BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DEBORAH REIMER, Claimant, v. OVERLAND WEST, INC., Employer, and WAUSAU UNDERWRITERS INSURANCE CO., Surety, Defendants.	**IC 2010-002268** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED** **27 AUGUST 2018**

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 Twin Falls on June 20, 2017. Claimant, Deborah Reimer, was present in person and represented by James C. Arnold, of Idaho Falls. Defendant Employer, Overland West, Inc., and Defendant Surety, Wausau Underwriters Insurance Company, were represented by Matthew Vook, 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 February 27, 2018. On July 18, 2018, Judith Atkinson substituted as counsel for Defendants.

ISSUES

The issues to be decided by the Commission are:

1. Whether Claimant's tinnitus and hyperacusis are related to her industrial accident and whether she is entitled to medical care

therefore;

2. Claimant's entitlement to additional temporary disability benefits and date of medical stability;
3. The extent of Claimant's permanent partial impairment;
4. The extent of Claimant's permanent disability, including whether she is totally and permanently disabled; and
5. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant suffered an industrial accident causing lumbar injury on August 18, 2009, while at work. She underwent lumbar surgery on May 7, 2013. On March 10, 2014, Claimant received gadolinium in preparation for a lumbar MRI with contrast. She alleges the gadolinium caused anaphylaxis resulting in tinnitus and hyperacusis for which she seeks additional medical treatment. She requests further temporary disability benefits from January 18, 2010 until August 16, 2017. Claimant alleges she suffers permanent impairment of 15% of the whole person and is totally and permanently disabled. She also asserts Defendants have unreasonably delayed and denied medical care and are thus liable for attorney fees.

Defendants acknowledge Claimant's industrial accident and have paid for her May 7, 2013 lumbar surgery and temporary disability benefits from May 7 to October 15, 2013. Defendants assert they have acted reasonably and that Claimant has received appropriate permanent impairment and temporary disability benefits, and is entitled to no further benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. Joint Exhibits A through Z and AA through II, admitted at the hearing.

3. The testimony of Claimant taken at the hearing.

4. The post-hearing deposition testimony of Amy C. Drumm, M.D., taken August 16, 2017, by Claimant.

5. The post-hearing deposition testimony of James H. Bates, M.D., taken September 20, 2017, by Claimant.

6. The post-hearing deposition testimony of Michael V. Hajjar, M.D., taken October 20, 2017, by Defendants.

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

FINDINGS OF FACT

1. Claimant was born in 1953. She was 63 years old and resided in Ketchum at the time of the hearing. She was five feet five inches tall, right-handed, and weighed approximately 115 pounds at all relevant times.

2. **Background.** Claimant was raised in California where she graduated from high school in approximately 1971. She then pursued a double degree in psychology and nursing. In approximately 1980 she received an executive MBA from UCLA. For approximately ten years thereafter she worked as vice president of marketing and later as director of real estate finance for several very large land development companies leasing and marketing commercial real estate. She maintained a very demanding professional schedule with extensive national travel, earning from $55,000 to $100,000 annually with stock options. Claimant was very health conscious and physically active. She participated in triathlons. In approximately 1990, Claimant

moved to Idaho and worked remotely on out of state projects. In approximately 1992, she obtained her Idaho real estate license and began working locally in residential real estate at Sun Valley Real Estate and Coldwell Banker. She sustained ACL injuries requiring reconstructive surgery in 1992 and 1995. She fully recovered and resumed her usual activities.

3. The real estate market declined in the late-1990s and in approximately 2000, Claimant got out of real estate. She began working for an art gallery and later for a high end retail store in Ketchum as a sales associate. In approximately 2007, she commenced working for Overland West as a customer service representative at Hertz Car Rental (Hertz) at the Hailey Airport.

4. Claimant continued to be physically active with skiing, hiking, and horseback riding. Due to skiing accidents, she sustained right and left tibial plateau fractures requiring surgical treatment. She fully recovered and resumed her usual activities. She had no significant back symptoms and no limitations due to her back prior to August 18, 2009.

5. **Industrial accident and treatment.** On August 18, 2009, Claimant was at work transferring heavy luggage to a rental vehicle for a Hertz gold preferred customer when she felt a low back "pop" and pain. Claimant informed a coworker she had "tweaked" her back and also notified her supervisor. She continued to work for several months with back and hip pain and sciatica. Claimant hoped her low back would heal on its own with time; however, it worsened. She had no prior industrial accidents and was unaware of the customary procedure for obtaining medical care, nor did Hertz then file a report of her accident or provide her any information regarding making a claim or obtaining medical care for her work injury.

6. Sometime in October 2009, Claimant was at work and aggravated her low back pain. Her daily work duties required her to lift a firebox used for record storage weighing

approximately 30 pounds. On this particular day the shelf holding the firebox "collapsed and she had reaching, lifting and twisting in an awkward fashion to catch it." Exhibit G, p. 3. This increased her low back pain. She continued to work but leaned on the counter at work and avoided prolonged sitting and lifting luggage.

7. In late December 2009, Claimant gave her supervisor notice of her intent to take vacation to be seen for her back pain by her brother-in-law, who was a physician in California. Claimant believed she would have to pay for medical treatment for her industrial injury. Hertz did not notify her of any procedures for or the availability of medical attention for her industrial injuries.

8. Hertz terminated Claimant's employment on January 1, 2010, citing inadequate notice of her vacation plans. Hertz did not file a report of Claimant's industrial accident prior to terminating her employment. Upon applying for unemployment benefits, Claimant was advised for the first time by an individual at the Idaho Department of Labor that her circumstances implicated workers' compensation and she became aware of her entitlement to medical treatment for her industrial injuries. The Idaho Department of Labor found Claimant ineligible for unemployment insurance benefits.

9. On January 7, 2010, Claimant presented to Tracy Busby, M.D., for her low back injury. Dr. Busby noted that Claimant hurt her back in August lifting a very heavy bag into a car at Hertz. "Has never really gotten better. Was a triathlete and a back country horse back rider so considers herself tough and didn't want help basically. …. [T]rying to work through it. …. Refer to PT, can't believe she's been putting up with this for months." Exhibit B, pp. 1, 3. Claimant commenced physical therapy. On January 12, 2010, lumbar and thoracic x-rays revealed moderate S-shaped curvature of the spine with degenerative changes.

10. On January 15, 2010, Employer prepared a First Report of Injury for Claimant's August 18, 2009 accident, indicating August 19, 2009, as the date Employer was notified thereof.

11. On January 18, 2010, Claimant came under the care of David Verst, M.D., for her continuing low back pain and neck pain. A March 2010, lumbar MRI revealed moderate L3-4 disk herniation with right posterolateral extrusion migrating slightly downward into the right L4 lateral recess. Claimant continued with physical therapy. Dr. Verst later provided lumbar steroid injections; however, Claimant's back and right leg pain persisted. Claimant also underwent acupuncture by Tom Archie, M.D., which provided limited improvement.

12. On August 11, 2011, Claimant was examined by Richard Knoebel, M.D., at Defendants' request. He diagnosed low back pain and right leg radiculopathy resulting from her industrial accident and also pre-existing thoracolumbar scoliosis. He found Claimant was not medically stable and was limited to sedentary light work. He recommended further medical care by Dr. Verst. Exhibit G.

13. On January 4, 2012, Dr. Verst recommended and Claimant agreed to surgical intervention including decompression and "L3-4 right hemilaminectomy." Exhibit E, p. 16. It appears that on January 9, 2012, Dr. Verst requested Surety authorize surgery. Exhibit E, p. 14. No later than May 14, 2012, Dr. Verst again requested Surety's authorization for L3-4 hemilaminectomy. No authorization was forthcoming. Given Claimant's ongoing back symptoms, Dr. Verst indicated she could only work as tolerated.

14. On May 16, 2012, Claimant was examined by neurosurgeon Michael Hajjar, M.D., at Defendants' request. Dr. Hajjar recommended decompression and L3-4 fusion.

However, he related the need for surgery to degenerative issues, not to Claimant's industrial accident. Exhibit I, p. 5.

15. Claimant retained Curtis & Porter, P.A., who on August 29, 2012, wrote Surety requesting Dr. Hajjar be provided with additional information regarding the circumstances surrounding Claimant's August 18, 2009 accident.

16. On September 5, 2012, Benjamin Blair, M.D., examined Claimant at her expense. Dr. Blair opined Claimant needed lumbar surgery and concluded the need for surgery was causally related to her August 2009 industrial accident. Exhibit J, pp. 5-7.

17. In March 2013, Claimant began receiving Social Security Disability benefits of $1,280 per month. She became Medicare eligible at approximately this same time.

18. Claimant provided additional information to Surety and Dr. Hajjar, and approximately April 22, 2013, he reversed his causation opinion and concluded her need for lumbar surgery was work-related. Dr. Hajjar recommended decompression and L3-4 fusion rather than the hemilaminectomy proposed by Dr. Verst. Defendants authorized the surgery recommended by Dr. Hajjar and Claimant elected to proceed with surgery.

19. On May 7, 2013, Dr. Hajjar performed decompression and L3-4 posterior interbody fusion using a carbon fiber cage. Claimant testified her post-surgical recovery was difficult. She was too nauseated for oral pain medication and remained hospitalized for a week, instead of the anticipated three days. Claimant reported persisting back pain and right lower extremity sciatica after surgery.

20. During her recovery from surgery Claimant traveled by cab from Ketchum to Twin Falls for follow-up appointments with Dr. Hajjar. The lengthy trips aggravated her back

pain. Dr. Hajjar agreed to monitor Claimant's recovery telephonically rather than requiring her to travel to Twin Falls for office visits. On July 30, 2013, he wrote:

> Ms. Reimer is a woman who is about two and a half months out from a fusion and instrumentation procedure. ….. Deborah lives about eighty miles from my Twin Falls office and I have followed up with her over the phone. …. I do not believe that Ms. Reimer has failed in any aspect of her patient responsibilities to proceed with her normal postoperative care including therapy.

Exhibit I, p. 22.

21. Claimant's back pain and leg pain persisted and she reported that Dr. Hajjar later advised her the reason she did not obtain a better surgical outcome was because of the extensive delay in obtaining surgical treatment. Transcript, p. 57, ll. 19-25. On August 6, 2013, Dr. Hajjar wrote to Surety stating: "I am not surprised that Deborah has some lingering postoperative issues given the fact that her presurgical issues lingered for a few years." Exhibit I, p. 24. He recommended followup with a physical medicine specialist.

22. On October 10, 2013, Dr. Hajjar responded to an Industrial Commission rehabilitation consultant's inquiry, indicating Claimant could return to work at her time of injury duties. Exhibit CC, p. 14. The job site description indicated Claimant's job duties did not require lifting more than 10 pounds. On October 15, 2013, Dr. Hajjar wrote: "Ms. Reimer has a fairly sedentary job as a counter representative at Hertz Rent A Car. Based on the job description that has been provided to me, Deborah can return to this type of work at the present time." Exhibit I, p. 29. Defendants ceased payment of temporary disability benefits on October 15, 2013. Claimant continued experiencing significant back pain.

23. On October 31, 2013, Claimant presented to Amy Drumm, M.D., in Ketchum, with Dr. Hajjar's approval. On November 6, 2013, Dr. Drumm wrote Surety's adjuster, Julie Osler, stating:

> I understand that she has been released to work by Dr. Michael Hajjar, but I do not agree with this assessment. Deborah is unable to sit or stand for more than 5-10 minutes at a time and is unable to sleep due to worsening pain and discomfort since her surgery, which has left her mentally and physically fatigued. I witnessed for myself in our 45 minute visit with her that she is unable to sit or stand or to stay still for even 5 minutes at a time. I cannot imagine that she would in any way be a productive worker when she is sleep deprived as well. Thus, in my opinion, she could not work right now, even at a sedentary job.

Exhibit K, p. 5. At her post-hearing deposition, Dr. Drumm testified that she continued to hold the same opinion, specifically, that Claimant was not capable of working due to her back condition. Drumm Deposition, p. 9, ll. 8-17.

24. On November 12, 2013, Dr. Hajjar wrote Surety's representative stating:

> Deborah has been followed by Dr. Amy Drumm at St. Luke's Family Medicine. It has been requested that I change Deborah's work status from released to work at sedentary work to a status of not being able to return to work at the job description that was previously provided to me.
>
> This is based on Dr. Drumm's assessment that Deborah is unable to sit or stand for periods that are longer than five minutes.
>
> Ms. Reimer is now months out from a single level lumbar fusion and instrumentation. She has not improved much and she clearly requires additional treatment which will not likely require additional surgery. ….
>
> It has been request [sic] of Ms. Reimer that she follow up with a physical medicine specialist, but secondary to the fact that Deborah lives in the Wood River area she has been reluctant to travel to Twin Falls for this assessment which is [sic] led her to established care by Dr. Drumm. If Dr. Drumm feels comfortable providing these evaluations, then I will lead [sic] this issue up to her regarding Deborah's return to work.

Exhibit I, p. 31.

25. On January 7, 2014, Dr. Hajjar authored a letter indicating Claimant had reached maximum medical improvement and rating her permanent impairment at 9% of the whole person for her lumbar condition due to her industrial accident. Exhibit I, p. 35.

26. Claimant continued to experience low back pain and also worsening thoracic back pain. She was concerned with her thoracic pain and scoliosis and after searching, identified neurosurgeon David Antezana, M.D., practicing in Portland, Oregon, as a physician experienced in scoliosis treatment. Dr. Drumm referred Claimant to Dr. Antezana for evaluation of her scoliosis. Dr. Antezana agreed to a telephone consultation with Claimant and requested an updated lumbar MRI prior to the consultation. Dr. Drumm ordered a lumbar MRI.

27. On March 10, 2014, Claimant received an infusion of gadolinium contrast in preparation for the lumbar MRI ordered by Dr. Drumm. Within seconds of the gadolinium infusion, Claimant felt flushed, dizzy, nauseated, and short of breath. The MRI technician immediately placed her in a wheel chair and rushed her down the hall to the emergency department where she was observed to have skin redness, rash, itching, shortness of breath, throat swelling, and nausea. She was diagnosed with anaphylaxis and hypoxia and treated with intramuscular EpiPen injection, intravenous Benadryl and Pepcid, prednisone, and Zyrtec and was monitored in the emergency room for approximately 90 minutes until she recovered. Exhibit L.

28. On March 25, 2014, Claimant consulted Dr. Antezana telephonically regarding her scoliosis. He recommended periodic monitoring and did not recommend surgical intervention. Exhibit M.

29. After recovering from her anaphylactic shock, Claimant noted persisting heightened hearing and disturbing ringing in her ears which did not resolve. She presented to ENT Russell Mayes, M.D., who diagnosed tinnitus and referred Claimant to Charles Mangham, M.D. Dr. Mangham diagnosed hyperacusis.

30. On June 10, 2015, Claimant was examined by allergist Gregory Wickern, M.D. He diagnosed tinnitus and allergic rhinitis. He researched medical literature regarding the relationship between Claimant's anaphylactic reaction and her persisting tinnitus and recorded: "Many case reports of tinnitus during acute phase of anaphylaxis but not able to so far find info regarding on-going tinnitus post-anaphylaxis." Exhibit Q, p. 6.

31. On March 4, 2016, Dr. Bates examined Claimant at her request and rated her lumbar and thoracic spinal impairment. On March 22, 2016, Dr. Whitcomb rated Claimant's permanent impairment due to her tinnitus and hyperacusis.

32. **Condition at the time of hearing.** At the time of the hearing, Claimant continued to have back symptoms and take multiple medications as prescribed by Dr. Drumm who sees Claimant every two months to monitor her pain levels and medications. At the time of hearing Claimant was taking hydrocodone as needed, Diazepam for pain, Flexeril as a muscle relaxer, Gabapentin for nerve damage, and Belsomra for sleep.

33. Claimant's hyperacusis and tinnitus have persisted since her March 2014 anaphylaxis. At hearing she described her tinnitus as an incessant buzzing in her head, and described her hyperacusis as like having a fish bowl over her head that uncomfortably amplifies every sound. Her tinnitus and hyperacusis cause her to avoid music and noisy environments. High pitched voices and low diesel sounds are especially bothersome.

34. Claimant has trouble standing in place. She has difficulty sleeping due to back pain and right leg pain. Sleep deprivation due to chronic back pain makes her irritable. She has difficulty predicting how she will feel on any given day or time.

35. Claimant testified at hearing that her sciatica, mid back pain, scoliosis, and hyperacusis were worsening. At hearing she leaned on a walking cane while she stood for

almost all of her testimony. She reported her back was "killing" her. The record documents that she has resorted to a cane on prior occasions[1] and has suffered at least one fall when her right leg gave out on her.[2] Sitting aggravates her back pain, thus she prefers standing.[3] Claimant testified she did not believe she could do even one average day's work due to poor sleep the night before. Any bending or stooping was very uncomfortable. She doubted she could stand/walk for two-thirds of the work day or sit for an hour. She must lie down during a normal day to manage her back pain.

36. **Credibility.** Having observed Claimant at hearing and compared her testimony with other evidence in the record, the Referee finds that Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

37. 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).

38. **Medical care.** The first issue is whether Claimant is entitled to medical care for her tinnitus and hyperacusis. Idaho Code § 72–432(1) requires an employer to provide an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and

[1] The July 29, 2014 office note of David Jensen, D.O., recorded: "pt uses a cane to assist with ambulation." Exhibit O, p. 1. The March 4, 2016 independent medical evaluation of Dr. Bates recorded: "She reports that she will have increased pain and stiffness after driving. She will use her cane intermittently, particularly after driving. She reports that driving or prolonged sitting seems to cause increased numbness in the legs." Exhibit T, p. 2.

[2] Dr. Drumm's January 20, 2017 chart note recorded: "right leg gave out 1 week ago[.] Banged right knee and right elbow and a little sore." Exhibit K, p. 55.

[3] Dr. Drumm's May 23, 2017 office note recorded: "Constitutional: … standing as always …." Exhibit K, p. 60.

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. Thus, Idaho Code § 72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable.

39. 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, 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). It follows that Claimant's request for medical benefits herein must be supported by medical evidence establishing causation.

40. In the present case, Claimant asserts her anaphylaxis from the gadolinium contrast administered in preparation for her March 2014 lumbar MRI caused her tinnitus and hyperacusis for which she is entitled to medical treatment. Surety paid for the March 2014 MRI; however, Defendants now dispute that her anaphylaxis was related to her industrial accident and also dispute that her anaphylaxis caused tinnitus and hyperacusis. Defendants assert that Claimant's scoliosis pre-existed her industrial accident, that Dr. Drumm's referral of Claimant to Dr. Antezana for evaluation of her scoliosis was not reasonable medical care for her industrial accident, and thus the anaphylaxis Claimant suffered is unrelated and any consequences thereof are not compensable.

41. On July 29, 2014, David Jensen, D.O., examined Claimant and recorded:

> She has evidence of an underlying significant thoracolumbar scoliosis with a large rib hump with scapular elevation and uneven scapulae and posterior displacement of the left scapula ….
>
> I was able to review her most recent MRI done on March 10, 2014, showing a posterolateral fusion at L3-4. There are some mild degenerative changes below at the L4-5 level, a little bit of ligamentum flavum thickening, a little bit of lateral recess narrowing. A scoliosis study showed she has a very significant thoracolumbar scoliosis, very significant in the thoracic spine in particular.
> ….
>
> She feels like a lot of her scapular and upper thoracic and rib hump pain are related and I certainly do not see that. I do not how [sic] that would be related to her single level fusion. All of her scoliosis problems are preexisting.

Exhibit O, p. 3.

42. Similarly, Dr. Hajjar opined that Claimant's scoliosis—which he referred to as adolescent scoliosis—was unrelated to her industrial accident. He testified:

> Adolescent scoliosis is the type of scoliosis that you see most commonly in kids, teenagers, who eventually will become adults.
>
> It is much more common in girls and women than men, where they have a curve in their spine that usually starts in the thoracic spine, which is the chest area or the part with ribs, that will flow into their lower back. And as people get older, they can develop some degenerative changes or wear and tear changes in the curves. And all of that can lead to symptoms as adults, including older adults.

Hajjar Deposition, p. 11, l. 17 though p. 12, l. 2.

43. Dr. Bates testified that Claimant's thoracic back pain was related to her 2009 industrial accident and resulted from "sprain/strain type injury." Bates Deposition, p. 8, ll. 23-24, p. 9, l. 17. Dr. Bates' March 4, 2016 IME report specifically addressed the causation of Claimant's thoracic back pain stating: "Thoracic back pain, nonspecific, sprain/strain type injury. Persisting since the time of injury. There is record of scoliosis predating the injury but no evidence of the scoliosis being symptomatic prior to the thoracic sprain/strain injury."

Exhibit T, p. 12. He opined that the injury was permanent and rated the impairment for Claimant's persisting thoracic sprain/strain at 2% of the whole person. While clearly acknowledging Claimant's scoliosis pre-existed her industrial accident, Dr. Bates commented on the aggravation of her scoliotic thoracic spine by her work injury:

> I believe that it is hard to differentiate scoliosis from the thoracic spine. I believe the conditions and the pain of the thoracic spine were aggravated by this injury. I think the injury would—would not be unexpected. A few negatives in that one, in that sentence, but it is not a surprise that an injury like this would cause pain into the thoracic region. If the scoliosis was present in the thoracic region and asymptomatic, it could exacerbate that. And then the real question that really cannot be defined, "Did it exacerbate the scoliosis or the other structures that were in the thoracic spine?" So I do not—it's a small point here, but I do not blame this on the scoliosis because I cannot separate scoliosis from the other condition of the thoracic spine.

Bates Deposition, p. 11, ll. 1-15 (emphasis supplied).

44. Dr. Busby's January 12, 2010, note recorded: "Back pain is increasing and she's in complete spasm all the way up to her neck now. …. OBJECTIVE … Back: +scoliosis (pt denies previous dx of same) and palpable spasm up into thoracic area." Exhibit B, p. 4. This corroborates Dr. Bates' opinion that Claimant's work injury resulted in not only L3-4 lumbar disc herniation, but also in sprain/strain aggravation of her scoliotic thoracic spine. Dr. Busby's January 12, 2010 note documents Claimant's thoracic symptoms and provides persuasive foundation supporting Dr. Bates' causation opinion.

45. To treat the accident-related aggravation of Claimant's scoliotic thoracic spine, Dr. Drumm first contacted Dr. Floyd, a Boise spinal orthopedic surgeon, seeking his recommendation of a Boise scoliosis specialist and he "recommended looking at some of the larger cities for scoliosis specialists there." Drumm Deposition, p. 13, ll. 4-5.

46. On March 5, 2014, Dr. Drumm wrote to David Antezana, M.D.: "I am referring my patient, Deborah Reimer, to you for evaluation of scoliosis which has significantly worsened

following L3-4 spinal fusion performed on May 7, 2013 for a severely symptomatic L3-4 disc herniation." Exhibit K, p. 16. On March 10, 2014, an order for MRI lumbar spine was processed allowing the radiologist to elect contrast. Coverage for the MRI was listed as: "Payor: WORKER'S COMPENSATION Plan LIBERTY NORTHWEST." Exhibit K, p. 17.

47. Dr. Drumm ordered the March 2014 MRI after Claimant communicated with Dr. Antezana who requested an updated MRI before his telephone consultation with Claimant. On November 18, 2014, Dr. Drumm wrote to Surety explaining:

> I was asked by Deborah Reimer to clarify the MRI order that was performed on 3/10/14. On my visit with her on 2/6/14, I did state that she did not need an MRI at that time. However, in early March, she initiated a consult with a Dr. David Antezana at The Oregon Clinic, Neurosurgery division, in Portland, Oregon. After a conversation with his office and in preparation for a phone consultation with him on March 25, 2014, she relayed his request for a new MRI of her lumbar spine prior to the phone consultation. The lumbar spine MRI was ordered for this reason.

Exhibit K, p. 25.

48. Defendants acknowledged and paid for the March 2014 MRI ordered by Dr. Drumm. However, Defendants now assert referral to Dr. Antezana was not reasonable and that Claimant is not entitled to the best medical care available nationally, only to reasonable medical care that could have been provided by unspecified local physicians. Dr. Antezana reviewed Claimant's lumbar MRI and recommended periodic monitoring of her scoliosis. He did not recommend surgical intervention. Defendants have not established that a local physician would have recommended evaluation or treatment of the aggravation of Claimant's scoliotic thoracic spine any differently.

49. It is apparent that Dr. Drumm did not find the request for a lumbar MRI in March 2014 unreasonable as she ordered it. Regarding Claimant's March 2014 MRI, Dr. Bates testified that "an MRI to—would be reasonable for a thorough evaluation of the condition of the spine.

I'd say … for most conditions it is the most thorough imaging study that we have for the spine." Bates Deposition, p. 14, ll. 14-19. He further testified it was reasonable for Claimant to be concerned about the relationship between her injury and her scoliosis. No medical expert has opined that the March 2014 lumbar MRI ordered by Dr. Drumm was not reasonable.

50. Considering the totality of the circumstances established by the record, the Referee finds that the March 2014 lumbar MRI ordered by Dr. Drumm, Claimant's treating physician, constituted reasonable diagnostic medical treatment for Claimant's injuries from her industrial accident.

51. Defendants also deny that Claimant's anaphylaxis caused tinnitus and hyperacusis. As noted above, within seconds of the administration of gadolinium contrast on March 14, 2014, Claimant suffered an anaphylactic reaction and was rushed to the emergency room where she was successfully treated for anaphylaxis and hypoxia.

52. On April 21, 2014, Claimant was evaluated by ENT Russell Mayes, D.O., in Twin Falls for ringing in her ears. He recorded her report: "She noticed bilateral tinnitus the day after her reaction." Exhibit N, p. 1. Dr. Mayes diagnosed tinnitus, noted Claimant's MRI a few weeks earlier and anaphylactic reaction to the gadolinium contrast, and recorded: "She could have suffered a mild sensory neural hearing loss injury from the medications given or the stressful situation she was then [sic]. This could cause the tinnitus. Stress in and of itself and medications can lead to tinnitus as well." Exhibit K, p. 20.

53. On September 10, 2015, Dr. Wickern opined: "Tinnitus during anaphylaxis has been documented and reported in many anaphylaxis case studies. She experienced tinnitus during the acute event and unfortunately continues to experience tinnitus to the present time. I believe the chronic tinnitus is a consequence of the acute anaphylactic event." Exhibit Q, p. 14.

54. On January 13, 2016, board certified orthopedic surgeon R. David Bauer, M.D., reviewed Claimant's medical records. He reported gadolinium allergies were rare and he had never had a patient with a gadolinium reaction experience tinnitus. He concluded: "My review of the peer-reviewed medical literature does not confirm that tinnitus would remain as a result of a single incident anaphylactic event that was treated appropriately and within short order." Exhibit S, p. 11.

55. On June 7, 2016, otolaryngologist Charles Mangham, Jr., M.D., examined Claimant and administered a tinnitus questionnaire, a hyperacusis questionnaire, and an audiogram. He diagnosed bilateral hearing loss, bilateral tinnitus, and hyperacusis of both ears and recorded:

> The most likely cause of her hearing loss is a nonsyndromic inherited inner ear disorder. The differential diagnosis includes autoimmune inner ear disease (AEID), bilateral Meniere's disease, congenital inner ear anomaly, neurofibromatosis type II, hydrocephalus, hypothyroidism, and central nervous system inflammatory diseases including sarcoidosis, syphilis, and Lyme disease. Moderate allergic reactions/"anaphylaxis" are not in the differential diagnosis of bilateral progressive hearing loss. I put anaphylaxis in quotes because her medical record does not indicate that she experienced a "severe, potentially life threatening allergic reaction." Whether she had anaphylaxis are [sic] not is moot because this is not a described mechanism for bilateral progressive hearing loss. Deborah has experienced a 10 dB per year decline in her hearing in both ears over the past 2 years. This rate of loss meets criteria for autoimmune inner ear disease as does the observation that the loss is a least 30 dB HL and it asymmetrical. ….
>
> She has tinnitus and abnormal loudness growth at least in part caused by her progressive hearing loss. Her loudness versus intensity functions show that she has hyperacusis as a cause for her loudness intolerance.

Exhibit U, p. 8.

56. On July 12, 2016, Dr. Mangham administered an audiogram; noted improvement in Claimant's hearing and recorded: "I am unable to explain her recent dramatic hearing improvement. … Her current test makes evaluation of progressive hearing loss moot." Exhibit

U, p. 20. On May 1, 2017, Dr. Mangham administered an audiogram and recorded: "Her spreadsheet and graphs of her hearing results over the last couple of years show stable to improved hearing in both ears. Her intensity versus loudness functions show an improvement in intensity processing. She no longer has the dramatic loudness recruitment curve that she had 6 months ago. She still has mild hyperacusis." Exhibit U, p. 40. He recommended Ginkgo Biloba.

57. On March 22, 2017, Curtis Whitcomb, Au.D., opined:

> I concur with the physicians you listed that Deborah Reimer suffers from tinnitus and hyperacusis ….
>
> I agree with Dr. Wickern's assessment as to the cause of Ms. Reimer's tinnitus is due to the anaphylactic event caused by the Gadolinium use for contrast in her MRI. There is documented evidence of this in the professional literature.

Exhibit W, p. 1.

58. The record establishes that Claimant's anaphylaxis was caused by the gadolinium contrast administered in preparation for her March 2014 lumbar MRI. The opinions of Drs. Wickern and Whitcomb convincingly relate Claimant's tinnitus and hyperacusis to her anaphylaxis. Their opinions are more persuasive than the opinions of Drs. Bauer and Mangham, particularly given the absence of those symptoms prior to administration of the gadolinium contrast, prompt onset of Claimant's tinnitus and hyperacusis symptoms in relation to her anaphylaxis, and the persistence of those symptoms thereafter.

59. Claimant has proven her tinnitus and hyperacusis were caused by her anaphylaxis in March 2014. She has also proven her anaphylaxis is related to reasonable diagnostic medical treatment for her industrial accident. Claimant has proven she is entitled to reasonable medical treatment for her tinnitus and hyperacusis due to her industrial accident, including hearing

aids/tinnitus maskers and tinnitus retraining therapy as palliative care as recommended by Dr. Whitcomb. Exhibit W, p. 2.

60. **Temporary disability.** The next issue is whether Claimant is entitled to additional temporary disability benefits due to the industrial accident. Idaho Code § 72-102 (11) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as 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). Additionally:

> [O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986).

61. In the present case, Claimant has not worked since January 1, 2010, when her employment was terminated by Hertz. Defendants paid Claimant temporary disability benefits from the time of her May 7, 2013 lumbar fusion, until Dr. Hajjar opined she could return to her time-of-injury job at Hertz on October 15, 2013. Claimant seeks temporary disability benefits from January 18, 2010 until March 22, 2017, less the period for which Defendants have already

paid temporary disability benefits. Other than to observe Dr. Hajjar released Claimant to her time-of-injury job on October 15, 2013, and declared her medically stable on January 7, 2014, Defendants do not address Claimant's arguments for additional temporary disability benefits.

62. On January 18, 2010, Dr. Verst examined Claimant and commenced treating her back pain and radiculopathy due to her industrial accident. A lumbar MRI in March 2010 documented L3-4 disk herniation and extrusion. However, Dr. Verst's office notes from January, February, and March 2010, and January 2011, indicate Claimant was not taken off work. Exhibit E, p. 9.

63. Dr. Knoebel found Claimant was not medically stable on August 11, 2011, restricted her to sedentary light work, and recommended further medical care by Dr. Verst. Dr. Knoebel recorded:

> At this time, however, the claimant is able to return to work. The claimant currently has a limitation to sedentary light work. This contemplates that the individual can do work in a standing or walking position with a minimal demand for physical effort. The lifting capacity is limited to 15 pounds occasionally and 10 pounds frequently and no bending, squatting, kneeling, climbing, pushing, pulling, or other activities involving comparable physical effort are recommended.

Exhibit G, p. 9.

64. By January 2012, Dr. Verst concluded Claimant needed L3-4 hemilaminectomy. On March 8, 2012, Dr. Verst indicated to Surety that he had not given Claimant a full-duty work release, but rather only a release "for her to work as tolerated." Exhibit E, p. 18. In his May 16, 2012 report Dr. Hajjar recommended L3-4 fusion but did not relate it to Claimant's industrial accident. However, he noted: "Deborah is probably not able to continue to work now." Exhibit I, p. 5. In September 2012, Dr. Blair opined Claimant needed lumbar surgery due

to her work accident. Finally, on April 22, 2013—after being provided complete information—Dr. Hajjar opined Claimant's need for L3-4 fusion was due to her industrial accident.

65. The record indicates Defendants' adjuster on one occasion denied Claimant's request for temporary disability benefits because Hertz terminated her employment for cause, asserting Claimant gave inadequate notice prior to taking vacation. Regardless of whether termination for cause was warranted, Claimant's time-of-injury job at Hertz required daily lifting of the firebox weighing approximately 30 pounds and regular lifting of Hertz gold preferred customers' luggage. Both activities substantially exceeded Dr. Knoebel's restrictions. Claimant is entitled to total temporary disability benefits from the time Dr. Knoebel restricted her to sedentary light work on August 11, 2011, until her L3-4 fusion on May 7, 2013.

66. Following the L3-4 fusion, Defendants paid Claimant temporary disability benefits from May 7 until October 15, 2013. On October 15, 2013, Dr. Hajjar released Claimant to return to her time-of-injury job at Hertz. He released her in reliance upon a job site evaluation that inaccurately represented Claimant's time-of-injury job required lifting no more than 10 pounds occasionally. Exhibit CC, pp. 14-15. As noted, Claimant's time-of-injury job actually required lifting a 30-pound firebox and loading gold preferred customers' luggage—which was precisely the duty she was performing at the time of her August 18, 2009 industrial accident. Thus, Claimant's actual time-of-injury job did not constitute suitable employment within the 10-pound lifting restrictions imposed by Dr. Hajjar on October 15, 2013. Furthermore, Dr. Drumm, whom Defendants recognized as Claimant's treating physician, opined by her November 6, 2013 letter to Surety that Claimant "could not work right now even at a sedentary job." Exhibit K, p. 5. In May 2016, Dr. Drumm completed a physician's functional assessment indicating with Claimant's back condition she could stand or walk frequently, seldom sit for an hour or less, lift

or pull from 10 to 20 pounds, seldom bend or stoop, and needed to lie down periodically other than during normal work breaks for pain relief. Exhibit K, pp. 39-40. Dr. Drumm reaffirmed this opinion at her deposition. Drumm Deposition, pp. 19-20.

67. Finally, Dr. Hajjar considered Claimant's lumbar condition stable on January 7, 2014; however, her thoracic spine condition was not. Dr. Bates found her thoracic condition stable on March 4, 2016. Claimant's thoracic spine required reasonable treatment including physical therapy and the March 2014 MRI which produced anaphylaxis resulting in tinnitus and hyperacusis which necessitated further treatment. Claimant alleges that she was medically stable on March 22, 2017, the date Dr. Whitcomb found her medically stable and rated the impairment from her tinnitus and hyperacusis.

68. As noted above, regardless of whether Hertz's termination of Claimant's employment for cause was warranted, her actual time-of-injury job required lifting 30 pounds or more—substantially exceeding the restrictions imposed by Dr. Hajjar in October 2013, and Dr. Drumm in November 2013, and March 2016. Under the circumstances presented, Claimant's actual time-of-injury job was not suitable employment. Defendants must show work was available to Claimant which would have been suitable for her. They have made no such showing as required by Malueg.

69. Claimant has proven her entitlement to total temporary disability benefits from August 11, 2011, until March 22, 2017, when she became medically stable. Defendants are entitled to credit for temporary disability benefits they paid during Claimant's L3-4 fusion and recovery thereafter from May 7 until October 15, 2013.

70. **Permanent partial impairment.** The next issue is the extent of Claimant's permanent impairment. "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).

71. In the present case, Dr. Hajjar found Claimant medically stable on January 7, 2014, and rated the permanent impairment of her lumbar spine at 9% of the whole person due to her L3-4 fusion. Hajjar Deposition, p. 10. On March 4, 2016, Dr. Bates also rated Claimant's permanent impairment for her lumbar spine at 9% of the whole person due to her industrial accident. Additionally he rated her thoracic impairment at 2% of the whole person due to the chronic thoracic sprain/strain resulting from her industrial accident. Bates Deposition, pp. 15-16. Exhibit T, p. 12. Dr. Bates' impairment rating is more comprehensive and persuasive because Claimant had no lumbar or thoracic back pain before her accident, but experienced persisting lumbar and thoracic back pain, including palpable thoracic muscle spasms as documented in Dr. Busby's notes and other medical records thereafter. Dr. Whitcomb found Claimant medically stable on March 22, 2017, and rated the permanent impairment due to her tinnitus and hyperacusis at 5% of the whole person pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition. Exhibit W, p. 2.

72. Claimant has proven she sustained whole person permanent impairments of 9% due to her lumbar spine condition, 2% due to her thoracic spine condition, and 5% due to her tinnitus and hyperacusis, thus totaling 16% of the whole person due to her industrial accident.

73. **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.

74. The focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995). The extent and causes of permanent disability "are factual questions committed to the particular

expertise of the Commission." Thom v. Callahan, 97 Idaho 151, 155, 157, 540 P.2d 1330, 1334, 1336 (1975). A disability evaluation requires "the Commission evaluate [claimant's] disability according to the factors in I.C. § 72–430(1), and make findings as to her permanent disability in light of all of her physical impairments, including pre-existing conditions, and that it then apportion the amount of the permanent disability attributable to [claimant's] accident." Page v. McCain Foods, Inc., 145 Idaho 302, 309, 179 P.3d 265, 272 (2008). The proper date for disability analysis is the date of the hearing, not the date the injured worker reaches maximum medical improvement. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012). Work restrictions assigned by medical experts and suitable employment opportunities identified by vocational experts may be particularly relevant in determining permanent disability.

75. Work restrictions. In the present case, the parties cite work restrictions determined by Drs. Hajjar, Bates, Blair, Drumm, and Mayes.

76. Dr. Hajjar opined that Claimant could return to work at Hertz as of October 15, 2013. Exhibit I, p. 29; Hajjar Deposition, p. 14. Ultimately, on January 7, 2014, he recommended work restrictions due to her lumbar condition of "no repetitive bending, twisting, stooping, exposure to vibrations, and a lifting restriction of no more than 30 to 50 pounds." Hajjar Deposition, p. 15, ll. 1-3.

77. Dr. Bates enumerated Claimant's restrictions due to the combination of her lumbar and thoracic spine conditions caused by her industrial accident:

> Frequent change of position, sit, stand, or walking, change every 30 minutes. No lifting while twisting. Occasional bending, stooping, twisting, squatting. Work at a light level. Maximum lifting up to 25 pounds on a rare occasion, and rare while being defined as 2 to 5 percent of the time. Lifting up to 15 pounds occasionally, that is up to one-third of the time, and lifting 5 pounds on a frequent basis.

Bates Deposition, p. 16, ll. 16-24; Exhibit T, p. 13. On December 5, 2016, Dr. Benjamin Blair concurred in these restrictions. Exhibit J, p. 9. By correspondence dated May 18, 2017, Dr. Bates deferred to Dr. Drumm's assessment of Claimant's functional abilities including her ability to work. Exhibit T-1.

78. On May 4, 2016, Dr. Drumm completed a physician's functional assessment of Claimant's back condition and concluded Claimant could stand/walk for two-thirds of the workday, sit for one hour or less per workday, lift or pull 10-20 pounds occasionally, seldom bend or stoop, and that Claimant's condition would cause her to lie down periodically for pain relief and the need to lie down could not be accommodated during normal work breaks, and would cause her to miss work more than two days per month. Exhibit K, p. 39. Dr. Drumm reaffirmed this opinion at her deposition. Drumm Deposition, p. 20. On May 5, 2017, Dr. Drumm completed another physician's functional assessment indicating with Claimant's back, tinnitus, and hyperacusis conditions, she needed to lie down periodically other than during normal work breaks for pain relief and that her conditions would seriously interfere with the attention and concentration required for even simple work tasks and would cause her to miss more than two days of work per month. Exhibit K, pp. 58. Dr. Drumm reaffirmed this opinion at her deposition and testified it was unlikely Claimant's back condition would significantly improve. Drumm Deposition, pp. 19-20.

79. On May 19, 2016, Dr. Mayes completed a physician's functional assessment of Claimant's bilateral tinnitus and concluded that her condition required her to lie down periodically for relief, would cause her to miss regular work more than two days per month, would frequently seriously interfere with the attention and concentration needed to perform simple work tasks, and would daily limit her sleep and attention. Exhibit N, p. 18.

80. Dr. Drumm has been Claimant's treating physician and has had regular contact with her since at least 2014. Dr. Drumm last examined Claimant on May 18, 2017, and is the most knowledgeable regarding Claimant's current functioning. In contrast, Dr. Hajjar last examined Claimant in 2013. He did not consider Claimant's thoracic spine injury due to her industrial accident nor her tinnitus or hyperacusis in determining her restrictions.

81. The Referee finds the restrictions imposed by Dr. Drumm and Dr. Mayes persuasive as the most current, comprehensive, and credible assessment of Claimant's functional capacity. Specifically, due to Claimant's lumbar and thoracic condition resulting from her industrial accident, she is restricted to standing/walking two-thirds of the workday, sitting for one hour or less per workday, lifting or pulling 10-20 pounds occasionally, seldom bending or stooping, and she must lie down for pain relief more frequently than is accommodated by normal work breaks and will miss more than two regular work days per month. Claimant's bilateral tinnitus and hyperacusis will frequently seriously interfere with her attention and concentration needed to perform simple work tasks, daily limit her sleep, compel her to lie down periodically for relief, and cause her to miss more than two regular work days per month.

82. Opportunities for gainful activity. After Claimant's accident she continued working until January 1, 2010. She has not worked since that time. Claimant asserts her back pain makes it impossible for her to lift more than 10 pounds, bend, or sit for any significant period, or sleep more than an hour at a time. She also asserts that her tinnitus and hyperacusis alone preclude her from employment because they are so irritating and unrelenting. Claimant testified that both the residential and commercial real estate markets have changed since she worked in real estate. She affirmed she could not do that kind of work now, because her back pain permits her to sleep only an hour at a time resulting in decreased mental acuity and

concentration, and she could not travel sufficiently now because she cannot lift suitcases or tolerate sitting for any significant period.

83. *Mary Barros-Bailey*. Mary Barros-Bailey, Ph.D., CRC, CLCP, a vocational expert retained by Surety, interviewed Claimant on September 24, 2016, and prepared a report evaluating her disability. From Claimant's work history, Dr. Barros-Bailey opined she retained a variety of transferable skills.

84. Dr. Barros-Bailey noted that based upon Dr. Hajjar's returning Claimant to work without restrictions; there was no basis for permanent disability. Dr. Barros-Bailey opined "Given Dr. Blair's estimate of Deborah's permanent physical restrictions, her residual functional capacity would be within the Medium level of strength," Exhibit AA, p. 11, and Claimant would not have lost any access to her relevant labor market. Dr. Barros-Bailey reported that based on Dr. Bates' restrictions, Claimant met the partial range of Sedentary and Light work and would have lost access to 47% of the labor market. Dr. Barros-Bailey concluded that "based on Dr. Bates' opinions, Ms. Reimer's disability inclusive of impairment would be 24%. However, based on Dr. Drumm's opinions, Deborah would be totally disabled." Exhibit AA, p. 13. She noted that based upon Dr. Drumm's opinion as to Claimant's function, it would not be reasonable to expect Claimant "to find any skilled or semiskilled work within the competitive labor market and she would be considered totally and permanently disabled from work." Exhibit AA, p. 12.

85. Dr. Barros-Bailey opined regarding the impact of Claimant's sensory limitations resulting from her tinnitus and hyperacusis:

> Given the severity of the function identified by Drs. Mangham and Mayes based on the tinnitus and hyperacusis, it is unreasonable to believe that Ms. Reimer could be competitively employed regardless of any of her estimates of function by Drs. Hajjar, Blair, Bates, or Drumm. That is, independent of the physical

> restrictions, the impact of the sensory conditions on Deborah's emotional, cognitive, and social functioning alone would render her totally disabled.

Exhibit AA, p. 14.

86. *Delyn Porter*. Claimant retained vocational expert Delyn Porter, M.A., CRC, CIWCS, to evaluate her employability. He interviewed Claimant on March 8, 2016, and on July 14, 2016, issued a vocational evaluation report. He recorded Claimant's report that she was unable to static stand for more than five minutes, used a cane when walking, and has difficulty with steps. Exhibit Z, p. 14. Mr. Porter noted that Claimant has extensive formal education and "has worked as a real estate leasing agent, real estate marketing specialist, real estate finance director, real estate broker, real estate development director, real estate sales, and car rental agent." Exhibit Z, p. 23.

87. Mr. Porter concluded that if Dr. Hajjar's restrictions are adopted, Claimant has no permanent disability. Applying the permanent restrictions imposed by Dr. Bates, Mr. Porter opined that Claimant had access to 11% of the labor market pre-injury, but only approximately 4.5% post-injury, resulting in a 59% loss of labor market access. Mr. Porter noted there were jobs available within the restrictions imposed by Dr. Bates with wages comparable to Claimant's time-of-injury job and concluded that "using the work restrictions from Dr. Bates, Ms. Reimer has sustained a 0% loss of wage earning capacity post injury." Exhibit Z, p. 27. Considering the Commission's observations of the limitations of simply averaging the estimated loss of labor market access and the expected wage loss, as set forth in Deon v. H&J, Inc., 2013 WL 3133646 (Idaho Ind. Com. 2013), and weighting Claimant's loss of labor market access over her loss of wage earning capacity, Mr. Porter concluded Claimant "sustained permanent partial disability (PPD) of 59%, inclusive of impairment." Exhibit Z, p. 31.

88. Mr. Porter affirmed that if Dr. Drum's restrictions are adopted, then Claimant is totally and permanently disabled. He opined that "Based upon the combined work restrictions from Dr. Bates and Dr. Mayes, Ms. Reimer would have access to approximately 0% of the total jobs in her assigned labor market area. This would result in 100% loss of labor market access." Exhibit Z, p. 27. He concluded that combining the work restrictions "would result in a post-injury wage earning capacity of $0.00; and would equate to a 100% loss of wage earning capacity post injury." Exhibit Z, p. 27. Mr. Porter reported that considering the combined work restrictions, Claimant would meet the criteria for an odd-lot worker and it would be futile for her to seek employment.

89. On May 25, 2017, Mr. Porter issued an addendum to his vocational report. He reviewed additional recent work restrictions imposed by Drs. Whitcomb and Drumm which further strengthened his prior conclusion that Claimant is totally and permanently disabled under the odd lot doctrine and it would be futile for her to seek employment.

90. *Weighing the vocational opinions.* The vocational experts' opinions are thorough and largely consistent in concluding that given the restrictions determined by Dr. Drumm and Dr. Mayes, Claimant is significantly disabled.

91. Based upon Claimant's permanent impairment of 16% of the whole person, extensive permanent physical restrictions as determined by Drs. Drumm and Mayes, transferable skills, and considering all of Claimant's medical and non-medical factors including her inability to return to any of her previous positions, and her age of 57 at the time of the industrial accident and 63 at the time of the hearing, Claimant's ability to compete in the open labor market and engage in regular gainful activity after her industrial accident has been greatly reduced. The

Referee concludes that Claimant has proven permanent disability of 90%, inclusive of her 16% whole person permanent impairment.

92. **Odd-lot.** Claimant also alleges she is totally and permanently disabled pursuant to the odd-lot doctrine. 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. Dumaw v. J. L. Norton Logging, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). A claimant may satisfy his burden of proof and establish a prima facie case of 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).

93. In the instant case, Claimant has presented no evidence of any failed attempts at other types of employment. She has not presented evidence of an unsuccessful work search. However, Claimant alleges that a work search would be futile. Delyn Porter concluded: "when

you consider the permanent work restrictions and limitations assigned by Dr. Mayes, Mr. Reimer's actual labor market is so small that a viable competitive labor market would no longer exist and she meets the criteria for odd-lot total perm …." Exhibit Z, p. 30. Dr. Barros-Bailey and Mr. Porter have both persuasively opined that Claimant is totally and permanently disabled, not competitive for employment and indeed, a work search would be futile. Claimant has proven that a work search would be futile. She has established a prima facie case that she is an odd-lot worker under the Lethrud test.

94. 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 [defendants] 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).

95. In the present case, Defendants have not shown that there is an actual job regularly and continuously available which Claimant can perform and at which she has a reasonable opportunity to be employed.

96. Claimant has proven that she is totally and permanently disabled pursuant to the odd-lot doctrine commencing April 22, 2017, the date Whitcomb found her medically stable and rated her tinnitus and hyperacusis.

97. **Attorney fees.** The final issue is Claimant's entitlement to 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).

98. In the present case, Claimant asserts entitlement to attorney fees for Defendants' delay in providing medical treatment for Claimant's industrial injuries.

99. Claimant notified her supervisor at Hertz of her industrial accident no later than August 19, 2009; however, from the time of her August 18, 2009 accident until after January 1, 2010, Defendants provided her no information or direction regarding filing a claim or seeking medical care for her injuries. Hertz terminated her employment on January 1, 2010 alleging insufficient notice when Claimant took vacation from work to seek medical care for her industrial injuries. Only after an individual at the Department of Labor alerted Claimant of potential workers' compensation procedures did Claimant seek medical treatment. No First Report of Injury was filed until January 15, 2010—nearly five months after the accident—at which time Surety acknowledged receiving notice of Claimant's industrial accident on August 19, 2009—the day after the accident.

100. Claimant commenced treatment by Dr. Busby on January 7, 2010. Dr. Verst began treating Claimant on January 18, 2010, and ordered a lumbar MRI that very day. On February 23, 2010, Claimant faxed a letter to Surety stating in part:

> This is my second letter / fax to you, following up on numerous unanswered phone calls and voice messages that I have placed to Casey Downer in your Beaverton, Oregon office.
>
> Additional calls have been made to your offices by both the physical therapist, Mark Brown, and the office of my physician, Dr. David Verst, all with the express purpose of getting approval for an MRI procedure.
>
> February 17, 2010, my physical therapist informed me that Liberty Mutual had ordered that my physical therapy sessions be suspended (temporarily) until such time as the MRI procedure was approved. Suspending my treatment has left me in a position where I am not being afforded treatment of any kind for a condition which continues to deteriorate, and for which I am entitled to treatment. It has been five (5) weeks, or January 18, 2010 since my attending physician requested approval for an MRI.
>
> February 22, 2010, I visited with Dr. Verst to see what could be done to help me because my condition has continued to deteriorate. He indicated that without the MRI he was unable to make an accurate diagnosis for treatment.
>
> My employer showed total disregard and lack of concern for me regarding the work-related injury I sustained on August 18, 2009. I informed my supervisor verbally about the injury, and then later confirmed the injury in writing (via e-mail, copy enclosed for your reference) …. My employer, Overland West, Inc., did absolutely nothing to explain or assist me with the process of filing a workmen's comp claim.

Exhibit DD, p. 1.

101. On March 15, 2010—eight weeks after Dr. Verst's order—the lumbar MRI was performed revealing moderate L3-4 disk herniation with right posterolateral extrusion migrating into the right L4 lateral recess. Claimant then underwent additional physical therapy, injections, and acupuncture seeking non-surgical resolution of her back symptoms.

102. On August 11, 2011, Defendants sent Claimant for examination by Dr. Knoebel who diagnosed low back pain and right leg radiculopathy resulting from her industrial accident.

He found Claimant needed more medical treatment and restricted her to sedentary light work. Defendants did not commence payment of temporary disability benefits.

103. Dr. Verst recommended L3-4 hemilaminectomy on January 4, 2012, and apparently requested Surety to authorize surgery on January 9, 2012. Exhibit E, p. 14. No later than May 14, 2012, Dr. Verst again requested Surety authorize surgery. No authorization was provided; instead, Surety sent Claimant for examination by Dr. Hajjar.

104. On May 16, 2012, Dr. Hajjar examined Claimant and recommended L3-4 fusion. However, he related the need for surgery to degenerative issues, not to Claimant's industrial accident. Exhibit I, p. 5. Significantly, when Surety sought a causation opinion from Dr. Hajjar, it appears to have failed to provide him critical information regarding the claim, specifically, the fact that Claimant had reported her industrial accident to a coworker the same day it occurred and to her supervisor the very next day. Dr. Hajjar opined Claimant's lumbar condition was not work related. He reached this conclusion because he was not aware that Claimant reported her industrial accident on August 19, 2009:

> The causation issue in this case is clearly a quandary. Her previous IME noted that her condition is more likely than not related to her work related accident. Deborah's treating physician, Dr. Verst, also stated this fact. Having said this, I have a big problem with the fact that her original injury was reported on August 18, 2009, and the injury was not reported until January of 2010. This is a lapse of almost five months and during that five months Deborah seemed to have worked uneventfully in a moderately physical job which clearly would have required her to do some lifting that is similar to what was done on August 18, 2009. Furthermore, the radiographic findings on Ms. Reimer's scans including her MRI scans, are solely degenerative. There could be an acute component at the L3-4 level including a disk protrusion/herniation but if this was indeed to be the case, one would think that on a more probable than not basis, Deborah would have reported her injury sooner than five months after its occurrence.
> ….
> I have a problem stating that Ms. Reimer had an industrial accident of any significance on August 18, 2009, secondary to the fact that it was not reported until January of 2010.
> ….

> [T]he injury was not reported for several months after it occurred. As I stated earlier, I have an extremely hard time with this in the realm of liability cases because, clearly if a specific incident caused a problem, the problem should be reported in a timely fashion. Unless there is a compelling reason that one can provide me, why Ms. Reimer's [sic] did not report this incident for so long, despite the fact that it caused a sudden and precipitous change in her general health and particularly her spine health, I cannot contribute [sic] her status to any event that happened at any time in 2009, much less on August 18, 2009.

Exhibit I, pp. 4-6 (emphasis supplied).

105. Dr. Hajjar's opinion based upon a mistaken understanding prompted Claimant to retain an attorney. She retained Curtis & Porter, P.A., who on August 29, 2012, wrote Surety requesting Dr. Hajjar be provided with material information regarding Claimant's August 18, 2009 accident, specifically, that she promptly reported her accident to her supervisor.

106. On September 5, 2012, Benjamin Blair, M.D., examined Claimant at her expense and opined she needed lumbar surgery due to her August 2009 industrial accident.

107. Only after pointed requests by Claimant and her then attorney did Surety provide Dr. Hajjar more information regarding Claimant's timely reporting of her August 18, 2009 industrial accident. Upon receiving this information, Dr. Hajjar promptly reversed his causation opinion and on April 24, 2013, advised Surety that Claimant's need for lumbar surgery was work-related. Defendants then authorized surgery and on May 7, 2013, Dr. Hajjar performed Claimant's decompression and L3-4 fusion. Fifteen months transpired between Dr. Verst's first request for surgical authorization and Claimant's lumbar surgery.

108. It is unclear whether Surety initially failed to inform Dr. Hajjar that Claimant reported her August 18, 2009 industrial accident on August 19, 2009. However, it is clear that having received Dr. Hajjar's May 16, 2012 opinion obviously based on a mistaken understanding of a critical fact, Surety delayed providing critical information to Dr. Hajjar for approximately 11

months. Surety's conduct in this instance delayed an accurate evaluation of the causation of Claimant's lumbar condition by Dr. Hajjar by at least 11 months resulting in a substantial delay in the necessary surgical treatment of her condition. Exhibit DD, pp. 24-26.

109. In his May 16, 2012 report, Dr. Hajjar noted:

> Deborah struck me as a very healthy woman with minimal past medical history …. It seems that Deborah's back condition was clearly new. She never had back issues before. From the standpoint of a surgeon and based on Deborah's otherwise good health and pain tolerance, she would be an excellent surgical candidate for this deformity.

Exhibit I, pp. 5-6. While Claimant was an excellent surgical candidate in May 2012, unfortunately, she did not achieve an excellent or even good surgical outcome from a technically satisfactory but delayed surgical decompression and fusion. Dr. Hajjar was not surprised that Claimant had continuing symptoms after her 2013 L3-4 fusion because she had suffered persisting symptoms for a prolonged period due to the delay in surgical treatment. On August 6, 2013, Dr. Hajjar wrote to Surety stating: "I am not surprised that Deborah has some lingering postoperative issues given the fact that her presurgical issues lingered for a few years." Exhibit I, p. 24.

110. Dr. Bates, after reviewing Claimant's medical records, testified that "There is record of a delay here" noting the extended period between Claimant's accident and her surgical treatment. Bates Deposition, p. 7, l. 19.

111. Claimant has proven her entitlement to an award of attorney fees for Defendants' unreasonable delay in providing medical treatment for her industrial accident.

CONCLUSIONS OF LAW

1. Claimant has proven her entitlement to reasonable medical treatment for her tinnitus and hyperacusis.

2. Claimant has proven her entitlement to temporary disability benefits from August 11, 2011 until March 22, 2017. Defendants are entitled to credit for payment of temporary disability benefits from May 5, 2013 until October 15, 2013.

3. Claimant has proven she suffers permanent impairment of 16% of the whole person due to her industrial accident.

4. Claimant suffers permanent disability of 90%, inclusive of her 16% permanent impairment, and has proven in the aftermath of her 2009 industrial accident that she is an odd-lot worker, totally and permanently disabled under the Lethrud test.

5. Claimant has proven her entitlement to an award of attorney fees.

RECOMMENDATION

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

DATED this ___21st_ day of August, 2018.

INDUSTRIAL COMMISSION

_/s/_____
Alan Reed Taylor, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __27th_ day of _August___, 2018, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

JAMES C ARNOLD
PO BOX 1645
IDAHO FALLS ID 83403

JUDITH ATKINSON
PO BOX 6358
BOISE ID 83707-6358

_/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DEBORAH REIMER, Claimant, v. OVERLAND WEST, INC., Employer, and WAUSAU UNDERWRITERS INSURANCE COMPANY, Surety, Defendants.	**IC 2010-002268** **ORDER** **FILED** **27 AUGUST 2018**

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

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

1. Claimant has proven her entitlement to reasonable medical treatment for her tinnitus and hyperacusis.
2. Claimant has proven her entitlement to temporary disability benefits from August 11, 2011 until March 22, 2017. Defendants are entitled to credit for payment of temporary disability benefits from May 5, 2013 until October 15, 2013.
3. Claimant has proven she suffers permanent impairment of 16% of the whole person due to her industrial accident.
4. Claimant suffers permanent disability of 90%, inclusive of her 16% permanent impairment, and has proven in the aftermath of her 2009 industrial accident that she is an odd-lot worker, totally and permanently disabled under the Lethrud test.

5. Claimant has proven her entitlement to an award of attorney fees. Claimant has proven her entitlement to an award of attorney fees pursuant to Idaho Code § 72-804. Unless the parties can agree on an amount for reasonable attorney's fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees and costs in the matter. See *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 900 (1984). Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendant may file a memorandum in response to Claimant's memorandum. If Defendant objects to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after Defendant's response, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees and costs.
6. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this __27th__ day of _August_____, 2018.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

_/s/_____
Aaron White, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __27th_ day of _August____, 2018, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

JAMES C ARNOLD
PO BOX 1645
IDAHO FALLS ID 83403

JUDITH ATKINSON
PO BOX 6358
BOISE ID 83707-6358

sc _/s/_____