BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DIXIE SODERLING, Claimant, v. WEST ADA SCHOOL DISTRICT, Self Insured Employer, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2014-024042** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed March 19, 2020**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on February 8, 2019. Claimant, Dixie Soderling, was present in person and represented by Taylor Mossman-Fletcher, of Boise. Defendant Employer, West Ada School District, was represented by Alan R. Gardner, of Boise. Defendant, State of Idaho, Industrial Special Indemnity Fund, was represented by Paul J. Augustine, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken, and briefs were later submitted. The matter came under advisement on September 12, 2019.

The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

The issues to be decided are:

1. Claimant's entitlement to medical care;

2. Claimant's entitlement to temporary disability benefits;

3. The extent of Claimant's permanent impairment attributable to the industrial accident and that attributable to pre-existing injuries or conditions;

4. The extent of Claimant's permanent disability, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise;

5. Whether apportionment for a pre-existing or subsequent condition pursuant to Idaho Code § 72-406 is appropriate;

6. Whether the Industrial Special Indemnity Fund is liable under Idaho Code § 72-332;

7. Apportionment under the Carey formula; and

8. Claimant's entitlement to an award of attorney fees.

CONTENTIONS OF THE PARTIES

All parties acknowledge Claimant suffered an industrial accident on September 5, 2014, when she fell from a counter at work and struck her head. Claimant asserts she is now totally and permanently disabled and is entitled to additional medical, temporary disability, and permanent impairment benefits and to attorney fees for Employer/Surety's unreasonable denial of benefits. Employer/Surety assert that Claimant is not totally and permanently disabled, and in fact has proven no permanent impairment and no permanent disability due to her industrial accident. In the alternative, they maintain that if Claimant is deemed totally and permanently disabled it is due to the combined effects of her industrial accident and pre-existing permanent impairments for which ISIF bears responsibility. ISIF maintains that Claimant's pre-existing conditions do not combine with her industrial accident to render her totally and permanently

disabled. Rather, ISIF asserts Claimant's industrial accident alone has rendered her totally and permanently disabled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file.
2. The parties' Joint Exhibits 1 through 51, admitted at the hearing.
3. The post-hearing deposition testimony of James H. Bates, M.D., taken by Claimant on February 28, 2019.
4. The post-hearing deposition testimony of Jackie J. Whitesell, M.D., taken by Claimant on April 22, 2019.
5. The post-hearing deposition testimony of Robert H. Friedman, M.D., taken by Defendants Employer/Surety on May 9, 2019.
6. The post-hearing deposition testimony of Paul J. Montalbano, M.D., taken by Defendants Employer/Surety on May 22, 2019.
7. The post-hearing deposition testimony of Michael F. Enright, Ph.D., taken by Defendants Employer/Surety on May 23, 2019.
8. The post-hearing deposition testimony of Barbara K. Nelson, M.S., CRC, taken by Defendant ISIF on June 17, 2019.

All outstanding objections are overruled and motions to strike are denied.

After having considered the above evidence and the arguments of the parties, the Commission submits the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. **Background**. Claimant was born in 1954 and was raised in Emmett. She was 64 years old and resided in Boise at the time of the hearing. She is right-handed.

2. Claimant attended high school through the 10th grade and left school in the 11th grade. She obtained her GED at the age of 18. After leaving high school she worked in agricultural packing sheds, at Boise Cascade as a general laborer, and at Micron measuring circuit pathways. Thereafter she performed administrative office work and provided group CPR training for Idaho State employees. Claimant subsequently worked as a medical office administrator and processed medical records. She was later employed by the Meridian School District where she worked as a bus monitor and thereafter as a paraprofessional teacher's aide assisting one on one with special needs children. Claimant enjoyed her work.

3. **Medical history.** In February and September 2000, Claimant underwent left and right shoulder arthroscopy and rotator cuff repair, respectively. In 2002 and 2003, she suffered a myocardial infarction, underwent balloon angioplasty, and placement of three stents. In approximately 2004, Claimant underwent gastric banding. In October and November 2006, she received medical treatment for depression. In June 2007, she lost her job and sought treatment for depression in October 2007. On November 3, 2008, she sought treatment for low back pain and headache. By November 6, 2008, her headache had resolved, and she returned to work. In 2012, Claimant underwent right knee total arthroplasty. In April 2014, she underwent L4-5 discectomy and fusion. She was released to return to work without restrictions in June 2014.

4. **Industrial accident and treatment.** On September 5, 2014, Claimant was working at Willow Creek Elementary School in her special needs classroom and climbed up on the counter to position some curtains. She lost her balance and fell, striking her head on the

counter and falling to the floor. She did not believe she lost consciousness. She was examined by the school nurse who encouraged her to seek medical attention and was then transported by her husband to the hospital. Upon admission to the hospital on September 5, 2014, Claimant reported "a pretty severe headache. She does feel confused. She had some swelling in the occipital portion of her head. She has some soreness in her neck but no numbness or tingling." Exhibit 10, p. 580. A head CT scan revealed left sided subdural hematoma measuring approximately 3 mm. Claimant's headache persisted and was agitated. She remained hospitalized overnight. Neurosurgeon Kenneth Little, M.D., examined Claimant on September 6, 2014, and recommended follow-up with the traumatic brain injury clinic. Upon discharge from the hospital, Dr. Little indicated Claimant would most likely have post-concussive headaches and should not return to work until her symptoms had substantially improved. Exhibit 10, p. 583.

5. On September 8, 2014, Claimant was examined by neuropsychologist Jason Gage, Ph.D., and reported headaches aggravated by light and noise stimulation.

6. On September 9, 2014, Claimant was evaluated in the STARS program and diagnosed with post-concussive syndrome, cervicalgia, headaches and difficulty walking. She was treated through the STARS program and with physical therapy until October 28, 2014.

7. On September 19, 2014, Claimant began treating with physiatrist Michael McMartin, M.D. She reported dizziness with position changes, word finding difficulties, confusion, decreased concentration, and short-term memory difficulties. Dr. McMartin diagnosed posttraumatic headache syndrome.

8. Claimant returned to work four hours per day, two days per week with brain breaks; however, her symptoms persisted and included headaches, visual deficits, and noise sensitivity.

9. Claimant continued to report frequent headaches through early 2015 as she continued to treat with Dr. Gage. By February 2015, Dr. Gage opined Claimant had returned to her pre-accident cognitive functioning but noted she continued to experience residual pain and exacerbated anxiety.

10. On April 27, 2015, Dr. McMartin found Claimant had reached maximum medical improvement and rated her permanent impairment at 2% of the whole person for chronic, recurrent, post-concussive headache syndrome. Exhibit 14, p. 951.

11. Claimant worked as she was able and completed the rest of the 2014-2015 school year. After returning to work in the fall of 2015, Claimant was assigned to a different school (Gateway). She reported more demanding assignments, inadequate time for regular brain breaks, and increasing headaches with nausea and photophobia toward the end of her work-days. On November 4, 2015, she returned to Dr. McMartin and he agreed to arrange a referral for neurological consultation. Claimant's performance notably declined as she struggled but completed the 2015-2016 school year. She noted word finding difficulties and decreased short term memory. She wore noise reducing headphones and sunglasses to reduce headaches due to overstimulation.

12. On May 18, 2016, Claimant's work performance was assessed in her paraprofessional/instructional assistant evaluation that provided in part:

> In the ERR [Extended Resource Room] at Gateway, Dixie has needed frequent monitoring to ensure student schedules are covered, and instructional and behavior strategies are being implemented. Dixie's decision making is questionable when it comes to appropriately supporting our ERR students effectively.

….

Dixie has participated in multiple training opportunities at Gateway and is not resistant during those sessions. However, Dixie struggles with applying the training she receives to live situations in the classroom and ERR room with our ERR students.
….

Dixie can be a very pleasant and happy person to be around, and she has made connections with many staff members. However, when pressed about her job performance by her supervisor, Dixie has not been able to tolerate that criticism and it has developed into a conflict that has not yet been resolved.
….

Dixie typically works well with Gen Ed teachers. She has struggled with her fellow ERR parapros, as they view her basic performance in other areas as negatively impacting the overall ERR program, which has hurt her relationship with them.
….

When presented with on the job, live situations, Dixie struggles with taking in all of the needed information, processing it, retaining it, and making good judgments based on that information. During those conversations, Dixie requests much information to be repeated, which is difficult in a fast-paced environment.
….

In the ERR room, changes occur daily based on present/absent students, Gen Ed teachers' events, and student behaviors. These daily changes were difficult for Dixie to grasp and respond to fluidly. Dixie asked for much information to be repeated and explained multiple times.
….

Dixie joined the Gateway ERR team mid-year, after being displaced from the ERR program at Willow Creek Elementary School. Concerns about Dixie's performance arose early on in her placement at Gateway. …. Dixie met with the building principal multiple times over the course of 3 months to discuss her concerns with her supervising teacher and her perceived performance. The building principal met multiple times with Dixie's supervising teacher to discuss her concerns with Dixie's performance, primarily in the areas identified above …. The building principal met multiple times with Dixie and her supervising teacher and discussed the specifics of each of their concerns and how to support and train Dixie so that her job performance could approach proficiency. Areas were identified and presented to her in writing for clarity and review. Dixie was presented with an improvement document on 4/2/2016, which was a summary of areas discussed that day between the building principal, the supervising ERR teacher, and her. The building principal made it clear what the areas of concern were and how performance needed to be improved in the coming weeks for it to be reflected more positively on her year-end evaluation. Unfortunately, Dixie had to be placed on medical leave by her doctor due to work stress, and additional information was not able to be gathered that

> could have counterbalanced the information described above. It appears that the brain injury that Dixie sustained last year significantly impacted her job performance at Gateway, and it is my sincere hope that when Dixie is healthy again that her job performance will improve significantly.
>
> Dixie can be a wonderful, positive person, and she has made many, many connections with staff members at Gateway. She is generous and caring and has a deep love for children. I hope that Dixie recovers quickly and is able to resume working.

Exhibit 42, pp. 1716-1719.

13. On May 31, 2016, Claimant presented to Dr. McMartin reporting increasing headaches. Dr. McMartin recorded Claimant's cervical spine range of motion was approximately 50% of normal in all directions. On June 17, 2016, Dr. McMartin again recommended a neurological referral and on August 11, 2016, Dr. McMartin noted he would refer Claimant to neurologist Jackie Whitesell, M.D.

14. During the 2016-2017 school year, Claimant returned to work and was assigned back to Willow Creek Elementary. Claimant initially was better able to manage her recurring migraines and complete her work assignments there with two special needs children.

15. On October 10 and 11, 2016, Claimant was examined by an IME panel comprised of physiatrist Robert Friedman, M.D., neurosurgeon Paul Montalbano, M.D., and psychologist Richard Enright, Ph.D., at Employer/Surety's request. The panel determined further medical treatment for her work injury was not indicated and she could return to work without restrictions.

16. On November 2, 2016, Claimant was examined by Dr. Whitesell who diagnosed chronic migraine secondary to traumatic brain injury in September 2014. Exhibit 24, p. 1179. Dr. Whitesell prescribed new medications including Propranolol, Fioricet, and Botox injections.

17. Claimant's recurring migraines worsened as the school year progressed. On January 30, 2017, Dr. Whitesell took Claimant off work due to her chronic migraines. In February 2017, Claimant began treating with psychiatrist Jordan Merrill, M.D., for depression

and anxiety. Dr. Whitesell's March 14, 2017 office note indicated Claimant wanted to return to work; however, she would need to continue with brain breaks and avoid lifting, bending, and overhead reaching which often provoked headaches. Dr. Whitesell's March 27, 2017 office note recorded that Claimant's Employer required that she return to work without restrictions, yet she continued to suffer chronic intractable migraines.

18. On or about April 13, 2017, Claimant requested reasonable accommodation from Employer. Specifically, as advised by Dr. Whitesell, Claimant requested brain breaks for 15 minutes every two hours, a structured work schedule, flexible work attendance (due to her unpredictable recurring migraines), and no physical exertion (as exertion triggered migraines). On April 21, 2017, Employer responded that it was unable to provide the accommodations requested. Claimant had exhausted all available leave and her employment was terminated as of April 20, 2017, due to her multiple and continuing absences.

19. On April 27, 2017, Claimant's psychiatrist, Dr. Merrill, recorded: "Claimant states she hit rock bottom with depression headaches, migraines have been refractory. States it was time to return to work and she was let go." Exhibit 32, page 1435.

20. On December 2, 2017, Claimant was approved for Social Security Disability benefits. She also applied for PERSI disability benefits and was examined by Christian Gussner, M.D., at the request of PERSI. He concluded she was totally disabled pursuant to PERSI criteria. On May 3, 2018, Claimant was approved for PERSI disability benefits.

21. **Condition at the time of hearing.** At the time of hearing, Claimant testified her chronic migraine headaches continued and also reported cervical and right knee pain. She continued receiving Social Security Disability and PERSI disability benefits.

22. **Credibility.** Having observed Claimant at hearing and compared her testimony with other evidence in the record, the Referee finds that she is a credible witness. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

DISCUSSION AND FURTHER FINDINGS

23. 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).

24. **Medical benefits and psychological benefits.** The first issue is Claimant's entitlement to additional medical care for her industrial accident. Idaho Code § 72–432(1) requires an employer to provide an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Of course, an "employer cannot be held liable for medical expenses unrelated to any on-the-job accident or occupational disease." Henderson v. McCain Foods, Inc., 142 Idaho 559, 563, 130 P.3d 1097, 1102 (2006). Thus, claims for medical treatment must be supported by medical evidence establishing causation. 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).

25. In the present case, Claimant asserts Defendants are liable for additional medical benefits including all treatment provided and prescribed by Dr. Whitesell.

26. Dr. Whitesell is board certified in neurology and psychiatry combined, and also in electrodiagnostics. She has been practicing in neurology for 11 years. Approximately 40% of the patients she treats suffer from migraines. Only 5% of her patients are workers' compensation patients. Claimant correctly notes that Dr. Whitesell is the only neurologist involved in this case.

27. Dr. Whitesell opined Claimant's chronic migraines were caused by her industrial accident and resulting subdural hematoma. Whitesell Deposition, pp. 10-11. Dr. Whitesell readily acknowledged that there was no strictly objective examination to prove Claimant or any other individual actually suffers from migraine headaches. However, Dr. Whitesell had no doubt that Claimant was experiencing migraine headaches. Whitesell Deposition, p. 22.

28. Dr. Whitesell provided Claimant periodic Botox injections from June 2017 through September 2018. Initially, Botox treatments were helpful in reducing the severity of her migraine headaches. However, over time the severity returned despite Botox treatments which were then discontinued. At the time of her deposition, Dr. Whitesell continued to prescribe Zofran as needed, Escitalopram, and Topamax, and opined these were medically necessary and reasonable treatments for Claimant's migraines. Whitesell Deposition, pp. 27-28.

29. Physiatrist James Bates, M.D., examined Claimant on April 9, 2018, and opined she sustained a head injury and traumatic brain injury due to her industrial accident. He opined that although her cognitive functioning had returned to its pre-injury level, she continued to experience chronic migraine headaches and chronic cervical sprain due to the accident.

Exhibit 32, p. 1437. Dr. Bates concluded Claimant needed further medical treatment for her chronic migraines due to the industrial accident. Exhibit 32, p. 1439. He testified that the treatment provided to Claimant by Dr. Whitesell, including Botox injections for migraine headaches, was reasonable, necessary, and related to the industrial accident. Bates Deposition, pp. 12-13.

30. Dr. Friedman, chair of the IME panel, reported that Claimant's symptoms in October 2016 were not related to her industrial accident. He opined she had returned to her pre-injury cognitive functioning level and her headaches were stress related. He opined any need for ongoing medical treatment was unrelated to the industrial accident. Exhibit 21, p. 1135.

31. Dr. Montalbano, a member of the IME panel, examined Claimant on one occasion on October 11, 2016. He opined that Claimant had at most a very small subdural hematoma that resolved quickly. Dr. Montalbano disputed the assertion that Claimant's migraines were causally related to her industrial accident:

> Q. [by Mr. Gardner] … Even if she has migraine headaches, would those be causally related in any manner to the injury?
>
> A. Absolutely not. That she has migraine headaches is really irrelevant in this case, due to the fact that she had an initial CT scan; and it was essentially normal.[1]
>
> She had a follow-up CT scan after her injury, and that was essentially normal.[2] She presented on the day of her injury to three separate medical facilities, and she was treated by three separate individuals initially.

[1] Although Dr. Montalbano opined that Claimant's post-accident CT scan was essentially normal, the radiologist interpreting her CT scan on September 5, 2014, Anthony Giauque, M.D., did not so characterize the scan. Rather, Dr. Giauque's conclusion was: "an increased density along the cerebral falx measuring up to 3 mm, likely an acute subdural hematoma. Consider 6-8 hour follow-up CT to document stability. No intracranial mass effect." Exhibit 12, p. 821.

[2] The hospital discharge summary of September 6, 2014, noted: "Repeat CT of the head without contrast showed no significant interval change with probable CIN parafalcine subdural hematoma and potentially minimal subarachnoid hemorrhage, unchanged without evidence of mass effect or midline shift." Exhibit 10, p. 560.

> She was a Glasgow Coma Scale of fifteen. She had no neurological deficits. She was in the hospital and discharged within a twenty-four-hour period, again, with no focal neurological deficit.
>
> There is no post-traumatic seizure history that's documented. There is no post-traumatic diagnosis as it related to her closed head injury.
> ….
>
> There are a lot of reasons for people to have headaches; but in this case, it would not be related to any significant injury to her brain, as outlined on her CT scan and follow-up CT scans and MRI scans and multiple examinations.
>
> There are a lot of reasons for people to have headaches, and a lot of those are psychological components that would include any type of distress. Outside of low back pain, headaches are probably the second most common cause for somebody to see a primary care physician and undergo treatment.
> ….
>
> Whether she has headaches or not, treated by Dr. Whitesell, I am—she has headaches. I have no reason to disbelieve that Dr. Whitesell is treating her for the headaches, but it's not related to this injury.

Montalbano Deposition, p. 15, l. 11 through p. 16, l. 4, and ll. 14-18.

32. Dr. Montalbano opined that Claimant's migraine headaches were due to her motives for secondary gain:

> Whenever you deal, as I'm sure you are aware, with a liability case or a work comp case, there are certain somatization disorders that come into play. There is a financial benefit for somebody to complain of headaches after a work-related injury, especially in this case. So if you are looking for a reason for her to have headaches, you need to consider that as one of the reasons why she is continuing to have treatment, especially given objective studies on multiple occasions, separated by a period of several years, and that these studies are all normal.
> ….
>
> I wouldn't use an imaging study to tell me that there is financial reward. You know as well as I do, especially in this case, that there is a financial benefit to be complaining of headaches.

Montalbano Deposition, p. 18, ll. 4-25.

33. Dr. Montalbano testified: "if you look at her medical records by Dr. Gage—and Dr. Gage is a psychologist—she has a history of psychological factors that would predispose

somebody to develop headaches." Montalbano Deposition, p. 17, ll. 22-25. Defendants therefore assert that Claimant's migraine headaches are not caused by her industrial accident, but rather by her pre-existing somatization psychological condition. However, if Claimant's migraine headaches are caused even in part by her accident, then even though her probability of having headaches is greater due to her pre-existing somatization condition, the Employer takes the injured worker as it finds her. Spivey v. Novartis Seed Inc., 137 Idaho 29, 43 P.3d 788 (2002).

34. Dr. Montalbano had no explanation for why Claimant had no history of chronic migraines before her work accident. He had no explanation for why she attempted to work for several years after her accident, but her performance declined until she was ultimately unable to continue. Her work attempts and declining performance are well documented in her May 2016 evaluation.

35. Dr. Montalbano did not dispute that Claimant had evidence of cognitive loss due to her industrial accident. She completed the STARS program and was treated by Dr. Gage for approximately five months before he determined that her cognitive functioning had returned to baseline. However, the fact that her cognitive functioning returned to baseline does not preclude the continuation of her migraine headaches.

36. Dr. Friedman is a board certified physiatrist. Dr. Montalbano is a board certified neurosurgeon. Dr. Enright is a board certified psychologist and offered no direct opinion regarding the causation of Claimant's chronic migraines. Dr. Whitesell is board certified in neurology and psychiatry combined. Approximately 40% of her patients suffer from migraines. Dr. Whitesell's expertise in evaluating and treating the conditions from which Claimant suffers is greater and her interactions with Claimant more extensive and recent than that of Drs.

Montalbano or Friedman. Dr. Whitesell's opinions are supported by the record as a whole and are more persuasive than those of Drs. Montalbano or Friedman. Although providing no causation opinion, Dr. Gussner opined regarding Claimant's treatment:

> current treatment by her Board Certified Neurologist, Jackie Whitesell, M.D., is Botox injections every three months, Lexapro, intermittent judicial use of Fioricet, Zofran for nausea, and the triptan Zomig. This treatment is consistent with professional standards of care. …. Her neurologist, Jackie Whitesell, M.D., is a very respected board certified neurologist.

Exhibit 31, p. 1411.

37. Claimant has proven she is entitled to additional reasonable medical treatment for chronic migraine headaches, including treatment provided and prescribed by Dr. Whitesell. Inasmuch as Defendants denied these medical benefits, Claimant is entitled to payment at the full invoiced rate for treatment already received. Neel v. Western Construction, Inc., 147 Idaho 146, 206 P.3d 852 (2009); Millard v. ABCO Construction, Inc., 161 Idaho 194, 384 P.3d 958 (2016).

38. Claimant also asserts she is entitled to treatment for psychological injuries, including depression and anxiety, due to her industrial accident. Idaho Code § 72-451 addresses psychological accidents and injuries and provides in pertinent part:

> (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(18)(a) through (18)(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.

(2) Nothing in subsection (1) of this section shall be construed as allowing compensation for psychological injuries from psychological causes without accompanying physical injury.

39. In the present case, Claimant experienced pre-accident depression, anxiety, and ADHD issues, and was treated occasionally for such. However, she was consistently gainfully employed, and her work performance was acceptable to her employers. Since the 2014 work accident, she has been regularly treated with anti-depressant and anti-anxiety medications and has treated periodically with her psychiatrist Dr. Merrill. Claimant asserts that treatment of her psychological conditions subsequent to her industrial accident is Employer/Surety's responsibility.

40. Defendants argue that Dr. Gage, the IME panel, and Claimant's MMPI-2 testing indicate she had significant pre-accident depression, anxiety, and somatization tendencies which adversely impacted her recovery and continuing pain more than her accident.

41. Dr. Enright is a clinical psychologist. He testified that Dr. Gage, a neuropsychologist was trained to evaluate the impact of Claimant's accident on her cognitive functioning and had concluded that by February 2015, Claimant's cognitive function had returned to baseline. Dr. Enright noted that Claimant had been treated for depression in 2006 and 2007 and diagnosed with attention deficit disorder and acute situational anxiety well prior to her 2014 industrial accident. He administered the MMPI-2 testing from which he concluded Claimant had pre-accident somatic symptoms disorder and major depressive disorder that were not due to her industrial accident. Following psychological testing, Dr. Enright diagnosed major depressive disorder and anxiety attention deficits. His secondary diagnosis was somatic symptom disorder. Enright Deposition, pp. 15-16. Dr. Enright opined that the predominant cause of Claimant's psychological conditions post-accident was her pre-accident depression and somatic symptom disorder. Enright Deposition, p. 23. Dr. Enright concluded that Claimant's industrial accident would be a stressor that would potentially exacerbate Claimant's pre-existing conditions. Enright Deposition, pp. 24-25. He specifically opined her industrial accident was not the predominant cause over all other causes combined resulting in her psychological distress and need for additional psychological care. Exhibit 20, p. 1129. The IME panel, including Drs. Friedman, Montalbano, and Enright, opined Claimant's industrial accident was not the predominant cause as compared to all causes combined of her psychological condition.

42. Dr. Whitesell opined that Claimant may have a somatization disorder but "it was the stress of the accident that probably exacerbated everything." Whitesell Deposition, p. 26,

ll. 7-8. A similar conclusion—that Claimant's anxiety and depression were exacerbated by her industrial accident—was also espoused by Claimant's psychiatrist, Dr. Merrill, and by Drs. Gussner and Gage. Dr. Merrill recorded: "62 y/o female with history of depression and ADHD. Concussion in 2014 with post concussive syndrome has markedly exacerbated both sets of symptoms, now with refractory and worsening depression and worsening of ADHD symptoms." Exhibit 25, p. 1201. Dr. Gussner reported: "The disabling condition is severe refractory chronic migraines. The migraine headache syndrome exacerbates her depression, anxiety, and ADHD symptoms." Exhibit 31, p. 1410.

43. Although several physicians concluded Claimant's 2014 accident exacerbated her depression and anxiety, no practitioner opined that her accident was the predominant cause, as compared to all other causes combined, of her current psychological conditions of depression and anxiety.

44. Claimant has not proven her entitlement to treatment for her psychological conditions of depression and anxiety.

45. **Temporary disability benefits and maximum medical improvement.** The next issue is whether Claimant is entitled to additional temporary disability benefits due to the industrial accident. Idaho Code § 72-408 specifies that if a claimant is totally or partially disabled during the period of recovery, he shall be paid income benefits for such disability as calculated by Idaho Code § 72-408 and Idaho Code § 72-409. Claimant bears the initial burden of adducing medical proof that she is in a period of recovery and entitled to total or partial temporary disability income benefits. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980).

46. A claimant's entitlement to time loss benefits comes with certain constraints. Idaho Code § 72-403 specifies that injured workers who receive total or partial temporary disability income benefits during a period of recovery have an obligation to seek or accept suitable employment consistent with their restrictions. Employer bears the burden of proving that an injured worker has failed to satisfy this statutory obligation. *See* Idaho Code § 72-403; Roberts v. Portapros, IC 2019-008048 (October 2019)

47. In the present case, Claimant asserts she did not reach maximum medical improvement until March 27, 2018, after her treatment by Dr. Whitesell. Defendants assert she reached maximum medical improvement by April 27, 2015, as determined by Dr. McMartin who then rated her permanent impairment. Exhibit 14, p. 951.

48. Although Dr. McMartin rated Claimant's permanent impairment on April 27, 2015, he continued to treat her thereafter with prescription medications and physical therapy. Dr. McMartin ultimately referred Claimant to a neurologist, Dr. Whitesell, who commenced treating Claimant on November 2, 2016, with additional prescription medications, including Propranolol, Fioricet, Zofran, Zomig, and a series of Botox injections. Periodic Botox injections were beneficial for several months.

49. Dr. McMartin is a board certified physiatrist. As previously noted, Dr. Whitesell is board certified in neurology and psychiatry combined. Approximately 40% of her patients suffer from migraines. Dr. Whitesell's expertise in evaluating and treating the conditions from which Claimant suffers is greater and her interactions with Claimant more recent than Dr. McMartin's. Dr. Whitesell's opinions are more persuasive than those of Dr. McMartin. Dr. Bates found Claimant reached maximum medical improvement only after her treatment by

Dr. Whitesell. In determining the date of maximum medical improvement, Dr. Bates opined that an appropriate date would be March 27, 2018. He noted this was the date of Claimant's visit with Dr. Whitesell during which Dr. Whitesell reported improvement with periodic Botox treatment and observed that Claimant's condition was fairly stable at the time of evaluation. Exhibit 32, p. 1440.

50. The weight of the evidence establishes that Claimant was still in a period of recovery following April 27, 2015, and did not reach maximum medical improvement until March 27, 2018, after treatment by Dr. Whitesell. If Claimant was totally or partially disabled at any time between the date of injury and March 27, 2018, she is entitled to the income benefits payable per Idaho Code §§ 72-408 and 72-409.

51. **Permanent impairment.** The next issue is the extent of Claimant's permanent impairment, including the portion thereof attributable to her industrial accident and the portion attributable to pre-existing conditions. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive 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 employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. A determination of physical impairment is a question of fact and the Commission is the ultimate evaluator of impairment. Soto v. J.R. Simplot, 126 Idaho 536, 887 P.2d 1043 (1994).

52. In the present case several physicians have evaluated Claimant's permanent impairment as discussed below.

53. *Dr. McMartin.* On April 27, 2015, Dr. McMartin rated Claimant's permanent impairment at 2% of the whole person for post-concussive headache syndrome. After Dr. McMartin's rating, Claimant's work performance deteriorated and she sought further treatment by Dr. Whitesell.

54. *Dr. Friedman.* Dr. Friedman examined Claimant once in October 2016 and opined that she had returned to her pre-accident cognitive level. Dr. Friedman then opined that Claimant's symptoms, ostensibly including recurring migraine headaches, were not related to her industrial accident. Exhibit 21, p. 1135. However, in the same report, Dr. Friedman expressly responded to Surety's claims adjustor's inquiry thus: "do you concur with the impairment rating previously assigned by Dr. McMartin? Yes. Dr. McMartin previously assigned no impairment for a traumatic brain injury with a 2% impairment of the whole person." Exhibit 21, p. 1136. Additionally, at his post-hearing deposition, Dr. Friedman testified that he could not disagree with the opinion of his partner, Dr. Gussner who had more recently examined Claimant and opined she was disabled pursuant to PERSI criteria. Friedman Deposition, p. 19.

55. *Dr. Montalbano.* Dr. Montalbano characterized Claimant's subdural hematoma CT findings as "minimal," and opined that Claimant's cervical CT scan the day of her accident revealed no traumatic injury. He recorded Claimant's cervical complaints but recorded no cervical abnormality when he examined her neck on October 11, 2016. In contrast, the panel chair, Dr. Friedman, noted in his physical examination of Claimant: "Cervical spine range of motion reveals normal rotation, 50% of normal right and left lateral bending with normal flexion

and extension." Exhibit 21, p. 1134. Dr. Montalbano concluded Claimant sustained no significant cervical injury due to her industrial accident. Montalbano Deposition, p. 11.

56. *Dr. Bates.* Dr. Bates is board certified in physical medicine and rehabilitation. He examined Claimant, reviewed her medical records, and rated her permanent impairments at Claimant's counsel's request. Dr. Bates testified that headaches frequently occur after a head injury. He agreed that Claimant's cognitive status had returned to its pre-injury level but disagreed with Dr. Friedman's opinion that Claimant's migraines were not caused by her industrial accident. He testified "Returning to a cognitive status does not indicate whether or not a person has migraines." Bates Deposition, p. 15, ll. 11-12. Dr. Bates acknowledged that stress can trigger or amplify migraines. He opined Claimant suffered an injury from her fall in 2014 and not merely the exacerbation of anxiety. Dr. Bates concluded that Claimant suffers post-concussive headaches with myofascial triggers. He could not comment on Dr. Montalbano's classification of Claimant's subdural hematoma CT findings as "minimal." Dr. Bates agreed with Dr. Whitesell that Claimant should limit physical activities including lifting, bending, and reaching overhead to avoid provoking headaches. Dr. Bates concluded Claimant suffers refractory chronic migraines due to her industrial accident.

57. Dr. Bates rated Claimant's whole person permanent impairments due to her 2014 accident at 0% for neurocognitive residuals, 5% for chronic headaches, and 2% for chronic persistent neck strain. Dr. Bates also assigned the following permanent impairments for Claimant's pre-existing conditions: 2012 right total knee arthroplasty with good result 25% lower extremity, 2017 total left knee arthroscopy with fair result 37% lower extremity,[3] left foot

[3] There is no indication or assertion that the 2017 total knee replacement was casually related to the 2014 industrial accident. There is insufficient evidence to establish the extent of Claimant's left knee impairment, if any, prior to her industrial accident.

degenerative changes 5% lower extremity, right foot degenerative changes 5% lower extremity, rotator cuff repair with distal clavicle excision 10% upper extremity, bilateral wrist degenerative changes 5% upper extremity each, and L4-5 fusion 7% whole person. Exhibit 32, pp. 1438-1439.

58. *Dr. Whitesell*. Dr. Whitesell's December 12, 2017 letter affirmed that Claimant had one or two headache-free days per month and would not be able to consistently attend any job because of her chronic migraines caused by her post-concussive disorder. Whitesell Deposition, p. 37. Dr. Whitesell had no doubt that Claimant was experiencing migraine headaches. Whitesell Deposition, p. 22. Dr. Whitesell testified that Claimant's major depressive disorder was probably contributing to her disability. Whitesell Deposition, p. 20.

59. Dr. Whitesell's board certifications in neurology and psychiatry, and extensive experience treating patients suffering from migraine headaches, distinguish her as the most trained, experienced, and knowledgeable practitioner in Claimant's case. Dr. Whitesell's expertise in evaluating and treating the conditions from which Claimant suffers is greater and her opinions more persuasive than those of Drs. McMartin, Friedman, Montalbano, and Enright. Dr. Whitesell's opinions strongly corroborate Dr. Bates' rating of Claimant's impairment due to her chronic headaches.

60. Claimant has proven she suffers whole person permanent impairments due to her 2014 industrial accident of 5% for chronic headaches and 2% for chronic persistent neck strain. Claimant has also proven she suffers the following permanent impairments for pre-existing conditions: 25% of the lower extremity (10% whole person) for her 2012 right total knee arthroplasty, 5% lower extremity (2% whole person) for left foot degenerative changes, 5% lower extremity (2% whole person) for right foot degenerative changes, 10% upper extremity

(6% whole person) for rotator cuff repair with distal clavicle excision, 5% upper extremity each (3% whole person each) for bilateral wrist degenerative changes, and 7% whole person for L4-5 fusion.[4] Her total permanent impairment is 40% of the whole person, with 7% impairment attributable to the 2014 industrial accident and 33% impairment attributable to pre-existing conditions.

61. **Permanent disability**. The next issue is the extent of Claimant's permanent disability, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise. "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. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. In sum, the focus of a determination of permanent disability is

[4] Whole person impairment values Tables 15-11, 16-10. Guides to the Evaluation of Permanent Impairment, 6th Ed.

on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995). The proper date for disability analysis is the date of the hearing, not the date that maximum medical improvement has been reached. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012).

62. To evaluate Claimant's permanent disability several items merit examination including the physical restrictions resulting from her permanent impairments and her potential employment opportunities—particularly as identified by vocational experts.

63. Work restrictions. Prior to the September 5, 2014 work accident, no medical provider had discussed or imposed any restrictions on Claimant's work or other activities. As previously noted, Dr. Bates assigned multiple permanent impairments for Claimant's pre-existing conditions of her right knee, left and right feet, bilateral shoulders, bilateral wrists, and low back. Dr. Bates and Dr. Friedman both agreed that Claimant was limited to medium duty work due to her lumbar surgery. Specifically, for her lumber condition, work restrictions would include lifting no more than 25 pounds repetitively and 50 pounds occasionally and no twisting or torqueing of her low back. For her bilateral rotator cuff surgeries, work restrictions would include medium level work and no repetitive over-the-shoulder activity or lifting more than 20 pounds. Friedman Deposition, pp. 13-14. Dr. Bates agreed that given Claimant's bilateral rotator cuff surgeries, she should limit over-the-shoulder work. Dr. Friedman opined that work restrictions from total knee replacement would include no kneeling or crawling, and limited squatting. Dr. Bates agreed with these restrictions and also imposed limited stair climbing. Exhibit 32, p. 1438.

64. The Commission finds that Claimant is restricted to medium duty work of lifting no more than 25 pounds repetitively and 50 pounds occasionally, no twisting or torqueing of her

low back, no repetitive over-the-shoulder activity or lifting more than 20 pounds, no kneeling or crawling, and limited squatting and stair climbing. While perhaps not formal work restrictions, both Dr. Bates and Dr. Whitesell agreed that Claimant should limit physical activities including lifting, bending, and reaching overhead to avoid provoking migraine headaches.

65. Opportunities for gainful activity. Several experts have evaluated Claimant's capacity for gainful employment. Their opinions are addressed below.

66. *Dr. Gussner.* Dr. Gussner examined Claimant at the request of PERSI to determine whether she qualified for PERSI disability benefits. He concluded she was disabled per PERSI's criteria. The PERSI definition of disability is:

> (a) that the member is prevented from engaging in any occupation or employment for renumeration or profit as a result of bodily injury or disease, either occupational or non-occupational in cause, but excluding disabilities resulting from service in the armed forces of any country other than the United States or from an intentionally self-inflicted injury; and (b) that the member will likely (which, in turns, means with reasonable medical certainty) remain so disabled permanently and continuously during the remainder of the member's life[.]

Exhibit 31, pp. 1409-1410.

67. Dr. Gussner relied upon Dr. Whitesell's records, who had been treating Claimant for severe migraine headaches since November 2, 2016. Dr. Gussner noted Claimant "is not able to return to work in a reasonable fashion due to persistent difficulty with chronic migraine pain, nausea, intermittent vomiting, attention and concentration deficits." Exhibit 31, p. 1410. He opined that Claimant's disabling condition was severe refractory chronic migraines. He did not believe she was able to perform any form of employment on a full-time (8 hours/day, 40 hours/week) or part-time (a minimum of 4 hours/day, 20 hours/week) basis. Dr. Gussner further observed "only in rare cases would I consider a patient with migraines to meet the above definition of disability. However, Ms. Soderling is that unique case." Exhibit 31, p. 1411.

68. *IME panel.* Drs. Friedman, Montalbano, and Enright examined Claimant in October 2016 and concluded she could return to work without restrictions. Dr. Gussner and Dr. Friedman are partners in their medical practice. Acknowledging at his deposition that Dr. Gussner's examination and evaluation of Claimant were more recent that Dr. Friedman's, Dr. Friedman testified that, regarding Dr. Gussner's conclusions, there was "nothing I disagree with." Friedman Deposition, p. 18, l. 8. Dr. Friedman affirmed he is very knowledgeable about the standards of Social Security disability and somewhat knowledgeable about PERSI disability standards. Dr. Friedman did not disagree that the standards for PERSI disability are higher than the standards for Social Security disability. Friedman Deposition, p. 18.

69. *Dr. Whitesell*. Dr. Whitesell's December 12, 2017 letter affirmed that Claimant had one or two headache-free days per month and would not be able to consistently attend any job because of her chronic migraines caused by her post-concussive disorder. Whitesell Deposition, p. 37. Regarding the frequency and impact of Claimant's migraines on her ability to sustain employment, Dr. Whitesell opined that "with as many days that she would have to miss of work at this point she probably couldn't." Whitesell Deposition, p. 19, ll. 14-16. In spite of treatment, Dr. Whitesell was not able to help Claimant return to work and doubted she could work "enough days of the week to really make a job work for her." Whitesell Deposition, p. 29, ll. 3-4. Dr. Whitesell supported Claimant in pursuing disability under her group life policy and noted her migraine headaches had not improved since the time of that application. Whitesell Deposition, pp. 19-20.

70. *Dr. Bates.* Dr. Bates agreed with Dr. Whitesell's December 2017 chart note that Claimant would not be able to consistently hold down a job because of her chronic migraine headaches. Bates Deposition, p. 20.

71. *Dr. Janzen*. Vocational expert John Janzen, Ed.D., CRC, was retained by Employer/Surety to evaluate Claimant's disability. He opined that she was totally and permanently disabled. In his October 22, 2018 report, Dr. Janzen noted her pre-existing debilitating arthritis and degenerative joint disease, but also concluded she was precluded from regular employment by her chronic headaches, stating:

> In addition to her reported arthritis and degenerative disease, the incapacitating effects of her migraine headaches including the need to remain in a dark room for a minimum of 8 hours and up to 4 days as a result of excruciating pain prevents her from performing gainful employment as a result of her inability to perform sustained activity in task completion and maintain a regular schedule in employment.

Exhibit 33, p. 1444. However, in his November 7, 2018 report, Dr. Janzen concluded Claimant's total disability was due both to her headaches and to her pre-existing conditions. Exhibit 33, p. 1446.

72. *Barbara Nelson*. Vocational expert Barbara Nelson, MS, CRC, was retained by ISIF to evaluate Claimant's disability. She interviewed Claimant on January 16, 2019, reviewed her medical and employment records, and prepared a report assessing her employability. Ms. Nelson reviewed the depositions of Dr. Whitesell, Dr. Bates, and of Claimant. Ms. Nelson observed Dr. Whitesell, Claimant's primary treating physician, concluded that Claimant suffered migraine headaches from her brain injury, that her headaches had been very recalcitrant to treatment, and that Claimant's migraine headaches prevented her from working reliably. Nelson Deposition, p. 11. Ms. Nelson noted that Dr. McMartin diagnosed Claimant with chronic, recurrent, post-concussive headaches, restricted Claimant by imposing periodic brain breaks, and assessed a permanent impairment rating.

73. Ms. Nelson reviewed Dr. Gussner's opinion and testified:

> I thought he was very fair in that he said, just as I've been taught, that you really have to look at headaches carefully because they are subjective. Probably very few of them, even

> migraine headaches, will result in a permanent and total disability or a complete inability to work. He respected the treatment that Dr. Whitesell had given her up to that point, and he endorsed that she met the [PERSI] definition of disability due to migraine headaches.

Nelson Deposition, p. 11, ll. 7-16.

74. Ms. Nelson noted that Dr. Bates concluded that Claimant was not able to consistently attend to job duties due to her migraine headaches. Ms. Nelson observed that Drs. Enright, Montalbano, and Friedman opined that Claimant had no permanent disability; however, the panel report was dated, having occurred in 2016 at a time Claimant was working in a modified capacity position. Her employment ended subsequent to the panel evaluation. Ms. Nelson noted that pursuant to the medical records, Claimant's migraine headaches can last for hours or days and can be accompanied by nausea, sensitivity to light and/or sound, dizziness, fatigue, visual disturbance, and problems with concentration. She noted that Claimant's work records from the school district documented these types of problems. Ms. Nelson opined that Claimant's chronic migraine condition eclipsed any non-medical factors.

75. Ms. Nelson testified that in her professional training, substantial medical documentation is required to show that headaches are frequent, severe and debilitating; that the headaches have lasted for an extended period; that the evaluee has received ongoing care from a physician and has followed prescribed therapy; and that the condition is not expected to improve on a more probable than not basis. Nelson Deposition, pp. 19-20. Ms. Nelson affirmed that her review of Claimant's medical records, depositions, and hearing transcript confirmed that her migraines affect her level of functioning such that she could not perform her basic work activities on a regular basis. The records further confirmed the frequency of her headaches would cause her to miss work frequently and established that it was more probable than not that Claimant would not recover from this condition. Ms. Nelson based her conclusions on the

medical records and opinions of Drs. Whitesell, Bates, and Gussner. Ms. Nelson testified that the main consequence of Claimant's migraine headaches was intermittent and unforeseen absenteeism. She affirmed that such unforeseen intermittent absenteeism is "enormously tough on employers." Nelson Deposition, p. 21, l. 11. Ms. Nelson concluded it was highly unlikely that such a worker would be hired, or even if hired, retained.

76. Ms. Nelson opined, as Dr. Janzen, that Claimant's chronic migraine headaches prevent her from maintaining a regular schedule of gainful employment. Ms. Nelson observed that Claimant attempted to return to work unsuccessfully, and also worked with a vocational counselor from the Industrial Commission without success. Ms. Nelson summarized Claimant's return to work attempt thus:

> Well, she worked for a school district. So it was only during the school year. It wasn't for a full year. My understanding is that, after Dr. McMartin released her to try and go back to work, he suggested that she take brain breaks. She was a special education paraprofessional. So the person who supervised her was a special education teacher, who was very kind and tried to really accommodate her and even, according to the records, let her take breaks maybe more frequently than Dr. McMartin had suggested. So by doing that, she was able to make it through the rest of that first school year. The second—when the school year started, she was assigned to a new school; and they were not as accommodating and were not able to give her those frequent breaks and accommodate the difficulties that she was having in performing the work. So they let her go.

Nelson Deposition, p. 30, l. 18 through p. 31, l. 10. Ms. Nelson observed that in her experience, the degree of accommodation given Claimant during the first school year after her injury was not typical and went above and beyond what a normal employer would provide. She concluded it would be futile for Claimant to look for suitable work. Nelson Deposition, p. 26.

77. Ms. Nelson opined that Claimant's chronic migraine headaches eclipsed her other limitations and restrictions to render her totally and permanently disabled.

78. *Evaluating the expert opinions.* Defendants Employer/Surety assert Claimant has no work restrictions pursuant to the conclusion of the IME panel. However, even Dr. Friedman,

the panel chairman, acknowledged that he would not disagree with Dr. Gussner's more recent evaluation and conclusion that Claimant was disabled pursuant to PERSI criteria. Furthermore, Dr. Janzen, the vocational expert retained by Defendants Employer/Surety, affirmed that Claimant is totally permanently disabled.

79. Dr. Whitesell's opinion is supported by the record and her multiple examinations and interactions with Claimant over the course of several months. The conclusion reached by Ms. Nelson that Claimant is essentially precluded from the competitive labor market is thorough, well-reasoned, supported by the conclusions of Drs. Whitesell, Bates, and Gussner, and persuasive.

80. Based on Claimant's impairment of 7% of the whole person due to her industrial accident and her pre-existing impairments including 10% right knee, 2% left foot degenerative changes, 2% right foot degenerative changes, 6% rotator cuff repair with distal clavicle excision, 3% whole person each wrist for bilateral wrist degenerative changes, and 7% whole person for L4-5 fusion, her permanent physical limitations including medium duty lifting restriction, chronic migraine headaches, and considering her non-medical factors including her age of 59 at the time of the accident and 64 at the time of hearing, limited formal education, limited transferable skills, and inability to return to her previous positions, Claimant's ability to engage in regular gainful activity in the open labor market in her geographic area has been significantly reduced. The Commission concludes that Claimant has suffered a permanent disability of 90%, inclusive of her 40% whole person permanent impairment.

81. Odd-lot**.** A claimant who is not 100% permanently disabled may prove total permanent disability by establishing he is an odd-lot worker. An odd-lot worker is one "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." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market - absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status rests upon the claimant. A claimant may satisfy his burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways: (1) by showing that he has attempted other types of employment without success; (2) by showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or (3) by showing that any efforts to find suitable work would be futile. Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

82. In the present case, Claimant returned to work in a modified capacity with increasing difficulties as her performance suffered because of her recurring headaches and resulting unforeseen intermittent absences. Ultimately her performance was inadequate and her employment ceased. She has presented no other evidence of her own unsuccessful work search. Claimant's assertion that she is unemployable is corroborated by the expert opinions of Dr. Janzen and Ms. Nelson that Claimant is an odd-lot worker and it would be futile for her to search for work. Claimant has established a prima facie case that she is an odd-lot worker, totally and permanently disabled, under the Lethrud test.

83. Once a claimant establishes a prima facie odd-lot case, the burden shifts to Defendants "to show that some kind of suitable work is regularly and continuously available to

the claimant." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). Defendants must prove there is:

> An actual job within a reasonable distance from [claimant's] home which [claimant] is able to perform or for which [claimant] can be trained. In addition, the Fund must show that [claimant] has a reasonable opportunity to be employed at that job. It is of no significance that there is a job [claimant] is capable of performing if he would in fact not be considered for the job due to his injuries, lack of education, lack of training, or other reasons.

Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 407, 565 P.2d 1360, 1364 (1977).

84. In the present case, Defendants have not established there is an actual job in which Claimant has a reasonable opportunity to be employed given her chronic migraine headaches. Defendants have not rebutted Claimant's prima facie showing that she is an odd-lot worker.

85. Claimant has proven she is totally and permanently disabled pursuant to the odd-lot doctrine.

86. **Apportionment pursuant to Idaho Code § 72-406**. Idaho Code § 72-406 (1) provides that 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 pre-existing physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease. The conclusion that Claimant is totally and permanently disabled renders apportionment under Idaho Code § 72-406 moot.

87. **ISIF liability**. The next issue is whether ISIF bears any liability in the present case. Idaho Code § 72-332 provides that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing

impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his income benefits out of the ISIF account.

88. In Aguilar v. Industrial Special Indemnity Fund, 164 Idaho 893, 436 P.3d 1242 (2019), the Idaho Supreme Court summarized the four inquiries that must all be satisfied to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was a pre-existing impairment; (2) whether that impairment was manifest; (3) whether the impairment was a subjective hindrance to employment; and (4) whether the impairment in any way combined with the subsequent injury or was aggravated and accelerated by the subsequent injury to cause total disability. Aguilar, 164 Idaho at 901, 436 P.3d at 1250.

89. Combination. In the present case, Claimant's pre-existing whole person impairments include 10% right knee, 2% left foot degenerative changes, 2% right foot degenerative changes, 6% rotator cuff repair with distal clavicle excision, 3% each wrist for bilateral wrist degenerative changes, and 7% for L4-5 fusion; collectively totaling 33% whole person permanent partial impairment. Even assuming all of the above impairments rated by Dr. Bates pre-existed, were manifested prior to Claimant's 2014 industrial accident, and constituted a hindrance or obstacle to employment, to establish ISIF liability the pre-existing impairment must combine with the subsequent industrial injury or be accelerated and aggravated by the subsequent injury to cause total permanent disability.

90. "[T]he 'but for' standard … is the controlling test for the 'combining effects' requirement. …. The 'but for' test requires a showing by the party invoking liability that the claimant would not have been totally and permanently disabled but for the pre-existing

impairment." Corgatelli v. Steel West, Inc., 157 Idaho 287, 293, 335 P.3d 1150, 1156 (2014), rehearing denied (Oct. 29, 2014), overruled on other grounds by Oliveros v. Rule Steel Tanks, Inc., 165 Idaho 53, 438 P.3d 291 (2019), and Aguilar v. Industrial Special Indemnity Fund, 164 Idaho 893, 436 P.3d 1242 (2019). This test "encompasses both the combination scenario where each element contributes to the total disability, and the case where the subsequent injury accelerates and aggravates the pre-existing impairment." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

91. In the instant case, Dr. Janzen's first report acknowledged that Claimant could not return to any employment due to her frequent migraines. His second report simply offered the conclusion without supporting analysis that "The combination of pre-existing conditions combined with her most recent work related injuries have resulted in total and permanent disability for gainful employment." Exhibit 33, p. 1446. Ms. Nelson testified that before Claimant's industrial accident she was capable of employment and consistently employed in spite of challenges presented by her pre-existing conditions. Ms. Nelson opined that it would be futile for Claimant to attempt to return to work given her chronic headaches, which alone made her unemployable and thus permanently totally disabled. Nelson Deposition, p 26. Ms. Nelson opined that Claimant's pre-existing conditions did not contribute to her total permanent disability, rather her chronic headaches resulting from her 2014 industrial accident render her unemployable. Exhibit 34, p. 1473; Nelson Deposition, p. 26. Dr. Whitesell's December 12, 2017 letter affirmed that Claimant had chronic migraine headaches with only one or two headache-free days per month and would not be able to consistently attend any job because of her chronic migraines caused by her post-concussive disorder. Whitesell Deposition, p. 37.

92. The record contains no persuasive evidence that any of Claimant's pre-existing impairments combined with the 2014 industrial injury or that her industrial injury aggravated and accelerated any of her pre-existing impairments to render her totally and permanently disabled. No party has shown that but for any pre-existing impairment Claimant would not have been totally and permanently disabled by her industrial accident. Rather, the weight of the evidence establishes that Claimant's chronic migraine headaches alone render her unable to maintain employment. The combination prong of the Aguilar test has not been satisfied as to any of Claimant's pre-existing impairments.

93. Pursuant to Idaho Code § 72-332, ISIF is not liable for Claimant's pre-existing impairments.

94. **Carey apportionment.** Inasmuch as ISIF is not liable for Claimant's pre-existing impairments, apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is moot.

95. **Attorney fees.** The final issue is whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804. Attorney fees are not granted as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804 which provides:

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

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

96. In the present case, Claimant asserts entitlement to attorney fees for Employer/Surety's allegedly unreasonable assertion that Claimant reached maximum medical improvement before being examined by a neurologist for her migraine headaches and for the allegedly unreasonable two-year delay before Claimant was seen by a neurologist.

97. Claimant was treated by Dr. Gage, a psychologist, and by Dr. McMartin, a physiatrist in 2014 and 2015. She was also examined and evaluated by a psychologist, Dr. Enright, and a neurosurgeon, Dr. Montalbano as part of the October 2016 IME. Although their conclusions regarding when Claimant reached maximum medical improvement and the residual limitations due to her industrial accident have not been found persuasive, Defendants' denial of benefits was not unsupported. Given the circumstances herein, including the multiple conflicting medical opinions, Defendants' denial of benefits was not unreasonable.

98. Claimant has not proven Employer/Surety's liability for attorney fees.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven she is entitled to additional reasonable medical benefits for her industrial accident including treatment for chronic migraine headaches provided and prescribed by Dr. Whitesell. Claimant is entitled to payment at the full invoiced rate for treatment already received. Neel v. Western Construction, Inc., 147 Idaho 146, 206 P.3d 852 (2009); Millard v. ABCO Construction, Inc., 161 Idaho 194, 384 P.3d 958 (2016). Claimant has not proven her entitlement to treatment for her psychological conditions of depression and anxiety.

2. Claimant has proven she is entitled to additional temporary disability benefits due to her industrial accident until March 27, 2018.

3. Claimant has proven she suffers permanent impairment of 40% of the whole person with 7% attributable to her 2014 industrial accident and 33% attributable to her pre-existing conditions.

4. Claimant has proven permanent disability of 90% inclusive of impairment and is totally and permanently disabled pursuant to the odd-lot doctrine.

5. Apportionment pursuant to Idaho Code § 72-406 is moot.

6. Pursuant to Idaho Code § 72-332, ISIF is not liable for Claimant's pre-existing impairments.

7. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is moot.

8. Claimant has not proven Employer/Surety's liability for attorney fees.

Pursuant to Idaho Code § 72-218, this decision is final and conclusive as to all matters adjudicated.

DATED this ___19th___ day of __March__, 2020.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas P. Baskin, Chairman

_____/s/_____
Aaron White, Commissioner

_____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___19th___ day of ____March____, 2020, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

TAYLOR MOSSMAN-FLETCHER
611 WEST HAYS STREET
BOISE ID 83702

ALAN R GARDNER
PO BOX 2528
BOISE ID 83701

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701

__/s/_____
_____