE, Claimant, v. CITIBANK, Employer, and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Surety, Defendants.	**IC 2013-034253** **ORDER** **FILED JANUARY 20, 2026** **IDAHO INDUSTRIAL COMMISSION**

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

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

1. Claimant sustained an injury arising from an accident in the employment of Employer.
2. Causation has been established for Claimant's cervical injuries due to the industrial accident.

3. Causation has not been established with regard to Claimant's claim for psychological injuries relating to the industrial accident. Pursuant to Idaho Code § 72-451, Claimant's industrial injury was not the predominant cause of her psychological injuries.
4. Apportionment pursuant to Idaho Code § 72-406, apportionment for preexisting conditions is not appropriate. Claimant is entitled to the full award of 15% whole person impairment, without deduction for apportionment, from Defendants. Claimant is thus entitled to an additional 6% whole person impairment.
5. Claimant is owed additional temporary disability benefits for the following periods:
    a. February 17, 2016 through July of 2017;
    b. January 19, 2018 through September 15, 2018; and
    c. March 17, 2019 until November 29, 2019.
6. Caimant is owed reimbursement for the following medical expenses:
    a. Caimant incurred $5,441.86 in medical expenses from Albertson's and Save-On Pharmacies from December 26, 2013 through June 9, 2014. To the extent that the prescriptions were for treatment of her cervical injuries, these expenses are reimbursable.
    b. Claimant is not entitled to recover expenses relating to psychological treatment by Dr. Ashaye or other psychiatric providers, thus, to the extent that the Albertson's and Save-On Pharmacies' prescriptions are related to psychiatric medications, they are not reimbursable.
    c. Claimant incurred $8,777.37 in medical bills from Intermountain Imaging from November 8, 2016 through February 17, 2020. These expenses related to her cervical spine and are recoverable.

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m. Claimant incurred $2,061.00 at the Spine Institute of Idaho from February 1, 2021 through March 15, 2021. These bills were related to Claimant's cervical spine, and, as such, are reimbursable.

7. Claimant is entitled to reimbursement of her medical expenses at the full invoiced rate, per Neel v. Western Construction, Inc., 147 Idaho 146, 206 P.3d 852 (2009).

8. Claimant is entitled to such reasonable and necessary future medical care related to her cervical spine, such as further fusion surgeries, radiofrequency ablations, and pain management for her cervical spine and headaches related to the industrial injury, including medications for pain.

9. Claimant is entitled to a 25% permanent partial disability (PPD), inclusive of the 15%impairment as found by Dr. Friedman and Dr. Cox.

10. Claimant is entitled to recovery of her reasonable attorney fees pursuant to Idaho Code § 72-804, due to unreasonable delays and denials by Defendants of her reasonable medical expenses and temporary disability benefits. Pursuant to *Hogaboom v. Economy Mattress,* 107 Idaho 23, 684 P.2d 990 (1984), the Commission shall determine: (1) the anticipated time and labor required to perform the legal services properly; (2) the novelty and difficulty of the legal issues involved in the matter; (3) the fees customarily charged for similar legal services; (4) the possible total recovery if successful; (5) the time limitations imposed by the client or circumstances of the case; (6) the nature and length of the attorney-client relationship; (7) the experience, skill and reputation of the attorney; (8) the ability of the client to pay for the legal services to be rendered; and (9) the risk of no recovery. No less than 21 days from the date this decision is filed, Claimant shall file an appropriate memorandum of attorney fees with the Commission setting forth the claimed attorney fees and assessing the factors identified above. Defendants shall have 14 days after submission of Claimant's memorandum to respond. Within 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's fees.

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

DATED this _20th_____ day of __January_____, 2026.

INDUSTRIAL COMMISSION

Claire Sharp

Claire Sharp, Chair

Aaron White, Commissioner

ATTEST.

Mary McMenomey
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __20th____ day of __January__, 2026, a true and correct copy of the foregoing **ORDER** was served by regular United States mail and Electronic Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LORI KEELE, Claimant, v. CITIBANK, Employer, and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Surety, Defendants.	**IC 2013-034253** **ORDER** FILED FEB 24 2023 INDUSTRIAL COMMISSION

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

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

1. Claimant is entitled to surgery in the form of fusion and decompression at C4-5.

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

DATED this 24th day of February, 2023.

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Aaron White, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 2023, a true and correct copy of the foregoing **ORDER** was served by regular United States mail and Electronic Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LORI KEELE, Claimant, v. CITIBANK, Employer, and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Surety, Defendants.	**IC 2013-034253** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED** **FEBRUARY 24, 2023**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John Hummel, who conducted an emergency hearing in Boise on July 12, 2022. Claimant, Lori Keele, was present in person; Taylor Mossman-Fletcher, of Boise, represented her. Mark D. Sebastian and Matthew O. Pappas, of Boise, represented Defendant Employer, CitiBank, and Defendant Surety, Insurance Company of the State of Pennsylvania. The parties presented oral and documentary evidence, took post-hearing depositions and later submitted briefs. The matter came under advisement on January 4, 2023.

ISSUE

The sole issue to be decided by the Commission as the result of the hearing is as follows: whether and to what extent Claimant is entitled to surgery in the form of a fusion and decompression at C4-5.

CONTENTIONS OF THE PARTIES

This is not a case in which the necessity or reasonableness of medical care is at issue. Rather, as noted above, the sole issue is whether Claimant's proposed neurosurgery, a fusion and decompression at the level of C4-5, is related to or caused by the industrial accident. Claimant argues that surgery is necessary because of the adjacent segment damage caused by her 2014 surgery, a C6-7 fusion, which was related to her industrial accident in 2013, thus surgery at C4-5 is covered under the compensable consequences doctrine. Defendants, however, deny that surgery at the C4-5 level is related but rather attributable to a much older surgery that Claimant underwent in 1995, a C5-6 fusion, thus the proposed surgery is nonindustrial.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony taken at the hearings dated July 12, 2022, December 20, 2017, and August 18, 2017;
3. Joint Exhibits 1- 69;
4. The deposition testimony of Claimant taken on April 10 and 11, 2017;
5. The deposition testimony of Eric Gabiola, taken on February 14, 2017;
6. The deposition testimony of Paul J. Montalbano, M.D., taken on July 19, 2022;
7. The deposition testimony of Michael V. Hajjar, MD, taken on September 7, 2022;
8. The deposition testimony of Paul J. Montalbano, M.D., taken on May 23, 2018;
9. The deposition testimony of Craig W. Beaver, PhD, taken on April 19, 2018;
10. The deposition testimony of Rodde D. Cox, M.D., taken on April 18, 2018;

11. The deposition testimony of Olurotimi Ashaye, M.D., taken on February 26, 2018; and

12. The deposition testimony of Robert H. Friedman, M.D., taken on February 14, 2018.

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's Background**. Claimant was born in Ogden, Utah on December 16, 1967. She grew up in Ogden, Utah, Post Falls, Idaho, and Spokane, Washington. Claimant's Dep. (Vol. I), 7:12-19.

2. After Spokane, Claimant with her father moved to Fresno, California, where she graduated from high school in 1986. She remained in Fresno until approximately age 22. *Id.* at 8:12-25.

3. Other than a tonsillectomy at age 5, Claimant does not recall having any medical issues growing up or in high school. *Id.* at 9:1-4; 10:6-8. She was also involved in a minor mini-motorbike accident at age 10 in which she skinned her knees but did not require significant health care. *Id.* at 10:9-25.

4. Claimant attended one year of college at Fresno State, with a major of child psychology. Beginning in high school, she worked at a McDonald's in Fresno for four years. She finished in management of the store. *Id.* at 11 at 7-12:18.

5. Following her tenure at Fresno State, Claimant met and married Michael Shane Keele in 1989. She had three children with Mr. Keele and remained married to him for thirteen years. *Id.* at 16:20-17:8. They moved to Idaho Falls in 1990. *Id.* at 19:1-3.

6. Claimant remarried on March 24, 2015, and is now known as "Lori M. Gabiola." Tr. (August 18, 2017; Vol I), 24:3-11. For purposes of this record, however, Claimant will continue to be referred to as "Lori Keele."

7. **Employer**. Administrative notice is taken that all relevant times, Employer operated a bank and financial services institution in multiple locations, including Meridian, Idaho.

8. **Claimant's Employment with Employer**. Claimant began working for Employer at its Call Center located in Idaho Falls in or about 1997. Her position was customer service and on call. In that position she would take calls from customers and assist them with their accounts. Since this Call Center was devoted to the customers of Sears Credit Services, which Employer had purchased, Claimant also helped Sears stores with credit card issues. *Id.* at 29:2-27.

9. The physical requirements of Claimant's job were sedentary; she sat to do her work and used a phone and a computer all day. There were no lifting requirements. Claimant worked an 8-hour shift. *Id.* at 29:18-30:1.

10. Claimant continued to be employed by Employer through the date of her industrial accident and thereafter.

11. **Prior Medical History**. Claimant had neck surgery on July 31, 1995. The etiology of the need for surgery was unknown. Claimant's neurosurgeon, Dr. Stephen Marano, M.D., noted in pertinent part as follows: "This lady states there was no inciting event, but somewhere around 7 – 8 years ago she had a gradual onset of neck and shoulder pain and this went on for quite some time." Ex. 3:0001. Before having surgery performed, Claimant received conservative measures in the form of physical therapy, which was not successful. Tr. (August 18,

2017; Vol I) 43:22-44:10. Dr. Marano performed a level one, anterior discectomy and fusion at C5-6 on Claimant on July 31, 1995. Ex. 2:0005. Although Claimant experienced brief instances of neck pain thereafter, her experience of the surgery was a good result, generally reducing her neck and shoulder pain. *See, e.g.*, Ex. 3:00022. The fusion itself failed to take and Claimant would later be diagnosed with resultant C5-C6 pseudoarthrosis. Ex. 17:00779; Hajjar Dep. 8:6-21.

12. The medical record reflects that Claimant received medical evaluations concerning neck pain between her July 31, 1995, surgery and her industrial accident. For example, on February 18, 1998, Murray Sturkie, M.D. evaluated Claimant for neck pain at the St. Luke's Urgent Care Clinic. Dr. Sturkie noted Claimant's C5-6 fusion in 1995 and her present complaints of sharp pain in the anterior part of the neck. He assessed acute cervical pain and prescribed Voltaren. Ex. 4:00219-00220.

13. On October 21, 2010, Dr. Amy Baruch, M.D. of St. Luke's Urgent Care Meridian, evaluated Claimant for neck pain and weakness in her upper extremities. Dr. Baruch noted Claimant's history of a fusion. In reading Claimant's cervical spine imaging, Dr. Baruch noted degeneration disk disease and disk space narrowing at the C5-C6 level; otherwise normal cervical spine. Ex. 4:00221-0222.

14. On August 2, 2011, Dr. James Weiss, M.D. of Primary Health noted that Claimant had presented with neck pain and that she had a 16-year history of neck pain. Ex. 3:0022-0023.

15. **Industrial Accident**. On the morning of December 22, 2013, at approximately 8:00 a.m., Claimant experienced a slip and fall on ice in Employer's parking lot located in Meridian, Idaho. In falling, both of Claimant's feet went out from underneath her and her head

and neck hit the running sideboard of her car, a 2004 Chevy Tahoe. Claimant also hit her tailbone when she fell. Ex. 1:00001-00002. (First Report of Injury or Illness.); Tr., 58:19-59:5 (Vol. I; August 18, 2017).

16. Claimant got up slowly after her fall; she was in a lot of pain. She went to work where she ended up informing her supervisor of the slip and fall. Claimant worked for approximately four hours until her pain symptoms (tailbone, neck pain, and headache) became too much to handle and her supervisor authorized her leaving work to go to the hospital. Claimant's husband drove to her workplace and took her to St. Luke's Regional Hospital, Meridian. *Id.* at 60:15-62.25.

17. **Medical Care following Accident.** Claimant reported to staff at St. Luke's Meridian on December 22, 2013, that she slipped on ice and hit her head at 8:00 a.m. that morning while at work. Dr. James Weiss, M.D., family physician, dictated the history as follows: "This is a 46-year-old female who comes to the ED for evaluation after suffering a ground-level fall around 0800 this morning. The patient states that she was getting out of her car when she slipped on the ice and fell backwards. She hit her head and neck on the car bumper and her tailbone on the ground." Ex. 4:00295.

18. Dr. Weiss ordered morphine and Norco for pain; CT scans of Claimant's head and cervical spine; and XRAY of the Sacrum Coccyx. *Id.* at 00296. Indications of the head CT and cervical spine CT were trauma. *Id.* at 00297-00298. Similarly, the findings as to the Sacrum/Coccyx CT indicated trauma. *Id.* at 00299. Dr. Weiss's impression was minor head injury with cervical strain and sacral contusion. *Id.* at 00300. Claimant was discharged home with instructions on how to manage medications. *Id.* at 00303.

19. The findings of Claimant's CT scan were as follows: C4-5: mild facet hypertrophy. Mild annular bulge without central canal or foraminal stenosis. C5-6: severe disc narrowing with reactive endplate change of the posterior disc osteophyte complex resulting in mild deformity anterior aspect of the canal and moderate bilateral foraminal stenosis; C6-7: mild facet hypertrophy and left uncovertebral joint hypertrophy. There is no central canal stenosis but there is moderate to severe left foraminal narrowing and mild right foraminal narrowing. Ex. 4:00298.

20. Claimant followed up with Primary Health Medical Group on January 2, 2014. She had complaints of neck pain radiating down her left arm. Jeremy D. Frix, P.A., prescribed her Robaxin and re-prescribed Norco. Ex. 3:00031.

21. Claimant next sought evaluation and treatment from Stephen C. Martinez, M.D., with Primary Health. Claimant reported continued moderate to severe neck pain, as well as left arm numbness and tingling. Although she had a prior neck fusion, Claimant stated that her symptoms had been quiet for the past 20 years prior to the slip and fall injury. Dr. Martinez released Claimant to full duty work and re-prescribed the same medications for her. He observed in pertinent part as follows: "This condition is deemed (on a more probable than not basis) work related as her previous cervical spine degeneration symptoms were quiescent for the past 20 years prior to this DOI." Ex. 14:00644.

22. Claimant then received a referral from Dr. Martinez to Dr. Paul Montalbano, M.D., a neurological surgeon. In a letter to Dr. Martinez dated February 12, 2014, Dr. Montalbano observed that conservative measures had failed to improve Claimant's condition, which is C7 Radiculopathy. "Due to weaknesses, I have recommended surgical intervention, which would include a C6-7 anterior cervical decompression, fusion and instrumentation."

Claimant consented to the procedure. Ex. 15:00658-00659. Dr. Montalbano took Claimant off work. *Id.* at 660.

23. On February 26, 2014, Claimant returned to Dr. Montalbano and informed him that she wished to try conservative measures before surgery. Dr. Montalbano then prescribed physical therapy in addition to an epidural steroid injection. Ex.15:00663.

24. Claimant underwent a four-week course of physical therapy at Intermountain Physical Therapy. She received a discharge on April 14, 2014. Ex. 16:00740.

25. On March 19, 2014, Dr. Montalbano opined that Claimant was much improved with the administration of a steroid injection. He prescribed continued physical therapy and a follow-up home exercise program. Ex. 15:00667. Dr. Montalbano assessed that Claimant could return to work on light/sedentary duty. *Id.* at 00668.

26. On May 21, 2014, Dr. Montalbano observed that Claimant had been doing quite well with physical therapy and a home traction machine. He opined that she had reached medical stability and returned her to work with no restrictions. *Id.* at 00673-00674.

27. On July 2, 2014, Claimant returned to Dr. Montalbano with renewed complaints of neck pain, headaches, and cervical radiculopathy. *Id.* at 00675.

28. On July 20, 2014, Dr. Montalbano recommended a bone scan for the persistence of Claimant's neck pain. *Id.* at 00676. He also recommended that she return to work on a light duty/sedentary basis. *Id.* at 00677.

29. The bone scan, as read by Dr. Shane McConegle, M.D., found in pertinent part that Claimant's cervical spine showed prominent focal activity in the cervical spine at the C5-6 level corresponding with advanced spondylosis and degenerative disc space narrowing. *Id.* at 00681.

30. On August 20, 2014, Dr. Montalbano recommended surgical intervention in the form of "a C5-C6 anterior cervical decompression, fusion and instrumentation." Ex. 15:00687. On September 8, 2014, Dr. Montalbano performed the surgery. Ex. 15:00694. The procedure was a C5-C6 and C6-C7 microscopic anterior cervical complete/radical diskectomy for compression and a C5-C6 and C6-C7 anterior cervical arthrodesis. Ex. 17:00779. On referral from Dr. Montalbano, Claimant sought treatment and evaluation by Rodde D. Cox, M.D., a physiatrist with Boise Physical Medicine & Rehabilitation Clinic, on November 5, 2014. Dr. Cox took a history of her present illness and past medical history, which he found significant for "previous neck fusion in 1994[1] at C5-6." Dr. Cox diagnosed Claimant with cervical radiculopathy, status post C5-6 and C6-7 fusion, which appeared to be stable. Dr. Cox arranged for her a new physical therapist. He explained the importance of weaning off Norco. He prescribed Cymbalta for depression and pain management. Claimant was to return in 3 to 4 weeks. Ex. 22:00920-00921.

31. Claimant returned to Dr. Cox for follow-up on December 3, 2014. She reported that she had been unable to wean off Norco and was taking two every six hours. Claimant still had headaches. Dr. Cox's plan was to schedule her for trigger-point cervical injections, which were performed on December 16, 2014. *Id.* at 00925-00926.

32. At a follow-up appointment on January 9, 2015, Claimant was "doing reasonably well." She felt the trigger point injections were useful. She rated her neck pain at 2 or 3 out of 10. She remained on narcotics but attributed them to her acid reflux condition. Dr. Cox renewed a prescription for Robaxin initially prescribed by another provider. Claimant was scheduled for acid reflux surgery; Dr. Cox stated that the clinic would get Claimant back into physical therapy

[1] The surgery was actually performed in 1995.

following that surgery. Claimant was considering trigger point injections into the posterior area of the cervical spine. *Id.* at 00928.

33. On February 4, 2015, Claimant followed up with Dr. Cox. She was doing "reasonably well," but complained of headaches which Dr. Cox opined were not related to the industrial injury. Dr. Cox felt she was approaching stability from her neck standpoint. Ex. 22:00932.

34. On April 7, 2015, Dr. Cox determined that Claimant had reached maximum medical improvement for her cervical condition. He assigned a 15% whole person impairment to her condition. He also assigned permanent work restrictions of lifting up to 35 pounds occasionally and avoiding repetitive head turning. *Id.* at 00933. Upon prompting from Surety, he added that there would be a 6% apportionment from her prior surgery in 1995. *Id.* at 00935.

35. On April 29, 2015, Claimant sought treatment and evaluation from Dr. Sandra A. Thompson, M.D., of The Pain Center located in Boise. She complained of ongoing neck and shoulder pain following cervical fusion surgery. She also complained of ongoing facial pain of an unknown etiology. Dr. Thompson's plan was to discontinue Norco and substitute Butrans patches. Also, Dr. Thompson would initiate treatment with Zofren. She ordered an MRI of the cervical spine. Ex. 31: 01427-01428.

36. Claimant continued to treat with Dr. Thompson until July 8, 2015, when Dr. Thompson discharged Claimant from her care for violating their pain contract by seeking Norco from another physician on two separate occasions. *Id.* at 01437.

37. Claimant sought pain management care from Dr. William Binegar, M.D. with Pain Care Boise on May 8, 2015. Ex. 32:01441. Dr. Binegar performed occipital nerve injections on Claimant to address her headaches. *Id.* at 01448. Thereafter, Dr. Binegar performed bilateral

C5-C6 facet injections to address neck pain. Those injections were repeated three times through August 27, 2015. Ex. 32:01460, 01462, and 01467. On September 14, 2015, Dr. Binegar performed C5-C6 bilateral frequency ablation for her neck pain. *Id.* at 01472.

38. Dr. Binegar continued to perform a number of different kinds of injections on Claimant through the end of his care of her. The purpose of these injections and the radio frequency ablations was to ameliorate her neck pain. *Id.* at 01488-01502. She was referred back to physical therapy for a trial of a TENS unit. *Id.* at 01506.

39. Dr. Binegar referred Claimant to Dr. Daniel Marsh, M.D. for further follow-up of her neck and head pain on February 20, 2017. Ex. 35:01587. Dr. Marsh observed on May 31, 2017, that Claimant was injured in a slip and fall with whip lash type injury. She also suffered from post laminectomy syndrome. *Id.* at 01589. He decided to refer her to IMI for another ablation on the right side. Meanwhile, Dr. Marsh planned another diagnostic block. *Id.* at 01590.

40. Dr. Montalbano evaluated Claimant once again on August 21, 2018. She presented for evaluation of neck pain as well as right posterior shoulder discomfort. Reviewing an MRI dated August 9, 2018, Dr. Montalbano noted that Claimant had a "solid arthrodesis from C5-C7." Instrumentation was well placed. Nevertheless, the "MRI scan demonstrates severe lateral recess stenosis on the right at 4-5 with compression of the right C5 nerve root… In terms of the etiology of her symptomatology, I do relate this to next segment degeneration at the level of C4-5 which is related to her prior construct." Dr. Montalbano opined that Claimant carried the diagnosis of mid cervical region C4-5 disc degeneration, disc with radiculopathy, disc displacements and cervical region spondylosis with radiculopathy. Dr. Montalbano recommended a course of Relafen and physical therapy. If these conservative measures failed, he

would endorse an extension of her fusion to the level of C4-5 with associated decompression. Ex. 15A:00276.

41. On October 24, 2018, Dr. Montalbano ordered a bone scan "to further elucidate the etiology of her symptomology." Claimant was not improved with conservative measures. Ex. 15A:00279.

42. On November 20, 2018, Dr. Montalbano interpreted the bone scan as showing increased uptake involving her facet joints at C2-3, C3-4, and C4-5. Furthermore, he opined that the "etiology of her symptomatology emanates from next segment degeneration. Although it is multiple levels, she was asymptomatic prior to her fusion at the level of C5-6 and C6-7 and therefore I relate this to next segment degeneration." "Surgical intervention to address this issue would include removal of her prior anterior cervical buttress plate and extension of her fusion to the level of C2-3, C3-4, C4-5." Claimant consented to the operation. *Id.* at 00281.

43. Surety denied coverage of Dr. Montalbano's proposed surgery. Ex. 32A:00429.

44. Upon referral from Dr. Binegar, Claimant sought another opinion from St. Luke's Northwest Neurosurgery Associates on January 28, 2020. Stephanie Breiih, P.A.-C, evaluated her at her first appointment. Ms. Breiih took a medical history that included past surgeries and conservative measures. She reviewed Claimant's most recent imaging studies. She concluded that Claimant had spinal stenosis and at C4-5 adjacent to her previously placed construct at C5-7. Claimant did not wish to pursue further conservative measures but rather undergo surgery. Ms. Breiih discussed extension of her fusion to C4-C5. Ex. 26:02610-02613.

45. Claimant was scheduled for surgery with Dr. Derek L. Martinez, M.D., but decided not to go through with it prior to the surgery. Tr., 22:1-10 (Vol. III, 7/12/2022).

46. On January 2, 2021, Claimant sought another opinion from Dr. Bruce Anderson, M.D. Ex. 61:02781. Since two other surgeons had recommended fusion surgery, Dr. Anderson suggested that Claimant follow through on those recommendations. *Id.* at 02783.

47. On February 23, 2022, Claimant returned to Dr. Montalbano for a consultation. Dr. Montalbano ordered X-rays and an MRI of the cervical spine. He noted that Claimant's current condition was related to the prior fusion at C5-C7. Ex. 15A:00287.

48. On April 6, 2022, Dr. Montalbano noted that the MRI showed significant central canal stenosis and cord compromise at the level of C4-C5. He further noted that Claimant was at "significant risk for spinal cord injury if surgery is not performed." *Id.* at 00290.

49. **Independent Medical Examinations. *Michael V. Hajjar, M.D.*** Defendants, through counsel, hired Dr. Hajjar, a neurosurgeon, to perform an independent medical records review of Claimant. He delivered his report on February 5, 2019. Dr. Hajjar's credentials are known to the Industrial Commission. Ex. 53:02350.

50. Dr. Hajjar noted as "a preexisting condition, Ms. Keele underwent a C5-6 anterior cervical decompression and stabilization under the care of Dr. Marano in the mid-1990s. She had almost 20 years between that surgery and the current injury. It was noted from notes in 2011 that she still had some ongoing neck pain…" *Id.*

51. Dr. Hajjar concluded as follows:

> At the present time, Ms. Keele has been noted on radiographic studies and clinically to have findings that are consistent with next segment degenerative changes occurring at the C4-5 level. There is spinal canal compromise, potential for spinal cord compression and some subtle but present myelopathic signs noted in the medical record… In Ms. Keele's case the surgery that would have prompted the next segment degenerative change is not the surgery done in 2014 but the original fusion surgery done at C5-6 in the mid 1990s. Therefore, in my opinion, the next segment change that relates to the need for the current treatment is accelerated or precipitated by the patient's preexisting condition including her

1999 [sic] surgery and not the work related injury from late 2013 or its treatment rendered by Dr. Montalbano. Ex. 53:02351.

52. Dr. Hajjar further concluded that "100%" of Claimant's current condition was due to preexisting factors. He attributed 0% of Claimant's current condition, including the need for additional surgery which he did not dispute, to Claimant's December 2014 surgery. Ex. 53:02351.

53. ***Vicken Garabedian, M.D.*** Defendants requested a records review from Dr. Garabedian, who is a neuroradiologist. He delivered a report on April 30, 2019. Dr. Garabedian's qualifications are contained in a curriculum vita contained in Exhibit 55.

54. Dr. Garabedian agreed with Dr. Hajjar's conclusion that the "unfortunate progression of disease in the cervical spine which is most pronounced at C4-5 in my opinion is related to the C5-6 original surgery in the 1990s resulting in altered biomechanics and progressive adjacent segment failure." Ex. 55:02367.

55. ***Paul Rubery, M.D.*** Claimant sought a records review/ "second opinion" from Dr. Paul Rubery, an orthopedic surgeon, who delivered his report on an unknown date. Dr. Rubery's qualifications are stated in a curriculum vita in his report. Ex. 60:02775.

56. Dr. Rubery did not opine on the etiology of Claimant's condition. He did agree that fusion surgery at C4-5 would be reasonable. He advised Claimant that she did not "have to rush into surgery." *Id.* at 02779.

57. ***Bruce J. Anderson, M.D.*** Claimant sought a second opinion/records review from Dr. Anderson on January 28, 2021. Dr. Anderson is a neurosurgeon with St. Luke's Regional Medical Center. Ex. 61:02783.

58. Dr. Anderson did not opine on the etiology of Claimant's condition. He advised her that since two other neurosurgeons have recommended fusion surgery, she should go ahead with that plan. *Id.*

59. **Medical Depositions.** ***Paul J. Montalbano, M.D.*** Dr. Montalbano is a neurosurgeon practicing in Boise. Montalbano Dep., 5:3-5. His qualifications are known to the Industrial Commission. His deposition was taken on July 19, 2022.[2]

60. The last time Claimant was seen in Dr. Montalbano's clinic, she brought an MRI demonstrating "progressive changes at the level of C4-5 with severe central canal stenosis and known instability at that level, and at that point in time, I recommended surgery which would include extension of her prior fusion from C5 to C7 up to the level of C4-6, with associated decompression." *Id.* at 6:1-6.

61. Dr. Montalbano defined "next segment degeneration" as referring to 'adjacent levels of the spine in regards to a fusion." *Id.* at 6:11-12. In Claimant's case, "she had a prior fusion from C5 to C7, and that fusion takes away mobility at those levels." *Id.* at 6:13-14. According to Dr. Montalbano, this leads to additional stress and makes the spine prone to degenerative changes, as seen in Claimant's next segment degeneration. *Id.* at 6:19-24.

62. Dr. Montalbano recommended urgent surgical intervention, because Claimant's progressive disc herniation or disc protrusion, is causing spinal cord compression. *Id.* at 7:7-10.

63. Dr. Montalbano addressed why he fixed the failed fusion at C5-6 when he addressed the issue at C6-7, as follows: "Going in and fixing C6-7 and not addressing the failed fusion at 5-6 does not make any sense. You have to fix both. Nevertheless, "[b]ecause both

[2] A previous deposition of Dr. Montalbano was taken on May 23, 2018.

levels were fixed, her risk of next segment failure doubled because you're adding another level at 6-7." *Id.* at 7:19-23.

64. Dr. Montalbano addressed whether Claimant was asymptomatic from her failed fusion from 1995 as follows: "It's not surprising that Ms. Gabiola [Claimant] was asymptomatic related to that failed fusion in 2000 – from 2000 – or 1995 to when her injury was in 2013." Montalbano Dep., 9:12-14.

65. As to Claimant's symptomology following the 2014 surgery, Dr. Montalbano noted as follows: "But in 2018, three years later, she had a persistent subluxation. There was progressive spinal cord compression, and questionable cord signal change, which is bruising of the spinal cord." *Id.* at 10:6-9.

66. Dr. Montalbano apportions the causation of Claimant's condition as follows: "a third to be related to her prior fusion at C5-6, a third related to prior fusion at C6-7, and a third related to a degenerative condition given the fact that they were multiple levels above her fusion." *Id.* at 12:1-5. He later updated his opinion on apportionment to include 85% attributable to the 2014 surgery and 15% attributable to the 1995 surgery and general degeneration. *Id.* at 22:16-23:1; 13:14-17.

67. Dr. Montalbano argues that the opinions of Dr. Hajjar and Dr. Garabedian are actually consistent with his, as follows:

> So had she not been injured in 2014, that asymptomatic failed fusion at C5-6 never would have been fixed because she was asymptomatic. But because she developed an issue below her fusion at C6-7, if she didn't have the prior fusion – or the prior surgery at 5-6, she wouldn't have developed additional need for surgery at 6-7, and then in 2014 you actually stabilize both those segments, and by so doing you increase the rigidity of the spine at those two levels causing next segment failure.
> So their opinion regarding next segment failure coincides with mine. They just choose to ignore multi-level fusion as opposed to a single level fusion at 5-6.

Id. at 14:12-23.

68. Dr. Montalbano specifically addressed the opinion of Dr. Garabedian, as follows: "So if you accept his opinion that the progression of the disease in the cervical spine at 4-5 is related to the original surgery [in 1995], it doesn't follow suit that you ignore the additional surgery in 2014, which included fixing the 5-6 pseudoarthrosis, making it more rigid, and adding another level at C6-7." *Id.* at 19:27-22.

69. ***Michael Hajjar, M.D.*** Defendants took the deposition of Dr. Hajjar, a neurosurgeon, on September 7, 2022. His credentials are known to the Commission.

70. Dr. Hajjar agreed that Claimant was currently suffering from next level degeneration at the C4-C5 level. Hajjar Dep., 6:23-7:2.

71. Dr. Hajjar expressed his opinion on the etiology of next level segment degeneration, as follows:

> My opinion has always been in this case that the problem at C4-5 is related to the 1990s problem and surgery, even though Ms. Keele was pseudoarthrotic at the C5-6 level. We see patients who undergo these surgeries who end up having non-healed fusions often, and they still develop next segment changes at some point often because that surgery, even though it didn't fully heal, will still lead to additional strain on the segment above the original operation.

Id. at 8:6-14.

> So it's not like that C4-5 level was normal 100% at the time of her second surgery. She had more subtle wear and tear that happened to progress and that progression, in my opinion, is still based on the 1990-something surgery.

Id. at 9:12-16.

72. Dr. Hajjar disagreed with Dr. Montalbano on whether the two-level fusion he performed in 2014 added more stress resulting in next level segment degeneration. "I don't think there's any data that shows that longer fusions lead to more stress and more propensity to develop next segment changes versus single fusions. A two-level fusion isn't a long fusion

anyway. And so, I don't agree with that statement that doing C6-7, adding to C5-6 made C4-5 more likely to go bad." *Id.* at 12:4-9.

73. Dr. Hajjar reaffirmed his opinion stated in his report that "In Ms. Keele's case the surgery that would have prompted the next segment degenerative change is not the surgery done in 2014 but the original fusion done at C5-6 in the mid-1990s." Hajjar Dep., 12:11-14.

74. Dr. Hajjar admitted that he had never met Claimant or conducted a physical examination of her, nor has he taken her history. *Id.* at 16:20-17:1. His only role was to review records provided to him by defense counsel. *Id.* at 17:2-9.

75. Dr. Hajjar agreed that she was "relatively asymptomatic" between her 1995 fusion and her 2013 injury. *Id.* at 19:11-15. He did not find evidence of any major treatment that would indicate Claimant was symptomatic from her prior fusion. *Id.* at 19:16-19.

76. **Claimant's Condition at Hearing**. Claimant explained that "my quality of life is nothing. The pain is just debilitating." Tr., 28:3-4 (Vol. III, 7/12/2022).

77. Claimant qualified for Social Security Disability and Medicare. *Id.* at 28:5-7.

78. Claimant described her current life in more detail as follows:

> And my – my life has changed. My poor husband, you know, knew me as active and we used to go on trips all the time. We have a timeshare in McCall. We used to go there all the time. We would go to Vegas. We would go once a month to see our grandkids. We have four grandbabies in Idaho Falls. We haven't seen them in a year because I don't dare interact with them. They are – they are active. I don't bike. I don't play tennis. I don't swim. I just want to get back to that. I don't go out with my friends – our friends anymore because I never want to do anything. I mean we are still friends, but they are tired of me saying no. It's just – it's just hard, you know, to do anything with the pain. It just aggravates – anything aggravates it.

Id. at 35::12-36:3.

79. **Claimant's Credibility.** Claimant testified credibly at hearing.

DISCUSSION AND FURTHER FINDINGS

80. The provisions of the Idaho 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).

81. **Medical Causation.** Claimant bears the burden of proving that the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). There must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his contention. *Dean v. Dravo Corporation*, 95 Idaho 958, 560-61, 511 P.2d 1334, 1336-37 (1973).

82. The compensable consequences doctrine is recognized in Idaho. A subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if there is a demonstrable causal connection between the compensation sought and the work-connected injury. *Sharp v. Thomas Brothers Plumbing*, 510 P.3d 1136 (2022). The permanent aggravation of a preexisting condition or disease is compensable. *Bowman v. Twin Falls Construction Company, Inc.*, 99 Idaho 312, 581 P.2d 770 (1978).

83. No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 901, 591 P.2d 143,

148 (1979). While a temporal relationship is always required to support a finding of causation between an accident and the injury, the existence of a temporal relationship alone, in the absence of substantive medical evidence establishing causation, is insufficient to satisfy Claimant's burden of proof. *Swain v. Data Dispatch, Inc.* IIC 2005-528388 (February 24, 2012). The Industrial Commission, as the fact finder, is free to determine the weight to be given to the testimony of a medical expert. *Rivas v. K.C. Logging*, 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).

84. An employer is required to provide reasonable medical care for a reasonable time. Idaho Code § 72-432(1). A reasonable time includes the period of recovery, but may or may not extend to merely palliative care thereafter, depending upon the totality of facts and circumstances. *Harris v. Independent School District No. 1*, 154 Idaho 917, 303 P.3d 604 (2013). 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). It is for the physician, not the Commission, to decide whether the treatment is required; the only review the Commission is entitled to make is whether the treatment was reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

85. **Coverage of Claimant's Cervical Condition**. As noted above, this case is not about the reasonableness or necessity of the treatment that Claimant is seeking for her cervical spine. Rather, the sole question is one of causation, whether the need for surgery is causally related to the industrial accident and injury.

86. The evidence this Referee finds persuasive demonstrates that the subject accident is the cause of Claimant's need for surgery at C4-5. Claimant required surgery in 1995 to fuse her C5-6 segment. The evidence establishes that at some point after the 1995 surgery, the fusion failed, leaving Claimant with a fibrous union only at C5-6. Montalbano Dep. 9. The fibrous union preserved some of Claimant's C5-6 motion, and decreased the risk of injury to the adjacent segment at C4-5. Montalbano Dep. 7-8. The medical records reflect that Claimant did seek occasional treatment for neck pain following the 1995 surgery, but her complaints and need for care were much greater following the 2014 surgery. The C6-7 fusion performed at the time of that surgery was directly related to the injuries Claimant suffered as a result of the subject accident. The C5-6 fusion was deemed necessary only because of the need to treat Claimant's work-related injury at C6-7. In other words, but for the C6-7 work related injury, the C5-6 failed fusion would not have been restored. Montalbano Dep. 25. Dr. Montalbano explained that fusing C6-7 places more stress on the failed C5-6 fusion that would inevitably lead to further compromise of the C5-6 level. Failure to address C5-6 at the time of the C6-7 fusion would only lead to a need for further surgery to fix C5-6. Avoiding multiple surgeries decreases risk to the patient, so fixing C5-6 at the time of the C6-7 fusion was strongly indicated. Montalbano Dep. 7-8, 19-20, 25. Therefore, the fusion of C5-6 is causally related to the need to repair the work-related lesion at C6-7, and, by this path, is shown to be causally related to the accident as well.

87. The 2014 fusion at two levels in turn caused the accelerated degeneration of the C4-5 disc space. Dr. Montalbano persuasively testified that the C5-7 construct places more strain on the C4-5 space and accelerated the degeneration of that level. Montalbano Dep. 7-8, 24-25. From this it follows that the need for the proposed C4-5 surgery is causally related to the subject accident.

88. In fact, even if it be assumed that the need for the C5-6 fusion is wholly unconnected to the C6-7 fusion, and was performed only coincidentally to the C6-7 fusion (a finding that this Referee does not make), the proposed C4-5 surgery is still compensable. Dr. Montalbano persuasively explained what seems obvious to a lay person; the longer two-level fusion caused more damage, more quickly, to Claimant's C4-5 disc space than would a one-level fusion at C5-6. Montalbano Dep. 7, 24. Therefore, Claimant's need for C4-5 surgery is still causally related to the C6-7 lesion, and by this route, to the work accident. The fact that the accident might be only a cause, as opposed to the only cause, of the need for surgery is not a challenge to Claimant's entitlement to medical care. The employer takes Claimant as she comes and the fact that Claimant may suffer from a pre-existing condition is not a defense to her entitlement to benefits. *Wynn v. J.R. Simplot Co.*, 666 P.2d 629, 105 Idaho 102 (1983). The opinion of Dr. Montalbano is entitled to more weight than those of Dr. Hajjar and Dr. Garabedian because he was Claimant's treating physician and surgeon, whereas Dr. Hajjar and Dr. Garabedian merely reviewed records. Dr. Montalbano, on the other hand, performed Claimant's 2014 surgery, took her medical history, and evaluated her in various office visits. In Dr. Garibaldian's case, he is not a surgeon but rather a neuroradiologist.

89. The opinions of Dr. Hajjar and Dr. Garabedian ignore the impact of the 2014 surgery, almost as if it did not occur. The 1995 surgery was not the procedure that set Claimant up for failure of the C4-5 disc. Dr. Montalbano made it clear that the C5-6 disc space would never have been re-fused absent the accident related need to fuse Claimant at C6-7. Montalbano Dep. 14:12-23. The two-level fusion that resulted from the 2014 surgery is the condition that accelerated the degeneration of the C4-5 disc space. Absent the subject accident Claimant would

not have undergone the 2014 surgery, would not have suffered accelerated degeneration at C4-5 and would not now need the C4-5 fusion proposed by Dr. Montalbano.

90. The record includes testimony from doctors related to apportionment of the medical expense of the surgery. Legally however, apportionment does not appear to have been independently argued as an issue for consideration. The issue before the Commission was stated as follows in the June 14, 2022, order setting this matter for hearing: "...whether Claimant is entitled to receive as a workers' compensation benefit surgery in the form of a fusion and decompression at C4-5." At hearing, the issue was stated slightly differently: "...whether and to what extent claimant is entitled to the following medical benefits: surgery in the form of a fusion and decompression at C4-5." Tr. 5:8-10 (Vol. III, 7/12/2022) (emphasis supplied). This articulation of the issue, to which the parties assented, would potentially admit the inclusion of the question of whether responsibility for the payment of the prospective surgery should be apportioned between the subject accident and the pre-existing injury and surgery at C5-6. However, neither party argued for or against apportionment of medical benefits in their briefing, and the issue is deemed abandoned. Even if this Referee were to consider the issue of apportionment, there is little evidence supporting it.

91. Idaho Code statutorily authorizes apportionment of disability for preexisting impairment or different injuries. "Such authority has been judicially interpreted to include apportionment of hospital, medical and kindred expenses." *Earl v. Swift & Co.*, 467 P.2d 589, 93 Idaho 546 (1970). The apportionment of medical expenses and total temporary disability benefits is a factual issue which will be upheld on review when supported by substantial and competent evidence. *Blang v. Liberty Northwest Ins. Corp.*, 125 Idaho 275, 278, 869 P.2d 1370, 1373 (1994) (holding expenses would not be apportioned due to unique circumstances). In

circumstances where an injury with a second employer, however minimal, accelerated or aggravated and permanently worsened a condition and causes the need for the medical treatment, the Commission frequently attributes liability for medical expenses to the surety liable at the time of the most recent accident. *Hall v. Wal-Mart Stores, Inc.*, 082401 IDWC, IC 97-015081 (Idaho Industrial Commission Decisions, 2001). Dr. Montalbano did testify to apportionment of "indications for surgery", opining that 85% was attributable to the 2014 procedure, with 15% attributable to the 1995 procedure and other degenerative issues. Montalbano Dep. 22:16-23:1; 13:14-17. However, he is also clearly of the view that absent the need to fuse C6-7, there would have been no need to fuse C5-6 in 2014. It is this accident-related multi-level fusion that is responsible for the acceleration of Claimant's C4-5 degeneration. This Referee finds no persuasive evidence establishing that the surgical costs should be apportioned between the subject accident and a pre-existing condition. *Brooks v. Standard Fire Insurance Co.*, 117 Idaho, 1066, 793 P. 2d 1238 (1990).

92. For all these foregoing reasons, Claimant's current condition is causally related to her 2013 accident and injury and subsequent surgery in 2014.

CONCLUSIONS OF LAW

1. Claimant is entitled to surgery in the form of fusion and decompression at C4-5.

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 2nd day of February, 2023.

INDUSTRIAL COMMISSION

John C. Hummel

John C. Hummel, Referee

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 2023, 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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