BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JILL L STANSELL, Claimant, v. FRED MEYER/THE KROGER COMPANY, Employer/Self-Insured, Defendants.	**IC 2016-018995** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed April 24, 2020**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael Powers, who conducted a hearing in Boise on August 21, 2018. Claimant, Jill Stansell, was present in person and represented by Taylor Mossman-Fletcher of Boise. Defendant Employer, Fred Meyer, and Defendant Surety, The Kroger Company, were represented by Matthew O. Pappas of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken. Thereafter, Referee Powers retired. By letter dated July 22, 2019, the parties wrote they were willing to have the matter reassigned and that there was no need for another Referee to re-hear the case. The matter came under advisement on October 23, 2019, and on December 17, 2019, the matter was reassigned to Referee Sonnet Robinson. The commission has reviewed the proposed decision authored by Referee Robinson and agrees with the outcome. The Commission prefers to give additional treatment to the factual dispute over Claimant's initial visit with Dr. Dockter and hereby issues its own findings of fact, conclusions of law and order.

ISSUES

The issues to be decided were clarified at hearing and are:

1. Whether Claimant suffered a personal injury arising out of and in the course of employment;

2. Whether Claimant's injury was the result of an accident arising out of and in the course of employment;

3. Whether Claimant's condition is due in whole or in part to a pre-existing injury or disease or cause not work-related;

4. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof;

5. Whether Claimant is entitled to temporary partial and/or temporary total disability (TPD/TTD) benefits, and the extent thereof;

6. Whether Claimant is entitled to permanent partial impairment (PPI) benefits, and the extent thereof;

7. Apportionment under Idaho Code § 72-406;

8. Whether Claimant is entitled to permanent partial disability (PPD) in excess of permanent impairment, and the extent thereof; and,

9. Whether Claimant is entitled to attorney fees due to Employer/Surety's unreasonable denial of compensation as provided for by Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant contends that she suffered a compensable workplace injury and is entitled to past

medical care, payable per *Neel*[1], future medical care, past and future TPD/TTDs, impairment, and permanent partial disability of 41%. Claimant's injury was acute and was not due to any pre-existing condition. Defendants unreasonably denied this claim, and Claimant is entitled to an award of attorney's fees.

Defendants contend that Claimant did not suffer a workplace accident: Claimant's first chart note records "no known injury" and, further, Claimant's report of the accident is inconsistent. Claimant's need for care was entirely due to her documented pre-existing back condition. Claimant is not entitled to impairment or disability, and Defendants acted reasonably throughout this claim.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Joint Exhibits (JE) 1-41, admitted at hearing;
3. The testimony of Claimant, Jill Stansell, Monte Hurley, Brittany Fife, and Jeff Mortimer, taken at hearing;
4. The pre-hearing depositions of Jill Stansell, one taken March 17, 2017 and one taken November 9, 2017;
5. The post-hearing depositions of Robert Friedman, M.D., Lisa Dockter, M.D., Peter Reedy, M.D., Vicken Garabedian, M.D., Rodde Cox, M.D., and Douglas Crum.

All outstanding objections are overruled, apart from Defense Counsel's objection to Dr. Friedman's new impairment rating at page 27 of his deposition, which is sustained.

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

FINDINGS OF FACT

1. At the time of hearing, Claimant was a 51-year-old divorced woman living in Nampa, Idaho.

2. **Relevant Pre-Accident Medical History.** On January 14, 2001, Claimant presented to the St. Luke's ER in Boise with back pain. Claimant explained that she was getting on a ladder and performed a "twisting bending motion" which caused severe pain. JE 3:13. Claimant stated she had experienced this type of pain before, that typically the pain would get better, but never go away, and that this time was the worse it had ever been. *Id.* Claimant was admitted and prescribed Lortab, Flexeril, and Lodine. *Id.* at 14.

3. On August 24, 2008, Claimant suffered an injury to her low back while working for Fred Meyer. JE 35:821. On August 26, 2008, Claimant presented to Primary Health in Meridian with low back pain caused by lifting at work. JE 5:19. Claimant was prescribed Naproxen and Robaxin; an X-ray was ordered, and work restrictions were issued. *Id*. The lumbar X-ray showed "multilevel mild degenerative disease. Mild to moderate degenerative disk disease at L5-S1. Relative lack of lumbar lordosis. No compression abnormalities." *Id.* at 21. Claimant's back pain had resolved by her follow-up appointment on September 8, 2008. JE 6:24.

4. On July 20, 2011, Claimant suffered another injury to her low back while working for Fred Meyer. JE 35:821. At deposition, Claimant stated she was lifting and her "back went out." Clt. Depo. 3/16/17 49:2. She was prescribed Flexeril and briefly assigned light duty. *Id.* at 49-50.

5. On November 20, 2015, Claimant underwent a CT scan for abdominal pain, which in relevant part showed: "lumbar degenerative disc disease at L5-S1. Limbus type vertebra L4 and L5." JE 11:144.

6. **Industrial Accident.** On Monday July 11, 2016, Claimant was on her way to clock in, when another employee informed her that a cider keg had "exploded" underneath the Growler station. Tr. 34:10. To clean underneath the Growler station, Claimant had to lift all the kegs[2] out from where they were stored under the station. In the process of lifting one, she felt a "burning, shooting pain" in her low back. *Id.* at 35:5-8. Claimant testified she "held" her back after feeling the pain, and that as the day went on her back continued to hurt and feel "heavy." *Id.* at 36:5; 39:10-12, 17. Claimant did not recall reporting the accident to anyone that day; instead her intention was to ice it when she got home. Clt. Depo. 3/16/17 99:13-100:18. Claimant also explained that Fred Meyer was having a competition where if the store was accident free for a year, every employee would get $50. *Id.*

7. There is surveillance footage from the day of the accident, but the video begins at 10:30 a.m. after Claimant had already begun cleaning the Growler station and had moved at least two sixth kegs from the right side of the Growler station. JE 26. At deposition, Claimant recalled she hurt her back when she pulled a keg out of the right side of the Growler station. Clt. Depo. 3/16/17 93:21-94:1. Therefore, there is no footage of the accident as described by Claimant.

8. Jeff Mortimer, a loss prevention manager at the time of the accident, testified that the tape was supposed to begin at 9:55 a.m., as indicated on the disc itself, however, for whatever reason, that footage was not captured and was taped over by the time Mr. Mortimer was contacted about the error. Tr. 161:1-25. Mr. Mortimer does remember reviewing footage as he burned it, and footage of Claimant cleaning the Growler station, but could not recall any specific accident or

[2] Claimant described them as "sixth kegs," and that they weighed approximately 50 to 60 pounds each when full. *Id.* at 35:12-15.

injury either in the footage he thought he copied (i.e. from 9:55am to 10:30am) or the footage he actually did copy. See Tr. 160-164.

9. In the footage available, Claimant is in front of the right cupboard of the Growler station and two sixth kegs have already been moved out from underneath the Growler station. JE 26. Claimant is seen cleaning while kneeling, lifting sixth kegs of unknown weight/fullness to clean around them, and hooking up a sixth keg with the help of a merchandiser. *Id.*

10. On her way to her car that night, Claimant went to put her left leg into her car, and it would not respond: "And then when I went to get in the car, I had to reach and help my left leg get up into the car." Clt. Depo. 3/16/17 95:18-20. In the middle of the night, Claimant woke up in even more pain and spent the entire Tuesday icing her back. *Id.* at 100:20-101:1.

11. On Wednesday July 13, 2016, Claimant had her regular yearly exam with Lisa Dockter, M.D. JE 8:70. Dr. Dockter recorded Claimant had had back pain since Monday night, sudden onset, after work, with "no known injury." *Id*. Dr. Dockter suspected an annular tear and prescribed Prednisone and Norco and referred Claimant to physical therapy; she took Claimant off work until July 16th and limited her lifting to less than 10 pounds for six weeks. *Id*. Claimant testified both at hearing and at deposition that she told Dr. Dockter she had injured herself lifting a keg at work. Tr. 42:17-19; Clt. Depo. 3/16/17 107:10-11.

12. Claimant called Brittany Fife, the food assistant manager at Fred Meyer, after her doctor's appointment; the substance of that conversation is disputed. JE 3:5. Claimant testified she told Ms. Fife that she had injured herself at work, but that Ms. Fife was very busy, and their conversation kept getting interrupted. Clt. Depo. 3/16/17 114:13-22. Claimant testified Ms. Fife said she wanted a manager to show her how to fill out the paperwork because Ms. Fife had never done it before. *Id.* at 115:6-10.

13. Ms. Fife testified that Claimant did not tell her the injury happened at work during that conversation but verified that she was busy that day because there was a food safety audit happening. See Tr. 143:5-21.

14. On July 15, 2016, Claimant called again and asked Ms. Fife about filling out workers' compensation paperwork. JE 3:5. Ms. Fife consulted with her director and filled out a "Questionable Claim Form," which reads as follows:

> Jill contacted me on 7/13/16 around 10:30am stating that she just went to the doctor and found out she had a torn disc in her back. When I asked her what happened she told me when she was getting into her car after work on 7/11/16 her back starting [sic] hurting. She told me she would need to be off until 7/17/16 and that she had a doctor's note. At this point she didn't say she wanted to file a claim, or that the incident happened while she was working. Today at 7:30am (7/15/16) she called me asking if she needed to fill out Workers Compensation paperwork. I asked her right then if it happened at work and if it did, why didn't she mention it when she called on 7/13/16. She said she thought she did and that she hurt her back lifting a beer keg into the growler station cooler. She worked her whole 10am to 7pm shift on 7/11/16 when the incident happened at 11am and she didn't mention anything to management that day.

Tr. 144:19; *Id*.

15. Claimant followed up at Primary Health on July 16, 2016 and saw Nathan Ward, D.O. JE 8:76. Claimant reported that she had injured herself at work while lifting a beer keg and that Prednisone had given her "mild relief, but not much." *Id.* at 77. Dr. Ward recommended Claimant start an anti-inflammatory and recommended a limited return to work with no physical exertion; Claimant felt she could not complete a full workday due to her pain. Dr. Ward recorded: "When I declined to take her off of work completely she stood up and left." *Id.* Claimant called Primary Health on July 18, 2016 and left a message for Dr. Dockter regarding her appointment with Dr. Ward: she hadn't been feeling better Saturday morning and wanted an extra day off work, but that Dr. Ward had said "your diagnosis was wrong and other things could have been done for

her[.] she states it was not a good appt [sic]. she walked out in tears. He lacked compassion and spouted off statistics, didn't listen to her concerns." *Id.* at 81.

16. On July 26, 2016, Claimant was seen at Atlas Physical Therapy for a physical therapy evaluation. JE 13:163. Claimant reported she had injured herself lifting a keg at work and reported numbness and tingling into her left leg. *Id*. at 163, 160. Jacob Gabrielsen, DPT, MTC, CFC, conducted the evaluation and recommended a twice weekly program for six weeks. *Id.* at 165. However, Claimant did not return to physical therapy because "when I left there I felt worse." Tr. 53:3-4.

17. On July 29, 2016, Claimant self-referred to Shannon Gaertner-Ewing, D.C. Clt. Depo. 3/16/17 130:24-25. Claimant reported she had injured herself lifting a beer keg at work: "she had signs of a muscle strain but the pain came later." JE 14:167. Dr. Gaertner-Ewing diagnosed a lumbar sprain, lumbar sprain degenerative disorder, and a herniated lumbar disc. *Id.* at 175. Dr. Gaertner-Ewing treated Claimant with manipulations, ultrasound, heat, and lotion, and recommended Claimant return three times per week for the next two weeks. *Id*.

18. On August 8, 2016, Claimant was still experiencing neurological symptoms including numbness into her left foot and leg and weakness. *Id.* at 179. Dr. Gaertner-Ewing ordered an MRI, which showed:

> Multilevel lumbar spondylosis most severely affecting L4/5 and L5/S1. There is moderate canal stenosis at L4/5. There is moderate bilateral foraminal stenosis at L4/5 and L5/S1 with possible mass effect on the existing bilateral L4 and L5 roots at these levels, respectively. There is mild canal and foraminal stenosis elsewhere, as detailed above.

JE 14:185. Dr. Gaertner-Ewing referred Claimant to Peter Reedy, M.D. *Id.* at 186.

19. On September 8, 2016, Claimant saw Dr. Reedy. JE 15:196. She reported she had injured herself at work lifting a beer keg and that Prednisone had given her temporary relief. *Id*.

Dr. Reedy ordered a CT myelogram with flexion and extension views which showed left sided L4-L5 and L5-S1 spondylosis producing radiculopathy and a right sided L5-S1 facet arthropathy "possibly getting both the 5 and the S1 nerve root." *Id.* at 204. Dr. Reedy diagnosed left lateral recess encroachment at L4-L5, lateral recess stenosis bilaterally at L5-S1, and he recommended surgery to treat these conditions. *Id*. at 210.

20. On October 14, 2016, Claimant underwent left L4 partial hemilaminectomy and partial medial facetectomy, a left L5-S1 partial hemilaminectomy and partial medial facetectomy, and a right L5-S1 partial medial hemilaminectomy and partial medial facetectomy. JE 16:235.

21. Claimant returned for follow-up to Dr. Reedy on November 22, 2016, and he kept her off work for another six to eight weeks and noted there was no light duty available. JE 15:212. Dr. Reedy recorded that Claimant was "still having some problems with her right foot but much of the buttock and right leg pain that she had before surgery is improving." *Id*. At her next follow-up on December 1, 2016, Dr. Reedy recorded that Claimant could possibly return to work after the New Year and should follow-up again then. *Id.* at 213. The next record is dated December 18, 2017 and contains Dr. Reedy's response to the Job Site Evaluation (JSE); he notes Claimant could return to work with a maximum lifting restriction of 40 pounds. *Id.* at 214.

22. At some point, Claimant went on light duty at Fred Meyer prior to her surgery, and after the surgery, was contacted regarding her return to work. Tr. 55:23-25. Claimant testified that she told Fred Meyer that she could not lift kegs anymore, and she was terminated for being unable to perform her job duties. *Id.* at 56-57. Claimant then went to work in April 2017 at a seasonal job at Sequoia National Park as a gift shop manager. *Id.*

23. On April 17, 2017, Vicken Garabedian, M.D., compared the November 2015 CT scan with the August 2016 MRI scan and September 2016 CT myelogram, at the request of Defendants. JE 17:270. His conclusions were as follows:

> CT scan dated November 2015 shows that the changes at L4-L5 and L5-S1 are similar in severity and morphology to the subsequent studies performed at the reported injury. There is not imaging evidence of significant change from 11/2015 to 9/2016.

Id.

24. Claimant was laid off her job at Sequoia National Park in late October 2017. Claimant returned to Idaho and began to search for work. Clt. Depo. 11/9/17 181:18-183:3.

25. On December 20, 2017, Claimant underwent an independent medical exam (IME) with Rodde Cox, M.D., at the request of Defendants. JE 18:271. Dr. Cox reviewed records and examined Claimant. Dr. Cox diagnosed (1) low back pain and left leg pain, post-surgery; (2) lumbar spine degenerative disc disease; (3) history of low back pain. *Id.* at 283. He noted Claimant's subjective complaints were consistent with objective findings[3], and that symptom magnification behavior was mildly evident. *Id.* at 281. He rated her whole person impairment (WPI) at 7% with 3% apportioned to her previous low back pain. *Id.* at 285. Dr. Cox issued restrictions of no lifting more than 50 pounds on an occasional basis, and no repetitive bending, twisting, or stooping. *Id.* Dr. Cox opined that Claimant's treatment was reasonable, but "did not feel that she required any care related to any alleged injury as it is not clear that she suffered a work related injury." *Id.* at 286. Dr. Cox felt that her symptoms were likely related to her pre-existing degenerative disease. *Id.*

[3] Dr. Cox testified at deposition that he did <u>not</u> feel that Claimant's subjective complaints were consistent with objective findings. Cox Depo., 21:25-22:5.

26. On January 10, 2018, Claimant underwent an IME with Robert Friedman, M.D., at her request. JE 19:300. Dr. Friedman reviewed records and examined Claimant. *Id.* at 303. Dr. Friedman found Claimant's accident aggravated her pre-existing lumbar degenerative disc disease and that she had pre-existing low back pain. *Id.* Dr. Friedman opined Claimant's workplace injury caused her need for surgery on a more probable than not basis. *Id.* at 304. He rated her WPI at 7% with 40% apportioned to her pre-existing arthritis, for a total WPI related to the accident of 4%. *Id.* Dr. Friedman issued restrictions of no lifting greater than 50 pounds on an occasional basis, no lifting greater than 25 pounds on a repetitive basis, and no twisting or torquing maneuvers with her low back. *Id.* at 305. He concluded: "Though she had preexisting degenerative disease, permanent restrictions are as a result of the lumbar surgery to treat her lumbar radiculopathy, and aggravation of her preexisting condition." *Id*.

27. Dr. Cox responded to Dr. Friedman's opinion and Dr. Reedy's JSE restrictions by letter dated February 2, 2018. JE 18:299. Dr. Cox disagreed with Dr. Friedman that the injury was work-related because of Claimant's delay in reporting and noted their impairment ratings were similar. *Id*. Dr. Cox also "would not necessarily significantly disagree" with Dr. Reedy's 40-pound lifting restriction. *Id*.

28. On April 28, 2018, Doug Crum, CDMS, issued a vocational report on behalf of Defendants. JE 20:324. Mr. Crum reviewed records and attended Claimant's second deposition on November 9, 2017. *Id*. Mr. Crum wrote that Claimant's pre-injury labor market included heavy and medium duty labor jobs, because despite her prior back problems, she had no restrictions. *Id.* at 331. Mr. Crum opined that Claimant could return to many retail sales jobs within her restrictions. *Id.* at 332. He calculated her pre-injury labor market access at 14.7%, and post-injury labor market access at 9.3%, representing a 37% reduction in labor market access, considering Dr. Friedman's

restrictions. *Id.* Mr. Crum calculated her wage loss at approximately 25%-37%, based on a pre-injury wage of $16.07 an hour, and a post-injury wage of $10-$12 an hour; he opined Claimant had a 50% probability of finding employment with the same health and dental benefits that her time of injury Employer offered. *Id*. Mr. Crum ultimately opined Claimant's permanent partial disability, inclusive of impairment, was 34%. *Id.* at 333.

29. On June 26, 2018, Barb Nelson, MS, CRC, issued a vocational report on behalf of Claimant. JE 21:335. Ms. Nelson reviewed records, including Mr. Crum's report, but did not interview Claimant. *Id*. at 336. Ms. Nelson completely agreed with Mr. Crum's labor market access loss figure of 37%, but found he underestimated wage loss; first, because he incorrectly recorded her wage at $16.07 an hour, when it was actually $16.47 an hour, and did not include her benefits package, which included "medical, vision, and dental insurance, employee discounts, life insurance, disability insurance, Employee Assistance Program, tuition reimbursement, and a 401K retirement plan." *Id.* at 337. Ms. Nelson estimated her wage loss to be in the range of 36% to 53% based on her correct wage and benefits package. *Id.* at 339. Ms. Nelson opined her permanent disability, inclusive of impairment, was 41%. *Id.*

30. **Post-Hearing Depositions. Dr. Dockter** was deposed on December 19, 2018 at Defendant's request. She stated she does not treat workers' compensation patients because it is "incredibly frustrating" and "very problematic" to treat workers' compensation claimants. Dockter Depo. 9:1-14. She testified she usually just tells patients to call their HR department so HR can refer them to a workers' compensation physician, but that she will treat them if she is already engaged in care. *Id.* at 8:15-10:10. Dr. Dockter had no independent recollection of the July 13th visit, however, she did remember Claimant and had reviewed her notes from July 13th in

preparation for deposition. *Id.* at 11:9-12:8. Dr. Dockter said she typically types her own notes while a patient is speaking. *Id.* at 14. Regarding the injury, Dr. Dockter testified:

> Q: [By Mr. Pappas] Okay. She didn't describe any injury to you or anything at work that led to that?
>
> A: She didn't.
>
> Q: Okay.
>
> A: I mean, I believe that if she had, I probably would have written it down. I think it - - I would say though, you don't have to have an injury to have discogenic disease, right?
>
> Q: Right.
>
> A: I mean, you put your disk out bending over the wrong way to pick up a pen, so…
>
> Q: Or even rolling over in bed or any - -
>
> A: Well - -
>
> Q: Back-based action?
>
> A: Right.
>
> Q: Yeah.
>
> A: So - - I mean, ultimately the question is she did not describe a specific injury.

Id. at 17:23-18:15. Counsel for Defendants described Dr. Friedman's testimony, detailed *infra*, where Claimant reported to Dr. Friedman that Dr. Dockter would not treat her if it was workers' compensation. Dr. Dockter denied saying she would not treat Claimant but did admit: "I'm certain that I've told people that if it's workmen's comp, then they need - - they need to be seen by a different doctor." *Id.* at 36:21-23. Further, she understood how Claimant could have misinterpreted her that way. *Id.* at 37:2-25.

31. On cross-examination, Dr. Dockter agreed that Claimant's description of her injury at deposition and hearing was "absolutely consistent" with what Dr. Dockter recorded, but that her chart note was not as detailed. *Id.* at 45-46; 46:9. Dr. Dockter was questioned regarding what "injury" meant to her, and Dr. Dockter agreed it was "absolutely possible" that Claimant could have tweaked her back moving kegs and "not necessarily had a known injury." See *Id.* at 47:8-13.

32. **Dr. Reedy** was deposed on February 19, 2019 at Defendant's request. Dr. Reedy recounted that Claimant described feeling pain in her back when she lifted a six keg, that it worsened over the days afterward, and that Prednisone gave her some temporary relief. See Reedy Depo., 6:24-7:12. Dr. Reedy was aware of her pre-existing back issues. *Id.* at 10:13-16. Dr. Reedy did personally review the MRI scan and Dr. Dockter's notes but had not seen the prior 2015 CT scan of her abdomen, the surveillance video, first report of injury/questionable claim form, or Dr. Gaertner's records. *Id.* at 8:3-11; 9:23-10:8; 11:18-21. Dr. Reedy explained he ordered a CT myelogram because it shows a dynamic load vs. a static position and has more spatial resolution than an MRI. *Id.* at 15:17-16:9. He opined the CT scan showed both arthritic, age-related findings and an acute dynamic disc protrusion at L4-L5. 16:14-18:14. Dr. Reedy does not issue impairment ratings or permanent restrictions; he relies on functional capacity exams to issue appropriate restrictions. *Id.* at 23:10-24:6. However, he did recall issuing a 40-pound lifting restriction. *Id.* at 22:21-22. Regarding the injury, Dr. Reedy testified: "We talk about spondylosis, the arthritis, and disk protrusion bulging at basically every level of the spine. That's all preexisting. But then all of a sudden, one day an injury occurs, and things - - kind of the last deal to push her over the edge." 25:11-16. Counsel for Defendants described the surveillance video of Claimant cleaning on her hands and knees, continuing to lift kegs, and not showing "any evidence of pain" and asked whether that would change his opinion; Dr. Reedy said no. *Id.* at 28:22-29:16. Dr. Reedy reiterated

his opinion that it was more likely than not that she injured her L4-L5 disk, which caused her left leg pain.

33. On cross-examination, Dr. Reedy agreed it would be "unfair" to compare a CT of the abdomen vs. a CT of the spine, because the myelogram shows a dynamic disk instead of a static image. *Id.* 31:15-32:12.

34. **Dr. Garabedian** was deposed on April 11, 2019 at Defendant's request. Dr. Garabedian is board certified in radiology, with a subspecialty in neuroradiology, and has practiced medicine in the Boise area for 22 years; he is qualified to provide expert testimony in this case. Dr. Garabedian reviewed the 2015 CT scan, 2016 MRI, and 2016 CT myelogram, but did not examine Claimant. Dr. Garabedian explained that the CT scan from 2015 showed degenerative changes and a disk protrusion at L4-L5, and when compared to the 2016 MRI scan and CT scan, showed the same findings, with no significant change. Garabedian Depo., 11:20-13:23. Dr. Garabedian did agree with Dr. Reedy that a CT myelogram of the spine would show a more detailed look than a CT scan of the abdomen. *Id.* at 15:5-20.

35. On cross-examination, Dr. Garabedian agreed that an injury could make an asymptomatic disk protrusion symptomatic and that it was certainly possibly that Claimant's disk protrusion in 2015 was asymptomatic. *Id.* 19:2-20:9. Dr. Garabedian did not have an opinion on whether Claimant suffered an acute injury and would defer to Dr. Reedy regarding that finding. *Id.* at 20:25-21:12.

36. **Dr. Cox** was deposed on May 7, 2019 at the request of Defendants. The Commission is familiar with Dr. Cox's credentials, and he is qualified to testify as an expert in this matter. Regarding her visit with Dr. Dockter, Claimant reported to Dr. Cox that Dr. Dockter had said if it was a workers' compensation injury, she wouldn't be able to see her, because Dr. Dockter

"didn't do workers' compensation." *Id.* at 12:23-13:3. Dr. Cox opined Claimant's surgery was to treat chronic, degenerative "mechanical" issues as opposed to inflammation. *Id.* at 18:10-21. Dr. Cox, during his physical exam of Claimant, observed that she had giveaway weakness that did not fit an anatomic or dermatomal pattern and that her straight leg tests were "somewhat inconsistent." *Id.* at 20:21-21:4. Dr. Cox did not feel that Claimant's low back and left leg symptoms were due to the work injury. *Id.* at 22:18-21. Dr. Cox discounted Dr. Friedman's testimony, discussed *infra*, that Claimant suffered from an inflammatory process which got worse over a few days because if that was the case, Prednisone should have "made her a lot better." *Id.* 26:22-27:18.

37. On cross-examination, regarding Dr. Reedy's opinion that Claimant suffered an acute injury, Dr. Cox testified "I would say that I think the evidence is clear, that she did have some type of an acute injury around that time. There was, obviously, an increase in her symptomatology. The nature of that acute injury, we may agree or disagree on." *Id.* at 33:1-9. Dr. Cox explained that part of the basis for his opinion that Claimant's injury was not related was that she waited to report it, in addition to the degenerative nature of her condition. *Id.* at 34:1-36:17. Dr. Cox agreed with Dr. Reedy and Dr. Garabedian that a CT myelogram is more detailed than a CT of the abdomen but reiterated that Claimant's findings were the same on both CTs. *Id.* at 38:17-39:6.

38. **Dr. Friedman** was deposed on October 29, 2018 at Claimant's request. The Commission is familiar with Dr. Friedman's credentials and he is qualified to testify as an expert in this matter. Dr. Friedman discussed that the most unusual part of his examination was that Claimant believed Dr. Dockter wouldn't treat her if her injury was work-related. Friedman Depo., 9:22-10:4. Dr. Friedman repeated his opinion from his report that he considered Claimant's injury

to be an aggravation of pre-existing lumbar degenerative disease. *Id.* at 12:3-13:1. Dr. Friedman explained how Claimant's pain could have increased over time as follows:

> Most people who have a radiculopathy do not have severe symptoms initially, but takes hours to days for their symptoms to occur and worsen. And physiologically that is thought to be due to the fact that just pushing on a nerve root without inflammation does not usually cause pain, so you need a process of inflammation, and that can take a day or two to occur to call them [sic] - - like blood cells, to have swelling, more blood coming in, and basically, irritate the nerve root.

Id. at 18:15-25. Dr. Friedman explained that while Claimant did have a pre-existing condition, he did not believe the majority of her symptoms were due to her pre-existing condition, specifically because it wasn't until after the injury that she had pain down her leg. *Id.* at 21:11-18.

39. On cross-examination, Counsel for Defendants described the surveillance video of Claimant cleaning on her hands and knees, continuing to lift kegs, and not showing "pain behavior" and asked whether Dr. Friedman would have liked to review the video. Dr. Friedman responded that he likes to have all information, but that as Defense Counsel had described the video, it would not change his opinion because of the inflammatory process he described earlier in his testimony. *Id.* at 32:6-33:10. Dr. Friedman agreed it was possible for someone to injure their back lifting their leg to get into a car, but he had never heard of it and did not think it was "probable." *Id.* at 34:6-22.

40. **Douglas Crum** was deposed on June 12, 2019 at Defendant's request. The Commission is familiar with Mr. Crum's credentials and he is qualified to give expert vocational testimony. Since his original April 2018 report, Mr. Crum had reviewed all the doctors' post-hearing depositions and Ms. Nelson's report. Mr. Crum did admit there was an error in his original report regarding Claimant's wage; he had it listed at $16.07, when it was $16.47, which updated his wage loss figure to 33%. Crum Depo., 23:9-13; 26:19. Mr. Crum concluded that if the injury was related to the work accident, Claimant suffered 35% permanent partial disability. *Id.* at 27:19-

25. Mr. Crum did not apportion any of this disability because Claimant had no prior work restrictions. *Id.* at 28:1-8.

41. **Vocational Background.** Claimant graduated from high school in 1984. Clt. Depo. 3/16/17 9:21-22. Claimant got married at 16 and largely worked retail until she moved to Germany in 1984, where she performed missionary work. *Id.* at 11:16-13:20. Claimant moved to Vancouver, Washington in 1986 and was a homemaker. *Id.* at 14:9-15:13. Claimant moved to Boise in 1994 and ran her own construction cleaning company, called Jill's Cleaning, from 1997-1998; she was the only employee. *Id.* at 16:19-17:12. Claimant went to work for Fred Meyer in 2003 as a clerk; in 2004, she left to work as children's coordinator for Modern Woodmen, and then went back to Fred Meyer in 2005. *Id.* 22:11-28:5. Claimant worked as a clerk, assistant nutrition manager, nutrition manager, a clerk again, and then began work as a wine steward in 2012. See *Id.* at 30-61. Claimant is a decent typist and is familiar with Microsoft Suite; she has basic reading and arithmetic skills. Clt. Depo 11/9/17 at 198:7-200:25.

42. Post-accident, Claimant worked at Sequoia National Park as noted *supra* and was paid $15 an hour. Claimant then worked at a call center from March 2018 to May 2018 and was paid $11 an hour; she left voluntarily. Tr. 59:14-61:4. Claimant has continued to apply for jobs, but is interested in pursuing college education, and at the time of hearing, was enrolled at Treasure Valley Community College with the goal becoming a counselor. *Id.* at 61:7-63:7.

43. **Credibility.** The Commission did not have the benefit of observing Claimant at hearing. There are inconsistencies between Claimant's testimony and the medical records, which are discussed *infra*.

DISCUSSION AND FURTHER FINDINGS

44. The provisions of the Workers' Compensation Law are to be liberally construed in

favor of the employee. *Haldiman v. American Fine Foods,* 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc*., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992). 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, 626−27, 603 P.2d 575, 581−82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998). An "accident" means an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. Idaho Code § 72-102(18)(b).

45. **Accident.** Defendants' arguments that an accident did not happen as Claimant described are as follows: (1) Claimant testified she "held" her back but neither Jeff Mortimer or Brittany Fife recall seeing anything that looked like an incident on the footage; (2) Claimant did not immediately report the injury; (3) Claimant's primary care physician recorded "no known injury" in her records.

46. Regarding the surveillance footage, it is not at all clear that either Mr. Mortimer or Ms. Fife actually viewed the footage from 9:55am to 10:30am, when the alleged accident happened. Ms. Fife testified as follows:

> Q: [By Ms. Mossman-Fletcher] Okay. Now you - - you talked to Mr. Pappas about watching the surveillance video, but you didn't see the time frame between 10 o'clock and 10:30, did you?
>
> A: It's possible. I would have to go back and look. I know that there was a short amount of time that it wasn't showing, but I'm not sure exactly the time frame.

Q: Okay. So, you're not able to say today whether or not you saw the surveillance at the time frame from when the injury occurred?

A: I could say it was a little bit after that she showed no discomfort or looked like an injury.

Q: You're referring to the time period after the injury occurred?

A: Correct.

Tr. 148:8-23. Mr. Mortimer recalled that he watched the tape as he added it to the discs, but the discs do not contain footage from 9:55am to 10:30, when the accident occurred. See Tr. 159:9-14; JE:26. Although this was an accidental omission, the fact that this time frame is not on the discs that Mr. Mortimer reviewed casts some doubt on whether he saw the time frame in question. When asked specifically whether he recalled reviewing the 45-minute time frame in which the injury occurred, but for which there is no surveillance footage, Mr. Mortimer testified that the video he recalled viewing was the video that he had copied. See Tr. 164:1-5. The first report of injury also states the accident happened at 11am, making it more likely that Mr. Mortimer may not have gone back far enough on the discs to observe when the injury happened. Lastly, Mr. Mortimer explained he only viewed the footage once, when he was copying it to disc, and then never watched it again. *Id.* at 159. Based on this testimony, it is difficult to conclude that Ms. Fife or Mr. Mortimer reviewed the relevant timeframe; their testimony regarding whether Claimant "held" her back is given no weight.

47. Claimant did not immediately report her accident. She waited, by her account, at least two days from the Monday injury to the Wednesday phone call to report that she was injured at work. Claimant admitted she knew she was supposed to report an injury and that she was familiar with the process from her prior workplace injury at Fred Meyer in Idaho Falls. Clt. Depo. 3/16/17 100:1-4; Tr. 49:12-15. However, Claimant testified consistently at deposition, at hearing, and in

her reports to Dr. Friedman and Dr. Cox that she was motivated to just get through the day because she had the next two days off, she wanted to ice her back and rest it to see if it got better. See Tr. 36:5-10; Clt. Depo. 3/16/17 100:7-12; JE 19:300; JE 18:273. Further, there was a contest at Fred Meyer where every employee would get $50 dollars if there were no accidents reported for a year. Clt. Depo. 3/16/17 100:7-12. When Claimant's symptoms got worse that night, she waited because she had a doctor's appointment the next day. Tr. 40:16-22. Claimant's motivations make sense from a lay perspective and her testimony is not inherently improbable; she did not know how serious her injury was until Dr. Dockter told she suspected an annular tear, and according to Claimant, she called immediately after her appointment to inform Ms. Fife about her injury. Claimant should have immediately reported her injury, but it is understandable why she did not and was well explained by Claimant.

48. By far, the most perplexing factual dispute is that over Claimant's visit with Dr. Dockter on July 13, 2016. This visit is worth discussing because it represents the first occasion on which Claimant gave a history to anyone concerning her new onset of low back discomfort. At its simplest, the dispute is this; Claimant has testified that she gave Dr. Dockter a specific history of injuring her low back while lifting a keg at work. Dr. Dockter denies receiving such a history. Rather, her notes reflect that Claimant developed a sudden onset of low back pain after work with no known injury. Dr. Dockter testified that she retains no present recollection of her July 13, 2016 visit with Claimant. Nor did her contemporaneous chart notes refresh her recollection. However, she did testify that had Claimant presented with a report of a work accident, she would have recorded the same. She does not believe that Claimant gave the history now described by Claimant in her deposition and hearing testimony. Claimant testified as follows concerning the visit of July 13, 2016:

Q. Do you recall, was Dr. Dockter typing notes as you talked to her and she'd ask you questions and she'd type it up or was she dictating?

A. I think she had a computer there. She might have been writing. No, I think she uses the computer. You know, I don't go to see her a lot, but I think she uses a laptop.

Q. It looks like she asked the history of your present illness, at least that's a section on her chart note that we have. And it discusses low back pain, lower extremity. I'm going to read this and let me know if you think Dr. Dockter has this accurate or not. [Reading] "This 49-year-old female presents with complaints of low back pain for three days. Low back, sudden onset. Low back pain with difficulty standing up. That onset after work with no known injury July 11th."

A. She asked me what happened. I told her that I was lifting a keg at work. She told me, I'm not a workmen's comp doctor. And in my mind, I didn't care. I just wanted to get out of pain.

Q. Sure.

A. And that's what I remember.

Q. Okay. You specifically remember you told her you had lifted a keg that day?

A. Yes. Not that day. She asked me what had happened and I said I lifted a keg at work.

Q. I guess it's a better question for her why she doesn't mention the keg in her notes. Do you have any reason why she doesn't have that in her notes?

A. All I can think of is when she said she wasn't a workmen's comp doctor. I did not understand what that meant until I got further into this.

Q. Do you know why she would write onset after work with no known injury July 11th?

A. I don't know.

Clt. Depo. 3/16/17 106:9 - 107:21.

A. I went in, met with Dr. Dockter. I told her what had happened, that I was — was lifting kegs and that this happened and she said I am not a worker's comp doctor and I said I don't care, I just need to get out of pain. I need your help. Because at that point I was — I was not in good shape.

…

Q. Okay. Do you remember telling her that you thought something happened at work?

A. I told her that I was lifting a keg at work and this happened and she said I am not a workmen's comp doctor.

Q. Okay.

A. I didn't know what that meant. I just wanted to get out of pain. Dr. Dockter is one of the few doctors that I trust and I knew she would help me.

...

Q. ... she wrote in there NKI, which stands for no known injury. What's your explanation for that in her chart note?

A. I don't have any really. I can't know why that was put in there. I can surmise that perhaps since she's not a worker's comp doctor that maybe — maybe that's what was required of her business. I don't know. I really don't know.

Tr. 42:4 – 43:11.

Q. Okay. And what do you remember specifically telling Dr. Dockter about what happened and why your back hurts?

A. I remember telling Dr. Dockter that I was lifting a keg at work and injured my back. She told me she was not a worker's comp doctor and I said I didn't care.

Tr. 101:20-25.

Q. ...sudden onset low back pain with difficulty standing up. That onset after work with no known injury July 11th.

A. I did read that.

Q. Okay. Do you agree with that?

A. No, I do not.

Q. Do you think Dr. Dockter's chart note is inaccurate?

> A. I can't speak for her. She will have to speak for herself. I know what I said and that's — that's all I can give you.
>
> Q. Okay. Have you had any discussions with her why her chart note said that?
>
> A. No.

Tr. 103:1-14.

> Q. …again there is — there is no mention of any kind of work accident, no mention of the keg in any of that — you're sure you talked to [Dr. Dockter] about a keg that day?
>
> A. Yes, sir.

Tr. 104:18 - 22.

49. From the foregoing it is clear that Claimant is quite emphatic in her assertion that she advised Dr. Dockter of the work-related nature of her injury. Claimant also testified that on advising Dr. Dockter of the work-related nature of her (Claimant's) injury, Dr. Dockter told Claimant that she (Dr. Dockter) was not a worker's compensation physician.

50. For her part, Dr. Dockter acknowledges that she may have said something to Claimant at the time of the July 13, 2016 visit that might have led Claimant to believe that she (Dr. Dockter) would not treat Claimant if Claimant's injury was work related. Dr. Dockter acknowledged that, in the past, she has told patients that if an injury is work related, the patient needs to be seen by a different physician. Dockter Depo., 36:11-23.

51. If, in fact, Dr. Dockter treated work-related injuries not at all, or only with reluctance, it is easy to understand why she would advise Claimant of this policy after learning from Claimant of the work-related nature of Claimant's injury. It is harder to understand why Dr. Dockter would volunteer this policy to Claimant if Claimant's presenting history was of sudden

onset of low back pain, occurring after work, and with no known injury. In other words, Dr. Dockter's testimony does not explain why she might volunteer her policy concerning the treatment of worker's compensation patients to Claimant without Claimant first having said something to her about a possible work-related injury.

52. Having carefully reviewed the testimony of Claimant and Dr. Dockter, it seems likely that Claimant may have initially intimated to Dr. Dockter that there was a connection between her employment and her low back condition, only for Dr. Dockter to say something that suggested to Claimant that Claimant would not receive treatment if she had in fact injured her back at work. Claimant's testimony is to the effect that she was desperate for assistance, and it is not hard to imagine that she might revise her history in order to receive treatment. Of course, we recognize that this is inconsistent with Claimant's deposition and hearing testimony, testimony in which she rather emphatically insists that she gave Dr. Dockter a history of a specific work-related event. It is possible that Claimant has misremembered the events of July 13, 2016. It is possible that she dissembled the truth at deposition and at hearing, and that she actually did give a history to Dr. Dockter that her back pain, though sudden in onset, was not related to a particular work event. Because we cannot think of a good reason for Dr. Dockter to volunteer her policy concerning the treatment of work injuries without some signal alerting her to a possible work injury, we reconcile this factual dispute in Claimant's favor, and conclude that the dispute is not fatal to Claimant's current insistence that she suffered a work-related injury while engaged in lifting a sixth keg or kegs on July 11, 2016.

53. Lastly, Claimant consistently reported that she injured herself lifting a keg at work; she reported this history to Dr. Ward, the claims examiner, PT Gabrielsen, Dr. Gaertner, Dr. Reedy, Dr. Cox, Dr. Friedman, at both depositions, and at hearing. Claimant's consistent reporting of her

accident further supports her argument that she suffered the accident as she described numerous times to providers, attorneys, and lay witnesses.

54. Claimant has shown, on a more probable than not basis, that she suffered an accident on July 11, 2016 at work.

55. **Injury/Pre-existing Condition.** An "injury" is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102(18). A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 918 P.2d 1192 (1996). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion was 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 (2001). A pre-existing disease or infirmity of the employee does not preclude a workers' compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983).

56. Dr. Reedy, Claimant's treating physician, opined Claimant suffered an acute injury which aggravated her pre-existing degenerative condition: "the straw that broke the camel's back." Reedy Depo., 25:3-4. Dr. Friedman, Claimant's IME physician, opined that Claimant suffered an aggravation of her pre-existing lumbar degenerative disease with arthritis. JE 19:304. At

deposition, Dr. Cox agreed with Drs. Reedy and Friedman that Claimant suffered an acute injury, along with her pre-existing degenerative condition. Dr. Cox repeatedly emphasized Claimant's delay in reporting was the basis for his opinion that the injury was not work-related: "not to beat a dead horse, but again the fact that she didn't report it, I think that was very unusual in someone who was not naïve to the work comp system." Cox Depo., 39:16-19. Dr. Cox's opinion based on how Claimant reported her injury is not a medical opinion but is a legal opinion about whether the accident happened and was discussed *supra*. Claimant has proven, to a reasonable degree of medical probability, that she suffered an aggravation of her pre-existing low back condition.

57. **Medical Care.** 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. A surety that initially denies a workers' compensation claim that is subsequently determined to be compensable may not review for reasonableness a claimant's medical bills that were incurred prior to the time that the claim was deemed compensable; a surety may, however, review for reasonableness medical bills that were incurred after the claim was deemed compensable. *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009).

58. Dr. Cox opined that the care Claimant received was reasonable. JE 18:286. Dr. Friedman opined that Claimant's workplace injury caused her need for surgery. JE 19:304. Dr. Reedy recorded Claimant's surgery as work-related. JE 15:212. Claimant has met her burden of showing her medical treatment, including surgery, was necessary and reasonable and related to

her work injury on a more probable than not basis. Defendants are obligated to reimburse Claimant the full invoiced amount of her medical bills per *Neel*, *supra*.

59. **Temporary Disability.** Disability, for purposes of determining total or partial temporary disability income benefits, means a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 605 P.2d 939 (1980).

60. Claimant requests TTDs from the date of injury to December 31, 2016. Claimant did return to Fred Meyer in a light duty capacity; however, she did not recall, and the record does not reveal when she began light duty. Clt. Depo. 3/16/17 126:19-25; 137:2-10. Claimant was off work and on short term disability by at least August 25, 2016 and never returned to work at Fred Meyer thereafter. JE 36:831. Claimant is owed TTD benefits from the date of injury through December 31, 2016, with an offset for those wages that Employer paid during her period of light duty.

61. **Permanent Partial Impairment (PPI).** Claimant alleges entitlement to permanent partial impairment benefits. Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss is considered stable at the time of evaluation. Idaho Code § 72-422. While utilizing the advisory opinions of physicians, the Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989). Dr. Cox rated

Claimant at 7% WPI with 3% apportioned to her pre-existing low back pain. Dr. Friedman also rated Claimant at 7% WPI with 40% apportioned to her pre-existing low back arthritis, resulting in 4% impairment rating related to her industrial injury. Claimant is entitled to a 4% WP impairment rating.

62. **Permanent Partial Disability (PPD)**. "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.

63. In determining percentages of permanent disabilities, account shall be taken of the nature of the physical disablement, the disfigurement if of a kind likely to limit the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the afflicted 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. Idaho Code § 72-430.

64. The test for determining whether Claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced Claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination

of permanent disability is on Claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

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

66. Both vocational experts agreed that Claimant had sustained labor market access loss of 37%. Regarding wage loss, Mr. Crum updated his analysis at his deposition to reflect Claimant's correct wage and opined Claimant suffered wage loss of 33%. However, Mr. Crum never updated his wage loss analysis to include Claimant's benefits, as noted by Ms. Nelson. Mr. Crum felt that Claimant had a 50% likelihood of getting another position with similar benefits. Ms. Nelson estimated wage loss in a range of 36% to 53%, reflecting a much steeper wage loss if Claimant was unable to secure another position with similar benefits. Ms. Nelson's analysis is more reflective of Claimant's actual permanent partial disability; Ms. Nelson averaged her two wage loss figures to arrive at her final PPD number which adequately accounts for the possibility that Claimant may or may not secure a position with similar benefits to her position at Fred Meyer. Claimant has proven permanent partial disability of 41%, inclusive of impairment.

67. **Apportionment.** Idaho Code § 72-406(1) provides:

> In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

Thus, where permanent disability is less than total, it is a "statutory dictate that an employer is only liable for the disability attributable to the industrial injury." *Page v. McCain Foods, Inc.*, 145 Idaho 302, 309 fn. 2, 179 P.3d 265, 272 fn. 2 (2008). Consequently, where, as here, apportionment under Idaho Code § 72-406 is at issue, a "two-step approach is envisioned for making an apportionment." *Brooks v. Gooding County EMS*, 2013 IIC 0064.29 (September 12, 2013). First, the claimant's permanent disability from all causes combined must be determined; second, a determination must be made of the extent to which the injured worker's permanent disability is attributable to the industrial accident. *Id*.

68. Neither Mr. Crum nor Ms. Nelson have opined as to Claimant's disability from all causes. Further, while there is evidence Claimant had previous episodes of low back pain, there is no evidence she was assigned any permanent restrictions by medical authority. Nor is there testimony from Claimant tending to establish that she recognized functional limitations as a result of previous episodes of low back pain. Apportionment of disability under Idaho Code § 72-406 is inapplicable.

69. **Attorney's Fees.** Claimant argues she is owed attorney's fees for Defendants' unreasonable denial of her claim. Idaho Code § 72-804 provides:

> Attorney's fees — Punitive costs in certain cases. 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.

Defendants denied this claim by way of letter dated August 8, 2016. JE 25:382. Defendants denied the claim because Claimant's report was not consistent with what Fred Meyer reported, the surveillance footage, Dr. Dockter's chart note, and that Claimant did not complete her appointment with Dr. Ward. *Id.*

70. Claimant has not proven entitlement to attorney's fees. Defendants' reliance on Dr. Dockter's chart note and Ms. Fife's reporting the claim as "questionable" were both reasonable grounds, together and separately, to deny the claim.

CONCLUSIONS OF LAW AND ORDER

1. Claimant suffered an accident on July 11, 2016.

2. Claimant suffered an acute aggravation of her pre-existing degenerative low back condition.

3. Claimant is entitled to past medical care, paid at the invoiced amounts, per *Neel* and future medical care per Idaho Code § 72-432.

4. Claimant is entitled to TTDs from the date of injury until December 31, 2016, subject to an offset for any amount of wages Defendants paid during her period of light duty.

5. Claimant is entitled to permanent partial impairment (PPI) of 4% WPI.

6. Apportionment under Idaho Code § 72-406 is inapplicable.

7. Claimant is entitled to permanent partial disability (PPD) of 41%, inclusive of impairment.

8. Claimant is not entitled to attorney's fees.

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

DATED this 24th day of April, 2020.

INDUSTRIAL COMMISSION

Thomas P. Baskin, Chairman

Aaron White, Commissioner

Thomas E. Limbaugh, Commissioner

ATTEST:

Kamerron Monroe
Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, 2020, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by email upon each of the following:

TAYLOR MOSSMAN-FLETCHER
taylor@mossmanlaw.us

MATTHEW O PAPPAS
mpappas@ajhlaw.com

El Emma O. Landers