BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LUZ AGUERO, Claimant, v. CTI FOODS HOLDING CO., LLC, Employer, and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2011-003578** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** FILED DEC 09 2022 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Douglas A. Donohue who conducted a hearing in Boise on March 11, 2021. Bryan Storer represented Claimant. W. Scott Wigle represented Employer and Surety. Paul Augustine represented ISIF. The parties presented oral and documentary evidence. The record was held open to accommodate Claimant's objection to certain proposed exhibits about which parties were uncertain whether they had been timely produced. Motions were made about augmenting the record and regarding closing the record. Post-hearing depositions were taken. Claimant submitted an opening brief on February 8, 2022. Defendants responded with briefs on February 24 and 25. Claimant filed an amended opening brief and a reply brief on March 9.

Firstly, Claimant did not seek or obtain permission to file an Amended Opening Brief. Secondly, the Amended Opening Brief was filed after Defendants had filed their responses. Thus, they would have no opportunity to respond to changes, if any. Thirdly, the Referee noted that

Claimant's Opening Brief and Amended Opening Brief are not materially different, even to the extent of retaining typographical and margin errors in both. Moreover, the Referee noted that Claimant's briefs failed to meet the standards required by JRP 11A. Specifically, Claimant in the guise of summarizing documents, single-spaced much of her Brief. The rule allows for single-spacing only longer quotes, not summaries of documents. Moreover, these "summaries" include substantial argument and "explanation" by Claimant beyond any direct summarization of the underlying documents. Violative portions of the briefs include parts of pages 3 through 6, the entirety of pages 7 through 10, part of page 11, and parts of pages 27 and 28. Claimant's briefs comprise a full 30 pages each, the maximum allowed by JRP 11. Had Claimant properly spaced her arguments about the medical records, her brief would have been significantly overlength. After noting these violations, the Referee issued Claimant's Attorney a written warning as a sanction.

For today, the Referee's written warning should suffice as a sanction. Claimant's attorney should be aware that he individually risks more tangible sanction should such conduct arise in the future.

The case came under advisement on March 14, 2022. This matter is now ready for decision.

ISSUES

The issues to be decided according to the Notice of Hearing are:

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

    a) Temporary disability,
    b) Permanent partial impairment,
    c) Permanent disability in excess of impairment, including total permanent disability,
    d) Medical care, and
    e) Attorney fees;

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

3. Whether apportionment is appropriate under Idaho Code § 72-406;

4. Whether ISIF is liable under Idaho Code § 72-332; and

5. Apportionment to establish ISIF's share of liability under *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984).

CONTENTIONS OF THE PARTIES

Claimant contends she is totally and permanently disabled both 100% and as an odd-lot worker. She was injured in accidents on January 31 and April 23, 2011. Her shoulders required surgery. Her work was limited after the first accident. On her first day back from right shoulder surgery, with her arm in a sling, she fell and was again injured bilaterally. She has not worked at all since the end of 2011. She should be entitled to a permanent medication regimen even though she cannot ever work again. Temporary benefits were unreasonably denied. They were stopped arbitrarily. They should be paid from June 20, 2012 through whatever MMI date the Commission finds appropriate. She should be deemed totally and permanently disabled thereafter. Attorney fees should be awarded for the unreasonable curtailment of her benefits.

Claimant further contends it is unlikely that ISIF is liable. Despite pre-existing conditions, she was able to work without any problems for a long time before the January 2011 accident.

Employer and Surety contend that they have paid benefits to Claimant whose symptoms are inconsistent with objective medical facts. She sought a pain management physician beginning in November 2012 after she reached MMI and after benefits had ceased. Dr. Marsh opined then that her chronic pain likely would never abate. Nevertheless, he prescribed opioids. Opioid therapy has not helped her. It is neither reasonable nor necessary. Claimant is not totally and permanently disabled unless one believes her pain management physician who is prescribing the opioids.

Further, Claimant has a longstanding history of alleging subpar recovery from injury due to her attitude and failure to cooperate in her own best interests. Objective medical evidence cannot account for her lingering complaints. Based upon Dr. Cox's opinions, Claimant's permanent disability should be 32%, inclusive. She has not met criteria for consideration of odd-lot status. While not dispositive here, the Social Security ALJ decision from August 2013 may be helpful. The ALJ found Claimant's allegations of symptoms "not credible." Finally, while there is insufficient basis to conclude that Claimant is totally and permanently disabled, if that conclusion arises, then Claimant's prior shoulder condition "checks the boxes" for ISIF liability as well.

ISIF contends that Claimant is not totally and permanently disabled. Claimant, who filed a Complaint against ISIF, conceded in her post-hearing brief that ISIF liability was unlikely. Claimant has failed to establish the elements of subjective hindrance and combining, has not established any pre-existing condition has been aggravated, and has not established by the but-for test that her pre-existing conditions contributed to total and permanent disability.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant,

2. Joint Exhibits ("JE") 1 through 31 (the disputed exhibits, seven pages to JE 25 designated as A-G are not admitted as being untimely produced. Also, page 164 of JE 4 is for a patient other than Claimant.), and

3. Post-hearing depositions of physicians Daniel Marsh M.D. and Rodde Cox M.D.

All objections raised in post-hearing depositions are OVERRULED. Claimant's motion to strike Dr. Cox's deposition testimony has previously been denied.

The Referee prepared a proposed decision for the Commissioners' review. The

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

FINDINGS OF FACT

Introduction and Accidents

1. On January 31, 2011 ("first accident") and April 23, 2011 ("second accident") Claimant injured her shoulders. After the first accident she underwent surgical repair of her right shoulder. On her first day back at work, she had the second accident.

2. Her first accident involved a fall on stairs. She was able to hold onto both rails and so avoided hitting her head. JE 9 p. 242. Both shoulders and wrists hurt afterward. *Id.* The first accident was witnessed. Tr. 32:21-34:21. She reported it right away. *Id.* She finished her shift that day. *Id.*

3. The second accident involved slipping on a wet or oily floor. Tr. 36:17-38:3. She landed on her left wrist. *Id.* She described pain in her right shoulder as immediately increasing from the jarring event. *Id.* The second accident was witnessed by her supervisor. *Id.* Claimant went to the hospital. *Id.*; JE 11 p. 485.

Medical Care

4. In addition to "Aguero," older medical records also identify Claimant as "Baez" and "Zamora." Birthdate and Social Security numbers confirm all names refer to her.

Medical Care: First Accident – Second Accident

5. She first sought medical care for the first accident on February 3, 2011. Dr. Chicoine treated her. X-ray of the right shoulder showed arthritis with some bone spurs but was otherwise negative. He diagnosed bilateral shoulder strain. Also on that first visit she reported

that she had been taking her husband's hydrocodone. JE 9 pp. 242-245.

6. Claimant returned to Dr. Chicoine on February 8. He X-rayed her left shoulder. It was negative. He recommended physical therapy. JE 9 p. 246.

7. By February 21 the physical therapist reported to Dr. Chicoine that Claimant was showing "very little progress." JE 9 p. 248. By March 14 the physical therapist also reported her range of motion had returned to baseline as had her shoulder strength. JE 10 p. 260. She still showed pain behaviors. *Id.* Despite no objective findings on examination, upon Claimant's reports of continued pain and tenderness, Dr. Chicoine referred Claimant to an orthopedist. JE 9 pp. 249-253.

8. On March 15 Claimant visited Roman Schwartsman, M.D. By history he noted that Claimant reported her symptoms "never completely resolved following the 2004 rotator cuff repair" done by Dr. George Nichola, M.D. JE 11 p. 470.[1] She reported her pain was different after the January 31, 2011 accident. She reported weakness and loss of motion in both shoulders, worse on right. Upon examination Dr. Schwartsman noted a positive impingement sign on the left, less so on the right. He noted full range of motion. He ordered an MRI. JE 11 pp. 470-471.

9. On March 28 a right shoulder MRI showed a rotator cuff tear at the supraspinatus extending into the infraspinatus. A left shoulder MRI showed a mild tear at the infraspinatus and some subacromial impingement. JE 11 pp. 473-474.

10. On March 29 Dr. Schwartsman recommended right shoulder surgery. He recommended deferral of left shoulder surgery until the right had recovered and become stable.

[1] The record reflects that Claimant had surgery on her right shoulder in May 2006 and January 2007, both performed by Dr. Nichola. The May 2006 surgery involved procedures of "Arthroscopy of right shoulder, decompression, bursal resection, and mini open AC." JE 5 p. 185. The January 2007 surgery involved procedures of "Arthroscopy, decompression of the right shoulder, and debridement." JE 5 p. 207.

He opined the pathology in both shoulders was consistent with Claimant's description of the first accident. JE 11 p. 475.

11. On April 11 Roman Schwartsman, M.D. performed surgery on Claimant's right shoulder. He found a partial-thickness tear which had progressed to a full thickness tear at the insertion of the supraspinatus. Another osteophyte on her acromion was removed. JE 11 pp. 478-480.

12. From April 22 to December 16 Surety assigned a nurse case manager. JE 12.

Medical Care: Second Accident Through 2011

13. Claimant returned to work on April 23. Her right arm was in a sling. She slipped on a wet floor, fell, and hurt her left wrist. Tr. 36:14-38:3. In subsequent visits, Dr. Schwartsman would diagnose a left wrist sprain. She visited the emergency department. X-rays were done of both shoulders. The right showed the surgical changes. It was otherwise normal. The left showed mild osteoarthritis. The studies were interpreted as showing no acute injury. JE 11 p. 485.

14. During recovery Claimant reported her left shoulder pain was increasing. Dr. Schwartsman attributed it to increased use while her right shoulder surgery healed. JE 11 pp. 487-499.

15. Claimant returned to physical therapy. On May 18 her right shoulder was "a little swollen." She was given home exercises in addition to physical therapy appointments. With consecutive appointments Claimant's range of motion decreased and her claims of pain increased. On May 25 she reported that two hydrocodone provided insufficient relief to allow restful sleep. By June 20 she was taking three hydrocodone every four to six hours. JE 10 pp. 296-328.

16. On May 19 nurse case manager McAllister reported that Dr. Schwartsman allowed

a return to work with no right shoulder activity over five pounds. JE 12 pp. 538-539.

17. In deposition in 2017 Claimant recalled that when she returned to work after surgery she asked human resources for help to open doors for her and help her put on her smock. She testified that she told Employer, "How can I work like this? I can't work like this." Claimant 2017 Depo. 51:21-22.[2]

18. She last worked for Employer on June 21. In deposition Claimant recalled that a line worker under her supervision had called in sick. Claimant had to take the absent worker's place on the line. Claimant could not do the job because she was on light duty. Her boss told her not to come to work until both shoulders were better. Claimant 2014 Depo. 46:5-52:2.[3]

19. Also on June 21 Dr. Schwartsman took her off work for two weeks. On subsequent visits he extended her off-work status to successive dates through the end of 2011. She has not worked nor applied for any other job since. Dr. Schwartsman's note of that date reported that she was required at work to use her right arm "in a forceful manner" on June 11. This activity had "set her back quite a ways" and left her with increased right shoulder pain. Dr. Schwartsman prescribed a refill of Norco. JE 11 pp. 491-522.

20. On examination on August 4 Dr. Schwartsman found no objective basis for Claimant's reports of right elbow and wrist pain. He opined it unconnected to any shoulder pathology. He expressed concern that her shoulder surgery may have failed. JE 11 pp. 498-500.

21. On August 8 another right shoulder MRI showed swelling and tendinopathy. Additionally, a small contrast fluid leak suggested the surgical site had been compromised. JE 11

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[2] Claimant's June 29, 2017 Deposition is contained in the record as JE 31.

[3] Claimant's October 30, 2014 Deposition is contained in the record as JE 30.

pp. 501-502.

22. At an August 19 visit Dr. Schwartsman became concerned that Claimant's left shoulder tear may have progressed. An August 22 left shoulder MRI showed extensive progression of the earlier seen tears as well as mild AC joint degeneration. JE 11 pp. 503-507.

23. Dr. Schwartzman performed another surgery on her right shoulder on August 26. He repaired the anterior anchor of a prior surgery because the sutures had pulled through the cuff. He noted and removed some adhesive scar tissue. JE 11 pp. 510-512.

24. On September 29 Claimant visited her long-time family practice physician Samantha Portenier, M.D. Dr. Portenier treated Claimant for hypothyroidism, depression, and high cholesterol. On subsequent visits additional non-industrial complaints were addressed. JE 14.

25. On October 4 Dr. Schwartsman found inflammation in the right shoulder and suggested that she was prone to an inflammatory response. JE 11 pp. 517-518.

26. By October 31 Claimant reported to her physical therapist that she was taking two hydrocodone per day. JE 10 pp. 370-372. On December 29 her physical therapist reported that "her right shoulder was as good as it is going to get." JE 10 p. 388.

27. On November 1 Dr. Schwartsman instructed Claimant that she needed to work on range of motion despite it causing immediate, temporary pain. He told her it was necessary to ameliorate long-term problems and pain. JE 11 pp. 519-520.

28. By December 1 Dr. Schwartsman believed Claimant's right shoulder had recovered sufficiently to schedule the left shoulder surgery. JE 11 pp. 521-522.

Medical Care: 2012

29. Dr. Schwartzman performed surgery on Claimant's left shoulder on January 4,

2012. He repaired a "functional full-thickness tear" of her supraspinatus, a biceps tendon tear, and removed acromial osteophytes and decompressed the area. JE 11 pp. 523-524.

30. About January 3 Kevin Krafft, M.D. confirmed carpal tunnel syndrome. JE 15. He noted Claimant related it to her work accidents, but he did not opine about causation. *Id.* In other medical records Dr. Schwartsman opined Claimant's carpal tunnel syndrome was non-industrial. JE 11 p. 527.

31. On February 9 Dr. Schwartsman expressed disappointment. He found Claimant noncompliant with in-home exercises and her effort in physical therapy. He deemed her overprotective of her shoulders and told her she would lose range of motion if she failed to attempt to assist in her own recovery. He found her "preoccupied with muscular discomfort" and explained that this discomfort was not harmful and was necessary to full recovery. He told her to stop using her sling. He prescribed Flexeril for the muscle discomfort. He released her to return to work effective February 9. Claimant did not return to or seek any work. JE 11 pp. 525-526.

32. Post-surgical physical therapy continued. On March 7, 2012 (the record erroneously says "2011") the physical therapist noted that Claimant reported she fell to the ground and hurt her shoulder. She hurt it again when her husband picked her up. These events were connected to her father having passed away. The physical therapist suggested she may have "hurt" her shoulder then but did not "damage" it. JE 10 pp. 421-423.

33. On May 3 Dr. Schwartsman expressed dismay about her "disproportionate" complaints of pain, her "non-anatomic," variable, and "consistently inconsistent" complaints. Bilateral shoulder X-rays showed no new problem associated with her post-surgical condition. Upon examination he noted poor effort in range of motion and grip strength. He referred her to

physiatrist Rodde Cox, M.D. for evaluation for a work-hardening program and for a PPI rating. JE 11 p. 527.

34. On May 18 Claimant visited Dr. Portenier who recommended she discontinue Norco. Dr. Portenier characterized Claimant's taking two Norco four times daily as "oversedation." JE 14 pp. 589-590.

35. On May 21 Claimant began evaluation for STARS work-hardening program. JE 16 p. 629. On May 30 STARS physical therapist reported Claimant demonstrated "low effort," "poor performance and tolerance," and "heightened illness conviction" which made her less likely to succeed in the program. JE 16 pp. 646-652. Dr. Calhoun performed psychological testing regarding potential admission to the program, and concluded that she was not likely to be successful in a structured work hardening program. JE 18 .

36. On June 21 Claimant reported to Dr. Portenier that she had completely stopped taking Norco. Also on that date chest and C-spine X-rays were normal. JE 14 pp. 593-597.

37. On June 28 Rodde Cox, M.D. evaluated Claimant. He noted marked pain behaviors and deemed her range of motion and grip strength not valid, with diffuse give-way weakness in all upper extremity muscle groups. He deemed her at MMI. Dr. Cox rated PPI at 4% whole person in each shoulder, an 8% total combined value. JE 19 pp. 678-679. On August 2, 2012, having reviewed Dr. Schwartsman's concurrence with Dr. Nicola's prior PPI rating of 6% with a 50/50 apportionment, Dr. Cox opined Claimant's net whole person PPI related to the 2011 accidents to be 2%. Dr. Cox noted that based upon objective physical findings Claimant's only restriction was that she avoid repetitive work above shoulder level. JE 19 p. 680.

38. By mid-2013 Claimant felt nearly unable to perform even basic tasks of everyday

living. Her husband and son helped her with everything. JE 23 pp. 700-701. Eventually and as of the date of hearing a caregiver helps her with daily activities. Tr. 59:21-60:17. She testified that her medication eases her pain but does not really increase her function. Tr. 85:10-17.

39. On July 18, 2012 Ryan Hulbert, Ph.D. performed a mental status examination. JE 20. He concluded, "Her prognosis for successful full-time employment, from a mental health standpoint, is seen as poor to fair." JE 20 p. 685.

40. On August 14 Dr. Portenier addressed Claimant's bilateral shoulder pain. She prescribed Percocet and ordered an MRI. JE 14 pp. 598-599.

41. On August 24 a right shoulder MRI showed minimal edema which was interpreted as possible bursitis. Dr. Portenier found that MRI findings suggested a low-grade partial interstitial tear and tendinopathy. JE 14 pp. 604-607.

42. On September 10 Dr. Portenier discussed steroid injections as potentially therapeutic as well as diagnostic. She referred Claimant to Dr. John Smith to pursue possible steroid injections. JE 14 p. 606.

43. On October 19 Alex Homachevarria, M.D., provided a second opinion at Dr. Portenier's request. He opined that no surgical options were available. He recommended consultation with a chronic pain physician, continuation of her home exercises, and consultation with a hand surgeon. JE 21 p. 688.

Social Security Disability Application and Decision

44. Claimant applied for Social Security Disability benefits on April 16, 2012 alleging disability effective March 21, 2011. The application was denied on August 2, 2012 and denied upon reconsideration on October 17, 2012. After additional procedure, including a hearing at

which Claimant testified, her application was again denied on August 30, 2013. JE 26.

45. The ALJ found Claimant's symptoms "not credible to the extent they are inconsistent with" objective medical evidence admitted at that hearing. JE 26 p. 904. The ALJ did not find the claimant's allegations to be "fully credible." *Id.* The ALJ concluded Claimant was "not disabled" under the Social Security Act. JE 26 p. 907.

46. Claimant continued to pursue benefits and was ultimately awarded benefits by an appeals council effective May 27, 2015. JE 26 pp. 909-928. Summary reference is made to additional physicians' examinations and opinions, most notably Dr. Gibson, but actual medical records from these physicians is not of record here.

Medical Records: 2013-Hearing

47. Dr. Portenier's next relevant note after 2012 occurred on February 5, 2015. That note mentions Dr. Marsh's involvement. Dr. Portenier considered possible linkage of Claimant's complaints of vertigo and dizziness to medications prescribed by Dr. Marsh. JE 14 pp. 610-614.

48. On October 7, 2015 Claimant was examined by Jeffrey Hessing, M.D. Without medical records he found it difficult to evaluate her. He found reduced range of bilateral shoulder motion, crepitus in the subacromial spaces and impingement. He made no diagnosis nor prognosis without medical records. JE 22 pp. 691-692.

Medical Records: Dr. Marsh, November 3, 2012-hearing

49. On the initial visit of November 3, 2012 Daniel Marsh, M.D. was under the impression the workers' compensation claim had been completed. JE 23 p. 693. He stated Claimant was paying through her "regular medical insurance." *Id.* He immediately started her on a fentanyl patch. JE 23 p. 695. He causally related her shoulder pain complaints to the industrial accident and

subsequent shoulder surgeries. JE 23 p. 694. She has visited him regularly, once or twice per month since. JE 23.

50. On March 7, 2013 without the benefit of information regarding Claimant's prior evaluation for work hardening, he recommended she start the program. JE 23 p. 696.

51. On April 23, 2013 Dr. Marsh noted she was taking morphine twice per day and Opana three times per day. Valium was also a long-term component of her medication regimen. JE 23 pp. 698-699.

52. On June 17, 2013 Dr. Marsh estimated extensive restrictions based on Claimant's reports of what she was unable to do. JE 23 pp. 700-701.

53. On May 20, 2015 Dr. Marsh noted, "I do not see that I have prescribed opana." JE 23 p. 741.

54. On June 14, 2019 Dr. Marsh noted Claimant had been on opioids for six years "at substantial dosages, 170MME a day." JE 23 p. 834.

55. On March 20, 2020 Dr. Marsh identified Claimant's permanent work restrictions: No overhead work, no vibrating tools, no pushing or pulling with right upper extremity, rarely push or pull with left, no ladders, rare lifting up to 5 pounds with left hand, sedentary work only without bending or other motions. Only walking was unrestricted. Dr. Marsh faxed these restrictions to Claimant's attorney the same day. JE 23 pp. 859-863.

56. Dr. Marsh was providing continuing opioid treatment for Claimant through the date of hearing.

Physicians' Deposition Opinions

57. In deposition on August 4, 2021 Dr. Marsh testified that Claimant steadily

improved after he began treating her. Marsh Depo. 16:19-21. He also testified at length that she has been "very stable" and that her function has been very consistent over time. *Id.* at 16:21-24, 25:19-26:4. He has observed that she "always is guarding her arm." *Id.* at 25:21-22. Dr. Marsh noted that in June 2013, he assessed that Claimant was unable to perform basic tasks such as cooking, cleaning, and dressing herself. *Id.* at 33:8-20. When asked if Claimant's condition and physical abilities has changed over the course of his treatment, Dr. Marsh responded as follows:

> A. I think she understands her – her limitations better, so she's more stable and she doesn't have ups and downs. She's been extremely stable for many years now. That was soon after I met her and I think that there is no essential change at all in her ability to do more things. She's still got the same restrictions.
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> Q. [BY MR. STORER] Would you say that it's probably more comfortable pain wise because of the medication?
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> A. I think the medication has had a very positive effect in her life. I think she would not be sleeping nearly as well as she is and would be even less functional. Like I said earlier, she's able to go out and walk. You know, there is a certain amount of motion that happens with walking. She's trying to exercise. She's trying to cope, but she still doesn't do cooking. She still doesn't do anything. She still requires help with dressing and bathing and –
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> Q. So, even though you would consider this a successful outcome it doesn't mean her condition is necessarily good?
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> A. Her condition is – her condition is lousy, but she has not had successful surgeries. But in terms of chronic pain management and palliative care, her condition with medications is vastly better than without. So, she's a success story in that regard.

Marsh Depo. 34:1-25. Although Dr. Marsh stated that Claimant's function has increased in regard to her ability to sleep, he acknowledged that his treatment is palliative, not curative. *Id.* at 39:4-8,48:13-49:2. He opined she suffers a tendinopathy in her right shoulder caused by the work accidents. *Id.* at 19:21-27:25. Claimant has been compliant with Dr. Marsh's medication regimen.

She has not taken medication in excess of his recommendations. *Id.* at 30:6-32:19.

58. Dr. Marsh testified that when he began treating Claimant she was taking Percocet, about 40 milligrams of morphine equivalent (MME) per day. He initially prescribed 135 MME per day. *Id.* at 50:16-53:25. He testified that Medicaid has an allowable limit of 90 MME per day, but that Medicare, which Claimant uses, does not have that same limitation. *Id.* at 61:13-23.

59. Dr. Marsh was cross-examined about whether and to what extent he reviewed medical records as opposed to merely taking Claimant's word for her medical history. Dr. Marsh could not recall specifically what records he reviewed at his initial meeting with Claimant in November 2012, but surmised that the records he reviewed were not included with his dictated report. Marsh Depo. 66:19-69:14. Dr. Marsh did not recall if he had reviewed Claimant's physical therapy records from STARS at the initial consultation, but surmised that her physical therapy had not been successful because he would not have been consulted otherwise.

> Q. [BY MR. AUGUSTINE] So, you made an assumption that physical therapy did not – was – was not working for her based upon what she told you; is that correct?
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> A. She saw me in November of 2013 – '12 and she had her surgery in 2011 and she has been through all manner of treatment, a couple surgeries, she has had and failed conservative care by definition or she would not be in my office. That is as plain as can be. And, therefore, I'm – I'm – I'm brought in as a pain management physician for somebody who has failed. Otherwise, you know, expected to be good treatment and it hasn't worked. So, at that point I'm trying to manage the patient the best way that I can.

Id. at 73:22-74:9.

60. Dr. Cox testified in deposition on November 15, 2021. He affirmed his observations and opinions found in his earlier records. At the time of deposition he did not recall Claimant or specifics not found in those records he dictated. Cox Depo. 42:7-43:5. He testified generally that

pain behaviors are mentioned as being consistent or inconsistent with objective findings upon examination. His mention that active range of motion was greater than passive range of motion shows a functional inconsistency. His mention of give-way weakness means she was not trying to cooperate with his examination and that she likely does not have a neurologic weakness. His mention of invalid grip strength means that she was not giving full effort as he tried to assess her function. Because of her inconsistent effort on examination Dr. Cox used the *Guides*, 6th edition, DRE method of assessing PPI. He found no objective basis for imposing lifting restrictions, other than avoidance of overhead work. Cox Depo. 12:15-27:15.

61. Long after he assessed PPI, Dr. Cox received from Defendants additional medical records relating to the work hardening program assessment. He found these consistent with and supportive of his observations and opinions from his examination of Claimant. Cox Depo. 24:12-27:2.

62. Dr. Cox read Dr. Marsh's deposition testimony. He disagrees with Dr. Marsh's definitional testimony. Dr. Cox explained that the terms "tendinosis," "tendinitis," and "tendinopathy" are often used interchangeably. It has multiple potential causes. It is treatable and can be ameliorated. Cox Depo. 28:1-30:13. Upon cross-examination, Dr. Cox agreed that tendinopathy is a larger umbrella term which included tendinosis and tendinitis. Cox Depo. 51:10-54:10.

63. Dr. Cox opined that opioids are not curative treatment for tendinopathy. Anti-inflammatory medications such as Tylenol are curative treatment for tendinopathy. Where opioids are used therapeutically, 50 MME per day is considered near the high end of reasonable. A 90 MME would be an upper limit for rare cases according to guidelines of various recognized

professional organizations. At the time of Dr. Marsh's deposition he had reduced her prescriptions from 200 MME to 135 MME. Upon his first visit with Claimant, Dr. Marsh increased Claimant's MME from 45 by adding another 60. Cox Depo. 29:16-33:6.

64. Dr. Cox opined that long-term opioid treatment would not be medically necessary and that low doses, something under 50 MME, would be "possibly" reasonable, but that her longstanding dosages prescribed by Dr. Marsh are not. Cox Depo. 33:19-34:8.

65. Dr. Cox would expect some chronic shoulder pain after Claimant's surgeries. Cox Depo. 54:24-55:15, 86:5-24.

Prior Medical Care

66. Claimant filed several workers' compensation claims while working for Employer since 1997. Most did not involve time loss. Only those relating to her shoulders, wrists, or hands are described below.

67. Claimant has longstanding diagnoses of a thyroid problem and depression.

68. In August 2005 Claimant suffered a left shoulder strain while working for Employer. JE 1 p. 8.

69. In October 2005 Claimant suffered a repetitive motion wrist problem while working for Employer. JE 1 p. 11. In March 2006 Dr. Nicola performed bilateral carpal tunnel releases. Claimant returned to work on April 6, 2006. Tr. 30; JE 5 p. 182.

70. Ten days later in October 2005 Claimant suffered a right shoulder injury when she fell on a wet or waxed floor. JE 3 p. 143.

71. On November 16, 2005 an MRI of the right shoulder showed some osteophytes, bursitis, mild biceps tendinitis, and marked tendinosis and a partial tear of the supraspinatus. JE 5

pp. 177-178.

72. In February 2006 Dr. Nicola opined she had significant, longstanding problems. Nevertheless, based on the condition of the supraspinatus shown on MRI, he recommended surgery. In the meantime, he allowed her to return to work and restricted her against overhead lifting. JE 5 p. 180.

73. On May 16, 2006 Dr. Nicola operated on her right shoulder. He debrided a partial tear, performed a bursectomy, and removed an osteophyte. Recovery was slow. Adhesive capsulitis was considered possible, as was a possible undisclosed cuff tear. JE 5 p. 185.

74. In September 2006 Claimant suffered a left-hand injury, apparently a fractured finger, while working for Employer. This delayed assessment of her shoulder for a few months. JE 5 p. 202.

75. Another MRI and an arthrogram were performed in December 2006. They ruled out adhesive capsulitis but did show a small tear of the supraspinatus. JE 5 p. 205.

76. Arthroscopic surgery was performed in January 2007. Dr. Nicola described her shoulder joint as "pristine," no tear, no arthritis. He did report a large spur at the medial end of the acromion. He also removed some scar tissue. Post-surgical physical therapy was ordered. JE 5 p. 207.

77. In April 2007 she was awarded a 3% whole person PPI, with an additional 3% whole person PPI apportioned to a prior shoulder condition. Dr. Nicola noted bilateral carpal tunnel syndrome which had healed. He noted her pinky fracture had healed. He awarded no PPI for those conditions. JE 5 p. 215.

78. In August 2007 Dr. Schwartsman examined Claimant forensically and agreed with

Dr. Nicola's PPI rating. He noted Claimant gave "poor effort," but with coaxing did better. He saw no objective basis upon which to impose restrictions. JE 8 pp. 240-241.

79. In July 2007 Dr. Nicola examined Claimant's shoulder and found no objective problem despite her complaints. He stated, "I think she may be slightly sensitive with regard to her pain." He recommended no more treatment and suggested an IME be performed. JE 5 p. 216.

Vocational Factors

80. Claimant was born December 26, 1965 in Mexico. Claimant has lived in the United States since age 5. She is a permanent resident of the U.S. Tr. 25:7-19.

81. At the time of injury she worked for Employer as a production line supervisor. She worked alongside the crew whenever someone called in sick. When doing so, she lifted 30-40 pound boxes occasionally. Tr. 39:18-42:1.

82. She began working in the fields with migrant workers at age 9. She worked for a seed company as a sorter. She has worked in packing sheds as well. Tr. 26:2-27:2.

83. She attended but did not complete 7th grade. She has no further formal education. Claimant 2014 Depo. 9:10-10:12.

84. Claimant is bilingual. The Referee noted that her accent is noticeable when she speaks English but not an impediment to communication. She is well understandable in English with an adequate vocabulary. She reads better in English than Spanish. Claimant 2017 Depo. 17:12-18.

85. Employer processes meat for fast food restaurants. Claimant started working for Employer on the line. A few years before the first and second accidents she was promoted to quality assurance supervisor. She received a two-day course in inputting data into the computer.

As a supervisor she occasionally lifted boxes which weighed 30-40 pounds, rarely 50 pounds. She supervised multiple lines processing different meats, about 14 workers. Whenever a line worker called in sick Claimant usually filled the line worker's position when a replacement could not be promptly obtained. While working as a supervisor for Employer she was offered a promotion. She declined it because it involved too many hours and too much responsibility. Tr. 27:8-29:2, 39:18-42:1; Claimant 2014 Depo. 14:22-22:1, 46:21-47:25; Claimant 2017 Depo. 14:14-22:13, 41:11-22.

86. ICRD consultant Shaun Byrne assisted Claimant beginning February 29, 2012. He interviewed Claimant and conducted a job site evaluation. In mid-June 2012 Mr. Byrne noted Claimant was not a good candidate for a work-hardening program. On August 28, 2012 Claimant reported she has lost her job on June 14, 2012 and did not believe she could perform any work at all. In mid-December 2012 Mr. Byrne closed the file because Claimant chose not to return to her prior work which was fully compatible with physician-imposed restrictions. JE 2.

87. Asked about her restrictions and limitations in a 2017 deposition Claimant used the phrase, "If I'm sitting too much." Claimant 2017 Depo. 62:16-20. When the questioner followed up she responded to a question about her ability to sit, "I'm not limited. I just limit myself." Claimant 2017 Depo. 63:2-4.

88. In deposition in 2017 Claimant testified that she has never tried to stop taking opioids. She cannot say whether she might function better with or without them. Claimant said she saw no reason to reduce her opioid use because she testified, "I'm doing fine the way I am right now, with those." Claimant 2017 Depo. 70:4-71:23.

89. Claimant obtained Social Security Disability benefits in 2015 and has been

receiving these since. JE 26 pp. 909-928.

90. Doug Crum reviewed records and interviewed Claimant. His report is dated May 16, 2019. (The report consistently repeats a typographical error "Mr." where "Ms." would be correct.) Mr. Crum noted that Claimant reported that as of the date of the interview she was no longer using narcotic analgesics. This representation is inconsistent with Dr. Marsh's records. Mr. Crum also noted that Claimant did not become a supervisor until after her industrial injury. In fact, she was a supervisor before the first accident in 2011. Otherwise, his summary of records and report of Ms. Aguero's interview appears consistent with the record. JE 29.

91. Mr. Crum noted inconsistency and ambiguity of Dr. Marsh's statements about Claimant's functionality. Nevertheless, he opined that if Dr. Marsh's restrictions were accepted Claimant is totally and permanently disabled. JE 29 p. 944.

92. Mr. Crum opined that if Dr. Cox's restrictions were accepted Claimant's loss of labor market access is no more than 10%. Her reduction of wage-earning capacity, assuming she did not return to her time-of-injury job would range from 30-54%. Dr. Cox's restrictions would not prevent Claimant from returning to her time-of-injury job. Using traditional averaging and the higher wage loss component, Claimant's overall permanent partial disability, inclusive of PPI would be 32% whole person. JE 29 p. 944.

DISCUSSION AND FURTHER FINDINGS OF FACT

93. 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).

94. 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). A claimant must prove all essential facts by a preponderance of the evidence. *Evans v. Hara's, Inc.*, 123 Idaho 472, 89 P.2d 934 (1993).

95. 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).

96. The Referee noted that Claimant's demeanor was subdued for most of her examination. On cross-examination her demeanor varied depending upon the subject of questioning, but the Referee noted no indicators of untruthfulness.

97. Claimant testified that she had never been written up, suspended, or fired. According to Mr. Byrne's notes, that testimony is inconsistent with what she told him in August 2012.

98. Social Security Disability criteria differs from Idaho Workers' Compensation Law. Qualifying conditions differ. The definition of disability differs. Thus a detailed analysis of the August 30 decision is not relevant here. However, the ALJ's assessment of a claimant's credibility is a factor before any tribunal in which sworn testimony is offered. While not dispositive, the ALJ's finding Claimant not fully credible is a factor to be considered.

99. Overall, the Referee found the Claimant to be credible in her testimony. That is, she appears to believe what she says. However, the Referee noted that she is only a fair historian and is somewhat overdramatic in describing her pain and loss of function. Claimant presents as a

sympathetic figure. Despite physician instructions, she poorly understands her own role in her recovery. Moreover, she is clearly not the drug-seeking malingerer occasionally encountered in cases before the Commission involving long-term use of opioids. She has taken medication as prescribed, not more. She was apparently able to discontinue opioids at her physician's recommendation between June 21, 2012 and August 14, 2012 when Dr. Porteneir prescribed Percocet. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

Causation

100. A claimant must prove that he was injured as the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001). Aggravation, exacerbation, or acceleration of a preexisting condition caused by a compensable accident is compensable in Idaho Worker's Compensation Law. *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994).

101. Here, Claimant showed it likely that she suffered bilateral shoulder injuries as a result of the subject accidents. Claimant failed to show it likely her carpal tunnel claims are related to either

accident. She did suffer a temporary wrist strain or sprain from the second accident which resolved completely in a matter of weeks.

102. Physicians' records suggest that Claimant has a tendency to develop osteophytes on her acromion as part of a preexisting degenerative condition. No physician suggests that these are caused by any work accidents.

103. The record does not show it likely that her depression or other preexisting conditions were aggravated, exacerbated, or accelerated by either industrial accident.

104. The preponderance of evidence shows that Claimant's condition was made more difficult by her accelerated return to work in an arm sling after the first accident. But for the return to work she would not have incurred the second accident. This was a substantial factor in her need for additional right shoulder surgery and extended recovery time.

105. Given Claimant's documented difficulty, response to, and slow recovery after her prior surgeries, it is not surprising that Claimant experienced the same types of circumstances after the accidents at issue.

Medical Care

106. Medical benefits are payable for causally related care during the course of recovery. Idaho Code §72-432. Post-recovery palliative care is a recognized benefit where reasonable and may be awarded. *Rish v Home Depot*, 161 Idaho 702, 390 P.3d 428 (2017). A reasonable time includes the period of recovery, but may or may not extend to merely palliative care thereafter, depending upon the totality of facts and circumstances. *Harris v. Independent School District No. 1*, 154 Idaho 917, 303 P.3d 605 (2013); *Rish v Home Depot*, 161 Idaho 702, 390 P.3d 428 (2017). One factor among others to be considered in determining whether post-recovery palliative care is

reasonable is whether such care is helpful, that is, whether a claimant's function improves with the palliative treatment. *Id.*; *see also*, *Sprague v. Caldwell Transp., Inc.*, 116 Idaho 720, 591 P.2d 143 (1979)(limited and overruled on other grounds by *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015)). However, even palliative care that merely provides pain management, or is even ineffective, may be compensable if found to be reasonable. *Rish*, 161 Idaho at 706, 390 P.3d at 432.

107. Claimant sought care from Dr. Marsh outside the chain of referral after she had been deemed at MMI by treating physicians within the chain of referral and after Defendants had suspended benefits. Dr. Marsh's charges have been paid through insurance other than workers' compensation. However, once an employer wrongfully fails to provide medical treatment, an injured employee may seek medical treatment causally related to the industrial accident at the employer's expense. *Reese v. V-1 Oil Co.*, 141 Idaho 630, 115 P.3d 721 (2005). Furthermore, once the employer has wrongfully ceased providing medical care, a claimant is not required to seek permission from an employer or from the Commission to change physicians. *Id.* Here, Defendants suspended Claimant's benefits in June 2012 after Dr. Cox declared that Claimant was at MMI. Claimant's Opening Brief p. 22; Def. Responsive Brief p. 27; JE 27 p. 929. Claimant's shoulder pain persisted. On August 14, 2012, Claimant reported to Dr. Portenier that she was unable to move her shoulders without "significant pain" and that her shoulder pain gave her "severe discomfort" that interfered with her ability to sleep. JE 14 p. 598. Dr. Portenier ordered an MRI and subsequently assessed that Claimant had right shoulder tendinopathy with low-grade partial interstitial tear and recommended that Claimant see an orthopedic surgeon again for a possible series of steroid injections to bring the pain under control. JE 14 p. 606. On October 19, 2012,

Claimant met with Dr. Homaechevarria, who opined that there were no surgical options available to Claimant. JE 21 p. 688. Dr. Homaechevarria recommended that Claimant consult with a chronic pain physician. *Id.* On November 13, 2012, Claimant sought treatment for her shoulder pain from Dr. Marsh, a physician who specializes in chronic pain management. Marsh Depo. 5:11-22. Although Dr. Homachevarria did not refer Claimant to Dr. Marsh by name, he did recommend that Claimant consult a chronic pain physician for her shoulder pain. Dr. Marsh related his treatment of Claimant's shoulder pain to her workplace accident. For reasons further explained *infra*, the Commission finds that Dr. Marsh's treatment was reasonable and required under Idaho Code § 72-432. We therefore find that Employer wrongfully denied further care in reliance on Dr. Cox's examination. Therefore, Defendants are liable for Dr. Marsh's treatment, even though Claimant sought care from Dr. Marsh outside the chain of referral, and without permission from Employer.

108. Claimant first met with Dr. Marsh on November 13, 2012. JE 23 pp. 693-695. Dr. Marsh noted that the pain in her shoulders was chronic and was "probably not going to improve that much" and that, going forward, the "only solution is going to be either intrathecal therapy or chronic opioid therapy..." JE 23 p. 694. Dr. Marsh started Claimant on opioid therapy that continues to this day. Over the years, Dr. Marsh noted improvement in Claimant's pain complaints due to her medication. JE 23, pp. 750, 758, 794, 807, 877-878. At his deposition, Dr. Marsh credited the opioid therapy for improvements in Claimant's function (by sleeping better) and improving her depression. Marsh Depo. 48:13-49:7. Dr. Marsh's treatment has helped manage Claimant's chronic shoulder pain. For their part, Defendants contend that Dr. Marsh's treatment has been unreasonable based on Dr. Cox's opinion that the opioid dosage (135 MME) is unreasonably high. In Justice Jones' concurrence in *Rish*, he noted that it was proper for the

Commission to "consider whether a claimant was suffering from opioid addiction at the time opioids were prescribed in determining whether said prescription was reasonable." *Rish*, 161 Idaho at 707, 390 P.3d at 433 (Jones, J., concurring). There is nothing in the record to suggest that Claimant is abusing Dr. Marsh's opioid prescriptions or is suffering from an opioid addiction. Even Dr. Cox agreed that Claimant has not misused her medication. Cox Depo. 38:7-13. Under the parameters established in *Rish*, Dr. Marsh's treatment, although merely palliative to manage Claimant's pain, is reasonable, related to the industrial accident, and is therefore compensable, even though the improvement of Claimant's function is, at best, minimal. We do not find sufficient evidence in the record to support the Referee's conclusion that Claimant has been "affirmatively harmed" by Dr. Marsh's treatment.

109. Claimant has proved that she is entitled to medical care benefits for Dr. Marsh's treatment.

TTD/TPD Benefits

110. Claimant argues that she is entitled, at a minimum, to TTD benefits from June 29, 2012 (the date Defendant stopped paying benefits; see JE 27) to May 16, 2019 (the date of Mr. Crum's disability evaluation). It is unclear where Dr. Marsh determined Claimant was at MMI. His earliest medical record to expressly document that Claimant was MMI was September 17, 2015. JE 23 p. 745. Dr. Marsh was asked about this note at his deposition:

> Q. On September 17th of 2015 – this is page 745. You had noted that she was at MMI and is it your opinion that that was the first time she was MMI? I know it's been a long time and it's hard to remember. Or is that just a general time period when she was at MMI?
>
> A. That's just reflecting again the fact that she's – she's got a chronic condition and she's not improving. She's not worsening at that point and she is coping, managing, and the palliative care strategy is working and I don't think she

will be going back to work.

Marsh Depo. 38:4-14. Furthermore, as stated above, on Claimant's very first visit with Dr. Marsh on November 13, 2012, he noted that Claimant's shoulder pain was chronic and "probably not going to improve that much." Given Dr. Marsh's explanation that his designation of MMI on September 17, 2015 was a general observation noting Claimant's chronic condition that would not improve, the Commission concludes that Claimant was at MMI by the date of Dr. Cox's examination of June 28, 2012. Therefore, Claimant has not shown that she is entitled to any further TTD/TPD benefits.

Permanent Impairment

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

112. Upon Claimant reaching medical stability, Dr. Cox rated PPI at 8%, 2% referable to the subject accidents. Dr. Cox's opinion and basis of apportionment is reasonable. As developed *infra*, Claimant is totally and permanently disabled. Therefore, Defendants are entitled to apply PPI benefits paid to date to their obligation to pay benefits for total and permanent disability under Idaho Code § 72-408. *Dickinson v. Adams County*, IC 2013-028122 (Idaho Ind. Comm. March 21, 2017); *see also Oliveros v. Rule Steel Tanks, Inc.*, 165 Idaho 53, 438 P.3d 291 (2019).

Permanent Disability

113. "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 as provided by Idaho Code § 72-430.

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

115. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423 and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See*, *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986). Where preexisting impairments produce disability, all impairments and disability should be accounted for with a subtraction back for the compensable portions. *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008). An employer takes an employee as he finds him. *Wynn v J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983).

116. Claimant established that she suffered permanent disability in addition to the 2%

PPI. Mr. Crum's analysis concluded that, if the Commission employed Dr. Cox's restrictions (which was only to "avoid repetitive work above shoulder level" JE 19 p. 679), Claimant's disability arising from the first and second accidents is 32% whole person. Based on Claimant's significant pain complaints for which she is currently being treated for by Dr. Marsh and which the Commission finds compensable, it seems inappropriate to employ Dr. Cox's sole restriction (avoid repetitive work above shoulder level) imposed nearly a decade ago to assess Claimant's disability. Mr. Crum concluded that under Dr. Marsh's restrictions, Claimant would be 100% totally and permanently disabled. However, Mr. Crum's opinion of Claimant's disability under Dr. Marsh's restrictions merits further discussion. It appears that Mr. Crum based his opinion on Dr. Marsh's 2013 notes that Claimant was unable to dress herself, and unable to cook and clean around the house and that she had "essentially permanent" work restrictions and would not be able to engage "in any type of meaningful employment." JE 23 pp. 700-701. Mr. Crum's report concluded that "[b]ased on the recommendations of Dr. Marsh, Mr. [sic] Aguero would seem to be totally and permanently disabled. While Dr. Marsh does not provide any specific limitations, he does note that Mr. [sic] Aguero is not even functional around the house with activities such as cleaning and cooking." JE 29 p. 944. Mr. Crum prepared his report on May 16, 2019. Approximately ten months later, on March 20, 2020, Dr. Marsh provided more specific permanent work restrictions:

> The following are permanent work restrictions for Luz. She should engage in no overhead work with the right or the left upper extremity she should not use any vibrating tools with either extremity. There should be no pushing or pulling at all with the right and only rarely with the left. She should not be climbing ladders or required use of her arms for stabilization. There should be rare lifting only and that should be 5 pounds or less with the left hand. She should engage in sedentary work only withut [sic] bending lifting or twisting. Ambulating is unrestricted..[sic]

JE 23 p. 861. Mr. Crum was not deposed as a part of this proceeding. The record does not contain

an addendum report, nor a report by any other vocational rehabilitation expert, in which an opinion is offered on Claimant's disability using these specific work restrictions given by Dr. Marsh in 2020. However, at his deposition Dr. Marsh connected his 2020 restrictions to the notes he made in 2013 regarding Claimant's inability to work, asserted that his work restrictions have been the same throughout his treatment of Claimant, and opined that Claimant was unemployable. Marsh Depo. 35:1-37:4. Indeed, Dr. Marsh stated at his deposition that Claimant is, at present, still unable to cook and "do anything" and that she still "requires help with dressing and bathing," similarly to what he concluded in his 2013 note. Marsh Depo. 34:15-17. Although Mr. Crum did not have an opportunity to opine Claimant's disability under these more specific restrictions issued by Dr. Marsh, it is apparent that these 2020 restrictions are so strict as to equate to Dr. Marsh's earlier assessment that Claimant is in need of assistance to perform basic functions, such as cooking cleaning, and dressing herself, etc. Therefore, the Commission will adopt Mr. Crum's opinion that Claimant is totally and permanently disabled under the restrictions adopted by Dr. Marsh. We find that Claimant is 100% disabled.

117. Having found that Claimant is totally and permanently disabled, there is no basis for apportionment under Idaho Code § 72-406.

Odd-lot analysis

118. Even though we conclude that Claimant is totally and permanently disabled under the 100% method, we find that Claimant would qualify as totally and permanently disabled via the odd-lot method as well. If a claimant is able to perform only services so limited in quality, quantity, or dependability that no reasonably stable market for those services exists, she is to be considered totally and permanently disabled. *Id.* Such is the definition of an odd-lot worker. *Reifsteck v.*

Lantern Motel & Cafe, 101 Idaho 699, 700, 619 P.2d 1152, 1153 (1980); *also see*, *Fowble v. Snowline Express*, 146 Idaho 70, 190 P.3d 889 (2008). Odd-lot presumption arises upon showing that a claimant has attempted other types of employment without success, by showing that she or vocational counselors or employment agencies on her behalf have searched for other work and other work is not available, or by showing that any efforts to find suitable work would be futile. *Boley, supra.*; *Dehlbom v. ISIF*, 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997).

119. Upon establishing the presumption, the burden shifts to a defendant to show suitable work is regularly and continuously available. *Rodriguez v Consolidated Farms, LLC.*, 161 Idaho 735, 390 P.3d 856 (2017).

120. Claimant has shown that she is odd-lot based on the third prong (by showing that any efforts to find suitable work would be futile). Claimant has not sought nor applied for employment since she was let go by Employer in 2012, nor did she cooperate with ICRD to help her find work. However, with the significant limitations and restrictions imposed by Dr. Marsh and Claimant's need for a caregiver, she has shown that there are no positions that she would be able to perform under such strict restrictions, and that a search for suitable work to accommodate those restrictions would be futile. Defendants have failed to show that there is suitable work regularly and continuously available to Claimant under Dr. Marsh's restrictions.

Attorney Fees

121. Attorney fees are not granted as a matter of right, but may be recovered only under the circumstances set forth in Idaho Code § 72-804, which provides as follows:

> If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused

> within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

Claimant argues that Defendants unreasonably cut off benefits even before Dr. Cox's IME of June 28, 2012. Claimant's Opening Brief p. 22. However, the record reflects that Defendants paid Claimant TTD benefits up to June 29, 2012 and permanent partial indemnity benefits from June 2012 to August 2012. JE 27 p. 929. The evidence does not support an award of attorney fees pursuant to Idaho Code § 72-804. The standard for receiving fees is that the employer must have discontinued payment of compensation "without reasonable grounds." Although the Commission concludes that Claimant is entitled to medical benefits for Dr. Marsh's treatment, conflicting medical evidence in the record illustrates that Defendants had a reasonable factual basis to discontinue benefits. Under these circumstances, Defendants' behavior was not unreasonable. Claimant is not entitled to attorney fees.

ISIF ISSUES

122. Idaho Code § 72-332(1) provides the criteria upon which ISIF liability is predicated. The statute requires:

> If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account [fund].

(brackets in original). A four-factor test has long been employed in this analysis. The test includes, (1) a preexisting physical impairment which was (2) manifest and (3) subjectively hindered Claimant's employment and (4) combined with the compensable industrial impairment to render a claimant totally and permanently disabled. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990). A "but for" test is required to establish the "combined with" element. *Bybee v. ISIF*, 129 Idaho 76, 921 P.2d 1200 (1996). This is the first prong of a disjunctive test for ISIF liability. *Aguilar v. ISIF*, 164 Idaho 893, 436 P.3d 1242, (2019).

123. A progressive, preexisting physical impairment shall be considered in evaluating ISIF liability and *Carey* apportionment. *Colpaert v. Larson's, Inc.*, 115 Idaho 825, 771 P.2d 46 (1989). The second *Aguilar* test adds "or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability …" (*See Aguilar, supra.*)

124. Having found that Claimant is totally and permanently disabled, the record does not support that ISIF is liable. Although Claimant had a manifest pre-existing physical impairment, the evidence does not support that her pre-existing impairment subjectively hindered Claimant's employment. Although Claimant reported to Dr. Schwartsman that her symptoms "never completely resolved" after the shoulder surgeries performed by Dr. Nicola, the record establishes that Claimant was not given any restrictions as a result of the prior surgeries performed by Dr. Nicola. Furthermore, it is clear that Claimant was able to work for Employer without accommodation for several years prior to the 2011 industrial accidents. Tr. 30:2-32:20; Claimant 2014 Depo. 30:7-11; Claimant 2017 Depo. 41:23-42:10. Having concluded that Claimant's pre-existing condition was not a subjective hinderance to her employment, it is unnecessary to analyze whether the fourth element of ISIF liability; whether the pre-existing condition "combined with"

or "aggravated" or "accelerated" to render claimant totally and permanently disabled, is satisfied. Based on the foregoing reasons, the Commission concludes that ISIF is not liable.

CONCLUSIONS OF LAW AND ORDER

1. Claimant reached medical stability on June 28, 2012.

2. Claimant has accident related PPI of 2%.

3. Claimant is totally and permanently disabled, through either the 100% method or odd-lot doctrine, and is entitled to the payment of total and permanent disability benefits from the date of medical stability at the statutory rate, with credit for PPI paid to date

4. Claimant has met her burden to show she is entitled to medical care provided by Dr. Marsh;

5. Claimant failed to show she is entitled to additional temporary disability benefits or to attorney fees; and

6. ISIF is not liable.

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

DATED this 8th day of December, 2022

INDUSTRIAL COMMISSION

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

Aaron White, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of December, 2022, a true and correct copy of the foregoing **FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER** was served by regular United States Mail and Electronic Mail upon each of the following:

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