

CONCEPCION LOPEZ, Claimant

v.

ANHEUSER-BUSCH COMPANIES Employer

and

INDEMNITY INSURANCE COMPAN OF AMERICA, Surety, Defendants.

No. IC 2010-022110

Idaho Workers Compensation

Before the Industrial Commission of the state of Idaho

June 16, 2016

ORDER

R.D. Maynard, Chairman

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

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

1. Claimant has proven her decompressive lumbar laminectomy and fusion surgery of January 10, 2012, was caused in part by her industrial accident of September 1, 2010 and partly by her pre-existing lumbar degenerative condition.
2. Claimant has proven a right to reimbursement for reasonable and necessary medical care associated with treatment and surgery of her lumbar spine under Idaho Code § 72-432(1) from November 3, 2011 until August 27, 2012, when she reached MMI. Reimbursement of such past medical costs is subject to payment at full invoiced amount under *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009). Claimant shall notify the Commission of her plan for resolving the disputed past medical bills awarded in this decision.
3. Claimant has proven she is entitled to TTD benefits from January 10, 2012 through August 27, 2012, when Dr. McDonald released her to full-duty work.
4. Claimant has proven she is entitled to 2 percent whole person permanent partial impairment (PPI) benefits for her covered lumbar spine industrial injury.
5. Claimant has failed to prove she is entitled to permanent disability benefits in excess of her permanent partial impairment (PPI) rating.
6. The issues of total permanent disability under the odd-lot doctrine and apportionment under Idaho Code § 72-406 are moot.
7. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

Thomas E. Limbaugh, Commissioner, Thomas P. Baskin, Commissioner Assistant Commission Secretary

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

Brian Harper, Referee

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Coeur D'Alene, Idaho, on July 9, 2015. Claimant was

represented by Michael Kessinger, of Lewiston. Eric Bailey, of Boise, represented Anheuser Busch Companies ("Employer"), and Indemnity Insurance Company of America ("Surety"), Defendants. Brenda Kehoe served as an interpreter. Oral and documentary evidence was admitted. Post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on April 25, 2016.

ISSUES

The issues to be decided are:¹

1. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition;
2. Whether and to what extent Claimant is entitled to the following benefits:
 - a. Medical care;
 - b. Temporary total disability benefits, (TTD);
 - c. Permanent Partial Impairment (PPI); and
 - d. Permanent Partial Disability in excess of impairment, including total permanent disability pursuant to the odd-lot doctrine;
3. Whether Claimant is totally and permanently disabled; and
4. Whether apportionment is applicable pursuant to Idaho Code § 72-406.

CONTENTIONS OF THE PARTIES

On September 1, 2010, Claimant fell while working within the course and scope of her employment. She claims to have permanently aggravated her pre-existing lumbar spine degenerative condition, which necessitated surgery. She has not, and cannot, work since. She is totally disabled under the odd-lot doctrine. Claimant argues she is entitled to reimbursement of all medical costs associated with her industrial accident. She is also entitled to temporary disability benefits from the date of the accident through August 27, 2012, and total permanent disability benefits thereafter.

Defendants argue Claimant has been paid all benefits to which she is entitled. Her lumbar surgery was not due to her industrial accident, and she is not entitled to TTD benefits. Claimant suffered no permanent disability above her 2% impairment rating provided by two physicians. Claimant failed to prove "odd-lot" status. If a disability award is made, Defendants are entitled to apportionment for Claimant's non-industrial conditions, which account for much of her disability.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's testimony, taken at hearing;
2. The testimony of Employer representative Edward Charles Atkins, Jr., taken at hearing;
3. Joint Exhibits (JE) 1 through 16, admitted at hearing;
4. The post-hearing deposition transcript of John McNulty, M.D., taken on October 5, 2015;
5. The post-hearing deposition transcript of Michael Ludwig, M.D., taken on October 14, 2015;
6. The post-hearing deposition transcript of Douglas Crum, taken on November 4, 2015; and
7. The post-hearing deposition transcript of William Jordan, taken on November 4, 2015.

All objections preserved during the depositions are overruled.

Having considered the evidence and briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. At the time of hearing, Claimant was a fifty-two year-old married woman living in Bonners Ferry, Idaho with her husband, and on occasion, an adult son. Claimant was born in Mexico, and has been living in the

United States since 1991. Her ability to speak and understand English is poor, but she does have a twelfth-grade education from Mexico and a GED she obtained in the United States. Claimant is able to read and write in Spanish (she took the GED test in Spanish), and can do basic math. She is also capable of using a PC to input data.

2. Claimant ran an embroidery machine in Mexico, putting letters and designs on clothing. Since coming to the U.S., Claimant has worked for Employer, primarily at its "Backwoods Farm" hop farm near Bonners Ferry.²

3. Claimant's first position with Employer was working as a teacher's aide in its day care facility at the hop farm. She remained in that assignment from 1993 into 1997.

4. In 1998, Claimant began working in Employer's hop fields at the farm. The work was full-time but seasonal. The "season" was about six to seven months long, six or seven days per week, typically between eight to ten hours per day.

5. Claimant was a hop vine trainer in the spring; the work was often done from ground to knee level.³ She also performed other tasks, such as washing trucks, or various odd jobs. Later in the season, Claimant was involved in the hop harvest. During harvest, she would pick up vines from the ground that the harvesting machine cut and pull vines the machine missed. The vines first had to be cut into segments, and then thrown into harvest trucks. She also cleaned inside the harvest buildings, and for some years, would clean the harvest machinery.

6. In 2005 and 2006, Claimant went to St. Louis, MO, to work for Mr. Busch personally, cutting his lawn and working in his garden. Claimant was not comfortable in that job, and returned to Backwoods Farm after her stint in Missouri.

7. In December 2007, Claimant had low back surgery in Mexico. The records of that procedure were not available for review. That surgery was not industrially-related.

8. Claimant returned to work at Backwoods Farm for the 2008 season. She did not train vines that year. Instead, Employer had her performing a record keeping task, tracking how many vines each employee trained. (Employees were paid a bonus based upon how many vines they trained, in addition to a base pay.) Claimant would then input that data into the company computers. This was "modified" work for Claimant, although it was a necessary task.

9. Claimant testified her 2007 back surgery did not affect her ability to work thereafter. Claimant did not train vines in the spring of 2008; it is not clear if in 2009 she resumed her vine training tasks. It appears Claimant did participate in harvest in each year, picking up down vines. However, by 2010 Claimant was again training vines, although in that year Employer cut back its hop acreage from 1,711 acres to 300 acres, due to a hop glut.

10. On September 1, 2010, Claimant slipped and abruptly fell into a sitting position while engaged in harvest activities. She testified at hearing that she felt immediate pain in her lower back area and her right leg. She was transported from the field to the office where she was given Ibuprofen, and then driven to her apartment.

11. The following day, Claimant still felt pain when sitting or standing. Her supervisor drove her from her apartment to the office, where she was given the task of shredding papers. Employer suggested she not go to the doctor right away, but rather to wait and see if her pain, which Employer felt was a strain-type injury (which Employer testified was a quite common injury at the farm) would abate.

12. When Claimant's pain persisted for the next five days, Employer decided she should see a doctor. Employer told Claimant to see Ernest Lucero, M.D. in Bonners Ferry.

13. On September 7, 2010, Claimant presented at Dr. Lucero's office, accompanied by Armando Zarate, a supervisor for Employer. (Employer testified it is policy that a company representative goes with the injured employee to the hospital, to make sure they get there safely and because the company "has a vested interest in them getting better, returning to work as soon as possible." Hearing Transcript, p. 85.)

14. Claimant testified that Armando served as an interpreter, since Dr. Lucero did not speak Spanish. Employer testified that Dr. Lucero was Employer's preferred physician in part because he did speak Spanish and no interpreter was needed. In any event, Dr. Lucero's office notes of Claimant's initial visit indicate Claimant was complaining of right leg, knee, and thigh pain, with the primary pain in her right knee. Claimant's right knee pain was worsened with extension and flexion.

15. Dr. Lucero ordered X-rays of Claimant's right knee which came back as negative except for some mild degenerative arthritic changes. Dr. Lucero placed Claimant on light duty with no walking on uneven

surfaces, and scheduled a return appointment for one week hence. He suggested an MRI of the right knee would be appropriate if Claimant's pain did not subside in the upcoming week.

16. When Claimant returned to Dr. Lucero on September 13, 2010, she was showing visible bruising on the back of her knee, and was complaining of pain in her knee and into her right hip. Dr. Lucero ordered a right knee MRI and applied a pain patch to Claimant's right hip.

17. The MRI, taken on September 14, 2010, showed a small amount of subcutaneous fluid in the posterior lateral distal thigh, and a trace Baker's cyst. No other abnormal findings were noted.

18. Dr. Lucero diagnosed a torn hamstring muscle based on the MRI findings, and prescribed physical therapy. He also continued Claimant's work restrictions for an additional two weeks.

19. When Claimant returned to Dr. Lucero on October 4, 2010, she reported no improvement from her two physical therapy sessions. She was complaining of pain from her right buttock down the back of her right leg to her mid-calf. Dr. Lucero ordered a lumbar MRI.

20. Claimant's lumbar MRI showed a moderate broad-based central disc protrusion at L4-L5 which deformed the ventral subarachnoid space and mildly narrowed the central spinal canal, in addition to mild narrowing of Claimant's left L4-L5 neural foramen.

21. Dr. Lucero suggested a referral to an orthopedist for evaluation of what he continued to call a torn hamstring.

22. Claimant was referred to orthopedist William Magee, M.D., at Boundary Community Hospital. He took a detailed history, reviewed Claimant's records and MRI scans, and examined her. He diagnosed a stretch injury to Claimant's sciatic nerve, which he felt should resolve with conservative care. He referred Claimant to a neurologist for a second opinion of his diagnosis.

23. On December 6, 2010, Claimant saw neurologist James Lea, M.D., in Coeur d'Alene. Dr. Lea set out a succinctly-detailed history, noting the mechanism of injury, and Claimant's treatment history and current complaints, in addition to objective radiographic findings. After examination, Dr. Lea opined that Claimant had symptoms suggesting right L5 injury, but without a great deal of L5 distribution weakness. Dr. Lea felt that Dr. Magee's opinion of a right sciatic stretch injury could be correct, because "oftentimes the peroneal division of the sciatic nerve is more susceptible" to the type of trauma Claimant suffered on September 1, 2010. JE 4 26. Dr. Lea suggested an EMG/nerve conduction study of Claimant's right leg with continued physical therapy. He felt at some point Claimant might benefit from epidural steroid injections.

24. After her EMG study, Claimant returned to Dr. Lea on December 20, 2010. She was still complaining of low back radicular pain. Dr. Lea felt that even though the EMG did not demonstrate evidence of axonal disruption of the lumbosacral nerve roots or sciatic nerve trunk, Claimant's symptoms were nevertheless radicular in nature. Dr. Lea suspected a possible L5 nerve root inflammation and felt epidural steroid injections would be appropriate. He referred Claimant to Jeff McDonald, M.D., a Coeur d'Alene neurosurgeon, for further treatment.

25. Dr. McDonald examined Claimant on January 20, 2011. He took a history, reviewed film studies, and made recommendations. In particular, he found Claimant's complaints of low back pain with primarily right-sided lower extremity radiation was consistent with her radiological findings showing severe degeneration at L4-5 with moderate severity neuroforaminal narrowing bilaterally. Dr. McDonald commented on the fact that Claimant's degenerative disc disease had progressed dramatically since her 2006 MRI lumbar spine scan, which showed only mild degenerative changes at that time.

26. Dr. McDonald recommended injection therapy and continued physical therapy. If that treatment regimen failed to ameliorate Claimant's symptoms, then an L4-5 fusion surgery should be considered.

27. Claimant underwent two rounds of bilateral L4-5 transforaminal epidural steroid injections in February and March 2011. In April she returned to Dr. McDonald in followup. His office notes indicate Claimant had a 50% improvement in symptoms after the first injection, and a 65% improvement after the second. However, she still experienced quite severe symptoms occasionally, and overall her pain was intolerable. She desired surgical intervention. Dr. McDonald sought authorization from Surety for surgery.

28. In response to the request for authorization, Surety sent Claimant to Jeffrey Larson, M.D., a Coeur d'Alene neurosurgeon, on June 14, 2011. After reviewing past MRI films and x-rays taken that day, along with a physical examination, Dr. Larson recommended bilateral facet blocks at L4-5 to see if he could pinpoint the source of Claimant's discomfort. He scheduled her for followup examination in two weeks.

29. There are no records of any such followup visit. The next record in the exhibits is dated August 16, 2011, and is the final page of a two page office note. Therein, Dr. Larson's treatment plan noted the doctor

was having problems defining the exact etiology of Claimant's complaints, due to a language barrier and her subjective complaints. Claimant had only slight pain improvement with the previous facet injections. While Dr. Larson felt the definitive treatment regarding Claimant's hypertrophic lumbar facets would be a stabilization surgery, Claimant's main complaint that date was more in the region of her SI joints bilaterally. As such, Dr. Larson recommended Claimant undergo bilateral SI joint injections to help further clarify her overall low back pain etiology.

30. When Claimant next presented to Dr. Larson on September 27, 2011, his notes reflect that Claimant had obtained temporary relief from the SI joint injections.⁴ Coupling this information with the mechanics of Claimant's fall (on to her buttocks), Dr. Larson concluded that Claimant's pain complaints were due to a SI joint strain, as opposed to her chronic degenerative disc disease. Dr. Larson prescribed physical therapy directed at Claimant's SI joints. Dr. Larson did not feel Claimant needed surgical intervention.

31. The injections (both the bilateral facet blocks at L4-5, and the SI joint injections) ordered by Dr. Larson were performed by Michael Ludwig, M.D., who practiced with Dr. Larson in Coeur d'Alene. After the SI joint injection and Claimant's September 27 visit with Dr. Larson, Claimant met with Dr. Ludwig on November 3, 2011. Dr. Ludwig went over Dr. Larson's notes with Claimant. She denied that the SI joint injections provided even temporary relief, and Claimant still suffered from right-sided pain from her buttocks to her thigh and calf. Dr. Ludwig felt that in light of her history Claimant did not need further procedures aimed at her SI joint. He noted Claimant's EMG was normal, and with her degenerative disc condition and history of low back pain including endoscopic spine surgery in 2007, Claimant had reached MMI in relationship to any injury from her September 1, 2010, industrial accident. Dr. Ludwig believed the MRI from 2010 supported a finding that the industrial accident caused no traumatic damage to Claimant's lumbar spine.

32. Dr. Ludwig rated Claimant at 2% whole-person impairment, adjusted 50% for pre-existing condition apportionment for her prior history of low back pain and surgery in 2007. Because Dr. Ludwig did not find any objective supporting findings of continuing disability, he imposed no long-term work restrictions.

33. After Dr. Ludwig's analysis, Surety denied authorization for Claimant's requested surgery. She then returned to Dr. McDonald on November 21, 2011 complaining of low back and lower extremity pain. Dr. McDonald continued to recommend an L4-5 decompression and fusion surgery. He felt the surgery was necessitated by Claimant's severe degenerative disc changes at L4-5. Claimant was in favor of the proposed surgery.

34. On January 10, 2012, Dr. McDonald performed the decompressive lumbar laminectomy and fusion surgery.

35. By two months post-surgery, Claimant was doing "reasonably well" in Dr. McDonald's opinion. She was still having some back pain, moderate discomfort into her right lateral thigh, and occasional muscle spasm. Dr. McDonald felt Claimant's symptoms were much improved when compared to her pre-operative complaints. Dr. McDonald encouraged Claimant to pursue physical therapy for back reconditioning.

36. At her four-month check up, Claimant was struggling with right-sided leg pain from her lateral thigh to her right calf. The pain was constant and kept her awake at night. Dr. McDonald felt Claimant had inflammatory neuritis of the right L5 nerve root. He prescribed amitriptyline for her condition and encouraged Claimant to faithfully continue doing her exercises.

37. On August 27, 2012, Dr. McDonald noted that eight months post-surgery Claimant's right leg was still bothering her and that more recently her pain was primarily in her calf. She had also developed arthralgias in both shoulders, wrists, and knees. On a positive note, Claimant's back pain was better than pre-surgery. Dr. McDonald released Claimant to work full time with no restrictions.

38. By the time of Claimant's final visit with Dr. McDonald on March 14, 2013, she had undergone a left knee replacement surgery (in November 2012), and was using a cane. Claimant complained of right-sided SI joint discomfort, which Dr. McDonald attributed to her cane usage. Claimant had no mid-line spine pain, and her lower extremity symptoms had resolved.

39. Claimant sought an independent medical evaluation from John McNulty, M.D. on December 18, 2013. Dr. McNulty chronicled a detailed history and examined Claimant. At the time of examination, Claimant's chief complaint was right knee pain and leg weakness, along with mild mid-line low back pain. She was in no apparent discomfort, walked with a slight limp, favoring her left leg, and was able to sit for the interview without any apparent discomfort. She was able to get on and off the examination table without difficulty. Lumbar extension was to 30 degrees but elicited some mild discomfort. Other diagnostic spine tests were negative. Bilateral knee testing showed mixed results.

40. Dr. McNulty diagnosed permanent aggravation of pre-existing L4-L5 degenerative disc disease with right lower extremity radiculopathy, and right knee sprain.

41. Dr. McNulty explained the basis for his diagnosis by noting Claimant was working at a high activity level in a job which required repetitive bending and stooping for long periods of time prior to the accident. She had been able to perform these functions without the need for medical treatment.

42. Using the *AMA Guides to Evaluation of Permanent Impairment*, 6th Ed., Dr. McNulty rated Claimant as having a 7% whole-person permanent impairment for her lumbar spine. Dr. McNulty apportioned 5% whole-person impairment for Claimant's preexisting intervertebral disc lesion of the lumbar spine, and an additional 2% whole-person impairment as a direct result of her work-related injury in 2010.

43. Dr. McNulty felt Claimant's right knee injury, with its ill-defined complaints and lack of MRI evidence of permanent injury, did not warrant an impairment rating. In support of his conclusion, Dr. McNulty noted x-rays from 2012 showed moderate degenerative changes, which more likely than not would not have been permanently impacted by the mechanics of her accident.

44. Dr. McNulty stated it would be challenging to determine Claimant's work restrictions because the intervening left knee replacement surgery complicated her status. Her left knee was not a work-related condition, and yet it was the most significant factor in limiting Claimant's ability to work at her previous job. Also, her left knee prevented Claimant from engaging in physical therapy designed to increase her mobility and help strengthen her lower back. After proper physical therapy, Dr. McNulty felt Claimant could be "reevaluated and [her] work restrictions determined. However, since [Claimant's] left knee replacement precludes her from returning to her pre-injury occupation and is the most substantive limiting factor in her return to work, physical therapy is unlikely to improve her functional capacity." JE 12: 209, 210.

45. Dr. McNulty felt Claimant could not endure the amount of repetitive stooping and bending he understood her employment required.⁵ The doctor opined that Claimant would have restrictions placing her in a light medium-duty job category based on her lumbar spine condition. Her right knee condition did not warrant any work restrictions. Dr. McNulty did not specifically opine on the restrictions he would impose for Claimant's left knee condition, although the tone of his report and deposition testimony makes it clear that Claimant's left knee status was a major impediment to Claimant returning to her time-of-injury employment. Dr. McNulty did reiterate that physical therapy could lessen Claimant's work restrictions, should her left knee condition improve to the point where she could undertake such therapy.

DISCUSSION AND FURTHER FINDINGS

46. As Defendants note in their briefing, this case chiefly boils down to whether Claimant should recover from the Defendants the cost of her 2012 back surgery and related benefits, and the extent of Claimant's disability including and up to permanent disability. These issues are discussed below.

Causation for Surgery

47. Claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be evidence of medical opinion— by way of physician's testimony or written medical record— supporting the claim for compensation to a reasonable degree of medical probability. Claimant is required to establish a probable, not merely a possible, connection between cause and effect to support her contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973). Defendants are not liable for medical expenses unrelated to any on-the-job accident or occupational disease. *Sweeney v. Great West Transp.*, 110 Idaho 67, 71, 714 P.2d 36,40 (1986).

48. Claimant is entitled to compensation if she proves she received personal injuries caused by an accident arising out of and in the course of employment covered by the worker's compensation laws. Personal injury is defined as "an injury caused by an accident, which results in violence to the physical structure of the body...." I.C. s 72-102(18)(c). Compensation is recoverable where Claimant's work causes an accident which aggravates or accelerates her pre-existing diseased condition. *Bush v. Bonners Ferry School District*, 102 Idaho 620, 636 P.2d 175 (1981).

49. There is no disputing that Claimant injured herself when she slipped and fell on September 1, 2010. Whether the diagnosis was a torn hamstring muscle, sciatic nerve stretch injury, or knee sprain, it is clear Claimant injured her lower right extremity in the accident. However, that injury was not permanent, and is not a source of ongoing dispute.

50. There is also no serious disagreement that Claimant suffered some type of low back or sciatic injury, of at least a temporary nature. The dispute is over Claimant's charge that she permanently injured her lumbar spine in the accident to the point that surgical intervention was reasonable and necessary.

51. As noted in her briefing, Claimant concedes;

Defendant Surety has paid for extensive medical care for Claimant's lumbar spine. Dr. McDonald opined that Claimant injured her back at work. Dr. Ludwig has opined that Claimant injured her back at work and assigned a permanent impairment rating for the injury. Finally, Dr. McNulty opined that Claimant suffered an injury to her back at work.

[T]here is disagreement about the extent of treatment that was required as a result of Claimant's work-related back injury.

Claimant's Opening Brief, p. 8. The Referee agrees with this statement.

52. When Claimant first presented to Dr. Lucero, she did not report low back pain. While she testified at hearing that she did in fact mention such pain, all of Dr. Lucero's records from September center on Claimant's complaints involving her right knee, leg, and thigh. On her anatomic chart, only Claimant's right knee is circled. Dr. Lucero ordered x-rays and an MRI of Claimant's right knee. His notes reflect that Claimant had prior left knee surgery, and do not list Claimant's other prior surgeries, including her lumbar surgery of 2007. Nothing in Dr. Lucero's notes would hint at the fact Claimant complained of low back pain during her September 2010 visits.

53. When comparing Claimant's testimony in 2015 regarding her memory of complaint sequencing to the physician notes taken contemporaneously with the treatment, the notes are afforded more weight. Claimant appeared credible at hearing, and placing more weight on Dr. Lucero's notes than Claimant's memory is not an indication of Claimant's relative credibility, but rather is an acknowledgment that it is difficult to recall the exact sequence of events, complaints, and statements made to various providers a half-decade previously. In fact, at hearing when first asked what Claimant told Dr. Lucero, she indicated she told him she bruised herself in the accident from her hip "all the way down my right leg", and only upon further specific questioning from her counsel did Claimant state she told Dr. Lucero that she had hurt her low back. HT 39, 40.

54. On Claimant's October 4, 2010 appointment with Dr. Lucero, he noted for the first time a radicular-type pain, extending from Claimant's low back down her right leg. He also noted tenderness in the L5 area, and ordered a lumbar MRI.

55. On October 28, 2010, when Claimant presented to Dr. Magee, his notes indicate Claimant walked without limp, denied back pain, but had pain, burning, and numbness in her right buttock which extended down her right leg.⁶ From this point on in her treatment, Claimant's low back pain complaints were consistently part of her clinical picture.

56. While Claimant complained of low back pain since perhaps as soon as early October 2010, that fact alone does not prove she permanently injured her low back in her September 1, 2010 industrial accident. Claimant had significant pre-existing degenerative changes in her lumbar spine, and had even undergone prior lumbar surgery in December 2007. Claimant bears the burden of proving that her low back complaints and subsequent surgery were not simply due to the progression of her degenerative spinal condition.

Arguments For and Against Causation

57. Claimant argues her pre-existing degenerative spinal condition is partly to blame for her post-accident symptoms, and the fall itself is partly to blame. She supports her argument with the medical opinions of Drs. McDonald, Ludwig, and McNulty.

58. Dr. McDonald's opinion is contained in his notes of November 21, 2011, wherein he stated;

Ms. Lopez reports to us that when she fell at that time, while working in the fields, her current symptoms began. She states that she never had symptoms like this before the fall, and therefore our conclusion has been that the fall is likely attributable to her current symptomatology.

JE 5: 39. However, later in those same notes, Dr. McDonald stated, "in my opinion, her symptoms are in all probability referable to the severe degenerative disc changes at L4-5". *Id.*

59. Dr. McDonald was not deposed. His above-stated opinion on causation is weak at best, and more than a little confusing. He based his causation analysis not on medical findings but simply on Claimant's subjective statement that her current back pain was different than her previous back pain which led to surgery in 2007, and her current pain began when she fell. It may well be true that Claimant's back pain in 2010 was different in nature than her pain in 2007, but the fact remains she had degenerative processes ongoing in her lumbar spine for years prior to her 2010 industrial accident. Whether Claimant had her low back pain from the time of her fall is also debatable when considered in light of Dr. Lucero's medical records. But also confusing is Dr. McDonald's statement in the same record that Claimant's back surgery is referable to

her degenerative disc changes, which certainly were not caused by her work accident.

60. Dr. Ludwig opined that Claimant hurt her back in the industrial accident but testified in his deposition that the need for surgery was not "specific to the accident." Ludwig depo. p. 19, ll. 14, 15. However, later in that same deposition, Dr. Ludwig conceded that while the accident was not the primary reason for her surgery, it may have been a contributing factor. He could not opine on whether the accident accelerated Claimant's need for lumbar surgery, but felt Claimant's back surgery was "relatively imminent" even without the accident in question. Ludwig depo. p. 38, l. 11. Still later in the deposition, Dr. Ludwig reiterated that in his opinion the accident merely caused a temporary exacerbation of her condition. Then again even later, he testified that he did not think the Claimant's primary indication for her surgery was related to her fall, but did concede it was "a factor" in her need for surgery. Ludwig depo. p. 45, ll. 6,7,12.

61. Dr. McNulty also weighed in on causation. He squarely and unequivocally placed the need for Claimant's 2011 lumbar surgery on the industrial accident in question. In his IME report of December 18, 2013, Dr. McNulty stated "[t]he necessity for [Claimant's] lumbar spine surgery is directly related to her 9/1/2010 work-related injury." He rendered this opinion to "a reasonable degree of medical certainty." JE 12: 209. When asked in his post-hearing deposition what caused Claimant's need for her 2011 back surgery, Dr. McNulty answered "[t]he fall of 9/1/2010." McNulty depo. p. 12, l. 10.

62. Defendants argue several points in support of their position that Claimant is not entitled to benefits stemming from her lumbar surgery. These include the fact that not all doctors found Claimant had an industrial back injury, no findings exists on MRI or in the operative report of acute back injury and/or any condition which would explain right-sided radicular symptoms, Claimant was symptomatic prior to September 1, 2010, and Drs. McDonald and McNulty's opinions are flawed due to incomplete or inaccurate information provided to them.

63. As noted previously, Dr. Lucero noted no back complaints on Claimant's initial visits. Dr. Magee concluded Claimant's pain was not spinal in nature, but was a sciatic nerve stretch injury (in addition to her knee injury). Dr. Lucero is deceased, and whether or what he may have been able to say about his visits with Claimant will never be known.⁷ Dr. Magee and Dr. Larson diagnosed sciatic issues, which diagnosis proved to be suspect with further treatment. While Dr. Larson thought Claimant received excellent results from SI joint injections, after detailed conversations with Claimant by his partner, Dr. Ludwig, that thought was later dismissed. With the benefit of hindsight, it appears Claimant's complaints were not limited to an SI joint or nerve injury, and did not respond to treatment for such.

64. Defendants point to the operative report, MRI findings, and Dr. Ludwig's deposition transcript to support their propositions that Claimant's right-sided lumbar condition would not account for right-sided radicular symptoms. They support the proposition with a normal right lower-extremity EMG and MRI films which showed no acute findings. Defendants argue these facts establish that Claimant's surgery was simply due to her escalating degenerative back condition and not her industrial accident.

65. Dr. McNulty did not opine that the accident caused Claimant a new traumatic injury which would be evidenced by EMG or MRI. Rather, he opined the fall permanently aggravated a pre-existing condition, rendering Claimant symptomatic with regard to her lumbar spine pain. Certainly, Claimant began to consistently complain of low back pain shortly after her accident and no amount of non-surgical treatment or therapy resolved her condition. Dr. McNulty's opinion of an aggravation to Claimant's low back pre-existing condition which would not resolve with conservative care, or spontaneously, appears reasonable when reviewing the entire file.

66. Defendants also point out that Claimant was symptomatic prior to her 2007 surgery in Mexico. Thereafter, Employer modified Claimant's duties to eliminate much of her bending and stooping. They argue that it was due to the duty modification that Claimant was able to perform her work after 2007, and the modification was necessitated by her post-2007 surgery physical limitations.

67. Defendants' argument on modification fails for several reasons. First, Employer unilaterally gave Claimant a new and less-demanding job duty in the spring of 2008. There is no testimony that Claimant sought out the work accommodations after unsuccessfully trying to perform her regular duties. While Employer's accommodation was admirable and shows a thoughtful understanding of its workers' needs, it does not prove Claimant was symptomatic after her 2007 surgery. Furthermore, Claimant apparently participated in harvest 2008, and by spring of 2010 at the latest was back to her pre-surgery task of training vines. Claimant's un rebutted testimony is that she was asymptomatic at the time of her industrial accident.

Causation Analysis

68. Analyzing causation in this case is difficult. Although several physicians have opined on the issue, mostly their opinions have been equivocal, or they have contradicted themselves at some point. Dr.

McDonald concluded that, based on the history given by Claimant, the work accident caused the need for surgery. However, he also stated surgery was necessitated by Claimant's severe degenerative condition. Perhaps one could infer the degenerative condition was what would be corrected by the surgery, while the need to correct the degenerative condition *at that time* was at least in part due to the accident. However, Dr. McDonald was not that clear. Dr. Ludwig's testimony was even more confusing, as he went from direct to cross examination. His final word on causation was that the accident was one factor for surgery, albeit not the primary factor.

69. Dr. McNulty was the only doctor to render a consistent opinion on causation. Unfortunately, the medical rationale for the opinion was lacking; instead, his opinion appears to be based on Claimant's subjective observation that she was not hurting before the accident, but was hurting thereafter. Opinions based solely on that predicate have been devalued for years. *See e.g. Jodoin v. Far West Consulting, dba Days Inn*, 2005 IIC 0044, (Jan 28, 2005); *Swain v. Data Dispatch, Inc.*, 2012 IIC 0018 (Feb 24, 2012); *Major v. Idaho Dept. of Corrections*, 2014 IIC 0034 (May 5, 2014); *Wegner v. Coeur D'Alene Power Tools*, 2015 IIC 0020 (May 19, 2015). Of course, sometimes when the correlation between the onset of pain and the accident is obvious, such an explanation is reasonable. Other times, such as here, the correlation is not necessarily self-evident. Since Dr. McNulty and Dr. McDonald base their opinions in large part on Claimant's subjective statements, they are not afforded great weight.

70. Importantly, Dr. Ludwig testified Claimant's industrial accident *was a factor in her need for lumbar surgery at the time it was performed*, even though he believed that with the passage of time, she might well have become a candidate even without the aggravation caused by the accident.

71. No physician used or discussed the term "violence to the physical structure of the body" when discussing Claimant's lumbar spine condition. Defendants argue there was no such violence to the physical structure of Claimant's lumbar spine and that her surgery was simply due to the natural progression of a disease process which had been ongoing for years, finally reaching the point of becoming noticeably symptomatic on a consistent basis by the time of her 2011 surgery, if not years earlier.

72. Dr. McNulty discussed Claimant's lumbar injury as a permanent aggravation of a pre-existing condition. Although short on medical explanation, his diagnosis appears accurate with hindsight. Claimant's degenerating lumbar spine became symptomatic shortly after her industrial accident, either because of the trauma of the fall, or coincidentally and in spite of the trauma of her fall. Given Claimant's testimony, and reviewing all the evidence as a whole including the medical opinions on causation, it appears more likely from a reasonable medical probability standpoint that Claimant's lumbar spine became symptomatic due to the trauma of her fall, and not coincidentally at or very near the time of her fall.

73. This case presents a close question, due to the lack of solidly-grounded opinions from medical experts. However, when considering the record as a whole, the opinions of Drs. McDonald, Ludwig, and McNulty attributing at least a portion of Claimant's need for surgery in 2011 to her work accident, although not impressively weighty, carry more weight than Defendants' also-weak arguments to the contrary, including those opinions of Dr. Ludwig supportive of their position.

Medical Care Benefits

74. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical care and treatment as may be reasonably required by the employee's physician or needed immediately after an injury, and for a reasonable time thereafter. If the employer fails to provide such care and treatment, the injured employee may obtain such at the expense of the employer. It is well-settled that the permanent aggravation of a preexisting condition is compensable. *See, e.g., Woody v. Seneca Foods*, 2013 IIC 0039, 0039.20 (May 23, 2013).

75. Because Claimant's industrial accident was a factor in her need for low back surgery, Defendants are responsible under Idaho Code § 72-432(1) for her medical charges associated with her low back treatment after November 3, 2011, when Defendants stopped providing medical care benefits, until she reached MMI on August 27, 2012. Reimbursement of such past medical costs is subject to payment at full invoiced amount under *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009).

Temporary Total Disability (TTD) Benefits

76. Idaho Code § 72-102(10) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on Claimant to establish through expert medical testimony the extent and duration of the disability in order to recover income benefits for such disability. *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 605 P.2d 939 (1980). Once Claimant reaches medical stability, she is no longer in a period of recovery, and temporary

disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001).

77. Claimant argues she is entitled to TTD benefits from January 10, 2012, when she underwent lumbar spine surgery with Dr. McDonald until she was released to full duty work with no restrictions on August 27, 2012. Defendants assert Claimant is entitled to no further TTD benefits beyond what they paid through November 3, 2011, when Dr. Ludwig declared Claimant at MMI.

78. As decided hereinabove, Claimant's January 10, 2012 spine surgery was related to her industrial accident. Claimant has proven she is entitled to TTD benefits from the date of surgery through August 27, 2012, when Dr. McDonald released her to full-duty work.

Permanent Partial Impairment (PPI) Benefits

79. Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and a claimant's position is considered medically stable. *Henderson v. McCain Foods*, 142 Idaho 559, 567, 130 P.3d 1097, 1105 (2006). Idaho Code § 72-424 provides that the evaluation of permanent impairment is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and other activities. The Commission can accept or reject the opinion of a physician regarding impairment. *Clark v. City of Lewiston*, 133 Idaho 723, 992 P.2d 172 (1999). "When deciding the weight to be given an expert opinion, the Commission can certainly consider whether the expert's reasoning and methodology has been sufficiently disclosed and whether or not the opinion takes into consideration all relevant facts." *Eacret v. Clearwater Forest Industries*, 136 Idaho 733, 40 P.3d 91 (2002). The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989).

80. Two physicians have rendered impairment ratings for Claimant. Dr. Ludwig assigned Claimant a 2% whole person impairment rating, with 50% allocated to preexisting conditions, and 50% to her industrial injury of September 2010. Dr. McNulty assigned Claimant a 7% whole person rating, with 2% attributable to her work injury in question.

81. Dr. Ludwig assigned his rating prior to Claimant's 2012 surgery. Dr. McNulty assigned his rating after the surgery. Dr. McNulty's rating carries more weight since it was made based upon Claimant's condition when she became medically stable after her 2012 lumbar surgery.

82. Claimant has proven her entitlement to PPI benefits equal to 2% whole person rating for her industrial accident (7% whole person rating with regard to her lumbar spine, with 5% apportioned to her pre-existing lumbar disc lesion and 2% to her work injury in question).

Permanent Partial Disability (PPD) Benefits

83. 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 impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. Claimant bears the burden of establishing her claim for permanent disability benefits.

84. Claimant argues she is totally permanently disabled under the odd-lot doctrine and it would be futile for her to even look for work. She had made no attempt to look for work, and was at the time of hearing receiving SSI disability benefits. Claimant hired a vocational rehabilitation expert, Douglas Crum, to evaluate her vocational abilities. He supports her belief that she is totally disabled, and that it would be futile for her to look for work.

85. Defendants disagree with Claimant and Mr. Crum. They hired vocational rehabilitation expert William Jordan to assist in formulating their position regarding Claimant's employment opportunities.

86. In this case, the issue of permanent disability hinges on facts unrelated to a comparative analysis of competing expert vocational witnesses. Also, on the facts presented herein, the procedure of determining permanent disability from all causes and then subtracting disability from non-industrial causes, leaving work-related disability, is unnecessary to the determination of the issue, as shown below.

87. While the Idaho Supreme Court in *Brown v. The Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012) iterated that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing, there are cases, such as the instant proceedings, where disability assessment utilizing a time other than that of hearing is more appropriate. See, e.g., *Hurlbutt v. J.R. Simplot Co*, 2014 IIC 0038 (May 14, 2014).

Disability Assessment

88. As noted above, in January 2012 Claimant underwent lumbar surgery for a degenerative condition which had been permanently aggravated by her work-related fall. She was in a period of recovery thereafter until mid-August. During her recovery period, Dr. McDonald continued to treat her for issues related to her lumbar spine surgery and monitor her recovery process.

89. After examining Claimant on August 27, 2012, Dr. McDonald released Claimant to return to work with no restrictions.

90. Claimant was aware that Dr. McDonald told her she could return to work without restrictions. However, she did not return to work. Instead, she elected to have a troublesome left knee, which had bothered her for some time, treated. That treatment led to a total knee replacement in November 2012.

91. Claimant testified at hearing that she subjectively felt like she could not do her previous job due to her back condition at the time Dr. McDonald released her to full employment. She did not attempt to return to work, or even call Employer to inquire as to available work, with or without accommodation. Of course, with her ongoing knee issues and upcoming knee replacement surgery, it might have been imprudent to seek work until after the knee replacement surgery and recovery therefrom.

92. Claimant had difficulty rehabbing after her left knee replacement surgery. She had difficulty progressing in physical therapy; she was unable to increase her range of motion as required for recovery. She developed arthrofibrosis, and had to have her knee joint manually manipulated under general anesthesia to break up the adhesions. Although the procedure aided Claimant's ROM, she still experienced pain with joint movement. By the time of hearing, Claimant testified both her right and left knees were equally bothersome.

93. Claimant asked Dr. McNulty to evaluate her work restrictions. He noted the assignment was "quite challenging." The reason for the difficulty is set forth in his report, discussed in paragraph 45, *supra*, and reiterated below.

[Claimant's] total knee replacement, which is non-work related is the most limiting factor in preventing her from returning to her previous employment at Elk Mountain Farms. If she did not have a left total knee replacement, she would benefit from a course of physical therapy to strengthen her lumbar spine as well as increase her mobility. After a period of physical therapy, she could be reevaluated and work restrictions determined. However, since the left total knee replacement precludes her from returning to her preinjury occupation and is the most substantive limiting factor in her return to work, physical therapy is unlikely to improve her functional capacity.

JE 12: 209,210. Dr. McNulty went on to give Claimant work restrictions based upon her then-current condition, but noted her condition could well improve if she was able to complete a course of physical therapy which in turn could reduce her work restrictions.

94. Permanent disability results when the ability to work is reduced or absent because of permanent impairment *and no fundamental or marked change in the future can be reasonably expected*. Here, Dr. McNulty opined there very well could be a marked change in Claimant's ability to work if she completed physical therapy. Unfortunately, she could not complete the physical therapy at the time Dr. McNulty issued his report due to intervening non-industrial left knee condition. As such, the restrictions placed on Claimant were not due to her industrial accident, but rather due to her non-industrial intervening condition.

95. It is not appropriate in this situation to evaluate Claimant's condition at the time of hearing or even at the time of Dr. McNulty's December 2013 evaluation since, by such time, Claimant's disability was significantly affected by her subsequent left knee replacement and resultant ongoing limitations, not just to her left knee, but to her overall physical conditioning. Her lack of conditioning and inability to strengthen her back increased her perceived disability. In light of the intervening impediment to Claimant's condition, it is most appropriate to evaluate Claimant's disability, if any, at the time just prior to her knee replacement surgery. *Hurlbutt v. J.R. Simplot Co, supra*.

96. As noted, by late August, 2012, Dr. McDonald released Claimant to full work duties *with no restrictions*. While Claimant was critical of this release, in that she claimed Dr. McDonald did not know what she did for

a living, the release was not specific to her time-of-injury employment. His release was without restrictions; therefore Dr. McDonald felt Claimant could undertake whatever tasks were involved in her employment.

97. Claimant's treating knee surgeon, Adam Olscamp, M.D., recorded in his office notes of September 18, 2012 that Claimant was doing reasonably well about eight months post-back surgery, but was having bilateral knee pain. X-rays showed left knee with medial arthritis with medial loss of joint space, sclerosis, spurring, and varus deformity.

98. Nothing in the record demonstrates that Claimant was unable to return to her time-of-injury employment immediately prior to her left knee replacement surgery, other than her left knee issue, and her subjective belief that she could not do the bending and stooping required in tying vines. However, no physician thus limited her, and there is no evidence her job with Employer would have necessarily required her to tie vines. She may well have been a piece work recorder, or been assigned other tasks with less bending if it became an issue.

99. It would be a dangerous precedent to allow the Claimant's purely subjective self-imposed limitations to override the qualified opinions of trained medical treating physicians absent some valid reason to do so. Here no such valid reason exists in the record.

100. Claimant's vocational expert, Douglas Crum, admitted in his deposition that if Dr. McDonald's release to full employment without restrictions was accepted as authoritative, Claimant would have no disability in excess of her impairment. The Referee agrees with this assessment.

101. Dr. McDonald's release in August 2012 carries more weight than Dr. McNulty's qualified opinion of work restrictions promulgated in December 2013.⁸

102. Claimant has failed to establish a right to permanent disability benefits in excess of her 2% whole person impairment.

Odd-Lot and Apportionment Issues

103. Because Claimant was released to work *without restrictions* she had no disability. Therefore it is axiomatic that she can not be totally disabled under any theory, including odd-lot.

104. The issue of apportionment of disability is moot.

CONCLUSIONS OF LAW

1. Claimant has proven her decompressive lumbar laminectomy and fusion surgery of January 10, 2012, was caused in part by her industrial accident of September 1, 2010 and partly by her pre-existing lumbar degenerative condition.

2. Claimant has proven a right to reimbursement for reasonable and necessary medical care associated with treatment and surgery of her lumbar spine under Idaho Code § 72-432(1) from November 3, 2011 until August 27, 2012, when she reached MMI. Reimbursement of such past medical costs is subject to payment at full invoiced amount under *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009). Claimant shall notify the Commission of her plan for resolving the disputed past medical bills awarded in this decision.

3. Claimant has proven she is entitled to TTD benefits from January 10, 2012 through August 27, 2012, when Dr. McDonald released her to full-duty work.

4. Claimant has proven she is entitled to 2 percent whole person permanent partial impairment (PPI) benefits for her covered lumbar spine industrial injury.

5. Claimant has failed to prove she is entitled to permanent disability benefits in excess of her permanent partial impairment (PPI) rating.

6. The issues of total permanent disability under the odd-lot doctrine and apportionment under Idaho Code § 72-406 are moot.

RECOMMENDATION

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

Notes:

[1] Defense counsel often includes the applicability of collateral estoppel regarding Claimant's pre-existing condition as an issue to be decided, then often does not argue the concept in briefing. The issue was once again withdrawn by counsel in Defendants' opening brief.

[2] The farm is also sometimes called "Elk Mountain Farm".

[3] Actually, there were two "training" responsibilities - the "first training" was as described above and involved wrapping the newly emerging vines around a trellised twine, and a "second training" which involved re-inspecting the vines when they were about chest high and re-wrapping any vines which were not growing up the twine. The second training involved mostly walking through the fields and checking to make sure the vines were properly climbing the twine; very little bending and kneeling was required if the worker had done the first training correctly.

[4] At hearing, Claimant disputed that the SI joint injections relieved her pain. Also, the physician notes of the doctor who administered the injections state that Claimant had no relief from the injections.

[5] Although noted above, Dr. McNulty's opinion on whether Claimant could pursue her time-of-injury occupation, without further foundation showing he has the requisite knowledge of her work requirements and the full scope of her duties, is afforded no weight. His limits on bending and stooping are within his area of expertise, and will be considered as meaning Claimant is to avoid repetitive bending and stooping.

[6] Dr. Magee used a translator to communicate with Claimant, and it could well be that when Claimant denied back pain, that did not include the area of her lower back, which is more in the hip/buttock area than what one might call their "back". In any event, Claimant did complain of pain in the right buttock area.

[7] Employer's representative accompanied Claimant to her visits with Dr. Lucero, but neither party called him as a witness; perhaps he had no memory of what transpired during those visits.

[8] It is not clear that Dr. McNulty's opinion on work restrictions were even meant to be permanent. He indicated that if Claimant reached a point where she could participate in meaningful physical therapy for her back, she could then be re-evaluated and his restrictions potentially reduced. As such, it does not appear Dr. McNulty gave Claimant permanent work restrictions, which would further diminish the weight of his opinion.
