BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DENISE PESKIN, Claimant, v. SUN VALLEY COMPANY, Self-Insured Employer, Defendant.	**IC 2018-009776** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

FILED
APRIL 18, 2024
IDAHO 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 June 30, 2023. Jason Thompson represented Claimant. Chad Walker represented self-insured Employer. The parties presented oral and documentary evidence, took post-hearing depositions, and submitted briefs. This case came under advisement on August 31, 2023. This matter is now ready for decision.

ISSUES

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

1. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;

2. 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; and

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

At hearing, Claimant's attorney expressly disclaimed and withdrew any abdominal

complaints as a basis for any worker's compensation benefits. Nevertheless, Claimant's testimony indicates that she still mistakenly believes that this condition was caused by the accident.

CONTENTIONS OF THE PARTIES

Claimant contends she was injured in a ski collision while employed as a ski instructor on April 4, 2018. At her first medical visit she reported a headache, shoulder, and hip pain. She was treated for a concussion and rotator cuff injury. She had other symptoms but mentioned only some. In succeeding days additional symptoms manifested. She underwent shoulder surgery. Physicians—more qualified than those upon which Defendant relies—have opined in favor of causation linking all symptoms to the industrial accident to a reasonable degree of medical probability. She incurred over $300,000 in medical bills which should be paid at the *Neel* rate. Her MMI date should be November 2022, not December 2018. She is entitled to additional TTDs by adoption of this later MMI date. Surety failed to pay an average of PPI ratings. Mary Barros-Bailey opined that she is an odd-lot worker. The *futile* prong of the test is required for Claimant to qualify, and she does. She is totally and permanently disabled. She was awarded Social Security Disability retroactively effective as of the date of the accident. Defendant unreasonably denied and delayed her benefits, so she is entitled to attorney fees.

Claimant contends that Defendant's summary of symptoms spreadsheet violates JRP rules for post-hearing briefing. The spreadsheet lacks pertinent information and is inaccurate. Defendant's brief is both factually inaccurate and largely speculative rather than arguing factually from actual evidence of record.

Defendant contends Claimant is preserving her complaints of symptoms for purposes of secondary gain. The accident was minor. She landed on the snow on her backside. Claimant was

wearing a helmet. She completed the ski lesson she was teaching. She did not first seek medical attention for three days. Defendant accepted her initial claims of injury but denied her attempts to belatedly add alleged injuries. Defendant relied upon treating physician Dr. Hammond's and IME expert Dr. Friedman's opinions. At least one physician has stated that her results on concussion and mental testing are "not real." Both vocational experts opined that if Dr. Friedman's opinions are accepted Claimant has no permanent partial disability.

Defendant contends Claimant is unable to show objective evidence or consistent subjective evidence to support a causal relationship between her claimed conditions—except for a minor right shoulder injury—and the accident. Whenever a treating physician would express skepticism Claimant would simply seek out a different physician in Idaho or Colorado or Texas or Maryland.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant;
2. Joint Exhibits 1 through 66 excluding exhibit 57; and
3. Post-hearing depositions of treating neurologist Richard Hammond, M.D., treating optometrist Scott Lewis, O.D., treating anesthesiologist/pain management specialist Christopher Chun, M.D., forensic physiatrist Robert Friedman, M.D., and of vocational experts Mary Barros-Bailey, Ph.D. and Lee Barton.

Objections raised in depositions are OVERRULED.

Defendant provided a comprehensive summary of medical records in evidence showing her claimed symptoms on specific dates. This chart was appended to its brief. It has not been offered as evidence or admitted to the record. The brief, without the chart, is at maximum allowed length. The chart exceeds the page length requirement for the brief. The chart is illustrative but

ultimately carries no weight as it is the overlength part of Defendant's brief.

The Referee submits the following findings of fact and conclusions of law and recommends that the Commission approve and adopt the same.

FINDINGS OF FACT

Introduction and Accident

1. On April 4, 2018, Claimant was working as a ski instructor teaching a pre-teen. It was near the end of the ski season with few people on the mountain. A skier collided with Claimant, striking her from behind and on her right side, knocking her down. Claimant's skis and helmet stayed on. That skier continued skiing past her.

2. Although disputed by Claimant on some occasions, Claimant told some medical providers on some occasions that she finished the lesson. She and her pupil skied to the ski patrol shack. Claimant testified that twice she attempted to report the injury at the ski shack and expressly asked a ski patrol member to "fill out paperwork" to document the accident. Then she and her pupil skied to the bottom. Claimant went straight home.

3. On April 7, 2018, Claimant returned to Employer and completed an incident report. Employer's agent told her to go to the emergency room. She did.

Medical Care: Post-Accident 2018

4. On April 7 Claimant visited St. Luke's Wood River ER. Terrence O'Conner, M.D., examined her. She reported the ski accident, that she was wearing a helmet, and that she did not lose consciousness. She said she was able to finish the lesson with her student. She complained of headache, right shoulder, and right hip pain. She described her head as "buzzing or vibrating" (quote marks are Dr. O'Conner's) and right sided head discomfort which "felt like rushing fluid"

and reported "some short-term memory problems such as forgetting where she put her keys." She expressly denied neck pain and denied coordination difficulty. Examination revealed that her cranial nerves were intact, no pre-impact amnesia, no eye problems, no C-spine tenderness with full motion, no abdominal issue, no spine or joint tenderness including absence of tenderness at the right shoulder but with some pain on shoulder motion. Claimant's mental status was normal with no confusion. Her Glascow coma scale score was 15. Dr. O'Conner diagnosed a right shoulder strain and rotator cuff injury. He did not rule out a possible concussion but did not find sufficient indicators to order a CT scan. X-rays showed chronic degeneration and an old, distal, right collarbone injury but no acute fracture. He prescribed ibuprofen 800 mg. He provided written information about what symptoms to expect from a concussion. (Later medical records show Claimant belatedly began to endorse each of these symptoms at varying occasions.) A phone follow-up the next day did not indicate any problems. He referred her to orthopedist Tony Buoncristiani, M.D., for follow-up of her shoulder injury and "concussion without loss of consciousness."

5. On April 10 Claimant returned to the ER. Brent Russell, M.D., treated her. She complained of nausea, abdominal pain, and headache. She added symptoms of vomiting, intermittent blurry vision, and neck pain when describing her history since the accident. A head CT scan showed no acute trauma. An abdominal CT scan showed "no acute intra-abdominal abnormality." A C-spine X-ray showed no acute malalignment but did show degenerative disc disease and facet arthropathy.

6. On April 11 Claimant visited Royal McClure, M.D. By history, he noted she "may have had a brief loss of consciousness." He noted that she "takes many, many supplements which

may be contributing to her nausea." He advised that "no further workup or treatment is indicated for concussion."

7. On April 13 Claimant visited John Hatzenbuehler M.D., at St. Luke's Family Medicine. This is her first complaint of dizziness, light sensitivity, double vision, fatigue, sleep disturbances, and "feeling in a fog." He noted that she wore sunglasses in his office. On examination he found bilateral nystagmus, C-spine tenderness and reduced range of motion, and "positive BESS testing with multiple errors." He noted the Impact test was "considerably abnormal" and unlikely the result of significant functional deficits.

8. Also, on April 13 Claimant began physical therapy for vestibular complaints. She endorsed extreme visual, mental, and vestibular complaints. The April 17 note includes the following: "Per psychic, [sic] atlas is 'out'. Do you do Cranial Sacral work?" She attended physical therapy visits on 19 separate dates through June 8. On some of these dates more than one physical therapist entered notes focusing upon differing complaints. On May 10 she claimed reaching with her right upper extremity caused pain and nausea. She also claimed that shaking in her head and hands occurred intermittently. On May 17 she complained in a phone conversation that "every muscle in my body gets weak." She reported, "I feel like my head is bigger on one side." On May 18 she complained that she "cannot hold a coffee cup with her right [hand] due to pain and weakness." On May 21 she reported excess skin under her right armpit and an inability to reach her head with her right arm unless she bent over. On June 7 a therapist noted she "exhibits atypical balance reactions" but can lay down and rise "without apparent reaction." In summary, a therapist described her dizziness and balance issues as "not resolved." The therapist noted "all symptoms persist and [are] variable from session to session."

9. On April 20 Claimant first visited Dr. Buoncristiani. References in the record to "Dr. Tony" refer to him. Dr. Buoncristiani was aware that she had injured her shoulder in a 2011 car accident and that Claimant had "insist[ed]" that her shoulder was "back to normal" before the ski accident. Claimant reported that her shoulder symptoms had "worsened" and thus instigated this visit. Dr. Buoncristiani's review of symptoms noted that Claimant denied gastrointestinal symptoms, including abdominal pain or vomiting, and denied neurological symptoms in her extremities. Upon examination he noted mild pain with all right shoulder motions, essentially normal strength but with pain upon resistance, atrophy in the infraspinatus and supraspinatus fossa, positive Hawkin's, Neer's, Speed's, and Yorgason's tests and signs. He noted that range of C-spine motion was decreased but pain free. He also noted diffuse right paraspinous tenderness, negative Spurling's test, and decreased motor and sensory responses in a C8 distribution. He reviewed the shoulder X-rays and noted "chronic posttraumatic and resulting superimposed chronic degenerative changes of the distal right clavicle and acromioclavicular joint. No new or acute fracture identified." He differentially diagnosed a rotator cuff contusion with impingement versus tendinitis versus bursitis. He thought a full thickness tear unlikely. He recommended conservative treatment including injections, physical therapy, and progressive active mobility exercises. He performed an injection at that time and prescribed physical therapy.

10. On April 30 Claimant returned to St. Luke's Wood River ER. This visit is the first in which she reported that she was struck by a "ski racer at a fast speed." This is also the first time she claimed she was struck "in her lower back" by that skier. She said her symptoms were getting worse. Dr. Russell noted that she complained of right shoulder pain, bilateral back pain having been constantly present since the accident, and three episodes of vomiting that morning. Claimant

was demanding an MRI.

11. On May 3 a right shoulder MRI showed a partial tear of the supraspinatus tendon, tendinopathy, and bursitis. It showed the old clavicle injury and degeneration in the rotator cuff generally.

12. Also on May 3 Claimant visited Dr. Hatzenbuehler. Her complaints included "feeling very shaky," "feeling absent," and left low back pain. She endorsed confusion, being easily distracted, and difficulty sleeping as examples of altered mental status. Upon examination, nystagmus was notably absent.

13. Also on May 3 Claimant returned to dentist Jon Calvert, D.D.S., whom she had seen before the accident. She reported that she believed her jaw had "shifted." At the November 2017 visits she had complained of lower left jaw pain which Dr. Calvert recommended treatment for an abscess. It is unclear whether or what treatment she received as a January 2018 note indicates she was checking on insurance. At this May 3 visit Dr. Calvert examined Claimant's mouth and noted that "everything looked okay." He performed an occlusal bite adjustment and recommended a pulpotomy to alleviate her complaints. The pulpotomy was apparently never performed for insurance reasons. Claimant attended no appointment with Dr. Calvert after May 3. On January 22, 2019, Dr. Calvert answered written questions from her attorney. In that letter he diagnosed tempero-mandibular disorder with joint pain and addressed possible future worsening and possible headaches related to TMJ. Dr. Calvert's records in evidence do not contemporaneously mention a possible TMJ disorder.

14. On May 4 Dr. McClure noted that she "had an unnecessary Impact test." This is the first post-accident medical note in which Claimant reported TMJ pain. Dr. McClure noted she did

not have such pain on earlier post-accident visits. He noted, "her concussion symptoms can be negated when she is distracted." His examination revealed "inappropriate talkative female in no acute distress" and "inappropriate affect" as an observation of her psychological presentation. He opined her post-concussion syndrome was likely related to the accident, but that her TMJ was not. Specifically her TMJ was left-sided and the accident impact was on her right.

15. On May 7 Dr. Buoncristiani noted that Claimant appeared for an unscheduled MRI follow-up. She reported the injection had provided no relief. Dr. Buoncristiani noted she reported more and new symptoms involving her shoulder and arm as well as her low back. He reviewed the MRI with her. He also noted, "I also discussed with Denise that she has had several "awkward" encounters with myself, my staff, the physical therapist, and other providers which makes me a little hesitant to urgently proceed with surgery."

16. On May 21 Claimant visited Dr. Hatzenbuehler. She reported general improvements. Physical therapy was helping.

17. On May 24 Dr. Buoncristiani noted new and increasing symptoms. His diagnosis remained unchanged. He now recommended surgery. Claimant moved to Colorado before he could perform surgery. Dr. Buoncristiani did not see or treat her again.

18. On May 27 Claimant returned to Dr. Russell at the ER. She reported a worsening of head symptoms, left rib pain, and unsteadiness on her feet. A head CT showed normal. A chest X-ray was negative for rib injury. He considered the possibility that her worsening symptoms might be accounted for by a subdural hematoma. None was found. He first diagnosed "concussion with loss of consciousness" as if loss of consciousness were factually accurate despite Claimant's denials when she gave notice to Employer as well as in her early ER visits.

19. On May 29 Richard Paris, M.D., noted Claimant reported that her head and visual problems have been increasing. She reported that she "passed out" and went to the ER on May 27. ER medical records do not suggest that she reported that she had passed out on that date.

20. On May 30 physical therapist Kacey Fairfield noted that Claimant "recalls waking up" after the accident. This is the first note in which Claimant reported actual loss of consciousness from the accident.

21. On June 1 Dr. Paris referred her to a neurologist, a Dr. Lindholm.

22. On June 6 Claimant visited Dr. Hatzenbuehler. She claimed worsening symptoms and that her headaches were changing in pattern. She now claimed occasional paresthesias in her hands. Upon examination she had unusually intense and unusually fast positional balance issues which Dr. Hatzenbuehler noted that "some of it appears to be volitional although difficult to fully assess." He noted that the worsening of symptoms was "quite unusual at this stage of concussion." He noted that her neurological exam is "inconsistent" and that "it is difficult to ascertain true pathology from some possible volitional abnormalities" and that "I think her residual symptoms are likely to be more psychiatric in nature." Nevertheless, he allowed her claimed symptoms to provide a basis for temporarily taking her off work.

23. On June 7 Claimant's brain MRI was found to be normal.

24. On June 20 Dr. Hatzenbuehler noted no nystagmus but did note moderate balance issues. Upon Claimant's report that she was moving to Colorado, a referral was provided to neurologist Dr. Lawrence Adams, M.D. In September she telephoned Dr. Hatzenbuehler requesting another referral to a different neurologist. Dr. Hatzenbuehler named a Dr. Feldman in Denver as a referral.

Colorado

25. On June 26 Claimant visited Laurence Adams, M.D. After examination he diagnosed: post concussive syndrome, history of concussion, vestibulopathy of left ear, diplopia, exotropia. He also noted the shoulder problem, but his focus was on her head. He recommended a neuro-optometry consult, noted prominent occipital neuralgia and anxiety overlay.

26. On June 28 Claimant visited optometrist Thomas Wilson, O.D. On September 13 he opined the change in her contact lens prescription to be accident related without explanation.

27. On July 2 Claimant began vestibular therapy in Colorado. The therapist noted "Inconsistencies in movement, balance, and affect are noted during the evaluation." Claimant expressly denied having suffered a "fall" in the past year. The therapist's assessment was:

> At this time, based on several of the vestibular function tests there is no evidence of vestibular hypofunction. Significant symptom magnification is noted as well as inconsistencies in performance of balance skills and head turning tolerance.

(Hrg. Ex.19, p.489).

28. At the four follow-up visits for vestibular therapy in July the therapist gave home exercise instructions, noted "some exaggerated head/eye movement," "aphysiologic" symptoms waxed and waned, and vestibular testing was normal but with "inconsistent balance control." Claimant did not attend this therapy after July. In an August 6 e-mail to the adjustor Claimant stated the facility cancelled her appointments because they were "not qualified to work on my vision damage."

29. On July 3 Claimant visited Dr. Adams' physician's assistant Christen Kutz, PA-C, for a neurological consultation. His examination noted "no abnormal involuntary movements." Despite her subjective claims, he noted no neurocognitive problems during his observation of

Claimant. At a July 12 follow-up visit PA Kutz noted that Claimant reported her ski helmet had "a dent in it" after the accident. This is the first time in the record upon which Claimant asserted this detail. Examination was unrevealing of any neurocognitive problems. On July 17 PA Kutz deemed additional neurological workup to be appropriate before clearing her for elective shoulder surgery. Claimant telephoned the office, faxed handwritten notes, and sent e-mails to PA Kutz and to an adjustor to protest. She adamantly demanded that her surgery was "NOT ELECTIVE" (emphasis hers). In the fax she characterized her shoulder pain as "unliveable." She cancelled her next appointment with PA Kutz scheduled for July 19.

30. On July 9 Claimant visited orthopedist Theodore Schlegel, M.D., to request shoulder surgery. An X-ray showed the old surgery and that the clavicle condition was likely very old. An MRI showed a "near full-thickness tear" with tendinopathy. On July 13 Dr. Schlegel, after referring to a Dr. Ho for his reading of the MRI, noted that Dr. Ho saw "moderate degeneration of the rotator cuff with some interstitial disease" which he, Dr. Ho, opined "no significant partial-thickness tear" of the rotator cuff but that bursitis was seen. Dr. Schlegel was reluctant to support Claimant's desire for surgery.

31. On July 16 optometrist Joshua Watt, O.D., recorded that Claimant "has no visual concerns" which contraindicated shoulder surgery. He also performed vision testing under the title "Impact Vision Therapy." This testing relied largely upon the accuracy of a patient's subjective reports and voluntary eye movements. He opined that she failed essentially all tests, was unable to work, and all this was 100% caused by the accident. On July 24 he recommended a 24-session series of treatment. On November 5 he reported that she had made less-than-expected progress.

32. On July 20 Claimant began physical therapy prescribed by PA Kutz. At the second visit Claimant directed her therapy away from exercise in favor of manual intervention and hot tub soaks. During the 10 visits and after she obtained her soak therapy elsewhere, she requested that the therapist provide it. The therapist recommended she seek a referral from her physicians for such therapy.

33. On July 25 Dr. Schlegel answered an adjuster's written questions. He opined Claimant's right shoulder condition was related to the ski accident. When asked whether the surgery was "recommended" or whether it was "elective" Dr. Schlegel wrote the surgery was recommended.

34. On July 25 an EEG was entirely normal.

35. On August 2 PA Kutz performed an occipital nerve block.

36. On August 23 Dr. Schlegel performed an arthroscopic debridement and decompression of the superior labrum and shoulder, along with a resection of the old clavicle condition. He observed the residual of the old shoulder surgery as well as "notable fraying and degeneration of the superior labrum with associated synovitis." He found scarring which explained the impingement. Post-operatively she reported no pain and that she was happy with the result.

37. On August 24 Claimant began post-surgical rehabilitation through physical therapy at UCHealth. She attended 21 visits through November 7. Claimant's cooperation was equivocal. She claimed forgetfulness and overuse of her shoulder at home as a cause for shoulder soreness. The soreness hampered therapy. She claimed nausea or dizziness at some visits which curtailed therapy. She visited the therapy facility's emergency department for abdominal pain and nausea

in lieu of therapy on October 3. At the October 3 visit Claimant repeatedly expressed dissatisfaction with the treatment she was receiving. A CT scan of her abdomen and pelvis showed no abnormality.

38. On August 29 Claimant began physical therapy ordered by optometrist Dr. Joshua Watt for Claimant's visual and mental complaints. The therapist's headline onset date erroneously notes "MVA." Claimant was not injured on this date in a car accident. The initial history notes Claimant's description of the ski accident. In a seemingly contradictory entry compared to the bulk of the encounter notes, the therapist indicated with a simple "no" that Claimant's mental status/cognitive function did not appear impaired. The therapist found bilateral TMJ pain, worse on the right, and reported her claims of neurocognitive difficulty with photophobia. The therapist reported "obvious poor control and coordination of her eyes" related to this injury. The therapist noted, "The clinical presentation is unstable with unpredictable characteristics." Claimant attended 32 visits through November 7. On September 18 Claimant gave a history of the accident by stating that she was struck directly on the right and back of her head.

39. On September 14 Claimant visited Matthew Dhieux, PA-C, to Alexander Feldman, M.D. upon referral from Dr. Watt. His examination found no objective indicators of head or visual conditions. He opined that 100% of her pain and symptoms were related to the ski accident. On October 30 Dr. Feldman referred Claimant to Dr. Richard Hammond.

40. On September 25 clinical psychologist David Shapiro, Ph.D., visited with Claimant and recommended a full neuropsychological evaluation. The testing was performed on October 12. By history Claimant reported that she was moving slowly and was struck from behind. She reported that she finished the lesson. She reported a constellation of subjective symptoms mostly

affecting her memory and mental focus. Dr. Shapiro reviewed records and administered tests. Dr. Shapiro noted that in more than one pre-examination phone conversation Claimant "adamantly" denied that she was involved in litigation and was not planning any. He connected this with his representations to her that he would not see her if she did engage in legal actions. He opined her test results were "invalid and uninterpretable." He provided detailed test data. Discrepancies between certain tests were deemed statistically significant and inconsistent with her educational accomplishments. Memory and cognitive responses "were compromised by motivational factors." Testing could not reliably assist in diagnosing a traumatic brain injury (TBI). Personality testing suggested "Histrionic personality traits may include a self-dramatizing style and the pursuit of praise in a solicitous and sometimes showy manner."

41. On November 5 despite not having examined Claimant for a number of weeks, Dr. Schlegel issued restrictions through the 2018/2019 ski season of light use, no lifting over 10 pounds, and no repetitive overhead use of her right arm.

Idaho

42. On October 16 James Rose, M.D., scoped her gastrointestinal system. He noted a small hiatal hernia along with minimal inflammation, edema, and erythema. Biopsies were benign. Later when answering written questions from the adjustor, Dr. Rose opined the causation of these symptoms as "probability versus possibility cannot be established." Still later he noted the temporal proximity as an indicator that causation "may be probable from her accident."

43. On November 15 Claimant began treating with chiropractor Bradley Turner, D.C., in Twin Falls. He diagnosed a displaced atlas and recommended multiple treatments. The record shows only three.

44. On November 12 Claimant visited neurologist Richard Hammond, M.D. On examination he noted Claimant's tremors "resolve with distraction." Detailed examination showed no abnormality in any cranial nerve. He thought it possible her atlas, C1 vertebra, might be out of alignment and recommended a specific chiropractor, Dr. Turner, who had a device designed for treating this vertebra. Referring to possible post-concussive syndrome he noted, "I am hard pressed to say that she had a severe head injury with this accident." He also recommended physical therapy for her symptoms of neck pain.

45. On November 14 Claimant visited optometrist Scott Lewis, O.D. He was unable to examine her because of her claims of overwhelming subjective symptoms.

46. On November 29 Claimant began physical therapy at St. Alphonsus Rehabilitation Services (STARS). The record shows three visits. Despite the therapist's expectation to continue her plan of care, Claimant stopped attending.

47. On December 11 Claimant first visited orthopedic surgeon David Christensen, M.D. He examined her and recommended continuation of physical therapy.

48. On December 14 Claimant visited Brad Starley, M.D., for gastrointestinal pain and issues. Upon examination he noted with emphasis that her abdominal pain increased when conducting a straight leg raising test. He recommended evaluation by a pain management clinic.

49. On December 20 physiatrist Robert Friedman, M.D., reviewed records and examined Claimant for forensic purposes at Surety's request.

Friedman: shoulder

50. Dr. Friedman opined that Clamant aggravated a prior shoulder surgery and required the recent shoulder surgery as a result of the accident. He opined her to be at MMI for that

condition and that she needed no future medical care for it. He rated permanent impairment at 10% of the upper extremity but reduced it by 1% because of her "nonphysiologic" symptoms and apportioned the 9% to 2.25% with the remainder related to prior shoulder injury and surgery. He opined that light-duty lifting no more than 20 pounds repetitively overhead should have been imposed after her 2011 shoulder surgery and the ski accident did not increase it.

Friedman: concussion, etc.

51. He considered it possible that she "may have sustained a mild concussion." However, he opined that the onset, timing, and course of her symptoms were inconsistent with concussion. He opined that her symptoms were unrelated to the accident. He opined all other conditions were unrelated to the ski accident. He opined that she was exaggerating her subjective symptoms to an obvious degree.

52. On December 26 Claimant visited St. Luke's emergency department and reported pain which she associated with her recently diagnosed hiatal hernia. Despite her report R. Scott Holliday II, D.O., noted, "it is unclear if this is related to the [ski] injury at all." He reviewed prior emergency room records and gave little weight to her brain and abdominal complaints. He did address her shoulder injury as related to the ski accident. After examination and multiple tests, he considered a possible ductal dilation of the distal pancreatic duct as a possible cause. He opined that it did not require emergency care.

53. Also, on December 26 associated with the ER visit, a CT scan of Claimant's abdomen and pelvis was normal except for a mild pancreatic duct change.

54. On December 31 an abdominal MRI showed no clinically significant abnormality.

55. On December 31 Claimant applied for Social Security Disability.

Medical Care: 2019

56. On January 8, 2019, Claimant returned to Dr. Christensen. She reported that chiropractic treatment to her atlas had reduced her neck pain. Despite her doubts about continuing physical therapy Dr. Christensen recommended she continue it.

57. On January 10 Claimant visited gastroenterologist Christopher Hammerle, M.D. Upon examination and review of recent records he noted her presentation was inconsistent with a pancreatic injury.

58. On January 14 Claimant returned to Dr. Hammond. He noted, "She is able to relate all her recent history and contacts with attorneys, doctors, etc., without difficulty." He further noted, "She does not really have any problem today."

59. Having examined Claimant a second time on January 15, Dr. Lewis issued a report on January 29. He noted that Claimant's eyes were not aligning. After overseeing six sessions of therapy, he opined that she "should have a temporary restriction from doing near point work." He expected no lasting difficulties beyond six months with her visual system depending upon resolution of her post-concussive syndrome. He visited her again on February 14 and April 16. At some point he recommended she use prism glasses.

60. On January 29 Dr. Christensen corresponded with Defendant's attorney. Dr. Christensen checked a box to indicate that he concurred with Dr. Friedman's IME report of December 20, 2018.

61. On January 31 Claimant appeared at the emergency room with abdominal complaints. Dr. Hammerle found a CT of her chest to be unremarkable. An ultrasound confirmed her pancreas to be normal.

62. On February 2 another emergency room visit for abdominal pain included a CT angiography. It showed no relevant abnormalities. It did note moderate multilevel spondylitic changes in the spine. Claimant requested acupuncture. The physician recommended no further care.

63. On February 6 Claimant began physical therapy with Wright Physical Therapy. Claimant attended 14 visits through April 21. The therapists focused on shoulder issues but acknowledged Claimant's neurocognitive complaints.

64. On February 20 Claimant visited Christopher Reising, M.D., upon referral for second opinion from Dr. Hammerle. He offered no diagnosis beyond "pain, unspecified." He did not recommend surgery. He found no phrenic nerve injury nor other diaphragmatic injury.

65. On March 8 Claimant returned to Dr. Hatzenbuehler. Claimant reported continuing vision issues, that she was often unable to stand up straight because of abdominal pain, and that nausea continued. She reported that her "concussion symptoms are getting worse." Dr. Hatzenbuehler's note is silent about physical examination. It notes, "There are no diagnoses linked to this encounter" and "No follow-ups on file." The record contains no mention that he ever treated her again.

66. On April 24 Claimant visited Richard Roman, M.D., for possible pancreatic complaints. After examination and testing Dr. Roman diagnosed an unspecified musculoskeletal source.

Colorado

67. In late April Claimant was admitted to Sky Ridge Medical Center for her pancreas concerns. She linked her pain to the ski accident. Discharge diagnosis was a stone in her bile duct

which was surgically observed and removed by Bernard Powers, M.D. The records for this admission do not show that any physician accepted Claimant's causation claim or opined that her condition was related to work.

68. On June 5, 2019, Claimant visited orthopedist Theodore Schlegel, M.D., at UCHealth. She described right shoulder and C-spine and T-spine pain. He examined her and found posterior capsular tightness in the shoulder and later diagnosed it at right shoulder impingement. He ordered an MRI to rule out differential diagnoses in her spine.

69. On June 7 MRIs of C-spine and T-spine were performed. Claimant's C-spine and T-spine showed multilevel degeneration. Dr. Schlegel opined that these symptoms were unrelated to her shoulder surgery.

70. On June 11 Claimant visited Colleen Jenson, DMD, in Colorado for TMJ. Claimant reported that she had suffered a "triple concussion" in the ski accident. Dr. Jenson provided a dental examination and recommended additional treatment. Claimant had a follow-up visit with Steven Enea, D.D.S., in February 2020.

Texas

71. On June 14 Claimant visited Lone Star Neurology which is associated with neurologist Maushmi Sheth, M.D. An EEG showed that she was "normal and awake." Other testing showed poor performance in subjective responses. Dr. Sheth's examination noted that he found her complaints corresponded to cranial nerves 2, 3, 4, and 6. He noted a "functional tremor" which disappeared when she was distracted. He noted "patchy" sensory responses throughout her arms and legs. He noted her responses on a mental cognition examination rated only a 15 out of 30. He noted that after the appointment she was observed "carrying heavy bags without difficulty

at a normal gait." This was contrary to her examination where she reported nausea and dizziness precluded "tandem and gait/Romberg assessment." Among his assessment items he included "other" amnesia, not traumatic amnesia. Claimant attended 18 biofeedback training sessions in June and July. After six weeks of therapy, the records noted marked decreased areas of inflammation. Initially, Claimant's NPSY evaluation could not be completed due to her cognitive state, but comprehensive reports were accomplished on June 14, 2019, July 29, 2019, and September 6, 2019. Claimant's NCV and EMG findings returned to normal.

72. On July 1 Claimant began physical therapy with Peak Physical Therapy in Frisco, Texas. She attended three visits through July 8.

73. On July 8 Claimant visited Christopher Chun, M.D., at Epic Pain and Orthopedics for pain management. Upon examination he noted indicators of C-spine radiculopathy and a T-spine disc herniation. He reviewed the June MRIs. He referred her to neurologist Dr. Sheth.

74. On July 10 Claimant began physical therapy with PT Concepts Plano West. She attended 83 visits through February 5, 2020. Her reported levels and locations of pain varied at times. A therapist noted, "The clinical presentation is evolving with changing characteristics." At least once to therapists she reported inconsistent problems which at other times she denied including: she reported significant difficulties in performing activities of daily living including bathing and dressing herself; she reported near total inability to read and understand but on other visits the therapist denied that her mental status and cognitive function appeared impaired; she reported an "Air BB" worsened her concussive symptoms; on several occasions she expressed inability to participate in active therapies but allowed therapists to perform passive therapies; she reported non-anatomical complaints in her shoulder and other body parts; she reported

photophobia rarely but when she did it was severe; she added hand and knee pain among her complaints. The therapists focused on her right shoulder and chronic pain but also addressed her complaints in other body parts. Therapy included manual manipulation, hot/cold packs, ultrasound, vasopneumatic, cryotherapy, electrical stimulation, acupuncture, mechanical traction, and other modalities.

75. On July 29 Claimant underwent additional testing at Lone Star Neurology. Her subjective responses were grossly below normal while concurrent electrodiagnostic testing, a "neuropsychological screener," was unrevealing of an objective abnormality beyond some anxiety.

76. Also, on July 29 Claimant began chiropractic treatment with Matt Schindlbeck, D.C., a/k/a "Dr. Matt." He performed a "MyoVision sEMG" and found "muscle tension" at multiple levels in her C-spine and T-spine as well as hypotonic muscles at multiple levels of her T-spine and L-spine. Claimant attended 47 visits through February 5, 2020. In addition to complaints made earlier and elsewhere, Claimant complained of pain and dysfunction in both arms and legs. The majority of Dr. Schindlbeck's treatment appears focused on Claimant's upper back and right shoulder.

77. On August 6 Dr. Chun performed a C6-7 epidural steroid injection and trigger point injections.

78. Eight more biofeedback training sessions with Dr. Sheth occurred in August and early September.

79. On August 21 Dr. Chun noted, "The injuries and symptoms are directly related to the aforementioned incident, based on, including, but not limited to, the patient's reported history." He separated her C-spine condition from her other condition which he termed "chronic pain due

to trauma." He ended this note with the following: "In all reasonable medical probability, based on the history, physical exam, and objective findings above, the injuries sustained and resulting symptoms are the direct result of the incident on 04/04/18."

80. On September 3 Dr. Chun performed facet joint injections at C5-6 and C6-7 on the right.

81. On September 6 Claimant reported that her shoulder, T-spine, and abdominal symptoms had worsened. On September 16 Dr. Chun performed another injection, this time at T5-6. At subsequent visits Claimant reported waxing and waning symptoms, variable across differing areas with some worsening and with others improving, and back again. Dr. Chun tried radiofrequency thermocoagulation therapy. His last treatment occurred on December 3.

82. Also, on September 6 Claimant visited Dr. Sheth. Upon a complaint of radiculopathy bilaterally down her arms testing was ordered. On October 8 EMG and nerve conduction velocity (NCV) studies showed moderate chronic C7 radiculopathy on the right and mild bilateral carpal tunnel syndrome.

83. Follow-up visits with Dr. Sheth occurred on September 10 and 13. As of September 13, Dr. Sheth's assessment included "mild cognitive impairment, so stated."

84. On September 18 Claimant began cognitive skills training with Village Physical Therapy & Rehab at Dr. Sheth's recommendation. She attended 12 visits through November 15.

85. On October 22 a right shoulder MRI showed a partial tear of the supraspinatus tendon and evidence of the old car accident and surgery.

86. On November 12 Claimant returned to Peak Physical Therapy—this time in Prosper, Texas—for her TMJ. She attended 14 visits through January 2, 2020. A "re-evaluation"

was conducted on January 7, 2020.

87. On December 19 Claimant visited Dr. Sheth for the last time. He reported that her headaches were better managed and that she was medically stable and would be discharged from his care.

Medical Care: 2020-Hearing

Colorado

88. On February 12, 2020, Dr. Schlegel visited Claimant for the first time since November 2018. She complained of shoulder pain and reduced motion. Based upon a new MRI which showed no substantial change, he recommended conservative treatment.

89. On February 17, 2020, Dr. Enea provided an occlusal bite guard.

90. On March 16, 2020, Claimant returned to Dr. Powers in Colorado for an upper GI endoscopy. Biopsy revealed some inflammation and duodenitis.

Maryland

91. A May 9, 2021, e-mail from Judith Bernardi, Ph.D., declared Claimant an "excellent candidate" for a spinal cord stimulator. Through Pain Management Institute of D.C., a stimulator trial was considered to mitigate persistent sternum and left rib pain. The evaluator erroneously reported, "She is not involved in any unsettled legal issues." In fact her workers compensation Complaint was filed in 2019 and the stimulator itself was a disputed medical benefit. Claimant identified Medicare as payor for the Maryland physicians. Claimant provided selected prior medical records to the Maryland physicians evaluating the appropriateness of a spinal cord stimulator for Claimant. Claimant reported good relief during a stimulator trial. Claimant delayed her decision to implant a permanent device.

Idaho

92. On November 1, 2021, Dr. Lewis visited Claimant for the first time since January 15, 2020. Claimant endorsed the same visual and neurocognitive subjective symptoms as before.

93. On January 26, 2022, Dr. Lewis again examined Claimant's vision. At the next visit on March 30 he noted, "when she is relaxed she sees two of something." Claimant began therapy visits for which only handwritten notes from two therapists are of record. These therapy notes are difficult to decipher. One must rely upon his post-hearing deposition which is discussed below.

94. On June 9, 2022, Dr. Lewis corresponded with Claimant's attorney. He noted that therapy was continuing. He found her unfit to work and expected the condition was permanent. On August 11, 2022, he did check a box to indicate that she was at maximum medical improvement.

95. On June 22, 2022, Dr. Lewis examined Claimant's vision. On August 1, 2022, she reported worsening symptoms including inability to understand the written word. On September 26, 2022, he noted upper extremity "big tremor."

96. On July 5, 2022, Dr. Chun summarized his treatment. He noted Claimant had not reached MMI but had improved under his care. On July 26, 2022, Dr. Chun responded to a check-the-box question from Claimant's attorney which had the effect of opining that his treatment, amounting to $22,931,36, was made necessary as a result of the ski accident.

97. On November 1, 2022, Dr. Lewis again corresponded with Claimant's attorney. He reported that Claimant was no longer in therapy because her progress had "stalled." He rated her impairment at "30" based largely on her claimed inability to read for sustained periods.

Physicians' Opinions

98. On April 8, 2019, Dr. Christensen corresponded with Claimant's former attorney and opined that Claimant's ski accident aggravated a prior right shoulder condition which required surgery, aggravated prior neck arthritis which caused some nausea and headache. He expounded, "She was evaluated by a neurologist and found **not** to have any symptoms consistent with any serious concussion" (emphases his). He endorsed Dr. Schlegel's light-duty upper extremity restrictions through the 2018/2019 ski season with return to "full unrestricted activity" thereafter. He opined the accident caused no permanent impairment nor required future medical care.

99. On March 16, 2023, Dr. Hammond opined Claimant suffered

> . . . a soft tissue neck injury, headache, and transient thinking problems secondary to her Sun Valley accident on 4.4.2018. I do not believe that her continued complaints of difficulty thinking, visual disturbance or tremors are related to this accident.

100. In post-hearing deposition, Dr. Friedman opined that his examination of Claimant revealed some non-physiologic complaints, that is, her subjective complaints were not supported by physical findings which her complaints suggested should be expected. She reported inabilities but when distracted actually did several things which she claimed to be unable to do. These inconsistencies related to her complaints about her abdomen, under her left ribs, vision, vertigo, and concussion. Specifically, Dr. Friedman opined that Claimant's very clear memory of the accident indicates she did not suffer a traumatic brain injury or concussion. He opined that her claims of increasing mental symptoms over time are inconsistent with such injury because "concussions don't get worse." He well explained why Claimant's description of increasing neurocognitive issues is unrelated to the accident specifically and unrelated to trauma generally.

He opined that Dr. Shapiro's testing did not validate a possible link between her complaints and the accident, but, to the contrary, shows Claimant exhibited "a fair amount of cognition" in her voluntary attempt to overreport her claimed inabilities. He opined that her claimed visual problems are inconsistent with a convergence disorder given the absence of evidence of cranial nerve injury and given the absence of dysfunction as he examined her. He opined that pre-existing TMJ showed no evidence of aggravation or exacerbation as a result of the industrial accident. Except for the right shoulder, Dr. Friedman opined she suffered no PPI for any other condition, regardless of whether industrially related or not. He opined that for all conditions including the right shoulder that future medical treatment was not necessary.

101. Dr. Friedman did opine that—even though aspects of her shoulder examination were non-physiologic—the industrial accident caused a right shoulder injury which had become medically stable and for which he rated PPI and recommended no repetitive over-the-shoulder activity greater than 20 pounds. He opined that this restriction should have been identified and imposed as a consequence of the first surgery more than a decade earlier.

102. Dr. Friedman opined that, having reviewed recent records on January 12, 2023, the additional medical care recommended by other physicians did not change any of his earlier opinions including his opinion that she needed no further medical care. He particularly noted that other physicians appear to have relied upon Claimant's denials of pre-accident complaints and that they did not have earlier records available to them. Dr. Friedman did not review neurology records from Lone Star Neurology. He did review Claimant's optometrist records from Impact Vision Therapy, including those from Dr. Watt, and her evaluation from Pine Creek Vision Clinic.

103. Dr. Friedman opined that Dr Lewis' initial visit was reasonable, but that his

continuing to treat without improvement was "not appropriate." He opined that Dr. Chun's treatment was not related to the industrial accident.

104. In post-hearing deposition Dr. Chun testified that he relied upon Claimant's representations about causation, subjective symptoms, the timing of onset of symptoms, and absence of pain or problems before the ski accident to form his opinion that the ski accident caused her conditions. He described the rhizotomy he performed and expected she would need repeat rhizotomies every two years or so for life to combat chronic pain. He erroneously speculated that doctors "always" use the terms "herniation" and "protrusion" to imply a traumatic origin and that the term "bulge" refers to degeneration. He did not qualify his basis for claiming knowledge about how other doctors use terms or what those terms imply. This speculation about the state of mind of other physicians who may use these terms is manifestly inaccurate and contrary to the experience of the Commission.

105. In post-hearing deposition Dr. Lewis noted that Claimant's reports of vision on testing differed between her first and second visits in November 2018 and January 2019 respectively. He described in detail the tests which he conducted. By a September 2022 examination Claimant's vision problems had worsened compared to the initial two visits. Dr. Lewis explained how a concussion does not require direct contact to the head. He opined that Claimant was unlikely to be faking because her results were consistent across various tests. He clarified that he rated her vision impairment at 30% of the whole person rating 15% for 20/40 vision and adding 15% for her other visual problems. He relied upon the *Guides*, 6th edition. He disagreed with Dr. Hammond's opinion that vision problems are unrelated to the ski accident; Claimant's 20/40 vision may not be related, but her other problems likely are. He acknowledged

that his terms "developed or aggravated" allow for his uncertainty whether her convergence insufficiency was present before the accident but became a problem because of the accident.

106. In post-hearing deposition Dr. Hammond explained that her nonphysiologic tremor which ceased with distraction was more likely evidence of a "psychological, either volitional or nonvolitional" condition—that is, no disease was causing it. His examination of her vision showed no neurological problems. He prescribed particular chiropractic therapy focused on the atlas, C1. He did not observe and could not confirm Claimant's complaint of memory loss; to the contrary he found her memory for events and for medical treatment to be "good." Similarly, inconsistencies in her responses in neuropsychological testing invalidated the results. Her testing reports from Lone Star Neurology, if accurate, evidenced moderate dementia; she would not be able to live independently nor drive long distance, but she does both. Other testing from other treaters was inconsistent but showed deficits which, if accurate, would prevent her from functioning as well as she does. For example Claimant's Montreal Cognitive Assessment (MoCA), scored at 10, caused Dr. Hammond to opine "there's no way that that is factual." He opined that Claimant's complaints about reading comprehension do not explain the score. He opined that the inconsistency in the observed frequency and amplitude of her tremors were nonphysiologic. He opined that he found no objective evidence of her neurocognitive, vestibular, and/or vision complaints. He maintained his opinion that these complaints were not caused by the ski accident.

Claimant's Testimony about Functionality

107. At hearing Claimant described her loss of ability to function in activities of daily living. She described headaches, mental function difficulties, vision difficulties, nausea, and dizziness as the causes.

108. At hearing and in scattered medical records Claimant described various methods she employed for palliative relief. These include prism glasses, peppermint oil (inhaled), ginger cubes, lighting changes, meditation, hot-pool soaking, yoga, stretching, and deep breathing exercises. She takes breaks as desired and paces herself in daily activities.

Salient Prior Medical Records

109. In an undated correspondence, Jennika Darling at Colorado Dental Group in Colorado Springs, Colorado reported that Claimant needed "restorative work" "recently completed" and a bite adjustment on July 21, 2011. This is a curious document provided in lieu of medical records. Ms. Darling is not identified by role or profession. Being undated, one cannot speculate about what she means by "recently."

110. On August 8, 2011, Dr. Field noted Claimant's complaints included "low back pain, bilateral neck pain, right headache, right upper back pain, right wrist pain." These symptoms of "severe intensity" followed an automobile accident which had occurred on August 6. She sent Claimant for X-rays.

111. Also on August 8, 2011, cervical, thoracic, and lumbar X-rays were taken. These are unlike usual radiology reports. They are written in the second person, as if to Claimant directly. The report describes spinal arthritis and disc disease. It describes multiple instances of misalignment. Oddly, the report emphasized with an all caps disclaimer: "We cannot and do not warrant or guarantee the accuracy, completeness or relevancy of any information or results provided in this PostureRay® report." The X-rays are a product of "Dr. Anthony Evans, Align For Life Chiropractic Center." The so-called "Dr." Evans does not indicate his actual credential, whether Ph.D., D.C., M.D., or perhaps something else.

112. On August 22, 2011, after 10 visits with Dr. Field, the final diagnosis included, "multilevel disk space and facet joint degeneration is rather severe" with stenosis. Claimant's cervical spine was noted as being worse than her thoracic or lumbar spine.

113. On August 24, 2011, Claimant transferred her care to Matthews Chiropractic. The new patient document names her attorney. Claimant reported severe pain at many areas including her head, neck, right shoulder and arm, entire spine, and right leg. She endorsed questions to signify extreme pain interfering with personal care, work, driving, and sleep. She checked boxes claiming severe impacts on lifting, carrying, and reading, as well as claiming severe headaches and extreme difficulty concentrating, utter inability to work, extreme difficulty driving, sleeping, and performing any recreational activities. She endorsed an inability to walk more than 100 yards, sitting more than 30 minutes, and standing more than 10 minutes.

114. Dr. Jeffrey Matthews, D.C., noted 46 chiropractic visits ending on April 19, 2012. In October, diagnoses included neck sprain, myalgia, TMJ disorders, radial styloid tenosynovitis, ligament strain in the AC joint, and headache. At the last visit, Claimant reported shoulder had improved 60%.

115. On October 5, 2011, an MR arthrogram of Claimant's right shoulder showed a large tear of the posterior superior labrum in an "overlying severely arthritic AC joint". The radiologist was Bao Nguyen, M.D.

116. On October 24, 2011, Claimant transferred her care to Randall Robirds, D.C. She claimed symptoms in her right neck and shoulder, low back, bilateral wrists, and headache. By history, she claimed to have suffered disorientation, dizziness, and headache which began some time after the car accident. Claimant's description of the accident is exceedingly detailed. She

also mentioned "having moderate localized left TMJ symptoms." Complaints of knee symptoms arose in subsequent visits. Claimant attended 13 visits with Dr. Robirds through February 3, 2012. At the last visit Dr. Robirds did not express a time frame within which he expected Claimant to fully recover.

117. On November 11, 2011, Wiley Jinkins, M.D., examined Claimant for right shoulder and bilateral wrist complaints. In this history Claimant was unable to describe how the car accident happened. He diagnosed some traumatic and some chronic conditions in her shoulder. On a January 24, 2012, follow-up visit Claimant's symptoms remained. He performed an injection.

118. On September 17, 2012, Claimant visited David Weinstein, M.D., an orthopedist. Upon examination he approved Claimant's request for shoulder surgery. On September 27 Dr. Weinstein performed an arthroscopic subacromial decompression, rotator cuff repair, and biceps tenodesis. Postoperatively she healed well until mid-December when she felt increasing pain during physical therapy. It persisted for several weeks.

119. On February 13, 2013, an MRI of the right shoulder showed the surgical changes were intact and some mild tendinopathy was present. Compared to the earlier MRI she had some bursitis and advanced osteoarthritis of the AC joint.

120. On September 23, 2013, at her last visit to Dr. Weinstein she complained of low grade shoulder discomfort and right neck pain. Dr. Weinstein felt she had reached a healing plateau.

121. On November 20, 2017, Claimant visited Sun Valley dentist John Calvert, D.D.S. She reported left lower jaw pain.

122. Claimant wore contact lenses to correct her visual acuity before this accident.

Surveillance Report

123. On December 11-13 surveillance of Claimant was conducted at Defendant's request. The report does not unequivocally describe right shoulder use in excess of Dr. Friedman's restrictions of limited lifting over 20 pounds overhead.

124. The surveillance report does not add weight to any finding herein.

Some Salient Inconsistent Statements and Inherently Incredible Testimony

125. Claimant's hyperbole throughout her testimony was overdramatic to the point of absurdity. At hearing, she would frequently be describing a recollection in detail, catch herself, and claim a sudden inability to remember or a loss of mental focus. At hearing, she was able to recall a definitional difference between "concussion" and "traumatic brain injury" but claimed an inability to subtract 20 from 31.

126. She testified that a multitude of symptoms arose immediately. This is not supported by initial medical records. She testified that despite medical care nearly all have become worse rather than better continuously to the date of hearing. This is "impossible" according to Dr. Friedman. She testified that some were less noticeable initially but became more prominent over time. This, if true, would tend potentially to somewhat excuse or explain the conflict of inconsistent medical records. However, it is not probable given her express denials of such symptoms early on and the absence of consistent indicators upon initial examinations.

127. Generally, Claimant's recollection of events surrounding her medical care and her speculation about various physicians' motivations are inconsistent with the medical records. For example, her contemporaneously made e-mails dated July 23 and 24, 2018 accuse Dr. Adams. She uses terms such as "medical mis-conduct," "mistreatment," "unprofessional," "unethical medical

malpractice," "completely unprofessional," "rude," "insulting," "unreliable," "negligent," and "abusive," apparently all because he did not personally take her repeated telephone calls between scheduled visits and his staff did not meet her demands for communication in detail. She claimed her "rights as a patient" were being violated. Claimant reported that a neuropsychological test imposed as a prerequisite to shoulder surgery was a deliberately imposed obstacle. The adjustor explained in a reply e-mail that it was Claimant's continuing neurocognitive symptoms which could be adversely affected by anesthesia and not the proposed test which had caused physicians to hesitate or delay surgery. The adjustor's reading of the medical records and her view of the physicians' bases for action or inaction are more reasonable than Claimant's opinions. Claimant's e-mail on August 2, 2018, attacked the adjustor when Claimant thought the physicians and the adjustor were telling incompatible stories. Her excoriation of the adjustors continued throughout her e-mails. She threatened "serious repercussions."

128. Claimant has reported or testified on many occasions that the skier who hit her was travelling at 30, 40, 50, 60, 65, 70, or 85 miles per hour. She has also admitted in testimony that she did not see that skier before he struck her and therefore could not reasonably speculate his speed at impact. Nevertheless, in an e-mail she characterized the accident as "being assaulted by a racing skier." She has repeatedly claimed the skier was racing against a clock and looking down at his timepiece when he struck her. Again, she admitted in testimony that she has no observed basis for this speculation on her part. In that same e-mail and elsewhere she claimed that the accident was "life threatening" and that by her conscious actions she saved her student from "serious injury and/or death." Her testimonial admissions undercut the weight to be afforded these claims.

129. Claimant testified at hearing that she lost consciousness in the accident. She denied it in her first two medical visits after the accident. On April 11, 2018, Claimant visited Royal McClure, M.D. By history, he noted she "may have had a brief loss of consciousness." Claimant has affirmed and denied on multiple occasions to varying physicians whether and to what extent she lost consciousness.

130. Dr. McClure also noted that she "takes many, many supplements which may be contributing to her nausea." At hearing, Claimant denied knowledge of why Dr. McClure might say this and testified that she takes one multivitamin daily.

131. Claimant testified that she had no prior "jaw injury or anything like that before", but 2011 medical records show otherwise.

132. Claimant accused Dr. McClure of having "physically assaulted" and "injured" her after he opined she showed no signs of concussion when distracted, noted she had no left jaw impact, noted that her jaw claim arose two weeks after the accident, and opined that a jaw injury was not related to the accident. By her own description of this "assault" Dr. McClure conducted a TMJ examination that she found to be too rough.

133. Claimant can quote her medical records to correct the cross-examiner but testified that she cannot "cognitively remember" more than "a word or two" at a time when she reads.

134. She testified to an inability to focus for more than a very short period of time. Regardless of the subject at hand her main theme was, "I can't do anything." She can see and mentally function well enough to drive state-to-state.

135. Claimant testified that she cannot read "at all," that she would "just see a lot of symbols." She blamed double-vision and blurriness.

136. Claimant testified she could not recall whether she graduated high school in 1977, '78, maybe '71 or '72 but recalled that she graduated college in 1977.

Vocational Factors

137. Born May 31, 1955, Claimant was 67 years old at hearing.

138. Claimant is a college graduate.

139. Claimant worked 43 years as a business owner selling physical therapy beds, tables, and chairs at medical trade shows. Claimant's tax records show she did make a reasonable living in 2013 and that her business generally declined in years closer to the ski accident. However, in 2017 Claimant's gross sales, schedule C line 1, amounted to only $12,365; in 2016 $45,698; in 2015 $84,459; in 2014 $68,009; and in 2013 $174,9885.

140. Long ago Claimant sold advertising for a Los Angeles radio station for a few years.

141. She managed musicians in Hawaii for a few years.

142. On March 24, 2019, the Social Security Administration awarded Claimant disability benefits effective October 2018 based upon an injury date of April 4, 2018. Claimant alleged the following conditions as disabling in her application: traumatic brain injury, triple concussion, vision damage, whip lash, jaw injury, shoulder surgery, internal organ issues, stomach tear, pancreas tear, memory issues, concentration, talking issues, balance.

Vocational Experts' Opinions

143. On January 18, 2022, Lee Barton reported his vocational evaluation. He reviewed records and interviewed Claimant. He opined that Claimant's permanent disability was either zero or total and permanent depending upon which physicians' opinions are given weight.

144. On October 21, 2022, Mary Barros-Bailey, Ph.D., reported her vocational

evaluation. She reviewed records and interviewed Claimant. She acknowledged that if one relied upon Dr. Friedman's opinions "there would be no basis for arriving at disability." However, if one accepts Dr. Lewis's and Dr. Chun's opinions, she is not medically stable, not released to return to work now, and it would be speculative to assume her return to work. Under that scenario, Dr. Barros-Bailey would expect it likely that she would be considered an odd-lot worker.

145. In deposition Dr. Barros-Bailey acknowledged that she accepted Claimant's complaints as genuine and did not observe any inconsistent indicators. She opined that Claimant's functional disabilities related to her neuropsychological evaluation would constitute limitations distinct from any imposed restrictions, but both need to be considered in a vocational analysis. Dr. Barros-Bailey reviewed Claimant's tax records and acknowledged that Claimant's business profit was never as large as her Social Security Disability checks.

146. In post-hearing deposition Lee Barton reiterated his opinion that whether she is seen as without any disability or totally and permanently disabled depends upon which physicians' opinions are accepted.

DISCUSSION AND FURTHER FINDINGS OF FACT

147. 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).

148. 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).

149. 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).

150. Claimant's demeanor appeared a little off. She casually described very subjective symptoms of extreme severity but with an absence of emotional impact which appeared grossly inconsistent. For example, she testified, "my arm was falling off" and chuckled. She testified "I felt like I was gonna die or something" and chuckled. She expressed frequent *non-sequitur* remarks and chuckled inappropriately in a way that appeared to be a disingenuous attempt to be likeable.

151. At hearing Claimant exhibited variable brain function and memory. She could state, for each physician, whether medical bills had been paid. She remembered in detail events and conversations which she likely deemed favorable to her case but expressed a failure to recall less helpful ones. She blamed her alleged brain injury as the cause of her alleged traumatic amnesia at some of these points. She attempted to control and redirect cross-examination by asking tangential or rhetorical questions rather than to simply answer directly.

152. Claimant did not make a good first impression and was not, by demeanor, credible.

153. Neither was her testimony substantively credible. Some examples of her lack of substantive credibility are included in these findings and conclusions. Wherever Claimant has represented that any physician has told her something, that representation is given no weight. The

record is replete with instances in which Claimant's representation is irreconcilably inconsistent with a physician's contemporaneously made note of such conversation.

Causation

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

155. Idaho Code § 72-332(1) frames compensable medical care in terms of reasonable care for a reasonable time. The most appropriate approach to adjudicating medical causation and the measure of compensable medical care in this case is to state medical compensability in terms of a determined "reasonable time." This is a unique case. Claimant's veracity was frequently questioned by her medical providers. Treatment occurred in several different states. Many of the injured or diseased body parts and systems in question (brain, vision, and abdominal problems) are relatively complex and differentiating the possible diagnoses is equally complex. Under these

circumstances, Dr. Friedman's December 20, 2018, IME provides a medical opinion and an MMI date which defines the "reasonable time" in which medical diagnosis and treatment reasonably took place. Until this IME, Claimant's injuries and symptoms required cautious sorting out. Ultimately, Claimant's shoulder and hip injuries were the only conditions which the medical evidence supports as compensable. Conditions relating to Claimant's jaw, brain, vision, vestibular system, spine and abdomen are shown to be unrelated to the accident. Compensable medical attention was required, however, to figure this out.

156. Here, the weight of medical opinion clearly supports a finding that Claimant suffered an injury or aggravation of an old injury to her right shoulder. The May 3, 2018, MRI objectively supports a possible new tear and a likely aggravation of tendinitis and bursitis. Other claimed injuries were initially considered to be related by early treating physicians despite early indicators to the contrary.

157. On Claimant's first visit after the accident, on April 7, 2018, with Dr. O'Connor, she complained of unusual mental feelings and difficulties. However, she did not report any physical problems. On examination Dr. O'Conner noted the absence of any objective finding related to her head, eyes, or neck; Claimant neither objectively showed nor claimed pre-impact amnesia which might suggest a concussion or other head injury; she neither reported nor showed spine or joint tenderness, expressly including her cervical spine; she denied any eye problems. Moreover, her responses upon testing of her mental state were "considerably abnormal." Dr. O'Conner's examination did show some shoulder pain when her range of motion in the shoulder was tested.

158. Visits for treatment on April 10, 11, and 13—each by a different physician—show unusual complaints without accompanying objective findings. Dr. Russell noted that CT scans

showed no acute head trauma and no acute intra-abdominal abnormality and that a cervical spine X-ray showed no acute trauma. Dr. McClure examined her and found "no further workup or treatment is indicated for concussion."

159. The next notable treatments by Drs. McClure and Hatzenbuehler indicate when the providers began to express doubts of Claimant's authenticity. May 4, 2018, is the first note, made by Dr. McClure, recording that she newly claimed TMJ pain, that such pain was on the left when she had been struck on the right in the accident, and that her "concussion symptoms" disappeared with distraction. On May 3, 2018, Dr. Hatzenbuehler found bilateral nystagmus but expressed his concern that her claimed symptoms were not the result of significant functional deficits—basically that her mental testing results were suspicious if not outright unbelievable.

160. Early provider impressions and Claimant's behavior are telling. Successive physicians who treated her in the first month after the ski accident all report that she made unusual claims about varying physical or mental sensations. Also, she was exaggerative in her descriptions. It is significant that on May 3, 2018, Claimant received a general information document which listed potential symptoms of concussion and that she later began at various dates to endorse each symptom.

161. Analyzing the alleged jaw condition, Dr. Calvert, the dentist, saw Claimant for jaw pain in November 2017 and again on May 3, 2018. At the visit after the ski accident, he noted "everything looked okay." He did not indicate any basis by which a TMJ disorder diagnosis might be considered. He did not well explain in January 2019 how or why he considered, at that late date and with no intervening examination, the newly diagnosed TMJ disorder. He did not indicate whether he was familiar with dental work done in 2011. His report is inconsistent with the later

grinding down of her teeth and the removal of two teeth. In any event, medical opinions that her alleged TMJ disorder was related to the ski accident carry little weight. They are far too removed from the date of the accident and too reliant upon what have been established to be Claimant's inconsistent and unreliable descriptions of the accident and subjective symptoms.

162. Claimant's presentation as a patient gave her providers pause. All physicians who treated her in the first six weeks after the accident, including Dr. Buoncristiani, noted unusual difficulties encountered in attempting to treat Claimant's complaints. Dr. Buoncristiani delayed surgery to her shoulder, despite actual objective indicators supporting it, because of these other unusual difficulties.

163. The last objective indicator of Claimant's brain function generated before Claimant moved to Colorado was the June 7, 2018, brain MRI which showed no trauma or other anomalies. A previous head CT scan performed in Idaho on April 10, 2018, had shown no acute trauma. And a previous head CT scan performed in Colorado on May 27, 2018, showed normal.

164. Ultimately, Defendant effectively generated a reasonable end to Claimant's medical treatment. Dr. Friedman's opinions expressed after his December 20, 2018, examination had the benefit of comprehensive information about Claimant's medical care since the date of the ski accident as well as the selective pre-accident medical information available to him. Dr. Friedman's opinions carry greater weight because they do not rely upon subjective symptoms or a version of the ski accident given at a point in time. He well explained why he found the shoulder condition to be related to the ski accident and all other conditions still reported by Claimant to be unrelated. Although Dr. Friedman did not review the Lone Star neurology records, Dr. Hammond did. Dr. Hammond explained the tests ultimately cannot be used to support

Claimant's neuropsychological disability because the scores from test to test are inconsistent, and the findings on her cognitive abilities are impossible given Claimant's ability to drive and live independently. The Lone Star neurology medical provider also noted Claimant's inconsistencies on examination and that her reaction time was "more delayed than expected", which could be from stress or fatigue or a processing disorder. Therefore, despite his failure to review the Lone Star records, Dr. Friedman's opinion carries greater weight than the tentative opinions by the initial treaters who, in their own records, noted reasons to be uncertain because of anomalous findings and inconsistent reporting by Claimant.

165. Additionally, Dr. Lewis opined that some of Claimant's vision problems were related to the ski accident. Dr. Lewis diagnosed Claimant's vision based on a number of objective tests such as measuring eye alignment using diopters and observing eye tracking using a computer sensor. While faking these tests is possible, Dr. Lewis did not think it likely because Claimant's results were consistent from test to test. He did however, remember that at one point a given test had to be run three times because the computer could not track – "her results were a little interesting" – and at one point "because she was trying so hard, she would actually force them [her eyes] to cross." Even assuming these objective tests were accurate however, the tests only measure symptoms, and do not show the underlying cause of Claimant's condition. Dr. Lewis' opinion on causation ultimately suffers the same lack of grounding as other physicians who first saw her long after the ski accident and who relied upon her unreliable reporting of the accident and of the timing of the onset of symptoms.

166. Claimant established by a preponderance of weight of medical opinion that she aggravated a prior right shoulder injury. She also incurred a soft tissue contusion to her right hip

which healed within a reasonable time and without lingering symptoms or permanent impairment. Claimant failed to show by a preponderance of weight of medical opinion that she suffered a concussion or other head injury, injury to her jaw, vision changes, or C-spine injury as a result of the work accident. Claimant failed to show she suffered any other injury except for the right shoulder injury and right hip contusion.

Temporary Disability

167. Idaho Code § 72-408 provides income benefits "during the period of recovery." The burden is on a claimant to present medical evidence of the extent and duration of the disability. *Sykes v. C.P. Clare and Company,* 100 Idaho 761, 605 P.2d 939 (1980). Once a claimant attains medical stability, he is no longer in the period of recovery. *Jarvis v. Rexburg Nursing Center,* 136 Idaho 579, 38 P.3d 617 (2001). Further, a claimant's refusal of an offer of light-duty work suitable to Claimant's restrictions ends his entitlement to temporary disability. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986).

168. Here, Dr. Friedman's opinion that Claimant had reached maximum medical improvement (MMI) or medical stability had occurred on or before December 20, 2018. This opinion is corroborated by the fact that, despite significant treatment including a variety of types of therapy and other medical treatment, Claimant's symptoms as a whole have waxed and waned from time to time without a demonstrable showing of objective improvement after that date.

169. Claimant has met her burden of showing that she is entitled to benefits for temporary disability to December 20, 2018, but not thereafter.

Medical Care

170. Idaho statute and case law support a finding that all the medical care Claimant

received before the date of medical stability on December 20, 2018, is compensable. Idaho Code § 72-432(1) states an ...employer shall provide...reasonable medical...attendance or treatment... as may be reasonably required by the employee's physician...immediately after an injury...and for a reasonable time thereafter....

171. "The Commission's review of the reasonableness of medical treatment should employ a totality of the circumstances approach." *Chavez v Stokes* (2015). The unique circumstances of the *Chavez* case had to do with the costly expense of Life Flight transportation for a non-life-threatening finger amputation. The care was deemed reasonable under the circumstances. Consistent with this rule, the Commission's practice has been to find that reasonable diagnostic testing to determine whether the cause of an injury or condition is compensable is itself compensable. See, *Lowe v. Champion Home Builders, Inc.*, 2002 IIC 0113 (February 11, 2002), citing *Bourne v. Edwards Bros., Inc.*, 1999 IIC 0415 (March 11, 1999).

172. In this case, the parties dispute which medical conditions are compensable. The following description of the parties' contentions on this issue may lack some precision, but it covers their basic contentions. Claimant alleges $312,151.19 in care for various treatments and diagnostics occurring after December 20, 2018. This includes:

$51,565.77 - facet joint injections and rhizotomy at Eminent Medical Center,

$39,100.00 - neurologic testing at Lone Star Neurology,

$28,175.00 - physical therapy for her shoulder and other chronic pain at PT Concepts of Plano West,

$148,505.95 - injections and rhizotomy at Eminent Medical Center,

$18,663.48 - expenses for rhizotomy procedure on 10/28/19

$13,630.00 - cervical chiropractic care at Chiro Concepts of Plano West,

$477.29 - vision therapy at Impact Vision Therapy,

$11,188.70 – vision therapy at Focus Vision Therapy, and

$845.00 - dental care at Spruce Dental.

The alleged $39,100 bill from Lone Star Neurology does not appear to be "contained in *Exhibit* 65" as asserted on pgs. 21-22 of Claimant's Opening Brief, however.

173. In Defendant's Post-Hearing Brief, Defendant separates compensable and non-compensable conditions as follows:

Compensable/Accepted: right shoulder aggravation, mild strain of supraspinatus, and mild short-term concussion.

Non-compensable/Denied: all other conditions including traumatic brain injury, vision issues, memory, concentration and speech problems, balance problems, cervical and thoracic spine.

174. For purposes of our analysis, the above-referenced conditions are grouped into several categories: abdominal care, complaints and subjective symptoms, the right shoulder. **Abdominal care** – At hearing, Claimant expressly disclaimed any abdominal complaints as arising from the accident. Yet, the record shows that treatment directed to Claimant's hiatal hernia, pancreas, and bile duct ameliorated the left upper quadrant pain, nausea, and vomiting which constituted a significant impetus for Claimant to seek emergency room and other treatment on multiple occasions. Despite Claimant's belief, the majority of physicians have opined that these issues are not related to the ski accident in which Claimant was hit from behind and to the right side. Physicians who have opined that these issues are related to the ski accident all began treating

Claimant well after the accident, and they rely upon the accuracy of Claimant's descriptions of the severity of impact and of the timing of the onset of such symptoms. Physicians' opinions supporting a non-work related cause carry more weight.

175. Nevertheless, proximate timing to the ski accident and Claimant's representations made compensable the initial medical care for the abdominal complaints. Claimant first complained of nausea, vomiting, and abdominal pain about one week after the ski accident, and she claimed it had been occurring since the date of the accident. It took some time before the inconsistencies in Claimant's representations undercut the weight of initial physicians' opinions and showed that these symptoms were not probably related to the ski accident. The totality of the circumstances show Claimant is entitled to benefits for this treatment to the date of medical stability. Dr. Friedman's opinion, made proximately to the date of medical stability, carries persuasive weight. Claimant is not entitled to benefits for medical care incurred for abdominal symptoms after that date.

176. **Complaints and Subjective Symptoms** – Similarly, other among Claimant's multiple complaints and subjective symptoms found herein to be unrelated to the ski accident should be compensable to the date of medical stability. A review of the totality of the circumstances shows they too required reasonable attempts at diagnosis and causation.

177. **Right Shoulder** – Likewise, treatment for Claimant's shoulder, including surgery was causally related to the ski accident and is compensable. Dr. Friedman opined that the condition reached medical stability, was ripe for a PPI rating as of December 20, 2018, and that it required no additional curative or palliative future care.

178. Dr. Friedman's opinions carry persuasive weight. Claimant is entitled to medical

care to the date of medical stability but not afterward.

Permanent Partial Impairment

179. 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.

180. Here again, Dr. Friedman's opinion that Claimant suffered permanent impairment rated at 2.25% of the upper extremity after apportionment carries persuasive weight for reasons described above. It included consideration of her head and vision claims. Dr. Lewis' PPI rating for visual problems would allow 15% for the ski accident and 15% for the prior visual acuity difficulty. However, the preponderance of evidence shows visual symptoms are not likely to be related to the ski accident. Therefore, the entirety of Dr. Lewis' PPI rating is related to conditions either pre-existing the ski accident or subsequently arising unrelated to the ski accident.

181. Dr. Friedman's opinion that Claimant's overhead work restrictions should have been imposed after the 2011 surgery is less well established. However, no other physician addressed this point to specifically disagree. Dr. Hammond endorsed all of Dr. Friedman's opinions. Without specific medical opinion to the contrary there is nothing to weigh against the *prima facie* strength of Dr. Friedman's opinion on this point.

Permanent Disability

182. 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. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

183. "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.

184. 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). A claimant's local labor market access in the area around his home is the general geographical scope for assessing permanent disability. *Combs v. Kelly Logging*, 115 Idaho 695, 769 P.2d 572 (1989).

185. Claimant's Social Security determination causes one to consider permanent disability above PPI. However, standards and measures for determining Social Security Disability differ markedly from Idaho Workers' Compensation Law. Moreover, the majority of the bases upon which Social Security Disability was approved do not apply because they are unrelated to

the ski accident. Additionally, the Social Security Administration did not weigh the evidence of Claimant's subjective complaints or acknowledge the variability, inconsistency, and exaggerated nature of these representations.

186. Both vocational experts of record agree that if Dr. Friedman's opinions are accepted, Claimant suffered no disability in excess of PPI related to the ski accident.

187. Claimant owned and successfully worked a business for decades. Her 2013 tax return showed significant gross income. That the returns in all years showed deductions which minimized declared profit does not mean that the business did not support her lifestyle. To the contrary, in testimony she described herself as highly successful over the decades. The record is insufficient to establish whether recent years of declining gross income are due to market changes, her desire to slow down, or some other factor. No assumption is made where the record does not provide sufficient indicators. Considering the totality of medical and non-medical factors, Claimant has failed to establish disability in excess of PPI.

188. Here, Claimant established that she is entitled to permanent disability rated at 2.25% of the upper extremity. She failed to show that she is entitled to benefits for permanent disability in excess of PPI.

Odd-Lot Analysis

189. 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, he 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 he or vocational counselors or employment agencies on his 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).

190. 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).

191. Here, Claimant failed to make a *prima facie* showing of entitlement to benefits as an odd-lot worker under any analysis consistent with Idaho Workers' Compensation Law. Burden-shifting analysis does not apply.

Attorney Fees

192. Attorney fees are awardable for unreasonable denial or delay of benefits due and owing to a claimant. Idaho Code § 72-804.

193. Defendant accepted the claim and paid for much medical care from April to December 2018. Isolated episodes of miscommunication do not establish that Defendant acted unreasonably in any action. Claimant's often and vociferously expressed dissatisfaction with physicians, nurse case managers, and adjustors does not substitute for actual unreasonableness.

194. Claimant alleges that attorney fees are awardable for Defendant's failure or refusal to average and pay PPI ratings. Here one rating pertained to her right shoulder. One rating pertained to her visual problems. These are distinct injuries or conditions. One condition was accepted by Defendant. One was not. One was found to be related to the ski accident. One was not. Claimant offered no authority for the proposition that PPI for a separate, denied, non-work

related condition must be averaged with PPI for a separate, accepted, work related condition and paid. The filings and briefing of the parties indicate Defendants paid 2.25% upper extremity impairment for Claimant's compensable right shoulder injury. Defendant did not act unreasonably in this instance.

195. Claimant failed to show that she is entitled to an award of attorney fees.

CONCLUSIONS

1. Claimant suffered a partial tear and aggravation of an old right shoulder injury as well as a soft tissue contusion to her right hip in the ski accident. She failed to show any other condition which was causally related to the ski accident;

2. Claimant became medically stable from all conditions related to the ski accident on December 20, 2018. This date is to be used in consideration and calculation of all benefits awarded herein;

3. Claimant is entitled to temporary disability benefits for actual periods of temporary disability from the date of the accident to the date of medical stability. The record suggests that these may all have been paid, but if not, they are to be paid by Defendant;

4. Claimant is entitled to all medical care which attempted to treat or diagnose Claimant's conditions from the date of the ski accident to the date of medical stability. Claimant has not shown that she is entitled to benefits for care thereafter or in the future, neither diagnostic, curative nor palliative;

5. Claimant is entitled to permanent disability designated as PPI rated at 2.25% of the upper extremity. She is not entitled to permanent disability in excess of PPI;

6. Claimant failed to qualify as an odd-lot worker; and

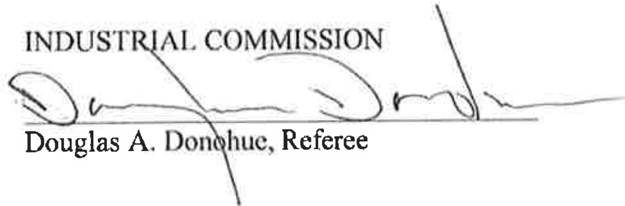
7. Claimant failed to show that she is entitled to attorney fees.

RECOMMENDATION

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

DATED this __29th__________ day of February, 2024.

INDUSTRIAL COMMISSION



Douglas A. Donohue, Referee

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of April, 2024, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States mail and Electronic Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DENISE PESKIN, Claimant, v. SUN VALLEY COMPANY, Self-Insured Employer, Defendant.	**IC 2018-009776** **ORDER** **FILED** **APRIL 18, 2024** **IDAHO INDUSTRIAL COMMISSION**

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

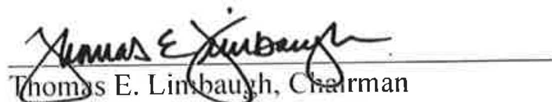
Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant suffered a partial tear and aggravation of an old right shoulder injury as well as a soft tissue contusion to her right hip in the ski accident. She failed to show any other condition which was causally related to the ski accident;
2. Claimant became medically stable from all conditions related to the ski accident on December 20, 2018. This date is to be used in consideration and calculation of all benefits awarded herein;
3. Claimant is entitled to temporary disability benefits for actual periods of temporary disability from the date of the accident to the date of medical stability. The record suggests that these may all have been paid, but if not, they are to be paid by Defendant;

4. Claimant is entitled to all medical care which attempted to treat or diagnose Claimant's conditions from the date of the ski accident to the date of medical stability. Claimant has not shown that she is entitled to benefits for care thereafter or in the future, neither diagnostic, curative nor palliative;
5. Claimant is entitled to permanent disability designated as PPI rated at 2.25% of the upper extremity. She is not entitled to permanent disability in excess of PPI;
6. Claimant failed to qualify as an odd-lot worker; and
7. Claimant failed to show that she is entitled to attorney fees.
8. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this __17th____ day of __April_____________, 2024.

INDUSTRIAL COMMISSION


Thomas E. Limbaugh, Chairman

Claire Sharp, Commissioner

Aaron White, Commissioner

ATTEST:

Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of April, 2024, a true and correct copy of the foregoing **ORDER** was served by regular United States mail and Electronic Mail upon each of the following:

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