BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LAURIE LINK, Claimant, v. CRANE CREEK CATTLE ASSOCIATION, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2012-015356** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed May 19, 2017

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. He conducted a hearing in Boise on August 5, 2016. Nathan Gamel represented Claimant. Neil McFeeley represented Defendants Employer and Surety. Claimant testified at hearing. Exhibits were admitted. Post-hearing depositions were taken and submitted. After briefing, the case came under advisement on February 6, 2017. This matter is now ready for decision.

ISSUES

The issues to be decided according to the Notice of Hearing and as agreed to by the parties at hearing are:

1. Whether and to what extent Claimant is entitled to:

    a) permanent partial impairment;
    b) disability in excess of PPI including total permanent disability, and
    c) medical care;

2. Whether Claimant is entitled total permanent disability under the odd-lot doctrine; and

3. Whether apportionment of permanent partial disability for a pre-existing condition is appropriate under Idaho Code §72-406.

The parties stipulated to the withdrawal of formerly noticed issues of medical stability, temporary disability benefits, and attorney fees.

CONTENTIONS OF THE PARTIES

Claimant contends she is totally and permanently disabled as an odd-lot worker. A job search has been unproductive, and further efforts to find work are likely futile. Claimant suffers from occasional seizures as a result of the head injury she suffered in the industrial accident—she was thrown from a horse in June 2012—and this risk precludes all work from horseback and involving vehicle operation. No job title for which she has any experience is safe or suitable now. Although she has worked a little since the accident as a pen rider, she does it against medical advice. She is entitled to future medical care to manage her seizures and other residual symptoms. She is entitled to professional assistance in the activities of daily living which she can no longer do.

Defendants contend Claimant's disability should be rated at 51%. She is not an odd-lot worker. She has worked seasonally since the accident. She has owned her own ranch for years. Her post-accident work is not performed for a sympathetic employer. Neither she nor others on her behalf have actually conducted a job search. There is no basis for Mr. Montague's opinion that attempts to obtain work would likely be futile. If her migraines and consequent reluctance to drive are considered a source of disability, apportionment under Idaho Code § 72-406 is appropriate. She had two seizures in 2013, one in January, and one in March. She was prescribed medication and has not had another. She declined treatment at Elks' Rehabilitation Traumatic Brain Injury program. She retains a driver's license and does drive. Claimant's claim for future medical care includes items not ripe and other items not permitted under the statutes. Defendants' renew their motion to exclude Mr. Montague's vocational report as speculative, objectively inaccurate, and beyond the scope of his qualifications.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant;

2. Claimant's exhibits A through O;

3. Defendants' exhibits A through D; and

4. Post-hearing depositions of Lawrence Green, M.D. and of vocational experts Terry Montague and Sara Statz.

In Mr. Montague's deposition, Defendants' objections at pages 28, lines 1and 2 of 30, pages 31, 34, 40, 53, and 69, and Claimant's objections at pages 73 and 76, are SUSTAINED. All other objections in this deposition are OVERRULED. Defendants' motion to strike at page 40 is GRANTED. Other motions to strike made therein are DENIED.

All other objections raised in depositions are OVERRULED.

FINDINGS OF FACT

1. Claimant worked for Employer seasonally since 2005. Working mostly from horseback in a remote area from Ola, Employer provided her a cabin in season. On June 18, 2012 she was thrown from a horse in a compensable accident.

2. Claimant was driven to Walter Knox Hospital in Emmett, and then transported to St. Al's in Boise by ambulance.

Medical Care: 2012

3. Claimant arrived at St. Al's shortly after midnight June 19. After a couple of hours of treatment in the emergency room Claimant was admitted. A trauma center note indicates Claimant suffered a loss of consciousness of one minute at the time of the accident. According to the history and physical, she suffered a "brief 5-second loss of consciousness" but without other symptoms of possible concussion. The emergency room physician's notes record she also reported nausea. CT scans, X-rays, and other tests were performed. Discharge

diagnoses included right C7 nondisplaced facet fracture, superficial abrasions on the left face, right intraparenchymal temporal lobe bleed with no sign of contusion and no worsening on serial CT scans, left shoulder grade 2 AC separation, and left 2-11 rib fractures. She was discharged in a cervical collar to be worn for an expected six weeks and a left arm sling to be used as needed.

4. Claimant was released to full work in August. She resumed working at her old job in September and finished the season.

5. On December 28 chiropractor Martin Donaldson provided work restrictions which specified no lifting over 15 pounds, no overhead reaching and limited pushing and pulling with her left arm, and no horseback riding.

Medical Care: 2013

6. On January 22 Claimant visited Walter Knox emergency room immediately after a seizure which included loss of consciousness. A CT scan of her head showed no new abnormality, but noted a "small focal area of encephalomalacia"—scar tissue—at the location of the prior temporal lobe bleed. This was Claimant's first seizure.

7. On January 25 Claimant visited Saint Al's Orthopaedics. Jeffrey Shilt, M.D., provided treatment for continuing left shoulder pain. Upon examination he noted weakness with external rotation but could not confirm other subjective complaints. He recommended an MRI. It showed mild tendinopathy and possible bursitis but no rotator cuff tear. On March 26 Dr. Shilt injected lidocaine.

8. On January 28 she visited her treating physician William Vetter, M.D. Claimant reported occasional garbled speech since the accident. Dr. Vetter referred her to neurologist Lawrence Green, M.D. who began treating her after a second seizure.

9. On March 22 Claimant suffered a second seizure while working as a waitress.

10. On March 26 Dr. Green diagnosed generalized convulsive epilepsy. He opined it causally related to the accident (although his note misstates the date as 2011 instead of 2012). He opined her migraines were aggravated by the accident as well. Dr. Green restricted her from work—except for "waitress work with caution"—and driving for three months. This note represents the first written reference to an "aura" involving nausea and dizziness which preceded both seizures. An EEG was deemed abnormal.

11. On April 30 Dr. Green noted his discussion with Claimant about her summer job of "back country cooking" scheduled to begin June 1 with monthly trips to town. He prescribed a medication change to Keppra or its generic equivalent. This note does not mention restrictions. A follow-up note dated May 21 indicates Claimant was tolerating the new medication and that her symptoms were about the same.

12. A June 20 note by Dr. Green shows Claimant reported no seizures and very few migraines. He considered her medically stable with no PPI on this date.

13. Although Claimant testified she began having "panic attacks" shortly after the seizure at the restaurant, these are not contemporaneously documented by medical notes.

14. Dr. Green's next note is dated August 27. A new complaint related to memory is noted. Claimant reported "slight persistent low-grade right temporal headache" but no migraines.

15. Dr. Green's next note is dated December 2. Claimant reported one episode of "feeling somewhat confused" but no seizures. Dr. Green suggested possible attendance at Boise Elks brain injury program but left the decision in Claimant's hands. He opined her post traumatic epilepsy to be "well controlled."

Medical Care: 2014--Hearing

16. On June 10, 2014 Dr. Green noted no new issues, minor headaches, no seizures.

17. On November 16, 2014 Gary Cook, M.D., a physician in Chester, evaluated Claimant at her attorney's request. He examined Claimant and reviewed records. The examination took place in Meridian. Claimant described what Dr. Cook identified as "prodromal aural-type symptoms" or "partial seizures." Dr. Cook noted at length Claimant's perceptions of her loss of function. He noted she suffered two seizures including loss of consciousness. He opined Claimant was medically stable regarding her seizure disorder, but not for sequela of her traumatic brain injury or left shoulder. Accepting these conditions as if medically stable, he rated Claimant's PPI at 37% whole person. It is unclear whether Dr. Cook was recommending restrictions or identifying Claimant's self-reported tolerances when he described left hand lifting of 20 pounds, right at 50; driving 90 minutes to two hours followed by a 24-hour rest period; "sustained activity involving exertion" of 60 to 90 minutes; and lifting, pulling, reaching, or work above shoulder level. He identified potential future medical care needs arising from the accident and recommended attendance by several specialists and a pain management specialist, including possible future nerve ablation.

18. On March 15, 2015 Dr. Green opined Claimant was medically stable. Claimant was status quo at a March 30 visit.

19. Claimant testified she telephoned Dr. Green's office after a seizure and that he increased her antiseizure medication in May 2015. Dr. Green's notes do not show his office received a telephone call or that he increased her dosage in that time frame. Mr. Hess testified in deposition to having witnessed this third seizure.

20. On June 24, 2015 Claimant visited Michael O'Brien, M.D., for a neurological consultation. He reviewed medical records and examined Claimant. He had not seen Claimant

since a February 2013 consultation. At this 2015 visit Dr. O'Brien opined Claimant was medically stable. He rated her PPI at 26% whole person using the *AMA Guides*, 5th edition.

21. Also in his record of this 2015 visit, Dr. O'Brien noted Claimant suffered three seizures which were documented. He noted Claimant's reports of "abortive" or "partial" seizures recurring approximately monthly. He noted that since treatment with Keppra, seizures were well controlled. He accepted her reports of a loss of mental acuity and personality change. He found MRI and EEG reports to be consistent with her reports of symptoms and with the description of the accident. He noted her neck and shoulder complaints were minor and did "not materially affect her ability to function." He found her "able to do much of her work on a horse as she did prior to her injury." He noted she required continuing seizure control medication and other future medical care as a result of her traumatic brain injury. He opined that "significant accommodations would be necessary," specifying avoiding dangerous machinery and working at heights, as seizure precautions if she attempted full-time work. He suggested that if seizures returned, driving and other functions might become contraindicated.

22. On July 8, 2015, Robert Friedman, M.D., and Robert Weschler, M.D., reviewed records and examined Claimant as a panel evaluation at Surety's request. Their report refers to a third seizure which occurred May 17, 2015, which is also referred to in Dr. O'Brien's June 24, 2015 medical note, but not found contemporaneously reported in the evidence of record. They opined Claimant was medically stable. They recommend future, lifetime treatment for her seizure disorder. Restrictions were recommended: for her shoulder, no repetitive activity over 20 pounds; for her neck, medium work involving 50 pounds occasionally and 25 pounds repetitively; limit driving to moments when she is not having an aura and immediately pull over if one occurs; if she has another seizure, defer to a treating neurologist about future driving;

for fatigue, rest when necessary (this is expected to improve over time); stop working more than one job concurrently. Considering all impairments and using the *AMA Guides* combining table, Claimant's PPI is rated at 26% whole person.

23. On August 6, 2015, Robert Friedman, M.D. reviewed and criticized Dr. Cooks' November 2014 evaluation and opinions. He noted Claimant's range of motion and other complaints and function relating to her neck and shoulder was significantly better at the panel examination than as reported at Dr. Cook's examination. He disagreed with Dr. Cook's recommendation for future medical care beyond treatment for her seizure disorder. He amplified on the panel report to confirm that no PPI was awarded for the C7 facet fracture and that migraines were deemed preexisting conditions unrelated to the accident.

24. On April 21, 2016 Dr. Green noted Claimant reported more difficulty with cognition on some days, but no seizures. The note indicates they talked about "lifetime limitations." None is specified.

25. In response to a May 23, 2016 letter from Claimant's attorney, Dr. Green refused to recommend Claimant's attendance at a brain injury clinic. He deemed any benefit so long after the accident to be "unlikely."

26. In deposition Dr. Green explained the cause, nature, and extent of Claimant's partial seizures. He deems her partial seizures to be "98, 99 percent controlled" and that they do not require treatment beyond the antiseizure medication being administered to protect her from tonic-clonic seizures which occurred in January and March 2013. He has no basis to question the accounts of a third seizure in May 2015, but she never reported it to him. He opined that Claimant's reports of occasional mental confusion are consistent with his expectation for a patient with post-traumatic epilepsy in the range of severity which Claimant

suffers. He accepts reports of personality change from friends and family as consistent with her condition. Documented scarring in the temporal lobe makes a complete recovery less likely. He believes Claimant is unable to perform mentally "trying and taxing" jobs such as jobs involving multitasking, but that herding cattle is not contraindicated on that basis. Dr. Green associates Claimant's reports of oncoming headlights precipitating "auras" with her migraines rather than her seizure disorder. Migraine auras are not related to her seizure disorder. He opined that although migraines are a preexisting condition, the accident permanently aggravated and exacerbated them. He opined Claimant will need lifelong future medical care for her seizure disorder.

27. Dr. Green would not restrict Claimant's driving based upon her migraines or auras. He would restrict her from obtaining a commercial driver's license (CDL). Dr. Green reported that Idaho prohibits driving for six months after a tonic-clonic seizure; medical data indicates a person who has not had a tonic-clonic seizure for three months is as safe a driver as the general population. If future tonic-clonic seizures were to occur, the question of driving privileges might be revisited on a temporary basis.

28. Dr. Green does not think it advisable for Claimant to work alone in remote areas, but would not medically restrict her from such jobs.

Prior Medical Care

29. Claimant has a prior history of treatment for migraine headaches.

Vocational Factors

30. Born December 31, 1964, Claimant was 51 years old on the date of hearing.

31. Having grown up on a cattle ranch near Sweet, Claimant had performed ranch work since her teen years.

32. Claimant graduated from Emmett High School in 1983. She has completed at least one college course related to ranch work about 1995, but received no certificate or degree.

33. She has worked for the U.S. Forest Service as a range tech and plantation protector. This work was performed in remote areas supervising and inspecting tree planting crews, gopher control, and fencing projects. This work was performed largely from horseback. While working there Claimant attended skill-specific classes such as tree planting, chainsaw use, etc.

34. Claimant has worked as a pen rider at various feedlots including a feedlot in Nyssa, Oregon as well as Simplot's Caldwell location which then was about 45 miles from her home. She also worked as a resaw operator at a sawmill.

35. Claimant has worked as a waitress in nearby towns.

36. Claimant is and was at the time of the accident a part owner of a working ranch of 40 cattle. She had purchased her ex-husband's share of the ranch after her divorce. After her accident her son took over the loan and that half-ownership of the ranch. He has become its primary operator and raises bucking bulls.

37. Claimant is also a one-quarter owner of a nearby ranch which she inherited from her parents.

38. Injured in June 2012, Claimant returned to work for Employer at the same job-association rider—in September 2012 tending 600 cattle. She completed the season in October. Her 2012 pay rate was $2,000 per month.

39. Near the end of 2012 Claimant returned to her winter work as a waitress. After hospitalization for the January 22, 2013 seizure, she returned to work. Some time after her second seizure in March 2013, Claimant ceased working as a waitress.

40. Claimant has also performed occasional day-work for nearby ranches in the off-season.

41. About March 2013 Claimant declined a U.S. Forest Service job offer after the second seizure left her feeling unsafe to drive.

42. In 2013 Claimant worked as a hand at Sulphur Creek Ranch, cooking, cleaning, packing in guests from the trailhead, etc. Mr. Hess also worked there and was paid as a separate employee.

43. Starting with the 2014 season and continuing to the date of hearing Claimant has worked for Hitt Mountain Cattle Association ("Hitt") performing essentially her pre-accident job attending 800 cattle. She paid her boyfriend half her wage of $3,000 per month to work alongside her. In 2015 Hitt paid her $2,000 per month and hired her boyfriend at the same rate to work alongside her.

44. Claimant also buys and sells horses for herself and as an agent for others. Part of her work with Hitt is performed on horses she is training for purposes of sale. She has been training and trading horses since about 2010.

45. Vocational expert Terry Montague performed an evaluation at Claimant's request. He reviewed records and interviewed Claimant. His written report is dated March 8, 2016. Mr. Montague did not address specific restrictions imposed by physicians. He relied upon Claimant's description of her perception of her subjective limitations. Mr. Montague did not perform a labor market analysis. Mr. Montague did not perform a wage-loss analysis. He opined she would qualify as an odd-lot worker because a job search would be futile. He did expound upon his understanding of her medical condition and non-medical functional bases for that opinion.

46. Vocational expert Sara Statz, upon obtaining her master's degree in vocational rehabilitation counselling, worked for IDVR from 2010 into 2012, and for ICRD in the Caldwell office from 2012 to 2015. She opened her own consulting company in 2015. Her work is divided between Social Security disability determinations and workers' compensation cases in northwestern states including Alaska.

47. Ms. Statz reviewed records and interviewed Claimant at Surety's request. Her written report is dated July 20, 2016. She assigned little weight to wage loss as a factor of disability. Taking the most restrictive elements of each physician's set of restrictions, Ms. Statz calculated a 51% permanent disability inclusive of PPI. She identified several job titles within Claimant's physician-imposed restrictions. She well explained her written report and responded well in deposition testimony to Mr. Montague's criticisms of her written report.

DISCUSSION AND FURTHER FINDINGS OF FACT

48. 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). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447−48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 603 P.2d 575 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

49. Claimant's demeanor at hearing raised no concerns. Claimant makes an excellent first impression as a hard worker and a motivated worker.

50. Testimony elicited from Claimant at hearing largely addressed her fears should another seizure occur. It addressed contingent obstacles to continued employment in the event her personal circumstances might change. Such speculation does not substitute for evidence.

Medical Care

51. 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). One factor among many in determining whether post-recovery palliative care is reasonable is based upon whether it is helpful, that is, whether a claimant's function improves with the palliative treatment. *Id.*; *see also, Sprague v. Caldwell Transp., Inc.*, 116 Idaho 720, 591 P.2d 143 (1979)(overruled by *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015) to the extent *Sprague* suggested its articulated factors were exclusive.)

52. The record contains many references to seizures, often with varying adjectives as labels. Claimant has suffered two tonic-clonic or "grand mal" seizures in 2013, one in January and one in March. These support a diagnosis of "seizure disorder" also known as "posttraumatic epilepsy." Dr. Green testified about "partial seizures" as brief instances of mental confusion or automatic, irrational action. Reports of such partial seizures are consistent with objective evidence of scarring about Claimant's temporal lobe.

53. Dr. Green opined it likely that Claimant's reports of auras are related to her migraine headaches and not the result of her seizure disorder. He explained that Claimant's linking of these auras to possible impending seizure or partial seizure is understandable,

but probably erroneous. Nevertheless, the accident caused the migraines to be chronically aggravated.

54. Testimony about a May 2015 seizure does not well describe whether this was a third seizure or one of the unnumbered partial seizures. Claimant did not report it to physicians contemporaneously and did not seek medical treatment for it immediately after its occurrence.

55. Dr. Green well explained that Claimant will need future medical care for life to control her seizure disorder. This includes medication and infrequent but reasonably regular visits to monitor the condition. His opinion regarding her alleged need for an attendant at work is persuasive. Claimant failed to show she is entitled to such service.

56. Dr. Green agreed with speculation that Claimant may in the future need medication and monitoring for her migraines depending upon her tolerance. If so, that need would be causally related to the accident as well.

57. Future medical care for body parts unrelated to her seizure disorder or migraines has not been shown to be or become likely as a result of the accident.

Permanent Partial Impairment

58. Permanent impairment is defined and evaluated by statute. Idaho Code §§ 72-422 and 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry,* 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan,* 97 Idaho 151, 540 P.2d 1330 (1975).

59. This case highlights a major difficulty associated with a traumatic brain injury. Within a spectrum, mental acuity and functional personality may be impaired when compared to a claimant's pre-accident ability. This would represent a genuine loss. Such loss may not be observable to someone who did not know that claimant well both before and after the accident.

60. Here, Claimant credibly described mental confusion, diminished judgment, loss of memory, and other impairments not observable in the context of a hearing. Further, she described occasional slurred speech and reduced stamina associated with fatigue which impairs her function greater than before the accident. Personality changes include post-accident "panic attacks," increased frustration, and agitation over matters which would not have previously occurred in the same circumstances pre-accident. Mr. Hess's testimony of his observations of Claimant before and after the accident appears consistent with Claimant's subjective perceptions. It is consistent with Dr. Green's expectations for a person who has suffered head trauma to the degree Claimant has. The Referee finds mental acuity and personality changes to be evidence of actual impairment caused by the traumatic brain injury.

61. However, the record does not show evidence of neurocognitive testing and evaluation either before or after the accident. Such impairment is extraordinarily difficult to quantify based upon the evidence of record.

62. Dr. Cook's PPI rating inconsistently mixes DRE and ROM standards and draws inconsistently from both the 5th and 6th editions of *AMA Guides*. He failed to use the combining table set forth in both editions. This methodology carries less weight than the internally consistent approaches of the panel and of Dr. O'Brien.

63. Dr. Friedman's PPI rating declined to rate the healed C7 facet fracture. He declined to rate Claimant's migraines as preexisting. The panel PPI rating of 26% is slightly low because the evidence shows Claimant's migraine condition was chronically aggravated by the accident and it adversely affects her activities of daily living.

64. Dr. O'Brien's PPI rating of 26% differs from Dr. Friedman's in its components, but the result is the same. He did not evaluate possible PPI related to the neck and shoulder injuries.

65. Raising Claimant's PPI award slightly to account for the panel's refusal to rate the migraine condition—whether an additional one or two percent—would not materially affect Claimant's entitlement to benefits in this instance. Adding neck and shoulder PPI to Dr. O'Brien's rating would result in a similarly small increment after appropriate use of the combining table. Claimant has demonstrated permanent disability in excess of PPI which would entirely eclipse the incremental component resulting from such adjustments.

66. Claimant suffered permanent impairment as a result of the accident rated at 26% of the whole person.

Permanent Disability

67. **"**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.

68. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 766 P.2d 763 (1988). In sum,

the focus of a determination of permanent disability is on a claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

69. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423 and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

70. Chiropractor Donaldson's restrictions were imposed before Claimant's first seizure and antiseizure medication began. The restrictions are afforded little weight.

71. Dr. Cook's intemperate characterization of Claimant's medical care and willingness to rely largely upon Claimant's reports of her tolerances undermines the weight to be assigned to his suggestions regarding restrictions.

72. Dr. O'Brien's suggestions of restrictions are reasonable but vague. To some extent they are based upon speculation about future worsening of her condition which has not been established to a reasonable medical likelihood. While these generalized restrictions are given weight, they are ultimately of little guidance when addressing Claimant's loss of local labor market access.

73. By contrast, the panel's restrictions are given the most weight as being specific and linked to Claimant's conditions at the time she was evaluated.

74. Vocationally, Mr. Montague's opinions receive little weight. He opined Claimant was totally and permanently impaired as an odd-lot worker under the "futile" prong of

the analysis. A worker may be totally and permanently disabled when she establishes 100% disability. Under the odd-lot doctrine, total and permanent disability may also be shown for a worker who is not 100% disabled. By definition, an odd-lot worker is less than 100% disabled, but qualifies as totally and permanently disabled under the tests described in the next section of this analysis. Mr. Montague failed to assess or quantify Claimant's loss of local labor market access.

75. Ms. Statz's well documented local labor market analysis receives greater weight.

76. Descriptions of occupational titles and computer programs help vocational experts quantify disability. Of necessity these generalize and group varying jobs under one descriptor. Given the small population and limited economy in Claimant's local labor market, some aspects and factors incorporated into these aids are more relevant if adjusted to actual local applications. Mr. Montague's criticism of Ms. Statz's analysis consisted in large part of identifying how one or another occupational title contained within its broad category one or more functions which would be difficult for Claimant to perform. That criticism, unless specifically applied to jobs in the local labor market, carries little weight.

77. The major factor to be considered here is what Claimant has actually done. She no longer works in restaurants—consistent with Dr. Green's caveat about jobs involving multitasking—because she has found it too mentally taxing to the extent it brings on auras or partial seizures. She avoids solo work in remote areas. But more importantly, she works and has worked seasonally since she returned from her accident in September 2012. She has taken appropriate off-season jobs.

78. Claimant's work ethic and abilities are impressive. Her fears about the future are largely real and reasonable. Her disability is significant.

79. Ms. Statz analyzed the local labor market and offered expert opinion with adequate description of the underlying factual bases upon which she relies. The evidence of record demonstrates that Claimant's impairment alone does not adequately compensate her for disability. The Referee concludes that Claimant has suffered additional disability of 25%, over and above her impairment rating.

Odd-Lot

80. If a claimant is able to perform only services so limited in quality, quantity, or dependability that no reasonably stable market for those services exists, she is to be considered totally and permanently disabled. *Id.* Such is the definition of an odd-lot worker. *Reifsteck v. Lantern Motel & Cafe*, 101 Idaho 699, 700, 619 P.2d 1152, 1153 (1980). Taken from, *Fowble v. Snowline Express*, 146 Idaho 70, 190 P.3d 889 (2008). Odd-lot presumption arises upon showing that a claimant has attempted other types of employment without success, by showing that she or vocational counselors or employment agencies on her behalf have searched for other work and other work is not available, or by showing that any efforts to find suitable work would be futile. *Boley, supra.*; *Dehlbom v. ISIF*, 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997).

81. The only suggestion that Claimant qualifies as an odd-lot worker is Mr. Montague's assertion that the futile prong of odd-lot analysis applies. This assertion flies in the face of facts of record which show Claimant can work, has worked, and is sought after by others for her skill, ability, and judgment in various aspects of horsemanship and ranch work.

82. Claimant is not an odd-lot worker.

Causation and Apportionment

83. A claimant must prove that she was injured as the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden.

Beardsley v. Idaho Forest Industries, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001). Idaho Code 72-406 allows apportionment where a preexisting physical impairment causes an increase of disability, in severity or duration, to the effects of a compensable accident.

84. Here, the only dispute is whether apportionment is appropriate for the preexisting migraine condition. Upon Dr. Green's opinion that the accident caused a chronic aggravation of the migraine condition and in the absence of evidence to show it likely that the preexisting condition resulted in impairment before the accident, no apportionment of disability is appropriate.

CONCLUSIONS

1. Claimant was injured in a compensable accident which resulted in permanent physical impairment rated at 26% of the whole person;

2. Claimant is permanently disabled rated at 51% of the whole person, inclusive of PPI, without apportionment;

3. Claimant is entitled to reasonable medical care for sequela of her head injury, including seizure disorder and migraines, for life;

4. Claimant is not totally and permanently disabled and did not show she qualifies as an odd-lot worker.

RECOMMENDATION

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

DATED this 5th day of May, 2017.

INDUSTRIAL COMMISSION

___/s/_____
Douglas A. Donohue, Referee

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of May, 2017, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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dkb

___/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LAURIE LINK, Claimant, v. CRANE CREEK CATTLE ASSOCIATION, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2012-015356** **ORDER** Filed May 19, 2017

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue 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 was injured in a compensable accident which resulted in permanent physical impairment rated at 26% of the whole person;

2. Claimant is permanently disabled rated at 51% of the whole person, inclusive of PPI, without apportionment;

3. Claimant is entitled to reasonable medical care for sequela of her head injury, including seizure disorder and migraines, for life;

4. Claimant is not totally and permanently disabled and did not show she qualifies as an odd-lot worker.

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

DATED this 19th day of May, 2017.

INDUSTRIAL COMMISSION

___/s/_____
Thomas E. Limbaugh, Chairman

___/s/_____
Thomas P. Baskin, Commissioner

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

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of May, 2017, a true and correct copy of the **ORDER** was served by regular United States Mail upon each of the following:

NATHAN T. GAMEL
1226 EAST KARCHER ROAD
NAMPA, ID 83687-3075

NEIL D. MCFEELEY
P.O. BOX 1368
BOISE, ID 83701

dkb

___/s/_____