**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

| | |
|---|---|
| MARBELLA GARCIA,<br>Claimant,<br>v.<br>SORRENTO LACTALIS, INC.,<br>Employer,<br>and<br>TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,<br>Surety,<br>Defendants. | **IC 2018-003185**<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**<br><br>**FILED**<br>**MAY 10, 2024**<br>**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 January 17, 2023. Darin Monroe represented Claimant. Scott Wigle represented Employer and Surety. A Spanish interpreter provided assistance. The parties presented oral and documentary evidence. Post-hearing depositions were taken. The parties submitted briefs. The case came under advisement on September 21, 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, and
   c) Permanent disability in excess of impairment
   d) Medical care, and
   e) Attorney fees; and

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

This case involves an accepted accident and claim. The causation issue is limited to a low

back surgery and related medical treatment.

## CONTENTIONS OF THE PARTIES

Claimant contends the industrial accident which occurred on January 16, 2018, caused her need for L4-S1 fusion surgery which was performed by Michael Hajjar, M.D. on December 20, 2019. She remains symptomatic but is much less so since the surgery. She is entitled to medical care benefits for Dr. Hajjar's treatment and for unpaid pre- and post-surgical care. She is entitled to temporary disability benefits for her period of surgical recovery December 29, 2019, through March 2, 2020. She is entitled to permanent partial impairment (PPI) rated at 8% whole person—of which 2% has been paid by Defendants—and to permanent partial disability (PPD) amounting to 13.7% inclusive of PPI. She is entitled to attorney fees for unreasonably denied benefits. Finally, several representations in Defendants' brief are misleading.

Employer and Surety contend that after conservative care and a period of light-duty work Claimant was found to be at MMI from this industrial accident in December 2018. PPI of 2% was paid. She returned to work without restrictions. On multiple doctor visits in 2019 Claimant did not mention low back or radiculopathy complaints, but on others she did. Surgery was performed in December 2019 despite an absence of objective indicators. Claimant has a history of overreporting her condition in the workers' compensation arena as shown by an earlier claim which was adjudicated to hearing. Claimant also has a demonstrated history of degeneration in her spine which preceded the subject accident. Diagnostic imaging after the subject accident showed no objective, acute injury, only degenerative disease. Dr. Hajjar himself recommended against surgery and ordered additional X-rays, but despite the fact that these X-rays failed to provide objective indicators for surgery he reversed his surgical recommendation. Dr. Hajjar refused to opine about causation. Dr. Sirucek's opinions about disc herniation and trauma are

contrary to the majority opinions of the medical profession. Dr. Montalbano's opposing opinions are entitled to more weight because he is qualified as a surgeon. Claimant's entitlement to additional medical care, temporary disability, and PPI are dependent upon Commission acceptance of Dr. Sirucek's opinion over Dr. Montalbano's. Moreover, Dr. Sirucek's opinion about PPI is not admitted into the record. It was not offered until Claimant's opening brief appended a document expressing the 8% PPI claimed. Also, Claimant's PPD claim is based upon her rejection of a physically suitable, higher-paying job with Employer in favor of a lower-paying, lower-stress job. Finally, Claimant earned more with Employer at the time of hearing than at the time of injury.

## EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant;

2. Joint exhibits 1 through 25;

3. Post-hearing depositions of orthopedic surgeon Paul Montalbano, M.D. and treating chiropractor Dax Sirucek, D.C.

Defendants objected to the late production of a PPI opinion by Dr. Sirucek which was appended to Claimant's opening brief. As Claimant does not move for admission of this document, it is acknowledged as part of Claimant's argument, but it is not admitted as an exhibit to the record and receives no evidentiary weight.

Admission of an exhibit to Dr. Sirucek's post-hearing deposition—a Mayo Clinic internet article—was objected to by Claimant. This objection is SUSTAINED. It is considered as potential impeachment of Dr. Sirucek's opinion on causation—for the limited purpose of showing alternate definitional usage of certain terms by another medical entity. It is not admitted for weight or the truth of any matter asserted therein.

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

## FINDINGS OF FACT

### Introduction and Accident

1. On January 16, 2018, Claimant was working in a position known as "Operator 2." An Operator 2 is capable of working all lines, any production job in the plant, and occasionally trains employees. Generally an Operator 2 moves from job to job during the day to allow other operators their lunch and other breaks.

2. It was on that date that Claimant felt a "pinch pain" in her lower back while lifting and stacking boxes on a pallet. Unable to walk, she was taken by wheelchair to a nurse.

### Medical Care: Post-Accident 2018

3. Claimant first sought medical treatment outside the plant on January 24. Claimant visited St. Luke's Nampa occupational health facility. She complained of right low back and right shoulder blade pain. She reported that she had been placed on light duty. An examination revealed some muscle spasm and right sacroiliac tenderness. Alex Casebolt, PA-C, treated this as a strain with radiculitis. He recommended physical therapy and a continuation of light-duty work.

4. On January 26, St. Luke's Rehab began physical therapy. Therapy continued to the end of March.

5. On February 7, Claimant returned to PA Casebolt. She reported that her right leg pain had resolved. An examination showed that spasm remained but tenderness had decreased.

6. On February 28, Claimant followed up at St. Luke's this time with Shayne Olsen, D.O. She reported moderate improvement. An examination found some tenderness at the right SI joint. Spasm had resolved. Claimant displayed some lumbar range-of-motion limitation.

7. On March 14, Claimant returned to Dr. Olsen. Symptoms were reported as waxing and waning without an observable trend toward or away from healing. Dr. Olsen suggested an MRI. The MRI was performed the following week and showed multilevel mild spinal canal and mild to moderate neural foraminal stenosis.

8. On March 26, Dr. Olsen reviewed the MRI with Claimant. He noted, "MRI results do not correlate well with patient reported complaints." He declined to recommend surgery "at this time."

9. Claimant returned to light-duty work.

10. On April 17, Claimant visited Karl Zarse, M.D., at Idaho Spine & Pain. He reviewed the MRI and noted that he did not see "profound stenosis." He did note stenosis at L4 - 5 and general lumbar degeneration. He initially prescribed Gabapentin but the next day performed his first of several epidural steroid injections. Dr. Zarse's injections temporarily relieved some pain. (Dr. Zarse's notes of subsequent visits often cut and paste new information onto a template containing prior information which makes it occasionally difficult to sort out.) At various times thereafter Claimant provided inconsistent reports of whether and how much these injections helped.

11. On a May 1, visit Dr. Zarse opined, "I don't believe this is an acute injury per se but an exacerbation." He noted Claimant had stopped attending physical therapy. He recommended she resume it. He noted that given her age, small frame, and lumbar degeneration she needed a job that required less heavy lifting.

12. On May 2, to assess Claimant's likelihood of success for St. Al's Rehab Services (STARS) Workstar program, Robert Calhoun, Ph.D., provided a psychological evaluation and

individual cognitive behavioral pain management therapy. Treatment sessions with Dr. Calhoun appear to have begun during the Workstar program in July.

13. On May 9, Claimant began physical therapy upon referral from Dr. Zarse. The therapist's initial assessment included a mention of inconsistent and nonanatomic responses to some physical motions. Treatment emphasized core stabilization to relieve spinal leverage. Claimant stopped attending therapy after eight visits.

14. On May 26, Claimant visited St. Al's Nampa facility emergency department. Hydrocodone, 12 pills, were prescribed along with an anti-inflammatory medication.

15. On June 7, another lumbar MRI showed multilevel, T12 through S1, lumbar spondylosis without significant central spinal canal stenosis.

16. On June 8, Russell Harmony, N.P., at Dr. Zarse's office reviewed the new MRI and opined it was "not much different than her last MRI and does not explain the profound level of pain, syncope, and weakness she is experiencing." NP Harmony issued a temporary restriction with no lifting over 15 pounds, pushing and pulling up to 25 pounds, and repetitive position and motion restrictions. Claimant did not visit Dr. Zarse's office again until July 2020.

17. On June 20, Rodde Cox, M.D., evaluated Claimant. Claimant described fairly intense back and bilateral leg pain, worse on the right, radiating to her knee. Upon examination Dr. Cox found diffuse tenderness about her lumbar spine and bilateral gluteal muscles, worse on the right. He also found multiple behavioral exaggerations, nonanatomic reports of symptoms, and positive Waddell's signs despite a demonstrated ability to bend and move. Dr. Cox recalled having seen her after her 2015 accident. Having reviewed her medical records, including diagnostic imaging since the date of accident he opined that she showed no evidence of

radiculopathy. He recommended against surgery. He did recommend a work-hardening program. He provided a work release for light-duty work.

18. On July 2, Claimant was further evaluated for entry into the Workstar program. This process began with a functional musculoskeletal evaluation. Claimant was deemed a "fair"—as opposed to an excellent or good—candidate for the program based upon decreased knowledge of "hurt vs. harm, symptom control strategies, Flare-Up Plan/management, inconsistencies." Nevertheless, she was admitted to the Workstar program and, although expected to begin in about three weeks because of an upcoming long-distance trip, she began on July 9. She did take a one-week hiatus for the trip.

19. Also on July 2, Dr. Calhoun again evaluated Claimant as a candidate for the Workstar program. He noted that Claimant expressed anger against her Employer. She reported that her "husband" (Dr. Calhoun's term, not Claimant's) had worked for Employer but left on less-than-positive terms. She expressed extreme frustration over her continuing pain. MMPI-2 results suggested a psychological link to her continuing pain. Dr. Calhoun deemed her a "marginal" candidate for the Workstar program.

20. On July 11, Dr. Cox provided a work release for two weeks to ameliorate the double effort of working while undergoing the Workstar program. He anticipated a return to four-hour workdays beginning August 6.

21. Claimant underwent work hardening through the Workstar program. Therapists note that her compliance was equivocal to good at various sessions. Therapists were able to increase her effort with coaxing. Therapy continued through August 9. Therapists reported that goals were accomplished or partially accomplished in all aspects including repetitive

medium- to- heavy work. At hearing Claimant testified that Workstar helped reduce her pain "a little bit."

22. On August 9, Dr. Cox provided a release to return to full duty effective August 13.

23. On August 16, when Dr. Cox next examined Claimant, she had returned to full-duty work. After examination he deemed her to be at MMI. He rated PPI at 2% whole person without apportionment. He expressly imposed no restrictions.

24. In August Claimant visited Primary Health, usually Daryn Barnes, PA-C, about low back pain. She did not seek additional care for her low back until 2019.

**Medical Care: 2019**

25. On January 21, Claimant visited Primary Health. She reported one day of low back pain with bilateral radiating pain into her legs. She claimed this occurred infrequently, about once each month, since the industrial accident.

26. On April 17, a left shoulder ultrasound revealed a small sebaceous cyst.

27. In July Claimant twice visited Primary Health for pain near her left ribs. It was diagnosed as shingles.

28. On September 12, Claimant visited Primary Health. She complained of back pain radiating into both legs.

29. On September 30, Claimant visited Primary Health. An MRI of her lumbar spine showed mild lower lumbar levoscoliosis and degenerative disc disease which had "slightly progressed" at L4-5 since the 2018 MRI.

30. On October 16, Michael Hajjar, M.D., examined Claimant. Claimant reported worsening symptoms. She did not report any facts upon which Dr. Hajjar could posit a cause for

this increase in symptoms. He reviewed radiographic data and noted generalized degeneration without obvious instability or substantial stenosis. He opined she had "mainly mechanical back pain" superimposed on nonsurgical arthritis. He obtained additional X-rays which, although negative, he found showed a basis upon which he deemed her a candidate for surgery, possibly fusion, at L4 through S1.

31. On December 20, Dr. Hajjar performed a decompression and a two-level fusion. His operative report is well detailed, but it lacks commentary of having observed a structure, impingement, or condition which could cause her pre-operative complaints. She was released from hospital after three days. Claimant's pain remained in her low back and right leg, but with significantly less intensity.

**Medical Care: 2020**

32. On January 24, Claimant returned to physical therapy. Claimant was noted to be motivated and progressing well. She attended 27 visits through June 10, 2020.

33. On February 28, new X-rays showed the surgery was successful. They did not show a basis for her continuing low back pain. Dr. Hajjar allowed her to return to light-duty work effective March 2, 2020, with a 15-20 pound lifting restriction and restrictions against repetitive motions.

34. On May 27, Claimant visited Primary Health. She complained of back pain but acknowledged that she has stopped taking medication for it. She said she did not feel like she needed it. Upon examination PA Barnes noted tenderness in her right paraspinal muscles. He noted that she was subjectively cautious on lumbar range-of-motion testing and when walking.

35. On June 1, nearing the end of physical therapy, new X-rays showed a successful

fusion and generalized degeneration throughout her lumbar spine.

36. On June 3, Dr. Hajjar noted Claimant's most significant source of pain was on her iliac crest where bone was harvested for the fusion. He recommended she continue her gradual return to full work. His new restrictions allowed lifting up to 30 pounds and changed "repetitive" to "limited" regarding motion restrictions. He further noted that she "can increase activity as tolerated per her discretion."

37. On June 26, new X-rays were consistent with prior ones and showed some progression of Claimant's degenerative condition, particularly at L2-3. Dr. Hajjar raised her lifting limit to 30 pounds continuously and 50 pounds occasionally. He recommended that she "switch machines every other day." He also noted, "restrictions will end on 7/31/2020."

38. On July 22, after Dr. Hajjar suggested possible injections and pain management, Dr. Zarse began SI joint injections.

39. On August 12, Dr. Zarse examined Claimant. He addressed her complaint of SI joint pain since the December 2019 fusion. He added a muscle relaxer to her medication regimen.

40. On September 7, Claimant visited St. Al's Nampa facility emergency department for rib pain. Upon examination Claimant displayed normal range or motion in her back without a complaint of pain.

41. On November 17, Dr. Zarse performed the first of a few anesthetic nerve blocks at L5 through S3 for diagnostic purposes.

**Medical Care: 2021 - Hearing**

42. On January 21, 2021, Dr. Zarse performed radiofrequency ablations in the same locations as the previous diagnostic blocks.

43. On February 2, 2021, Claimant reported to Dr. Zarse that the ablations increased her pain. Dr. Zarse told her to give herself time to heal from the ablations.

44. On April 21, 2021, Dr. Zarse entered his last note. Claimant continued to report symptoms. X-rays showed a good fusion and progressing degeneration throughout the lumbar spine.

45. A May 17, 2021, CT scan ordered by Dr. Hajjar showed a good fusion and degeneration with mild stenosis at L2-3. Dr. Hajjar's final note is dated two days later. He opined that additional surgery was unnecessary.

46. On June 24, 2021, Kevin Krafft, M.D., examined Claimant upon referral from Dr. Hajjar. His report of this examination is detailed. He prescribed gabapentin, over-the-counter naproxen, and Tirosint to be added to her muscle relaxer. Notes of follow-up visits show consistent symptoms with mild waxing and waning of intensity. He performed treatments including injections at her right SI joint. Dr. Krafft's last note in the record is dated December 1, 2021.

47. On August 1, 2021, Claimant began physical therapy at Mountain Land. She attended six or seven visits through September 23, 2021, with official discharge from this therapy dated November 10, 2021, because the therapist had been unable to contact her for additional visits.

48. On November 11, 2021, Claimant visited St. Al's Nampa facility emergency department with a complaint of shortness of breath, a cough, and low back pain. She tested positive for Covid. The examination did not include any observation or finding about her low back.

49. On January 29, 2022, Claimant visited St. Al's Nampa facility emergency department with a complaint of pain and numbness in her right leg and groin. By history, this

record notes low back pain which began "last evening" and describes intermittent low back pain since Dr. Hajjar's surgery. Examination was unrevealing of a cause. An X-ray showed mild multilevel degenerative changes and prior surgical fusion.

50. On August 19, 2022, Paul Montalbano, M.D., reviewed records for forensic purposes at Defendants' request. He has not met Claimant. He opined that the records showed Claimant "responded appropriately to an initial diagnosis of lumbar strain" from the industrial accident. He opined that surgery was related to pre-existing degeneration and not to the accident. He opined that the degeneration was not exacerbated by the accident. In post-hearing deposition Dr. Montalbano opined that Claimant's radiographic imaging shortly after her 2018 industrial accident showed no signs of hematoma, fracture, facet injury, disc herniation, or spinal instability. That is, there was no evidence of a traumatic injury. He opined that she suffered a lumbar strain which healed and was unrelated to her degenerative condition. It was the degenerative condition and not the accident that caused her need for surgery. He opined that her history of returning to work after injections and a work-hardening program was consistent with a lumbar strain.

51. On September 6, 2022, Dax Sirucek, D.C., reviewed records for forensic purposes at Claimant's request. He has not met Claimant. He opined that MRIs showed Claimant's condition had not changed since March 21, 2018, the date of the first MRI. He defined "protrusion" as a subset of "herniation." He cited a "landmark article" for the proposition that all disc protrusion is a directional herniation which must always be the result of trauma. This article does not say that. Rather, the article recommended that these terms be used in this way. In post-hearing deposition Dr. Sirucek explained that this article was an attempt by differing radiologic societies to create consistent definitions for use of certain words. This article does not address

medical causation. Indeed, the final sentence on page 2526 of this article (the second page of this deposition exhibit) expressly disclaims any implication of an intention to express any causal linkage. In post-hearing deposition Dr. Sirucek admitted he had no authoritative source for the proposition that the directional disc displacement he saw on Claimant's diagnostic imaging "can only be caused by traumatic injury." He rejected the proposition that disc protrusions could occur as a result of ordinary wear and tear. He rejected the opinion expressed by Mayo Clinic that "disc herniation is most often" the result of gradual, degenerative conditions.

52. Dr. Sirucek opined that all the protrusions throughout her lumbar spine were traumatically caused and pointed to the absence of prior symptoms and absence of prior imaging as evidence that the accident caused all of the protrusions. He opined that the protrusions at L4-5 and L5-S1 and resulting surgery were caused as a traumatic aggravation from the accident. He opined that nerve root impingement was present, in part, "based off her clinical presentation."

53. Dr. Montalbano disagreed with Dr. Sirucek's theory relating all disc protrusions to trauma. Dr. Montalbano testified that degenerative disease causes disc protrusions also. Moreover, he opined that the directionality of a disc protrusion shows only the weak point within the disc and, except for a vertebral fracture, does not indicate the location or direction of specific forces involved in trauma or degeneration. Dr. Montalbano opined that, contrary to Dr. Sirucek's theory, mainstream medical opinion is that most disc protrusions across the population are the result of degeneration and not trauma. Dr. Montalbano well explained the anatomical bases for his opinions. He opined that Claimant demonstrates a non-verifiable leg pain and not a radiculopathy because there is no objective evidence of a neurological component related to her spine. He opined that because Claimant had no medical care for a period of months between her

return to work after work hardening and the resumption of medical care which led to the fusion surgery and because there is an absence of radiological evidence of a structural injury, Claimant's December 2019 surgery was unrelated to the industrial accident.

54. On the date of hearing, Claimant worked for Employer as an Operator 1 with rare and irregularly assigned Operator 2 duties.

**Relevant Prior Medical Care and Conditions**

55. Claimant has inconsistently acknowledged or denied having depression and thyroid issues to various physicians. She has undergone treatment for both.

56. On May 22, 2010, Claimant visited Primary Health, PA Barnes, complaining of low back pain. X-rays showed mild lower lumbar levoscoliosis and degenerative disc disease at L4-5 and L5-S1.

57. On March 29, 2011, Claimant visited Primary Health for a left leg bruise. She denied low back pain.

58. On May 24, 2013, Claimant visited Primary Health for back pain. Claimant described it as a "muscle pull."

59. On April 14, 2014, Claimant visited Primary Health for right knee pain. An X-ray showed a little swelling.

60. In March 2015 Claimant was temporarily restricted to light-duty work for a right-hand injury. Symptoms in Claimant's neck arose. Her extensor tendon required surgical repair and physical therapy. A trigger finger resulted and required a second surgery. Pain returned and a third surgery, another trigger finger release, was performed. A C5-6 total disc replacement surgery was performed by Shane Andrew, D.O. A diagnosis of complex regional pain syndrome

("CRPS") was considered. This matter went to hearing. In April 2018 the Commission determined Claimant was entitled to medical care for the disputed third surgery but not for complaints relating to her right elbow and shoulder. She was entitled to PPI rated at 3% upper extremity, with no PPD in excess. Medical records relating to this claim did not mention any lumbar complaint. They are consistent with Claimant's current complaints where they indicate some vocal and behavioral exaggeration and slow healing concerning a compensable, objective injury.

61. In February 2017 neck symptoms arose. A March MRI arthrogram showed bursitis and tendinopathy, and a C-spine MRI showed multilevel degenerative disc disease. Claimant underwent neck surgery in June 2017.

**Vocational Factors**

62. Born June 1, 1964, in Mexico, she arrived in the United States at a very young age. Claimant was 58 years of age on the date of the hearing.

63. She attended school in the United States into the 11th grade but did not graduate.

64. She worked agricultural jobs and for a company which sold dry fruit.

65. Except for a one-year hiatus in 2007, Claimant has worked for Employer since 1995. She has worked in several positions, including supervisory duties. When the Nampa plant opened in 2002, Claimant moved to Idaho and trained new employees. When Claimant returned from her hiatus, she chose work as an operator rather than as a supervisor. She testified that for her the supervisor position was too stressful.

66. When deposed in 2016 Claimant was working as an Operator 2 with some accommodation for her prior workers' compensation claim, the injury to her hand.

67. Although Claimant's return to Operator 1 duties from Operator 2 duties may have

involved a pay cut, with raises since 2018 she now makes more per hour than she did at the time of injury. Claimant testified when deposed in 2022 that she returned to Operator 1 duties, same hours, same pay, but lighter work.

68. Claimant's wage when deposed in 2016 was $17.85 per hour.

69. Claimant's time-of-injury wage was $18.25 per hour.

70. When deposed in March 2022 Claimant's wage was $21.65 per hour.

71. Claimant's date-of-hearing wage was more than her time-of-injury wage.

72. Claimant received ICRD services from June into September 2018. Dr. Cox approved a job site evaluation ("JSE") for the Operator 1 position. Claimant returned to full-duty work for Employer about mid-August 2018.

## DISCUSSION AND FURTHER FINDINGS OF FACT

73. 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).

74. 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).

75. 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).

76. Claimant is repeatedly described in medical notes as "very nice" or "kind." Claimant's demeanor is consistent with these descriptions. She is a willing worker. She does not show signs of antagonism against Employer.

77. The credibility findings by the prior referee at Exhibit 21, findings ¶¶ 55-58, relating to her earlier injury to her hand are consistent with this Referee's findings here. By demeanor and substance of medical records Claimant displays an overfocus on her pain and symptoms that may slow her fullest potential recovery. That said, she is not disingenuous; she is not consciously magnifying her condition for secondary gain. Claimant is a credible witness.

**Causation: Certain Medical Treatment**

78. 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 his or her plain and unequivocal testimony conveying a conviction that events are causally related. *Jensen v. City of Pocatello*, 135 Idaho 406, 18 P.3d 211 (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).

79. The parties do not dispute that the accident occurred. The medical records show she received treatment, improved, and returned to work in August 2018 after eight months of treatment for a lumbar strain. Except for a single January 2019 visit for low-back pain of one day's duration, Claimant did not again seek medical care for low back pain between mid-August 2018 and the end of September 2019. On that January visit she did report that she had experienced occasional flare-ups for which she had not sought treatment. She did seek treatment for unrelated conditions during this interval but did not mention back pain as being among her symptoms.

80. Causation is disputed by the opinions of two physicians. Dr. Sirucek is a chiropractor with board certification in chiropractic neurology. Dr. Montalbano is a neurosurgeon and board certified as such. Dr. Sirucek opined that her degenerative condition was caused or permanently aggravated by the accident because, he says, all focal disc protrusions are traumatically caused. His authoritative support for this proposition is a *non sequitur* based upon an article which attempts to define terms and specify how radiologists and others should ideally use those terms. Dr. Montalbano based his opinions upon specific objective findings upon viewing Claimant's diagnostic imaging which showed no impingement, no structural fractures, essentially no trauma-caused persistent condition of any kind. These opposing opinions about causation relating to a fusion surgery are not of similar weight.

81. The preponderance of medical evidence shows the accident caused a lumbar strain which was treated over eight months and resolved. Claimant failed to show it likely that the January 2018 accident aggravated, accelerated, or exacerbated a degenerative condition which lingered and worsened beyond those eight months.

**Temporary Disability**

82. Idaho Code § 72-408 provides income benefits "during the period of recovery." The burden is on the 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 or her entitlement to temporary disability. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986).

83. Claimant's period of recovery continued until she reached Maximum Medical Improvement (MMI) as opined by Dr. Cox on August 16, 2018. Claimant is entitled to TTDs for actual workdays lost to the need for healing including medical treatment to that date but not beyond. The record does not well describe what days or hours are involved. Defendant's evidence of TTD calculations does not clearly show whether and to what extent additional TTDs may be owed. As Claimant was seeking TTDs primarily for the post-surgical recovery dates and has not identified benefits due and owing during the period of recovery to August 16, 2018, the record does not support Claimant's eligibility for additional TTDs.

**Permanent Impairment**

84. 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.

85. Here Dr. Cox rated Claimant at 2% PPI. Dr. Sirucek's 8% rating, even if it had

been timely provided and admitted, is based upon his opinion that the fusion surgery was causally related to the accident. That causal relationship has not been shown to be likely. Claimant is entitled to PPI rated at 2% whole person which has been paid by Defendants.

**Permanent Disability and §72-406 Apportionment**

86. "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.

87. 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).

88. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72423 and 72425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See*, *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

Where preexisting impairments produce disability, all impairments and disability should be accounted for with a subtraction back for the compensable portions. *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008). An employer takes an employee as it finds him or her. *Wynn v J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983).

89. Here, Dr. Cox and Dr. Montalbano have opined against any work restrictions for Claimant. Without restrictions, it is difficult to find non-medical factors which would establish a compensable basis for permanent disability in excess of PPI. Moreover, Claimant has returned to work with Employer and is earning more than her time-of-injury wage.

90. Claimant failed to establish a likely basis for permanent disability in excess of 2% PPI. She may have ever increasing flareups as her degenerative condition continues to progress. However, these are unrelated to the January 2018 accident and do not show a compensable loss of access to the labor market.

**Attorney Fees**

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

92. Claimant failed to show it likely that Defendants acted unreasonably for purposes of this statute. Facts which may provide a basis for an attorney fee award have not been established.

## CONCLUSIONS

1. Claimant suffered a compensable accident on January 16, 2018. Her degenerative condition was not shown to have been aggravated, accelerated, or exacerbated by the surgery. She is entitled to reasonable medical care and TTDs through August 16, 2018, but not thereafter;

2. Claimant is entitled to PPI rated at 2% whole person; and

3. Claimant failed to establish it likely that she is entitled to permanent disability in excess of PPI or 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 ____26th _____ day of April 2024.

INDUSTRIAL COMMISSION

Douglas A. Donohue, Referee

ATTEST:

SEAL

Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 10th day of May 2024, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by **UNITED STATES CERTIFIED MAIL and ELECTRONIC MAIL** upon each of the following:

DARIN MONROE
PO BOX 50313
BOISE, ID 83705
dmonroe@monroelawoffice.com
lgreenfield@monroelawoffice.com

W. SCOTT WIGLE
PO BOX 1007
BOISE, ID 83701-1007
swigle@bowen-bailey.com
bperkins@bowen-bailey.com

dc

Debra Cupp

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

| | |
|---|---|
| MARBELLA GARCIA,<br><br>Claimant,<br>v.<br><br>SORRENTO LACTALIS, INC,<br><br>Employer,<br>and<br><br>TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,<br><br>Surety,<br>Defendants. | **IC 2018-003185**<br><br>**ORDER**<br><br>**FILED**<br>**MAY 10, 2024**<br>**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 compensable accident on January 16, 2018. Her degenerative condition was not shown to have been aggravated, accelerated, or exacerbated by the surgery. She is entitled to reasonable medical care and TTDs through August 16, 2018 but not thereafter;

2. Claimant is entitled to PPI rated at 2% whole person; and

3. Claimant failed to establish it likely that she is entitled to permanent disability in excess of PPI or attorney fees.

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

matters adjudicated.

DATED this __10th____ day of ___May_____, 2024.

INDUSTRIAL COMMISSION


Thomas E. Limbaugh, Chairman

Claire Sharp, Commissioner

Aaron White, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

## CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 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:

DARIN MONROE
PO BOX 50313
BOISE, ID 83705
dmonroe@monroelawoffice.com
lgreenfield@monroelawoffice.com

W. SCOTT WIGLE
PO BOX 1007
BOISE, ID 83701-1007
swigle@bowen-bailey.com
bperkins@bowen-bailey.com

dc

Debra Cupp